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Let's Not Do Responsibility Skepticism

KEN M. LEVY 

ABSTRACT *I argue for three conclusions. First, responsibility skeptics are committed to the position that the criminal justice system should adopt a universal nonresponsibility excuse. Second, a universal nonresponsibility excuse would diminish some of our most deeply held values, further dehumanize criminals, exacerbate mass incarceration, and cause an even greater number of innocent people (nonwrongdoers) to be punished. Third, while Saul Smilansky's 'illusionist' response to responsibility skeptics – that even if responsibility skepticism is correct, society should maintain a responsibility-realist/retributivist criminal justice system – is generally compelling, it would not work if a majority of society were to convert, theoretically and psychologically, to responsibility skepticism. In this (highly improbable) scenario, and only in this (highly improbable) scenario, the criminal justice system would need to be reformed in such a way that it aligned with the majority's responsibility-skeptical beliefs and attitudes.*

1. Introduction

Responsibility skeptics generally believe three things.¹ First, genuine moral responsibility, the kind of responsibility that depends on metaphysical libertarianism ('libertarian free will'),² is either physically or metaphysically impossible. Second, the only responsibility-realist alternative to metaphysical libertarianism, compatibilism,³ should also be repudiated but for different reasons, one of which is that it equally lends support to retributivism, the theory that criminals should get their 'just deserts'.⁴ Responsibility skeptics reject retributivism primarily because they believe both that it is unjust in itself and that its widespread adoption helps to make our criminal justice system so dysfunctional – overly punitive, highly inequitable, and counterproductive.⁵ Third, in order to reform our criminal justice system – in order to make it more just, equitable, humane, and constructive – we should uproot this toxic foundation. Instead of talking about moral/criminal responsibility and retributive justice, we should talk only about causal responsibility, especially social causation and systemic racism, and restorative justice.⁶ To this extent, the responsibility-skepticism movement intersects with the criminal justice reform movement.⁷

In the end, however, many of us responsibility realists want the very same things as responsibility skeptics. We too want, among other things, to minimize the number of people who are punished for crimes that they did not commit or punished too harshly for crimes that they did commit. So the main locus of contention between responsibility skeptics and responsibility realists does not concern our ultimate goals but rather the best means to achieving these shared goals.

My argument that responsibility skeptics have adopted the wrong means will fall into two parts. First, I will argue that responsibility skeptics are committed to adopting a

universal nonresponsibility excuse in the criminal justice system. Second, I will argue that a universal nonresponsibility excuse would diminish some of our most deeply held values, further dehumanize criminals, exacerbate mass incarceration, and cause an even greater number of innocent people (nonwrongdoers) to be punished. So even if responsibility skepticism were the correct theory of responsibility, it does not follow that we should overhaul the criminal justice system to reflect it.

To this extent, I agree with Saul Smilansky's 'illusionism', according to which society is practically better off with a responsibility-realist criminal justice system, a criminal justice system that presumes adults are morally responsible for their choices and behavior, even if this widely shared presumption is false.⁸ But my agreement with Smilansky assumes a particular background condition: that most of society remains committed, both theoretically and psychologically, to responsibility realism. If a majority of citizens were to convert both theoretically and psychologically to responsibility skepticism, as current responsibility skeptics think they should, then Smilansky's illusionism would no longer hold. Instead, this hypothetical society's criminal justice system would need to be reformed in such a way that it aligned with the majority's responsibility-skeptical beliefs and attitudes.

2. Even If Responsibility Skepticism Were True, a Criminal Justice System Would Still Be Necessary

One implication of responsibility skepticism might seem at first to be that criminal punishment is no longer, and never was, justified. If genuine responsibility is impossible and therefore criminal defendants are not at all genuinely responsible for their actions, just as the rest of us are not genuinely responsible for ours, then it seems grossly unjust to blame and punish them – as unjust as it would be to frame and punish a person who is known to be innocent.⁹ And if it is grossly unjust, then, like any other grossly unjust institution (for example, slavery), we should get rid of it.¹⁰

This argument, however, assumes what responsibility skeptics actually reject: retributivism – once again, the theory that criminal punishment is predicated on just deserts. If genuine responsibility is impossible, then there is no such thing as just deserts. Nobody deserves anything (good or bad), at least not on the basis of their decisions or behavior, because nobody is genuinely responsible for anything they choose or do.¹¹ So this justification for criminal punishment falls away.¹² But it does not follow that criminal punishment is completely unjustified and should therefore be abolished; there may just be other nonretributivist justifications for it.

Even if it were always (grossly) unjust to punish anybody for criminal misconduct, we would still need to do something with criminals, especially criminals who have demonstrated a willingness to violate other people's supremely valued interests and rights (e.g. life, liberty, property, and physical wellbeing).¹³ Yes, criminal punishment carries great costs, both economic and noneconomic, including injustice. But these costs are still outweighed by the benefits, primarily minimization of future crime.¹⁴ If we were simply to abolish the criminal justice system and exonerate all offenders, even with expressions of severe disappointment and exhortations to self-betterment, we would be sending the message that there will no longer be any real consequences for breaking the law. And this message would quickly lead to anarchy.¹⁵ The number of crimes, and therefore the number of innocent victims, would skyrocket. Society would quickly descend into a state

of nature – a postapocalyptic, dystopian world in which roving gangs competed for ever-dwindling resources. (See ‘The Walking Dead’.)

Responsibility skeptics, then, cannot (and typically do not) claim that we should just abolish the criminal justice system. This position is far too naïve and unrealistic.¹⁶ Instead, the only reasonable position for responsibility skeptics to adopt is that ‘nonretributive sanctioning’, ‘quarantine’ for at least the most serious crimes,¹⁷ is a necessary evil, an unjust practice (given criminals’ lack of desert) without which even grosser injustice would result.¹⁸

3. Responsibility Skeptics Are Committed to Replacing the Traditionally Recognized Excuses with a Universal Nonresponsibility Excuse

In Section 2, I argued that responsibility skeptics are committed not to abolishing the criminal justice system *per se* but only to putting it on a fully nonretributivist foundation.¹⁹ In a responsibility-skeptical criminal justice system, it would still be necessary for public safety – as Gregg Caruso puts it, ‘the protection of society and the prevention of harm to others’ and ‘the right of self-defence and defence of others’²⁰ – to incapacitate people who have proven themselves to be dangerous. Given this new foundation, however, the traditionally recognized excuses – automatism, duress, entrapment, infancy, insanity, involuntary intoxication, mistake of fact, and mistake of law – are suddenly far too limited.²¹

The traditionally recognized excuses are generally thought to be essential parts of the modern criminal justice system.²² The reason that they are thought to be essential is to prevent injustice. Take, for example, the insanity defense. The reason why most states, the federal government, and the military provide an insanity defense is because they believe that (a) criminal responsibility requires moral responsibility and (b) insanity negates moral responsibility.²³ But from (a) and responsibility skeptics’ belief that genuine moral responsibility is impossible, it follows that genuine criminal responsibility is impossible as well. So for responsibility skeptics, it makes no sense to maintain the insanity defense for the purpose of assessing blame and punishment. Because sane defendants are just as nonresponsible as insane defendants, it is arbitrary and unjust to exempt only the latter, not the former, from blame and punishment. The same naturally applies to the rest of the recognized excuses as well. It is equally arbitrary and unjust to limit exonerations to the defendants who satisfy one of these defenses. This approach unfairly leaves out all of the defendants who do not satisfy any of these defenses but are just as nonresponsible as those who do.

