Article

"Character, Choice and Criminal Responsibility"

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Character, Choice and Criminal Responsibility

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This paper examines the issue of criminal responsibility and the role of legal excuses from two theoretical viewpoints : the character theory and the choice theory of responsibility. The character theory claims that the moral assessment of an offender's character is a necessary prerequisite of criminal liability and punishment. Legal excuses preclude the attribution of moral and legal blame because, by negating voluntariness, they block the inference from a wrongful act to a flawed character. The choice theory, on the other hand, claims that criminal responsibility pertains to the voluntary violation of the law rather than to the doing of an immoral act as such. For the choice theorist criminal responsibility is concerned with choices rather than with character traits. From this point of view, excuses are taken to preclude criminal liability because, when these conditions are present, the actor does not have sufficient capacity or a fair opportunity to choose to act according to law. The paper concludes that the character theory, by placing the emphasis on those character traits that motivate a person's choices offers a better basis for understanding the moral significance of human actions and for explaining and justifying the attribution of criminal responsibility and punishment.

Le présent article examine la responsabilité criminelle et le rôle des excuses selon deux points de vue théoriques différents : la théorie fondée sur le caractère de l'accusé (« the character theory ») et la théorie de la responsabilité fondée sur le choix (« the choice theory »). La première préconise l'individualisation de l'examen de la culpabilité morale et de la

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punition de manière à tenir compte des traits de caractère de l'accusé. Les excuses empêchent d'imputer tout blâme à l'auteur d'un acte interdit commis involontairement ; elles repoussent ainsi l'inférence entre la nature mauvaise de l'acte et les traits de caractère répréhensibles de l'accusé. La deuxième théorie revendique que la responsabilité criminelle se rattache au caractère volontaire de la contravention à la loi plutôt qu'à la nature immorale de la conduite. Dans ce cadre, la responsabilité criminelle concerne davantage les choix que les traits de caractère. De ce point de vue, les excuses empêchent l'attribution de la responsabilité criminelle parce que l'auteur de l'acte n'a pas, dans les circonstances donnant ouverture à une excuse, une capacité suffisante ou une opportunité équitable de choisir de respecter la loi. L'auteur conclut que la théorie fondée sur le caractère de l'accusé, en mettant l'accent sur les traits de la personnalité qui motivent les choix d'une personne, offre un meilleur fondement théorique pour comprendre les actions humaines sous l'angle moral et pour expliquer et justifier l'attribution de la responsabilité criminelle et de la sanction.

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Criminal law doctrine proceeds from the principle that a person cannot be found guilty of an offence unless two basic elements are established : the conduct or state of affairs which a particular offence prohibits *(actus reus)* and the state of mind which a person must have at the time of such conduct or state of affairs *(mens rea)*. Criminal liability and punishmentdepend, moreover, upon the absence of certain justifying or excusing conditions. An act which meets the external requirements of a criminal offence is deemed nonetheless not unlawful if it falls under a norm of justification. Justifications complement or modify the primary or prohibitory norms of the criminal law by allowing for exceptions in prescribed circumstances. Excuses, by contrast, do not dispute the wrongfulness and unlawfulness of the act as such, but call in question the attribution of an unlawful act to the actor. Writers in criminal law distinguish between excusing conditions negating a

mental state as a prescribed element of an offence definition, and excusing conditions denying or diminishing moral blame as a necessary prerequisite of criminal liability, despite the presence of the requisite state of mind. Cases where breaking the law results from the extraordinary psychological pressure to which the actor was subjected are treated under the latter category of excuses. In such cases the wrongful and unlawful act may be committed with both knowledge of its unlawful character and intention, *i.e.* with *mens rea*, but culpability is precluded or diminished on the assumption that, in the overwhelming circumstances the actor found herself in, she could not have acted otherwise. In these cases the actor is said to act morally involuntarily. The defence of duress provides the typical example here. On the other hand, conditions falling under the former category of excuses are understood to negate the necessary volitional or cognitive elements required by offence definitions. In such cases the actor is either unable to exercise control over her bodily movements, *i.e.* she acts involuntarily, or is unaware of or mistaken about some material fact relating to the nature of her conduct. The defences of automatism and mistake of fact belong to this group of excuses[1].

The question of excusing in law has been the subject of different philosophical theories of responsibility. These theories attempt to shed light on the nature and function of legal excuses and to justify their role in a criminal justice system. This paper examines the issue of excusing in law from two different theoretical standpoints: the character theory and the choice theory of responsibility. The two theories differ on the kinds of causes of action they each find to provide the basis for holding people responsible. The character theory, focuses on character, the choice theory on choice and the capacity to choose. It is argued that the character theory of responsibility, by drawing attention to what lies behind and motivates actual choices, offers a better basis for interpreting the moral significance of human actions and for explaining our actual blaming judgements with regard to those actions.

1. Criminal Responsibility and Moral Character

Writers in criminal law often emphasise the important relationship between criminal law and what is described as social or common morality. The main difference, it is pointed out, between criminal law and other branches of the law is that criminal law seeks to punish conduct which

1. For a discussion of the legal use of the term « voluntariness » see A.R. WHITE, *Grounds of Liability*, Oxford, Clarendon Press, 1985, p. 57 ff.

threatens the system of values upon which society is based[2]. Criminal sanction expresses society's disapproval of a wrongful act not in the abstract but as reflecting the actor's moral stance with regard to commonly shared values and expectations and, as such, it constitutes the strongest formal condemnation that society can inflict on wrongdoers. It is the element of moral stigma that marks out the social significance of criminal liability and punishment and it is precisely this element that requires a clear moral justification[3].

The principal claim of the character theory is that when a person is convicted of a crime, society expresses a negative judgement on that person's moral worth. This means that only when the wrongful act reveals a flaw in the actor's character the imposition of criminal punishment may be morally justified[4]. The assumption here is that moral and legal responsibility is primarily concerned with those enduring and interrelated features which make up what we call a person's character, her emotions, values, desires, aversions, ambitions etc. These attributes of character as well as the way they manifest themselves in conduct are the result of a person's prior experience, moral education and critical self-reflection. Actions, the object of praise or blame, are seen as expressions of particular character traits in their authors[5]. But judgements of blame or praise ultimately pertain not to actions as such but to the character traits or attitudes that bring them about. Such an approach to moral and legal responsibility presupposes that per-

