
RATIONALITY AND RESPONSIBILITY

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An agent's responsibility for action has critical importance in both criminal and civil law. In a liberal society that favors negative liberty, the law permits maximum liberty and autonomy only to responsible agents.¹ Generally unencumbered by legal regulation, they are free, for example, to make foolish, irrational and even dangerous life choices, such as refusing potentially life-saving medical treatments. Even if it is virtually certain that a responsible agent will harm others by, say, criminal behavior or behavior that might impoverish his or her family, the law cannot intervene unless the behavior qualifies as a criminal offense. In contrast, agents who are not responsible may be treated paternalistically for their own good or preventively deprived of liberty in the absence of criminal conduct for the safety of others.

I have pursued questions of responsibility in criminal law and mental health law since the beginning of my legal academic career at the University of Southern California Law School.² This article will canvass and reflect upon my most recent positions about the central issues of

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1. I recognize that there is no clear line between negative and positive liberty, but it is generally true that our polity favors the right to be left alone over the right to the provision of conditions that might increase autonomy and other goods.

2. See, e.g., Stephen J. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527 (1978); *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777 (1985); *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 VA. L. REV. 971 (1982); *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CAL. L. REV. 54 (1982); *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976); *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984); *Justice, Mercy, and Crazyness*, 36 STAN. L. REV. 1485 (1984) (reviewing NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* (1982)).

responsibility and desert.³ Part I presents an internal, positive account of the concept of responsibility that best explains our present criminal and mental health law rules, practices, and institutions. I argue that the general capacity for rationality is the fundamental criterion of responsibility. Part II turns to determinism's challenge to responsibility, which many believe to be the most profound external critique. I claim that determinism is not inconsistent with real responsibility. Part III applies the rationality model of responsibility to a number of doctrines and policies in criminal and mental health law. Part IV is a brief conclusion.

I. RESPONSIBILITY

The legal concept of responsibility is primarily moral and political. Human beings, other animals, and the physical forces of the universe can all be causally responsible for changes in the world, but only human beings are capable of being judged morally responsible by a legal regime. Judgments concerning responsibility are judgments about people, so a proper understanding of responsibility must begin with a concept of the person.

In brief, the law's concept of the person is a creature who acts for reasons and is potentially able to be guided by reason. Physical causes explain all the moving parts of the universe, but only human action can also be explained by reasons. It makes no sense to ask the winds or the tides or infrahuman species why they do what they do, but this question makes sense of and is central to our explanations of human behavior. When we want to know why an agent intentionally behaved as she did, we do not desire a biophysical explanation, as if the person were simply biophysical flotsam and jetsam. Instead, we seek the reason she acted, the desires and beliefs that formed the practical syllogism that produced intentional conduct. There are those who believe that all mental states, such as desires, beliefs and intentions, can be reduced to biophysical states of the brain and

3. See, e.g., Stephen J. Morse, *Brain and Blame*, 84 GEO. L.J. 527 (1996); *Crazy Reasons*, 10 J. CONTEMP. LEGAL ISSUES 189 (1999); *Culpability and Control*, 142 U. PA. L. REV. 1587 (1994); *Deprivation and Desert*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE 114 (William C. Heffernan & John Kleinig eds., 2000); *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, in 23 CRIME AND JUSTICE 329 (Michael Tonry ed., 1998); *Hooked on Hype: Addiction and Responsibility*, 19 L. & PHIL. 3 (2000); *Neither Desert nor Disease*, 5 LEGAL THEORY 265 (1999); *Waiting for Determinism to Happen* (1999), at <http://www.legalessays.com/morse.pdf>. The present article draws liberally from sections of some of the articles listed in this footnote.

nervous system, but such reductionism is almost certainly “moonshine”⁴ and the law clearly views human action as reason-governed.

The law’s conception of the person as a practical reasoner is inevitable if one considers the nature of law. At base, law is a system of rules and standards expressed in language that are meant to guide human behavior. The law therefore presupposes that people are capable of using rules and standards as premises in the practical syllogisms that guide action. For example, no instinct governs how contracts are made or what is the standard of care in ordinary behavior. It is plausible, therefore, to assume that the law plays a guiding, and often the central, role in those areas of human life that it regulates.

