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IMMATURITY AND IRRESPONSIBILITY

STEPHEN J. MORSE*

I. INTRODUCTION

Our image of teenage offenders vacillates. We see them as wayward youths, as kids gone wrong, but who are nonetheless not "bad." This image is of the teen as a victim. They are misguided, immature, insufficiently socialized, but not evil. What they need is a therapeutic response that will permit natural maturation and socialization to set them on the right path. In contrast, we also see teen offenders as hostile predators, the products of unfortunate environments and perhaps heredity, who have little or no human sympathy or regard. This image is of the teen as a full-fledged criminal. Because they are evil and fully responsible, they must be punished to satisfy just deserts and to protect the public. At the extreme, they deserve to be executed. In the anecdotal reports that fill the media and that often drive public policy, it is not hard to find either image.

The image of the teen offender as a criminal seems currently to predominate. Mid- to late-adolescence is a high-risk age for offending, especially violent offending,¹ and the increased availability and common use of weapons² makes teen violence particularly frightening. Although violent crime rates,

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¹ DELBERT ELLIOTT, *YOUTH VIOLENCE: AN OVERVIEW* 4 (1994).

² *Id.* at 10-11.

including rates of violent juvenile crime,³ are down in most major cities of the United States, the public still fears teen violence. Pictures of youths throwing a small boy to his death from a rooftop and of gang slaughter fill our minds. We are warned that a cohort of "superpredators" will soon emerge as the inevitable result of demographic variables.⁴

The legislative and judicial reaction to public concern about serious and violent teen offenders has been substantial. Since 1992, forty-seven states and the District of Columbia have made changes in their laws governing the response to serious and violent juvenile offenders.⁵ The rate at which the juvenile offender has been removed from the juvenile system and prosecuted in the criminal justice system has skyrocketed. Additionally, the traditional confidentiality of juvenile court proceedings and records is yielding to greater openness.

Critics of these changes believe that they are unfair to juveniles, because juveniles are not fully responsible for their offenses, and that they will not protect public safety, because a criminal justice response will simply harden the antisocial tendencies already exhibited. They wish the juvenile justice system would adopt more flexible dispositional options that would give kids a genuine chance to grow up straight, while simultaneously exerting enough control over them to protect the public.

The common law treated people fourteen-years-old as fully responsible.⁶ Many think the common law was wise; many disagree. This paper addresses the claim that adolescent offenders are not fully responsible moral and legal agents. I make the assumption, which is almost universally shared in Anglo-American criminal jurisprudence, that desert based on moral fault is at least a necessary pre-condition for just punishment. If youths

³ OFFICE OF JUVENILE JUSTICE PROGRAMS, *JUVENILE JUSTICE REFORM INITIATIVES IN THE STATES 1994-1996*, 6 (1997); MELISSA SICKMUND ET AL., *JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 16-19* (1997) (violent victimizations by juveniles declined more than those by adults; one in seven juvenile arrests was for a crime of violence in 1995; after consistent increase from 1985-94, juvenile violent arrest rate declined in 1995).

⁴ See WILLIAM J. BENNETT ET AL., *BODY COUNT* 26-29 (1996).

⁵ PATRICIA TORBET ET AL., *STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME* 59 (1996); see also SIMON I. SINGER, *RECRIMINALIZING DELINQUENCY: VIOLENT JUVENILE CRIMES AND JUVENILE JUSTICE REFORM* (1996) (analysis of New York's attempt to treat violent juvenile offenders as adult criminals).

⁶ WAYNE LAFAVE & AUSTIN SCOTT, JR., *CRIMINAL LAW* 399 (2d ed. 1986).

are to be adjudicated and punished like adults, it is therefore crucial to address the desert of youthful offenders. The focus on desert is not intended to gainsay the importance of other juvenile justice goals, such as prevention or reform. Depending on one's theory of punishment, such goals may be of great importance. But these other goals will be addressed only as they relate to the article's central question—the moral and ultimately legal responsibility of adolescent offenders.

We cannot think sensibly about this issue unless we first have in place a robust theory of responsibility generally. Only then will we be in a position to consider the relation of what we know about juveniles developmentally and psychosocially to ascriptions of responsibility to juveniles. Indeed, the primary goal of this paper is to provide a theory of responsibility with which juvenile responsibility can be properly addressed. Part II therefore offers a theory of responsibility that is rooted in our current moral theories and actual practices of blaming and punishing. Part III explores whether juveniles meet the test of responsibility Part II provides. In particular, to determine which juveniles deserve mitigation, it reviews psychosocial and developmental variables that differentiate juveniles from adults. Part IV addresses the dispositional consequences that Parts II and III imply. I conclude that neither common sense nor behavioral science data resolve the issue of juvenile responsibility. How we should respond to juvenile offenders is ultimately a moral judgment that must be derived from our best normative account of responsibility.

II. THINKING ABOUT RESPONSIBILITY

This Part begins by explaining the law's concept of the person and how the legal conceptions of responsibility and excusing flow from the account of personhood. It then offers an account of what we are doing when we hold people responsible. This Part then offers a broader view of the criteria of responsibility. Finally, it addresses the many confusions about the premises of excusing that have hindered understanding.

A. THE LAW'S CONCEPT OF THE PERSON AND RESPONSIBILITY

Intentional human conduct, that is, action, unlike other phenomena, can be explained by physical causes and by reasons for action. Although physical causes explain the movements of

galaxies and planets, molecules, non-human organisms, and all the other moving parts of the physical universe, only human action can also be explained by reasons. It makes no sense to ask a bull that gores a matador, "Why did you do that?," but this question makes sense and is vitally important when it is addressed to a person who sticks a knife into the chest of another human being. It makes a great difference to us if the knife-wielder is a surgeon who is cutting with the patient's consent or a person who is enraged at the victim and intends to kill him.

When one asks about human action, "Why did she do that?," two distinct types of answers may therefore be given. The reason-giving explanation accounts for human behavior as a product of intentions that arise from the desires and beliefs of the agent. The second type of explanation treats human behavior as simply one more bit of the phenomena of the universe, subject to the same natural, physical laws that explain all phenomena. Suppose, for example, we wish to explain why Molly became a criminologist. The reason-giving explanation might be that she wishes to emulate her admired mother, a prominent criminologist, and Molly believes that the best way to do so is also to become a criminologist. If we want to account for why Molly chose one graduate school rather than another, a perfectly satisfactory explanation under the circumstances would be that Molly knew that the chosen school had the most estimable criminology department. Philosophers and cognitive scientists refer to this mode of reason-giving explanation as "folk psychology."⁷

The mechanistic type of explanation would approach these questions quite differently. For example, those who believe that mind can ultimately be reduced to the biophysical workings of the brain and nervous system—the eliminative materialists—also believe that Molly's "decision" is solely the law-governed product of biophysical causes. Her desires, beliefs, intentions, and choices are therefore simply epiphenomenal, rather than genuine causes of her behavior. According to this mode of explanation, Molly's "choices" to go to graduate school and to become a criminologist and all other human behavior are indistinguish-

⁷ See generally John D. Greenwood, *Introduction: Folk Psychology and Scientific Psychology*, in *THE FUTURE OF FOLK PSYCHOLOGY: INTENTIONALITY AND COGNITIVE SCIENCE* 1, 1-21 (John D. Greenwood ed., 1991) (providing a descriptive, conceptual and historical account of folk psychology).

able from any other phenomena in the universe, including the movements of molecules and bacteria.

The social sciences, including psychology and psychiatry, are uncomfortably wedged between the reason-giving and the mechanistic accounts of human behavior. Sometimes they treat behavior "objectively," treating it as primarily mechanistic or physical; other times, social science treats behavior "subjectively," as a text to be interpreted. Yet other times, social science engages in an uneasy amalgam of the two. What is always clear, however, is that the domain of the social sciences is human action and not simply the movements of bodies in space. One can attempt to assimilate folk psychology's reason-giving to mechanistic explanation by claiming that desires, beliefs and intentions are genuine causes, and not simply rationalizations of behavior. Indeed, folk psychology proceeds on the assumption that reasons for action are genuinely causal. But the assimilationist position is philosophically controversial,⁸ a controversy that will not be solved until the mind-body problem is "solved"—an event unlikely to occur in the foreseeable future.

Law, unlike mechanistic explanation or the conflicted stance of the social sciences, views human action as almost entirely reason-governed. The law's concept of a person is a practical reasoning, rule-following being, most of whose legally relevant movements must be understood in terms of beliefs, desires and intentions. As a system of rules to guide and govern human interaction,⁹ the law presupposes that people use legal rules as premises in the practical syllogisms that guide much human action. No "instinct" governs how fast a person drives on the open highway. But among the various explanatory variables, the posted speed limit and the belief in the probability of paying the consequences for exceeding it surely play a large role in the driver's choice of speed. For the law, then, a person is a practical reasoner. The legal view of the person is not that all people behave consistently rationally according to some pre-ordained, normative notion of rationality. It is simply that people are creatures who act for and consistently with their reasons for action and who are generally capable of minimal rationality

⁸ See ALEXANDER ROSENBERG, *PHILOSOPHY OF SOCIAL SCIENCE* 46-49 (1988).

⁹ The legislatures and courts do not decide what rules infrahuman species must follow.

according to mostly conventional, socially constructed standards.¹⁰

The law's concept of responsibility follows logically from its conception of the person and the nature of law itself. As a system of rules that guides and governs human interaction, law tells citizens what they may and may not do, what they must or must not do, and what they are entitled to. Unless human beings were creatures who could understand and follow the rules of their society, the law would be powerless to affect human action. Rule-followers must be creatures who are generally capable of properly using the rules as premises in practical reasoning. It follows that a legally responsible agent is a person who is so generally capable, according to some contingent, normative notion both of rationality itself and of how much capability is required. For example, legal responsibility might require the capability of understanding the reason for an applicable rule, as well as the rule's narrow behavior command. These are matters of moral, political and, ultimately, legal judgment, about which reasonable people can and do differ. I shall offer below an interpretation of criminal law's rationality requirement, but there is no uncontroversial definition of rationality or of what kind and how much is required for responsibility. These are normative issues and, whatever the outcome might be within a polity and its legal system, the debate is about human action—intentional behavior guided by reasons.

Criminal law criteria exemplify the foregoing analysis. Most substantive criminal laws prohibit harmful conduct. Effective criminal law requires that citizens must understand what conduct is prohibited, the nature of their conduct, and the consequences for doing what the law prohibits. Homicide laws, for example, require that citizens understand that unjustifiably killing other human beings is prohibited, what counts as killing conduct, and that the state will inflict pain if the rule is violated. A person incapable of understanding the rule or the nature of her own conduct, including the context in which it is embedded, could not properly use the rule to guide her conduct. For example, a person who delusionally believed that she was about

¹⁰ See MICHAEL S. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 100-11 (1984); see also MICHAEL S. MOORE, *PLACING BLAME* 60-64 (1997). Moore would disagree with social constructivist accounts of the content of rationality.

to be killed by another person and kills the other in the mistaken belief that she must do so to save her own life, does not rationally understand what she is doing. She, of course, knows that she is killing a human being and does so intentionally. And, although in the abstract she probably knows and endorses the moral and legal prohibition against unjustified killing, in this case the rule against unjustifiable homicide will be ineffective because she delusionally believes that her action is justifiable.

The general incapacity to follow the rule properly is what distinguishes the delusional agent from people who are simply mistaken but who have the general ability to follow the rule. In this context, we believe that the delusional person's failure to understand is not her fault because she lacked the general capacity to understand. In contrast, the person capable of properly following the rule is at fault if she does not do so.

B. HOLDING RESPONSIBLE

My explanation and justification for holding people responsible and blaming them is an internal account, an interpretation of our practices as I find them. My task is to determine if our practices are internally coherent and consistent with moral theories that we accept. Although I acknowledge that responsibility and blame are social constructs, my account is not purely pragmatic. I am concerned with when it is fair to hold people responsible, to blame them, and to express our blame through sanctioning responses. When it is fair individually and socially to respond in these ways will depend on facts about the agent and the situation and on moral theory. Thus, assuming that a coherent and consistent moral account of our practices is possible, assertions about when it will be fair to hold people responsible will be propositional and have truth value. For example, we believe that it is unfair to hold young children genuinely and fully morally responsible for their misdeeds. Whether a harmdoer is of a certain age and possesses juvenile attributes are determinate facts and a rich, morally defensible theory about fairness compels excusing young children. In another words, I believe that, viewed internally, we are not just expressing an emotional preference when we exempt young children from responsibility.

