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THE VALUES OF INTERDISCIPLINARITY IN HOMICIDE LAW REFORM

Robert Weisberg*

Professor Reid Fontaine's article, Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification, makes a convincing case for treating heat of passion wholly as an excuse not a justification, as the only sensible way to comprehend its various forms. In doing so, Professor Fontaine stimulates further thinking about heat of passion doctrine, along two dimensions. On the one hand, his analysis of doctrine motivates deeper inquiry within the realm of doctrine itself—specifically, about the under-examined category of second-degree intentional murder and its core notion of “impulsive intent.” On the other hand, Professor Fontaine induces us to consider a range of extra-doctrinal questions, especially those about the psychological concept of the personality disorder and the philosophical notion of moral luck to explain the paradoxical potential harmony between the unreasonable and the rational.

I. INTRODUCTION

Professor Fontaine argues that the debate over voluntary manslaughter under the heat of passion (HOP) or provocation doctrine—the debate whether it is a partial justification or partial excuse—can now be settled. He asserts that if we hope to establish any jurisprudential coherence for HOP manslaughter, we must fully commit to viewing that doctrine as a partial excuse, because the partial justification theory simply cannot accommodate the modern range of judicial and statutory forms that HOP takes.¹ I find his argument and demonstration thereof quite convincing, so my purpose here is not to enter the justification vs. excuse debate itself. Rather, I want to take the opportunity of reading this article to elaborate some of the wider implications of the excuse theory of manslaughter as Professor Fontaine has conceived it. And in doing so, I am also taking the opportunity of reaching back into two of Professor Fontaine's earlier articles to fill out the argument in his new one.

Many law review authors engage in the ritual, if harmless trope, of self-citation early in their new work. In this case, however, I

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1. Reid G. Fontaine, *Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification*, 43 U. MICH. J.L. REFORM 27 (2009).

found it very illuminating to examine Professor Fontaine's two relevant earlier articles, *The Wrongfulness of Wrongly Interpreting Wrongfulness: Provocation Interpretational Bias and Heat of Passion Homicide*,² and *Disentangling the Psychology and Law of Instrumental and Reactive Subtypes of Aggression*.³ Indeed, I have been so presumptuous as to make my reading of *Adequate (Non)Provocation* a reading of the trio of related articles as a minibody of work. And as I do so, I observe that Professor Fontaine's overall thesis has at least several components, and runs something like this:

Read comprehensively, as a matter of positive law, HOP doctrine makes sense only as a partial excuse; and in normative terms as well, the HOP principle should be so viewed, and so viewed rather broadly. That is, modern homicide law focuses too narrowly on emotional dysfunctionality—hyper-passionate impulsiveness—as the paradigm of HOP. Once properly viewed as an excuse, HOP should also include cognitive dysfunctionality of the kind that falls under such scientific names as “hostile attribution bias” or provocation interpretational bias (PIB).⁴ Extending HOP to the cognitive dimension makes good retributivist sense, because deficits in cognitive capacity and deficits in emotional self-control both bear on the level of responsibility at issue in our allocation of moral condemnation.

The goal of Professor Fontaine's new article is obviously a classification project involving the proper coordination of legal, moral, and psychological categories, and my goal in this Essay is to suggest that the classification effort poses more challenges than Professor Fontaine may have acknowledged. The most basic challenge to proper classification for Professor Fontaine's overall project is his concern with the general idea that reasonable people sometimes can be very unreasonable. In the following passage he tries to capture the standard paradox of HOP doctrine, but he does so in a way that suggests he finds the problem vexing and mysterious.

If a truly (or reliably) reasonable person, then, would not lose control in response to the subject provocation, it may be inferred that the meaning of the reasonable person requirement is not that a reasonable person would lose self-control. Rather, the reasonable person requirement may be interpreted to mean that it is at least somewhat understand-

2. Reid G. Fontaine, *The Wrongfulness of Wrongly Interpreting Wrongfulness: Provocation, Interpretational Bias, and Heat of Passion Homicide*, 12 NEW CRIM. L. REV. 69 (2009).

3. Reid G. Fontaine, *Disentangling the Psychology and Law of Instrumental and Reactive Subtypes of Aggression*, 13 PSYCHOL. PUB. POL'Y & L. 143 (2007).

4. Fontaine, *supra* note 1, at 30–31 & n.12; Fontaine, *supra* note 2, at 90–91.

able (and thus excusable) for a person to lose control and act unreasonably when presented with a substantial provocation.⁵

Professor Fontaine recognizes that that this oft-noted paradox in fact rests on many unsettled questions about law, morality, and psychology. More specifically, filling out the HOP picture in this way involves seeing and reconciling several conceptual pairings or distinctions: (1) the legal distinction between murder and manslaughter; (2) the psychological distinction between instrumental and reactive aggression;⁶ and (3) the distinction between an *interpretational* and an emotional disorder. Professor Fontaine delves into the relationship between the latter two pairings as a means to address the first one. But in doing so, he also brings in a related pairing, the difference between PIB and the more common (and commonly misunderstood) categories of psychopathy and sociopathy.⁷ The complexity of coordinating these distinctions becomes daunting and awaits further work in terms of psychological science, moral philosophy, and legal rulemaking.

Roughly speaking, my Essay makes two points: (1) as a matter of law, we need a fuller examination of the category of second-degree intentional murder; and (2) the various types of emotional and cognitive deficits in manslaughter must be explored as part of the larger question of how law depends on both the psychology of personality disorders and the philosophical conundrum of moral luck. Let me therefore note my own paradox: In reaching back into Professor Fontaine's earlier articles I am moving in two somewhat opposite directions. I suggest that Professor Fontaine's thesis in his new article is, on the one hand, not quite doctrinally focused enough and, on the other hand, too purely doctrinal because it does not fully explore its interdisciplinary implications.

II. THE UNDERAPPRECIATED MURDER CATEGORY

Professor Fontaine pays brief rhetorical fealty to the mundane point that there are traditionally two levels of intentional murder—premeditated murder and plain vanilla intentional murder. This is the distinction at the heart of the first-degree/second-degree divide, but he suggests that the distinction is no longer very important. As

5. Fontaine, *supra* note 2, at 74–75. He also ponders whether he can solve the paradox by altering “reasonable” to “ordinary,” but he finds that ready solution illusory. *Id.* at 75 n.19.

6. Fontaine, *supra* note 1, at 31; Fontaine, *supra* note 3, at 155.

7. This is evident in Fontaine, *supra* note 3, at 156.

a matter of positive law, he notes, some states have abolished it (as did the MPC).⁸ At several key points he insists on defining murder in terms of cool deliberation in a way that suggests that the premeditation formula is more or less coincident with the definition of murder.⁹ The problem in doing so is that he leaves a big void in terms of second-degree intentional murder, and his thesis does not quite support erasure of the concept.

This is in part because the rumors of the demise of the degree distinction are greatly exaggerated. There may be movement towards eliminating the degree distinction, but the majority of states maintain the traditional categories of murder.¹⁰ The consequences of the distinction are undeniable: generally, in degree-distinguishing states, only first-degree can make the defendant eligible for the death penalty, and, more numerically important, the non-capital sentencing differential is large. Those who attack the distinction plausibly argue that the premeditation formula is hopelessly vague and arbitrary,¹¹ but it is disingenuous to deny that a single category of intentional murder would be worryingly broad and heterogeneous. At the very least, if Professor Fontaine's goal is to enhance the coherence of our criminal law categories, he would have to bear some burden of proof to establish that the degree distinction should be abolished.

