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Criminal Responsibility Reconsidered

Stephen J. Morse[1]

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Abstract
This essay review addresses the central responsibility thesis of David Brink's "Fair. Opportunity and Responsibility" and then considers two applications of the central. Thesis: legal insanity and diminished capacity.

Keywords Criminal responsibility · Fair opportunity · Control capacity · Cognitive capacity · Hardchoice · Diminished capacity · Legal insanity

Criminal responsibility is an apparently irresistible topic for any philosophically oriented criminal law theorist. David Brink has been writing about responsibility for almost two decades. He has now written a splendid book, *Fair Opportunity & Responsibility*[1] [FOR], that sums up and expands the themes that he has been so fruitfully pursuing. It is an excellent blend of theory and practical arguments for law reform. It is also stunningly polite, fair-minded and humane. This essay will primarily address his foundational arguments for responsibility. Then it will turn to two applications he discusses: legal insanity and partial responsibility. Space constrains prevent me from considering the many other applications FOR covers so well.

1 Fundamentals

FOR modestly does not enter the metaphysical thicket of incompatibilism versus compatibilism. It is an issue in dialectical stalemate, so it would be a fruitless distraction. Brink simply says that his theory is compatible with compatibilism, and, as many have argued, compatibilism is the metaphysical position most consistent with a broadly scientific worldview and with the normative responsibility doctrines, practices and institutions that employ responsibility concepts in criminal law. In any

[1] David O. Brink, Fair Opportunity & Responsibility. Oxford, Clarendon Press, 2021.

✉ Stephen J. Morse
smorse@law.upenn.edu

[1] Law School & Psychiatry Department, University of Pennsylvania, Philadelphia, USA

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case, as I have argued, free will in the strong, metaphysical sense is not a criterion for any criminal law doctrine and is not even foundational for criminal responsibility.[2] FOR also wisely sidesteps the thorny argument concerning the principle of alternative possibilities (PAP). Many theorists believe that they can give a reasonable account of responsibility that does not require PAP, but that seems too facile. Christian List has strongly argued that we do have the capacity to choose alternative possibilities even if something like determinism is true.[3] FOR sensibly avoids these disputes by maintaining metaphysical modesty. It relies on a commonsense view that agents have the capacities and opportunities to avoid wrongdoing.[4]

FOR adopts an "error theory" of responsibility that asks if the premises and arguments of the critics of a concept and practices are so strong that they should replace the extant concepts and practices that govern our lives and that have been supported by argument and experience. In lawyer's terms, the question is who bears the burden of persuasion. The concept and practices of responsibility have been a fundamental feature of western morality and justice for over two millennia. Anglo-American criminal law has been developing for about a millennium, but some recent hard incompatibilist critics, such as Gregg Caruso,[5] have said that supporters of the current cruel system of retributive punishment, whether pure or mixed, should have the burden of persuasion to justify such a harsh institution. FOR agrees with Scott Sehon[6] and me[7] that the contested arguments of the critics are not nearly persuasive enough to overcome the heavy burden that an error theory places on them. Moreover, the proposed, consequentially-based social control arrangements of the critics, such as the so-called public health quarantine model, present a dystopian regime that neither Brink nor I could endure. Brink and I agree completely on these issues.

We also agree on a view of responsibility that is neo-Strawsonian and depends on moderate reason-responsiveness understood as a property of whole agents and not as "submechanisms" of an agent. Strong reason-responsiveness would be too demanding and weak responsiveness would hold agents responsible who do not deserve blame and punishment. For Brink, we are agents, although sometimes our responsibility can be mitigated or excused. FOR refreshingly does not address the current craze for arguing about responsibility using the new post-genome cracking behavioral genetics or the new neuroscience. There is no discussion, thank goodness, of "genetic determinism" and "neuroscientific determinism," and no characterization of the person as a "gene machine" or "just a pack of neurons."

[2] Stephen J. Morse, "The (Non)Problem of Free Will in Forensic Psychiatry and Psychology," 25 Behav. Sci. & Law 203 (2007).

[3] Christian List, Why Free Will is Real. Cambridge, Harvard University Press, 2019.

[4] FOR, pp. 6, 85–90. Brink says that responsibility does not require metaphysical PAP.

[5] Gregg D. Caruso, Rejecting Retributivism: Free Will, Punishment and Criminal Justice. Cambridge, Cambridge University Press, 2021.

[6] Scott Sehon, Free Will and Action Explanation: A Non-Causal, Compatibilist Account. Oxford, Oxford University Press, 2016.

