

Moral Responsibility Without Contingency

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ABSTRACT

Using the Supreme Court ruling allowing the death penalty for non-intentional accomplices, *Tison v. Arizona* (1982), I explored various theories of intention and foreseeability and their relevancy to assessing moral responsibility. While the Court acknowledged that the brothers were neither the triggermen nor intended for the victims to die, it ruled that the Tison brothers could foresee that arming two convicted murderers and aiding their escape from prison might lead to the death of innocent people. I propose that foreseeability is sufficient for moral responsibility.

INTRODUCTION

Do we have free will? Well, one way of answering this question is to adopt determinism, which is to say that humans are causally determined and therefore do not have free will. You act the way you do because your genetics, combined with psychological and social influences, make it so. Your genes are good, you ate the right foods, your parents loved you, your kindergarten teacher taught you to use your words when you were angry, and you are mentally sound. A killer on the other hand had substandard genes, ate too many Twinkies, was abused as a child, was bullied, or perhaps suffered from paranoid delusions. You were bred and raised to act the way you do. Had you been raised by your evil stepmother or had the killer eaten a salad once in a while, things would be different.

There is something intuitive about this. When someone acts in some particularly heinous way, we do look at his or her childhood, mental state, or drug/alcohol use. Sociologists, psychologists, and even marketers use this information to make reasonably accurate predictions about our behaviors.

But equally intuitive, if not more so, is the idea that we do have free will and that not every action is caused by some previous cause or causes, which is indeterminism. Instead, we are the authors of our own lives. This is what Laura Waddell Ekstrom calls the “*internal* story of human agency.”¹ From infancy, we began to form preferences: this baby preferred to sit in one of those wind up chairs, this one wanted to be held. As we get older our intellectual, physical, and emotional capacities develop, and coupled with decreasing parental constraints, our options expand. By this theory, we are also encountering “forks in the road.” This might explain how a gang member from an “at-risk” family “chooses” to go to college and eventually become a mayor² (Eddie Alberto Perez became mayor of Hartford, CT in 2001), while a “good girl” from a “good family” ends up exchanging blow jobs for crack cocaine.

So why does it matter if an action is free or determined? Philosophers have concluded that free will is necessary for a number of different values—human dignity, creativity, and authenticity. But the most central concern for free will is moral responsibility. How can we be responsible for our actions if they are causally determined? More specifically, how much freedom do we have and in what degree is it sufficient to warrant significant moral responsibility?

In our social and legal systems, there are general, intuitive conditions that determine responsibility. In assessing the degree of responsibility assigned to an action of a particular agent, we take into account conditions of age, intelligence level, sanity, and how informed the agent was regarding her actions. In this respect, a sane adult with normal functioning would be held accountable (thus, more praise and blameworthy) for her actions, while animals, children, the insane, and those with cognitive disabilities would be held less, or not, accountable.

¹ Ekstrom, Laura Waddell. *Agency and Responsibility*. Bolder, CO: Westview Press, 2001.

² Former gang member, Eddie Alberto Perez, became mayor of Hartford, CT in 2001.

In philosophical studies, however, the focus often shifts from the general conditions of responsibility to an examination of whether human beings are metaphysically free enough to act responsibly.³ Traditionally, two propositions arise from this study:⁴

- In order for an agent to be morally responsible, she must possess free will (or the ability to act otherwise than she does). For, if she cannot ever act otherwise, then she is not morally responsible for the consequences of her actions.
- If determinism is true, then free will cannot exist.

The consequence of these propositions is that moral responsibility entails indeterminism. Unfortunately, in accepting this consequence, one is forced to concede that if determinism is proven true, then our deeply seated, intuitive sense of moral responsibility must be dismissed as well.

The rejection of this entailment has stimulated an upsurge of compatibilist theories.⁵ Philosophers such as Hume, Strawson, Frankfurt, and Fischer have rejected the proposition that free will cannot exist if determinism is true and have, instead, posited alternatives to the requirements for free will. However, these alternatives are not in agreement: some hold that an agent is responsible only if the action was caused by one's "deep self,"⁶ others require that the agent possess the ability to cognitively and normatively recognize and appreciate the world for what it is,⁷ some insist that the agent must meet certain epistemic and freedom relevant conditions,⁸ while still others argue that the agent must possess the right type of control.⁹ To simplify these, however, we can think of compatibilism as claiming an agent is acting freely when she is free of constraints. So according to compatibilists, even if determinism is true, you were acting freely when you came here today. It is important to distinguish that "acting freely" does not necessarily mean that the agent is also "willing freely." For example, even if those genetic, psychological, and social influences caused you to read this, you acted freely by doing so. Therefore, you are responsible for your action. Conversely, according to compatibilists, had someone pointed a gun at your head and demanded that you read, you would not be responsible.

