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Virtue and Inculpation

Kyron Huigens

The criminal justice system assesses inculpation according to judgments about the virtue of the defendants. Kyron Huigens asserts that such a republican theory of the criminal law stressing judgment and the good is plausible and necessary, both to explain the defenses and to describe the broader principles of blame and punishment in criminal justice. Huigens locates the elements of his theory in Aristotle’s Nicomachean Ethics. Aristotelian virtue is a matter of sound practical judgment in the pursuit of the good. Basing blame and punishment on virtue in this sense is legitimate because in an interdependent society we define the good of all as we define the good for ourselves and because our best opportunity for attaining our own good lies with a concerned involvement with the good of others. Aristotle’s definition of virtue as an indeterminate, context-sensitive faculty of judgment explains and justifies our reliance on the jury, and defuses counter-arguments charging perfectionism and determinism. Applying the theory to concrete issues, Huigens demonstrates how virtue ethics establishes a compelling theoretical basis for the punishment of criminal negligence, inchoate offenses, and crimes of omission.

Frequently, someone who’s committed pre-meditated murder, which in Michigan is how you get life with no possibility of parole, is not a good problem solver. They have elected to kill someone as a solution to a problem that they’ve identified. But now that that person is dead, the problem is resolved.

“*I caught a case.*” It’s like they went fishing and it just leaped on their line or something. They didn’t commit a crime. They don’t frame it that way. They’re a victim. And it’s incredible to me when you know the kinds of crimes that some of these fellows have committed, that they still do not see the person that they brutalized as the victim. They see themselves as a victim.

— Pam Withrow, Warden, Michigan State Reformatory, Ionia.

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I. INTRODUCTION

The jails are filled with innocent people. That is, every defendant has his reasons for acting as he did and frequently, in his own mind, those reasons constitute a good defense. Usually, the crime itself was not the object. There was something else the defendant was trying to accomplish, and the crime was committed incidentally, so to speak, as an easy means or an unforeseen consequence. Or the defendant will have been “forced” to act as he did and whatever harm was inflicted is really someone else’s fault — often the victim’s. The defendant is usually wrong as a matter of law. He may even come to see that he was wrong about having an excuse or justification. Nevertheless, at the moment of action, and often for a long time afterward, he believes in the legitimacy of his ends and the means he chose to achieve them.

This belief is more than an example of the tenacity of self-serving rationalization; it is also a truth about inculpation. What we mean when we blame and punish, and our moral warrant for doing so, has to do with this faulty reasoning. We blame and punish, ultimately, because each of us reasonably demands that each of the others pursue his chosen ends with a due regard for us — with a certain amount of maturity, disinterestedness, and perspicacity. We blame and punish if we find that quality of judgment lacking. It is not just harm, but the lack of judgment that results in harm that the criminal law condemns.

That conception of inculpation, which this Article will defend at length, takes seriously the central phenomenon of the criminal law: that in judging a person guilty we reject his chosen ends as improper. It is a central dogma of the liberal tradition that no such judging takes place or ought to take place in a democratic society. Government ought to be impartial or neutral, to the greatest extent possible, with regard to its citizens’ chosen ends. The rejection of the chosen ends of the individual in the context of the criminal law is taken to be a necessary exception — a self-justifying means of preventing harm. This Article will explore a deeper logic for the rejection of ends implicit in inculpation. Indeed, it will challenge the assumption that the


3 In Mill’s classic formulation:

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. . . . The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

liberal tradition, especially deontological theories of distributive justice, has any bearing on inculpation. The theory advanced here is a republican⁴ theory of inculpation premised on Aristotle's *Nicomachean Ethics*.⁵ The law has a purpose, an end in view, which is to promote the greater good of humanity.⁶ The criminal law serves that end by promoting virtue; that is, by inquiring into the quality of practical judgment⁷ displayed by the accused in his actions.

⁴ In the course of examining republicanism from a critical perspective, Richard Fallon defines it as follows:

[N] early all accounts of historical republicanism would encompass a few core tenets: that human beings are essentially political animals, that they can fulfill their natures only by participating in self-government, and that the most important aims of the political community should be to promote virtue among the citizenry and to advance the common good.


⁶ Gordon Wood describes the place of the greater good in the republican political thought of Revolutionary-era America:

This common interest was not, as we might today think of it, simply the sum or consensus of the particular interests that made up the community. It was rather an entity in itself, prior to and distinct from the various private interests of groups and individuals. As Samuel Adams said in 1776, paraphrasing Vattel, the state was “a moral person, having an interest and will of its own.”


⁷ The idea of practical judgment or practical reason is at the center of both Aristotelian virtue ethics and republican political theory. Miriam Galston has described it well:

[M]any contemporary legal theorists with republican concerns have rejected the model of demonstrative or syllogistic reasoning based upon universal truths in favor of some form of contextual reasoning process. The catalyst for this development is a growing appreciation of the importance of the particular for political discourse. This development seems to derive from two basic insights. First, because of their general nature, rules cannot capture the detail, concreteness, and complexity of political life. Political and moral rules, even if in some sense “true,” are too abstract to furnish meaningful guidelines for the types of particular decisions that make up everyday life. A wealth of considerations would have to be added to any rule before it could be transformed into a prescription for action. Second, since human nature and circumstances are themselves evolving, general rules describing human affairs must be similarly evolving. As a consequence, the premises of political and
I use the term "inculpation" advisedly, though it is rarely seen in the literature. I do so in preference to "culpability" or "criminal responsibility" in order to make clear the scope of this study. The terms culpability and responsibility both denote an attribute of the actor. Use of either would suggest that my subject is mens rea—a necessary element of proof. Although an adequate account of mens rea certainly would indicate why it is a necessary element of proof, I wish to put at the top the question of what society is about in the act of blaming and punishing people. The term inculpation, rather than culpability, denotes this wider focus.

Explaining inculpation by resort to Aristotle’s Ethics may seem quixotic, dilettantish, or both. I hope it is neither. As I will argue in the next section, the criminal law cannot avoid the question of the good—in the sense of the greater good of society or the good life for human beings. Nor can the criminal law do without an account of human judgment. We understand justification as an actor’s choosing the best course of action under the circumstances.8 But if that is our understanding, we must be prepared to answer questions about what the best is, and about the difference between determining it ex ante (from the point of view of the actor) and ex post (from that of legislators, judges, juries, and commentators). No less can the criminal law do without a theory of character. We understand excuse as the actor’s not being blameworthy, though his act was wrong.9 If that is our understanding, however, we need an account of worthiness, and various proxies proposed for character in explaining worthiness—especially voluntariness—are plainly inadequate.10

I have taken Aristotle’s Ethics as the premise for this theory of inculpation because the Ethics offers an integrated account of the good, human judgment, and human character. As the third section of this Article will make clear, Aristotle’s understanding of virtue is a rich alternative to the prevailing, simplistic sense of virtue as conformity to a moral code. Aristotle’s virtue is a matter of mature, perspicacious practical judgment. Virtue cannot be reduced to a definite rule. It requires a capacity to respond to the infinite challenges of practical life with a regard for the good—not as a monolithic constraint, but

8 See infra pp. 1429-30.
9 See infra p. 1440.
10 See infra pp. 1445-46.
as a term in an ongoing practical dialectic. Such an account of virtue makes it possible to respond to the issues of the good, practical judgment, and character as they inevitably arise in the explication of inculpation, with a due regard for modern concerns about perfectionism.11

The fourth section of this Article will address the grounds of inculpation as a judgment on virtue; the meaning of that phrase in terms of the actual trial of a criminal case; the Aristotelian response to the charge of perfectionism; and the answer to what I call the determinist’s defense. The latter — the contention that criminal responsibility is impossible to assess due to the deep, longstanding, and well-known causes of criminal behavior — arises with particular force in an Aristotelian theory of criminal law.

The fifth section of this Article will consider the effects of my theory on the borders of inculpation. One question is whether criminal negligence is inculpatory or merely strict liability in disguise. The answer offered here is that negligence is genuinely inculpating. I next consider the other border of inculpation, inchoate offenses, and argue that an ethics of virtue is clearly discernible in the leading rationale for punishing attempts, solicitations, and conspiracies. Punishing a disposition to do harm involves by definition a judgment on virtue. Finally, I consider the problem of omissions. I argue that the Bad Samaritan who refuses to aid another in distress may be culpable regardless of our ability to find a duty to rescue. The virtue ethics on which my theory is based obviates the need to identify a discrete duty with which to transmute the omission into an inculpating “act.”

As that last paragraph suggests, there is a prescriptive strain to some of the arguments that follow. On the whole, I believe my theory to be descriptive of the criminal law as it stands. This Article is an attempt to articulate the justifying subtext of the particular practices and rules of the criminal law.12

11 In general, perfectionism is a limitation on the political principle of equality, in the service of human excellence, whether in virtue, art, science, or philosophy. As Rawls describes it: “[T]he greater happiness of the less fortunate does not in general justify curtailing the expenditures required to preserve cultural values. These forms of life have greater intrinsic worth than the lesser pleasures, however widely the latter are enjoyed.” RAWLS, THEORY, supra note 2, at 326 (citations omitted).

The charge of perfectionism is one that the republican revivalists have moved promptly to meet. See Frank Michelman, Law’s Republic, 97 YALE L.J. 1493, 1495 (1988) (“I will contend, to the contrary, that republican constitutional thought is not indissolubly tied to any such static, parochial, or coercive communitarianism . . . .’’); Cass R. Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539, 1541 (1988) (“This version of republicanism, I argue, is not antiliberal at all; it incorporates central features of the liberal tradition.”).

12 It might be argued that I do not adhere to H.L.A. Hart’s scheme of three levels of analysis in the criminal law. See H.L.A. HART, Prolegomenon to the Principles of Punishment, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 3–13 (1968). Hart distinguishes between defining punishment, justifying the general practice of punishment, and determining who may be punished by how much. He calls these three levels of analysis Definition, General Justifying Aim, and Distribution. See id. at 3–4. My argument violates Hart’s
ever, one cannot help but notice whether the structure resting on it is square and secure. The prescriptive elements of my argument are on that order: changes in practice or doctrine that might be made to square the law with its foundations, but not a comprehensive program of legal reform.

II. THE NEED FOR AN ARISTOTELIAN ACCOUNT OF INCULPATION

This Article is about inculpation: the justification of the punishing majority rather than of the innocent accused. Nevertheless, one cannot avoid discussion of the defenses. Not only is there a substantial body of excellent scholarship on excuse and justification,13 but also the defenses are conceptually inseparable from inculpation. My specific widely accepted scheme in that it employs a single ethical theory to explain both who is punished and why we have punishment at all. I am not troubled by that violation.

First, Hart’s conceptual borders are not as impermeable as some assume. Hart argues that our theory at one level does not have any necessary implications for our understanding of another level. Hart does not argue that our theory at one level can have no implications for our understanding on another. On the contrary, he suggests just the opposite. See id. at 9 ("Of course Retribution in General Aim entails retribution in Distribution.")

Second, Hart’s argument must be seen as part of a defense of utilitarianism. One argument against utilitarianism as a theory of punishment is that general utility would be served by the deterrent effect of punishing people selected at random so long as it were publicly assumed or claimed that the punishment was for crimes. A utilitarian theory of the criminal law, in other words, does not entail individualized punishment or any notion of desert. Hart’s objective in the Prolegomenon is to respond to that criticism by making room in a utilitarian theory for individualized punishment:

Much confusing shadow-fighting between utilitarians and their opponents may be avoided if it is recognized that it is perfectly consistent to assert both that the General Justifying Aim of the practice of punishment is its beneficial consequences and that the pursuit of this General Aim should be qualified or restricted out of deference to principles of Distribution which require that punishment should be only of an offender for an offence.

Id. Thus Hart’s limited point — that one’s theory at one level has no necessary implications at another — has a limited purpose: to answer an objection to utilitarianism.

That being the case, I feel no strong compulsion to observe Hart’s distinctions here. My theory is not a utilitarian theory and, whatever other defects it may have, it is able to account for individualized punishment.

13 See Joshua Dressler, Foreword — Justifications and Excuses: A Brief Review of the Concepts and the Literature, 33 Wayne L. Rev. 1155, 1157–60 (1987) (reviewing recent scholarship and basic concepts). George Fletcher is widely credited with reviving interest in excuse and justification as a result of his efforts to bring Continental legal thinking to bear on the Anglo-American system. See id. at 1159. As Fletcher describes it, the distinction between excuse and justification is clearer in other systems of criminal law because they distinguish between two levels of analysis in criminal liability: the level of wrongdoing, at which the prohibitions of the criminal law correlate with society’s norms of behavior; and the level of attribution, at which the question of the fairness of blaming and punishing the particular wrongdoer arises. See George P. Fletcher, Rethinking Criminal Law § 6.6, at 454–58 (1978); see also George P. Fletcher, The Right and the Reasonable, 98 Harv. L. Rev. 949, 951–53 (1985) (describing “structural” legal discourse, of which this would be an example, in contrast to the “flat” legal discourse of the common law, with its emphasis on reasonableness as a single-stage inquiry). Justification is a question that arises at the level of wrongdoing: a criminal actor whose act appears to violate the prohibitory norm is justified if the act falls within an exception to the norm or a countervailing norm. Excuse is a question which arises at the level of attribution: a criminal actor is excused if,
concern in this section is to demonstrate that we cannot think clearly
about excuse and justification — or about inculpation — without also
thinking about three other issues: the good, practical judgment, and
character.

A. Justification and the Good

Let us take up justification first.14 Both George Fletcher and Paul
Robinson understand justification as a balancing of competing inter­
est.15 Robinson takes the defense of lesser evils as the paradigm of
justification.16 One who sets fire to a field in order to create a fire­
break, thereby saving a town from an approaching forest fire, is ac­
quitted of arson on the ground that he avoided a greater harm than he
inflicted. Similarly, one who defends against aggression with deadly
force is acquitted on the ground that the harm inflicted by the defend­
ant in self-defense is less than the harm threatened by the victim. In
the case of self-defense, however, the law requires only that the force
used be proportional to the threat, not that it actually outweigh the

upon reflection, we find that it would not be fair to blame and punish him for the act, despite the
fact that it is and remains wrongful. See Fletcher, supra, § 6.6.1, at 459.

Because of these differing rationales, excuse and justification differ in their implications and
applications. Foremost among these is the fact that justification can be universalized whereas
excuse cannot. See id. § 10.1.1, at 761–62. For example, a third party may assist a justified actor
in the “wrongful” act, but a third party may not assist one who is merely excused. The right to
resist also distinguishes excuse and justification. One is entitled to resist an excused actor, be­
cause her act remains wrongful. If one resists a justified actor, however, one would be violating
the norm that justifies her behavior. See id. at 760; see also Paul H. Robinson, Criminal Law
Defenses: A Systematic Analysis, 82 Colum. L. Rev. 199, 203 (1982) (identifying five categories of
criminal law defenses: justification, excuse, failure of proof, offense modification, and
nonexculpatory public policy). But see Kent Greenawalt, The Perplexing Borders of Justification
and Excuse, 82 Colum. L. Rev. 1897, 1898 (1982) (challenging Fletcher’s claims that a more
rigorous distinction between the defenses is either possible or desirable).

14 Joshua Dressler writes that a justification “negates the social harm of an offense.” Dressler,
supra note 13, at 1161. That definition is inadequate. The language is obviously figurative — the
actual harm remains. One cannot simply negate the injury or death of a person, nor the destruc­
tion of property, but the difference between “social harm” and actual harm is unclear. Dressler
cites Albin Eser’s definition of “social harm” as the “negation, endangering, or destruction of an
individual, group[ ] or state interest which was deemed socially valuable.” Id. at 1161 n.21 (quot­
ing Albin Eser, The Principle of “Harm” in the Concept of Crime: A Comparative Analysis of the
Criminally Protected Legal Interests, 4 Duke L. Rev. 345, 413 (1955)) (internal quotation marks
omitted) (alteration in Dressler). This definition, however, seems too strong. It is not accurate to
say that a justified homicide involves the destruction of an individual who was once deemed
socially valuable but who now, due to the circumstances of her destruction, is not. To say, as
Dressler does, see id. at 1161 & n.22, that the harm is tolerable from society’s point of view is not
to say that the harm is negated but that the interest harmed by the facially criminal act is out­
weighed by some other interest.

15 See Fletcher, supra note 13, § 10.1.3, at 760; Robinson, supra note 13, at 213.

16 “This type of justification defense, though the least common in American criminal codes,
most clearly reflects the general principle of justification defenses.” Robinson, supra note 13, at
214.
threatened harm. The interests of the defender are said to outweigh those of the aggressor in a theoretical context only because we include the general interest in a peaceable society among those on the defender’s side. In a third category of justification — public authority — the general interests of society make up the entire weight on the prevailing side. The police officer with probable cause or a warrant may make an arrest regardless of any actual threat to himself, and the liberty interest of the arrestee is outweighed by society’s interest in a law-abiding citizenry and in law-enforcement generally.

So stated, one difficulty with the balance-of-interests theory of justification is obvious: general social interests in peace, a law-abiding citizenry, and so on function as makeweights. If a balancing of interests is not to be arbitrary or result-oriented, we need a reliable scale of value, neutral as between the interests, upon which they can be compared. This objection might be taken to mean that no such neutral scale exists — from which it would follow, supposedly, that the interest-balancing theory of justification is insupportable. That is not my argument. In fact, as later sections will make clear, nothing could be farther from my intentions.

