

Virtue, Vice, and Criminal Liability:

Do We Want an Aristotelian Criminal Law?

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1. INTRODUCTION: THE YEARNING FOR GRAND THEORY

In criminal law theory, as in other kinds of theorizing, there is a powerful temptation (or, less question-beggingly, a powerful disposition) to search for a grand, unitary theory of criminal liability: some unitary account of what we are or should be liable for, of the conditions under which we are or should be held liable, of the basic structure and elements of liability, which applies across the whole range of criminal offenses. Such theorizing is typically an exercise in censorial rather than in purely analytical jurisprudence: although theorists of a Herculean disposition might claim that their account makes best sense of the values and aspirations that can be discerned within our existing legal systems and structures, their claim has in the end to be that this is how the law ought to be, not that this is how the law actually is in its contingent historical complexity. Such theories thus offer us, as any good normative theory should offer us, a standard against which we can assess and criticize existing legal doctrine and practice.

The most ambitious theory would specify necessary and sufficient conditions of criminal liability: for instance that we are liable for and only for the choice to do or to risk doing what the law defines as the *actus reus* of a crime. Others, more modestly, claim only to specify a necessary condition of liability: for instance that criminal liability always requires, or must always be for, an “act” or a

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“voluntary act.” (Slightly less ambitious theorists of these kinds also allow that there could be justified exceptions to such requirements.) Others eschew any ambition to specify even normally sufficient and/or necessary conditions of liability in favor of a paradigm-based account: they aim to explicate *the* paradigm of liability (for instance, the intentional commission of what the law defines as an *actus reus*), and to explain any justified modes of liability that do not fit that paradigm as being parasitic on or derivative from it.

Now I do not wish to denigrate the aspirations to, and of, such grand theorizing—indeed, in some moods and on some days I share such aspirations. Even if such theorizing is doomed to ultimate frustration, and even though it can lead to dangerously procrustean attempts to fit every aspect of criminal liability to one model, its pursuit can reveal structures which, whilst not as unitary or universal as the grand theorizer might want, are nonetheless significant and interesting. This paper, however, is rather motivated by a respect for the more particularist, deflationary critiques of grand theory: for arguments to the effect, not just that our existing systems of criminal law do not match any such theory (to which the answer is that the theory is normative rather than merely descriptive), but that we should not expect any viable human system of criminal law to match any such grand theory—that we should look not for a single model of criminal liability, but for a number of different models, patterns and structures that interweave (and may conflict) in various and complex ways.

This paper is particularly concerned with the recent development of Aristotelian accounts of criminal liability, some of which do seem to aspire to the status of grand, unitary theory. I will argue that whilst Aristotelian virtue theory might play a central role in our understanding of moral life and moral goodness, it should play no such central role in our understanding of, or in the law’s determinations of, criminal liability.

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Section 2 sketches the recent emergence of an Aristotelian virtue-based approach, and its claim to deal with the problems faced by Kantian “choice” theories and Humean “character” theories. Section 3 highlights some issues that any general theory faces, about the relationship between the favored basis of liability (be it choice, character, or vice) and the conduct which seems to provide the focus both of the law’s definitions of offenses and of the criminal trial. Section 4 brings out some central features of Aristotle’s account of virtue and vice, to show why the criminal law should not be concerned with virtue and vice in their fully Aristotelian senses. Section 5 discusses the main ways in which theorists have thought that some kind of (roughly) Aristotelian conception of virtue or vice should nonetheless figure in an account of criminal liability and its conditions: the conclusion, in Section 6, is that whilst we can find a useful role for some etiolated ideas of virtue and vice in explaining some aspects or types of criminal liability, the grander ambitions of Aristotelian theorists are misguided: criminal liability is not generally grounded in the manifestation of anything like Aristotelian vice.

2. CHOICE, CHARACTER AND VICE

Perhaps the most familiar kind of grand theory in recent years has been the “choice” theory in its various forms. Criminal liability, insist choice theorists, must be determined by what we choose to do: by our choice to do or to risk doing something that the law defines as a crime.¹

Such a conception of criminal liability sits happily with central aspects of a familiar kind of liberal individualism that often finds its inspiration in Kant. It can claim to take individual freedom seriously: by making our fate at the

1. See, e.g., H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968); Andrew Ashworth, *Belief, Intent and Criminal Liability*, in *Oxford Essays in Jurisprudence* (John Eekelaar & John Bell eds., 3d ser. 1987); Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses, and the Model Penal Code*, 19 *Rutgers L. J.* 671 (1988); Michael S. Moore, *Choice, Character, and Excuse*, 7 *Soc. Phil. & Pol’y* 29 (1990).

law's hands depend on our choices, it increases the extent to which we can predict and so control that aspect of our lives. It claims to respect our autonomy, by making the law respond to us on the basis of our choices: for it is in our exercise of the capacity for choice that we most clearly display our rational agency. It can claim to treat us justly, in holding us liable only for what we choose: for we can be justly held responsible only for what lies under our rational control, and it is in choosing that we exercise such rational control as we have. It can claim to respect individual privacy, and the neutrality that a liberal state should supposedly exercise: for whilst on this view the criminal law must of course look beyond overt conduct to the choices by which that conduct is informed, it does not inquire (or intrude) into the deeper aspects of our character or into our conceptions of the good; it is interested only in the choices by which we ourselves voluntarily engage as agents with the public world.

Choice theories face some familiar criticisms, whose general form is that theories which focus solely on "choice," however that notion is understood, omit too much that is relevant to criminal liability. The broadest criticism of this kind is that by "abstracting" individual agents from the social contexts which help to determine their actions, such theories distract us from a range of social factors that should bear crucially on criminal liability—that the fiction of the rational choosing individual which such theories create is one that undermines the legitimacy of our ascriptions of criminal liability to those socially situated agents who actually appear in our courts.² That kind of criticism, however, will apply with as much (or as little) force to the "character" and "vice" theories that I consider later, since they too focus on individual agents who can, they presume, be sufficiently abstracted from their social contexts to be bearers of criminal responsibility; I will

2. See, e.g., Alan W. Norrie, *Crime, Reason, and History: A Critical Introduction to Criminal Law* (1993); for one response, see R.A. Duff, *Principle and Contradiction in the Criminal Law*, in *Philosophy and the Criminal Law: Principle and Critique* (R.A. Duff ed., 1998).

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therefore not attend to it further here. Two other criticisms are more relevant to present purposes, since they might seem to favor a character-based over a choice-based theory. They are that choice is neither a necessary nor a sufficient condition of criminal liability.

The objection that choice is not a necessary condition of criminal liability does not rest simply on the claim that criminally culpable action need not be preceded by any *process* of deliberation: any plausible choice theory will allow that criminal actions can be spontaneous, and that the choice to do Φ need not be separable from the doing of it. Nor does it rest simply on the claim that we can be criminally liable for negligent conduct, which precisely does not involve choosing to cause or to risk causing criminal harm: for choice theorists who want to allow for such liability can both legitimate it and show why negligence is a lesser species of fault by talking about the choices (to attend, to take care or precautions) that the agent should and could have made but did not make.³ It rests, rather, on the claim that there are “crimes of indifference” which are more serious than crimes involving merely negligence, but in which the agent’s reckless indifference is displayed precisely in his failure to notice or advert to the harm that he is likely or certain to do.⁴ For a choice theorist, the agent’s unawareness of the relevant features of his action (for instance, that the attack in which he is engaged might be fatal, or that this woman might not be consenting to sexual intercourse with him) precludes liability for anything worse than a crime of negligence; to understand the seriousness of his wrongdoing we must attend not just to the choices he makes, but to the attitudes or concerns (or

3. See H.L.A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, in Hart, *supra* note 1.

4. See, e.g., Samuel H. Pillsbury, *Crimes of Indifference*, 49 *Rutgers L. Rev.* 105 (1996) (though he wants to build choice—choices about what to attend to or to care about, for instance—into the picture in a way that seems to me neither plausible nor necessary); R.A. Duff, *Intention, Agency, and Criminal Liability: Philosophy of Action and the Criminal Law* ch. 7 (1990).

lack of concern) that are manifest in his actions and in his very failure to notice or attend to those relevant aspects.

