The Theoretical and Philosophical Foundations of Criminal Law

David Dolinko

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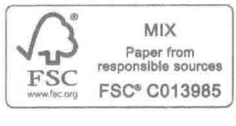

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The Theoretical and Philosophical Foundations of Criminal Law

The International Library of Essays on Criminal Law
Series Editor: Stephen Shute

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The Codification of Criminal Law
Michael Bohlander and Daley Birkett

The Theoretical and Philosophical Foundations of Criminal Law
David Dolinko

Criminal Law and Human Rights
P.H.P.H.M.C. van Kempen

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Series Preface

This series, consisting of six volumes, brings together some of the most significant and influential writings to have been published in the field of criminal law, criminal procedure, and criminal justice in the last century or so. Individually, each volume illuminates many of the key debates that have ebbed and flowed in the field; collectively, they provide the conceptual, theoretical, and structural tools we need to understand how contemporary criminal law works. That understanding is further advanced by the fact that each volume begins with a synthetic introduction which places the selected essays in their context and explores the connections and contrasts between them.

The Theoretical and Philosophical Foundations of Criminal Law (David Dolinko) includes 19 path-breaking essays on criminal law theory. These essays consider demanding questions such as: What conduct should and should not be criminalised? What authority does the state have to respond to various criminal wrong doings by inflicting intentional harm on perpetrators in the form of criminal punishment? What role do the concepts of individual 'choice', 'capacity' and 'character' play in the ascription of moral and criminal responsibility? What is the relevance of mental state to culpability judgement and how should this judgement change when we have full information about the reasons someone had for acting as they did? What liability should be imposed on people for the crimes they seek to bring about but fail? and, more generally, What place should luck and happenstance have in the criminal law?

In *The Structure and Limits of Criminal Law* (Paul H. Robinson) a further 19 essays confront a series of important foundational questions regarding how we should best understand the architecture of the criminal law: Is it possible to construct a single, unified, conceptual framework into which all criminal law rules fit? if it is, What value does such a framework have? Can we identify a set of necessary and sufficient conditions for criminal liability? and, if we can, What are the proper limits of these doctrines and how should they be expressed?

In the volume on *The Codification of Criminal Law* (Michael Bohlander and Daley Birkett) issues concerning the development of criminal codes are considered by another 24 essayists. The apparently simple question 'What is a criminal code?' turns out to be frustratingly difficult to answer, as is the question whether it is sensible for every country to adopt one. Most authors in this volume, whether approaching the topic from a theoretical, historical, or comparative perspective, answer the latter question in the affirmative. But a few are more sceptical. For them, whatever approach is taken, the promised benefits of full codification – simplicity, accessibility and comprehensibility – will always remain tantalisingly out of reach or be undermined or negated by the likely loss of flexibility and responsiveness that codification brings.

Concern with human rights has been present in one form or another in all human societies since time immemorial. Yet, despite these deep roots, the notion that every human being is a rights-bearer by virtue of their humanity, and that certain of these rights are universal and inalienable, has been taken up in the last 100 or so years in a way that has no parallel in any previous historical period. This explosion of interest in human rights thinking raises

difficult questions for the doctrines, rules, and principles of criminal law, criminal procedure, and criminal justice. It creates tensions between the instrumental aims of crime reduction and public safety embraced by all criminal justice systems and the protection and safeguards that human rights discourse seeks to achieve. So how are these tensions to be eased? This is the key question that lies at the heart of the 14 essays included in *Criminal Law and Human Rights* (P.H.P.H.M.C. van Kempen). Through the lens of human rights discourse, central criminal law conundrums are considered: What are the implications of the right to be presumed innocent? How should the conflict between the right to liberty and the use of preventive detention be resolved? How should the protection we offer to privacy affect the way criminal investigations are conducted? What is the impact of human rights protection on the scope of legitimate criminalisation? and What is its impact on the doctrines, principles, and rules of substantive criminal law, criminal procedure, and sentencing?