He will face some difficulty in meeting that burden, because a second reason to resist Professor Fontaine's preference for erasure of the degree distinction is that Professor Fontaine's HOP thesis underscores the need to pay more than merely dismissive attention to the category of second-degree intentional murder. Let us consider what killings fall into the traditional second-degree category and what killings would still do so under Professor Fontaine's thesis. In his review of cases and statutes defining HOP, Professor Fontaine acknowledges that lots of defendants plead HOP and fail.¹² But in the cases of failure he allows for, the defendants' factual claims that are insufficient to prove HOP under various formulas are hardly consistent with the image of the defendant as the cool decision maker, much less the long-calculating planner exhibiting what might formally count as premeditation. That means that Professor Fontaine implicitly acknowledges that we

8. *Id.* at 147 & n.4, 153–54.

9. Fontaine, *supra* note 1, at 31; Fontaine, *supra* note 2, at 71, 76, 8; Fontaine, *supra* note 3, at 144, 147.

10. WAYNE LAFAVE, CRIMINAL LAW 766 (4th ed. 2003).

11. The classic statement of this concern is BENJAMIN CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS 99–100 (4th ed. 1938) (1931).

12. *E.g.*, Fontaine, *supra* note 1, at 33–40.

need second-degree intentional murder as the default category of murder into which failed HOP claims fall, and that category can hardly be described as the set of dispassionate killings.

In a state like California that uses both the degree distinction¹³ and an MPC-style heat of passion formula (and Professor Fontaine assumes the validity of the latter), a person who exhibits emotional distress in a particular situation where there is no reasonable excuse for doing so can be guilty of second-degree murder. This can be a person who is generally hot-headed in response to stressful situations, even those where the ordinary reasonable person would not be greatly stressed, but who suffers no diagnosable mental illness. Professor Fontaine laments that right now, under modern homicide law, the category of murder includes the emotional killer whose emotion is actually quite “partly rational” if we grant the killer’s premises—i.e., if he is correct to interpret the situation as provocative, as where the husband, being somewhat paranoid and jealous, construes the sight of a possibly innocuous encounter between the spouse and another as evidence of a sexual relationship. And indeed, under the old doctrine of *State v. Yanz*,¹⁴ which Professor Fontaine treats as solid law, a person who makes a factual mistake about a stressful situation—i.e., perhaps misidentifying the person who might have provoked him—is only guilty of voluntary manslaughter if his mistake is reasonable. But he would be a second-degree murderer if his mistake was unreasonable, even if honest. That unreasonable but honest mistake may be due to a kind of “cognitive impulsiveness” (to use my own admittedly blurry term) or it might be part of a category that Professor Fontaine himself interestingly adds to the discussion, “cognitive carelessness.”¹⁵ Whereas Professor Fontaine would like to place under the manslaughter category one who is not fully responsible for his own PIB problems, the cognitively careless person would get no such sympathy. This person is, in criminal mens rea terms, negligent with respect to the perception of the factor that would cause distress. To stretch our criminal law vocabulary, this would be a case of “imperfect heat of passion,” by analogy to “imperfect self-defense.”

Thus, even though Professor Fontaine would like to shrink the category of murders that represent failed manslaughter-mitigation cases, under his formulation it still would hardly remain a null set.

13. CAL. PENAL CODE § 189 (2008).

14. 50 A. 37 (Conn. 1901). See *People v. Berry*, 556 P.2d 777 (1976) (holding that defendant was entitled to manslaughter instruction where cumulative effect of decedent’s taunting behavior was reasonable psychological explanation of defendant’s homicidal passion).

15. Fontaine, *supra* note 2, at 78.

The set would include a number of types of mental states that are very hard to reconcile with his often-cited notion that murder is cool and deliberative, if not formally premeditated. So I suggest that Professor Fontaine's excuse theory of HOP is an opportunity for exploring the odd nature of second-degree murder, the most unexplored of the levels of homicide. I will briefly sketch out some of the possibilities that Professor Fontaine has motivated me to reflect on.

In doing so, let me first get a little legal pedantry out of the way. I am focusing on intentional killings, and I am therefore setting aside, at least temporarily, such other categories as second-degree extreme indifference (or grossly reckless, or "depraved heart") murder,¹⁶ as well as felony murder (which can be first- or second-degree in some jurisdictions that use degrees),¹⁷ as well, of course, as the various forms of involuntary manslaughter.¹⁸ In addition, I will put aside the one key version of voluntary manslaughter that sits aside HOP—namely, so-called imperfect self-defense.¹⁹ I will however return to these briefly below to see if they can be brought into the mix.

Second-degree intentional murder gets little doctrinal attention because as a matter of substantive law it seems so simple. In fact, in the standard parsing of mens rea distinctions under MPC-inspired codes, purposive or intention itself seems the easiest of mental states to define.²⁰ Doctrinal discussion of it tends to be limited to the somewhat slippery distinction between purpose and knowledge when the relevant element is a fact, not an action, and, as a result, intentionality gets somewhat implicated in the discussion of "willful ignorance."²¹ But otherwise, and as a casebook editor I plead guilty to reinforcing this view myself, in discussions of intentional murder the interesting case law all seems procedural or evidentiary.²² Most notably, the *Sandstrom* line of cases tells us that the prosecution must prove purpose to kill beyond a reasonable doubt—it cannot rely on any presumption about how people normally intend the predictable consequences of their actions.²³

16. LAFAYE, *supra* note 10, at 739–44.

17. *Id.* at 744–65.

18. *Id.* at 793–809.

19. *Id.* at 790–91.

20. See MODEL PENAL CODE § 2.02(2)(a) (1985).

21. See *United States v. Jewell*, 532 F.2d 697, 700–01 (1976).

22. *E.g.*, JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 325–80 (6th ed. 2008).

23. *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Francis v. Franklin*, 471 U.S. 307 (1985).

The closest we get to an affirmative definition of intentional murder is still as a default category—in the cases where the prosecution has difficulty proving premeditation. Only in the rare appellate case is the premeditation count rejected because of a faulty instruction or insufficient evidence. Where that happens, if the formula is a fairly high and formal hurdle—some quantity component of duration of the intent or a very strong quality component of exceptional coolness—then a decision for reversal may suggest that the killer is still guilty of murder because he acted with what we might have to call a “rational impulse.”²⁴ That is, he did not plan for long, and he did not engage in dialectical thinking, turning over in his head whether or not to kill, and he did not take an elaborated series of planning steps. Rather, he just decided to kill, and he killed.

As a practical matter, the issue is more likely to arise in a charging decision. An infamous case in the history of Stanford University itself is illustrative. In 1978 Theodore Streleski, a frustrated and embittered long-time graduate student in Mathematics, walked by the office of a professor whom he somewhat knew and beat the professor to death with a ball-peen hammer.²⁵ Streleski was convicted of second-degree murder. It was murder because he did not proffer evidence that could have conceivably provided any HOP mitigation (or insanity), but it was only second-degree murder because with no eyewitnesses or evidence of planning, the prosecutor could not prove premeditation.²⁶

In the Streleski case, the evidence was unclear as to why the killer chose this particular victim, who had been one of the most popular members of the faculty and the one most sympathetic to students. If Streleski had earlier decided to kill whichever professor seemed most vulnerable when he strode through the building, the last minute decision to kill this victim might still have fit the premeditation formula.