The objection that choice is not a sufficient condition of liability rests on the claim that, in order to explain how someone who chooses (in any ordinary sense of the word) to commit what the law defines as a crime can escape conviction by offering some legally recognized excuse, we cannot just appeal to the idea of a capacity, or of a fair opportunity, to choose to refrain from the crime. To explain why duress, for instance, should be an excuse (and when it should not excuse), we must look not just at the agent's choice to give in to the threat, but at what his giving in showed about his courage or cowardice, and about his commitment or his lack of commitment to the interests or values that he injured—at, in other words, features of his character that lie behind the choices he made.⁵

These two (alleged) defects in choice theories help explain the attractions of the Humean character-based theories of liability that were typically offered as alternatives.⁶ What matters, on a Humean theory, is not (just) the agent's overt conduct, nor (just) her choice to engage in such conduct (even if she did so choose), but the character traits that can be inferred from her conduct: she should be criminally liable if and only if we can infer some relevantly defective or undesirable character trait from her conduct; excuses exculpate those who commit what is defined as a criminal act if and because they cite some factor that blocks the usual inference from criminal conduct to defective character trait.

One general worry about character-based theories, for traditional liberals, is whether we should allow the criminal law to take such an interest in our characters;

5. See, e.g., Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 *Ariz. L. Rev.* 251 (1995); see also R.A. Duff, *Choice, Character, and Criminal Liability*, 12 *Law & Phil.* 345, 350-61 (1993).

6. See, e.g., Michael D. Bayles, *Character, Purpose, and Criminal Responsibility*, 1 *Law & Phil.* 5 (1982); George Vuoso, *Note, Background, Responsibility, and Excuse*, 96 *Yale L. J.* 1661 (1987); Nicola Lacey, *State Punishment: Political Principles and Community Values* ch. 3 (1988).

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another is whether such character-based liability must presuppose, if it is to be just, that we are responsible for our characters—and if so, whether we are thus responsible. I comment on these two worries later. There are, however, two more particular problems with the Humean character-based conception of liability, which point the way towards the new, Aristotelian accounts.

First, it is not clear which kinds of character trait should ground liability. Hume himself counted as virtues those character traits which were either useful or agreeable, to the person who possessed them or to others;⁷ which implies a broad class of vices, as character traits that are either harmful or disagreeable, to their possessor or to others. Modern Humean character theorists also sometimes cast the net of liability rather widely: so Bayles would hold mentally disordered offenders criminally liable (although their disposal need not be punitive).⁸ Second, on the Humean picture the relationship between character and action is contingent and causal: traits are underlying psychological conditions which cause actions; given adequate empirical expertise, we can infer traits from actions in the way that we generally infer causes from their effects. But this makes the criminal law's apparent focus on actions very puzzling: it is now unclear either why criminal action should be necessary for liability at all—since we could surely have other persuasive evidence of undesirable character traits than that; or why just one criminal action should suffice for liability—since one would usually expect more than one such piece of evidence as grounds for an adequately confident inference to its cause.⁹

Humean theorists are not, of course, simply silenced by such problems: but theorists who look to “character” rather than “choice” as the basis of criminal liability have recently turned from Hume towards Aristotle for their

7. David Hume, *A Treatise of Human Nature* III.iii.1, at 591 (L.A. Selby-Bigge & P.H. Nidditch eds., 2d ed. 1978) (1739).

8. Bayles, *supra* note 6, at 17-18.

9. See Bayles, *supra* note 6, at 10; Lacey, *supra* note 6, at 75; George P. Fletcher, *Rethinking Criminal Law* 800-01 (1978).

inspiration; and an Aristotelian account can claim to avoid these two problems. For we can say, first, that the character traits which should ground criminal liability are those that constitute vices—i.e., in Aristotelian terms, those that embody a distorted or ethically mistaken conception of the good; and, second, that while there is more to Aristotelian vice than wrong action, such action is partly constitutive of, not just empirical evidence for, the relevant character trait.¹⁰

This Aristotelian turn in criminal law theorizing is part of a wider movement into “virtue jurisprudence,”¹¹ and reflects the revival of interest in Aristotelianism in philosophical ethics. It also reflects reactions against the neutralist liberal individualism that the traditional choice theories expressed—reactions both by communitarians who eschew liberal individualism and by perfectionist liberals who eschew neutralism, all of whom seem prepared to allow the state to take a closer interest in its citizens’ moral characters than traditional liberals would allow.

Before I turn to the question of whether or how far Aristotelian conceptions of virtue and vice can illuminate the grounds of criminal liability, a more general question must be tackled, about the role that the favored basis of criminal liability—choice, or character, or vice—is to play in grounding liability.

10. For examples of Aristotelian accounts of the grounds of criminal liability (by no means all of which aspire to provide grand, unitary theories in such terms), see Finkelstein, *supra* note 5; Kyron Huigens, *Virtue and Inculpation*, 108 *Harv. L. Rev.* 1423 (1995), *Virtue and Criminal Negligence*, 1 *Buff. Crim. L. Rev.* 431 (1998); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 *Colum. L. Rev.* 269 (1996); John Gardner, *The Gist of Excuses*, 1 *Buff. Crim. L. Rev.* 575 (1998), *On the General Part of the Criminal Law*, in *Philosophy and the Criminal Law: Principle and Critique*, *supra* note 2; Victor Tadros, *The Characters of Excuse*, 21 *Oxford J. of Legal Stud.* 495 (2001).

11. See, e.g., Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 *S. Cal. L. Rev.* 1735 (1988).

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3. INTENTIONAL OBJECTS OF LIABILITY, OR CONDITIONS OF LIABILITY?

When I am blamed, or condemned, or held liable, there is something for which I am blamed, condemned, or held liable: which is to say that blame, condemnation and holdings of liability require an intentional object on which they are focused and towards which they are directed. Within any practice of blame, condemnation, or holding liable, there will also be conditions of liability—conditions which must be satisfied if the blame, condemnation, or holding liable is to be justified (or perhaps even intelligible) but which are not themselves part of the object of the blame, condemnation, or liability. It is, for instance, a condition of being justly blamed, or condemned, or held liable for a wrong I have committed that I am not mentally disordered in a way that undermines my responsibility for that action: but I am not blamed, or condemned, or held liable *for* not being mentally disordered.¹²

When it is said that criminal liability is grounded in choice, or character, or vice we must therefore ask whether that “ground” is supposed to constitute the intentional object of liability, or a condition of liability. Are we to be held liable *for* our choices (to do or to risk doing what the law defines as criminal), or defective character traits, or vices? Or are we to be held liable *for* something else—for, as the most obvious possibility, a criminal action—on condition that we chose to do or to risk doing that action; or on condition that that action flowed from, and thus justified an inference to, a relevant undesirable character trait; or on condition that that action flowed from a relevant vice?

12. This distinction is too often ignored by theorists: but see Jeremy Horder, *Criminal Culpability: The Possibility of a General Theory*, 12 *Law & Phil.* 193, 204-06 (1993); Douglas Husak, *Does Criminal Liability Require an Act?*, in *Philosophy and the Criminal Law: Principle and Critique*, supra note 2, at 67-73; Tadros, supra note 10, at 501. The distinction is clearly a close relative of that between “wrongdoing” and “attribution” (see Fletcher, supra note 9, at ch. 6.6-8), but I cannot discuss their relationship here.

The possible views about how choice, character, or vice can ground liability are actually more symmetrical, and more complex, than the previous paragraph suggests. They are more symmetrical because even theorists who focus on choice, character, or vice as the intentional object of liability typically accept the necessity for some kind of “act requirement,” if only to provide suitably reliable, non-intrusive proof of guilt: their view then is that we are liable for our choices, character traits, or vices on condition that they lead to or are revealed in criminal action—something that constitutes the *actus reus* of an offense. They are also more complex, because different conceptions of the relationship between choice, character, or vice and action make room for different accounts of the intentional object of liability.

If we see that relationship as purely contingent and causal, we will see a sharp distinction between the intentional objects and the conditions of liability. Action would then be a distinct condition of liability for criminal choices, character traits, or vices: a condition most plausibly justified by the need to base convictions on reliable evidence that can be established without unduly oppressive or intrusive investigative methods. Or choice, character trait, or vice would be a distinct condition of liability for criminal actions: a condition most plausibly justified in terms of culpability or responsibility.