In *Theoretical Foundations of Criminal Trial Procedure* (Paul Roberts) 19 essays are gathered together with a focus on the criminal trial and its theoretical underpinnings. The reflection in these pieces embraces the detail of the trial process and the law of evidence as well as discussing the values that ought to be honoured in criminal trials, casting light on these issues through case analysis, the use of interdisciplinary methods, and insights drawn from international comparisons.

Finally, in the volume of essays on *Expert Evidence and Scientific Proof in Criminal Trials* (Paul Roberts), 26 essays focus on the role that science plays in the modern criminal trial. Here abstract discussions of the concepts of truth, fallibility, and authority nestle side by side with analyses of data collected from interviews and psychological experiments, including the use of mock juries, discussion of major decided cases, surveys of solutions found in other legal systems, and consideration of practical questions such as the admissibility of scientific evidence in criminal trials and issues regarding how expert evidence and scientific proof are portrayed in the media and on television.

Taken as a whole, the volumes in this series serve up more than 100 essays written by leading scholars in the field of criminal law, criminal procedure, and criminal justice. Reading or re-reading them will inform (and, I trust, entertain) both the novice reader and the expert alike. But, whatever their distinction and significance, no set of essays can - or should - mark the end of debate in these important areas. My hope, therefore, is that this series will spark yet more intellectual inquiry which will continue to advance our knowledge and understanding of these fields, something which becomes more of a necessity as each day passes.

STEPHEN SHUTE
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Series Editor

Introduction

The nineteen essays reprinted in this volume address fundamental theoretical issues concerning criminal law. Philosophers have made criminal law the subject of reflection since at least the time of Plato, who had the eponymous sophist in his *Protagoras* endorse a deterrent theory of punishment. Yet most of the essays in this collection were published in the last forty years. For only in recent times have philosophically-minded criminal law scholars examined foundational issues beyond the perennial debate over the justification of punishment.

Older scholars had not ignored such matters as the meaning of 'mens rea' or the contours of attempt liability. They had addressed these matters, however, largely through traditional modes of legal analysis such as collating and harmonizing prior cases and extracting general principles from their holdings, and had made little or no use of any doctrines or techniques of moral or political philosophy. In the 1950s and 1960s, however, a pair of roughly simultaneous developments prompted efforts to apply the methods of analytic philosophy to issues concerning substantive criminal law – the evolution of the Model Penal Code in the United States and the criminal law scholarship of H.L.A. Hart in Britain.

In 1962 the American Law Institute completed its decade-long effort to draft a model code of criminal law that could stimulate and help state and federal lawmakers to rethink, revise and reorganize their generally chaotic and unsystematic bodies of criminal law. The resulting Model Penal Code (MPC) was in fact very influential in spurring state reform efforts. But the Code and its official commentaries had at least as great an impact on the legal academy, functioning as 'the first comprehensive treatise in this country [the US] devoted to rethinking the premises and principles of the criminal law' (Kadish, 1999, p. 950).

The Code embodied a utilitarian, instrumentalist perspective that approached criminal law as a means of advancing society's overall interests by deterring harmful conduct and incapacitating those dangerous persons who engaged in such conduct. It stimulated many authors to adopt the same perspective in their own work. Others, however, were inspired to pursue a different form of criminal law scholarship, often called 'criminal law theory', which studied blaming and punishing practices and the moral and philosophical features of such concepts as responsibility, culpability, excuse and justification.

Another stimulus for this new interest in theory came from the path-breaking essays that H.L.A. Hart published between 1957 and 1967 and collected in book form in 1968 (Hart, 1968). The essays included an influential 'hybrid' theory of punishment combining features of retributivism and utilitarianism. More importantly, Hart subjected such topics as responsibility, criminal negligence and the rationale of excuses to rigorous philosophical scrutiny, using then-novel methods of analytic philosophy.

The post-Code, post-Hart years witnessed an outpouring of work in criminal theory. One milestone was the appearance in 1978 of George Fletcher's *Rethinking Criminal Law*, which

focused the attention of scholars on the significance of the concepts of wrongdoing and attribution (or culpability).[1]

The sheer volume of criminal law theory makes it impossible to compile a truly representative selection of particularly significant, influential work without vastly exceeding space limitations. Unavoidably, much outstanding work has been excluded, including essays readily available in prior anthologies or that are simply too long for this volume (examples include Dan-Cohen, 1984; Kelman, 1981; Morris, 1968; and Schulhofer, 1974).