[7] Stephen J. Morse, "The Neuroscientific Non-Challenge to Meaning, Morals and Purpose," in G. Caruso & O. Flanagan, eds., Neuroexistentialism: Meaning, Morals, and Purpose in the Age of Neuroscience, Oxford: Oxford University Press, 2018, pp. 333–358.

Since H.L.A. Hart first introduced the concept of "fair opportunity,"[8] it has been a darling of many responsibility theorists, including Brink. For him, it is the overarching responsibility concept that is introduced early in the book.[9] Here we part ways. I do not understand what independent work fair opportunity does above and beyond the specific criteria for responsibility that are allegedly subsidiary to it, such as normative competence and situational control. FOR seems to claim that if the criteria are met, then the agent did have fair opportunity and consequently is responsible and deserves blame and punishment. It argues that an attractive feature of fair opportunity is that it specifies responsibility criteria that are independent of the reactive attitudes, but I find this unconvincing. The reactive attitudes and responsibility criteria are always in constant interaction with each other. If notions of responsibility change, so will the reactive attitudes. And if reactive attitudes shift, as they clearly may, it may signal that the former view of responsibility was too harsh or too tender. If announced responsibility criteria shift but reactive attitudes don't, it suggests that responsibility criteria aren't always independent. Whether reactive attitudes are the guide to when we think people are responsible is illuminated by Michael Moore's view that the emotions are a crucial guide to desert.[10] But what emotions we have are mediated by our normative conceptions. Again, I think the relationship is interactive.

If FOR's specific responsibility criteria are met, then the agent is responsible *tout court*. What more needs to be said? It is a bit like the process of psychiatric diagnosis. Once the underlying criteria for the disorder are met, the diagnosis inexorably follows and the diagnosis itself does no work.

1.1 Volitional (Control) Competence

The major disagreement I have with FOR is its specifications of the criteria for responsibility. We agree entirely that cognitive competence, however it is defined, is crucial. Virtually every legal system I know of excuses agents whose wrongdoing was in part produced by abnormally irrational practical reasoning. So far so good. But FOR, along with many others, insists that normative competence must include volitional competence. Before quoting FOR's brief definition, let me say a word about the terms, "volition" and "volitional," and about why there is allegedly a need for a control test. There is no conceptual consensus about the nature of a volition or whether a bodily movement is volitional. Differing conceptions abound. The most extensive attempt to provide a legal definition is by Michael Moore, who describes volition as an executory intention that proximately produces an action. By this definition, however, virtually all excused agents acted volitionally because they intentionally acted on their irrational thoughts or desires. I much prefer the term

[8] H.L.A. Hart (& John Gardner), Punishment and Responsibility: Essays in the Philosophy of Law (2d Ed.), p.152. Oxford: Oxford University Press, 2008.

[9] FOR, pp.4–7.

[10] Michael Moore, Placing Blame: A Theory of Criminal Law, pp. 233–246. Oxford: Clarendon Press, 1997.

"control" because it is more commonsensical, as in usages such as, "he can't control" himself. Except when quoting FOR directly, I shall use the term control.

The case for an independent control test depends on the observation that some people who are clearly in touch with reality, know the rules and are instrumentally rational appear to be unable to control themselves. The clearest examples are cognitively intact addicts and pedophiles who say that they would like to stop but can't help themselves. Unless one is a pure moralist about these conditions, one must admit that these agents have powerfully bad habits that are damnably hard to break and thus deserve sympathy. I recognize that by characterizing these conditions as habits rather than diseases, I have begged the question against the medical model, but there are profound problems with the disease model. Moreover, disease does no work when considering whether agents with these conditions should be held responsible for their actions.[11] Use of the disease model simply begs the question of responsibility because the *sine qua non* of these conditions is action, not mechanism, unlike the signs and symptoms of other diseases. There is much to be said for an independent control test, whether or not disease is implicated, and in principle I have no objection. At present, however, I have conceptual and practical objections. But I get ahead of myself, so let's turn to FOR's argument.

Here are FOR's definition and examples,

> It [normative competence] also requires volitional capacities to form intentions based on one's practical judgments about what one ought to do and to execute these intentions over time, despite distraction, temptation, and other forms of interference. Volitional impairment might take many forms. Some volitional impairment involves irresistible urges or paralyzing phobias that are insistent and resist attempts to override or control them. Severe depression or listlessness might make it difficult to summon focus, attention and resolve necessary to execute complex or difficult plans….Volitional competence requires the ability to manage psychic resistance and interference with acting on one's normative judgments so that the forms of resistance and interference don't derail those moral commitments."[12]

FOR says following Alfred Mele that one has control capacity if one can resist or circumvent a temptation using willpower to resist and foresight and planning to circumvent.