Responsibility skeptics, then, are committed to replacing the recognized excuses with a much broader excuse, a ‘universal nonresponsibility’ excuse that applies to everybody not because of any cognitive deficiencies or situational constraints but simply because of a metaphysical deficiency: their universal human inability to be genuinely responsible for their crimes.²⁴

4. Moving to a Responsibility-Skeptical Criminal Justice System Would Be Highly Counterproductive

In the previous section, I argued that responsibility skeptics are committed to abolishing the recognized excuses and replacing them with a universal nonresponsibility excuse. In this section, I will argue that recognizing such an excuse – that is, moving from a

responsibility-realist/retributivist criminal justice system to a responsibility-skeptical/nonretributivist criminal justice system – would be highly counterproductive. All else being equal, a responsibility-skeptical/nonretributivist criminal justice system would be even less humane than a responsibility-realist/retributivist criminal justice system.

4.1. *Things We Deeply Value*

Some philosophers argue that responsibility, or at least a belief in responsibility, is necessary for things we deeply value. The list includes accountability, agency, autonomy, cooperative living, dignity, forgiveness, gratitude, humanity, justice, love, meaning, meaningful relationships, morality (moral behavior, motivation, and obligation), objective value, personhood, respect, self-pride, and self-respect.²⁵ Take dignity, for example. Most adults believe that their dignity, which they deeply value, would be severely impaired by others' perception that they are not responsible for their choices and behavior.²⁶ Such impairment tends to yield devastating effects, including learned helplessness (i.e. fatalistic resignation), diminished cognitive self-efficacy, and lower self-esteem.²⁷ More generally, responsibility skeptics, who insist that we rip some or all of these personal and interpersonal foundations away, even if only in the context of the criminal justice system, are playing with fire. In their admittedly good-faith, zealous effort to reduce injustice, they risk causing not only even greater injustice but also serious and widespread psychological and social harm.

In response, Derk Pereboom argues that none of the values (or valuable things) listed above really require responsibility in the first place and therefore that we could retain them all even if we were to abandon the concept entirely.²⁸ For example, it may at first seem as though abandoning responsibility would obligate us to abandon backward-looking accountability. But abandoning responsibility would obligate us to abandon only the negative emotions that often accompany backward-looking accountability, indignation, and resentment, not necessarily accountability itself. And these two emotions are no more necessary to successfully hold adults accountable than they are to successfully hold children accountable.²⁹

I offer two responses to Pereboom's position here. First, it would be extremely difficult, if not impossible, for many people, no less everybody, to start assuming that both they themselves and everybody around them are never genuinely responsible for their decisions or behavior.³⁰ Second, psychological and practical difficulties aside, such a society might be able to retain criminal punishment as well as most or all of the valuable things listed above, but their degree of value would significantly diminish. If human beings really have no genuine responsibility at all for their decisions or actions, then it is not clear what distinguishes them from equally cognitively and emotionally sophisticated robots. While I might place some stock in a sophisticated robot's emotions and attitudes toward me, its complete nonresponsibility for these, and for their underlying judgments, would make them far less important to me than the identical emotions and attitudes of a (presumed) responsible human being.

For example, all else being equal, I would be much prouder to receive a job offer from a hiring committee composed of discriminating scholars who came to a consensus about me after careful discussion than a hiring committee composed of programmed, algorithm-following computers. And that's just pride. The same arguably goes for forgiveness, gratitude, love, and so on; good or bad, they mean much more to me coming from responsible

beings, beings that have more or less appropriate standards and are capable of judging and discussing the extent to which I do or do not measure up to those standards, than from nonresponsible beings.

Responsibility skeptics will likely respond that even if all of this judging and discussing by a group of humans may be more meaningful to me than whatever activities a collection of robots and computers engaged in, they are more meaningful to me not because the people doing the judging and discussing have genuine responsibility but rather because people's capacities to do all of this judging and discussing are more impressive than the capacities of even the most sophisticated machines. But I maintain that it *is* primarily in virtue of humans being responsible – specifically, in virtue of their being creatures who, unlike computers and robots, can make judgments about me and are capable of participating in 'justificatory dialogue' about these judgments³¹ – that I take them more seriously. Judging and dialoguing are both highly complex and creative acts, so complex and creative that we still have not figured out how to build such capacities (programs) for the most advanced machines, at least not at the same level as our own. No currently existing robot or computer, for example, could write an article like this, understand critical feedback, and make substantial revisions in light of this feedback.

Intuitively, then, these cognitive and highly creative capacities seem to depend on something much more intricate, something metaphysically richer, than mere rationality or reasons-responsiveness. This more intricate, metaphysically richer something – what metaphysical libertarians typically mean by free will and agency – is precisely what responsibility skeptics deny the existence of. Such a denial, however, is too reductive. By implying that the difference between an ultimately human-authored creation (such as this article) and even the most advanced ultimately machine-authored creation is only in degree, not in kind, free-will skepticism misses just how splendid, even sublime, our cognitive and creative (and emotional) capacities are.³²

Just imagine your reaction if you learned that this article was written and revised entirely by a newly developed robot at one of our leading universities. Once you overcame your initial disbelief, you would be astonished – not because this article is brilliant but because the very capacity to write it, something we philosophers tend to take for granted, is itself wondrous. The awe-inspiring nature of this capacity – again, free will or agency, what separates humans from the most advanced machines – is what I think responsibility skeptics overlook when they suggest that free will simply does not exist and therefore does not contribute to some, most, or all of our deepest values.³³

4.2. *Even More Mass Incarceration and Injustice*

As I argued in Section 2, even if the criminal justice system dropped all concern with culpability, one of the principal justifications for criminal punishment, it would still need to incapacitate the more serious criminals for nonretributivist – primarily consequentialist and protective – reasons. But I argue that, however justified it might still be, all of this criminal punishment without any concern for culpability would inevitably increase the (unjust) punishment of people who are 'doubly innocent' – innocent not only in the sense of being nonresponsible, as everybody supposedly is according to responsibility skepticism, but also in the sense of being nonwrongdoers. Some of the doubly innocent would be prosecuted in good faith; the government would genuinely believe that they were

sufficiently dangerous. Others would be prosecuted in bad faith; the government would, for whatever reason, frame them.

Generally speaking, people who may seem dangerous but have not committed a crime cannot be imprisoned because, as a society, we believe that an element of every crime, *actus reus* (bad act), is necessary for culpability.³⁴ But Elizabeth Shaw argues that a responsibility-skeptical society would still need to retain *actus reus* for three nonculpability-based reasons: citizens' rights (a) to fair notice (otherwise known as the 'legality principle'),³⁵ (b) against deprivation of liberty without due process, and (c) to be evaluated for dangerousness on an individual rather than statistical basis.³⁶

The first two justifications are plausible. The third justification is also plausible but leads to a significant problem. According to the third justification, *actus reus* is good evidence that a person is dangerous – that is, likely to commit another such *actus reus* in the future.³⁷ Put in criminological terms, a history of criminal behavior is a risk factor for future criminality.³⁸ But if being a risk factor for future criminality is a good, if not sufficient, reason to criminalize it (that is, to make it an element of a crime), then it would seem that other risk factors should be criminalized as well. There are at least seven: (1) 'antisocial, procriminal attitudes, values, and beliefs, and cognitive emotional states (e.g. anger, rage, and criminal identity)'; (2) 'having pro-criminal friends and a lack of prosocial friends and acquaintances'; (3) 'temperamental and personality factors' such as egocentrism, hostility in personal relationships, lack of empathy, and lack of self-control; (4) family problems such as 'low levels of affection, poor parental supervision, and outright neglect and abuse'; (5) 'low levels of personal educational, vocational, or financial achievement'; (6) 'low involvement in prosocial leisure activities'; and (7) 'abuse of alcohol and/or other drugs'.³⁹ Currently, in our responsibility-realist society, law enforcement is not supposed to decide who to arrest and who not to arrest on the basis of risk factors (1) through (7) because all of them together, even if fully manifested by a particular individual, do not amount to criminal culpability (with the exception of illegal drug use). If, however, society were to adopt responsibility skepticism and thereby abandon any concern for culpability, then – as Shaw claims – one of the main reasons for continuing to retain *actus rei* in criminal statutes would be public safety. And if public safety, not culpability, were now the primary or sole basis for criminalizing *actus rei*, then – given that the seven other risk factors would only help to strengthen predictions of crime – there would be no good reason not to criminalize them as well. Again, concern about culpability would no longer present a barrier.

