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THE RELEVANCE OF CONDUCT AND CHARACTER TO GUILT AND PUNISHMENT

BENJAMIN B. SENDOR*

I. INTRODUCTION

Consider these two basic principles of modern American criminal law: (1) To be guilty of a crime means to be guilty of committing a prohibited act, or a series of related acts, with a designated culpable state of mind. Although a defendant's character sometimes can function as evidence of whether the defendant committed the alleged act with a culpable mental state, the defendant's character is not itself a criterion or an element of guilt. (2) However, once a defendant is convicted of a crime, the sentencer can consider the defendant's bad or good character as a criterion for determining the appropriate punishment.

This description of the distinctions made by modern criminal law in the relevance of culpable conduct and character to guilt and punishment is obviously correct. Whether criminal law *should* function in this way is an important normative question, and a question this article will address. However, as a matter of purely descriptive fact, criminal law does assign different roles to a defendant's culpable act and a defendant's character in determining guilt and punishment. Even if jurors in some cases might ignore these rules and convict or acquit a defendant on the basis of bad or good character, and even if prosecutors or defense attorneys sometimes encourage jurors to do so, any such verdicts would represent instances of jury nullification. As a matter of principle, these distinctions are bedrock rules of criminal law.

However, some scholars, such as George Fletcher,¹ Michael Bayles,² Richard Brandt,³ Nicola Lacey,⁴ Robert Nozick,⁵ and

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1. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 10.3.1 (1978).

2. Michael D. Bayles, *Character, Purpose, and Criminal Responsibility*, 1 *LAW & PHIL.* 5 (1982).

3. RICHARD B. BRANDT, *ETHICAL THEORY* 465-74 (1959); Richard B. Brandt, *A Motivational Theory of Excuses in the Criminal Law*, in *NOMOS XXVII: CRIMINAL JUSTICE* 165, 175 (J. Roland Pennock & John W. Chapman eds., 1985) [hereinafter Brandt, *A Motivational Theory of Excuses*].

George Vuoso,⁶ have suggested that a defendant's bad or good character is a criterion of guilt as well as of punishment.⁷ The suggestion that a defendant's character is a criterion of guilt tends to arise in discussions of the exculpatory function of excuses. These commentators, whom I shall call "character theorists," contend that excuses operate to exculpate a defendant because they block an inference that a criminal act reflects, or is attributable to, the defendant's bad character. The term "bad character" in this context means a "settled disposition"⁸ or enduring inclination to commit acts that violate the law.⁹

Although this argument about the relevance of character to guilt arises in analyses of excuses, the point of the argument clearly extends beyond the role of excuses. That is, if excuses

4. NICOLA LACEY, STATE PUNISHMENT 67-78 (1988).

5. ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 381-84, 394-96 (1981).

6. George Vuoso, *Background, Responsibility, and Excuse*, 96 YALE L.J. 1661 (1987).

7. As Michael Moore has observed in Michael S. Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL'Y, Autumn 1989, at 29, 40 n.38, their position can be traced to the eighteenth century philosopher David Hume, who wrote that "[a]ctions are, by their very nature, temporary and perishing; and where they proceed not from some *cause* in the character and disposition of the person who performed them, they can neither redound to his honor, if good; nor infamy, if evil. . . . For as actions are objects of our moral sentiment, so far only as they are indications of the internal character, passions, and affections" DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 100-02 (Henry Regnery ed., 1965).

Traces of this view can also be found in the Commentaries to the Model Penal Code. See, e.g., MODEL PENAL CODE AND COMMENTARIES § 2.04, at 275 (1985) (excuse of mistake-of-law applies when "act charged is consistent with the entire law-abidingness of the actor"); *id.* § 210.3, at 55 (provocation defense recognizes that "one who kills in response to certain provoking events should be regarded as demonstrating a significantly different character deficiency than one who kills in their absence").

8. LACEY, *supra* note 4, at 66-68.

9. See generally Michael Moore's discussion of the meaning of the term "character" in Moore, *supra* note 7, at 40-48. See also BRANDT, ETHICAL THEORY, *supra* note 3, at 465-68 (defining a character trait as a relatively enduring "response-tendency" that is regarded normatively either as a virtue or a vice and is within the actor's control to a high degree); Brandt, *A Motivational Theory of Excuses*, *supra* note 3, at 165, 174 (equating character with "standing motivation"; basing guilt upon proof that defendant's behavior resulted from a "defect" in motivation, where defects are those identified by criminal prohibitions); Vuoso, *supra* note 6, at 1670 (character defined as "the collection of many of [a person's] dispositions to act").

Note that "bad character" does not necessarily entail an enduring inclination to violate the law, though such a quality of defiance certainly could be a facet of a given defendant's character. Rather, bad character here means merely an enduring inclination to commit a certain kind of act (e.g., theft, assault, or fraud) that the law does in fact prohibit.

identify situations in which particular criteria of guilt are not satisfied, then excuses also identify those criteria of guilt themselves. If excuses tell us which criterion of guilt is missing, they thereby identify that criterion as an essential element of guilt. By telling us that the absence of a criterion must exculpate a defendant, excuses tell us that the absent criterion must be present to convict a defendant.¹⁰ Thus, when character theorists maintain that excuses function by blocking the ordinary inference that commission of a criminal act reflects or is attributable to the defendant's character, they thereby maintain that this inference is a criterion of guilt.

According to character theory, then, the commission of a criminal act ordinarily creates an inference that the act either reflects or is attributable to the defendant's character. Character theory regards that inference as an essential criterion of guilt. Excuses operate to exculpate a defendant under character theory by blocking the creation of that inference.

In this article I will advance two theses. First, I will contend that the character theory of excuses and guilt is not an accurate description of modern American criminal law because criminal law does not make bad character a criterion of guilt. Second, I will propose that bad character *should not* be adopted as a criterion of guilt. In doing so, I will suggest several reasons that support the law's principle that a defendant's bad character should not be a criterion of guilt but that a defendant's good or bad character should be a criterion of punishment (although not the only criterion of punishment).

10. As philosopher J.L. Austin wrote in his famous essay, *A Plea for Excuses*: "to examine excuses is to examine cases where there has been some abnormality or failure: and as so often, the abnormal will throw light on the normal, will help us to penetrate the blinding veil of ease and obviousness that hides the mechanisms of the natural successful act." J.L. Austin, *A Plea for Excuses*, in *FREEDOM AND RESPONSIBILITY* 6, 8 (Herbert Morris ed., 1961). See also BRANDT, *ETHICAL THEORY*, *supra* note 3, at 472 ("Because excuses, in moral contexts, shield from the charge of reprehensible conduct, it will be of interest, as evidence for or against our definition of "reprehensible," to see what kinds of statement function as excuses. As defenses against the charge of acting reprehensibly, their content tells us, presumably, about the substance of the charge."); Moore, *supra* note 7, at 29; Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 *GEO. L.J.* 1371, 1415-23 (1986) [hereinafter Sendor, *Crime as Communication*]; Benjamin B. Sendor, *Mistakes of Fact: A Study in the Structure of Criminal Conduct*, 25 *WAKE FOREST L. REV.* 707, 720-50 (1990) [hereinafter Sendor, *Mistakes of Fact*] (defenses, including excuses, can help identify criteria of guilt; they represent situations in which particular criteria of guilt are absent).

This article is divided into three sections. Section II describes the character theory of guilt, including character theory's view of excuses. Section III the article shows that character theory does not accurately describe modern American criminal law, including the law of excuses. Section IV discusses why the criminal law should focus solely on culpable acts as criteria of guilt and should consider both acts and character as criteria of punishment. The final section also discusses an important, correct insight of character theory — namely, that criminal conduct conveys certain meaning — and shows how this insight, when properly understood in a way that differs from character theory's analysis, identifies the essential criterion of criminal culpability.

II. CHARACTER THEORY OF GUILT AND EXCUSES

At first glance, the character theory of guilt and excuses has genuine appeal. Although I believe it is fundamentally incorrect, I think that when we separate its wheat from its chaff, it offers some valuable insights into the nature of guilt and the role of excuses. To understand its appeal, its mistakes, and its insights, it is important to understand character theory clearly.

According to character theorists, the commission of a crime creates a particular inference about an offender's character. Michael Moore (a strong critic of character theory) has helpfully identified three versions of the inference in the literature.¹¹ One version is that the commission of a crime expresses or reflects the offender's "bad character" — that is, the commission of the crime expresses or reflects or is evidence of the offender's enduring inclination or settled disposition to violate the law. For example, Nicola Lacey has written that character theory bases "actions for which we hold a person fully responsible are those in which her usual character is centrally expressed."¹² She further writes, "it is unfair to hold people responsible for actions which are out of character, but only fair to hold them so for actions in which their settled dispositions are centrally expressed."¹³

The second version is that the commission of the crime is caused by, or is attributable to, the offender's bad character — that is, the commission of the crime is caused by, or is attributable to, the offender's enduring inclination or settled disposition

11. Moore, *supra* note 7, at 47-48. See also Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 730-33 (1992) (identifying and criticizing two of the three versions of character theory).

12. LACEY, *supra* note 4, at 66.

13. *Id.* at 68.

to engage in conduct that violates the law. For example, Richard Brandt has written that "persons who have unjustifiably broken valid law should be exempt from punishment unless their behavior is a result of standing motivation (one might say "character" instead)" ¹⁴

A third version combines these two versions. The third version claims that moral and criminal judgment of a person for committing an act is appropriate only if the act reflects the person's character. This version further claims that an act reflects a person's character only if it is caused by the person's character. George Vuoso has argued in favor of this combined version. Vuoso explains:

What an actor does is relevant to a moral evaluation of him only to the extent that it reflects on the sort of person he is. . . . Whether an action merits praise or blame, or reward or punishment, will depend on how it reflects on the agent, or on something enduring in the agent (which, following tradition, we are calling his "character"). . . . If an action is caused or determined by the agent's character, it is clear that it reflects on his character: It was his character or some aspect of it that helped bring the action about. If an action is due to chance, it is clear that it does *not* reflect on the agent's character. ¹⁵

For the purposes of this essay, there is no need to choose one of these versions over the others. They all regard an inference from a defendant's act to a defendant's character as a criterion of moral judgment and guilt. They are all equally vulnerable to the criticisms to be discussed in Sections III and IV of this essay.