My point is rather that the theory of justification as a balancing of interests requires a supporting theory of the good. It requires a theory of the final ends of political association in which those ends are taken to be something apart from the particular ends of society’s members. Without some such conception of the greater good of society, the balance-of-interests theory of justification is incoherent. Without some comprehensive background of value, common to both interests and within which each can be given its full due, the choice between interests might be nothing more than an arbitrary preference for one of two incommensurable concerns.

Despite the widespread acceptance of the balancing theory of justification, this particular aspect of the theory remains largely unrecognized and unexamined. The paradigm case of lesser evils is usually framed so as to render the scales of value problem unproblematic.

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17 See Model Penal Code § 3.04(2)(b) (1985) (“The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat . . . ”); see also 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 5.7(b), at 651–53 (1986) (“In determining how much force one may use in self-defense, the law recognizes that the amount of force which he may justifiably use must be reasonably related to the threatened harm which he seeks to avoid.”).

18 Fletcher frames the dominant Anglo-American view as a discounting of the aggressor’s interests. “The underlying premise is that if someone culpably endangers the interests of another, his interests are less worthy of protection.” Fletcher, supra note 13, § 10.5.2, at 858. I take this argument as another way of saying that the social interest in peaceable society weighs in on the side of the victim of the initial aggressor.

19 See Robinson, supra note 13, at 215–16.

20 See infra Part IV.A.
The hypothetical is usually one like the fire-break case, in which the interests at stake are primarily economic. Either the two competing interests are both economic and therefore comparable on a simple scale of dollars — the value of the crops in a field versus the value of the homes, businesses, and infrastructure of the town — or one competing interest is economic and the other is the sort of interest that is generally and uncontroversially accepted as paramount — the value of the crops in a field versus the value of the lives in the town.

If one accepts the idea that all human activity is ultimately reducible to economic terms, this framing does not pose a problem. That assumption is widely shared may, perhaps, account for the uncritical acceptance of interest-balancing as an adequate explanation for justification. If, however, one takes a more exacting approach to the problem of the good, then justification and its converse, inculpation, require considerably more philosophical support.

The problem of the good in explaining justification cannot be avoided simply by abjuring the interest-balancing theory. Alternative explanations of justification eventually run up against the same problem. For example, Sanford Kadish has advanced a theory of self-defense, in which he purports to derive a liberty to kill from a right against the state. Among the rights we do not surrender in the social contract, he argues, is the right to resist aggression. Consequently, we have not ceded to the state the power to punish us for so resisting.

Several problems with this theory come to mind. Most significant for our purposes is the fact that it cannot extend beyond the core case. See Sanford H. Kadish, Respect for Life and Regard for Rights in the Criminal Law, 64 CAL. L. REV. 871, 884-86 (1976) (citing ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 33 (1974)). Kadish rejects interest-balancing as an explanation for self-defense — a much more significant category of justification than lesser evils — for a number of cogent reasons. The foremost is that the balancing test conflicts with a considered judgment that all lives are of equal value. That principle leaves us no basis for choosing between the life of the initial aggressor and that of the defendant, and renders the entire balancing enterprise suspect from the start. See id. at 882.

The balancing theory also fails to account for the justification of deadly force in cases in which life is not threatened, for example in the defense of property following an unlawful entry. We cannot dispense with our prevailing judgment that lives should be valued over property by gesturing toward the supposed sanctity of the dwelling, which in any event could function only as a makeweight in a balancing analysis. The balancing theory also implies (falsely) that one person attacked by twenty should submit rather than attempt to destroy them all. Finally, the rule seems to justify the killing of innocent aggressors, such as a child or an incompetent person. See id.

First, it relies on a simplistic account of the social contract. How does Kadish know that we have not surrendered the right to defend against aggression? He suggests that it simply stands to reason that we would retain it, because we would be worse off if we surrendered it. See id. at 884-85. As Rawls demonstrates, however, the social contract theory requires considerably more elaboration before we can even approach a clear idea of what kind of institutions would arise from an original position. See RAWLS, THEORY, supra note 2, § 3, at 11-17.

Second, Kadish’s theory merely restates the problem. To say a right or liberty is reserved vis-à-vis the state tells us nothing about the nature of the right or liberty other than to claim for it
of defending against a clear threat to one's life. The right to self-preservation does not account for my right to respond with deadly force when I am not necessarily threatened with death — in a case of kidnapping or rape, for example, or when I can safely retreat. Nor can self-preservation account for the right to use deadly force when property rights are threatened, as in those jurisdictions which permit the use of deadly force against one who is about to commit a crime other than assault after an unlawful entry onto premises. For these cases, Kadish expands the right of self-preservation to include a right of personal autonomy: I need not retreat from my residence, and can defend it and the property it contains, because my property is an "interest" closely identified with my person. The right to preserve one's life becomes a right to preserve "the personality of the victim" of the aggressor. Because the right to defend against lesser threats and the right to defend property are limited rights, Kadish posits "proportionality" as a separate, countervailing principle to the expanded right of self-defense.

At this point, we reach the same sort of objections I have lodged against the theory of balancing interests. What is the scope of personal autonomy? What is the scale of proportionality? My right to personal autonomy presumably extends to liberty of movement and bodily integrity: use of force in defending against kidnapping and rape can be accounted for without much controversy along the autonomy axis. But how far personal autonomy extends outward from the person to places and things, and on what grounds, is far from clear. Along the proportionality axis, no strong consensus appears in any class of cases: not all jurisdictions recognize a right to use deadly force in rape and kidnapping situations, not to mention the protection of the status of a natural right. Such a claim raises its own set of questions and objections. Beyond a brief reference to Nozick, to which we will return in a moment, Kadish does not address those issues. See Kadish, supra note 21, at 885 n.23.

Kadish's theory also fails to account for one of the principal features of self-defense and justification generally: the right of third parties to intervene. See Fletcher, supra note 13, § 10.1, at 761-62. How can my right to self-preservation provide grounds for a third person to kill my aggressor? Kadish notes the problem but argues only that my right would be infringed upon were the state to take away the right of third parties to assist me. See Kadish, supra note 21, at 885-86. This assertion at best restates and at worst adds to the problem. What right would the state infringe upon, and how do we know it is so extensive?


27 See Kadish, supra note 21, at 886.

28 Id.

29 Id. at 888.

30 See id. at 886.
property, and those that do allow deadly force do so in a varying range of circumstances.\textsuperscript{31}

Once again, the inference I would draw from the lack of consensus is not that it renders Kadish's scheme of autonomy versus proportionality untenable; my point is rather that, as with the scale upon which competing interests are to be weighed, some comprehensive system of value must exist within which to judge the scope of personal autonomy and the degrees of proportionality. Without some common, underlying standard, our resolutions of conflicts between autonomy and proportionality in particular cases will be arbitrary.

This problem of standards in the analysis of justification involves us in issues of the greater good of society or of the distinctive good of human beings. Only by reference to a conception of the good, broadly conceived, can we make the judgments of weight and degree involved in justification. That is by no means the prevailing view. On the contrary, to the extent that the problem of standards is recognized, the assumption seems to be that the standards can be supplied by the leading deontological theories of justice.\textsuperscript{32}

Kadish's analysis of self-defense rests quite explicitly on a deontological theory of justice. The question of justification, for Kadish, is a problem of each person's relation to the state.\textsuperscript{33} He begins with the assumption that there is no end or purpose of social organization that is distinct from the ends of the individuals involved. He cites Nozick

\textsuperscript{31} Although the Model Penal Code authorizes the use of deadly force to ward off "death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat," \textit{MODEL PENAL CODE} § 3.04 (1985), the New Jersey statute otherwise adopting the Model Penal Code provision refers only to "death or serious bodily harm," \textit{N.J. STAT. ANN.} § 2C:3-4(b)(2) (West Supp. 1994). Minnesota authorizes deadly force only to resist "great bodily harm or death," \textit{MINN. STAT. ANN.} § 609.065 (West 1987), an express change from prior law which allowed it in response to the commission of a felony generally, \textit{see id.} cmt. at 72.

\textsuperscript{32} Deontological political theories, in accord with their Kantian roots, subordinate the good to the right. \textit{See RAWLS, THEORY, supra note 2,} § 6, at 31 & n.16; David A.J. Richards, \textit{Kantian Ethics and the Harm Principle: A Reply to John Finnis}, \textit{87 COLUM. L. REV.} 457, 464 (1987). That is, they reject the notion of an overriding societal good or a comprehensive conception of the good life as an organizing principle of society on the ground that it would violate the precept that others should be treated as ends in themselves rather than as means. \textit{See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS} 47 (Lewis W. Beck trans., 1959). To devote society to a single conception of the good would be to use individuals as instruments toward that end. Consequently, deontological theory begins with the assumption that the individual members of society simply have the ends they have and stresses the priority of the right: the question of the fair terms of social cooperation. \textit{See DWORKIN, supra note 2,} at 191–92. To minimize the question of the good, however, is not to eliminate it. \textit{See RAWLS, THEORY, supra note 2,} § 60, at 395–99.

\textsuperscript{33} Kadish writes:

The individual does not surrender his fundamental freedom to preserve himself against aggression by the establishment of state authority; this freedom is required by most theories of state legitimacy, whether Hobbesian, Lockeian or Rawlsian, according to which the individual's surrender of prerogative to the state yields a quid pro quo of greater, not lesser, protection against aggression than he had before.

Kadish, \textit{supra} note 21, at 885.
for the concept of side constraints—a key concept in Nozick’s theory of limited government—and he cites Kant, by way of Nozick, for the proposition that the principal side constraint on individual and state action is the categorical imperative. For Kadish, the question of justification, like all questions of justice, is a matter of the fair terms of social cooperation—a question of the right, not the good.

Fletcher seems to share that assumption in his analysis of lesser evils. He is at pains to distinguish the theory of justification as interest-balancing from utilitarianism and from teleological theories generally. His analysis is drawn from German law, and he is quite clear that the German concept of Recht stands as an absolute side constraint on utility maximization or the choice of the greater good. He has elsewhere likened the concept of Recht to Rawls’s first principle of justice, and stressed its Kantian definition as “the set of conditions under which the choices of each person can be reconciled with the choices of others, under universal laws of freedom.” For Fletcher too, justification is a question of the right, not the good.

Treating justification as a matter of deontological justice seems plausible initially. The net effect of rules about self-defense, defense of others, lesser evils, and necessity is to establish fair terms of social cooperation. The rules define spheres of autonomy that must be respected and the conditions under which and limits within which people can invade and interfere with one another’s interests. From this perspective, the rules governing the various justifications function like any other social institution. Consequently, it makes sense to assert that, like any other social institution, justification should be set up so that it leads to an equal right to the most extensive basic liberty compatible with a similar liberty for others, or so that it constitutes a set

34 See id. at 885 n.23.
35 Nozick’s concept of a side constraint is perhaps the one feature of his theory that most clearly marks it as a deontological theory of justice. Nozick introduces the concept for the precise purpose of distinguishing his approach at a fundamental level from teleological theories of politics and the state — what he calls “an end-state maximizing view.” Robert Nozick, Anarchy, State, and Utopia 33 (1974). He needs the concept to explain why a state that takes Kant’s categorical imperative seriously would not make the imperative itself the end or purpose of social organization. A state which is minimal because it is organized around the principle that one person should not be used as a means for others’ ends could quickly become a maximal state if it set out actively to prevent its members from treating each other in that way. See id. at 27–29. Nozick therefore limits the role of the categorical imperative to that of a side constraint on governmental action as opposed to the end of governmental action.
36 See Kadish, supra note 21, at 885 n.24 (citing Nozick, supra note 35, at 34, and Immanuel Kant, The Metaphysical Elements of Justice 35–36 (J. Ladd trans., 1965)).
37 See Fletcher, supra note 13, § 10.2, at 774–78.
38 See id. at 780–88.
39 See Fletcher, supra note 13, at 966 & n.77 (citing Rawls, Theory, supra note 3, § 11, at 60, for the proposition that “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others”).
40 Id. at 965.
of conditions under which the choices of each person can be reconciled with the choices of others under universal laws of freedom.

One may well ask, however, whether that perspective, perhaps best characterized as the legislator's perspective, is the proper one for analyzing justification. To view justification as a system of social cooperation is to stress its role in the criminal law's system of deterrence. The pattern of successful and failed assertions of necessity or self-defense is what defines the boundaries of autonomy and the weight of contending interests for the rest of us. We understand that we cross these lines at our peril. But to make the deterrent function the main focus of our analysis of justification raises at least three problems.

First, the deterrent function for society at large is a secondary effect of individual cases, and to make a secondary effect the centerpiece of our analysis of justification is counterintuitive. In actual cases of justification, we do not set out to arrange the terms of fair cooperation in the society. The trial turns on the particulars of the case itself: the nature of the particular threat presented and the appropriateness of the particular response. General social and institutional considerations are represented in the law and in the instructions to the jury. But that law is either the accretion of past individual cases or the product of separate, ordinary legislation in which the legislature, for the most part, has tried to encapsulate the logic of prior cases. At trial, the object is to render justice to the individual, not to legislate. Analyses of justification premised on deontological theories of justice, however, stress the secondary, legislative function almost to the exclusion of individual justice.

That exclusion points to the second difficulty with analyzing justification as a matter of deontological justice: stressing the deterrent function of individual cases is inconsistent with the categorical imperative that undergirds deontological justice. Rawls and Nozick derive the central premise of their theories from Kant's dictum that we are to treat others not as means, but as ends in themselves.

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41 "To the extent that common law offenses have rested on desirable definitions, these definitions have been incorporated into the Code; where clarification or modification of the common law definitions was thought necessary, this was effected by the Code formulations." Model Penal Code § 1.05 cmt. 2 (1985).

42 See Nozick, supra note 35, at 33; Rawls, Theory, supra note 2, § 40, at 251-57; cf. John Rawls, Kantian Constructivism in Moral Theory: The Dewey Lectures 1980, 77 J. Phil. 515, 518-19 (1980) (distinguishing his method of argument from Kant's). The basis of the categorical imperative is Kant's conception of the person as autonomous:

The ground of this principle is: rational nature exists as an end in itself. Man necessarily thinks of his own existence in this way; thus far it is a subjective principle of human actions. Also every other rational being thinks of his existence by means of the same rational ground which holds also for myself; thus it is at the same time an objective principle from which, as a supreme practical ground, it must be possible to derive all laws of the will. The practical imperative, therefore, is the following: Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.
to that principle as strongly as Fletcher and Kadish seem to be should hesitate to premise their analyses on the feature of the criminal law that comes closest to violating it. Their treatments of justification as a social institution, however, give the law's deterrent function primary place. Deterrence, at bottom, is a matter of making an example of the defendant, and to make an example of someone is to treat him as a means rather than as an end. In this light, an analysis of justification as a matter of deontological justice is at cross-purposes, if not actually self-contradicting.

Finally, if one does shift the focus from the operation of justification as a social institution to its operation in the individual case, one recognizes that the concept of the good plays a different role in the theory of justification than it does in deontological theories of justice. Deontological theories are theories of distributive justice: the question is how the goods of the earth and society are to be shared. The subject is social cooperation. Both Nozick and Rawls frame the problem in terms of social contract, and their point of view is the hypothetical beginning of society. In seeking a fair arrangement of society, the first step such theories take is to defer the question of the good. Given that a single comprehensive moral doctrine is not a fair basis of social organization for a democratic society, deontological theories begin with the assumption that people are entitled to the ends that they have. From there, the question is the optimal conditions under which each person seeks his or her own good.

In the matter of justification, in contrast, we do not have the luxury of deferring the question of the good. We are not concerned with distributing goods at society's beginning or with cooperation; we are concerned with the active pursuit of goods by real people in an ongoing social arrangement. In a case of justification, we begin with a certain, known conflict. Furthermore, whatever particular form the conflict takes, it is at bottom a conflict between schemes of ends: between that of the criminal actor and that of another person; or between that of the criminal actor and that of society as expressed in its

KANT, supra note 32, at 47 (footnote omitted).

43 One can never dispense entirely with the question of the good, even in a deontological theory. Rawls acknowledges that unless we take rationality as a good and posit an index of primary goods — those basic things that all people want, whatever else they want — there is nothing to drive his theory. The members choose the basic arrangements of their society from behind a veil of ignorance as to their particular circumstances, but there must be some "thin theory of the good" on which they base even those elementary choices. RAWLS, THEORY, supra note 2, § 60, at 396. In any analysis of social institutions, then, the question of the good must arise; the issue is what role it plays in the analysis.

44 See NOZICK, supra note 35, at 3-9; RAWLS, THEORY, supra note 2, § 3, at 12.

45 This is not to say that a theory such as Rawls's puts no limits on what are acceptable ends, but only that people are to choose within the broadest possible range and any limits are determined by something other than a conception of the greater good.

46 See NOZICK, supra note 35, at 149-50; RAWLS, THEORY, supra note 2, § 6, at 28-29.
legislation. When the accused is found guilty, the decision in a criminal case is to prefer one set of ends over the other. When the defense is justification, that question of ends is posed most starkly; but it is present in some form in every criminal case. In a criminal case, in other words, the neutrality toward individuals' schemes of ends to which deontological theory aspires is simply impossible.

In this sense the analysis of justification necessarily leads us to questions of the good. Schemes of ends are determined by the person's, or the legislature's, conception of the good — what is worth pursuing and in what order. The relative priority of competing schemes of ends is necessarily determined in the disposition of actual cases, and one cannot understand what is happening without directly taking up the question of the good. Deontological theories of distributive justice simply address the wrong questions if one is seeking an understanding of justification.

