

# Who is Responsible, for What, to Whom?

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*I sketch an account of responsibility, in particular criminal responsibility, as relational and practice-grounded: to be responsible is to be held responsible for something by some person or body within a social practice. To understand responsibility in these terms, we must answer three sets of questions: What is it to be a responsible subject? What are the proper objects of responsibility? To whom are we responsible? I suggest approaches or answers to these sets of questions as they bear on the criminal law.*

*Responsible subjecthood is best understood as a matter of responsiveness (the capacity to respond) to reasons. I discuss the capacities that such responsiveness requires.*

*What we are criminally responsible for depends partly on what the general conditions of responsibility are—I discuss the “control requirement” and the “epistemic condition”; and partly on what should be the business of the criminal law—I discuss the “act requirement” and the “harm principle.”*

*We are criminally responsible, in a liberal democracy, to our fellow citizens: we must answer to them, through the criminal courts, for our alleged criminal wrongs. But there are further questions to be asked about the conditions that must be satisfied if the courts are to have the right to call us to account.*

## I. INTRODUCTION: RESPONSIBILITY AS RELATIONAL AND PRACTICE-GROUNDED

This paper sketches an approach, rather than developing any detailed argument: it could have been more ambitiously (or ironically) entitled “Prolegomena to a(ny) Future Theory of Criminal Responsibility.” It offers a structure within which we can understand, and see how to set about resolving, some of the central questions about criminal responsibility. Its starting point is the by now familiar idea that responsibility, in the sense that concerns us here, is relational and practice-grounded.<sup>1</sup>

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<sup>1</sup> See, e.g., R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* (1994); JOHN M. FISCHER & MARK RAVIZZA, *RESPONSIBILITY AND CONTROL* (1998); ANTONY M. HONORÉ, *RESPONSIBILITY AND FAULT* (1999); PETER CANE, *RESPONSIBILITY IN LAW AND MORALITY* (2002).

Responsibility is relational in that it is constituted by the relationship between a subject who is responsible, an object for which that subject is responsible, and a body to whom that subject is responsible for that object: to be responsible is to be responsible to A for X.<sup>2</sup> It is practice-grounded in that to *be* responsible is to be (liable to be) *held* responsible by somebody within some practice. The meaning of responsibility is therefore to be found within the practices in which we ascribe, accept and deny responsibility, in the different ways in which we hold each other and ourselves responsible, and determine the justice of such holdings. Responsibility is answerability; to be responsible is to be liable to be called to answer for something by and to somebody.<sup>3</sup>

To say that A is responsible is not always to say that A is responsible for something or to somebody. Some other uses of “responsible” are derivative from this usage: if someone is a responsible teacher, for instance, she takes her duties seriously, and there will be some body to whom she is, and by whom she is held, responsible for her performance of those duties. Other uses cannot be thus explained: to say that the gale was responsible for the damage to my roof is not to say that it is responsible to somebody for that damage. But my aim is not to explicate the concept of responsibility: it is, rather, to explicate the notion of responsibility that is relevant to criminal responsibility (or to moral responsibility, or to responsibility in a range of other practices that involve responsibility-attributions).

Questions about responsibility, as thus understood, are questions about the grounds on which, and the conditions given which, people can be held responsible for something. We can talk, descriptively, of the responsibilities that are actually ascribed to people within existing practices. Under English criminal law, for instance, parents are responsible for their children’s attendance at school; parents of truanting children are liable to be convicted of an offense, a conviction that holds them responsible for their child’s failure to attend school.<sup>4</sup> We can also talk, critically, about when people can be justly held responsible, for what and by whom. We can ask whether it is right to hold a parent so strictly responsible for

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<sup>2</sup> The sense of “relational” here is therefore quite different from Norrie’s “entity relationism.” ALAN W. NORRIE, *PUNISHMENT, RESPONSIBILITY, AND JUSTICE* (2000). It also differs from that discussed by John Gardner in *The Mark of Responsibility*, 23 *OXFORD J. LEGAL STUD.* 157, 164–66 (2003), and exemplified in Richard Rorty, *Is Truth a Goal of Enquiry?* Davidson vs. Wright, 45 *PHIL. Q.* 281 (1995).

<sup>3</sup> See JOHN R. LUCAS, *RESPONSIBILITY* (1993). Sometimes, of course, I am responsible only to myself (no one else might have the right to call me to account, but I must answer to my own conscience). Although I cannot discuss this possibility further here, I do not think that it threatens my general account, partly because answering only to oneself still presupposes a shared social practice within which that can make sense.

<sup>4</sup> Education Act, 1996, c. 56, § 444(1) (Eng.). The parent of a truanting child is held “strictly” responsible, in that it is not open to her to argue that it was the child’s responsibility to attend school as he was told, or that she had fully discharged her parental responsibilities by telling the child to go to school, and by punishing him for failing to attend.

her child's absence from school. My goal is a critical account of criminal responsibility—an account which, although inevitably grounded in the ways in which our existing systems ascribe criminal responsibility, tries to identify the criteria and conditions given which people can be justly held responsible by or under the criminal law.

Three further preliminary points should be noted. First, I will focus on the responsibilities of individual agents, and will say nothing about the ways in which we might hold collectives or institutions responsible—important though those are for the criminal law. Second, my primary concern is with retrospective rather than prospective responsibilities. My prospective responsibilities are those that I have before the event, those matters to which it is up to me to attend: people have such responsibilities as friends, as parents, as teachers, as citizens, and as human beings. My retrospective responsibilities are those that I have after the event, for that for which I can be called to answer, for what I have done or failed to do. Both species of responsibility are for something to somebody, and our prospective responsibilities help determine our retrospective responsibilities: we hold a parent retrospectively responsible for her child's truancy only insofar as it was her prospective responsibility to ensure that he attended school. But criminal responsibility is retrospective: we are held responsible for our alleged past criminal conduct. Of course if I am held criminally liable for a past crime, I will probably acquire new prospective responsibilities: to pay a fine, for instance, or to carry out the prescribed Community Service. But my *criminal* responsibility is for the past crime, and those new prospective responsibilities depend on that retrospective responsibility.<sup>5</sup>

Third, we must distinguish criminal responsibility from criminal liability: I might accept responsibility for the conduct that grounds a criminal charge against me, but avoid liability by offering a defense. We will attend later to the issue of what we can be responsible for under the criminal law, and to the difference between answers to a charge that admit responsibility but deny liability and those that deny responsibility: but we should avoid the confusions that flow from identifying responsibility with liability.<sup>6</sup> We hold people responsible only for what we take to be wrong or undesirable (benefactors are, but are not held, responsible for their good deeds): but one can admit responsibility while denying liability or blameworthiness.