The law’s concept of responsibility follows from its view of the person and the nature of law itself. Unless human beings are rational creatures who can understand the applicable rules and standards, and can conform to those legal requirements through intentional action, the law would be powerless to affect human behavior. Legally responsible agents are therefore people who have the general capacity to grasp and be guided by good reason in particular legal contexts. They must be capable of rational practical reasoning. The law presumes that adults are so capable and that the same rules may be applied to all people with this capacity. The law does not presume that all people act for good reason all the time. It is sufficient for responsibility that the agent has the general capacity for rationality, even if the capacity is not exercised on a particular occasion. Indeed, it is my claim that lack of the general capacity for rationality explains precisely those cases, such as infancy or certain instances of severe mental disorder or dementia, in which the law now excuses agents or finds them not competent to perform some task.

The general capacity for rationality in a particular context is thus the primary criterion of responsibility and its absence is the primary excusing condition.⁵ A general capacity is nothing more than an underlying ability to engage in certain behavior.⁶ English speakers, for example, have the general capacity to speak English, even when they are silent or are speaking a different language. Of course, general capacity can refer to

4. Galen Strawson, *Consciousness, Free Will, and the Unimportance of Determinism*, 32 *INQUIRY* 3, 3 (1989).

5. I am assuming, as most theorists about rationality and competence do, that rarely is an incapacity global across all behavioral domains. An agent might be quite capable of rationality generally, but still lack the general capacity in a particular context. Only in the latter would the question of responsibility arise.

6. See R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* 214–21 (1994).

behavior that is on a continuum. For example, a person of average strength might easily be able to lift a certain amount of weight, but as the weight increases, it will become harder for the person to lift it and would finally become impossible. As long as the agent is generally capable of certain conduct, it is fair to hold her responsible for failing to engage in such conduct unless there is a reason that she ought to be excused. For example, suppose an object fell on and pinned down a victim that the agent had a duty to aid. If the object were light, the average agent might have no difficulty removing it; if it were heavy, removing it would be more difficult, but morality and the law alike would expect the agent to strain to do so and would blame an agent who did not exercise a capacity she possessed. People often engage in legally relevant behavior for non-rational, irrational, and foolish reasons, but this does not excuse them or render them nonresponsible if they are generally capable of rationality.⁷

I have claimed that rationality is the defining criterion of legal (and moral) responsibility, but it is not self-defining. It is a normative concept that can take on various meanings according to differing moral and political judgments about how society should govern itself. Accepting rationality as the defining criterion therefore does not entail a commitment to any particular view of what rationality requires. “Thick” and “thin” versions are possible, which would narrow or expand respectively the numbers of citizens who would be considered responsible. For example, if rationality is deemed to require the emotional capacity to empathize with the feelings of others, then people who lack this capacity, such as psychopaths, would not be considered rational. Which capacities and how much of such capacities are necessary can only be decided on normative grounds.

7. There are objections to the notion of a general capacity. Some might contend that it is impossible for an agent to exercise a general capacity on a specific occasion when the agent did not exercise it. Such an argument is simply a form of the *reductio* that no one is capable of doing anything other than what they did do. This is trivially true in the sense that agents cannot do “p” and “not-p” at the same time. It does not follow, however, that it is impossible for an agent to exercise the general capacity. An English speaker who is silent surely has the general capacity to speak English.

A more challenging version of the same claim is the determinist argument, which suggests that the notion of a general capacity is useless because at a fixed time only one outcome is ever possible for both an agent and the other moving parts of the universe, given antecedent events and the fixed laws of the physical world. Such an argument is an external, metaphysical attack on the basic concepts and practices of responsibility. I return to it more generally in Part II. Taken seriously, however, it would suggest that no one should ever be treated as more or less responsible than anyone else because either no one or everyone is responsible. Thus, this argument cannot possibly explain or furnish internal grounds for criticism of current concepts and practices. The notion of a general capacity is one we use all the time to evaluate our behavior and that of others. There is no reason to abandon it in the face of an unknowable metaphysical challenge.

Although there cannot be an a priori, incontrovertible answer to such normative questions, some guidance is available concerning the content of the capacity for rationality. I do not have an exalted or complicated notion of rationality—itsself a congeries of skills rather than a unitary capacity. At the very least, rationality must include the ability, in Susan Wolf's words, "to be sensitive and responsive to relevant changes in one's situation and environment—that is, to be flexible."⁸ By this account, rationality is the ability to perceive accurately, to get the facts right, to form justifiable beliefs, and to reason instrumentally, including weighing the facts appropriately and according to a minimally coherent preference-ordering. Rationality includes the general ability to recognize and be responsive to the good reasons that should guide action.⁹ Put yet another way, it is the ability to act for good reasons. There is good reason not to act (or to act) if doing so (or not doing so) will be unjustifiably harmful or maladaptive.