If we instead see the relationship as logical or constitutive, matters are more complicated. The strongest claim of logical connection would be that—either in virtue of the very concept of choice, character, or vice, or as a feature of the conception of choice, character, or vice that is appropriate to the criminal law—the relevant choice, character trait, or vice is actualized in and only in action of the relevant kind. A person might intend a criminal action without as yet having taken even a first step towards carrying that intention out, but counts as “choosing” to commit that crime only at the point when she begins to translate intention into action. Or she might harbor dishonest thoughts, inclinations, or intentions, but counts

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as “dishonest” for the purposes of the criminal law only if and when she engages in an action which manifests, and so part constitutes, her dishonesty as criminal. Now so strong a claim, for such a tight logical connection, is no doubt implausible outside the law: although it is a conceptual rather than an empirical matter that choices are normally expressed in action that aims to fulfil them, agents can choose without acting accordingly; even if it is a conceptual rather than an empirical truth that character traits and vices are sometimes expressed in actions appropriate to them, so that one who never flees danger cannot be a coward,¹³ there are also other ways in which we can reveal our character traits or vices. How far so strong a claim, or something approaching it, is appropriate to the criminal law is a different question, and is in effect a version of one of the questions with which this paper is concerned: to what extent are character traits or vices, and to what extent are the kinds of public action which normally figure in the law’s definitions of crimes, *constitutive* of criminal liability (i.e., of the intentional object of liability); and to what extent are those traits, or vices, or actions, distinct conditions of liability for something else?

The main point to notice here, however, is that a constitutive account of the relationship between choice, character or vice and action makes different and more complex accounts of the intentional objects of liability possible. We could now suggest that we are liable, not just for our choices, character traits, or vices as such, but for those choices, traits, or vices in so far as they are manifest in criminal action that part constitutes them; or, on an action-based view, that we are liable not just for our actions as such (as distinct from choice, character, or vice), but for our criminal actions in so far as they manifest, by part constituting, a relevant choice, character trait, or vice.

13. Even this is of course controversial: contrast R.B. Brandt, *Traits of Character: A Conceptual Analysis*, 7 *Am. Phil. Q.* 23, 26 (1970), with Michael A.E. Dummett, *Truth and Other Enigmas* 14-16 (1978). The plausibility of the claim that there is a conceptual connection here is increased if we note that the danger that a coward flees need not be physical danger.

These accounts might also seem to dissolve the differences between action-based and choice- or character-based accounts of the intentional object of liability: to talk of choices or traits “in so far as they are manifest in criminal action” might seem to differ only verbally from talking of actions “in so far as they manifest a relevant choice, character trait, or vice.” In fact, however, there is still an important difference between these two kinds of account, even on this reading.

Bernadette Ryan bought what she believed was a stolen video-recorder. The prosecution, however, could not prove that it had been stolen when she bought it; the courts had therefore to take it that she handled the recorder in the mistaken belief that it constituted stolen goods, and to determine whether on those facts she was guilty of attempting to handle stolen goods, knowing or believing them to be stolen.¹⁴ Now on a choice- or character-based account, she should surely be guilty: her choice “to handle stolen goods” was fully actualized in her action, in that she initiated (and indeed completed) an action that she believed fit that description; and the kind of dishonesty manifested by one who handles stolen goods knowing or believing them to be stolen is equally manifested by one who handles what she mistakenly believes to be stolen goods. On an action-based account, however, there is room to argue that she ought not to be liable: for what liability requires is an action of handling or at least attempting to handle stolen goods, which manifests the appropriate kind of dishonesty; but there is no such action in Ms. Ryan’s case.¹⁵ An action-based account, even if it talks of actions manifesting choices or character traits, is thus friendlier to

14. Theft Act, 1968, c. 60, § 22 (Eng.); *Anderton v. Ryan* [1985] 1 A.C. 560.

15. For further discussion of this and other relevant examples, and for an account of how such an action-based view can deal with attempts, see R.A. Duff, *Criminal Attempts* chs. 3.5, 6.3, 8.4, 11.4, 13.4 (1996). To talk thus of “action” and an “action-based” account of course raises some large questions about the concept(s) of action, and about the extent to which a concept of action can play a substantial, non-trivial role in analyses of the grounds of criminal liability (see Husak, *supra* note 12)—questions that I cannot pursue here; see Duff, *supra*, chs. 9-11.

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an “objectivist” conception of liability than are choice- or character-based accounts.

The question of whether, on a character- or vice-based account, we should see character or vice as the intentional object of liability, or as a condition of liability, is also connected to the problem of responsibility. If we are to be held liable for our vices or our character traits, we must be responsible for them, in the sense that we must have control over them—at least, minimally, in that it must be within our power to change and remedy them; or perhaps, more ambitiously, that it must have been within our power to avoid acquiring them. For to be held criminally liable for Φ is to be blamed or condemned for Φ ; and whatever uncertainties there might be about the meaning of “control,” it is a basic requirement of justice that we be blamed or condemned only for what lies within our control. “Character” theorists—beginning indeed with Aristotle himself—have therefore sometimes worried about whether or in what sense we can be said to be responsible for our characters;¹⁶ and, as Aristotle’s own discussion showed, it is difficult to make out a plausible case for the claim that we are responsible for becoming or for having become the kinds of people we are.¹⁷

This is not the place to try to settle the issue of whether, in what sense, or to what extent we can be held retrospectively responsible for our characters or vices: for having become the kinds of people we are, for having acquired the vices we now have. The point we should note here is, rather, that the problem of responsibility might be less directly pressing if our vices or character traits are relevant not as intentional objects of criminal liability, but as conditions of liability for our criminal actions. If I am to

16. See Aristotle, *Nicomachean Ethics* III.5 (W. D. Ross trans., revised by J. L. Ackrill & J. O. Urmson, 1980); see also, e.g., Edmund L. Pincoffs, *Legal Responsibility and Moral Character*, 19 *Wayne L. Rev.* 905 (1973); Peter Arenella, *Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, 7 *Soc. Phil. & Pol’y* 59 (1990).

17. Though, to be fair to Aristotle, all he needed to show to refute *his* opponents was that *if* we are responsible for our virtues and virtuous actions, we are also responsible for our vices or vicious actions.

be justly held liable for an action on condition that it manifests a relevant character trait or vice, I must be responsible for the action, in the sense that I must have control over it. We can explain the notion of “control” in this context in terms of sensitivity to reasons: we have control over our actions in so far as what we do depends on or can be guided by what we see reason to do; and we do in that sense often (typically) have control over our own actions. Now if a criminal conviction is to mark a justified condemnation of the defendant’s conduct, the character trait or vice which constitutes a condition of liability must of course also be faulty or defective: even morally faulty or defective, if we believe that criminal guilt should depend on moral fault. But this does not entail that the defendant must be responsible for—for having acquired—that character trait or vice: whilst blaming someone for something implies or presupposes that it was within their control, not all moral criticism, not all adverse moral appraisal, involves blame; we can recognize moral defects in ourselves and in others (defects in, for instance, sensitivity, in imagination, in feelings, and in appetites) without supposing that we or they are “to blame” for those defects.

One who is to be held criminally liable must be a responsible agent, which is to say not just that he must be responsible for his criminal actions, but also that he must live, deliberate, and act within the shared realm of reasons which includes the values in the light of which he is convicted and condemned: he must be capable of grasping and being moved by the reasons in virtue of which his action was criminally wrong. He must also be responsible for his vices in that it is his responsibility to recognize them as defects which he should try to remedy. But if his vices, or character defects, are relevant to his criminal liability as conditions rather than as intentional objects of liability, we might not need to be able to say that he is retrospectively responsible for his vices in the sense that he had control over his acquisition of them.

