
L'agent et ses excuses en droit pénal : De l'intention criminelle aux dispositions coupables.

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Résumé

Notre projet est d'examiner les standards de la responsabilité et de l'irresponsabilité criminelle du point de vue de l'agentivité, à la lumière de concepts tirés de la philosophie de l'action (D. Davidson) et de théories de l'excuse formulées par des philosophes du droit anglo-saxons contemporains (H. L. A. Hart, G. Yaffe et R. Duff). On s'intéressera ici au problème de la caractérisation criminelle (i.e. au fait de savoir ce qui doit compter comme crime) sous l'angle du rapport qu'entretient cette qualification pénale avec les catégories de l'action *imparfaite* ou *incomplète*, et plus précisément avec la reconnaissance d'*excuses* dans le langage juridique.

On commencera par s'interroger sur la nature de l'excuse juridique au regard de la norme d'agentivité qu'elle sous-tend, pour se demander ensuite comment l'excuse juridique, dans ses mutations contemporaines, tend à être comprise en termes dispositionnels, alors même que certaines dispositions de l'agent revêtent une valeur juridique équivoque (aggravante et non atténuante de responsabilité).

Le problème de la nature de l'excuse et des limites de la criminalisation de l'intention peut ainsi conduire à une réflexion plus large propre à réinscrire l'ontologie pénale dans un cadre de philosophie politique : l'incrimination par des catégories pénales telles que celle de dangerosité (des dispositions ne valant plus que comme circonstances aggravantes) met en exergue la relation avec le modèle social et politique que cette ontologie est susceptible de promouvoir.

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I would like to examine the categories of agent and excuses in the criminal law, in light of concepts drawn from philosophy of action. The introductory question could read as follows: what is the definition of a crime, and how is the structure of criminal responsibility really shaped by intentionality (or by its absence)?

To deal with the issue, and bearing in mind that the act or the omission involving criminal liability has got, as a hallmark, a requisite mental or moral element, I want to offer to the theory of offence a principle of intelligibility which is that of intentional action (or bodily movement adequately caused by a primary reason, a combination of beliefs and desires).

*Intervenant

Criminal law requires indeed, beside the *actus reus* (action with a damageable result), the establishment of a *mens rea* (guilty mind) to constitute an offence. In that sense, a bad act should be proportionate to a guilty mind just as an action properly said should be defined by its intention.

However, in charging someone with a crime, one has yet to triumph over concurrence between various descriptions of his action, since an action (in the Davidsonian ontology) is first and foremost an event, and as such, can be picked out under various descriptions. Likewise, thanks to a re-description of the incriminated act, one might contract or expand the sequence of intentional action in time and space, i.e. retracting it by deducting consequences characterized as "adjacent effects", or, to the contrary, dilating it by adding to the narrative sequence hidden goals able to redeem it, or some danger which could only be avoided by trespassing the law (for example, when the defendant claims to have driven recklessly only to escape from an objective danger threatening all passengers in his car), etc. This, of course, can be done so as to meet the best interests of the parties concerned, particularly when those new circumstances (the threat of death or bodily harm, among others) are taken into account as mitigating factors. The criminal law thus highlights and exacerbates the problem of what might be called "action sequencing": that is, collecting separate fragments and rebuilding order by piecing them together, in order to make visible another action, endowed with a different legal meaning and to which are attached different legal consequences. As a result, action can be shifted from a liability regime to another.

This will first lead me to a series of questions about the lexical rungs stating the presence of mens rea in an action: intention, recklessness, negligence or gross negligence. In order to articulate optimally intention to crime, the criminal law resorts to some action schemes and to objective standards such as the standard of reasonable care used as a test in negligence law. Moreover, criminal rationalizations may hide, under the cover of an appeal to reason and reasonableness (that of the *reasonable person*), a discourse of authority on what an agent should be, and, in this case, the imposition of a certain kind of reasons for action.

Secondly, and more importantly, I will concentrate on some figures of failure of action. Special focus will be on "incomplete" agency sequence and "abnormal" action, lying as far away as possible from the definition of intentional action –the latter not being defined or analyzed without the notion of intention, and being necessarily caused by its relevant reasons¹; furthermore, intentional action is often thought of as "led" or "headed by a plan". In this respect, how does the criminal law articulate in its specific language the failure of actions in reference the norm of intentional action, which is (at least partly) desired, designed and controlled?

Excuse, in particular, causes this constitutive relationship between action and intention to weaken and blur. As a result, the action entitled to excusing conditions will accordingly be distanced from standard assignation of liability, sometimes by ways of invoking shared, unwanted or inflicted agency. The significant interest of the wide range of excuses is that, taking the question of intention into account, the inflation of certain types of excuses –and, to the contrary, the decline of some others – can have a great influence on the norm of action, but also on what is to be an agent according to the criminal law. The definition of the criminal agent is subject to possible grading and revision depending on what excuse is worth being examined. More specifically, one may apply a different scale in the case of addiction² or indoctrination³. This trend in case law could fruitfully be confronted to the renewal of interest for "character theories" in the theory of criminal excuses: are responsibility and excuses to be understood in terms that appear more and more "dispositional", and what should be the consequence of such an evolution on the norm of action?⁴ Hart wrote that the mens rea could only be defined in a "negative" way, by the absence of excusing conditions. All these perspectives of investigation converge towards the nature of intention as a double marker of moral responsibility and legal punishability⁵(given that numerous concepts assessing responsibility are homonyms in both domains), and hence question law's ability to create faults and offences of its own.

- 1 D. Davidson, *Essays on Action and Events*, 1980, Oxford University Press.
- 2 G. Yaffe, "Recent Work on Addiction and Responsible Agency", 2001, in *Philosophy and Public Affairs*, v. 30, n. 2.
- 3 G. Yaffe, "Indoctrination, Coercion and Freedom of Will", 2003, in *Philosophy and Phenomenological Research*, 67 (2), p. 335-356.
- 4 R. A. Duff, "Virtue, Vice and Criminal Liability: Do We Want an Aristotelian Criminal Law?", 2002, in *Buffalo Criminal Law Review*, vol. 6, n°1 (April 2002), p. 147-184.
- 5 M. S. Moore, "Intention as a Marker of Moral Culpability and of Legal Punishability", 2011, in *Philosophical Foundations of Criminal Law*, Oxford University Press, p. 179.

Mots-Clés: Philosophie de l'action, agentivité, droit pénal, philosophie du droit, excuse, disposition, responsabilité, droit, Davidson, Hart, Yaffe, Duff, common law, droit comparé.