A highly controversial question is whether desires or preferences in themselves can be irrational.¹⁰ It is of course true that having desires most people consider irrational is likely to get one into trouble, especially if the desires are strong and frequently occurring. Nonetheless, I conclude that even if certain desires can be labeled irrational, irrational desires do not deprive the agent of normative competence unless they somehow disable the rational capacities just addressed or produce an internal hard-choice situation distinguishable from the choices experienced by people with equally strong, rational desires. In other words, if the agent with irrational desires can comprehend the relevant features of her conduct, she can be held responsible if her irrational desires are the reasons she engages in legally relevant behavior.

Rationality is of course a continuum concept and individuals differ widely in their ability to get the facts straight, to understand the rules, and to reason. People with fewer endowments will find it harder to be rational; people with more will find it easier. In general, however, the threshold for responsibility or competence in law is not high because our legal system has a preference for maximizing liberty and autonomy. Minimal rationality will usually suffice and unimpaired adults will have the general capacity in most contexts to meet the law's relatively modest requirements.

8. SUSAN WOLF, *FREEDOM WITHIN REASON* 69 (1990).

9. *See* JOHN MARTIN FISCHER & MARK RAVIZZA, *RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY* 41 (1998).

10. ROBERT NOZICK, *THE NATURE OF RATIONALITY* 139–40 (1993) ("At present, we have no adequate theory of the substantive rationality of goals and desires . . .").

Because I claim that rationality best explains our doctrines of responsibility, the concept of rationality must do a great deal of work. One might therefore desire a more precise, uncontroversial definition of irrationality, but such a desire would be unreasonable. The definition I am using, which is always open to normative revision, is grounded in our ordinary, everyday understanding of practical reasoning and its critical role in human interaction, including morality. We are, after all, the only creatures on earth who truly act for reasons. We all, everywhere and always, successfully employ the imprecise definition I am using to evaluate both moral and nonmoral conduct. To demand more is to desire the impossible and the unnecessary. Moreover, if one wishes to jettison rationality as the core responsibility condition because it is difficult to define it precisely, the burden should then be on the agent rejecting rationality to offer and justify a more morally compelling and precise criterion.

In addition to the general capacity for rationality, the absence of compulsion, coercion, or involuntariness is also a condition of responsibility.¹¹ An agent who is compelled to engage in conduct will not be held responsible for that conduct. Much confusion exists concerning the meaning of compulsion. To begin, compulsion has both a literal and a metaphorical meaning. The literal meaning involves cases in which the agent's bodily movement is not intentional, but is produced by an external or internal force that operates as a pure mechanism. For example, an agent's arm might rise despite the agent's intention to keep it still because a much stronger person forces the agent's arm up or because the agent suffers from an untreatable neurological disorder that produces an upward jerk of the arm. In both cases, the movement is literally, mechanistically compelled and not intentional. Indeed, in such cases we say that the agent has not acted at all and because agents can only be legally responsible for action, these are indisputably cases in which the agent is not responsible.¹²

The metaphorical cases are more problematic. In these cases, the agent is placed in a "do it or else" hard-choice situation. If the agent acts to avoid the threatened "or else" by doing "it" and then seeks to be excused for "it," the question is when the threat or hard choice is sufficiently hard to qualify as compulsion. Notice that the agent's action is surely intentional

11. These terms are often used interchangeably and nothing conceptually turns on the term used. For ease of exposition, I will use "compulsion" to address the issues.

12. In criminal law, assuming that the agent did not intentionally create the situation in which the mechanism would operate on her, such claims defeat the prima facie case because there has not been a "voluntary act."

and apparently rational. There is no “volitional” problem because the agent is perfectly able to execute the action necessary to avoid the threat.¹³ Acting to avoid a harmful outcome is rational, understandable conduct, but which threats should excuse? Should the standard be subjective, based on the agent’s subjective fear of or distaste for the threatened outcome, or should it be objective, based on whether we think a reasonable person should have been expected to resist the threat. The choice between the two standards and the content of the standards—How much fear? What is reasonable?—are both normative issues. In general, the law has opted for objective standards, with the standard of reasonableness varying according to the interests at stake in a particular context. For example, the criminal law defense of duress only obtains if the defendant is threatened with death or grievous bodily injury (common law)¹⁴ or if a person of reasonable firmness would have yielded to a threat of unlawful force (Model Penal Code).¹⁵