Under character theory, the role of excuses pertains to the inference from criminal act to bad character. Character theorists

14. Brandt, *A Motivational Theory of Excuses*, *supra* note 3, at 165. See also NOZICK, *supra* note 5, at 383 ("Excuses show an act is not to be attributed to a defect of character . . ."). The nature of the causal relationship between a character trait and an act — how a character trait "causes" an act or how an act is attributable to a character trait — is beyond the scope of this article. Ultimately, that issue hinges largely on the definition of the concept of a character trait. See Peter Arenella, *Character, Choice, and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, 7 SOC. PHIL. & POL'Y 59, 79-80 (1990); Moore, *supra* note 7, at 41-44 (describing character traits as motivational or dispositional states to feel certain types of emotions and to engage in certain types of acts).

15. Vuoso, *supra* note 6, at 1673-74 (emphasis in original). See also Moore, *supra* note 7, at 48 (describing third version as maintaining that "[s]ome act A will evidence some trait C if and only if not only C causes A, but also states of type C typically cause events of type A").

contend that excuses function by blocking the inference that a criminal act reflects or is caused by a defendant's enduring inclination to commit acts that violate the law. In other words, if a jury acquits a defendant on the basis of an excuse, for conduct that otherwise would be a crime, the jury says, in effect, that the defendant is not guilty because the excuse prevents the jury from making the ordinary inference that the defendant's otherwise criminal conduct either expresses or is attributable to the defendant's bad character.

To understand character theory's view of excuses, a brief introduction to the law of excuses will be helpful. The law recognizes two general categories of excuses. First, "incapacity" excuses arise when a defendant lacks physical, volitional, or cognitive capacities at the time of the alleged offense that are necessary to choose to avoid committing the offense.¹⁶ For example, insanity and retardation are incapacity excuses. In addition, although infancy technically functions as a total jurisdictional bar to prosecution of an accused juvenile offender from the state's criminal jurisdiction, rather than as an excuse, in theory it nevertheless operates as an incapacity excuse, too.¹⁷ Second, there are situational or "no-fair-opportunity" excuses, which arise when a person has the requisite capacities to choose to avoid committing a crime at the time of the alleged offense, but circumstances not fairly attributable to the person deprive him or her of a fair opportunity to avoid committing the crime.¹⁸ Examples of no-fair-opportunity excuses include duress, accident, and mistake of fact.

To understand character theory's view of excuses, it is also necessary to have a clear grasp of the precise claims of character theory. The basic claim of character theory concerning the nature of guilt is that criminal conduct creates a particular inference about an offender's character. The theory infers that the conduct either expresses or is attributable to the offender's *bad* character — the offender's enduring inclination to commit acts that violate the law. It is vital to recognize that character theory does not claim that an excuse blocks all inferences about a

16. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 17.03[E] (1995); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1356-60, 1365-67 (1989); Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses, and the Model Penal Code*, 19 RUTGERS L.J. 671, 701-02, 715 (1988) [hereinafter Dressler, *Excusing Wrongdoers*]; Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 259-61 (1987); Sendor, *Mistakes of Fact*, *supra* note 10, at 716.

17. 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 175 (1984).

18. *See supra* note 16.

defendant's character. Character theory's claim is narrower: it claims that an excuse blocks the inference that criminal conduct expresses or is attributable to the defendant's *bad* character.¹⁹

This refinement of this "inference" as an inference about bad character is essential for character theory. The role of incapacity excuses under character theory illustrates the importance of this refinement. Incapacity defenses do not necessarily block the inference that criminal conduct reflects or is attributable to the defendant's character in some manner. Consider this example: if a defendant presents a convincing insanity defense based upon proof of a serious and chronic mental illness, the defendant's insanity does not block an inference that the defendant's conduct reflects or is attributable to the defendant's character in some fashion. On the contrary, the force and credibility of the insanity defense in that case rests on the inference that the defendant's conduct *does* reflect something important about the defendant's character, or that something important about defendant's character *did* cause the defendant's conduct. In such a case, the defendant's mental illness is the important feature of the defendant's character that is relevant to the defendant's responsibility; the law excuses the defendant by reason of insanity precisely because the defendant's conduct does reflect, or is attributable to, the defendant's mental illness. It is only when an otherwise sane and law-abiding defendant pleads temporary insanity that the insanity defense might block the inference that the criminal act reflects or is attributable to the defendant's character, to the defendant's enduring personality traits.²⁰

19. FLETCHER, *supra* note 1, § 10.3.1; Vuoso, *supra* note 6, at 1670.

20. According to Richard Brandt's position, insanity would block an inference from act to character because Brandt's definition of character includes a normative component. Brandt distinguishes between personality and character. According to Brandt, a personality trait is a relatively enduring response-tendency of a person. In Brandt's view, a character trait is not just a relatively enduring trait, but also is a trait with normative value — either a virtue or a vice — and a trait over which an actor has substantial control. In other words, for Brandt, the very concept of a character trait has a built-in connotation of "good" or "bad" trait over which an actor has considerable control. Clearly, mental illness is not a feature of personality that is either normatively good or bad and it is not a feature over which an actor has substantial control. In Brandt's view, then, insanity would not block all inferences from act to personality, but it would block all inferences from act to character. BRANDT, *ETHICAL THEORY*, *supra* note 3, at 465-68.

In this essay, I use the terms "personality trait" and "character trait" interchangeably, without any inherent normative connotation, to refer to any enduring feature of an actor's personality. Given that usage here, it is important to clarify that the claim of character theory is that the commission of

Under character theory, then, the insanity defense in the case of a chronically disturbed defendant does not operate by blocking an inference that the defendant's criminal conduct expresses or is attributable to the defendant's character generally. Rather, the insanity defense in such a case blocks an inference that the criminal act reflects, or is attributable to the defendant's *bad* character. The character theorist would argue that a person has a bad character if and only if he or she has both an enduring inclination to commit acts that violate the law and the capacity to resist the inclination. A mentally ill defendant might have an enduring inclination to commit criminally prohibited acts and, therefore, such a defendant might have a *dangerous* character. However, a dangerous character is not the same as a bad character. To have a dangerous character, a person need have only an enduring disposition to commit acts prohibited by the criminal law. To have a bad character, a person must have both a long-term inclination to commit legally prohibited acts and the necessary capacities to resist that inclination. According to character theory, then, an incapacity excuse operates by blocking a particular inference about the defendant's bad character: that the defendant's conduct expresses or is attributable to the enduring inclination of a defendant to commit criminally prohibited acts when the defendant has the necessary capacities to resist that inclination.

Under character theory, "no-fair-opportunity" excuses also function by blocking an inference that criminal conduct reflects bad character. However, the rationale for no-fair-opportunity excuses differs slightly from the rationale for incapacity excuses. The rationale for situational excuses under character theory is that an excuse blocks the inference from criminal conduct to bad character because that inference requires yet one more ingredient: not only the requisite capacities to resist the enduring inclination to engage in criminally prohibited conduct, but also a fair opportunity to avoid such conduct. Under character theory, then, the inference from criminal conduct to bad character requires both that the defendant have the requisite capacities

a criminal act creates an inference about the offender's bad personality or bad character.

Nicola Lacey appears to disagree even with the contention that the conduct of a mentally ill person can meaningfully reflect any personality traits in Brandt's non-normative sense of personality. LACEY, *supra* note 4, at 74. Lacey's view seems to underestimate the degree to which the conduct of mentally ill people can reflect enduring dispositions or patterns that can correctly be regarded as personality traits.

to avoid the conduct and that the defendant have a fair opportunity to avoid such conduct.

As an example of character theory's treatment of a situational excuse, consider a hunter who claims that her shooting of a bystander was accidental because some of the buckshot fired at an animal ricocheted off a boulder and struck the victim, a victim whom she reasonably did not believe was in the vicinity. In this hypothetical illustration, the hunter does not claim that she lacked the necessary capacities to avoid shooting the bystander. Indeed, she can prove that she is a mentally normal, faithfully law-abiding person. Her plea of accident rests on the argument that since she reasonably did not know that the bystander was in the vicinity, it would not be just to blame her for shooting the bystander. In other words, the exculpatory rationale of her excuse of accident is that her conduct cannot be said to express, or cannot be attributed to, an enduring inclination to commit criminally prohibited acts because she did not have a fair opportunity to avoid shooting the bystander.²¹

In this case, the excuse of accident does block an inference that her shooting reflects bad character. However, it is essential to consider why the accidental nature of the shooting blocks that inference. After all, what if the hunter really does have a bad character? What if she would have shot at the animal even if she saw the passerby standing right next to the animal? According to character theory, the accident succeeds as an exculpating condition because we (or the jury, speaking on our behalf) conclude that the hunter lacked a fair opportunity to avoid the shooting. Since she reasonably did not know that the bystander was in the vicinity, her shooting of the bystander cannot be said to reflect her enduring disposition to engage in criminally prohibited conduct and cannot be attributed to any such disposition. Even if she would have shot at the animal had she known of the bystander's presence, her reasonable ignorance of the bystander's presence prevents a trier of fact from inferring the existence of that disposition on the basis of her conduct. The trier of fact cannot determine that the shooting of the bystander either reflects the hunter's long-term inclination to engage in criminally prohibited conduct or was caused by her long-term inclination to engage in criminally prohibited conduct.