But what if Streleski had no such plan? Instead, let us assume that upon seeing a professor, he immediately decided that killing the professor was desirable. We then would have a case of “rational impulse”—with the term “impulse” largely serving to eliminate the

24. *E.g.*, *People v. Plummer*, 581 N.W.2d 753 (Mich. Ct. App. 1998).

25. For one summary of the story, see Dennis Overbye, *When Student-Advisor Tensions Erupt, The Results Can be Fatal*, N.Y. TIMES, Mar. 27, 2007, at F2.

26. In the most famous of recent California murder cases, the prosecutor charged O.J. Simpson with first-degree premeditated murder. Had Simpson not made an alibi defense—had he conceded his fatal act of stabbing but argued *mens rea*—the arguments, evidence, and instructions might well have produced a very vigorous debate over non-premeditated intentional killing as a possibility.

durational element of premeditation, and not necessarily implying hotheadedness in any way. Clearly Streleski would have had a motive, an instrumental reason for killing. He wanted to punish a faculty member. Now of course, as Professor Fontaine notes, motive itself is not a formal element of homicide; but he also acknowledges that when we deal with degrees of homicide, especially HOP, we often must address questions of motive when we apply the formal mens rea elements.²⁷ So one category of second-degree murder is the killing which is rationally motivated but where, to use the non-legal term, the motive awaits the right opportunity to even come into the killer's mind or it lies dormant until the opportunity induces its coming to consciousness (i.e., where the motive had not previously developed into a planned desire to kill, and hence could still be treated as premeditation).

But then there are cases where the notion of a previously conceived motive makes little sense because the motive itself is specifically generated by the situation. (a) Our subject is planning a larceny but never thinks about the possible need to eliminate a witness. But a witness suddenly appears as our subject is doing the stealing, and our subject immediately but calmly decides to kill the witness. (b) Our subject meets a second person already known to him, and the second person surprises our subject by exhibiting some previously undisclosed characteristic which our subject deems unacceptable, and on the spot our subject kills the second person. In case (a) we might imagine that if, as a practical (not moral!) matter, our subject had more time to consider the wisdom of the killing, he might have chosen otherwise. But in many cases protraction of opportunity would make no difference. And in (b), protraction is perfectly possible but its irrelevance is a matter of the killer's choice. So there are many cases where killing is temporally spontaneous and in a limited sense, "impulsive," but where the killer calmly sees the action unequivocally as "rational" or the outcome as something to which he is fully entitled.²⁸

Thus, we implicitly have a category of second-degree murder where a person simply makes a decision to kill for some reason and then kills almost immediately. Of course, an alternative example is Stephen's famous case of the man pushing the child into the river.²⁹ This comes close to Coleridge's famous notion of "motiveless [m]alignity," derived from his reading of the character of Iago

27. Fontaine, *supra* note 1, at 46.

28. See JACK KATZ, *SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL* 18–19 (1988).

29. Fontaine, *supra* note 3, at 154.

in *Othello*.³⁰ Of course Iago himself *did* have a motive, and we might even say the man in the Stephen hypo did as well if we can imagine the motive being the pursuit of simple sadistic pleasure.

Now, if forced to confront the issue of second-degree intentional murder, Professor Fontaine might refuse the bait. He might disavow any obligation to imbue it with any coherent affirmative meaning. In other words, he might fully embrace its status as merely the operative downward default when the prosecutor cannot prove premeditation but the killer clearly had purpose, and the upward default when HOP fails. If so, what are we left with substantively? The second-degree set could be the sum of those defaults plus my somewhat invented category of “rational impulse.” But so strong is Professor Fontaine’s commitment to rendering the category of voluntary manslaughter more coherent that it would be disingenuous for him to disavow any such need for murder categories.

Those defending the exclusion of this PIB killer from voluntary manslaughter might argue that because the deficit lies in cognition, not mood control, the killing is really “rational” or “instrumental.” That would be a weak rejoinder, since it illogically elides “cognitive” with “rational.” Professor Fontaine might respond that if some people exhibiting PIB have understandable reasons for that condition, then they are not really different from people who are somewhat more hotheaded than the norm, and who *overreact* in situations where *some* negative reaction would be common. At this point, the distinction between instrumental and reactive aggression may enter the picture. Professor Fontaine might well call both PIB and emotional impulse killings reactive, and thus he would use the category of the reactive killing as a defining notion for manslaughter. But that might suggest that second-degree intentional murder must be a species of instrumental aggression, and if so, distinguishing premeditated from “impulsive instrumental” killings remains a challenge. Moreover, as noted below, however tempting the instrumental/reactive distinction is for Professor Fontaine, he turns out to be sensibly agnostic about how clear a distinction it is in the world of psychology from which it emerges.³¹

These questions will lead me to my second set of observations inspired by Professor Fontaine’s article(s). But before I get to that,

30. 5 SAMUEL TAYLOR COLERIDGE, *Lecture 5*, in THE COLLECTED WORKS OF SAMUEL TAYLOR COLERIDGE: LECTURES 1808–1819 ON LITERATURE II 315 (Kathleen Coburn ed., 1987).

31. See generally Fontaine, *supra* note 3.

I will make one more foray into pure doctrine by speculating on how another component of murder law, so-called extreme indifference murder, might assist in my proposed definitional project.

Extreme indifference murder is a species of aggravated recklessness.³² If a reckless person consciously advert to and chooses to act in the face of an unreasonable risk of serious harm, then extreme indifference is the mental state in which one or more of the components of the definitions of recklessness is aggravated—the degree of conscious aversion, the seriousness of the harm, etc. And in its homicide form, what California identifies under the venerable but melodramatic term “abandoned and malignant heart murder” is a grossly reckless killing.³³ This doctrine is very important in modern criminal law, especially as an Eighth Amendment standard for death penalty cases.³⁴ But it also has some resonant and normative power in providing some meaning to the otherwise obsolete term “malice,” and it can thereby help us harmonize the range of killings placed under a murder category.

Let us use the language of extreme indifference to suggest an antisocial attitude whereby the person elevates his own selfish interest over the value of another’s life. If so, the extreme indifference idea might help explain felony murder—i.e., any serious risk of death undertaken where the “justification” for doing so is the selfish aim of a felony like a robbery, manifests extreme indifference and hence should be murder.³⁵ And, conversely, even if a killing is not coolly premeditated but rather immediate and impulsive, as in some of my examples above, it is second-degree murder because it involves placing an unworthy selfish motivation over the life of another.³⁶

32. LAFAYE, *supra* note 10, at 739–44.

33. CAL. PENAL CODE § 188 (2008).

34. *Tison v. Arizona*, 481 U.S. 137 (1987) (holding that extreme indifference is sufficient culpability standard for death penalty).

35. See Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 162–64 (2004).

36. The temptation to read a strong normative component into the definition of murder became controversial in California decades ago. In *People v. Conley*, 411 P.2d 911 (Cal. 1966), the Supreme Court of California suggested that even if the state proved the technical elements of murder, such as intent, the crime could still be manslaughter if the defendant lacked “malice” in a normative sense. An angry legislature overruled *Conley* with the following language now embedded in CAL. PENAL CODE § 188:

[M]alice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Whether working with the evocative but vague idea of extreme indifference can so advance this definitional project is contestable. For now, I offer it merely to show how the project that, in my view, Professor Fontaine has implicitly identified for us, has some rich material to work with.