4. ARISTOTELIAN VIRTUE AND VICE

Those who look to Aristotle as inspiration for a virtue-based account of criminal liability are appealing to a particular, and particularly rich, conception of virtue and vice. We should note some of its central features.¹⁸

First, Aristotle's account gave a central role to the "*pathe*"—emotions, feelings, appetites, desires—as partly constitutive of human excellence and flourishing. The *pathe* are not merely non-rational forces which "reason" must quell or resist (on a crudely Kantian model), or serve as a "slave" (on the Humean model):¹⁹ they are aspects of our rational nature, which can be so structured by our rational grasp of the good that they come to "speak . . . with the same voice as" reason;²⁰ they involve some (albeit often inchoate or ill-formed) evaluative conception of their object. The *pathe* can of course be irrational: they can portray as valuable, or as if it was valuable, what even the agent himself recognizes is not valuable; an irrational fear portrays its object as dangerous and fearful (worth fearing) when, as even the agent might recognize, it is not. What makes such *pathe* irrational, however, is not that they are *pathe*, but rather that they are misguided or misdirected *pathe*,²¹ which embody an ill-founded or irrational evaluation of their object; and we can hope to remedy them by ordinary methods of rational argument.

This Aristotelian conception of the *pathe* is a clear ancestor of, sometimes the inspiration for, more recent accounts of emotions as having an essential cognitive or

18. Following what has unfortunately remained orthodox practice, I will talk of Aristotle's account of "virtue" and "vice," although these are not happy translations of "*arete*" and "*kakia*"; it would be less misleading to talk of "excellence" and "defect" of character.

19. Hume, *supra* note 7, II.iii.3, at 415.

20. Aristotle, *Nicomachean Ethics*, *supra* note 16, at I.13, 1102b28. Even this understates the extent to which "reason" and "*pathos*" are interwoven in Aristotle: for it becomes clear in Book VI of the *Nicomachean Ethics* that our grasp of the good is part constituted by our *pathe*; so Aristotle happily defines "choice" as "either desiderative reason or ratiocinative desire." *Id.* at VI.2, 1139b4-5.

21. See Bernard Williams, *Morality and the Emotions*, in *Problems of the Self* 207, 224 (1973).

evaluative dimension—as rational, rather than non-rational, aspects of our psychology.²² It has also inspired recent attempts to give the emotions a more significant role in analyses of the grounds of criminal liability,²³ and it could offer support to theorists who seek a partial, in principle rationale for criminal punishment in the rational propriety of such emotions as anger and resentment.²⁴ Of more relevance here, however, is the difference that this conception makes to Aristotle's own account of virtue and vice.

For, second, “virtue” and “vice” do not constitute an exhaustive classification of ethically significant conditions: they rather mark the end points of a spectrum of four possible kinds of states of character, the other two of which are *enkrateia* (self-control, or “continence” in more traditional translations) and *akrasia* (weakness of will or “incontinence”).²⁵

In the person of true virtue, reason and passion “speak with the same voice”; her actions manifest an integrated unity of reason and passion. For virtue consists not merely in a reliable disposition to act appropriately, or to deliberate and act appropriately, but also in dispositions of feeling and appetite: a virtuous person's emotions and appetites are oriented towards, and structured by her

22. See, e.g., Robert C. Solomon, *The Passions: Emotions and the Meaning of Life* (Hackett Pub. Co. 1993); Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (2001).

23. See Kahan & Nussbaum, *supra* note 10; Jeremy Horder, *Provocation and Responsibility* (1992).

24. See, e.g., Murphy's arguments in Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* chs. 1, 3 (1988); but see Jeffrie Murphy, *Moral Epistemology, the Retributive Emotions, and the “Clumsy Moral Philosophy” of Jesus Christ*, in *The Passions of Law* (Susan A. Bandes ed., 1999) for some apt criticism.

25. I leave aside here two further kinds of state which do not loom large in Aristotle's account: “superhuman” or “heroic and divine” virtue, which transcends ordinary human virtue; and “brutishness,” which falls below ordinary human vice. See *Nicomachean Ethics*, *supra* note 16, at VII.1. The main features of Aristotle's account are found in *Nicomachean Ethics* I.13 (on the different aspects of human psychology); II (on the nature of excellence or virtue of character); III.6-12, IV (on the particular virtues); VI (on practical wisdom and its relation to character); and VII.1-10 (on weakness of will).

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understanding of, the good, so that what she feels or wants is appropriate to her situation; and her actions express those appropriate emotions and appetites. She therefore does not have to resist temptation, or overcome contrary feeling or inclination, in order to act as she sees she should, since there is nothing in her character that would motivate her against what is appropriate. Finally, virtue of character both enables, and is structured and guided by, practical wisdom—the rational excellence by means of which we can recognize the good and what we must do to achieve it; and since the variegated and complex circumstances of human life cannot be captured by any set of rules, practical wisdom requires a well-trained, virtuous “eye of the soul” to discern the good and thus to guide action.²⁶ which is to say that true virtue also involves appropriate dispositions of thought, of attention, of observation.

The “self-controlled” person also manages to act appropriately, and does so for the right reason in that she does so *because* she sees it to be appropriate. Her actions, however, are not wholehearted in the way that those of the virtuous person are, since she has contrary passions or appetites that she must resist in order to do what is right. Faced by someone in need, whom it would be appropriate to help, the virtuous person is at once or spontaneously moved to help by the compassion she feels—a compassion structured by her recognition of the other’s need, of the appropriateness of helping, and of what would help. In the same situation the immediate response of the self-controlled person might be irritation, or contempt, or an inclination to turn away: but she realizes that that response is inappropriate, and that she should offer help—and so she overcomes her initial disinclination, and helps as she should.²⁷ But she will, or should, see the feelings that she must resist not merely as unfortunate obstacles to

26. Nicomachean Ethics, *supra* note 16, at VI.12, 1144a29-31.

27. We will see in section 5 that this is misleading, since the self-controlled person’s lack of proper feeling might sometimes qualify the worth of her action, or the sense in which she acts “appropriately.” See *infra* note 35.

appropriate action, but as defects of character. They are not vices, since she does not identify herself with them: but they show her to be ethically lacking, since they are an ethically inadequate response—a response which portrays the needy person not (as the compassionate eye sees him) as a fellow being whom she can and must help, but as an irritant, an intrusion, an annoyance. This is not to deny that a self-controlled person merits admiration and praise, for her successful struggle to overcome her own feelings and to do what she sees to be right; nor is it to say that we, or she, should blame her for those feelings.²⁸ But it is to say that she is ethically defective in a way that the truly virtuous person is not: for her passions are not unequivocally structured by an appropriate conception of the good; they fail—even though she does not ultimately fail—to recognize the other's humanity.²⁹

A weak-willed person likewise lacks the unity of reason and feeling that characterizes the person of true virtue: although he does in some sense recognize and aspire to the good, he has emotions and appetites which tempt him away from the good. But, unlike the self-controlled person, the weak-willed person gives in to, or is conquered by, that temptation: he does what he in some sense knows to be wrong. This is not the place for a discussion of the problem of weakness of will—of whether it really is possible to act voluntarily in a way that I truly think is wrong or irrational: all we need note here is that whilst a weak-willed person culpably does wrong, and is motivated by ethically inappropriate emotions or appetites, he is different from the truly vicious person. For a vicious person can display, as does the virtuous person, a unity of reason and passion, and a wholehearted commitment to his actions—whereas neither self-controlled nor weak-willed agents are thus wholehearted, since both act out of inner

28. See *supra* text accompanying notes 16-17.

29. Aristotle's list of virtues of character did not include compassion as I have portrayed here; indeed, it would be alien to his conception of a good human life. I use this example to show how an account of virtue which is Aristotelian in its structure need not be Aristotelian in its ethical content.

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conflict. The trouble with the vicious person is that he is wholeheartedly oriented towards evil rather than good; his reason and his passions mutually reinforce each other's *misdirection*.

Aristotelian virtue and vice are thus richly complex conditions of the soul. To determine whether someone is truly virtuous or merely self-controlled, or whether he is truly vicious, or merely weak-willed, we need to examine not just his behavioral dispositions to act rightly or wrongly, nor just his deliberative dispositions—the kinds of reasons by which his actions are guided: we must examine his emotional and appetitive dispositions too, the patterns of feeling and desire which help to constitute his character. We might then suspect—a suspicion which the following section will show to be fully justified—that the criminal law should not take an interest in virtue or vice in this rich sense: that whatever role the Aristotelian conception can properly play in an account of moral life and action, it can have no proper role in an account of the grounds of criminal liability in anything that purports to be a liberal polity. We surely cannot believe, as Stephen could believe, that “criminal law is in the nature of a persecution of the grosser forms of vice,”³⁰ at least or especially if “vice” is understood in its Aristotelian sense; or that the criminal law should serve “the greater good of humanity . . . by promoting virtue,”³¹ at least or especially if “virtue” is understood in its Aristotelian sense.