The internalist account I am defending asserts that to hold someone morally responsible and to blame that person is, first, to be susceptible to a range of appropriate emotions, such as resentment, indignation or gratitude, just in case that agent breaches or complies with a moral obligation we accept, and second, to express those emotions through appropriate negative or positive practices, such as blame or praise.¹¹ Moral responsibility criteria and practices are not simply behavioral dispositions to express positive and negative reinforcers. They reflect moral propositional attitudes towards the agent's conduct. So, for example, an appropriate responsive expression of blaming language is rarely intended simply as a negative reinforcer, emitted solely to decrease the probability of a future breach of this or a similar moral expectation. It also essentially conveys the judge's attitude that the agent has done wrong. Because holding an agent morally responsible expresses a morally propositional attitude, it is not a species of non-cognitive and purely emotional response. Moral responsibility practices are not solely propositional, however; they are not just descriptions of wrongdoing, of the breach of expectations. Again, holding people morally responsible involves the susceptibility to a set of reactive emotions that are inherently linked to the practices that express those emotions. It is one thing to say that behavior breached a moral expectation. This is an example of objective description. It is another to hold the agent morally responsible for that behavior, which involves a complex of emotions and their expression that have the force of a judgment. This, I believe, is what we are doing when we hold people morally responsible.

The reactive account theorizes that we hold people morally responsible if they breach a moral expectation we accept. A moral expectation that we accept is one that can be normatively defended by reason. Most of the core prohibitions and obligations of the criminal law, including its justifications, command broad normative assent. We might argue about various qualifications, some of which can be very controversial, but the basic notions would be difficult to contest. Most core criminal law prohibitions do not seem unfairly to infringe on freedom or to

¹¹ The following defense draws directly and liberally from Jay Wallace's Strawsonian account. See R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* 51-83 (1994).

require supererogatory virtue. They are fair expectations, and we understand the need to give normative reasons if we believe that they are not fair.

Assuming that some reasonable measure of agreement can be reached about the content of the criminal law's prohibitions, the question is when is it just or fair to feel and to express a reactive emotion in response to a breach of the expectation a prohibition reflects? The expressions of the negative reactive emotions, which can in theory range from the mildest expressions of disapproval to the most punitive sanctions, are all likely to impose pain on the recipient, and if morality has any requirements, it at a minimum necessitates having good reason to harm another human being. Morality and our law are firmly committed to a theory of desert that holds that it is unfair to hold responsible and sanction a person who is not at fault.¹² We are committed to this principle at the deepest level. Accordingly, it would be unjust to express a negative moral reactive attitude either to an agent who did not breach an obligation we accept or to an agent who lacked the capacity when she breached to understand and be guided by good, normative reason. To be at fault, an agent must actually breach an expectation and must have general normative competence and the general ability at the time to be guided by it. Moral and legal responsibility and blaming practices track this account.

For example, children lack normative competence because they are generally unable to grasp the good reasons not to breach an expectation. The agent acting under duress and some people with mental disorders may have general normative competence, but they may be unable to be guided by it in specific circumstances because, respectively, the choice they face is too hard or because they are unable fully to comprehend what they are doing. It would be unfair to hold responsible and blame such people because they do not deserve it.

The reactive account includes the potential for negative reaction to the breach of a moral expectation we accept. We should therefore consider the potential cruelty of negative moral reactive expression, which always threatens to impose pain. It may appear that the infliction of pain based on retrospective evaluation is necessarily cruel, but this does not follow.

¹² See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 35-40 (1968).

One needs some theory of cruelty to guide assessment. As so often is the case, there is no uncontroversial definition, but let me use the gratuitous infliction of psychological or physical pain as the touchstone. The infliction of pain for no good, generalizable reason is cruel. On the reactive account, the imposition of negative expressions of the reactive emotions is not gratuitous: It essentially expresses the moral sentiments and gives them weight. It is possible, of course, that hatred and similar emotions can motivate the judge to impose greater pain than is appropriate to the agent's breach. But the possibility of the cruel abuse of a practice does not mean that the practice is necessarily or essentially cruel. A wrongdoer has a legitimate moral expectation that her judge will inflict no more pain than is appropriate under the circumstances, according to some theory of proportionality that can be normatively defended.

C. THE CRITERIA FOR RESPONSIBILITY AND EXCUSE

The law and morality alike exculpate either because an agent has not violated a moral prohibition or obligation we accept, or because the agent has violated the norm, but is generally or situationally normatively incompetent. In criminal law terms, the former case includes all doctrines that deny *prima facie* liability, such as the absence of a voluntary act or the absence of appropriate *mens rea* resulting from ignorance or mistake; the latter includes the excusing affirmative defenses, such as legal insanity, duress and infancy. In this subsection I focus on the latter. I argue that the law and morality include two generic excusing conditions: non-culpable irrationality (or normative incompetence) and non-culpable hard choice. An agent who is non-culpably irrational or faces a sufficiently hard choice when she breaches a moral obligation is not at fault and does not deserve to be blamed and punished.

Rationality or normative competence is the most general, important prerequisite to being morally responsible.¹³ More specifically, it means that the agent has the general capacity to

¹³ I state this criterion in alternative terms—rationality or normative competence—because the concept of rationality is associated with so much historical, conceptual and philosophical disagreement that the term distracts many people. As I explain *infra*, I mean nothing exalted or essential by the term. It is simply a common sense term used to cover a congeries of human capacities without which morality and human flourishing in general would be difficult. If the term “rationality” seems too broad, I am perfectly comfortable with the term “normative competence” alone.

understand and to be guided by the reasons that support a moral prohibition that we accept. The agent can be incapable of rationality in two different respects: either the agent is unable rationally to comprehend the facts that bear on the morality of his action or is unable rationally to comprehend the applicable moral or legal code. For example, the delusional self-defender is unable rationally to comprehend the most morally relevant fact bearing on her culpability—whether her life is genuinely threatened. For another example, a defendant who delusionally believed that she was God's agent, that God's law superseded earthly law, and that God wanted her to kill for good reason, would not be able rationally to comprehend the applicable moral and legal code. Although distinguishable, these two forms of irrationality could be collapsed into the notion that the agent is unable rationally to understand what she was doing when she acted.¹⁴ An agent unable rationally to understand morally what she is doing cannot grasp and be guided by the good reason not to breach a moral and legal expectation we accept.

What is the content of rationality that responsibility requires? As part of the normative, socially constructed practice of blaming, there cannot be a self-defining answer. A normative, moral and political judgment concerning the content and degree of rationality is necessary. Nonetheless, some guide is possible. I do not have an exalted or complicated notion of rationality, but most generally it includes the ability, in Susan Wolf's words, "to be sensitive and responsive to relevant changes in one's situation and environment—that is, to be flexible."¹⁵ It is the ability to perceive accurately, to get the facts right, and to reason instrumentally, including weighing the facts appropriately and according to a minimally coherent preference-ordering. Put yet another way, it is the ability to act for good reasons and it is always a good reason not to act (or to act) if doing so (or not doing so) will be wrong. Notice that it is not necessary that the defendant acted for good, generalizable reason at the time of the crime. Most offenders presumably do not or

¹⁴ The *M'Naghten* test for legal insanity distinguishes the two. *M'Naghten's Case*, 10 Cl. & F. 200 (H.L. 1843). The first prong of the Model Penal Code test collapses the two rationality defects. See MODEL PENAL CODE § 4.01(1) (1962).

¹⁵ SUSAN WOLF, *FREEDOM WITHIN REASON* 69 (1990).

they would not have offended. The general normative capacity to be able to grasp and be guided by reason is sufficient.

After much thought, I have come to the conclusion that normative competence should require the ability to empathize and to feel guilt or some other reflexive reactive emotion. Most of the time when the desire to do harm arises, a police officer is not at one's elbow. The cost of future official detection, conviction and punishment for most crimes is relatively slight compared to the immediate rewards of satisfying one's desires, especially if one is a dispositionally steep time discounter. Unless an agent is able to put oneself affectively in another's shoes, to have a sense of what a potential victim will feel as a result of the agent's conduct, and is able at least to feel the anticipation of unpleasant guilt for breach, one will lack the capacity to grasp and be guided by the primary rational reasons for complying with moral expectations.¹⁶

Perhaps people who lack the capacity for empathy and guilt—the so-called “psychopaths”—are particularly immoral and deserve special condemnation rather than excuse,¹⁷ but this does not seem fair. To the best of our knowledge, some harmdoers simply lack these capacities and they are not amenable to reason. They may be dangerous people, but they are not part of our moral community. Once again, it is not required that the defendant have actually empathized and felt guilt at the time of the crime. Most wrongdoers presumably do not experience such states at the time of the crime. A general capacity to feel these emotions is sufficient to render the agent normatively rational.¹⁸

¹⁶ See John Deigh, *Empathy and Universalizability*, 105 *ETHICS* 743 (1995) (discussing the responsibility of psychopaths and the role of empathy in moral judgment).

¹⁷ The law does not at present excuse psychopaths. See MODEL PENAL CODE § 4.01(2) (1962); Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay On Choice, Character and Responsibility*, 67 *IND. L.J.* 719, 746-47 (1992) (claiming that psychopaths are rational and should be held responsible, unless they lack selfish feelings, which is highly improbable).

¹⁸ As Paul Robinson once pointed out to me in a personal communication, some people may systematically suppress their capacity to empathize and feel guilt. If so, they retain the general capacity and are responsible for inactivating it. Professor Robinson correctly notes that it may be difficult to distinguish those who suppress a capacity they retain from those who do not have the capacity. This difficulty may be overstated, however. An examination of an offender's range of relationships should make it easier to determine if the capacity generally exists. A terrorist may squelch any empathy or guilt for the victims of her terror, but she may demonstrate with her compatriots that she retains the general capacity.

A highly controversial question is whether desires or preferences in themselves can be irrational.¹⁹ It is of course true that having desires that most people consider irrational is likely to get someone into trouble, especially if the desires and situations tempting an actor are strong. Nonetheless, I conclude that even if desires can be construed as irrational, irrational desires do not deprive the agent of normative competence unless they somehow disable the rational capacities just addressed or they produce an internal hard choice situation distinguishable from the choices experienced by people with equally strong, rational desires. In other words, if the agent with irrational desires can comprehend the morally relevant features of her conduct, she can be held responsible if her irrational desires are the reasons she breaches an expectation we accept.

Hard choice as an excusing condition requires that the defendant was threatened with harm, unless she did something even more harmful than the harm threatened. If a person of reasonable firmness would have yielded under the circumstances, we conclude that the choice was too hard to have expected the defendant to resist. Although the agent may have breached an expectation we accept, we think it is unfair to blame and punish her, because the choice to do the right thing was too hard to make under the circumstances. The law requires that the threat be made by a human being, but why should it matter whether the threat is made by another person or arises as a result of naturally occurring, impersonal circumstances?

Imagine the following scenarios, which I borrow from a leading criminal law casebook.²⁰ In the first, a driver is negotiating a steep, narrow mountain road, with great precipices on both sides. A gunslinger is holding a gun to her head, urging her on. As they come around the curve, two people loom ahead, lying unconscious in the middle of the road. There is no way to go around them. The gunslinger orders the driver at pain of death to drive over the people, which will surely kill them. If the driver accedes, she has the possibility of succeeding with the hard choice excuse of duress in jurisdictions that allow

¹⁹ See ROBERT NOZICK, *THE NATURE OF RATIONALITY* 139-40 (1993) ("At present, we have no adequate theory of the substantive rationality of goals and desires . . .").

²⁰ SANFORD KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 905 (6th ed. 1995).

the excuse in cases involving the taking of innocent life. Now consider the same scenario, except that there is no gunslinger. Instead, the driver's brakes fail, despite her completely conscientious maintenance of the vehicle. Either she must drive over the people, surely killing them, or to avoid them, she must go over the side of the precipice and fall to a certain death herself. If an excuse is possible in the first case, it ought to be available in the second.

Moreover, why should a threat of death or grievous bodily harm be necessary, as the law now requires? People of reasonable firmness are more likely to find such threats too hard to bear, compared to threats of lesser physical and psychological harm, but why exclude the latter *a priori*? Consider a person who possesses a financially worthless object—say, a cheap memento from her deceased, beloved parent—that is of supreme psychological importance to the person. Now a desperado threatens to destroy the memento unless the person destroys more valuable property or inflicts some form of physical harm on another. It is at least morally thinkable that, depending on the degree of the other harm, a rational person of reasonable firmness might yield.

