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Does Situationism Excuse? The Implications of Situationism for Moral Responsibility and Criminal Responsibility

Ken Levy*

Criminal responsibility is almost universally thought to require moral responsibility. Using the psychological theory of "situationism," however, I will argue that criminal responsibility can survive—and therefore that defendants can be justly punished—without moral responsibility.

I. INTRODUCTION

"It's an explanation, not an excuse." Most of us have heard or used this expression. But few genuinely understand it. What, after all, is the difference between explaining and excusing? If I do something wrong to you and then offer you the cause or reason—for example, "I was tired," "I was angry," "I was panicking," "I was not myself," or "I'm mentally ill"—that cause or reason is my explanation. (It is the correct explanation if I am not lying or self-deluded). But does this explanation qualify as a good excuse? The answer: it depends.

Suppose, for example, that Romeo is in a relationship with Juliet and observes her talking with another man at a bar. Romeo becomes jealous and angry. When Juliet returns to the table, Romeo yells at her. Later, when they return home, Romeo apologizes. He says, "I'm sorry, but I'm just a very possessive guy. I was also pretty drunk." Is this explanation a good excuse?

The answer to this question is largely up to Juliet. What constitutes a good excuse is almost entirely determined by the norms governing their relationship. If Juliet and Romeo normally yell at each other in public, then Romeo's explanation

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should qualify as a good enough excuse. If, however, Romeo's behavior was unusual for them, then Romeo's excuse is more questionable. Juliet will have to consider not only the sincerity and plausibility of Romeo's explanation but also the influence that her acceptance or rejection will have on Romeo's future behavior and on their relationship itself.

Now transfer this situation to the criminal law. Of course, yelling at one's girlfriend is wrong, but it is not a crime. So instead of yelling at Juliet, let's assume that Romeo *hit* her. That is a battery.¹ And if Romeo is arrested, Romeo's attorney will certainly advise him that the explanation he gave to Juliet for yelling at her—again, being drunk and jealous—should not work with any judge or jury.² The criminal law assumes that the explanation in this situation does not amount to a good excuse. This assumption itself rests on two deeper assumptions. The first assumption is that Romeo's reasons for violating the law are not very good; they do not qualify as reasons that society accepts. The second assumption is that Romeo is responsible for his violent behavior. Putting both of these assumptions together, we conclude that Romeo is blameworthy and therefore punishable for hitting Juliet.

In this article, I focus on the second assumption. I will argue that a person may deserve criminal punishment even in certain situations where she is not necessarily responsible for her criminal act. What these situations share in common are two things: (a) the psychological factors that motivate the individual's behavior are environmentally determined; and (b) her crime is serious, making her less eligible for sympathy.

I will arrive at this conclusion in four steps. In Part II, I will offer the first two of these steps. First, I will argue that our virtually sacred assumption that responsibility is necessary for just blame and punishment is not self-evident and is actually rather difficult to explain and justify. Second, I will offer an explanation and justification that appeals to our moral psychology: we subscribe to this assumption (that responsibility is necessary for just blame and punishment) ultimately because

1. 6 AM. JUR. 2D *Assault and Battery* § 2 (2015) (defining battery as "a wrongful or offensive physical contact with another through the intentional contact by the perpetrator and without the victim's consent").

2. *Id.* § 45 (noting that intoxication is not a defense to battery).

we sympathize with agents who lack responsibility for their actions.

Third, in Part IV, I aim to show that even if responsibility is not conceptually—only “emotionally”—necessary for just blame and punishment, the traditionally recognized criminal excuses (automatism, duress, entrapment, hypnosis, infancy, insanity, involuntary intoxication, mistake of fact, and mistake of law) are not at risk because, contrary to popular wisdom, they do not really rely on this assumption (that responsibility is necessary for just blame and punishment) to begin with. Instead, they stand less for the metaphysical proposition that we should refrain from blaming and punishing the non-responsible and more for the normative/ethical proposition that we should refrain from blaming and punishing those whom we cannot reasonably expect to have acted better. I will further argue that the latter proposition does not reduce to the former.

Fourth, once I have defended my account of the excuses, I will question in Parts V and VI the increasingly popular notion that we should add certain conditions or circumstances to the list of recognized excuses. I will focus on one in particular—the psychological theory of “situationism”³—and will argue that, despite its initial plausibility, it should be kept off the list.

3. See Lee Ross & Donna Shestowsky, *Two Social Psychologists' Reflections on Situationism and the Criminal Justice System*, in IDEOLOGY, PSYCHOLOGY, AND LAW 612, 613 (Jon Hanson ed., 2012); PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* vii (2008); David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for Law and Legal Theory*, 2008 B.Y.U. L. REV. 1275, 1277 n.1 (2008); Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1657-58 (2004); Kenneth B. Davis, Jr., *Structural Bias, Special Litigation Committees, and the Vagaries of Director Independence*, 90 IOWA L. REV. 1305, 1329 (2005); Dain C. Donelson & Robert A. Prentice, *Scienter Pleading and Rule 10b-5: Empirical Analysis and Behavioral Implications*, 63 CASE W. RES. L. REV. 441, 500 (2012); Caroline Forell, *McTorts: The Social and Legal Impact of McDonald's Role in Tort Suits*, 24 LOY. CONSUMER L. REV. 105, 111-12 (2011); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 7-8, 170-79 (2004); Michael A. McCann, *Social Psychology, Calamities, and Sports Law*, 42 WILLAMETTE L. REV. 585, 630-31 (2006); Roger C. Park, *Grand Perspectives on Evidence Law*, 87 VA. L. REV. 2055, 2068 (2001); Jeffrey J. Rachlinski, *The Psychological Foundations of Behavioral Law and Economics*, 2011 U. ILL. L. REV. 1675, 1690 (2011); Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT L. REV. 1537, 1566 (2000) [hereinafter Rachlinski, *Limits*]; L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2055 n.105 (2011); Amy L. Wax, *Musical Chairs and Tall Buildings: Teaching Poverty Law in the 21st Century*, 34 FORDHAM URB. L.J. 1363, 1386-87 (2007); Andrew K. Woods, *A Behavioral Approach to Human Rights*, 51 HARV. INT'L L.J. 51, 56-57 (2010).

While situationism arguably does negate moral responsibility, it does not negate criminal responsibility. For a given criminal act that is “situationally” motivated, a person might be criminally responsible (and therefore criminally punishable) but not morally responsible. From this point, my ultimate thesis follows: just criminal punishment does not require moral responsibility.

Of course, this thesis is controversial. Criminal responsibility and therefore just criminal punishment are almost universally thought to require moral responsibility.⁴ But in a previous article, I used personality psychology to drive a wedge between the two.⁵ In this article, I will use the opposite end of the psychological spectrum—social psychology—to drive the same important wedge.

II. RESPONSIBILITY

In this Part, I will describe and attempt to solve a puzzle. On the one hand, responsibility is poorly understood. On the other hand, this poorly understood entity is considered to be supremely important in criminal law.⁶ This is an odd situation. How can such a mysterious entity play such a significant role? I

4. See *Bennis v. Michigan*, 516 U.S. 442, 466 (1996) (Stevens, J., dissenting) (“Fundamental fairness prohibits the punishment of innocent people.”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 75, 4(b), June 8, 1977, 1125 U.N.T.S. 3 (“[N]o one shall be convicted of an offence except on the basis of individual penal responsibility”); Richard J. Bonnie, *Excusing and Punishing in Criminal Adjudication: A Reality Check*, 5 CORNELL J.L. & PUB. POL’Y 1, 10-11 (1995) (“[W]e remind ourselves of the general postulates of free choice and personal responsibility which provide the moral foundation for the social practice of criminal punishment.”); Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 18 (1994) (“[T]he theory of personal responsibility for conduct . . . is the foundation for punishment”); Paul H. Robinson, *Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and “Rotten Social Background,”* 2 ALA. C.R. & C.L. L. REV. 53, 75-76 (2011) (“There is an enormous lay intuitive commitment to the notion that people normally operate with free will, that people are generally responsible for who they are. It is this foundation that supports the essentially universal human intuition that serious wrongdoing deserves punishment.”) (footnote omitted); Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 860 (1999) (“Only the blameworthy (guilty), and not the blameless (innocent), should be punished.”).

5. Ken Levy, *Dangerous Psychopaths: Criminally Responsible But Not Morally Responsible, Subject to Criminal Punishment And to Preventive Detention*, 48 SAN DIEGO L. REV. 1299, 1362-67 (2011).

6. See *supra* note 4 and accompanying text.

will resolve this tension by arguing that responsibility should be regarded as much a psychological concept as a metaphysical concept. I will further distinguish in Part III between moral responsibility and criminal responsibility and argue in Part VI that only the latter, not the former, should be regarded as fundamental to the criminal justice system.

A. Two Kinds of Blameless Wrongdoing

It is a foundational axiom of criminal law—call it the “Responsibility Axiom”—that criminal punishment requires or presupposes responsibility.⁷ We believe that a person should not be blamed and punished unless she not merely performed a wrongful act but also was responsible—blameworthy—for this performance. Our adherence to the Responsibility Axiom explains why all but the very few strict liability crimes (such as statutory rape) require a mens rea element (purpose, knowledge, recklessness, or criminal negligence) to be satisfied.⁸ Whether or not a wrongdoer is blameworthy will largely depend on whether or not she had the mens rea, a mental state that indicates a willingness to inflict, or risk inflicting, unjustifiable harm upon another.⁹

It follows from the Responsibility Axiom that we cannot justly punish blameless wrongdoing—that is, wrongdoing without the required mens rea. There are two different kinds of blameless wrongdoing.¹⁰ The first kind is unintentional harm—

7. See *id.*

8. See MODEL PENAL CODE § 2.02 (2014) (“[A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.”); SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 242 (9th ed. 2012) (“The vicious will [is] the mens rea; essentially it refers to the blameworthiness entailed in choosing to commit a criminal wrong.”); 21 AM. JUR. 2D *Criminal Law* § 117 (2015) (“Mens rea is generally an essential element of any criminal offense . . .”). But see *id.* § 132 (“Strict liability allows for criminal liability absent the element of mens rea . . .”).

9. See MODEL PENAL CODE § 2.02.

10. Strict liability crimes such as statutory rape and selling alcohol to minors are not good examples of blameless wrongdoing. They are blameworthy and therefore punishable to the extent that the offenders voluntarily *assumed the risk* of breaking the law. This point explains why involuntariness is a perfectly acceptable defense for strict liability crimes. See Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 431 (1993) (“While a strict liability crime does not require a culpable mental state, it does require a voluntary criminal act. . . . The existence of an actus reus requirement allows a defendant charged with a strict liability offense to invoke the defense that he acted involuntarily. If a defendant acts involuntarily, for instance, by

that is, *actus reus* without the *mens rea*. A good example is a purely innocent accident such as driving carefully but still hitting a child who has darted in front of the car.

The second kind of blameless wrongdoing is intentional wrongdoing that is excused.¹¹ Consider two examples. The first example is a paranoid schizophrenic who intentionally kills her neighbor from an honest but unjustifiable fear that the latter is “out to get” her. She committed intentional wrongdoing (killing her neighbor), but she is blameless to the extent that she is insane—that is, to the extent that she did not know or have “substantial capacity . . . to appreciate” the moral and/or legal status of her act.¹² The second example is a person—call her “Peggy”—who playfully fires what she honestly and reasonably, but mistakenly, believes to be an unloaded gun at her friend. Peggy intentionally fired the gun, but she is blameless to the extent that her belief that it was unloaded was honest and reasonable.¹³

B. The Blameless Wrongdoer Argument

Why does criminal punishment require blameworthiness in the first place? Why can’t we seek to punish blameless wrongdoers, especially blameless criminal wrongdoers—that is, persons who blamelessly cause criminal harm? Consequentialists will argue that we cannot punish blameless wrongdoers because it does no good. Indeed, it just does “bad.”¹⁴ It does not help to promote specific deterrence, general deterrence, or rehabilitation.¹⁵

reflex or in an automatic state, he cannot commit a strict liability crime regardless of his mental state.”) (footnote omitted).

11. See 1 PAUL H. ROBINSON ET AL., *Criminal Law Defenses* § 25 (2015).

12. MODEL PENAL CODE § 4.01(1) (2014); see generally Walter Sinnott-Armstrong & Ken Levy, *Insanity Defenses*, in OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 299 (John Deigh & David Dolinko eds., 2011) (discussing the insanity defense). I will briefly discuss the insanity defense further in Part VII.

13. See ROBINSON ET AL., *supra* note 11, § 181 (describing certain exculpatory mistakes).

14. Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 922 (2002) (“Consequentialist theories hold that punishment of an innocent lowers societal welfare to a greater extent than punishment of a guilty person.”).

15. See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 348 (2002) (“[C]onsequentialist approaches would most likely oppose punishment of the innocent person . . . [because] such punishment would fail in its purpose and have serious

In response to this point, however, punishing blameless wrongdoers *can* do some good. It can help to facilitate incapacitation and therefore protection of society.¹⁶ For example, locking up Peggy, the woman who blamelessly shot her friend, will certainly prevent her from playfully firing her gun again.

Consequentialists will object to this response on two grounds. First, they will say that we do not necessarily need to protect society from Peggy (and other Peggy-like individuals).¹⁷ She most likely learned her lesson and will not play with a gun again.¹⁸ Second, consequentialists will say that even if we did need to protect society from Peggy, we could have facilitated incapacitation anyway—through civil commitment or simply confiscating her gun—without all of the stigma and disapproval that punishment carries.¹⁹

Still, it is not clear that consequentialists are entitled to this second point. First, this complaint about inappropriate stigma and disapproval itself presupposes that the blameless wrongdoer does not deserve punishment, precisely the point that is in question and that consequentialists especially are not entitled to,

adverse consequences if word got out, which is likely.”); Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 212 (2000) (“Utilitarian penology could not recommend a government policy of publicly and deliberately punishing innocent people because this would impose needless suffering, create perverse incentives, and destroy public security.”); Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 597, 609 (2012) (“From a consequentialist approach, penalizing the innocent undercuts the goal of minimizing the social costs of crime. If defendants are punished even when they observe the law, incentives to comply with legal rules are diluted and deterrence goals are undermined.”) (footnote omitted); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 11-12 (1955) (“[O]ne sees that the hazards [of deliberately punishing the innocent] are very great. . . . If one pictures how such an institution would actually work, and the enormous risks involved in it, it seems clear that it would serve no useful purpose. A utilitarian justification for this institution is most unlikely.”).

16. See MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 93 n.19, 94-97 (1997); J.J.C. SMART, *An Outline of a System of Utilitarian Ethics*, in UTILITARIANISM: FOR AND AGAINST 3, 69-72 (1973); WILFRID J. WALUCHOW, *THE DIMENSIONS OF ETHICS: AN INTRODUCTION TO ETHICAL THEORY* 166-68 (2003); Binder & Smith, *supra* note 15, at 118; Christopher, *supra* note 14, at 870-80, 922-23; Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 214 (1984); Laura Peterson, Note, *Collective Sanctions: Learning from the NFL's Justifiable Use of Group Punishment*, 14 TEX. REV. ENT. & SPORTS L. 165, 169-70, 172 (2013); Rawls, *supra* note 15, at 4-5; Robinson, *supra* note 4, at 61-62.

17. See MOORE, *supra* note 16, at 99.

18. See *id.*

19. See *id.*

given that they either reject retributivism—the theory that the primary purpose of criminal punishment is not to minimize future crimes but rather to give offenders their just deserts—or subordinate retributivism to consequentialism.²⁰ Second, it is not as obvious as consequentialists tend to assume that punishing blameless wrongdoers would not further promote two of the main consequentialist goals of punishment—general deterrence and specific deterrence. This point cannot simply be assumed; instead, it ultimately relies on empirical evidence.²¹

Another reason some might offer why we cannot punish the blameless is semantic: just punishment is predicated on just blame, and we cannot justly blame the blameless without self-contradiction. Still, this explanation is tautological and therefore not very helpful. It explains only why it might be somewhat illogical, not morally wrong, to punish the blameless. And it is the moral connection between blame, punishment, and responsibility that we are trying to explain here. To make this point clearer, I reformulate the questions at the beginning of this section as follows: why can't we blame and punish people who commit criminal wrongdoing if we deem them to be non-responsible for their wrongdoing?

This is not an easy question, certainly not as easy as it first seems. One may argue that the Responsibility Axiom—which, again, says that criminal punishment requires responsibility—is self-evident. But this position is weak, if only because we may well imagine individuals and cultures that do not share this belief, cultures that do not believe in individual responsibility itself or in responsibility as a necessary condition of just criminal punishment.²² Of course, we can simply assert that

20. See Ken Levy, *Why Retributivism Needs Consequentialism: The Rightful Place of Revenge in the Criminal Justice System*, 66 RUTGERS L. REV. 629, 633-35 (2014) (explaining the differences among the three main theories of criminal punishment: retributivism, consequentialism, and expressivism); see also Rawls, *supra* note 15, at 4 (“What we may call the retributive view is that punishment is justified on the grounds that wrongdoing merits punishment.”).