But here is the problem: Without this barrier, mass incarceration would only further increase. Not only many more genuinely dangerous people but also many doubly innocent people – again, people who are both nonresponsible and nonwrongdoers – would end up being incarcerated.⁴⁰ The injustice done to the latter group, and the resulting rage and terror that would spread throughout the community, would arguably outweigh the public benefit of incapacitating the former group. Caruso offers several moral reasons (such as the 'principle of least infringement') against punishing individuals excessively or unjustly,⁴¹ but I think that once culpability was abandoned, such reasons would be inadequate barriers to punishment for suspected dangerousness. Given human nature, at least humans' track record for the past few centuries, it is quite likely that even a morally advanced responsibility-skeptical society would simply override these moral principles by filling the space previously occupied by culpability with a much more robust, single-minded concern for public safety.

I turn now from *actus reus* to *mens rea* ('guilty mind'), which is generally thought to be equally necessary for culpability.⁴² In our current responsibility-realist/retributivist criminal justice system, if an individual causes harm to another person without intent, knowledge, recklessness, or negligence, she is generally thought to be perfectly innocent and therefore undeserving of blame or punishment. The harm was a mere accident and therefore something that she cannot be reasonably expected to have avoided.⁴³ But if responsibility skepticism were to replace responsibility realism, then all harmful actions – whether or not performed with intent, knowledge, recklessness, or negligence – would equally be accidents, equally outcomes for which individuals cannot be justly blamed. So continuing to require *mens rea* would serve no purpose.

Suppose that two people, Alan and Billy, killed their wives, Annie and Betty respectively, under the same exact circumstances. The only difference was in their mental states: while Alan intentionally killed Annie, Billy negligently killed Betty. If the criminal justice system were to abandon all consideration of *mens rea*, then Alan's and Billy's killings would be considered morally and legally equivalent. While Alan's is intuitively morally worse than Billy's, this intuition presupposes that there are different levels of culpability,⁴⁴ a presupposition that would be swept away in a responsibility-skeptical system.

As it turns out, making every crime strict liability in this way would significantly help prosecutors and hurt defendants. All that prosecutors would have to prove is that the defendant committed the *actus reus*, not that he had any particular *mens rea* (intent, knowledge, recklessness, or negligence) when he committed the *actus reus*.⁴⁵ But this easing of the prosecution's evidentiary burden would, just like criminalizing risk factors (1) through (7), inevitably increase the number of criminal defendants who are convicted and incarcerated.

Shaw argues, however, that there are three good nonretributivist reasons to retain *mens rea* even in a responsibility-skeptical criminal justice system: liberty, fair warning, and moral education.⁴⁶ Still, I argue, all three fail. Regarding liberty, Shaw says, 'More people would actually be detained if the *mens rea* requirement were abandoned'.⁴⁷ Shaw is certainly correct here, but maximizing liberty cannot justify retaining *mens rea* any more than it can justify adding, for example, a red-hair element to criminal statutes. While a red-hair element would certainly help maximize liberty for non-red-haired defendants, it would also be arbitrary and counterproductive – arbitrary because there is no principled reason to discriminate between red-haired and non-red-haired defendants and counterproductive because letting all the non-red-haired but dangerous defendants go free would undermine public safety. Likewise, then, with *mens rea* in a responsibility-skeptical society; retaining *mens rea* in criminal statutes just to maximize liberty would be as arbitrary and counterproductive as requiring red hair just to maximize liberty.

Shaw's response would likely be that retaining *mens rea* in a responsibility-skeptical society would not be arbitrary or counterproductive in the same way or to the same degree as a red-hair element because only *mens rea*, not red hair, is eligible for the two aforementioned nonretributivist justifications – again, fair notice and moral education. But I will now argue that both of these justifications fail as well. Regarding fair notice, Shaw agrees with H.L.A. Hart's claim 'that the *mens rea* requirement should be preserved because individuals will be better able to predict when they will be subject to legal sanctions than they would be if they could be detained simply because they had performed a prohibited action'.⁴⁸ But, first, as long as a red-hair element was added to criminal

statutes through the legislative process, it would give just as much notice to all citizens, red-haired and non-red-haired citizens alike, as the *mens-rea* element does. Second, while Shaw's/Hart's point applies well to *actus reus*, it does not apply well to *mens rea*. Consider homicide, for example. If a person in a society that had eliminated *mens rea* from their homicide statute killed a pedestrian while driving negligently, her complaint that the statute failed to give her fair notice of the prohibition against negligent killing would be totally implausible. Clearly, a strict-liability homicide statute (that is, a homicide statute that omitted *mens rea*) would give citizens fair notice that any killing – not only intentional killing and knowing killing but also reckless killing and negligent killing – are all prohibited. Strict liability in this context would be highly problematic, but failure to give fair notice is not the reason.

Finally, Shaw argues that a responsibility-skeptical society would have to retain *mens rea* in its criminal statutes because (a) every offender must be morally appraised in order to serve the 'forward-looking goal' of moral education,⁴⁹ which itself serves the forward-looking goals of rehabilitation and reconciliation,⁵⁰ and (b) such moral appraisal requires taking into account her state of mind at the time she committed the crime.⁵¹ But even if we accept (a) and (b), we need not accept Shaw's conclusion. In a responsibility-skeptical society, *mens rea* might be important in determining sentencing – which could be determined entirely by forward-looking goals like rehabilitation and reconciliation – but it would not be necessary to determine guilt (i.e. to determine whether the defendant should be convicted). And if *mens rea* would not be necessary to determine guilt, then it would not need to be retained in criminal statutes.

One might try to salvage Shaw's position by arguing that there is yet a fourth nonretributivist reason to retain *mens rea* in a responsibility-skeptical criminal justice system: maximizing public safety. Return to Alan and Billy. It could be argued that Alan is clearly more dangerous than Billy; the fact that Alan intentionally killed his wife and Billy 'only' negligently killed his wife seems to license the prediction that Alan is more likely than Billy to kill again and therefore that Alan should be incapacitated for a proportionally longer time than Billy.⁵² Indeed, Alan seems to exhibit to a much greater extent than Billy two of the seven risk factors above: (1) 'antisocial, procriminal attitudes, values, and beliefs, and cognitive emotional states (e.g. anger, rage, and criminal identity)' and (3) 'temperamental and personality factors' such as egocentrism, hostility in personal relationships, lack of empathy, and lack of self-control.