The issue of compulsion is further vexed by “one-party” cases in which the agent is allegedly compelled by desires produced by mental disorder or other untoward internal states. Familiar examples include drug seeking and using by addicts, sexual molestation by pedophiles, and betting by compulsive gamblers. Control, volitional, or irresistible impulse insanity defense tests are doctrinal responses to such alleged compulsions. Because the compulsion is caused by allegedly abnormal internal states there is a natural tendency to think of these cases as mechanistic, like the arm jerk of an agent with a neurological disorder, but this is an incorrect view. In all these cases, the agent is acting intentionally, apparently driven by strong, insistent desires. The agent wants to avoid the discomfort of abstinence, to obtain the pleasure of indulgence, or both, but in all cases the agent acts intentionally to satisfy the desire. Once again, there is no volitional problem, properly understood, because the agent is able to execute the action to satisfy the desire. If one conceives of the discomfort of abstinence as a threat, however, the analogy to external compulsion arises, but when should such threats be sufficient to excuse?

I am firmly of the opinion that disorders of desire should excuse only in those cases in which the desire is so strong and overwhelming that the agent at least temporarily loses the capacity to be guided by reason. Thus, the problem would be irrationality and not compulsion. Furthermore, if the

13. See MICHAEL S. MOORE, *ACT AND CRIME* 113–65 (1993) (explaining that a volition is simply a species of executory intention that converts an intention into an action).

14. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 273 (2d ed. 1995).

15. MODEL PENAL CODE § 2.09(1) (1962).

agent experienced quiescent periods in which the desire was not demanding, as all agents in fact do, she might have the duty to take steps to avoid future situations in which she might do harm because she would become irrational. In sum, external compulsion is relatively rare but furnishes an excuse; intense desires are perhaps less rare, but only furnish an excuse if they produce irrationality. Finally, action in response to delusional beliefs, say the paranoid belief that one is about to be killed, producing self-defensive behavior, is no more compelled than if such beliefs are reasonably or unreasonably mistaken. The delusional mistake would excuse because it is irrational, not because the delusional actor is more compelled than rational actors with the same belief.

Finally, some would argue that free will, free choice or the like are the criteria for responsibility. Most of these locutions are confusing, conclusory, prove too much, or are placeholders for a full, robust theory of responsibility.¹⁶ We would do well to abandon all such locutions as explanations of responsibility within legal discourse. If they are unpacked, all collapse into a theory about rationality and hard choice.

In sum, the general capacity for rationality is the precondition for liberty and autonomy. A lack of this capacity explains virtually all cases of criminal law excuses and virtually all the mental health laws that treat some people with mental disorders differently from people without disorders.

II. THE CHALLENGE OF DETERMINISM

Determinism is famously thought to be the most threatening challenge to ordinary moral and legal notions of responsibility: How can it be fair to say that anyone *deserves* praise and blame, reward and punishment, if it is true, roughly, that all events in the universe, including human behavior, are fully caused and explained by the conjunction of prior events and the covering physical laws of the universe? On this view, it may seem that human beings are simply passive spectators of the events that are their lives, rather than active agents whose actions determine the shape of those lives. No one knows if any of the various theses called determinism are true because it is impossible to know with certainty unless someone were somehow able to step outside the universe and to look in. Nonetheless, the universe appears to be such a lawful, regular place that we must accept the “realism constraint” that determinism, universal lawful causation or a near approximation is an accurate metaphysical view, at least at levels above the

16. See Morse, *Culpability and Control*, *supra* note 3, at 1590–1605 (examining the flaws in these alternative accounts).

subatomic.¹⁷ Consequently, our physical and interpersonal lives are properly predicated on the deep, rarely consciously acknowledged assumptions that matter does not rearrange itself at random and that our social and interpersonal lives depend on an enormous amount of implicit and explicit understanding of the regularities of nature, including human conduct.

There are three standard responses to deterministic worries. First, determinism is true and responsibility is impossible (so-called hard determinism, a form of incompatibilism); second, if determinism were true, responsibility would be impossible, but it is not true, at least not for human adults, and responsibility is possible (so-called metaphysical libertarianism, also a form of incompatibilism); third, determinism is true, yet responsibility is possible (so-called soft determinism or compatibilism). Anxieties about the relation between determinism and responsibility will not and should not vanish, but I conclude nonetheless that the compatibilist view is internally consistent, coherent, and provides the best theoretical and practical hope for grounding responsibility in both morality and law.

