Causation and the Excuses

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My target in this paper is a theory of excuse that I call the causal theory. The causal theory is partly descriptive and partly normative. The descriptive part asserts that the established excuses of Anglo-American criminal law can best be understood in terms of causation. According to this part of the theory, when an agent is caused to act by a factor outside his control, he is excused; only those acts not caused by some factor external to his will are unexcused. The normative part of the theory asserts that the criminal law is morally right in excusing all those, and only those, whose actions are caused by factors outside their control. In a nutshell, the causal theory of excuse regards causation as the core of both legal and moral excuse.

I shall urge that we must reject the causal theory of excuse. It neither describes accurately the accepted excuses of our criminal law nor provides a morally acceptable basis for deciding what conditions ought to qualify as excuses from criminal liability. I shall approach my thesis gradually, for some preliminary work must be done. In Part I below, I examine what a theory of excuse is. To do this I shall ask first what the excuses are and how they differ both from one another and from justifications. I shall then ask what a theory of excuse might be and how one might argue for or against such a theory.

In Part II, I attempt to show why the causal theory of excuse is so widely accepted. In examining the theory's plausibility, I undertake two tasks that correspond to the theory's descriptive and normative aspects. First, I examine some of the legal doctrines that have developed around each of the excuses described in Part I. From these doctrines we might plausibly conclude that it is causation that underlies our established excuses. Second, I set out the moral argument one could make for this underlying causal principle.

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The remainder of the paper, Parts III and IV, develop alternative arguments against the causal theory. Part III assumes that human actions and choices, like all other events in the world, are caused. This assumption I shall call "determinism." Taking determinism as an essential premise, I construct a reductio form of argument to show that the causal theory of excuse leads to the absurd conclusion that no one is responsible for anything. I then examine a number of dodges the causal theorist might make to avoid this absurdity and show that none is adequate. As a result, the causal theorist who accepts determinism at all must accept the kind of "hard determinism" that makes moral responsibility an illusion.

Part IV makes the alternative assumption that human actions and choices are not determined. For purposes of argument I grant that persons sometimes exercise free will, "free" here meaning "not caused." I argue that even if we make this strong assumption, the causal theory is false. More specifically, I argue (1) that the causal theory describes the established legal excuses less well than other, noncausal theories of excuse, and (2) that moral responsibility for an action should be ascribed to an actor even when that action was caused by factors over which he had no control. Therefore both the descriptive and the normative parts of the causal theory of excuse must be rejected.

Before launching into this discussion it may be well to use the remainder of this introduction to say why any of it matters. First and foremost, whether the causal theory of excuse is correct matters because so many people accept it. This is true not only of many theorists, some of whom I shall discuss in a moment, but also of the common sense beliefs of many educated laypersons. Common sense often adopts as folk wisdom the French proverb, "tout comprendre c'est tout pardonner." This common sense urges that we should excuse whenever we come to know the causes of behavior and that to do so is the mark of a civilized being.

Many distinguished judges, psychiatrists and legal theorists, seeing themselves as civilized in this respect, have adopted the commonsense view. This has had a number of ramifications. First, these persons propose adding new excuses to the criminal law or abolishing old ones by showing how certain conditions cause or do not cause criminal behavior. For example, recent arguments for the abolition of the insanity defense

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1. To understand all is to forgive all. The proverb is usually taken to assume that one understands another's behavior when one knows the causes of that behavior.

have often been based on the assumption that insane criminals, who are excused, are no more strongly caused to act than are normal criminals, who are not excused. Such comparisons lead advocates of a causal theory of excuse to reject the insanity defense. Likewise, proposals to add new defenses also are frequently based on the discovery of some new cause of criminal behavior. Consider Chief Judge Bazelon's proposals to excuse those whose environment caused them to become criminals. Or consider the debate about brainwashing that the Patty Hearst case occasioned. Brainwashing may be urged as a defense simply because brainwashing identifies a factor that causes criminal behavior. Proposals to create excuses for persons with an extra Y chromosome or for women suffering from premenstrual-tension syndrome also are often based on causal grounds. One can intelligently assess these proposals to abolish or add excuses only if one has first answered the question common to all of them: Is causation the core of excuse?

Second, adoption of the causal theory of excuse leads many judges and theorists to slant their interpretations of the existing legal excuses. When the excuse of duress is applied in a particular case, for example, a judge must decide how serious and immediate a threat the accused must have experienced before he is excused. A causal theorist will pose the question in terms of whether the threat or the actor's will was the cause of the criminal act. Or consider the irresistible-impulse version of the insanity defense, which requires a judge to decide how compelled an

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3. See N. Morris, Madness and the Criminal Law 53-76 (1982); see also Moore, The Determinist Theory of Excuses, 95 Ethics 909 (1985) (reviewing Morris on this point). The American Medical Association has also accepted this line of argument in its recent Hinckley-inspired proposal to abolish the insanity defense. See Committee on Medico-Legal Problems of the AM. MEDICAL ASS N, REPORT OF CONCLUSIONS AND RECOMMENDATIONS REGARDING THE INSANITY DEFENSE (1983).


6. See People v. Yukl, 83 Misc. 2d 364, 368-72, 372 N.Y.S.2d 313, 317-20 (Sup. Ct. 1975) (rejecting the XYY genetic evidence, but only because "the genetic imbalance theory of crime causation has not been satisfactorily established and accepted"). As noted in the Yukl opinion, other courts in France, Australia, and New York have allowed evidence of XYY to go to the jury as a separate defense or as part of the insanity defense. Id. For discussions of the defense, see Saxe, Psychiatry, Sociopathy and the XYY Chromosome Syndrome, 6 Tulsa L.J. 243 (1970); Taylor, Genetically-Influenced Antisocial Conduct and the Criminal Justice System, 31 Cleve. St. L. Rev. 61 (1982); Note, The XYY Chromosome Defense, 57 Geo. L.J. 892 (1969).


8. The question is so put in Regina v. Hudson, [1971] 2 All E.R. 244.
accused must have been in order to be excused. A causal theorist again will interpret compulsion in terms of causation. Was the actor’s conscious will the cause of his criminal act, in which case he was not “irresistibly impelled”? Or was his unconscious motive the cause of his criminal act, in which case he was impelled to act by a factor he could not resist? If the causal theory of excuse is wrong, as I shall urge, some other interpretation of these defenses is necessary.

Third, some of those accepting the causal theory will be psychiatrists called to testify as experts in criminal trials. It is no secret that many psychiatrists accept the causal theory as the best moral theory of excuse. They may consciously or unconsciously frame their testimony about legal excuses accordingly. Whether or not the causal theory of excuse is right will make a great difference in how we assess the weight and relevance of such testimony.

Fourth, as I show in Part III, acceptance of the causal theory of excuse may lead to an unfortunate cynicism about the moral basis of the criminal law. If one accepts the determinist thesis that all events, including all human behavior, are caused, and if one believes that causation excuses, then one must believe that moral responsibility is an illusion on which liability to criminal punishment cannot be built. For some cynics, this conclusion will lead to a purely utilitarian theory of punishment and of legal excuse. For others, this conclusion will generate a deeper skepticism about the rationality of the substantive criminal law on any grounds, moral or utilitarian. In either case, such cynicism is pernicious and debilitating for those who suffer from it. Yet they can only be justified if the causal theory of excuse is right.

Even if the causal theory of excuse were not so widely accepted, we should examine it for the same reason we examine any other plausible theory about an area of law. Rejecting a theory often paves the way for formulation of better theories, theories that may capture the plausibility of the rejected theory while avoiding its mistakes. Building such general

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10. This was certainly true of the earlier psychiatrists who regarded responsibility as an illusion solely because they believed all behavior was caused. See, e.g., K. Menninger, The Crime of Punishment (1968). For a softer view, see Katz, Law, Psychiatry and Free Will, 5 INT’L REV. PSYCHO-ANALYSIS 257 (1978). In 1945 the American Bar Association expressed concern over the determinist inclinations of psychoanalysis and the courts’ inevitable problems with psychoanalytic testimony. Report of the Special Committee on the Rights of the Mentally Ill, 70 ANN. REP. A.B.A. 338, 339 (1945).
11. For a confession by one who manipulated testimony so as to fit his own causal theory of excuse, see Diamond, Criminal Responsibility of the Mentally Ill, 14 STAN. L. REV. 59, 61-62 (1961).
theories is part and parcel of the larger enterprise of seeking the best general expression of our criminal laws, a traditional task of academic criminal lawyers for at least a century.

I
What is a Theory of Excuse?

A. What Are the Excuses?

Our first task is to determine exactly what a theory of excuses is a theory of. What, in other words, are the legal excuses? Think of the range of arguments a defendant might make in order to defeat a prima facie showing of legal responsibility. He might seek to show that he acted in ignorance of certain facts; that he was mistaken about the law; that the statute of limitations has run; that he acted in self-defense; that he was young, or crazy, or drunk; that he was threatened by others; that he was unconscious or asleep or acting under posthypnotic suggestion; or that he did not cause the harm, but that some other intervening agent did. Our first need is to cull out of this seemingly heterogeneous set of defenses those that are excuses and then to impose order on them.

Two distinctions are helpful here. The first is between extrinsic policy defenses and culpability defenses. Most defenses in criminal law are ways of showing that the actor was not morally culpable.14 Some defenses, however, are unconnected to the actor's culpability. The statute of limitations is one example, and entrapment may be another.15 Excuses are a subclass of those defenses that show the lessened moral culpability of the offender.

Within the class of culpability defenses a second distinction is crucial: that between justifications and excuses. Criminal law theoreticians have formulated this distinction in various ways. Some describe the legal consequences of classifying a defense as a justification or an excuse. For example, a justification entitles others to do a like action, because they too will be justified, whereas an excuse is not generalizable in this way but is said to be a matter of individual justice to a particular actor. Alternatively, third parties may lawfully come to the aid of the actor whose action is justified, but they may not if his action is only excused. As a third example, the victim of a violent act may lawfully resist it if the act

14. I here assume that the utilitarian theory of excuses is incorrect. Therefore, in order to account for the excuse of insanity, for example, one must discuss not the insane's dangerousness or lack of deterability, but their lack of culpability. On the utilitarian theory of excuses and its problems, see H.L.A. Hart, Legal Responsibility and the Excuses, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 28-53 (1968); Brandt, The Utilitarian Theory of Excuses, 78 PHIL. REV. 337 (1969).

is excused but has no right to resist if the violent act is justified.\textsuperscript{16} Some theoreticians focus on the moral consequences of describing a defense as a justification or an excuse. A justification entitles one to act in a certain way because it shows that an act that is morally wrongful in most instances is not wrongful in particular (justifying) circumstances. In contrast, an excuse does not create an entitlement to act in a certain way because it does not make the \textit{act} any less wrongful. Instead, an excuse shows that the \textit{actor} was not as culpable as others typically performing the same wrongful act.\textsuperscript{17} These two approaches are fine as far as they go, but they do not go far enough. Showing the legal or moral consequences of making the distinction does not tell us what the distinction is; such an analysis can only tell us what follows from the distinction once it is made. Needed is an analysis of the distinction itself.\textsuperscript{18}

The difference lies in the fact that justifications answer a different moral question than do excuses. Justifications answer the general evaluative question of whether, all things considered, the world is better or worse than it was without the action in question. Justifications answer this question in light of all the actual consequences and circumstances of an action, not in light of the circumstances and consequences known to the actor.\textsuperscript{19} In this sense justifications are said to answer an objective moral question. Excuses answer a different question, the finger-pointing question of attribution: is there a culpable actor who is responsible for making the world worse than it was without the act? By focusing on the actor, excuses necessarily concern themselves with the subjective mental states of a particular actor. In this sense excuses are said to answer a subjective question. Justifications and excuses both may ultimately relieve an actor of moral responsibility for some harm, but they do so in markedly different ways. When an action is justified, any harm produced is outweighed by the other (and good) effects of the action; when an action is excused, it is harmful overall but the actor cannot be held responsible for it.

\textsuperscript{17} Id. at 759.
\textsuperscript{18} For a defense of the view that an analysis of legal concepts must include the criteria of their correct application, as well as the legal consequences attached to their authoritative use, see M. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 44-49 (1984).
\textsuperscript{19} But cf. Greenawalt, The Perplexing Borders of Justification and Excuse, 84 COLUM. L. REV. 1897 (1984) (paper presented to the German-Anglo-American Workshop on Basic Problems in Criminal Theory, July 1984). Greenawalt urges that actions the accused performed under mistaken beliefs about justifying circumstances (as in cases of imperfect self-defense, for example) should be treated as justified actions. \textit{Id.} at 1907-11. I choose to treat them as excused actions, because this is the only way I can make the distinction survive the elegant counterexamples to be found throughout Greenawalt's paper. If an actor mistakenly but reasonably believes he was shooting in self-defense, one might say that \textit{he} was justified in doing what he did, but that his action was not justified. Because the action was wrongful, the actor's defense is one of excuse (mistaken belief), not of justification.
When we put aside the justificatory defenses and the extrinsic policy defenses, we are left with the excuses. We can divide the excuses into three categories. There are, first of all, what I shall call the “true excuses.” These are the mistake excuses (mistake of fact, mistake of law) and the compulsion excuses (duress, necessity, provocation, addiction). Such excuses are not merely means of disproving the prosecution's prima facie case, but are affirmative defenses. Nor do such excuses focus on the general status of the accused; instead they explain the defendant's particular actions in light of the events or states present at the time of the action. For both these reasons I shall classify mistake and compulsion as “true” excuses.

Second, there are those “defenses” an accused may raise to disprove the case in chief. Consider three of them: (a) No voluntary action. An accused may show that he was asleep, unconscious, in shock, in a post-hypnotic trance, or reacting to the stings of bees. What he denies is that he acted or was the agent of the harm. (b) No mens rea. An accused may seek to show that he was ignorant of some circumstances surrounding his action, some consequence of his action, or some risk his actions created. He thus can deny that he knew of or was reckless with respect to some harm, or that he acted with that harm as his purpose. (c) No proximate cause. An accused may show that his act, admittedly a but-for cause of the harm, nonetheless should not make him responsible because an intervening occurrence—an extraordinary natural event or a voluntary act by another party—was the real cause of the harm. These intervening causes are said to break the causal chain between defendant's culpable act and the harm.

Lack of voluntary action, mens rea, and proximate cause are excuses only in an extended sense of the word, for legally they are not defenses at all but means of disproving the prosecution's case in chief. Still, we should consider them as excuses for two reasons. First, doing so allows

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20. Although there may be some dispute, I classify defense of others, self-defense, and the general balance-of-evils defense as justifications and not as excuses.

21. It is commonly thought that mistake of fact merely negates the intention or knowledge required for conviction. As I argue in M. Moore, supra note 18, at 85-86, this is not the case. A mistaken belief is not the same as ignorance. Mistake exists when the accused falsely believes that some proposition is true; in contrast, ignorance exists when the accused does not know that some true proposition is true. It is only ignorance, but not mistake, that negates intention or knowledge. If we supply the suppressed premise of rationality, namely, that a person's beliefs are consistent, then we may infer from mistake that there was ignorance, and thus mistake may negate that there was knowledge. But it is only when we are confident in making this assertion of consistency in beliefs that mistake negates the mens rea requirement of crime.