If we are to understand criminal responsibility in these terms, as a matter of being held responsible for something to or by some person or body, we must

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<sup>5</sup> In civil cases, by contrast, the focus might be more on prospective responsibilities—on who should bear the cost of the harm that occurred; there is then room for argument about how far that decision should be based on a judgment of retrospective responsibility for the harm.

<sup>6</sup> See, e.g., NORRIE, *supra* note 2, at 124; MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 36 (1997) [hereinafter MOORE, *PLACING BLAME*] (discussing “the sense of ‘responsibility’ relevant to a theory of the criminal law”); see also Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 333 n.1 (1996).

address three sets of questions. The first (discussed in Part II) concerns the responsible subject: what characteristics must a person have if she is to be held responsible? The second (discussed in Part III) concerns the objects of responsibility: are there any general constraints, of logic or morality, on what we can be held responsible for; can we say anything general, and non-vacuous, about the appropriate objects of criminal responsibility? The third (discussed in Parts III and IV) concerns the bodies to whom we are responsible: who can justly call us to answer for our alleged crimes; what gives them (and what can deprive them of) the right thus to call us to account?

## II. RESPONSIBLE SUBJECTS

We take it for granted that most adult human beings are responsible subjects: they are not responsible for every aspect of their lives, but they can participate in the various practices that involve attributions of responsibility, including the practices that constitute the criminal law. Some people, however, are not responsible agents: their condition is such that it is impossible for them to participate, or unreasonable to expect them to participate, in some or all of these practices. They might not yet be responsible, capable of meaningful participation, if they are very young; they might have no prospect of becoming responsible, if they suffer some serious congenital impairment; they might have temporarily or permanently ceased to be responsible, if they suffer serious mental disorder. So what distinguishes the responsible person from the non-responsible? What characteristics must a person have, what conditions must he satisfy, if he is to be appropriately treated as a participant in our responsibility-practices? It is here that “capacity” theories of responsibility find their place: not, as some portray them, as competing with “choice” or “character” theories,<sup>7</sup> which rather concern the objects of responsibility, but as accounts of the conditions of responsible personhood. To participate in our responsibility-practices, a person must have certain capacities—but what capacities? (We cannot assume that the same capacities are always required: I focus here on those required for participation in the practices that constitute a system of criminal law.)

### A. *Responsibility and Reasons*

The by-now-familiar answer is that the requisite capacities have to do with reasons.<sup>8</sup> The responsible person is “responsible” (i.e., capable of responding

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<sup>7</sup> See, e.g., Jeremy Horder, *Criminal Culpability: The Possibility of a General Theory*, 12 LAW & PHIL. 193 (1993); WILLIAM WILSON, CENTRAL ISSUES IN CRIMINAL THEORY 333–43 (2002).

<sup>8</sup> See, e.g., WALLACE, *supra* note 1; FISCHER & RAVIZZA, *supra* note 1; Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 329 (Michael Tonry ed., 1998); MOORE, PLACING BLAME, *supra* note 6, at 602–09; WALTER GLANNON, THE MENTAL BASIS OF RESPONSIBILITY (2002).

appropriately) to reasons: she is capable of recognizing, deliberating about and being guided (or guiding herself) by reasons. In the context of criminal responsibility, the reasons to which one must be responsible are reasons for action: but responsibility in general also involves the capacity to respond appropriately to reasons for belief, for emotion, and for thought, as well as for action. The general connection between responsibility and reasons is obvious: we are responsible (prospectively and retrospectively) for what we have reason to do or not to do. Our focus here must be on the form that connection takes in the context of the criminal law.

The criminal law addresses the citizens in terms of reasons for action that are supposedly authoritative: to commit a crime is to act in a way that, according to the law, I had authoritative reason not to act. Just what kinds of reason these are is controversial. For a simple positivist, the law addresses us in terms of the brutally prudential reasons that it creates: the orders of a sovereign whose authority consists in his monopolistic power give her subjects reasons for action that consist solely in the threatened sanctions attached to disobedience. On this view, criminal responsibility would require only the capacity to respond to such prudential reasons: the notorious “partial psychopath,” who is incapable of moral understanding but fully capable of prudential calculation and action, would be criminally responsible.<sup>9</sup> On a more plausible view, however, even if the criminal law addresses us ultimately in the prudential language of deterrent punishment, it must initially address us in terms of *moral* reasons that we allegedly have for refraining from crime. Those moral reasons might, as with uncontroversial *mala in se*, be prior to and independent of the criminal law; the law’s primary task is then not to offer us new reasons for action, but to give authoritative recognition to such prior moral reasons, as defining various “public” wrongs. Or the reasons might involve appeal to the law’s authority to define *mala in se* more precisely, or to create *mala prohibita* which it is therefore wrongful to commit.<sup>10</sup> Whatever the precise character of these moral reasons, however, if the criminal law must address citizens in such terms, criminal responsibility must require the capacity to understand and to respond appropriately to relevant moral as well as prudential reasons. One who lacks such a capacity might be deterrable, but cannot participate in the criminal law; for he cannot engage with the reasons with which it deals.<sup>11</sup>

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<sup>9</sup> On “partial psychopathy”, see HERBERT CLECKLEY, *THE MASK OF SANITY* 195–234 (4th ed. 1964); but it is unclear what conception of his own interests such a person could have; see also ANTONY J. KENNY, *FREEWILL AND RESPONSIBILITY* 42–44 (1978), for the argument that criminal responsibility requires only deterrability.

<sup>10</sup> See R.A. Duff, *Crime, Prohibition and Punishment*, 19 *J. APPLIED PHIL.* 97 (2002).

<sup>11</sup> See SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* 36–44 (1998), who argues that liability requires “rationality” but not “moral capacity” (though this sits uneasily with his remarks on “choosing experience,” *id.* at 44–45, and with his suggestion that “[moral responsibility] . . . depends on participation in the ongoing argument about the meaning of human life,” *id.* at 120).

This point can be reinforced by noting that a responsible agent must be able to answer for her alleged crimes at a trial; she must be fit to plead. The trial calls the defendant to answer a charge of wrongdoing; its legitimacy therefore depends on whether she is capable of playing her part in the process. She must be able to understand the charge that she faces, as a charge of criminal wrongdoing; to understand what it is to be convicted, that it is to be condemned as a wrongdoer; and to have some grasp of what would constitute an answer to that charge. This requires the capacity to engage with the reasons for action that the law claims to provide: she must be able to understand that she is accused of doing what she had authoritative reason not to do.<sup>12</sup>

Two further aspects of this dimension of criminal responsibility are worth noting. First, a responsible agent must have the requisite capacities both at the time of his alleged crime, and when he comes to trial: at the former time he must be capable of responding appropriately, in action, to the law's reasons; at the latter time he must be capable of responding appropriately, as a defendant, to the charge he faces. Most defendants are responsible, or non-responsible, at both relevant times, but some are not: a defendant who *was* culpably responsible for his crime cannot be justly convicted if he is *now* not fit to be tried. Second, the authoritative reasons for action that the law claims to offer include reasons that appeal to the law's own authority: this is true of the reasons that it offers for refraining from conduct it defines as criminal, insofar as they are not simply pre-legal moral reasons, and also of the reasons (implicit in the summons to appear for trial) it offers defendants to play their part in their trial. A criminally responsible agent must therefore be capable of at least a modest grasp of the idea of law and its supposed authority (which is not to say that only competent jurists can be criminally responsible, any more than competence in moral philosophy is required for moral responsibility).