The essays that are included address recurring topics in criminal law theory. The three essays in Part I deal with the proper scope of criminal law – what should be criminalized, and why? Part II presents competing views on the roles of a person's choices and character in determining liability for criminal acts. In Part III, two authors challenge, in different ways, prevailing views about the mental states relevant to criminal liability. Part IV presents different opinions on the bases of justification and excuse defences, on the significance of the distinction, and on what justifies self-defensive killings. The essays in Part V deal with perennially fascinating problems concerning criminal attempts – the problem of impossible attempts and the widespread practice of punishing attempts less than equally culpable completed crimes. Finally, Part VI focuses on the continuing controversy over the propriety of criminal punishment. Joel Feinberg's classic contribution to the characterization of punishment is followed by three recent efforts to justify punishment as an institution.

The Structure and Limits of Criminal Law

No question can be more fundamental for criminal law theorists than what conduct to criminalize. Are there articulable restrictions on the sorts of behaviour that may appropriately be made criminal, or should lawmakers be free to impose criminal sanctions whenever they deem it desirable? The question gains urgency from the relentless expansion that the criminal law has undergone. William Stuntz observed a dozen years ago that 'criminal codes have continually broadened throughout the past century and a half' (2001, p. 511). One (conservative) estimate found 4,000 federal offences carrying criminal penalties (Luna, 2005, p. 712) and state criminal codes have swelled similarly (Robinson and Cahill, 2003, p. 172 and n.16). England's criminal law has grown similarly, with an estimated 8,000 offences on the books when the current century began (Ashworth, 2000, p. 226).

Henry Hart's essay (Chapter 1) was a reaction to this trend, and especially to the proliferation of strict liability 'public welfare offences'. Hart famously declared that the crucial distinction between criminal and civil sanctions is that the former embody a judgment of community condemnation. The central theme of his essay is that because they necessarily imply blame, criminal sanctions are misused when applied to conduct that is not morally blameworthy. Hart's emphasis on the central role of *blaming* in criminal liability was later elaborated by Joel Feinberg (Chapter 16) and became a prominent theme in discussions of the justification of punishment.

[1] Other outstanding features of this book include its use of 'a wide range of interdisciplinary sources and methodologies', its influential presentation of 'a nonconsequentialist framework for understanding criminal law' and its path-breaking attention to comparative criminal law (Christopher, 2004, p. 738).

Hart wanted only conduct meriting the community's moral condemnation to be criminalized. Can any perspicuous account be given of what conduct *does* merit such condemnation? Some theorists answer 'no', including the prominent English criminal scholar Glanville Williams. He concluded that while the distinctive features of criminal *proceedings* could be described, one could define a *crime* only as 'an act capable of being followed by criminal proceedings having a criminal outcome' (Williams, 1955, p. 130). The essays by Lawrence Becker (Chapter 2) and by S.E. Marshall and R.A. Duff (Chapter 3), however, are more optimistic, presenting rival substantive accounts of what conduct may appropriately be criminalized.

These essays endorse the widely held view that crimes are, *in some sense*, public or social wrongs, but explain that sense differently. Becker contends that the distinctive kind of social harm wrought by the major sorts of crime is 'social volatility' – the potential for the disruption of fundamental social cooperation that is created when members of society fear aggression by their fellow citizens. Marshall and Duff, however, believe Becker's view minimizes or even ignores the specific harm that the criminal inflicts on his or her individual victim. Such a view, they think, stems from an 'atomistic' moral or political viewpoint that takes individuals as prior to and independent of society. Their own account rests instead on their communitarian premise that living in society is a precondition of one's development as a fully responsible, autonomous moral agent, and that one's identity and goods are bound up with relationships with one's fellow citizens. Accordingly, they conceive of crimes as those wrongs to individuals that amount to attacks on the community itself because they challenge values central to the community's identity and self-understanding.