22. Ignorance negates purpose as well as knowledge because bringing about some harm cannot be a defendant's purpose unless he believes that his action has some likelihood of bringing about that harm. If he is ignorant as to that likelihood, bringing about the harm cannot be his purpose because he lacks the means/end belief necessary to connect his action to the thing he wants to achieve. On this, see M. Moore, supra note 18, at 15-18, 324-26.
the causal theorist to make his case as plausible as possible, for these "excuses" include some of his best examples. Second and more important, these excuses all function like the true excuses in answering the finger-pointing, or attribution, question. An accused will claim unconsciousness, ignorance, or intervening cause, for example, to respond to the subjective question of whether he was culpable, not the objective question of whether the act was wrong. For this reason, too, a theory of excuse ought to include these claims, even if as a matter of procedure they are assigned to the prosecutor to negate as he makes out his case in chief.\textsuperscript{23}

A third category of excuses consists of the status excuses: insanity, infancy, and intoxication. I call these status excuses because they make a claim about the accused's general status, not about his state of mind at the time he acted. Duress, for example, is a true excuse because its exculpatory effect depends on a particular event (threat) that explains why the criminal performed the forbidden act. Infancy, in contrast, is not a true excuse because its exculpatory effect depends on the accused's status. Juveniles as a class are considered incapable of committing crime because they are young. They are not excused because they possessed some particular mental state or were confronted with some threat at the time of their crime. Similarly, involuntary intoxication furnishes an excuse because the accused was drunk, not because he was ignorant or in some other way lacked mens rea. As to insanity, there is admittedly some dispute about whether it operates as a true excuse or as a status excuse. For now, let us include it as a status excuse. I shall argue for this categorization later.\textsuperscript{24} The reasons for including the status defenses as excuses are the same as those supporting the inclusion of unconsciousness, ignorance, and intervening cause among the excuses: (a) The status defenses allow the causal theorist to make his case as plausible as possible, since insanity is traditionally thought to be one of his best examples; and (b) the status defenses also answer the subjective question of culpability, not the objective question of wrongdoing.

In summary, we have identified three separate types of excuses: the

\begin{itemize}
  \item \textsuperscript{23} One might think that there is something improperly circular in using a theory of excuse in order to sort defenses into excuse and nonexcuse categories. After all, the very reason one wants to sort out the excuse defenses is to build a theory of them. There is no circularity here, however, because the theory used to do the sorting—the theory of justification versus excuse—is not the same as the theory of excuse later to be examined—the causal theory. The general distinction between the two kinds of moral questions (that grounds the distinction between justification and excuse) is in no way connected to the causal theory of excuses. In any case, even if there were circularity, it would not be a vicious circularity. Holistic justifications of theories in any field of knowledge have to allow for the theory-dependence of the data of which they are theories. For one example of holistic justification in the realm of moral knowledge, see Moore, \textit{Moral Reality}, 1982 Wts. L. Rev. 1061.
  \item \textsuperscript{24} See infra text accompanying notes 121-30.
\end{itemize}
true excuses, excuses negating the case in chief, and status excuses. In assessing the causal theory of excuses we shall want to ask whether that theory best accounts for the excuses falling in each of these categories.

B. What is a Theory of Excuse?

There are three different things a person might mean by “theory” when talking about a “theory of excuse.” First, one might think of a theory as a kind of deep description of the doctrines for which it is a theory. Consider Richard Posner’s well-known theory that negligence doctrine aims at achieving an efficient level of accident and safety costs. One way to see this theory is as a descriptive device only: the common law rules of negligence best fit with Posner’s principle of efficiency and not with other principles, such as the fault principle, the traditional theory of tort law.

Second, one might think of a theory as part of an explanation of why we have the doctrines we do in various areas of the law. For example, the explanatory version of Posner’s theory of negligence would claim that the common law judges who originated the various doctrines of negligence were motivated consciously or unconsciously by a desire to achieve economically efficient rules.

Third, one might think of a theory as neither descriptive nor explanatory. A theory in this third sense is normative. It is what might be called an internal justificatory principle. Posner’s principle of efficiency, on this reading, would be a principle with which judges should justify their decisions in those negligence cases not covered by authoritative rules. For a principle to operate as a reason for decision in this way, it

Because we shall return to it later, it is helpful to summarize the taxonomy of excuses as follows:

I. True Excuses
   A. Compulsion
      1. External Compulsions
         a. Duress
         b. Necessity
      2. Internal Compulsions
         a. Provocation
         b. Addiction
   B. Mistake
      1. Mistake of Fact
      2. Mistake of Law

II. Excuses Negating the Case in Chief
    A. Unconsciousness, reflex, etc. (No action)
    B. Ignorance (No purpose, knowledge, or recklessness)
    C. Intervening Cause (No proximate causation)

III. Status Excuses
    A. Insanity
    B. Involuntary intoxication
    C. Infancy

must have two dimensions: (1) it must fit the past doctrines and cases, and (2) it must be morally defensible. Both of these aspects are necessary to give a principle normative force within a legal system. The dimension of fit with past cases and doctrines gives a principle normative force because of the rule-of-law values mandating that judges act consistently with established doctrines and previous cases. The dimension of moral defensibility makes a principle that much more acceptable to use as a reason for decision. The best internal justificatory principle for a body of law is one that best fits the established doctrines and cases and is morally the best principle.

In discussing the causal theory of excuse, my use of the word theory is the third of these usages. The causal theory of excuse is an internal justificatory principle with which judges may justify their decisions about the excuses in criminal law. Thus, the causal theory of excuse must have both a normative and a descriptive aspect.

There are two ways to think of the descriptive aspect. Some legal theorists have urged that the relationship between a theory (T) and the set of legal rules (R_1, R_2, ..., R_n) of which it is a theory is one of implication; if the rules R_1, R_2, ..., R_n imply the theory T, then T is a theory of those rules. The problem with this view is that it completely trivializes any use of a theory as an internal justificatory principle. A theory of excuse in my sense of theory should allow us to generate new rules and to make decisions we could not have made under established rules. Yet if R_1, R_2, ..., R_n imply T, then any new rule (R_{n+1}) that T implies is not in fact a new rule because it was already implied by the old rules. As a result, any legal theory that was simply implied from existing rules of excuse would be severely handicapped in its ability to systematize the law and provide the reasons for decision in novel cases.

A second and better way to think of the descriptive aspect of a theory is to say that the relationship between a theory T and the legal doctrines of excuse R_1, R_2, ..., R_n is that T implies R_1, R_2, ..., R_n, but

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27. See, e.g., R. SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS (1975), wherein Sartorius urges that the principles that underlie the law are implied by a set of rules.

28. This is exactly what both Ronald Dworkin and Sartorius must claim about those principles that generate right answers in all cases, no matter how novel. See Dworkin, No Right Answer?, in LAW, MORALITY AND SOCIETY 58 (P.M.S. Hacker & J. Raz eds. 1977). See also R. SARTORIUS, supra note 27, at 181-210.

29. One can see this by taking the two implications as premises:
   (1) R_1, R_2, ..., R_n implies T
   (2) T implies R_{n+1}
   Doing so yields as a conclusion:
   (3) R_1, R_2, ..., R_n implies R_{n+1}.
   When T is implied by the old rules, any new rule implied by T will simply be an implication of those old rules. Cf. E. NAGEL, THE STRUCTURE OF SCIENCE 33-42 (1961), wherein Nagel points out the same relationship between scientific theories and the experimental laws such theories would explain.
that $T$ is not implied by those rules. Given this relationship, $T$ may now generate a new rule ($R_{n+1}$), which could not have been derived from the existing rules without the theory.\footnote{Now, one is not able to derive the new rule from the old rules:
(1) $T$ implies $R_1, R_2, \ldots, R_n$
(2) $T$ implies $R_{n+1}$.
From these two premises, it is not derivable that $R_1, R_2, \ldots, R_n$ imply $R_{n+1}$.
} This kind of theory, in other words, is not trivial and may operate as an internal justificatory principle. It would be a mistake to think that this second way of conceiving of the relationship of fit between a theory and its rules will result in the rules' uniquely determining one theory. Rather, any finite set of legal doctrines will be implied by an infinite number of theories. According to the Duhemian tradition in science, there are an infinite number of theories that imply the established scientific laws; the same is true of legal theories and legal rules.\footnote{For a discussion of the Duhemian thesis applied to law, see Schauer, An Essay on Constitutional Language, 29 U.C.L.A. L. Rev. 797, 816-18 (1982).}

The underdetermination of a theory by its rules makes it necessary for us to consider a second dimension in order to discover the correct legal theory for a body of law. This is the dimension of moral correctness. Among all the general theories that fit the established rules of excuse equally well, the correct theory is the one that is morally the best. Indeed, we may prefer a theory that is morally superior to a second theory, even if the second theory fits a little better with the established rules. In such a case we prefer moral correctness to the rule-of-law values that motivate our concern that a theory fit the rules.

If we adopt this view of what a legal theory is, we must ask two questions in order to assess the correctness of any legal theory. First, does the theory imply the established doctrines of excuse? If there are established excuses the theory does not imply, or if the theory implies an excuse where legally there is none, that counts against the theory on this first criterion. Second, is the theory morally a good theory? Does it at the very least enable us to understand the law of excuses as embodying an intelligible set of values? And further: is it morally the best theory one could imagine for achieving the purposes of the doctrines of excuse? As we will see, these two questions generate two kinds of arguments against the causal theory of excuse.

II

THE PLAUSIBILITY OF THE CAUSAL THEORY OF EXCUSE

Because the causal theory of excuse is my own reconstruction of a view to be found as an implicit (if crucial) premise in the thought of many criminal law theoreticians, I shall here draw out why such a theory
seems plausible. Part of the motive for presenting in a sympathetic light a view with which I disagree and against which I later argue is to help causal theorists recognize themselves. Because a theory as above described has two dimensions, I shall hold up my "mirror" to causal theorists from two angles, that of legal doctrine and that of moral correctness.

A. The Doctrinal Plausibility of the Descriptive Part of the Theory

In the legal doctrines of excuse, one might find strong suggestions that the causal theory is the theory of excuse. From such suggestions one might conclude that the established doctrines fit with (that is, follow deductively from) the causal theory. In elaborating on these suggestions, I will follow the three-part taxonomy of the excuses developed earlier.32

1. The True Excuses
   a. Compulsion Excuses

   The excuse of duress is made out when the accused has performed an otherwise criminal act under the threat of death or serious bodily injury. Causation is part of the test for duress because a defense exists only if the threat both "causes the defendant reasonably to believe that the only way to avoid imminent death or serious bodily injury to himself or another is to engage in conduct which violates the literal terms of the criminal law,... and causes the defendant to engage in that conduct."33 In other words, the threat must cause the criminal act before it can operate as a legal excuse. Sometimes these causal requirements are stated in a way that makes causation by the threat rule out causation by the will of the actor. An English court of appeal, for example, recently ruled that duress excuses an accused "if the will of the accused [was] overborne by threats of death or serious personal injury so the commission of the alleged offense was no longer the voluntary act of the accused."34 Such doctrines about the causal role of threats may seem to be specific instances of a general theory that causation by factors external to the actor's will excuses.

   The excuse of necessity can exculpate an accused when natural circumstance, rather than another's threats, has compelled his criminal act.35 To the extent that it is recognized at all as an excuse, necessity is put in terms of "irresistible force," "overwhelming pressure," or "teleo-

32. See supra note 25.
35. Sometimes necessity is miscategorized as a justification, as in W. LAFAVE & A. SCOTT, supra note 33, at 381; sometimes it is not recognized as a defense at all.
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36 These metaphors may be taken to suggest that like duress, necessity excuses because it has to some degree caused the accused's criminal act.

In American law, provocation is a means of mitigating the punishment for intentional homicides by reducing the crime from murder to voluntary manslaughter. Thus, it serves as an excuse, albeit a partial one. Often courts treat the provoking circumstance as a cause that competes with the defendant's own will. They excuse the defendant only when the external circumstances are the "dominant cause" of the crime. As the Wisconsin Supreme Court once stated the rule, a defendant is legally provoked (and thus partially excused) when the provoking situation can be said "to cause him, uncontrollably, to act from the impelling force of the disturbing cause, rather than from any real wickedness of heart."  

Addiction—the constitutional defense of being addicted to drugs or alcohol—is distinct from any common law or statutory defense of intoxication. In Robinson v. California, the Supreme Court held it unconstitutional ("cruel and unusual punishment") to punish a drug addict for being a drug addict. A decade later, language in Powell v. Texas indicated that the compelled nature of drug addiction had been crucial to the Robinson decision. In Powell, which suggested that alcoholics could not be punished for being alcoholics, five members of the Court were prepared to hold that an addict's use of alcohol was compelled and therefore excused. Further, they thought that the compulsive nature of drug addiction or alcoholism lies in the fact that these addictions are "caused and maintained by something other than the moral fault of the alcoholic." Again, the doctrinal suggestion is that it is because alcoholism causes them to drink that alcoholics cannot be blamed for using alcohol.

b. Mistake Excuses

A causal theorist has a difficult time accommodating the excuse of mistake of fact within his theory. He has two routes open to him. First, he could treat beliefs as unchosen causes of behavior. Beliefs, in other words, would be causal factors external to the will of the actor.
fore, according to the causal theory, they would excuse the actor from responsibility for any behavior that they cause. Pursuing this route further, a causal theorist would say that mistaken beliefs cause behavior and thus excuse, whereas true beliefs do not cause behavior and do not excuse.

This route, whatever its plausibility or implausibility as a matter of psychological fact, does not fit legal doctrines about mistake of fact. What the causal theorist would like in the way of legal doctrine would be a requirement that the accused's mistaken belief must have caused his criminal act before he is excused. Yet legal doctrine does not impose such a causal requirement. Consider, for example, the concept of willful blindness. Under the Model Penal Code's definition of this concept, a defendant who has a belief that would otherwise subject him to liability is excused if he also has a mistaken belief to the contrary. For example, a defendant who is aware of a high probability that his car is full of marijuana is excused from liability for transporting marijuana across the U.S. border if he also believes (mistakenly) that there was no marijuana in his car. The Model Penal Code does not require that the mistaken belief cause the defendant to drive the car (and the marijuana) across the border. His mistaken belief excuses him even though, had he known the marijuana was in the car, he still would have crossed the border.

The second route open to the causal theorist is to concede that all beliefs, both true and mistaken, operate as causes of behavior, but to argue that beliefs are not causes external to the actor's will. The relevant causal connection thus would not be between beliefs and behavior, but between beliefs and the factors producing those beliefs. When certain factors cause the accused to believe that he has no marijuana in his car, then he is excused. If, however, in the absence of these factors he chooses to believe that there is no marijuana in his car, then he is not excused. The causal theorist will classify chosen beliefs as uncaused and therefore restrict the excuse of mistake of fact to cases in which the actor's beliefs are caused by factors external to his will.

Mistake of law is not as troublesome to the causal theorist. To begin

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Will, 76 J. Phil. 243 (1979). In the text I allow the causal theorist alternative assumptions on this question.

43. MODEL PENAL CODE § 2.02(7) (Proposed Official Draft 1962). "Requirement of Knowledge Satisfied by Knowledge of High Probability. When knowledge of the existence of a particular fact is an element of the offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." Id.

44. Admittedly, even in the second route the causal theorist is bending doctrine a bit in order to make it fit his theory. For he is reading into the Model Penal Code's concept of willful blindness a limitation transplanted from the English version of the doctrine (according to which the essence of willful blindness is purposeful avoidance of knowledge). On the English doctrine, see G. Williams, CRIMINAL LAW: THE GENERAL PART § 57, 157-59 (2d ed. 1961). Still, there is some plausibility in thinking that a chosen (mistaken) belief is not an excuse, even under the Model Penal Code.
with, most mistakes of law do not excuse. "Ignorance of the law is no excuse" is a time-honored maxim of Anglo-American jurisprudence. Mistakes of law that do excuse can be divided into four classes: (1) mistakes about legal conclusions the accused must draw in order to have the mens rea required for the offense (for example, an alleged thief claims he did not know the property he took was "owned by another"); (2) mistakes about whether an accused's act will aid an official in performing a public duty (for example, an accused charged with assault claims he thought he was helping a police officer make an arrest); (3) mistakes about the existence of a criminal prohibition when knowledge of the prohibition was not reasonably available to the public; and (4) mistakes of law induced by reliance upon official advice that proves to be erroneous.

The causal theorist can explain the first class of mistakes of law the same way he explains mistakes of fact. Such mistaken beliefs excuse only when they are caused by factors external to the will of the actor. If he chooses to believe, for example, that another's property is his own, then that (uncaused) belief will not excuse.

The causal theorist need not account for the second and third exceptions to the rule that ignorance of the law is no excuse. These exceptions are not excuses at all, but are extrinsic policy defenses. We eliminate responsibility for those who act in furtherance of what they believe to be an official's public duty in order to encourage aid to officials; we eliminate responsibility when laws are not reasonably available to citizens in order to maximize the liberty of all citizens. We "excuse" particular criminals only as a means of achieving these extrinsic social goals, not because such criminals are not culpable.

