

# A Companion to Free Will

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# Criminal Responsibility

KEN LEVY

## 1 Introduction

This entry will explicate the conditions required for criminal responsibility, provide an overview of criminal defenses, distinguish criminal responsibility from both tort liability and moral responsibility, and explicate the current state of the insanity defense.

## 2 Actus Reus, Mens Rea, Strict Liability, and Causation

In American criminal law, an individual is considered criminally responsible – responsible for committing a crime – when a factfinder (judge or jury) determines that the elements of a criminal statute are all satisfied.

One element common to every criminal statute is *actus reus*, the prohibited action or omission. The action or omission must be voluntary, which is generally taken to mean that the individual herself – as opposed to a muscle twitch or spasm – “caused” the bodily motion that constituted the action or omission. We normally refer to this kind of causation as *control* or *agency*. Agency implies that the individual was not forced to act or omit as she did and therefore that she could have done otherwise – that is, she could have refrained from performing the action or omission. Importantly, while possession is not generally considered to be an action per se, it can still qualify for actus reus because it requires a previous action (acquiring) or previous omission (failing to relinquish).

In most criminal statutes, a second element – the *mens rea*, a certain state of mind that accompanies the prohibited action – must also be satisfied. There are four kinds of mens rea (*mentes reae*): specific intent, knowledge, recklessness, and negligence. I say *most*, not all, criminal statutes require mens rea because a small number of criminal statutes are a matter of *strict liability*; they do not require intent, knowledge, recklessness, or even negligence. Instead, they require only actus reus. For example, many rape statutes impose liability on

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adults for engaging in sexual relations with minors even if the former's mistaken belief that the latter has reached the age of majority is reasonable. Still, most strict liability crimes are insignificant – that is, either misdemeanors or regulatory (public welfare) offenses for which relatively small fines are imposed. Two examples are speeding and selling alcohol to a minor.

In most criminal statutes, the required mens rea is *specific intent*, which is equivalent to conscious purpose. In many criminal statutes, the mens rea is a state of mind that is easier to prove than specific intent: knowledge or recklessness. Knowledge is awareness of a particular fact – either of the act itself, of a circumstance occasioning the act, or of a practically certain consequence of the act. Recklessness is also a kind of knowledge – not knowledge of a particular *fact* but rather knowledge of a substantial and unjustifiable *risk* of causing serious harm.

In a small number of criminal statutes, only negligence is required. In most of these statutes, negligence means either (a) inadvertent (as opposed to conscious or knowing) disregard of a substantial and unjustifiable risk of causing serious harm or (b) gross disregard of the need to use reasonable care in order to avoid causing serious harm. (a) is considered to be “recklessness lite” – that is, recklessness minus (evidence of) contemporaneous awareness of the risk; (b) is considered to be a conscious or unconscious deviation from the ordinary standard of care that is *gross* – that is, significant in degree. (a) and (b) are usually taken to be identical, either in meaning or scope.

In some jurisdictions, courts have decided that *civil* negligence is sufficient for such crimes as pollution and vehicular manslaughter. Civil negligence is the standard of liability in tort law; it involves only a deviation – as opposed to a *gross* deviation – from the ordinary standard of care. To the extent that civil negligence has bled into criminal law, the boundary between tort law and criminal law has blurred.

Finally, many criminal statutes require a third element: satisfaction of a particular circumstance. For example, all homicide statutes contain a causation element. In order to be guilty of murder, manslaughter, or negligent homicide, a defendant must satisfy not merely the *actus reus* (for example, shooting the victim) and the *mens rea* (for example, intending to kill the victim) but also causation; the bullet fired from the defendant's gun must cause the victim's death. In order for the shooting to qualify as the cause of the victim's death, it must satisfy both an empirical element (the “factual” cause) and a normative element (the “legal” or “proximate” cause). In order to qualify as a factual cause, the shooting must have been either a necessary condition of the victim's death or part of a group of causes that itself was a necessary condition of the victim's death. In order to qualify as a proximate cause, the shooting must have been closely connected to the victim's death. For example, the shooting would probably *not* qualify as the proximate cause of the victim's death if it merely traumatized her and, as a result of the trauma, she commit suicide two years later. Still, unlike the factual cause, this determination would be a matter of subjective or intersubjective judgment, not a matter of objective fact (such as the bullet's exact trajectory).