It might be objected at this point that I am demanding too much of a virtue theorist of the criminal law: that we need not mobilize the entire Aristotelian apparatus to find a useful role for notions, even roughly Aristotelian notions, of virtue and vice in explaining and grounding criminal liability. That is obviously true: there are non-Aristotelian conceptions of virtue and vice; and we can properly make use of some aspects of an Aristotelian account without

30. James Fitzjames Stephen, *Liberty, Equality, Fraternity* 152 (R.J. White ed., Cambridge Univ. Press 1967) (1873).

31. Huigens, *Virtue and Inculcation*, *supra* note 10, at 1425 (footnote omitted).

taking on board the whole structure. An important general question does arise here, however, about the role or ambitions of “virtue theory” in relation to criminal liability.

We could make it a truism that anyone who commits what a (just) system of criminal law (justifiably) defines as a crime, without what the law should recognize as a justification or an excuse, displays some vice, or lack of virtue: for a virtuous citizen would never act thus—she would be reliably disposed not to act thus; in acting thus the offender displays a lack of civic virtue, or the presence of a civic vice. But this would make the reference to virtue and vice a merely rhetorical flourish: the notions would be doing no substantive work in explaining or in grounding criminal liability. For, first, “virtue” and “vice” are now purely behavioral notions: vice simply consists in culpably wrongful action. Second, that the offender lacks virtue or has a vice is now simply entailed by the prior finding that he culpably committed a crime: the reference to virtue or vice neither explains nor grounds his culpability.

If “virtue theory” is to make a substantial rather than a merely rhetorical difference to our understanding of criminal liability, it must give “virtue” and “vice” more substantial meanings and a more substantive role than this. In the following section, I turn finally to the question of whether it can do so.

5. WHAT ROLE(S) FOR VIRTUE OR VICE?

The question then is this: what substantive roles, if any, can be played by substantial notions of virtue and vice in explaining or in grounding criminal liability? I will work through several possible roles, drawing both on the role of virtue and vice in moral thought, and on the claims made by theorists who want to give virtue and vice a central role in criminal law theory.

Constituting the Character of the Agent

The most familiar role for notions of virtue and vice in moral thought is as determinants, not of right action or of proper deliberation, but of moral goodness or badness of character. A good person, we might say, is not just one who reliably does what is right; nor even, if we are unpersuaded by the austerities of Kantianism as it is usually portrayed, one who reliably does the right thing for the right reason, or because he sees it to be right. The good person will also have appropriate dispositions of feeling, of attention, of observation: she will notice morally relevant features of the world around her; she will attend to them, and to other people, in the appropriate spirit; her appetites and emotions will express her conception of the right and the good. Nor are these aspects of goodness valuable only because they make it more likely that their possessor will reliably identify and do the right thing: they are valuable as constituting the person's wholehearted orientation towards the good.³² Similarly, vice is a matter not just of acting wrongly, or of acting for the wrong kinds of reason, but of failures of feeling (the lack of appropriate feeling, the presence of inappropriate feeling), attention, and observation.

Such a view gives substantial notions of virtue and vice a substantive role in explaining moral goodness and badness; they are not analyzed in behavioral terms; their ascription is not simply an inference from the agent's (even intentional or deliberate) actions. But it is also quite ill-suited to ground an argument that criminal liability should depend on, or should be explained by reference to, vice or lack of virtue: not even the most aspirational perfectionist is likely to want to give the criminal law *this* kind of interest in its citizens' virtues or vices.

We can show this quite simply (and without having to spell out the liberal ideals which would figure in a more

32. For two versions of this thought, one roughly Platonic and one roughly Aristotelian, see Iris Murdoch, *The Sovereignty of Good* (1970); Lawrence A. Blum, *Friendship, Altruism, and Morality* (1980).

detailed argument) by noting how implausible it would be to say that the criminal law should attend to the distinctions between virtue and self-control, and between weakness of will and vice. Such distinctions are, as we saw, crucial to Aristotle's account of virtue and vice, and any substantial notions of virtue and vice will incorporate some account of the proper role of emotions and appetites: but they are surely not relevant to the criminal law.

The distinction between virtue and self-control could not be generally relevant, since so long as we do not commit what the law defines as crimes, the law has no interest in why we do not commit them—in whether our non-criminal conduct expresses virtue, self-control, a self-interested concern to avoid sanctions, or whatever. Nor, however, is it relevant in those contexts in which the law might attend more closely to agents' reasons for what they do. For even those who argue that the courts should attend to the defendant's reasons for action in determining whether he can avail himself of a justificatory defense³³ do not think that the law should require virtue rather than self-control—for instance, that one who pleads a justifying necessity must show that she did not have to resist a cowardly temptation not to do what she saw needed to be done. Even if we agree that certain kinds of excuse work by showing that the defendant lived up to “the standards of character which were demanded of [her],”³⁴ she need not show that she exhibited virtue as distinct from self-control.

Nor is the distinction between vice and weakness of will relevant to criminal liability: it cannot plausibly be argued that one whose commission of a crime exhibited weakness of will rather than true Aristotelian vice should therefore be acquitted, or should be convicted only of a

33. For two recent useful contributions on either side of this ongoing debate, see John Gardner, *Justifications and Reasons*, in *Harm and Culpability* (A.P. Simester & A.T.H. Smith eds., 1996); Paul H. Robinson, *Structure and Function in Criminal Law* 95-124 (1997).

34. Gardner, *The Gist of Excuses*, *supra* note 10, at 598; see also Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 *S. Cal. L. Rev.* 1331, 1334 (1989). I return to these issues later: see *infra* text accompanying notes 43-49.

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lesser offense. Whether the offense is serious (murder, rape, and so on), or relatively minor (like many driving offenses, or petty theft), we can imagine it being committed either through weakness of will by one who gives in to a temptation that he knows, in some sense, he should resist, or through vice by one who is wholeheartedly involved in the wrong he does: but both commit, and should be convicted of, the same offense. It might be argued that the distinction does become relevant at the stage of sentencing: that someone who gave in to temptation in a moment of tragic weakness deserves a lighter punishment than one whose commission of the crime reflected his own corrupt values; and perhaps that this helps to explain the idea that the offender's remorse entitles him to some mitigation of sentence (for the weak-willed offender is more likely than the vicious offender to be remorseful), and that prior criminal record can make a harsher punishment appropriate (for the vicious offender is more likely to be a regular offender). But neither remorse nor lack of prior record are reliable indications of weakness of will as distinct from vice: a vicious offender could be remorseful; a weak-willed offender can be weak-willed often enough in a particular way to collect an impressive criminal record.

Perhaps the difference between a vicious and a weak-willed commission of just the same crime could still bear appropriately on sentencing decisions. I think, however, that what is at stake here is better interpreted as a difference in the character of the actions that constitute the crime, than as a difference in the character of the agents who commit them: what justifies the harsher punishment for the "vicious" assailant is the viciousness of the attack itself, not of his underlying character. This leads us to the next possible role for virtue and vice.

Constituting the Character of the Action

Sometimes the moral character of an action (if not its character as straightforwardly right or wrong, at least its character as morally appropriate or inappropriate) is

determined in part by the attitude it expresses or by the spirit in which it is done.

This is especially true of expressive actions, whose meaning lies to a significant extent in the emotion or attitude they communicate. If I go to visit my sick aunt, the value of my action lies largely in the sympathetic concern that it expresses, or purports to express. Perhaps I feel no such concern: perhaps I undertake this (as I see it) boring, irritating, or unpleasant visit just to keep my place as a beneficiary in her will.³⁵ My action is then a pretense, a lie; and whilst we can sometimes talk of doing “the right deed for the wrong reason,” we might well not want to say this here, even if my aunt is actually cheered up by my successfully deceptive visit: the moral character and worth of my action is at least vitiated by the fact that it flows from greed, rather than constituting a genuine expression of my love and sympathy. So too, what makes a failure to acknowledge a colleague so hurtful and wrong might be the attitude it manifests: of disdain or contempt, of hatred, or even just of indifference.