To explain the fourth kind of excusing mistake of law, the causal theorist will say that the official who gives the wrong advice causes the defendant's criminal behavior. The official is like the coerer who by his threats forces the accused to do what the coerer wants. The official gets his way by trickery or stupidity, not by threats, but the important causal element is the same: a third party, not the defendant, causes the harm. Therefore the defendant must be excused. According to this view, mistake of law is an excuse much like the subjective version of the entrapment defense, which excuses the accused if a government agent induced him to commit a crime he was not already predisposed to commit. In these cases, a causal theorist like Mark Kelman would assert "[d]efendant's conduct is deemed determined by the [government] agent: The defendant would not have committed the crime had the agent never come along with the plan."45

45. Kelman, supra note 13, at 644.
2. **Excuses Negating the Case-in-Chief**

   a. **No Action**

   There are many states or conditions an accused may assert to disprove that he performed a voluntary act. These include hypnotic suggestion, sleep, unconsciousness, hypoglycemic episodes, reflex reactions, epilepsy, and the use of defendant's body by another. The causal theorist wishes to show that all these conditions preclude voluntary action solely because they are causes of the defendant's behavior.

   Instances of human behavior that are not actions fall into three categories. First, there are motions of a person's body in which his own muscles are not involved. If one is carried into the street by police officers, hurled through a window, or has one's arm moved by another person or by a falling rock, one has performed no action and cannot fairly be held responsible for the harm one's body may have caused. Second, there are motions of the body caused by the movement of one's muscles but over which the self—the acting, willing person—had no control. Reflex reactions to the doctor's hammer or to multiple bee stings are examples, as are an epileptic's movements during a seizure or a diabetic's movements during a hypoglycemic episode. Third, there are motions of the body that we do not treat as the defendant's acts, even though they look identical to actions of an intelligent, goal-seeking agent. They pursue an intelligible goal by means of behavioral routines that may be both complicated and efficient. Yet despite appearances, these are not actions if the defendant was asleep, unconscious, or in a hypnotic trance. Because these motions have such a strong appearance of inner-directedness, they may tempt us to ascribe them to some second agent within the actor. Even if we do so fractionate the self, we do not attribute such behavior to the agent who is the conscious will, the responsible self.

   A causal theorist will seize upon each of these three kinds of cases as instances of his theory. Each involves a kind of nonaction, he will say, because an external cause precludes attributing the motion to the defendant as his act. In the first case, the external cause is a natural factor or the act of another person. In the second case, there is again an external cause, even though it operates through the muscles of the accused. In the third case, there may be an external cause, such as a posthypnotic suggestion or a shot to the stomach inducing unconsciousness. Or, as in the typical cases of somnambulism and unconsciousness, there may be no external cause. The causal theorist may attribute the defendant's movements to some internal stimulus or even to some second agent within the defendant. In either case, it is not the defendant who directs his movements, but his unconscious, his dream censor, or his bad digestion. His

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46. See M. Moore, supra note 18, at 73.
movements are nonactions because caused by some factor external to the actor’s conscious will.

The causal theorist would take the way “voluntary act” is typically defined as providing doctrinal support for his theory. According to the Model Penal Code, for example, an act is not voluntary if it was produced by a reflex or a convulsion, if it occurred during unconsciousness, sleep, or hypnosis or resulted from hypnotic suggestion, or if it otherwise “was not a product of the effort or determination of the actor, either conscious or habitual.” This enumeration of negating conditions suggests that we may discover what an action is only by identifying the conditions that preclude action, and further, that these conditions exist whenever external causes for the behavior in question can be found. In other words, such a doctrine may be taken to suggest that causation by factors external to the will of the actor precludes action and therefore negates responsibility.

b. No Mens Rea (Ignorance)

If one is ignorant of some circumstance affecting one’s act, of the likelihood of some consequence of the act, or of the risk of either of these, then one does not have the belief states necessary for intention, purpose, knowledge, or recklessness as those terms are used in American criminal law. Ignorance, unlike mistake, should be regarded as simply the negation of these forms of mens rea.

A causal theorist will seek to explain the requirement of mens rea (and thus, why ignorance is an excuse) in the same way he explains the requirement of a voluntary act: both action and intention are possible only when no causes external to the actor’s will produce the behavior in question. Therefore, if causes beyond the actor’s control produce his criminal behavior, the actor cannot have one of the belief states required for mens rea. The legal doctrine requiring mens rea, accordingly, is simply an instance of a more general causal principle: there can be no responsibility for behavior caused by factors beyond the actor’s control.

Sometimes the criminal law specifies exactly what sort of causal factors may be sufficient to preclude intention or purpose. It is often said that a mentally ill or seriously intoxicated defendant cannot have the intention required for crime. The insanity defense is sometimes justified in this way. More typically, the alleged inconsistency between mental illness/intoxication and intention only reduces the gravity of the offense

47. MODEL PENAL CODE § 2.01(2) (Proposed Official Draft 1962).
49. See, e.g., Goldstein & Katz, Abolish the “Insanity Defense”—Why Not?, 72 YALE L.J. 853, 863-64 (1963) (assuming that intention is negated by insanity).
by providing the defendant with the partial excuse of diminished capacity.\textsuperscript{50} In either case, it is assumed that causation by some external factor precludes the intent required for culpability.

c. No Proximate Causation (Intervening Cause)

According to the direct cause conception of proximate cause, a defendant’s action is the proximate cause of some harm if: (a) the act was a cause in fact of the harm; and (b) no other cause intervened between the time of the defendant’s act and the occurrence of the harm to “break the causal chain” and relieve the defendant of responsibility.

Again the causal theorist will claim that this legal doctrine exemplifies his general principle that external causes excuse. The external causes in this case are those called in law “intervening causes.” According to Hart and Honoré, they are of two kinds: abnormal natural events amounting to a coincidence, and voluntary human action.\textsuperscript{51} Whenever one of these external causes intervenes between act and harm, the first actor is excused.

Some causal theorists offer a further explanation of why intervening action by a second human agent breaks the causal chain between the first agent and the harm. According to Professor Kadish,\textsuperscript{52} the legal doctrines defining causation and complicity presume that the second action is necessarily free; if it is an action at all, it cannot be caused. The second action, because it is uncaused, acts as a barrier through which causation by the first agent cannot be traced. According to this view, intervening acts by human agents become intervening causes precisely because causation of action is conceptually impossible. In some such way causal theorists like Kadish get double usage out of their conceptual claims that actions are necessarily uncaused: not only does this claim explain why we treat some behavior as an action and some not, but it also explains why we have the doctrines about proximate causation that we do. In each instance, the causal theory is buttressed by this conceptual claim, the merits of which we will address later.\textsuperscript{53}

\textsuperscript{50} See Morse, Undiminished Confusion in Diminished Capacity, 75 J. Crim. L. & Criminology 1, 40-50 (1984) (rejecting the notion that mental disease or intoxication completely negates intention); see also Arenella, The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage, 77 Colum. L. Rev. 827 (1977).


\textsuperscript{52} Kadish, Complicity, Cause and Blame: A Study in the Interpretation of Doctrine, 73 Calif. L. Rev. 324, 333 (1985).

\textsuperscript{53} See infra text accompanying notes 112-20.
3. Status Excuses

a. Insanity

A causal theorist will not regard insanity as a status excuse; rather, he will regard it as an excuse on a par with the true excuses of compulsion or mistake. For him, insanity excuses because it causes criminal acts. Legal doctrine clearly has been influenced by this view of insanity. The New Hampshire test for insanity, which asks only whether the criminal act was the (causal) product of mental illness, directly expresses this causal theory. The landmark opinion of Justice Doe, the principal architect of the New Hampshire test, makes his causal rationale quite clear.

For, if the alleged act of a defendant, was the act of his mental disease, it was not “in law” his act, and he is no more responsible for it than he would be if it had been the act of his involuntary intoxication, or of another person using the defendant’s hand against his utmost resistance . . . . [W]hen disease is the propelling, uncontrollable power, the man is as innocent as the weapon . . . .

Chief Judge Bazelon’s rationale for the former Durham insanity test also relied on the causal theory. The Durham test, like the New Hampshire test, exculpated from criminal responsibility those whose acts were the product of a mental disease. According to Judge Bazelon:

The legal and moral traditions of the western world require that those who, of their own free will . . . commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease . . . moral blame shall not attach, and hence there will not be criminal responsibility.

Like Justice Doe, Judge Bazelon contrasted free and therefore culpable acts, with caused acts, which are excused.

The causal theory is equally evident in the “irresistible impulse” test for insanity. The Alabama Supreme Court’s leading formulation of that test in the nineteenth century described the “duress of mental disease” as destroying the free agency of the insane. One prong of the Alabama test was whether “the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely.”

More generally, all tests of legal insanity require that the defective

55. Id. at 441.
mental condition be causally connected to the criminal act it purports to excuse. This is as true of the "cognitive" versions of the test as of the "volitional" versions. What this doctrinal fact may be taken to evidence is the general principle that any defendant who is caused to do something by events beyond his control must be excused. This principle conjures up a picture of insanity as "an unseen ligament pressing on the mind, drawing it to consequences which it sees but cannot avoid."

b. Involuntary Intoxication

Unlike voluntary intoxication, involuntary intoxication is a defense in American law and not merely a means of disproving mens rea. The rationale for this defense may seem to be quite straightforward: if becoming intoxicated was not the actor’s fault (because involuntary), and if he would not have committed the crime but for the intoxication, then he is not responsible for the crime. Whatever it was, human or natural, that caused him to become intoxicated is at fault; the actor is not because his behavior was caused by factors beyond his control. This is, of course, exactly what a causal theorist would say.

T.B. Macaulay seems to have adopted the causal rationale in drafting the Proposed Indian Penal Code, which includes the following provision:

Nothing is an offence which a person does in consequence of being in a state of intoxication, provided that either the substance which intoxicated him was administered to him without his knowledge, or against his will, or that he was ignorant that it possessed any intoxicating quality.

This type of causal test has been accepted by only a few jurisdictions. One apparent example is Maine, whose Supreme Court recently held that "there is no criminal responsibility for any acts otherwise criminal . . . if they are caused by defendant's intoxication which is not self-induced."

Legal doctrine is against the causal theorist in that most jurisdictions do not adopt Macaulay's straightforward causal test. In the vast majority of American jurisdictions, involuntary intoxication will excuse only when, in addition to causing behavior, it also causes a severe diminishment of the actor's reasoning capacities. The causal theorist cannot show that this extradotal requirement follows from his theory. He should urge its elimination. Failing that, he should urge that this extra

58. See Morse, Crazy Behavior, supra note 2, at 531-32, 560-90, for a discussion of this.
62. See W. LAFAVE & A. SCOTT, supra note 33, at 347 n.45.
requirement be interpreted so that it becomes harmless surplusage: if the intoxication caused the criminal behavior, it necessarily diminished the actor's reasoning capacity.

c. Infancy

A causal theorist attempting to explain why infancy excuses would liken it to the status conception of insanity: the very young, like the insane, lack free will. According to this rationale, everything the infant does is excused because an infant is not yet free of the grip of a universal causation. Although "infancy" does not name some entity as a cause of crimes in the way "insanity" arguably does, still, the causal theorist will assert, causation is the core of this excuse too, because what excuses infants as a class is the fact that their behavior is completely determined.63

B. The Moral Plausibility of the Causal Theory of the Excuses

The causal theorist will thus conclude that his general theory of excuse—that people are excused whenever their behavior is caused by factors beyond their control—satisfies the descriptive requirement of a good legal theory: the existing legal doctrines of excuse follow from it as deductive consequences. As discussed earlier,64 he also must show that it is a good moral theory. What makes the causal theory morally correct, he will propose, is the principle that no one should be blamed for what he could not help doing. As H.L.A. Hart once observed:

[M]ost lawyers, laymen and moralists, considering the legal doctrine of mens rea and the excuses that the law admits, would conclude that what the law has done here is to reflect, albeit imperfectly, a fundamental principle of morality that a person is not to be blamed for what he has done if he could not help doing it. This is how Blackstone at the beginning of modern legal history looked at the various excuses which the law accepted. He said they were accepted because "the concurrence of the will when it has its choice either to do or avoid the act in question" is the only thing that renders human actions praiseworthy or culpable.65

We can call this principle the principle of responsibility. The plausi-

63. Since eventually infants do become responsible actors (when they become adults), the causal theorist is committed to the partial determinist view that there can be "some" causation. (For an explanation of partial determinism, see infra Part III, Section B). This implication makes the causal theorist's account of the infancy excuse very implausible. See Strawson, Freedom and Resentment, in FREE WILL 75 (G. Watson ed. 1982): "Would it not be grotesque to think of the development of the child as a progressive or patchy emergence from an area in which its behavior is . . . determined into an area in which it isn't?" Yet the alternative implication possible here seems even more grotesque: that all of a sudden what was determined becomes free.

64. See supra text accompanying notes 26-31.

bility of such a moral principle should be readily apparent. What could be more unfair than punishing someone for something he could not help? Samuel Butler satirized the opposite view when, in *Erewhon*, he describes the "justice" of a trial for the crime of pulmonary consumption. The trial judge, anticipating a charge of unfairness for meting out a severe sentence to the diseased defendant, responds:

It is all very well for you to say that you came of unhealthy parents, and had a severe accident in your childhood which permanently undermined your constitution; excuses such as these are the ordinary refuge of the criminal; but they cannot for one moment be listened to by the ear of justice. I am not here to enter upon curious metaphysical questions as to the origin of this or that. . . . There is no question of how you came to be wicked, but only this—namely, are you wicked or not? Our intuitions may well reject the moral premises of the Erewhonian legal system; it does matter to us how the crime originated. It seems plausible that if the crime was caused by events over which the accused had no control, he could not help committing the crime and therefore should be excused.

III


A. Determinism and the Causal Theory

Many people find determinism plausible, as do I. Determinism tells us that human choices and actions are caused and that those causes themselves have causes. One reason this idea is so plausible is that its opposite, indeterminism, is so implausible. After all, is it not extraordinary to think that part of our most basic metaphysical picture of what the universe is like—in terms of causal relations—should have no application to persons? Is it not extraordinary to think that agents who can clearly cause changes to occur in the world are themselves uncaused? We are all quite literally Aquinas’s uncaused causers—God—on such indeterminist views.

This Section is written for those causal theorists who find determinism plausible. A serious problem for such causal theorists is how, according to their theory of excuse, anyone can be held morally responsible. If one accepts determinism—the doctrine that every event, including human actions and willings, has a cause—then it is hard to see why everyone is not excused for all actions. The formal structure of this argument is that of a *reductio ad absurdum*.

66. S. BUTLER, EREWHON 107 (1872).
1. All human actions and choices are caused by factors beyond the actor's control (the determinist premise).
2. If an action or choice is caused by factors beyond the actor's control, then that action or choice is morally excused (the moral version of the causal theory of excuse).
3. If an action or choice is morally excused, then that action or choice should not be legally punishable (the theory of punishment making moral culpability at least a necessary condition of legal liability).
Therefore:
4. No actions and choices should be legally punishable (the conclusion of universal legal excuse).

The most direct way to answer another person's reductio argument is to embrace the conclusion as not at all absurd. Yet the causal theorist can ill afford to do this by embracing the existence of universal legal excuse, for how then would his theory be a theory of legal excuse? His causal theory might contribute to an argument for radical reform of our criminal law by the elimination of any liability to punishment, but it is hard to see how it could serve as theory of the existing excuses of criminal law. Those excuses presuppose that some people are to be punished even if others are to be excused.

In addition, it surely is unpalatable to think that no one should be punished. As long as one doesn't allow oneself the easy out of saying that involuntary treatment does not constitute punishment, surely there are good reasons to want a legal system that punishes at least some offenders. If so, then for those reasons too the conclusion of the argument is a difficult one to swallow for the causal theorist, no less than for anyone else.

This leaves the causal theorist having to give up one of the three premises leading to the absurd conclusion that no one ought to be legally punishable. The first premise, that of determinism, he may find hard to relinquish. He may not share William James's professed ability to will to disbelieve determinism. He may think, as I do, that determinism is simply true. He should balk at giving up the theory of punishment according to which moral culpability is necessary for legal liability. To do this would commit him to either a purely utilitarian or a purely rehabilitative theory of punishment, each of which is subject to deep and well-charted objections.