2. For an elaborate defence of this view of the criminal law see P. DEVLIN, *The Enforcement of Morals*, London, Oxford University Press, 1965. Devlin argues that there is a common or shared morality which ensures the cohesion of society. Any deviation from this common morality poses a threat to society by undermining its cohesion. For this reason, he argues, it may be justifiable and necessary to penalise immoral behaviour.
3. See J. FEINBERG, « The Expressive Function of Punishment », in H. GROSS and A. VON HIRSCH (eds), *Sentencing*, New York and Oxford, 1981, pp. 23-36.
4. As N. Lacey remarks « it is unfair to hold people responsible for actions which are out of character...[and] fair to hold them so for actions in which their settled dispositions are centrally expressed » : N. LACEY, *State Punishment*, London, Routledge, 1988, p. 68.
5. The character theory of responsibility is often associated with the Scottish philosopher David Hume and his doctrine of the moral sense. According to this doctrine, a form of intuitionism prevalent in eighteenth century British philosophy, the perception of certain actions or gives rise to special feelings of pleasure or pain in the observer. These feelings enable her to distinguish right from wrong actions and, at the same time, provide motivesto moral conduct. But the object of the moral sense is not so much actions assuch but the character reflected in them. As Hume remarked « actions are objects of our moral sentiment, so far only as they are indications of the internal character » : D. HUME, *An Inquiry Concerning Human Understanding*, La Salle, Open Court, 1949, p. 108. And see his *Treatise of Human Nature*, ed. L.A. Selby-Bigge, Oxford, Clarendon Press, 1888, pp. 477, 575. For an account of Hume's theory see M. BAYLES, « Hume on Blame and Excuse », (1976) 1 *Hume Studies* 2, 17-35.

sons are in some way responsible for their characters[6]. It is assumed that persons are capable of being aware of and exercising a degree of control over those character traits and dispositions that motivate their rational choices in acting. It is precisely this assumption that makes the attribution of moral and legal responsibility possible. As Arenella points out

> A character—based conception of moral agency could be used to explain why moral agents possess the capacity to think, feel, interpret and behave like a reasonable person [...] [T]his character model would locate [a person's] moral culpability in his earlier failure to do something about a character defect that clearly could impair his ability to make the right moral choice in certain circumstances. We blame him for not acting like a reasonable person because we believe he is morally responsible for not doing something about those defective aspects of his character that prevent him from acting like one[7].

As this suggests, the ultimate basis for holding people culpable lies in their failure to do something about those character traits or attitudes that prompt them to engage in morally and legally objectionable conduct.

From the point of view of the character theory, the various states of mind, such as intention, recklessness or negligence, which the law requires to be proved before an accused is convicted of an offence, are seen as indicating differing attitudes towards societal values or interests. Although attitudes may be short-lived or changing the law relies upon a general hypothesis that certain conduct accompanied by the requisite state of mind manifests a socially undesirable character trait or attitude. Thus, a person who commits an offence intentionally, is taken to manifest a clear desire to cause the prescribed harm and, consequently, a strong attitude towards the occurrence of that harm. A person who brings about the prohibited state of affairs recklessly, *i.e.* with the knowledge that her conduct involves a substantial risk that such state of affairs may occur, displays a less undesirable disposition toward the prescribed harm. She does not desire the harm to occur, but is indifferent at to whether it occurs or not. Depending on the degree to which the relevant harm is likely to eventuate, the person may be

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6. Aristotle believed that we are responsible for our characters because we are capable of choosing to be the persons we are. (*Nichomachean Ethics*, III, 1111b31-1112a17). According to a weaker version of this approach,although initially we have no control over the processes through which our characters are formed, we later on develop an ability to maintain or shape our characters through our choices. For a fuller account of this view as it relates to criminal responsibility see E.L. PINCOFFS, « Legal Responsibility and Moral Character », (1973) 19 *Wayne Law Review* 905-923.
7. P. ARENELLA, « Character, Choice and Moral Agency : The Relevance of Character to Our Moral Culpability Judgments », (1990) 7 *Social Philosophy and Policy* 59, reprinted in *Justification and Excuse in the Criminal Law*, M.L. CORRADO (ed), (New York, London : Garland Publishing, 1994), 241, at p. 257.

said to manifest a more or less undesirable attitude. And the more undesirable the attitude the more blame and, consequently, punishment the person deserves.

According to character theory, criminal liability and punishment turns on two interrelated requirements, namely just deserts and voluntariness. The requirement of just deserts relates to the assumption that the distinctive feature of criminal punishment is that it expresses moral blame. And, as was explained above, moral blame involves something more than the formal disapproval of the wrongful act: it involves also the moral disapproval of the wrongdoer's character as manifested by her commission of an offence. In the words of Professor Fletcher, one of the chief contemporary advocates of this approach to criminal responsibility,

> An inference from the wrongful act to the actor's character is essential to a retributive theory of punishment. A fuller statement of the argument would go like this : (1) punishing wrongful conduct is just only if punishment is measured by the desert of the offender, (2) the desert of an offender is gauged by his character — *i.e.*, the kind of person he is, (3) and therefore, a judgment about character is essential to the just distribution of punishment[8].

According to Fletcher, we blame a person who committed a wrongful act only if the act reveals what sort of person the actor is, that is, only if we can infer from the commission of a wrongful act that the actor's character is flawed[9]. From this point of view the chief aim of criminal punishment is retribution: inflicting pain on offenders who are morally blameworth[10]. Some retributivists offer purely deontological justifications for requiring a connection between just deserts and punishment. By adopting Kant's categorical imperative that a moral agent must be treated as an end in herself, not as a means to an end, they argue that it is « right » to give people what they deserve, irrespective of the desirable or not consequences for society

8. G. FLETCHER, *Rethinking Criminal Law*, Boston, Little, Brown and Co., 1978, p. 800.
9. A similar approach is adopted by J. FEINBERG, *Doing and Deserving*, Princeton, Princeton University Press, 1970, p. 126. See also J. GLOVER, *Responsibility*, Princeton, Princeton University Press, 1974 ; M. BAYLES, « Character, Purpose and Criminal Responsibility », (1982) 1 *Law and Philosophy* 5-20.
10. For a discussion of contemporary approaches to retributive punishment and the notion of just deserts see T. HONDERICH, *Punishment, The Supposed Justifications*, Harmondsworth, 1984, Postscript ; and see C.L. TEN, *Crime, Guilt and Punishment*, Oxford, Clarendon Press, 1987, p. 38 ff. ; H.A. BEDAU, « Retribution and the Theory of Punishment », (1978) 75 *The Journal of Philosophy* 601-620 ; J. COTTINGHAM, « Varieties of Retribution », (1979) 29 *The Philosophical Quarterly* 238-246 ; J. FINNIS, « The Restoration of Retribution », (1971-72) 32 *Analysis* 131-135 ; D.J. GALLIGAN, « The Return to Retribution in Penal Theory », in C. TAPPER (ed), *Crime, Proof and Punishment*, London, 1981, pp. 144-171.

that such a practice may entail, because this is what justice demands[11]. Others have adopted a comparative notion of desert, which links punishment with justice in the distribution of benefits and burdens in society[12]. But if, according to the character theory, it is character traits rather than acts that is the focus of just deserts, what is wrong with punishing people directly for bad character ? As Fletcher explains

> [T]he 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. [...] Disciplining the inquiry in this way [...] secures the individual against a free-ranging enquiry of the state into his moral worth[13].

