

Marquette Law Review

Volume 88
Issue 2 Fall 2004

Article 4

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Repository Citation

Michael B. Brennan, *The Lodestar of Personal Responsibility*, 88 Marq. L. Rev. 365 (2004).
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ESSAY

THE LODESTAR OF PERSONAL RESPONSIBILITY

BY MICHAEL B. BRENNAN*

"You break the law, you go to jail."

This is an aphorism we learn at a young age. To lawyers, this phrase raises all sorts of questions: Did you in fact break the law? What was the law you broke? If you broke the law, then did you receive due process? Should you go to jail or receive probation? If you are going to jail, for how long? How long a jail term is fair for the crime committed? These are all important concepts lawyers and law students discuss. Sometimes a deeper idea is broached, and that is the topic of this Essay.

I. THE LODESTAR

A basic principle underlies much of not only law, but of life: *A person will be held to the consequences of his decisions; if not by himself, then by society.* We can call this concept the guiding principle or ideal, the lodestar if you will, of personal responsibility.

At first glance, this is not controversial; it is even simple. It would seem to underlie much of the school of thought we call ethics. Reward is apportioned according to this principle: You scored the winning touchdown; therefore, you receive the accolades and the big money contract. Just so, blame is apportioned according to this principle: You were the trigger-man in the armed robbery gone bad; therefore, you receive a longer prison sentence than the driver of the getaway car. The personal responsibility principle is essential to assess liability for actions.

In my years as a judge, I have presided over more than 6000 cases. I have sentenced thousands of people to dispositions ranging from a small fine to life in prison without the possibility of parole.¹ At each sentencing hearing, the

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A version of this essay was delivered as the Second Annual Chief Justice Warren E. Burger Memorial Lecture on September 26, 2003 at the William Mitchell College of Law in St. Paul,

defendant has a constitutional right to give an allocution, to say in open court, during that important moment before sentence is pronounced, whatever that defendant wants to say. Many criminal defendants recite a version of the lodestar as part of their allocutions: "Judge, I am here to take responsibility for my actions," or, "Judge, I accept responsibility for what I have done." Then one often hears, "I had a difficult upbringing," or "I got caught up with the wrong crowd," which immediately vitiates some of the defendant's acceptance of responsibility. As one fellow judge has said: "In all my years on the bench, I've never yet met a member of the wrong crowd. I've only met people who fell in with them."²

Now there is a difference between an excuse and an explanation. But the close juxtaposition of saying you accept responsibility with listing a cause other than one's own decision to commit the crime qualifies the defendant's ownership of the crime. The defendant seems to be saying: "While I accept blame, it is actually not my fault, or only partially my fault, for thus-and-so reason."

The personal responsibility proposition also has an intuitive appeal. There is no sense in the thought that while someone did something freely, that person cannot be held responsible for it. Rather, the opposite is true. We hold a person responsible for particular actions because the person owns or identifies with his actions, and because the agent could have done otherwise than that agent did, but chose not to.

Our deeply rooted practices reflect this intuition. We address "oughts" to one another, as in "you ought to do this," and hold one another responsible for our actions, supposing that we are freely able to do what we ought to do. Responsibility connotes freedom. The "oughts" we hold each other responsible for fulfilling—"You ought to do this"—imply the "can" of freedom—"You can do this."

The personal responsibility principle holds true when one looks at its obverse. Only in Kafka is one held responsible for a decision one did not make.³ Life is not lived such that you can claim to be a passive instrument of fate, of other people, or of a concept that contract students and lawyers know

Minnesota. The author thanks Raymund Sobocinski for his leadership in instituting that lecture series.

1. In Wisconsin, life without the possibility of extended supervision. See WIS. STAT. ANN. § 973.014(1g)(a)(3) (West 2000).

2. *Bayorgeon Presided in Many Notorious Cases, THE THIRD BRANCH*, Summer 2004, at 9 (quoting Judge James T. Bayorgeon in an article noting his honor's retirement).