21. See *supra* note 16 and accompanying text.

22. See HAROLD J. BERMAN, *JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW* 297 (rev. ed. 1963) (discussing “the strong Russian cultural tradition of collective responsibility for individual misconduct”); HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 126-27 (1861) (stating that in ancient law, a family was responsible for the actions of its members; an individual’s moral status depended on the group of which he was a member); SYBILLE VAN DER SPENKEL, *LEGAL INSTITUTIONS IN MANCHU CHINA:*

they are wrong and we are right. But if we really are right, then we should be able to justify this belief. So it is preferable to defend the Responsibility Axiom with an argument. One such argument goes like this:

- (1) Just as it would be dramatically unjust, indeed the very definition of injustice, to knowingly punish an innocent person—that is, a person whom we know did not commit the crime in question—so too it would be dramatically unjust to knowingly punish a blameless wrongdoer.²³ There might be good consequentialist reasons for knowingly punishing an innocent person, a point that is often used against consequentialism.²⁴ But there is no good retributive—that is, desert-based—reason for knowingly punishing an innocent person. Knowingly punishing an innocent person is the supreme antithesis of retributive justice.
- (2) The reason that an innocent person should not be punished is because she is blameless. Her moral immunity from punishment is in virtue of her blamelessness.
- (3) Therefore all blameless people, even if wrongdoers, do not deserve punishment any more than the innocent person.
- (4) Ex hypothesi, the blameless wrongdoer is blameless.
- (5) Therefore the blameless wrongdoer is just as undeserving of punishment as the innocent person.

Call this the “Blameless Wrongdoer Argument.”

Unfortunately, the Blameless Wrongdoer Argument is not successful. Unlike the innocent person, the blameless wrongdoer committed a crime (let’s not forget!). This is a very significant difference between the two, one that arguably makes all the difference. Even if the wrongdoer is blameless, she

A SOCIOLOGICAL ANALYSIS 47 (1962) (“The edict of 1708 . . . stressed the principle of group responsibility for misdeeds of members, an idea with deep roots in China.”); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 556 (1933) (“The older view held the family, tribe, or nation responsible for the acts of any one individual . . .”); David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 780 (1991) (“[C]hoice may be a social act, as when a group must reach a decision together. Or, choice may also be the act of only one of the personalities within a single human being, as in the common experience of a battle of ‘competing identities.’ If American cultures fully recognized either of these alternatives, then an emphasis on choice would not necessarily lead to the individualistic version of responsibility which currently dominates the law.”) (footnote omitted).

23. See *supra* note 4 and accompanying text.

24. See *supra* note 16 and accompanying text.

should still be punished for her wrongdoing; the fact that she caused criminal harm matters more than the fact that she is blameless for this harm. She did it and she needs to pay! That is all there is to the matter.²⁵

Yes, this attitude seems unfair. But it is arguably more unfair to the victim not to punish the person who victimized her. So the Blameless Wrongdoer Argument and its assumed equivalence between the innocent person and the blameless wrongdoer breaks down, in which case a different argument must be provided for excusing blameless wrongdoers from punishment. If no such argument can be provided, then excusing blameless wrongdoers is unjustified.

C. A Working Conception of Responsibility

Once we distinguish between the blameless wrongdoer and the innocent person (non-wrongdoer), it remains to be explained why we should refrain from blaming and punishing the former—the person who (we know) committed a crime. We think that the blameless wrongdoer is blameless not because she did not commit the crime—she did—but because another condition necessary for justly blaming her is absent. This condition, we have already seen, is responsibility. So we return to the question driving this Part: why is responsibility thought to be necessary for just blame and punishment?

Indeed, it should strike us as rather odd that responsibility is regarded as just as important for blame and punishment as

25. See Levy, *supra* note 20, at 651-52 (“[M]any, if not most, human beings—instinctively wish to return harm for (unjustified and unexcused) harm. They—we—feel the urge to hurt another person who has, we feel, unjustifiably and inexcusably hurt us. . . . We feel tremendous satisfaction in putting the perpetrator in the same position that she put us (the victim). This turning of the crime against the perpetrator helps to restore our sense of emotional equilibrium.”) (footnote omitted); *id.* at 656-57 (“[O]ur desire to achieve retributive justice—just deserts—is not *sui generis* but is itself motivated by a deeper desire, the desire for revenge. We believe that it is (a) just to punish criminals in proportion to the moral severity of their crimes and (b) unjust not to punish them or to under-punish them *not* because (a) and (b) are self-evident principles or because dispensing just deserts is *obviously* a good end in itself but because we are the kind of beings who desire (proportional) revenge in response to culpable causation of harm.”) (footnote omitted); *id.* at 666 (“Whether or not we admit it, most of us embrace revenge in our everyday lives. . . . [W]e spend much of our everyday lives enjoying both fictional and non-fictional accounts of karma, payback, the tables being turned, settling scores, getting even, and unpleasant people getting theirs across widely different contexts.”) (footnotes omitted).

wrongdoing itself. It is odd because, while we have little difficulty determining what wrongdoing is—criminal wrongdoing is a voluntary commission of an act that the State has designated as a crime²⁶—we have great difficulty determining what responsibility is. Philosophers have been debating this issue for centuries—especially the twentieth and early twenty-first—and still have not arrived at anything near a consensus. On the contrary, there are many different theories of responsibility out there. And while there is some overlap among them, they diverge radically from one another.²⁷ So how can we even know that this mysterious entity, responsibility, is necessary for just blame and punishment if we still do not know—or at least cannot agree—on what it even is?

The pragmatic answer to this conundrum is that we can agree on what responsibility essentially is, what it is at the core, which is all that matters for the criminal justice system.

26. MODEL PENAL CODE § 2.01(1) (2014) (“A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.”).

27. The following philosophers all offer differing accounts of responsibility: JOSEPH KEIM CAMPBELL, *FREE WILL* (2011); GREGG. D. CARUSO, *FREE WILL AND CONSCIOUSNESS: A DETERMINIST ACCOUNT OF THE ILLUSION OF FREE WILL* (2012); RANDOLPH CLARKE, *LIBERTARIAN ACCOUNTS OF FREE WILL* (2003); DANIEL DENNETT, *FREEDOM EVOLVES* (2003) [hereinafter DENNETT, *FREEDOM EVOLVES*]; DANIEL DENNETT, *ELBOW ROOM: THE VARIETIES OF FREE WILL WORTH WANTING* (1984) [hereinafter DENNETT, *ELBOW ROOM*]; RICHARD DOUBLE, *THE NON-REALITY OF FREE WILL* (1991); JOHN MARTIN FISCHER, *THE METAPHYSICS OF FREE WILL* (1994); JOHN MARTIN FISCHER & MARK RAVIZZA, S.J., *RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY* (1998); CARL GINET, *ON ACTION* (1990); ISHTIYAQUE HAJI, *MORAL APPRAISABILITY* (1998); SAM HARRIS, *FREE WILL* (2012); ROBERT KANE, *THE SIGNIFICANCE OF FREE WILL* (1996); NEIL LEVY, *CONSCIOUSNESS AND MORAL RESPONSIBILITY* (2014); NEIL LEVY, *HARD LUCK: HOW LUCK UNDERMINES FREE WILL AND MORAL RESPONSIBILITY* (2011); MICHAEL MCKENNA, *CONVERSATION AND RESPONSIBILITY* (2012); ALFRED R. MELE, *FREE WILL AND LUCK* (2006); DANA KAY NELKIN, *MAKING SENSE OF FREEDOM AND RESPONSIBILITY* (2011); TIMOTHY O’CONNOR, *PERSONS AND CAUSES: THE METAPHYSICS OF FREE WILL* (2000); DERK PEREBOOM, *LIVING WITHOUT FREE WILL* (2001); SAUL SMILANSKY, *FREE WILL AND ILLUSION* (2000); PETER VAN INWAGEN, *AN ESSAY ON FREE WILL* (1983); R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* (1994); BRUCE N. WALLER, *AGAINST MORAL RESPONSIBILITY* (2011) [hereinafter WALLER, *AGAINST*]; BRUCE N. WALLER, *FREEDOM WITHOUT RESPONSIBILITY* (1990); SUSAN WOLF, *FREEDOM WITH REASON* (1990); Harry Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5 (1971); Harry Frankfurt, *Alternate Possibilities and Moral Responsibility*, 66 J. PHIL. 828 (1969) [hereinafter Frankfurt, *Alternate Possibilities*]; David Hunt, *Moral Responsibility and Unavoidable Action*, 97 PHIL. STUD. 195 (2000); Stephen Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587 (1994) [hereinafter Morse, *Culpability and Control*].

Responsibility is essentially “the set of conditions an agent bears that make it genuinely fair to blame or praise and possibly punish or reward that agent for a given act.”²⁸ These conditions include not only the commission of a given act (or omission), but also a minimal level of rational, cognitive, and volitional capacities at the time that the agent commits this act (or omission). These capacities include at least a threshold awareness of her environment, threshold understanding of the moral or legal reasons for or against her committing this act (or omission), and the ability to effectively translate these reasons into action.²⁹

What philosophers then debate is what other conditions, if any, are required for responsibility. They debate, for example, whether indeterminism is necessary.³⁰ Some say it is,³¹ others say it is not,³² and still others say that it is necessary for some

28. Levy, *supra* note 5, at 1328.

29. See Stephen D. Hart, *Psychopathy, Culpability, and Commitment*, in MENTAL DISORDER AND CRIMINAL LAW: RESPONSIBILITY, PUNISHMENT AND COMPETENCE 159, 164 (Robert F. Schopp et al. eds., 2009) (“Cognitive functions are construed in broad terms in the law as those related to the capacity for rational thought, including the abilities to perceive the outside world accurately, to weigh or consider information, and to appreciate meaning or consequences of interpersonal behavior”); Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUST. 329, 392 (1998) (“[T]he general capacity for rationality or normative competence is . . . a congeries of perceptual, cognitive, and affective abilities. . . . [M]ost generally it includes 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’ It is the ability to perceive accurately, to get the facts right, and to reason instrumentally, including weighing the facts appropriately and according to a minimally coherent preference ordering. Put yet another way, it is the ability to act for good reasons”) (citation omitted).

30. Indeterminism is the negation of determinism. Determinism is the theory that every state of the universe is uniquely necessitated by the immediately preceding state in conjunction with the laws of nature. Therefore every event, including every action, that happens had to happen and could not have happened otherwise. See WALLACE, *supra* note 27, at 181.

31. See, e.g., KANE, *supra* note 27; Peter van Inwagen, *A Promising Argument*, in THE OXFORD HANDBOOK OF FREE WILL 475 (Robert Kane ed., 2d ed. 2011).

32. See, e.g., DENNETT, *ELBOW ROOM*, *supra* note 27; DENNETT, *FREEDOM EVOLVES*, *supra* note 27; Bernard Berofsky, *Compatibilism Without Frankfurt: Dispositional Analyses of Free Will*, in THE OXFORD HANDBOOK OF FREE WILL 153 (Robert Kane ed., 2d ed. 2011); Michael McKenna, *Contemporary Compatibilism: Mesh Theories and Reasons-Responsive Theories*, in THE OXFORD HANDBOOK OF FREE WILL 175 (Robert Kane, ed., 2d ed. 2011); Paul Russell, *Moral Sense and the Foundations of Responsibility*, in THE OXFORD HANDBOOK OF FREE WILL 200 (Robert Kane, ed., 2d ed. 2011); Peter Strawson, *Freedom and Resentment*, 48 PROC. BRIT. ACAD. 1 (1962), reprinted in PERSPECTIVES ON MORAL RESPONSIBILITY 45 (John Martin Fischer & Mark Ravizza eds., 1993); Christopher Taylor & Daniel Dennett, *Who’s Still Afraid of*

kinds of responsibility but not for others.³³ But because this issue leads down the road of metaphysics and away from the very practical purposes of the criminal justice system, we may sidestep it and adhere to the point established above: responsibility at its core—a particular act (or omission) in conjunction with a set of threshold rational, cognitive, and volitional capacities—is all that is necessary for just blame and punishment.

There are two drawbacks to this approach. First, it fails to address the concerns of philosophers who believe that genuine responsibility is metaphysically impossible and therefore that nobody, not even the most violent criminal, is genuinely blameworthy for anything. Skeptics subscribe to this counterintuitive approach for one of two reasons: they believe that either (a) responsibility is incompatible with the only two options, determinism and indeterminism; or (b) being the ultimate causes of our actions is both necessary for responsibility and metaphysically impossible.³⁴ From either

Determinism? Rethinking Causes and Possibilities, in THE OXFORD HANDBOOK OF FREE WILL 235 (Robert Kane ed., 2d ed. 2011).

33. See MELE, *supra* note 27, at 95 (“A theorist may leave it open that free action and moral responsibility are compatible with determinism but maintain that the falsity of determinism is required for a more desirable species of free action and a more desirable brand of moral responsibility. This is a *soft libertarian* line.”).

34. See generally DOUBLE, *supra* note 27; HARRIS, *supra* note 27; PEREBOOM, *supra* note 27; WALLER, AGAINST, *supra* note 27; Galen Strawson, *The Impossibility of Moral Responsibility*, 75 PHIL. STUD. 5, 7 (1994) (arguing that “true moral responsibility is impossible, because it requires true self-determination”). According to “responsibility skeptics,” responsibility requires one condition that is metaphysically impossible and a second condition that is incompatible with the first (already impossible) condition. See Ken Levy, *The Main Problem with USC Libertarianism*, 107 PHIL. STUD. 107, 110-15 (2001). The first condition is my being the ultimate author, the ultimate uncaused cause, of my reasons and actions. See *id.* at 114. This condition is metaphysically impossible because every person is thrust into this world by forces outside her control. See *id.* And while each person eventually acquires control over her actions, the self that is taking this control was not shaped by itself but rather by its previous self, the nature of which was determined not by itself but rather by genes, personality, and environment. So these early choices are really not self-determined—or are determined by a self that was not itself self-determined. Therefore the self that results from these choices is no more self-determined either. And (therefore) so on for all future choices. The second condition, which is incompatible with the first condition, is that the things I do—including the reasons that I adopt and actions that I perform—are not random or undetermined but are themselves motivated by reasons. This second condition is incompatible with the first because it suggests that reasons, not I myself, are the ultimate causes of my actions. Given that these two conditions are necessary for genuine responsibility *and* (doubly) impossible to fulfill, it follows that the offender is no more responsible or blameworthy for her law-breaking behavior than the upright, ordinary person is responsible for her law-abiding behavior.

proposition, (a) or (b), it follows that every person whom the criminal justice system punishes is blameless.³⁵ And, again, punishing the blameless is supposed to be just as wrong, just as unfair, as punishing the innocent (i.e., non-wrongdoers), at least according to the Blameless Wrongdoer Argument in Part II.B.

Second, even if we wholeheartedly believe that the criminal justice system's operating concept of responsibility—again, a set of threshold rational, cognitive, and volitional capacities—is correct, there is still the great difficulty of applying this concept. Application of the concept of responsibility is difficult because we cannot hope to sift out the genuinely blameworthy from the genuinely blameless wrongdoers until we first figure out what the thresholds are for each capacity and therefore how diminished these capacities may become before we deem the agent non-responsible. This task, separating those whose thresholds are satisfied from those whose thresholds are not satisfied, is difficult to say the least. Because capacities cannot be measured in discrete quantities like pounds and inches, we cannot precisely quantify these thresholds or precisely determine if any particular person whose responsibility we question falls below them.³⁶

Both are equally the "victims" or passive "playthings" of "constitutive" luck and "circumstantial" luck—the luck of genetic inheritance, personality, environment, and the constant interaction between these three things as one's life progresses.