The hard determinist viewpoint generates an external, rather than an internal, critique of responsibility. That is, hard determinism does not try either to explain or to justify our responsibility concepts and practices. It simply assumes that they are metaphysically unjustified, even if they are internally coherent and justifiable according to some equally unjustifiable moral or political concept. To see why determinism cannot explain our responsibility attributions, remember that determinism “goes all the way down”: it applies to all people, all events. If this is a causal universe, all events are caused; no one and nothing is outside the causal stream. Thus, if determinism is true and is genuinely inconsistent with responsibility, then no one can ever be truly responsible for anything and responsibility cannot provide a justification for further action. But western theories of morality and the law do hold some people responsible and excuse others, and when we do excuse, it is not because there has been a little local determinism at work. For example, we do not hold young children fully responsible because they are not fully rational, not because they are determined creatures and adults are not. Determinism and causation do not loosen their grip on us as we age.

Determinism also does not tell us how we should act or what justice demands. Understanding the lawful regularities of human behavior might reveal what is possible for human beings and what is not, but such

17. Strawson, *supra* note 4, at 12.

understanding cannot dictate what morals, politics, and laws we ought to adopt. As we know from both history and ordinary observation, people are capable of adopting and acting on extraordinarily diverse moral, political, and legal schemes, which can make immense differences in the material and moral conditions of peoples' lives. It is difficult to imagine what the metaphysical truth of determinism could tell us about how we should live. To what metaphysical facts should morality and law have to answer? Even if there are right answers, without placing ourselves outside the universe—anyway an impossibility—how would we ever know that we got it right? Hard determinism is a moral and legal dead end.

Libertarianism has estimable adherents, but in my view even the most sophisticated version is metaphysically bewildering. Many people believe that “real” responsibility is possible only if people genuinely are prime movers unmoved. Only then would responsibility be secure because all our intentions and actions would be entirely “up to us.” Such god-like powers would indeed be a secure foundation for responsibility, but it seems wildly implausible that humans possess them. It is simply unimaginable that intentions and actions are not caused by the various genetic and environmental influences that shape peoples' lives. What would one have to believe, metaphysically, to believe also that those causes somehow apply to everything but human intentions and actions? Furthermore, it makes little sense to suggest that causal processes shape behavior, but with less force or less fully than the causal processes that shape other events. If this is a causal universe, it is causal all the way down. We would like to be prime movers unmoved, but we are not.¹⁸ Libertarianism, despite its promise, cannot provide a plausible foundation for responsibility, but we need not have the power it posits to justify responsibility.

Compatibilism, the view that we can be responsible in a deterministic universe, is the most theoretically and practically satisfactory response to deterministic anxieties. It is also the predominant view among philosophers. Attribution of responsibility and related practices are socially constructed, fundamentally moral enterprises. As such, they must be justified primarily by an internal, normative argument. It is hard to imagine to what metaphysical facts one could appeal outside morality itself and our best understanding of human nature. Nonetheless, anxieties about determinism and other apparent threats motivate many to seek a secure, external foundation to ground concepts as important as responsibility.

18. A less sophisticated version of libertarianism claims that there is indeterminacy in the universe, including in our brains and nervous systems, but this does not help. Why would essentially random events in our brains or anywhere else be a basis for responsibility?

Most notable among the seekers are theologians and secular metaphysicians, who try to justify responsibility with speculations and arguments about the divine or about ultimate reason. I am unconvinced by these accounts, however, and believe that no ultimate, uncontroversial justification can be found. There is simply no way to know about the existence of God or the genuine ontology of the universe. What is more disquieting, if we were convinced that God or metaphysical moral reality existed, such a conclusion would not lead to uncontroversial concrete answers to the specific questions of morals, politics, and law that vex human societies. Even if we agree that in principle there are ontologically correct answers to every moral question, there is no way for us to know what those answers are. For example, knowing that an absolute morality exists does not tell us whether the death penalty is ever justified. On epistemological grounds alone, then, even if foundations exist, we will never know when we have reached rock bottom.

We must therefore try to justify our concepts and practices by using the best moral and political theories available, recognizing that none will *ever* cause determinist anxieties to disappear or provide universally satisfying, uncontroversial, persuasive answers to the hardest problems. Because I accept the realism constraint, the view that the macro-universe is lawfully regular, the most I can do is to offer an internal account of responsibility that is not inconsistent with the truth of determinism or principles of fairness that we endorse. Indeed, I believe that the account of responsibility based on the capacity for rationality that Part I provided does explain our legal concepts, practices, and institutions. More normatively important, accepting the general capacity for rationality as the basis for responsibility is fully consistent with deeply held principles of justice in our moral and legal culture.

Individual and collective actions can cause pleasure or pain, can create wealth or poverty, can be kind or cruel. We discuss, argue, fight, and even kill about morals and politics precisely because the moral and political regime in which we live has an enormous impact on our well-being. It is unimaginable that conscious, social creatures such as ourselves could live in a world without moral and nonmoral norms, without some moral and political regime. Even if it is a deterministic world, even if our actions are determined, we are rational creatures. We must deliberate about how to act, and it is clear that those deliberations and actions make a difference. Only creatures who genuinely do not care about their lives or who believe that their actions make no difference fail to deliberate about what to do, but few, if any, people fully fit that description.