3. See, e.g., FRANZ KAFKA, *THE TRIAL* (Willa & Edwin Muir & E.M. Butler, trans., Alfred A. Knopf 5th ed. 1965) (1937).

as *force majeure*.⁴

Law, ethics, and indeed a large part of human interaction begin with this proposition that a person is responsible for his own acts. This principle is a given. It is one of what Oliver Wendall Holmes called the “can’t help,” as in “it can’t help but be true.”⁵

II. PHILOSOPHICAL PEDIGREE

This basic concept has a long philosophical pedigree. Aristotle says in the *Nicomachean Ethics* that all human activity is purposeful.⁶ He says that whatever we put our minds to, whatever we consciously and freely do, is undertaken with an end in view.⁷ It may be some objective reached by means of what we do, but it is not an activity without a purpose.⁸ Aristotle reasons that whatever is sought by an action as its end or goal is sought to fulfill or perfect the agent.⁹ Aristotle also notes that where there are ends, we will often recognize means of achieving those ends.¹⁰ Sometimes means are desirable only because they bring about an end and are in themselves difficult or repulsive, such as bitter medicine or the drilling of teeth by the dentist. Sometimes something is desirable in itself but also instrumental in bringing about another end, such as a charitable contribution which pleases the donor, and which the recipient may use to accomplish another good.¹¹

Actions can also be clustered. For example, a number of different activities, each having its own end—reasoning, writing, speaking—can be clustered and become the practice of law and then directed to a common good—just application of the law in court. But the foundational principles to Aristotle’s reasoning in this area all share the lodestar. A human decision and act is purposeful toward a consequence, and that consequence is the responsibility of that human decision and act.

The lodestar holds true, for example, in many schools of moral theology. In the Roman Catholic moral tradition, the intent of an act is considered, but also considered are the act’s foreseeable consequences, and the circumstances

4. “Greater force”: An unexpected or uncontrollable event. THE AMERICAN HERITAGE DICTIONARY 710 (3rd ed. 1992).

5. See RICHARD A. POSNER, OVERCOMING LAW 192 (1995).

6. ARISTOTLE, *Nicomachean Ethics*, in THE BASIC WORKS OF ARISTOTLE Book I, 1094a, at 935 (Richard McKeon ed., 1941).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. See *id.*

in which the act is done.¹² According to St. Thomas Aquinas, the morality of a human act can depend on the object rationally chosen by the deliberate will.¹³ The object of the act is a freely chosen kind of behavior. That object is the proximate end of a deliberate decision. For an act to be moral in the Roman Catholic tradition, all three components of the act—intent, object, and circumstances—must be licit.¹⁴

For example, shooting a firearm at an individual, with the intent of self-defense, toward the end of only disarming that individual, in the circumstances of an assault perpetrated by that individual, and not in a crowded area, could be deemed morally acceptable. Just so, shooting a gun in rage, intending to kill another person, toward the end of death, and in the circumstances of an aggressive assault perpetrated by the shooter in the middle of a crowd could be deemed morally unacceptable.

Some schools of ethical thought disagree, in whole or in part, with the Thomistic analysis. These include consequentialism and proportionalism. Consequentialism determines the “rightness” or “wrongness” of a given act from a calculation of foreseeable consequences deriving from a given choice.¹⁵ To put it bluntly, sometimes the ends can justify the means. Proportionalism weighs the various goods being sought, and focuses on the proportion acknowledged between the good and bad effects of that choice with a view of the “greater good” or “lesser evil” possible in a particular situation.¹⁶ But even these two schools of thought hold the actor responsible for the consequences of his act. In consequentialism, the foreseeable consequences determine the morality, and in proportionalism, the effects of the choice are gauged. So regardless of the school of ethics, responsibility demands that the human actor be held accountable for the consequences of his human action.

Now there is a potential philosophical problem with the lodestar of personal responsibility: the notion of moral luck. This philosophical concept can be seen as a challenge to our ordinary practices of holding one another responsible. The idea of moral luck is that to be responsible for one’s actions, one must be responsible for the beliefs and desires that lead to one’s actions, and for the habits of believing and desiring that lead to the formation of one’s beliefs and desires. But according to moral luck, much of what we do (and

12. CATECHISM OF THE CATHOLIC CHURCH ¶ 1750 (1994).

13. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* pts. I–II, q. 18, art. 2 at 522–24 (Anton C. Pegis ed., 1948).

14. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 12, at ¶ 1760.