### 3 Criminal Defenses

Suppose that an individual – Mikey – has been arrested for crime *C*. At some point, Mikey will talk with a prosecutor (local, state, or federal, depending on the crime charged), and the prosecutor will most likely “plea bargain” with him – that is, try to work out a deal with Mikey in order to avoid a trial, which tends to be very costly for both sides. But if they fail to work

out a deal and the case does proceed to trial, the prosecutor has the burden of proof; she must provide evidence to the factfinder proving beyond a reasonable doubt that the defendant did in fact commit C. If the crime is strict liability, the prosecutor will need to establish only the required actus reus. Otherwise, the prosecutor will also need to establish the required mens rea and every other element in the statute.

Once the prosecutor has provided sufficient evidence to establish the defendant's guilt, the burden of proof shifts to Mikey. He now has four possible responses – defenses – available to him. The first possible defense is that the prosecutor failed to prove at least one of the elements, and therefore his guilt, beyond a reasonable doubt.

The second possible defense is admitting to the act in question but denying that it was a crime on the grounds that the act was justified – that is, right, good, or permissible. The traditionally recognized justifications are consent, necessity, self-defense, and defense of others.

The third possible defense is admitting to the crime but claiming blamelessness because, given the particular circumstances, he cannot be reasonably expected to have avoided committing the crime. The traditionally recognized excuses are automatism, duress, entrapment, infancy, insanity, involuntary intoxication, mistake of fact, and mistake of law.

The fourth possible defense: Instead of claiming full exculpation, Mikey might plead a mitigating factor, a condition that makes the criminal act somewhat understandable and thereby reduces the level of the offense for which he is convicted. Traditionally recognized mitigating factors include addiction, extreme emotional disturbance (EED), mental illness, past abuse or neglect, and provocation (“heat of passion”). If Mikey is convicted, then – depending on the circumstances – he may offer several other mitigating factors prior to sentencing: elderly status, first-time offender, minor role in the crime, no harm caused, no longer dangerous, physical illness, or remorse.

#### 4 Criminal Law vs. Tort Law

Once Mikey either pleads guilty to C or is found guilty by a factfinder of committing C, the judge will try to determine an appropriate sentence. The two most common forms of criminal punishment are imprisonment and fines. While punishment is generally thought to be the defining feature of criminal law, other areas of law, principally torts and administrative law, also prescribe punishment for certain transgressions. Juries sometimes impose punitive damages on tortfeasors, and public employees who violate administrative laws can be punished in a variety of ways, ranging from censure and suspension at one end to fines and imprisonment at the other.

In tort law, punitive damages are rare. The much more typical remedies are restitution (repayment) and compensatory damages. Neither restitution nor compensatory damages are thought to qualify as *punishment* because their primary purpose is not retributive; they are not designed to inflict suffering, hardship, or deprivation on the tortfeasor *as an end in itself*. Rather, their primary purpose is to make the victim whole, to restore her to the condition that she was in prior to being injured. Of course, restitution and compensatory damages cannot always restore health, no less life or limbs. But they are nonetheless considered to be the next best thing when full qualitative restoration is impossible.

Still, restitution and compensatory damages are like punishment in three respects. First, they are all designed to inflict deprivation on the guilty party. (Again, such infliction is an intrinsic end for punishment, an instrumental end for restitution and compensatory

damages.) Second, they are all designed to achieve “general deterrence” (discouraging the general public from engaging in the same kind of illegal conduct) and “specific deterrence” (discouraging the guilty party himself from recidivating). Third, they are all designed to express disapproval of the guilty party’s offense. The level of disapproval is reflected by the severity of the sentence or assigned damages, which itself is supposed to be roughly proportional – or at least not grossly disproportionate – to the severity of the offense.