Before leaving this initial discussion of the character theory of guilt and excuses, it is important to take note of another, very different type of theory of guilt and excuses that rests in part on

21. See BRANDT, *ETHICAL THEORY*, *supra* note 3, at 472; Brandt, *A Motivational Theory of Excuses*, *supra* note 3, at 176.

an understanding of a defendant's character. Under this other theory — which can be called the moral agency theory of character — character is not regarded as an element of guilt. This alternative character-based theory does not claim that guilt requires proof that an act either reflects or is attributable to the defendant's bad character. Rather, the moral agency theory claims that in order to be held responsible and to be found guilty for specific acts, a defendant must be a moral agent; in order to be a moral agent, a defendant must have certain character attributes or capacities. The moral agency theory views certain character traits as conditions of moral agency, which, in turn, is a condition of guilt for specific conduct. Peter Arenella has argued in favor of this moral agency theory of character.²² Michael Moore, who has vigorously criticized the form of character theory involving character-based judgments of guilt, agrees with the proposition that to be a moral agent, a person must have certain capacities.²³ Indeed, the law's very acceptance of incapacity excuses necessarily and obviously rests on the premise that only people with the requisite capacities to avoid violating the law can be found guilty of violating the law.

The only significant debate about the moral agency theory of character is over which capacities are necessary. For example, Peter Arenella has argued that a person must have a capacity for "moral responsiveness":

A capacity for *moral responsiveness* presupposes that moral agents appreciate the normative significance of the moral norms governing their behavior. It also assumes that moral agents can exercise *moral judgment* about how these norms apply to a particular context. Acting on the basis of moral judgment requires *moral motivation*: the desire to use the applicable moral norm as the basis of acting. Finally, moral agents must be able to act on these "moral motivations," despite conflicting desires and impulses. This latter ability is only possible if the moral agent can control or revise those aspects of her character that impair her ability to appreciate or comply with applicable moral norms on any particular occasion. Thus, moral agents must have

22. Arenella, *supra* note 14; Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511 (1992) [hereinafter Arenella, *Convicting the Morally Blameless*].

23. MICHAEL S. MOORE, LAW AND PSYCHIATRY 13-14, 83, 195-97, 244-45 (1984); Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1137-39, 1148-49 (1985); Moore, *supra* note 7, at 37-39. See also Pillsbury, *supra* note 11, at 745-47; Sendor, *Crime as Communication*, *supra* note 10, at 1393-94.

some modest capacity for *critical self-reflection* and *self-revision*. This capacity for moral responsiveness encompasses several distinct but interrelated abilities to react to applicable moral norms in thought, feeling, perception, and behavior.²⁴

Michael Moore has written that a capacity for "practical reasoning" is a condition of guilt, and that practical reasoning itself requires such capacities as perception, memory, imagination, learning, reasoning, feeling emotion, and the will to fulfill emotions and desires.²⁵ Commentators, notably including Arenella, Moore, and Samuel Pillsbury, have debated about which capacities are necessary to deem a person to be a moral agent who is responsible or culpable for his or her conduct.²⁶ Arenella has criticized Moore's view of the requisite capacities as too "thin," contending that the necessary capacities together entail the expansive quality of moral responsiveness described above.²⁷ However, this particular debate is concerned only with the requisite capacities for moral agency, not with whether bad character is a criterion of guilt.

I have briefly discussed the moral agency theory of character here only to make it clear that my criticism of what I call the "character theory" does not pertain to the moral agency theory. I fully agree with Arenella, Moore, and Pillsbury that to be guilty of a crime, a defendant must be a moral agent at the time of the crime and, that to be a moral agent, a defendant must have certain capacities (or character attributes). However, as Arenella has correctly emphasized, the moral agency theory does *not* make the additional claim that guilt entails a judgment about the defendant's bad character. Arenella has cautioned against

conflat[ing] two separate and independent elements of moral culpability analysis: (1) what attributes the actor needs to qualify as a moral agent who has the capacity to act like a reasonable person, and (2) whether an act-based

24. Arenella, *supra* note 14, at 82.

25. MOORE, LAW AND PSYCHIATRY, *supra* note 23, at 13-14, 83, 195-97, 244-45; Moore, Causation and the Excuses, *supra* note 23, at 1137-39, 1148-49; Moore, *supra* note 7, at 37-39. See also Pillsbury, *supra* note 11, at 745-47 (moral agency required for criminal responsibility requires mental states, rationality, noncoercion, and experience over time with personal pain and pleasure); Sendor, *Crime as Communication*, *supra* note 10, at 1393-94 (responsibility entails cognitive and volitional capacities to take into account a variety of sensory, intellectual, emotional, and normative factors in determining conduct).

26. Arenella, *supra* note 14; Moore, *supra* note 7, at 37-39; Pillsbury, *supra* note 11, at 733-47.

27. Arenella, *supra* note 14, at 64, 82.

or character-based moral judgment best reflects the type of moral blame imposed by our legal blaming judgments. We might blame criminals for their choice to violate act-regarding norms, but the culpability of their choice might depend on our assumption that moral agents can control those aspects of their characters that motivate such choices.²⁸

To summarize thus far, the character-based theory of judgment claims that a criminal act gives rise to an inference that the act reflects or is attributable to the defendant's bad character, and that an excuse functions by blocking that inference. In contrast, the character-based theory of moral agency claims only that moral judgment (or, in criminal law, a judgment of guilt) for certain conduct is appropriate only if, at the time of the conduct, the defendant had the requisite capacities to act as a moral agent. I fully subscribe to the character-based theory of moral agency. I do not agree with the character-based theory of guilt (or of moral judgment) and it is to the critique of that theory that I shall now turn.

III. THE CHARACTER-BASED THEORY OF GUILT AND EXCUSES IS AT ODDS WITH AMERICAN LAW

This critique of the character-based theory of guilt and excuses will begin by showing that character theory does not fit the views of modern American criminal law about the nature and criteria of guilt and the exculpatory role of excuses. Of course, such a showing does not by itself disprove character theory. After all, it may be that character theory is right and that American criminal law should change to the extent it does not mesh with character theory. However, showing that character theory is out of step with the actual criminal law should at least generate skepticism about the claims of character theory. After this section shows how character theory is at odds with criminal law, Section IV discusses why character theory should be rejected.

28. *Id.* at 74. Although Arenella emphasizes the importance of the distinction between character attributes as requirements for moral agency and character attributes as criteria of moral judgments about moral agents, he sometimes seems to slide back toward the character theory of moral judgment. For example, after making this distinction, Arenella writes, "[t]his limited version of a character-responsibility theme suggests that when our criminal acts do reflect some established feature of our characters, our moral culpability does not lie exclusively in our rational choice to do wrong. The ultimate basis for our culpability may lie in our failure to do something about those aspects of our character that make it so difficult for us to avoid engaging in morally objectionable conduct." *Id.* at 81.

A. *Character Theory Does Not Explain the Exculpatory Power of Excuses*

This subsection will show that character theory does not fit the law's view of excuses. The next subsection will show that the theory's more fundamental claim about the criteria of guilt seriously conflicts with modern criminal law.

It is true that excuses can block an inference that criminal conduct reflects an offender's bad character. However, the problem with the character theory is that such blockage does not *explain* the role of excuses; it does not *explain* why the law accepts excuses as exculpatory. The flaw lies in the fact that in criminal law, a person might well commit an act that does not reflect, and is not attributable to bad character, and yet still be guilty for the act. In such a case, the defendant is guilty, even if she would be able to gather strong evidence that blocks an inference that the act reflects or is attributable to her bad character. In other words, not everything that blocks an inference from prohibited conduct to bad character does or should qualify as an excuse under the law.²⁹

For example, consider the irrelevance of a defendant's good motive to guilt. Assume that the defendant is an otherwise law-abiding person who commits a criminal act on the basis of a good motive — in this case, a once-in-a-lifetime act of civil disobedience. The defendant is still guilty.³⁰ In fact, the power of her protest rests in large part on her willingness to sacrifice her liberty, to be arrested and possibly convicted and punished, in order to publicize a perceived injustice. Such a protester is guilty of a crime even though her crime does not reflect and is not attributable to bad character.

As another example, consider an attorney with an exemplary lifetime record of obeying and upholding the law, who, in a moment of professional, emotional, and financial crisis, succumbs to the temptation to borrow money from a Client A's trust account with the firm intent to return the money at the end of the same day. To make the illustration more compelling, assume that the lawyer has a good motive for his ethical and criminal breach, such as donating the money to a charity to meet an imminent deadline for raising private matching funds, or using the money temporarily to make a down-payment on an investiga-

29. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 16, § 17.03[D]; Moore, *supra* note 7, at 51-54.

30. If a jury that is sympathetic to the defendant's cause decides to acquit her, such a verdict would be an act of jury nullification that conflicts with the law.

tor's fee or expenses for an urgent investigation on behalf of Client B, who is indigent. The lawyer knows he is doing the wrong thing, but he yields to temptation, aided in his yielding by his resolve to repay the money by the end of the day. Unfortunately, something goes wrong, such as an unexpected need for the trust account funds on behalf of Client A that day, which leads to the discovery that the funds are missing. The lawyer is prosecuted for embezzlement. Under American criminal law, he is certainly guilty, even though his conduct does not reflect and is not attributable to an enduring inclination to violate the law.

Next, consider this hypothetical suggested by Joshua Dressler:

D, a person of exemplary character, loses her job. She seeks other employment, but months pass without success. Her family is severely impacted by the loss. Her self-esteem is threatened. In a period of frustration and deep anguish she severely batters an unsympathetic employee at a government compensation office. Do we say that *D* does not deserve to be punished, that she is not accountable for her actions? *D* probably feels guilty for what she has done. Do we believe that these feelings are unjustified?³¹

It seems clear that *D* is guilty of assault, even though her conduct is out of character for her. Dressler agrees with this view:

The reader's intuition may differ from mine, but I submit that excusing her, despite her good character and genuine contrition, would be wrong. She is accountable for her wrongful acts. Although she should not be imprisoned for what she has done, blame and punishment *are* deserved. The common law and the [Model Penal Code] are consistent with this view: they do not recognize any excuse that a person of good character may assert in these circumstances.³²

In both this case and the case of the embezzling attorney, the defendants are guilty. Yet any claim that their conduct reflects or is attributable to enduring character traits would represent an unfounded overgeneralization resting on inadequate evidence about the defendants' character.

Finally, consider this illustration, by Michael Moore,³³ from the true story, chronicled by Willard Gaylin, of Richard Herrin's killing of his girlfriend, Bonnie Garland when she tried to break

31. Dressler, *Excusing Wrongdoers*, *supra* note 16, at 697.

32. *Id.* at 697-98.