15. *See, e.g.*, POPE JOHN PAUL II, *VERITATIS SPLENDOR* (Encyclical Letter on the Splendor of Truth) ¶ 75 (1993).

16. *Id.*

believe and desire) is due to much that we did not do (or believe or desire), but rather is due to influences outside of our control—those habits of believing or desiring—with lucky or unlucky result.¹⁷ This notion poses a challenge to the idea of holding one another responsible for our actions because the base influences that start this claim might not be within our control. Addressing this challenge is beyond the scope of this Essay, but the concept of moral luck is assuredly not what we base our laws on today. Rather, much of law, as we will see, relies upon the concept of personal responsibility: *A person will be held responsible for the consequences of his decisions; if not by himself, then by society.*

III. PERSONAL RESPONSIBILITY AND THE LEGAL SYSTEM

U.S. Supreme Court Justice Clarence Thomas has noted three reasons why we hold people accountable for their decisions and actions.¹⁸

One reason is that “the law cannot persuade where it cannot punish.”¹⁹ As Alexander Hamilton said, “[i]t is essential to the idea of a law that it be attended with a sanction . . . a punishment for disobedience.”²⁰ Most of us are faced regularly with the deterrent effect of the law; the incentive not to engage in conduct that might harm others.

A second reason why we hold people responsible accentuates a different aspect of human nature: “When society punishes someone for breaking the law—when it holds him accountable for the consequences of his acts—we are recognizing that only mankind is capable of being moral or rational,” choosing what we deem to be right or wrong.²¹ That is an acknowledgement of the human dignity of our fellow man.²² To ignore the fact that someone has harmed another person by breaking the law treats that person as “being incapable of determining right from wrong and controlling his behavior.”²³

A third reason we hold people responsible for their acts is the theory of the social contract.²⁴ We have mutual political and social obligations in a civilized, democratic society. By benefiting from the opportunities of a free society, we consent to be bound by its rules and expect the government to enforce them. When a person breaks those rules, that social contract is

17. See, e.g., THOMAS NAGEL, *MORTAL QUESTIONS* 24–38 (1979).

18. Clarence Thomas, *Punishment and Personhood*, 4 *CITY JOURNAL* (Autumn 1994), available at http://www.city-journal.org/html/4_4_punishment.html.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

violated, and that person must be punished. By his conduct, the violator is telling society that the rules do not apply to him. We must hold the violator to those rules, as otherwise, those who obey the rules are cheated. Without the social contract and holding all to the rules produced by that social contract, our country could be faced with vigilante justice with its accompanying chaos.

Justice Thomas offered these three reasons why we hold people accountable for their decisions and actions, and they make the important assumption of a properly functioning legal system. The legal system steps in when individuals do not take responsibility for their decisions and actions. This is Political Science 101, and the third rationale offered by Justice Thomas: The social contract that we will behave according to certain rules, and if we do not, an institution will ensure that the individual is held responsible, rather than a mob gain control. Whether criminal law or civil law, that institution is our judicial system.

IV. ACTIONS TO AVOID THE LODESTAR

Some behavior that is the subject of civil law attempts to escape the lodestar of personal responsibility:

- *Breach of contract*: When a defendant is to perform on an agreement, and that defendant fails to uphold his end of the bargain, a court may hold that defendant liable for breach of contract and assess damages.

- *Taking property without just compensation*.²⁵

- *The tort of bad faith*: Bad faith can be defined as “a separate intentional wrong, which results from a breach of duty imposed as a consequence of the relationship established by contract.”²⁶ When such a breach occurs, the insurer is liable for any damages that are the proximate result of that breach.

- *Negligent acts* without compensating the victim.

If a party breaks a contract, injures someone in tort, or discriminates against someone improperly, the legal system is supposed to hold the offending party responsible.