Each of these essays offers only a sketch of a theory of criminality, leaving many details that call for further development. One problem they face confronts any search for features distinguishing criminal from civil wrongs – the enormous variety of behaviours that are treated as criminal. Can one realistically hope to find common features linking murder, rape and treason with minor vandalism, tax evasion, prostitution and bookmaking? Becker, convinced that no single principle can account for this entire range, explicitly limits his attention to the most serious criminal offences. Marshall and Duff, though less explicit, focus on crimes that directly wrong individual victims, and clearly only the most serious of these are plausibly seen as attacks on truly central community values. One is left wondering whether there is any way to explain why criminal law extends to so wide a spectrum of lesser offences.

Criminal Responsibility

After 'What should be criminal?' – what behaviours merit the censure and 'hard treatment' characteristic of criminal punishment – a natural question is what censure and punishment are imposed *for*. For what, exactly, is the criminal held responsible? The essays in Part II explore the rival answers that currently dominate the discussion.

The more traditional view is the 'choice theory' of criminal responsibility: the offender is held liable and punished for her free choice to act wrongfully. In H.L.A. Hart's canonical formulation: 'What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise those capacities' (1968, p. 152). A defendant lacking such capacities or opportunity – who 'could not have done otherwise' or 'had no real choice' – is excused for an otherwise criminal action.

The competing account, tracing back to Hume,[2] is the 'character theory' of responsibility. 'According to this conception, ascriptions of responsibility are based upon judgments about the *character* of the agent: actions for which we hold a person fully responsible are those in which her usual character is centrally expressed' (Lacey, 1988, pp. 65–66). A defendant is excused for an otherwise criminal action, on this theory, when features of the defendant or his situation block the ordinary inference from defendant's act to his character.

Hume stressed the role of character judgments in our *moral* evaluations of others, a notion developed in more detail by the contemporary philosopher Richard Brandt (1969) and subsequently extended to *legal* excuses (Brandt, 1985). Michael Bayles's essay (Chapter 4) played a leading role in prompting legal scholars to examine the character theory as an alternative to the reigning choice theory.[3]

Bayles sees socially undesirable character traits, rather than acts manifesting them, as the direct objects of blame and punishment. Only conduct disclosing such a trait is blameworthy and properly punished. He confronts two principal objections:

I If defective character traits rather than acts are what is punished, why require an actus reus at all – why not punish anyone in whom such traits are detected, even if they have committed no forbidden acts?

II Conversely, should punishment be proper only if *many* criminal acts have been committed? A single act is very weak evidence of a settled character trait: it could be completely 'out of character'.

Bayles dismisses (I) summarily by saying that abolishing the act requirement would so greatly expand the state's punishment power as to jeopardize 'freedom' or 'liberty' (which he leaves unanalysed). He counters (II) by arguing that the law's attention to a defendant's mental state (mens rea) greatly strengthens the inference of character from a single criminal act.

Bayles also contends that the character theory accounts nicely for such features of existing criminal law as accomplice liability and the treatment of mistakes. Though acknowledging that his theory differs radically from existing law by denying that mental abnormality can exculpate, he notes that punishment is not the only possible response to blameworthy character traits. Since punishing the mentally abnormal is unlikely to eliminate such traits, other, more effective alternatives (treatment? quarantine?) are appropriate instead.

Michael Moore (Chapter 5) and R.A. Duff (Chapter 6) are not persuaded. For Moore, as a retributivist, punishment is properly inflicted only on those who deserve it – those morally responsible for their wrongful acts. He therefore believes that defeating objection (I) requires a *moral* argument that punishment cannot be deserved without a criminal act. Bayles offers only the *prudential* claim that punishment for character alone would expand the state's power to a dangerous degree, which Moore finds irrelevant. Nor is he impressed by the character theory's good fit with current criminal law. The issue, for Moore, is whether the theory correctly

[2] 'If any *action* be either virtuous or vicious, 'tis only as a sign of some quality or character. It must depend upon durable principles of the mind, which extend over the whole conduct, and enter into the personal character' (Hume, 1888, p. 575 (Book III, Part III, section 1)).