The possibility of predicting future behavior also cannot avoid the necessity for practical reason.¹⁹ Suppose that instead of deliberating an agent decides simply to conform or to defer to the agent's own prediction about what the agent will do. The agent must then take into account in making the prediction the agent's own knowledge of what the agent will do. But such knowledge would create an infinite regress problem that would undermine the agent's ability to predict her own behavior. An agent's knowledge of the prediction will affect the agent's behavior, which in turn will affect the prediction, and so on. Prediction of one's own behavior cannot substitute for practical reason because one cannot predict one's own behavior. Others can in principle successfully predict another agent's behavior, but once again, only if they do not reveal the prediction to the agent or if practical reason is ineffectual. And if the prediction is not revealed to the agent, the agent cannot conform or defer to the prediction and must use practical reason to decide what to do.

Even if determinism is true, we cannot wait for it to happen. We must determine what determinism dictates. And we do.

III. LAW AND POLICY

This Part considers a number of doctrinal and policy issues in criminal law and mental health law that have consistently concerned me: Should a history of deprivation furnish an excuse to crime? How should the law respond to crimes motivated by disorders of desire? Should psychopathy provide an excuse? How should the law respond to newly discovered psychological syndromes? Should the criminal law adopt a generic partial-responsibility excusing condition? Should results matter to desert? Is involuntary civil commitment justified for some people with mental disorders? The model of responsibility Part I describes is at the heart of much of the analysis, but my views are also animated by a strong political preference for permitting maximum liberty and autonomy.²⁰

Understanding that the capacity for rationality is the fundamental criterion of criminal responsibility for intentional action clarifies a number of important criminal law questions. Let us begin with the oft-stated claim that a history of deprivation that plays a causal role in criminal conduct

19. See HILARY BOK, FREEDOM AND RESPONSIBILITY 79–88 (1998).

20. By necessity, the arguments presented here must be telegraphic and conclusory; the fuller arguments are found in the articles cited *supra* note 3.

should itself be an excusing condition.²¹ Causation per se is not an excusing condition, however. If it were, everyone or no one would be excused because all behavior is caused.²² Deprivation should provide an excuse only if it severely diminishes the agent's capacity for rationality, but there is little reason to believe that this is true for most people who have had an unfortunate history of deprivation. Indeed, to believe otherwise threatens to patronize and stigmatize such people. In cases in which rationality is diminished, the excusing condition should be irrationality, not deprivation. Nor is there reason to believe that deprived people are often in a sufficiently hard-choice condition to justify a compulsion excuse. Deprivation is not compulsion per se, and if a deprived person is compelled by a sufficient threat, duress will be the excusing doctrine. In contrast, if deprivation produces a situation in which otherwise wrongful conduct is right or permissible under the circumstances because the balance of evils is positive, the agent will be justified. For example, an agent may justifiably steal to avoid starvation because it is preferable to commit theft than to starve. As a matter of social justice, our society must try harder to prevent avoidable deprivation among needy citizens, but excusing responsible agents will not accomplish this goal.

How should the law respond to criminal conduct motivated by "disorders" of desire, such as "addictions," so-called "pathological" or "compulsive" gambling, "deviant" sexual desires, and the like?²³ I suggested in Part I that, contrary to popular belief, there is no problem of compulsion or volition in such cases, but in some cases the desire may be so intense that it undermines the capacity for rationality. Nonetheless, an irrationality excuse is problematic because virtually all sufferers from disorders of desire have quiescent periods during which their capacity for rationality is not undermined and during which they recognize future dangers. They arguably have the duty at that time to take those steps necessary to suppress the desire or to ensure that they will not be in a position to act wrongly or dangerously when they become irrational. Thus, they may be held legally responsible if they offend to satisfy the desire.

Some disorders of desire, such as addiction, may sometimes produce a lifestyle with so much physical and psychological stress that the addict's

21. I address this issue most recently in *Deprivation and Desert*, *supra* note 3. I first addressed it in *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, *supra* note 2.

22. See Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091 (1985); Morse, *Deprivation and Desert*, *supra* note 3, at 130–32.