Tort law especially exemplifies the lodestar of personal responsibility. The concepts of proximate cause, comparative negligence, contributory negligence, and assumption of risk all were created and became the law to assess responsibility; that is, to apportion fault. For example, in analyzing a tort allegation, the court determines whether there is a duty, whether there is a breach of that duty, whether that breach of the duty was the proximate cause of any damages, and whether any such damages exist. In Wisconsin, the test

25. U.S. CONST. amend. V.

26. *Anderson v. Cont'l Ins. Co.*, 85 Wis. 2d 675, 687, 271 N.W.2d 368, 374 (1978).

for whether negligence was causal is whether that negligence was a substantial factor in causing the injuries. "Cause" need not be the sole factor, nor the primary factor, but only a substantial factor.²⁷

When an intervening or superseding cause allegedly produced by another is interposed as a defense by a defendant charged with the first act of negligence, a jury is required to find whether the negligence of that other was a substantial factor in causing the accident. In fact, in Wisconsin tort law, it is so important that cause be properly allocated that it is reversible error to instruct a jury by saying "*the* cause" rather than "*a* cause."²⁸ Because more than one person's acts may be a substantial factor in an accident or injury, use of the word "the" rather than "a" might mislead a jury as to how many parties may be at fault.²⁹ The substantial factor concept of causation relies on the same reasoning. There may be several substantial factors contributing to the same result; hence, special verdict forms are used with blanks in which the jury may allocate percentages of fault.³⁰

Reflect also on behavior in the area of criminal law to escape the lodestar of personal responsibility:

- *Perjury*: A defendant is charged under oath with telling the truth. The defendant fails to do so. The law holds that defendant responsible for that failure.

- *Escape*: A defendant is supposed to serve a sentence of a certain length in punishment for a crime. The defendant escapes from custody after one-half of that sentence. The defendant is caught and charged with a new crime. Not only must he serve the second half of the original sentence, but he is also held responsible for failing to be responsible, and in Wisconsin has to serve a second sentence consecutive to the first sentence.³¹

- *Obstructing an officer* by giving false information: name, date of birth, address, etc.

There are a variety of purposes for holding someone responsible under the criminal law. Retribution assumes that committing a crime inherently merits punishment.³² Deterrence treats punishment as a tool of social control and protection, employing its threat as a disincentive to dissuade potential

27. See Wis. JI-Civil 1500 (1999) and accompanying comment.

28. *Id.*

29. *Id.*; see also *Merco Distrib. Corp. v. Commercial Police Alarm Co.*, 84 Wis. 2d 455, 458-59, 267 N.W.2d 652, 654 (1978); *Reserve Supply Co. v. Viner*, 9 Wis. 2d 530, 533, 101 N.W.2d 663, 665 (1960).

30. See WIS. STAT. ANN. § 805.09(2) (West 2000).

31. *Id.* § 946.42(4).

32. See BLACK'S LAW DICTIONARY 1248 (7th ed. 1999); NEIL P. KOHEN & DONALD J. HALL, CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS 682-85 (1995).

criminals from offending (general deterrence) and a particular criminal from reoffending (specific deterrence).³³ Incapacitation uses imprisonment to remove the offender from society to protect it from the danger he poses. Rehabilitation calls for the improvement of the criminal for his own benefit, to reduce the probability that he will offend again, which in turn also benefits the community.³⁴ But regardless of the purpose of the criminal law, each law shares the common logic that a person's act has a consequence, and that the person is to be held responsible for that consequence, regardless of the purpose or purposes that underlie that law.

V. EXCEPTIONS TO THE LODESTAR

A few qualifications or exceptions to this lodestar of personal responsibility, especially in the area of the criminal law, come to mind. For example, by reason of mental disease or defect, a person may not be able to form the intent required to be held responsible for having committed a crime. We do not hold responsible persons who cannot cognitively make decisions that have a legal or moral component.³⁵

The legal system itself also places qualifications on the lodestar of personal responsibility. Even if you were not suffering from a mental disease or defect at the time of the crime, if you are not now competent to be adjudicated—you cannot assist your attorney, you do not understand the role of the court, counsel, the jury, etc.—you may be committed to an institution but not sentenced to jail or prison.³⁶

The felony murder rule is another example. If a murder is committed during the course of a felony, even if that murder was not the intent of the felony crime, the defendant may be held criminally liable for the death of that individual. In Wisconsin, the rule is that “if an action that resulted in death was sufficiently temporal to the attempted commission or commission of the underlying felony, felony-murder liability may be extended to all those who intended to commit the underlying felony.”³⁷

These exceptions prove the rule: The lodestar is assumed, “built into” the civil and criminal law, unless a particular exception is expressly provided.