35. I develop the skeptic's argument further below in Part II.E.

36. See *United States v. Lyons*, 731 F.2d 243, 248-49 (5th Cir. 1984) (en banc) ("[A] majority of psychiatrists now believe that they do not possess sufficient accurate scientific bases for measuring a person's capacity for self-control or for calibrating the impairment of that capacity. . . . [I]t may be that some day tools will be discovered with which reliable conclusions about human volition can be fashioned. It appears to be all but a certainty, however, that despite earlier hopes they do not lie in our hands today."); Stephen R. McAllister, *Some Reflections on the Constitutionality of Sex Offender Commitment Laws*, 50 U. KAN. L. REV. 1011, 1020 (2002) ("[T]he medical and scientific reality is that volitional control is a matter of degree that is impossible to measure or establish."); Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1060 (2002) [hereinafter Morse, *Uncontrollable Urges*] ("In basic and clinical science . . . there is no consensus about the conceptual meaning, the definition, or the measurement of these terms."); *id.* at 1061-62 ("[G]ood objective measures of the operative terms, such as tension and arousal, often do not exist, and thus make valid empirical research impossible. . . . Even when the research is good, in the absence of a successful account of 'uncontrollability,' research cannot tell us whether failure to resist is 'controllable' because the research concerns human action and not mechanisms. This research does not investigate how many 'desire units' are necessary mechanically to flip the 'action switch.' . . . [W]e have no scientific measure of whether, ultimately, an agent can control himself. . . .") (footnote omitted); *id.* at 1062-63 ("Loss of control as a non-responsibility condition is so conceptually unclear and empirically unresolved that it invites unhelpful, potentially

It is for this reason—our inability to precisely measure or fathom threshold capacities, especially control—that some scholars, such as Stephen Morse, argue that the insanity defense should not contain a volitional prong; that we should not allow for the possibility that some defendants might be acquitted on the purported grounds that they fall beneath the volitional threshold required for responsibility as a result of mental disease or defect.³⁷

D. The Sympathy Argument

Responsibility is problematic in both theory and application. Yet we stubbornly hang on to it and insist that a threshold quantity of it is necessary for just blame and punishment. The best explanation of this insistence—and therefore the best answer to the central question of this Part (why is responsibility thought to be necessary for just blame and punishment?)—is not the Blameless Wrongdoer Argument (in Part II.B). Rather, it is the “Sympathy Argument.” The Sympathy Argument falls into two parts. The first part is that blameless wrongdoers should not be punished not because they are innocent but because their “causal situation,” the primary internal and external factors that led to their committing a crime,

misleading, and conclusory expert testimony when it is raised. . . . [Expert opinions] are clearly not based on expert, scientifically, or clinically grounded understandings or measurements of lack of control.”); Morse, *Culpability and Control*, *supra* note 27, at 1601 n.47 (“I conclude that we lack the technology validly to measure the strength of impulses and impulsiveness.”); *id.* at 1657 (“[F]amously, we cannot distinguish between irresistible impulses and those impulses simply not resisted. No established metric exists to determine the magnitude of impulses, desires, or feelings. . . . I know of no such measurement system with established validity. Furthermore, it is difficult to disentangle the strength of desires, the strength of temptations, and the capacity for self-control.”) (footnote omitted); James D. A. Parker & R. Michael Bagby, *Impulsivity in Adults: A Critical Review of Measurement Approaches*, in *IMPULSIVITY: THEORY, ASSESSMENT, AND TREATMENT* 142, 142 (Christopher D. Webster & Margaret A. Jackson eds., 1997) (“Since there exists little consensus in the literature about what constitutes impulsivity, the low correlations among different impulsivity measures reflects the diversity of theoretical approaches to this construct.”) (citation omitted).

37. See Morse, *Uncontrollable Urges*, *supra* note 36, at 1054-63; Morse, *Culpability and Control*, *supra* note 27, at 1599-1602; Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 812 (1985) (“I believe that the relationship of mental disorder to compulsion is frustratingly vague, and that there is no such special or necessary relationship. . . . Acts influenced by mental disorder are not reflexive, unconscious, or the like; crazy persons may have crazy reasons for their actions, but their acts are clearly products of conscious effort or determination.”) (footnote omitted).

are sufficiently unusual and unfortunate that we sympathize with them.³⁸ The second part is that, because we sympathize with blameless wrongdoers, we should regard their being punished as just as “unfitting”—that is, just as inappropriate and unwarranted—as punishing the innocent.³⁹

The crucial role that sympathy plays here cannot be overstated. The criminal justice system generally reflects our particular moral psychology.⁴⁰ We human beings—or possibly just we intellectual descendants of western culture (and much eastern culture)—predicate punishment on blameworthy wrongdoing,⁴¹ and we predicate blameworthy wrongdoing in turn on three things: (a) norms of wrongful behavior; (b) the satisfaction of threshold psychological—i.e., rational, cognitive, and volitional—capacities; and (c) the absence of certain situational constraints. The reasons we care about capacities and situational constraints in addition to just norms of wrongful behavior are as much psychological as metaphysical. We have a certain picture of what a human being is and is capable of, and we have different attitudes, usually sympathy or compassion,

38. See Robinson, *supra* note 4, at 74 (emphasizing the role of sympathy in our intuitions about punishment and retributive justice); cf. Morse, *Culpability and Control*, *supra* note 27, at 1653-54 (“If deprivation or rotten social background does not satisfy standard criteria for excuse, what is the basis of the powerful intuition that deprived agents should be excused? The true basis, I believe, is sympathy for those who have suffered. Although such responses are understandable because sympathy is entirely appropriate, deprivation is nevertheless not clearly relevant to responsibility ascriptions, and the proper legal response to the rational and uncoerced but relevantly deprived criminal is problematic.”).

39. See WALLACE, *supra* note 27, at 2 (“I postulate a close connection between holding someone responsible and a central class of moral sentiments, those of resentment, indignation, and guilt. To hold someone responsible, I argue, is essentially to be subject to emotions of this class in one’s dealings with the person.”).

40. See Strawson, *supra* note 32, at 63-64 (“[S]avage or civilized, we have some belief in the utility of practices of condemnation and punishment. . . . [There is] something vital in our conception of these practices. The vital thing can be restored by attending to that complicated web of attitudes and feelings which form an essential part of the moral life as we know it. . . . Only by attending to this range of attitudes can we recover from the facts as we know them a sense of what we mean, i.e. of *all* we mean, when, speaking the language of morals, we speak of desert, responsibility, guilt, condemnation, and justice.”); Levy, *supra* note 20, at 656-57 (“[O]ur widespread belief in retributive justice is very much a reflection of our general moral psychology. . . . Without this particular, if not peculiar, psychological configuration, retributive justice would not be *justice* in the first place.”). *But see* Robinson, *supra* note 4, at 65 (“[T]he most recent set of studies show that many modern crime-control doctrines seriously conflict with the community’s shared intuitions of justice. . . .”).

41. See *supra* note 4 and accompanying text.

toward people who do not measure up to this metaphysical picture.

I contend that it is this sympathy, this compassion, that primarily motivates our practice of excusing, and creating rules that excuse, blameless wrongdoers from punishment. When we say that it just does not seem “right” or “fair” to punish somebody who is not responsible for her behavior, it is ultimately sympathy that is motivating this position.⁴² It would be particularly unsympathetic—indeed, callous or cruel—to punish somebody who we know was more worthy of sympathy than of indifference or hostility. In this way, contrary to the common wisdom, the argument against blaming and punishing the blameless is much less a matter of strict logic than it is a matter of rough ethical intuition and emotion.

E. Criminal Punishment Does Not Necessarily Require Responsibility

For all we know, we are already punishing blameless wrongdoers every day on a massive scale. Indeed, it may very well just be that no offender, much less any other person, is genuinely responsible for her actions.⁴³ Yet we are still doing the right thing in blaming and punishing offenders. We are certainly doing the right thing for an obvious consequentialist reason: minimizing future crimes.⁴⁴ But we are also doing the right thing for retributivist reasons.

My last point (about retributivism) is contrary to the assumption that many or most retributivists make—namely, that retributivism requires or presupposes genuine responsibility as a necessary condition of inflicting just blame and punishment.⁴⁵ I maintain instead that if an offender knowingly and willingly committed a crime, she deserves criminal punishment—even if the skeptics are right that genuine responsibility is metaphysically impossible. The offender committed a criminal act. This fact is important even if the self from which the offender’s action emanated did not itself originate from her.

42. See *supra* note 38 and accompanying text.

43. See *supra* note 34 and accompanying text.

44. See *supra* note 16 and accompanying text.

45. See Levy, *supra* note 20, at 644-45.

Yes, it is very sad that the offender was made into this knowing, willing, crime-committing agent by factors outside her control—namely, her genes, personality, environment, and their constant interaction. And, yes, it is to some extent unfair to seek this kind of retaliation against a person who ultimately (given her genes, personality, environment, and their constant interaction) could not help it. But, first, even though she arguably could not have done otherwise, she was not externally compelled or threatened; rather, she chose on her own to commit the crime.⁴⁶

Second, it is usually even sadder what offenders do to their victims and therefore more unfair to acquit them. The offenders may or may not have suffered prior to injuring their victims. The victims, however, certainly did suffer. And the fact that the offenders caused this suffering with an inappropriate attitude—for example, excessive anger or amusement or indifference—is sufficient to warrant retaliation against them on behalf of the victims whose suffering the offenders did not care enough about. It is reason enough to “pay them back,” to “teach them a lesson.” Inflicting punishment on the offenders, even if they were not genuinely responsible for their criminal acts, will help at least to some extent to right the moral imbalance that the offenders created when they committed their crimes.⁴⁷

Just as we feel great sympathy for the blameless wrongdoer whom we judge to be incapable of living up to society’s moral and legal standards,⁴⁸ we also feel great sympathy for the victim of any wrongdoer, blameless or blameworthy. After all, she has

46. See A.J. AYER, *Freedom and Necessity*, in *PHILOSOPHICAL ESSAYS* 271, 282 (1954) (“[T]o say that I could have acted otherwise is to say, first, that I should have acted otherwise if I had so chosen; secondly, that my action was voluntary in the sense in which the actions, say, of the kleptomaniac are not; and thirdly, that nobody compelled me to choose as I did When [these three conditions] are fulfilled, I may be said to have acted freely.”).

47. Levy, *supra* note 20, at 655-56 (“When the state punishes a criminal, . . . [it] is reducing the criminal’s rights and powers to roughly the same degree that he previously reduced the victim’s rights and power when he committed the crime. While the perpetrator indicated through his crime that his rights and interests were superior to his victim’s, criminal punishment negates that message and puts the perpetrator back into his non-superior, equal position. By restoring the equality between perpetrator and victim, by communicating that the perpetrator’s rights and interests are not superior to his victim’s rights and interests, criminal punishment helps to restore not *metaphysical* equilibrium but *moral* and *social* equilibrium. The *emotional* equilibrium then follows this restoration of the moral and social order.”) (footnote omitted).

48. See *supra* Part II.D.

needlessly suffered harm (e.g., death, physical injury, or emotional injury) at somebody else's hands. Indeed, this is largely what criminal punishment is about: expressing this sympathy by retaliating against the offender, exacting as much sacrifice or suffering from the offender as the offender initially exacted from the victim, and thereby balancing out their situations, "righting the wrong" that the offender inflicted on the victim.⁴⁹

Importantly, my arguments here operate under the skeptical assumption that offenders, and people generally, are not genuinely responsible for their actions. But this background assumption may not be true; in fact, it is very likely untrue. The standard common-sense presumption that we do bear genuine responsibility for our behavior is more plausible. So if, as I have just tried to show, blame and punishment are just even in a world of non-responsibility, then they are that much more (plausibly) just in a world of responsibility, which is what this world is if the "responsibility skeptics" are wrong.

III. DANGEROUS PSYCHOPATHS, MORAL RESPONSIBILITY, AND CRIMINAL RESPONSIBILITY

In Part II, I argued that just criminal punishment does not require responsibility. Still, criminal punishment does require criminal responsibility. It follows, then, that criminal punishment does not require another kind of responsibility: moral responsibility.

In *Dangerous Psychopaths*,⁵⁰ I used the example of psychopaths—people who are neurologically incapable of genuine compassion, remorse, and guilt—to argue that even if individuals are not morally responsible for their criminal acts, it may still be just to hold them criminally responsible, and therefore criminally punishable, for them.⁵¹ After explicating

49. See *supra* note 47 and accompanying text.

50. Levy, *supra* note 5.

51. See *id.* at 1328-29, 1362-75; see also Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1513 (1992) ("Our criminal justice system need not and frequently does not make criminal liability dependent on some showing that the offender deserves moral blame for what he has done."); *id.* at 1525 ("[T]he criminal law does not always honor its promise to exempt the morally blameless from criminal liability. It permits the conviction of some offenders who should not qualify as morally accountable actors . . ."); *id.* at 1526 ("[The processes of the criminal law] are ill-suited for determining whether

the conditions of moral responsibility and the conditions of criminal responsibility, I offered several arguments for the conclusion that psychopaths do not satisfy all of the conditions of moral responsibility⁵² and an argument that psychopaths still satisfy all of the conditions of criminal responsibility.⁵³ From these arguments, I ultimately concluded that, even if psychopaths are not morally responsible for their criminal acts, they are still criminally responsible, and therefore criminally punishable, for them. Therefore, more generally, criminal responsibility does not require moral responsibility.

For the purposes of this article, the respective conditions of moral and criminal responsibility are the most important. So I will reiterate them here. In *Dangerous Psychopaths*, I argued that the four conditions of moral responsibility are:

- (1) knowledge, or a threshold capacity to know, that a given action "A" is morally wrong;
- (2) a threshold capacity to refrain from A-ing;
- (3) control over A-ing; and
- (4) an absence of circumstances that excuse this performance.⁵⁴

And the four conditions of criminal responsibility are:

- (5) knowledge, or a threshold capacity to know, the (relevant) criminal law "C";
- (6) a threshold capacity to refrain from violating C;
- (7) control over violating C; and

offenders qualify as moral agents. Nor can we afford to exempt dangerous but morally blameless offenders from criminal liability and punishment . . ."); *id.* at 1616 ("[A]ny attempt to link criminal culpability more closely to a persuasive account of moral agency would generate significant ideological, financial, and administrative costs. . . . [T]he law's expectation that most criminals were morally accountable actors could be subjected to constant challenge."); *id.* at 1622 ("[T]he impoverished conception of moral agency that animates many criminal law doctrines permit conviction and punishment in the absence of moral desert. We appear unwilling to acknowledge openly that we sometimes punish the morally blameless or that our conception of justice to the individual sometimes encompasses concerns apart from the offender's moral desert."); John Hasnas, *Once More Unto the Breach: The Inherent Liberalism of the Criminal Law and Liability for Attempting the Impossible*, 54 HASTINGS L.J. 1, 45-54 (2002) (arguing that moral responsibility and criminal responsibility are generally conflated).

52. Levy, *supra* note 5, at 1332-44.

53. *Id.* at 1362-75.

54. *Id.* at 1329.

(8) an absence of circumstances that excuse this violation.⁵⁵

I drew these sets of conditions from the criminal law, scholarship on moral and criminal responsibility, and common sense. I will return to these conditions below in Part VI.

One might argue that control either requires the ability to do otherwise or amounts to the very same thing as the ability to do otherwise and therefore that conditions (3) and (7) render (2) and (6) respectively redundant. But this objection is simply false. A person may exhibit control over her action even if she could not have refrained from performing it.⁵⁶

To support this point, I offer two examples. First, suppose that I am driving my car well; I am not high or drunk or otherwise mentally incapacitated. So I have control over my action. Suppose further that I want to commit suicide by swerving into oncoming traffic. I keep trying to work up the courage, but I just cannot bring myself to do it. I find it psychologically impossible to cross the median. The fact that I find it psychologically impossible to cross the median hardly shows that I lack control over my driving. Quite the contrary; it shows just the opposite—that I do have control, though more control than I would like. We have, then, a situation in which I have control and yet cannot do otherwise.

A more controversial example is addiction.⁵⁷ Even if an addict cannot resist her addictive urge, it is arguably false to say that she does not exhibit control over the action that this urge motivates. Suppose that I am addicted to nicotine. Several hours after my last cigarette, I develop an increasingly intense craving for another. I try to resist this craving for ten to fifteen

55. *Id.* at 1363.

56. See generally Frankfurt, *Alternate Possibilities*, *supra* note 27 (arguing for the similar point that responsibility does not require the ability to do otherwise); Ken Levy, *Why It Is Sometimes Fair To Blame Agents for Unavoidable Actions and Omissions*, 42 AM. PHIL. Q. 93, 94-99 (2005) (same).

57. See ARTIE LANGE, *CRASH AND BURN* (2013) (describing how difficult it is to quit using heroin despite all of its self-destructive side effects); FRANCIS F. SEEBURGER, *ADDICTION AND RESPONSIBILITY: AN INQUIRY INTO THE ADDICTIVE MIND* 10 (1993) (“The deeper one sinks into addiction, the more desperate becomes the pain and agitation and need when one is deprived of that to which one has become addicted, and the greater is the eventual sense of relief when that deprivation is lifted.”); *id.* at 19 (“[A]ddiction seems to take on a life of its own, independent of the desires and decisions of the addict. It is as if the addiction were an external force acting inexorably on the addict, as inexorably as an avalanche sweeps over whomever is unfortunate enough to be in its way.”).

minutes, but withdrawal symptoms—anxiety, irritability, fatigue, headaches, nausea, and an inability to concentrate—start to kick in. And I know that they will only get worse the longer I deny myself a cigarette. With this knowledge in mind, I give up, reach into my desk drawer, and light up. Given that I deliberately performed this action—grabbing a cigarette and lighting up—on my own, I had control over it. Yet I very arguably could not have done otherwise. My intense nicotine craving in combination with my dread of intensifying withdrawal symptoms conspired to make resisting my desire to smoke psychologically impossible. So, once again, control does not necessarily entail a threshold capacity to refrain.