This argument, if successful, would show that a responsibility-skeptical system is not so farfetched because it would more or less track our responsibility-realist/retributivist intuitions about proportional punishment.⁵³ But, alas, it is not successful; greater or lesser exhibition of two risk factors does not provide sufficient guidance about whether, or for how long, to incapacitate a given defendant. The fact of the matter is that risk factors, even all eight together (the eighth being prior criminality), are not crystal balls. They do not tell us what will happen, only what is likely to happen. For example, despite first appearances, intentional killing does not necessarily license a prediction of future killing any more than does negligent killing; we can easily imagine some people intentionally killing only once and some people negligently killing (for example, in the course of driving or hunting) at least twice. Indeed, while many intentional killers reform themselves, many negligent killers do not. It is therefore wrong to assume that Alan should necessarily be incapacitated for a longer period of time than Billy. On the contrary, an unreformed Billy would

be (by definition) more dangerous, and therefore should be incapacitated for a longer period of time, than a reformed Alan.

5. Saul Smilansky's Illusionism Is Not Entirely Correct

While I share responsibility skeptics' goal of reforming the criminal justice system, their proposed means to achieving this reform would have the very opposite effect. Converting the criminal justice system into a responsibility-skeptical institution would make it (much) worse than it already is. It would diminish some of our most fundamental values, further dehumanize offenders, and lead to great injustice, especially incarceration of even more individuals, including many nonwrongdoers.

What, then, is a responsibility skeptic to do? On the one hand, responsibility skepticism seems impractical; on the other hand, responsibility skeptics think that this impractical theory is true. Saul Smilansky's solution to this dilemma is to accept the theory but reject its implementation.⁵⁴ At first glance, this position seems irrational. Generally speaking, if an individual believes that proposition *X* is true, then it seems irrational for her to operate as if *X* is false. But Smilansky argues that things are different here; that our criminal justice system, among other institutions and practices, works much better when we assume that people have 'libertarian free will' (as he calls it) than when we assume that people do not have libertarian free will – even if the fact of the matter is that libertarian free will is impossible. Put slightly differently, the benefits of acting as if (i.e. pretending that) libertarian free will exists outweigh the costs of demanding perfect consistency between our criminal justice system and the harsh reality that libertarian free will does not exist.

Smilansky is certainly correct that our responsibility-realist institutions and practices will work better (i.e. the benefits will outweigh the costs) in a responsibility-realist society – that is, in a society where most people assume the truth of responsibility realism – even if responsibility realism is false. By analogy, a familial or romantic relationship will generally work better on the shared assumption that there is mutual love, even if this assumption is ultimately mistaken. But what if society were evenly divided on the issue of responsibility realism versus responsibility skepticism? Or more radically, what if Smilansky's and his fellow responsibility skeptics' arguments for responsibility skepticism were so famous and compelling that a majority of society came to accept them? What, then, of his recommendation to maintain the illusion of responsibility realism – that is, to maintain institutions and practices that are predicated on a false belief in libertarian free will?⁵⁵

It stands to reason that, even if responsibility skepticism is true, responsibility-realist institutions and practices maintain their prudential superiority only within a larger responsibility-realist society. So if a majority of society were to convert to responsibility skepticism – that is, if a majority of society were to agree with Smilansky and his fellow responsibility skeptics that libertarian free will simply does not exist – it is no longer clear that the criminal justice system should maintain 'business as usual'. Instead, if the criminal justice system continued to rely on an assumption that a majority of society no longer held, the assumption of responsibility realism, they would very likely be alienated by the disconnect. And this alienation would soon mutate into distrust and cynicism, attitudes that can be seriously corrosive and destabilizing, much more corrosive and destabilizing than their shared repudiation of libertarian free will itself.⁵⁶

Contrary to Smilansky, then, if a majority responsibility-skeptical society is to thrive rather than fail, the criminal justice system (above all) would need to be radically transformed. It would need to make very clear that criminal punishment is not at all based on culpability in any deep metaphysical sense but rather on the purely forward-looking considerations of minimizing crime, rehabilitation, and reconciliation. This message would be well-received because, *ex hypothesi*, most or all people receiving it would be responsibility skeptics.

6. Conclusion

My argument in Section 5 is that a responsibility-skeptical criminal justice system might work only if there is enough ‘buy-in’ – that is, only if it is situated within a society that mostly subscribes to responsibility skepticism. But this is quite an assumption to make. It is hard enough (at least for responsibility-realists like me) to imagine any sizable community containing a majority, no less a significant minority, of responsibility skeptics⁵⁷; it is even harder to imagine how this community would react, both individually and collectively, to serious crimes. Maybe it would have the strength and ideological dedication to suppress, ignore, or even avoid the emotional reactions that are grounded in responsibility realism, especially retributivist emotions like indignation, resentment, and vengefulness. But if it did not have this strength and ideological dedication, which seems more likely given humans’ responsibility-realist/retributivist ‘hardwiring’,⁵⁸ the dissonance between their theoretical commitment to responsibility skepticism and their responsibility-realist/retributivist emotions would pull the criminal justice system in two opposite directions. And it is difficult to see how this particular institution, and therefore the larger society that would depend on it for protection of its supreme values (such as life, liberty, property, and physical wellbeing), could survive this constant tension.

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NOTES

- 1 Other terms philosophers use for responsibility skepticism are ‘hard incompatibilism’, ‘hard determinism’, ‘nihilism’, and ‘eliminativism’. Responsibility skeptics include: Alces, Peter. 2018. *The Moral Conflict of Law and Neuroscience*. Chicago, IL: University of Chicago Press; Caruso, Gregg D. 2012. *Free Will and*