B. Inculpation and Instrumentalism

At this point, we must turn the usual question around, and view these issues as a matter of inculpation rather than as a matter of (exculpating) justification. If the line of reasoning I have been pursuing is correct, the question of the good arises at some point in any criminal case and not just in cases of justification. In cases of a colorable defense the controversy becomes overt, but even in an easy case — a confessed, premeditated homicide, say — the suspect has acted in accord with her scheme of ends, however obviously perverse it may be, and our finding her culpable entails a rejection of that scheme. The question then becomes: what is the rationale of that rejection? Given that the decision in every case entails an assessment of the defendant's scheme of ends and her conception of the good, what constitutes that assessment?

The short answer is that inculpation, as an inquiry into a person's relation to and responsibility for the greater good, is an inquiry into the person's character — more particularly into the soundness, matur-

47 Stuart Hampshire draws a distinction, along these lines, between justice and liberty as political ideals. He does so in the course of commenting on the ascendancy of the latter in modern political philosophy, most conspicuously in the work of Rawls. Rawls is concerned with preserving liberty in a scheme of distributive justice. Justice itself, including justice in the criminal law, is a different matter:

Liberty, like happiness and the pursuit of happiness, is a positive ideal, while justice is a negative ideal. To recommend practices and institutions in proportion as they remove barriers to the freedom of individuals is to aim at a positive good. The aim is one of enlightened improvement in harmony with those human desires which can be assumed to be almost universal. We think of justice as a restraint upon those desires: the desire for a greater share of rewards, the desire for dominance. . . . When justice needs to be enforced and is enforced, the scene is not one of harmony; some ambitions are frustrated. A barrier is erected, an impossibility declared.

ity, and breadth of her practical judgment, the faculty by which she assembles her conception of the good and her scheme of ends. If we take virtue to be, at bottom, this sort of exemplary practical judgment, then inculpation is a judgment on virtue.

Understanding inculpation as an assessment of virtue requires a fundamental shift in perspective. We must begin to consider the question at the level of individual justice and case adjudication. We must stop treating inculpation as a matter of distributive justice and surrender the society-wide perspective of the legislator.

From the perspective of the legislator or the legal theorist, persons are causes of harm and nothing else. When considering a rule, the legislator holds people’s choices and motivations constant; that is, the hypothetical conditions into which a proposed rule is introduced include human beings who will react in uniform and predictable ways or whose reactions can be meaningfully aggregated. Variations in individuals’ assessments of their circumstances and in their fears, interests, strengths, motivations, aspirations, desires, failings, and every other aspect of character are set aside.

This instrumental style of reasoning has profound implications for our understanding of the law. Because it pushes questions of individual character and motivation into the background and holds them constant, it precludes a role for the criminal actor’s deliberations, choices, and ends — in short, her practical judgment — in our understanding of the defenses and inculpation. It blocks an adjudication-level perspective and contributes to the misguided tendency to treat inculpation and the defenses as a branch of distributive justice.

The particular ways in which the legislator’s perspective distorts our understanding of the defenses point directly to practical judgment as a preferable focus or starting point for the analysis of inculpation. I have already alluded to one such distortion. Instrumental explanations require us to view the person as a cause of harm and nothing more. We do not view her as a full moral agent, with her own scheme of ends, her own talents and abilities, her own strengths of character, and so on. This view runs counter to our post-Kantian convictions about the proper regard for persons: treating a person as an end in herself would require taking her individuality into account rather than treating her as a uniform cog in a social mechanism. We can respond to an objection along these lines by imposing a side constraint based on the categorical imperative, in order to ensure that we do in the end maintain a proper regard for individuals. But would it not be preferable to have an understanding of inculpation that did not lead to implications in need of a side constraint? Would it not be simpler and wiser just to take real individuals’ conceptions of the good and schemes of ends as our starting point?

48 See, e.g., Kadish, supra note 21, at 889.
There is also reason to doubt the explanatory power of instrumental theories in this area. Is it really plausible to say that the law on the defenses serves to deter harm? Consider carefully the sort of cases we are dealing with here. Cases of excuse and justification both involve consideration of the defendant's circumstances: of an external threat or constraint that in some sense either necessitates her action (justification) or makes it not her own (excuse). In either case we are dealing not with a person who sets out to do harm, but with one who does harm in response to her immediate circumstances. In some cases of colorable defense the actor has the opportunity to assess the consequences to herself of various courses of action, but more often her action will be a spontaneous, relatively unconscious reaction. To the extent it relies on conscious, contemporaneous, instrumental reasoning on the part of the actor, an account of the defenses becomes implausible. In such cases, systems of deterrence and motivation do not operate except insofar as they have been so deeply ingrained as to become part of the actor's very character. Would it not make sense, then, to approach the question from the point of view of character rather than of deterrence? Is not the focus of our concern better described as the judgment of the actor? Are we not asking whether she has made the right choices in her particular situation — choices which, given the exigent circumstances, spring directly from her deepest preferences and priorities?

Finally, instrumentalism also falls victim to the danger of mistaking the metaphor for the thing itself. By this I mean that the rules and standards of the analysis are and should remain heuristic devices: they do not actually serve a public, prescriptive role. Having arrived at a rule, we ought to return our attention to the individual case it is supposed to explain. That last step, however, is most often omitted. We forget that the defenses are legislated only in bare outline, and that our true object of study is the actual, individualized adjudication of a person by a jury. The point of decision we are trying to explain involves no one with the god-like perspective of a legislator; there are only twelve people judging another person, or, if you prefer, another person's act.49

What is at issue in the trial is the pattern of individual choices that led to the act and hence to the harm. The factfinder, in deciding the case, will accept or reject the decision the actor made in the circumstances she faced; and in doing so, will pass judgment, ultimately, on the practical reasoning of that actor. The jurors will accept or reject the particular conception of the good and the scheme of ends that led the actor into the conflict and to the resulting harm. In order to ana-

49 I am holding constant here certain real but exogenous influences on jury outcomes, such as race and ethnicity. Cf. Batson v. Kentucky, 476 U.S. 79, 88–89 (1986) (holding unconstitutional the use of peremptory challenges to affect the racial balance of a jury).
lyze justification properly, we ought to view the matter from the same perspective. We ought to concern ourselves with the rendering of individual justice — the resolution of actual cases — rather than with the logic of imaginary legislators pursuing the optimal conditions of social cooperation.

What we need in order to understand inculpation is not a rule that will embrace the greatest number of cases. Rather, we need to know how an assessment of the actor’s practical judgment can result in blame and punishment that are widely accepted as legitimate.

C. Excuse, Practical Judgment, and Character

Despite the well-charted doctrinal differences that separate excuse from justification, an analysis of the principal controversy in the theory of excuse can help us answer the question posed above. What we mean by “culpable” action — be it non-excused or non-justified — is that it evinces poor judgment in conceiving and pursuing the good: an absence of virtue. Our difficulties in the theory of excuse are attributable to our reluctance to acknowledge that inculpation is a matter of assessing character in that sense.

The principal difficulty in the theory of excuse is the incursion of what I will call the determinist’s defense. We take it as a given that a person should not be punished for an act, however wrong it might be, if she could not have acted otherwise. We therefore excuse wrongdoing rather than justify it when we cannot fairly attribute the wrongdoing to the defendant. It must be noted, however, that in principle this defense has no limit. Seen in retrospect, none of our actions are freely determined by ourselves. None of us is a god-like unmoved mover. Each person is the product of a specific history that not only has placed her in the circumstances of the alleged crime, but also has shaped the character from which her choices in those circumstances will emerge. In a genuine sense, then, any criminal actor can be said to have been unable to act otherwise in committing her crime.

50 See Fletcher, supra note 13, §§ 10.1-10.5, at 759-875.
51 See id. § 10.3, at 798-99.
52 See Michael S. Moore, Causation and the Excuses, 73 Cal. L. Rev. 1091, 1122-13 (1985).
53 This universal excuse is not recognized anywhere, of course. One does see it, however, in the constant pressure to recognize new excuses and to expand the boundaries of existing excuses. The constitutional decriminalization of the status of drug addiction, see Robinson v. California, 370 U.S. 660, 667 (1962), leads to the argument that an alcoholic must be excused for public drunkenness, see, e.g., Powell v. Texas, 392 U.S. 514, 536 (1968), and the argument that a heroin addict must be excused for possession, see United States v. Moore, 486 F.2d 1139, 1208 (D.C. Cir. 1973). Self-defense based on a reasonable apprehension of dangerousness becomes self-defense based on a history of battering, see State v. Wanrow, 559 P.2d 548, 553-56, 559 (Wash. 1977), and diminished capacity due to abuse suffered as a child, see State v. Janes, 850 P.2d 495, 506 (Wash. 1993). Legitimate political concern for the welfare of the economically and socially deprived seems to imply an excuse for the defendant with a “rotten social background.” See David L. Bazelon, The Morality of the Criminal Law, 49 S. Cal. L. Rev. 385, 403-05 (1976); Richard
As Michael Moore has shown in detail, the full range of excuses can plausibly be framed in terms of a superseding cause breaking the link between the defendant and the harm. Such interpretations of the excuses, as Moore points out, turn on the humane and plausible assumptions that to understand is to forgive and that to know the cause is to understand. Despite its intuitive appeal, however, the causal theory is deeply flawed. Two of Moore’s arguments against it interest us here, because they bring out the central role of character and judgment in inculpation.

First, Moore shows that a cause of behavior excuses only when it has not been integrated into the character of the actor. He denies that any incompatibility exists between saying that behavior is caused and saying that it is the autonomous action of a person. Consider the act of raising my arm. Moore distinguishes cases in which someone else raises my arm or when my arm goes up as a reflex from cases in which I raise my arm because I have been raised as a Nazi or because I believe it is the best way to reach my jacket. All four examples can plausibly be cast in terms of caused action, but in the first pair the ability or opportunity to exercise my will is absent. In the second pair, though we can say why I will as I do, I do not lack the capacity to will the act. According to Moore, whether an act is excused depends not only on whether we can trace a cause, but also on whether the external cause bypasses the person herself. In other words, an actor is guilty if the criminal act is a deliberate act of will founded in her.

54 Duress, as LaFave and Scott formulate it, exists when a threat “causes the defendant reasonably to believe that the only way to avoid imminent death or serious bodily injury to himself or to another is to engage in conduct which violates the literal terms of the criminal law, . . . and causes the defendant to engage in that conduct.” 1 LAFAVE & SCOTT, supra note 17, § 5.3, at 614, cited in Moore, supra note 52, at 1102. Intoxication, provided it is involuntary, excuses acts performed under the influence — in some jurisdictions without any further showing that the intoxication impaired the actor’s reasoning capacity. See Moore, supra note 52, at 1110–11. An addiction such as alcoholism can be considered an excuse, because the disease operates as a compulsion on the actor. See id. at 1103. Mistakes of fact and mistakes about legal conclusions (for example, the defense that I did not know that the umbrella I took was the property of another) excuse when the mistaken belief is externally caused, rather than something I just choose to believe. See id. at 1105.

55 See Moore, supra note 52, at 1092.
56 See id. at 1132.
57 See id. at 1136.
58 See id.
own character, rather than a direct result of a cause that is clearly
overbearing and external to her character.

Second, Moore also argues that it is not the intervention of a cause
that excuses, but an interference with the practical reason of the actor.
For instance, if a youth robs and beats people because his deprived
background has left him without another way to live and without any
compassion for his victims, it is fair to say that this background has
casted his criminal act. But it would not be accurate to say that he
was compelled so to act. We reserve the term compulsion for cases in
which the actor is unable to reason about or to choose what to do.59
And it is only in cases of compulsion, not mere causation, that we
excuse. In a good case of duress, for example: if Baker has kidnapped
my wife and children and will kill them if I do not rob Able, my
choice is clear. I have been deprived of any meaningful opportunity to
reason about or to choose what I will do. “The difference between
compulsion and causation,” Moore writes, “comes to this: compulsion
involves interference with practical reasoning.”60

We will return to the problem of the determinist’s defense,61 but
for now let us focus on the theory of inculpation implicit in Moore’s
responses to it. Moore’s responses complement one another. If my act
is compelled, it will not be a deliberate act arising from my character.
If the cause operates on me without reaching my will and character,
then my practical reason has not been engaged. We begin to see a
conception of inculpation at work that is sharply at odds with those
based on models of distributive justice. Rather than considering the
effects of possible rules of decision on the distribution of social goods,
the conception of inculpation implicit in Moore’s responses to the de-
terminist focuses on the individual who is on trial and the connection
between his actions and his character, specifically as it reveals the
quality of his judgment. Unfortunately, Moore does not develop these
implications. He fails to tell us what it is about practical reason or
character that makes its engagement a necessary condition to
inculpation.

59 Though gravity causes the planets to stay in orbit, it would be absurd to say that they are
compelled to orbit by gravity. See Moritz Schlick, Problems of Ethics 147 (David Rynin
trans., 1939), cited in Moore, supra note 51, at 1129 n.106.
60 Moore, supra note 51, at 1119. One example may serve to sum this up. We know that
parents who abuse children are, overwhelmingly, abused children themselves. Poverty, drug
abuse, and stress, separately or in a common lethal mixture, also lead to child abuse. Despite our
clear fix on the causes, however, we are far from ready to recognize an excuse for assaults and
homicides of children, even when those antecedent causes are clearly established. The recognized
exuses look, not to external causes of wrongful acts, but to interference in the actor’s autono-
mous reasoning. If the child abuser’s mental condition has deteriorated to a dissociative state so
that he is functioning as an automaton, watching his own actions go by as if they were on televi-
sion, we are prepared to excuse. See, e.g., State v. Sommerville, 760 P.2d 932, 933, 936 (Wash.
1988) (acquitting the defendant, by reason of insanity, of murder but not of rape).
61 See infra Part IV.D.
George Fletcher's analysis of excuse leads to a similar impasse. Fletcher clearly recognizes the centrality of character and judgment to inculpation. Fletcher acknowledges that “[a]n inference from the wrongful act to the actor’s character is essential to a retributive theory of punishment.” He agrees with Moore that “[t]he only way to work out a theory of excuses is to insist that the excuse represent a limited, temporal distortion of the actor’s character.” Moreover, he agrees that “[t]he circumstances surrounding the deed can yield an excuse only so far as they distort the actor’s capacity for choice in a limited situation.” We excuse, Fletcher explains, because the excusing conditions block any inference from the act to the person’s character. “Typically, if a bank teller opens a safe and turns money over to a stranger, we can infer that he is dishonest. But if he does all this at gunpoint, we cannot infer anything one way or the other about his honesty.” This explanation, like Moore’s account of the excuses as circumventions of character or as interference with practical reason, promises a conception of inculpation quite different from that of the distributive justice model. The natural implication of Fletcher’s point is that if we refuse to inculpate because an inference about character is blocked, culpable acts must involve character that is in some sense faulty.

However, while Moore fails to develop the implication that character and judgment play a role in inculpation, Fletcher actively avoids it. Immediately upon concluding that excuse bars an inference about character, Fletcher resorts to the conventional logic of excuse as a matter of involuntary action. Uncomfortable with the value-laden terminology of the will, deliberation, reason, judgment, character, and so on, Fletcher subsumes them all into a single, less overtly normative psychological category.

In order to understand inculpation, we need to take seriously the insights that Fletcher and Moore set aside as unworkable or not worth pursuing. We need to face the implications they avoid. If excuse involves a bar to an inference about character, a good case of inculpation involves flawed or blameworthy character. If excuse involves an

62 Fletcher, supra note 13, ¶ 10.3.1, at 800.
63 Id. at 802.
64 Id.
65 Id. at 799-800.
66 See id. ¶ 10.3.2, at 802-07. Fletcher does not mean that an excused act is literally involuntary. He uses the term in a “normative,” or metaphorical, sense. To explain when an act is or is not “normatively” involuntary, Fletcher falls back on the notion of balancing interests. In a case of duress, to use Fletcher’s example, the compulsion must be of a type that a person of reasonable firmness would not be able to resist. If faced with a choice between a broken finger and the annihilation of a city, the appropriate moral balancing would result in a broken finger. According to Fletcher, however, this balancing is itself a mere metaphor for an unexplicated sense of culpability: “It is important to remember . . . that the balancing of interests is but a vehicle for making a judgment about the culpability of the actor’s surrendering to external pressure.” Id. at 804.
interference with practical reason, a good case of inculpation involves the free exercise of practical reason — but an exercise of practical reason that is faulty in a normative dimension beyond the merely instrumental.

Those inferences seem to leave us stranded. We do not have a theory of character or of practical reason that seems adequate to the task of explaining inculpation. As with justification, our preference for instrumental explanations that are congruent with the natural sciences makes us wary of such unambiguously normative concepts. That the criminal actor deserves blame and punishment because of the sort of person he is or because of his faulty thinking seems a risky proposition, both morally and intellectually.

We can, nevertheless, build such a theory of criminal law by drawing on Aristotle's *Ethics*. The *Ethics* suggests a reply to the determinist who asserts universal excuse and offers a way to understand the normative psychological concepts that inevitably arise in connection with excuse — practical reason, the will, deliberation, judgment, and so on. Perhaps more important, we can analyze in Aristotelian terms the questions of judgment and the good that, as we have seen, must be addressed in connection with justification. Indeed, as I will argue, Aristotle's account of character and practical judgment as they relate to virtue and the good provides the basis for a comprehensive theory of inculpation.