Agents who appear to be incapable of reasonable firmness present an apparently problematic case for the hard choice excuse. An easy choice for most people may be subjectively very difficult for them. Consider a coward who is threatened with a hard punch unless she kills someone. Although virtually everyone, including cowardly types, would choose to be the victim of a punch rather than to kill, some people might find the threat of a punch as terrifying and coercive as a death threat.

How should such cases be analyzed? Remember, to begin, that the "person of reasonable firmness" standard does not mean that everyone who is not dispositionally of reasonable firmness will be excused. The standard is normative. Those who are fortunate enough to be especially brave and those who are of average braveness will be able to meet it quite readily. Those who are of less than average dispositional firmness will have more trouble resisting when they should. Still, if we judge that the person had the general capacity to comply with the reasonable firmness standard, even if it is harder for her than for most, then she will be held responsible if she yields when a person of reasonable firmness would have resisted. This is true of

most objective standards in the law: People with less than average ability to meet standards are still held to that standard if they are generally capable of meeting them. The legal result comports with common sense and ordinary morality. When important moral expectations are involved—e.g., be careful; do not harm others under weakly threatening conditions—we believe it is fair to expect fellow citizens capable of meeting reasonable standards to comply.²¹

What should be done, however, with the person we do not think capable of complying, such as the extreme coward who is placed in the threatening situation through no fault of her own? Justice demands an excuse in such cases, but on what theory? One possibility is that the person's general capacity for rationality is disabled. For example, the fear of bodily injury may be so morbid that any threat creates anxiety sufficient to block the person's capacity to grasp and be guided by good reason. Another way of analyzing the case is as an example of "internal hard choice." The threat that creates the hard choice is not of the lesser physical harm itself; instead it is the threat of such supremely dysphoric inner states—terror, for example—that renders the choice so hard for this agent.²² A model of hard choice created by the threat of internal dysphoria may be the best explanation of why we might want to excuse in an array of cases that are often thought to require a "volitional" or control excuse, such as the pedophile, pyromaniac, compulsive gambler, drug "addict," and similar cases. In all these cases of alleged compulsion, the predisposition causes intense desires, the frustration of which threatens the agent with great dysphoria. Perhaps a person of reasonable firmness faced with sufficient dysphoria would yield. In sum, if an excuse is to obtain in the case of the coward or the other cases mentioned, once again, the generic incapacity for rationality or hard choice will explain why we might want to excuse.

Although the internal hard choice model is plausible and competing explanations that rely on so-called volitional problems are confused or lack empirical support,²³ I prefer to ana-

²¹ H.L.A. Hart, *Negligence, Mens Rea and Criminal Responsibility*, in HART, *supra* note 12, at 136, 152-54.

²² I have explored such a model for inner coercion at length elsewhere. Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1619-34 (1994).

²³ *Id.* at 1658-59.

lyze these cases in terms of irrationality. At the most practical level, it will often be too difficult to assess the degree of threatened dysphoria that creates the hard choice. Assessing the capacity for rationality is not an easy task, but it is a more common sense assessment of the sort we make every day. Second, it is simply not clear that the fear of dysphoria would ever be sufficient to excuse the breach of important expectations, except in precisely those cases in which we would assume naturally that the agent's rational capacity was essentially disabled.

I have argued that irrationality—defined to include the capacity for empathy and guilt—and hard choice are the essential excusing conditions. A rational agent not faced with a hard choice may fairly be blamed and punished if she breaches an expectation we accept. It is not hard to understand why irrationality and hard choice are excusing conditions. Either condition will make it too hard for the agent properly to follow the rule, and to comply with the expectation, because she will be unable either to grasp or to be guided by the good reasons not to offend.

Perhaps there should be other conditions required for responsibility in addition to the general capacity for rationality and the absence of a hard choice. Many variables may make it easier or harder for the agent to meet moral obligations.²⁴ It is harder to conform to the requirements of morality and the criminal law if an agent has characteristics that predispose to objectionable behavior and lacks characteristics that are self-protective. Impulsivity and hot temper are examples of the former; successful self-control strategies and good judgment are examples of the latter. An agent with many of the worrisome characteristics and few of the self-protective variables will surely be at greater risk for breaching expectations, especially if circumstances are provoking or tempting. If an agent lacks protective predispositions and is exposed to a criminogenic environment, it will, all else equal, be considerably harder for the agent to avoid offending than for a person who is more fortunately endowed and exposed to a more benign environment.

But not all variables that make it harder to behave rightly are prerequisites for responsibility. Even a combination of un-

²⁴ See *id.* at 1605-10 (discussing variables that make it harder or easier for the agent to "fly straight").

fortunate dispositions and situational variables will not necessarily excuse. A hot-blooded person who is sorely, but inadequately provoked (as a legal matter), will not have an excuse if she kills the provoker, even if she both lacks self-control and appears out of control.²⁵ Morality and the law alike set a minimum standard for what is required for responsible action and not everything that would help an agent to behave well is or should be included in the standard. As long as an agent possesses the minimum requirements for normative competence, she is capable of meeting moral obligations, and it is not unfair to hold her responsible, even if it is harder for some people than for others. Moreover, the justice of holding people to high standards of regard for the rights and interests of others is especially warranted in cases involving serious harmdoing, because such situations give agents the strongest possible reasons to avoid breaching moral expectations. Proponents who claim that other variables should be included in the criteria of responsibility and excuse must justify such inclusion with a robust moral theory.

Although the bad luck of lacking self-protective variables and being exposed to highly criminogenic situations should generate sympathy and caution before blaming and punishing, variability of good fortune is an inevitable aspect of the human condition. Bad luck is not an excuse unless it produces an excusing condition, such as lack of normative competence. Anger at harmdoers and sympathy for victims should not lead us to overestimate the normative competence of harmdoers, but sympathy for harmdoers should also not lead us to underestimate their normative competence.

The view of responsibility I have presented is not necessarily an all-or-none, bright line concept. There can be almost infinite degrees of normative competence or hardness of choice, and correspondingly, in principle, responsibility could be arrayed along an almost infinitely subdivided continuum. But human beings are epistemologically incapable of evaluating the criteria for responsibility with such subtle precision. Thus, the law does adopt a bright line test. But rough mitigating doc-

²⁵ See LAFAVE & SCOTT, *supra* note 6, at 654-55 (reduction of murder to manslaughter possible only if defendant is provoked by circumstances that would create "heat of passion" in a reasonable person). Modern requirements for "adequate" provocation are softening, however, permitting reduction to manslaughter in a wide range of cases. See, e.g., MODEL PENAL CODE § 210.3(1)(b) (1962).

trines are possible and may be the appropriate vehicles for addressing the moral relevance of those variables that make "flying straight" harder. I have argued that, for just this reason, the law should adopt a generic, mitigating partial excuse.²⁶ If mitigation is justified in an individual case, however, it must be because the genuine criteria for excuse—irrationality and hard choice—are sufficiently, albeit not fully, present. Thus, criminogenic predispositions will be relevant only if they compromise the general capacity for normative competence. If they do, a strong case for mitigation obtains.

D. ALTERNATIVE EXPLANATIONS FOR EXCUSE

I have argued that the incapacity for rationality and hard choice are the excusing conditions that best account for the moral and legal world that we have and that they provide a coherent and justifiable account of our practices. However, many alternative explanations have been given. Most of these, in my opinion, are either incorrect, confusing, question-begging, or conclusory. This subsection explores these alternatives so that we can clearly focus on the proper issues for analysis of juvenile responsibility.

1. Determinism/Universal Causation is Not the Issue

The most common alternative general explanation for the excuses is that the defendant's conduct was "determined" or "caused." Such claims are often made in the idiom of lack of "free will." The defendant should be excused, it is alleged, because she lacked free will. Thus, kids should be excused because they lack free will. Although such locutions are indeed common, I claim, in contrast, that these alternatives do not explain the excuses we have, nor do they represent a coherent theory that could explain the excuses.

There is no consensually accepted meaning of determinism, but a typical understanding is that the laws of the universe and antecedent events together determine all future events. In brief, as a result of the inexorable laws of the universe and given the antecedent events, only one outcome is lawfully possible. Many people assume that this is true, at least at levels higher

²⁶ Stephen J. Morse, *Excusing and the New Excuses*, in *CRIME AND JUSTICE* (Michael Tonry ed., forthcoming 1998).

than the explanation of subatomic particles, and it is certainly the background assumption of many working scientists.

The simplest reason why the theoretical truth of determinism does not explain the excuses we have is that determinism is true or not, "all the way down." If the truth of determinism were the defining characteristic for responsibility, then everyone or no one would be responsible. Consider the following examples. If determinism is true, then children and adults are equally determined creatures. Yet we only generally excuse children. It is metaphysically preposterous to believe that children are determined, but somehow determinism loosens its grasp on human beings as they mature. The genuine reason human beings are considered more responsible as they mature is that they become more rational. The behavior of legally crazy people is no more or less determined by the laws of the universe and antecedent events than the behavior of people without disorders. The former are simply less rational. People who accede to a threat made with a gun at their head are no more determined than the desperado making the threat; the former faces a choice too hard to bear; the latter does not. As P.F. Strawson argued in his pathbreaking article, *Freedom and Resentment*, the theoretical truth of determinism cannot account for the excuses we have.²⁷

2. Causation is Not an Excuse

A related argument, subject to similar defects, is that if science or common sense identifies a cause for human action, including mental or physical disorders or developmental variables, then the conduct is necessarily excused. I refer to this mistaken belief as the "fundamental psycholegal error:" Causation is neither an excuse per se nor the equivalent of compulsion, which is an excusing condition. For example, suppose that I politely ask the brown-haired members of an audience of criminologists and criminal lawyers to whom I am speaking to raise their hands to assist me with a demonstration. As I know from experience, virtually all the brunet(te)s will raise their hands, and I will thank them politely. These hand-raisings are clearly caused by a variety of variables over which the bru-

²⁷ Peter F. Strawson, *Freedom and Resentment*, in *FREE WILL* 59-80 (Gary Watson ed., 1982).

net(te)s have no control, including genetic endowment (being brown-haired is a genetically determined, but-for cause of the behavior) and, most proximately, my words. Equally clearly, this conduct is human action—intentional bodily movement—and not simply the movements of bodily parts in space, as if, for example, a neurological disorder produced a similar arm-rising. Moreover, the conduct is entirely rational and uncompelled. The cooperating audience members reasonably desire that the particular lecture they are attending should be useful to them. They reasonably believe that cooperating with the invited lecturer at a professional meeting will help satisfy that desire. So, they form the intention to raise their hands and they do so.

It is hard to imagine more completely rational conduct, according to any normative notion of rationality. The hand-raising was not compelled, because the audience was not threatened with any untoward consequences whatsoever for failure to cooperate. In fact, the lecturer's request to participate was more like an offer, an opportunity to make oneself better off by improving the presentation's effectiveness. Offers provide easy choices and more freedom, rather than hard choices and less freedom.²⁸

The cooperative audience members are clearly responsible for their hand-raising and fully deserve my "Thank you," even though their conduct was perfectly predictable and every bit as caused as a neuropathologically-induced arm-rising. Although the conduct is caused, there is no reason consistent with existing moral and legal excuses that it should be excused.

All phenomena of the universe are presumably caused by the necessary and sufficient conditions that produce them. If causation were an excuse, no one would be responsible for any conduct and society would not be concerned with moral and legal responsibility and excuse. Indeed, eliminative materialists, among others, often make such assertions,²⁹ but such a moral and legal world is not the one we have. Although neuropathologically-induced arm-raising and co-operative, intentional

²⁸ ALAN WERTHEIMER, COERCION 204-11 (1987) (distinguishing threats from offers and discussing different methods of setting baselines to make the distinction).

²⁹ See, e.g., PAUL CHURCHLAND, THE ENGINE OF REASON: THE SEAT OF THE SOUL: A PHILOSOPHICAL JOURNEY INTO THE BRAIN 309-14 (1995). B.F. Skinner made the same point from a radical behaviorist point of view. See B.F. SKINNER, BEYOND FREEDOM AND DIGNITY 60-82 (1971) (ascribing all "control" to the environment).

hand-raisings are equally caused, they are distinguishable phenomena, and the difference is vital to our conception of ourselves as human beings. In a moral and legal world that encompasses both responsible and excused action, all of which is caused, the discrete excusing conditions that should and do negate responsibility are surely caused by something. Nevertheless, it is the nature of the excusing condition that is doing the work, not that the excusing condition is caused.