With respect, the definition is vague, uses terms without clear referents, such as "irresistible urges" (that begs the question), psychic resistance and willpower, or is easily collapsible into rationality defects, such as the depression example. Urges and phobias do not resist anything; people do. The tools for circumventing temptation are cognitive. But these are arguably quibbles. We get the point that in many circumstances the agent faces temptations he knows he should not satisfy, but he goes ahead because he subjectively feels that he simply cannot help himself. We talk this

[11] Herbert Fingarette & Ann Fingarette Hasse, Mental Disabilities and Criminal Responsibility. Berkeley, University of California Press, 1979.

[12] FOR, p. 59.

way all the time. It seems like commonsense. To use a word favored by FOR, control capacity is a "plausible" criterion for normative competence. Nonetheless, FOR recognizes that there is considerable skepticism about control tests. For example, in the wake of Hinckley, both the American Psychiatric Association and the American Bar Association recommended abolition of control tests for legal insanity, and neither organization has reversed itself. Only a minority of jurisdictions have a control test for legal insanity. The major quasi-criminal use for control tests is to incarcerate so-called "mentally abnormal sexually violent predators" indefinitely in a secure hospital *after* they have been convicted and punished for sexual crimes.[13] The legal landscape is not propitious.

FOR tries to rehabilitate control tests and focuses in on my objections to them. I re-iterate that I have no principled objection to a control criterion independent of a rationality/cognitive criterion. FOR fairly characterizes my view, but let me put it in my own words. First, we have no clear conceptual understanding of what a control problem is and we lack a folk psychological explanation for why a seemingly rational agent cannot control himself. There is no consensual definition of a control or self-regulation problem in any of the relevant disciplines. Second, we lack objective means to measure the difference between "does not" and "cannot." Laboratories around the world are trying to develop tests for lack of control capacity. One of the most famous is the ego-depletion model created by psychologist Roy Baumeister and colleagues. Roughly, the ego, the hypothesized self-control mechanism, is analogized to a muscle: if it is overused, it weakens. Thus persistent temptation of the sort that, say, addicts and pedophiles experience makes it extremely difficult to conquer (FOR's word) their urges. But, like all such models, it has severe critics and recent research has shown that the model lacks validity.[14] There is a chance that future research will achieve a conceptual operationalization. For now, however, such a technique is unavailable.

I also made two other arguments that have important practical implications. The first is purely anecdotal, I concede, based on my experience as a practicing forensic psychologist. Expert testimony about lack of control capacity tends to be far less scientifically based and rigorous and much more influenced by the antecedent values of the expert. There is already too much questionable expert testimony. Further opportunities for mischief should be avoided. More important, virtually all the cases for which a control test is allegedly needed are better understood as cases involving cognitive abnormalities. Failure to adopt a control test does not threaten the injustice of convicting many defendants who do not deserve blame and punishment.

FOR mostly correctly characterizes my two main objections: that there is no adequate account of irresistible urges and that we cannot genuinely distinguish between

[13] Kansas v. Hendricks (1997)(upholding the constitutionality of these statutory schemes); Kansas v. Crane (2002)(clarifying that lack of control must be proven as an independent criterion for these commitments). Justice Scalia's dissent in *Crane* is a masterful, amusing deconstruction of control tests.

[14] E.g., Veronika Job, Carol S. Dweck, and Gregory M. Walton, "Ego Depletion—Is It All in Your Head? Implicit Theories About Willpower Affect Self-Regulation," 21 *Psychological Science* 1686 (2010).

those urges that are irresistible and those that aren't.[15] My quibble is that my quarry is control incapacities, not allegedly irresistible urges. The latter arise in only a subset of cases involving alleged control incapacities. FOR also criticizes me for claiming that there are no irresistible urges.[16]

I have focused on irresistible urges in my writings because they appear to be the purest case in which a control problem exists that is genuinely independent of a cognitive problem. Addiction has been my prime example. I do not deny that all urges are resistible. I use the example of a drug addict threatened with death if he uses simply to show that the actions of those with strong urges are actions that respond to incentives and they are not mechanical signs, like a reflex. I am not a weak skeptic about the possibility of irresistible urges, as FOR contends; instead, I am a strong skeptic of implicit claims that urged actions are essentially mechanisms like reflexes or convulsive movement. If a genuinely independent control problem exists, then of course some people will meet the test and should be excused. And I agree that the test must include what we can expect of people in ordinary, expectable environments rather than in the presence of extreme incentives like a gun to one's head. But my fundamental objection is that at present we have no such test and that no injustice occurs as a result.