The question of moral responsibility most often arises in relation to our legal system. Punishment, for the most part, demands that an agent possess the mens rea, or guilty mind. If determinism is true and we reject moral

³ According to Eric Kraemer in an unpublished handout, the metaphysical problem of free will arises from three plausible claims:

1. Thesis of Free Action: At least some agents act freely sometimes.
2. Thesis of Determinism: All actions are causally determined by previous causes
3. Traditional Analysis of Freedom: For an agent to act freely the act must not be caused by a previous cause

Since all three claims cannot be true, one claim must be rejected. This has led to three general "solutions" to the problem:

- A. *Determinism* - Humans are causally determined. Therefore, no actions are free. [rejects (1)]
- B. *Indeterminism* - Humans sometimes acts freely. Therefore, no all actions are caused by previous causes. [rejects (2)]

Compatibilism - Humans are causally determined, yet sometimes act freely. [rejects (3)]

⁴ Peter van Inwagen discusses these propositions in "Fischer on Moral Responsibility" *The Philosophical Quarterly*, Vol. 47, No. 188. (July 1997) 373.

⁵ John Martin Fischer discusses a variety of compatibilist theories at length in his survey article "Recent Work on Moral Responsibility" *Ethics*, 110 (October 1999) 93-139.

⁶ Harry Frankfurt held that there are two types of freedoms—freedom of action (the freedom to do what one wants) and freedom of will (the freedom to control what one wants). According to Frankfurt an agent is responsible only if her action involves the use of both these freedoms.

⁷ Susan R. Wolf, "Sanity and the Metaphysics of Responsibility," in Ferdinand David Schoeman, ed., *Responsibility, Character and the Emotions: New Essays in Moral Psychology*. New York: Cambridge University Press, 1987. Wolf argues that the condition of sanity be included in the deep-self theory.

⁸ In the *Nicomachean Ethics*, Aristotle proposed that "actions done in ignorance of particulars are involuntary." Both John Martin Fischer and Joel Feinberg discuss this Aristotelian view.

⁹ Fischer, John Martin and Thomashauer, Regina. *The Metaphysics of Free Will*. Cambridge, MA: Blackwell Publishers, 2002. Fischer identifies two types of control—regulative and guidance that, if an agent possesses either, sufficiently establish moral responsibility. Having regulative control requires that alternative possibilities be available for an agent. Guidance control, exhibited when our actions appropriately issue from our responsiveness to reasons, does not require this and is compatible with either determinism or indeterminism.

responsibility, our criminal justice/legal system would collapse. Because we typically think of capital punishment as being reserved for the most morally reprehensible criminals, it seems most fitting to use a death penalty case to fully examine the scope, and application, of moral responsibility.

In *Tison v. Arizona*¹⁰, the Supreme Court ruled that the death penalty could be extended to accomplices who demonstrated a “reckless indifference for human life.” In coming to their decision, the majority ruling, along with a dissent by Justice Brennan, explored some of the key issues of moral responsibility.

DISCUSSION

The specifics of the case are as follows: On July 30, 1978, brothers Donald, Ricky, and Raymond Tison entered the Arizona State Prison at Florence carrying a large cooler filled with guns. Their father, Gary Tison, had been sentenced to life imprisonment as the result of a prison escape during the course of which he had killed a guard. After he had been in prison a number of years, Gary Tison's wife, their three sons, Gary's brother Joseph, and other relatives made plans to help Gary Tison escape again. Plans for escape had been discussed with Gary Tison, who insisted that his cellmate, Randy Greenawalt, also a convicted murderer, be included in the prison break. The Tisons armed Greenawalt and their father, and the group, brandishing their weapons, locked the prison guards and visitors present in a storage closet. Without firing any shots, the five men left the prison.

After leaving the prison, the men drove to an isolated house. The tire on their car had gone flat, so the men replaced the tire with the only spare. Two days later, while driving towards Flagstaff, another tire blew. Unable to replace the tire, Raymond attempted to flag down a passing car while the other four armed themselves and lay in wait by the side of the road. John Lyons, his wife, his 2-year-old son, and his 15-year-old niece, pulled over to render aid.

As Raymond showed John Lyons the flat tire on the Lincoln, the other Tisons and Greenawalt emerged. The Lyons family was forced into the backseat of the Lincoln. Raymond and Donald drove the Lincoln down a dirt road off the highway and then down a gas line service road farther into the desert; Gary Tison, Ricky Tison, and Randy Greenawalt followed in the Lyons' Mazda. The Lyons were escorted to the Lincoln and ordered to stand in its headlights. Gary Tison then ordered his sons to return to the Mazda to fill a water jug. While at the car, the three brothers saw their father and Randy Greenawalt raise their shotguns and murder the Lyons family.