Sometimes we will describe the attitude or spirit that is displayed in an action in terms of specific virtues or vices. We might see the (dis)value of an action as lying partly or primarily in its courageous, or cowardly, character; in its honesty or its dishonesty; in its kindness or its callousness. Such moral descriptions also break down the distinction between “the right deed” and “the right reason”: the action takes its own moral character from the reasons for which, or the spirit in which, it was done.

I do not suggest that this is true across the moral board. In some cases, we might indeed think that an action has no moral worth if it is not done in the right spirit: I should perhaps not visit my aunt at all if I can't visit her

35. More complex is the case in which I overcome my reluctance from a sense of duty (which would involve recognizing my immediate feelings as morally lacking): depending on how the idea of “duty” figures in my life, we might or might not still be able to see my action as expressing my love and concern for her. See Peter Winch, *Moral Integrity, in Ethics and Action* (1972).

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out of loving concern. In other cases we might think that the action should still be done, or that it is better that it is done, although its worth is vitiated by its lack of appropriate motivation: at least the homeless person has the money to pay for a room, even if the worth of the gift is seriously qualified by the disdainful spirit or Hobbesian motive of self-aggrandizement from which the giver acted.³⁶ But in yet other cases, especially perhaps those in which we can talk of what is owed as a matter of justice, the rightness of the deed is more sharply distinguishable from the agent's motive or reason for doing it, and there is then more room to judge the deed as right whilst judging the agent as morally lacking. The debt is paid, the promise is kept, the right grade or the right verdict is given; perhaps even the life is saved: the action is thus right, even if the agent's motives for it are quite disreputable.³⁷ So too, the moral wrongness of an action is often distinguishable from the motives or reasons for which it was done.

What then of the criminal law? It is equally implausible that the criminal wrongfulness of criminal actions is *generally* constituted, even partly, by the attitudes or motives they display. The agent's intention might often, if not always, be partly constitutive of the wrong for which he is convicted:³⁸ but the vicious attitudes, motives, or character traits that might be displayed in the action do not generally help to constitute its criminal wrongfulness. This is true of both serious and more trivial offenses: wounding, serious arson attacks, robberies, or burglaries do not take their basic character as criminal wrongs from the attitudes or motives of those who

36. See Thomas Hobbes, *The Elements of Law* Part I ch. 9.17 (F. Tonnies ed., 1889) (1640).

37. For what is done to count as "the right deed," it must of course be done intentionally, under the appropriate description—it must not be a matter of mere chance that what the agent did for her own purposes happened also to constitute paying a debt, keeping a promise, giving the appropriate grade, and so on.

38. This is another issue that I can't pursue here: compare Robinson, *supra* note 33, at 129-37, with Fletcher, *supra* note 9, at 475-78, 553-54, 695; see also R.A. Duff, *Rule Violations and Wrongdoings*, in *Criminal Law Theory: Doctrines of the General Part* 47, 68-74 (Stephen Shute & A.P. Simester eds., 2002).

perpetrate them. A vicious motive might aggravate the wrong that the offender commits, if it is displayed in the character of the action that constitutes the crime: but it is not essential to the constitution of the action as a crime. Perhaps sometimes, however, the very identification of an action as a criminal wrong requires reference to something like vice. Gardner argues that in defining theft in terms of dishonesty, the law builds “a standard of character” into the determination of criminality: for part of what makes the thief’s action criminally wrongful is its dishonesty, and in judging its (dis)honesty, we apply “exactly the same standard” as that by which we judge a person’s (dis)honesty.³⁹ Similarly, it might be argued that the American doctrine of “depraved-heart murder,” which defines one type of murder in terms of the callous or wicked indifference to human life displayed in the defendant’s action,⁴⁰ defines the wrong (as murder rather than as manslaughter) in terms that make essential reference to the vice displayed by the defendant.

If vice is relevant in such cases, it is relevant as partly constituting the intentional object of liability, not merely as a condition of liability: the defendant’s action counts as murder, not as a lesser wrong of manslaughter, because of the wicked indifference that it displayed; or as theft because of the dishonesty it displayed. So can we say that in such cases as these vice is substantively relevant as a ground of criminal liability?

We could say this, but only if we recognize just how etiolated the notion of vice becomes in such contexts. It is thus etiolated not just because it does not attend to the diachronic aspect of vice as a lasting character trait (one vicious action does not constitute its agent as a vicious

39. Gardner, *The Gist of Excuses*, supra note 10, at 575-76: see *Theft Act*, 1968, c. 60, §§ 1-2 (Eng.); contrast *Model Penal Code* § 223.2 (Proposed Official Draft 1962).

40. See Pillsbury, supra note 4, at 116-23, 174-82; see also Gerald H. Gordon, *The Criminal Law of Scotland* 286-300 (Michael G.A. Christie ed., 3d ed. 2000-01) (on the Scottish doctrine of “wicked recklessness” in murder).

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person),⁴¹ but because it does not distinguish vice from weakness of will. The dishonesty that is displayed in a person's theft, even the "wicked indifference" that his fatal attack displayed, cannot of course (if he is a responsible agent at all) constitute nothing more than a momentary lapse which has no connection with any persisting aspects of his character: but it could reflect a tendency or a temptation which he usually manages to resist because he sees that he should; it could, that is, display a momentary weakness of will in an agent who, whilst not virtuous, is generally self-controlled rather than vicious. More generally, vice in any substantive sense of the term of involves dispositions not just of action, but of feeling, of motivation, of response, of thought and attention: but the notion of vice in play in these criminal contexts is a far more limited conception. In determining whether the defendant's action was dishonest, we are not interested in whether the appropriation of another's property appeared to him as a temptation which he should (and perhaps even tried) to resist, but to which he gave in; or as an option to be assessed simply in terms of whether or not he could get away with it (we are not, that is to say, interested in his conception of the good). We are not interested in whether he was struck down by remorse after the act, or simply enjoyed his gains. We are not interested in whether he spotted this chance to steal because he is sensitive to, even on the alert for, such dishonest opportunities, or because it was such an obvious possibility that even normally honest people might have been tempted. We are not, that is, interested in whether he is a dishonest person: for all the things we are not interested in when determining his criminal liability are matters that bear crucially on whether we should ascribe the vice of dishonesty to him.⁴²

41. See Gardner, *The Gist of Excuses*, supra note 10, at 575.

42. So Gardner is wrong to say that "apart from [the] diachronic aspect, the standard by which we judge a person dishonest is exactly the same standard as that by which we judge an action dishonest," or that a person "is dishonest if and only if she tends to act dishonestly." *Id.* There is much more to being a dishonest person than even a persistent tendency to act dishonestly.

In so far as criminal liability depends and is focused on such matters as the dishonesty of the agent's action, or the attitudes displayed in his action, it is focused on what lies deeper not only than his overt behavior, but also than his choices; it is focused on motives, attitudes, and spirit which are, we might naturally say, aspects of character. But the "character" at issue here is, we should also say, the character or meaning of the action rather than that of the agent: the criminal law should still not make vice, as a substantial feature of the agent's character, either part of the intentional object or a condition of criminal liability. This distinction, between the character of the agent and the character of her action, is of course far from sharp: the motives, attitudes, and concerns that help determine the action's character are the motives, attitudes, and concerns of its agent, and would properly figure in any adequate character-based narrative of his life. The distinction is thus not between two sharply separate realms of "inner" and "outer," or of "character" and "action"; it is rather between deeper and shallower, or between more and less substantial, interpretations of the person and her agency. It is still, however, a distinction that must matter to anyone who wants to set liberal limits on the extent to which the criminal law should be allowed to inquire or intrude into our lives.

Grounding Defenses

Perhaps we can find a larger and more substantive role for notions of vice or virtue, not in the definitions of offenses, but in the articulation of certain defenses: perhaps most notably in explaining the defense of duress and the partial defense of provocation, but more generally in explaining defenses in which the figure of the "reasonable person" plays a criterial role.⁴³

43. See, e.g., Huigens, *supra* note 10, at 1429-37 (on justifications generally); Finkelstein, *supra* note 5 (on duress); Kahan & Nussbaum, *supra* note 10, at 305-23 (on provocation and "heat of passion" homicide), 327-33 (on self-defense), 333-38 (on duress); Gardner, *supra* note 10; Tadros, *supra* note 10.