33. Moore, *supra* note 7, at 52-54.

off their relationship.³⁴ Richard and Bonnie were students at Yale. Richard, who is Hispanic, grew up in the East Los Angeles barrio and, as Moore observes, had achieved “stunning success” by making it to Yale. Bonnie came from a wealthy white family in Scarsdale, New York. They became romantically involved. When Bonnie tried to end the relationship gradually, Richard felt “miserable, hurt, and frustrated” by her behavior. One night, when he was staying at her family’s home, Richard killed Bonnie. He had intended to commit suicide after killing her, but he did not do so. Richard was charged with murder, but he was convicted of manslaughter on the basis of extreme emotional disturbance.

Moore comments on this case,

Richard had the capacity not to choose to kill Bonnie, and he had a fair opportunity to exercise that capacity. Nonetheless, he chose to kill her. For that, to my mind, he fully deserved the eight to twenty-five year sentence he received for Bonnie’s killing. Yet a character theorist should find this conviction unfair, for the act was out of character for Richard.³⁵

Moore observes that Richard himself thought that his sentence was excessive in light of his personality, his background, his capacity for a productive life, and the fact that he had a clean arrest record. Moore responds,

Richard wanted credit for an otherwise good — even, in some ways, exemplary — life. He felt it was unfair to have eight years of his life taken from him because of a momentary choice that was at odds with who he really was and how he both had lived and would live his life. His choice to kill Bonnie in the middle of a sleepless night must have looked, in retrospect, like an unbelievable action for him. Yet is there any doubt at all that Richard Herrin was seriously culpable for his choice? No matter how out of character this act was for him behaviorally, no matter how alien it seemed to him phenomenologically, *he* horribly violated another’s rights at a single point in time. His generally good character puzzles us, because we don’t understand very well how a generally kind, non-violent (if somewhat weak) individual could do what he did. But such explanatory puzzlement is not accompanied by a similar puzzlement about his responsibility: his clear choice to do evil is sufficient to make him very culpable.³⁶

34. WILLARD GAYLIN, *THE KILLING OF BONNIE GARLAND* (1982).

35. Moore, *supra* note 7, at 52.

36. *Id.* at 52-53.

To be sure, the ground of "extreme emotional disturbance" that apparently led the jury to acquit Richard of murder and to convict him instead for the lesser crime of manslaughter can be seen as the operation of a partial excuse. However, as Moore writes, under character theory, Herrin should have been acquitted outright of all charges, since his conduct did not reflect and was not attributable to bad character.³⁷

The point of these four illustrations is this: there are situations in which a defendant commits a wrongful act that is out of character for the defendant, that does not reflect and is not attributable to the defendant's bad character, and yet in which the defendant would and should nevertheless be guilty. If this point is correct, then character theory does not explain the exculpatory power of excuses. As noted above, the problem with the character theory account of excuses is not that excuses do not block the inference that a defendant's conduct reflects or is attributable to bad character. I think that excuses do, in fact, block such an inference. However, that blockage does not *explain* their exculpatory power. As I will contend below, that blockage is merely *symptomatic* of the real explanation of their explanatory power.³⁸

B. *Character Theory's Criterion of Guilt Conflicts with the Criteria Actually Used by the Criminal Law*

Under character theory, evidence of a person's bad character should be both necessary and sufficient as a criterion of guilt. However, as this section will show, under modern American law, evidence of a defendant's bad character quite clearly is neither necessary nor sufficient as a criterion of guilt. At least in theory, modern American law takes a strong stand against the use of evidence of a defendant's bad or good character as a criterion of guilt.

First, if character theory were correct, then proof of guilt should not even require proof of a wrongful act to begin with. To prove guilt under character theory, it should suffice to prove

37. *Id.* at 53.

38. As Joshua Dressler has observed, when a normally good person commits a bad act that seems to be out of character, the person's character "serves as an impetus to look for an explanation — excuse — for the conduct that will help us make sense of the situation." Dressler, *Excusing Wrongdoers*, *supra* note 16, at 694. The person's normally good character might also function "as corroborating evidence of the actor's claim of excuse." *Id.* at 695. Yet, as Dressler writes, "[u]sed in this way, a person's character serves simply as a way to announce our conclusion; it does not appreciably advance the analysis of determining what 'moral desert' means." *Id.*

that a defendant has a bad character. Obviously, this is a radical claim and I have not seen character theorists make this claim, but it is the logical extension of character theory's account of excuses. If an essential criterion of guilt is that a defendant's criminal conduct creates an inference that his conduct reflects or is attributable to the defendant's bad character, then as Michael Moore asks, why require an act at all?³⁹ Why go through the two-step process of proving an inference from wrongful act to bad character? Why not simply permit direct proof of the defendant's character, and dispense with the indirect route of using proof of a wrongful act to create an inference about bad character? As an example, Moore mentions a man whom psychiatrists had diagnosed as having violent character traits, but who had not yet acted violently.⁴⁰ If this man has a bad character (and not just a dangerous character because of a mental illness), then why not punish him without waiting for him to commit a provable, violent act? As another example, consider a person who has committed a violent act that can be proven to reflect or be attributable to her bad character. She is convicted and punished, and then she is released when she completes her sentence. Why not simply arrest and convict her again, as soon as she is released, without proof of any additional criminal act, since the state has already proven that she has a bad character?

The strong rejection by American law of evidence of a defendant's bad or good character as a criterion of guilt further highlights the problems with character theory. If character theory were correct as a description of American criminal law's views about the criteria of guilt, then one would expect the law to permit the prosecution and the defense freely to introduce evidence of a defendant's character during a trial. The prosecution would seek to introduce relevant evidence of a defendant's bad character, either to prove the criterion of bad character directly, or to prove the inference from wrongful act to bad character. In contrast, the defense would seek to introduce relevant evidence of the defendant's good character, either to raise a reasonable doubt about the direct criterion of bad character, or to raise a reasonable doubt about the inference from wrongful act to bad character.

However, current law quite clearly prohibits the use of character evidence to prove bad or good character *as a criterion of guilt*. Of course, the law does permit the introduction of character evidence for certain purposes, but the law is quite precise

39. Moore, *supra* note 7, at 55.

40. *Id.* at 54.

about the narrow scope of such evidence. For example, under Rule 404(a) of the Federal Rules of Evidence, the prosecution cannot begin a battle of character evidence. Such a battle can begin only if the defendant fires the first shot, that is, only if the defendant first chooses to introduce character evidence.⁴¹ Surely, if character were a criterion of guilt, the prosecution would be able to introduce evidence of the defendant's character first. Moreover, even if the battle of character evidence begins, its scope is limited. Under Rule 404(a), the only purpose of such evidence is to show that it is either less or more likely that the defendant committed the charged act, "for proving action in conformity therewith on a particular occasion."⁴² Yet, if character theory were correct, then the legitimate purpose of character evidence should include showing that the defendant has a good or bad character generally, regardless of whether such evidence makes it either less or more likely that the defendant committed the charged act. Finally, under Rule 405(a), the form of character evidence is limited to opinion and reputation testimony.⁴³ Rule 404(b) expressly prohibits the use of specific instances of conduct to show that the alleged crime conformed to the defendant's conduct.⁴⁴ All of these restrictions would be quite odd, indeed, if bad character were a criterion of guilt.⁴⁵

41. FED. R. EVID. 404(a)(1) states that evidence of a person's character or of a character trait is not admissible to prove that the person acted in conformity with such character or trait except "[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same"

42. FED. R. EVID. 404(a).

43. FED. R. EVID. 405(a) (inquiry into relevant specific instances of conduct is allowed on cross-examination).

44. FED. R. EVID. 404(b).

45. As a personal comment, I will note that in my experience as a defense attorney and former prosecutor, unfortunately, prosecutors and defense attorneys sometimes violate these clear restrictions by using character evidence or evidence of other wrongs to persuade jurors to render verdicts on the basis of the defendant's character. On occasion, courts even interpret the law concerning such evidence in ways that tend to encourage such violations. *See, e.g., State v. Greene*, 241 S.E.2d 662, 665 (1978) ("Our Court has been very liberal in admitting evidence of similar sex crimes in construing exceptions to the general rule" barring evidence of other wrongs or crimes). *Accord, State v. Williams*, 279 S.E.2d 592, 596 (1981); *State v. DeLeonardo*, 340 S.E.2d 350 (1986). The temptation of practicing attorneys to persuade jurors to render verdicts on the basis of a defendant's character, rather than on the basis of whether the defendant committed a crime on a particular occasion, illustrates the appeal of character theory.

At common law, a homicide committed with extreme recklessness is regarded as a certain type of murder, a type that, at first glance, might seem to involve character as an element. A depraved heart murder, for example, was described by the court in *Commonwealth v. Malone*, 354 Pa. 180, 183, 47 A.2d

George Fletcher, who has advocated the character theory of excuses, has recognized the need to explain why he believes that character theory accounts for excuses but not for the criteria of guilt.⁴⁶ Fletcher has advanced a retributive theory of punishment in which a defendant's desert is "gauged by his character."⁴⁷ Accordingly, Fletcher claims that "a judgment about character is essential to the just distribution of punishment."⁴⁸ To shore up character theory against the plain reality of criminal law's exclusive focus on acts rather than bad character as a criterion of guilt, Fletcher has posited a side constraint that he contends explains the law's exclusion of proof of bad character as a criterion of guilt. Fletcher maintains that limiting proof of guilt to an inquiry into guilt for an act, rather than into bad character, protects the defendant's privacy:

It might be objected that if punishment should be inflicted according to the type of person the actor is, then we should examine the full range of the suspect's deeds — not just the attributability of a single wrongful act. The limitation of the inquiry to a single wrongful act follows not from the theory of desert, but from the principle of legality. We accept the artificiality of inferring character from a single deed as the price of maintaining the suspect's privacy. God might judge people on the full range of their life's work, but the law does not arrogate this function to itself. The issue in the legal inquiry is not whether, all things considered, the actor is wicked, but whether a single instance of wrongful conduct warrants the inference that the actor deserves punishment. Disciplining the inquiry in this way restricts the range of relevant information, but it secures the individual against a free-ranging inquiry of the state into his moral worth.⁴⁹

This explanation of the law's willful blindness to the defendant's character as proof of guilt is not persuasive. First, the law

445, 447 (1946) as entailing " 'wickedness of disposition, hardness of heart, cruelty, recklessness of consequences and a mind regardless of social duty' which proved that there as *at that time* 'the state or frame of mind termed malice.'" (emphasis added). See generally DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 16, § 31.05. Despite the character-laden descriptions used by courts to describe such murder, the distinctive element at issue in such murder is the offender's malice at the time of the alleged conduct, rather than the offender's enduring character. The emphasized portion of the quotation from *Malone* illustrates this point.