## 5 Criminal Responsibility vs. Moral Responsibility

Criminal responsibility and moral responsibility are clearly distinct things because we can have one without the other. A person is morally responsible but not criminally responsible in two situations: (a) she commits an act that is immoral but not illegal or (b) she commits an illegal act, but the criminal justice system does not hold her accountable for whatever reason – for example, she was never caught, the prosecutor offered her immunity in exchange for her assistance, or the crime was *de minimis*. One might argue that (b) involves *unrecognized* criminal responsibility, but ordinary usage of the term *criminal responsibility* implies a formal finding of guilt.

(a) and (b) seem pretty straightforward, but what about the converse of (a) and (b)? Can a person be criminally responsible without also being morally responsible? It is generally assumed that the answer is no, that criminal responsibility *requires* moral responsibility. But this assumption is false. There are at least three situations in which a person might be criminally responsible without also being morally responsible: erroneous conviction, psychopathy-motivated criminality, and situationism.

Suppose an individual – Norris – leads a very clean life. He works hard at his job, takes good care of his young children, treats everybody with kindness and respect, and does not engage in any illegal activity whatsoever. One day, Norris’s laptop suddenly crashes, so he drops it off at Best Buy for repair. As it turns out, the repair guy at Best Buy – Oliver – has it in for Norris. After repairing Norris’s laptop, he plants some child pornography on the hard drive, returns it to Norris, and then alerts the FBI. The next day, the FBI knock on Norris’s door, he invites them in, they ask to see his computer, Norris consents, they find the child pornography, and they immediately arrest Norris for possession of child pornography, which is prohibited by 18 U.S.C. § 2252A.

Norris is clearly innocent – morally. But he may still be *criminally* responsible if either he pleads guilty (most likely to avoid a trial and therefore the risk of much greater punishment) or a factfinder believes (wrongly) that the prosecution has proven all the elements of § 2252A, including knowledge, beyond a reasonable doubt. Both of these situations exemplify criminal responsibility without moral responsibility and therefore the proposition that criminal responsibility does not require moral responsibility.

In *Free Will, Responsibility, and Crime: An Introduction*, I argue that criminal responsibility and moral responsibility may come apart in two other kinds of situation as well. One is when a clinical psychopath – Psycho – commits a violent crime *C* as a result of his psychopathy. Arguably, Psycho is not morally responsible for *C* because, as a psychopath, he does not really understand that, or why, *C* is morally wrong. But Psycho is still *criminally* responsible for *C* because, despite his moral ignorance, he intentionally *C*-ed knowing full well that *C* was illegal and that, if caught, he would likely be arrested and punished for *C*-ing.

The second case involves situationism, the social-psychological theory that environmental circumstances sometimes play a more significant role in explaining an individual’s behavior

than his character. Return to Oliver, who planted child pornography on Norris's computer. On the surface, it looks like Oliver is just a bad guy – that is, has bad character. But we can imagine a situation in which Oliver is actually a good guy – has good character – but still frames Norris because of external pressures. Suppose, for example, that Oliver is in desperate financial straits, is terrified that he will lose his job and not be able to find another, is instructed by his boss – Quincy – to frame Norris, and very reluctantly complies. Arguably, Oliver is not morally responsible. Given his situation, it is not clear that he could have done otherwise, that he had the strength to defy Quincy. But if the police caught and arrested Oliver for planting child pornography on Norris's laptop, his defense that he was “just following orders” would not work. Employer's instructions themselves do not exonerate; only instructions accompanied by credible threats of violence or serious property damage qualify for the duress excuse. Because Oliver would be criminally responsible without necessarily being morally responsible, it follows, once again, that criminal responsibility does not require moral responsibility.