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Sometimes the reasonable person plays a purely evidential role: that such a person would have foreseen x as an outcome, or would not have believed that p , is evidence from which the jury might properly infer that this defendant foresaw x , or did not believe that p ; but it is still open to the defendant to offer evidence or arguments to try to persuade the jury that he might not have foreseen x , or might have believed that p .⁴⁴ In these contexts, the reasonable person could be seen simply as the statistically or empirically ordinary person. But in other contexts, the reasonable person plays a criterial role. That a reasonable person would have resisted the kind of threat to which this defendant gave in, or would not have been so provoked as to lose their self-control by that which this defendant claimed provoked him into a fatally violent loss of self-control, is not merely (rebuttable) evidence that this defendant could have resisted that threat, or could have controlled himself: it entails the failure of his defense.⁴⁵ In these contexts, the reasonable person sets a normative standard against which the defendant is judged—he is convicted if he fails to attain that standard; and as a normative exemplar of this kind, the reasonable person must be understood in normative, rather than merely empirical or statistical, terms. We might then plausibly suggest that the reasonable person in such contexts is a

44. This role is implicit in, for instance, Criminal Justice Act, 1967, c. 80, § 8 (Eng.) (given which, the fact that death was a “natural and probable consequence” of the defendant’s action, i.e., one that a reasonable person would have foreseen, is nothing more than rebuttable evidence that the defendant foresaw it); and in Sexual Offences (Amendment) Act, 1976, c. 82, § 1(2) (Eng.) (given which, the absence of “reasonable grounds” for the belief that the victim consented to sexual intercourse, i.e., the fact that a reasonable person would not have believed that, is nothing more than rebuttable evidence that this defendant did not believe that).

45. See Model Penal Code §§ 2.09 (Proposed Official Draft 1962) (“a person of reasonable firmness” in duress), 210.3 (homicide “committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse”). For a discussion of the “role of a sober person of reasonable firmness” in duress, see J.C. Smith & Brian Hogan, *Criminal Law* 259-62, 369-75 (10th ed. 2002); see also *R. v. Howe* [1987] A.C. 417. For a discussion of the role of the reasonable person in provocation, see Smith & Hogan, *supra* at 367-73; *R. v. Duffy* [1949] 1 All E.R. 932; Homicide Act, 1957, c.11, § 3 (Eng.).

person who has and displays those modest civic virtues that the law can properly demand of its citizens—and that those virtues should be understood in roughly Aristotelian terms. I'll focus here on the example of duress: but we could offer an analogous account of provocation, though it would need to be complicated to deal with the fact that provocation is only a partial defense.

The reasonable person (the reasonable citizen) fears what is fearful; the threat of what is seriously fearful, because seriously harmful (death or serious injury to herself or those whom she loves, for instance), will make her very afraid. She also has a proper concern and respect for the interests that the criminal law protects: citizens' interests in life, security, property, and so on; the state's proper interest in such things as the administration of justice. She also has a suitable degree of courage—a willingness to face harm or danger for the sake of what is truly valuable. Given those virtues, she would often refuse to commit an offense even if threatened with harm by someone who tried to force her into committing it: if the harm threatened was not serious, or if the offense was very much more serious than the threatened harm. But she would sometimes give in to such a threat. In some such cases this would be because giving in would be justified: at least permissible, if not positively the right thing to do.⁴⁶ In other cases, giving in would not be justified: a person of true courage, or a person of such moral strength that her proper concern for the interests that the crime would injure would not be undermined even by this threat, would not give in. But the law should not (it cannot reasonably) demand that kind of courage or moral strength of its citizens, on pain of criminal conviction and punishment if they fail to display it: it should set only modest, rather than

46. I assume here, with Dressler (Joshua Dressler, *New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 *UCLA L. Rev.* 61, 70-75, 80-87 (1984)), that "justified" conduct includes permissible conduct—and also that duress is sometimes a justification (a bank clerk who hands over her employer's money under plausible threat of death is justified in what she does).

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heroic or saintly, standards for us, and condemn us only if we display a vice which involves the lack even of the modest kind of virtue—of courage or moral strength, of concern for legally protected interests—that meeting those standards requires.⁴⁷

There are in fact two ways in which duress, on this kind of account, can excuse. First, the threat might be so terrifying that its victim's rational agency is in effect undermined: he is so terrified, so destroyed, by the threat of further torture that he is no longer capable of the kind of practical reasoning that would ground a rational decision to resist, or to give in; all he can think of is how to prevent further agony. Even in this extreme case the reasonable person sets a normative standard. If a reasonable person would not have lost control of herself as this defendant did in response to that kind of threat, we have to judge that in thus losing control of himself the defendant displayed a lack of even the modest level of virtue that the law properly demands of us: an excessive concern for his own safety, or an excessive fear of what was not that fearful, or a lack of concern for the interests that his action injured. Second, however, this kind of utter loss of control is not plausibly involved in all cases of exculpatory duress: often, the defendant was still capable of, and still exercised, practical reason. She is then excused if and because resistance would have required a greater degree of courage or commitment than the law can properly demand of us; if, that is, in giving in she did not display a vicious lack of even that minimal level of civic virtue that the law can demand of us, and that is exemplified in the reasonable person.⁴⁸

On this analysis vice (or a lack of even minimal virtue) presumably figures as a condition of criminal liability

47. See Dressler, *supra* note 34, at 1367, 1373.

48. Very much more needs to be said about duress than I can say here, and in particular about whether the law can properly sometimes demand heroism of us (as English law seems to do, for instance, in denying duress as a defense to murder): but I hope that I have said enough to show how plausible it is to explain duress in terms of virtue and vice.

rather than as part of its intentional object. That is, the defendant is to be convicted and punished not *for* his cowardice, or lack of strength or commitment, but for the crime that he commits under threat (for perjury, for theft, or whatever), on condition that his commission of that crime manifested the relevant vice or lack of virtue. (In the previous sub-section, by contrast, vice appeared to figure as part of the intentional object of liability.) But does this give a substantial notion of vice a substantive role in grounding criminal liability?

Defenses of this kind do provide the most plausible focus for the virtue theorists' claims: but they still give only a limited role to etiolated notions of vice and virtue.

The role is limited because even if we should explain these defenses in terms of the vice displayed by the defendant, we cannot conclude that vice is a *generally* necessary condition of criminal liability: the most we can say is that in those—relatively unusual—situations in which one of these defenses is in play, the relevant kind of vice is a condition of liability.

We might be misled about how etiolated the notions of virtue and vice are in this context by the fact that we talk of the “reasonable person”: for we might then think that what we must do is compare the defendant, as a person, with the reasonable person, and that we will thus be involved in judging virtue and vice as substantial traits of the agent. But this is just one of the ways in which talk of the “reasonable person” is misleading. What concerns the court in such cases is, essentially, the question of whether this defendant's response and action were within the (fairly generous) boundaries of the “reasonable”: was his fear reasonable, was his response to it reasonable, was it reasonable to give in to that threat? We are, therefore, still concerned with the character of the action rather than with the character of the agent—as is partly shown by the fact that the distinction between vice and weakness of will is as irrelevant here as it is in the other legal contexts we have discussed. Once again, we must look beyond or behind the agent's overt behavior and his choices: we must look to the emotions and concerns by which

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he was moved, and judge them to be reasonable or unreasonable. But in doing this we are not trying to reach some judgment on his character, nor do we attend to aspects of his character which would be crucially relevant to the question of whether *he* was virtuous or vicious.⁴⁹

Virtue, Vice, and Practical Reasoning

We turn finally to the most ambitious of recent Aristotelian accounts of criminal liability as grounded in vice. The purpose of law, argues Huigens, is “to promote the greater good of humanity,” and “[t]he criminal law serves that end by promoting virtue.” It promotes virtue “by inquiring into the quality of practical judgment displayed by the accused in his actions”: what grounds liability is the offender’s “faulty reasoning,” and what the criminal law “condemns” is “not just harm, but the lack of judgment that results in harm.”⁵⁰

Huigens grounds this account of inculcation in Aristotle, but focuses more on Aristotle’s discussion of practical reasoning and practical wisdom (*phronesis*) than on his discussions of the virtues of character. Virtue of character, properly speaking, involves practical wisdom; it informs and is informed by the agent’s conception of the good, her understanding of how that good can be achieved, and her perception of what is appropriate in the situations in which she finds herself. What inculcates a person, what makes it appropriate to blame and punish her as a criminal, is the radical lack of such virtuous practical

49. If we focus on the question of whether this agent’s response and action were “reasonable” or not, we might also manage to undercut the interminable and often radically confused debate about which of the particular agent’s characteristics should be ascribed to the “reasonable person”—a debate which has done so much to obfuscate discussions of both duress and provocation.