IV. THE EXCUSES

The central question in this article is whether or not situationism qualifies as a good excuse. In order to answer this question, we first need to know what kinds of reasons for acting qualify as good excuses. In this Part, I will present Stephen Morse's theory of the excuses, indicate the main respects in which I differ from Morse, and offer an alternative theory.⁵⁸

A. Stephen Morse's Dualist Theory of the Excuses

Morse's theory of the excuses is "dualist." He believes that there is a fundamental, irreducible dichotomy between two kinds of excuses: nonculpable irrationality (represented best by insanity) and nonculpable hard choice (represented best by duress).⁵⁹ By inserting "nonculpable" before "irrationality" and "hard choice," Morse means to suggest that the person is not responsible for being irrational or being in a hard-choice situation, which is why these conditions are excuses in the first place.⁶⁰

Morse advocates developing two generic excuses that correspond to the duality between irrationality and hard choice.

58. I base most of my discussion in this Part on Morse, *supra* note 29; *see also* Stephen J. Morse, *Psychopathy and the Law: The United States Experience*, in *RESPONSIBILITY AND PSYCHOPATHY: INTERFACING LAW, PSYCHIATRY, AND PHILOSOPHY* 41, 48-49 (Luca Malatesti & John McMillan eds., 2010).

59. *See* Morse, *supra* note 29, at 334. *But see* LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 139-41 (2009) (proposing alternatives to the hard-choice account of the duress defense).

60. *See* Morse, *supra* note 29, at 341.

These generic excuses are designed to cover not only insanity and duress but also every other excuse, recognized and unrecognized, that involves nonculpable hard choice or nonculpable irrationality:

[T]he specific excuses the law now includes are too limited. . . . [T]he criminal law should adopt two generic excuses: the general incapacity for rationality or normative competence and hard choice. This proposal would enable the law more rationally to consider any reasonable claim and relevant evidence that might satisfy the underlying reasons for excusing, and it would permit defendants to avoid the unreasonable strictures of existing excusing doctrine, which is generally tied to a medical model of abnormality.⁶¹

[N]onculpable irrationality and nonculpable hard choice should excuse whether or not the irrationality was produced by mental disorder or the hard choice was occasioned by a human threat. Variables such as mental disorder or human threat would no longer be necessary criteria of excuse; instead they would simply be evidentiary considerations bearing on whether the defendant was nonculpably irrational or faced a hard choice at the time of the crime.⁶²

Morse adopts this dualist position rather than the “monist” position that all recognized excuses are explained by irrationality or “normative incompetence” for the simple reason that normative incompetence does not explain why hard choice is an excuse. The reason for recognizing hard choice as an excuse is not that the person who committed a crime in a hard-choice situation was normatively incompetent but just the opposite: given the hard choice she faced, it is actually her normative competence that motivated her to commit a crime. In other words, far from being normatively incompetent, the person who commits a crime in the face of a hard choice acted rationally; she performed the act that she reasonably believed would cause less harm to herself or another.⁶³

61. *Id.* at 390-91.

62. *Id.* at 391.

63. *See id.* at 341 (“Compulsion involves a wrongful hard choice that produces a threat that a rational, otherwise responsible agent faces. If she yields to the threat, it will not be because she does not understand the legal rule or what she is doing or because the threat turned her into an automaton. She knows it is wrong and acts intentionally precisely to avoid the threatened harm. The killing is clearly action and satisfies most normative

Although Morse's dualist proposal is plausible and well defended, I think that there are several problems with it. First, nonculpable irrationality is over-inclusive because there are many instances in which nonculpable irrationality motivates a crime but we still believe that the person should be punished, not excused. For example, the seven deadly sins—greed, sloth, anger, lust, pride, envy, and gluttony—are rarely thought to excuse criminal acts.⁶⁴ Yet many people are motivated to commit crimes, often serious crimes, by at least one of these, and these motives are often both irrational (i.e., excessive or self-destructive) and nonculpably possessed (i.e., acquired through some combination of genes, personality, and environment).

Second, Morse's notion of nonculpable irrationality is also under-inclusive. By "rationality," Morse means:

[A] congeries of perceptual, cognitive, and affective abilities. . . . [M]ost generally it includes the ability . . . "to be sensitive and responsive to relevant changes in one's situation and environment—that is, to be flexible." It is the ability to perceive accurately, to get the facts right, and to reason instrumentally, including weighing the facts appropriately and according to a minimally coherent preference ordering. . . . [I]t is the ability to act for good reasons, and it is always a good reason not to act (or to act) if doing so (or not doing so) will be wrong. . . . The general normative capacity to be able to grasp and be guided by reason is sufficient.⁶⁵

Irrationality, then, is the absence of at least one of these abilities. While this conception of irrationality seems correct, it has much narrower extension than Morse suggests. Nonculpable irrationality extends to insanity alone. Contrary to Morse, it does not extend to a whole number of other excuses—

notions of rationality. Still, society, acting through its legal rules governing such cases, might decide that some choices are too hard fairly to expect the agent to behave properly and that people will be excused for making the wrong choice.").

64. See Kevin Bennardo, *Of Ordinarity and Excuse: Heat-of-Passion and the Seven Deadly Sins*, 36 CAP. U. L. REV. 675, 689-92 (2008) (arguing that the mere fact that ordinary people might experience a particular wrongful passion in a particular situation does not automatically excuse their acting on this passion).

65. Morse, *supra* note 29, at 392 (citation omitted); see also Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 382 (2004) [hereinafter Morse, *Reason, Results*] (noting the "general capacities generally thought to ground ordinary responsibility, such as the capacity to grasp and be guided by reason").

for example, infancy, hypnotism, involuntary intoxication, and automatism.⁶⁶ Instead, what covers not only insanity but also infancy, hypnotism, involuntary intoxication, and automatism is not (nonculpable) irrationality per se, as Morse suggests, but rather something different—namely, the fact that these conditions make it difficult or impossible for the agent either to know better or to act better. And an *inability to act better* is not necessarily a problem of irrationality.

Irrationality usually applies more to cognitive and emotional impairment than to perceptual or volitional impairment.⁶⁷ And even an *inability to know better* is not necessarily a problem of irrationality. For example, indoctrination or religious zealotry may lead some people to believe that certain activities—for example, terrorism—are either morally permissible or even morally obligatory.⁶⁸ This belief is false, but possession of this belief hardly indicates that the person who holds it is irrational. Her belief is rational given the premises and the “evidence” that have been drilled into her head.⁶⁹

66. Morse, *Reason, Results*, *supra* note 65, at 375.

67. See *United States v. Lyons*, 731 F.2d 243, 249 (1984) (“Most psychotic persons who fail a volitional test would also fail a cognitive test, thus rendering the volitional test superfluous for them.”); Captain Vaughan E. Taylor, *Building the Cuckoo’s Nest*, *ARMY LAWYER* 32, 37-38 (1978) (“The words ‘mental disease or defect’ . . . comprehend[] those irrational states of mind which are the result of deterioration, destruction, or malfunction of the mental, as distinguished from the moral, faculties. The key word here is mental, as opposed to any other type of defect, such as a defect of morals, character, behavior, development, or culture.”).

68. See Robinson, *supra* note 4, at 66 (“[I]ndoctrination techniques follow a series of stages in which the subject is first isolated, then disoriented through malnutrition and constant provocation of anxiety, and finally made to participate in symbolic acts of self-betrayal. This renders the subject’s previous personality subject to degradation. The captors then build up a new personality, one that agrees with the belief structure of the indoctrinators, by offering positive reinforcement when the subject expresses the desired views. Eventually, the subject does not feel manipulated and comes to truly hold the beliefs of his captors.”) (footnotes omitted).

69. See LAWRENCE SUSSKIND & PATRICK FIELD, *DEALING WITH AN ANGRY PUBLIC: THE MUTUAL GAINS APPROACH TO RESOLVING DISPUTES* 18 (1996) (“It simply doesn’t matter whether you think that someone else’s anger is rational or irrational. Someone else’s behavior may appear bizarre to you, but from where they are standing, ‘zealots’ see their outrage as quite logical and rational.”); Stephen J. Morse, *The Jurisprudence of Crazyness*, in *THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR* 225, 256 (Francesco Parisi & Vernon L. Smith eds., 2005) (distinguishing between rational and irrational terrorists); Jeffrey F. Addicott, *American Punitive Damages vs. Compensatory Damages in Promoting Enforcement in Democratic Nations of Civil Judgments to Deter State-Sponsors of Terrorism*, 5 U. MASS. ROUNDTABLE SYMP. L.J. 89, 94 (2010) (“It is

Likewise, the reason why infancy is an excuse is not because children are irrational—that is, not because they are unable to “think straight.” Infancy is an excuse because we cannot reasonably expect children to know better or behave better, where this lack of knowledge or control is due not necessarily to irrationality but much more often to lack of maturity, experience, or education.⁷⁰ For example, a young child may not fully appreciate how wrongful and dangerous it is to throw rocks at moving cars not because she is irrational but because nobody ever taught her better or because she did know better but was not mature enough to resist her temptation to enjoy the thrill of breaking the rules, tempting fate, and testing her throwing abilities. Indeed, this is the reason why we excuse her, at least from criminal punishment—assuming that the harm is not too great. We cannot expect her to behave better, to behave like an adult, given her inability to fully understand and appreciate the moral and legal consequences of her action.

sometimes said that terrorism is a mindless and irrational activity. This conclusion is absolutely false. The reality of modern terrorism is the exact opposite. Terrorism is the premeditated use of unlawful violence calculated to, as the old Chinese saw relates, ‘kill one and frighten ten thousand.’”); Laura Nader, *Rethinking Salvation Mentality and Counterterrorism*, 21 *TRANSNAT’L L. & CONTEMP. PROBS.* 99, 111 (2012) (“[T]he average U.S. citizen does not have insight into U.S. covert warfare, so in the absence of that insight retaliatory acts appear irrational, which fits the media profile of ‘the terrorist.’”); Jide Nzelibe, *Courting Genocide: The Unintended Effects of Humanitarian Intervention*, 97 *CAL. L. REV.* 1171, 1181-82 (2009) (“Much . . . political science scholarship assumes, at least implicitly, that perpetrators often act rationally when they deploy genocidal violence against their weaker adversaries. That is, rather than acting out of a fanatical or irrational impulse to harm another ethnic group, dominant groups tend to use genocidal violence strategically in order to coerce minority rebel groups to drop their military demands.”) (footnote omitted); Ehud Sprinzak, *Rational Fanatics*, 120 *FOREIGN POL’Y* 66, 66 (Nov. 20, 2009) (“Whereas the press lost no time in labeling [the 1983 Beirut barracks bombers] irrational zealots, terrorism specialists offered a more nuanced appraisal, arguing that suicide terrorism has inherent tactical advantages over ‘conventional’ terrorism.”); *id.* at 73 (“The perception that terrorists are undeterrable fanatics who are willing to kill millions indiscriminately just to sow fear and chaos belies the reality that they are cold, rational killers who employ violence to achieve specific political objectives.”); D.A. Jeremy Telman, *Non-State Actors in the Middle East: A Challenge for Rationalist Legal Theory*, 46 *CORNELL INT’L L.J.* 51, 62 (2013) (“Rationalist theory can quite easily accommodate both rogue states (if there are any such entities in the contemporary Middle East) and terror groups, as demonstrated by the relatively rich literature on the self-interested conduct of individual terrorists and terror organizations.”).

70. See Elizabeth Couffman & Laurence Steinberg, *Researching Adolescents’ Judgment and Culpability*, in *YOUTH TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 325, 325 (2000).

Again, none of this necessarily has anything to do with irrationality.

Third, by limiting his theory of the excuses to nonculpable irrationality and nonculpable hard choice, Morse may be inadvertently excluding other conditions and circumstances that do not fall into either category, but would still qualify as a plausible excuse. For example, in Parts V and VI, I will discuss what I take to be a very plausible candidate—situationism. I will also argue, however, that situationism does not implicate irrationality or hard choice. Still, I will argue that situationism should not be added to the list of recognized excuses. Morse might respond that my rejection of situationism merely proves his point, that the reason situationism should not be added to the list of recognized excuses is precisely because it does not fit into the irrationality or hard-choice camps. But, I will argue that situationism should be rejected not for this reason but rather for a number of other reasons.

Fourth, Morse's attempt to show that psychopathy is fundamentally a problem of irrationality and therefore a (potentially) good excuse is not entirely convincing. Morse adopts, in rather ad hoc fashion, a new criterion for rationality or normative competence—emotional understanding as opposed to cognitive understanding—and then argues that because psychopaths lack this emotional understanding of moral and legal rules, they should be excused for disobeying them.⁷¹ But,

71. See Morse, *supra* note 58, at 51 (“In brief, the argument for excusing psychopaths, or anyway some of them, is that they lack the strongest reasons for complying with the law, such as understanding that what they are doing is wrong and empathic understanding of their victim’s plight.”); Stephen J. Morse, *Psychopathy and Criminal Responsibility*, 1 *NEUROETHICS* 205, 205 (2008); Stephen J. Morse, *Thoroughly Modern: Sir James Fitzjames Stephen on Criminal Responsibility*, *OHIO ST. J. CRIM. L.* 505, 521 (2008) (“Almost all philosophers think that psychopaths should be excused because they lack the central rational capacities necessary to behave well—the capacity to understand others’ interests and the difference between right and wrong.”); Morse, *Reason, Results*, *supra* note 65, at 376; Stephen J. Morse, *Rationality and Responsibility*, 74 *S. CAL. L. REV.* 251, 264 (2000) (“I believe that [psychopaths] are morally irrational and should be excused. . . . 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.”) (footnote omitted); Stephen J. Morse, *Immaturity and Irresponsibility*, 88 *J. CRIM. L. & CRIMINOLOGY* 15, 26, 61 (1997) (“Perhaps people who lack the capacity for empathy and guilt—the so-called ‘psychopaths’—are particularly immoral and deserve special condemnation rather than excuse, but this does not seem fair. To the best of our knowledge, some harmdoers simply lack these capacities and they are not amenable to

it is not at all clear that emotional understanding of a rule is necessary for rationality or normative competence.⁷² To be sure, if we stretch rationality or normative competence broadly enough, Morse is correct. But that is just the point: the success of Morse's position on psychopathy depends on our stretching these concepts beyond what they normally, plausibly capture.

B. A Monist Theory of the Excuses

In this section, I will offer an alternative theory of the excuses, one that differs from Morse's dualism. I propose, in short, that what ties all of the existing, recognized excuses together is not the defendant's normative incompetence (or hard choice) but society's normative expectations. The "theme" running through the currently recognized excuses is that they all point to conditions or circumstances that make it unreasonable for society to expect the defendant to have behaved otherwise, unreasonable for society to expect the defendant to have avoided committing the criminal act that she committed.⁷³ Given this much, my proposal diverges from Morse's dualist thesis in two respects: (a) it is "monist;" and (b) it shifts the focus from the defendant, the potential excused, toward us, the excusers.

According to my monist account of the excuses, the excuses as a whole embody this fundamental point: it is more

reason. They may be dangerous people, but they are not part of our moral community. . . .") (footnotes omitted); see also Samuel H. Pillsbury, *Misunderstanding Provocation*, 43 U. MICH. J.L. REFORM 143, 158-59 (2009). But see Jerome Hall, *Mental Disease and Criminal Responsibility*, 45 COL. L. REV. 677, 707 (1945) (implying that the notion that a person can have cognitive knowledge of a proposition without affective knowledge is untenable because the "affective, the cognitive, and the conative functions as well as all the others, inter-penetrate one another").

72. See Levy, *supra* note 5, at 1362-70 (arguing that only a cognitive, not an emotional or affective, knowledge of the law is necessary for criminal responsibility); *id.* at 1370-75 (arguing that psychopaths are sufficiently rational to be held criminally responsible for their criminal acts).