The *reductio* that everyone or no one is responsible if the truth of determinism or universal causation underwrites responsibility is often attacked in two ways. The first is "selective determinism" or "selective causation"—i.e., the claim that only some behavior is caused or determined and only that subset of behavior should be excused. The metaphysics of selective causation is wildly implausible, however. If this is a causal universe, then it strains the imagination also to believe that some human behavior somehow exits the "causal stream." Moreover, just because we possess the scientific understanding to explain and predict some events more fully than others, it does not follow that the former are more determined or caused. And comparative lack of causal or predictive knowledge about behavior is not an excusing condition in any case. The reason that we excuse children is not because we understand the causal antecedents of their conduct more thoroughly than the antecedents of adult behavior or that we can predict their behavior more accurately than we can predict adult behavior. To explain in detail why selective causation/selective excuse is an unconvincing and ultimately patronizing argument would require a lengthy digression from this essay's primary purpose. I have made the argument in detail elsewhere³⁰ and shall simply assert here that good arguments do not support this position.

The second attack on the causal *reductio* claims that only abnormal causes, including psychopathological and physiopathological variables, excuse. Although this argument appears closer to the truth, it, too, is unpersuasive. Pathology can produce an excusing condition, but when it does, the excusing condition pathology causes does the analytic work, not the existence of a pathological cause *per se*. Consider again the delu-

³⁰ See Stephen J. Morse, *Psychology, Determinism and Legal Responsibility*, in *THE LAW AS A BEHAVIORAL INSTRUMENT* 35, 50-54 (Gary B. Melton ed., 1986).

sional self-defender, who kills in response to the delusionally mistaken belief that she is about to be killed. Such a killing is no more caused or determined than a killing motivated by any belief that one's life is endangered by a presumed unlawful aggressor. Crazy beliefs are no more compelling than non-crazy beliefs. A non-delusional but unreasonably mistaken self-defender, who feels the same desire to save her own life, would have no excuse for killing. Once again, we excuse the former but not the latter because only the delusional defender is incapable of rational conduct. Finally, consider infancy as an excuse. There is nothing abnormal about normal childhood, yet normal children are not held fully responsible. What the delusional defender and the child have in common is not "pathological causation;" they have in common the absence of full capacity for normative competence. Normative incompetence is the genuine excusing condition that is operative.

3. *"Free Will" is Not the Issue*

The next, unconvincing claim for excuse, which is related to but distinct from claims about determinism or causation, concerns "free will." Courts and commentators routinely claim that excused defendants lacked "free will," but I believe that this is virtually always just a placeholder for the conclusion that the actor supposedly lacking this desirable attribute ought to be excused. To understand the argument better requires that we first examine the concept of the "will."

Non-reductive theories of action uncontroversially posit that people act for reasons that are rationalized by desire/belief sets. Human action is based on practical reason. But it is notoriously true that practical syllogisms are not deductive. A person may have a desire/belief set that seemingly should ensue in a particular basic action, but the person may not act at all. When the person does act, how do desires, beliefs and intentions lead to the bodily movements that we call voluntary acts? This is the mystery that the theory of the will or volition seeks to explain. In brief, an "operator" is necessary to get us from here—desires, beliefs and intentions—to there—a bodily movement that will successfully (we hope) satisfy our desires through action.

Theories of the will or volition have waxed and waned in recent philosophy. For a short period, under the influence of

Gilbert Ryle,³¹ the concept of the will was considered preposterous by the majority of action theorists, but in recent years, some such concept has become central to accounts of voluntary action.³² Some think that volitions are actions of the will,³³ some treat the will or volition as simply another type of intention or trying.³⁴ Michael Moore argues that the will or volition is a functional mental state that translates desires, beliefs, and more general intentions into "basic" actions, including resolving conflicts between intentions.³⁵ This and similar functional accounts emphatically reject equating volitions with wants.³⁶ In sum, modern theories treat the will in one fashion or another as an executory function.

Once one understands the meaning of the will or volition, it becomes apparent that the excuses are not based on a defective will, understood as an executory functional state. The victim of a threat of death or a delusional self-defender who kills to save her own life are both able to execute the actions that will, respectively, save them from genuine or delusionally-feared death.³⁷ People acting under duress, or as a result of mental disorder, and juveniles are all able to execute their more general intentions. Even if an actor's body is literally forced to move despite her strong desire to remain still, there is no defect or problem of the will, as there is simply no intention to execute and no act to excuse. Agents can be physically forced or psychologically compelled to act against their desires, or they can be irrational, but the executory state remains intact. Even in cases of so-called "weakness of the will,"³⁸ the best explanation of an

³¹ GILBERT RYLE, *THE CONCEPT OF THE MIND* 62-69 (1949).

³² See *infra* sources in notes 33-36.

³³ See CARL GINET, *ON ACTION* 31 (1990) (noting that "will comes as close as any" verb to describing volition).

³⁴ See ALFRED R. MELE, *SPRINGS OF ACTION: UNDERSTANDING INTENTIONAL BEHAVIOR* 193 (1992) (noting that volitions "are not actions" but are "proximal intentions").

³⁵ MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 113-65 (1993). Moore claims that the functional mental state that does the work is an "intention," what he terms a "bare intention," which "executes our more general plans into discrete bodily movements." *Id.* at 121.

³⁶ *Id.* at 120 (observing that "it is . . . not plausible to treat volitions as wants of any kind"); GALEN STRAWSON, *FREEDOM AND BELIEF* 66-67 (1986) (noting that Kant believed that "one possesses a will that is . . . a faculty distinct from desire" (citation omitted)).

³⁷ See HERBERT FINGARETTE & ANN FINGARETTE HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 55-65 (1979).

³⁸ See JUSTIN GOSLING, *WEAKNESS OF THE WILL* (1990) (historical and conceptual overview).

agent's acting contrary to his or her strongest desire, belief or intention is that the agent's action is clearly the intentional product of a well-functioning will.³⁹

In some of these cases, of course, we say colloquially that the agent's will was overborne in the sense that either the agent was forced to move or felt that she "had to" act contrary to her preferences, or that the will was operating in response to irrational reasons for action. But this is a misleading, metaphorical locution. As noted, volitions are not wants or desires; on the best theory they are a species of intention. In the cases of no act and irrational and compelled action alike, moving or acting contrary to other desires, beliefs or intentions does not entail a problem with the will. Nonetheless, for various reasons some people undeniably seem to lack self-control, either more generally or in specific contexts. For example, juveniles may find it harder than adults to resist peer pressure, even in situations when it is clear to them that they ought to resist. These people find it more difficult to behave themselves and are more disposed to offend. Still, the problem is not a defect in the will as an executory state of bare intention. The problem lies elsewhere.⁴⁰

We are now ready to return to the discussion of lack of "free will" as the general explanation for the excuses. In almost all instances, however, the assertion that lack of free will excuses cannot correctly mean either that there is a defect in the agent's executory mental functioning or that action is irrational or

³⁹ See MOORE, *supra* note 35, at 140-41 (noting that agents "intentionally do acts that flout their strongest desires").

⁴⁰ One possible exception to the conclusion that out-of-control agents have intact wills might be cases in which there is a duty to act and the agent wants to do her duty, but she is psychologically paralyzed. I have never encountered a judicial opinion addressing this issue. Nor, I suspect, does it occur often in ordinary life. Still, such a case is surely possible. Imagine a parent with a pathological fear of open spaces, so-called "agoraphobia." He totally encloses and child-proofs the yard of the house so that his toddler can safely play unsupervised in the yard. Despite his admirable caution, the toddler one day suffers some obvious, untoward event, such as a seizure, that requires immediate attention. The parent *wants* to rush out to help the child—i.e., there is no conflict of desire, belief or intention whatsoever—but he experiences "paralysis" and is thus "unable" to assist. We can even imagine that by brute force of will he goes to the door and starts to go out, but anxiety and its psychophysiological concomitants cause him to faint. Our hapless parent plausibly suffers from a volitional defect that interfered with his desire to do his duty. Truly he could not help himself. But if we were to exempt him from responsibility, note that the basis would be lack of action, not a control excuse. Note, too, that this case is recharacterizable as an irrationality problem if, as seems plausible, the father's groundless fear of open spaces is deemed irrational.

compelled solely because it is determined or the product of universal causation. In a deterministic or universally caused world, some people are irrational and others are not; some face hard choices and others do not. Moreover, if determinism or causation is true and inconsistent with free will, then no one has this quality (or the opposite) and no one is responsible (or everyone is). Often, I believe, the “unfree” will claim is used rhetorically to buttress an insufficiently supported conclusion that the agent under consideration ought to be excused, because we all “know” that free will is a necessary component of, and perhaps sufficient for, moral and legal responsibility. However, this move creates a tautology. And a conclusory label, no matter how rhetorically powerful, does not provide justifications and criteria for excuse.

A more promising approach, although daunting, would be to enter the highly-contested, technical free will literature to see what can be made of the claim that lack of free will underwrites excusing. For example, one might say that only agents capable of rational self-reflection on their reasons for action possess free will,⁴¹ and it is precisely this capacity that excused agents lack. Or, one might say that agents acting under certain constraints, such as threats or strong, unwanted desires—just the types of conditions that often lead to claims for compulsion excuses—lack free will.⁴² This article previously addressed such arguments and suggested that irrationality is the basic excusing condition, but note that such arguments are, once again, not addressed to defects in the agent’s narrowly conceived executory functioning, nor to problems that the truth of determinism might create. Rather, they are claims about the proper criteria for the moral responsibility of intentional agents; they are decidedly not about automatons, mechanisms, or the lack of some desirable attribute or condition such as “free will.”

In sum, trying to underpin excusing in terms of will or volitional problems or lack of free will is likely to be inaccurate, confusing, rhetorical, or in its best incarnation, a placeholder

⁴¹ See, e.g., WALLACE, *supra* note 11, at 157-59; Randolph Clark, *Free Will and the Conditions of Moral Responsibility*, 66 PHIL. STUD. 53, 54-55 (1992). But see Richard Double, *How Rational Must Free Will Be?*, 23 METAPHILOSOPHY 268, 277-78 (1992).

⁴² See, e.g., Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, in THE IMPORTANCE OF WHAT WE CARE ABOUT 11, 24 (Harry G. Frankfurt ed., 1988) (claiming that “[a] person’s will is free only if he is free to have the will he wants”).

for a fuller, more adequate theory of excusing conditions. The will and free will are not legal criteria, and we would do well to dispense with employing them in responsibility analysis and attribution.

4. *Lack of Intent is Not the Issue*

Another claim is that excused agents lack "intent." Once again, if "intent" is a conclusory term that means "blameworthiness," "culpability" or the like, it is unexceptionable, but the conclusion does no analytic work. However, if intent is more properly treated as a mental state, the absence of which might excuse, then this claim is incorrect as a general explanation of excusing. Indeed, it is apparent that excused action is intentional, even in the most extreme cases in which morality and law alike hold that an excuse is fully justified. Remember, we are considering cases of action, not bodily movements resulting from irresistible mechanism or literal physical compulsion. Consider cases of duress in which the agent is threatened with death unless he or she does the wrong thing.⁴³ The agent compelled to act by such threats clearly acts intentionally to do the alternative, rather than to face destruction. The agent's opportunity set is wrongfully and drastically limited in such conditions and we would surely excuse her, but not because she lacked intent. She acted fully intentionally to save her life. Even young children clearly act intentionally, to further their desires in light of their beliefs. For further support, consider the American Psychiatric Association's generic definition of "compulsive behavior"—for which morality and the law might wish to provide a compulsion excuse—as "intentional" and "purposeful."⁴⁴ And consider again our delusional self-defender. She kills for irrational reasons, but she surely does so intentionally in the delusionally mistaken belief that she needs to do so to save her own life. And so on. Action is by definition intentional and is not excused because it is unintentional.

⁴³ I am assuming that under some conditions duress operates as an excuse. Others contend that even if the balance of evils is negative, the agent's conduct is *justified* if yielding to the threat is reasonable. See WALLACE, *supra* note 11, at 145-46.

⁴⁴ AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 423 (4th ed. 1994) [hereinafter DSM-IV].