50. Huigens, *supra* note 10, at 1424-25 (footnotes omitted). This is part of a larger “republican” theory of criminal law, but I cannot discuss that larger picture here. Nor can I attend to the ways in which Huigens has developed his account in more recent articles: see Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 *Wm. & Mary L. Rev.* 943 (2000), *Rethinking the Penalty Phase*, 32 *Ariz. St. L. J.* 1195 (2000), *Solving the Apprendi Puzzle*, 90 *Geo. L. J.* 387 (2002), and his contribution to this volume.

wisdom that her actions manifest: her misconception of the good, her improper or misguided choice of ends, and her faulty practical reasoning. The jury or factfinder must also exercise *phronesis* in judging the defendant. Cases cannot be decided by the mechanical application of rigid rules, but require sensitive attention to the particularities of the individual case. The factfinder must in the end decide whether this defendant “made the right choices in her particular situation,”⁵¹ or whether she herself “would have acted in the same way as the accused under the given circumstances”⁵²—which involves the exercise of the factfinder’s own practical wisdom.

Now Huigens suggests that “lack of judgment” is a central aspect of the intentional object of criminal liability—it is part of what the offender is condemned *for*.⁵³ It might, however, be better to portray lack of judgment as a condition of liability—at least if this account is to be, as Huigens intends, “descriptive of the criminal law as it stands,”⁵⁴ and even, I think, if it is to be at all plausible as a prescriptive account. The murderer, the rapist, the thief, might display a lack of practical judgment in committing their crimes: but they are and should properly be convicted and punished for those crimes, for what they did to their victims, not for their lack of practical judgment.

Is “lack of judgment” then a substantial condition of criminal liability? If offenders who are properly convicted have culpably done what they should not do, it does of course follow that there was *something* amiss with their practical reasoning: someone exercising *phronesis* would not have acted thus, from which it follows that someone who culpably acted thus could not have been exercising *phronesis*. But this is so far to show only that “lack of judgment” can be inferred from criminal liability, not that it constitutes a substantial condition of liability.

51. Huigens, *supra* note 10, at 1439.

52. *Id.* at 1463.

53. See *supra* text accompanying note 50.

54. Huigens, *supra* note 10, at 1427.

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Furthermore, Huigens appears to ascribe to offenders a more determinate kind of “lack of judgment” than is warranted; he ascribes vice, though offenders might only exhibit weakness of will. He claims, for instance, that “in judging a person guilty we reject his chosen ends as improper,” or “reject the particular conception of the good and the scheme of ends that led the actor into the conflict and to the resulting harm,” or “reject and condemn their pursuit of those ends or their use of those means.”⁵⁵ But offenders might commit crimes through weakness of will rather than true Aristotelian vice, and the weak-willed agent does not have a conception of the good that we should reject, nor has he chosen improper ends; his trouble is that he fails to act in accordance with his own conception of the good or his own rational ends. Indeed, in an Aristotelian sense of “choice” (as Aristotle’s term “*prohairesis*” is often translated) a weak-willed agent does not choose his action at all: for choice in this sense is a product of rational deliberation about how to achieve the good as one conceives it; and the trouble with a weak-willed agent is that his actions are not structured by any such rational deliberation.⁵⁶ So those convicted of the same offense might manifest quite different kinds of defect in their practical reasoning: a vicious offender reasons efficiently from bad ends, from a misconception of the good, to her criminal action;⁵⁷ a weak-willed offender either fails to complete the appropriate practical syllogism that would lead him (in the light of his own conception of the good) not to offend, or fails to act in accordance with his own practical reasoning.⁵⁸ This adds more force to the suggestion that faulty practical reasoning is an inference from criminal liability rather than either a constituent or a condition of it.

Finally, Huigens exaggerates the extent to which factfinders need *phronesis* if they are to determine guilt, or

55. Id. at 1424, 1439, 1458.

56. See Aristotle, *Nicomachean Ethics*, supra note 16, at III.2.

57. See id. VI.12 (on “cleverness” as distinct from practical wisdom).

58. See id. VII.3, VII.7 (on “impetuosity” and “weakness” as two types of weakness of will).

to which citizens need *phronesis* if they are to avoid committing crimes. A Dworkinian judge might need *phronesis* to carry through her Herculean task, and we must of course hope that both factfinders and citizens will be moderately sensible: but factfinders will not usually have to determine whether the defendant “made the right choices in her particular situation,” or make a “judgment . . . about the right course of action in the circumstances of the accused”;⁵⁹ nor will citizens usually need *phronesis* to distinguish criminal from non-criminal actions amongst the options facing them. It is true that, although there are very many cases in which factfinders and citizens can simply read the criminality of a given action off from such authoritative guidance as is available to them, there are also many cases in which they need to make a judgment about what it is or would be “reasonable” do to: for instance about whether it is or was “reasonable” to take this risk, when the issue is one of recklessness; about whether it is or was “reasonable” to give in to this threat, when duress is the issue; about whether it is or was “reasonable” to use this kind of force in response to this kind of supposed attack, when self-defense is the issue; and so on. But the judgment that a particular action is in this sense “reasonable” is not the judgment that it is “*the right* course of action in the circumstances”; it is the judgment that the action falls inside, rather than outside, the boundaries of the legally reasonable—and those boundaries are quite generous. We might need *phronesis* if we are to decide what is *the* right or appropriate course of action in a difficult situation; but we do not need *phronesis*, as a distinctive and quite demanding intellectual and moral excellence, if we are simply to determine whether a particular course of action is “reasonable” in the sense that it is not so clearly wrong or inappropriate that the law should count it as unreasonable.

59. Huigens, *supra* note 10, at 1439, 1463.

6. A VERY MODEST CONCLUSION

The conclusion of this paper is both modest and deflationary: etiolated conceptions of virtue and vice can play a limited role in some contexts in an account of the conditions (sometimes also of the intentional objects) of criminal liability. We should not conclude that Aristotelian virtue theory contributes nothing substantial to our understanding of the grounds of criminal liability: but what it can contribute is less both in content (because the relevant conceptions of virtue and vice are much thinner than Aristotle's) and in scope (because it is only in particular and limited contexts that it is useful to talk of virtue or vice) than some Aristotelian theorists would claim.

If that is right, there are two possible ways forward. We could, first, abandon any hope of or aspiration towards a unitary theory of criminal liability, in favor of much more piecemeal, particularist accounts of the different forms, structures, and grounds of liability that we find in existing systems, and that we would expect to find in any acceptable system, of criminal law. Or we could, second, look for some other unitary theory, organized around some other central concept. In more ambitious moods, I still incline towards the second route, and to look to the concept (or a conception) of action to provide the unifying idea—that criminal liability is, at least paradigmatically, imposed not for choices, or character traits, or vices, but for actions.⁶⁰ In taking that route we would of course need to take due notice of the various ways in which actions—both in general and as intentional objects of criminal liability—differ in structure, in complexity, in depth of meaning; and at the same time guard against the danger that, in trying to do justice to that diversity, we so empty the concept of action of substantial content that it comes to mean “what defendants are properly held liable for,”

60. Which is not to say that this would provide a complete account of criminal liability: it would be an account of its intentional objects, but not of the conditions under which we can be held liable for those objects. See Horder, *supra* note 12.

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turning the claim that “actions” are the intentional objects of criminal liability into an empty and uninteresting truism.⁶¹ These are, however, matters for another occasion than this.

61. Cf. Husak, *supra* note 12, at 93 n.19, on interpretations of the supposed “act requirement.”