A criminally responsible subject must be capable of engaging with the kinds of reason for action that the criminal law claims to provide. A full account of criminal responsibility would therefore include an account, first, of what such engagement involves—of what it is to grasp such reasons and to guide one's actions by them; and, second, of what it is to have or to lack the capacity for such engagement. I will not pursue the first of these questions here, beyond noting that on any plausible philosophical account of practical reasoning, what is involved is the exercise not merely (as a crudely Humean account would have it) of austere intellectual capacities for empirical or means-end reasoning, but of emotional and imaginative capacities that are crucial to our grasp of reasons. Practical reason is not "the slave of the passions": not because (as an equally crude Kantianism holds) it is or ought to be their master, but because (as a subtler Aristotelianism tells us) it is structured by emotions and attitudes that constitute rationally affective, or

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<sup>12</sup> See R.A. DUFF, TRIALS AND PUNISHMENTS 29–35, 119–23 (1986).

affectively rational, conceptions of and responses to the world.<sup>13</sup> For to understand something as a possible reason for action (even as a reason by which others claim I should be moved) is to grasp it as something about which I could care, and by which I could be moved to act; such a grasp must draw on my capacities for rational emotion.

The second question—about what it is to have or to lack such capacities—raises difficult problems that I should at least sketch here. The idea of capacity is unproblematic, as a condition of responsibility, when the capacity is of a kind that is answerable to the will—when to say that A has the capacity to  $\Phi$  is to say, roughly, that A can  $\Phi$  at will. This is true of many physical capacities: I have the capacity to perform a physical task if (roughly) it is up to me whether I do so or not, since I will normally do so if I “try” to.<sup>14</sup> We can then distinguish “will not” from “cannot.” When someone does not perform a physical task, we can wonder whether this was because he lacked the capacity or the will to perform it. We can decide between these explanations by offering him what he would see as a sufficient incentive to perform the task and seeing if he performed it: for if he would perform it when given what he saw as good reason to do so, he has the capacity to perform it.

The idea of capacity becomes rather more problematic when we cannot so easily separate capacity from will, or distinguish “will not” from “cannot” as different explanations of “does not.” Two kinds of case have caused particular difficulty in relation to responsibility.

#### B. “Irresistible Impulses”

The first difficult case is that of so-called “irresistible impulses.” This is not the kind of case in which the agent’s will is “overborne” by a threat to which even a “reasonable” person might give in, or in which she is provoked to violence by some wrong that might cause even a “reasonable” person to lose self-control: in such cases the person is still seen as a responsible agent, whose conduct can be understood and judged in terms of reasons (the reasons that actually explained her actions, and their relation to the guiding reasons by which it would have been appropriate or “reasonable” for her to be moved).<sup>15</sup> Our concern is with

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<sup>13</sup> See ARISTOTLE, THE NICOMACHEAN ETHICS VI.2, 1139b4–5 (W.D. Ross trans., J.L. Ackrill & J.O. Urmson rev. 1980). “[C]hoice” is “either desiderative reason or ratiocinative desire”; *contra* DAVID HUME, A TREATISE OF HUMAN NATURE II, § III, ¶ 3 (1739), on reason as “the slave of the passions”; see also Dan M. Kahan & Martha Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996).

<sup>14</sup> I say “normally” to allow for the distinction between “can (general)” and “can (particular).” See HONORÉ, *supra* note 1, at 143–50. “Try” is in scare quotes because we do not normally *try* to perform simple physical tasks.

<sup>15</sup> For the distinction between “guiding” and “explanatory” reasons, see JOSEPH RAZ, PRACTICAL REASON AND NORMS 16–20 (2d ed. 1990).

pathological cases, in which the agent is moved to act by some impulse that we and he find unintelligible, but that he claims he cannot resist. What moves him is not a temptation that presents itself as an attractive reason for action, as something genuinely desirable (agents who give in to temptation are still acting, albeit perhaps irrationally, as responsible agents within the realm of reason): it is an urge that is rationally alien to him, that finds no place within the deliberative structures of his rational agency; it is insensitive to what he sees as reasons for action, or for desire.<sup>16</sup>

Now the mere fact that an impulse is pathological, or resistant to reason, does not render it irresistible: we can and do resist bizarre impulses that afflict us. So how can we distinguish someone who fails to resist such an impulse because it is “irresistible,” from someone whose failure displays a culpable lack of concern for the values or interests at stake, or his culpable weakness of will?

Theorists and lawyers have sometimes been skeptical about the very meaningfulness of the distinction between impulses that are simply not resisted and those that are “irresistible,” but in principle (whatever the difficulties of proof) the distinction is clear enough. The agent is still a responsible agent who operates within the realm of reasons: the question is whether this aspect of his conduct is within the reach of his capacities for reason-guided action; and it is within their reach if he would resist the impulse were he given what he saw as good enough reason to do so. If an agent would resist an impulse when offered suitable incentives to do so, he could resist it (even when that incentive was not on offer): that is all that “he could resist it” means.<sup>17</sup> That is what distinguishes a culpably weak-willed agent from one who is the victim of a pathological compulsion. Although the weak-willed person acts against what she sees to be the balance of reasons, she has an intelligible reason for what she does (she gives in to an intelligible temptation), and would be persuaded to act differently if offered some even better reason to do so: to stay in bed when I know I should be going for a run might be weakness of will; to stay in bed when I know the house is burning down is suicidal or pathological.

To talk thus of what an agent could or could not resist presupposes that the agent is still capable of grasping and weighing reasons for action: we face greater difficulties when what is lacking or impaired is that very capacity or set of capacities—as in delusional psychoses, the more serious kinds of learning

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<sup>16</sup> The distinction between intelligible temptations and pathological impulses may, however, sometimes be controversial: should we, for instance, see a pedophile’s desires as temptations that he should resist (and that he should be ashamed even to feel), or instead as pathological distortions of sexual desire that merit sympathy and treatment?