- Consciousness: A Determinist Account of the Illusion of Free Will*. Plymouth, UK: Lexington Books; Caruso, Gregg D. 2015. "Free Will Eliminativism: Reference, Error, and Phenomenology." *Philosophical Studies* 172: 2823–33; Caruso, Gregg D. 2016. "Free Will Skepticism and Criminal Behavior: A Public Health-Quarantine Model." *Southwest Philosophy Review* 32: 25–48; Caruso, Gregg D. 2020. "Justice Without Retribution: An Epistemic Argument Against Retributive Criminal Punishment." *Neuroethics* 13: 13–28; Caruso, Gregg D. 2021a. *Rejecting Retributivism: Free Will, Punishment, and Criminal Justice*. Cambridge: Cambridge University Press; Caruso, Gregg D. 2021b. "Précis of Rejecting Retributivism: Free Will, Punishment, and Criminal Justice." *Journal of Legal Philosophy* 46: 120–25; Caruso, Gregg D. 2021c. "Retributivism, Free Will Skepticism and the Public Health-Quarantine Model: Replies to Corrado, Kennedy, Sifferd, Walen, Pereboom and Shaw." *Journal of Legal Philosophy* 46: 161–215; Chiesa, Luis E. 2011. "Punishing Without Free Will." *Utah Law Review* 2011: 1403–60; Daly, Sean. 2015. "Free Will Is No Bargain: How Misunderstanding Human Behavior Negatively Influences Our Criminal Justice System." *Nevada Law Journal* 15: 992–1029; Double, Richard. 1991. *The Non-Reality of Free Will*. New York: Oxford University Press; Greene, Joshua, and Jonathan Cohen. 2004. "For the Law, Neuroscience Changes Nothing and Everything." *Philosophical Transactions of the Royal Society of London* 359: 1775–85, pp. 1781, 1783; Harris, Sam. 2012. *Free Will*. New York: Free Press; Levy, Neil. 2011. *Hard Luck: How Luck Undermines Free Will and Moral Responsibility*. New York: Oxford University Press; Pereboom, Derk. 2001. *Living Without Free Will*. Cambridge: Cambridge University Press; Pereboom, Derk. 2014. *Free Will, Agency, and Meaning in Life*. Oxford: Oxford University Press; Pereboom, Derk. 2017. "A Defense of Free Will Skepticism: Replies to Commentaries by Victor Tadros, Saul Smilansky, Michael McKenna, and Alfred R. Mele on Free Will, Agency, and Meaning in Life." *Criminal Law and Philosophy* 11: 617–36; Pereboom, Derk. 2021. *Wrongdoing and the Moral Emotions*. Oxford: Oxford University Press; Strawson, Galen. 1994. "The Impossibility of Moral Responsibility." *Philosophical Studies* 75: 5–24; Waller, Bruce. 2011. *Against Moral Responsibility*. Cambridge, MA: MIT Press; Waller, Bruce. 2015. *The Stubborn System of Moral Responsibility*. Cambridge, MA: MIT Press. Saul Smilansky admits to cognitive dissonance in recognizing the cogency of both responsibility skepticism and compatibilism. See Smilansky, Saul. 2000. *Free Will and Illusion*. New York: Oxford University Press, pp. 94–141; Smilansky, Saul. 2003. "Compatibilism: The Argument from Shallowness." *Philosophical Studies* 115: 257–82. Sofia Jeppsson tries to resolve this dissonance by defending a specific version of 'freedom contextualism'. See Jeppsson, Sofia. 2016. "Non-Elusive Freedom Contextualism." *Philosophia* 44: 793–808, pp. 803–07. Tamler Sommers self-identifies as a responsibility meta-skeptic – that is, a skeptic about whether any theory of responsibility, including responsibility skepticism, is objectively true. See Sommers, Tamler. 2012. *Relative Justice: Cultural Diversity, Free Will, and Moral Responsibility*. Princeton, NJ: Princeton University Press.
- 2 Metaphysical libertarians believe both that indeterminism is necessary for genuine responsibility and that genuine responsibility is at least metaphysically possible. Metaphysical libertarians include: Clarke, Randolph. 2003. *Libertarian Accounts of Free Will*. New York: Oxford University Press; Kane, Robert. 1996. *The Significance of Free Will*. New York: Oxford University Press; Kane, Robert. 2005. *A Contemporary Introduction to Free Will*. New York: Oxford University Press; Lemos, John. 2018. *A Pragmatic Approach to Libertarian Free Will*. New York: Routledge; Levy, Ken M. 2020a. *Free Will, Responsibility, and Crime: An Introduction*. New York: Routledge; Nozick, Robert. 1981. *Philosophical Explanations*. Cambridge, MA: Harvard University Press; O'Connor, Timothy. 2000. *Persons & Causes: The Metaphysics of Free Will*. New York: Oxford University Press.
- 3 Compatibilists believe that the necessary and sufficient conditions of responsibility are compatible with determinism. Compatibilists include: Campbell, Joseph Keim. 2011. *Free Will*. Malden, MA: Polity Press; Dennett, Daniel C. 1984. *Elbow Room: The Varieties of Free Will Worth Wanting*. Cambridge, MA: MIT Press; Fischer, John Martin. 1994. *The Metaphysics of Free Will: An Essay on Control*. Malden, MA: Blackwell; Fischer, John Martin, and Mark Ravizza. 1998. *Responsibility and Control: A Theory of Moral Responsibility*. Cambridge: Cambridge University Press; Morse, Stephen J. 2004. "Reason, Results, and Criminal Responsibility." *University of Illinois Law Review* 2004: 363–444, pp. 437–44; Strawson, Peter. [1962] 1993. "Freedom and Resentment." In *Perspectives on Moral Responsibility*, edited by John Martin Fischer and Mark Ravizza, 45–66. Ithaca, NY: Cornell University Press; Vargas, Manuel. 2013. *Building Better Beings: A Theory of Moral Responsibility*. New York: Oxford University Press; Wolf, Susan. 1990. *Freedom Within Reason*. New York: Oxford University Press.
- 4 See Caruso 2021a op. cit., Caruso 2021b op. cit., Caruso 2021c op. cit.; Kelly, Erin. 2009. "Criminal Justice Without Retribution." *Journal of Philosophy* 106: 440–62, p. 446; Kelly, Erin. 2012. "Desert and Fairness in Criminal Justice." *Philosophical Topics* 40: 63–77, p. 66; Levy, Neil. 2012. "Skepticism and Sanction: The Benefits of Rejecting Moral Responsibility." *Law & Philosophy* 31: 477–93, pp. 477, 480–1; Pereboom 2014