5. *The Capacity for Choice is Not the Issue*

Some claim that responsibility resides in the ability to choose, and that excuses are based generally on a lack of the ability to choose or a lack of choice.⁴⁵ Philosophers of mind and action dispute the precise contours of choosing, understood as an agent's mental act,⁴⁶ but the technical intricacies of the concept are not central to the ordinary language notion that might underpin excusing generally. Nonetheless, even ordinary accounts of the concept of choice can be ambiguous. Understood as a mental act, sometimes it seems to refer to the act of deciding between (at least two) alternative courses of action (or non-action). Other times, choice as a mental act seems to be synonymous with acting intentionally ("I chose to go out for ice cream"). In the alternative, choice sometimes refers to a feature of the agent's world that might be described as the alternative courses of action, the opportunities to act differently, that were available. If you are in a jail cell, for example, you can choose among and act on many alternative courses of action open to you at most moments: you can sit on your bed, stand up, walk around, sing, listen to the radio, and so on; but you can not choose to go out for ice cream. Let us consider these ordinary uses of choice to understand why lack of choice or opportunity is an inaccurate or potentially confusing general justification for excusing.

Neither mental act usage is promising as a general foundation. Virtually all agents seem unproblematically able to choose between alternatives. If there is a gun at one's head, one may find it exceedingly easy to choose to accede to the wrongful death threat. Juveniles, too, choose between alternatives, although their lack of experience and knowledge may prevent them from fully recognizing the choices available.⁴⁷

⁴⁵ See, e.g., SANFORD H. KADISH, *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 85-88 (1987).

⁴⁶ Compare MICHAEL E. BRATMAN, *INTENTION, PLANS AND PRACTICAL REASON* 165 (1987) (suggesting that "intention is tied to further reasoning and action in ways in which choice need not be; that is why we do not intend everything that is an element in what we choose"), with MELE, *supra* note 34, at 140-41, 152 n.16 (noting that when deciding to perform an act, one also has the intention to perform the act). Such dispute about "choice" is unsurprising because the contours of all mental furniture are similarly contested.

⁴⁷ The same point can, of course, be made about many adults.

In some cases, a non-culpably ignorant or irrational agent may not be aware that a choice is possible. One might then claim that the agent does lack the ability to make a choice. Although this is not an implausible claim, note that it is entirely parasitic on other standard exculpatory conditions—ignorance and the excuse of irrationality—which are doing all the work. In other cases, the agent might claim that the irresistibility of a desire deprived her of the capacity to make a choice. Again, such a characterization is plausible. But, assuming the validity of the claim about the strength of the desire, it seems more accurate to say, like the case of the agent acting under duress, that she was psychologically compelled to make the hard choice “threatened” by the strength of the desire. She did, after all, choose to yield to the desire. She intentionally yielded. Indeed, the strength of the desire made her choice easy, and if she struggled with conflict about yielding, this underscores the presence of the capacity to choose. The American Psychiatric Association’s generic definition of “compulsive behavior” as “aimed at preventing or reducing distress or preventing some dreaded event or situation”⁴⁸ again further supports the conclusion that the agent is able to exercise choice. Even if conflict remains “unresolved,” agents are able to exercise and implement choice.⁴⁹ In “irresistible desire” cases, then, the agent chooses, but in a hard choice situation. And if the terror of the choice set renders the agent “unable to think,” such that no “choice” is possible, this is a rationality defect.

As a synonym for lack of intentional action, the other mental act notion—lack of choice as the basis for excusing—suffers from the same defects identified in the discussion above of the will and intention. Excused agents, including juveniles, act intentionally, so they “choose” their acts in this sense. In sum, lack of mental capacity to make a choice will not furnish a general justification for the excuses.

Lack of choice as lack of alternatives or opportunity is more promising, but this meaning can be both literal and metaphorical; to avoid the ever-present lure of mechanism, one must distinguish the two. On occasion, literally no relevant alternative

⁴⁸ DSM-IV, *supra* note 44, at 423.

⁴⁹ ISAAC LEVI, *HARD CHOICES: DECISION MAKING UNDER UNRESOLVED CONFLICT* 34 (1986).

action is open to an agent, such as in cases of literally irresistible physical compulsion. But such compulsion defeats the prima facie requirements of criminal liability, which include a voluntary act. These are not the standard cases of excuse.

Those wishing to draw the analogy to examples of no literal choice claim that the agent had no "real" choice, or no reasonable choice. Indeed, we talk this way colloquially all the time. In brief, a hard choice is assimilated to no choice. For example, the person acting under sufficient duress has a choice—she might refuse to harm another, despite the awfulness of the threat—but she is a non-culpable victim of a wrongfully imposed hard choice and we can not fairly expect her not to yield. For another example, juveniles often may not fully recognize the options that are available. But, once again, ignorance or irrationality is the more fundamental excusing condition in this case.

Hard choice cases in which we cannot expect the agent to behave differently undeniably exist, but note that what does the excusing work is not a failure to choose. Instead, we are making a moral judgment about when options are so wrongfully or non-culpably constrained that it is simply not fair to require the agent to behave otherwise. It is not that the agent literally was physically forced to do wrong and thus literally had no choice. Rather, as a moral matter, we might excuse because the choice the agent faced was too hard. Finally, even if hard choice situations explain why some agents might be excused, many agents we excuse, such as children and many people with severe mental disorder, are neither objectively nor subjectively in hard choice situations. Hard choice does not mean that the agent lacks the capacity to exercise choice and it fails to furnish a general justification for excusing.

To understand more fully the difference between cases of genuine "no choice" and hard choice/irresistible impulse cases that produce human action, consider the following example.⁵⁰ Imagine that a person is hanging by the fingernails from the edge of a cliff and cannot pull himself back up. Depending on strength, the agent can hang on for some time, but ultimately

⁵⁰ The discussion that follows is also relevant to the discussions of the will and of intention, *supra* at notes 31-43 and accompanying text, and of self-control, *infra* at notes 51-58 and accompanying text.

he will fall. Hard choices and so-called irresistible impulses are allegedly like the pull of gravity in this example. To see why the analogy fails, however, imagine that another agent stands at the edge of a cliff with a gun and tells the hapless cliffhanger that if the cliffhanger starts to let go, the gunslinger will shoot and kill the cliffhanger. Despite this dreadful threat, sooner or later, all cliffhangers, no matter how strong they may be, will nonetheless "let go," but the letting go will not be intentional, chosen human action. It will be the mechanical failure of the muscles to operate under the combined influences of gravity, muscle fatigue and the like. But now imagine that a similar gunslinger remains always at, say, an addict's elbow and tells him that if he tries to obtain or use the addictive substance, he will be killed instantly. The addict will not buy or use. The cliffhanger's fall is a genuine mechanism and not human action; it is ultimately unmodifiable by reason. In contrast, drug buying and using behavior is intentional, chosen human action and modifiable by reason. If it is not so modifiable, the agent is irrational, but still not an "unintentional," "unchoosing," "uncontrollable" mechanism. Most arguments that facetiously suggest that hard choices or any other kind, are necessarily unchosen and therefore uncontrollable, are conceptually unsound.

I conclude that although colloquial talk about lack of choice is commonly used to characterize many cases of excuse, it is often inaccurate and potentially misleading, as when the lure of mechanism leads to the conclusion that no difference exists between cases of no literal choice and cases of hard choice. Agents facing sufficiently hard choices should sometimes be excused, but not because they do not choose to do what they do. These cases are better analyzed directly in terms of ordinary justifications for excusing conditions, such as irrationality and compulsion.

6. "Self-Control"

Finally, being "out of control" or lacking "self-control" is sometimes offered as the general theory that justifies excusing. Here, too, there is a grain of common sense truth, but properly understood, this explanation does not account for the excuses we have. Various intrapersonal and environmental variables make it easier for a person to behave well. If anger-provoking or evil-tempting situational variables never arise, one is both

lucky and less likely to engage in harmdoing. It will be easier to exert self-control and to be in control. And, all things being equal, the reverse is also true. Similarly, if an agent has an even temperament, moderate desires, lots of dispositional self-control mechanisms at her disposal, plenty of empathy, and the like, she is more likely to be in control and to control herself, even if provoked or tempted to do wrong. Nonetheless, these observations are almost tautologically true and tell us little about excusing in general. The excusing conditions I have identified, irrationality and hard choice, make "controlling oneself" difficult, but not every variable that has this effect is a necessary condition of responsibility. Hot temper, for example, may make it harder for the easily-provoked agent to behave well, but virtually all such agents retain sufficient general normative competence to be held fully responsible. Too often, I contend, "lack of self-control" or "out of control" is once again a synonym for "lack of culpability." Those who make this claim need to provide a fuller theory of excusing and an account of why particular variables ought to be included as excusing conditions.

A subset of the self-control claim that appears to exert a hold on the popular, mental health and legal imagination is cases of so-called "irresistible impulses." Although an "irresistible impulse" or a volitional or control test is not a currently favored insanity defense criterion,⁵¹ it remains a test in some jurisdictions and its intuitive appeal continues. But even if such a behavioral state as "irresistible impulse" exists in some cases, it is not generalizable to explain the excuses, and, I claim, it is once again reducible to irrationality or hard choice claims.

"Impulse control disorders" are an established category of mental disorders,⁵² some of which, such as "intermittent explosive disorder," kleptomania, pathological gambling, and pyromania, may produce behavior for which the actor will seek an excuse. Moreover, impulsive behavior is blamed for much criminal conduct and other antisocial behavior.⁵³ Thus, there is

⁵¹ In the wake of John W. Hinckley, Jr.'s acquittal by reason of insanity for the attempted assassination of President Reagan in 1982, many jurisdictions, including Congress, abolished the volitional or control test of legal insanity. *See, e.g.*, 18 U.S.C. § 17(a) (federal insanity defense, which includes only a "cognitive" test).

⁵² DSM-IV, *supra* note 44, at 609-21.

⁵³ *See, e.g.*, MICHAEL GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 85-120 (1990); Willard L. Johnson et al., *Impulsive Behavior and Substance Abuse*, in THE

reason to believe that attention to problematic impulses and impulsivity should shed light on excusing. Once again, however, although the basic concepts appear clearly relevant, the potential for metaphor and confusion warrants caution.

Human beings incontrovertibly can be subject to momentary and apparently capricious passions that leave them feeling subjectively unfree and that seem to compromise their ability to control themselves. Such fleeting passions are often termed impulses and should be distinguished from cases in which such impulses are dispositional, which are usually termed impulsive or compulsive.⁵⁴ Both impulses and compulsions are often thought to have the potential for coercive motivational force.⁵⁵ Such observations, however characterized, are within the domain of common sense. The question is how these commonplaces bear on the general justifications for excusing.

Note, first, that the impulses under consideration are desires, fleeting and unconsidered desires to be sure, but desires nonetheless. If an agent acts to satisfy such a desire, doing so will surely be an intentional act executed by an undeniably effective will, and there is no reason to believe that universal causation or determinism plays a special role in such cases. The agent may have a strongly felt need to satisfy the impulse, but why is this different from standard cases of people desiring to fulfill momentary, strong desires? What would it mean to say that such a desire was literally irresistible? The lure of mechanism is clearly at work, but should be resisted. After all, why should a powerful desire—really, really, really wanting something—be assimilated to the patellar reflex? One possibility is that such impulses create a hard choice, but if so, hard choice analysis will do the work. A more likely possibility is that unthinking action in response to thoughtless or ephemerally thoughtful, momentary desires should be judged irrational in

IMPULSIVE CLIENT: THEORY, RESEARCH AND TREATMENT 225-46 (William G. McCown et al. eds., 1993).

⁵⁴ See William G. McCown & Philip A. DeSimone, *Impulses, Impulsivity, and Impulsive Behaviors: A Historical Review of a Contemporary Issue*, in THE IMPULSIVE CLIENT, *supra* note 53, at 3, 4.

⁵⁵ See GEORGE AINSLIE, PICOECONOMICS: THE STRATEGIC INTERACTION OF SUCCESSIVE MOTIVATIONAL STATES WITHIN THE PERSON 205 (1992); DSM-IV, *supra* note 44, at 418, 609 (people suffering from compulsions feel “driven to perform” the compulsive behavior; the essential feature of impulse control disorders is “failure to resist” performing a harmful act).

appropriate cases. But is such action better understood as irrational or as simply non-rational? In any case, rationality problems and not some supposed irresistible quality of the desire would be the ground for excuse when action is impulsive. Furthermore, momentary irrationality is not inconsistent with the general capacity for normative competence. Finally, even if impulses do have coercive motivational force, it is impossible to differentiate "irresistible" impulses from those simply not resisted.