Consider FOR's primary examples other than irresistible urges for when a control test is necessary to do justice: paralyzing fears, depression and "systematic weakness" caused by frontal neocortical injuries or lesions. I agree that some people in these conditions should be excused, but the explanatory reason is a cognitive impairment. Paralyzing fears, phobias, are classic cases of irrationality. The agent is incapable of accurately assessing the danger to himself of the feared stimulus. Note, too, that if the agent is paralyzed, the only liability that would accrue is if the agent has a duty to act. I have given the example of a severe acrophobic agent who has "childproofed" the backyard so that the child can play safely while the parent can remain inside. On a given occasion, the child has an obvious seizure and needs immediate attention. If the parent becomes "paralyzed" by anxiety, I suppose that the parent would be excused from liability for a charge of child abuse, but how many cases like that are there? I have never seen one in the legal literature or in forensic practice. Here's another example. Suppose a defendant has a severely phobic fear of being touched or of physical pain. Imagine that he is threatened with a touch or slight pain if he does not commit a serious crime. He complies, but duress would not apply. If the phobia were severe enough, perhaps the defendant ought to be excused, but the ground would be the agent's abnormal rationality, not the lack of control capacity.

Severe depression can also compromise the sufferers' capacity to grasp reality, impairing their understanding of their own worth, the potential efficacy of their actions and the options available. People seldom commit serious crimes while severely depressed, and if they are less depressed, the rationality impairments are much diminished. If excuse or mitigation is warranted, cognitive impairment will

[15] FOR, p. 70.
[16] *Ibid.*

suffice. The same is true for severe mania. People do commit crimes in such states, but their rationality is extremely impaired.

Another example is Andrea Yates, the Texas mother who drowned her five young children seriatim in the bathtub. She believed that she was so corrupt that she was corrupting her children and that if she didn't kill them, they would be tortured in Hell by Satan for all eternity.[17] She was accused of capital murder, raised the insanity defense and was convicted. There was a national outcry because even the lead prosecution witness admitted that Ms. Yates had been psychotic at the time of the trial. One response was to claim that Texas, which did not have a control test for legal insanity, needed one to do justice. But that was not the problem. Texas had an extraordinarily narrow cognitive test for legal insanity. Of course Ms. Yates knew that killing her children violated the criminal law and she probably also knew that her neighbors would condemn this behavior. Completely overcome by her delusions, however, she thought she was doing the right thing. The material motivation for her actions was irrational. If she had a control problem, it was because she didn't know what she was doing in the most fundamental sense. The problem was not lack of a control test; it was lack of a sensible cognitive test sensibly applied. There was an error at trial and Ms. Yates needed to be re-tried. She was acquitted by reason of insanity at the second trial under the same cognitive test.

FOR's third example is "systemic weakness" caused by frontal neocortical injury or lesions. People with such abnormalities often do show persistent impairments of judgment that can be loosely characterized as impulsive. But impulsivity is a classic rationality problem characterized by failure to be able to attend to future consequences. Sir James Fitzjames Stephen, the 19th-century English judge, law reformer, political theorist and historian, was the first person to argue for a control test for legal insanity.[18] His explanation for lack of control was that some people with mental disorder could not attend to future consequences, the technique that helps most people to behave well. This is a classic rationality problem. Whether impulsivity and how much of it should be the basis for a cognitive excuse or mitigation are of course arguable, but the basis is cognitive. FOR's examples all demonstrate that a cognitive test would be sufficient to do justice.

I have claimed that there is no consensual definition of a control problem in any of the relevant literatures. FOR does not deny this claim. I have also argued that no one can give an adequate account of the nature of a control problem without furnishing a persuasive folk psychological account of *why* an agent has a control difficulty that makes it supremely difficult to conquer or circumvent a temptation. Without one, the conclusion that it exists is handwaving. Note that Fitzjames Stephen did attempt to provide a folk psychological explanation, but it was a cognitive

[17] Deborah Denno, "Who is Andrea Yates? A Short Story about Insanity," 10 Duke J. Gender L. & Pol. 1 (2003). FOR discusses this case in the context of legal insanity, but it is also a good illustration of the point I am making now.

[18] James Fitzjames Stephen, A History of the Criminal Law of England (3 Vols). 1883, vol. 2, p. 120, and more generally, pp. 153–186.

explanation. Michael Moore provides a folk psychological explanation,[19] but I have argued that Professor Moore's elegant, sophisticated account also reduces to a cognitive problem.[20] In my target article, "Against Control Tests for Criminal Responsibility,"[21] I challenged my commentators to provide the necessary folk psychological account. None even tried.