III. THE ARISTOTELIAN ELEMENTS OF A REPUBLICAN CRIMINAL LAW

In his leading treatise, *Aristotle's First Principles*, T.H. Irwin writes:

If [Aristotle] ascribes intrinsic value to political activities, then some institutional and constitutional arrangements that might seem to raise only questions of efficiency will in fact be open to another kind of evaluation. We might think that in deciding how many citizens should take what sort of part in government, we need only consider the instrumental function of one or another arrangement, and need only ask how efficiently it secures some benefit that is its causal result. But if a particular sort of political activity is itself part of the human good, then the argument for its presence in a city cannot be purely instrumental, and we need not, and should not, defend it on purely instrumental grounds.67

Inculpation is such an institution. As I argued in the preceding section, a number of reasons exist to doubt the utility of instrumental explanations here. Inculpation is more than an instance or aspect of distributive justice — it has intrinsic value as part of the good life for human beings.

“The good life” may seem an odd phrase here, but it has the right note of ambiguity. Aristotle is concerned with the good in the broadest sense: the common good or the good of humankind.68 The central thesis of the Ethics is that the good can be found and served by seeking one’s own happiness — eudaimonia — if that happiness is properly understood.69 Eudaimonia requires an extended concern for friends and for others in the political community because only that sort of concern will lead to a full development of one’s capacities and potential as a human being.70 Political life is genuinely constitutive of the person.

Inculpation is a part of this constitutive political life. It does not serve the greater good by indirectly promoting it, by ensuring the greatest good for the greatest number, or by any other instrumental formula. Inculpation is an act of communal interpretation that we engage in as we construct a good life.71 To be sure, inculpation deters harm. Aristotle is no ascetic; he appreciates the necessity of a basic supply of primary goods, including bodily integrity and property.72 That effect, however, is secondary to inculpation itself, to the judging of another member of the community and her actions. In that judging, we are concerned not only with the effects of her actions, but also with her decisions. We care about the quality of the accused’s practical judgment, for it is by means of that faculty that the accused participates with us in the conduct and construction of our shared political life. We are equally concerned, however, with the exercise of our own practical judgment in one of the central events of our political life — the inculpation of another.

A. Responsibility and the Rational Agent

We have seen how Fletcher resorts to voluntariness as a proxy for character in his account of inculpation.73 It is helpful to see why that move is mistaken and why one cannot escape the more overtly normative vocabulary of the will, practical judgment, and character. Suppose I have a horse that I keep in a pasture next to my neighbor’s orchard. Some of her apples hang within reach of my property. My horse ambles over, stretches across the fence, and takes one. Is he guilty of theft? The absurdity of the question is proof enough that voluntariness is not sufficient to define inculpation or any other variety of moral responsibility. My horse’s action is clearly voluntary: he

68 See ARISTOTLE, supra note 5, at I.2.
69 See id. at I.4.1095a, I.7; IRWIN, supra note 67, § 208, at 389.
70 See IRWIN, supra note 67, §§ 211-217, at 385-406.
71 “The relation between fellow-citizens expresses, instead of simply facilitating, the extended concern and interest that realizes each person’s capacities. That is why relations within a city are a part of each person’s happiness, and not simply a means to it.” Id. § 217, at 406.
72 See ARISTOTLE, supra note 5, at II.8.1099a-1099b; IRWIN, supra note 67, § 206, at 385-86.
73 See supra p. 1443.
sees an opportunity and directs himself to it. A great deal of what might allow us to say he is responsible, however, is clearly missing.

It is surprising, then, to find that Aristotle seems to agree with Fletcher that voluntariness is the defining feature of responsibility. Aristotle writes:

Virtue or excellence is, as we have seen, concerned with emotions and actions. When these are voluntary we receive praise and blame; when involuntary, we are pardoned and sometimes even pitied. Therefore, it is, I dare say, indispensable for a student of virtue to differentiate between voluntary and involuntary actions, and useful also for lawgivers, to help them in meting out honors and punishments. 74

Aristotle then considers classic examples of lesser evils and duress in terms of whether the constraint is sufficient or of the right kind to render the action involuntary and so to excuse it. 75

But consider the following passage:

Now, since the end is the object of wish, and since the means to the end are the objects of deliberation and choice, it follows that actions concerned with means are based on choice and are voluntary actions. And the activities in which the virtues find their expression deal with means. Consequently, virtue or excellence depends on ourselves, and so does vice. 76

Despite some familiar words, this passage is not altogether clear. In reading Aristotle, we soon realize that we are likely to err if we import into the Ethics our own categories of personality, causation, voluntariness, and responsibility. Aristotle’s psychology is fundamentally different from ours. As I will argue below, however, we have every reason to take his psychology seriously.

Most of what Aristotle says elsewhere in the Ethics makes it plain that his conceptions of voluntariness and responsibility bear little resemblance to ours. In Book III, chapter v, Aristotle contends that each person is responsible for his own character. 77 If I act in ignorance, but do not regret my action, Aristotle contends that I have not acted involuntarily. 78 Similarly, if I am physically forced into an action, but take pleasure in it, he suggests that I have not acted involuntarily. 79 These contentions appear odd and unsupportable. In our usage, my pleasure or regret over my actions has no bearing on voluntariness and certainly cannot render an ignorant or compelled action voluntary. We ask only whether, roughly speaking, I am the cause of the action or have an opportunity to act otherwise.

74 ARISTOTLE, supra note 5, at III.1.1109b.
75 See id. at III.1.1109–1110a.
76 Id. at III.5.1113b.
77 See id. at III.5.1113b.
78 See id. at III.1.1110b.
79 See id. at III.1.1110b; IRWIN, supra note 67, § 182, at 342.
Our differences with Aristotle come down to this: we tend to think of the person in this context as a causal agent and nothing more. He thinks of the person as a rational agent, with a minimum set of faculties that one must possess to be a candidate for responsibility, and that are fully in play when one acts in a truly voluntary fashion. One cannot understand Aristotle's arguments on responsibility, especially the argument that one is responsible for one's own character, unless one has a grasp of these various faculties and of the extent to which they transform our understanding of the moral agent.

Aristotle's rational agent is guided by prohairesis, variously translated as choice, decision or deliberative desire; and by boulesis, usually translated as wish, but more a rational desire for the good. We ordinarily take desire's object to be some immediate pleasure or end, and assume that when our ends conflict they can be reconciled under some relatively simple calculus of their respective strengths. The sort of decision denoted by prohairesis is more deeply deliberative. I do not consider the strength of my desires so much as the place of each in a whole life. I consider my desires critically; I ask how I came to have them, whether I ought to have them at all, and whether some other desires might not serve me better. Decision, in Aristotle's terms, is not determined by my current appetites or immediate needs, but by boulesis, my wish for the good. Boulesis, in turn, depends on prohairesis; they are reciprocal. My good, in this context, is comprehensive — much more than simple satisfaction. My good is to be, to the fullest extent possible, what each human being essentially is: a rational being.

That conception of the good obviously requires elaboration and defense, and we will take it up in the next section. For now, however, let us stay with the question of responsibility and consider what sort of rational agency Aristotle has in mind. The faculties of prohairesis and boulesis are distinctively human faculties. My horse has the ability to direct himself to cause external events; he can act, in our modern, limited sense, voluntarily. What he lacks, however, is the ability to conceive of himself as persisting through time, or as being

80 See IRWIN, supra note 67, §182, at 343-44.
81 See ARISTOTLE, supra note 5, at III.2, III.3.1113a; IRWIN, supra note 67, § 179, at 337.
82 See ARISTOTLE, supra note 5, at III.4.1113a n.15; IRWIN, supra note 67, § 174, at 331-32, § 179, at 337 & n.22, §191, at 359-60.
83 See ARISTOTLE, supra note 5, at III.2.1111b-1112a; IRWIN, supra note 67, § 179, at 337.
84 See ARISTOTLE, supra note 5, at III.4.1113a.
85 As Irwin describes it:
This deliberation about what promotes living well as a whole will form the wise person's rational wish; the way she conceives happiness; and this conception of happiness will be the rational wish from which she begins the sort of deliberation that results in a decision. IRWIN, supra note 67, § 179, at 337.
86 See ARISTOTLE, supra note 5, at I.7.1098a; IRWIN, supra note 67, § 199, at 374.
87 See ARISTOTLE, supra note 5, at III.2.1111b.
possessed of certain capacities that can be developed to a greater or lesser extent, or as a member of a society, or as having a final good that depends on all of these things and more. My horse, in short, lacks the ability to shape a life into a satisfying and adequate whole.

To Aristotle, this means that my horse lacks the essentials for responsibility or truly voluntary action. In the passage quoted earlier to suggest Aristotle's distance from us on those issues, he insists that "de-liberation" and "wish" are necessary aspects of voluntariness. That position seems initially to be consistent with our conception of voluntariness as self-direction. The appearance is misleading, however, because of the added weight those terms carry in the Ethics. In Aristotle's terms, deliberation and wish — prohairesis and boulesis — have to do specifically with the rational construction of a whole life over time.

Bearing that in mind, one can see why a rational agent so conceived might be not considered to be acting involuntarily when he takes pleasure in a compelled act or when he does not regret something done in ignorance. In such cases, the satisfaction reveals the act's accord with the actor's conception of his life, and the act is in that sense more thoroughly of or from the actor than if he were merely its cause. We also begin to see how Aristotle can attribute responsibility for my character to me. If I have the capacity to reflect on my ends, the means by which I would achieve them, and the relation of both to a whole life, I have the capacity as well to shape my life in each particular decision that I make. I am responsible for my character to the extent I am responsible for the decisions I make about the ends and effects that shape it. Of course, an answer to the determinist's standard objection is needed here, and one will follow. For now, however, we need at least to be clear that in treating issues of responsibility, Aristotle conceives of the person as more than just a cause of external events.

This conception of the person gives us part of what we need to rethink inculpation in Aristotelian terms. I have argued against instrumental accounts of inculpation, in part on the ground that the person at the center of such theories is a cause of harm and nothing more. Beginning with that truncated view cuts off a full consideration of character and the good in our thinking about inculpation — despite the fact that the rest of our thinking about inculpation tells us that character and the good are central to it. Aristotle provides us with a

88 See supra p. 1446.
89 See ARISTOTLE, supra note 5, at I.7.1098a, VIII.10.1160a; IRWIN, supra note 67, § 180, at 338–39.
90 See IRWIN, supra note 67, § 182, at 344.
91 See infra Part IV.D.
different way of understanding ourselves — as more than just causes of events — which gets to the heart of inculpation.

B. Self Realization and the Good

We are concerned here not only with responsibility, but also with virtue. When Aristotle says that a person is responsible for his own character, he means it. There does exist a state of character which is preferable to others in a fully normative sense. Before addressing the specifics of virtue, we need to understand how Aristotle gets to that normative level. In what has been said so far, no ground is apparent for preferring one life over another or for praising one set of decisions rather than another. The responsible agent exhibits prohairesis and boulesis, which are specifically concerned with the construction of a whole life. But in what sense, we might ask, am I or should I be concerned with the construction of such a life, rather than just the satisfaction of my immediate desires? Furthermore, even granted that I can construct a whole life out of my conception of the good and the consequent course of decision, is there any reason that the shape of that life cannot reflect whatever I happen to prefer as my good?

Aristotle opens the Nicomachean Ethics by arguing that our desires have a structure. We can identify one end which is pursued for its own sake, which our immediate ends ultimately serve and for the sake of which everything else is done. He identifies this final end as eudaimonia.92 The word is usually translated as “happiness,” but that translation is misleading in this context. Happiness can be renounced in favor of something else: nobility, godliness, or the happiness of others, for example.93 The eudaimonia which, according to Aristotle, is the final end and self-sufficient good, is better translated as “the best possible life.” As J.L. Ackrill points out: “This is why there can be plenty of disagreement as to what form of life is eudaimonia, but no disagreement that eudaimonia is what we all want.”94

Of course, the conclusion that the good of humankind is to live the best possible life is very nearly tautological. Aristotle notes this problem and argues that the best life or the highest good depends on the characteristic function — the ergon — of human beings,95 which he

92 See Aristotle, supra note 5, at I.6.1097a-1097b.
94 Id.
95 See Aristotle, supra note 5, at I.7.1097b. The categorization of beings by their characteristic function, or ergon, is fundamental to Aristotle’s teleological science. It is foreign to us, no doubt, but on the other hand, we should not read too much into it. To say that our good depends on our distinctive function is only to say that, in determining what is the good for humans, we need to heed what sort of beings we are. If we do not, we will address the wrong problem: determining some other being’s good, not our own. See Irwin, supra note 67, § 194, at 365. When Aristotle argues that the human ergon is not nutrition and growth because plants have
then identifies as the ability to reason. Specifically, Aristotle concludes that the *ergon* of man is the life of rationality in action, as opposed to the mere possession of rationality. Aristotle’s concern is to define not so much the good for humans as the good in humans — that aspect of humanity which can be made the leading principle in human life, so as to lead to an end or purpose needing no further justification.

The fundamental question for Aristotle’s rational agent, as for us, is: what shall I do? I might seek the satisfaction of the desires I find myself in possession of, but Aristotle relies on our considered judgment that such a life is unworthy. Out of the most basic concern for myself, I will attend not only to my immediate desires, nor even just to my future desires, but primarily to the human capacities that underlie my desires. It makes sense for me, as a rational agent, to seek a life that draws on the greatest range of those capacities. *Eudaimonia*, the best possible life, is simply the most complete human life, in that sense of “complete.”

*Eudaimonia* consists exclusively of the contemplative life. See Ackrill, *supra* note 93, at 29 (“And the whole further development of the work, with its detailed discussion of moral virtues and its stress upon the intrinsic value of good action, follows naturally if (but only if) the conclusion of the *ergon* argument is understood to refer to complete and not to some one particular virtue.”); see also Amelie O. Rorty, *The Place of Contemplation in Aristotle’s Nicomachean Ethics*, in ESSAYS, *supra* note 93, at 377, 391–92 (reconciling competing views). But see Robert Heinaman, *Eudaimonia and Self-Sufficiency in the Nicomachean Ethics*, 33 PHRONESIS 31, 32–35 (1988) (taking contemplation as happiness); Thomas Nagel, *Aristotle on Eudaimonia*, 17 PHRONESIS 253, 257–59 (1972) (discussing contemplation of the divine as happiness).

96 *See* ARISTOTLE, *supra* note 5, at X.7.1174a.  
97 *See* id. at X.7.1179a. The latter point is obscured later in the *Ethics* when Aristotle suggests that *eudaimonia* consists exclusively of the contemplative life. See id. at X.7.1179a–X.8.1179a. We may set that controversy aside for the moment. The better argument seems to be the contention that *eudaimonia* is a more comprehensive quality than the contemplative life. See Ackrill, *supra* note 93, at 29 (“And the whole further development of the work, with its detailed discussion of moral virtues and its stress upon the intrinsic value of good action, follows naturally if (but only if) the conclusion of the *ergon* argument is understood to refer to complete and not to some one particular virtue.”); see also Amelie O. Rorty, *The Place of Contemplation in Aristotle’s Nicomachean Ethics*, in ESSAYS, *supra* note 93, at 377, 391–92 (reconciling competing views). But see Robert Heinaman, *Eudaimonia and Self-Sufficiency in the Nicomachean Ethics*, 33 PHRONESIS 31, 32–35 (1988) (taking contemplation as happiness); Thomas Nagel, *Aristotle on Eudaimonia*, 17 PHRONESIS 253, 257–59 (1972) (discussing contemplation of the divine as happiness).

100 This insight, it should be noted, plays an important role in Rawls’s theory of justice. He uses what he calls the “Aristotelian Principle” as a principle of motivation in the original position. *See* RAWLS, THEORY, *supra* note 2, at 47–28.
Eudaimonia, then, is not mere contentment or satisfaction, but the attainment of distinctively human purposes. The normative force of Aristotelian ethics, the reason we should pursue such an end, is bound up in eudaimonia so defined. We would live such a life not to conform or to comply, but because such a life is the best we can have.\(^{101}\)

This principle might be framed as a matter of self-interest, were the terminology of self-interest not completely engrossed by the tradition of Hobbes and his heirs in modern market economics. That tradition assumes a fundamental conflict between the self and the rest of humanity. Aristotle, in contrast, sees a direct connection between eudaimonia and life among others. The final good is self-sufficient, he argues, in a special sense:

[W]e define something as self-sufficient not by reference to the “self” alone. We do not mean a man who lives his life in isolation, but a man who also lives with parents, children, a wife, and friends and fellow citizens generally, since man is by nature a social and political being.\(^{102}\)

If we are mystified by this intimate connection between my final, highest good and political life, it is because of our unexamined assumption that serving the good of others or of all necessarily detracts from our own.

Aristotle’s conception of eudaimonia and its connection to the development of human capacities helps us to see an alternative sort of altruism.\(^{103}\) Aristotle describes friendship as concern for another in himself, because of himself, or because he is who he is.\(^{104}\) I am concerned with my friend as for myself; specifically, I am concerned with him as a rational agent. I care about his development and the scope of his life, just as I do for my own.\(^{105}\) Indeed, my concerns are indistinguishable: in seeking the good of my friend, I encounter additional opportunities for my own self-realization.\(^{106}\) Simply because humans live together rather than alone, the complete human life I seek will entail a significant involvement with others and with the construction of their lives.\(^{107}\)

The same principle extends beyond friendship to political life. My self-realization requires political involvement because such involvement presents additional, necessary opportunities to draw upon and

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\(^{101}\) See IRWIN, supra note 67, § 241, at 447–48, 421–22.

\(^{102}\) ARISTOTLE, supra note 5, at I.7.1097b; see also id. at IX.9.1169b (reiterating that “man is a social and political being” in the context of discussing the relationship between friendship and happiness).