<sup>17</sup> See, e.g., FISCHER & RAVIZZA, *supra* note 1, at 48–49, 231–32. If the agent who is afflicted by an irresistible impulse retains his general capacities for reason-guided action, he is also of course prospectively responsible for taking such steps as he can to deal with his pathological impulses, and is retrospectively responsible for failing to take them; he may thus be retrospectively responsible for his condition, and for the conduct to which it leads.



disability and, on some readings, psychopathy. These kinds of case create the second difficulty for an account of responsibility as responsibility to reasons.

### C. *Reason, Emotion and Value*

The question now is whether we can distinguish, at least in principle, the non-responsible agent who is incapable of responding to reasons, from the responsible agent who differs from most of us in her beliefs, emotions or values, but whom we cannot justifiably call incapable: whether we can distinguish the disordered or incapable from the rebel or nonconformist. The answer depends on whether we can identify suitably non-subjective, interpersonal standards of reason, from which we can draw rough standards of rational competence.

As all but the most fervent truth-deniers would agree,<sup>18</sup> we can identify such standards in the case of ordinary empirical thought, and can thus identify those whose cognitive capacities are congenitally deficient or seriously distorted by psychosis. They do not just form mistaken or unusual beliefs: their thought has either never gained, or has lost, touch with reason; their beliefs are not grounded in, or are not sensitive to, what could count as reasons for or against such beliefs. They are thus, to the extent that they lack the capacity for rational thought and belief, not responsible agents: they cannot take part in the practices of deliberation and belief-formation; we cannot engage with them as responsible fellow participants. Possession of this minimal capacity for rational belief-formation is, we should note, constituted by its exercise: it is not a capacity that a person exercises only when she chooses to; it is one that she cannot but exercise, to some degree, if she thinks at all.

Some theorists, particularly those who think that we can sharply distinguish “facts” from “values,” insist that we cannot identify such non-subjective standards of reason for emotions or for values: so long as another’s emotions and values do not rest on factual error, we cannot judge them to be mistaken, irrational, or disordered. A person who is so depressed by the loss of his job that he kills himself and his family; a person who never feels remorse for anything he has done, or is never moved by others’ needs or sufferings: such people are unusual, and perhaps frightening, but they lack no capacity to engage with reasons.<sup>19</sup> They recognize and respond to what they regard as reasons for action, and we cannot claim that there *are* reasons that they fail to recognize, or that what they see as reasons *cannot* be reasons: for X counts as a reason for A if and only if A sees X as a reason, or would so see it were he free from purely cognitive error or confusion.

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<sup>18</sup> Cf. BERNARD A.O. WILLIAMS, *TRUTH & TRUTHFULNESS: AN ESSAY IN GENEALOGY* (2002), on the “deniers of the values of truth.”

<sup>19</sup> HUME, *supra* note 13, again lurks in the background here: the “passions,” which provide reasons for action and which ground moral attitudes, lie outside the realm of reason.

If we reject such a rampant subjectivism, however, in favor of a modestly objectivist conception of emotion and value, which recognizes rational constraints on what we can, or must, recognize as a reason (a reason for belief, for action, for emotion), we can say that such people may be rationally incapacitated—either blind to, i.e., *unable* to recognize or respond to, a range of reasons that are there to be seen (whose seeing involves emotions); or suffering such distorted vision that they are no longer responsive to reason. We should not of course leap to such a conclusion too quickly: we must be alert to the possibility that what initially seems rationally unintelligible will turn out on closer and more imaginative examination (an examination that crucially involves attending to the agent's self-explanation) to be merely different. We will also, however, be ready to conclude in the end that the person is rationally incapacitated: for we recognize that, just as there are disorders and incapacities in the context of empirical or factual thought, so there are in the context of values and emotions; there are standards of reason, and someone who has lost, or never gained, touch with those standards is not a responsible agent. Such people cannot participate in the practices of deliberation, action and explanation that are structured by such reasons: we cannot hold them responsible, since we cannot address them as fellow participants in such practices.<sup>20</sup> Note again, however, that the possession of these capacities is also constituted by their exercise: to say that someone is capable of recognizing such reasons, and of responding appropriately to them, is not to say that she will recognize and respond to them if (and only if) she chooses to do so; it is simply to say that she does at least sometimes recognize and respond to them.

#### D. *What About Free Will?*

There is clearly much more to be said about such capacities; but I should attend briefly to just one concern about such a capacity-based account of responsibility. I have described the relevant capacities in general terms, as capacities to engage with and respond to certain kinds of reason. But surely, it might be said, what matters for responsibility is not merely whether a person possesses such general capacities, but whether she is specifically capable of thinking, feeling or acting otherwise than she does; and her possession of such general capacities does not guarantee this. Suppose that someone steals from a supermarket. She has the capacity for moral thought and action: she holds moral beliefs, and acts on them; she understands moral reasons; she can engage in moral discussions. She stole because, perhaps, she does not think it is wrong to steal from large corporations, or because she cares more for her own profit than for the demands of honesty in this context. If we are to hold her responsible for her theft,

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<sup>20</sup> Cf. Philip Pettit & Michael Smith, *Freedom in Belief and Desire*, 93 J. PHIL. 429 (1996) on “orthonomy” and the “conversational stance”; see also Susan Wolf, *Sanity and the Metaphysics of Responsibility*, in *FREE WILL* 372 (Gary Watson ed., 2d ed. 2003).

and thus potentially liable to blame and punishment, we must surely show more than that she has that general capacity for moral thought; we must show that she could have accepted that this sort of theft is also wrong, or have cared more than she does for the demands of honesty. But it is not clear whether or how we could show that; it is here that attributions of responsibility seem to depend on an assumption of free will that is unprovable, or even incoherent.<sup>21</sup>

One response to this worry is that it rests on confusion. In holding this agent responsible for her theft, in criticizing her for it, we are challenging her either to persuade us that it was justified, or excusable, or to accept that it was a wrong for which she can be blamed: we treat her as a participant in our moral and legal practices, because she has the requisite capacities. We suppose that she “could” be persuaded, and “could have” thought and acted differently: but all that this means is that she is a participant in these practices, and that there is therefore a rational path, a bridge of reasons, from her current attitudes, beliefs and actions to those that we urge on her, a bridge that is available to her in that it lies within the scope of her capacity to recognize and to respond to reasons. What is required to lead her across that bridge, what is required if she is to be so led as a responsible agent, is not therapy or manipulation or force, but the kind of conversation that is involved in holding her responsible. Of course we might not persuade her—fallibility is a necessary feature of rational discussion: but what matters is not that the conversation succeed, but that it be possible; and what makes it possible is simply that she is capable of participation in these practices.<sup>22</sup>

Such a response is certainly much too swift: we need to ask more carefully whether there are not conditions that might make someone who is generally capable of participation in such practices incapable of certain kinds of rational change in a way that negates his responsibility for what he does. It is, however, on the right lines, and it suggests that being responsible is in the end, in the context of those capacities for recognizing and accepting reasons that are basic to being a responsible subject, a matter not of what we are responsible *for*, but of what we are responsible *to*—a suggestion that might undercut some familiar worries about freedom and determinism.<sup>23</sup>

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<sup>21</sup> Cf. GALEN STRAWSON, *FREEDOM AND BELIEF* (1986).