The character theory of criminal responsibility views just deserts as dependent upon the requirement of voluntariness. In this context the notion of voluntariness is understood as being wide enough to encompass all cases in which a person is said to be in control of and therefore morally responsible for her actions. The concept of voluntariness may be interpreted to denote either the actor's ability to control her external conduct — *i.e.* to act in a strict sense — or the actor's capacity to determine freely the course of her action — *i.e.* to give effect to her choice of action. In the former sense voluntariness refers to intentional action as a necessary prerequisite for ascribing what may be described as *authorship — responsibility* ; in the latter sense voluntariness pertains to action which is both intentional and free as required for the attribution of moral responsibility. It is moral responsibility as presupposing *authorship — responsibility* that the notion of voluntariness should be understood as referring to here.

Why criminal responsibility, as involving just deserts, hinges on the requirement of voluntariness ? Simply because only voluntary action can warrant the inference from a wrongful act that the actor's character is flawed. The requirement of voluntariness indicates that a person cannot be convicted and punished of an offence unless she was capable of exercising control over her conduct. In this respect excusing conditions, by negating voluntariness, are seen as blocking the normal inference from a wrongful act to a flawed or defective character and hence as blocking the attribution of

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11. See *e.g.* J. KLEINING, *Punishment and Desert*, The Hague, 1973, p. 67. See also L.H. DAVIES, « They Deserve to Suffer », (1971-72) 32 *Analysis* 136-140.
12. See *e.g.* H. MORRIS, « Persons and Punishment », in J.G. MURPHY (ed), *Punishment and Rehabilitation*, Belmont, 1973 ; D.J. GALLIGAN, *op. cit.*, note 10, especially pp. 154-157.
13. G. FLETCHER, *op. cit.*, note 8, pp. 800-801. And as Dworkin notes « The government may restrain a man for his own or the general good, but it may do so only on the basis of his behaviour, and it must strive to judge his behaviour from the same standpoint as he judges himself, that is, from the standpoint of his intentions, motives, and capacities » : R. DWORKIN, *Taking Rights Seriously*, London, Duckworth, 1977, at 11.

moral blame as a necessary prerequisite of criminal responsibility. Excuses, in other words, negate moral and legal responsibility for prima facie wrongful actions which are not expressive of undesirable character traits. For example, a accused who, acting under a reasonable mistake of fact, brought about a prohibited harm cannot be said to have manifested, through her action, an undesirable character trait and therefore she cannot be held morally and legally responsible for the harm caused[14]. If, however, the accused's mistake was unreasonable, she may be found guilty of a negligence-based offence. In such a case, the accused's failure to realise that her conduct involved a substantial and unjustifiable risk of harm in a situation where she should have realised it can be said to indicate an undesirable character trait and therefore a degree of blame is appropriate. Here the accused's failure to conform to a prescribed standard of care reflects an socially undesirable attitude, namely indifference to the welfare of others. Similarly, a person who commits an offence intentionally, but only because she is compelled to do so by threats or other forms of coercion which she cannot reasonably be expected to avoid or resist, does not display a defect of character as required for the attribution of moral and legal responsibility (such a person is said to act morally involuntarily). However, if the person is found to have caused, through her own fault, the conditions of coercion or lack of self-control under which the offence was committed, her excuse may reduce but will not negate culpability for the offence. In such a case, the person's causing or failing to prevent the incapacitating condition is seen as reflecting an defect in that person's character.

The character theory of criminal responsibility also provides a basis for understanding the role of partial excuses in the criminal law. A person who kills another under provocation, for example, does not deserve to be branded as a murderer, for the fact that she had lost her normal self-control capacities, as any reasonable person would when faced with the same provocation, precludes the normal inference from the act of killing of such a grave character flaw as required for a conviction of murder. Nevertheless, the accused is still culpable to a lesser degree for allowing her justifiable anger at the provoker to fester to the point that it unduly interfered with her capacity to exercise self-control. The accused's criminal liability for the lesser offence of manslaughter, in such cases, is based on a character —based moral judgement about her culpability for allowing herself to be carried away by passion and kill.

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14. As Fletcher remarks, « mistaken beliefs are relevant to what the actor is trying to do if they affect his incentive in acting. They affect his incentive if knowing of the mistake would give him a good reason for changing his course of conduct » : G. FLETCHER, *op. cit.*, note 8, p. 161.

The character theory of criminal responsibility has been criticised on the grounds that it builds upon an incomplete view of the criminal law[15]. Modern criminal law, it is argued, is not concerned only with what is seen as immoral conduct expressive of bad character. There is an increasing number of criminal offences in which the element of moral stigma is absent or hardly distinguishable. With regard to these offences criminal liability is imposed merely as a practical means of regulating or controlling certain forms of social activity. The moral blame, which normally accompanies the more serious crimes (the so called *mala in se*) is almost absent in what is referred to as « regulatory » offences (otherwise known as *mala prohibita*)[16]. As far as the latter offences are concerned moral blame — the inference from a wrongful act to a flawed character — cannot provide the test for criminal liability. These offences therefore fall outside the scope of the present theory of criminal responsibility.

Another problem which the theory faces, according to some critics, is that the bounds of what is referred to as common or social morality, in the light of which conduct is assessed as immoral and hence as possibly illegal, is sometimes very difficult to circumscribe. Devlin argues that common morality can be defined and measured according to the strength of the feelings of ordinary people. So, if certain conduct gives rise to feelings of intolerance or indignation among ordinary members of society, this would be a sufficient indication that the conduct in question threatens common morality — and as such it may be criminalized. Devlin proposes that common morality could be discovered by assembling a group of ordinary citizens — in the form of a jury — and asking them to consider how certain forms of conduct should be classified[17]. But, as Devlin's critics remark, the feelings of ordinary people may not be moral in nature but, rather, an expression of prejudice. Devlin's proposed method of discovering common