46. FLETCHER, *supra* note 1, § 10.3.1.

47. *Id.*

48. *Id.*

49. *Id.*

does judge defendants on the full range of their lives. It does not do so to assess guilt or innocence, but it certainly does so during a sentencing hearing. Immediately after a defendant is convicted, the defendant's character is moved to center stage as a key criterion of punishment. A fundamental question that Fletcher does not address is why the law treats the defendant's character as a criterion of sentencing but not as a criterion of guilt. Why does a defendant's privacy right trump the need to prove bad character at trial, but not for sentencing? Second, anyone who has ever served as a prosecutor, as a defense attorney, or as a detective knows that the pretrial investigation by law enforcement officers can delve quite deeply into a defendant's background and character. The more serious the case, the more extensively the police comb through a defendant's background and character. The law does not protect the privacy of defendants from such investigation. Third, if and when a battle of character evidence begins, the inquiry into a defendant's moral worth can be quite extensive and intrusive. For example, Rule 405 of the Federal Rules of Evidence provides that "[o]n cross-examination, inquiry is allowable into relevant specific instances of conduct."⁵⁰ This rule permits a prosecutor to cross-examine a defense character witness about prior conduct of the defendant that is inconsistent with the character trait described by the witness.⁵¹ Fourth, and most fundamentally, it is profoundly anomalous that the law would choose to be willfully blind to the very issue claimed by character theory to be the criterion of guilt, namely, the defendant's character. Similarly, it is odd that the law would prohibit direct proof of the criterion of bad character, through an open inquiry at trial into a defendant's character and, instead, would rely solely on a mere inference from act to bad character.

Fletcher could advance a better argument, even though such an argument has its weaknesses and limits. The argument is that even if bad character is the criterion of guilt, we cannot know whether a defendant now genuinely has an enduring inclination to violate the law without proof of a criminal act that demonstrates that inclination. Without proof of an act we must conclude that a defendant has an adequate character for law abidingness. Even if a person is demonstrably a mean, greedy,

50. FED. R. EVID. 405(a).

51. One answer to this argument against Fletcher's view, though, rests on the fact that under current law, it is the defendant who begins any battle over character in a trial. A defendant who injects the issue of character into a trial waives any privacy interest in shielding the defendant's life from an extensive inquiry into his or her character.

selfish, nasty, and morally bad person who speaks with contempt for the law and for the interests of others, that person cannot reliably be said to have a bad character (as I have defined that term in this article and character theorists have defined the term)⁵² unless he or she has broken the law. The proof of bad character for law abidingness should be in the pudding of criminal conduct that demonstrates such character. In other words, we must rely on an inference from act to character rather than proceeding directly to proof of character because the act is necessary to prove character reliably.

Unfortunately, this argument is vulnerable, too, as an explanation of current law. If this argument adequately explained current law, then we would expect the law to permit the prosecution to start a battle of character evidence by introducing evidence of the defendant's character *for the purpose of proving the defendant's bad character as a criterion of guilt*, along with proof of a criminal act. That is, the prosecution would have to prove that the defendant committed a criminal act, but the prosecution would also be able to initiate the introduction of character evidence of the defendant's character to bolster the inference that the act reflects or is attributable to the defendant's bad character. Yet, as discussed above, current law steadfastly prohibits just such use of character evidence, at least in principle.

Another problem with this argument is that under current law, a defendant can be convicted of a crime committed years earlier, as long as prosecution is not barred by a statute of limitations, even if reliable evidence would show that the defendant has changed profoundly and no longer has a bad character. Under current law, the defendant's character change could be considered for the purpose of sentencing but not for the purpose of determining guilt or innocence.

In summary, this section has shown that character theory does not correctly explain either criminal law's criteria for guilt or the exculpatory role of excuses. The law does not regard bad character as the criterion for guilt, either directly or in the indirect form of relying on an inference from act to character. The next section will discuss why the law is correct to base guilt upon proof of culpably wrongful conduct rather than on the basis of character.

52. See *supra* note 9 and accompanying text.

IV. THE LAW'S TREATMENT OF CHARACTER IS CORRECT

A. *The Law Correctly Bases Guilt Solely on Proof of Culpably Wrongful Conduct*

The striking fact that serves as the pole star in this analysis is that the law permits a defendant's character to serve as a criterion of punishment, but not as a criterion of guilt. To understand why the law treats character so differently for the purpose of determining guilt and innocence and for the purpose of determining punishment, it is vital to understand the functional relationship between those two purposes. A clear understanding of that relationship will demonstrate the wisdom of the law's treatment of character.

The following metaphor can help to illuminate the relationship between the determination of guilt and innocence and the determination of punishment: under current law, the determination of guilt at a trial can be seen as a gate through which the state must pass before the case reaches the arena of punishment. For a case to pass through that gate, the trier of fact must find that the defendant committed a criminal act. Once the case has passed through that gate, the sentencer can consider both the criminal conduct for which the defendant has just been convicted and the defendant's character. In short, the determination of guilt and innocence has a different purpose from the determination of punishment. The determination of guilt and innocence is a *jurisdictional threshold* that a case must clear before it becomes appropriate to consider the defendant's bad or good character for the purpose of determining punishment.

Criminal law's approach of basing proof of guilt on conduct rather than bad character, and then basing punishment on both conduct and character — of using the determination of guilt and innocence as a jurisdictional gate or threshold — is sound for several reasons. First, consider this basic point, which rests on principles of classical Lockean liberalism enshrined in the United States Constitution. Criminal law must balance two competing interests: the interest of any individual, including a criminal defendant, to be left alone by the state, free from state interference with life and liberty, against the interest of the state (acting on behalf of the defendant's fellow citizens) in punishing crime. Currently and traditionally, American criminal law resolves the tension between those interests by requiring the state to have a compelling reason to interfere with a defendant's

life and liberty before so interfering through punishment.⁵³ That resolution is reflected in numerous substantive and procedural protections for defendants, such as the state's high burden of proof in criminal cases,⁵⁴ a criminal defendant's right to an attorney,⁵⁵ the right to a jury trial,⁵⁶ the state's duty to disclose exculpatory evidence to a defendant,⁵⁷ and the protection against double jeopardy.⁵⁸

That resolution is also reflected in the requirement that guilt must be based upon proof of a criminal act — of an act that harms legally protected interests — not upon proof of an inclination to commit an act. Pinpointing criminal conduct as the compelling event that justifies state intervention rests on a principle of fundamental fairness: the law must give people a fair opportunity to comply with the law before imposing liability. A defendant cannot control or undo her past and she might not be able to control her enduring inclinations. However, the premise of the law is that except in cases involving excuse defenses, a defendant can control her present conduct.⁵⁹ When a person who can con-

53. See generally JOEL FEINBERG, HARM TO OTHERS 3-27 (1984); JOHN STUART MILL, ON LIBERTY 9 (Alburey Castell ed. 1947); Jean Hampton, *Retribution and the Liberal State*, 5 J. CONTEMP. LEGAL ISSUES 117, 125 (1994).

54. See *In re Winship*, 397 U.S. 358 (1970).

55. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Miranda v. Arizona*, 384 U.S. 436 (1966).

56. See *Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

57. See *Brady v. Maryland*, 373 U.S. 83 (1963).

58. See *Hudson v. Louisiana*, 450 U.S. 40 (1981).

59. Commentators have long discussed the extent to which a person can control her character and the extent to which a person can control her conduct despite a character trait that gives her an enduring disposition to act in a certain way. See, e.g., ARISTOTLE, NICOMACHEAN ETHICS (W.D. Ross trans., 1925), in THE BASIC WORKS OF ARISTOTLE 935a, 1114a, ll. 18-23 (Richard McKeon ed., 1941); Arenella, *supra* note 14; Dressler, *Excusing Wrongdoers*, *supra* note 16, at 695-97; Moore, *supra* note 7, at 44-48. It seems to me that criminal law rests on a reasonable premise that regardless of the extent to which people can control their characters, nevertheless, on specific occasions people with the requisite capacities and opportunities to choose to avoid criminal conduct can control their conduct to avoid engaging in such conduct, despite enduring dispositions to engage in such conduct. Indeed, criminal law holds itself out as a factor that can help influence people to avoid prohibited conduct. That goal of deterrence is at the heart of major theories of punishment of general deterrence, specific deterrence, and moral education. These theories are discussed more fully below.

Acceptance of this premise of criminal law does not require acceptance of any particular position in the age-old debate about free will, except to reject the view of complete, incompatibilist determinism. For a summary of this debate and the differences between incompatibilist and compatibilist positions about free will and determinism, see Moore, *Causation and the Excuses*, *supra* note 23, at

control her present conduct chooses not to do so, then proof of that choice justifies the state's assertion of its jurisdiction — its control over the defendant. Proof of that choice gives the state moral authority to intervene in the defendant's life, to decide whether and how to punish her, and to take the defendant's character into account in determining the appropriate punishment. In short, proof that a defendant has committed a criminal act does not, by itself, create an inference that the defendant has bad character, as character theory claims. Rather, proof that a defendant has committed a criminal act is a threshold event that gives the state authority to decide — during a sentencing hearing — whether that inference is correct in a given case.

