CRIMINAL CULPABILITY: THE POSSIBILITY
OF A GENERAL THEORY

ABSTRACT. In this article, I try to do two things. First I analyse critically the suggestion that the principles of criminal culpability can be explained by reference to a single, all-encompassing concept, such as "defiance of the law". I then go on to explain the foundations of criminal culpability by reference to three interlocking theories — the capacity theory, the character theory, and the agency theory. I conclude that even these three theories may not be sufficient to explain the complex structure of culpability, which is shaped as much by shared cultural understanding as by moral theory.

INTRODUCTION

Part of the stigma that attaches to criminal conviction for some important crimes, such as murder, is explained by the assumption that the wrongful harm caused in such crimes will have been brought about intentionally, or at least knowingly or recklessly. It is not part of what we morally understand about murder, for example, that one can become a murderer accidentally or inadvertently. The law reflects this moral understanding (as it reflects other moral understandings) in the way that it constructs *mens rea* in individual crimes.¹

Moreover, criminal laws generally seek to shield defendants from conviction and punishment, even when harm has been brought about intentionally, knowingly, or recklessly, where certain familiar excusing conditions are met, conditions associated (for example) with the need

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¹ In crimes such as criminal damage, for example, it is part of our moral understanding of them that they can be committed inadvertently, at least where the harm stemmed from carelessness. For whereas we may say "Take care not to damage X's property", it makes little moral sense to say "Take care not to murder X". Hence the law may well permit conviction for crimes such as criminal damage where the harm was brought about by (gross) carelessness: see R. v. Caldwell [1981] 1 All E.R. 961.
to act immediately to avoid death or harm, either in self-defence or under duress, and so on. The common obligation on the prosecution to prove not only *mens rea* but also the absence of any excuse raised, is what one could for short call the requirement, element, or conditions of culpability appertaining to the crime in issue.

It might be supposed that the very diversity of *mens rea* terms employed by the criminal law (intention, recklessness, carelessness, malice, dishonesty, etc.), and of excusing conditions, would defeat any attempt to distill from them all a single unifying concept of responsibility that could provide the benchmark of criminal culpability. In determining culpability the law sometimes focuses on intentionality, sometimes on capacity or opportunity, and at other times on different factors, depending on the nature of the defendant's plea. Nonetheless, it is becoming increasingly popular to suppose that the insights of moral philosophy are capable of yielding an exclusive, unitary theory of criminal culpability. It is the notion that there might be such an exclusive unitary theory that I wish to criticise in this article. I will suggest, by way of contrast, that while there is some pattern to the way in which the criminal law shapes conditions of culpability, no single theory of culpability unifies that pattern to the exclusion of all others.

**THE ALLURE OF AN EXCLUSIVE UNIFYING THEORY**

It has proved tempting to suggest that the elements comprising what I have called the requirement of culpability, the definitions of *mens rea* and the excusing conditions, are not (or are not merely) the product of historical accident and expediency, but have some underlying theoretical unity within our understanding of responsibility. Jean Hampton, for example, has recently suggested that the deep theory running through the criminal law's requirements of culpability centres on the notion of "defiance". Those who wrongfully cause harm intentionally,

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3 J. Hampton, loc. cit. n. 2 ante.