If the causal theorist can give up neither of the other premises, he must give up his own theory in order to avoid the absurd conclusion that no one ought to be punished. It cannot be the case that moral culpability

67. W. JAMES, The Dilemma of Determinism, in THE WILL TO BELIEVE 147 (1898).
is eliminated just because an actor was caused to act by factors beyond his control. A determinist who believes in punishment but not in unjust punishment can come to no other conclusion.

Despite this *reductio* argument, many causal theorists who are determinists believe they need not abandon their causal theory. Very generally, they take one of two approaches: (1) they waffle on determinism in ways that seem to suggest some room for moral responsibility; or (2) they adopt an “as if” strategy whereby we lawyers can pretend that people are free even though they really are not. I shall explore each of these approaches below.

**B. The Partial Determinist Strategies**

1. *Degree Determinism*

There are four strategies open to causal theorists who are convinced that some form of determinism is correct and who yet reject the conclusion that no one is fairly punishable. The first and most popular is what I shall call determinism by degrees, or degree determinism. Degree determinism is a denial that all human actions are *fully* caused. The degree determinist believes in a continuum of freedom from causation: different actions can be more or less determined and thus more or less free. In his recent book on madness, Norval Morris assures us that there are “degree[s] of freedom of choice on a continuum.”  

69 Completely free actions and completely determined actions are ideal types, or as Morris calls them, “polar conditions.” 70 All actions in the real world, Morris believes, will lie somewhere between the polar conditions.

In order to salvage responsibility, the degree determinist needs an additional premise about where on the freedom/causation continuum responsibility ends and excuse begins. We might call this the “baseline premise.” If we imagine free action to be at the low end of the continuum and determined action to be at the high end, we must draw a baseline above which actions are so determined that they must be excused and below which actions are so free that they cannot be excused. Morris appears to draw the baseline at the actions of those persons raised in conditions of gross social adversity. Morris believes they have just enough freedom to be fairly punished for their misdeeds. 71 Having established his baseline, Morris uses it to separate the responsible from the excused. Since Morris believes that the insane have as much freedom as those raised in conditions of gross social adversity, he urges the abolition of the excuse of insanity.

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70. *Id.*
71. *Id.* at 62.
Degree determinism has many other adherents. Liberals like Bazelon also have seen the analogy between madness and social deprivation: both are at least somewhat "criminogenic." Bazelon, however, draws the baseline lower on the continuum of degrees of causation than does Morris. Since the actions of both the mentally ill and the socially deprived are sufficiently determined, both should be excused.

Another haven for degree determinism is psychiatry. As indicated in the recent Statement on the Insanity Defense of the American Psychiatric Association, many psychiatrists are determinists who nonetheless believe that the moral issue raised by insanity is that of free will. These psychiatrists also reconcile moral responsibility with their determinism by accepting Morris's continuum of freedom and causation. Stephen Morse recently has noted that in accepting the freedom/causeption continuum, psychiatry aligns itself with certain commonsense intuitions: "Philosophically impure common sense consistently rejects the philosophically pure view [of the irrelevance of causation to responsibility] by assuming that the behavior of all persons is subject to various causes and that these causes vary in their salience and strength."  

Sheldon Glueck was another proponent of the degree-determinist continuum. Glueck spelled out in more detail than have most causal theorists what it means to say that there is a continuum between free choice and determinism. Glueck found it helpful to "imagine a simple chart which shows the freedom/determinism proportions of a feebleminded person, an extreme psychotic, an average 'sociopathic' or psychopathic personality," and others. Then, Glueck told us, we might speculate that the feebleminded person's freedom/determinism mix "will consist of, say, 10 percent . . . endowed intelligent free-choosing capacity, and 90 percent . . . predetermined blocking of freedom, of conscious, purposive choice and control." By contrast, the "chart of the psychopath or sociopath will consist of, say, 30 percent to 45 percent . . . amount of free-choice capacity, the balance to be rigidly controlled." Glueck apparently set his baseline for responsibility at the "free-choosing capacity of the 'average, reasonable' or 'prudent' abstract standard man of the law [which] will range, let us say, between 50 and 65 percent, leaving a 50 to 35 percent quantum of solid-line dominance."  

I think very little sense can be made of any of this. It makes sense to

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72. See Bazelon, supra note 4, at 394-97.
73. See AMERICAN PSYCHIATRIC ASS'N, STATEMENT ON THE INSANITY DEFENSE 8 (1982).
For a further example of such thought in psychiatry, see A. STONE, Psychiatry and Violence, in LAW, PSYCHIATRY AND MORALITY 53 (1984); A. STONE, Psychiatry and Morality: Three Criticisms, in LAW, PSYCHIATRY AND MORALITY, 219-24 (1984).
74. Morse, Failed Explanations, supra note 2, at 1030.
76. Id. at 12-13.
say that we are determined or that we are free, but to speak of being partly determined or partly free makes as much sense as to speak of being partly pregnant.\footnote{Cf. Strawson, supra note 63, at 75: "Whatever sense of 'determined' is required for stating the thesis of determinism, it can scarcely be such as to allow of compromise, borderline-style answers to the question, 'Is this bit of behaviour determined or isn't it?'"} To be sure, we can make comparative judgments that one cause is more important than another in producing behavior. Indeed, there is quite a body of literature on the criteria we use in determining which conditions are more causally relevant than others in various contexts.\footnote{Some of this literature deals with the question of why in historical analysis, ordinary speech, and the law, we will cite one necessary condition over others as "the cause" of the harm. For examples, see J. Feinberg, Action and Responsibility, in Doing and Deserving: Essays in the Theory of Responsibility 119 (1970); H.L.A. Hart & A. Honore, supra note 51, at 8-57; M. White, Foundations of Historical Knowledge 105-81 (1965). See also the discussions of causal apportionment in tort law in Kaye & Aickin, A Comment on Causal Apportionment, 13 J. Legal Stud. 191 (1984); Rizzo & Arnold, Causal Apportionment in the Law of Torts: An Economic Theory, 80 Colum. L. Rev. 1399 (1980). As Kaye and Aickin point out, one can make sense of causal apportionment only in terms of probabilities of types of events, not in terms of actual causal contributions to any particular event.} But none of this literature can make sense of the quite different comparative judgment about the relative importance of all causes on the one hand, and of freedom on the other. For the degree determinist, it has to be sensible to ask: how much causation was there? The problem is that such a question seems to make no sense at all.

Stephen Morse points out that one might attempt to work out the needed concept of "degrees of causation" with the concept of "predisposing causation," that is, causation that only predisposes, or makes more likely, bad behavior but does not operate as either a necessary or a sufficient condition for that behavior.\footnote{Morse, Failed Explanations, supra note 2, at 1031. For further elucidation of the idea of a predisposing cause, see also Morse, Crazy Behavior, supra note 2, at 564-66.} "Strongly predisposing" would describe a factor that renders the bad behavior highly likely, while "weakly predisposing" would describe one that renders the behavior only somewhat more likely. This is essentially a probabilistic notion. When certain factors make the probabilities of bad behavior high enough (when a person is strongly predisposed to bad behavior), responsibility is said to evaporate. Norval Morris seems to have exactly this probabilistic notion in mind when he talks about the comparative "criminogenic effect" of various environmental or other factors.\footnote{N. Morris, supra note 3, at 62.}

There is no doubt that predisposing causes exist. Explanations in terms of probabilistic laws—what Carl Hempel calls inductive-statistical explanations—are an unquestioned feature of both natural and social science.\footnote{C. Hempel, Aspects of Scientific Explanation (1965).} It is also undoubtedly true that we will assign varying probabilities to the occurrence of bad behavior depending upon which factors we
use to explain or predict that behavior. Yet the existence of these probabilistic explanations is not enough to resuscitate the idea of a causation/freedom continuum. These explanations correlate *types* of behavior with *types* of causal factors. They do not purport to tell us to what degree a particular action is caused. They thus do not make intelligible and plausible a metaphysics of degrees of causation of *particular* actions.

Only if one took the position that the only kind of explanation possible for human behavior was of the probabilistic kind could one make plausible the metaphysics of degrees of causation for particular actions. If one could show that explanations of human behavior are irreducibly probabilistic in the way explanations of the behavior of electrons are irreducibly probabilistic, then perhaps the idea of predisposing causation could rescue the causation/freedom continuum.

Yet such a showing is to my mind very unlikely. It may well be that the factors social scientists cite as the causes of crime are not sufficient conditions: they only make bad behavior probable, not inevitable. Yet this lack of sufficient conditions may only reflect our ignorance of factors that inevitably produce the criminal behavior. It is very controversial to assert that there is no set of sufficient conditions for human behavior and that probabilistic explanations are the best we can give. Imagine a similar claim about explanations of the pattern of heads/tails landings of a coin that has been flipped repeatedly. Perhaps the only currently available explanation for a roughly fifty/fifty pattern of heads/tails is a probabilistic one. That does not rule out, however, the existence of a set of sufficient conditions that would explain each of the coin’s landings and therefore also explain the overall pattern of landings. The physical laws governing matter in motion might explain the pattern of landings if only enough were known about the original force exerted on the coin each time it was flipped, the coin’s physical features, the motion of the air, the features of the landing surface, and so forth.

To be sure, in subatomic physics a plausible case may be made for the claim that some events are *only* explainable in terms of probabilistic laws. But no similar case has yet been made about human behavior.\(^{82}\) Yet unless such a case is made, the thesis that there are strongly predisposing and weakly predisposing causes is not a metaphysical thesis that freedom and causation can exist in degrees; it can only be a thesis about the degree of our present ignorance. The degree determinist must therefore defend the dubious metaphysical position that human behavior, like the behavior of subatomic particles, *cannot* be explained by sets of suffi-

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cient conditions.\textsuperscript{83}

Not only must the degree determinist make plausible a metaphysics of degrees of causation, he also must show that the moral and legal excuses just reviewed apply only to actions that are highly probable because their occurrence is due to "strongly predisposing" factors. No such showing has been made, nor, to my mind, is such a showing likely.\textsuperscript{84}

We would have to be convinced, for example, that there is a greater likelihood that an insane person, who is excused, will commit a crime than there is that a very greedy person, who is not excused, will steal money he finds lying in the street. No matter how certain we are that the greedy person will take the money, we will not be inclined in the least to excuse him. Yet, we can be totally unable to predict criminal tendencies in the very insane and still be quite willing to excuse them, in which case, excuse and responsibility do not correlate with strongly versus weakly predisposing factors.

2. Ignorance Determinism

A strategy alternative to degree determinism is what might be called ignorance determinism. An ignorance determinist would admit that all human behavior, like other events, is fully determined. Nonetheless, he might urge that what determines an actor's responsibility is not the degree to which the actor is caused to act, but rather the degree to which we have knowledge of the causes of his action. If studies showed us, for example, that eighty percent of the children raised in a certain environment commit crimes, we would excuse them from responsibility. If there were no such studies and we were therefore ignorant of this probabilistic correlation, then those same children would be held fully responsible. Only those for whose actions social scientists could show strongly predisposing causes would be excused. In this way a partial determinist might seek to avoid the absurdity of degrees of causation and yet retain some

\textsuperscript{83} Moreover, in defending this position the degree determinist cannot avail himself of some kind of Davidsonian nonreductionism. Donald Davidson has urged that the Intentional features of mental state and action individuation preclude the discovery of psychophysical laws about either of them. D. DAVIDSON, ESSAYS ON ACTIONS AND EVENTS 245-59 (1980). Whether Davidson is right about this does not matter in the present context, for even if there can be no such laws connecting types of actions with types of physical events, it may well be the case that particular act-tokens are fully determined by some set of factors. (Indeed, Davidson seems to contemplate just such token/token identities and correlations even in the absence of any type/type identities and correlations.) The degree determinist does not need to show that types of actions cannot be explained by psychophysical laws; rather, he needs to show that particular actions cannot be completely determined by physical factors in the way the position of an individual electron cannot be so determined. It is irrelevant whether laws about types of actions are or are not irreducibly probabilistic. After all, persons are held responsible for particular actions, not types of actions, and individual actions may be fully caused even if the only laws that can be cited to explain them are of a probabilistic kind.

\textsuperscript{84} This argument has been made with respect to the specific defense of insanity. See Morse, Failed Explanations, supra note 2, at 1031-32.
notion that there is a continuum, in this case a continuum in the knowledge we possess about when behavior is caused.

The problem with ignorance determinism is not that no continuum exists between our ignorance and our knowledge of the causes of various criminal acts. Rather, the problem lies in connecting that continuum with responsibility. It is inconsistent with our basic moral beliefs to attribute responsibility according to our present, completely fortuitous, state of knowledge. If we truly believe that all behavior is fully determined and that fully determined behavior is not the actor's responsibility, it would be immoral to hold people responsible because we were ignorant of what caused them to act. To say otherwise would be tantamount to excusing those who have some particular excuse about which we have knowledge, but holding all others responsible because we are ignorant of what excuse they have—even though we believe that all of those others have some valid excuse. If causation by external factors excuses, it excuses everyone on determinist assumptions. Who is excused cannot be based on such a fortuity as how much of the causal story we happen to know at any particular time.

It may well be that what Stephen Morse calls "philosophically impure common sense" here joins Norval Morris and other theorists in urging some version of these first two strategies, whether based on degrees of causation, or on degrees of our own knowledge of causation. Undeniably, many people soften their judgments about responsibility when they know more of the causal story behind a person's bad behavior. *Tout comprendre c'est tout pardonner* does indeed reflect such people's commonsense beliefs about responsibility. Yet such philosophically impure common sense should not survive these insights into its philosophical impurity. If common sense believes that there can be a little bit of causation, then common sense is wrong—wrong because this belief is inconsistent with our basic metaphysical ideas about the kinds of causal relations that can exist. If common sense believes that the degree of an actor's responsibility can depend on the degree of our ignorance about a universally present, excusing condition, then common sense is wrong—wrong because this belief is inconsistent with our more basic moral belief that fortuitous factors unconnected to the actor can have nothing to do with his responsibility. Such inconsistencies cannot protect themselves under the mantle of common sense.

3. **Selective Determinism**

A third kind of strategy that might occur to a causal theorist who is

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85. Morse, *Failed Explanations*, *supra* note 2, at 1030.
also a determinist might be called selective determinism. A selective
determinist will admit that all behavior is fully caused, but he is selective
about which causes excuse. If only some kinds of causes excuse, then
determinism need not imply the elimination of responsibility because the
excusing kinds of causes need not be universally present. Yet to hold this
view is to give up the causal theory of excuse, for now what excuses is not
causation, but something else—whatever distinguishes excusing causes
from nonexcusing causes. One can be a determinist while exercising this
selectivity, but one cannot advance a causal theory of the excuses.

4. Dualistic Determinism

Fourth, and finally, the causal theorist might adopt what I shall call
dualistic determinism. This is the view that although human actions and
choices are caused, they are not always caused in the same way as natural
events are caused. I call this dualistic determinism because it envisions
two kinds of causation: causation that necessitates (for natural events)
and causation that only inclines (for most human actions and choices).
For a dualistic determinist, causal factors outside of the control of the
actor usually only incline the actor towards a certain action but do not
necessitate that he perform the action.

The causal theorist would use dualistic determinism to salvage his
theory of excuse in the following way. Most of the time actors are mor-
ally responsible because their actions are not caused in the sense of
“caused” that leads to excuse. Only when their actions are necessitated
are they excused. In other words, the causal theorist avoids my general
reductio argument by interpreting “cause” in his causal theory of excuses
differently from “cause” in the determinist premise. This allows him to
admit that determinism is true and yet avoid the conclusion that no one
is morally responsible or legally punishable.

There are two problems with this strategy. The first is that one of
the conceptions of causation does not seem very plausible. What is
“inclining causation” but another name for degrees of causation? The
idea of an inclining but not necessitating cause presupposes the degrees of
causation explored earlier, and is subject to the same objections. The
second problem with dualistic determinism does not stem from the char-
acter of the kinds of causal relations posited. Rather, the problem lies in
the idea that there can be two of them. While one might generally argue
that all causes do not necessitate, to argue that only some do raises the

86. See Hollander, Sociology, Selective Determinism, and the Rise of Expectations, 8 AM. SOCIO-
OLOGIST 147 (1973). Selective determinism is discussed at some length in M. Moore, supra note 18,
at 358-60.