- op. cit., pp. 157–8; Vilhauer, Benjamin. 2013. “Persons, Punishment, and Free Will Skepticism.” *Philosophical Studies* 162: 143–63, pp. 144, 149. Other reasons why responsibility skeptics reject compatibilism include the ‘manipulation argument’ (Caruso 2021a op. cit., pp. 74–91; Dennett, Daniel C., and Gregg D. Caruso. 2021. *Just Deserts: Debating Free Will*. Medford, MA: Polity Press, pp. 54–88; Pereboom 2001 op. cit., pp. 112–6; Pereboom 2014 op. cit., pp. 74–7) and the ‘luck pincer’ (N. Levy 2011 op. cit., pp. 93–109).
- 5 See Caruso 2021c op. cit., pp. 172, 187; Focquaert, Farah, Andrea L. Glenn, and Adrian Raine. 2018. “Free Will Skepticism, Freedom, and Criminal Behavior” In *Neuroexistentialism: Meaning, Morals, and Purpose in the Age of Neuroscience*, edited by Gregg D. Caruso and Owen Flanagan, 235–50. New York: Oxford University Press, pp. 237, 240, 245; Greene and Cohen op. cit., p. 1783; K. Levy 2020a op. cit., p. 27; Pereboom 2021 op. cit., p. 102. The deeply problematic state of the current criminal justice system is only one reason to oppose retributivism. A second reason is our inability to prove beyond a reasonable doubt that we have free will. See Caruso 2020 op. cit.; Pereboom 2014 op. cit., pp. 158, 178; Pereboom 2021 op. cit., p. 82; Vargas op. cit., pp. 70–2; Vilhauer, Benjamin. 2009. “Free Will and Reasonable Doubt.” *American Philosophical Quarterly* 46: 131–40; cf. Jeppsson, Sofia M.I. 2021. “Retributivism, Justification and Credence: The Epistemic Argument Revisited.” *Neuroethics* 14: 177–90, pp. 188–9. A third reason is opposition to revenge – specifically, the state vengefully giving criminals their just deserts. See Kelly 2009 op. cit.; Kelly 2012 op. cit.; Levy, Ken. 2014. “Why Retributivism Needs Consequentialism: The Rightful Place of Revenge in the Criminal Justice System.” *Rutgers Law Review* 66: 629–84, pp. 638, 663–6; Pereboom 2014 op. cit., pp. 158–9; Pereboom 2021 op. cit., pp. 75–7, 83. Cf. Pereboom 2021 op. cit., pp. 1–7, 32–52. A fourth reason is retributivism’s (or retributivists’) myopic focus on individual responsibility and corollary blindness to conditions of social injustice caused by the very entity that administers criminal punishment – i.e. the state. See Kelly 2012 op. cit., pp. 67–70. A fifth reason is to spare the state the moral obligation, arguably entailed by retributivism, of establishing a *positive*-desert system, which would be expensive and difficult to administer. See K. Levy 2014 op. cit., pp. 637, 649–50; Pereboom 2014 op. cit., pp. 159–60.
 - 6 See Caruso 2016 op. cit., pp. 31–45; Daly op. cit., p. 1028; Focquaert *et al.* op. cit., pp. 241–3; Kelly 2012 op. cit.; Lemos, John. 2016. “Moral Concerns About Responsibility Denial and the Quarantine of Violent Criminals.” *Law & Philosophy* 35: 461–83, p. 465; N. Levy 2011 op. cit., pp. 7–8; Pereboom 2001 op. cit.; Pereboom 2014 op. cit.; Pereboom 2017 op. cit.; Pereboom, Derk, and Gregg D. Caruso. 2018. “Hard-Incompatibilist Existentialism: Neuroscience, Punishment, and Meaning in Life.” In *Neuroexistentialism: Meaning, Morals, and Purpose in the Age of Neuroscience*, edited by Gregg D. Caruso and Owen Flanagan, 193–222. New York: Oxford University Press; Shariff, Azim F., and Kathleen D. Vohs. 2014. “The World Without Free Will.” *Scientific American* 310: 76–9, p. 79; Vilhauer 2013 op. cit., p. 144; Waller 2011 op. cit., pp. 293–304; Waller 2015 op. cit., pp. 192–200. See also Miller, Arthur. 2016. “Why Are Not the Milgram Obedience Experiments Still so Extraordinarily Famous – and Controversial?” In *The Social Psychology of Good and Evil*, 2nd ed., edited by Arthur Miller, 185–223. New York: Guilford Press, pp. 214–5.
 - 7 While most responsibility skeptics are criminal-justice reformers – see e.g. Caruso 2021a op. cit.; Caruso 2021b op. cit.; Caruso 2021c op. cit.; Chiesa 2011 op. cit., pp. 1409–10, 1455–6 – it is less clear that most criminal-justice reformers are responsibility skeptics.
 - 8 See Smilansky 2000 op. cit., pp. 145–91; Smilansky, Saul. 2005. “Free Will and Respect for Persons.” *Midwest Studies in Philosophy* XXIX: 248–61, pp. 257–61. See also Kane 2005 op. cit., pp. 77–8; Shariff and Vohs op. cit., p. 79; Sommers op. cit., pp. 144–8. Similar to Smilansky, Lemos (2018 op. cit., pp. 154–68) argues that there are good moral, as opposed to empirical and metaphysical, reasons for adopting metaphysical libertarianism.
 - 9 See Caruso 2021c op. cit., p. 171; Lemos 2018 op. cit., pp. 118–9; K. Levy 2020a op. cit., pp. 59–61; N. Levy 2012 op. cit., pp. 481, 484; Murtagh, Kevin J. 2013. “Free Will Denial and Punishment.” *Social Theory and Practice* 39: 223–40, p. 227; Nadelhoffer, Thomas. 2019. “Moral Responsibility Has a Past: Has It a Future?” *Journal of Information Ethics* 28: 13–31, pp. 21, 23; Pereboom 2001 op. cit., p. 167; Smilansky 2000 op. cit., pp. 162–3, 173–4; Smilansky, Saul. 2011. “Hard Determinism and Punishment: A Practical Reductio.” *Law & Philosophy* 30: 353–67, pp. 356–7, 363; Vilhauer 2013 op. cit., pp. 161–2. Murtagh (op. cit., pp. 239–40) concedes that framing and punishing innocents may be justified in some limited cases.
 - 10 See K. Levy 2014 op. cit., p. 642 n. 47, 643–4; Pereboom and Caruso 2018 op. cit.
 - 11 See Smilansky 2005 op. cit., p. 259; Vilhauer (2013 op. cit., pp. 149–52) argues that personhood-based desert still exists even if action-based desert does not. See also Caruso 2021c op. cit., p. 191; Shaw, Elizabeth. 2019b. “Justice Without Moral Responsibility?” *Journal of Information Ethics*, 28: 95–114, p. 100.

- 12 See Chiesa op. cit., pp. 1452–3; Lemos 2016 op. cit., p. 464; Lemos 2018 op. cit., pp. 116–7; Murtagh op. cit., pp. 223, 226; Pereboom 2001 op. cit., pp. 159–61; Pereboom 2014 op. cit., p. 157; Sommers op. cit., pp. 151–2.
- 13 See Caruso 2012 op. cit., pp. 33, 38–9; Focquaert *et al.* 2018 op. cit., pp. 246–7; Kelly 2012 op. cit., p. 73; Lemos 2016 op. cit., p. 463; Lemos 2018 op. cit., pp. 116–7; N. Levy 2011 op. cit., 7; N. Levy 2012 op. cit., pp. 487–8; Murtagh op. cit., p. 223; Shariff and Vohs op. cit., p. 79; Smilansky 2005 op. cit., p. 255; Smilansky 2011 op. cit., pp. 355, 362; Vilhauer 2013 op. cit., p. 159; Waller 2015 op. cit., pp. 192–206.
- 14 Criminal punishment helps to minimize future crime in three different ways: incapacitation, general deterrence, and specific deterrence or rehabilitation ('moral education'). Caruso 2021a op. cit., Caruso 2021b op. cit., and Caruso 2021c op. cit. argues that (a) the consequentialist goal of general deterrence does not justify criminal punishment and (b) self-defense and defense of others can justify incapacitation of dangerous offenders. For discussions of the relationship between (non-)responsibility and punishment, see Campbell, Joe. 2017. "P.F. Strawson's Free Will Naturalism." *International Journal for the Study of Skepticism* 7: 26–52, pp. 32, 48; Caruso 2016 op. cit., pp. 28–9, 31, 34–6; Chiesa op. cit., pp. 1452–7; Daly op. cit., pp. 1013, 1022; Kane 2005 op. cit., pp. 75–6; Kelly 2009 op. cit., pp. 448–9; Kelly 2012 op. cit., p. 73; Lefkowitz, David. 2015. "Blame and the Criminal Law." *Jurisprudence* 6: 451–69, p. 467; Lefkowitz op. cit., p. 467; Lemos 2016 op. cit., pp. 464, 472; Lemos 2018 op. cit., pp. 116–7, 122–4; K. Levy 2014 op. cit., pp. 634, 641; N. Levy 2012 op. cit., pp. 481, 489–90; Levy, Neil. 2014. *Consciousness and Moral Responsibility*. Oxford: Oxford University Press, p. xi; Murtagh 2013 op. cit., pp. 223, 234; Pereboom 2001 op. cit., pp. 156–7, 168–74; Pereboom 2014 op. cit., pp. 154–7; Pereboom 2017 op. cit., pp. 617–9, 622–6; Pereboom 2021 op. cit., pp. 6–7, 54–7, 70–7, 84–102; Shariff and Vohs op. cit., pp. 78–9; Shaw 2019b op. cit., 96–104; Sider, Theodore. 2005. "Free Will and Determinism." In *Riddles of Existence: A Guided Tour of Metaphysics*, edited by Earl Conee and Theodore Sider, 112–32. New York: Clarendon Press, p. 118; Smilansky 2011 op. cit., p. 355; Vilhauer 2009 op. cit., p. 137. Kelly (2009 op. cit., pp. 446–62; 2012 op. cit., p. 71) argues that criminal punishment is justified as a means to legitimizing the *threat* of criminal punishment, which is itself justified on the grounds of deterrence. See also K. Levy 2014 op. cit., pp. 640–1. Smilansky (2011 op. cit.) argues that if genuine responsibility is impossible, then (a) all punishment is undeserved; (b) undeserved punishment would still be necessary for the most dangerous criminals; (c) because this punishment would be undeserved, it would have to be offset by 'funishment' – that is, pleasant circumstances that compensate for this injustice; and (d) the prospect of funishment would only incentivize, not deter, further crime. See also Lemos 2018 op. cit., pp. 118–20; N. Levy 2011 op. cit., p. 4; Pereboom 2014 op. cit., pp. 172–3. Contra Smilansky, N. Levy (2012 op. cit., pp. 483–92) argues that a responsibility-skeptical society would be more equitable and therefore the prospect of funishment would be less appealing to most or all citizens. Murtagh (op. cit., pp. 233–4) argues that if pleasant confinement had a weak general deterrent effect, then significantly unpleasant confinement would be justified. Pereboom (2021 op. cit., pp. 98–102) argues that a responsibility-skeptical society could inflict punishment that is simultaneously serious on the one hand and both just and effective on the other.
- 15 See Smilansky 2011 op. cit., pp. 359–61.
- 16 See Greene and Cohen op. cit., pp. 1777–8.
- 17 See Caruso 2021a op. cit.; Caruso 2021b op. cit.; Caruso 2021c op. cit.; Chiesa op. cit., pp. 1454–7; Pereboom 2014 op. cit., p. 156; Pereboom 2021 op. cit., pp. 88–9, 98.
- 18 See Jeppson 2021 op. cit., p. 182. Even in a responsibility-skeptical system, some might view quarantine as a form of criminal punishment if only because it would be in response to convictions for criminal wrongdoing. The question then becomes whether the word *punishment* implies retribution (i.e. the motive of giving criminals their 'just deserts'). If it does, then quarantine in a responsibility-skeptical system would *not* qualify as criminal punishment. If it does not, then quarantine in a responsibility-skeptical system might still qualify as criminal punishment (again, qua response to convictions for criminal wrongdoing). There is no need for me to decide this semantic issue here.
- 19 Responsibility skeptics sometimes supplement consequentialist justifications of criminal punishment with 'expressivism', the idea that criminal punishment is necessary to communicate the extent to which society disapproves of the defendant's crime. See e.g. Shaw, Elizabeth. 2018. "Retributivism and the Moral Enhancement of Criminals Through Brain Interventions." *Royal Institute of Philosophy Supplement* 8: 251–70, p. 263; Shaw 2019b op. cit., pp. 98, 110. Another nonretributivist justification for criminal punishment is 'contractualism', which says that criminal punishment may be justified on the grounds that citizens consent to it by voluntarily violating the law with full knowledge of the possible consequences. See Pereboom 2021 op. cit., pp. 29, 97.