III. THE NEED TO FULLY EMBRACE PSYCHOLOGY AND PHILOSOPHY

If my first set of observations has to do with Professor Fontaine not having pushed doctrinalism quite far enough, my second has to do with his tendency, as in some of his earlier articles, to go perhaps too far beyond doctrine.

In *Disentangling the Psychology and Law of Instrumental and Reactive Subtypes of Aggression*, Professor Fontaine cites and interacts with a very striking recent article by Bushman and Anderson, *Is It Time to Pull the Plug on the Hostile Versus Instrumental Aggression Dichotomy?*³⁷ Written by two non-lawyer psychologists, this article boldly goes where Professor Fontaine appears to want to go, but Professor Fontaine is understandably cautious of moving as far so quickly. As a legal matter, even more explicitly than Professor Fontaine, Bushman & Anderson argue that positive law is moving strongly away from degree distinctions.³⁸ And they reveal a strong normative investment in that legal change, because of a parallel distinction in psychology they would like to erase or, at least, challenge. This is the distinction between hostile and instrumental aggression, which is roughly coincident with the “reactive/instrumental” difference quite prominent in modern psychology (and the latter is the terminology which Professor Fontaine uses in his discussions of psychology).

Bushman and Anderson offer very intriguing theory and data to suggest that the hostile/instrumental distinction cannot be supported. They say that the key to understanding the decision to commit an act—including a homicide—is to see the decision as a

When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, *no* other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice.

CAL. PENAL CODE § 188 (2008) (emphasis added).

37. Brad J. Bushman & Craig A. Anderson, *Is it Time to Pull the Plug on the Hostile Versus Instrumental Aggression Dichotomy?*, 108 PSYCHOL. REV. 273 (2001).

38. *Id.* at 273–74.

process of drawing on previously established knowledge frames, and that what appear to be non-reflective, or hostile/reactive actions differ only in degree from more ostensibly instrumental ones.³⁹ The details of their thesis and its proof are complex but have to do with the degree to which the actor has a pre-established store of frames and motives which can be fairly quickly retrieved. In that sense, ostensibly reactive or hostile killings do not simply arise from the apparent triggering event, but result from a considerable amount of prior mentation by the actor.

If Bushman and Anderson are right on their psychology, then drawing a legal distinction solely along the lines of the hostile/instrumental divide is wrong. On the other hand, once we accept that the law can sometimes legitimately draw a culpability line at what it considers a meaningful point in a continuum, then Bushman and Anderson may have inadvertently undermined their argument for eliminating the degree distinction in murder. Rather, they have given us the psychological apparatus to identify some categories of rational killings that might otherwise look too “reactive” to satisfy us that they should be treated as murder, and we could still distinguish some of these killings from a more egregiously deliberated group we would call the premeditated.

My point about Bushman and Anderson bears on my reading of Professor Fontaine. Mostly implicitly in his new article (with a few explicit references)—but in considerable explicit detail in the earlier articles—Professor Fontaine, to his credit, wants to enrich his criminal jurisprudence with modern psychology. That means that his excuse theory of manslaughter raises, and demands more attention to, major questions about how certain categories of psychology, including the vexing one of the personality disorders, should bear on law.

In *Disentangling the Psychology and Law of Instrumental and Reactive Subtypes of Aggression*, Professor Fontaine is quite anxious to draw on psychological resources. He seems tempted to rely on the established reactive/instrumental distinction because it might support his legal argument for (a) treating HOP as an excuse and (b) including PIB cases under the voluntary manslaughter umbrella. On the other hand, he is at least skeptical about the validity of the distinction (if more tentative in his view than are Bushman and Anderson), noting that there are overlaps in the incidences and developmental etiologies of the two forms of aggression. Indeed, Professor Fontaine refers to quite a number of “dichotomous models of aggression” to complete the picture of the

39. *Id.* at 275–77.

current scientific research. His discussion of these is rich and nuanced.⁴⁰ But even while he is properly cautious about expecting scientific distinctions to map easily on to legal ones, he does, like Bushman and Anderson, tend to analogize the key dichotomies (involving, whatever the vocabulary, passion and emotion) to the legal distinction between “malice aforethought” and “heat of passion” and thereby assumes away the problem of providing some affirmative conception of second-degree murder. The temptation he shares with them to view this as the salient legal distinction suggests that he still struggles with whether and how to address the mapping difficulty.

In his effort to explore the relationship of psychology and criminal law, Professor Fontaine thrusts himself into a double debate: 1) how coherent is the distinction between instrumental and reactive aggression, and 2) how much we might or should expect legal homicide distinctions to map on to whatever scientific distinctions emerge as reliable. Professor Fontaine is very ambivalent on both scores, but he is nevertheless very interested in the possibility of both clarifying distinctions with the separate fields of psychology and law and then coordinating the two sets of distinctions. Thus, he exhibits great faith in social information processing theory,⁴¹ but he is careful to note that SIP at this point does not clearly answer the first question. If anything, what we call reactive and instrumental aggression are reflected in different stages of the SIP process—along such stages as encoding of cues, interpretation of cues, clarification of goals, and response evaluation and decision-making. So in a sense they differ as matter of degree, not kind, and he makes similar observations about the neurobiology of these phenomena.⁴²

To complicate things further, Professor Fontaine is very ambivalent about the findings and consequences of the important Bushman-Anderson article. A key problem is that because they (more firmly than Professor Fontaine) continually elide murder with premeditation, their argument for eliminating degree distinctions also complicates the murder/manslaughter distinction. It leaves unclear whether they would move more manslaughters to murder or vice-versa. Professor Fontaine explicitly raises this concern and also criticizes Bushman and Anderson for their superficial treatment of the role of motive in criminal law. They assert that motive is not an element of murder and use that notion to buttress the

40. Fontaine, *supra* note 3, at 143, 153–55.

41. Fontaine, *supra* note 1, at 31; Fontaine, *supra* note 2, at 74, 81.

42. Fontaine, *supra* note 3, at 156–58.

argument for eliding reactive and instrumental killings, whereas Professor Fontaine rightly notes that motive is still important in the instrumental/reactive distinction, and he therefore concludes that Bushman and Anderson have failed to note the differences in discourses. Nevertheless, Professor Fontaine may have this backward;⁴³ the real point is that Bushman and Anderson may have underestimated the role of motive in law. He then links from Bushman and Anderson to purely utilitarian questions of whether impulsivity should require more severe sanctions because of predictions of danger,⁴⁴ but I concern myself only with retributivist implications here.

Professor Fontaine nicely notes the scientific evidence that reactive aggressive behavioral patterns are often rooted in perceptual encoding patterns. But if so, the challenge of deciding whether and how to distinguish reactive from instrumental aggression, and whether to make a legal distinction out of the psychological one, remains daunting. One way out would be to associate the instrumental aggressor more with a deficit in moral appreciation than cognitive perception. This approach sensibly leads Professor Fontaine to consider the relationship of the instrumental aggression and that of SIP, to the phenomenon of psychopathy.⁴⁵ Psychopathy becomes of especially strong interest to him when he considers utilitarian, as opposed to retributive, legal concerns. But he is ambivalent about the relevance of psychopathy to his main concern. He hints of an association of the psychopath with the instrumental aggressor, and the latter with a cognitive deficit more than an emotional regulation deficit, with the possible implication that instrumental and perhaps psychopathic killers are actually less culpable than reactive ones for this reason.⁴⁶ But if so, Professor Fontaine may have proved too much, because he may have implicitly expanded the HOP or partial excuse category more than he intended.