\(^{103}\) Miriam Galston makes the point that the leaders of the republican revival often mistakenly portray civic virtue as necessarily requiring self-sacrifice. See Galston, supra note 7, at 344.

\(^{104}\) See ARISTOTLE, supra note 5, at VIII.3.1156b, IX.4.1166a–1166b, IX.8.1168b.

\(^{105}\) See id. at IX.4.1166a.

\(^{106}\) See id. at IX.9.1170a, IX.11.1173b–IX.12.1172a.

\(^{107}\) See id. at IX.8.1169a–1169b, IX.9.1169b.
develop my human capacities. It is in this sense that Aristotle sees humans as essentially political animals. This conception of selves and of politics, however, leaves out the war of all against all. We are political not just because we have been thrown in together, but because we present each other with the opportunity for more complete lives.

The normative force of Aristotelian ethics comes out of this special sort of self-concern. The virtuous life, for Aristotle, is the life of full involvement with the community’s good. The mark of virtue is not conformity to external standards, but practical wisdom — an excellence of deliberation and decision in an active, engaged life. That life is the one we ought to pursue, not because any variety of god tells us to, but simply because it is the best life we, as human beings, can have.

C. Aristotle’s Conception of Virtue

In Book II of the *Ethics*, Aristotle specifies virtue as action and emotion in accord with the mean. On the surface, this definition sounds banal, like a call to timidity or complacency. That criticism assumes, however, that the mean is a known quantity, a determinate rule of prudence with which one must simply comply. It is not. On the contrary, Aristotle deliberately refuses to provide such a rule, and his reasons for doing so are at the heart of the *Ethics*.

Aristotle defines virtue in this central passage:

> We may thus conclude that virtue or excellence is a characteristic involving choice, and that it consists in observing the mean relative to us, a mean which is defined by a rational principle, such as a man of practical wisdom would use to determine it.

Any resemblance to or suggestion of a Rawlsian thought experiment is purely coincidental. Aristotle does not set out to say what the mean is, nor does he provide a decisionmaking procedure for determining what it is. He provides instead a description of practical wisdom in action and of virtue’s organic definition in a life guided by practical wisdom. “[V]irtue or excellence is a characteristic involving choice...”

We can draw two points of Aristotle’s larger argument out of that clause. Aristotle makes clear elsewhere that choice entails deliberation. He notes that we deliberate only over that which is contingent, which can be other than what it is, and not over that which is as it is by necessity. We neither choose nor deliberate about mathe-

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108 See id. at IX.9.1169b–1170a; IRWIN, supra note 67, § 217, at 405.
109 See ARISTOTLE, supra note 5, at II.6.1106b.
110 Id. at II.6.1106b–1107a.
111 Id.
112 See id. at III.2.1112a.
113 See id. at III.3.1112a–1112b.
matics or logic. That virtue thus concerns only the contingent, undetermined parts of human life will prove to be significant.

The second point concerns the objects of this deliberation. Aristotle appears to assert in Book III of the Ethics that humans deliberate about means, but not ends. In Book VI, however, he writes as if we deliberate about ends as well. The apparent contradiction is generally resolved in favor of Book VI. This issue is far more than a point of translation. The possibility of our deliberating on ends is critical to our understanding of the Ethics. To his everlasting credit, Aristotle understood that life is not simply a matter of maximizing. We cannot maximize utility, efficiency, or any other value unless we know, in concrete terms, what we want. The assumption that humans maximize whatever it is they do happen to want has its place as a theoretical assumption in economic theory, and a similar assumption is the central pillar of deontological political theory. However, for Aristotle's purposes, for a description of life as it is actually lived, the assumption is plainly misleading. In real life, we deliberate over competing courses of action, and our deliberations concern ends, not just the means to maximize fixed ends. Because he is concerned with this deeper sort of deliberation, Aristotle cannot simply take our desires as a given. He is concerned with what those desires are and how we arrive at them.

It is the combination of these two premises — that we deliberate about only that which is contingent and that we deliberate about our ends — that makes it impossible to reduce to a determinate rule either

\[ \text{See id. at III.3.1112b.} \]

\[ \text{See id.} \]

\[ \text{See id. at VI.9.1142b.} \]

\[ \text{See id. at VI.9.1142b.} \]

\[ \text{See id. at VI.9.1142b.} \]

\[ \text{Scholars have frequently noted that Aristotle fails to distinguish between means that are instruments to achieving an end — such as moving a chair in order to reach a light bulb — and means that are constitutive of an end — such as moving one's queen in a game of chess. See, e.g., David Wiggins, Deliberation and Practical Reason, in Essays, supra note 93, at 221, 224. Wiggins points out that the phrase Aristotle actually uses, } \text{pros to telos}, \text{is better translated as "toward the end," rather than as "means to an end." Id. at 223-24. He argues that the Greek phrase comprehends both the instrumental and constitutive senses of "means." See id. at 224-27; see also Ackrill, supra note 93, at 19 ("That the primary ingredients of eudaimonia are for the sake of eudaimonia is not incompatible with their being ends in themselves; for eudaimonia is constituted by activities that are ends in themselves."). Although that argument does not salvage Aristotle's failed hope of using the instrumental sense of "means" to illuminate the constitutive sense, it does mean at least that Book III does not deny the possibility of deliberating on ends. See Wiggins, supra, at 224-27.} \]

\[ \text{Wiggins writes:} \]

\[ \text{There are theories of practical reason according to which the ordinary situation of an agent who deliberates resembles nothing so much as that of a snooker player who has to choose from a large number of possible shots that shot which rates highest [as a probable success] . . . . But with ordinary deliberation it is quite different. There is nothing which a man is under antecedent sentence to maximize; and probabilities, though difficult and relevant, need not be the one great crux of the matter.} \]

\[ \text{Wiggins, supra note 117, at 232.} \]
the mean that constitutes virtue or the choosing involved in virtue. In
deciding on a course of action, the parameters of the problem are not
immediately apparent to us. We must figure out both how to live a
good life and what a good life is. We set goals, identify the relevant
concerns, frame the issues, assess the limits of the possible, hypothesize
solutions, and test and revise those solutions in a constant and infinite
process of feedback, adjustment, and incremental advancement. That
process, dialectical by nature, is Aristotle's focus in the definition of
virtue as the mean.\footnote{As Wiggins puts it:

The man of highest practical wisdom is the man who brings to bear upon a situation the
greatest number of genuinely pertinent concerns and genuinely relevant considerations
commensurate with the importance of the deliberative context. The best practical syllo-
gism is that whose minor premise arises out of such a man's perceptions, concerns,
and appreciations. It records what strikes such a man . . . in the situation [as the] most salient
feature of the context in which he has to act. This activates a corresponding major prem-
ise that spells out the general import of the concern that makes this feature the salient
feature in the situation. . . . Its evaluation is of its essence dialectical, and all of a piece
with the perceptions and reasonings that gave rise to the syllogism in the first place.
\textit{Id.} at 234.}

Virtue is the dialectic as the man of practical wisdom conducts it.
Aristotle writes: "Virtue or excellence is not only a characteristic which
is guided by right reason, but also a characteristic which is united
with right reason; and right reason in moral matters is practical wis-
dom."\footnote{ARISTOTLE, \textit{supra} note 5, at VI.13.1144b.} The centerpiece of Aristotle's \textit{Ethics}, then, is practical wis-
dom, or \textit{phronesis}.

\textbf{D. Phronesis and the Dialectic of the Good}

\textit{Phronesis} is the ability to deliberate on and frame an overall con-
ception of the good life — that is, the life well lived — and to inte-
grate one's particular choices into that all-encompassing conception.\footnote{As Aristotle describes it:

Practical wisdom . . . is concerned with human affairs and with matters about which
deliberation is possible. As we have said, the most characteristic function of a man of
practical wisdom is to deliberate well: no one deliberates about things that cannot be other
than they are, nor about things that are not directed to some end, an end that is a good
attainable by action. In an unqualified sense, that man is good at deliberating who, by
reasoning, can aim at and hit the best thing attainable to man by action.
\textit{Id.} at VI.7.1141b.} The person possessed of \textit{phronesis}, the \textit{phronimos}, is a person of ma-
ture judgment who does not simply know universal truths or the par-
ticular facts from which universal principles can be inferred. She is
one, rather, who has the capacity to integrate the universal and the
particular: to identify and pursue the good amid the contingencies of
practical human affairs.\footnote{See \textit{id.} at VI.7.1141b-VI.9.1142b; Wiggins, \textit{supra} note 117, at 235–37.}

\textit{Phronesis} is familiar to us in our everyday lives. It is a quality of
mind we recognize in those whose wisdom, judgment, or sagacity we
admire, and which we are proud to discover in ourselves if we can. The *phronimos* navigates the world of practical human affairs with a judicious eye for particulars, generating flexible, creative responses to the circumstances in which she finds herself, without relying on doctrine or ideology, without demanding certainty — and yet never being overwhelmed by detail or falling victim to confusion, doubt, or hesitation. The product of *phronesis* is action, not understanding. The *phronimos* is one who simply does the right thing in the given circumstances.

The truth that the *phronimos* locates in the particulars of contingent human affairs is, specifically, the good. *Phronesis* is not mere cleverness, nor is the excellence of deliberation that the *phronimos* displays merely sound instrumental reasoning. The object of the *phronimos*’s deliberations is not only the means to her given ends but those ends themselves. It is her concern with the good that distinguishes the *phronimos* from one who is merely clever. This good is not merely her own good but a broader, political good. Aristotle notes that *phronesis* is commonly held to be a matter of knowing one’s own good. “And yet,” he writes, “surely one’s own good cannot exist without household management nor without a political system.” Indeed, the good for the person and the good of politics are recognized as inseparable throughout the *Ethics*.

Just as *phronesis* is distinguished from cleverness by a concern with the good, the truly virtuous are distinguished from the naturally good by their possessing *phronesis*. “We tend to be just, capable of self-control, and to show all our other character traits from the time of our birth. Yet we still seek something more, the good in a fuller sense,

123 See Aristotle, supra note 5, at VI.7.1141b, VI.10.1143a.
124 *Phronesis*, not surprisingly, is never found among the young. However skilled a young person might be in mathematics, for example, he cannot be expected to display *phronesis*: “The reason is that practical wisdom is concerned with particulars as well as with universals, and knowledge of particulars comes from experience. But a young man has no experience, for experience is the product of a long time.” *Id.* at VI.9.1142a.
125 See *id.* at VI.12.1144a.
126 Aristotle writes:
Without virtue or excellence, this eye of the soul, <intelligence>, does not acquire the characteristic <of practical wisdom> . . . . For wickedness distorts and causes us to be completely mistaken about the fundamental principles of action. Hence it is clear that a man cannot have practical wisdom unless he is good.

*Id.*
127 *Id.* at VI.8.1134a.
128 Aristotle writes:
This good, one should think, belongs to the most sovereign and most comprehensive master science, and politics clearly fits this description. . . . Since this science uses the rest of the sciences, and since, moreover, it legislates what people are to do and what they are not to do, its end seems to embrace the ends of the other sciences. Thus it follows that the end of politics is the good for man.

*Id.* at I.2.1094a–1094b.
and the possession of these traits in another way.\textsuperscript{129} The "something more" is the possession of individual virtues with a consciousness of their underlying practical logic, so that in possessing one virtue, we possess all. True virtue is a \textit{hexis prohairetike}, a fixed, deliberative disposition toward the good, in which the truth of the good pursued is ensured by \textit{phronesis}, or excellence in deliberation.\textsuperscript{130} Indeed, Aristotle concludes, as already noted, that virtue and \textit{phronesis} are identical.

It is the fact that final ends and the good are in play that gives \textit{phronesis} its distinctive quality as an intellectual faculty. Its dialectical nature is well articulated by David Wiggins:

No theory, if it is to recapitulate or reconstruct practical reasoning even as well as mathematical logic recapitulates or reconstructs the actual experience of conducting or exploring deductive argument, can treat the concerns which an agent brings to any situation as forming a closed, complete, consistent system. For it is of the essence of these concerns to make competing and inconsistent claims. (This is a mark not of irrationality but of rationality in the face of the plurality of ends and the plurality of human goods.) The weight of the claims represented by these concerns is not necessarily fixed in advance. Nor need the concerns be hierarchically ordered. Indeed, a man's reflection on a new situation that confronts him may disrupt such order and fixity as had previously existed, and bring a change in his evolving conception of the point (to \textit{kai hueka}), or the several or many points, of living or acting.\textsuperscript{131} Indeed, it should come as no surprise that a faculty or quality of mind that takes as its objects the contingent and the particular in human desire and action, deliberating with an eye to the good not only of the self, but also of the self in the context of all, should be fundamentally indeterminate. Plainly, no determinate set of universally applicable rules could comprehend and regulate such complexity. We know implicitly that no such rules exist to bring order to life — if, that is, we see life as more than a matter of maximizing those ends we do have, and begin to contemplate what ends we ought to have.

\textbf{IV. A Republican Theory of Inculpation}

The ends one ought to have is the special concern of the criminal law. We use that particular body of law to examine, assess, and, where proper, condemn the choices individuals make in forming and pursuing their particular visions of the good. We do so legitimately because of the interest each of us has in the quality of others' deliberations on the good — an interest that arises from the inescapable fact that the good of each of us is inextricable from the good of all. If,

\begin{itemize}
  \item \textsuperscript{129} Id. at VI.13.1144b.
  \item \textsuperscript{130} See id. at VI.9.1142a-1142b.
  \item \textsuperscript{131} Wiggins, \textit{supra} note 117, at 233.
\end{itemize}
with Aristotle, we take virtue to be a quality of excellence in one’s conceiving the good and formulating a scheme of ends, inculpation is a judgment on virtue.

Virtue is a feature of republican political theory, a theory strongly at odds with current conceptions of democracy. Republicanism is a teleological theory of politics. It supposes there is an end, a purpose, a greater good served by political association. That greater good is not, as we are accustomed to thinking of it, the aggregate good of society’s members or the sum of their individual desires. Whereas liberalism takes the good to be the aggregate of individual preferences or concerns itself with the distribution of primary goods and a fair opportunity to pursue one’s own idea of the good, republican theory posits a greater good that transcends and comprehends individual preferences. The good, broadly conceived, is independent of individual desires, and individual desire may quite reasonably be expected to serve it.

The agenda of the first substantive section of this Article ought now to be apparent. My aim was to suggest that a republican criminal law is not a proposed reform, but what we have now. Deontological political theory, whatever its merits in explaining distributive justice, is inadequate to explaining criminal justice. We need an alternative theory to cope with the fact that the criminal law condemns the decisions and actions of individuals in their pursuit of the good as they conceive it. The aspiration to neutrality with regard to individual conceptions of the good — which, however it is formulated, is the principal feature of deontological theories of distributive justice —

132 See Wood, supra note 6, at 58.
133 As Ronald Beiner observes:
The basic point is this: If our world succumbs to nuclear or ecological catastrophe, we all suffer the same fate; if injustice, inequality, and political oppression run rampant in our world, we are all diminished as human beings; if the absence of a common culture leads to a new, postliterate barbarism, we are all the worse for it. The minimum notion of community required to cope with these grave political realities is the sense that our fate, for good or ill, is a shared one, from which no one can sensibly retreat into a private domain of either pleasures of consumption or burdens of conscience. The great mistake of liberalism is to pretend that all modernity forces us to regard private morality as reigning supreme and public morality as limited to the business of negotiating the “successful accommodation” between ourselves as rational individuals. The problem with liberalism is not that it deprives us of the delights of communal attachments, whether national, ethnic, sectarian, or whatever, but that it tends to cause us to forget that our destiny in this dangerous world of ours is a collective destiny, and that the perils of insufficient citizenship are likewise shared. Ronald Beiner, What’s the Matter with Liberalism? 34 (1992) (citation omitted).
134 Rawls acknowledges that justice as fairness is not procedurally neutral because it does more than organize a decision procedure based on such values as impartiality, consistency of application, and equal opportunity to be heard. See Rawls, Liberalism, supra note 2, at 192. Nor is justice as fairness neutral in its effect, because “the facts of commonsense political sociology” tell us that a liberal regime is likely to affect the viability of comprehensive moral doctrines in terms of adherents and converts. Id. at 193–94. Stripped of those connotations of “neutrality,” however, he argues that justice as fairness is neutral in aim in the sense of preserving for persons
renders deontology useless in explaining and understanding inculpation as it now occurs.

A. Inculpation as a Judgment on Virtue

As noted in Part I, every defendant has excuses and justifications for his actions and, regardless of society's evaluation of his defenses, they hold good in his own mind. Those who commit crimes do so incidentally, as it were; not just to cause harm but in the pursuit of other ends, and by the use of means, the legitimacy of which they assert by their actions. In finding them guilty, we necessarily reject and condemn their pursuit of those ends or their use of those means. Their offense is, in the final analysis, a failure of practical judgment: they have failed to assemble and pursue an appropriate scheme of ends premised on an adequate conception of the good. We blame and punish them for that failure.

This thesis is the conception of inculpation to which Moore and Fletcher allude in their different ways, but which neither elaborates. Moore argues that excuses involve an interference with practical reason, but does not pursue the implication that culpable acts must therefore exhibit practical reason which is in some sense faulty. Fletcher observes that a good excuse serves to bar our assessing the actor's character, but he declines to follow out the implication that a bad character is some part of culpability. If, with Aristotle, we take practical judgment as the prime constituent of character, Fletcher and Moore can be said to share a single insight. Neither chose to pursue it, but it rings true to those with a working acquaintance with criminal behavior.