FOR offers no such account. Instead, it offers a set of behavioral observations no one would deny and claims that these observations furnish both an account of the nature of a control problem and a means to evaluate it. It also claims that there are tests that measure "volitional engagement,"[22] but the example given is inapt and the overall statement is false. There is no consensual empirical measure of control problems independent of cognitive impairments. Let us therefore return to the core behavioral observational argument. It is true that some people repetitively act in ways that harm them, say that they wish they could stop, and claim that subjectively they can't help themselves. Once again, people with addictions are a classic example. We look at such behavior and conclude that it must be the case that these people cannot control themselves. If they could, they would surely stop. I have lectured to many groups of addiction clinicians who make just this argument. When I ask how they know that these people cannot stop, they either use the commonsense inference just noted or they resort to question-begging assertions about signs and symptoms of disease. There is no doubt that such habits can be very strong, but without a folk psychological explanation of why addicts cannot stop, we do not know what the control problem is. Moreover, the difficulty with the lack of a control account is that it is belied by the facts.[23] Substance use is clearly affected by prices and other incentives. Most addicts quit without professional help. That addiction changes the brain, as do all experiences, neither proves that addiction is a disease nor that addicts can't help themselves.

FOR's defense of the ability to evaluate control problems is also deficient. There are no tests. We must us commonsense inferences about an ephemeral capacity. FOR replies that there can be difficulties in evaluating cognitive problems, too. This is of course true. For example, was John W. Hinkley, the attempted assassin of President Reagan, delusional or only grandiose and narcissistic? This is a difficult differential diagnostic problem. But this argument proves too much. Because there is difficulty

[19] Michael S. Moore, " The Neuroscience of Volitional Incapacity," in M. Pardo & D. Patterson, eds., Minds, Brains, and Law: The Conceptual Foundations of Law and Neuroscience. Oxford: Oxford University Press, 2013, p.179.

[20] Stephen J. Morse, "Moore on the Mind," in K.K. Ferzan & S.J. Morse, eds., Legal, Moral and Metaphysical Truths: The Philosophy of Michael S. Moore. Oxford: Oxford University Press, 2016, pp. 243–246.

[21] Stephen J. Morse, "Against Control Tests for Criminal Responsibility," in P. H. Robinson, S. Garvey & K. K. Ferzan, Criminal Law Conversations. Oxford: Oxford University Press, 2011, pp. 449–472.

[22] FOR, p. 72, but the example given is of a test on psychopathic subjects and the blanket statement is incorrect.

[23] Gene Heyman, Addiction: A Disorder of Choice. Cambridge, Harvard University Press, 2009 (complete review of the data bearing on this question). See also, BRIEF OF AMICI CURIAE OF 11 ADDICTION EXPERTS IN SUPPORT OF APPELLEE, Commonwealth v. Eldred, MA. Supreme Judicial Court, No. SJC-12279 (2017) (complete review of data with philosophical and public policy arguments).

in one context of responsibility evaluation, it does not follow that all contexts face similar difficulties. Cognitive evaluation is at the heart of our judgments of each other's rationality and, roughly speaking, we know what we are talking about. There are numerous valid tests that measure cognitive capacities. In contrast, judgments about control are much more amorphous and there are no tests that aren't question-begging.[24] H.L.A. Hart made the same observation and nothing has changed since he made it.[25]

I have offered folk psychological explanations for why we might excuse or mitigate the responsibility of addicts and others who allegedly lack control, but all of them reduce to a cognitive problem. For example, at times of peak temptation, addicts and others find it very hard to focus on the good reasons not to yield. At that moment, all that they can think about is satisfying the desire. This explanation typically will not excuse, however, because when the temptation is not strong, the agent has a duty to try to set in motion means to circumvent the desire. If they fail to do so, they will be responsible for the later harmful consequences even though they may not have been responsible at the time of doing wrong. This is a classic case of diachronous responsibility. I believe FOR largely would agree with this line of reasoning.[26] Of course, liability would then depend on the defendant's mens rea concerning the future consequences he causes when incapacitated. Alternatively, many addicts may not be able to conceive of a life without substances or fail to understand that there are viable alternatives. Many addicts stop when they finally discover a good enough reason for doing so. These are cognitive problems that can explain persistent maladaptive behaviors that seem to require a control test. I cannot solve this problem here, but there is a more than plausible cognitive explanation for excuse or mitigation.