15. For a fuller account of the criticisms against the character theory see *e.g.* H. GROSS, *A Theory of Criminal Justice*, New York, Oxford University Press, 1979, especially pp. 340, 386 ; M. MOORE, « Choice, Character and Excuse », (1990) 7 *Social Philosophy and Policy* 59, reprinted in M.L. CORRADO (ed), *Justification and Excuse in the Criminal Law*, (New York and London : Garland Publishing, 1994), 197 ; A. BRUDNER, « A Theory of Necessity », (1987) 7 *OJLS* 339, 344-352 ; And see J. HORDER's reply in *Provocation and Responsibility*, Oxford, Clarendon Press, 1992, pp. 131-134.
16. Merely regulatory offences are considered, for example, the illegal parking of a motor vehicle, or the riding of a bicycle without lights. In common law jurisdictions the large majority of these offences fall in the categories of strict and absolute liability offences, *i.e.* offences requiring a minimal only degree of fault or even no fault at all on the person's part.
17. P. DEVLIN, *The Enforcement of Morals*, London, Oxford University Press, 1965, pp. 22-23.

morality — resorting to a jury made up of ordinary members of the community — besides the fact that it does not preclude prejudice, it may also fail to lead to agreement on a number of morally disputed issues in society such as, for example, abortion or euthanasia[18]. With regard to criminal offences based on conduct whose moral basis remains in question it seems difficult to say that criminal liability is imposed only because the relevant conduct reflects a flaw in the actor's character or because we disapprove of the actor as an unworthy person. Indeed, the opposite may be the case if most members of society agree that certain conduct should no longer be considered immoral and must therefore be decriminalised. On the other hand, even where there is agreement as to the immorality of certain conduct, one cannot infer from a single instance of such conduct that the actor's character is flawed. Legal blame is sometimes imposed on persons with good characters who, at a moment of weakness, have made a conscious but uncharacteristic choice to break the law. Although the commission of a criminal offence may be « out of character » for the offender, this does not preclude criminal liability and punishment from being imposed. And, conversely, even though an act may be expressive of a bad character, this does not necessary entail that such an act is or ought to be criminalized.

The general plausibility of the character theory of criminal responsibility cannot be denied on these grounds, however. It may be true that legal punishment, as a particular type of social response, is not always imposed for morally blameworthy conduct. But criminalization rests upon the application of the harm principle. According to that principle, only conduct that causes or is likely to cause societal harm should be criminalized[19]. It is on the basis of the harm principle that certain forms of conduct are prescribed as criminal offences. But the character theory is not concerned with the issue of criminalization (or decriminalization) as such. Rather, it is the quite separate question of whether a person who has caused one of the prescribed harms should be characterised as a criminal that the character theory focuses on. Its primary aim is to provide a basis for dealing with the question of culpability in the application of the criminal law in a way that accords with our common conceptions of justice and fairness. In dealing with this question, the character theory relies on the assumption that every harmful action is expressive of an undesirable character trait, irrespective of

18. For an evaluation of Devlin's views see *e.g.*: WILLIAMS « Authoritarian Morals and Criminal Law », [1966] *Crim.L.R.* 132 ; R. DWORKIN, « Lord Devlin and the Enforcement of Morals », (1966) 75 *Yale L.J.* 986 ; G.B. HUGHES, « Morals and the Criminal Law », (1962) 71 *Yale L.J.* 662. See also R.E. SARTORIUS, « The Enforcement of Morality », (1972) 81 *Yale L.J.* 891.

19. For a fuller discussion of the harm principle see J. RAZ, *The Morality of Freedom*, Oxford, Clarendon Press, 1986, especially Ch. 15.

whether such action is « in » or « out » of character for the offender[20]. Thus, if a person of previously impeccable character suddenly and unexpectedly gives in to an impulse to steal someone else's umbrella, his generally good character will be irrelevant as far as that person's criminal liability for stealing is concerned[21]. As the character theory is concerned with bad character only to the extent that it is reflected in harmful actions, it is a mistake to think that, from this point of view, criminal punishment is imposed for bad character as such[22]. No matter our differences as to what constitutes immoral and therefore socially undesirable behaviour, as regards the majority of criminal offences, moral blameworthiness remains a necessary (although not sufficient) condition for justifiable punishment. With regard to these offences, therefore, the character—based theory is both plausible and compatible with current criminal law doctrine.

2. Choice, Fairness and Criminal Responsibility : H.L.A. Hart's Theory

In his writings on criminal jurisprudence Professor Hart has elaborated a theory of criminal responsibility that has received wide recognition in common law jurisdictions[23]. (Hart's theory is sometimes referred to as the « choice » or « fairness » theory of criminal responsibility.) The starting-point of Hart's theory is the position that the general justifying aim of the institution of punishment is the utilitarian one of general deterrence—the

20. As Joel Feinberg explains, « When we say that a man is at fault, we usually mean only to refer to occurrent defects of acts or omissions, and only derivatively to the actor's flaw as the doer of the defective deed. Such judgments are at best presumptive evidence about the man's general character. An act can be faulty even when not characteristic of the actor, and the actor may be properly « to blame » for it anyway ; for if the action is faulty and it is also *his* action (characteristic or not), then he must answer for it. The faultiness of an action always reflects some discredit upon its doer, providing the doing is voluntary ». « Sua Culpa » in J. FEINBERG, *op. cit.*, note 9, p. 192.

21. Nevertheless, depending on the seriousness of the offence committed, previously good character is usually considered as a factor in mitigation of the sentence imposed for the offence.

22. As Horder points out, « the character conception of culpability is parasitic on (a version of) the harm principle. It is therefore also focused on actions, the harmful actions proscribed under the harm principle. This naturally and properly limits the aspects of character that will be relevant to culpability » : J. HORDER, *op. cit.*, note 15, p. 133.

23. Hart's theory of criminal responsibility and punishment is contained in a series of essays published together under the title *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford, Clarendon Press, 1968 (reprinted with revisions in 1970, 1973, 1978, 1982, 1984). And see R. WASSERSTROM, « H.L.A. Hart and the Doctrines of *Mens Rea* and Criminal Responsibility », (1967) 35 *Univ. Chic. L. Rev.* 92-126.

prevention of socially harmful conduct. This should be distinguished, however, from the principles of justice applying to the distribution of punishment[24]. Justice in the distribution of punishment requires that the application of punishment should be restricted to those who could have avoided breaking the law[25]. Although Hart rejects retribution as the general aim of punishment, he considers it to be relevant to the distribution of punishment (hence he often speaks of « retribution in the distribution » of punishment)[26].