<sup>22</sup> And, it might be added, the truth of determinism is either irrelevant to, *see* Peter F. Strawson, *Freedom and Resentment*, in *FREE WILL* 72 (Gary Watson ed., 2d ed. 2003), or ruled out by, *see* Norman Malcolm, *The Conceivability of Mechanism*, 77 *PHIL. REV.* 45 (1968), the existence of these practices. In either case, the supposed threat of determinism to human responsibility vanishes.

<sup>23</sup> Which is a central theme of some of the more interesting recent accounts of responsibility and free will. *See, e.g.*, WALLACE, *supra* note 1; Pettit & Smith, *supra* note 20; Wolf, *supra* note 20.

## III. RESPONSIBLE FOR WHAT?

A responsible agent is one who can be properly held responsible—but for what? We must ask now about the possible objects of responsibility, either in general or in criminal law. One question is whether there are any quite general conditions or constraints, logical or normative, on what we can be properly held responsible for. A more particular question is whether there are any conditions or constraints on the possible objects of *criminal* responsibility.

A. *Responsibility and Control*

Since to be a responsible agent is to be responsible to reasons, we might suppose that we are in general responsible for, or only for, what lies within the reach of our rationality, of our capacities to grasp and be guided by reasons. Reasons are reasons to  $\Phi$  (when  $\Phi$ -ing might be a matter of acting, or thinking, or feeling); we can surely be responsible for something only if it is or depends on a  $\Phi$ -ing that we could be guided by reasons to do or not to do. This rather obscure way of putting the matter points us towards a familiar answer to the question whether there are general constraints on the possible objects of responsibility: that we are justly held responsible only for what is within our control.<sup>24</sup> Such a requirement is intuitively plausible: it is surely unjust, if coherent at all, to demand that someone answer for what was not within her control. However, we must ask what “control” means in this context, and how far such a requirement sets plausible, substantive constraints on the possible objects of responsibility.

Control over oneself is a matter of rational capacities: thus I have control over my actions insofar as I have the capacities necessary to recognize reasons and guide my actions by them, insofar as I am capable of engaging in practical reasoning and of actualizing its results. More generally, I have control over  $X$ , whether  $X$  is an action, an event, or a state of affairs, insofar as it is up to me, or within my power, to determine whether  $X$  is done, or occurs or exists; and what is within my power is what I can bring about if I see reason to do so.<sup>25</sup> Without pursuing the meaning of “control” further here, however, I want to rely on an intuitive understanding of the idea, and ask whether it sets plausible constraints on the objects of responsibility—in particular of criminal responsibility.

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<sup>24</sup> See, e.g., FISCHER & RAVIZZA, *supra* note 1. For criminal law, see Douglas Husak, *Does Criminal Liability Require an Act?*, in PHILOSOPHY AND THE CRIMINAL LAW 60 (R.A. Duff ed., 1998); Andrew P. Simester, *On the So-called Requirement for Voluntary Action*, 1 BUFF. CRIM. L. REV. 403 (1998).

<sup>25</sup> This will not do as it stands, since it does not allow for “Frankfurt-type examples” in which I intentionally bring about  $X$  but (unknown to me) would not have been able to prevent  $X$  or to avoid bringing  $X$  about anyway. See Harry Frankfurt, *Alternate Possibilities and Moral Responsibility*, 66 J. PHIL. 829 (1969); for further complications, see FISCHER & RAVIZZA, *supra* note 1.

The constraints it sets are in two ways generous. First, we have control over many things that are not plausible candidates for criminal responsibility. We have control over many of our thoughts—it is often up to me what I think about, and how I think about it. We have some control over some of our beliefs and emotions: while I cannot believe or feel simply at will, I can often modify my beliefs by attending to evidence, or by thinking critically about them; I can often think myself into or out of emotions (into sympathy by focusing on another's need, or out of anger by attending to the accidental character of the harm I suffered). Sometimes we are held responsible for our beliefs and emotions: I am responsible to my fellow philosophers for my philosophical beliefs, and to my partner for being inappropriately irritated or angry. In the context of criminal law, however, while it might be argued that we could in principle be responsible for some kinds of practical thought, particularly for our firm intentions to commit crimes,<sup>26</sup> it could not now be plausibly suggested that we should be liable for our emotions or for other kinds of thought.

Second, if we attend to matters that might more plausibly concern the criminal law, to the ways in which we make a substantial impact on the public world, the "control" requirement is either implausibly strict or extremely weak. The strictest version of the requirement is offered by those subjectivists who want to minimize the effect of "luck" on criminal liability and who think that I "control" *X* only if the occurrence or non-occurrence of *X* depends wholly on me, and in no way on matters lying outside my control. It is taken to follow from this that we can be properly held criminally liable only for our choices and for our attempts to actualize them, not for what actually ensues from those choices and attempts: I can be civilly liable to pay for the damage I cause by attempting to damage another's property, but criminally liable only for the attempt.<sup>27</sup> I will not discuss this view, which I think rests on various confusions about the notions of control and luck and their significance.<sup>28</sup> My interest here is rather in the question of where we can draw the limits of control, and thus of responsibility, if we reject that view, and recognize that we are morally and criminally responsible for at least some of the actual results of our actions.

I am clearly responsible for results that I bring about intentionally, even if my success is a matter of luck: if I luckily succeed in bringing off a difficult fraud, I am responsible not just for attempting to defraud, but for actually defrauding my perhaps gullible victim; that is what I am condemned for. I am also responsible for results that I bring about recklessly: if the risk of harm to *V* that I recklessly take is

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<sup>26</sup> See Husak, *supra* note 24, at 86–90. According to some accounts of attempt liability, intending criminals are liable precisely for their criminal intentions, see R.A. DUFF, *CRIMINAL ATTEMPTS*, ch. 2 (1996).

<sup>27</sup> See, e.g., Andrew J. Ashworth, *Belief, Intent and Criminal Liability*, in *OXFORD ESSAYS IN JURISPRUDENCE 1* (John Eekelaar & John Bell ed., 3d ed. 1987).