Until we can conceptualize and measure genuinely independent control capacity, the law should not adopt such a test. When we can, the law should because it would be unfair to blame and punish cognitively unimpaired agents who find it supremely difficult to control themselves. Little or no injustice will occur until that happens, and the practice of forensic expertise will be improved.

1.2 Situational Control

FOR claims that situational control should be another criterion for responsibility.[27] The obvious example is duress, by which is meant coercion by threat. If coercion is literal, e.g. someone moving my arm, then I will be exonerated because I haven't acted at all, thus negating the prima facie act element. FOR properly shows that the

[24] One forensic expert, who I will not embarrass by quoting, published a test for self-control problems that included as a central "diagnostic" item whether in the clinician's judgment the subject could control himself. The study concluded that if a clinician said self-control was lacking, it was.

[25] Hart, note 8 *supra*, pp. 31–33.

[26] FOR, p.108 (discussing an incapacitated drunk driver's responsibility based on recklessness concerning the consequences at the time of becoming voluntarily incapacitated).

[27] FOR, pp. 74–75.

defendant who meets the criteria for duress is a responsible agent who is normally reason-responsive, but who is not responsible for the wrongdoing. FOR explains the ground for the excuse because the threat denies "agents the fair opportunity to act on their own deliberations free from wrongful interference by others." It seems strange to have the higher level concept in FOR's responsibility hierarchy, fair opportunity, be a criterion for the lower level concept, situational control, but one gets the point. My objection is that the explanation is not the most perspicuous for why we excuse agents who meet the criteria for duress. Rather than lack of fair opportunity, I believe it is much more straightforward to say that the defendant faced such a hard, "do-it-or-else" choice through no fault of his own that we cannot fairly expect the agent to resist. This is a better folk psychological expression of why we want to excuse.

FOR seems to accept that duress is an excuse and not a justification, but this is controversial. Using the Model Penal Code's more forgiving formulation than the common law's, a person is excused if a person of "reasonable firmness" would have yielded under the circumstances. But if a reasonable person would behave as the defendant did, why is it wrong but excusable. Shouldn't it be a justification rather than an excuse? FOR has an extended discussion of both the excuse and justification aspects of the defense.[28] The analysis is complicated and non-traditional. For example, cases of necessity in which the balance of evils is positive are described as often involving a hard choice. But if one alternative is the right thing to do, is the agent really acting under threat? Although there is much to be said about FOR's treatment of this issue, discussing it in detail would take us too far afield.

In sum, my basic point is simply that a hard choice account is a better explanation than situational control.

1.3 Final Thoughts on Fundamentals

Although David Brink and I agree on many fundamentals, as should be clear, my criteria for responsibility are streamlined compared to those FOR proposes. Fair opportunity and control competence drop out and "hard choice" substitutes for situational control. I believe the virtues of my streamlined version are that fewer empirically and normatively contested assumptions are made, adherence to folk psychology is increased, and, most importantly, no injustice will be done.

I will conclude this section by noting three omissions that I think deserved discussion but were not covered. The first is the act doctrine that is part of the prima facie case for all crimes. The cases of theoretical and practical interest are those I term "actish"; cases in which the defendant appears to be acting intentionally, responsive to the environment and goal directed, but in which the agent's consciousness is partial/divided/dissociated. Examples are sleepwalking, behavior during a seizure, behavior following an injury or a toxic insult. My favorite is a Canadian case of a defendant on good relations with his in-laws who drove

[28] FOR, pp. 75, 199n.18.

a complicated route to their house one evening, went to their kitchen drawers to obtain knives, and went upstairs to attack the sleeping in-laws, one of whom was killed and the other injured. This is an extremely complicated behavioral performance but there was undisputed expert testimony that the defendant was sleepwalking throughout the entire episode. There is unanimous agreement that the defendant was not responsible, but is the ground that he didn't act at all or that he did act but should be excused because his rational capacities were disabled by divided consciousness. This question has divided commentators. Issues such as who bears the burden of persuasion and post-acquittal consequences depend on the answer to this very thorny, interesting question in the philosophy of mind and action.

A second omitted issue is the importance of results, and thus causation, to responsibility. In particular, do results contribute to desert or other criminal law concerns, and if so, how? This issue very much splits the philosophically oriented criminal law theorists.