- 20 Caruso 2021c op. cit., p. 204.
- 21 Greene and Cohen (op. cit., p. 1783) argue that consequentialism, as opposed to retributivism, provides a sufficient foundation for the traditionally recognized excuses.
- 22 See Focquaert *et al.* 2018 op. cit., pp. 237–8; K. Levy 2020a op. cit., pp. 137–40.
- 23 See Greene and Cohen op. cit., p. 1778; Kelly 2009 op. cit., p. 444; K. Levy 2020a op. cit., p. 111; Levy, Ken. 2020b. “Normative Ignorance: A Critical Connection Between the Insanity and Mistake of Law Defenses.” *Florida State University Law Review* 47: 411–43, pp. 415, 419–20; Ruble, Matthew. 2019. “Philosophers, Psychopaths, and Neuroethics.” In *The Bloomsbury Companion to Philosophy of Psychiatry*, edited by Şerife Tekin and Robyn Bluhm, 347–66. London: Bloomsbury Academic, pp. 350–1; Sinnott-Armstrong, Walter, and Ken Levy. 2011. “Insanity Defenses.” In *Oxford Handbook on the Philosophy of the Criminal Law*, edited by John Deigh and David Dolinko, 299–334. New York: Oxford University Press, p. 318.
- 24 For discussions of this global or universal excuse (‘excuse-extensionism’), see Campbell 2017 op. cit., pp. 40–1; Chiesa op. cit., pp. 1440–1; Focquaert *et al.* op. cit., p. 238; Kane 2005 op. cit., pp. 109–10; Nagel, Thomas. 1986. *The View from Nowhere*. New York: Oxford University Press, pp. 122–3; Pereboom 2014 op. cit., pp. 154–5; Russell, Paul. 1992. “Strawson’s Way of Naturalizing Ethics.” *Ethics* 102: 287–302; Smilansky 2000 op. cit., p. 156; Waller 2015 op. cit., pp. 81–4, 179–80.
- 25 For discussions of this point, see Chiesa op. cit., pp. 1439–40, 1447–51; Kane 1996 op. cit., pp. 79–101; Kane 2005 op. cit., pp. 76–7; Lemos 2016 op. cit., p. 483; Lemos 2018 op. cit., pp. 6, 114–6, 131, 157–63; Meyers, C.D. 2015. “Automatic Behavior and Moral Agency: Defending the Concept of Personhood from Empirically Based Skepticism.” *Acta Analytica* 30: 193–209, pp. 194, 206; Morse 2004 op. cit., p. 443; Nadelhoffer op. cit., pp. 21–2, 28; Nozick op. cit., p. 2; Sider 2005 op. cit., pp. 113, 122; Smilansky 2000 op. cit., pp. 150, 153–85, 189–90; Smilansky 2005 op. cit., pp. 248–50, 253, 256–61; P. Strawson op. cit. Hanna Pickard argues that both taking responsibility and holding others responsible (without blaming or attributing fault) are essential for self-improvement and rehabilitation. See Pickard, Hanna. 2011. “Responsibility Without Blame: Empathy and the Effective Treatment of Personality Disorder.” *Philosophy, Psychiatry, & Psychology* 14: 209–24. See also Ciurria, Michelle. 2019. “Mental Illness, Agency, and Responsibility.” In *The Bloomsbury Companion to Philosophy of Psychiatry*, edited by Şerife Tekin and Robyn Bluhm, 325–45. London: Bloomsbury Academic, pp. 326–7, 331–8; Focquaert *et al.* op. cit., pp. 241, 243–7; Kelly 2012 op. cit., p. 72; Pereboom 2014 op. cit., pp. 127–52, 172; Perring, Christian. 2019. “Mental Disorder, Free Will, and Personal Autonomy.” In *The Bloomsbury Companion to Philosophy of Psychiatry*, edited by Şerife Tekin and Robyn Bluhm, 433–46. London: Bloomsbury Academic, p. 445; Ruble op. cit., pp. 359–60.
- 26 See Smilansky 2011 op. cit., pp. 128–9, 270; Speak, Daniel. 2004. “Toward an Axiological Defense of Libertarianism.” *Philosophical Topics* 3: 353–69, pp. 364–7.
- 27 See Smilansky 2011 op. cit., pp. 129–30, 165–7; Waller 2015 op. cit., pp. 71–2, 163–7, 260–1; Zimbardo, Philip. 2007. *The Lucifer Effect: Understanding How Good People Turn Evil*. New York: Random House, p. 196.
- 28 See Pereboom 2001 op. cit., pp. 135, 141–3, 151–2; Pereboom 2014 op. cit., pp. 104–99; Pereboom 2017 op. cit., p. 625; Pereboom 2021 op. cit., pp. 123–48. See also Chiesa op. cit., pp. 1439–41, 1447–9. See also Caruso 2021c op. cit., pp. 163–4, 188–92.
- 29 See Pereboom 2014 op. cit., pp. 8, 146–62, 178–93, 199; Pereboom 2021 op. cit., pp. 42–3, 46. See also Chiesa op. cit., pp. 1447–49. Pereboom’s most recent position is slightly more nuanced; he now argues that even if resentment and indignation are ‘doxastically irrational’, they may still sometimes be ‘practically rational’. See Pereboom 2021 op. cit., pp. 3, 33, 46–7, 135–6.
- 30 See Shabo, Seth. 2012. “Where Love and Resentment Meet: Strawson’s Intrapersonal Defense of Compatibilism.” *Philosophical Review* 121: 95–124. But see Pereboom 2014 op. cit., pp. 192–9; Pereboom 2021 op. cit., pp. 7, 132, 169–73.
- 31 See Westlund, Andrea C. 2003. “Selflessness and Responsibility for Self: Is Deference Compatible with Autonomy?” *Philosophical Review* 112: 483–523. See also McKenna, Michael. 2012. *Conversation and Responsibility*. New York: Oxford University Press; Shaw op. cit., pp. 267–8.
- 32 See K. Levy 2020a op. cit., pp. 2–4.
- 33 One notable exception is N. Levy 2014 op. cit., who believes that ‘innovative creativity’ and responsibility skepticism are compatible.
- 34 *Kansas v. Hendricks*, 521 U.S. 346 (1997), may seem at first to contradict this point, but it does not. In *Hendricks*, the US Supreme Court held that individuals may be involuntarily committed, *not* necessarily imprisoned, if they are both mentally ill and present a danger to themselves or others. See also Shaw 2019b op. cit., pp. 105, 108.