Several days later the Tisons and Greenawalt were apprehended after a shootout at a police roadblock. Donald Tison was killed. Gary Tison escaped into the desert where he subsequently died of exposure. Raymond and Ricky Tison and Randy Greenawalt were captured and individually tried for capital murder of the four victims as well as for the associated crimes of armed robbery, kidnapping, and car theft. The capital murder charges were based on Arizona felony-murder law providing that a killing occurring during the perpetration of robbery or kidnapping is capital murder, and that each participant in the kidnapping or robbery is legally responsible for the acts of his accomplices. Each of the men was convicted of the four murders under these accomplice liability and felony-murder statutes. The Tison brothers, although they did not themselves commit any killing, were sentenced to death for their roles as accomplices.

At the core of this ruling is an assumption that the Tison brothers freely chose to act as they did, and that they are, therefore, morally responsible for the killings. The question that I pose is: is that assumption correct? Were the Tisons free moral agents and should they be held responsible for consequences that they did not intend?

In the *Harvard Law Review* article, “The Supreme Court – Leading Cases,”¹¹ the author(s) argue that the Supreme Court ruling in *Tison v. Arizona*¹² allowing the death penalty for accomplices is an appeal to vengeance, and “signals an unfortunate departure from the Court’s previous treatment of the death penalty as a unique punishment subject to the most exacting scrutiny and reserved for only the most reprehensible criminals.”¹³ A further distinction made by the Court was the role that the accomplices played in the felony murder and whether they showed a “reckless indifference to human life.” The Tisons had played major roles in the felony and were at the scene of the murders. The brothers had armed two convicted murderers, helped them escape from prison, and assisted in kidnapping and carjacking. While they had not directly participated in the killing of the Lyons family, they were present at the scene of the murders, did nothing to stop the murders, and continued to assist the murderers after the killing occurred.

¹⁰ 107 S. Ct. 1676 (1987).

¹¹ “The Supreme Court – Leading Cases,” *Harvard Law Review*. Vol. 101:119. 1987.

¹² 107 S. Ct. 1676 (1987).

¹³ *Ibid.* at 139.

Writing for the majority, Justice O'Connor asserted that, while the Tison brothers may not have intended for a killing to take place, by arming two convicted murderers – one of whom had previously killed a prison guard during a previous escape attempt and another who admitted that he was prepared to use lethal force in order to escape – and acting as major participants in the felonies, the Tisons had been aware of the possibility that lethal force may be used. This, O'Connor wrote, would be sufficient to demonstrate a “culpable mental state of reckless indifference to human life.”¹⁴

In changing the standard from “intent to kill” to “reckless indifference to human life,” the Court analyzed intention. It noted that some intentional murders, such as those done in self-defense, would not render the murderer criminally liable. Conversely, the Court argued that, since they are indifferent to the possibility that the victim may die during a violent felony, “some nonintentional murderers may be among the most dangerous and inhumane of all.”¹⁵ The majority, therefore, determined that reckless indifference was as morally reprehensible as intent to kill.

Split 5-4, the minority in *Tison v. Arizona* argued vociferously against the “reckless indifference” standard. Justice Brennan noted in his dissent that the brothers had made an agreement with their father that no one would get hurt,¹⁶ and that the brothers had “expressed feelings of surprise, helplessness, and regret”¹⁷ at the killings. Justice Brennan argued that the majority had neglected to consider this evidence in remanding the case back to the Arizona court, and stressed that this evidence be measured when determining the Tisons’ culpability under the “reckless indifference” standard.

Justice Brennan further notes that the majority did not establish a proportionate penalty for “nonintentional” accomplices.¹⁸ While he allowed for the possibility of the death penalty to be extended to one who actually committed the unintentional murder, Justice Brennan argued that intent to kill was necessary to establish when the defendant has not “committed an *act*”¹⁹ for which a death sentence could be imposed. He contended that the standard set forth by the majority in *Tison* depended on the moral culpability of the defendant regarding a murder committed by another agent. He asserted that extrapolating culpability based on factors such as participation in a felony or presence at the murder is not sufficient for determining whether a defendant possesses the mens rea necessary for a death sentence.