[3] The character theory also benefitted from the growth of interest among moral philosophers in virtue ethics, with its focus on the character of agents rather than on their discrete actions (Finkelstein, 2002, p. 318).

describes moral responsibility for wrongful acts, so that the criminal law *should* conform to it, and Moore argues that it fares much worse in accounting for moral responsibility than the rival choice theory, which he therefore favours.

Duff endorses neither theory. He first argues that a choice theorist cannot account for such defences as duress and insanity without conceding that liability depends on how a putatively criminal action is related to the actor's attitudes, concerns and values – that is, his character. But when Duff then turns to the character theory, he concludes that its partisans will have to concede a major role for choice and action.

Duff rejects Bayles's contention that mentally disordered offenders should get no defence (but should receive some alternative to punishment). Duff objects that this makes diagnosing and treating mentally disordered offenders simply one way to deal with the *guilty*, thereby collapsing the vital distinction between punishing responsible wrongdoers and medically treating dangerous but irresponsible persons.

He also challenges Bayles's treatment of objections (I) and (II). In dealing with (I), Bayles presupposes that criminal acts are *evidence* of defective character traits. Duff insists, however, that such conduct is not mere evidence but an essential *constituent* of the relevant trait, and that recognizing this permits a defence of the act requirement much stronger than that which Bayles gives. As for (II), which turns on the possibility of a genuinely 'out of character' criminal act, Duff dismisses the appeal to mens rea in favour of a detailed discussion of when an act would truly be out of character. He concludes that out-of-character acts are precisely those that a choice theorist would consider 'not freely chosen'. This in turn leads him to label the entire choice-versus-character controversy spurious – each theory expresses, *in distorted form*, a truth about criminal responsibility, and, undistorted, those truths are perfectly compatible. Ultimately Duff suggests that the apparent controversy may reflect a clash between individualist and communitarian conceptions of criminal law.

Culpability

'Culpability' has different meanings. In a broad sense, it refers to criminal blameworthiness in general. The MPC, however, popularized a narrow sense: the particular mental state or states required by the definition of a crime. It recognized only four such states – purpose, knowledge, recklessness and negligence – and many legislatures followed suit, doing away with the bewildering proliferation of common law and statutory culpability terms. Critics like Simons (1992) and Michaels (1998) questioned whether these four culpability states were really sufficient. Larry Alexander (Chapter 7), however, contends that only *one* culpability state – recklessness – is needed, and that every instance of criminal conduct exhibits a single kind of moral vice.[4]

Alexander defines recklessness as the conscious imposition on others of risks not justified by the actor's reasons. This is essentially the MPC definition now standard in American

[4] In a recent book co-authored with Kimberly Ferzan, Alexander has developed and defended this and other ideas for revising criminal law doctrines (Alexander and Ferzan, 2009), but the essay reprinted here marked their initial presentation.

law,[5] though Alexander drops the Code's requirement of a 'substantial' risk and looks to the risk the actor believes exists rather than the actual, 'objective' risk (a concept he finds meaningless). He argues that purpose and knowledge are simply special cases of recklessness, while negligence should not be considered a form of criminal culpability at all. All criminal actions thus become instances of reckless risk creation and therefore violate the same moral injunction: do not impose unjustified risks on other persons. Criminal blameworthiness – culpability in the broad sense – is simply the imposition of such a risk.

Alexander contends that reducing all culpability to recklessness precludes several possible errors: (1) treating purposeful imposition of a risk as always more blameworthy than knowing creation of the same risk, (2) treating knowing imposition of a risk as always more blameworthy than reckless creation of the same risk, and (3) treating 'wilful blindness' as a form of knowledge. However, sweeping all crimes into the single category of 'insufficient concern for the interests of others' seems questionable. Suppose John occasionally blasts loud music into the wee hours, keeping his neighbours awake, while Jane enjoys setting homeless people on fire and watching their agonizing deaths. Have John and Jane really exhibited the *same* moral vice, insufficient concern for the interests of others?