## 6 The Insanity Defense

In Part 3, I briefly mentioned the traditionally recognized excuses. Once again, they are automatism, duress, entrapment, infancy, insanity, involuntary intoxication, mistake of fact, and mistake of law. All of these are (a) conditions or circumstances (b) that make it unreasonable to expect the agent to have refrained from committing the crime in question (C) and therefore (c) unfair to blame or punish the agent for C-ing. The reason that these particular conditions or circumstances make it unreasonable to expect the agent to have done otherwise is that they conflict with at least one of three conditions necessary for blameworthiness: knowledge, self-control, and free choice. Mistakes of fact and of law conflict with knowledge, automatism conflicts with self-control, infancy and involuntary intoxication conflict with both knowledge and self-control, and duress and entrapment conflict with free choice.

Insanity conflicts with either knowledge or self-control. One version of the insanity defense, the M’Naghten Rule, is purely cognitive, not volitional. It suggests that a mental illness or disability renders a person blameless for criminal activity when it substantially impairs her ability to know right from wrong.

A second version of the insanity defense, the Model Penal Code (or MPC) Rule, contains both a cognitive prong and a volitional prong. (See Model Penal Code § 4.01 (1962).) It suggests that a mental illness or disability renders a person blameless for criminal activity when it negates either her “substantial capacity ... to appreciate” the difference between right and wrong or her “substantial capacity” to act on this understanding and comply with the law. A few jurisdictions have adopted the (once again) purely cognitive M’Naghten Rule and supplemented it with an MPC-like volitional prong, which is commonly referred to as the “Irresistible Impulse Rule.”

Satisfaction of either the M’Naghten Rule or the cognitive prong of the MPC Rule is relatively straightforward.<sup>1</sup> A mental illness or disability impairs an individual's ability to distinguish right from wrong when it causes her to believe, mistakenly, that her action is right, good, or permissible. There are three kinds of situations in which the afflicted individual suffers from this “normative delusion”: the mental illness or disability causes her to hallucinate, to perceive a danger that is actually non-existent, or to adopt beliefs that radically diverge from commonly accepted moral or empirical assumptions. An example of the first situation: killing the neighbor because voices commanded her to. An example of the second

situation: killing the neighbor from a conviction that he posed a lethal threat to herself, another, or the world.

The third situation is harder to explain because of both the conceptual and epistemic difficulties in distinguishing between “crazy” beliefs and radically unpopular but “non-crazy” beliefs. For example, suppose that a person *P* killed a slaveowner in the antebellum south because of her moral conviction that slavery is wrong. *P*’s moral belief here was crazy in the sense of radically unpopular but not crazy from an objective moral perspective. Likewise, a good number of individuals in the United States today are committed neo-Nazis; they are convinced that nonwhites and Jews are both subhuman and dangerous. While mental illness or disability may cause some to subscribe to this radical ideology, mere subscription to this radical ideology is not necessarily a sign of mental illness or disability. Many of them believe in the inherent inferiority and dangerousness of others not because of mental illness or disability but rather because of indoctrination, “tribal” influences and pressures, or a toxic combination of ignorance, anger, and fear.

So what is the difference between a crazy belief and a radical but non-crazy belief? It is not clear that there is one, at least not an intrinsic difference. Radical belief is sometimes, but not always, a sign of mental illness or disability. When determining whether a defendant is insane, a jury needs to determine not merely what radical beliefs the defendant possesses but also *why* the defendant possesses these radical beliefs. And this causal determination will be determined primarily by expert witnesses who specialize in abnormal psychology. If the cause seems to be mental illness or disability, then the defendant will have a stronger case for insanity. Otherwise, if the cause seems to be something else (for example, indoctrination), then she will have a weaker case for insanity.