23. I address this issue most recently in *Hooked on Hype: Addiction and Responsibility*, *supra* note 3. I put many of the categorical terms in scare quotes because all such characterizations inevitably beg social, moral and empirical questions.

general capacity for rationality is impaired, even when the desire is not at its peak. Such cases should be treated like “settled insanity” and an excuse like legal insanity should obtain. Whether many or few addicts would be excused under such a regime would depend on a normative judgment about how much the general capacity for rationality must be undermined to warrant a full excuse. In cases of lesser impairment, a generic partial responsibility excuse, discussed below,²⁴ might apply to addicts and others with disorders of desire. Finally, if those with such desires are considered criminally responsible, as they usually are, it is difficult to justify a regime of preventive civil detention on the ground that such people cannot control themselves. I am not sure what it means to be *unable* to control oneself, but if this condition warrants preventive detention, it should also furnish an excuse to crime.²⁵ After all, could it possibly be fair to blame and to punish those who genuinely cannot control themselves?

Although the law does not furnish an excusing condition to psychopaths, people who lack a conscience and the capacity for empathy, I believe that they are morally irrational and should be excused. Unless an agent is able to understand what the victim will feel and is able to at least feel the anticipation of unpleasant guilt for unjustifiably harming another, the agent lacks the capacity to grasp and be guided by the primary rational reasons for complying with legal and moral norms. What could be a better reason not to harm another than full, emotional understanding of another’s pain? People who lack such understanding are, in my opinion, incapable of moral rationality and not part of our moral community. They should not be held responsible, but if they are dangerous, they should be civilly confined to protect society.²⁶

The alleged discovery of new psychological or psychiatric syndromes, such as battered-victim syndrome or abused-child syndrome, has motivated claims for new excusing conditions.²⁷ Once again, however, even if a syndrome is valid and played a causal role in the criminal conduct,

24. See *infra* text accompanying notes 28–29.

25. I discuss this issue more fully in *Fear of Danger, Flight from Culpability*, 4 PSYCHOL. PUB. POL’Y & L. 250 (1998) and in *Neither Desert nor Disease*, *supra* note 3, at 271–79. In both articles I criticize the United States Supreme Court’s reasoning in *Kansas v. Hendricks*, 521 U.S. 346 (1997) (upholding the constitutionality of Kansas’ law authorizing preventive detention of so-called mentally abnormal sexually violent predators).

26. I leave open the fraught questions of how much predictive ability we now possess and how much should be required to justify preventive detention. I consider these issues in *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113 (1996); *Fear of Danger, Flight from Culpability*, *supra* note 25; and *Neither Desert nor Disease*, *supra* note 3.

27. I address this issue most fully in *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, *supra* note 3.

causation per se is not an excuse. Thus, the law should not adopt a new excuse each time a causal variable for crime, such as a syndrome, is discovered. The proper way to understand these claims is that many syndromes may potentially undermine rationality, which is a genuine excusing condition. Indeed, in many cases, the defendant's rationality does appear diminished, but the insanity defense is unlikely to obtain because most new syndrome sufferers remain firmly in contact with reality and more substantial irrationality is usually necessary for a successful plea of legal insanity. Consequently, there is no extant excusing doctrine to cover these cases and mitigation must be considered solely and discretionarily at sentencing or through executive clemency or pardon. As I shall argue, this result is unfair and can be remedied by the adoption of a generic partial excuse.

Before turning to the partial-responsibility proposal, let me comment briefly on the attempts by some advocates to use new syndromes to support alleged justifications, such as self-defense, under conditions in which traditional self-defense would not obtain. The argument is that the reasonable person should be "subjectified," that is, the law should grant a justification if the person acted as a "reasonable syndrome sufferer." But this move would obliterate objectivity and the important distinction between justification and excuse. It is also internally incoherent. By definition, the syndrome sufferer, who has a mental abnormality, is unreasonable in those areas of his or her life in which the syndrome is operating. The impulse to adopt a justification in these cases is understandable, but it would produce unwise policy and should be resisted.

Contrary to my earlier writing on this subject,²⁸ I now believe that the law should adopt a generic partial excusing condition, "Guilty But Partially Responsible," based on diminished rationality.²⁹ Mitigating doctrines in the law of homicide, such as provocation and passion, or extreme mental or emotional disturbance, reflect the recognition that many defendants suffer from substantially impaired rationality that is nonetheless insufficient to support an insanity claim. There is no reason whatsoever that such impaired rationality is true only of homicide defendants. Indeed, the criteria of such doctrines are potentially fully applicable to the mental states

28. See Stephen J. Morse, *Diminished Capacity: A Moral and Legal Conundrum*, 2 INT'L J.L. & PSYCHIATRY 271 (1979); *Undiminished Confusion in Diminished Capacity*, *supra* note 2.