The author(s) of the article see the *Tison* ruling as a shift away from treating the death penalty as a “unique form of punishment, subject to the most demanding scrutiny and reserved for the most blameworthy criminals.”²⁰ They note that the Court glossed over speculations of deterrence, retribution, and proportionality – all things that the Court has given ample consideration to in previous death penalty cases – and offered only a “vague explanation”²¹ as to why intent was an unsatisfactory measure. They argue that the Court has noted in past cases that the death penalty has little to no value as a deterrent in unintentional killings. Furthermore, killing an agent who commits a nonintentional murder, or who has not himself committed a murder, cannot have any retributive value. The author(s) note that the killing of an accomplice “may satisfy the community’s thirst for vengeance,”²² but this is not equivalent to the retributive goal of giving to the criminal his “just deserts.”

According to Joel Feinberg²³, there are two types of retribution—moralistic and legalistic. Moralistic retributive justice stems from the idea that criminals receive their deserved punishment or “just desert.” Clearly, as the word “deserved” suggests, moral culpability is major factor here. Legalistic retribution appeals to the notions of contracts—basically “commit the crime; do the time.” In choosing to live in a society, you are required to comply with the social contract of that society—in this case state and federal laws. For the social contract to be effective, it necessarily entails punishment for breaking rules of contract. With this type of retribution, moral culpability is not necessarily important. For example, let’s say Mary kills John and Jim kills Sue. The cause of death for both John and Sue are very similar: shot in the head at close range. According to legalistic retribution, Mary and Jim committed the same crime, and thus should be punished in view of that. What it fails to take into account, however,

¹⁴ *Ibid.* at 1684.

¹⁵ 107 S. Ct. at 1688.

¹⁶ *Ibid.* at 1692.

¹⁷ *See ibid.*

¹⁸ The author(s) footnote pg. 142 (35) states that Justice Brennan noted the Court’s examples in the majority opinion illustrated wanton, *intentional* killings. Instead of lacking intent, they lacked premeditation and deliberation.

¹⁹ 107 S. Ct. at 1694.

²⁰ Pg. 144

²¹ Pg 145

²² Pg 146

²³ Feinberg, Joel. *Harm to Others: The Moral Limits of the Criminal Law*. New York: Oxford University Press, 1987.

is the possibility that Mary killed would-be rapist John in self-defense while Jim killed bank-teller Sue in the midst of a botched robbery attempt. Understandably, this is a very important distinction—precisely what Justice O'Connor pointed to when she acknowledged that intention was neither necessary or sufficient for establish moral responsibility.

The dissent in *Tison* makes a valid point in questioning the Court's lack of consideration to deterrence. Deterrence is comprised in the consequentialist or utilitarian principle that punishment can be justified by its good effects/consequences. Thus, a punishment is justifiable if it stops others from committing crimes (deterrence), reduces recidivism, elects politicians, or some other good comes of it. Because the goal of this punishment is to produce a good consequence, actual guilt of criminal is neither necessary nor sufficient. While this is definitely the case with electing politicians and reducing recidivism (obviously someone who is imprisoned or executed will not be committing crimes), deterrence does seem to require some degree of culpability. Fear of punishment may deter some would-be criminals, but it seems that this would be unlikely if they felt that they might be punished anyway regardless of their actions. For deterrence to work well, it requires that an agent has an understanding of the potential outcomes of his or her actions and can freely choose his or her actions based on this understanding (i.e., we can assume that Gary Tison understood that shooting the Lyons family would result in their death and freely chose to fire). Writing for the majority in *Tison*, Justice O'Connor redefined foreseeability as whether or not a defendant "intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken."²⁴

Is the degree of foreseeability required in *Tison* the same as that necessary for deterrence? The Court in *Tison* held that "the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves."²⁵ Thus, the dissent in *Tison* points out, "any participant in a violent felony during which a killing occurred ... would be liable for the death penalty."²⁶ It is undeniable that the Tison brothers foresaw the possibility of bloodshed. By his own admission, Raymond Tison indicated that during the escape he was willing to kill in a "very close life or death situation." Raymond further stated that the brothers had an "agreement" with their father that no one would get hurt. However, in order for the death penalty for accomplices to hold any value as a deterrent, the defendant requires both the foreknowledge of the possibility of bloodshed and the freedom to chose his or her actions.

So is it still possible that the Tisons—though nonintentional accomplices to the murders—may still be morally responsible? Well, as I discussed earlier, compatibilism allows that an agent is acting freely if they are free of constraints. In many of their actions, the Tison brothers were not constrained. Even if we grant that the Tisons were constrained—and thus not free agents—at the time of the killing, moral responsibility may still apply.