According to Hart the principles applying to the distribution of punishment represent values that are, to some extent, independent of general deterrence as the justifying aim of the institution of punishment. The chief function of these principles is to ensure that justice or fairness to the individual citizen is not sacrificed in the pursuit of utilitarian aims — such as general deterrence. And it is against justice to use individuals as a mere means for achieving certain social aims, no matter how important the latter may be, unless they have the capacity and fair opportunity to comply with the law[27]. From Hart's point of view, just punishment presupposes striking a balance between the pursuit of general deterrence and the need to protect the individual from being used as a means to achieving general social goals[28]. He recognises, however, that in certain exceptional cases the principle of fairness to the individual may be overridden by the need to promote or safeguard an important societal interest. He points out, nonetheless, that when we think it right to set aside the constraints laid down by the requirement of fairness to the individual « we should do so with the sense of sacrificing an important principle. We should be conscious of choosing the

24. Hart distinguishes between the following tree questions : a) What is the justification of the institution of punishment ? b) Who may be subjected to criminal punishment ? c) How severe the punishment of an offender should be ? Only the first of these questions has to do with the general justifying aim of punishment — according to Hart, this is general deterrence, or the prevention of socially harmful conduct. The second and third questions pertain to the distribution of punishment.
25. A similar position is reflected in Kant's famous dictum « ought implies can », although, unlike Hart, Kant places the emphasis on retribution rather than deterrence as the general justification of punishment.
26. For a discussion of Hart's theory of punishment see J. FINNIS, « Old and New in Hart's Philosophy of Punishment », (1968) 8 *Oxford Review* 73-80.
27. H.L.A. HART, *op. cit.*, note 23, pp. 22-23, 181-183, 201. A similar position is adopted by H. GROSS, *A Theory of Criminal Justice*, New York, 1979, p. 137.
28. It is precisely the application of these principles of justice, especially the one requiring that only those who brake the law voluntarily should be punished, that distinguishes punishment from other measures, *e.g.* the compulsory isolation of people infected with certain contagious diseases, in which these principles do not apply.

lesser of two evils, and this would be inexplicable if the principle sacrificed to utility were itself only a requirement of utility[29] ».

Hart views criminal responsibility as being dependent upon two interrelated requirements, namely fairness to the individual and voluntariness. Basis of his understanding of fairness to the individual is a conception of society as a form of voluntary co-operation for mutual advantage among free and equal individuals. All members of such a society have a right to mutual forbearance from certain kinds of harmful behaviour. Society warrants that right by offering individuals

> the protection of the laws on terms which are fair, because they not only consist of a framework of reciprocal rights and duties, but because within this framework each individual is given a fair opportunity to choose between keeping the law required for society's protection or paying the penalty. From this point of view the actual punishment of a criminal appears not merely as something useful to society (General Aim) but as justly extracted from the criminal who has voluntarily done harm ; from the second it appears as a price justly extracted because the criminal had a fair opportunity beforehand to avoid liability to pay[30].

Within such a framework, Hart maintains, individual freedom is guaranteed and the citizen's life protected from excessive interference on the part of state officials, for punishment may be imposed only for failures to comply with the fair demands of society. And only failures to conform to the demands of the law that are the outcome of a free choice warrant society's interference into a person's life. As Hart puts it, society needs a « moral licence » to punish, and this presupposes that those charged with offences have had the capacity and fair opportunity to comply with the law. As Hart's points out

> One necessary condition of the just application of a punishment is normally expressed by saying that the agent « could have helped » doing what he did, and hence the need to inquire into the « inner facts » is dictated not by the moral principle that only the doing of an immoral act may be legally punished, but by the moral principle that no one should be punished who could not help doing what he did. This is a necessary condition [...] for the moral propriety of legal punishment and no doubt also for moral censure ; in this respect law and morals are similar. But this similarity as to the one essential condition that there must be a « voluntary » action if legal punishment or moral censure is to be morally permissible does not mean that legal punishment is morally permissible only where the agent has done something morally wrong[31].

As this suggests, the moral principles of justice that apply to the distribution of punishment are independent of the moral or not character of

29. H.L.A. HART, *op. cit.*, note 23, p. 12.
30. *Id.*, pp. 22-23.
31. *Id.*, pp. 39-40 ; see also H.L.A. HART, *The Concept of Law*, Oxford, Clarendon Press, 1961, p. 173.

the unlawful act at stake or the morality or immorality of the particular legal provision under which punishment is imposed[32]. If a morally evil law is applied even to those who have not broken it voluntarily, this is seen as an added wrong inflicted by the law.

According to Hart, it is the moral principle of fairness to the individual that necessitates making criminal liability and punishment conditional on voluntariness[33]. The chief claim of the choice theory is that an accused is excused for committing an offence because at the time she did so she did not have the capacity or opportunity to choose to do otherwise. Moreover, where, under the circumstances, the exercise of choice is made very difficult, even though not impossible, a person may rely on a mitigating excuse, *i.e.* an excuse that will only reduce, although not totally negate, culpability. But this is as far as the inquiry goes. Under the choice theory, one does not need to go beyond the issue of choice and into the question of whether one's choices manifest a fault in the actor's character. The argument in support of the present theory is that while a choice always evidences the possession of a will, it is not necessarily representative of the actor's character as a whole. Thus, a wrongful act may render the actor morally and legally responsible, if it is the result of a free choice, even though it may be « out of character », *i.e.* not expressive of the actor's general state of character.

Under the choice theory, a person can rely on an excuse where her conduct has not been caused, wholly or partly, by her choice but by factors over which she has had no control[34]. As Hart explains

> What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for abstaining from what it [the law] forbids, and a fair opportunity to exercise these capacities. Where these capacities and opportunities are absent, as they are in different ways in the varied cases of accident, mistake, paralysis, reflex action, coercion, insanity, etc., the moral protest

32. *Ibid.* ; H. MORRIS, *op. cit.*, note 12, pp. 40-64.
33. For, as Hart explains, « even if things go wrong, as they do when mistakes are made or accidents occur, a man whose choices are right and who has done his best to keep the law will not suffer » : H.L.A. HART, *op. cit.*, note 31, p. 182. Note, however, that here « right choice » means choosing to act in accordance with the law.
34. A similar approach was adopted by William Blackstone in his *Commentaries on the Laws of England* (1769). Blackstone remarked that « [A]ll the several pleas and excuses, which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of *will*. An involuntary act, as it has no claim to merit, so neither can it induce any guilt : the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable » (pp. 20-21).

is that it is morally wrong to punish because « he could not have helped it », or « he could not have done otherwise » or « he had no real choice »[35].