Impulsivity is a disposition or tendency to act with less forethought or steeper time discounting than most people of similar ability and knowledge.⁵⁶ Dispositional impulsiveness is arguably a feature of childhood and adolescence. Despite the apparent consensus on the general definition, more specific criteria or descriptions have proved elusive.⁵⁷ It is reasonable to assume, however, that at least some people who meet the general definition dysfunctionally suffer generally negative consequences as a result of impulsivity.⁵⁸ For example, dispositional impulsiveness may in part explain the higher accident rate among adolescents. The assumption that dispositional impulsiveness can be dysfunctional is also commonplace and raises questions about why a disposition to act impulsively, as well as acting on an individual impulse, should excuse. The dispositionally impulsive agent surely acts intentionally, with an effective will, and not under any particular influence of universal causation or determinism. Like the agent acting in response to an individual impulse, the dispositionally impulsive agent acting impulsively may experience a hard choice or act irrationally or non-rationally. But literal irresistibility will not be the operative variable to justify an excuse. Moreover, once again, the dispositionally impulsive agent surely has general normative competence and consider-

⁵⁶ See Scott Dickman, *Impulsivity and Information Processing*, in *THE IMPULSIVE CLIENT*, *supra* note 53, at 151; McCown & DeSimone, *supra* note 54, at 4.

⁵⁷ See James D.A. Parker & R. Michael Bagby, *Impulsivity in Adults: A Critical Review of Measurement Approaches*, in *IMPULSIVITY: THEORY, ASSESSMENT AND TREATMENT* 142, 142-43 (Christopher D. Webster & Margaret A. Jackson eds., 1997) ("the lack of conceptual clarity in the impulsivity construct has become a source of widespread confusion. . . ."); McCown & DeSimone, *supra* note 54, at 5; see also Dickman, *supra* note 56, at 153 (claiming that many of the inconsistencies in the impulsivity literature can be resolved by inferring the specific cognitive processes in which subjects differ).

⁵⁸ See generally Scott Dickman, *Functional and Dysfunctional Impulsivity: Personality and Cognitive Correlates*, 58 *J. PERSONALITY & SOC. PSYCHOL.* 95 (1990).

able experience with the drawbacks of his or her disposition from which we can fairly expect the agent to learn.

The general intuition supporting an argument for excusing the dispositionally impulsive agent is not that desires are irresistible or that hard choice or irrationality exists. It is, instead, that the agent has the misfortune to possess a character trait that makes behaving oneself more difficult. However, character rarely furnishes the basis for a legal excuse. The law assumes that people who are characterologically thoughtless, careless, pugnacious, excitable, cowardly, cruel, and the like have sufficient general normative capacity to be held accountable if they violate the law. True, it may be harder for such people to behave well, but the law assumes that they do not lack the ability to do so, if they are minimally capable of rationality and did not face a hard choice. Finally, if such characterological considerations were the basis for excusing, it would be because we decided as a normative matter that certain prophylactic personality qualities were necessary for responsibility, not because the desires of characterologically disadvantaged agents were uniquely "irresistible" or that such agents were generally normatively incompetent.

In sum, being "out of control" is just a conclusory synonym for lack of culpability that requires analysis to determine if it can explain the excuses we have. It clearly is not a unifying theoretical explanation that explains all the excuses, except in an extremely loose, unhelpful sense. Either irrationality or hard choice will explain those cases, such as "irresistible impulse," to which it seems particularly to apply.

III. THE MORAL AND LEGAL RESPONSIBILITY OF JUVENILES

Part II of this paper provided an interpretation of the excusing conditions and the practice of holding an agent morally responsible and blaming the agent. It challenged standard alternative accounts and suggested that new proposals should be justified according to a robust moral theory of responsibility and excuse. This part first considers a common strategy for addressing the responsibility of juveniles: identifying an alleged difference between juveniles and adults and assuming that the empirical difference makes a moral difference. Then, based on the analysis of Part II, this Part suggests why juveniles may be in general less morally responsible than adults and how the legal

system and researchers can take practical account of such differences.

A. BEGGING THE QUESTION

The question of juvenile responsibility is not simply whether juveniles are generally different from adults. Surely they are in many ways. The real issue is whether they are morally different, and the resolution of that issue depends on whether a moral theory we accept dictates that the variables that behaviorally distinguish juveniles should also diminish their responsibility. Difference is not necessarily diminution, after all, and to assume otherwise is to beg the question.

A standard strategy reviews the research on the developmental and psychosocial variables that apparently distinguish juveniles from adults and identifies the approximate age at which the distinction no longer seems to pertain. The explicit or implicit conclusion is that many of these variables diminish responsibility, but the conclusion is rarely supported by argumentation. It is assumed, and that is the difficulty. Many of the variables may seem to be attractive candidates for diminishing responsibility, but until the argument is provided, we can have little sense of the force of the assumption.

One possibility is that a proposed variable is reducible to normative incompetence. The task in this case is to show why the variable diminishes normative competence. The second possibility is that the concept of normative competence should be expanded so that the behavioral difference should make a moral difference. The task here is to show why according to some moral theory normative competence should be so expanded. In both cases, a further task is to explain why adults who are indistinguishable from juveniles should not be treated the same as juveniles according to the moral theory that treats juveniles as a class differently.

For example, if juveniles are not rational, it is a simple matter to explain why they are not responsible. We already excuse adults who are sufficiently irrational. But, to take a common example, suppose juveniles as a class are more subject to peer pressure than adults. This does not appear to raise a problem with an agent's general capacity for normative competence, but should it excuse the agent for some other reason? If so, is there

good reason not to excuse the smaller proportion of adults who may be as subject to peer pressure as the average juvenile?

A related question that is often begged is the moral and legal relevance of the observation that juveniles are allegedly more changeable than adults, either through normal developmental processes or through interventional strategies. Adolescence is a stage of dynamic psychological change and for this and other reasons juveniles may be especially amenable to treatment. Many self-protective variables may be precisely those that undergo developmental change and that can be strengthened. It is assumed without question that the assumed differential plasticity of juveniles should affect our moral and legal response. But the proper response to juvenile offenders depends entirely on our theories of justification for intervention in their lives. If we believe that pure retributivism should guide our response, everything will depend on moral responsibility; if we are pure consequentialists, moral responsibility is of no consequence; if we are mixed theorists, desert is a necessary condition for punishment and sets limits, but it is not sufficient for punitive intervention. Juvenile delinquency jurisdiction and adjudication thus needs a theory of intervention in general and a theory of punishment in particular. Otherwise, a focus on particular variables as necessitating a particular intervention once again begs the question.

If responsibility is treated as a matter of retrospective moral evaluation, as I suggested it essentially is and should be, then the plasticity or amenability to treatment of a variable is irrelevant to whether it diminishes moral responsibility. Responsibility should be mitigated or excused if a variable that diminishes responsibility was operative at the time of harmdoing, whether or not this characteristic is alterable, and vice versa. It is hard to imagine what moral theory would suggest that plasticity per se should reduce responsibility. To the extent that fault is a necessary or sufficient condition for full responsibility, plasticity is irrelevant. Thus, a pure retributivist can justify full negative sanctions for a fully responsible juvenile, even if the juvenile will grow out of the characteristic that predisposed her to wrongdoing. Similarly, the pure retributivist can justify lesser sanctions

for a partially responsible juvenile, even if she will not grow out of the characteristic that predisposes her to criminal conduct.⁵⁹

Plasticity might be highly relevant, however, to a mixed or purely consequential theory of punishment or social intervention. Thus, according to a mixed theory, specific prevention may justify a less punitive response for a fully responsible juvenile wrongdoer, say, shorter incarceration. The lesser punishment is perhaps justified either because she will mature or because it is easier to alter her antisocial tendencies, but the lenience will not be based on diminished desert. Or, if one is a purely consequential theorist, on general and specific prevention grounds, one could justify lengthier incarceration for a partially responsible but highly dangerous juvenile who is unlikely to change for the better.

In sum, the relevance of plasticity depends on the theory of intervention in the lives of juvenile offenders that guides our moral and legal response to them. With these considerations in mind, we are ready to turn to the question of the moral responsibility of juveniles.

B. THE CRITERIA FOR JUVENILE RESPONSIBILITY

This section considers the moral responsibility of adolescents from an explicitly retrospective, morally evaluative stance. In other words, it explores the degree to which adolescents can fairly be blamed and punished for their wrongdoing on the ground of moral desert. A consistent strategy of this section is to examine the law's response to adult offenders who possess juvenile characteristics and to consider whether juveniles who are morally like adults should be treated as juvenile and whether adults who are morally like juveniles should be treated as adults. The section does not address the good consequences that might

⁵⁹ Kevin Reitz has suggested in a personal communication that although the argument of this paragraph is narrowly true, the plasticity of juveniles might excuse them because it occurs at an earlier state of the developmental continuum, before they have had a chance to outgrow the characteristics that produce culpability. This is an attractive suggestion, but it concedes too much to matters of moral luck. There are always causes for culpability at every stage in the life cycle, most of which are not attributable to the agent's fault. Simply because one class of agents—juveniles—has a high probability of "maturing out" does not entail that they were not culpable when they acted. Nor, for that matter, does it entail that they should be differentiated from some classes of adults who may also "mature out" or for whom the probability of positive change is high. Plasticity is far more relevant to a consequential theory of punishment as I suggest in the text immediately following.

flow from treating adolescents as equally or less responsible than adults who commit the same deeds. Some of the consequential implications are considered in the next Part.

Let us begin by narrowing the question. At the very least, no class of human beings, juveniles included, should be held more morally responsible than the defining case of the ordinary adult. Thus, a juvenile faced with a hard choice to which a person of reasonable firmness would yield should be excused, and a juvenile incapable of reasonable rationality should likewise be excused. Young children rarely commit crimes in response to hard choices, and they lack many of the necessary attributes of rationality, including a developed capacity for empathy. Moreover, young children infrequently commit serious crimes. Consequently, the issue of full or substantial responsibility is not seriously in contention for young children.

Mid-adolescents do commit serious crimes,⁶⁰ however, and in many respects they may appear to meet the criteria for rationality. For example, few adolescents charged with delinquency are found non-responsible, although the insanity defense and other excusing defenses are available in delinquency proceedings. The moral and legal responsibility of adolescents is thus the critical moral and practical issue.

Many able scholars have reviewed the literature concerning potential legally relevant differences between adolescents and adults.⁶¹ I shall make the simplifying assumption that the near consensus of their findings represents the most accurate current assessment of those differences. In brief, the literature indicates that the formal reasoning ability and the level of cognitive moral development of mid-adolescents differs little from adults. Further, on narrowly conceived cognitive tasks performed under laboratory conditions that concern decisions about medical

⁶⁰ See SICKMUND ET AL., *supra* note 3, at 34 (robbery, aggravated assault); HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 112-13 (1995) (violent crime).

⁶¹ BARRY FELD, *BAD KIDS: THE TRANSFORMATION OF THE JUVENILE COURT* 31-53 (1996); Thomas Grisso, *Society's Retributive Response to Juvenile Violence: A Developmental Perspective*, 20 LAW & HUM. BEHAV. 229 (1996); Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221 (1995); Lawrence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249 (1996). See also Jennifer L. Woolard et al., *Theoretical and Methodological Issues in Studying Children's Capacities in Legal Contexts*, 20 LAW & HUM. BEHAV. 219 (1996). The findings summarized in the text are derived from these sources.

treatment, there is little difference in outcome between mid-adolescents and adults. As a class, however, adolescents: (1) have a stronger preference for risk and novelty; (2) subjectively assess the potentially negative consequences of risky conduct less unfavorably; (3) tend to be impulsive and more concerned with short-term than long-term consequences; (4) subjectively experience and assess the passage of time and time periods as longer; and (5) are more susceptible to peer pressure. All five differences diminish with maturation throughout adolescence, with most disappearing by mid- to late-adolescence, but they do appear robust for adolescents as a class. It is crucial to remember, however, that a finding of a statistically significant difference between groups does not mean that there is no overlap between them. In fact, the adolescent and adult distributions on these variables overlap considerably; large numbers of adolescents and adults are indistinguishable on measures of these variables.

Mid-adolescent and adult formal reasoning, including instrumental reasoning, are indistinguishable, but these other differences allegedly affect adolescent judgment and self-control. Adolescents make serious mistakes as a result of developmental immaturity that they would not make under similar circumstances after they mature. Consequently, many argue, adolescents should be protected from the full consequences of their immature mistakes, lest their lives be ruined by developmental factors they would outgrow in the normal course of life.⁶² It is important to remember, however, that all these characteristics are matters of degree and by mid-adolescence most juveniles are probably able to control them to a substantial degree, although it may be harder for them than for adults.