To understand this, we need to turn our attention to what might constitute moral responsibility. Certainly moral responsibility extends to intentional actions—Gary Tison and Randy Greenawalt clearly intended to kill the Lyons family when they aimed their guns and fired—their moral culpability is quite clear. But, moral responsibility does not rest solely with intentional actions.

One can be held morally responsible for intentionally failing to act. Although it accepted that the brothers did not fire the guns, they also did not stop Gary and Randy from killing the Lyons—even when they thought that this was a possible outcome.

One can also be held morally responsible for knowingly bringing about some outcome (i.e.—"The family was not killed on purpose. All we were trying to do was continue with our escape plan. I know that this is a potential outcome, but it is not our intention"), or bringing about some outcome one should have known might happen. ("Sure, we gave guns to convicted murders, helped them break out of prison, steal a car, and kidnap a family, but we didn't think they would *kill* anyone.") This is the "foreseeability" that the Court refers to which Gerald Dworkin as calls *indirect intention*.²⁷

Thus, I would argue that the Tison brothers are morally responsible for the murders both by failing to prevent the murders, and by arming two convicted murders when they should have known that this might lead to deaths.

²⁴ *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

²⁵ *Id.* Pg. 151

²⁶ *Id.* Pg. 164

²⁷ Dworkin, Gerald. "Intention, foreseeability, and responsibility." *Responsibility, Character, and the Emotions: New Essays in Moral Psychology*. Edited by Ferdinand Schoeman. Cambridge: Cambridge University Press, 1987 338-354. The distinction between what one intends and what one foresees (which Dworkin refers to as direct and indirect intentions) is embodied in the doctrine of double effect. In examining the relevance of this distinction for determining moral responsibility, Dworkin argues that "it is not a matter of responsibility, but rather a different degree of responsibility when one indirectly intends some harm or evil." (348).

While the brothers did not directly intend for killing to occur, they nonetheless should have, and did, foresee the possibility of bloodshed. However, the degree of moral responsibility assessed to Tison brothers should be less than that of the two triggermen.

LIMITATIONS

In conclusion, I would like to point out several qualifications to my argument for moral responsibility. My proposal that the Tisons are morally responsible for the murders is still troublesome. While Raymond states that he was willing to use force in this escape, he chose not to do so, and although arming two convicted murderers is very irresponsible to say the least, it has been established that the Tison brothers did not do so with the direct intention of any killing. They, furthermore, attempted to prevent the possibility of any killings by naively establishing an “agreement” with their father—an agreement that proves the Tison brothers did foresee the possibility of killing. Nonetheless, it is likely that the Tison brothers felt that these were adequate moral constraints. Now one could argue that the Tison brothers, though showing concern for human life before the prison escape, failed to prove that they were equally committed to preserving life during the escape. On the other hand, it could be argued that the Tisons were simply victims of bad luck. They made an agreement with their father and he did not comply.

The moral luck theory, as expressed by Williams and Nagel,²⁸ could also be applied to the carjacking as well. Given that there was no indication that the brothers could have foreseen the possibility of the getaway car breaking down or the need to kidnap anyone, it is reasonable to conclude that the brothers could not have taken this into account *before* arming their father and Greenawalt. We can certainly agree that the Tison brothers did not directly intend for their father to kill anyone—quite the opposite in fact—and that they did not directly or even indirectly intend for a second tire to blow on the getaway vehicle. Therefore, it is possible that some other person or persons, also with the exact same plan and intention to break out of prison and head to Mexico, might have done so without having to steal a car or be a party to murder. One could make the argument that moral responsibility is diminished on the ground of possible moral luck. An exploration of whether this is so is certainly beyond the scope of this paper.

Finally, moral responsibility consequently entails that people are either praise or blame-worthy for their actions (in the Tisons’ case blameworthy and therefore subject to punishment). Clearly the punishment should fit the crime and this is why the principle of proportionality is used in our justice system. In this respect, I would agree with Justice Brennan that extending the same punishment to a non-intentional accomplice as one might the non-intentional triggerperson is excessive.

I have purposely chosen not to address the fitness of the death penalty as a punishment. While it may appear to follow from my assessment of moral responsibility and our current system of punishments that a person who is guilty of taking another’s life should be given the most severe punishment, I nonetheless, do not think my argument commits us to any *form* of punishment. Whether or not the death penalty should be used as a form of punishment is certainly a topic worthy of attention, but again, is beyond the scope of this paper.

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²⁸ Williams, Bernard. *Moral Luck*. Cambridge: Cambridge University Press, 1981. Nagel, Thomas. *The View from Nowhere*. New York: Oxford University Press, 1986. Moral Luck is the principle that the perceived morality of a person's actions sometimes depends on luck or chance.