33. See BLACK'S LAW DICTIONARY, *supra* note 32, at 1247; KOHEN & HALL, *supra* note 32, at 682–85.

34. See BLACK'S LAW DICTIONARY, *supra* note 32, at 1290; KOHEN & HALL, *supra* note 32, at 682–85.

35. See, e.g., WIS. STAT. ANN. § 971.15 (West 2000) (mental responsibility of criminal defendant).

36. See, e.g., *id.* §§ 971.13, 971.14 (competency of criminal defendant).

37. *Id.* § 940.03.

VI. CULTURAL FACTORS

Some cultural factors undercut, consciously or subconsciously, this lodestar of personal responsibility. Two such factors are language and vocabulary. Many of the words and phrases used in the media and in the academy suggest that things simply happen to people, rather than being caused by their own choices or behavior. One example is an “epidemic” of teen pregnancy or of drug use.

Thomas Sowell, in his book *The Vision of the Anointed*,³⁸ points out other examples. People are often said to “lack access” to certain jobs or schools, when in fact those people may not have behaved in a way that would enable them to meet the standards of admission to those jobs or those schools. “Access” or “opportunity” is an *ex ante* expression used to describe *ex post* results; a prospective expression used in a retrospective manner.³⁹ Sowell’s point is that the terms “access” or “opportunity” preempt the whole question as to why those results turned out the way that they did.⁴⁰ Watch out for the use of *ex ante* words or expressions to describe *ex post* results.⁴¹ Another example is that a certain group was denied an opportunity to advance by a “glass ceiling.”⁴² Implicit in that phrase is the notion that rules were rigged against some individual or group. But whether, and to what extent, this is true is the issue to be argued, not circumvented by verbal sleight-of-hand.⁴³

This verbal tactic to shift responsibility is common. One favorite example is when a tavern patron drank too many alcoholic beverages. A police officer noticed his erratic driving and pulled him over. When confronted with failure on field sobriety tests, the patron responded: “But officer, I was overserved.” Whose fault was that? The bartender? You see the subtle shift in responsibility from the drinker to the bartender.

Another example is a phrase commonly used by criminals: “I caught a case.” Is the acting agent the crime seeking out the person or the criminal committing the act? It is the latter of course, although the phrase denotes the former.

This brings up another logical fallacy in this area of which you should be aware: *Post hoc, ergo propter hoc* (“after this, therefore because of this”). As you logicians know, just because item B comes after item A, that does not render item A the cause of item B. This is sometimes seen in the

38. THOMAS SOWELL, *THE VISION OF THE ANOINTED* (1995).

39. *Id.* at 198.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 198–99.

personification of the concept of “society”; e.g., “society is denying access to education/drug and alcohol treatment/*fill in the blank*, and that resulted in Mr. Criminal Defendant committing these crimes.” “Such use of the term . . . is a sophisticated way of saying ‘the devil made me do it.’”⁴⁴ “Society” is a “magic word to make choice, behavior, and performance vanish into thin air.”⁴⁵ With inconvenient things like the lodestar of personal responsibility out of the way, then results after the fact can be equated with conditions before the fact, *post hoc, ergo propter hoc*.

VII. CONCLUSIONS

A few conclusions may be drawn from the role of personal responsibility in the law and in life.

First, public policy initiatives and legislation should be analyzed pursuant to the lodestar of personal responsibility. Do they incorporate personal responsibility, or do they weaken it? One example is no-fault tort liability, such as automobile insurance. Are we better off by not assessing fault, providing just compensation for all in car accidents regardless of blame, and conceivably reducing costs to all? Or are we better off using a fault-based adjudication compensation system? Does assessing fault deter bad driving behavior? Or is the efficiency of a no-fault system so great that the benefits we will reap from such a system overcome the cost of not deterring bad driving?

Another example is truth-in-sentencing legislation for criminal penalties. The federal government and at least thirty states have adopted versions of determinate sentencing.⁴⁶ Does truth-in-sentencing increase personal responsibility among the criminal population and those who might be attracted to commit a crime? By everyone knowing how long a defendant will be incarcerated, that lodestar is publicly affirmed. Truth-in-sentencing was enacted to restore credibility to criminal sentences. Behind it was the concern that parole and other forms of early release had created a “revolving door” with many offenders serving less than half their sentences.⁴⁷ This contributed to a growing public cynicism regarding the effectiveness of our criminal courts.