This argument is similar to an argument other commentators have made to explain why criminal liability should rest on the commission of a wrongful act as well as a culpable state of mind, rather than solely on the basis of a culpable state of mind: we can control our conduct, but we cannot control our thoughts; fairness requires that the law impose liability only when we have the opportunity to control ourselves so as to comply with the law.⁶⁰

A second, related argument in favor of the law's use of proof of an act as the criterion of guilt rests on the concept of giving people an incentive to obey the law. As discussed above, criminal law assumes that people who have the requisite capacities and opportunity to choose to avoid criminal conduct can choose to avoid such conduct, despite character traits they might have that would incline them to engage in conduct prohibited by the law.⁶¹ As also discussed, criminal law holds itself out as a factor that can help influence people to avoid prohibited conduct; the goal of deterrence of criminal law is at the core of major theories of punishment.⁶² In order to give people an incentive to avoid criminal conduct, the law should base liability on a criterion that people

1112-28; Pillsbury, *supra* note 11, at 722-26. All that criminal law requires for a person to be deemed responsible for her conduct is that she have the requisite capacities and opportunity to take into account the myriad of factors that tend to serve as deterrents to criminal conduct. Such factors include criminal law's own prohibitions and threats of punishment, as well as many social, emotional, moral, and practical factors that serve as reasons to avoid criminal conduct. See Sendor, *Crime as Communication*, *supra* note 10, at 1393-94, 1406 n.142 (degree of freedom required for criminal responsibility is only the capacity and opportunity of an actor to incorporate relevant moral and legal factors into the actor's choice of conduct). This view is consistent with both compatibilist and incompatibilist positions favoring free choice.

60. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 16, § 9.01[B].

61. See *supra* note 59.

62. *Id.*

can control rather than on a criterion over which people might have little or no control.⁶³ To encourage all people, including ex-offenders, to avoid criminal conduct, the law should refrain from intervening unless they commit a new criminal act. As discussed above, people might have little control over their characters, but they might still be able to control their conduct. If the law can intervene and punish people for having a bad character, and if the law can continue to intervene in an ex-offender's life to continue to punish her for having a bad character, then people have no control over whether they will be subject to punishment and, therefore, no incentive to comply with the law in order to avoid punishment. Punishing for acts gives people an incentive to avoid committing additional criminal acts.

A third argument in favor of the law's current approach is the principle of fairness among defendants, or legality. This argument has two parts. First, it would be unfair to excuse a defendant with a formerly sterling character if the defendant now commits a crime that is out of character. As will be discussed below, evidence of the defendant's past character should be considered in mitigation of punishment, but such evidence should not shield the defendant from the state's intervention to determine whether he is an appropriate candidate for punishment.⁶⁴

The second part of this argument about fairness is that it would be unfair to convict a defendant with a bad character who has already been punished for all proven prior criminal conduct. Even if a defendant appears to have a bad character for law abidingness, shown by previous criminal acts, the defendant should be free of state intervention if he has been punished for all proven prior acts. The traditional metaphor used to account for this rule is that by completing his punishment for all past crimes, a defendant has "paid his debt to society." If so, the ledger has been cleared and the state has no authority to intervene in his life, to consider whether he still has a bad character.

I have recently proposed a theory of guilt and punishment, called the restorative theory of retributivism, that can serve as an analytic explanation for this metaphor of crime as the incurring of a debt and punishment as payment of a debt.⁶⁵ Briefly,

63. *Id.* See also H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 47 (1968) (permitting excuse defenses gives people the benefit of controlling their lives through choices about whether, when, and to what extent the law will penalize them).

64. Dressler, *Excusing Wrongdoers*, *supra* note 16, at 698-99.

65. Benjamin B. Sendor, *Restorative Retributivism*, 5 J. CONTEMP. LEGAL ISSUES 323 (1994).

according to the restorative theory, criminal law establishes spheres of autonomy in which individuals' interests are protected from interference by others. Criminal law creates and enforces what I call, "relationships of restraint,"⁶⁶ among all individuals in a community,

thereby decreeing that if one person's right is sufficiently important to outweigh another person's pursuit of his or her own interests, then the second person is prohibited from engaging in avoidable conduct that injures the first person's right. In our actions toward one another, we must refrain from engaging in avoidable conduct that wrongfully imposes control over the rights of others by injuring those rights in pursuit of our own interests.⁶⁷

When a person commits a crime, the criminal act injures the right violated by the crime. In addition, the criminal act "causes the social harm of damaging the relationships of restraint between the offender and the victim and between the offender and the other members of the community."⁶⁸ The crime causes social harm in three ways: the offender imposes control over a right to which the victim and each member of the community are entitled to autonomy, the offender devalues the violated right, and the offender makes the victim and the other members of the community insecure about the violated right.⁶⁹

Under the restorative theory, the purpose of punishment is to restore the relationships of restraint that the crime has damaged. Through punishment, society responds to all three forms of social harm caused by the crime. Society punishes in order to defeat or annul the offender's wrongful imposition of control over the victim's violated right.⁷⁰ If punishment cannot achieve that goal, it can at least free the victim and other members of the community from the continuing and indirect control of the offender's conduct over their lives by imposing control over the criminal. Punishment also can refute the criminal's wrongful assertion or message that he has the power to control the violated right.⁷¹ Punishment can also refute the message conveyed by the crime that the victim's right is not sufficiently important for the offender to refrain controlling that right through the offender's avoidable violation of the right. In other words, pun-

66. *Id.* at 333.

67. *Id.*

68. *Id.* at 334.

69. *Id.* at 334-36.

70. *Id.* at 338-39.

71. *Id.* at 339-40.

ishment annuls the offender's wrongful devaluation of the violated right.⁷² Finally, punishment can bolster the victim's and community's sense of security about the right by annulling the offender's control over the violated right to the extent possible, by annulling the offender's claim of the power to control the violated right, and by annulling the offender's devaluation of the violated right.⁷³ All these functions of punishment serve the overriding purpose of restoring the relationships of restraint that are damaged by the criminal act. Since punishment is in part a method of teaching the community about the value of rights, punishment must be proportionate to the crime. That is, punishment is designed to put the rights of the victim and the offender in their proper place to the extent possible, not to devalue the offender's own legitimate interests in life and freedom below their proper level.⁷⁴

Under the restorative theory, punishment should end when the community, speaking through the legislature and the sentencer, determines that the restorative goal of punishment will be accomplished.⁷⁵ Even if punishment does not succeed in transforming the offender into a person who acts with respect toward the rights of others, punishment can still accomplish its restorative purpose by firmly rebutting the offender's wrongful messages through proportionately harsh treatment of the offender and by imposing control over the offender's life to a proportionate degree for a proportionate amount of time. That is, the completion of a defendant's sentence signifies the restoration of relationships of restraint. Even if the newly released ex-offender proceeds to commit a new crime, such a crime represents a new break in the relationships of restraint.

The metaphor of crime as the incurring of a debt and punishment as a repayment of the debt, then, can be seen in this way: the debt is the damage to the relationships of restraint and the repayment is the restoration of those relationships. Once punishment is deemed to have restored the damaged relationships,

72. *Id.* at 341-42.

73. *Id.* at 342-43.

74. *Id.* at 342. See also Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1690-92 (1992).

75. This limitation on punishment would seem to be a corollary of the principle of proportionality. Once the designated purpose of punishment is fulfilled, the principle of proportionality requires that punishment cease.

the debt has been repaid and the ex-offender lives with a clean slate as far as the state's right to intervene in his or her life.⁷⁶

The restorative theory also suggests another argument favoring the law's use of criminal conduct rather than bad character as a criterion of guilt. This argument rests on the interest of a victim and the community in the determination of guilt. If a defendant has committed a crime, the victim and the community have an interest in obtaining a declaration that a violation has occurred, that the defendant has harmed a legally protected interest of the victim. If a defendant has damaged the legally mandated relationships of restraint by violating a right, a guilty verdict is an important first step in restoring those relationships. A guilty verdict can help to vindicate the violated right simply by serving as the community's collective declaration that the defendant acted wrongly in violating it. Moreover, even when a defendant is punished, it is important that the defendant, the victim, and the community regard the punishment not only as the community's response to the defendant's bad character, but also as the community's response to the wrongfulness of the criminal conduct. Under the restorative theory, punishment must represent a response to the defendant's criminal act, and not just to the defendant's character, in order to be perceived as a vindication of the right violated by the defendant.⁷⁷

This subsection has shown why the law is right to base the determination of guilt and innocence solely on whether a defendant has committed culpably wrongful conduct, rather than on an inference about a defendant's bad or good character. The next subsection will address the question of why the law permits punishment to be determined on the basis of both conduct and character.

B. *The Law Correctly Bases Punishment on Both Conduct and Character*

If, as I contend, criminal law is correct in using conduct rather than bad character as the criterion of guilt, then why should the law permit a sentencer to rely on a defendant's character in determining the appropriate punishment? Why can

76. Under sentencing systems that include parole, the parole board plays an important role in deciding when the purposes of punishment have been accomplished for a particular offender.

77. See GEORGE P. FLETCHER, WITH JUSTICE FOR SOME 177-205 (1995) (function of criminal trial is serving as declaration of wrongdoing and function of punishment is signalling community's solidarity with victim).

character be a proper criterion for sentencing but not for the determination of guilt?

To answer this question, it is necessary to examine the relevance of a defendant's character under major theories of punishment. An analysis of those theories of punishment shows that a defendant's bad or good character is an appropriate criterion of punishment under consequentialist theories — theories that justify punishment according to its effects on the conduct of the defendant or others in the future. Such theories include specific deterrence, general deterrence, incapacitation, and rehabilitation.⁷⁸ However, character would seem not to be a criterion of punishment under retributive theories of punishment — theories that justify punishment as a deserved response to past wrongdoing and to the harm caused by past wrongdoing.⁷⁹ Character would be relevant to theories of punishment that combine consequentialist and retributive rationales, such as the denunciation theory of punishment.⁸⁰

A defendant's character clearly is an appropriate factor for the purpose of specific deterrence. If a review of the defendant's record shows that he is an inveterate recidivist — that he has a strong and enduring inclination to break the law — then that fact shows that previous intervention by the state has not deterred him from criminal activity and that more severe punishment is warranted in order to deter him from future criminal conduct. On the other hand, if the defendant has a good character — for example, he has a spotless criminal record and evidence shows that he has always had a healthy regard for the rights of others — then those facts indicate that little punishment, or at least reduced punishment, is necessary to deter him from future criminal conduct.