Consider the defence of necessity, for example. Necessity, as currently defined in England and other common law jurisdictions, pertains to situations in which a person commits an offence in order to avoid an imminent threat of death or serious bodily harm[36]. Unlike duress, where the danger to one's life comes from another human being, in cases of necessity the danger arises from the circumstances in which the person or persons are placed. When the defence of necessity is raised the jury are required to consider the following questions: (a) Was the accused compelled to act as she did because she had a good reason to fear (in view of the circumstances as she believed them to be) that otherwise death or serious injury would result ? (b) If so, would a reasonable person of ordinary firmness, sharing the characteristics of the accused, have responded to the situation as the accused did ? As stated by the Supreme Court of Canada in *Perka* v. *R.*, necessity should be recognised as an excuses, and this implies no vindication of the accused's conduct[37]. An accused who successfully pleads necessity is legally (and morally) excused for committing a criminal offence. Under the choice theory of responsibility the accused's claim in such a case may be interpreted in two, interrelated, ways. The first interpretation is that, faced with a imminent threat to her life or limb, the accused was so overwhelmed by fear that it was impossible for her to have acted in a different, non-unlawful, way. The emphasis in this reading of the excuse is on the psychological pressure the accused found herself under in the circumstances. The second interpretation of the excuse places the emphasis on how unfair the threat on her life or limb made the accused's situation of choice as compared to that of other ordinary people normally placed. The first interpretation focuses on the person's defective capacity ; the second on her diminished opportunity to comply with the law. But, as was noted earlier, the defence would fail if it is established that the accused, through her own fault, *e.g.* acting negligently, brought about the circumstances of necessity, or if she did not respond as a reasonable person would have responded in the situation.

Choice theorists have had some difficulties in dealing with the question of how responsibility for negligent action is to be accounted for under the choice theory. The problem is that the negligent actor cannot be said to have chosen to do the prohibited act, as the choice theory presupposes. Hart's answer to this problem is that the negligent actor is morally and legally

35. H.L.A. HART, *op. cit.*, note 23, p. 152.
36. See *e.g. Howe*, [1987] AC 417 ; *R.* v. *Conway*, [1988] 3 All ER 1025 ; *R.* v. *Martin*, [1989] 1 All ER 652.
37. *Perka* v. *R.*, (1985) 14 CCC (3d) 385, 13 DLR (4th) 1.

responsible not for choosing to do a wrongful act, but for not exercising her capacity to choose not to do it, when she had a fair opportunity to do so[38]. In so far as the standard by which the actor's conduct is assessed is also a subjective one, it can be said that the negligent actor « could have done otherwise, given [her] capacities[39] », and therefore she is morally and legally responsible for her actions[40]. Responsibility for negligently bringing about the conditions of one's own defence can also be explained on this basis. But how, from this point of view, could one explain the difference in blameworthiness and, correspondingly, culpability, between negligent and intentional wrongdoing ? The assumption here is that a person who chooses to do a wrongful act is more to blame than one who simply fails to exercise her capacity to choose not to do it. But why is this so ? The choice theory, by abstracting choice, or the capacity to choose, from the agent's character, cannot offer a satisfactory answer to this question. By contrast, the character theory, by viewing choice, or the failure to exercise a capacity to choose, as manifestations of character, provides a clearer basis for understanding why intentional wrongdoings entail a higher degree of blame than negligent ones[41].

As was said before, what precludes a person from exercising choice, and hence provides the grounds for an excuse, is either an incapacitating condition in that person or the lack of a fair opportunity to use a normal, *i.e.* non-defective, capacity. Thus, when we say that a person could not have done otherwise this might refer either to a defect in the person's inherent capacity of choosing, or to a situation in which the person is unable to use her normal choosing capacity effectively[42]. But how is the choosing agent to

38. H.L.A. HART, *op. cit.*, note 23, p. 136 ff.
39. *Id.*, pp. 152-157.
40. Some have argued, however, that moral culpability presupposes some degree of awareness of at least the risk of harm which one's conduct entails. In this respect the negligent actor cannot be held morally culpable, for her lack of awareness of the risk precludes her from choosing to engage in conduct that involves a risk of bringing about the prohibited harm. See G. WILLIAMS, *Criminal Law: The General Part*, 2nd ed., London, Stevens and Sons, 1961, pp. 122-123.
41. As Arenella remarks, « By suppressing the link between character and choice, rational choice theorists offer an impoverished account of moral blame that does not accurately reflect the meaning of moral culpability embedded in our actual blaming practices » : P. ARENELLA, *op. cit.*, note 7, p. 244.
42. According to Blackstone, « there are three cases, in which the will does not join the act : 1. Where there is a defect of understanding. For where there is no discernment, there is no choice ; and where there is no choice, there can be no act of the will, which is nothing else but a determination of one's choice, to do or abstain from a particular action : he therefore, that has no understanding, can have no will to guide his conduct. 2. Where there is understanding and will sufficient, residing in the party ; but not called forth and exerted at the time of the action done : which is the case of all offences committed by

be described here ? Is the choosing agent to be identified solely with the conscious will, the rational aspect of the choosing self, or should our description include emotional states, such as feelings, desires, aversions and the like ? Are these largely unconscious factors part of the choosing self or should they be viewed as potential obstacles to reasoned deliberation which the choosing self must endeavour to overcome ? It is submitted that the choosing agent should be described as including both, for emotions play a part in the choosing process as both products and causes of the judgements that determine our decisions[43]. Thus, when a person gets angry in the face of an act of injustice, such as the infliction of undeserved punishment, her anger need not be an obstacle to reasoned deliberation and choice. As Moore remarks, « internal factors, like emotions, cannot be said to incapacitate our choices, except by an impermissibly narrow view either of who we are or of what our choosing agency consists[44] ». But if the choosing agent is described so as to include all those attributes that make up a person's character, then there seems to be nothing to separate the present theory from the character theory of responsibility.

Furthermore, it is recognised that some emotions, such as fear or anger, when they get out of hand, are capable of incapacitating choice, rendering the actor excusable. For emotions to have such an incapacitating effect on choice they must be « blind », *i.e.* not caused by judgements, and intense enough to cause action directly, that is without the mediation of rational judgement and choice. The rationale of the excuse in provocation and other partial defences is usually explained on this basis. But when the ability to choose is overcome by powerful emotions, how could the choice theorist explain the fact that the agent is still, to some degree, morally and legally to blame ? By shifting the emphasis from choice to capacity, the answer, again, seems to be that although the agent does not choose to do the wrongful act (killing), she had the capacity and a fair opportunity to have chosen not to do it — and this implies that the agent was capable of choosing to keep her

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chance or ignorance. 3. Where the action is constrained by some outward force and violence. Here the will counteracts the deed ; and in so far from concurring with, that it loathes and disagrees to what the man is obliged to perform [...] [The] several species of defect in will fall under one or other of these three general heads : [...] infancy, idiocy, lunacy, and intoxication, which fall under the first class ; misfortune and ignorance, which may be referred to the second ; and compulsion or necessity, which may properly rank in the third » : W. BLACKSTONE, *op. cit.*, note 34, pp. 21-22.