Where Alexander advocates a single, unified form of culpability, Douglas Husak (Chapter 8) wants to recognize *more* culpability states than the MPC does. Because *motives* profoundly affect criminal blameworthiness, he argues, they should be treated as culpability factors in determining an actor's criminal liability.

In modern, MPC-influenced criminal codes, a defendant's motive plays no part in deciding whether he is criminally liable, but at most may affect his sentence if he is convicted. Husak rejects the reasons given for treating motives purely as sentencing factors. Many of these explanations simply make the irrelevance of motive to liability true by definition or stipulation. Others distinguish motive from intention without explaining why this distinction should affect the relevance of those factors to a defendant's liability. Moreover, Husak observes that many crimes are defined to include acts varying widely in blameworthiness, while the discretion traditionally accorded to sentencing courts has been significantly trimmed in recent years. In combination, these facts make it likely that defendants very different in blameworthiness (and hence desert) will receive identical sentences. Factoring motives into the liability decision would avoid this problem.

But *how*, exactly, should motives influence determinations of liability? Husak suggests that reference to motives could sometimes be incorporated into offence definitions, as current law does to a limited extent under the rubric of 'specific intent'. He cites three other ways in which motives already affect criminal liability. Some justification defences apply only if the defendant acted with the proper motive ('justificatory intent'). Likewise, motives bear on the availability of certain excuse defences. Finally, motives can exert a hidden influence, as when they sway a decision-maker to exempt an actor from liability by treating relevant conduct as an omission rather than an act.

Beyond the role of motives, Husak's essay opens up the broader question of the relationship, if any, that does or should exist between culpability in the broad sense of blameworthiness

[5] English law has been different since 1981, when the House of Lords held that a person who creates an 'obvious' unjustifiable risk is reckless not only if he is conscious of the risk but also if he has given no thought to the possibility that such a risk exists (Williams, 1983, p. 106).

and culpability in the narrow sense of the mental state requirements for particular crimes. Husak recognizes that we cannot incorporate every factor relevant to blameworthiness into our offence definitions. How, then, should we decide which factors to incorporate? What, other than its relevance to blameworthiness, makes *motive* itself such a factor?

Defences, Justifications and Excuses

One defence to a criminal charge is the claim that not every required element of the crime was satisfied. More conceptually interesting, however, are defences in which one does not deny – and may even concede – that one had satisfied the elements of the crime, but alleges that additional circumstances make criminal liability improper or inappropriate. Some such defences assert that the defendant faced special circumstances in which his ordinarily unlawful conduct was the right thing to do, or at least permissible. Other defences focus on unusual factors that are said to make it unfair to hold the defendant responsible or blameworthy for conduct that is admittedly wrongful. 'In the one defense, briefly, we accept responsibility but deny that it was bad; in the other, we admit that it was bad but don't accept full, or even any, responsibility' (Austin, 1979, p. 176). Defences of the first sort are *justifications*; those of the second sort are *excuses*.

In Blackstone's day the law sharply distinguished excused from justified homicides, treating their perpetrators differently. By the mid-twentieth century, however, defences of both types simply resulted in acquittals, leading H.L.A. Hart to conclude that 'this distinction has no longer any legal importance' (1968, p. 13). But there has subsequently been a dramatic surge of scholarly interest in the nature and implications of excuse and justification, sparked largely by the path-breaking work of George Fletcher (see Fletcher, 1973, 1974, 1975 and especially 1978).[6] The essays in Part IV showcase some of the issues involved.

Paul Robinson's essay (Chapter 9) dates from the outset of his prolific career. It sketches a theory of justification that challenges both prevailing law and many other scholars. From the near-universal consensus that criminal law targets harmful conduct and not evil thoughts alone, Robinson infers that justification must depend on how things actually are rather than on the actor's beliefs, reasonable or not. Two corollaries of this 'objective' theory of justification are particularly controversial. Robinson rejects the widely held view – which the MPC advocates – that *mistaken* beliefs, if reasonable, can justify one's actions, contending that at most they may excuse the actor. And he insists that conduct can be justified by circumstances of which the actor is unaware.[7] Robinson has continued to champion what he now calls the

[6] Note in particular that Fletcher argued that the legal consequences of excuses and justifications do differ. Third parties may lawfully assist a justified actor but not one merely excused, and the target of an excused action, but not one that is justified, may forcibly resist (Fletcher 1978, pp. 760–62). For a court that agrees, see *United States* v. *Lopez*, 662 F. Supp. 1083 (N.D. Cal. 1987).