An offender's character can be an appropriate criterion for sentencing under the theory of general deterrence. At first glance, character might not seem to be an appropriate criterion

78. DRESSLER, *UNDERSTANDING CRIMINAL LAW*, *supra* note 16, § 2.03[A]-[B]; FLETCHER, *supra* note 1, § 6.3.2.

79. DRESSLER, *UNDERSTANDING CRIMINAL LAW*, *supra* note 16, § 2.03[C][1]; FLETCHER, *supra* note 1, §§ 6.3.2, 6.6.2; Sendor, *supra* note 65, at 356.

80. HART, *supra* note 63, at 169-73; C.L. TEN, *CRIME, GUILT, AND PUNISHMENT* 41-42 (1987); Sendor, *supra* note 65, at 350. For theories of punishment that combine the goal of denunciation with the goal of educating an offender about the wrongfulness of her conduct, see R.A. DUFF, *TRIALS AND PUNISHMENTS* 47-54 (1986); Jean Hampton, *The Moral Education Theory of Punishment*, 13 *PHIL. & PUB. AFF.* 208 (1984); Sendor, *Crime as Communication*, *supra* note 10, at 1427-28; C.L. Ten, *Positive Retributivism*, 7 *SOC. PHIL. & POL'Y* 194, 200-05 (1990).

for determining punishment for the purpose of general deterrence. Under this theory, a defendant is punished as an example for the purpose of deterring others from engaging in criminal conduct in the future. Punishment is intended to warn other people of the consequences of criminal conduct. The purpose of punishment under general deterrence is to persuade people not to commit criminal acts. It might seem, therefore, that under the general deterrence theory, an offender should be punished only for her conduct, not because of her settled inclination to engage in that conduct. The use of character as a criterion, then, does not appear to be directly related to the rationale of deterring people from committing particular acts. Aggravation or mitigation of an offender's punishment on the basis of his bad or good character will not contribute to deterring anyone from committing either the crime committed by that offender or other crimes. Indeed, mitigation of punishment on the basis of good character could dilute the deterrent effect of punishment. Such mitigation could convey the message that an offender will get a break, will be treated leniently, as long as the offender has a previously clean record.

Nevertheless, an offender's character could still be an appropriate criterion of punishment under the general deterrence theory in the following, limited way: if the defendant is a recidivist who has demonstrated her bad character through repeated criminal conduct, her character might have a dangerous effect on others. That is, the *defiant* quality of her inclination to violate the law might excite others to adopt her attitude and to engage in criminal conduct as well. The state might seek to rebut her message of defiance by increasing her punishment for additional crimes. Aggravation of her sentence on the basis of her proven inclination to violate the law might deter others from embarking on or continuing on a career of crime. For example, habitual offender laws can be seen as measures designed to deter offenders from committing additional crimes.

An offender's bad or good character plainly is an appropriate sentencing criterion for the purpose of incapacitating an offender. The rationale of incapacitation is that punishment — ordinarily imprisonment — will directly and effectively prevent an offender from committing additional crimes (that is, crimes outside of prison) for the duration of the offender's sentence. Incapacitation can be seen either as a distinct rationale of punishment or as a form of specific deterrence. Since the rationale of incapacitation is the necessity of preventing the offender from committing additional crimes, it is vital to try to gauge how likely it is that the offender will commit more crimes. Accordingly,

under the theory of incapacitation, the question of whether the offender has a bad or good character — whether the offender has a settled disposition to engage in conduct that is prohibited by the criminal law — certainly is an appropriate criterion in determining the sentence.

The rehabilitative function of punishment clearly requires the use of a defendant's character as a criterion of punishment. In order to determine the most effective measures to achieve the goal of rehabilitation, it is necessary to know the extent to which the defendant's character requires transformation. The more a defendant is inclined to violate the law, the more she will have to be rehabilitated. The less a defendant is inclined to break the law, the less she will have to be rehabilitated.

Under the denunciation justification of punishment, an offender's character would be an appropriate criterion of punishment. This theory regards punishment as a way for the community to express its condemnation of the offender's crime. Denunciation operates both as a retributive declaration of wrongdoing and as a utilitarian measure designed to deter the offender and other people from committing such conduct in the future. The commission of a crime, by itself, is sufficient cause to prompt the community to denounce the crime. In addition, if a defendant has a demonstrated and enduring inclination to engage in conduct that is prohibited by the law, such bad character would warrant additional denunciation for specific deterrence purposes and general deterrence purposes.

Whether an offender's character is an appropriate criterion for punishment under retributive theories of punishment is a very troublesome question. I do not have a firm position on this issue, but my tentative view is that character is not an appropriate criterion for punishment under a retributive theory. The underlying rationale of retributive theories is that a defendant should be punished if and/or only if she *deserves* to be punished.⁸¹ The question, then, is whether a person's good or bad character is an appropriate criterion of desert. In everyday life, the very concept of desert seems to me to entail a judgment based upon actual conduct. We decide that a person deserves reward or punishment because of good or bad acts, respectively, not because the person has an enduring inclination to commit such acts. Similarly, it seems to me that in criminal law, desert entails a judgment based upon conduct that causes at least social harm and,

81. See *supra* note 79.

possibly, actual harm to legally protected interests, not a judgment about character.⁸²

Consider these examples. A defendant is convicted of larceny. All we know about the defendant is that he committed this larceny. The sentencer knows nothing about his character, including whether he has a criminal record. Obviously, the sentencer will determine the robber's desert solely on the basis of the only relevant fact known by the sentencer, namely, that the defendant has committed the theft.

Change the hypothetical, so that the sentencer knows this additional fact: the defendant has no previous criminal record. The sentencer might well consider this fact as relevant to whether the defendant has a reduced need for specific deterrence, incapacitation, or rehabilitation. But for the purpose of retribution, is the defendant's previously clean record relevant to his desert? It seems to me that the defendant's desert should still be based solely on his commission of the harmful act of larceny.

Change the hypothetical a second time, so that the sentencer knows these additional facts: the defendant has no previous criminal record, the defendant has a solid employment record, the defendant is a college graduate, and the defendant has been an important community figure who has always contributed his time selflessly to charitable causes. Assume for the purpose of this hypothetical example that the defendant is fully culpable for the criminal conduct for which he has just been convicted. The sentencer might well consider these facts as relevant to whether the defendant has a reduced need for specific deterrence, incapacitation, or rehabilitation. The sentencer might also feel inclined to treat the defendant leniently on the basis of *mercy*, in light of the defendant's previous life and in light of the defendant's fine character. Still, do the defendant's sterling life and his character up to the time of the larceny make him less *deserving* of punishment for retributive purposes? Perhaps the sentencer believes that if this isolated act of larceny is weighed against the quality of the defendant's entire life, the defendant's commission of larceny weighs less than it otherwise would weigh. Yet why is that so? It is not because of the defendant's character *per se*. It is not the defendant's enduring inclination to obey the law or his other admirable character traits that lessen his desert for the larceny. Rather, it is the cumulative weight of the defendant's good conduct that lessens his desert for the larceny. In other words, in measuring the harm caused by the defendant, the sentencer has decided to broaden the relevant temporal con-

82. I thank Joshua Dressler for this helpful insight.

text to take into account the defendant's record of good deeds as well as the defendant's single bad deed.⁸³ It is still the relative harm caused by the defendant, not a weighing of his good and bad character traits, that determines his desert. The defendant's character seems relevant to the possibility of mercy, but not to the defendant's desert.⁸⁴

Change the hypothetical one more time. This time, the sentencer knows that the defendant has been convicted of the larceny and the sentencer knows these additional facts: the defendant is a recidivist, with two prior convictions for larceny, one prior conviction for robbery, and one prior conviction for forgery in the past ten years; during the sentencing hearing, the defendant cavalierly says that he has been a career thief because he has never liked to do honest work, and that he has always believed that honest work is for chumps. The sentencer might well consider these facts as relevant to whether the defendant has an increased need for specific deterrence, incapacitation, and rehabilitation. Still, do the defendant's record and his enduring inclination to violate the law make him more deserving of punishment? The sentencer might *feel* outraged by the defendant's attitude toward the law. This is the counterpart of the sentencer's mitigating feeling of mercy in the previous hypothetical. Yet the sentencer's feeling of anger should not lead to an aggravated sentence; at worst, it should simply dissuade the sentencer from making any discretionary reduction in the defendant's sentence.

Perhaps the sentencer in this case also decides to broaden the temporal context of desert and, after weighing the harm caused by the defendant in this case along with the harm caused by the defendant's prior crimes, decides that the record of the defendant's crimes increases the defendant's desert. Here, too, it is not the defendant's bad character *per se* that has increased his desert. Rather, it is the cumulative harm caused by the defendant that increases his desert. However, the sentencer has not finished adding weight to the defendant's desert: the sentencer decides to increase the defendant's sentence because the defendant has persisted in committing crimes despite the community's clear, repeated warnings — through prior convictions

83. See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981) (concerning time framing of conduct for the purpose of determining liability); DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 16, § 9.02[F] (discussing Kelman's analysis and scholarly commentary on his analysis).

84. Dressler, *Excusing Wrongdoers*, *supra* note 16, at 698-99.

and punishment — to desist.⁸⁵ Even here, it seems to me, it is not the defendant's character *per se* — his enduring disposition to violate the law — that increases his desert. Rather, as my restorative theory indicates, his desert is increased by the cumulative social harm caused by his repeatedly claiming the power to exercise wrongful control over the rights of others, by his repeated demeaning of the rights of others, and by his cumulative creation of insecurity about rights that increases his desert.⁸⁶

This analysis of the relevance of a defendant's character to punishment has shown that character is an appropriate criterion for consequentialist theories of punishment and for mixed theories of punishment that include consequentialist as well as retributive rationales. However, character would not be an appropriate criterion of punishment under a purely retributive theory of punishment. Modern American law reflects a hybrid of retributive and consequentialist theories of punishment.⁸⁷ In light of this mix, the law understandably permits the use of a defendant's character as a criterion (although not the sole criterion) of punishment.⁸⁸

C. *Rehabilitating Character Theory's Valuable Insight*

In the introduction to this article, I said that despite my fundamental disagreement with character theory, I believe that character theory rests on a valuable insight. I shall conclude this article by briefly discussing that insight.