73. See Robinson, *supra* note 4, at 57 ("The conclusion of blamelessness comes from the *existence of the excusing condition*—the finding that the effect of the disability on the actor was so severe that we could not reasonably have expected him to have remained law-abiding."); cf. Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457, 469 (2006) ("A no-fair-opportunity excuse claim is based on some *external* factor that acts on the individual in a way that convinces us that she did not have a fair opportunity to conform her conduct to the law The key word here, of course, is *fair*. This is a normative judgment. . . . [T]his form of excuse recognizes that there is nothing wrong with the woman—what was 'wrong' were external circumstances that we believe, but for the grace of God, would probably have caused us, as well, to act unlawfully.").

just that we refrain from punishing somebody whom we cannot reasonably expect to have refrained from committing a crime than that we simply vent our perfectly natural and understandable punitive impulses against her for committing this crime.⁷⁴ Whether this balancing of values—the justice of excusing (because we cannot reasonably expect the agent to have avoided committing the crime) versus the justice of punishing (because the agent did commit the crime)—is correct is actually a very deep and difficult question. The criminal justice system takes one position—namely, that we should excuse—and most blindly follow it. But I think that one could very plausibly take the other side of it, at least when very close calls have to be made between blamelessness and blameworthiness. I will develop this point further in Part VI.

Underlying my monist thesis is not a dualism but a “triplism.” Unlike Morse, who sees all excuses reducing to the two general conditions of nonculpable irrationality and nonculpable hard choice, I see all of the excuses as reducing to the non-fulfillment of three general normative expectations: we cannot reasonably expect the person to have avoided committing the crime because (a) her (threshold capacity for) legal or moral knowledge was nonculpably deficient; (b) her control over her action was nonculpably impaired; or (c) her incentives for choosing otherwise (that is, for choosing to abide by the law) were nonculpably diminished by external conditions. I will refer to all three of these general excusing conditions respectively as the Knowledge Constraint, the Volitional Constraint, and the Pressure Constraint.

74. See Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 279-80 (1987) (“[T]he concept of mental disease serves to identify so complete a breakdown of the normal human capacities of judgment and practical reason that the afflicted person cannot fairly be held liable. . . . [H]e may nonetheless be excused if his disease of the mind has so far impaired his rationality that he has ceased to be a moral agent. . . . Seen in this way, it is apparent why the excuse of legal insanity is fundamental. No blaming system would be coherent if it imposed blame without regard to moral agency. We may become angry with an object or an animal that thwarts us, but we can’t blame it.”) (footnote omitted); Levy, *supra* note 20, at 675 (“According to [Jeffrie] Murphy, while we must acknowledge the bad luck that lies behind every crime, we must still blame and punish the criminal for this crime because bad luck does not *completely* explain it. When it does, the defendant *is* fully excused; too much bad luck is arguably what all the traditionally recognized criminal law excuses—insanity, infancy, hypnotism, involuntary intoxication, automatism, duress, necessity, mistake of fact, mistake of law, and entrapment—attempt to capture.”) (footnote omitted).

Into the first category, the Knowledge Constraint, fall mistake of fact and mistake of law. Into the second category, the Volitional Constraint, falls automatism. Into either category fall hypnotism, infancy, insanity, and involuntary intoxication. And into the third category, the Pressure Constraint, fall duress, necessity, and entrapment.

V. SITUATIONISM AND MORAL RESPONSIBILITY

Given my monist account of the excuses, I now propose the following controversial claim: If what it takes for a certain condition or circumstance to be an excuse is that it makes it unreasonable for society to expect better, law-abiding behavior from a given person, then there are several more conditions and circumstances that we should at least consider adding to the current list of excuses, conditions and circumstances that very arguably satisfy the Knowledge Constraint, the Volitional Constraint, or the Pressure Constraint. The primary candidates are:

- Battered Woman Syndrome
- Postpartum depression
- Indoctrination
- Pedophilia
- Cultural background
- Past physical or sexual abuse
- Situationism

In this and the next Part, I will investigate the last of these candidates: situationism. I will argue that while there are some good reasons to think that situationism should be added to the list of recognized excuses, there are stronger reasons against this addition.

A. Our Nearly Universal Capacity for Evil

Consider the “Bloodlands”—the land between Germany and the Soviet Union in which Hitler and Stalin independently orchestrated the deaths of fourteen million innocent people.⁷⁵ We can offer several different explanations of how, for example,

75. See TIMOTHY SNYDER, *BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN* vii-viii (2010).

an ordinary German citizen joined the Einsatzgruppen and zealously helped to round up Jewish villages in Poland after the German invasion in 1939, made them dig ditches, and then shot them (after beating them) into these ditches.⁷⁶ While explanations such as anti-semitic propaganda, indoctrination, hatred, peer pressure, career advancement, and obedience to authority all help to provide some understanding, even the aggregate of these explanations still do not go the full distance. We still ask: even given all of these motivations, how could they have done all this? How could they enthusiastically beat, torture, and kill innocent men, women, and children? Where was their compassion? Prior to the Bloodlands, we might have thought that only psychopaths could have performed such acts. But the fact that the killing in the Bloodlands was conducted by many ordinary, non-psychopathic people easily undermines this thesis.

One might argue that the Bloodlands was a unique event by a unique people in unique circumstances.⁷⁷ People in most places at most times are incapable of doing what they did. But there is plenty of historical data to refute this hypothesis—especially genocides in other countries at other times (for example, Ukraine, Rwanda, Bosnia, and Darfur).⁷⁸ And these

76. See DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 222-34 (1996).

77. See *id.* at 386, 389-92, 400-03, 408-09, 412-14 (inclining toward this thesis); Claudia E. Haupt, *Regulating Hate Speech—Damned if You Do and Damned if You Don't: Lessons Learned from Comparing the German and U.S. Approaches*, 23 B.U. INT'L L.J. 299, 302 (2005) ("Some argue that the Holocaust is such a singular occurrence that it cannot possibly be the subject of a comparative analysis."); Gunnar Heinsohn, *What Makes the Holocaust a Uniquely Unique Genocide?*, 2 J. GENOCIDE RES. 411, 424-25 (2000) (arguing that the Holocaust was "uniquely unique" because "it was a genocide for the purpose of reinstalling the right to genocide") (footnote omitted); Alan C. Laifer, Note, *Never Again? The "Concentration Camps" in Bosnia-Herzegovina: A Legal Analysis of Human Rights Abuses*, 2 NEW EUR. L. REV. 159, 190-91 n.161 (1994) ("The Nazi Holocaust was unique . . . in the scope and number of murders and the fact that the liquidation of the targeted people was accomplished as a detriment to Germany's very own central objective, which was to win World War II. It was done to accomplish no strategic, political, or territorial gain. On the contrary, Germany expended resources on mass murder it could have used to defeat its enemy, and it could have benefitted from the talents of some of the people it killed or exiled."); Avishai Margalit & Gabriel Motzkin, *The Uniqueness of the Holocaust*, 25 PHIL. & PUB. AFF. 65, 74-75 (1996) ("[I]t is exceedingly rare and maybe unique that a group of people has been both systematically humiliated and systematically killed.").

78. See YEHUDA BAUER, *RETHINKING THE HOLOCAUST* 45-50 (2001); NORMAN G. FINKELSTEIN & RUTH BETTINA BIRN, *A NATION ON TRIAL: THE GOLDHAGEN THESIS AND*

are “just” genocides. There are many more places where war crimes and crimes against humanity are routinely committed. Indeed, Abu Ghraib and Guantanamo are only some recent evidence that even ordinary Americans can do very bad things to other people.⁷⁹ Slavery, the Trail of Tears, Japanese internment camps, and Hiroshima and Nagasaki provide that much more evidence that Americans are just as capable of cruelty as any other people.⁸⁰

Even with these examples in mind, however, most individuals still think that they themselves are incapable of cruelty.⁸¹ “I am different,” they think. But in many if not most cases, this is nothing more than wishful thinking. Despite our self-serving intuitions about our own virtue, there are several

HISTORICAL TRUTH 80, 87-96, 88 n.78, 143-46 (1998) (critiquing the “Holocaust ‘uniqueness’ mantra”); Ward Churchill, *Defining the Unthinkable: Towards a Viable Understanding of Genocide*, 2 OR. REV. INT’L L. 3, 26 (2000) (“Equally egregious have been the efforts of an uncomfortably large number of Jewish scholars to ‘prove’ that genocide is an historically unique fate suffered by their people alone at the hands of the [N]azis.”); Vivian Grosswald Curran, *Deconstruction, Structuralism, Antisemitism and the Law*, 36 B.C. L. REV. 1, 41-42 (1994) (“[T]he pervasive agreement among [H]olocaust scholars is that the [H]olocaust, whether or not unique up to the time of its occurrence, is not unique prospectively.”); Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal*, 105 YALE L.J. 449, 475 (1995) (“While some scholars continue to emphasize the monstrous singularity of the Nazi genocide and question the motives of those who would challenge such an understanding, others have attempted to assimilate the extermination of the Jews into a more ‘conventional’ history of atrocity, one that finds ample precedents in Stalin’s gulags and echoes in Pol Pot’s killing fields.”) (footnote omitted); Don B. Kates, *Genocide, Self Defense, and the Right to Arms*, 29 HAMLIN L. REV. 501, 507 (2006) (“In fact, Twentieth Century genocides killed over 260 million unarmed, defenseless victims.”); David Neiwert, *Ash on the Sills: The Significance of the Patriot Movement in America*, 58 MONT. L. REV. 19, 24 n.9 (1997) (“The conditions [Daniel Goldhagen] describes—a combination of fascism and eliminationism—as bringing about the Holocaust . . . are probably replicable under other circumstances, particularly with a different target and a different paligenetic myth.”) (citation omitted).

79. See ZIMBARDO, *supra* note 3, at 324-79.

80. See FINKELSTEIN & BIRN, *supra* note 78, at 81-82 (arguing that Americans are selectively blind to their own cruel acts and policies); JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY* 89-112 (1999) (discussing the events and mindset that led to the United States’ dropping atomic bombs on heavily populated cities in Japan).

81. See GINA PERRY, *BEHIND THE SHOCK MACHINE: THE UNTOLD STORY OF THE NOTORIOUS MILGRAM PSYCHOLOGY EXPERIMENTS* 295-96 (2012) (“It’s hard for anyone to imagine themselves as anything other than a defiant subject. We just can’t imagine doing what they did. . . . [Milgram’s research] was startling, counterintuitive, and it reinforced the notion that we might like to think we know ourselves but social psychologists know better: inside all of us is a concentration-camp guard just waiting to be called into service.”).

compelling reasons to believe that very few of us are incapable of performing cruel acts.⁸² (In what follows, I assume the dictionary definition of cruelty: callous indifference to or pleasure in causing pain and suffering.)⁸³

First, the Stanford Prison Experiment shows that ordinary, non-psychopathic people volunteering to participate in a psychological study willingly harmed others when the immediate norms surrounding them suddenly permitted.⁸⁴ In the Stanford Prison Experiment, most of the Stanford students who had been randomly designated to serve as guards in a mock prison quickly resorted to overly harsh and sometimes cruel methods of maintaining control over the Stanford students who had been randomly designated to serve as prisoners. Like the Milgram shock experiments, the Stanford Prison Experiment helped to show that when the norms are changed and ordinary people are suddenly authorized to treat strangers in ways that everyday life does not permit, these norms will often override their compassion.⁸⁵

Second, consider most people's treatment of animals. Millions of people hunt, and billions eat meat. Yet hunting is cruel because, whatever the person's motivations—often tradition, family bonding, or just the thrill of the chase—it

82. See *id.* at 293 (“[W]hat about us . . . ? Are we better than people who used to watch the Christians being thrown to the lions in ancient Rome?”); ZIMBARDO, *supra* note 3, at vii (“I argue that while most people are good most of the time, they can be readily seduced into engaging in what would normally qualify as ego-alien deeds, as antisocial, as destructive of others.”); *id.* at 3, 5-6, 14-15 (insisting that virtually anybody can be induced to perform evil acts).

83. OXFORD'S AMERICAN DICTIONARY AND THESAURUS 337 (Oxford Press 2003).

84. See ZIMBARDO, *supra* note 3, at 23-257 (describing the Stanford Prison Experiment and its implications for human psychology).

85. See VIKTOR E. FRANKL, *MAN'S SEARCH FOR MEANING: AN INTRODUCTION TO LOGOTHERAPY* 48 (Ilse Lasch trans., 1959) (“No man should judge [people who favor their friends over others in life-and-death situations] unless he asks himself in absolute honesty whether in a similar situation he might not have done the same.”); JON MEACHAM, *AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE* 359 (2008) (“[E]vil can appear perfectly normal to even the best men and women of a given time.”); STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* 6 (1974) (“Sitting back in one's armchair, it is easy to condemn the actions of the obedient subjects. But those who condemn the subjects measure them against the standard of their own ability to formulate high-minded moral prescriptions. That is hardly a fair standard. Many of the subjects, at the level of stated opinion, feel quite as strongly as any of us about the moral requirement of refraining from action against a helpless victim. They, too, in general terms know what ought to be done and can state their values when the occasion arises. This has little, if anything, to do with their actual behavior under the pressure of circumstances.”).

involves an indifference to or pleasure in killing innocent, sentient, and intelligent beings.⁸⁶ Likewise, eating meat is cruel because it involves an indifference to the plight of the animals killed for nothing more than a gratuitous and transitory pleasure in the consumption of their flesh.⁸⁷ Eating meat is all the more

86. See George Anastaplo, *September Eleventh, A Citizen's Responses* [sic] (Continued Further), 35 OKLA. CITY U. L. REV. 625, 721 (2010); Gary L. Francione, *Animals, Property and Legal Welfarism: "Unnecessary" Suffering and the "Humane" Treatment of Animals*, 46 RUTGERS L. REV. 721, 723 (1994); Richard H. Hiers, *Reverence for Life and Environmental Ethics in Biblical Law and Covenant*, 13 J.L. & RELIGION 127, 152-53 (1996-98); Laura J. Ireland, *Canning Canned Hunts: Using State and Federal Legislation to Eliminate the Unethical Practice of Canned "Hunting,"* 8 ANIMAL L. 223, 236-37 (2002); Kenneth L. Karst, *Religious Freedom and Equal Citizenship: Reflections on Lukumi*, 69 TUL. L. REV. 335, 342 (1994); Elizabeth A. Moore, Note, "I'll Take Two Endangered Species, Please": Is the Commercialization of Endangered Species a Valid Activity that Should Be Permitted Under the Endangered Species Act to Enhance the Survival of the Species?, 75 GEO. WASH. L. REV. 627, 648 (2007); Dick Nelson, *PETA Activists Aim to Reel in Sport Fishing*, TIMES UNION (ALBANY, N.Y.), Feb. 11, 1996, at C10; George Reiger, *Our Troubled Tradition: Could the Present Anti-Hunting Movement Date Back Not to Bambi But to the Manicured Suburban Lawn?*, FIELD & STREAM 20 (Feb. 1994); Bradford J. Roegge, Note, *Survival of the Fittest: Hunters or Activists? First Amendment Challenges to Hunter Harassment Laws*, 72 U. DET. MERCY L. REV. 437, 437-38, 441-42 (1995); Joyce Tischler, *A Brief History of Animal Law, Part II (1985 - 2011)*, 5 STAN. J. ANIMAL L. & POL'Y 27 (2012); Aileen Ugalde, Comment, *The Right to Arm Bears: Activists' Protests Against Hunting*, 45 U. MIAMI L. REV. 1109, 1113 (1991); Craig A. Wenner, *Judicial Review and the Humane Treatment of Animals*, 86 N.Y.U. L. REV. 1630, 1656 (2011); Bob Wyss, *The Great Swamp: Through the Seasons Deer Hunters Want a Sporting Chance*, PROVIDENCE JOURNAL-BULLETIN, Dec. 10, 1995, at 1A; Michael Levy, *Students Divided Over the Pros and Cons of Hunting*, BUFFALO NEWS, Dec. 21, 1993, at 2; *Federal Report: ADC Petitions Flood Congress*, HSUS NEWS 33 (Spring, 1991); *They Are Bloodthirsty Nuts*, U.S. NEWS & WORLD REP., Feb. 5, 1990, at 35.