[7] Robinson shares the first of these views with Fletcher (1978, pp. 762–69), but not the second (Fletcher, 1975), while many other scholars reject both. See, for example, Baron (2005), Corrado (1991) and Dressler (1984). Hurd (1999) defends views paralleling Robinson's. Others argue that the entire debate is misconceived – see Berman (2003) and Gardner (1996).

'deeds' theory of justification (Robinson, 1996a),[8] and the issues he pioneered are currently prominent in discussions of justification (Dressler, 1987, pp. 1161–63, n. 22).

Just as Robinson challenges prevailing views of justification, John Gardner (Chapter 10) presents an unorthodox account of excuses. These are often said to be 'predicated upon the presence of some disability or disabling condition affecting the actor' (Milhizer, 2004, p. 817; see also Kadish, 1987, p. 258). For Gardner, however, the 'gist' of excuses is that in acting, one lived up to the standards applicable to one's 'role' at that time. He thus rejects accounts of excuses that flow from the 'choice' and 'character' theories of criminal responsibility discussed in Part II. A character theorist, for example, would excuse a dishonest act too atypical to manifest a dishonest character. Gardner objects that any dishonest act, no matter how unprecedented, necessarily manifests at least the stirrings of dishonesty. It is not merely evidence of that trait, but *constitutive* of a dishonest character – a point on which he agrees with Duff (see Chapter 6). Gardner would excuse the actor only if the act is shown *not* to be really dishonest, and therefore denies that '[t]he distinguishing feature of excusing conditions is that they preclude an inference from the act to the actor's character' (Fletcher, 1978, p. 799). Rather, an excuse must come into play earlier, precluding the judgment that the act was dishonest at all.

Some choice theorists relativize the standards of character relevant to an excuse to the actor's capacities.[9] For example, they would excuse a defendant who yielded to coercion despite exerting all the courage he could, but not one who had the capacity to behave *more* courageously and resist the coercion. This presupposes that someone can have the capacity to live up to standards higher than those he does in fact meet. Gardner, however, argues that the defendant's capacity for courageous action at the time he was coerced is identical to the courage he actually displayed at that time. To excuse him if he'd exerted all the courage he was capable of would therefore be to excuse him if he'd exerted as much courage as he had exerted – an utterly vacuous 'standard'.[10] The degree of courage (or other virtue) we are entitled to expect of a person, Gardner asserts, should be relativized not to the person's capacities but to her *role*. If, at the relevant time, she was not acting in any special role, we should ask whether she met the normative expectations that apply to the role of 'member of a human community'.[11]

Interestingly, Gardner believes it erroneous to think that an excuse is a denial of one's responsibility for one's actions. Actually, one is responsible for one's actions if and only if those actions are in principle amenable to justification and excuse, because that means those actions have intelligible rational explanations. Someone whose actions lack such explanations – for example, a psychotic individual – is not responsible and is accordingly *exempt* from liability (*not* 'excused').

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[8] 'Objective' and 'subjective', Robinson believes, have so many other uses that they are best avoided. The issue is whether justifications rest on *deeds* (what actually takes place, whether or not the actor is aware of it) or *reasons* (the beliefs motivating the actor).

[9] Hart, for example, discussing negligence liability, deplores 'conditions of liability ... not adjusted to the capacities of the accused' (1968, p. 154).

[10] Note that Gardner's argument implies the highly counterintuitive proposition that no one is ever capable of exhibiting more courage than they do in fact exhibit.

[11] For objections to Gardner's position, see, for example, Horder (2004, pp. 108–18) and Tadros (2001).