87. For a recent expression of dualistic determinism, see Flew, Psychiatry, Law and Responsi-
general problem of metaphysical dualism discussed in the next Section: how does one say anything intelligible about the relation between these two kinds of causes? How does one make sense of the idea that the very same kind of event—human behavior—can be subject to both of these kinds of causal relations? As I will show, metaphysical dualisms threaten the coherence of our world view and should be seen as the harbingers of confusion rather than as acceptable solutions.

C. The Dualist Strategies to Show the Compatibility of Determinism and Responsibility

Since no partial determinist strategy makes much sense, many causal theorists attempt the alternative approach of reconciling determinism and responsibility. At first glance this approach seems to involve a logical contradiction. After all, the causal theorist is committed to the incompatibility of causation and responsibility. His slogan is: "Causes excuse." If the causal theorist does not tinker with the determinist premise of universal causation of behavior in any of the ways just explored, he has his work cut out for him if he wants to avoid the implication of universal excuse.

Nonetheless, one finds a number of criminal law theorists pursuing just such a course. They accept the truth of determinism and yet adopt an "as if" view of human freedom: we can design our institutions as if human action were not determined. This view recognizes that determinism may be the first postulate of science, but it takes free action as the first postulate of legal and moral thought. Franz Alexander and Hugo Staub articulated this view years ago:

[W]e may for practical purposes hold the individual responsible for his acts; that is to say, we assume an attitude as if the conscious Ego actually possessed the power to do what it wishes. Such an attitude has no theoretical foundation, but it has a practical, or still better, a tactical justification.8

Criminal lawyers have been very sympathetic to this "as if" view. They are apt to be apologetic in the face of deterministic science, conceding that psychiatrists and others are correct when they say that man is unable to do anything other than what his environment, unconscious, or heredity causes him to do. To justify our criminal laws, lawyers talk of positing free human actions, even though they admit that scientifically there is no such freedom.

An often-quoted statement of Jerome Hall illustrates this view:

Every science rests upon distinctive axioms or postulates that are accepted by the scientists as "given" . . . . [Psychiatry] purports to be

rigorously scientific and therefore takes a determinist position. Its view of human nature is expressed in terms of drives and dispositions which, like mechanical forces, operate in accordance with universal laws of causation.

On the other hand, criminal law, while it is also a science in a wide sense of the term, is not a theoretical science whose sole concern is to understand and describe what goes on. It is, instead, a practical, normative science which, while it draws upon the empirical sciences, is also concerned to pass judgment on human conduct. . . . Its view of human nature asserts the reality of a "significant" degree of free choice, and that is incompatible with the thesis that the conduct of normal adults is merely a manifestation of imperious psychological necessity. Given the scientific purpose to understand conduct, determinism is a necessary postulate. Given the additional purpose to evaluate conduct, some degree of autonomy is a necessary postulate.89

A like view was expressed by Herbert Packer:

The idea of free will in relation to conduct is not, in the legal system, a statement of fact, but rather a value preference having very little to do with the metaphysics of determinism or free will. . . . Very simply, the law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were.90

This kind of reconciliation by fiat cannot possibly work. The law demands more than that we pretend people are free and thus hold them responsible as if they were. A just legal system requires people to be truly responsible. If moral responsibility requires free action and if there is no such thing as free action, we cannot found our moral system on some supposed "postulate" of free action that we believe, as a matter of scientific fact, to be false. Our moral beliefs cannot be sealed off from our scientific beliefs in this way. If our moral beliefs require that we be free to be responsible and if determinism shows that we are not free, then we cannot be responsible for our actions.

My suspicion is that Alexander, Staub, Hall, and Packer could allow themselves this "as if" position only because they did not believe that the moral quality of culpability existed in any convention-independent sense. This nonrealist position about moral qualities then generated a kind of "as if" attitude about morality itself—so why should they be concerned if one of the presuppositions of that morality had an admittedly fictional cast?

I assume to the contrary, that there is such a thing as moral culpability91 and that a just legal system will punish only culpable actors.92 If

89. J. HALL, supra note 36, at 455 (footnote omitted).
91. I argue for this assumption at length in Moore, supra note 23.
92. I argue for this assumption in M. MOORE, supra note 18, at 238-40.
our legal and moral system is based upon culpability and if culpability is based on human freedom, then we need to assert that human beings are really free. We cannot pretend that an essential presupposition of our legal and moral system is true when it is not.

If we accept determinism, however, we also are committed to asserting that human beings are not free; their behavior is determined. Theorists like Packer and Hall thus need to assert what seems like a flat contradiction: that people are free and that they are not. The only conceivable way to do this, I think, is to adopt a once-popular kind of linguistic or metaphysical dualism. This dualism would allow the causal theorist to "seal off" the legal/moral system from science. Determinism could then be true in one system of thought while its contradictory, free will, could be true in another. Kant attempted this approach in his metaphysical dualism about persons. He argued that we are "noumenal" beings free of the laws of causation, and we are also "phenomenal" empirical objects obeying the usual causal laws that all objects obey. There is no contradiction in such a view because we are free only in one mode of being and determined only in the other.

Like all metaphysical dualisms, whether they be between facts and values, minds and bodies, or propositions and sentences, Kant's dualism faces the very difficult task of describing the relations that exist between the two realms of being. There are two possibilities: either mental states interact with physical states ("interactionist dualism") or they do not ("parallelism"). Rejecting interaction is possible, but it denies what seems obviously true: that physical events in the real world cause mental events, and vice versa. How else could we even talk about, for example, perception and action?

Perception obviously begins with something physical—the stimulus in the environment and its impact on the retina, for example—and ends with something mental, namely, a belief. Analogously, action seems to begin with something mental—a willing, a desire, an intention—and ends with something physical, such as the physical movements of the actor's limbs. Saying that there is no interaction between the mental and the physical seems very much to counter our experience in these areas. Yet the interactionist alternative sounds even stranger. How can one describe the causal relations existing between objects that have mass and energy and exist in space/time coordinates, and objects that have no mass or energy and exist only in time, but not in space? If Gilbert Ryle and the philosophy of mind he initiated have shown anything, it is that the relief metaphysical dualism gives from the tension between determin-
ism and responsibility is purchased at much too high a price in coherence.

The more modern version of dualism follows the linguistic turn of twentieth-century philosophy, talking not about how things really are, but rather about how we conceptualize how things are. According to the linguistic dualism of the 1950's and 1960's, there are two different categories of concepts: (1) concepts of intention, choice, and action; and (2) concepts of motion and mechanistic cause. According to this view, we have two quite different ways of conceptualizing ourselves: either as intelligent persons or as complicated bits of dumb clockwork. Conceptualized as clockwork, we are fully determined. But conceptualized as intelligent agents who make choices, we are free from determinism—free in the sense that it is a kind of "category mistake" to say that our actions are caused. Again, there is no contradiction in saying both that our actions are free and that they are determined, because the system of thought in which "free" is true is different from the system of thought in which "determined" is true. A causal theorist would complete this argument by saying that law and morality view persons as intelligent moral agents in one system of thought and that psychiatry and social science view persons as a kind of driven clockwork in a completely separate system of thought.

The problem with linguistic dualism's attempt to let us have both

95. The philosophy of the last 35 years is replete with different distinctions employed to develop the idea that mental-state words are in a different category from physical-state words. A sampling: (1) Gilbert Ryle's own view that one could detect an ambiguity in "exists" such that one could no more conjoin "mental" and "physical" with "existence" in one phrase than one could conjoin tides, hopes, and the average age of death in the sentence, "they are all rising." Id. at ch. 1; (2) the linguistic version of Franz Brentano's old view, that mental-state words are irreducibly Intentional, whereas physical state words are not. (For a modern statement of Intentionality, see R. Chisholm, PERCEIVING: A PHILOSOPHICAL STUDY (1967).); (3) a whole spate of views that developed from the work of Ludwig Wittgenstein in his PHILOSOPHICAL INVESTIGATIONS (G. Anscombe trans. 3d ed. 1968). These include: (a) the view that "human action" is in a different category from (at least normal) causation, A.I. Melden, Free Action (1961); R. Taylor, Action and Purpose (1966); Malcolm, The Conceivability of Mechanism, 77 PHIL. REV. 45 (1968); (b) the view that the language of reasons (for actions) is different from the language of causes, A.I. Melden, supra; R. Taylor, supra; Malcolm, supra, nicely summarized and demolished in Davidson, Actions, Reasons and Causes, 60 J. PHIL. 685 (1962); (c) the view that reasons belong to normative discourse, not to the descriptive discourse of physical science, A.R. Louch, Explanation and Human Action (1966); (d) the view that use of mental words, unlike the use of physical words, implies an early end to demands for evidence, G.E.M. Anscombe, Intention (2d ed. 1963); (e) the view that use of mental words, at least in the first person, is expressive only, not descriptive (L. Wittgenstein, supra); (f) the view that action and mental-state concepts are logically dependent on the concept of rules, whereas physical concepts are not, P. Winch, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY (1958); R.S. Peters, The Concept of Motivation (1958); (g) the view that action and mental-state concepts are built upon a concept of meaning that requires a special mode of empathetic awareness to gain understanding ("Verstelen"), G.H. Von Wright, Explanation and Understanding (1971). In the text I have lumped all these different distinctions together into my very simple one.
free will and determinism, and at the same time to save us from con-
tradiciting ourselves, is that no categorical barriers prevent us from con-
joining mental words with physical words. It makes perfectly good
sense to speak of actions being “caused” in the ordinary, physical science
sense of “caused.” We can fully attribute causation of actions to beliefs
and desires, when we explain actions by reasons: to mental causes, such
as emotions; to environmental stimuli, such as childhood experiences;
and to physiological states or events, such as those balances of neuro-
transmitters in the brain that affect both our moods and our acts. The
doctrine of category differences cannot eradicate the obvious fact that
causal relations exist between our actions, on the one hand, and our
mental states, environment, and physiology, on the other.

Although a thorough discussion would take us too far afield, it is
worth noting how so much of philosophy could have been led to the
counterintuitive results that a robust linguistic dualism demands. The
basic error was one of meaning theory. The ordinary-language philo-
sophy that followed upon the work of Ryle and the later Wittgenstein took
as its slogan that “meaning is use.” In other words, one can find the
meaning of words in natural languages simply by looking at how the
words are used by native speakers of those languages. One discovers the
“logic” of each expression by doing “conceptual analysis,” without for a
moment being concerned to inquire into the reference of the expres-
sions.

For example, ordinary-language philosophers analyzed the meaning
of the concept of intention in terms of the concept’s analytic or prag-
natic relations with other mental-state concepts, like belief and desire.
They were content to discover these relations of sense and pragmatic
implication, building in such a way a matrix of systematically connected
concepts. The largest of these matrices became a “category,” and to use a
concept outside of its usual matrix became a “category mistake.” They
never asked, “To what does the word ‘intention’ refer? And does it (can
it) refer to the same kind of thing that can be found in physiology?”
They felt justified in ignoring these questions of reference and identity
because, according to their meaning theory, meaning was use.

96. I argue that such categorical barriers do not exist in M. Moore, supra note 18, chs. 1, 4,
and 7, and also in Moore, Mind, Brain and Unconscious, (forthcoming in Philosophy and Psy-
choanalysis (P. Clark and C. Wright eds. 1986)).

97. See Hamlyn, Causality and Human Behaviour, in Readings in the Theory of Action
48 (N. Care and L. Landesman eds. 1968); see also Davidson, supra note 95.

98. For a good description of the ordinary-language movement, see Rorty, Introduction, The
Linguistic Turn 1 (R. Rorty ed. 1967). For a discussion of the development of the use of ordi-
nary-language methods to discover a new dualism in language, see R. Bernstein, Praxis and
Action ch. 4 (1971); Landesman, The New Dualism in the Philosophy of Mind, 19 Rev. Meta-
physics 329 (1965).
Such a view of meaning has had its day in the philosophy of language. Without reviewing in any systematic way the reasons for the demise of ordinary-language philosophy, we can glimpse the implausibility of its view of meaning in the following example. Suppose we place ourselves in ancient Babylon at just the time the Babylonian astronomers were discovering that the star that appears in the morning ("The Morning Star") and the star that appears in the evening ("The Evening Star") are one and the same thing, namely, the planet Venus. One can imagine a Babylonian ordinary-language philosopher "disproving" the astronomers' claim in the following way: The philosopher has not been looking at stars, but at language use. He has observed the phrases "Evening Star" and "Morning Star" in all their ordinary uses, and has learned from such observation that the phrases appear in different categories of discourse, evening talk and morning talk. Accordingly, the phrases cannot refer to the same thing. If they did, a well-known law of the logic of identity would require that the expressions be equivalent. Their differing uses, however, show that they manifestly are not equivalent; indeed, it is absurd—a category mistake—to even speak of the evening star and morning star as existing in the same sense of "exist."

This example illustrates the problem of the ordinary-language view of meaning and its accompanying doctrine of categorical differences. Inferences from patterns of ordinary usage cannot replace scientific insight about the true nature of the things to which words refer. Science cannot be barred from making discoveries, whether about planets or about minds, in the way the doctrine of category differences claims it can. A more contemporary view of meaning holds that the meaning of words like "intention" is given by the best scientific theory that one can muster about the true nature of intentions, even though that theory may involve knowledge that most ordinary speakers do not have and that, accordingly, is not reflected in their ordinary usage.  

For example, most ordinary speakers do not know the functional role played by pain in regulating behavior. They do not know the reflex arcs that generate immediate responses to pain. Nor do they know about differential pain thresholds or about C-fibre stimulation in the cortex that takes place when a person is in pain. Most ordinary users of the word "pain" know only the experience of pain and some of its behavioral expressions. Yet according to the contemporary-meaning theory I have defended elsewhere, the meaning of the word "pain" cannot be limited to what ordi-

99. For such a view of meaning, see H. Putnam, The Meaning of "Meaning", in MIND, LANGUAGE AND REALITY 215 (1975).

nary users know but will also include whatever behavioral, functional, and physiological facts that the best scientific theory tells us are part of pain.

As legal theorists, we should follow the contemporary philosophy of language in its rejection of linguistic dualism. If we do so, then we must face the question of reference from which that doctrine was to rescue us: do mental words like “intention” refer to physical phenomena? If they do not, then we have to decide to what kind of phenomena they do refer. This path seems likely to take us back to metaphysical dualism. If they do refer to physical phenomena, then we cannot claim that we are both free (in one system of thought) and determined (in the other). We cannot assert without contradiction what Alexander, Staub, Hall, and Packer need to be able to assert, that persons are both free and that they are not.

Both metaphysical and linguistic dualism are drastic doctrines. Metaphysical dualism forces us to simply accept some inexplicable relations between mind and body. Linguistic dualism forces us to grant ordinary usage a priority over scientific theory that is very counterintuitive. The motive for adopting either of these drastic positions is the same: the desire to preserve our “freedom and dignity” in the face of an advancing, mechanistic science. Unnoticed is that such drastic measures are unnecessary. To explain the mind in terms of the brain, or even to identify the mind with the brain, is not to explain the mind away. As I argue in the next sections, persons can be agents who act for reasons even in a world in which all mental states and all physical events are caused.

In any case, neither metaphysical dualism nor linguistic dualism could completely rescue the causal theory of excuse. It is true that either metaphysical or linguistic dualism would allow the causal theorist to avoid my general reductio argument; either would allow him to assert both that persons are free and that they are determined. Yet the causal theorist can do this only by erecting metaphysical or linguistic barriers between actions and causes. Since some people are excused, however, the causal theorist must find a way to cross his own metaphysical or linguistic barriers. He must find a way of saying that some human actions are caused, for his causal theory of excuse asserts that some actions—the caused ones—are excused. This means that the causal theorist must place excused actions on the physical side of his metaphysical or linguistic divide, along with such obviously caused events as landslides, sunsets, or chemical reactions. In other words, he must take them out of the category of “actions.” This is a plausible move when the behavior in question is excused because it was not a voluntary action—for example, movements the defendant made while asleep. For behavior covered by the other excuses, however, this tactic is not plausible at all. Consider duress. It seems wrong to say that because an action was caused by a
threat (and is thus excused according to the causal theory of excuse), it is no longer an action. We still should conceptualize action in response to a threat as an action, and an intentional action at that. The result is that even if there existed metaphysical or linguistic divides that would help the causal theorist avoid my *reductio* argument, he could ill afford to adopt them because his own theory requires that he talk of caused choices and caused actions.