<sup>28</sup> See DUFF, *supra* note 26, ch. 12; MOORE, *PLACING BLAME*, *supra* note 6, ch. 5.

actualized, I am responsible (and condemned) not merely for taking the risk, but for causing that harm. If I cause harm through negligence (by conduct falling well short of standards of care that I could have been reasonably expected to meet), I am properly held responsible not just for my negligence, or for the risks I create, but for the harm I cause—for killing someone, for instance.<sup>29</sup> In all these cases, a natural expression of the accusation I might face, the demand to answer for what I have done, is “Look what you have done!”—and what I have done includes such actual results.<sup>30</sup>

We can of course argue that the control requirement is satisfied in all these cases: even if the occurrence of the result was not wholly within my control, it was within my control to the extent that it resulted from my own voluntary conduct; I could have avoided bringing it about by acting differently. Once we extend the scope of “control” this far, however, we cannot but extend it much further. The key to this extension is the distinction between responsibility and liability.

I am responsible, but not necessarily liable, for what I do intentionally. If I am accused of intentional wrongdoing, I might accept the ascription of intentional agency, for instance that I intentionally damaged *V*'s property, while denying that it constituted culpable wrongdoing: I might offer a justification (I acted to prevent a greater harm), or excuse (I acted under a threat that I could not reasonably have been expected to resist). Matters are less straightforward with recklessness and negligence, since those concepts ascribe not just responsibility, but liability: if I respond to an accusation of recklessness or negligence by justifying my risk-taking or my failure to take normal precautions, I am denying that I was reckless or negligent.<sup>31</sup> To justify or excuse my risk-taking or lack of care, however, is still to accept responsibility for it, and to answer for it: so why should we not say that I must also admit responsibility for the harm that I cause, even if my justification or excuse wards off liability for it? If I reasonably take a risk of damaging your property, and that risk is actualized, I am responsible not just for taking that risk, but for damaging your property; if I non-culpably fail to take the normal precautions, I am responsible not just for that failure, but for the harm that flows from it.

Once we have gone this far, it is hard to resist taking the next step. Suppose that in doing something intentionally I cause some significant harm: there is no suggestion that I caused it intentionally, but a question about whether I caused it recklessly or negligently. I deny that I was either reckless or negligent, and thus

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<sup>29</sup> Cf. Road Traffic Act, 1988, c. 52, § 1 (Eng.) (causing death by dangerous driving); ANDREW P. SIMESTER & G. ROBERT SULLIVAN, *CRIMINAL LAW: THEORY AND DOCTRINE* 368–71 (2d ed. 2003) (on the controversial common law offense of manslaughter by gross negligence).

<sup>30</sup> See John Gardner, *On the General Part of the Criminal Law*, in *PHILOSOPHY AND THE CRIMINAL LAW* 205 (*supra* note 24), at 237–39.

<sup>31</sup> But does an excuse deny recklessness or negligence? If I plead duress as an excuse, do I seek to excuse my admitted recklessness or negligence; or do I deny that I was reckless or negligent, since I acted as any reasonable person would have acted in that situation?

deny liability for that harm; but am I not admitting responsibility for it, by implicitly admitting that I need to answer for it?

The quick answer to this question is that even if I had control over the occurrence of that harm in that it would not have come had I acted differently, I do not satisfy another condition of responsibility: the “epistemic condition,” that I am responsible only for results that I know will or might occur, or that I could have been reasonably expected to foresee;<sup>32</sup> that condition is not satisfied if I was not even negligent. But is this a condition of responsibility, rather than of culpability or liability? Even if—unless strict criminal liability can be justified—we cannot be justly blamed or held criminally liable for harms that we cause if the epistemic condition is not satisfied, this is not to say that we cannot be held responsible; and that we can be properly held responsible is suggested by the fact that we accept that we should answer for our actions of causing such harms, as when I inadvertently damage another’s property.<sup>33</sup>

This argument might appear to rely on an equivocation between answering a charge and answering *for* an action. I can answer a charge of wrongdoing in various ways, only some of which involve answering for the alleged conduct on which the charge is based: if I answer a charge of burglary by offering an alibi, I am not answering *for* anything. Answering for my actions also typically involves an explanation of reasons. I explain my reasons for  $\Phi$ -ing, and either claim that they were good reasons, or admit that they were not; I explain why I was not dissuaded from  $\Phi$ -ing by the alleged reasons against it—I did not see them as (good enough) reasons, or I was weak-willed. But if I answer a charge of damaging  $V$ ’s property by claiming that I could not have been expected to realize that my action might cause such harm, I am not discussing the reasons for or against whatever I intentionally did, or the reasons for or against damaging  $V$ ’s property: why then should we say that I am answering for, and thus admitting responsibility for, damaging  $V$ ’s property?

On the other hand, I did damage  $V$ ’s property, albeit inadvertently. I did what I had good reason not to do, although I did not realize that I had that reason: had I suddenly realized that my action would damage  $V$ ’s property, I would not thereby have acquired a reason that I did not have before; I would have become aware of a reason that already existed as a reason for me not to act as I intended to act. I therefore did something for which I should now apologize to  $V$  (for an apology need not admit culpable wrongdoing); but apologizing for damaging her property, as distinct from expressing detached regret that her property was damaged, involves accepting responsibility for damaging it.<sup>34</sup> Note too that an apology

<sup>32</sup> See, e.g., FISCHER & RAVIZZA, *supra* note 1, at 12–13, drawing on Aristotle’s discussion (*supra* note 13, III.1) of force and ignorance as the two factors that can negate “voluntariness.”

<sup>33</sup> Which suggests that even if we reject Honoré’s defense of strict liability, he was right about “outcome-responsibility.” HONORÉ, *supra* note 1, ch. 2.

<sup>34</sup> The idea of “agent regret” is clearly relevant here, as marking a recognition of one’s responsibility. See Bernard Williams, *Moral Luck* (in his MORAL LUCK 20 (1981)), at 27–31.

might involve explaining what I was doing—explaining the intentional action that was also the unintentional action of damaging *V*'s property; I answer for my action of damaging property by showing how it was an unintentional and non-culpably inadvertent aspect of my intentional  $\Phi$ -ing.

This suggests that a responsible agent can be properly held responsible for all his actions, and indeed for his omissions, and for events that he fails to prevent but could have prevented. Our retrospective responsibilities are not quite as extensive as this might suggest: for as far as actions are concerned, it could be argued that we can be held responsible only for actions that could and should be explained, i.e., only for those that we either intended or had reason not to do;<sup>35</sup> and we omit to do, or fail to prevent, only that which we had reason to do, or to prevent. (With omissions there is also an epistemic constraint on our prospective responsibilities, and thus indirectly on retrospective responsibility. Implicit in the parable of the good Samaritan is the thought that the Samaritan had reason to help the man who had fallen among thieves only when he happened to find the victim: he had no duty, no prospective responsibility, to go out looking for people in need of help, but only to help any whom he happened to find.<sup>36</sup> All I am suggesting here is that there is no *direct* epistemic condition on retrospective responsibilities.) Our retrospective responsibilities are partly determined, and thus limited, by our prospective responsibilities: but they are still very extensive, and the control requirement sets only very generous constraints on them.