As Professor Fontaine delves further into the psychology, his taxonomic efforts become more nuanced, but also more uncertain. He says that the categories of the instrumental and reactive have different etiological foundations but that both result in loss of self

43. *Id.* at 160.

44. *Id.* at 155–57.

45. *Id.* at 156–57.

46. For a superb discussion of the culpability of the psychopath, addressing both the psychology-law link at issue here and the matter of moral luck discussed below, see Paul Litton, *Responsibility Status of the Psychopath: On Moral Reasoning and Rational Self-Governance*, 39 *RUTGERS L.J.* 349 (2008).

control.⁴⁷ Instrumental violence may derive from a purely biological amygdala dysfunction that affects decision-making, a matter of serotonin and neurotransmitters. Applying another matrix, he notes that psychopathic behavior may result from information processing deficits that disrupt self regulation, while SIP focuses more on inability to synthesize social cues.⁴⁸ The latter suggests that, contrary to the former, the instrumentally violent offender processes information through self-regulating mechanisms. It is not clear, however, how big the differences between these strands of inquiry are, and hence we get worrisome sentences like the following:

The point for legal and social policy is that individuals who enact instrumental aggression may do so simply because they are inclined to for several reasons (e.g., persistent reinforcement based on enactive and observational learning) and not because they are incapable of normal moral development or are unable to control or manage themselves.⁴⁹

This point raises concerns about cure—with the implication that if cognitive and reactive deficits are more curable, instrumental violence may be *more* culpable than reactive violence.⁵⁰ But Professor Fontaine says that the opposite may be true because of the issue of motive—that is, maybe reactive aggressors are more curable because they act out of perceived threats and thus can be trained out of their misperceptions.⁵¹ By this reckoning, the reactive aggressor's misperception is not in that person's interest, and the natural incentive to enhance self-interest might enable the aggressor to unlearn the misperception. Would that mean that the instrumental aggressor turns out to be less curable than the reactive one?

Professor Fontaine even adverts to the idea that what distinguishes the instrumental offender is that he consciously weighs the victim's harm against anticipated realization of his own goals and is hence guiltier than the reactive aggressor, who does no such weighing. This interpretation brings the instrumental aggressor much closer to the psychopath: "Whereas [reactive aggressors are] viewed by society as suffering from emotional and psychological

47. Fontaine, *supra* note 3, at 155–57.

48. *Id.* at 157.

49. *Id.* at 158.

50. *Id.* at 156.

51. *Id.* at 159–60.

disturbances, instrumental aggressors are judged to be mentally capable, degenerate wrongdoers.”⁵²

In his new article Professor Fontaine alludes to the science underlying PIB—namely Social Information Processing (SIP)—and in *Disentangling the Psychology and Law of Reactive and Instrumental Subtypes of Aggression* he offers a very rigorous review of this science. The scientific explanation of the deficits in SIP that Professor Fontaine associates with PIB does much to support his argument for including PIB under the category of manslaughter. But as Professor Fontaine examines the SIP/PIB context, he finds himself getting curious about associated mental categories, including psychopathy and antisocial personality disorder.⁵³ This is an admirable and welcome extension of his work, because the questions he raises about PIB, in terms of both scientific validity and conceptual coherence and legal applicability, resonate with these other disorders. Therefore, I suggest the problems that have arisen in treating psychopathy and ASP in legal contexts reflect back on Professor Fontaine’s theory of homicide culpability in interesting ways.

When we examine psychopathy and its cousin ASP,⁵⁴ we enter the very vexing category of personality disorders. It is vexing because the things we call personality disorders are simultaneously unresolved in their causation and remarkably hard to cure. Thus, it is sometimes hard to see the medical utility of these disorder diagnoses—their value may lie more in cultural anthropology or sociology. When we look at the definitions of antisocial personality, as with other disorders, we often encounter a somewhat tautological sum of its symptoms. A personality disorder is conventionally defined as a rigid and persistent pattern of thought and action (or, in more technical vocabulary, a “cognitive module” or a “fixed fantasy” or “dysfunctional schemata”). Moreover, this fixed mindset is a disorder if it “deviates markedly from the expectations of individual’s culture.”⁵⁵

The key personality disorders are delineated in colorful vocabulary. There are the “odd or eccentric disorders,” including the paranoid disorder and the schizoid and schizotypal disorders. There are the so-called “dramatic, emotional, or erratic” disorders, including the antisocial, the borderline, the histrionic, and the narcissistic. There are, as well, the “anxious or fearful” disorders,

52. *Id.* at 160.

53. *Id.* at 156–57.

54. Robert D. Hare, *Psychopathy and Antisocial Personality Disorder: A Case of Diagnostic Confusion*, 13 *PSYCHIATRIC TIMES*, Feb. 1996, at 39, 39–40.

55. AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS TEXT REVISION 685* (4th ed. 2000) [hereinafter *DSM-IV-TR*].

including the avoidant-anxious, the dependent, and the obsessive-compulsive.⁵⁶

The psychology of personality disorders does not inspire scientific confidence. Each personality disorder seems to blend genetic, neurobiological, and environmental causes. Most of these disorders seem remarkably resistant to treatment, especially any psychoanalytically-oriented approach that requires critical self-consciousness.⁵⁷ Perhaps as a corollary, the personality disorders play only a very small role in criminal law. Such a disorder as ASP would almost surely fail as a basis for a NGI defense or proof of automatistic loss of control. And a personality disorder can rarely negate a required mens rea, because it is more a matter of the quality of attitude and interaction than of deficiency in cognition or rational awareness.⁵⁸

Professor Fontaine shows some interest in ASP because it bears some relationship to the kinds of deficiencies he wishes to put in the HOP category, especially the PIB phenomenon. According to the DSM-IV, the Antisocial Personality is “a pervasive pattern of disregard for, and violation of, the rights of others” that begins in childhood or early adolescence and continues into adulthood.⁵⁹ But as Professor Fontaine notes, the chief new claims of science in regard to law in this area have come more from neurology and biology

56. *Id.* at 690.

57. The professional/scientific descriptions of each tend to identify certain sub-variants of “talking therapies” suitable for particular disorders, with much jargon suggesting significant variations among these therapies. But all these recommended therapies are essentially modest protocols for marginal control through behavioral or cognitive management and, less often, with symptom-alleviating medication. The symptoms are not, in the short-run, egregious enough to warrant the power of anti-psychotic drugs.

58. The great irony is that one of the personality disorders—the antisocial personality—plays an *inculpatory* role in the death penalty—in other words, the commonest manifestation anywhere in the legal system of a personality disorder as a legal issue arises on the state and not the defense side. This may be the only example of a supposedly diagnostic syndrome that a prosecutor would offer in aggravation—whereby the prosecutor will borrow from supposedly medical language and not fear that to do so will risk the jury’s excusing the defendant’s behavior. John Blume & David Voisin, *Avoiding or Challenging a Diagnosis of Antisocial Personality Disorder*, 24 J. CRIM. JUST. EDUC. & RES., Mar. 2002, at 12.