Furthermore, even if his theory allowed the causal theorist to cross these supposed divides, it is still incomplete until it tells him when he may do so. Why can he cross the supposed metaphysical or linguistic divide between caused behavior and free action on some occasions but not on others? Why, in other words, should we adopt the “driven clockwork” view of people when we excuse because of duress or provocation, if we do not adopt that view when we exclude environmental causes as excuses? To apply the causal theory of excuse in a nonarbitrary way, the causal theorist would need some principled way of choosing when to adopt one viewpoint and when to adopt the other.¹⁰¹

I conclude that the causal theorist cannot avail himself of the dualistic escape routes from the absurd conclusion that no one is morally responsible or legally punishable. If he wishes to retain the view that criminal punishment depends at least in part on moral culpability, then to avoid the absurdity of no one’s being punishable he must give up either determinism or his causal theory of excuse. My own view is that determinism is true. For me, therefore, the argument just concluded is sufficient to dispose of the causal theory of excuse. Other criminal law theorists, such as George Fletcher,¹⁰² do not find determinism to be so plausible. For them, a different kind of argument against the causal theory must be made.

IV

WHY THE CAUSAL THEORY IS WRONG IRRESPECTIVE OF THE TRUTH OF DETERMINISM

To make this argument, it is necessary to establish two propositions. First, despite the appearances, in fact the causal theory does not account very well for the established legal excuses. Second, the moral principle that gives the causal theory what plausibility it has should be interpreted in a way that strips the causal theory of that plausibility. I pursue each of these tasks below.

¹⁰¹. This point is stressed in Kelman, *supra* note 13, at 672.
A. The Causal Theory Inaccurately Describes the Legal Excuses

I shall not scrutinize the legal doctrines surrounding each of the excuses identified earlier. Here I wish to paint with a somewhat broader brush. I shall examine the case for the causal theory in the three areas where it seems most plausible: first, as an account of the compulsion excuses (duress, necessity, provocation, and addiction); second, as an account of the excuses of unconsciousness, reflex, and the other excuses showing a lack of voluntary action; and third, as an account of the excuse of legal insanity. This is a representative sample of the three kinds of excuse I earlier identified. If the causal theory fails to account for these excuses, it is fair to say that it fails generally.

I. Compulsion and Causation

The philosophical distinction between causation and compulsion has been a commonplace at least since the writings of Moritz Schlick\(^{103}\) and A.J. Ayer.\(^{104}\) Schlick at times was apt to misstate this distinction because of his Humean view that the causal laws of nature amount to no more than regularity of sequence between classes of events. "[T]he laws of nature must not be thought of as supernatural powers forcing nature into a certain behavior . . . but simply as abbreviated expressions of the order in which events do follow each other."\(^{105}\) Left out of this description of causation is exactly the idea that causes all the problems here, namely the idea of causal necessity. Yet elsewhere Schlick stated the distinction between causation and compulsion in a way that is not hostage to the Humean regularity-of-sequence view of causation:

[T]here can be in regard to [natural laws] no talk of "compulsion." The laws of celestial mechanics do not prescribe to the planets how they have to move, as though the planets would actually like to move quite otherwise, and are only forced by the burdensome laws of Kepler to move in orderly paths; no, these laws do not in any way "compel" the planets . . . .\(^{106}\)

The difference between compulsion and causation comes to this: compulsion involves interference with practical reasoning. To be compelled is to have someone or something interfere with one’s normal ability or opportunity to do what is morally or legally required. This interference may take one of two forms: (1) a person may be constrained to employ certain means by threats, orders or natural necessity, or (2) a

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\(^{103}\) Schlick, Causality in Everyday Life and in Recent Science, 15 U. CAL. PUBLICATIONS PHIL. 99 (1932), reprinted in FREEDOM AND RESPONSIBILITY 292 (H. Morris ed. 1961); see also M. SCHLICK, PROBLEMS OF ETHICS (1962).


\(^{106}\) M. SCHLICK, supra note 103, at 147.
person may be constrained to pursue certain objects by his own internal cravings for, or emotions about, those objects. In either case, compulsion requires an agent who reasons about what to do but whose opportunity or capacity to follow the normal dictates of that reason is interfered with either by external factors (threats, natural necessity) or internal factors (extreme emotion or cravings). Schlick's example of the planets is apt because planets do not reason about how they should move. Since they have no practical reasoning, neither Kepler nor anyone else can interfere with it. To say that planetary motion is caused can hardly be to say that it is compelled.

Most causes of human behavior do not operate as compulsions. Consider four kinds of causes we commonly use as explanations of human behavior: beliefs and desires, character traits, physiological events, and environmental influences. When we explain an action by any of these kinds of causes, we do not mean that the actor was compelled. Simply because an actor is caused to act by his beliefs and desires, for example, it does not follow that his practical-reasoning processes have been constrained. I am caused, but not compelled, to go downtown by my desire to get a haircut. Going downtown is my uncompelled act, the product of my undisturbed practical reasoning. It is likewise with respect to character traits. If I am caused to engage in sharp practices by my greedy character, this is not to say I am compelled. I am simply the type of person who characteristically and unconstrainedly deals with others in financial matters in a greedy way. Greed does not constrain my powers of practical reasoning; it merely describes how I decide when I am unconstrained. Similarly, physiological causes do not compel our acts. No doubt there are many physiological states and events necessary for each of us to engage in basic acts. There even may be certain physiological conditions that underlie what used to be called volitions or acts of will. These physiological causes, however, do not disturb our practical reasoning. Rather, they are the conditions that make possible the execution of our desires in action.

Finally consider the environmental causes that behaviorists tell us can be conditions sufficient to explain adult behavior. One might think that this type of causation is compulsion because it severely constrains our choices. John Hospers, for example, exercises this familiar argument

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107. I have developed this account of compulsion as an interference with practical reasoning in M. Moore, supra note 18, at 86-90.
108. Character does not compel as long as "character" means what Gary Watson has called the "evaluational system," as distinguished from the "motivational system." The "motivational system" represents those drives that we may experience as compulsions. See Watson, Free Agency, 72 J. Phil. 205, 215 (1975).
109. For an attempt to revive the long-criticized concept of a volition and to hold the notion open to physiological instantiation, see L. Davis, Theory of Action (1979).
to lay the groundwork for his assertion that the unconscious makes none of us responsible

Everyone has been moulded by influences which in large measure at least determine his present behavior; he is literally the product of these influences, stemming from periods prior to his “years of discretion,” giving him a host of character traits that he cannot change now even if he would. . . . An act is free when it is determined by the man's character, say moralists; but what if the most decisive aspects of his character were already irrevocably acquired before he could do anything to mould them? . . . What are we to say of this kind of “freedom?” Is it not rather like the freedom of the machine to stamp labels on cans when it has been devised for just that purpose?110

Hospers's last question is not as rhetorical as he seems to think. The freedom essential to responsibility is the freedom to reason practically without the kind of disturbances true compulsions represent. Machines have no such freedom because they have no practical reasoning capacities and so can hardly be disturbed in the exercise of those capacities. Persons, on the other hand, do have such capacities. The fact that what a person desires or believes is caused by his environment in no way makes it difficult for him to reason practically.

Causation is not compulsion. If we want to show that some causally relevant factor constitutes a compulsion, we can do so only by showing that that factor interferes with practical reasoning. A threat, for example, can be a compulsion and thus an excuse for criminal conduct, but not because it is a cause of that conduct. A threat constrains an actor's choices in a way that other causes such as beliefs, desires, character traits, physiology, and the environment do not. The threat makes his choice a hard one in a way these other kinds of causes do not. As an alternative example, consider addiction. Addiction is a cause of behavior, but it is not because of this fact that addictions operate as compulsions and therefore provide an excuse. Rather, addictions can be compulsions because they make it difficult to do what the law demands. Unlike threats, the cravings characteristic of addiction do not constrain the actor's choices about how to achieve some legitimate end of his, such as survival. Still, addictions may make choices difficult in a way that beliefs, desires, character traits, physiology, and the environment do not. In this case, the constraint on choice is an internal one: the craving for an end that cannot be achieved without violating the law. Both the duress example and the addiction example show that what furnishes an excuse is the disturbance of practical reasoning, not the fact that the disturbance was caused.

Legal doctrines reflect this distinction. The law does not excuse actors whose behavior is caused by just any threat, natural necessity, craving, or emotional disturbance. A threat, for example, must do more than cause an actor to do what his threatener wants. Even under the liberal Model Penal Code standard, the threat must be one that a "person of reasonable firmness" would not have been able to resist.111 This test does not merely ask whether the threat caused the act; rather, it asks whether the actor's choice was so difficult—his practical reasoning so constrained—that he should be excused.

The same is true for the excuses of inner compulsion, provocation and addiction. No jurisdiction's provocation formula is reducible to a simple causal test, for example: did the victim's provoking act cause the defendant's criminal act? Rather, the law asks whether the victim's provoking act aroused the defendant's emotions to such a degree that the choice to refrain from crime became difficult for the defendant. The legal doctrine reflects the philosophical distinction between emotions that only cause choice and emotions so intense that they distort the very process of choosing.

2. Action and Causation

There is also a sound philosophical distinction between saying that behavior was caused by some external factor and saying that the same behavior does not amount to an action by an agent. Behavior might not be an action even if it were not caused; conversely, behavior may be an action even though it is caused. The notions of action and causation are simply independent of one another.

We can see this by constructing a positive account of action—in other words, an account that does not simply exclude various kinds of nonaction. As we do so we must ask whether that positive account contains any presuppositions about causation.

I have developed the positive account of action elsewhere.112 Briefly, the essence of human action is the exercise of causal power by a person, principally over his body but also over his thoughts and emotions. This kind of causal power of persons—let us call it will or autonomy—does not depend on freedom from causation.113 It is perfectly compatible to think both that persons are autonomous and that everything they do is caused by some set of factors external to their will.

To see this, let us imagine a very simple example of action: some person $X$ raises his right arm. Let us assume that we are correct in our belief that raising his arm up was indeed an action of his: $X$ had good

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112. See M. Moore, * supra* note 18, at 67-77.
113. See id., ch. 2.
reason for wanting to raise his arm; he (to the best of his knowledge) raised his arm for that reason; he had the nonobservational knowledge (characteristic of basic actions) that he willed the raising of his arm; and so forth. Now imagine the possible causal explanations for X’s act. (1) His desire to get his jacket, together with his belief that if he raised his arm he could get his jacket, caused him to raise his arm. (2) His real (unconscious) reason for raising his arm was that he wished to emulate the Nazi salute. (3) As a child, he habitually raised his arm when getting out of a chair because as an infant he had to raise his arm in order to get out of a high chair. (4) Certain chemical reactions in his brain caused a nerve impulse to be sent to the muscles of his right arm and those impulses caused his arm to go up. Any of these causal stories could be true or false; yet it still will be true that X raised his arm.

Some philosophers have thought that this cannot be true because action and causation are incompatible. For them, giving causal explanations of behavior is inconsistent with conceptualizing that behavior as an action. For how can a person have causal power if each of the exercises of that power is caused? These philosophers find a metaphysical incompatibility between a person’s causing (willing, choosing) some effect in the world and that person’s causings (willings, choosings) themselves being caused. Such philosophers conclude that for any behavior to be an act—an exercise of a person’s causal power—it must be uncaused.

A causal theorist about excuses should welcome this conclusion. If it were true, it would show that the causal theory of excuses necessarily is true. For to say that wherever there is causation of behavior there can be no action (and thus, no responsibility) is to say exactly what the causal theorist wants to say.

The problem is that the alleged metaphysical incompatibility between action and causation does not exist. The examples just given show that actions, choices, and willings do exist even though caused. Behavior may be an action even if caused by mental states, physiological events, or environmental stimuli. To explain an act, a choice, or a willing, in terms of its causal antecedents, is not to explain it out of existence. Suppose we were to discover the physiological determinants of willing the motions of our bodies. That knowledge would not show us that we did not will motions; rather, it would show us more about what those willings were. To think otherwise would be like thinking that to explain the presence of Lake Michigan in terms of its causes (glaciation, etc.) is to show that there is no such thing as Lake Michigan.

It seems to me that the metaphysical incompatibilist is misled by his insight that in various ways the agency of persons is special. The agency

114. See R. Taylor, supra note 95, at 110-11, 116; Malcolm, supra note 95, at 63-68.
of a person does seem different than the agency of a tree or of a stone. For one thing, it seems that we cannot give simple behavioral translations of talk about human actions, whereas we can give these translations for talk about the "actions" of a tree, a stone, or an acid. Saying that a person raised his arm does not translate into the nonaction language of bodily movement the same way that saying that a tree shed its leaves translates into a language not involving the agency of the tree. "His arm went up" is not equivalent to "he raised his arm," even though "the leaves fell off the tree" is equivalent to "the tree shed its leaves."\textsuperscript{115}

It is also difficult to replace talk of personal agency with talk about the causation of behavior by inner states. As a generation of philosophers has discovered, it is not easy to translate a statement like "he raised his arm" into a description of how an agent's beliefs, desires, or intentions caused his arm to go up.\textsuperscript{116}

These considerations have led some philosophers to the view that exercises of causal power by a person—actions—cannot be caused. Yet these considerations do not show this in the least. On the contrary, all such considerations suggest is that human action is a natural kind of event about which we should seek more and more knowledge. It is very probably a mistake to look for some essence of the willings of trees, because we do not really think that trees will or act. We do, however, think that persons will and act, and accordingly it makes sense to seek a theory of their willing. Such a theory may well be cast in terms of physiological events, and surely these events will themselves have causes. Rather than showing that actions and willings cannot be caused, the unique attributes of human action suggest that there is a deeper nature to such events in terms of underlying causes.

A familiar objection to the earlier examples of caused actions is the claim that these examples are not really instances of causation. The examples of caused behavior the causal theorist will propose will be more like: the wind blew the defendant's arm upward; another individual seized the defendant's arm and thrust it upward; the defendant was thrown through a window; the defendant was stung by a bee and then engaged in a series of reflex movements. The causal theorist will assert that his examples show the incompatibility of causation and action; they show that "true" ("full," "necessitating") causation of behavior means that the behavior in question cannot be an action. There are two separate responses to this objection. One is that the causal theorist is gerrymandering his concept of causation in an ad hoc manner so as to include only his examples and to exclude counterexamples like those given ear-

\textsuperscript{115} See R. Taylor, supra note 95, at 124.

\textsuperscript{116} This is the problem known in contemporary philosophy as "deviant causal claims." See D. Davidson, supra note 83, at 79-80.
lier. To avoid the gerrymandering charge, he needs a general account of causation that is both independently plausible and that includes his examples of caused behavior but excludes the earlier examples.

The second response is to explain why the causal theorist's examples seem to establish the incompatibility of causation and action. It is because these causal explanations tell us more than that the behavior was caused. They also tell us that the person whose behavior we are evaluating lacked the capacity or opportunity to act. We properly infer from this lack of capacity or opportunity to act that he did not act on this occasion.

Consider each of the three kinds of nonaction identified earlier.117 The first occurs when a natural force or a human agent moves the defendant's body for him. Causal accounts like these properly lead us to infer that the defendant did not act. We do not make the inference of nonaction on the basis of causation, however. Rather, we infer that there was no action because causal accounts of this kind show us that there was no opportunity or ability to perform an action. No human being has the ability to will his body to fly through the air the way it does, for example, when a group of other people or a gust of wind throws it through a window. The second type of nonaction, such as reflex reaction, is similar. We know enough about the reflex arcs of the central nervous system to know that the will is inoperative when the knee is tapped and the leg moves. People simply have no opportunity to exercise their causal powers in such circumstances. The same is true of the third class of examples. When a person is unconscious or asleep, the self we regard as the responsible agent is absent in an important sense, even though the person's body moves. The responsible self has no capacity to will such movements because it is asleep or unconscious.