If, despite the weight of scholarly authority, we decide to place character and practical judgment at the center of inculpation, what is our warrant for doing so? How do we justify an assessment of another's virtue with such extraordinary consequences? The answer depends in large part on what we mean by virtue. If we take it in the colloquial sense as conformity to a code of behavior, the demand for justification rightly shifts to a demand for justification of that code. Orthodox believers have no difficulty with that demand, ready as they are to affirm the authority of a divine being, but in a constitutional democracy with a heterogeneous population, any such approach to virtue and inculpation is doomed to fail.

Aristotelian virtue has a singular advantage in this regard in that it relies at all points on the exercise of individual judgment. To appreci-

an "equal opportunity to advance any permissible conception [of the good]." Id. at 193. Dworkin's theory that the state is not to promote or assist any particular comprehensive moral doctrine is, according to Rawls, also neutral in aim. See id. at 193 (citing DWORKIN, supra note 2).

135 See Moore, supra note 52, at 1129.
136 See FLETCHER, supra note 13, § 10.3, at 799–807.
ate this advantage, recall the reason for virtue's importance to republican political theory: if action springs from a virtuous self, the greater good will be served without the need to coerce compliance with norms. Aristotle defines virtue almost as if he had that problem in mind. Each of us is concerned with our own happiness. True happiness requires the construction of a whole life, drawing on the greatest range of our innate human capacities. Such a life demands friendship and political engagement with the life of the community. One who is fully successful in this enterprise is the *phronimos*, the person who can reconcile her own ends with a larger vision of the ends of her society. That, for Aristotle, is virtue: not conformity, but a quality of judgment.

In this light, the good is not a given, not a monolithic, prescriptive constraint on action; it is not even determinate. Both virtue and the good are defined in the course of the life well lived, in reciprocal relation to each other and in a constant dialectic with the world of practical experience. Neither the good nor virtue has any meaning apart from the ongoing, active participation of real people in ordinary life. For purposes of a republican politics, then, Aristotelian ethics reconciles freedom with virtue and the good by making the good a function of virtue, virtue a function of the good, and both a function of individual judgment.137

This definition of the good would be question-begging but for Aristotle's stipulation that the life well lived is one that serves the *ergon* of humankind; one that develops our distinctive rationality. The meaning and role of *ergon* in the *Ethics* and in this theory of inculpation will be taken up in Part IV.B., which addresses the charge of perfectionism. For now, however, let me dwell a little longer on the idea that the definition of the good is something in which we are all engaged during the ordinary course of our lives.

I began this discussion by asking about our warrant for inculpation — how we justify an assessment of another's virtue with extraordinary consequences like imprisonment and death. That warrant or justification would have to be based on some interest we all claim in the quality of that person's judgment. Aristotle's understanding of the relation between practical reason and the good, in *phronesis*, gives us the hint of an answer: if each of us is engaged in defining the good,

137 Stephen Feldman reaches a similar conclusion in recasting the common good as a postmodern interpretive concept:

We consequently reunite two components of the civic republican tradition: deliberative politics and the common good. Only now, we realize that these two components do not stand tensely opposed, rather they are dialectically linked in a postmodern interpretive circle. The substantive goal of identifying a common good generates political dialogue, while the process of political dialogue generates the common good. Process and substance collapse into each other.

Feldman, supra note 4, at 1281 (citation omitted).
each of us has an interest in how the others carry out that task. There are at least two ways to elaborate this thought. In doing so, we will articulate the interest in others’ judgment that grounds inculpation.

We can begin with the unremarkable observation that human beings are interdependent. One might say that human society is organic in that sense, were it not for the fact that there is no social organism that intelligently or otherwise pursues its own good. Nor is the good of society immediately apparent, or even determinate, in a way that enables the members of a society simply to pursue that good. Certainly it is not so obvious or uncontroversial that the good can be dictated into collective action. Whatever the need for collective action our interdependence may seem to impose, the greater good can be identified and pursued only through instances of individual judgment.

The individual judgments that bear on the greater good are not only those that concern overtly political questions. Because of our interdependence, the good of another or of the whole may be implicated in any particular decision that any one of us may face. The others have an unavoidable need, and therefore a reasonable expectation, that such decisions will be made well, with a cognizance of the wider implications of the decision and with both the willingness and the capacity to choose the course which best serves the greater good where it is implicated. We require, in short, that members display a certain amount of maturity, disinterestedness, and perspicacity in judging their own actions. The problem of inculpation can be approached as the task of understanding the quality of judgment that we demand of all, and that we find lacking in those we deem culpable.

The other way to articulate our legitimate interest in the individual actor’s deliberations on the good is to consider the nature of the person. Two views of the person, which are often put in opposition to one another, are prominent in political theory. The first is the individual of liberal theory: the person supported from the inside. \(^{138}\) He is an autonomous being, possessed of a will by which he determines his relations to the world around him. He has the capacity for free choice, for the independent determination of his own ends and for the definition of his own identity. The second view of the person takes society

\(^{138}\) See, e.g., Bruce A. Ackerman, Social Justice in the Liberal State 227 (1980) ("For [the liberal,] the overriding fact is that he finds himself among a large number of individuals, each one of whom affirms his own good . . ."); Ronald Dworkin, Why Liberals Should Care About Equality, in A Matter of Principle, supra note 2, at 205, 205 ("Government] must impose no sacrifice or constraint on any citizen in virtue of an argument that the citizen could not accept without abandoning his sense of equal worth"); Mill, supra note 3, at 161 ("He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation."); Rawls, Liberalism, supra note 2, at 304–10 (describing a theory of justice premised on individual choice of social institutions employing a minimal index of primary goods); Rawls, Theory, supra note 2, at 395–99 (explaining the need for a thin theory of the good in a deontological theory of justice).
to be constitutive of the self. One’s identity is not an irreducible core of being, but a function of one’s relations to the outside world and to others. I am what I am by virtue of being raised in this family, adhering to that religion, living in this neighborhood, and receiving and affirming that set of philosophical assumptions. Each of these commitments and communities can be seen as a coordinate, the set of which defines my place in the world and the contours of my self.

One of these two views of the person is emphasized in various competing and inconsistent political theories. In themselves, however, they are neither inconsistent nor mutually exclusive. On the contrary, both meet the test of ordinary experience. The person is neither a purely self-sufficient being nor merely an aspect of society. We push back against our environment and influences, just as they constantly press in on us. The person is the temporary product of this ongoing, dynamic process: a momentary balance in the push from within and the push from without. In that dialectic, the person is neither sovereign nor cipher. The person is a participant: discrete but engaged; a creature of the speech, agreements, symbols, texts, conventions, and institutions of society, but equally the author of that world of meaning through her intentional participation in it.

Foremost among such theories is Hegel’s notion of Sittlichkeit:

The doctrine which puts Sittlichkeit at the apex of moral life requires a notion of society as a larger community life ... in which man participates as a member.

Now this notion displaces the centre of gravity, as it were, from the individual onto the community, which is seen as the locus of a life or subjectivity, of which the individuals are phases.

CHARLES TAYLOR, HEGEL 378 (1975). Burke strikes a similar note in praising “just prejudice” and tradition:

We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages. Prejudice renders a man’s virtue his habit, and not a series of unconnected acts. Through just prejudice, his duty becomes a part of his nature.

EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 99 (Thomas H.D. Mahoney ed., 1955) (1790) More recently, Michael Sandel’s response to Rawls is in the same vein:

But we cannot regard ourselves as independent in this way without great cost to those loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are — as members of this family or community or nation or people, as bearers of this history, as sons and daughters of that revolution, as citizens of this republic.


Again, Feldman makes a similar point in applying postmodern interpretivism to republican theory:

Postmodern interpretivism reveals that the individual and the community are dialectically intermingled. Each individual always remains situated within a community and its traditions, which simultaneously enable and constrain one’s ability to communicate and interact — to be, in short, a person. Yet, the community and its traditions continue to exist only insofar as they constantly are constructed and reconstructed through concrete individual acts, words, and thoughts.

Feldman, supra note 4, at 2287 (citation omitted).
It is here that we locate an individual responsibility for defining the good that can be legitimately enforced by others and that can serve as a ground for inculpation as a judgment on virtue. If the person is defined in an ongoing transaction with the society he occupies, society is defined in the same transaction. The texts, symbols, and institutions that make up society have a constitutive, transformative effect on its members, but it is no less true that those texts, symbols, and institutions do not exist apart from the individual members who occupy, alter, and employ them. Each of us has a transformative, constitutive effect on the social world around us. If we define the society around us as we define ourselves — as we envision the good for ourselves and assemble our own schemes of ends — we bear a responsibility to others to conceive and pursue our ends in a way that promotes the greater good. Defining the good and determining ends are acts over which we maintain some control and upon which the well-being of others depends.

The criminal law asserts and enforces that responsibility. Criminal liability is not imposed because the actions of the defendant fall into a particular pattern or have a particular result. In the actual adjudication of a criminal case, the focus is not just on the harm done. The question — made explicit in cases of colorable justification or excuse, but implicit in every case — is whether the choices the actor made, in the particular circumstances she faced, reflect sound practical judgment in the pursuit of appropriate ends.

B. Virtue as a Jury Question

One might well ask what “a judgment on virtue” or “an assessment of virtue” means in the context of a criminal trial. Does phronesis supply a rule to which conduct must conform? Is the phronimos a standard, similar to the ubiquitous reasonable person, to which the jury compares the defendant and his actions? The answer to these questions is no. But why?

Recall the nature of phronesis. It is a quality of judgment, a quality of the person, not an abstraction about actions. It is not a rule or a standard. Neither phronesis nor specific judgments made by the phronimos are reducible to any definite, generally binding formula or normative idea. The question, then, is how phronesis can serve as a guide to action or, more to our point, as a guide to judgments about actions.

The short answer is that the jury decides whether the actor’s decision, in its particularity, was the right one under the circumstances.141 Jurors at trial are presented with the set of circumstances under which the defendant acted, closely defined by rules of evidence and articu-

141 I note again that I am holding constant exogenous influences on jury deliberations. See supra note 49.
lated with as much specificity and concrete particularity as the parties to the case can muster. In deliberating, each juror decides, ultimately, whether she would have acted in the same way as the accused under the given circumstances. That decision is a collaborative one: the point of assembling a jury is to check the possibly biased, possibly idiosyncratic, possibly arbitrary judgments of an individual decision maker, with a view to approximating the community’s judgment about the good of all. Achieving that approximation is the purpose of requiring jury unanimity in criminal cases.\textsuperscript{142}

The judgment the jury makes is not about the actions of the accused, but about the right course of action in the circumstances of the accused. This distinction is slight but significant. The former decision is the sort exemplified by the reasonable person standard: a matter of imposing a template on a course of events, then approving a match or condemning a discrepancy. The latter decision is itself an exercise of practical judgment. A comparison is made, to be sure, between the course of action the jurors would have pursued and the course of action actually taken by the accused. But the respective terms of that comparison are particularized practical judgments generated out of the facts of the situation: the judgment of the accused in the actual event and the judgment of the jury in the evidentiary reconstruction.

The jury’s decision is, ultimately, not a matter of imposing a universal rule on a set of facts. Once we see this, it alters fundamentally our understanding of inculpation. The decision is not about the proper distribution of social goods such as bodily integrity and property; the decision is one about judgment. If, with Aristotle, we take judgment to be the prime constituent of character, inculpation is, as we have long suspected, a decision about character.\textsuperscript{143}

This theory of inculpation explains the most prominent features of the criminal trial. It accounts for our intense concern with the careful and orderly presentation of the evidence in ways that are not misleading or biased. It also explains the importance — otherwise suspect as distorting rhetoric — of essential lawyering skills in a criminal trial: the importance of creating empathy and a vivid sense of the defendant’s circumstances, concerns, and perceptions. These features of the

\textsuperscript{142} See Burch v. Louisiana, 441 U.S. 130, 138 (1979) (holding that a nonunanimous verdict of a jury of six violates due process and the Sixth Amendment). But see Apodaca v. Oregon, 406 U.S. 404, 411 (1972) (holding that the Sixth Amendment does not require a unanimous jury of twelve); Johnson v. Louisiana, 406 U.S. 356, 363 (1972) (holding that due process does not require a unanimous jury of twelve).

\textsuperscript{143} It might be objected that character evidence is excluded from criminal trials and that therefore such trials cannot assess character. See Fed. R. Evid. 404. The objection rests in part on a misunderstanding of the rule. What the rule excludes is propensity evidence: the admission of evidence of prior acts to show action in conformity therewith. Even without instances of prior behavior to rely on, however, the jury can assess the judgment displayed by the accused in the circumstances of the offense and the adequacy and appropriateness of the scheme of ends implicit in her action. No “character evidence” of any description is needed to make such an assessment.
criminal trial, like jury unanimity, simply make more sense if we think of the trial as an exercise in which the jury members assess the judgment of the accused by comparing her responses and choices to their own in light of her circumstances.  

In this light, the institution of the jury itself takes on an added dimension. The jury is not merely a fair or democratic means of arriving at a decision that could be reached equally well by a judge or by any bystander trained in the applicable law. The jury is an organic part of the judgment itself. The decision the jury is asked to make is not whether the facts fall into a particular pattern that leads to inculpation, excuse, or justification. The question is not viewed from the legislator's perspective but at the level of the accused herself. In actually adjudicating the case, we engage in an explicitly communal exercise in which peers of the actor are placed in a carefully designed and controlled situation in which a set of circumstances is laid out before them in concrete terms. The jury then applies its own collective judgment to the question of the appropriate course of action, and in that way determines whether the accused chose his course of action correctly. In that sense the jury is a vital part of criminal adjudication. The judgment on inculpation is not one that can be reached other than by means of a jury.

This view of inculpation and the jury is open to several objections. It seems wrong to say that inculpation is not a matter of imposing rules on a set of facts. The jury has its instructions which contain, at a minimum, the prohibitions of a criminal code. Those instructions are assembled by a judge, who may well disallow certain defenses. It appears the jury's decision is by no means the free-ranging, particular-

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144 Given the degree to which such a jury decision is embedded in the concrete circumstances and actions of the defendant, there should be no fear that my theory would sanction "thought crimes." We do not punish intentions; some bad act is required. See LAFAVE & SCOTT, supra note 17, §3.2, at 271; see also LEO KATZ, BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW 153 (1987) (citing reasons such as the impossibility of enforcing such prohibitions, universal criminalization resulting from every person's occasional bad thoughts, the impossibility of grading such crimes by their seriousness or severity, and the oppressive effect on mental life generally).

The theory advanced here premises inculpation on practical judgment and virtue, but in Aristotle's theory, neither practical judgment nor virtue can be exercised in the abstract. Phronesis issues in action, not in thought. See infra pp. 1467-68.

145 This is not to say that criminal bench trials are illegitimate. The organic connection between inculpation and the institution of the jury helps to explain the constitutional presumption of jury trials in criminal cases, see U.S. CONST. art. III, § 2, cl. 3; id. amend. VI, even where the defendant wishes to waive that right, see Singer v. United States, 380 U.S. 24, 26 (1965). The connection also explains the value placed on jury trials historically. Against that historical and constitutional background, the criminal bench trial can only be seen as a surrogate for the jury — a "jury of one." At the defendant's option, the judge may hear the same evidence in the same controlled fashion as the jury. The judgment he makes will be the same as the jury's: whether the accused's actions display sound practical judgment in the pursuit of appropriate ends. Bench trials would contradict the point I make only if they were on a level, historically and constitutionally, with jury trials.
ized, context-sensitive assessment of practical judgment that I have suggested. On the contrary, the jury’s decision seems to be very much a matter of imposing a template on events. Juries do, after all, apply the reasonable person standard in cases of criminal negligence — and similar templates in other cases.

These objections mistake the level at which my theory addresses the criminal law. I am not concerned in the first instance with individual doctrines, offenses, elements, or standards, but with the underlying rationale of the whole. I am, as I stated at the outset, concerned with the justifying subtext of the law. Consequently, to say that phronesis lies behind the deliberations of the jury is not to imply that that idea must appear in the jury’s instructions, or that accepted legal standards like the reasonable person can no longer be employed. The point is that an Aristotelian virtue ethics can be located beneath our practice.

A second answer to the objection concerns our view of the instructions themselves. The jury may not have a free hand under its instructions to make an independent assessment of the defendant’s practical judgment. Does that mean, however, that the criminal law operates under a system of universal rules that subsume particular cases regardless of questions of individual judgment? Or is there another way of understanding the rules themselves that will put the question of practical judgment foremost?

In life, the phronimos himself does not proceed every step of the way making highly particularized decisions — that would be impossible. He must generalize from past experience. Thus it is that the recognized virtues retain their status in Aristotle’s Ethics. Those established virtues can be seen as rules: “We reflect that courage is an important human virtue; this serves as a ‘rule’ to guide our deliberation in particular situations. . . . All this is uncontroversial; and if Aristotle’s account had made no room for universal major premises, we would think there was something wrong with it.”

These “rules” are not, however, the binding universals of a moral code. Aristotelian virtue ethics is fundamentally different from a morality of duty or obligation. The virtuous person does what is right in the circumstances she faces as an expression of character — not in order to comply with a prescribed moral duty. In an ethics of virtue, one “might try to derive some judgments or rules about what is right, wrong, or obligatory from its basic ideals of virtue, but these basic ideals must themselves not be judgments or principles about what is right, wrong, or obligatory. They must be ideals about what is virtu-

146 See Irwin, supra note 67, § 241, at 439.
147 Nussbaum, supra note 7, at 198.
ous." Because *phronesis* is indeterminate, any such "rules" would be as context-sensitive as virtue itself.