59. DSM-IV-TR, *supra* note 55, at 706. The antisocial pattern includes:

- (1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest
- (2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure
- (3) impulsivity or failure to plan ahead
- (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults
- (5) reckless disregard for safety of self or others
- (6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations
- (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

than psychology.⁶⁰ One consequence thereof has been an argument for a greater distinction between ASP and psychopathy. Neuroscience researchers now use advanced brain scan techniques to identify neural indicia of psychopathic traits, inspired by the work of neuroscientist Robert Hare and his creation of the Psychopathy Checklist of defining traits.⁶¹ The gist of the current debate is that the neuroscience researchers believe that the DSM definition of ASP is flawed in several ways.⁶² The newer approach is to see that the distinguishing feature of psychopathy lies in certain *affective* deficits in the person, whereas ASP inheres more in simply behavioral manifestations. The promoters of this research make strong claims about the criminological significance of their work, because, they assert, psychopathy is much more relevant to crime propensity than is ASP.⁶³

Thus, brain scan research has suggested, if not established, that observable biological signs in the brain are strongly correlated with such psycho-linguistic deficits as difficulty in distinguishing abstract from concrete words. Those with psychopathic brains, as categorized according to brain-scan signs of “anterior cingulate dysfunction,” exhibit difficulty in recognizing fearful vocal affect in others, in understanding emotional metaphors in the language of others, and in experiencing rational fear themselves.⁶⁴ The posited category of the psychopathic brain must work on cognitive overload to process and evaluate affective stimuli.⁶⁵ And, remarkably, researchers exhibit confidence that these neurologically-diagnosed

60. John Seabrook, *Suffering Souls*, THE NEW YORKER, Nov. 10, 2008, at 64.

61. ROBERT D. HARE, *WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATH AMONG US* (Guilford Press, 1999); Robert D. Hare, *A Research Scale for the Assessment of Psychopathy in Criminal Populations*, 1 PERSONALITY & INDIVIDUAL DIFFERENCES 111 (1980).

62. Precisely because it relies so much on specific conduct indicators, the DSM's version of ASP suffers from the tautology problem that arises with personality disorders generally, and it may accept this problem as unavoidable because the need to establish consensus criteria in a medical textbook may require a more common denominator for uniformity than is scientifically useful. Michael Levenson, Kent Kielhl & Cory Fitzpatrick, *Assessing Psychopathic Attributes in a Noninstitutionalized Population*, 68 J. PERSONALITY AND SOC. PSYCHOL. 151, 152 (1995); Greg Miller, *Investigating the Psychopathic Mind*, 321 SCI. 1284, 1285 (2008).

63. In their view, while the vast majority of prison inmates exhibit ASP, only 15–25 percent exhibit signs of neurologically measured psychopathy, and that smaller number may represent a great disproportion of those likely to recidivate. Kent Kielhl, *A Cognitive Neuroscience Perspective on Psychopathy: Evidence for Paralimbic System Dysfunction*, 142 PSYCHIATRY RES. 107, 109 (2006).

64. *Id.* at 111. See generally Kent Kielhl et al., *Semantic and Affective Processing in Psychopaths: An Event-Related Potential Study*, 36 PSYCHOPHYSIOLOGY 765 (1999); Sherrie Williamson et al., *Abnormal Processing of Affective Words By Psychopaths*, 283 PSYCHOPHYSIOLOGY 260 (1991).

65. Kielhl, *supra* note 63, at 120–22.

psychopaths can find significant amelioration through “talking therapies.” Indeed, it is precisely the researchers who rely on neurological analyses of psychopathy who have been promoting the feasibility of behavioral and cognitive therapies as realistic ways of treating or mitigating the criminal tendencies of psychopaths, and who have thereby challenged the conventional wisdom, rooted in the narrower ASP diagnosis, that treatment is impossible and that effort at treatment may even backfire.⁶⁶ And these researchers, quixotically or not, hold out hope that their work will provide the basis for criminal defenses in the scientifically informed courtrooms of the future.⁶⁷

Moreover, if Professor Fontaine extended his inquiry more fully into the area of personality disorders, he would find one such disorder that might qualify under his broad theory of HOP excuse. This is the syndrome known as Borderline Personality Disorder. The name of this disorder does not mean that the person is on the borderline between neurosis and psychosis. Rather, the person is on the borderline of having a definable personality—or a moral self—in the first place.⁶⁸ As with other mental disorders, the causes of BPD are complex and unknown. BPD is often associated with a history of childhood trauma (possibly child sexual abuse), along with the usual mix of genetic predisposition, neurobiological factors, and brain abnormalities. In general, medication and talk therapy are methods of treating borderline personality disorder, although claims of new therapeutic innovations often sound to the

66. E.g., Michael Caldwell et al., *Evidence of Treatment: Progress and Therapeutic Outcomes Among Adolescents with Psychopathic Features*, 34 CRIM. JUST. & BEHAV. 573 (2007).

67. Miller, *supra* note 62, at 1286. But see Peter Arnett et al., *Autonomic Responsivity in Psychopaths: A Critical Review and Theoretical Proposal*, 17 CLIN. PSYCHOL. REV. 903 (1997) (suggesting incorrigibility of psychopaths); Donald Mitchell et al., *Risky Decisions and Response Reversal: Is There Evidence of Orbitofrontal Cortex Dysfunction in Psychopathic Individuals?*, 40 NEUROPSYCHOLOGIA 2013 (2002).

68. DSM IV-TR, *supra* note 55, at 706. Here are some of the now-established indicia of BPD:

- (1) frantic efforts to avoid real or imagined abandonment . . .
- (2) a pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation
- (3) a markedly and persistently unstable self-image or sense of self
- (4) impulsivity [in such forms as promiscuous sex, eating disorders, binge eating, substance abuse, reckless driving]
- (5) recurrent suicidal behavior, gestures, threats, or self-mutilating behavior [such as cutting, interfering with the healing of scars, or picking at oneself]
- (6) affective instability due to a marked reactivity of mood (e.g., intense episodic dysphoria, irritability, and [bouts of anxiety])
- (7) chronic feelings of emptiness
- (8) inappropriate anger or difficulty controlling anger . . .
- (9) transient stress-related paranoid ideation, delusions or severe dissociative symptoms.

Id. at 710.

skeptical outsider as merely trendy variations in the standard techniques of cognitive behavioral therapy.⁶⁹ The incidence of BPD has been calculated at between 1 to 3 percent of the American adult population, and the great majority of the affected group are female.⁷⁰ But most notably, the neurological explanation of BPD resonates with its more imagistic suggestion of a lack of coherent self.⁷¹ A fully developed theory of HOP excuse might well seek to include BPD among the types of explicable deficits that could arguably qualify for partial mitigation. BPD surely differs from PIB, but there are interesting resonances between the diagnoses and prognoses, as well as the mitigating moral quality, of these conditions.⁷²

A. *The Morally Uncomprehending Criminal*

If Professor Fontaine were to pursue the link between HOP excuse and the varieties of personality disorder, he would recognize that this psychological inquiry would necessarily loop right back to the questions of moral philosophy that seem close to the heart of excuse theory. Indeed, strongly implicit in much of his discussion of HOP is that certain deficits are inherent in the self, not volitionally chosen in any sense, and therefore merit some recognition in criminal liability.