Whether a defendant has satisfied the Irresistible Impulse Rule (which, again, supplements some M’Naghten statutes) or the volitional prong of the MPC Rule is harder for juries to determine than whether the cognitive prong has been satisfied because we cannot measure self-control with the same degree of precision that we can measure cognitive capacity. For example, if a defendant pleads that (a) he killed another person because he just couldn’t help himself and (b) he just couldn’t help himself because of either a sick compulsion or a psychotic episode, how is the jury supposed to evaluate this claim? Even if the defendant genuinely believes (a) and (b), his belief may be wrong. He may have been able to refrain from killing either by exerting greater willpower at the time or earlier in the day by, for example, taking his medications or consciously avoiding triggers. Again, how is the jury able to determine whether he could have exerted greater willpower or whether medications or consciously avoiding triggers would have been successful? It seems that the Irresistible Impulse Rule and volitional prong of the MPC Rule require juries to engage in extensive counterfactual speculation. And both the quality and results of this counterfactual speculation are all the more questionable if expert witnesses offer conflicting testimony, which is common. For this reason, some scholars think that the Irresistible Impulse Rule and MPC Rule’s volitional prong should be abandoned and the insanity defense remain purely cognitive.

It should be noted that not every state provides defendants with the opportunity to plead the insanity defense. One of them, Montana, abolished it in 1979. The other three – Idaho, Kansas, and Utah – abolished theirs after John Hinckley, Jr., who tried to assassinate President Reagan in 1981, successfully pled insanity in 1982. All four states felt that the insanity defense gave some of the most violent criminals an easy way out; all they needed to do was feign craziness and fool the jury into acquitting them in order to get back



out “on the streets” and commit more violent crimes. Whatever the merits of this concern, the other forty-six states still provide for the insanity defense because of their adherence to two basic precepts: (a) a defendant is not culpable for his behavior if he is insane at the time; and (b) if a defendant is not culpable for his crime, then it is unjust to blame and punish him for it.

While these two precepts seem incontrovertible, the United States Supreme Court <sup>S.Ct.</sup> seems to have rejected them in *Kahler v Kansas*, 140 S.Ct. (2020). In a 6–3 decision, the majority reasoned that, despite first appearances, Kansas has not really abolished the insanity defense in the first place. Instead, they claimed, Kansas has retained it in two ways. First, it provides for a diminished-capacity defense, which allows the defendant to plead that her mental illness or disability prevented her from forming the mens rea required for the crime charged. Second, Kansas allows the defendant to offer mental-health evidence during the sentencing phase of his trial.

The problem with the majority’s decision is that it effectively invites Kansas and the three other abolitionist states – and any other state that now decides to abolish the insanity defense – to violate precepts (a) and (b) above. As the three dissenters (Justices Breyer, Ginsburg, and Sotomayor) argued, and as I argue in Levy (2020b), the diminished-capacity defense is not an adequate substitute for the insanity defense. The reason is that mens rea, which is what the diminished-capacity defense is all about, is not equivalent to culpability, which is what the insanity defense is all about. While an insane individual is, by definition, not culpable for her behavior, many insane individuals can still form the mens rea required for various crimes. From this false equivalence between the insanity and diminished-capacity defenses follow two bad results. The first is that the defendant who successfully pleads diminished capacity is still being blamed and punished, just to a lesser degree. And blame and punishment to *any* degree is unjust if the defendant was not at all responsible for her crime, which is the case if she was insane. The second is factual inaccuracy. By suggesting that a delusional defendant is entitled to diminished-capacity mitigation for (say) a violent crime, a jury is falsely implying that the defendant could not possibly have intended violence.

## 7 Conclusion

Criminal responsibility – culpability – is a foundational feature of every criminal justice system. As the United States strives to make its own criminal justice system less punitive, less costly, and more equitable, it should look to other countries for alternative perspectives on this universal concept. These alternative perspectives are not merely theoretical; they also have substantial, tangible ramifications for policing, criminal procedure, sentencing, prison conditions, post-conviction relief, and social attitudes.

### Note

- 1 Conceptually straightforward, that is. The standards of proof for the M’Naghten Rule, the Irresistible Impulse Rule, the MPC Rule’s cognitive prong, and the MPC Rule’s volitional prong vary across jurisdictions. Usually it is clear and convincing evidence or preponderance of the evidence.

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