Outside of the realm of public policy, but still within the field of criminal

44. *Id.* at 199.

45. *Id.*

46. Paula M. Ditton & Doris James Wilson, *Truth in Sentencing in State Prisons*, BUREAU JUST. STAT. SPECIAL REP. 2 tbl.1 (Jan. 1999).

47. See WISCONSIN CRIMINAL PENALTIES STUDY COMMITTEE REPORT, Aug. 31, 1999, at i, available at http://www.doa.state.wi.us/docs_view2.asp?docid=42.

law, criminal sentencing decisions must be analyzed in the same manner: Do they hold the defendant responsible for that defendant's personal decisions? Do they motivate future irresponsible behavior? Or do they deter such irresponsible behavior by connecting punishment with a crime?

Second, what about the Constitution and personal responsibility? While the U.S. Constitution says much about governmental structure and the limits of power, with the exception of the Thirteenth Amendment abolishing slavery, the Constitution says little about the obligations of citizens to one another or to the government. But does that mean that the American Constitution is less concerned with responsibility? No. The American Constitution is primarily a charter of government. The Framers recognized that the constitutional order that they created presupposed the concept of responsibility. Consider this passage from President George Washington's farewell address in 1796: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness—these firmest props of the duties of men and citizens."⁴⁸

Without a general cultural insistence on a sense of personal responsibility, and its correlative—a sense of shame—any form of social organization faces trouble. This does not mean that in all instances the government is to define the content of individual obligations. But the government through the legal system should not actively undermine the fundamental sense of individual responsibility that is necessary for a civilized legal order.

Third, we can see proof of the lodestar of personal responsibility in our everyday lives. Consider how personal responsibility factors into your decisions:

- Why was my car ticketed? For parking too close to the fire hydrant? If the car was parked in violation of the ordinance, then should I take responsibility for that violation by paying the ticket? If I did violate the ordinance, but I contest the ticket to preserve my record for my car insurance premiums, am I improperly failing to take responsibility? If I do not pay the ticket, will the State of Wisconsin hold me responsible by suspending my car registration or my driving privileges?

- The young investment banker receives more than the allocated bonus deposited directly into her checking account at the end of the fiscal year. Can she retain the extra money because last year the bank did not give out a bonus, although she worked just as hard as this year? Or should she return the extra money? What should happen to her if she does not return the money and the

48. George Washington, *Farewell Address*, in 1 DOCUMENTS OF AMERICAN HISTORY 173 (Henry S. Commager & Milton Cantor eds., 10th ed. 1988).

bank finds out?

- Why were the company's losses shifted to off-the-book partnerships and not included in the financial statement? Who made that decision? Why? Who benefited? Who was hurt, and how much? Who should be held responsible for it? Should those persons be punished? Would such punishment bring back the lost worth of the company? Could the company's shareholders have anticipated these actions? How will those shareholders be compensated?

Scenarios such as these play out in our lives, either in our experience or in those we read about; hence the importance of keeping the lodestar in mind. And that is why it is termed a lodestar, which *Webster's* defines as "a star by which one directs one's course, especially the North Star."⁴⁹ It is also defined as "a guiding principle or ideal."⁵⁰

This Essay has argued that personal responsibility is good for society, and underlies not just our legal system, but our lives. How should society go about encouraging personal responsibility and its corollary, discouraging irresponsibility? One simple answer is to "set irresponsible people free." Not free from incarceration. As noted at the beginning of this Essay, you break the law, you go to jail. Responsibility can be defined as experiencing the consequences of your actions, or if not, society visiting the consequences of your actions upon you. Give people the freedom to make their own decisions, to face the consequences of their own acts, to see for themselves what their actions do to others and how others respond to them. Free people may then have an incentive to be virtuous. People who bear the consequences of their own acts will care about those consequences and may try to learn from their mistakes. In that way, a free society rewards virtue while still punishing irresponsibility, and above all, ensures that in the media, in the academy, and in our organs of government, including the courts, the lodestar of personal responsibility is considered at each juncture.

49. WEBSTER'S NEW WORLD DICTIONARY 831 (David Bernard Guralnik ed., 2d College ed. 1976).

50. *Id.*