The philosophical dimension of the psychopathy and ASP debate now sounds in the fashionable language of “moral luck.”⁷³ An early major foundational treatment of the subject in regard to criminal law was that of Peter Arenella, in his articles dealing with

69. One such new claim involves so-called “dialectical behavioral therapy,” emphasizing an exchange and negotiation between therapist and client, between the rational and the emotional, and between acceptance and change. See Kelly Koerner & Marsha Linehan, *Research on Dialectical Behavior Therapy for Patients with Borderline Personality Disorder*, 23 PSYCHIATRIC CLINICS N. AM. 151, 152 (2000).

70. DSM IV-TR, *supra* note 55, at 708.

71. Thus, the BPD suffers neurological impairment of what we would describe as a coherent ego, because of an eerie correlation between an early history of abuse and decreases in the size of the adult hippocampus and amygdala. And hence, greater likelihood of overstimulation, to the effect that the individual would be more traumatized by the memories and more closely attached to the emotions recalled. This condition reduces the amount of communication or integration between hemispheres at any given time, thereby causing one hemisphere to dominate the emotions of the individual and hence drastic fluctuation in affect and conduct. On the neurobiological research on BPD, see Marianne Goodman et al., *Trauma, Genes, and the Neurobiology of Personality Disorders*, 1032 ANNALS N.Y. ACAD. SCI. 104 (2004).

72. Heidi Maibom, *Moral Unreason: The Case for Psychopathy*, 20 MIND & LANGUAGE 237 (2005).

73. For an excellent discussion, see Litton, *supra* note 46, at 352–66.

this question: Can a person who is inherently incapable of appreciating the moral implications of his actions, although he is perfectly sane and has perfectly normal cognition in every other way, be blamed for his acts?⁷⁴ Arenella focuses on the character who is categorically incapable of appreciating the moral phenomenon of the interests or needs of others. For Arenella, moral agency requires the following character-based abilities and attributes:

[T]he capacity to care for the interests of other human beings, the internalization of others' normative expectations (including self-identification as participant in a culture's moral blaming practices), the possession of p-r⁷⁵ attitudes concerning one's own and others' characters and acts, the ability to subject one's non-moral ends and values to moral evaluation, the capacity to respond to moral norms as a motivation for one's choices, and the power to manage those firmly entrenched aspects of character that impair one's ability to make an appropriate moral evaluation of the situation one is in and the choices open to one.⁷⁶

He recognizes the fundamental "control principle," i.e., that people should not be held responsible for events or circumstances they cannot control, and he laments that many philosophers adhering to the control principle draw an arbitrary line by failing to acknowledge that some offenders do not have control-act freedom over how to do and how to be. Arenella recognizes that he is thrusting himself into knotty debates over "hard" vs. "soft" determinism.⁷⁷ He would not excuse the psychopath for whom moral

74. Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship between Legal and Moral Accountability*, 39 UCLA L. REV. 1511 (1992) [hereinafter *Convicting the Morally Blameless*]; Peter Arenella, *Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, 7 SOC. PHIL. & POL'Y 59 (1990).

75. "P-r" refers to the concept of participant-reactive attitudes described by Strawson, i.e., the minimally human menu of emotions and attitudes that result from interaction with others, whether remorse, blame, indignation, etc., that lend human color to the otherwise bloodless concept of responsibility. Arenella, *Convicting the Morally Blameless*, *supra* note 74, at 1609.

76. *Id.*; see also GALEN STRAWSON, FREEDOM AND BELIEF 1-21 (1986).

77. He concedes that these debates are complicated by the powerful "choice-theorist" position of Michael Moore, who proffers the strongest version of the control principle as demanding only purely instrumental reasoning and physical opportunity. Michael Moore, *Choice, Character and Excuse*, 7 SOC. PHIL. & POL'Y 29 (1990). Arenella also notes such alternatives as the group he calls "actual-sequence" theorists—those who base responsibility on "the presence of certain responsibility-attribution conditions (which would include my account of moral agency capacities) and the absence of other responsibility-defeating conditions (e.g., 'compulsion') in the actual causal stream that ended in the individual's action." Arenella, *Convicting the Morally Blameless*, *supra* note 74, at 1612 n.118 (citing Harry

judgment and moral motivation are simply much more difficult than for others; he worries about those for whom, as a threshold matter once adult legal responsibility sets in, they are *impossible*. So if Professor Fontaine is committed to a coherent psychological explanation of PIB and to giving it legal valence, I would press him to consider how it compares to Arenella's depiction of the moral desert of the amoral psychopath.

This set of issues also invokes the more explicit discussion of the phenomenon of moral luck. Two of the pivotal works on moral luck⁷⁸ are Bernard Williams's general invocation of the problem⁷⁹ and Thomas Nagel's classification of its four key forms.⁸⁰ As explained by Nagel, *resultant luck* is about decision under uncertainty: the question whether the virtue or propriety of an intentional action should be evaluated in terms of whether it succeeded and in what way.⁸¹ *Circumstantial luck* is about the situation one non-volitionally finds oneself in, so that two people with similar moral qualities and even goals may end up differing widely in terms of the good or bad things they do by virtue of the vagaries of the situations they end up in.⁸² And there is *causal luck*, which might be distinguished from the first two because it is about antecedent things and about events, not conditions.⁸³

But most relevant to my subject, and Arenella's, is *constitutive luck*. This phenomenon concerns the arguably arbitrary and re-

Frankfurt, *Alternate Possibilities and Moral Responsibility*, in *MORAL RESPONSIBILITY* 143 (John Martin Fischer ed., 1986)).

78. For a comprehensive and reliable guide to the entire moral luck debate, see Dana K. Nelkin, *Moral Luck*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, <http://plato.stanford.edu/entries/moral-luck/> (substantive revision on June 3, 2008) (on file with the University of Michigan Journal of Law Reform).

79. Bernard Williams, *Moral Luck*, 50 *PROC. ARISTOTELIAN SOC'Y* 115 (1976).

80. THOMAS NAGEL, *Moral Luck*, in *MORTAL QUESTIONS* 24–38 (1979).

81. *Id.* at 28–29. So there is Williams's famous example of a fictionalized Paul Gauguin abandoning his family to set out for the South Seas to develop his art, and the question is whether the virtue of that choice should depend on whether in fact he succeeds in his artistic mission. Nelkin, *supra* note 78. Of course, a venerable problem of "resultant luck" arises in the law of attempt, as we wonder why punishment should depend on the random question of how things turn out after the weapon is fired. And in classic evaluations of this issue, we see standard rationalizing tropes: some argue that the law of differential punishment is wrong, while some argue that the notion that this is pure luck rests on a false epistemological premise about how well we know the original intention, while others change the subject more drastically from retributivist to utilitarian goals by finding some deterrent value in punishing differentially even if desert is the same.

82. NAGEL, *supra* note 80, at 33–34. Another famous example here is the pair of two potential Nazi collaborators, one of whom has the luck to be sent by her employer out of Germany and thereby never has the opportunity to help Hitler. Nelkin, *supra* note 78.