#### B. *Criminal Responsibility: Action and Harm*

Can we set any stricter limits or conditions on the objects of criminal responsibility? Two debates converge on this question. One is exemplified by the controversies between “choice” and “character” theories of criminal liability: is criminal liability or responsibility grounded in the choices that we make, or in the character traits that our conduct displays?<sup>37</sup> The other is exemplified by the discussions surrounding the Harm Principle (either in its negative Millian form, as allowing the criminalization only of what causes or threatens harm to others, or in its positive Feinbergian form, as declaring harmfulness to be a good reason for criminalization), and various versions of Legal Moralism, which makes immorality

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<sup>35</sup> See R.A. DUFF, *INTENTION, AGENCY AND CRIMINAL LIABILITY* ch. 4 (1990). Others might argue that I am responsible for  $\Phi$ -ing if it *would* be proper to hold me responsible (call me to answer) for  $\Phi$ -ing if my  $\Phi$ -ing needed explanation; but I would tie responsibility more closely to actual reasons for or against  $\Phi$ -ing.

<sup>36</sup> See Luke 10:25–37. Of course, such a view of the scope of our prospective responsibilities for and to those in serious need is now much more controversial.

<sup>37</sup> For a useful recent overview, see WILSON, *supra* note 7, at 332–56; see also Horder, *supra* note 7; MOORE, *PLACING BLAME*, *supra* note 6, ch. 13.



a necessary condition of, or a good reason for, criminalization.<sup>38</sup> The two debates tend to be conducted separately from each other: the first is taken to concern the proper grounds of criminal liability, the second to concern the proper scope of the criminal law. However, both debates ought to be focused on the same general question: for what can we properly be called to answer, through the criminal process, by our fellow citizens?

The question “For what are we responsible?” thus cannot be separated from the question “To whom are we responsible?”. To determine what we can be held responsible for, we must understand the practice or form of life within which responsibility is to be ascribed, and our relationships to others within that practice: only then can we work out what is their business, as fellow participants in the practice, which is to determine what they can hold us responsible for. In an academic institution I might be responsible to both my students and my colleagues for my performance of my duties as a teacher, and for my philosophical views and my efforts to advance the discipline; but I am not responsible to them (as my colleagues or students) for my religious or political opinions and activities (unless they impinge on my academic work). In a religious community, I might be responsible to God, to my priest, to my fellow believers, not just for my overt actions, but for the thoughts and feelings that inform them. So for what am I responsible, to whom, within a political community? Any answer to that question must draw on political theory: in particular, I assume here, on a political theory structured by the central values of liberal democracy.<sup>39</sup>

In a liberal democracy we are answerable to our fellow citizens. What we are answerable to them for in general depends on how we draw the distinction between the “public” and the “private” in the context of a polity: which matters are, and which are not, the business of our fellow citizens simply as citizens? What we are criminally responsible for depends on what account we can then give of the criminal law as a distinctive institutional practice.

The criminal law deals with wrongs: to be charged with, or convicted of, a crime is to be accused of or condemned for the commission of what is claimed to be a wrong—either a pre-legal wrong that the law declares to be a public wrong, or a wrong whose wrongful character depends on its illegality.<sup>40</sup> But unless we set implausibly narrow limits on what can count as a kind of wrong that merits blame and punishment,<sup>41</sup> it is not plausible to claim (as some forms of Legal Moralism

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<sup>38</sup> For the two classic statements of the Harm Principle, see JOHN STUART MILL, *ON LIBERTY* ch. 1, ¶ 9 (1859); JOEL FEINBERG, *HARM TO OTHERS* (1984). For Legal Moralism, see MOORE, *PLACING BLAME*, *supra* note 6, at 68–75; JOEL FEINBERG, *HARMLESS WRONGDOING* (1988).

<sup>39</sup> Such a political theory could of course be a communitarian version of liberalism. See R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* ch. 2 (2001).

<sup>40</sup> See *supra* text accompanying note 10.

<sup>41</sup> See MICHAEL S. MOORE, *ACT AND CRIME* 46–54 (1993) on wrongdoing as requiring action: I count this as “implausibly narrow” because I can be blamed for wronging someone whom I make the object of my sadistic fantasies.

do) that every kind of wrong is in principle apt for criminalization—even if there are also better reasons not to criminalize many kinds of wrong:<sup>42</sup> we must distinguish “public” wrongs, which should concern all citizens, from “private” wrongs that concern only those involved in the particular relationships that the wrongs affect.

I cannot pursue this challenge here, beyond making three suggestions. First, some kinds of conduct are properly criminalized because they constitute wrongs against “the public,” or “the polity,” rather than any identifiable individual victim: for instance, some environmental offenses, treason, and tax evasion. But to suppose that all crimes should constitute “public” wrongs in that sense leads to a distorted conception of the criminality of crimes that victimize individuals, which locates their criminal wrongfulness in what they supposedly do, not to the victim, but to the whole polity—in the unfair advantage they take over the law-abiding, or in the “social volatility” or loss of trust that they cause.<sup>43</sup> Crimes do wrong the whole polity, not just their individual victims, but this is an implication of, not the ground for, seeing them as crimes: we see the wrong done to the individual victim as one that concerns us all, as one that we should share, and therefore see it as a wrong against “us” rather than just against her.<sup>44</sup>

Second, if we ask what types of wrong should be treated as in that sense public, the Harm Principle might seem relevant: not to identify the kinds of wrong that should be criminal (its scope is too broad for that), but to specify a necessary condition of criminalization—wrongs should only be criminal if they cause or threaten harm to others. But those who give the Harm Principle such a role face a dilemma. They could follow Feinberg, and insist that the relevant harm must be identifiable independently of the conduct that causes it, and thus independently of the wrongfulness of that conduct:<sup>45</sup> but they will then be unable to recognize the distinctive harm of some kinds of crime, whose character as harm is part constituted by the wrongfulness of the action that causes it; consider the harm suffered by victims of rape or burglary. Or they could agree that criminal harm can be partly constituted by the wrongfulness of the conduct that does the harm: but they might then find it difficult to resist versions of Legal Moralism according to which conduct that wrongs others can be said to thereby harm them.<sup>46</sup>

Third, the two debates noted above might seem to coalesce around the idea of action and the supposed “act requirement”—that criminal responsibility must be

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<sup>42</sup> See MOORE, *PLACING BLAME*, *supra* note 6, at 68–75, 739–95.