In some cases, we legitimately are in doubt as to a person's capacity to will the movements of his body—for example, when he is influenced by posthypnotic suggestion. Note that we need not doubt the causal influence of the hypnotist's suggestion. We may be quite confident that the subject would not have raised his arm but for the suggestion, yet may easily conclude that the suggestion did not make the person incapable of willing the movement. It might have caused the arm to go up in the same way an ordinary suggestion does—it causes (calls to mind) an action a person wants to perform anyway but had not noticed the opportunity to perform until it was suggested to him. Alternatively, the suggestion might have caused him to have a desire on which he then acts by raising his arm. In either case, the suggestion causes the behavior without at all changing its character from action to nonaction.

117. See supra text accompanying note 46.
The important point is that it is never causation alone that rules out action. Only those causal accounts that show that the accused lost the capacity or opportunity to will are incompatible with action.\textsuperscript{118} Even then, it is the absence of the capacity or opportunity to will, not the cause of that absence, that is crucial. If one lacked the capacity or opportunity to act, one would not be responsible no matter what causal account explained one's incapacity or lack of opportunity. This would be true even if the only account was that there was no cause.

Once it is recognized that a caused act is not necessarily an instance where the actor had no opportunity or capacity to act, it becomes apparent that the law recognizes as an excuse only lack of capacity or opportunity to act. Merely because behavior is caused does not mean that the law will equate it with nonaction and excuse it. Suppose, for example, I know that $Z$ has a limited repertoire of jokes and that if reminded of one of them in a social setting, he will tell it. Suppose further that I trigger one of his known jokes with a paraphrase of its first line. The responsibility for telling the bad joke is still $Z$'s (even if it is also mine), because his telling of it is still his action. I caused it, but it is his action nonetheless.\textsuperscript{119} In contrast, the instances of behavior that the law regards as involuntary and excusable are all instances of incapacity or lack of opportunity to act.

Consider our difficulties with the borderline defense of brainwashing. In the most famous recent example, the Patty Hearst case, we were certain of a causal connection between the conditioning Hearst received and her criminal behavior. That certainty, however, was irrelevant to the issue of whether her behavior was an action. She robbed the bank; it was her act, whether or not a situation that was not of her making implanted in her the beliefs that caused her to act. One might have allowed her some affirmative defense if she had not had adequate time between the conditioning and the criminal act in which to reject or integrate her new beliefs into her character.\textsuperscript{120} Such an affirmative defense is irrelevant to the issue of action. She plainly acted, whether or not her act was caused.

Causation is equally irrelevant to other proposed ways of negating voluntary action. Suppose high correlations are found between crime and certain environmental factors, or between crime and an extra $Y$ chromosome in some men, or between crime and premenstrual tension in

\textsuperscript{118} This point is made nicely in Murphy, \textit{Involuntary Acts and Criminal Liability}, 81 \textit{Ethics} 332 (1971).


\textsuperscript{120} For a version of this argument, see Dennett, \textit{Mechanism and Responsibility}, in \textit{Essays on Freedom of Action} 157, 178-79 (T. Honderich ed. 1973).
some women. Suppose that further, it is established that a defendant
would not have committed a certain crime but for one of these “crimi-
nogenic” factors. We can then say that the factor caused the crime. We
still have said nothing relevant to the question of whether the defendant
acted. If he had the capacity and the opportunity to will the movement
of his body, he could act; if he exercised that capacity on a particular
occasion, then on that occasion he acted. Nothing in the hypothetical
causal stories is relevant to these questions. Only if it is shown that these
factors caused a lack of capacity or opportunity to act will they be ways
of showing that the defendant did not act. It is not enough to show that
the factors caused the defendant’s behavior.

3. Insanity and Causation

The causal theory can explain the status excuses no better than it
does the other two types of excuses. To demonstrate this, we should
examine the insanity defense, the status excuse that most suggests the
accuracy of the causal theory. (Infancy is a less likely candidate because
infancy involves no disease-entity or other thing to be identified as the
cause of crime.) It is not because crazy people are caused to do what
they do that they are excused; rather, crazy people are excused because
they are crazy. Mental illness is directly relevant to responsibility in a
way that other illnesses that may also cause crime, such as blindness,
deafness, stomach cramps, and heart conditions, are not. Insanity beto-
kens a difference so fundamental that we deny moral agency to those
afflicted with it. The insane, like young infants, lack one of the essential
attributes of personhood—rationality. For this reason, human beings
who are insane are no more the proper subjects of moral evaluation than
are young infants, animals, or even stones. Only beings who, like most of
us, are fairly good practical reasoners can be the subjects of moral norms.

Nothing in this status conception of insanity implicitly refers us
back to causation. It is not because their mental disease causes the
insane to commit crimes that we excuse them, no more than it is because
an infant’s lack of rationality causes him to do bad that we excuse him.
Rather, in both cases, we excuse because the actors lack the status of
moral agents. Although we may colloquially attribute particular actions
to their insanity, we do not mean that they are to be excused because of
some supposed causal relation. We mean that they cannot fairly be
blamed because in general they lack our rational capacities.

Doctrinal support for this view of legal insanity is admittedly
scarcer than one might hope. The pre-M’Naghten test, for one, was con-

121. I argue this at some length in M. Moore, supra note 18, at 217-45, and in Moore, Mental
Illness and Responsibility, 39 BULL. MENNINGER CLINIC 308 (1975).
sistent with this view. According to that test, it will be recalled, the accused was not legally insane if he could tell the difference between right and wrong.\textsuperscript{122} This capacity was chosen as the mark of sufficient mental maturity that an offender could be held responsible. The test had been adopted from the test for responsibility for children, which as early as the fourteenth century drew the line of accountability at the ability to know of good and evil.\textsuperscript{123} That language was drawn from the passage in the Book of Genesis in which God likens humans to God once they have come to know of good and evil.\textsuperscript{124} Insofar as the law asked whether a person knew right from wrong, it was asking whether he was sufficiently like us to be a moral agent and thus responsible for his acts.

When the \textit{M'Naghten} test was adopted in 1843, however, this ancient wisdom was forgotten. The test measuring moral agency was supplanted by the language of mistake: only if the accused did not know the nature and quality of the particular act he did, or he did not know that it was wrong, was he to be excused.\textsuperscript{125} \textit{M'Naghten} transformed the insanity defense into a version of the mistake excuses.

All the other tests for insanity repeated this tendency.\textsuperscript{126} Rather than trying to determine when a being is enough like us to be considered a moral agent, courts have officially treated insanity as a true excuse rather than a status excuse. The status conception of the excuse, however, refuses to die. Jurors refuse to convict seriously deranged people even if these people are sane by the \textit{M'Naghten} test or any other test, and jurors convict less seriously deranged individuals even if these people quite literally satisfy the terms of the applicable test. As the Royal Commission on Capital Punishment observed about English juries: “However much you charge a jury as to the M’Naghten Rules or any other test, the question they would put to themselves when they retire is—‘Is this man mad or not?’”\textsuperscript{127} Psychiatrists serving as expert witnesses often do the same thing. In New Hampshire, for example, where an accused is excused only if his act was the “product” of “mental illness,”\textsuperscript{128} psychiatrists at the state hospital have given their own meaning to the phrase “mental illness” when they testify. This meaning is not the expansive one they use in clinical practice, but rather the more restrictive meaning

\textsuperscript{122} On the pre-\textit{M'Naghten} tests for insanity, see M. Moore, \textit{supra} note 18, at 65-66.
\textsuperscript{123} 5 Y.B. Eyre of Kent, 6 & 7 Edw. 2 (1313), reprinted in 24 \textit{Selden Society} 109 (1909).
\textsuperscript{125} \textit{M'Naghten’s Case}, 8 Eng. Rep. 718, 722 (1843).
\textsuperscript{126} See generally M. Moore, \textit{supra} note 18, at 217-24.
\textsuperscript{128} See \textit{supra} text accompanying note 54.
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captured by the popular labels "mad" or "crazy." More generally, psychiatrists testifying under any test typically assume that "mental illness," "disease of the mind," "abnormality of mind," and like phrases appearing in the various insanity tests should be taken to mean, roughly, the extreme psychoses.

Thus, the "unofficial" version of the insanity test—the test as actually applied by psychiatrists and jurors—restricts the excuse of legal insanity to those who are so lacking in rationality that they are popularly considered crazy. This is because those psychiatrists and jurors have glimpsed a moral truth: the very status of being crazy precludes responsibility. Seeking some hidden cause of the accused's criminal behavior is, accordingly, simply beside the point.

B. The Causal Theory Is Morally Incorrect

If the causal theory does not in fact fit very well with the established doctrines of excuse in the criminal law, then much of its plausibility as a theory of legal excuse evaporates. The theory then becomes a theory of moral excuse, a theory that does not reflect our criminal law so much as it urges us to change it. Specifically, the causal theorist at this stage must be seen as urging us to expand the categories of excuse so as to include conditions like brainwashing, possession of an extra Y chromosome, premenstrual tension, adverse environmental background, and involuntary intoxication whenever they are known to cause crime.

Since there is no dearth of such proposals, let us look at the moral case for the causal theory. In order to appreciate this moral case, it is crucial that we keep clearly in mind what has been settled and what has been left open by the previous analysis. My overall argument against regarding causation as a moral excuse is made in three steps. Two of these steps have already been taken, but since they were taken in the context of analyzing legal excuse, they should be repeated here in the context of moral excuse.

(1) Action can be caused. The causal theorist bases his conclusion that causation is incompatible with moral responsibility partly on the


130. See A. GOLDSTEIN, THE INSANITY DEFENSE 59-62 (1967); id. at 60-61 (reporting a "quite widespread feeling among psychiatrists that all psychotics should be regarded as insane"); see also Waepler, Psychiatry and the Problem of Criminal Responsibility, 101 U. PA. L. REV. 378, 384 (1952). Waepler observes that a "central core" of the concept of mental illness consists of "conditions in which the sense of reality is crudely impaired, and inaccessible to the corrective influence of experience—for example, when people are confused or disoriented or suffer from hallucinations or delusions. That is the case in organic psychoses, in schizophrenia, in manic-depressive psychosis." Id.
thesis of metaphysical incompatibility that I discussed earlier, the thesis that actions cannot be caused. This conceptual claim about action leads to the following argument about moral excuse. If behavior is caused, it is not an action; further, if a person's behavior is not an action, then he cannot be morally responsible for it. It follows that a person is not morally responsible for any of his behavior that is caused.

The earlier discussion of the compatibility of causation with the legal excuses based on lack of voluntary action in fact accomplished more than a bit of legal exegesis. It showed that both inside and outside the law, people can exercise their will even though their actions are caused. People do not need to stand outside the causal order—a truly extraordinary idea—in order to exercise those causal powers that are the essence of human actions. Eliminating this conceptual claim about actions eliminates one ground for thinking that where behavior is caused, there can be no moral responsibility.

(2) Moral excuses, like legal excuses, are not based on causation, but on interference with practical reasoning. My earlier arguments about the legal excuses of compulsion and insanity are equally applicable to the moral excuses that underlie the legal doctrines. The moral excuse of compulsion, for example, is available only when the actor's practical reasoning is constrained; it is not enough that the actions or the beliefs and desires guiding action were caused. The upshot is that at least the conventionally accepted versions of the moral excuses of compulsion and insanity are not based on the causal theory.

(3) Does anything else have to be shown to answer the causal theorist's moral argument that causation and moral responsibility are incompatible? If human action can be caused, and if an action does not fit into one of the conventional categories of moral excuse simply because it is caused, then it may seem that nothing more need be said in order to show the compatibility of moral responsibility with causal accounts of action. Indeed, a strong tradition in philosophy takes just this position. When A.J. Ayer and Moritz Schlick, for example, pointed out the distinction between causation and compulsion, they assumed they had answered the challenge of those who think that causation and moral responsibility are incompatible. They assumed this because they assumed that the challenge was motivated only by a conceptual confusion. Yet their response to the challenge does not do justice to the intuitive plausibility

131. Some theorists beguiled by the metaphysical incompatibility thesis are named supra in note 95; see also T. Nagel, Moral Luck, in Mortal Questions 24 (1979).
132. See supra text accompanying notes 113-20.
133. See supra text accompanying notes 103-11, 121-30.
134. See supra text accompanying notes 103-06.
of the principle of responsibility mentioned earlier. Even after the conceptual confusions are cleared away, the causal theorist has a moral argument: if a person could not help doing what he did, he is not morally responsible for it. This is true even if his behavior was an action, and an action not covered by the conventional moral excuses.

This argument merits a response, and therefore the compatibilist needs a third step to his argument, a step that meets the challenge to the adequacy of the standard moral excuses posed by the principle of responsibility. One way to take on the causal theorist here is to reject the principle of responsibility outright. One might urge, as Harry Frankfurt has, that it is irrelevant to an actor's moral responsibility whether he could have done other than he did. If he chose to do what he did, Frankfurt urges, then he is responsible, even if he could not have done otherwise.

In an attempt to establish this proposition, one can construct a thought experiment of the kind Frankfurt originated. Suppose that neurophysiology has advanced to the point that with suitable equipment, one person can monitor the thoughts of another and even, if he wishes to, control those thoughts. Suppose further that one person (X) is debating whether or not he should rape a woman for whom he has long had an attraction. Suppose further that for reasons of his own, another person (Y) wants the woman assaulted; Y is suitably equipped to monitor X's thoughts and does so. Now suppose that X decides to rape the woman and does so. Y knew what X was thinking; he had the power to intervene and control X's choice and would have done so, if X had chosen not to rape the woman. However, since X chose as he did, Y only monitored but did not interfere with X's thoughts. Frankfurt asks: Is not X still responsible for the rape of the woman, even though he could not have done other than he did? If he is responsible, the principle that one is responsible only if he could have done otherwise is false. X is responsible if he chose to act and acted, whether or not he could have done otherwise.

Unfortunately, such thought experiments only shift the locus of the argument. It is true that in the example, X could not have done otherwise, and yet we think it is morally correct to punish him. But, the causal theorist will respond, this is an easy case because we have not said anything about the factors that caused X's free choice. Since in our thought experiment X's choice apparently is uncaused, the intuition that X is responsible is not surprising. The causal theorist will propose to modify the example so that Y does have to interfere with X's thoughts in order to cause X to rape the woman. Suppose, for example, that Y

135. See supra text accompanying notes 64-65.
137. Id.
strengthens X’s desire for her and weakens X’s fear that he will be caught and punished. Now we have a causal account of X’s choice, and the intuition that X is responsible is considerably weaker.

A causal theorist would urge that all choices are ultimately like X’s choice in the revised scenario. Substitute for Y the natural factors that cause choice, and you have the same problem one step removed: if an actor could not have chosen otherwise, it does not matter that his actions were the products of his choices. The principle of responsibility is recast into: an actor is responsible for his actions only if he could have chosen to do otherwise.\(^{138}\)

Preferable to rejecting outright the principle of responsibility is reconstruing what it means. In some sense of the words, it is intuitively plausible that an actor can be held responsible only if he could have done other than he did. The causal theorist assumes that his is the only possible interpretation of this principle. He assumes that the word “could” in the principle must mean “could, no matter what.” Using this meaning of “could,” an actor could not have done otherwise if his actions were caused by factors not within his control. If an actor’s unfortunate upbringing caused him to commit violent crimes, then he could not have done other than commit those crimes.

Ignored by the causal theorist is a famous alternative interpretation of the principle of responsibility that originated with G.E. Moore.\(^{139}\) Moore argued that the “could” in the above principle is not an unconditional “could,” but rather, a conditional one. In other words, when the principle says an actor “could have acted otherwise,” it means that “he could have if he had chosen (or willed) to do otherwise.”\(^{140}\)

The consequence of Moore’s conditional interpretation of the princi-

\(^{138}\) See generally Chisholm, Freedom and Action, in FREEDOM AND DETERMINISM (K. Lehrer ed. 1966); Chisholm, Human Freedom and the Self, in FREE WILL 26-27 (G. Watson ed. 1982). Chisholm replaces the concern about determined actions with a concern about determined choices. Of course one can construct Frankfurt-like hypotheticals about choice as well as about action: suppose Y has the capacity to affect X’s choice of the desires that will determine his choice of action. Y does not exercise his power because X chooses a set of desires that produces just the choice Y would like. This strategem only moves the locus of the argument still farther back, to the choices about desires that cause choice. No matter how far back up the causal chain we go, at some point there will be factors that cause choices—or choices of choices—and those factors will not themselves be chosen. The moral question that remains is whether we can fairly hold X responsible for his choices if they are the product of factors not within his control. If choice is the touchstone of culpability, how can X be culpable when he did not choose those factors? Frankfurt’s kind of thought experiment only forces the causal theorist to reformulate his principle of responsibility.