83. On causal luck, see Benjamin C. Zipursky, *Two Dimensions of Responsibility in Crime, Tort, and Moral Luck*, 9 *THEORETICAL INQUIRIES L.* 97 (2008). But as is probably obvious, causal luck may be a redundant category, supplied by Nagel simply as a device for injecting the vocabulary of the free will question into the moral luck debate.

ceived set of traits or dispositions that one manifests at the point that one ostensibly can begin to exercise adult free will. Since our genes, caregivers, peers, and other environmental influences all contribute to making us who we are (and since we have no control over these), “who we are” is at least largely a matter of luck. In this sense, we are not responsible for being “inherently” cowardly or indifferent, nor do we merit praise for being “inherently” brave or smart or generous.

Nagel describes and agonizes over the philosophical problem:

I believe that in a sense the problem has no solution, because something in the idea of agency is incompatible with actions being events, or people being things. But as the external determinants of what someone has done are gradually exposed, in their effect on consequences, character, and choice itself, it becomes gradually clear that actions are events and people things. Eventually nothing remains which can be ascribed to the responsible self, and we are left with nothing but a portion of the larger sequence of events, which can be deplored or celebrated, but not blamed or praised.⁸⁴

The debates over moral luck have been voluminous in recent years. The issue seems to torture our best thinkers, forcing them to execute a variety of feints, maneuvers, and rationalizations. Often these moves involve a change of subject from solving the problem to asserting the moral or other benefits or the necessity of *not* solving the problem. Some philosophers deny that, despite appearances, there really is moral luck in the first place. Some accept the existence of moral luck while rejecting or restricting the so-called Control Principle. Some insist that we cannot look at moral luck as a monolith—that some of Nagel’s sub-types exist, that some do not exist, and that they vary in how well we can explain them. Some take a mixed approach, embracing one approach for one kind of luck and another approach for another kind of luck, or address only a certain type of luck, while ignoring others.⁸⁵

84. NAGEL, *supra* note 80, at 37.

85. For a review of some of the rationalizations, see Darren Domsky, *Tossing the Rotten Things Out: Eliminating Bad Reasons Not To Solve the Problem of Moral Luck*, 80 PHIL. 531 (2005). Many of these approaches are subtle or not-so-subtle ways of changing the subject. One approach is to insist that the predicate notion of moral evaluation is more complicated than we might first think. Thus, despite the attractive simplicity of the control principle, there are several different ways in which we make assessments, including judgments of a person’s moral character (“aretaic” judgments), judgments of states of affairs that concern people’s

Some writers are tempted to wring their hands over the metaphysical question and change the subject or focus again, saying that for purposes of moral assessment, it does not matter who you are, but what you do with who you are. There is an appealing poignancy to that way of reframing the question, but it is also a way of conceding that even all the heroic rationalizations of resultant and circumstantial luck end up failing to meet the challenge of constitutive moral luck. Thus, for a few examples, Susan Wolf “argues that there is a ‘nameless virtue’ which consists in ‘taking responsibility for one’s actions and their consequences.’”⁸⁶ “It is the virtue of taking responsibility in some sense for the consequences of one’s actions, even if one is not responsible for them. In some ways it is akin to the virtue of generosity in that it ‘involves a willingness to give more . . . than justice requires.’”⁸⁷ Some who concede the existence of luck demand that we drastically change our moral practices. Thus, “if the Control Principle is false, we ought not to respond to an agent’s wrongdoing with anger and blame that is ‘against’ him, but rather with anger that does not include hostility or the desire to punish.”⁸⁸ Some “have denied the existence of causal, and perhaps also of constitutive, moral luck by offering a distinctive metaphysical account of human agency.”⁸⁹

Another strategy is to suggest that moral luck is much less of a problem once we eschew an overly idealized conception of human agency and deploy instead a notion of morality that accepts human impurity.⁹⁰ Michael Zimmerman examines the predicate issue of

actions as “good” or “bad” (“axiological” judgments), or judgments of actions as “right” or “wrong” (“deontic” judgments). Nelkin, *supra* note 78.

86. Nelkin, *supra* note 78 (quoting Susan Wolf, *The Moral of Moral Luck*, 31 PHILOSOPHIC EXCHANGE 4, 13 (1990)).

87. *Id.* (quoting Wolf, *supra* note 86, at 14).

88. *Id.* (citing Brynmor Browne, *A Solution to the Problem of Moral Luck*, 42 PHILOSOPHICAL Q. 343, 350 (1992)).

89. *Id.* Under so-called “Agent-Causal Libertarianism,” “agents themselves cause actions or at least the formation of intentions, without their being caused to do so. Thus, the agent herself as a substance, exercising her causal powers is an undetermined cause of her intentions.” *Id.* According to some “agent-causal views,” “only the agent, as opposed to events caused by other events is the cause of the intention.” *Id.* (citing TIMOTHY O’CONNOR, *PERSONS AND CAUSES: THE METAPHYSICS OF FREE WILL* (2000)).

90. By this view, “the control principle is far from obvious, and we would not want to live in a world in which it held sway.” *Id.* Again, this argument is a subject-changer, suggesting that without moral luck, we would lose access to certain highly desirable virtues. Margaret Urban Walker argues that “moral luck threatens paradox only in the context of a view of moral agents as noumenal” or pure. Margaret U. Walker, *Moral Luck and the Virtues of Agency*, 22 METAPHILOSOPHY 14–27 (1991). Thus, by accepting that our “responsibilities outrun control,” we can celebrate the virtue of dependability by recognizing that others may rely on us, even if their needs are not in our control. *Id.* at 19. By contrast, in a world of “pure agency,” much less will be morally expected of us, and we will not be expected to “as-

how we know which traits of an individual are “essential” or “constitutive” and which are not, and laments that in this context “the role that luck plays in the determination of moral responsibility may not be entirely eliminable.”⁹¹ The most confident assertions have come from Nicholas Rescher, who argues that “[o]ne cannot meaningfully said to be lucky in regard to who one is, but only with respect to what happens to one. Identity must precede luck.”⁹² A careful examination of Rescher’s texts do not help us tremendously to see how he generates or supports this argument, but as one commentator has said, we have to note that Rescher “is working with a notion of luck that differs from the notion of ‘lack of control.’”⁹³

According to Rescher, something is lucky if (i) it came about “by accident” where this seems to mean something like “unplanned” or “unexpected” or “out of the ordinary” and (ii) the outcome “has a significantly evaluative status in representing a good or bad result, a benefit or loss.”⁹⁴

In this sense, it may seem an impossible dilemma to determine whether one’s identity is a matter of luck or not, and yet it still seems intuitively plausible to say that one’s identity is not a matter within one’s control.

As Professor Fontaine continues his impressive project of classification, he may find himself moving in several directions. If his jurisprudential efforts to build a more coherent legal taxonomy lead him, as it predictably and admirably does, to draw on psychology, then the psychological classifications may complicate his efforts, and, as I have suggested, will also lead him to issues in moral philosophy, since the linkage of psychology and law raises vexing problems of free will.

sume a share of the ongoing and massive human work of caring, healing, restoring, and cleaning-up on which each separate life and the collective one depend.” *Id.* at 25.

91. Michael J. Zimmerman, *Taking Luck Seriously*, 99 J. PHIL. 553, 575 (2002).

92. Nicholas Rescher, *Moral Luck*, in *MORAL LUCK* 155 (Daniel Statman ed., 1993).

93. Nelkin, *supra* note 78.

94. *Id.* (quoting Rescher, *supra* note 92, at 145).

