

GUILT

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Suppose I am the person who drove 45 miles per hour in a 20 mile per hour school zone, or it is I who slipped a package of gum into my pocket in the grocery store and exited, tendering nothing as payment to the owner. Or say that my mischief on some other occasion shows me to be activating a fire alarm in a public building fully aware that there is no fire or emergency. Am I guilty?

It requires an acumen of no great dimension to realize that the question is deeply ambiguous. Sometimes, in ordinary language, we say that one is guilty of some deed, meaning little more than to suggest that he did, in fact, perform the deed, and, moreover, that it is an act that the legal system proscribes. By extension we sometimes suspend the latter qualification, speaking of one's being guilty of not doing his homework, for example. In either of these senses it can be said that I am guilty.

Consider now that I am aware that no one has seen me perform any of these acts; there are no charges against me, so I cannot enter a formal plea of guilty, nor is it possible in our system of justice, under these circumstances, for a judge or jury to enter a finding of guilt. Under these conditions, there is a sense in which I am not guilty because I cannot be found guilty. Change the facts now such that I have been apprehended and a complaint filed. I enter a plea of not guilty and, at the end of the trial, the jury reports a verdict of not guilty, and the judge enters a finding of not guilty. In this sense too I am not guilty because I have been found to be such.

But I am guilty, some will urge, drawing obviously on the use of guilt in ordinary language, and perhaps more. Now, on the one hand, we can simply end the matter here and just recognize that, so long as we are clear about which sense of guilt we are using, the ambiguities disappear, and there is a clearing of any conceptual overcast. On the other hand, we can recognize that the person who complains, under these circumstances of my exoneration, that I am guilty, is not simply reiterating that the word can be used in another form but has in mind that something has gone very wrong or that I have done something equally wrong. Am I 'guilty' of this charge? Since the question seems to be asking whether I have done anything wrong, analysis here suggests an abumbration of the various sources of alleged wrongdoing.

First, it seems that my accuser may have in mind that I have done something wrong besides having performed some deed that the law proscribes. In particular, his difficulty with my action now may involve what I did not do--confess or take responsibility for

my act--or, put the other way around, for something else that I did--enter a plea of not guilty. If so, something new has entered the picture as far as my wrongdoing goes, since now we have stepped outside the realm of an ordinary use of guilty--I did it--as well as of a legal usage--I have been found guilty. Trying to make sense of what my accuser has in mind here, I consider the possibility that I had an obligation, possibly moral, to help to bring about a finding of legal guilt, given that I was guilty in the ordinary language sense of the word.

Let us consider the nature of this possible moral obligation by first noting how it collides with certain fundamental legal concepts. Consider that the underlying theory of our criminal system of justice is that I am innocent unless proven guilty, that the burden of proof lies on the state to prove beyond a reasonable doubt that I committed the crime, and that in the absence of its being able so to prove, my entitlements include going free and being found not guilty; another operative theoretical concern commonly cited as justifying this outcome is that it is better to free a guilty person (I gather this is the common use here) than to imprison an innocent person. On this line of reasoning, it certainly appears that I have a legal right to enter a plea of not guilty, even when I know that I committed some crime, and am guilty in that sense, and force the state to prove its case. If so, then presumably the purported moral obligation to confess or to enter a plea of guilty is designed to abrogate this fundamental legal right.

Now if I am supposed always to abide by this moral obligation and thereby always suspend my legal right, it is questionable why we should recognize there being any kind of a legal right here except to make the legal system sound more than fair, when in fact it is a system that, in effect, gives no such benefit of a doubt to an accused unless he is in fact innocent, which trivializes the benefit. Those who assert that the moral obligation obtains, then, seem to be claiming that there is something wrong with the legal system in that it grants such a right to the citizens, or they are suggesting that the theory of the legal system is a sham, since no such right obtains, and only the moral obligation has force. Whichever the case, it makes sense to ask about the source or justification for such a moral obligation, since, on either alternative, the moral obligation has grave implications for the legal order.

Could the source of this moral obligation to confess be that I am morally guilty, that I have done something morally wrong, and that the admission of this within the legal system allows for a simple fashion in which the moral community can administer sanctions to me? It may seem like a small point, but is it worth mentioning that no major reflective moral system of the West--and I am here thinking of ethical egoism, Kantianism, and

utilitarianism--employs any notion of guilt which this possible source makes reference to. Even so, it is still intelligible to inquire whether one of these systems may be the basis for the moral obligation in question. A casual consideration may lead us to reject egoism as the source, given its preoccupation with self interest, to recognize Kantian considerations as giving force to the obligation--after all, aren't we treating the victim of the crime as a means to an end and who could universalize abdicating responsibility for his actions?--and to recognize that utilitarian considerations may pull in different directions; on the one hand one might assert that we are all better off allowing a guilty man to go free than to imprison the innocent, while, on the other, one might consider that we are all better off if we take responsibility for our own actions.