We should understand the prohibitions and defenses of the criminal law in this way. To begin with, we do instruct *juries*. We do not mechanically hold persons to account against a rigid code. We employ juries because we place the person prior to the rule, because we are sensitive to the possibility that none of the rules may be adequate to describe justice in the given situation, and because the rules may conflict in a way that only human hands can unravel. We allow juries to nullify their instructions, for example, because we accept the possibility that the rules may fail to do justice in the individual case — may, that is, conflict with the jury's judgment about the appropriate course of action in the defendant's circumstances.

This sensitivity to the particular over the universal extends to the law that juries receive in their instructions. The criminal law is not a system of objectively valid rules or universally applicable standards. We are mistaken if we view it as a vast system of social control — designed, constructed, and governed from above. The criminal law is a set of accrued communal judgments about recurring situations and frequently confronted choices. By and large the product of common-law development, the criminal law is strongly analogous to the *phronimos*'s acquired guides to action. The law resembles and to a degree reflects the accepted virtues that concerned Aristotle, at least in the sense of having been generated out of the particulars of experience.

In short, the law of the jury's instructions, as well as the jury's particular decision, is grounded in *phronesis*. In the hard case, the jury acts as I have described it above: each member comparing the accused's choices with what she believes her own would be in the situation of the accused. Even in the easy case, however — the confessed premeditated homicide — *phronesis* is implicit in the very rules that speed the case to its foregone conclusion.

This point indicates again the descriptive nature of my theory. To say that a jury verdict's turning on *phronesis* is different from a jury's application of the reasonable person standard is not to suggest that the reasonable person standard ought to be discarded. My argument is that *phronesis* undergirds the reasonable person standard; that the rea-

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149 The fact that such a case would likely be decided by a plea bargain is irrelevant. What drives the plea bargain is the threat of a guilty verdict, however that may be understood. If we understand guilty verdicts as an assessment of virtue, a plea-bargained case is no less the result of an assessment of virtue than any other outcome.

The same can be said for cases in which the issue at trial is peripheral to the defendant's judgment — for example, cases of identity. If it pursues a defense of identity, the defense effectively concedes the wrongfulness of the action. If the wrongfulness of the action is understood as a matter of defective practical judgment, the identity case, too, involves an assessment of virtue.
sonable person standard is but a particular expression of a value that lies beneath all the criminal law: sound practical judgment or, in a word, virtue.\textsuperscript{150}

C. Inculpation as a Judgment on Virtue and the Charge of Perfectionism

To say that our warrant for blaming and punishing an actor derives from an obligation to pursue appropriate ends by reasoning correctly suggests that we are engaged in perfectionism: that the punishing majority is using its coercive powers to conform the conduct of the individual to ends which are not her own and to a vision of the good which she might not share. However, much of the sting can be taken out of the charge of perfectionism if we recall the indeterminate nature of Aristotelian virtue.

*Phronesis* has nothing to do with obeying a rule given by others. Sound individual judgment, not conformity, is the mark of virtue. *Phronesis* is a quality of practical judgment that enables one to act amid the contingencies of everyday life with a constant orientation toward the good — doing so not in order to conform or only out of a deep understanding of the propriety of one’s action, but because the proper action springs from the core of one’s character. According to Aristotle, virtue is manifested only in action — one cannot be virtuous in the abstract or in one’s thoughts.\textsuperscript{151} Nor can the right choice in any given situation be determined in advance by means of contemplation alone. Virtue cannot be dictated, except in bare outline.\textsuperscript{152} *Phronesis* neither relies on nor produces determinate rules.

This indeterminacy extends to the good that virtue serves. Certainly we begin with inherited notions of the good and the right. Precisely because they come to us as determinate rules, however, they cannot constitute genuine virtue. Aristotle insists that true virtue is

\textsuperscript{150} A comprehensive reformulation of the criminal law can only be hinted at here, but I suspect that, at any stage of the criminal case, the decision at hand can be expressed in terms of practical judgment rather than of distributive justice and thus as a question of virtue rather than of harm alone. For example, a court may refuse to submit a proffered defense to the jury either because it is not recognized — such as intoxication in a case of recklessness or a mistake of law — or because a recognized defense is not supported by the evidence. Each of those rules and decisions can be restated in terms of assessing practical judgment. One can say that the good of all is not served by a person’s choosing to become so intoxicated that he cannot deliberate or choose. One can say that the law is in deep accord with sound practical judgment, so that explicit notice of the demands of the criminal law is not required by justice. One can say that the defense of provocation cannot be considered in a case of a parent’s killing one who has molested his child, not because it would set a precedent that would lead to retribution and anarchy, but because the actor should know and act on that principle himself, as one possessed of sound judgment and as a conscientious and reflective member of society.

\textsuperscript{151} See ARISTOTLE, supra note 5, at II.4.1105b.

\textsuperscript{152} See id. at X.9.1181b.
pursued for its own sake.\textsuperscript{153} The virtuous person does not choose the good for any reason. The good is for her a direct expression of deeply held, well-examined convictions. This process of critically examining, internalizing, and acting on the good creates a dialectic. The good is not only the object of virtue; it is defined in the process of living a virtuous life. The good is not a given, known quantity, but the product of a life of sound practical judgment characterized by a fixed disposition to pursue the good — the life of the \textit{phronimos}.

The indeterminacy of Aristotelian virtue and the good serves as an adequate response to the charge of perfectionism, so far as it goes. Demanding another’s conformity to a rule leaves one open to the charge of perfectionism; demanding that others exercise mature, conscientious judgment in pursuing their ends does not. One problem is immediately apparent, however. If \textit{phronesis} and the good are defined in a reciprocal, dialectical relationship, what exactly does virtue require? The relationship between virtue and the good appears to be circular and empty: if the \textit{phronimos} both pursues and defines the good, the good is whatever the \textit{phronimos} happens to posit as his end. Answering that objection gives us a more adequate response to the charge of perfectionism.

Recall that Aristotle claims humans have an \textit{ergon}, a distinctive function.\textsuperscript{154} In distinguishing humans from plants and lower animals, Aristotle claims that humans have the distinctive capacity to form wishes and desires and to organize their actions with regard to these attributes.\textsuperscript{155} Furthermore, humans have the ability to view their lives as a whole. Humans ordinarily sort their wishes and desires into ordered schemes, and do so on the basis of a life over time.\textsuperscript{156} Our wishes and desires can be random and ephemeral, but we regard that condition as unusual, as less than we are capable of, as foolish.\textsuperscript{157} It is part of the distinctive rationality of humans that we are capable of conceiving of a final, comprehensive good into which our current wishes and desires are incorporated.\textsuperscript{158}

Human excellence, for Aristotle, is excellence in this process of constructing a whole, ordered life.\textsuperscript{159} The life well lived is one that draws upon and develops one’s human capacities.\textsuperscript{160} \textit{Phronesis}, the excellence of practical judgment that is the mark of the virtuous person, drives and exemplifies such a life. And such a life is the good. The good, for Aristotle, is not goods in the consumer sense, nor the good as

\textsuperscript{153} See id. at II.4.1105a; IRWIN, \textit{supra} note 67, § 181, at 341.

\textsuperscript{154} See ARISTOTLE, \textit{supra} note 5, at I.7.1109a.

\textsuperscript{155} See id. at III.2.1111b, 1113a.

\textsuperscript{156} See id. at I.7.1109a.

\textsuperscript{157} See id. at X.3.1174a.

\textsuperscript{158} See id. at VI.3.1140a.

\textsuperscript{159} See id. at VI.3.1144b--1145a, IX.8.1169a.

\textsuperscript{160} See id. at X.3.1174a, IX.9.1169b--1170a; IRWIN, \textit{supra} note 67, § 217, at 405--06.
a superhuman ideal, nor in any sense what is good for human beings. It is rather the good in humans: that which can be made the leading principle of life so as to lead to an end or purpose needing no further justification. The good is the fulfillment of distinctively human purposes — rationality in action.\textsuperscript{161}

The \textit{ergon} argument breaks the apparent circularity between the good and the \textit{phronimos}: both are defined by reference to rationality itself. More important for our purposes, the \textit{ergon} argument also serves to answer the charge of perfectionism. Aristotelian ethics asks the individual to heed his rational nature, to cultivate the quality of judgment that serves his own highest ends. It asks him to construct a whole life: a life that draws fully on his human capacities. That demand has a weight and content, but nothing that reduces the person to an instrument of another or to a vessel of others' meaning.\textsuperscript{162}

The critical link to inculpation is the fact that as a person constructs such a life, because of human interdependence, he will be participating in the dialectic which defines the good of society. The institution of inculpation is our demand that he participate conscientiously. If the self and society are viewed as mutually constitutive — as even the leading voices of liberalism do not deny\textsuperscript{163} — participation in defining one's society, including the ends of that society, is a given. The demand implicit in inculpation is nothing more than the minimal demand that one's participation in an enterprise that is a necessary and inescapable part of the human condition be carried out with a due regard for, and with the constant, conscientious employment of, the rationality that defines that condition. The criminal law demands that this constitutive role be carried out so as to express one's distinctive nature as a rational being. Surely among thin theories of the good, that is acceptably lean.

\textbf{D. Defeating the Determinist's Defense}

Fletcher acknowledges Aristotle's \textit{Ethics} as a possible framework for understanding the role of character in inculpation, but he immediately dismisses it. The reason he does so has nothing to do with perfectionism. Fletcher rejects the \textit{Ethics} in favor of simple voluntariness as a key to excuse because he finds the \textit{Ethics} and his own theory of excuse as a matter of character especially vulnerable to the logic of determinism: "it is difficult to maintain that all our vices are tracea-
ble to prior acts of choice and that therefore character is ultimately linked to a way of life we are free to perpetuate or reject."\textsuperscript{164} Fletcher cites Book II of the \textit{Nicomachean Ethics},\textsuperscript{165} but the canonical text is at Book III, chapter five — the point at which Aristotle confronts the question of determinism versus responsibility most directly. He writes there that "virtue or excellence depends on ourselves, and so does vice,"\textsuperscript{166} and that:

The saying, "No one is voluntarily wicked nor involuntarily happy," seems to be partly false and partly true. That no one is involuntarily happy is true, but wickedness is voluntary. If we do not accept that, we must contradict the conclusions at which we have just arrived, and must deny that man is the source and begetter of his actions as a father is of his children. But if our conclusions are accepted, and if we cannot trace back our actions to starting points other than those within ourselves, then all actions in which the initiative lies in ourselves are in our power and are voluntary actions.

These conclusions are corroborated by the judgment of individuals and by the practice of lawgivers.\textsuperscript{167}

It is as true now as it was in Aristotle's time that lawgivers consider our actions voluntary when they cannot be traced to causes other than ourselves. Nevertheless, that assumption hardly establishes that a wicked character is voluntary, or (Aristotle's larger point) that we are responsible for the wicked acts that arise from a bad character. If anything, it is the lawgivers' assumption that needs support.

The key to Aristotle's reply to the determinist is to recognize how the determinist's defense relies not only on the determined nature of human action, but also on the contingent nature of human life. The determinist's argument is that to impose responsibility where there is no opportunity to act otherwise is unjust. I have no control over the influences that shape my character or my actions. Those influences operate at the beginning of life, in the circumstances of my family, and in the competence of my parents. No one has any control over where and how I will start life. The real sting of the determinist's defense, then, is that responsibility is imposed arbitrarily, because each person's lot in life is assigned at random.\textsuperscript{168} The determinist's defense thus depends on the contingent as well as the determined nature of human life.

The question is whether that kind of contingency is relevant to moral and legal judgments. Everything about our world is arbitrary in the same sense, down to all basic physical existence. The Big Bang

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\textsuperscript{164} Fletcher, supra note 13, § 10.3.2, at 805.
\textsuperscript{165} See id. at 805 n.13.
\textsuperscript{166} Aristotle, supra note 5, at III.5.1113b.
\textsuperscript{167} Id.
\textsuperscript{168} "It is time — long past time — to confront the relationship between crime and the accident of birth." Bazelon, supra note 53, at 405.
might have had different ripples than it did. Moral and legal judgments, however, are a means of coping with the here and now. Such judgments take for granted an entire universe that might have been different, but is not. There is nitrogen, dogs bark, we feel gravity’s pull — an infinite number of things are arbitrary in an ultimate sense but matter to moral and legal judgments only as the non-controversial framework within which those judgments are made.

The question is where we draw the line between background conditions and foreground contingencies — with only the latter directly relevant to the moral or legal judgment at hand. With regard to inculpation, the determinist places the line farther back in the personal history of the accused than would one who affirms existing judgments about criminal responsibility. The determinist takes into account earlier environmental factors that traditionally have been excluded from consideration.

The determinist, however, does not and cannot place the marker all the way back. Any moral or legal judgment assumes some background. There is a given, whether we think of it as hard fact or hermeneutics, within which the personal history and the conversation about responsibility makes sense. There is a world in which human beings, working with limited capacities and abilities, are confronted with a familiar set of moral problems. And now, even more than in Aristotle’s time, we have a well-established set of answers that are defensible as considered judgments in reflective equilibrium.169

The effect of recognizing the determinist’s reliance on contingency is not to refute his argument but to shift the burden. The question is not whether we consider the background conditions of the crime but how much of the background we consider. We need to ask not why we place the marker between the given and the meaningfully contingent where we do but why we should place it elsewhere. So when Aristotle places the marker well forward — arguing that one is responsible for one’s own character and the acts that spring from it — he appeals to everyday judgment and the practice of legislators.

Aristotle’s point in Book III, chapter 5 is that we may begin with inherited capacities and dispositions, but that later we begin to make choices that shape those capacities and dispositions into a character.170 My choices are indeed determined by the circumstances in which I


170 See Aristotle, supra note 5, at III.5.1114b–1115a; see also M.F. Burnyeat, Aristotle on Learning to Be Good, in Essays, supra note 93, at 69, 80 (“[I]n the fully developed man of virtue and practical wisdom [pre-rational responses] have become integrated with, indeed they are now infused and corrected by, his reasoned scheme of values.”); T.H. Irwin, Reason and Responsibility in Aristotle, in Essays, supra note 93, at 117, 141 (“Vice requires the agreement of someone’s rational and nonrational desires. Someone may be incapable of changing his nonrational desires but still capable of changing his rational desires by deliberation . . .”))
begin, but at some point the connection between my origins and my present self is so attenuated that my starting point falls into the background. My original circumstances become the given — no different from my language, my society's institutions, or the scientific or religious paradigms of my time and place. At that point my origins drop out of the question of responsibility. The more recent influences on my character, on the other hand, are the products of my particular choices — of associates, of acquired tastes and acquired vices, of a style of living, of a habitual regard or disregard for others' welfare. I have made those choices — not in an ultimate sense, but in the only sense that is morally relevant — and can fairly be held accountable for them and for the person those choices have produced. My arrival at a point at which my character and circumstances are such that I commit a criminal act is not a random occurrence, is not beyond my control, and is not an arbitrary basis of responsibility.

Without the charge of arbitrariness, the determinist's defense loses its sting. To say that my criminal act is determined ultimately by factors in my personal history is little more than a statement of the human situation. My criminal act is determined no less and in the same sense by the physical environment, my framework of language, and the philosophical and scientific suppositions of my time. The connection between each of these influences and my criminal act is real, but so attenuated as to be irrelevant to the more immediate question of moral or legal responsibility. My origins are, likewise, simply part of the basic, background conditions which frame, rather than answer, such questions.

V. THE BORDERS OF INCULPATION

To examine the outer reaches of a concept can, on occasion, serve to enlighten us about its center. On that assumption, I will consider three issues at the borders of inculpation. The first concerns the infliction of harm where there is no consciousness of doing harm — criminal negligence. I argue that criminal negligence is genuinely inculpatory and not merely a form of strict liability. A second set of border cases — attempts, solicitations, and conspiracies — are uncontroversially inculpatory, but that is precisely why I find them interesting. The leading rationale for punishing inchoate offenses is customarily stated in terms of virtue ethics. Finally, I take up the problem of omissions, emphasizing the case of the Bad Samaritan. I conclude that if the criminal law is premised on an ethics of virtue, the search for a "duty to rescue" which will bring the Bad Samaritan within the scope of the criminal law is unnecessary and fundamentally misguided. Omissions can be inculpatory in and of themselves, without the necessity of a mediating duty.
A. Negligence As an Inculpatory Basis of Criminal Liability

Not everyone who is criminally liable is culpable; some are held liable though they have acted without fault and without drawing our blame. In areas such as food and drug law and highway safety, strict liability is imposed. The grounds and validity of strict liability have been ably and amply discussed elsewhere and do not concern us here. The only point to be made here is that strict liability defines the outer boundary of inculpation.

There is, however, a dispute over that border which does interest us. Some commentators have argued that criminal negligence entails liability without fault, that criminal negligence is indistinguishable from strict liability, and that therefore recklessness, a conscious disregard of risk, is the outer boundary of inculpation. Larry Alexander has advanced the argument against negligence as inculpation in an article drawing heavily on Mark Kelman’s Interpretive Construction in the Substantive Criminal Law. Alexander’s argument takes aim at the reasonable person construct that is central to any conception of negligence. He asserts that the construct collapses negligence into either strict liability or recklessness. At one extreme, if the reasonable person were “appraised of all the facts about the world that bore on a correct moral decision,” the person would recognize the risk and take all steps necessary to avert it. In the event of harm, any liability imposed would be strict liability. At the other extreme, if the reasonable person had exactly the same beliefs as the defendant, the reasonable person “will always act as the defendant acted [thus implying no liability] where the defendant is not conscious of the risk, and will act differently [implying liability] only where the defendant is conscious of the risk, i.e. reckless.” Alexander then argues that any reasonable person is an arbitrary construct. He concludes: “Recklessness is the lowest form of actual culpability, whereas negligence is just an arbitrarily drawn subcategory of strict liability.”