Before continuing, we must consider the relevance of the research concerning adolescence to juvenile *criminal* responsibility. Most of the research summarized above investigated adolescent decision-making and behavior in general and risk-taking in particular; it does not examine adolescent criminal behavior.⁶³ Adolescent criminal conduct for the most part involves

⁶² FRANKLIN ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 89-98 (1982).

⁶³ See Grisso, *supra* note 61, at 238-42 (suggesting more empirical research is needed before we can confidently conclude that differential legal treatment of mid- to late-adolescents is warranted); Scott et al., *supra* note 61, at 238 (noting only a single study comparing adult and adolescent decision making concerning criminal conduct).

the intentional infliction of harm: the offender intentionally killed, inflicted grievous bodily harm, raped, stole, destroyed, or burned. That is, it is the adolescent's conscious objective to cause in the immediate future precisely the harm the law prohibits. Unless serious adolescent offenders are specially unlucky or unskillful, they are practically certain to produce the harm that is their conscious objective, and they know it. The intentional harmdoer knows that the conduct invades the interests of others; those interests may be given little value or otherwise ignored or rationalized away, but they must be present to the adolescent agent's mind. Adolescents can surely commit crimes of risk creation, such as reckless homicide, but primarily serious crimes of intention raise the issues that concern us. And for crimes of serious risk creation, the risk is immediate and, once again, the risked result will at least be present to the adolescent's mind.

Risky conduct in general is different in important ways from conduct intended to cause immediate harm: risky conduct often is not criminal or seriously so; it often affects primarily the risk-taker; often the probability of the harm risked may not be high; and finally, often the risked result is a long-term, rather than an immediate, consequence. For example, an adolescent may intentionally drive too fast and engage in other forms of bravado, but much conduct of this sort is not criminal. Much of the risk is to themselves, and the probability of a serious harm, such as death, is not high. Adolescents may also intentionally experiment with drugs, but they face only the longer term and low probability risks of endangering their ultimate social success and health. Similarly, adolescents may intentionally engage in unprotected sex, but such behavior is not criminal and creates again the longer term, low probability risk of disease and pregnancy, and so on. The harms risked are serious, but the risky conduct does not demonstrate substantial antisocial potential, and in none of these cases is the result practically certain. When an adolescent (or anyone else) decides whether to engage in risky conduct, the potential harm does not weigh as heavily as the adolescent's gratification. The latter is certain; the former is not. Moreover, driven by a desire for gratification, it is easier to fail to weigh sufficiently the interests of others that one does not desire to harm and to underestimate the longer term risk one's conduct produces.

If risky conduct is statistically normal for adolescents, treating adolescents as criminals or proto-criminals may appear to be criminalizing "normality," but this is not the case. Again the law does not criminalize or seriously criminalize much risk-creating conduct. More important, no matter how much adolescents may prefer risk, it can scarcely be claimed that serious crime is the statistically normal mode that adolescents use to express their preference for risk. To treat an adolescent murderer, rapist, arsonist, and the like as simply a kid in search of risk and to suggest that we should consider decriminalizing such conduct among kids is neither justified by the data nor morally warranted.

In sum, the relevance of the research on adolescent immaturity and poor judgment to intentional criminal behavior is unclear. The desire for immediate gratification is likely to exert more influence when the potential harm is uncertain (and not criminal) than when it is intended (and criminal). What is more, the moral reason not to engage in conduct is in general vastly stronger and more immediate when the harm is intended rather than risked,⁶⁴ which explains why we consider intentional harmdoing more culpable than risky harmdoing. Although poor judgment may be characteristic of adolescent risk-taking, there is no evidence that such judgment also infects intentional criminal behavior. Adolescents have stronger reason to avoid poor judgment when intentional criminal behavior is contemplated. If the primary variable adolescent offenders underestimate is the risk of getting caught for their wrongdoing, this is hardly reason to think that they are less responsible. Moreover, recent research suggests that adolescents respond to the incentive structure of the juvenile and criminal law much like adults.⁶⁵

On empirical and normative grounds, the poor judgment that characterizes adolescent decision-making generally may not apply as fully to serious criminal conduct as it does to the behaviors the research on difference studied. Indeed, because the vast majority of adolescents do not commit the most serious criminal offenses,⁶⁶ even in criminogenic environments, it is dif-

⁶⁴ WALLACE, *supra* note 11, at 179-80.

⁶⁵ See Steven D. Levitt, *Juvenile Crime and Punishment* (1997) (unpublished manuscript, on file with author).

⁶⁶ The arrest rate for juveniles for violent crimes, from 1983-92, when juvenile crime rates were high, was no higher than about 1%, even at the highest risk age of

difficult to assert that poor adolescent judgment is strongly predisposing to such offenses. For the present, however, I wish to make the assumption that, in comparison to the case of adults, poor judgment more substantially affects the criminal conduct of adolescents as a class.

The potential excusing or mitigating force of these factors that I have lumped together as "poor judgment" does not depend on determinism, lack of free will, lack of choice, lack of intention, a defect in the will, irresistible impulse, or the formal inability to control oneself. Nonetheless, they surely all increase the probability that an agent will engage in risky or harmful behavior; they all decrease the probability that an agent will exercise her full capacity for normative competence when she probably should. When tempted by the rewards of risky or harmful conduct, the actor will either ignore or underweigh the reasons not to engage in this conduct, although he may have general normative competence. Thus, these factors decrease the probability that the agent will act wisely. But this is true of many characteristics that do not diminish responsibility. The question is whether these developmental characteristics of adolescence are reducible to sufficient, non-culpable defects in the capacity for rationality or whether they should excuse for other reasons.

The rationality criterion for moral responsibility requires that an agent is capable of understanding the morally relevant facts and the applicable moral reasons governing the conduct under the circumstances. Moreover, I have argued that the capacity for empathy and guilt are necessary to fully comprehend the nature of moral obligations. Unless one is capable of understanding the morally relevant facts and the rules and is capable of feeling empathy and guilt, one cannot be guided by good reason concerning moral obligations. Practical reasoning about a potential breach necessarily involves the facts, rules, and the relevant, motivating emotions. These are the components of moral reasoning and moral judgment.

It appears, however, that the variables distinguishing adolescents from adults are not components of moral rationality. An impulsive agent or one especially subject to peer pressure,

17. See SNYDER & SICKMUND, *supra* note 60, at 112. Even if the arrest rates substantially understated the actual rates of juvenile homicide crime, the statement in the text would still be true.

for example, may have the general capacity for normative competence. In this respect, these variables may be like other characteristics, such as hot-temper or greed, that are also not components of the general capacity for normative competence, but that may make it harder to exercise this capacity. If so, these variables would excuse only if they disabled the agent's capacity for rationality to a sufficient degree to warrant exculpation. Thus, we need to know the effect of these variables on the capacity for rationality and we need some sense of how much disability is sufficient to excuse.

At the extreme, the case for excuse based on such variables seems plausible. A thoroughly impulsive person for whom the desire becomes the deed, with no mediating thought whatsoever, who has tried without success to overcome this characteristic, may in fact lack the general capacity for normative competence. A totally other-directed, dependent person lacking any sense of autonomous selfhood, may be similarly situationally disabled when peer pressure is strongly brought to bear. These are extreme cases by definition, however, and no one seriously argues that mid- to late-adolescents as a class meet this description. It is a matter of degree. The strength of these variables is inversely proportional to the degree of difficulty an agent will experience in exercising the general capability for rationality.

It will be instructive to consider why these variables have no formal excusing force whatsoever for adults, except in extreme cases that are typically assimilated to mental disorder, such as impulse control disorders or the like. A highly impulsive or peer-oriented adult will be held fully culpable for wrongdoing potentiated by impulsivity or peer pressure. Indeed, many people will tend to condemn wrongdoers for these characteristics. The answer, I believe, is that we think that, except at the extremes, agents with these characteristics are sufficiently able to grasp and to be guided by good reason when they are considering wrongdoing. It may be harder for them to be guided by good reason, but they are nonetheless capable. And, after all, potential violation of moral expectations gives an agent supremely good reason to exercise the rational capacity the agent possesses.

Our moral and legal response to such variables is a product of our common sense understanding of human behavior, fil-

tered through our moral theory of how much capacity for normative competence an agent must possess to be held responsible. Everyone has been in a situation that made it harder to be guided by the general capacity for rationality. Stress, fatigue, rage, and a host of other variables that can undermine rationality are ever-present features of the human condition, as is the frequent desire to do wrong when in such states. Few people have been able to avoid wrestling with demons. Nonetheless, we know that virtually everyone virtually always is able to exercise the general capacity for rationality and does not do wrong. Our moral conclusion is that when wrongdoing, the breach of a moral expectation, is in issue, the wrongdoer may be held accountable, unless an adult agent's capacity for rationality is extremely and non-culpably disabled.

A substantial minority of adults is similar to mid- to late-adolescents on the variables that distinguish the age cohorts as classes. As noted, although the means may significantly differ, there is a great deal of overlap between the distributions. A regrettable number of adults are immature and have dreadful judgment. Yet we do not excuse that minority of adults. Why, therefore, should adolescents be treated differently? Adults obviously have more experience with the consequences of their behavior and life experience generally and some mature as a result, but many do not. Impulsive or peer-oriented adults probably have always "learned" less from experience than their more mature counterparts. Moreover, it does not take much life experience to understand how killing, raping, burning, stealing, and so on affects others. To understand the consequences of these actions does not require the sophistication and moral subtlety that only experience can provide.

A second reason for treating adolescents differently might be that immaturity is an inevitable "normal" developmental characteristic of the adolescent, but it is not a developmental characteristic of adulthood. This, too, is true, but its moral relevance is obscure. A characteristic that makes it harder to grasp and be guided by good reason may be a normal developmental characteristic or it may be a dismaying outcome of a failure to progress beyond a developmental stage. Nonetheless, if the characteristic exists, it will exert its influence similarly, no matter what its provenance might be. And one can hardly morally fault an adult for having a characteristic that is itself a product

of developmental failure. Do we really believe that when we ask a chronically immature adult to "grow up," that he or she has the potential to change her character very much? Or, do we really believe that telling a dependent adult to become more independent will somehow render the person less vulnerable to peer pressure?

Perhaps our society has a special moral obligation to at least mitigate the responsibility of the minority of unfortunate juveniles who may be inclined to commit serious crimes for reasons that they will outgrow or that are treatable.⁶⁷ But by the same token, why don't we have a similar obligation to those unfortunate adults whose life experiences have prevented them from outgrowing or receiving help for similar problems. Both have "impaired moral dispositions" through no fault of their own. We can ask an immature or dependent adult to change his or her behavior, provide the proper incentives to maximize the chance that this will happen, and expect that some behavior might change when something important is at stake. But the same is true of adolescents. Moreover, it may be harder for an adult to change behavior by "fighting against the grain" because the dispositions are longer standing and more ingrained.

I find it hard to understand why adolescents and similar adults should not be treated morally alike. If we believe that all adults who possess the usually distinguishing adolescent characteristics can fairly be held accountable, and thus permit no individualized mitigating or excusing claims, I see no good reason why mid- to late-adolescents as a class should be held less accountable on the basis of these characteristics. Conversely, if we believe these variables do sufficiently undermine the capacity for normative competence to warrant mitigation or excuse for mid- to late-adolescents as a class, then adult wrongdoers should be permitted to make individualized excusing claims based on these variables.

My analysis of the distinguishing variables implies that they do not undermine the general moral responsibility of an agent because they are not inconsistent with possessing the general capacity for normative competence concerning the gross, obvi-

⁶⁷ Kevin Reitz has made this morally appealing suggestion in a personal communication. As I argue in the text, however, I find it hard to differentiate juveniles from adults in this respect. One could perhaps differentiate on consequential grounds, but the case for a differential desert is difficult to discern.

ously wrong conduct constituting serious criminal offenses. At most, they make it harder for the agent to exercise the general capacity for normative competence. For example, consider again adolescent vulnerability to peer pressure. Adolescents are more likely to commit violent crime in groups, such as in juvenile gangs.⁶⁸ There can be no doubt that youths defining their fluid adolescent identities in terms of their peers will find it harder to consider the interests of those their peers wish to harm. Indeed, there will be often be reasons and rituals to help the potential adolescent wrongdoer devalue and demonize victims or otherwise rationalize her conduct. But most such adolescents surely retain the general normative competence to understand and be guided by the reasons that killing, raping, burning, stealing, and so on are wrong, even when the pressure of peers motivates them to ignore or to underweight these reasons.