87. See Gary Chartier, *The Law of Peoples or a Law for People: Consumers, Boycotts, and Non-Human Animals*, 12 BUFF. ENVTL. L.J. 123, 159 (2005) ("[I]ndividual consumers who purchase meat from grocery stores or meat markets likely endorse their suppliers' cooperation with slaughterhouses. Customers who buy meat at restaurants are in a roughly comparable position. . . . [T]hey likely do endorse the activities of the slaughterhouses and factory farms responsible for the availability of their meals and, thus, cooperate formally with the activities of these facilities."); Pablo Lerner & Alfredo Mordechai Rabello, *The Prohibition of Ritual Slaughtering (Kosher Shechita and Halal) and Freedom of Religion of Minorities*, 22 J.L. & RELIGION 1, 51 (2007) ("Though you are so hard and cruel as to eat meat . . .") (quoting A.I. Kook, *Telalei Orot*, in MAMARÉ HARAYAH 27 (Jerusalem 5744) (Hebrew)); Jay Sursukowski, *The Hunt for Mercy*, 3 J. ANIMAL L. 1, 10 (2007) ("Baroness Gale gave a speech which showed an unusual amount of commitment to individual animals when she revealed that not only did she not support hunting, but that she had also given up eating meat because of the cruelty to animals in factory farming and battery chicken operations."); Paul Solotaroff, *In the Belly of the Beast*, ROLLING STONE, Dec. 10, 2013, available at <http://www.rollingstone.com/feature/belly-beast-meat-factory-farms-animal-activists> (describing the rampant cruelty that is inflicted on factory-farm animals).

cruel when the individual knows about the brutality involved in hunting and livestock farming and still actively supports either industry by purchasing and eating the bloody results. My point is not that human carnivores are committing or participating in genocide. My point is that human carnivores are capable of committing or participating in genocide. All we would need to do is convince them that certain groups of people are subhuman; dehumanization is one of the key steps necessary for mass violence.⁸⁸ And the fact that millions hunt and billions eat meat shows that many, if not most, people are likely susceptible to this kind of persuasion.

In case the reader doubts this point, what would she say if a person ate the flesh of human beings who had been raised and slaughtered on human farms? She would most likely (hopefully) say that this behavior is cruel. But then it is difficult to see why the same kind of behavior is not cruel to animals. And while many desperate attempts have been made by hunters and carnivores to elicit a morally relevant distinction between animals and humans,⁸⁹ a distinction in virtue of which it is wrong/cruel to kill only the latter and not the former for food, these attempts merely prove the point: human beings are very good at rationalizing cruelty. Indeed, they are so good at rationalizing cruelty that they do not even realize when they are participating in it. It is this facility for rationalization and denial that helps to explain why most human beings are also capable of great inhumanity.⁹⁰

Third, most human beings who insist that they simply could not deliberately hurt or kill another human being fail to realize that there is at least one situation in which they would make a big exception to this “rule” without much, if any, hesitation or

88. See MILGRAM, *supra* note 85, at 9 (“For a decade and more, vehement anti-Jewish propaganda systematically prepared the German population to accept the destruction of the Jews. . . . Systematic devaluation of the victim provides a measure of psychological justification for brutal treatment of the victim and has been the constant accompaniment of massacres, pogroms, and wars.”); ZIMBARDO, *supra* note 3, at xii (“Dehumanization is one of the central processes in the transformation of ordinary, normal people into indifferent or even wanton perpetrators of evil. . . . It makes some people come to see those others as enemies deserving of torment, torture, and annihilation.”); *id.* at 308-10 (explaining how dehumanization promotes violence).

89. See Ken Levy, *The Carnivore’s Challenge* (unpublished manuscript) (on file with author).

90. See *id.*

compunction: righteous vengeance.⁹¹ All it takes to infuriate most people to the point of violent rage or at least enthusiastic approval of violence is to threaten, harm, or kill their loved ones. In this way, righteous vengeance easily contradicts people's intuitions that they themselves are simply incapable of great schadenfreude.⁹²

I conclude that most human beings are capable of participating in genocide. In case the reader is still skeptical of this proposition, or at least of the proposition that she is so capable, she needs to answer three questions: (a) Does she ordinarily comply with social norms accompanied by social pressure?; (b) Does she knowingly consume any animal products?; and (c) Would she want a person who deliberately and seriously harmed or killed her loved ones to suffer or die? If the answer to any one of these three questions is yes, then she is very arguably capable of violence/cruelty or at least willful toleration of violence/cruelty. And however she justifies her affirmative answers, genocides are generally committed by people who are convinced that they are in the right.⁹³

B. The Dispositionism Paradox

The previous section was not designed to convince the reader that she is evil. It is designed to show that she is most likely capable of evil, at least of violence or cruelty, and very skillful at both rationalizing and denying this capacity. But there is something that the previous section left out. While it may have provided some understanding of why people beat, rape, torture, and kill masses of innocent human beings, it still—arguably—failed to fully explain how ordinarily compassionate individuals can commit these violent acts. So the question remains: just how do ordinarily compassionate people do these things? How does their conscience not get the better of them?

Perhaps the most common answer to these questions is that the people who commit violent acts are violent people.⁹⁴ On this

91. See Levy, *supra* note 20, at 651.

92. See *supra* notes 25 and 47 and accompanying text.

93. See *supra* notes 68 and 69 and accompanying text.

94. See Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1388 (2003) (describing psychological research indicating a tendency to "attribute the behavior of others to personality rather than context").

view, each violent act is perpetrated by a violent individual; therefore mass violence is perpetrated by large groups of violent individuals. One label for this theory is “dispositionism.”⁹⁵ Dispositionism is another term for personality psychology. It locates the explanation for a given action entirely in the agent or the agent’s personality.⁹⁶ Dispositionism therefore lends itself to the assumption of individual responsibility and corresponding assignments of blame. If the reason that the individual committed wrongdoing resides entirely within the individual, then it seems to follow that the individual alone is responsible—blameworthy—for her wrongdoing. When we view human action from a dispositionist framework, we tend to make the (rebuttable) presumption that most actions are freely chosen and therefore, if wrongful, perfectly blameworthy and punishable.⁹⁷

Unfortunately, there is a significant problem with the dispositionist explanation of mass atrocities. Call it the “Dispositionism Paradox.” On the one hand, most people do not commit violent crimes. On the other hand, we have seen whole societies engage in the most inhumane, cruel acts toward others—widescale persecution, torture, rape, murder, and genocide. These two points are in serious tension with each other. Yet both seem indisputably true. How, then, do we reconcile them?

We cannot resolve the Dispositionism Paradox by adopting the assumption that all of the people who engage in mass atrocities were already violent criminals just waiting for the opportunity to unleash themselves. This assumption is weak for two reasons. First, it lacks explanatory power. It amounts to the circular explanation that some people commit violent acts because they have a violent nature. And how do we know that they have a violent nature? Because they commit violent acts. Their behavior is used as evidence of their character, and their character is then used to explain this behavior. So all the explanation amounts to is: they commit violent acts because they commit violent acts. Second, this assumption is ad hoc,

95. See ZIMBARDO, *supra* note 3, at 7; Peter A. Alces, *Guerilla Terms*, 56 EMORY L.J. 1511, 1548-49 (2007); Benforado et al., *supra* note 3, at 1657-58; Dripps, *supra* note 94; Amy L. Wax, *supra* note 3, at 1387.

96. Benforado et al., *supra* note 3.

97. See, e.g., GOLDHAGEN, *supra* note 76, at 379, 383, 389-92, 400 (defending the dispositionist thesis that the Holocaust was ultimately motivated by Germans’ “eliminationist anti-semitism”).

inconsistent with the evidence, and therefore implausible. Again, most people at most times are not violent.

C. Situationism and Norm-Compliance

Given both of these problems with the dispositionist explanation of mass atrocities, we need to consider another explanation. This is where situationism comes in. Situationism is a psychological theory that is designed to explain what dispositionism cannot. It says that people do bad things not because they are, and always were, bad but because they *became* bad.

Situationism, which is another term for social psychology, agrees with dispositionism that the agent's nature helps to explain her action. This point is obvious; it would be foolish to reject it. But situationism says that this point, while true, must be seriously qualified. The agent's nature does not constitute the whole explanation and sometimes may not even constitute most of the explanation. In order to understand why the agent did what she did, we must understand not only the agent but also to an equal or even greater extent her situation, her external circumstances.⁹⁸

When an agent finds herself in a situation that either elevates her power to a level that is without ordinary (previous) moral constraints or causes the agent abnormally high stress, pressure to conform or obey, fear, anger, or exhaustion, her typically expressed character and personality traits tend to play a lesser role in the explanation of her behavior. They are superseded by the circumstances, circumstances that trigger an "uncharacteristic" response, a response that is either contrary to, or independent of, her character under normal circumstances. Put another way, the agent's motivational system undergoes a shift. While her distinctive personality and character generally dominated before, a more submerged, animal, instinctive, and autonomous part of her psychological framework, a part that she shares with all other human beings, now takes over. And the longer circumstances motivate her to continue acting in this way, the more this behavior will incorporate itself into the agent's personality and thereby work to reshape her beliefs, values, reasons, and future actions. Situationism, then, helps to

98. See *supra* note 3.

explain how, throughout history, so many initially decent, upright, law-abiding people have turned into agents of the worst possible atrocities.⁹⁹

The fundamental mechanism of situationism is norm-compliance. How we act most or all of the time in most or all social and public situations is determined mostly by the norms that apply to those situations and our internalization of these norms.¹⁰⁰ If we find ourselves in a situation that tolerates or

99. In contrast to Goldhagen, many, if not most, accounts of the Holocaust (and other genocides) are situationist. See, e.g., FINKELSTEIN & BIRN, *supra* note 78, at 98 (“‘We must remember,’ Auschwitz survivor Primo Levi wrote, that ‘the diligent executors of inhuman orders were not born torturers, were not (with a few exceptions) monsters: they were ordinary men.’ Not deranged perverts but ‘perfectly normal men,’ ‘ordinary men’: that is the really sensational truth about the perpetrators of the Final Solution.”); *id.* at 100 (“[T]he central mystery of the Nazi [H]olocaust [is] how, under particular historical circumstances, ordinary men and women, as well as the ‘civilized gentlemen’ who lead nations, can commit history’s greatest crimes.”); *id.* at 144 (“[Daniel] Goldhagen’s concept of ‘natural’ human behavior is striking. . . . Goldhagen ignores the . . . evident human potential for evil and destructiveness. . . . Hence he must attack any concepts that involve the allegedly ‘universal’ psychological and social psychological factors.’ And in fact, he dismisses them as ‘abstract, ahistorical explanations . . . conceived in a social-psychological laboratory.’ Milgram’s experiments on cruelty and obedience to authority are brushed aside as providing ‘untenable’ explanations.”) (citations omitted); ZIMBARDO, *supra* note 3, at 287-88 (“Although it is important to note the motivating role of Germans’ hatred of Jews [as a cause of the Holocaust], Goldhagen’s analysis suffers from two flaws. First, historical evidence shows that from the early nineteenth century on there was less anti-Semitism in Germany than in neighboring countries such as France and Poland. He also errs in minimizing the influence of Hitler’s authority system—a network that glorified racial fanaticism and the particular situations created by the authorities, like the concentration camps, which mechanized genocide. It was the interaction of personal variables of German citizens with situational opportunities provided by a System of fanatical prejudice that combined to empower so many to become willing or unwilling executioners for their state.”).

100. See, e.g., Lynne L. Dallas, *A Preliminary Inquiry Into the Responsibility of Corporations and Their Officers and Directors for Corporate Climate: The Psychology of Enron’s Demise*, 35 RUTGERS L.J. 1, 21-22 (2003) (“Employees either internalize the primary group’s definition of unethical behavior through a socialization process, or adopt it through peer pressure, and act on that basis.”); Susan Hanley Duncan, *MySpace is also Their Space: Ideas for Keeping Children Safe from Sexual Predators on Social-Networking Sites*, 96 KY. L.J. 527, 571-72 (2007-08) (“Moral beliefs and social norms, either alone or in conjunction with legal sanctions, deter a number of undesired behaviors including sexual assault, assault, academic dishonesty and drunk driving. Social-norms theory contemplates that humans generally conform to how the majority behaves. . . . [I]nformal social norms influence[] people within tight-knit groups because the benefits of cooperating with others in the group produce[] positive results for individuals. In addition, individuals that cooperate[] could avoid shame or social sanctions from the group.”) (footnotes omitted); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1130-31 (2000) (“[E]xisting norms may be a contextual factor that affects individuals’ construction of preferences In many cases, a social norm might derive its power from both the desire

encourages festive behavior—for example, college parties, football stadiums, or wedding celebrations—most of us will act festively. And if we find ourselves in a situation that encourages serious behavior—for example, religious services, classrooms, funerals, and faculty meetings—most of us will act seriously. We are social and political animals. We take our cues from other people and generally follow the written and unwritten rules appropriate to the human-created setting. What others generally do and approve of is okay, and what others generally do not do or approve of is not okay.¹⁰¹ Just compare the percentage of people in the United States who believe that women should have suffrage and the right to work outside the home with the percentage of people who held these beliefs one hundred years ago.¹⁰²

What then, happens, when the norms flip—that is, when they tolerate or encourage behavior that was previously forbidden? We need not speculate. History and psychological studies show that most human beings quickly adapt to, and internalize, the new norms.¹⁰³ Why? Because most people just want to get along; they want to survive, be liked, achieve, and accumulate rewards (e.g., money, sex, power, accolades, and

for social approval and from internalization.”) (footnotes omitted); Cherie Metcalf, *Property Law Culture: Public Law, Private Preferences and the Psychology of Expropriation*, 39 QUEEN'S L.J. 685, 689-90 (2014); David G. Post, *Of Black Holes and Decentralized Law-Making in Cyberspace*, 2 VAND. J. ENT. L. & PRAC. 70, 71 (2000); Rachlinski, *Limits*, *supra* note 3, at 1564 (“The idea that group norms are powerful and important determinants of behavior pervades the social psychological literature. . . . Clearly, even though they are sometimes inconsistent with each other, social norms are a powerful influence on social behavior. Hence, understanding social norms is a key to understanding social behavior.”); Jessica E. Schaffner, *Optimal Deterrence: A Law and Economics Assessment of Sex and Labor Trafficking Law in the United States*, 51 HOUS. L. REV. 1519, 1544-45 (2014).

101. See Russell D. Clark III & Larry E. Word, *Why Don't Bystanders Help? Because of Ambiguity?*, 24 J. PERSONALITY & SOC. PSYCHOL. 392, 393 (1972) (arguing that bystanders' judgments about a situation depend largely on how other bystanders react); Ken Levy, *Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism*, 44 GA. L. REV. 607, 674 (2010) (“When they are in a group, people tend to exhibit the ‘bystander effect’—i.e., tend to be more reticent about directly addressing the emergency. . . . [One reason for this phenomenon is that] each person in the group infers from the others’ inaction that there is not really an emergency in the first place—i.e., that the person in distress is merely pretending or exaggerating.”) (footnotes omitted).

102. See Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657, 657-58 (1996) (offering an historical account of the women's suffrage movement in the nineteenth and early twentieth centuries).

103. See *supra* note 100 and accompanying text.

fame).¹⁰⁴ But all of this getting along requires a flexible morality—that is, a morality that adjusts itself to the dominant morality even if the dominant morality suddenly changes. Indeed, this flexibility explains why one and the same person can lead “double” or even “triple” lives—that is, act one way with his family, another way at work, and still another way with his mistress. It also explains how mass atrocities are possible. With the help of propaganda, peer pressure, terror, and ambition, people consciously or unconsciously break from their previous morality to carry out acts that the “new morality” encourages or requires.¹⁰⁵

D. Stanley Milgram’s Shock Experiment

Should situationism be added to the list of recognized criminal excuses? In this section, I will offer the best case I can for an affirmative answer. In the next Part, however, I will offer

104. See Carl E. Schneider & Mark A. Hall, *The Patient Life: Can Consumers Direct Health Care?*, 35 AM. J.L. & MED. 7, 50 (2009) (“What people most fundamentally want is not so much ‘control’ as doing the things that are important to them – working at rewarding jobs with congenial colleagues, spending time with the people they love and like, enjoying their leisure, and so on.”); Roy D. Simon, *Legal Ethics Advisors and the Interests of Justice: Is an Ethics Advisor a Conscience or a Co-Conspirator?*, 70 FORDHAM L. REV. 1869, 1871 (2002) (“Human nature sometimes prefers affirmation over accuracy.”); Lynelle J. Slivinski, Note, *Copyright Infringement—In Determining Whether or Not a Copyright License Is Exclusive or Nonexclusive, Courts Should Look Beyond the Parties’ Original Agreement and Consider Their Subsequent Actions: Jacob Maxwell, Inc. v. Veeck*, 110 F.3d 749 (11th Cir. 1997), 8 SETON HALL J. SPORT L. 719 (1998) (“It is a fact of human nature to want recognition for that which we achieve and develop. Other people’s mere personal satisfaction in your work would not be worth much if the users or admirers have no idea who is responsible for the creation.”).