A closer look, however, reveals that these systems of ethics are being misused if we think that any of them are the possible sources of our positing some firm moral obligation. Each is a decision procedure for the individual moral agent and as such does not allow us to posit some ontology of moral obligations that might interfere with the process of individual ratiocination. This is not to say that the agent may not be criticized for the decision he reaches. He may, for example, have it pointed out to him that his reasoning along ethical egoist lines should not have led him to avoid fessing up for his deed, since he failed to take into account the fact that his family, Kantians all, will endlessly badger him, which runs very strongly against self interest. What is important to note is that the criticism is not that he failed to take into account a moral obligation to confess but that he did not consider all the relevant variables in the instant case in arriving at his decision; the criticism makes no assumption of there being some invariable obligation to confess.

Suppose it is now urged that, even if we recognize that the decision rests with the individual agent and that we cannot use these moral theories to establish ongoing moral obligations, it is still the case that underlying each of these positions is the view that the agent is responsible for his actions; presumably he could freely choose what to do, and hence, when he failed to confess or to enter a plea of guilty, he failed to take responsibility for his act. For this reason he is morally culpable. But consider this. I did the deed in question. Hart, for example may be right that we can allege, until further evidence is presented to rebut the claim, that I am responsible for the act; we can, as Hart says, ascribe responsibility to me. But even so, even if no new evidence ever shows that I am not responsible for the act, and thus it remains that I am responsible for it, it does not follow that I must now take responsibility for the act by entering a confession or a plea of guilty. Concerning the question of what to do about my now having performed the deed, I now have a new decision to make which presumably refers me to

my basic ethical commitment here, either ethical egoism, Kantianism, or utilitarianism, which, presumably, led me to make the decision to perform the deed in question to begin with. Assuming, for example, that I am a utilitarian, I might decide, after analysis, that what produces the greatest good for the greatest number is to write a letter to the editor of the local newspaper criticizing deeds of this sort, or I might find that I should, for one month, wear a T-shirt with the nature of the criminal that I am printed on it. Or, I might find that I should do simply nothing, for which, true, I am responsible, as a utilitarian, but which further suggests that there is no necessary connection between my being responsible for my acts as a utilitarian, or for that matter a Kantian or an ethical egoist, and my taking responsibility for it in the specific form of confessing to an officer of justice or entering a plea of guilty.

If none of the major reflective systems of morality provide the ground for the obligation in question, could some deeply rooted commitment of customary morality do so? I gather that honesty, truth telling, and the avoidance of lying figure large in any inventory of our cultural values, and, arguably, are among the essential, raw materials for forging some obligation to confess to some crime one has committed. It is questionable, however, just what sort of a foundation such commitments provide when one considers, on the one hand, the imprecision of these values and, on the other, the consequent difficulty of reconciling these values with various other customary practices and commitments. Is the moral agent, in such a moral system, ever allowed, for example, to be less than honest? "Certainly," one might well respond within this value system, "to save a life, to name one obvious exception." But notice where this line of reasoning takes us when we consider saving one's own life; cannot he be less than honest to save his own life; what of self defense; is this too not clearly recognized within our customary moral system as an exception to some unwavering commitment to the value of human life. And, if so, cannot an accused, who did commit the restricted act, at least see it as an open question of what plea he enters, given that he may be defending himself by a plea of not guilty; and if so, and here is the point, why should customary morals be the foundation for some obligation to confess?

Further, it seems that obvious customary values like those mentioned--truth telling, honesty, and not lying--at most might push in the direction of urging one to fess up only when asked, "Did you commit the offense in question?" To some this may sound like fancy footwork, but this is analysis, and I will pursue this. Consider that George Washington is a folk hero for responding, upon being asked whether the cherry tree was felled by his hand, that it indeed was, and that he could not tell a lie. No

burden was placed on him to go forward with the truth of his misdeed. He did not interrupt his mother from her chores, tug at her skirt-tails and declare, on his own initiative, that the misdeed was his. So, so far as customary morals' providing the ground for some obligation to take the initiative to turn oneself in goes, it seems unable to do so. And so far as customary morals' providing the ground for some obligation to answer honestly when asked whether one did perform some deed, the matter is controversial with George Washington pulling in one direction and self defense in the other.

While it would be premature from just these considerations to conclude that we can never establish a foundation for an ongoing, invariable moral obligation to confess, indications that the major sources of reflective and customary morals fail to do so should at least make us very wary of anyone's asserting that there is such an obligation. Now, this skeptical attitude, it should be noted, is recommended only to rebut the positing of some obligation, simpliciter. There is nothing that has been said that, faced with a decision, the agent may indeed find, using one of the moral decision procedures we referred to, that on that occasion he does indeed have such an obligation.

Taking further stock in what we have done, felicitous consequences, as it turns out, accrue for the legal order. For we are not now in the unhappy position we thought we might have been in when we recognized that some invariable moral obligation to confess would undermine the legal right of a defendant to have the state prove its case against him, such a right supposedly being fundamental to our system of criminal justice. Nor must we abandon or think them shallow our commitments to presuming innocence until guilt is proven and to thinking it preferable to freeing a "guilty" person than to imprison an innocent person. Now, at least with our finding that an obligation to confess only may obtain, do we see that there need be no ongoing clash between our legal and moral systems.