Character theory is based on the view that a criminal act is not simply a physical act that causes harm to a right, but that a criminal act also conveys a message of some type. In other words, character theory claims that a criminal act has significance, that a

85. ANDREW VON HIRSCH, *DOING JUSTICE* 84-88 (1976) (defiance shown by recidivists warrants enhanced punishment for habitual offenders).

86. Clearly, a repeat offender's defiant character is an appropriate factor to consider for consequentialist theories of punishment. The question here, though, is whether such defiant character is an appropriate factor under retributive theories of punishment.

87. See, e.g., 18 U.S.C. § 3553(a)(2); N.C. GEN. STAT. § 15A-1304.12 (1994) (designating retribution, deterrence, incapacitation, and rehabilitation as purposes of punishment).

88. It is clear that character should not be the sole criterion of punishment. Under the principle of proportionality, the degree of punishment should, at least to some extent, be linked to the seriousness of the crime. As Joshua Dressler has discussed, proportionality serves as such a limitation on the severity of punishment under the retributive, general deterrence, and specific deterrence theories of punishment, though not under the rehabilitation theory of punishment. See DRESSLER, *UNDERSTANDING CRIMINAL LAW*, *supra* note 16, §§ 6.01-.05.

criminal act "says something" important beyond the simple causation of harm. According to character theory, the relevant meaning is the inference about the defendant's character, namely, that the defendant has an enduring inclination to violate the law.

In this article I have sought to show that character theory is wrong in contending that the inference about character is or should be a criterion of guilt. Nevertheless, I believe that character theorists are correct in maintaining that a criminal act — conduct that violates a right protected by criminal law — conveys meaning beyond the simple causation of harm. I have identified and discussed at length in previous articles the meaning expressed by the commission of conduct that violates a right,⁸⁹ so I will only summarize it briefly here.

Under my theory, which I have called the "interpretive theory," criminal law is not concerned with the defendant's character, but rather with the attitude expressed by a defendant's conduct toward a legally protected interest at the time he commits an act that wrongfully injures that interest.⁹⁰ The law requires that people act with respect toward legally protected interests — toward "rights." More specifically, the law requires people to act with sufficient concern for the rights of others so as to refrain from engaging in reasonably avoidable conduct that injures those rights.⁹¹

In criminal law (as well as in everyday life) the mental state with which a person injures an interest expresses the person's attitude toward that interest at the time of the act. The law uses the *mens rea* elements of crimes, such as intent, knowledge, recklessness, and even negligence, as an elaborate interpretive system for gauging a defendant's disrespect toward a right he has wrongfully injured. For example, the wrongful injury of a right with specific intent to injure it represents a strong form of disrespect. Even the wrongful injury of a right due to negligent failure to avoid a risk of harm to the right, signifies that the actor did not

89. See Sendor, *Crime as Communication*, *supra* note 10; Sendor, *Mistakes of Fact*, *supra* note 10; Sendor, *supra* note 65.

90. Sendor, *Crime as Communication*, *supra* note 10, at 1397-1400; Sendor, *Mistakes of Fact*, *supra* note 10, at 726-27.

91. Sendor, *Crime as Communication*, *supra* note 10, at 1397-1400; Sendor, *Mistakes of Fact*, *supra* note 10, at 726-27. For similar views, see LACEY, *supra* note 4, at 176; P.F. STRAWSON, *FREEDOM AND RESENTMENT* 1-25 (1974); Arenella, *Convicting the Blameless*, *supra* note 22, at 1535-44; Hampton, *supra* note 74; Jean Hampton, *Forgiveness, Resentment and Hatred and The Retributive Idea*, in *FORGIVENESS AND MERCY* 35-87, 111-61 (Jeffrie G. Murphy & Jean Hampton eds., 1988); Pillsbury, *supra* note 11, at 743-47.

act with sufficient respect toward that right to avoid the risk of harm.⁹²

The disrespect an offender's criminal conduct expresses for a violated right contributes to the social harm caused by the criminal conduct. That disrespect is a facet of the offender's assertion of the power to control the violated right, it plays a major role in the demeaning impact of criminal conduct on a violated right, and it contributes to the insecurity felt by the victim and others about the right.⁹³

The criminal justice system designates the trier of fact (normally the jury) as the primarily authoritative interpreter of a defendant's conduct. The defendant himself or herself, the alleged victim, and other witnesses obviously have relevant, legitimate voices in the process of determining the attitude expressed by the defendant's alleged conduct. However, their subjective views of that attitude are not dispositive. Even the defendant cannot make the conclusive determination of the meaning of his or her own conduct. The trier of fact makes the dispositive interpretation, subject only to deferential review by a trial judge and appellate courts.⁹⁴

Character theory is correct in claiming that the commission of an act prohibited by the criminal law creates an inference that is required to prove a defendant's guilt. However, character theory is mistaken about the content of the requisite inference. The incriminating inference is not an inference about the defendant's character over time. Rather, it is an inference about the disrespect for a right at the time of a violation of the right, expressed by the defendant's violation of the right. When a defendant wrongfully injures a right and does so with a prohibited state of mind, the defendant's conduct creates an inference that the conduct expresses disrespect for the violated right.⁹⁵ It

92. Sendor, *Crime as Communication*, *supra* note 10, at 1417-20; Sendor, *Mistakes of Fact*, *supra* note 10, at 730-34, 737-41.

93. Sendor, *supra* note 65, at 336-37.

94. Sendor, *Crime as Communication*, *supra* note 10, at 1402-03, 1417-20; Sendor, *Mistakes of Fact*, *supra* note 10, at 730-34, 737 n.103.

95. Sendor, *Mistakes of Fact*, *supra* note 10, at 743. In that previous article, I used slightly different terminology. I contended that proof of *mens rea* elements of an offense creates a rebuttable presumption of disrespect, and that excuses function by rebutting that presumption. *Id.* In that article, I explained that I chose to use the potentially controversial concept of a "rebuttable, mandatory presumption" rather than the concept of a permissive presumption or an inference because I believe that in the absence of an excuse defense, the proof of the *mens rea* elements of an offense requires a jury to interpret a defendant's violation of a right as expressing disrespect toward that right. *Id.* at 709 n.6, 721 n.45, 743 n.130. For the purpose of this comparison with character

is often the case that the commission of a criminally wrongful act also does create an inference about a defendant's bad character over time. It is often true that conduct that violates a right protected by the criminal law, and that expresses disrespect for the violated right, reflects or is attributable to the actor's bad character. Such an inference about character, however, is not a criterion of guilt. It is often a symptom of guilt, but it does not explain the defendant's guilt. It is the defendant's attitude toward a violated right, at the time of the violation, that serves as the criterion of the defendant's culpability.

Character theory is also correct in claiming that excuses operate by blocking an inference. However, once again, character theory is mistaken about the content of the inference. Excuses block the inference that the defendant's violation of a right expresses disrespect for the right, not an inference about the defendant's character over time. For example, if a hunter shoots someone by accident, the accidental quality of the shooting blocks an inference that the hunter acted with disrespect toward the victim's rights to life or avoidance of serious bodily injury. If a person with a serious mental illness commits a crime, the defendant's mentally disordered nature blocks an inference that the defendant acted with disrespect toward the violated right.

The interpretive theory, then, is similar to character theory in that both theories base culpability on certain meaning conveyed by a defendant's conduct. The two theories, however, differ about the content of that meaning. Character theory maintains that the commission of an act that violates a right creates an inference about the defendant's bad character, an inference that is blocked by an excuse. In contrast, the interpretive theory maintains that the commission of conduct that violates a right creates an inference about the defendant's disrespect toward the violated right at the time of the violation, an inference that is blocked by an excuse. As discussed in this article, character theory is seriously at odds with important principles of criminal law and with the sound philosophy of criminal law, which focus on culpable conduct rather than bad character as a criterion of guilt. On the other hand, the interpretive theory's reliance on the attitude expressed by a wrongful act at the time of the act conforms to the principles and philosophical foundation of criminal law.

theory, though, the semantic differences between the terms "rebuttable, mandatory presumption" and "inference" are not important.

V. CONCLUSION

The character theory of guilt and excuses claims that guilt rests on the inference that an offender's criminal conduct demonstrates the offender's bad character, and that excuses operate by blocking that inference. However, modern American criminal law steadfastly insists that a defendant's bad or good character is not a criterion of guilt, even though character can be relevant in limited ways to those factors that do serve as criteria of guilt. Under modern criminal law, guilt rests on proof of an act that harms a protected interest (a right) and that is committed with a culpable mental state. Excuses do not block an inference about character, but rather an inference about a prohibited attitude of disrespect for a violated right — an inference ordinarily created by the commission of a wrongful act with a prohibited state of mind.

Once a trier of fact decides that a defendant is guilty of a charged offense, however, that verdict serves as a jurisdictional threshold that permits the sentencer to consider a defendant's bad or good character under at least some theories of punishment. A convicted defendant's bad or good character is an appropriate criterion of punishment under consequentialist theories of punishment or under the currently prevailing hybrid theories of punishment that include consequentialist as well as retributive theories. However, character would not seem to be an appropriate criterion under purely retributive theories of punishment.

The law's strict insistence on confining the use of character as a criterion only for punishment is sound. The law's limitation of the criteria of guilt to commission of a wrongful act with a culpable state of mind, rests on concerns of individual freedom from government intervention, fairness, the value of incentives to avoid criminal conduct, and the need of victims and the community for clear declarations of wrongdoing. Our criminal justice system regards the determination of guilt — gauged solely on the basis of culpable conduct — as a threshold, jurisdictional condition for the subsequent consideration (during a sentencing hearing) of a defendant's culpable conduct and character as criteria of punishment. That restriction in the use of character rests on a wise appreciation of basic distinctions between the functions of guilt determination and the functions of punishment.