Finally, should agents who make reasonable mistakes about justifying circumstances be justified or excused? This, too, is a philosophically rich question with normative and practical implications. Here's the classic example. A careful, attentive agent reasonably believes that he is in imminent danger of a deadly attack and kills the feared attacker. The attacker's weapon, which looked completely real, was a toy. Excuse or justification? Did the defendant do the wrong thing because the defensive behavior was unnecessary? Or did he do the right thing because the defendant exercised all the due care we can expect of an agent under the circumstances and he should probably act the same way if confronted again with similar circumstances. The unnecessary harm is undoubted, but is the defendant's act wrong? Notice, too, that on a justification theory, if the victim recognized that he was in deadly danger, then both parties might be justified. Is this a problem for the justification account? Now consider a variation. Gunslinger One spies his worst enemy, Gunslinger Two, on the street and decides to kill him. Unaware that One is about to imminently kill him, Two shoots One dead. If Two had known the facts, he would clearly have been justified in killing One, but he didn't know he was in danger. He is objectively justified, but subjectively culpable. How should this case be handled?

I know David Brink would have had illuminating, interesting and thought-provoking ideas about all three above issues that would have fit into FOR perfectly. Please consider these remarks expressions of regret and not complaints.

2 Doctrinal Specifics

One of FOR's many virtues is that it does much more than deep criminal law theory. It applies its theory to an astonishingly broad array of contexts that have practical doctrinal and law reform implications. There are far too many of these to address in this brief essay review, so I shall exercise my writer's prerogative and pick those that interest me the most and that I have written about: legal insanity, and diminished capacity.

2.1 Legal Insanity

FOR begins its discussion of legal insanity by showing that the fair opportunity approach supports the Model Penal Code (MPC) test. It does so by describing the familiar, alleged advantages of the MPC to the *M'Naghten* test. The three differences are that the former includes a control test, uses lack of substantial capacity rather than all or none language, and uses "appreciate" rather than "know" in the cognitive prong. With all respect, the former is not an improvement for the reasons given in my discussion of control tests and the latter two advantages are not advantages in practice. The specific language used in a test doesn't matter, the more restrictive language tests do not limit the scope of expert testimony, and, as all lawyers know, words like "know" and "appreciate" can be given narrow or broad interpretations. FOR correctly points out that legal insanity is bivalent although responsibility is scalar and thus a threshold for legal insanity must be set. Because it is worse to over-punish, we should not make the threshold for sanity too low. I agree, but the problem can't be solved by the substitution of one criterial word for another. Juries will inevitably have broad discretion in applying any normative standard.

FOR also argues for a fully functional test of normative incompetence unmoored from the requirement that normative incompetence be the result of mental disorder or defect (intellectual disability).[29] In current tests for legal insanity, the presence of a disease or defect is a necessary but not sufficient criterion for legal insanity. FOR claims that if a defendant is normatively incompetent, e.g., does not know right from wrong, for any sufficient, non-culpable reason, the defendant should be excused. Extreme stress or sleep deprivation, for example, might be causes that don't quality as diseases but that should support a defense of normative incompetence. I have repeatedly made the same argument and am thrilled that David Brink agrees. The only reasonable argument that I have encountered for maintaining the mental disorder requirement is that it provides an objective indicator that the functional impairment is real and non-culpable. This is unpersuasive. If there is evidence of other non-culpable causes, it would be unfair to blame and punish the normatively impaired defendant and there is no reason to believe that such evidence could not be obtained.

FOR uses the very interesting case of Patricia Hearst to test its proposed purely functional test. Readers may recall that Ms. Hearst was the 19-year-old heiress who was kidnapped by a revolutionary group, the Symbionese Liberation Army (SLA), was allegedly coercively persuaded to adopt the SLA's program (in more colloquial terms, she was "brainwashed"), and then engaged with the SLA in a series of felonies including bank robbery. Although the precise facts are in dispute, let us assume that she would not have adopted the SLA program but for the coercive persuasion and that she was not under duress during the felonies, but instead was acting in

[29] In comparison, the Norwegian law of criminal insanity requires only the presence of a severely abnormal state of mind at the time of the crime to warrant a finding of legal insanity. No causal relation between the abnormal mental state and the practical reasoning that caused the crime is required. It is a purely medical test.

accord with her newly adopted beliefs and values. FOR claims that there is a "plausible case to be made that her wrongdoing was the result of temporary non-culpable cognitive incompetence."[30] As a result of her forced conversion, she may have mistakenly thought her conduct was justified and thus her ability to know right from wrong was substantially impaired.