105. See GLOVER, *supra* note 80, at 360 (“The belief system was central to Nazism. The pressures to obey were internalized because the beliefs were accepted. The beliefs motivated the repression of human responses and the erosion of people’s previous moral identity. A new moral identity grew round acceptance of Nazi beliefs.”); *id.* at 362 (“People want their lives to add up to something, to contribute to something larger than themselves. Many Germans found Nazism gave their lives a meaning and a purpose. Glory came from participating in the project of national renewal, in helping to build the Thousand-Year-Reich. The beliefs were held with great intensity and sustained some Nazis through running the death camps and the resulting trials.”); see also Drucilla Cornell, *Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon’s Toward A Feminist Theory of the State*, 100 YALE L.J. 2247, 2273 (1991) (book review) (“I in no way want to deny that fear too often leads to cruelty. We see this in race relations as well as in relations between the sexes.”); Gregory M. Herek, *Beyond “Homophobia”: Thinking About Sexual Prejudice and Stigma in the Twenty-First Century*, 1 SEXUALITY RES. & SOC. POL’Y 6, 7 (2004) (citing George Weinberg’s statement that fear always leads to “great brutality”).

several compelling reasons to reject this position. The best possible argument for adding situationism to the list of recognized excuses is simply this: situationism negates moral responsibility, and criminal responsibility requires moral responsibility. Therefore situationism is exculpatory.

Consider Stanley Milgram's shock experiments, which are often cited as virtually dispositive evidence for situationism.¹⁰⁶ In the Milgram shock experiments,¹⁰⁷ volunteers were solicited in New Haven, Connecticut with the promise of \$4.50 for participating in a psychology experiment. When a given volunteer ("Volunteer") arrived, he or she was introduced to another person who was designated as a fellow volunteer but was really a research assistant. Volunteer was then told that that she and her (supposed) fellow volunteer ("Fellow") were participating in a study to determine whether punishment in the form of shock treatment would help to improve memory and learning. After Fellow was directed to a chair, strapped in, and surrounded with wires and electrodes, Volunteer was led to an adjacent room; presented with a device that, she was told, would enable her to administer shocks of increasing intensity to

106. See MILGRAM, *supra* note 85, at 5-6 ("A commonly offered explanation [for the results of Milgram's shock experiments] is that those who shocked the victim at the most severe level were monsters, the sadistic fringe of society. But if one considers that almost two-thirds of the participants fall into the category of 'obedient' subjects, and that they represented ordinary people drawn from working, managerial, and professional classes, the argument becomes very shaky. . . . After witnessing hundreds of ordinary people submit to the authority in our experiments, I must conclude that [Hannah] Arendt's conception of the *banality of evil* comes closer to the truth than one might dare imagine. The ordinary person who shocked the victim did so out of a sense of obligation—a conception of his duties as a subject—and not from any peculiarly aggressive tendencies."); *id.* at 175 ("The occasion we term a psychological experiment shares its essential structural properties with other situations composed of subordinate and superordinate roles. In all such circumstances the person responds not so much to the content of what is required but on the basis of his relationship to the person who requires it. Indeed, where legitimate authority is the source of action, *relationship overwhelms content*. That is what is meant by the importance of social structure . . ."); ZIMBARDO, *supra* note 3, at 272 ("The data [of the Milgram shock experiments] clearly revealed the extreme pliability of human nature: almost everyone could be totally obedient or almost everyone could resist authority pressures. It all depended on the situational variables they experienced."). *But see* PERRY, *supra* note 81, at 60-62, 127-41, 147-51, 213, 297 (questioning both the authenticity of Milgram's data and Milgram's situationist interpretation of this data); *id.* at 169, 225-26 (pointing out that Milgram himself sometimes interpreted the results of his shock experiments from a dispositionist rather than situationist perspective).

107. I base the following description of the shock experiments on MILGRAM, *supra* note 85, at 3-4, 13-122, and PERRY, *supra* note 81, at 7-9, 39-64, 95-124.

Fellow; and instructed to administer a shock initially of low-level intensity for the first error made by Fellow, a shock of slightly higher intensity for Fellow's second error, and so on.

Many trials (with different variations) were conducted with different volunteers. All of them administered increasing shocks to a point where Fellow was screaming with pain and demanding to be released from the chair. All of them continued to look for guidance from the research instructor—call him “Instructor”—who was wearing a white labcoat, holding a clipboard, and insisting very calmly but firmly that Volunteer must continue with the experiment. And the vast majority of them—65%—continued until they could no longer hear Fellow screaming, which led many in this majority group to believe that their shocks had actually killed Fellow.

In the actual experiment, Fellow did not die. Nor was he actually shocked. Again, he was not actually a fellow volunteer but a research assistant who screamed not because he was suffering any pain but merely to fool Volunteer into thinking that he was. Milgram and his research assistants were testing not learning techniques but rather people's willingness to obey authority.

E. Arguments for Recognizing Situationism as a Moral Excuse

Hypothetically, suppose that Fellow was actually a fellow volunteer, was actually shocked, did scream from actual pain and terror, and was actually killed by Volunteer's incrementally increasing shocks. Suppose, further, that Volunteer was promptly indicted by the local district attorney for manslaughter or negligent homicide.¹⁰⁸

Volunteer's initial conversation with her defense attorney—“Attorney”—would probably go something like this:

Volunteer: *I did not kill Fellow. Instructor did.*

Attorney: *It doesn't matter. Both of you killed Fellow. So the D.A. can argue that both of you served as accomplices.*

108. The D.A. could not charge Volunteer with murder because Volunteer did not have intent or knowledge. It is obvious that Volunteer did not intend to kill Fellow. Regarding knowledge, there is insufficient evidence that Volunteer knew that she was killing Fellow with each consecutive shock. On the contrary, she was very surprised to learn after the experiment that she had actually killed Fellow.

Moreover, you were arguably more blameworthy for Fellow's death than Instructor because you, not Instructor, administered the shocks.

Volunteer: But Instructor should be charged with murder. Unlike me, he either wanted Fellow to die or knew that Fellow would die.

Attorney: Possibly. Don't worry about Instructor. Whether or not he goes away for murder, you will still be tried for manslaughter or negligent homicide.

Volunteer: But Instructor, the one who committed murder, coerced me into administering the shocks.

Attorney: Did Instructor ever threaten you?

Volunteer: Yes—implicitly. He made me worry that if I did not complete the experiment, he—a prominent Yale expert—would be very disappointed with me. I was also worried that they would not pay me. And I really needed the money.

Attorney: Those are not very threatening consequences. In any event, I know that they told you up front that you would be paid even if you did not complete the experiment.

Volunteer: None of this makes sense. I trusted him. I thought he knew what he was doing.¹⁰⁹

Attorney thinks about Volunteer's last comment for a few minutes and then comes up with Volunteer's defense: situationism. According to this defense, Volunteer is not criminally responsible for manslaughter because (a) situationist pressures negated her moral responsibility, and (b) moral responsibility is necessary for criminal responsibility. Because (b) is generally assumed without argument, and because I will refute (b) in Part VI, I will concentrate for the remainder of this section on (a).

How might Attorney argue that situationist pressures negated Volunteer's moral responsibility? Recall the four conditions of moral responsibility:

109. See PERRY, *supra* note 81, at 60-62 (offering evidence that subjects in Milgram's shock experiments continued to apply increasingly intense shocks to fellow subjects (the "learners") not because they were indifferent but rather because they trusted the authoritative lab instructor's assertions that the learners were not in any danger of suffering serious harm).

- (1) knowledge, or a threshold capacity to know, that a given action “A” is morally wrong;
- (2) a threshold capacity to refrain from A-ing;
- (3) threshold control over A-ing; and
- (4) an absence of circumstances that excuse this performance.

Given these four conditions, Attorney could employ three arguments to establish that Volunteer was not morally responsible for causing Fellow’s death.

First, Volunteer—like most other people—was simply too weak to withstand the situationist pressures to which she was subjected. And to say that she was too weak is just to say that, given her constitution, she could not have mustered the strength and courage to resist Instructor’s commands—no more than most of us can sit still at a green light and withstand the pressure of angry drivers honking their horns behind us. We are hardwired to succumb to even the mildest social pressure. Therefore condition (2) is not satisfied, in which case Volunteer is not morally responsible for her behavior.¹¹⁰

Second, even if Volunteer could have withstood the situationist pressures that confronted her, it is understandable that she did not. The majority of other human beings do not—and would not—resist these pressures either. While it seems fair to blame an individual for violating a norm, it seems much less fair to blame her for complying with a norm. “Industry

110. This argument assumes that the ability to do otherwise—what is usually called “free will”—is necessary for moral responsibility. See NELKIN, *supra* note 27, at 3 (“[T]he notion of responsibility at issue has been at the heart of debates over whether we have free will, where it is very often (although not always) presupposed that free will is essential to responsibility in the sense required for deserved praise and blame.”); Luis E. Chiesa, *Punishing Without Free Will*, 2011 UTAH L. REV. 1403, 1421 (2011) (“Free will is relevant to criminal liability because blame is typically a prerequisite for the imposition of punishment. It is generally believed that an actor can be blamed for committing an offense only if he freely willed to engage in conduct constitutive of the offense.”); Randolph Clarke, *Free Will and the Conditions of Moral Responsibility*, 66 PHIL. STUD. 53, 55 (1992) (“[F]ree will is a necessary condition of being morally responsible for what one does.”); Levy, *supra* note 5, at 1331 (“Of course, one might respond that, given that control does not entail the power to do otherwise, only control . . . not the power to do otherwise . . . is necessary for moral responsibility. This point may have merit, but—to be on the safe (or traditional) side—I will simply continue to assume that [the power to do otherwise] is also necessary for moral responsibility.”); R. George Wright, *Criminal Law And Sentencing: What Goes With Free Will?*, 5 DREXEL L. REV. 1, 10-11 (2012) (“It is often argued that there can be no genuine moral responsibility without freedom of will . . .”).

standards”—the dominant norms governing a certain kind of situation—tend to excuse.¹¹¹ Therefore condition (4) is not satisfied, in which case Volunteer is (once again) not morally responsible for her behavior.

According to this second argument, situationism is not necessarily about hard choice. If Volunteer felt little or no inner conflict—if, for example, she willingly obeyed Instructor because she trusted him—situationism would still qualify as a compelling excuse. What makes it exculpatory is not so much any hard choice that it forced upon Volunteer but rather, again, its being the norm. Volunteer could very plausibly argue that the specific conditions of the situation led most people—again, 65%—to trust and obey. Perhaps that is not a good thing; perhaps it is something to be lamented. But lamentable or not, this is what human beings generally do. And we certainly cannot punish Volunteer for being an ordinary human being.

Third, it might be proposed that it makes more sense to discuss situationism as a version of duress than as a different kind of excuse altogether and therefore that we already do recognize situationism as an excuse.¹¹² We just do not label it as such. Duress, according to the Model Penal Code, is “an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.”¹¹³ Situationism differs from duress only insofar as it involves great social pressure and therefore the threat of rejection and condemnation rather than coercion “by the use of, or a threat to use, unlawful force.”¹¹⁴

111. See 1 DAVID G. OWEN & MARY J. DAVIS, OWEN & DAVIS ON PRODUCTS LIABILITY § 7:6 (4th ed. 2014) (“Where industry or governmental standards pertain to testing obligations, conformity with those standards is probative of due care. So, for example, in the HIV antibody blood bank screening case of *Zaccone v. American Red Cross* . . . the federal trial court held, compliance with professional standards represented not just a rebuttable presumption of due care in testing, but conclusive proof of due care.”) (footnote omitted); Michael J. Weber & Cynthia A. Mellon, *ATMs and Check Fraud: Who’s Watching the Store?*, 9 FIDELITY L.J. 1, 8 (2003) (“The industry standard may be considered as evidence of compliance with ordinary care . . .”).

112. See CHARLES EISENSTEIN, *THE MORE BEAUTIFUL WORLD OUR HEARTS KNOW IS POSSIBLE* 166 (2013).

113. MODEL PENAL CODE § 2.09(1) (2014).

114. *Id.*

Of course, the kind of “penalty” that Instructor in the Milgram experiment implicitly threatened Volunteer with—namely, nonpayment of \$4.50 and probable expressions of disappointment—was not at all sufficient to excuse homicide, at least not from a third-person perspective. But one might argue that the situationism defense should be considered instead from a first-person perspective—that is, from Volunteer’s perspective rather than from your or my perspective. On this version of duress, merely to feel compelled is to be compelled. In this particular kind of situation, the belief creates the reality. If one believes that she is not free, then she is not free. Belief in free will is a necessary condition of free will; without this belief, free will evaporates. Merely by believing that one has no choice, one is thereby left without a choice.¹¹⁵

So even if Volunteer’s acquiescence to Instructor’s commands was unreasonable from a third-person point of view, it was not necessarily unreasonable from Volunteer’s own first-person point of view. The fact that Volunteer acted in the same way that many others—indeed, 65%—also acted in the same situation confirms this point. It is much more plausible to think that most or all of this 65% thought that they were acting reasonably—or at least that they reasonably believed that they could not have resisted—than that they were knowingly acting unreasonably.

In this way, situationism is much like what Doug Husak calls the “but-everyone-does-that!” (“BEDT”) defense.¹¹⁶ According to the BEDT defense, a defendant should be blamed and punished less than normal because her behavior did not fall below the commonly accepted norm.¹¹⁷ This defense may sound like duress, but the two differ in their motivations. While duress involves fear-motivated compliance with a threat, BEDT involves fully voluntary compliance with a norm.¹¹⁸ Situationism falls closer to the latter insofar as it is not

115. See GALEN STRAWSON, *FREEDOM AND BELIEF* 13-15, 72-73, 293-305 (1986) (defending the “Subjectivist” claim that “believing one is a free agent is a necessary and indeed constitutive condition of actually being a free agent”); Tomis Kapitan, *Doxastic Freedom: A Compatibilist Alternative*, 26 *AMER. PHIL. Q.* 31 (1989) (arguing that “doxastic freedom”—a belief that one has free will—is necessary for free will).

116. Douglas Husak, *The ‘But-Everyone-Does-That!’ Defense*, 10 *PUB. AFF. Q.* 307 (1996).

117. *Id.* at 307-08.

118. *Id.* at 312.

necessarily, or usually, motivated by fear so much as by an unconscious tendency to "blend in" or conform.

VI. SITUATIONISM AND CRIMINAL RESPONSIBILITY

In Part V.E, I offered three arguments that a person subject to strong situationist pressures is not morally responsible for her behavior. In this Part, however, I will argue that even if those arguments are correct, she is still criminally responsible. So one of the central points of this article—that criminal responsibility does not require moral responsibility—follows. Once again, as I argued in Part III, the four conditions of criminal responsibility are:

- (5) knowledge, or a threshold capacity to know, the (relevant) criminal law (C);
- (6) a threshold capacity to refrain from violating C;
- (7) threshold control over violating C; and
- (8) an absence of circumstances that excuse this violation.

Regarding condition (5), we may simply assume that Volunteer knows that it is against the law to commit battery, no less to kill others. Regarding condition (7), Volunteer had control over the escalating shocks. She administered them. The shocks were not administered through her. The doctor did not force her hand to keep moving the switch. Volunteer did this all on her own. The fact that she administered them because a doctor commanded her at best negates her capacity to refrain, not her control—a distinction that I made clear in Part III.

But what about condition (8)? Does situationism qualify as a good excuse? In Part V.E, we came across three strong arguments that it does. Once again, (a) situationism negates condition (2) (the ability to do otherwise); (b) even if situationism did not negate condition (2), we cannot reasonably expect a person to refrain from complying with the operative norms; and (c) situationism is very similar to duress. All of these arguments help to show that situationism negates moral responsibility. Still, I will now offer three arguments that situationism does not negate criminal responsibility.

First, there are serious dangers, both political and practical, involved in recognizing situationism as a legitimate excuse. It is dangerous because it would threaten to absolve many criminals, including perpetrators of the most horrific domestic and

international crimes. One can only imagine the public outrage if a criminal court were to excuse a terrorist who helped to kill innocent civilians on the grounds that she only did what many other people in her specific situation with her specific history have done or would have done. This kind of excuse could not be recognized more than once or twice without seriously undermining the public's respect for the law and the criminal justice system generally.¹¹⁹

Second, if we were to recognize situationism as an excuse, we would be shortchanging our retributive impulses. We would be increasingly depriving victims and society generally of the retribution that they want—and deserve—against the criminals who harm and threaten them.¹²⁰ Not only would this state of affairs itself be unfair—too forgiving to perpetrators and too insensitive to victims. It would also do great damage to our criminal justice system. One of the very valuable “services” that the criminal justice system provides to victims and to society generally is “getting even” with criminals, “paying them back” for defying society’s moral norms and callously inflicting harm on people who did not deserve it.¹²¹ Were the criminal justice system to cut back on this “service” by recognizing situationism as an excuse and thereby acquitting defendants like Volunteer, whom we intuitively consider blameworthy, it would be sending the highly offensive message that the costs of condemning some criminals’ blind compliance with operative norms are greater than the costs of their compliance itself. This would not be justice; it would be the height of injustice.