43. See J. SABINI and M. SILVER, « Emotions, Responsibility, and Character », in F. SCHOEMAN (ed), *Responsibility, Character, and the Emotions*, Cambridge, Cambridge University Press, 1987, pp. 164-175, at p. 168.

44. M. MOORE, « Choice, Character and Excuse », (1990) 7 *Social Philosophy and Policy* 59, reprinted in M.L. CORRADO (ed), *op. cit.*, note 7, p. 209.

emotions in check. But the choice theorist maintains that the agent's moral culpability in such cases does not rest on a prior assumption about those aspects of her character that precluded her from exercising her capacity to control her emotions. But by leaving outside the scope of the inquiry character — related considerations the choice theorist fails to account for what really justifies our actual blaming judgements in such cases. When we hold a person morally responsible for a wrongful act that was motivated by *e.g.* anger, it is because we blame her for not doing something about those aspects of her character that made it so difficult for her to control her anger and avoid engaging in morally and legally wrongful conduct.

Hart maintains that the recognition of legal excuses, as connected with the requirement of fairness to the individual, reflects deeply-rooted moral distinctions that pervade social life. As he explains,

> Human society is a society of persons ; and persons do not view themselves or each other merely as so many bodies moving in ways which are sometimes harmful and have to be prevented or altered. Instead persons interpret each other's movements as manifestations of intentions and choices, and these subjective factors are often more important to their social relations than the movements by which they are manifested or their effects [...] This is how human nature in human society actually is and as yet we have no power to alter it[45].

It is a fact of life, that people respond in different ways to harm caused by others, depending on their judgments about whether the harm inflicted was deliberate, *i.e.* the result of a free choice, or accidental. In this respect it is important for the law to take into account and reflect those moral distinctions by reference to which the character of human relations in society is determined. According to Ronald Dworkin, Hart's successor in Oxford, this suggests that « the government should treat its citizens with the respect and dignity that adult members of the community claim from each other[46] ».

Hart defends legal excuses on the grounds that their presence within the legal system maximises individual liberty as it increases our powers of predicting and controlling law's interference with our lives. For if we were to be punished for harm we cause accidentally, or involuntarily, this would mean that we could no longer determine, by our free choices, whether or not the law will interfere with our lives. Even if it was true that our actions are causally pre-determined by factors which are beyond our control, as determinists argue, this, Hart claims, would not remove the satisfaction which we experience from the exercise of choice, no matter what the intended consequences of our choices may be[47]. In this respect, Hart's theory is, arguably,

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45. H.L.A. HART, *op. cit.*, note 23, at pp. 182-183.
46. R. DWORKIN, *op. cit.*, note 13, (4th ed 1984), p. 11.

a version of rule-utilitarianism, for it views the system of excuses as a factor contributing to the maximisation of « the efficacy of the individual's informed and considered choice[48] ». The role of legal excuses is justified on the grounds that a system of excuses operates as a balancing factor between the maximisation of general welfare, as pertinent to crime prevention, on the one hand, and the maximisation of that other common good, individual liberty and freedom of choice, on the other. As Hart points out, however, there can be no comparison between the two social goods — crime prevention and freedom of choice — in an all — inclusive calculation of the general good, for each occupies its own, distinct area or appropriate domain. It is from this point of view that Hart argues that the principles pertaining to the maximisation of the good that is freedom of choice operate as a constraint on the maximisation of the other good, that is, the reduction of socially harmful conduct.

Hart's interpretation of the role of excuses in law departs from the traditional utilitarian understanding of excuses, as expressed by Jeremy Bentham and other representatives of utilitarianism. Utilitarians view criminal punishment as a form of harm and, as such, as detracting from general welfare. From this point of view they argue that punishment should not be imposed for harmless or justified conduct or when it is ineffective, *i.e.* when its application contributes nothing to the prevention of socially harmful conduct. Furthermore, punishment should be avoided when it is unprofitable, *i.e.* when the harm which it entails is greater than the harm which is prevented by it, and when it is needless, *i.e.* when it is not the most economical way of preventing harmful conduct. From this viewpoint, utilitarians assert, punishing a person who has a valid excuse would be pointless for, among other things, it would have no good effect on the conduct of the excusable offender[49]. Hart, in criticising the traditional utilitarian approach to the role of legal excuses, argues that although the threat of punishment may be ineffective against the excusable offender, it does not follow that the punishment of excusable offenders would not have a general deterrent effect[50]. For that reason the role of legal excuses cannot be justified simply on the basis of a utilitarian balancing of costs and benefits. For Hart, as was pointed out before, the recognition of legal excuses as part of our legal system draws its justification from the (non-utilitarian) principle of fairness

47. H.L.A. HART, *op. cit.*, note 23, at p. 49.
48. *Id.*, at p. 46.
49. J. BENTHAM, *An Introduction to the Principles of Morals and Legislation*, London, Burns and Hart (eds), (1970) (first published in 1789).
50. H.L.A. HART, *op. cit.*, note 23, pp. 19, 43, 48, 77.

to the individual citizen. It is only the general aim of punishment that is justified on utilitarian grounds[51].

Hart's theory of criminal responsibility, with its emphasis on the requirement that the law should be applied so as to respect the choices of individual citizens, is built upon the modern liberal conception of a social order. Within this order law both sets constraints upon the pursuance of individual preferences and, at the same time, guarantees the individuals' freedom to express and, within limits, to implement their choices. In a liberal and individualist society compliance with the law is regarded as a means to achieving a balance between different and often conflicting individual choices. The effectiveness of individual choices is seen as depending upon the legal rules being observed[52]. In this respect, moral blame, as a basis of criminal responsibility and punishment, pertains to the violation of the law as a condition for securing social cooperation rather than to the doing of an immoral act as such. Indeed within the liberal order no particular moral standpoint can be given priority, for different moral standpoints are interpreted merely as expressions of individual preferences. This explains the shift in emphasis in Hart's theory from the concept of just deserts to that of fairness to the individual. As was said, at the centre of Hart's conception of fairness lies the idea that criminal punishment is morally unacceptable, unless the accused chose to subject herself to the risk of punishment by voluntarily breaking the law. It is the preponderance of liberal ideas in today's social and political life that seems to account for the importance and continuing influence of Hart's theory on criminal law doctrine.

The fairness/choice theory has been subjected to the criticism that it offers little practical guidance for criminal justice systems faced with a much less ideal world than the one Hart appears to presume. As one critic remarks, the fairness/choice theory is built upon a « gentlemen's club »

51. From this point of view Hart argues against the introduction of a system of strict liability and the resulting elimination of legal excuses. According to him such a system will undermine fairness for it will result in the individual's being punished as a direct means to the promotion of social goals. He acknowledges, however, that with regard to certain types of offences, strict liability may be given priority over the requirement of fairness to the individual : *id.*, especially Ch. 7.