If one accepts this conclusion, then a purely functional test would be supported, but I reject that Hearst was cognitively impaired. How is she different from any other revolutionary terrorist who may have come to their beliefs without coercion? None psychotically believes that he is justified, unlike Ms. Yates. The only difference is the causal story about how the revolutionary beliefs were formed. Should that make a difference? I think not, and neither should FOR with its ahistorical approach to responsibility. One could argue that most people have counter-arguments and information available to them when forming their beliefs over time whereas Hearst was completely isolated when she was being coercively persuaded. Yet she had her entire history to draw on to resist her indoctrination. But again, why does it matter? There are cases of uncoerced political "conversions" after one has heard a charismatic speaker or becomes aware of horrible misdeeds by those in power. No one would dream of acquitting these revolutionaries. Hearst was a cognitively unimpaired agent when she committed her crimes. She should have been convicted and was, although in the event, President Clinton pardoned her but not the other members of the SLA. I agree with FOR's proposal of a purely functional test, but Hearst is not a convincing exemplar and my disagreement does show the flexibility of argumentation about such a test.

2.2 Diminished Capacity

I put the heading in scare quotes because "diminished capacity" confusingly covers two distinct mitigating claims. The first, which I term the mens rea variant, claims that the defendant's mental abnormality negated the mens rea element required for the prima facie case of the crime charged. The second, which I term the partial responsibility variant, claims that even if the defendant's behavior satisfies the elements of the prima facie case, the defendant's mental abnormality rendered him less than fully responsible. The former is simply a denial of the prima facie case and needs no new doctrinal label. The latter is a partial affirmative defense. In Anglo-American law, there is no generic mitigation for partial responsibility. The rationale for it is instantiated in doctrines, such a provocation/passion in the common law and extreme mental or emotional disturbance in the MPC, but these apply only to reduce murder to the lesser homicide offense of manslaughter. The most common application of partial responsibility is at sentencing, but this is discretionary, and even when exercised, it can vary from judge to judge in similar cases, which is unfairly unequal treatment.

[30] FOR, p. 267.

David Brink's FOR discussion is entirely of the partial responsibility approach and I end this essay on a high note of almost perfect agreement with the analysis. The basic point is that predominant retributivism requires some conception of partial responsibility and excuse because responsibility is scalar and not bivalent and because disproportionate over-punishment is unfair. Ideally, blame and punishment should be precisely proportionate to the defendant's degree of responsibility, what FOR terms "analog responsibility," ranging from completely non-responsible to completely responsible. The problem for both of us is that with the few exceptions listed above, responsibility is bivalent, people are either fully guilty or not, and the responsibility threshold is rather low. Consequently, many defendants with significant responsibility impairments will be substantially over-blamed and over-punished.

The difficulty is how to implement proportionate punishment based on partial responsibility. Judges and juries are fallible creatures who face what FOR terms "granular" and "normative" difficulties in evaluating partial responsibility. In the former case, we lack the ability to detect small differences; in the latter, we are unsure how to respond to small differences.[31] As a result, the analog approach is practically unworkable. FOR argues, as do I, that there should at least be what it terms a "trivalent" culpability assessment in which there would be one intermediate category of partial responsibility that would lead to lesser blame and punishment. FOR also considers the possibility of tetravalent and pentavalent culpability assessments. The risk of over-punishment decreases with the increase in the number of such intermediate categories because the fit between the degree of responsibility and the punishment will be tighter. Pentavalence was tried in the Netherlands and did not work, as FOR knows, so tetravalence seems to be the best hope for more perfect justice. In theory I think FOR is correct, but I also believe we lack the resources fairly to determine two intermediate categories. In any case, I doubt that any United States jurisdiction or English law would accept such complexity.

Assuming that some form of generic partial responsibility is practically workable, as I do, the questions are how to implement it procedurally and what should be the punishment consequences. FOR suggests that criminal proceedings should have three components: the prosecution's proof of wrongdoing, the defense's proof of responsibility/excuses, and sentencing. In a sense the current regime in which the prosecution puts on its case and then the defense puts on its case already achieves this.[32] I believe that partial responsibility should be a mitigating defense that can be raised at trial and that the jury should decide. It is a question fundamentally about responsibility; sentencing follows from it. I am agnostic about which party should bear the burden of persuasion. I am not wedded to any particular sentencing scheme, but I have a preference for a legislatively determined reduction that balances diminished responsibility and public safety. The "punishment discount" should be smaller for more serious crimes and larger for lesser offenses. But I would be satisfied with

[31] *Ibid*., p. 389.

[32] FOR seems to believe that the burden of persuasion on affirmative defenses must be placed on the accused, but this is a matter of state law. Jurisdictions can place the burden for affirmative defenses on either the prosecution or the defense.

any sensible approach to sentencing. Any such scheme would be consistent with the spirit of FOR's proposals.

3 Conclusion

Every criminal law scholar should read FOR.