- 35 See Kadish, Sanford H., Stephen J. Schulhofer, and Rachel E. Barkow, eds. 2022. *Criminal Law and Its Processes: Cases and Materials*, 11th ed. Frederick, MD: Aspen Publishing, pp. 189, 192.
- 36 Shaw, Elizabeth. 2019a. "The Implications of Free Will Skepticism for Establishing Criminal Liability." In *Free Will Skepticism in Law and Society*, edited by Elizabeth Shaw, Derk Pereboom, and Gregg D. Caruso, 192–206. Cambridge: Cambridge University Press, pp. 195–98. See also Shaw 2019b op. cit., pp. 108–10.
- 37 Prior criminal behavior is a risk factor for future crime, but by itself, it is not very predictive; quite simply, most people who have committed a crime do not recidivate. See Lave, Tamara Rice, and Aviva Orenstein. 2013. "Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes." *University of Cincinnati Law Review* 81: 795–837, p. 821; O'Neill, Michael Edmund, Linda Drazga Maxfield, and Miles D. Harer. 2004. "Past as Prologue: Reconciling Recidivism and Culpability." *Fordham Law Review* 73: 245–95, pp. 264–65.
- 38 See Latessa, Edward J., Shelley J. Johnson, and Deborah Koetzle, eds. 2020. *What Works (and Does not) in Reducing Recidivism*, 2nd ed. New York: Routledge, p. 21.
- 39 See Latessa et al. op. cit., pp. 19–21; cf. Caruso 2021c op. cit., pp. 176–7.
- 40 See Levy, Ken. 2011. "Dangerous Psychopaths: Criminally Responsible but Not Morally Responsible, Subject to Criminal Punishment and to Preventive Detention." *San Diego Law Review* 48: 1299–1395, pp. 1377–8; Chiesa op. cit., p. 1459, responds to this point by arguing that 'we ought to abstain from punishing people before they act based on predictions of dangerousness that are not grounded on the commission of prior wrongful acts'. But as I will argue below, Chiesa's assumption that prior wrongful acts are reliable indicators of future wrongful acts is highly questionable.
- 41 Caruso 2021c op. cit., pp. 163, 170, 189, 192, 211.
- 42 See Daly op. cit., pp. 1008–11; Kadish et al. 2022 op. cit., p. 284; K. Levy 2020a op. cit., pp. 57–58; Vilhauer 2009 op. cit., p. 134. Strict-liability crimes – that is, crimes that do not require intent, knowledge, recklessness, or negligence – still do require voluntary action, which itself requires *intent to assume the risk*, however small, of committing wrongdoing. See 21 *Am. Jur. 2d Criminal Law* § 127 ("To prove a violation of a strict liability statute, the state need only prove that the accused engaged in a voluntary act, or an omission to perform an act or duty which the accused was capable of performing. ... [T]he minimum requirement for a strict liability offense is the performance of a "voluntary act," which is an act performed consciously as a result of effort or determination") (notes omitted).
- 43 See K. Levy 2020a op. cit., p. 58; Lotke, Eric. 1993. "Reflection and the Limits of Liability: Necessary Blindness in the Legal System." *Ohio State Law Journal* 54: 1425–52, p. 1431.
- 44 See Kane, Robert. 2017. "Free Will, Bound and Unbound: Reflections on Shaun Nichols' Bound." *Philosophical Studies* 174: 2479–88, p. 2487.
- 45 Other elements like causation might also be necessary.
- 46 Shaw 2019a op. cit., pp. 198–200.
- 47 *Ibid.*, p. 198.
- 48 *Ibid.*, pp. 198–9.
- 49 See also Pereboom 2021 op. cit., pp. 42–43; Shaw 2018 op. cit., pp. 264–5.
- 50 See Caruso 2021c op. cit., pp. 180, 188, 197, 211; Pereboom 2021 op. cit., pp. 6, 36–42, 47–8, 52, 71, 79–81.
- 51 Shaw 2019a op. cit., pp. 198–200.
- 52 See Daly op. cit., pp. 1027–8.
- 53 See Nadelhoffer op. cit., p. 24; Shaw 2019b op. cit., pp. 97, 105–7. K. Levy 2014 op. cit., pp. 647–8, argues that proportionality may be motivated and justified by nonretributivist theories – specifically, consequentialism and expressivism. Similarly, Kelly (2009 op. cit., pp. 455–60) argues that proportionality can be preserved in a nonretributivist criminal justice system by calibrating punishment to the gravity of the crime, as measured by the nature and degree of the aggregate harms it causes.
- 54 See note 8 above and accompanying text. See also Greene and Cohen op. cit., p. 1783.
- 55 Greene and Cohen (op. cit., p. 1781) predict that questions about free will 'will lose their grip in an age when the mechanical nature of human decision-making is fully appreciated'.
- 56 Greene and Cohen (op. cit., p. 1778) state that '[t]he legitimacy of the law depends on its adequately reflecting the moral intuitions and commitments of society'.
- 57 See Shabo op. cit., p. 108: 'When we reflect on the relevant features of our emotional involvement with others, it seems doubtful that we could seriously try to adopt the Containment Policy on a large scale'. The Containment Policy, as Shabo (op. cit., p. 106) explicates it, involves 'striv[ing] as far as possible to take the reactive attitudes out of circulation'.

58 See Campbell 2011 op. cit., pp. 97–8; Caruso 2015 op. cit., pp. 2828–30; Focquaert *et al.* op. cit., pp. 236, 239; Greene and Cohen op. cit., p. 1784; K. Levy 2014 op. cit., pp. 651–2, 656–7; Nelkin, Dana Kay. 2011. *Making Sense of Freedom and Responsibility*. Oxford: Oxford University Press, p. 119; Pereboom 2014 op. cit., pp. 181, 183–4; Vargas op. cit., pp. 21–51; Waller 2015 op. cit., pp. 39–45, 109.