<sup>43</sup> See, respectively, Jeffrie G. Murphy, *Marxism and Retribution*, 2 *PHIL. & PUB. AFF.* 217 (1973); Lawrence C. Becker, *Criminal Attempts and the Theory of the Law of Crimes*, 3 *PHIL. & PUB. AFF.* 262 (1974); Susan Dimock, *Retributivism and Trust*, 16 *LAW & PHIL.* 37 (1997). For further discussion see DUFF, *supra* note 39, at 21–23, 60–61.

<sup>44</sup> See also Sandra E. Marshall & R.A. Duff, *Criminalization and Sharing Wrongs*, 11 *CANADIAN J. L. & JURISPRUDENCE* 7 (1998).

<sup>45</sup> See FEINBERG, *HARM TO OTHERS*, *supra* note 38, at 31.

<sup>46</sup> See R.A. Duff, *Harms and Wrongs*, 5 *BUFF. CRIM. L. REV.* 13 (2001).

for, or be grounded in, a (“voluntary”) act: we are not criminally responsible, not answerable to our fellow citizens in the censorial context of the criminal law, for our choices or character traits as such,<sup>47</sup> but only for the acts that flow from them. This seems to fit neatly with the Harm Principle, since we must surely act to cause harm—mere thoughts can do no harm. This suggestion is, at best, problematic: the objections to standard versions of the act requirement suggest that it is either implausible or vacuous,<sup>48</sup> and we must ask more carefully about the possible legitimacy, and consistency with any non-vacuous “act requirement,” of criminal liability both for omissions and for such possibly harm-enabling states or conditions as possession of dangerous items.<sup>49</sup> I think that we might, nonetheless, find a modest role for an “action presumption”: what we are criminally responsible for must normally be an action—an exercise of our rational capacities to actualize the results of practical reasoning in ways that have an impact on our shared social world: but both the conception of action involved in such a presumption and its proper role in a theory of criminal responsibility are matters that require much more work.<sup>50</sup>

It will be clear that I have no grand strategy for deciding, even in principle, what kinds of conduct should be criminalized,<sup>51</sup> what is required is, rather, a more piecemeal approach that recognizes the different kinds of reason we can have for treating different kinds of wrong as “public” in the appropriate sense. All I have tried to do in this section is to make clearer what the basic questions are, and how we might usefully approach them.

#### IV. RESPONSIBLE TO WHOM?

The question “To whom are we criminally responsible?” received its initial answer in the last section. Our legal systems implicitly answer it in the ways in which they label criminal cases. Civil cases are listed as “*Plaintiff v. Defendant*”: an injured plaintiff calls the defendant to answer as the alleged author of that

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<sup>47</sup> “Choice” and “character” theories then concern the conditions, rather than the objects, of responsibility: we are responsible for our criminal acts on condition that they flow from choice, or appropriate character traits. See R.A. Duff, *Virtue, Vice and Criminal Liability*, 6 BUFF. CRIM. L. REV. 147, 155–60 (2002).

<sup>48</sup> See Husak, *supra* note 24.

<sup>49</sup> There are of course serious problems about the over-enthusiastic creation of offenses of possession, see Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829 (2001), but we cannot reject such offenses merely by arguing that they do not require an “act.”

<sup>50</sup> See also R.A. Duff, *Action, the Act Requirement and Criminal Liability*, in AGENCY AND ACTION 69 (Helen Steward & John Hyman eds., 2004).

<sup>51</sup> That is, for constructing the first of the three “filters” that Schonscheck identifies in JONATHAN SCHONSHECK, ON CRIMINALIZATION: AN ESSAY IN THE PHILOSOPHY OF THE CRIMINAL LAW 63–83 (1994).

injury, with the support of the law. In England criminal cases are typically listed as “*Regina v. Defendant*”: this shows the extent to which our law still presents itself as a law for subjects who must answer to a sovereign. In the United States, the role of “*Plaintiff*” is played by “*People*,” “*State*,” or “*Commonwealth*,” or in federal cases, “*United States*”: this expresses a law whose rhetoric is rooted in a democratic republicanism. “*Commonwealth*” and “*People*” are the locutions that are most suited to the ideals of a liberal democracy. A liberal democracy’s law is a “common” law, in the sense that it is the citizens’ own law, as distinct from one imposed on subjects by a sovereign: it claims to speak in terms of the shared values of their polity, as a law that they make for, and impose on, themselves.<sup>52</sup> From this perspective, I am answerable for my (alleged crimes) to my fellow citizens, since it is our law, and the values embodied in that law, that I have violated. I am called to answer by and in a criminal court: but the court claims to speak and act in the name of the citizens.

This answer, however, raises further questions, about the conditions under which we can be properly called to account by our fellow citizens. The mere fact that *D* committed what the law defines as a crime is not enough to make it legitimate for that system’s criminal courts to call him to answer a criminal charge; our own laws specify conditions under which even one whose guilt could be proved beyond reasonable doubt may not be tried for his alleged crime—conditions concerning jurisdiction, for instance, or other bars to trial that do not negate guilt, such as unfitness to plead or diplomatic immunity.<sup>53</sup> The problems become harder when we ask, in more critical tones, about the conditions that *should* be satisfied before anyone is held criminally responsible, since we are now asking about the conditions of legitimacy for legal systems.

We must ask now about the political and social requirements that should be met if we are to say that the defendant is a member of a political community whose laws bind her, and that her fellow citizens have the right, the standing, to call her to account for her alleged crimes—the requirements that must be satisfied if she is to be morally answerable to them; and if, as is depressingly likely, those requirements are far from fully satisfied in our own legal systems, we must ask what implications this has for their legitimacy—for, that is, the legitimacy of our practices of criminal responsibility-ascription. I cannot pursue these questions here.<sup>54</sup> but they are crucial questions for anyone who cares about the legitimacy of our criminal laws and the trials and punishments that they inflict, and it is a merit of the kind of relational conception of criminal responsibility that I have sketched

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<sup>52</sup> See GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* chs. 1–2 (1986); ROGER B. M. COTTERRELL, *LAW’S COMMUNITY* ch. 11 (1995); LINDSAY FARMER, *CRIMINAL LAW, TRADITION AND LEGAL ORDER* (1997); DUFF, *supra* note 39, at 56–66.

<sup>53</sup> See PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* 55–57, 102–14, 179–87, 460–543 (1984) (on “non-exculpatory defenses”—although “defenses” is a misleading label); R.A. Duff, *I Might be Guilty, but You Can’t Try Me*, 1 OHIO ST. J. CRIM. L. 245 (2003).

<sup>54</sup> See DUFF, *supra* note 39, chs. 2, 5; Duff, *supra* note 53.

in this paper that it forces us directly to confront such questions, as questions about the very conditions of criminal responsibility.