Although I conclude that the distinguishing characteristics canvassed so far are not themselves part of normative competence and that they probably do not undermine the general capacity for normative competence, the research has not addressed a potentially critical distinguishing variable—the capacity for empathy, which I claim is a component of normative competence. Although adolescents have adequate formal reasoning powers and understanding of the content of the moral rules, and sufficient life experience to understand the facts, including the consequences of the serious crimes that concern us, they may fully lack the general capacity for empathy that is a component of full moral agency. Put another way, although adolescents may be highly subject to peer pressure, they are also developmentally self-centered, a quality that will usually diminish with normal maturation.⁶⁹ The research literature is not altogether clear on this question, but it seems to be a plausible assumption. If this is correct, then adolescents as a class may be less responsible moral agents in general and might deserve mitigation, if not full exoneration.

⁶⁸ See SNYDER & SICKMUND, *supra* note 60, at 56.

⁶⁹ See Martin L. Hoffman, *Empathy, Social Cognition and Moral Action*, in 1 HANDBOOK OF MORAL DEVELOPMENT AND BEHAVIOR 275 (William M. Kurtines & Jacob L. Gewirtz eds., 1991) (discussing the development of the capacity for empathy and its relation to moral principles and judgment).

Once again, however, the comparison to adults will be instructive. The law does not excuse full-fledged psychopaths,⁷⁰ who are apparently completely incapable of empathy and guilt as a result of genetic or developmental variables. On my theory of responsibility, such people should be excused and I wish to proceed as if the law followed. After all, if it is really morally acceptable to hold genuine psychopaths fully accountable, the argument for holding adolescents less responsible on the basis that they are not fully empathetic is anemic, at best. So, assuming that insufficient empathy undermines moral agency generally, it appears that morality and the law should treat adolescents and similarly situated adults alike. We cannot blame the adolescent for the lack, because it is a normal developmental characteristic. But we can hardly blame the adult either. The capacity for empathy is not the sort of characteristic one can easily "work on" and alter, like one's handwriting or manners. It is not even the type of characteristic, like impatience or hot-temper, that one can learn techniques to control, if not remove. Finally, we must ask how much lack of capacity for empathy is required to justify mitigation or excuse? Do adolescents lack it this much? Shouldn't adults who do so also be entitled to make a mitigating claim similar to the adolescents'?

I have reached no conclusion about whether mid- to late-adolescents as a class should be treated as less responsible than adults. My analysis does lead me to conclude, however, that we must very carefully identify why adolescents might be treated differently, and if fairness requires differential treatment for the class, it also requires that adults with the same responsibility diminishing characteristics should be treated equally.

IV. IMPLICATIONS AND RECOMMENDATIONS

This brief Part considers some of the conceptual, adjudicative and dispositional consequences that follow from concluding that mid- to late-adolescent serious offenders as a class should not be distinguished from their adult counterparts. I propose

⁷⁰ See MODEL PENAL CODE § 4.01(2) (1962) (denying psychopaths a responsibility defense).

to explore these issues selectively and suggestively, rather than comprehensively.⁷¹

If we conclude that mid- to late-adolescent offenders as a class are as morally responsible as adults, desert alone would furnish no basis for differential response, although other punitive and penological goals might. For example, dangerousness and amenability to treatment may distinguish adolescents and a system that considered consequential concerns in addition to desert might well conclude that these factors should be employed in determining the appropriate disposition.

The more difficult question is how the law should respond if dynamic developmental factors produce diminished general capacity for normative competence in large numbers of mid- to late-adolescent serious offenders. Let us assume that adolescents as a class are less responsible because they exhibit responsibility-diminishing attributes, such as a lack of fully developed capacity for empathy, that are a normal feature of their developmental stage. When determining culpability and disposition, how should the law consider the diminished responsibility of adolescents?

First, consider the adjudication of culpability. One response is entirely to individualize the desert determination for adolescent offenders to determine which offenders are not fully responsible. After all, not all adolescents are alike, even if they are distinguishable from adults as a class. The conclusion that adolescents are distinguishable from adults must depend on the ability to measure reliably and validly the distinguishing variables in the study samples. If there are no reliable and valid measures of these variables, we cannot conclude that the classes are distinct. If such measures are available, as they must be to warrant the underlying conclusion of difference, then any individual can be measured. A profile of potentially responsibility-diminishing attributes could thus be obtained for any adolescent offender and the score could be compared to the distribu-

⁷¹ In particular, I will not discuss whether the juvenile court should be retained as an independent institution. For the argument that the juvenile court should be abolished, see Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997). For the argument to the contrary, see Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137 (1997).

tions for adolescents and adults. Such individualization might be difficult, involving subtle judgments about an offender's cognitive and emotional status, but perhaps justice demands the attempt.

Suppose that an adolescent offender scored substantially below the adult mean for all the responsibility-diminishing variables? That is, suppose the adolescent exhibits far weaker diminishing variables than the average adult. Unless there is some other excuse theory suggesting that adolescents are less responsible just because they are adolescents, such a finding would suggest that in this case there is reason not to mitigate or excuse. The reverse would also be true for adolescents who exhibited far stronger diminishing variables than the average adult. No test score can dictate culpability, of course, but it would provide evidence that could be used to argue for greater or lesser guilt. Such evidence would be more objective, however, than the usual sources, such as the clinical evaluations of mental health professionals and others.

A second response would be for the law to adopt a rebuttable presumption of partial responsibility for adolescent offenders. Fairness and efficiency should require the prosecution to prove beyond a reasonable doubt that a particular adolescent defendant was fully responsible. Although another level of burden of persuasion could be used, liberty and stigma are essentially at stake in determining if an adolescent is fully responsible or not. These are precisely the interests that *Winship*⁷² identified as requiring the reasonable doubt standard. It is plausible to assume that in cases of obvious immaturity or where the evidence of immaturity is strong, the prosecution would either accept that mitigation was warranted or would be unable to bear its burden of persuasion. Where the evidence of maturity is strong, it suggests that this adolescent defendant has passed the stage of development that warrants mitigation. In this case, full responsibility would be both warranted and provable. Marginal cases are probably the largest category, because the overlap between mid- to late-adolescents and adults is so large. In these cases, the prosecution will most often be unable to bear the burden of persuasion and the presumption of partial responsibility will prevail. This is the way it ought to be in a system that prefers in-

⁷² *In re Winship*, 397 U.S. 358, 364 (1970).

correct attributions of innocence (or lesser culpability) to incorrect attributions of guilt (or greater culpability). Assuming that we can reasonably assess the attributes that distinguish adolescents, such a system would allow us to individualize, with a strong presumption in favor of partial responsibility.

The individualization described is analogous to the current juvenile court waiver or transfer authority. It differs, however, because it would be premised entirely on culpability, rather than on public safety or, alas, concerns for vengeance. If blameworthiness is a necessary precondition of punishment, then less responsible adolescent defendants should not be fully punished, no matter how dangerous they are or how dreadful their deeds. And under the regnant mixed theory of punishment, which holds that desert is necessary but not sufficient to justify punishment, a fully responsible adolescent offender need not be fully punished unless there is good consequential reason for doing so.

Finally, I concluded at the close of Part III that if most or all adolescents are only partially morally responsible, then similarly situated adults should be treated similarly. I recognize that the law may adopt a bright line test based on age to avoid the expense of individualization. Thus, if subjection to peer pressure does somehow excuse and juveniles are more subject to it as a class, there might be reason not to try to identify the small group of juveniles not especially subject to peer pressure. The search for efficiency in adjudicating juveniles then errs on the side of leniency.

But this argument need not be symmetrical. Should adult adjudication err on the side of severity and unfairness in the search for efficiency? We generally hold that it is better to acquit the guilty than to convict the innocent. Should not efficiency yield to the need to individualize for the small class of adults with the same characteristics as juveniles who therefore might not be responsible? This argument for asymmetry is analogous to the argument that the definition of defenses may fairly be left more vague than the definition of offenses.⁷³ If new variables do not reduce to standard excusing conditions, questions like these must be addressed fully.

⁷³ See KADISH & SCHULHOFER, *supra* note 20, at 870-71 (presenting opposing viewpoints).

Now, let us consider the dispositional consequences. Assume first that some form of individualization was performed and a minority of adolescent offenders was found fully responsible. They should be treated according to whatever theory of punishment was dominant. What seems clear in these cases, however, is that the considerations that presumptively apply to adolescents do not apply to them. Further developmental maturation is not required to achieve the full capability for responsibility. Thus, the system should apply the same dispositional considerations that it applies to adult offenders.

Assume, now, that individualization results in mitigation or that all adolescents are conclusively presumed to warrant mitigation. In this case, developmental variables have resulted in partial responsibility and a sensible dispositional response would take account of those variables. In other words, wrongdoing in these cases is in substantial measure a product of juvenile immaturity that will be outgrown under proper conditions. Once outgrown, the wrongdoer is far less likely to make such "mistakes" in the future. The question, of course, is what possible dispositions will facilitate maturation and protect the public from dangerous juveniles. Reformatories and prisons, especially if they are brutal, are hardly the types of environments that provide firm but caring discipline or the graded freedom and responsibilities that give adolescents the best chance to develop mature, good reason. On the other hand, less secure institutions may be insufficient for protection and the adolescent offender's usual environment might be more criminogenic than prophylactic. Although there are quite solid empirical findings about the general characteristics of treatment programs that "work,"⁷⁴ valid classification of offenders is difficult,⁷⁵ and we are seldom sure about what works specifically for whom among the various therapeutic interventions that might be tried. The disposition of partially responsible adolescents thus presents a gargantuan dilemma.

What should we do about partially responsible adolescents until the doctor comes with a dispositional cure? Attempts to

⁷⁴ Mark Lipsey, *Effective Intervention for Serious Juvenile Offenders: A Synthesis of Research* (1997) (unpublished manuscript, on file with author).

⁷⁵ For example, if lack of the capacity for empathy diminishes responsibility, incarceration term and treatment decisions would have to distinguish between normal developmental conditions and genuine psychopathy, which can be very difficult.

individualize terms of incarceration based on differential desert are likely to be well-meaning but misguided shams. Perhaps the best we can do is some legislatively-mandated reduction in punishment for all partially responsible adolescents.⁷⁶ The balance of just deserts and public safety could be obtained by an inverse relation between the seriousness of the offense and the reduction mandated: more serious crimes would receive less reduction and vice versa. In addition to maximizing public protection within a scheme of punishment reduction for partial responsibility, this proposal seems presumptively fair because serious crimes present the potential wrongdoer with the strongest possible reason to bring whatever rational capability could be brought to bear on the intention to harm another.

I want to conclude this section by emphasizing again that my primary focus on the implications of adolescent responsibility do not exhaust the range of considerations a sensible justice system might consider when adjudicating and mandating dispositions for serious adolescent offenders. But to the extent that desert is a necessary precondition for and a limit on punishment, it cannot be ignored.

V. CONCLUSION

Consideration of the moral and legal responsibility of mid- to late-adolescents depends on a prior, robust theory of responsibility. I have tried to offer an interpretation of our responsibility and blaming practices that meets this test. Whether, on this interpretation, adolescents should be treated differently from adults is an open question, however. Even on the assumption that behavioral research does demonstrate that there are significant differences between adults and adolescents on variables that bear on this theory of responsibility, whether the difference is substantial enough to warrant differential moral and legal treatment is a normative judgment that only society can make. Society should do so in the terms of the theory of responsibility applied, however, and should avoid begging questions because ideology or sentiment hold sway. I have also concluded that if adolescents are relevantly and sufficiently different, adults who

⁷⁶ I suggested (and rejected) such an approach for mentally abnormal but legally sane adults long ago. See Stephen J. Morse, *Diminished Capacity: A Moral and Legal Conundrum*, 2 INT'L J.L. & PSYCHIATRY 271 (1979). I have recently revived the idea, however. See Morse, *supra* note 26. The suggestion in the text follows the revival.

are like adolescents in the relevant ways should be treated equally. They should also be found partially responsible and treated accordingly. Finally, if normal developmental features render adolescents, or at least some of them, less responsible, the disposition of adolescent offenders should facilitate maturation to the fullest extent possible. This will not be a simple task.