52. From the liberal's standpoint, the realisation of individual or social choices presupposes an ability to engage in a certain kind of practical reasoning. This reasoning consists, firstly, in the ordering of one's choices according to their significance, secondly, in the soundness of the methods by which choices are translated into decisions and actions and, thirdly, in the ability to act so as to maximise the satisfaction of those choices according to their ordering. The third condition reflects the central role of utilitarian principles in the liberal social and political theory.

understanding of justice[53]. As has been said, the theory rests on a conception of society in which people live together sharing the same values and being subject to rules of conduct that work to everyone's advantage. Within this framework, anyone who brakes the rules gains an unfair advantage over the other members of society and so she violates the reciprocal bonds that warrant the well-being of all society members, including the offender herself. Criminal punishment cancels out that advantage and, at the same time, reaffirms the values which the criminal justice system is designed to protect. Although this picture may be accurate enough with regard to certain types of offenders, especially some of those committing what is known as « white collar crimes[54] », it appears too far off base when it comes to the large majority of criminals who come from the poorer classes of society. Although even the least advantaged members of society may be said to enjoy some benefits from living under the law, *e.g.* a certain degree of personal protection, these do not usually regard themselves as sharing fairly in the benefits of social cooperation that are distributed under law's protection. From this point of view, therefore, the claim that each person in society is given a *fair* opportunity to choose between keeping the law or paying the penalty — the basis of Hart's theory of responsibility — has been called into question.

Furthermore, the choice theory, by placing the emphasis on the concept of rational choice capacity as the sole basis of moral and legal blame misrepresents the meaning of moral responsibility as reflected in our actual moral judgements. Choice theorists focus on a person's ability to make rational choices about her actions — choices that are logically linked with the person's attaining certain identifiable objectives. Their concern is primarily with the person's reasoning ability as a means to achieving certain ends, not with what shapes the person's desires that motivate her choice of action. This way of looking at the choosing agent has allowed choice theorists to treat the agent's ability for rational choice as a matter separate from those aspects of the agent's character, her desires, values, feelings, perceptions and goals, that are the source of her rational choices. In this respect they offer an unacceptably narrow description of the object of our moral judgements that leaves outside those important attributes of the moral character that give meaning to the agent's choices and provide the basis for holding people morally blameworthy (or praiseworthy) for their choices. When we blame someone for choosing to do a wrongful act, or for not exercising her capacity to choose to act according to the norm, it is

53. See J.G. MURPHY, *Retribution, Justice and Therapy*, Dordrecht, D. Reidel Pub. Co., 1979, p. 107.

54. *e.g.* the corporate executive who commits fraud to avoid paying taxes.

because we hold her morally responsible for failing to do something about those aspects of her character that impair her ability to make the right moral choice in the circumstances. Similarly, when we excuse a person accused of a wrongful act, it is because we acknowledge that the wrongful conduct does not reflect a fault in that person's character as required for holding the person morally blameworthy. It is submitted that the character theory of responsibility, by drawing attention to what motivates our actual choices, provides a better basis for interpreting the moral significance of human actions and for explaining our actual blaming judgements with regard to those actions. On the other hand, if one places the emphasis on the necessary connection between choosing agency and character, then the difference between responsibility for choice and responsibility for character would tend to disappear. In so far as it is recognised that a bad choice is but an expression of a fault — whether temporary or « permanent » — in the actor's character, it shouldn't come as a surprise that the two theories overlap to a great extent in their treatment of legal excuses.

Conclusion

Criminal responsibility pertains to that aspect of criminal law that safeguards individuals from criminal punishment. Both theories examined in this paper proceed from the assumption that criminal responsibility is a defeasible concept: an accused cannot be held criminally liable if she successfully raises a legal excuse[55]. Much of the discussion about criminal responsibility revolves around the notion of involuntariness as a prerequisite for excusing in law and morals. The theories give different answers to the question of how involuntariness, as the basis of excusing, negates criminal liability-answers that reflect broader philosophical differences regarding the character and objectives of a criminal justice system. The two theories differ on the kinds of causes of action they each find to provide the

55. One may contrast the two theories discussed in this paper with the so called « objective » theory of criminal responsibility. The « objective » theory does not regard voluntariness as a necessary condition of criminal liability. It holds, instead, that criminal liability should not be imposed if the accused has acted as a reasonable person with ordinary intelligence and reasonable prudence would have acted in the circumstances. The theory rejects the requirement of voluntariness as well as the individualisation of the criteria of criminal liability, on the basis that we cannot have a full picture of a person's capacities and limitations that may affect her ability to act according to the law in the circumstances (the problem of proof). The individualisation of the criteria of liability, it is argued, is incompatible with a system, such as the criminal law, whose aim is the utilitarian one of inducing people's external conformity to the rules. See O. HOLMES, *The Common Law*, Lecture II (1881), 42, 43, 87. For a critical approach to this theory see H.L.A. HART, *op. cit.*, note 23, pp. 242-244 ; G. FLETCHER, *op. cit.*, note 8, p. 504 ff.

basis for holding people responsible. The character theory focuses on character, the choice theory on choice and the capacity to choose. According to the character theory, excuses preclude the attribution of moral and legal blame by denying that a wrongful act reflects a flaw in the actor's character. For the character theorist, moral blame is a necessary condition of criminal liability and punishment. The choice theorist's position is that excusing conditions preclude criminal liability because, when these conditions are present, the actor does not have the capacity or a fair opportunity to make a choice to act as the relevant legal norm requires. By contrast with the character theory, the choice theory treats moral culpability requirements only as a useful side-constraint on the pursuance of general deterrence as the chief aim of criminal liability and punishment. Although both theoretical approaches have exerted, and continue to exert, an important influence on the development of criminal law doctrine in Anglo-American jurisdictions, none seems capable of offering generally acceptable or conclusive answers to all the questions that may arise. This means that when it comes to dealing with important doctrinal issues or to deciding on matters of criminal policy, elements of both theories enter the discussion. It is submitted that the character theory, with its emphasis on moral blameworthiness, provides a better basis for understanding the attribution of criminal responsibility and the role of legal excuses in relation to criminal offences which also constitute moral wrongs *(mala in se)*. The choice theory, on the other hand, may be given priority when considering the question of criminal responsibility in relation to criminal offences in which the element of moral stigma is absent or minimal *(malaprohibita)*, or whose moral basis remains in question.