119. See Robinson, *supra* note 4, at 62 (“The law can build its moral credibility by distributing punishment in a way that tracks shared intuitions of justice of the community it governs—what has been called ‘empirical desert.’”); *id.* at 65 (“[T]he criminal law’s moral credibility is essential to effective crime control, and is enhanced if the distribution of criminal liability is perceived as ‘doing justice’—that is, if it assigns liability and punishment in ways that the community perceives as consistent with its shared intuitions of justice.”).

120. See *supra* notes 25, 47, and 92 and accompanying text.

121. See Levy, *supra* note 20, at 661-62 (“[T]he state is acting *in place of* the victim. It is helping the victim to do what she would ordinarily be powerless to do on her own. It is, in this sense, the victim’s *avenging agent*, working *on her behalf* to make sure that the person who victimized her gets the punishment that he deserves *for* victimizing her. By assuming victims’ burden of punishing the criminals who harm them, the state demonstrates that it shares and affirms the victim’s motivations, that it *also* wants revenge for violations against its ‘client.’”).

Third, situationism arguably reduces to generalizable weakness of will—that is, weakness of will plus the fact that most other people suffer from this condition, in which case it is the norm. So if situationism were recognized as an excuse for criminal wrongdoing, then we would also have to recognize weakness of will as an excuse. But this proposal is implausible for several reasons. The first reason is that it would undermine the criminal justice system; too many defendants could simply argue that they were too weak to avoid breaking the law. If this excuse works for Volunteer, then there is no reason that it should not work for most or all other defendants who invoke it.

The second reason that weakness of will and therefore situationism should not be recognized as an excuse in the criminal law is that formally recognizing this excuse would disincentivize many individuals tempted to break the law from exerting greater effort to resist this temptation. Once would-be law-breakers realized that the weakness-of-will excuse would be available to them, the last remaining psychological obstacle to their refraining from criminal activity would be removed.

The third reason that weakness of will should not be recognized as an excuse in the criminal law is that it does not amount to a negation of condition (6)—again, a threshold capacity to refrain from violating C. In the previous section, I implied the opposite. I said, “[T]o say that [Volunteer] was too weak is just to say that, given her constitution, she could not have mustered the strength and courage to resist Instructor’s commands—no more than most of us can sit still at a green light and withstand the pressure of angry drivers honking their horns behind us.” But there is another approach to weakness of will, an approach that does not equate it with an inability to do otherwise. On this approach, weakness of will is not a constitutive condition that destines the individual to failure. On the contrary, it is a temporary condition that the individual freely chose—and therefore might or would have avoided by exerting greater effort to make the opposite choice. Indeed, weakness of will is often contrasted with addiction, which is thought to be a sort of internal compulsion that leaves the addict with little to no choice.¹²²

122. See *supra* note 57 and accompanying text.

One might argue that my point here contradicts what I argued in Part V.E. Again, I have just suggested that a person who commits a crime from weakness of will is criminally responsible for this act because she could have avoided it—i.e., could have tried harder not to give in. In Part V.E, however, I suggested that Volunteer was too weak to refrain from killing Fellow and therefore was not morally responsible for his death. How can both of these points be true? The answer is that there are two different kinds of ability to do otherwise. On the one hand, the kind of ability to do otherwise that is necessary for criminal responsibility—and which Volunteer arguably had—is “compatibilist” (i.e., compatible with determinism). On the other hand, the kind of ability to do otherwise that is necessary for moral responsibility but not for criminal responsibility—and which Volunteer arguably lacked—is “incompatibilist” (i.e., incompatible with determinism).

I will start with the latter point first. When we are judging the individual morally, we often interpret the power to do otherwise in the incompatibilist sense. According to incompatibilism, the ability to do otherwise requires indeterminism.¹²³ To say that the individual could have done otherwise is just to say that she might have performed another action with the very same history—that is, under the very same internal (psychological) and external (environmental) circumstances. On this view, Volunteer could not have done otherwise. The overwhelming weight of internal and external circumstances left her no choice but to keep shocking Fellow until he died.

When we are judging criminal defendants, however, we tend to interpret the power to do otherwise in a compatibilist sense. According to compatibilism, the ability to do otherwise is perfectly consistent with determinism. To say that an individual could have done otherwise is to say not that she might have done otherwise under the very same circumstances but rather that she would have done otherwise had she wanted or tried.¹²⁴ On this

123. See VAN INWAGEN, *supra* note 27, at 126-27. There are two versions of incompatibilism. One version says that indeterminism is necessary for the ability to do otherwise. The other version of incompatibilism says that indeterminism is necessary for responsibility. Most incompatibilists subscribe to both versions.

124. See *supra* note 32 and accompanying text. Just as there are two versions of incompatibilism, there are two versions of compatibilism. According to the first version, determinism is compatible with the ability to do otherwise. According to the second

view, Volunteer could have done otherwise. If she had decided to stop shocking Fellow, her decision would have been effective; she would indeed have stopped shocking Fellow.

Criminal courts tend not to employ the incompatibilist sense of the ability to do otherwise because (a) the criminal justice system is supposed to make all of its critical judgments on the basis of provable evidence; and (b) determining whether a defendant might have indeterministically refrained from committing a crime requires unverifiable speculation.¹²⁵ It is unverifiable for two reasons. First, counterfactuals such as “he might have done otherwise under the very same circumstances” reference possible worlds that are not actual. And because we are always confined to the actual world and cannot “peer” into non-actual possible worlds, attorneys simply cannot prove to judges or juries this kind of counterfactual.¹²⁶ Second, we

version, determinism is compatible with responsibility. “Semi-compatibilists” subscribe to the second version over the first; they believe that even if indeterminism is necessary for the ability to do otherwise, neither indeterminism nor the ability to do otherwise is necessary for responsibility. See, e.g., John Martin Fischer, *The Importance of Frankfurt-Style Argument*, 57 PHIL. Q. 464 (2007).

125. See Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT’L L. 265, 308 (2012) (“The debate about whether the [International Criminal Court] is capable of deterring potential criminals may be impossible to resolve in light of the problem of counterfactual proof.”); Arthur Durst, *Property and Mortgage Fraud Under the Mandatory Victims Restitution Act: What Is Stolen and When Is It Returned?*, 5 WM. & MARY BUS. L. REV. 279, 301 (2014) (“Courts have been reluctant to wade into speculative waters.”); Kadish, *supra* note 74, at 281 (“It has been urged with force that there is no way objectively to establish that a person could not refrain from a criminal action, rather than would not, and that therefore such a test ‘involves an unacceptable risk of abuse and mistake.’”) (footnote omitted); Rainer Knopff, *The Politics of Reforming Judicial Appointments*, 58 U.N.B. L.J. 44, 51 (2008) (“One cannot prove counterfactuals, of course”); Vanessa Laird, Note, *Phantom Selves: The Search for a General Charitable Intent in the Application of the Cy Pres Doctrine*, 40 STAN. L. REV. 973, 978 (1988) (“It is extremely difficult to give anything other than a vague account of the conditions in which a counterfactual will be true. . . . It is . . . impossible to differentiate between alternative counterfactuals on the basis of the truth or falsity of their components.”) (footnotes omitted); L. Scott Smith, *Law, Morality, and Judicial Decision-Making*, 65 TEX. B.J. 400, 403 (2002) (“The problem is that the counterfactual question is often, in principle, unanswerable, and may result in an answer that is little more than conjectural. Attempting to answer a counterfactual question may prove more difficult than looking for the proverbial needle in a haystack, for the search is for what usually does not exist.”); David A. Westbrook, *Visions of History in the Hope for Sustainable Development*, 10 BUFF. ENVTL. L.J. 301, 314 (2003) (“[I]t is generally impossible to prove counterfactuals in history”).

126. See Michael A. Carrier, *A Tort-Based Causation Framework for Antitrust Analysis*, 77 ANTITRUST L.J. 991, 1015 (2011) (“[B]ecause it is so difficult to prove the counterfactual of what would have happened absent the conduct, it will almost always be impossible to trace the link between conduct and outcome with certainty.”).

would need to know both what events took place in the defendant's brain at the time of the crime and whether these events were determined to learn if the defendant could have refrained from committing the crime. Given the present state of technology, both of these facts are unknowable; and given that the defendant's criminal act took place in the past, outside the scope of a brain scan, this knowledge will probably elude even further advances in technology.

Again, for both these reasons, most courts, scholars, and attorneys implicitly or explicitly apply the compatibilist interpretation of the ability to do otherwise, which focuses not on unprovable counterfactuals but rather on the factual circumstances surrounding the actual exercise or non-exercise of this ability. They ask not whether the defendant might have done otherwise under the same exact circumstances but whether the defendant was forced or compelled to act the way that she did. If she was not, then she could have done otherwise in the sense that she would have done otherwise if she had wanted or tried. Nothing would have prevented her from refraining from committing the crime had she inclined in this direction.¹²⁷ This version of the ability to do otherwise does not require speculation because it reduces to a factual question—was there force or any extant obstacles to the opposite course of action?—rather than to a genuinely counterfactual question.

On the compatibilist approach, which (again) the courts tend to employ, situationism does not qualify as an excuse. The mere fact that the majority of people are often too weak to do the right thing in the face of social pressure to do evil hardly means that they were compelled to act as they did, that they would not have done the right thing had they tried a little harder. As a result, contrary to the excuses, we can reasonably expect them to have done the right thing. Indeed, a significant enough minority of people in the same situation do resist the temptation or pressure. Again, 35% of the volunteers in the Milgram experiment did disobey Instructor, despite their feeling tremendous pressure to obey. And this fact implies that most or even all of the other 65% could have disobeyed (i.e., would have disobeyed had they tried harder) and therefore that we can

127. See DENNETT, *ELBOW ROOM*, *supra* note 27, at 139 (“[W]hat would an open future be? A future in which our deliberation is effective: a future in which if I decide to do *A* then I will do *A*, and if I decide to do *B* then I will do *B* . . .”).

reasonably expect most or even all of the other 65% to have disobeyed.

While my argument in this section has been that situationism does not qualify as a criminal excuse, it can also be used to weigh against recognizing situationism as a moral excuse. As we saw in Part II, philosophers wildly disagree about whether genuine moral responsibility is even possible. Some philosophers react to this disagreement by descending from the confusion, returning to first principles, establishing what seems from ordinary common sense to be a paradigmatic example of moral responsibility, and then using this example as a test case for the skeptical arguments. The paradigmatic example of moral responsibility is a rational, sane person who knowingly and willingly commits wrongdoing without being forced or coerced. Well, this description seems to apply quite accurately to “victims” of situationism. Again, in the Milgram experiment, 65% of the subjects knowingly and willingly shocked a person, despite his strenuous protests, to a point where he stopped protesting altogether in a manner indicating coma or death. Yes, they were arguably pressured. But, as I have been arguing, this pressure was simply not strong enough to warrant the conclusion that they were forced or coerced. So, far from situationism’s being a good moral excuse, it seems to represent the very opposite—the paradigmatic example of moral responsibility. Quite arguably, if a person is not morally responsible in a situationist situation, she is never morally responsible.

VII. THE INSANITY DEFENSE: TWO FINAL OBJECTIONS

In this Part, I will anticipate and address two final objections against my conclusions in Part VI. Both objections concern the insanity defense. The first objection is that victims of situationism are not criminally responsible because their reason or judgment is so clouded by surrounding circumstances and norms that they cannot be said to know (or “substantially appreciate”) right from wrong and therefore cannot be reasonably expected to have done otherwise. While this is a profound objection, I do not believe that it is insurmountable. Given the distinction between mad and bad, between psychologically disturbed and immoral, situationism inclines

more toward the bad/immoral side than the mad/disturbed side. The 65% who obeyed the research instructor to the bitter end in Milgram's shock experiments were not suffering from permanent insanity, and it seems highly counterintuitive to suggest that they were suffering from temporary insanity. If giving into pressure from authority were an indication of temporary insanity, then we would have to regard most students, employees, and soldiers as temporarily insane many times on a daily basis. And this point is absurd.

The second objection concerns my central thesis that criminal responsibility does not require moral responsibility. The common, if not universal, wisdom is that if a person is not morally responsible for a given act, then it is simply unjust to hold her criminally responsible.¹²⁸ Indeed, this is arguably the reason why forty-six states, the federal government, and the military recognize the insanity defense.¹²⁹ The logic behind the insanity defense is that if an adult is not morally responsible for her behavior because of insanity—a mental defect or disorder that negates her moral understanding and, in some cases, control—then it would be unjust, not to mention pointless, to hold her criminally responsible, and therefore punishable, for her criminal behavior.¹³⁰

Still, there are two problems with this interpretation of the insanity defense. First, one might argue that there is a very different logic behind the insanity defense and therefore that there is a very different reason why forty-six states (and the federal government and military) do still recognize it. They recognize it not because insanity negates moral responsibility but because insanity negates criminal responsibility, which is different—as I argued in Part III.¹³¹

Second, the remaining states that recognize the insanity defense on the assumptions that (a) insanity negates moral responsibility and (b) criminal responsibility requires moral responsibility are simply misguided. (a) is true, but (b) is false.

128. See *supra* note 4 and accompanying text.

129. See Levy, *supra* note 5, at 1345-50.

130. See *id.* at 1345.

131. Four states—Idaho, Kansas, Montana, and Utah—do not even recognize the insanity defense. See IDAHO CODE ANN. § 18-207 (2015); KAN. STAT. ANN. § 21-5209 (West 2015); MONT. CODE ANN. §§ 46-14-102, -103, -311 (West 2015); UTAH CODE ANN. § 76-2-305 (LexisNexis 2015). So they at least seem willing to hold at least some people criminally responsible who are not morally responsible.

Criminal responsibility does not require moral responsibility. Once again, it requires only:

- (5) knowledge, or a threshold capacity to know, the (relevant) criminal law "C";
- (6) a threshold capacity to refrain from violating C;
- (7) threshold control over violating C; and
- (8) an absence of circumstances that excuse this violation.

VIII. CONCLUSION

Most people—including judges, attorneys, and scholars—simply assume that criminal responsibility requires moral responsibility. They believe that it is just plain wrong—morally and legally wrong—to convict and punish individuals who are not morally responsible for their criminal acts. I hope to have shown in this article, however, that this nearly universal belief is false; that when judges and juries attempt to assess criminal guilt, they should not really care whether the defendant was morally responsible for her act.¹³²

This point is not as counterintuitive as it might initially seem. There turns out to be a significant gap between morality and criminal law. We criminalize some perfectly amoral acts (most *malum prohibitum* crimes—for example, public intoxication and drug possession) and do not criminalize all immoral acts—for example, lying to one's parents and breaking promises to friends. All of this is as it should be. If we attempted to criminalize all things immoral, our society would turn into a very unpleasant, highly restricted police state. And if we attempted to criminalize only things immoral, we would have to discard many perfectly legitimate criminal laws (again, all *malum prohibitum* crimes).

Likewise, then, with moral and criminal responsibility. The latter does not perfectly track the former. Nor should it. If

132. I have offered two arguments in this article that criminal responsibility does not require moral responsibility. In Part II, I argued that even if responsibility were metaphysically impossible, it would still be just to hold criminals responsible for their criminal acts. The reason is that all of the skeptical arguments against responsibility are really directed against *moral* responsibility, not against criminal responsibility. And in Parts V and VI, I argued for two propositions: (a) situationism negates moral responsibility and (b) situationism should not be recognized as a criminal excuse. If (a) and (b) are correct, then a victim of situationism might be criminally responsible, even though she is not morally responsible, for her criminal acts.

it did—that is, if we required individuals to be morally responsible in order to be held criminally responsible—then we would find ourselves in a very difficult bind. As I argued in Part III, moral responsibility requires four conditions to be satisfied:

- (1) knowledge, or a threshold capacity to know, that a given action “A” is morally wrong;
- (2) a threshold capacity to refrain from A-ing;
- (3) control over A-ing; and
- (4) an absence of circumstances that excuse this performance.

But when it comes to criminal responsibility, condition (1) is irrelevant,¹³³ and condition (2) is impossible to determine on the basis of provable evidence.¹³⁴ So if proof of moral responsibility were required to establish criminal responsibility and thereby obtain criminal convictions, the criminal courts would either have to acquit most defendants or just pretend that they had conducted applicable moral-responsibility evaluations. Because neither result is desirable, it is much better that we continue to keep considerations of moral responsibility out of the criminal courts altogether.¹³⁵

133. Only knowledge of the criminal law, not morality, is necessary. See Levy, *supra* note 5, at 1367-70 (arguing that when it comes to determining whether a given defendant is guilty or not guilty, it matters only whether the defendant knew or had a threshold capacity to know the criminal law, not whether she knew or had a threshold capacity to know the moral law).

134. See *supra* notes 125 and 126 and accompanying text.

135. See *supra* note 51 and accompanying text.

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