29. I deal with this topic more fully, including discussion of the criteria and possible objections, in *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, *supra* note 3, at 397-402. My analysis is influenced by and indebted to a similar proposal made by Herbert Fingarette and Ann Hasse. See HERBERT FINGARETTE & ANN FINGARETTE HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 199-261 (1979).

of defendants accused of any crime. Because rationality is the touchstone of responsibility and culpability, the law should offer a formal, doctrinal partial excuse rather than leave mitigation primarily to the discretion of sentencing judges. Although responsibility is a continuum concept and an agent's level of responsibility depends on facts about the agent's capacity for rationality, we have only limited epistemic ability to make the fine-grained responsibility judgments that are theoretically possible. Thus, as the mitigating doctrines within homicide law demonstrate, one generic partial excuse with a legislatively mandated reduction in sentence would be a workable scheme that would improve the quality of justice in criminal cases. Such a partial excuse would apply and would be a rational, just response in many cases in which new syndrome claims are made.

Whether results should increase a criminal offender's moral responsibility and desert has vexed criminal law scholars for decades.³⁰ The predominant view among criminal law theorists today is that they should not. This view is driven by the recognition that two offenders who commit the same offense with the same mental state seem equally culpable, whether or not the intended result occurs, but this opinion is challenged by a substantial minority of scholars, and the law and public opinion are clearly to the contrary. The primary rationale for the conclusion that results should not matter has been based on the libertarian view that our actions are fully up to us whereas results are a matter of sheer luck. Although I agree that results should not matter to desert, the libertarian solution is unsupportable for the reasons given in Part II. I believe that the best explanation is that the law can only guide action *ex ante* and it clearly cannot guide states of the world that occur after a wrongdoer has acted. Responsibility and culpability depend entirely on the capacity to be guided by reason and therefore results should not matter to desert. The results a defendant intentionally risks by conduct are fundamental to responsibility and desert attributions, but the results themselves are not.

I should like to conclude this part with some brief remarks on involuntary civil commitment of people with mental disorders. In 1982, I published a wide-ranging attack on the theoretical and practical justification of this practice.³¹ Much has changed since then. Treatment

30. I address this issue more fully in *The Moral Metaphysics of Causation and Results*, 88 CAL. L. REV. 879, 881-89 (2000), and am currently working on a more detailed examination, *Guiding Goodness* (draft on file with the author). The argument is directed solely to the retributive justification for punishment; consequentialism might produce a different result.

31. See *A Preference For Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, *supra* note 2.

technologies have improved and misguided long-term commitment is now rare. The economics of mental health care today are such that hospitals wish to release people as soon as possible, rather than to keep them for extended periods. Virtually all involuntary inpatients suffer from severe disorders and a very substantial proportion also have problems with substance abuse or dependence. Outpatient commitment is increasingly popular, albeit controversial. Nonetheless, much remains the same. Insufficient resources are devoted to the public care of people with severe and chronic disorders. Although pharmacotherapy is in most cases a crucially important part of an adequate treatment regime, it is still overemphasized and not enough accompanying psychosocial rehabilitation and community follow-up is provided.

I now believe that involuntary commitment is theoretically justifiable for those whose general capacity for rationality is so impaired that they are not capable of making rational decisions about their lives and not capable of living safely without treatment. Nonetheless, I continue to believe, as I did in 1982, that involuntary civil commitment is unwise and should be abolished because it is consequentially unjustified. Our society lacks the resources to adequately treat the many people with severe disorders who need services and would accept them willingly. It is bootless to force those who do not want services to accept them because they have no greater claim to those services than those who would accept them voluntarily. Moreover, it is a fantasy to believe that involuntary commitment prevents large numbers of serious crimes and self-injuries. Mental disorders alone, even severe mental disorders, do not render most sufferers more dangerous than people without mental disorders. Only if people with disorders have a substance problem does the rate of violent crime increase substantially, but even then, the majority of people with co-occurring disorders do not engage in violent crime. Our best hope for both efficacious treatment provision and danger reduction is, as always, to offer adequate services with respect and caring attitudes to those who need them most without the threat of legal coercion.

IV. CONCLUSION

The general capacity for rationality is the fundamental criterion for the ascription of responsibility that is the foundation for liberty and autonomy. Determinism or universal causation poses a theoretical threat to responsibility, but compatibilism provides a satisfactory theoretical answer. There is no practical alternative to a compatibilist account of responsibility. Rationality explains and normatively justifies both ascriptions of criminal

responsibility and civil and criminal law doctrines that treat some people with mental disorders as nonresponsible.