171 See 1 LAFAVE & SCOTT, supra note 17, § 3.8, at 340 n.1.
175 See Mark Kelman, Interpretive Construction in the Substantive Criminal Law, 33 STAN. L. REV. 591, 600-42 (1981) (arguing that unconsciously applied interpretive constructs determine the outcome in criminal cases).
176 See Alexander, supra note 174, at 85.
177 Id. at 98.
178 Id. at 99.
179 See id.
180 Id. at 101 (citation omitted).
The flaw in this argument was identified thirty or more years ago by H.L.A. Hart: it erroneously takes negligence to be a psychological state of mind rather than a public standard of conduct.\textsuperscript{181} Alexander evidently rejects the validity of that standard of conduct, but his reasons for doing so, like Kelman's, are highly questionable.\textsuperscript{182} The reasonable person standard is hardly an arbitrary construct. It is a hermeneutic construct neither different in kind nor ontologically inferior to the facts of the case or the psychological state of the actor.\textsuperscript{183}


\textsuperscript{182} Alexander appears to follow Kelman in denying the validity of normative judgments generally. See Alexander, supra note 174, at 101 ("The concept of the [reasonable person] ... is a morally arbitrary and morally empty construct."). The idea that a clear line separates facts from normative judgments, or "values," had a brief life in Western philosophy, as a feature of a prominent British interpretation of logical positivism. See Alfred J. Ayer, Language, Truth and Logic 38-39 (2d ed. 1950). The various branches of the Critical Legal Studies (CLS) Movement have resorted to structuralist and deconstructive literary techniques to attack the distinction between fact and value, and well recognize its untenability. See Thomas C. Heller, Structuralism and Critique, 36 Stan. L. Rev. 127, 136 n.15 (1984); Mark Kelman, The Necessary Myth of Objective Causation Judgments in Liberal Political Theory, 63 Chi.-Kent L. Rev. 579, 581-86 (1987); Gary Peller, The Metaphysics of American Law, 73 Cal. L. Rev. 1151, 1169-70 (1985); David M. Trubek, Where the Action Is: Critical Legal Studies and Empiricism, 36 Stan. L. Rev. 575, 580 (1984). However, CLS scholars have consistently proceeded to the (much less than necessary) inference — drawn by the Frankfurt School, Althusser, and Lukacs before them — that therefore both "the facts" and values are the morally arbitrary, self-serving imposition of a ruling class. See Heller, supra, at 163-72; Kelman, supra, at 633; Peller, supra, at 1271-74; Trubek, supra, at 588-95; see also Paul Hirst, On Law and Ideology 40-42 (1979) (summarizing Louis Althusser's theory of ideological state apparatuses); Istvan Mesz-aros, Lukacs Concept of Dialectic, in Georg Lukacs 34, 44-54 (G.H.R. Parkinson ed., 1977) (summarizing Lukacs' theory of class consciousness). Those scholars, no less than the "positivists" they attack, deny the possibility of valid, broadly binding normative judgments. Kelman's article, on which Alexander's is based, is a prime example of such denial. See, e.g., Kelman, supra note 175, at 597 ("The 'victory' of one framework or the other is a temporary one that can never be made with assurance or comfort. Each assertion manifests no more than a momentary expression of feelings that remain contradictory and unresolved.").

\textsuperscript{183} To follow just one possible line of argument, Richard Rorty's neo-pragmatist view is that a fact is a creature of social practice, of hermeneutics:

We will not be able to isolate basic elements except on the basis of a prior knowledge of the whole fabric within which these elements occur. Thus we will not be able to substitute the notion of "accurate representation" (element-by-element) for that of successful accomplishment of a practice. Our choice of elements will be dictated by our understanding of the practice, rather than the practice's being "legitimated" by a "rational reconstruction" of the practice. This holist line of argument says that we shall never be able to avoid the "hermeneutic circle" — the fact that we cannot understand the parts of a strange culture, practice, theory, language, or whatever, unless we know something about how the whole thing works, whereas we cannot get a grasp on how the whole thing works until we have some understanding of its parts.

Richard Rorty, Philosophy and the Mirror of Nature 319 (1979). If this is what we mean by "fact," the fact/value distinction simply dissolves: the normative judgments so disparaged by Ayer's heirs have at least that much footing in the world. They are meaningful not as point-for-point representations of things called "values" out there in the world, but as practice, as interpretive constructs with an independent viability and validity within the life of a society.

Neo-pragmatism can be said to have begun with Quine's demolition of British logical positivism in the 1950s. See Willard V.O. Quine, Two Dogmas of Empiricism, in From a Logical
The reasonable person standard is but a particular expression of the demand implicit in all inculpation: in the conduct of one's affairs, one must exercise sound practical judgment. Far from a variety of strict liability, negligence is as thoroughly inculpatory as any other category of mens rea.

This analysis inverts the ordinary understanding of culpable negligence as a derivative, impoverished variety of intentional action. R.A. Duff, for example, frames the problem as a question of how to extend the paradigm of intentional action to reach criminal negligence. He solves the problem so framed by limiting liability for negligence to those who could have avoided the harm. This response to the problem, however, does not address Alexander's point: if the actor is unaware of the harm risked, as she is by definition in a case of negligence, then she cannot conform her conduct so as to avoid it. It will never be the case that she could and should have avoided causing the harm, and all such liability will be strict liability.

The knot in this conundrum is the focus on harm. Both Duff and Alexander treat the problem of inculpatory negligence as one of the actor's mental posture toward the harm risked in the offense. That may well be how we define mens rea for purposes of proof, but to confine ourselves to that issue in our attempt to understand inculpation is both unnecessary and self-defeating. Inculpation is a broader question than mens rea, and we can justify negligence as inculpatory liability even if the actor is conceded to be unaware of the harm or the risk at the time she engages in her inculpating behavior. The reason is that the responsibility on which inculpation is premised is broader than the responsibility to avoid harm.

The question of the good is neither an abstract problem nor a question one takes up at leisure. If the self and society are mutually constitutive, one is inevitably, constantly, and inextricably involved in defining the good for oneself and others. If we are the authors of soci-

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POINT OF VIEW 20, 42-43 (1953); see also W.V. Quine, Ontological Relativity, in ONTOLOGICAL RELATIVITY AND OTHER ESSAYS 47-51 (1969).


Duff writes:

If she could not have attained that standard of care, to convict her would be to hold her strictly (and unjustly) liable for what she could not help. But if she could have attained that standard; if she failed to take reasonable care, not because she lacked the capacity to do so, but because she failed to exercise capacities for thought and attention which she could (and should) have exercised; then to convict her of negligence is to hold her properly liable for what she could and should have helped. . . . Negligence can thus be defined as a genuine species of culpable fault.

Id. at 156.
ety in every decision and in each act, we have a responsibility to develop the deep and perspicacious judgment that not only will get us by in the world, but also will define the good with a full regard for our, and others', rationality. Inculpation is premised on that responsibility for the good, not on the more narrow responsibility to avoid harm. One can therefore act culpably while being unaware of the particular risk one has created.\textsuperscript{186}

B. Inchoate Offenses and the Requirements of Virtue

We have examined the case of harm with no intent: the genuinely inculpatory nature of criminal liability when there is not even a consciousness of possible harm. What of the other border case, the case of intent with no harm? Does the law on inchoate offenses support or illuminate the theory advanced here? It does. The logic of virtue ethics permeates the law of inchoate offenses.

Solicitations, attempts, and conspiracies consist of illicit intentions combined with enough of an act to confirm the intention, but no harm.\textsuperscript{187} Several justifications have been advanced for inflicting punishment in the absence of harm. One is the fortuity argument: the offender should not escape justice when harm has been averted or failed to materialize in spite of his best efforts.\textsuperscript{188} Another is the claim that criminalizing inchoate offenses gives law enforcement a margin of error, a capacity to stop crime before anyone is hurt.\textsuperscript{189} The third major argument, however, is the most compelling and the most interesting for our purposes:

Conduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards such activity, not alone on this occasion but on others. There is a need, therefore, subject again to proper safeguards, for a legal basis upon which the special danger that such individuals present may be assessed and dealt with. They must be made amenable to the corrective process that the law provides.\textsuperscript{190}

\textsuperscript{186} This conclusion raises the question whether a person who acts negligently, but who fortuitously causes no harm, is liable under the criminal law.

This question is not peculiar to my theory of criminal negligence. Generally, the lucky risk-taker is not liable, and many have long been troubled by this rule. See 2 LAFAVE & SCOTT, supra note 17, § 6.2(b), at 26–28. This is especially true if one considers that, in the case of knowing or intentional action, the fortuity of a wrong-doer's not causing harm is one of the principal reasons why we impose liability for attempts. See Model Penal Code § 5.01 introduction (1985).

My theory supports imposing liability only in that it solidifies one of the basic rationales for punishing inchoate offenses, of which this offense is a type. See infra Part V.B.

\textsuperscript{187} See Model Penal Code § 5.01 introduction (1985).

\textsuperscript{188} See id.

\textsuperscript{189} See id.

\textsuperscript{190} Id.; see also id. § 5.05 cmt. 1(b) (noting that most statutes provided lesser punishments for attempts than for completed crimes, but that some states actually did the reverse).
The same concern arises with respect to more particular issues, such as the act required to complete an attempt. Some minimal act is required because we do not punish bad intentions alone. The leading formula for the act requirement, however, looks directly back to the offender's illicit intent. Liability for an inchoate offense under the Model Penal Code requires an act or omission constituting a substantial step toward commission of the crime. A substantial step, in turn, is an act or omission "strongly corroborative of the actor's criminal purpose." Thus, the act requirement too is satisfied by proof of a dangerous disposition. An earlier formulation of the act requirement is even more clearly premised on a concern over the offender's dangerous disposition. A number of courts have held that an act is sufficient to complete an attempt when it goes beyond the point at which a law-abiding person would desist. One who takes his plans beyond that point is a dangerous person and may be punished for that, regardless of whether he succeeds in doing harm.

In each of these policies and rationales, we can discern an Aristotelian theory of inculpation. As I have argued above, the question of practical judgment arises even in cases of clear liability. In all crimes, not just those with an arguable excuse or justification, the offender has formulated an inappropriate system of ends or pursued his ends by inappropriate means, and we condemn him for that failure. What is significant in the logic of inchoate offenses is the explicit appeal to the pattern of such judgments and their source in the offender's character. Inculpation is based expressly on the disposition of the actor, rather than on the disposition implicit in the harm done.

Furthermore, the inchoate offenses bring out the distinction between an ethics of virtue and an ethics of moral duties. As noted above in Part IV.B., a virtue ethics such as Aristotle's does not pre-

191 See 1 LAFAVE & SCOTT, supra note 17, § 3.2, at 272.
192 See MODEL PENAL CODE § 5.01(1)(c) (1985).
193 Id. at § 5.01(2); see also WIS. STAT. ANN. § 939.32(3) (West Supp. 1994) (requiring acts that "demonstrate unequivocally under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some extraneous factor.").
195 In the area of solicitation, there are signs of an even broader concern with character. Some commentators have argued that the law serves the purpose of protecting the public from inducements that might offend them or lead them astray. The inducement is harmful in and of itself: "the solicitor has engaged in irreparably harmful conduct in implanting the suggestion of criminality in the mind of another." Note, The Proposed Penal Law of New York, 64 COLUM. L. REV. 1469, 1515 (1964). The harm in a solicitation is a corrupting effect on the character of another in addition to the dangerous disposition of the solicitor himself.
196 It is worth noting again that, because it looks to the the disposition implicit in the harm done or in the substantial step, my theory does not condone punishing thoughts. See supra note 144.
scribe discrete moral duties. Rather than imposing obligations to do certain things, Aristotle argues that one should be a certain kind of person. I have argued that juries in criminal cases make a more fine-grained determination than their instructions alone suggest. They are deciding a question of practical judgment and virtue, not just whether the accused has complied with his legal duties.

Inchoate offenses are notable in bringing this distinction between disposition and duty to the fore. Although we may think of a criminal prohibition as a duty not to do a particular harm, the fact is that we punish even when no such duty has been violated, usually with the same severity as if it had been. We punish the disposition to do the act. What is more, the disposition we punish for is a dangerous disposition in general, not a disposition to do a particular act. Courts and commentators frequently note the prophylactic effect of inchoate liability in preventing future crimes by the same actor. 197

In its focus on dispositions rather than violated duties, the law of inchoate offenses reflects a virtue ethics akin to Aristotle's rather than a morality of conventional duties and conformity. If virtue is our concern when no harm is done, there is reason to believe it remains our concern when the harm is done. In all cases, not just in inchoate offenses, we are concerned with the choices the actor makes and the ends he gives himself. In all cases, inculpation is a judgment on virtue.

C. Omissions, the Search for Duties, and Virtue Ethics

Suppose I come upon a drunk face down in a puddle. He will die if I do not turn him over. I walk on, because as a lawyer I know that I will not be held responsible for his death. It is black-letter law that criminal liability is not imposed for omissions. 198 Liability is found only if a duty can be identified, and I have no duty to a stranger in peril if I have not created the peril. 199 This case, often called the Bad Samaritan, is not necessarily representative of the law of omissions. The criminal law does impose duties to act in a wide variety of circumstances. 200 Nevertheless, the pattern of the law's evolution in this area has been a grudging incorporation of relatively uncontroversial moral duties into the realm of inculpating legal duties. 201

197 See 2 LaFave & Scott, supra note 17, § 6.2, at 23.
198 The exception would be crimes that are specifically defined in terms of failing to act, for example, failing to file a tax return, or failing to stop after a traffic accident. See 1 id. § 3.3(a), at 283.
199 See id. at 284.
200 Id. § 3.3(a)(1)-(7), at 284-89 (describing duties based on relationship, statute, contract, voluntary assumption of care, creation of the peril, control over others, and ownership of land).
201 See Graham Hughes, Criminal Omissions, 67 Yale L.J. 590, 614-15 (1958) ("[N]o sufficient awareness has yet developed of the potential harmful effects of failure to act; consequently, a
The law of omissions is generally defended on grounds of individual autonomy. The argument is that each person is free to pursue his own ends and projects in life and should be held criminally liable only if he interferes with another person's doing the same. As a consequence, the law prohibits acts but does not require action. My inaction cannot harm another, and to require me to act would divert me from the pursuit of my chosen ends.\textsuperscript{202}

One would expect the theory of inculpation as a judgment on virtue to treat omissions differently. The theory's emphasis on the interdependence of human beings and on their inescapable role in defining the common good suggests that the scope of inculpating duty should be broader than it is under existing law. That suggestion, however, is only partly correct.

My theory's emphasis on virtue by no means implies an expansion of moral or legal duties to act. Unlike conventional morality, virtue is not a matter of complying with discrete duties. Virtue is a disposition that leads one to make the correct choice in any given situation, and to do so as a matter of choice, not compliance.\textsuperscript{203}

This aspect of virtue ethics suggests a fundamentally different approach to the problem of criminal omissions. Up to now, the emphasis has been on duty. There is no liability for an omission without a mediating duty, and the question has been which compelling moral duties would be recognized as inculpating legal duties as well. An Aristotelian emphasis on virtue rather than on duty suggests dispensing with the requirement of a mediating duty altogether. It suggests that one might be held liable for an omission not because it is a failure to act where action is required, but because the failure itself evinces a lack of judgment, an absence of virtue.

This principle may or may not result in an expansion of liability for omissions, though it would change existing practice. Currently, when a case of omission is charged and tried, the question of the existence of a duty is for the court.\textsuperscript{204} With the elimination of the requirement of a mediating duty, that particular gatekeeping role would disappear. The court, however, would retain its general authority over the sufficiency of the evidence. The question for the jury would be whether the omission in and of itself was culpable. The jury might well resort to asking whether a duty to act existed. Just as often, however, they would address directly whether the course the defendant chose to follow evinced sound judgment; whether they, at their best,


\textsuperscript{203} See Frankena, supra note 148, at 152-55.

\textsuperscript{204} See 1 LAFAVE & SCOTT, supra note 17, § 3.3(a), at 284 n.8.
would have acted or refrained from acting in his circumstances; whether, that is, the defendant acted virtuously. The fact that the behavior in question was an omission would affect the fundamental issue not at all.

VI. CONCLUSION

In the theory presented above, inculpation is a demand that one respect, nurture, and employ one's rationality. That is, in the end, not such a radical theory. What is the criminal law, after all, but an interposition of rationality into the world of violence that is its province? The enforcement of the criminal law is viewed uncontroversially as a demand that disputes be resolved by reason rather than by force. An Aristotelian account of criminal law simply moves the locus of this demand for rationality from the legislature to the jury considering the individual case.

In rejecting a role for theories of distributive justice in inculpation, this theory supposes that the law frames our ends as well as the means we use to achieve them. Criminal law as distributive justice supposes that the parties to the dispute simply have the ends they have, and that if in the course of adjudication one set of ends is preferred over another, that is necessary but ultimately arbitrary. The theory of inculpation presented here rejects that view absolutely. By the institution of inculpation, we require that our ends reflect our status as rational beings capable of considering our own good in the context of the good of all. That is both a modest demand and a product of a richer conception of human life and purposes.