\(^{139}\) G.E. MOORE, ETHICS 84-95 (1912 & photo. reprint 1969).

\(^{140}\) Id. Moore seems to have preferred to analyze “he could have done so” as “he should or would have done so, if he had chosen to.” Id. at 90-93. To avoid J.L. Austin’s objection—that we can say a person is able to do something when that person chooses to do it and yet fails to do it on that particular occasion—I prefer Moore’s first formulation, which analyzes “could” as “could if he had chosen.”
ple of responsibility is to make responsibility for an action compatible with causation of that action. For the only freedom the principle of responsibility now requires is the freedom (or power) to give effect to one's own desires. One's choices, or willings, in other words, must themselves be causes of actions for Moore's interpretation of the principle to be satisfied; it is not required that such choices be uncaused.

It can hardly be disputed that in ordinary speech there are senses of "could" that express Moore's conception of ability. "I could have run a mile in five minutes" is true if I had the physical capability to run that quickly; "I could have fixed the clock yesterday" is true if I had the opportunity to do so. In neither of these examples does "I could" become incorrect or meaningless if there are causes for the action I could perform. The words "I could" require only that my choices be capable of causing certain effects and that I have the opportunity to exercise my choice.

Once one sees these capability/opportunity senses of "could," they are so perfectly ordinary that one might doubt whether ordinary speech has the sense of "could" required by the causal theorist. Is there an unconditional sense of "could" such that one could say in a conventional idiom: "Even though he had both the capability and the opportunity to refrain from killing her had he chosen to do so, he could not have done otherwise than kill her because his choice and his action were caused"? Moore and his followers seemed to think that they could settle this question by linguistic analysis. P.H. Nowell-Smith, for example, once sought to sustain Moore's interpretation of the principle of responsibility by arguing that it would be "logically odd" to use "could" in any usage other than one in which it was implicitly conditional on opportunity or ability (in its usual sense). Both Moore and Nowell-Smith were challenged by J.L. Austin on linguistic grounds, and there has been a burgeoning literature since.

Such a linguistic debate, however, cannot settle the meaning of the word "could" as it is used in the principle of responsibility. Suppose

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141. For discussions of the various senses of "can," see G.E. Moore, supra note 139, at 84-95; Aune, Can, in 2 THE ENCYCLOPEDIA OF PHILOSOPHY 18-20 (P. Edwards ed. 1967); and the readings collected in THE NATURE OF HUMAN ACTION (M. Brand ed. 1970).


143. Austin, Ifs and Cans, in THE NATURE OF HUMAN ACTION, supra note 141, at 161-78.

144. See generally THE NATURE OF HUMAN ACTION (M. Brand ed. 1970); FREE WILL (G. Watson ed. 1982).

145. Of course, if people see that what they meant by the principle of responsibility was always the conditional sense of "can," then pointing out yet another conceptual confusion will produce moral agreement. The problem is that even after the distinction is pointed out, not everyone who subscribes to the principle of responsibility will admit that it is the conditional sense of "can" that they meant. Rather, they will find that the unconditional sense is still the morally relevant sense to be given to the principle.
there were no ordinary sense of "could" that is negated by the existence of sufficient causes. The causal theorist nonetheless could claim the freedom any speaker has to invent new meanings in order to make himself understood. Only if there were something in the meaning of "could" that precluded its extension in this way would he be barred from his proposed new usage. And nothing in the linguistic analyses mentioned above can support this strong a claim. Nowell-Smith's "logical oddness," for example, turns out to be no more than a pragmatic feature of language, if that; it is not a logical or even a semantic feature. It is wrong, therefore, to think that the causal theorist cannot make his interpretation of "could" understandable to us, even if it sounds "odd." Novel moral insights often may involve the violation of pragmatic or even semantic conventions.

The upshot of this is that we need a moral argument to answer the question of which interpretation of the principle of responsibility is the morally compelling one. The only moral argument I can imagine that would establish one interpretation over the other is one that appeals to the totality of our moral experience involving praise and blame. By "moral experience," I mean to include both that range of emotions and attitudes partly described by P.F. Strawson and Herbert Morris—the attitudes of resentment, moral indignation, condemnation, approval, guilt, remorse, shame, pride, and the like—and that range of more cognitive judgments about when an actor deserves moral praise or blame. We have such experience, not as armchair theoreticians, but repeatedly in our daily lives as we raise our children, deal with our fellows, and guide our own behavior.

To justify any moral proposition is to show that it is a part of the most coherent account of our moral experience, considered as a whole. That is exactly what I claim about the Moorean interpretation of the principle of responsibility. Our practices of assessing merit and responsibility are consistent with the proposition that persons are responsible for their (determined) choices, inconsistent with its negation. We therefore have very good grounds to believe that the principle of responsibility should not be interpreted as the causal theorist would like.

Part of the relevant moral experience we have described before. We undeniably parcel out both praise and blame for actions and choices we know to be caused by factors external to the actor's free will. Our moral life is built upon our praising or blaming people when they help a friend, tell a bad joke, create a work of art, or write a clear and truthful essay

146. Strawson, supra note 63.
148. See Moore, supra note 23.
about the excuses—even though we know at least some of the factors that caused these actions. It is hard to imagine how different our praising and blaming practices would be if we really tried to cabin them to situations in which we could think of no causal explanation for a person’s behavior. We would always be in doubt as to whether a person really deserved praise or blame.

Of course a causal theorist could simply adopt a tough-it-out attitude. He could claim that most of our moral experience is just false in light of the truth of his interpretation of responsibility. Yet no less than his opponent, the causal theorist needs an argument to explain why his interpretation of the principle is the right one. And how is the argument to proceed if he concedes that his interpretation of the principle would falsify much of our moral life? What are the aspects of our moral life on which he can rely to support his interpretation?

He cannot appeal to the supposed metaphysical incompatibility of action and causation, as we have seen. Responsible action is possible even when caused by factors over which the agent has no control. Nor can he appeal to the recognized moral excuses, such as compulsion and insanity. These, as we have seen, do not have causation as their rationale. We can now appreciate the real bite of the first two steps of our three-step argument: by showing that actions are performable in an unbroken sea of causation, and by showing that the moral excuses are not partial and incomplete concessions to a more general causal principle, we have denied the causal theorist his most natural beachheads. He cannot claim that an actor is responsible only for his uncaused actions. Nor can he claim that our established moral excuses exculpate only uncaused actions. He is left with only a very isolated class of moral experience that speaks for his interpretation of the principle of responsibility.

That class of experience we have described before. It consists in the sympathy we may feel for wrongdoers whose wrongdoing was caused by factors such as social adversity or psychological abuse during childhood. There are three things to say about this range of moral experience. First, the moral judgment it seems to support does not fit with the much larger set of judgments about responsibility that we make in daily life. In seeking the most coherent expression of our moral judgments considered as a whole, these sympathetic judgments may simply have to be discarded. No area of human knowledge is perfectly coherent. Any systematic exposition of our sensory experience, for example, has to disregard certain visual experiences because they give us inaccurate information about the world. (Our perception of a “bent” stick partially immersed in

149. See supra text accompanying notes 1, 84-86.
water is a good example.) The same can be said of our sympathetic responses to disadvantaged criminals.

Second, we should be suspicious of that class of moral or perceptual experiences whose existence we can explain in a way that does not presuppose their truth. That is, just as we discount our experience with sticks looking bent when immersed in water because we can explain the experience away, so we should discount any sympathy for disadvantaged criminals if we can explain why we feel that sympathy in terms of extraneous factors.150 A feature of these moral experiences that should raise our suspicions is their asymmetry with regard to different kinds of causes: different causes of criminal behavior will call forth in us widely varying intuitions.151 Psychological abuse during childhood or a ghetto upbringing may give rise to intuitions of excuse, but one rarely hears the same arguments made to excuse criminals because of their happy childhood, their parents' wealth, or the advantages they may have enjoyed—even though such factors may well cause someone (for example Loeb and Leopold) to become a criminal. This asymmetry could evidence a connection between our sympathy for the disadvantaged defendant and either (1) our own guilt at not having done enough to alleviate "unhappy" causes of crime, or (2) our sense that those who became criminals because of adverse circumstances have "already suffered enough."152 In either case, the experience of sympathy may betoken something other than a general judgment that causation of choice excuses.

Finally, we have reason to discount certain experiences and the intuitions they generate when, on examination, their appearance of moral goodness proves deceptive. We might, for example, find that our feelings of pity harbor a hidden resentment, that our feelings of guilt mask self-loathing, or that our feelings of vengeance hide our own desires to engage in the criminal violence we nominally abhor. In each case we turn our moral theory back onto the experiences that generate it to judge their moral worth in light of their true psychology. If we find them wanting,

150. Any moral theory will have to reject some of the emotions that generate the theory in order to maintain overall coherence. See Moore, supra note 23, at 1136.

151. See Hollander, supra note 86, at 148: "[T]he popular social determinism of our days is not consistent but selective. In general, it proposes (or implies) that only the behavior of "underdogs" is socially determined,... only the lower strata are cast into certain roles by more powerful social forces, groups or agencies, or are equally helpless victims of expectations or labeling.

152. For an example of this last idea, see the letter to the New York Times quoted in Hollander, supra note 86, at 148. Listening to the stories behind each hijacker... points to a recurrent theme of frustration: to the hijacker the hijacking seems to represent a last, desperate effort for personal integrity in times that make this basic human feeling so hard to realize. It saddens me to hear these frightened, despondent men sentenced to more of the same despondency for 20 years.

Id.
then we have reason to reject the moral judgments such experiences seems to support.

In the case of those feelings of sympathy on which the causal theorist relies, one aspect of their psychology should make us hesitate to honor them as sources of moral insight. There is an elitism and a condescension often (and perhaps invariably) connected with such feelings. To stand back and to refuse to judge because one understands the causes of criminal behavior is to elevate one's self over the unhappy deviant. The elevation of self takes place because these causal theorists typically maintain high moral standards for themselves, yet refuse to judge others by those same standards. This discrimination betokens a refusal to acknowledge the equal moral dignity of others. It betokens a sense about one's self—as the seat of subjective will and responsibility—that one refuses to acknowledge in others. In Sartrean terms, it is to treat the disadvantaged criminal as an in-itself rather than as a for-itself.

By their nature, neither of these last two considerations can be conclusive. Experiences that are explicable for reasons unconnected to their truth and experiences that, when truly understood, demonstrate to us our own moral failings, may still lead us to make true judgments. One's hallucinations can result in true beliefs, and even moral lepers may stumble onto a moral truth or two. Still, considerations such as these give us strong reason to doubt that the sympathy we may well feel for disadvantaged criminals is evidence of a moral judgment about the incompatibility of causation and responsibility. And in any event, our first consideration, if correct, is conclusive: the causal theorist's interpretation of the principle of responsibility is inconsistent with the mass of our judgments about where it is just to praise and blame. Given the choice between discarding that interpretation and discarding the mass of moral experience with which it is inconsistent, it is easy to discard the contested interpretation. The result is to reject any requirement that, before we say an actor "could have acted otherwise," we establish that his choice to act was uncaused. Put another way, the result is to affirm the proposition with which we began, that one is responsible for actions that result from one's choices, even though those choices are caused by factors themselves unchosen.

With the disappearance of the causal theorist's interpretation of the principle of responsibility, the last vestige of an argument for his moral position also disappears. For the third and last beachhead from which the causal theorist could launch his assault on the coherence of our moral system is denied him once his version of the principle is rejected. My case, accordingly, is complete once it is shown: (1) that behavior can be an action even if it is caused; (2) that the moral excuses we have are not partial and inconsistent concessions to a general causal theory of
excuse; and (3) that there are good reasons to reject the causal theorist’s interpretation of the principle of responsibility and to reject the intuitions on which that interpretation is based.

There is thus no good reason to fear that in the realm of criminal law the legal excuses we presently recognize are arbitrary and isolated instances of a much more general moral excuse. There is no general moral excuse in terms of causation. Criminal law theoreticians who continue to argue that there is are either succumbing to the conceptual confusions we have exposed or giving undue weight to some isolated and inconsistent sympathies in the systematic articulation of our moral experience.

CONCLUSION

The causal theory of excuses has too long exercised its influence over criminal law theory. Implicit adherence to it has clouded our confidence in the moral basis of punishment. It has produced some shaky metaphysics and even shakier moral theorizing by criminal lawyers. It has produced proposals to interpret or abolish the existing legal excuses, or to add new ones, that do not comport with the moral deserts of offenders. And it has blurred lines that should not be blurred, such as the line separating bodily movements that are actions from those that are not. For each of these reasons, we would be well rid of it.

But what is to take its place? It is not obvious that there must be a single theory of all the excuses. If moral pluralism were true, there would be a group of isolated moral truths about the nonresponsibility of the insane, of those who are coerced, and so on. Although this is possible, my own view is that there is a hidden unity to the excuses. I have hinted at tentative thoughts about that unity throughout this Article: the excuses are all related to the exercise of the actor’s practical reasoning capacities.

Reason is practical when it gives us reasons for actions rather than reasons for belief. At a bare minimum, the ability to reason practically involves: (1) the ability to form an object we desire to achieve through action, (2) the ability to form a belief about how certain actions will or will not achieve the objects of our desires, and (3) the ability to act on our desires and our beliefs so that our actions form the “conclusion” of a valid practical syllogism. In addition to these minimal capacities, we must possess several additional capacities with respect to our desires, our beliefs, and our actions in order to be fully rational agents.  

The capacity to engage in practical-reasoning is one of the essential

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153. The nature of practical reason and the various capacities involved are explored in M. Moore, supra note 18, chs. 1-2.
prerequisites of personhood. Some of the excuses deal with such profound defects in practical-reasoning capacities that the very actor's personhood is in question. Insanity and infancy are excuses of this sort. Other excuses deal with defects in practical reasoning capacities that are less grave. Involuntary intoxication, for example, involves a temporary derangement of these capacities, but not as serious as in the cases of insanity or infancy. Nonetheless involuntary intoxication leads to excuse. Internal compulsion (provocation, addiction) also excuses persons whose reasoning is temporarily "unhinged" by their extreme emotional state. Again, in these instances the incapacity to engage in practical reasoning, though not so extreme as to put the individual's personhood in jeopardy, is sufficient for excuse.

Other excuses exist because persons whose practical reasoning capacities may be unimpaired nonetheless may not have the opportunity to use them. Unconsciousness, reflex, posthypnotic suggestion, and the other conditions of disproving voluntary action present extreme cases in which a person has no opportunity to use his latent capacities to conform to the law. Ignorance and mistake present less extreme examples. These excuses apply to cases in which, in some sense, the actor has the opportunity to exercise his practical reasoning capacities. Since, however, the actor is ignorant of or mistaken about some fact or legal norm, he does not have the same kind of opportunity to avoid doing evil that he would have if he knew what he was doing and still violated the law. External compulsion by threats or natural necessities presents an even less extreme case of lack of opportunity. Here, the actor knows what he is doing and that it violates the law; he also is sufficiently possessed of his faculties that he could choose to resist the threat or the necessity. Still, external compulsion excuses him because we recognize that his opportunity to conform to the law is severely restricted compared to that of persons who are not compelled to break the law.

In one or another of these ways, our legal and moral excuses all reflect the moral judgment that responsibility can only be ascribed to an individual who has both the capacity and the opportunity to exercise the practical reasoning that is distinctive of his personhood. No doubt this account of the excuses is pretty sketchy. But it is also a topic for another occasion.154

154. Moore, Excuses as Disturbed Practical Reasoning (forthcoming in Responsibility (F. Schoeman ed. 1986)).