

Stephen Kershner

Total Collapse: The Case Against Responsibility and Morality

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*I dedicate this book to my wife, Maryclaire
Koch:*

A hard-drinking hard-fighting Irishwoman

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About the Author

Stephen Kershner is a Distinguished Teaching Professor in the Philosophy Department at the State University of New York at Fredonia and an attorney. He focuses on applied ethics and political philosophy. He has written over eighty articles and chapters on such diverse topics as torture, affirmative action, reparations for slavery, pornography, hell, adult-child sex, discrimination, the most valuable player, capitalism, equal opportunity, slavery, sexual fantasies, and the nature of pleasure. He is the author of eight books, including *Does the Pro-Life Worldview Make Sense? Abortion, Hell, and Violence Against Abortion Doctors* (Routledge: New York, 2018), *Adult-Child Sex: A Philosophical Defense* (2015), *Gratitude toward Veterans: A Philosophical Explanation of Why Americans Should Not Be Very Grateful to Veterans* (2014), and *For Torture: A Right-Based Defense* (2012).

Chapter 1

Introduction



Abstract Morality is a fundamental part of our worldview. We view people as acting rightly or wrongly, making the world better or worse, and being virtuous or vicious. These policies are central to our justifying the ways we treat others, the people we befriend, our identities, and so on. Moral responsibility is also central to the notion that people can, and often are, praise- or blameworthy. We have a family of attitudes that presuppose moral responsibility. On the positive side we feel gratitude, pride, reciprocal love, and forgiveness. On the negative side, we feel resentment, indignation, anger, and shame. We also seem to have a distinct sort of love toward those who freely and reciprocally love us. Our daily view of the world is almost, if not completely, unimaginable without responsibility. In this book, I argue against (non-consequentialist) morality and morally responsibility.

Morality is a fundamental part of our worldview. We view people as acting rightly or wrongly, making the world better or worse, and being virtuous or vicious. These policies are central to our justifying the ways we treat others, the people we befriend, our identities, and so on.

Our view of life's permissions and duties depends on morality. We assume that people should live up to their promises, judges should be impartial, investment bankers shouldn't steal people's money, and physicians should try to benefit their patients. We condemn genocide and assume that parents shouldn't have sex with their children and hospital aides shouldn't rape anesthetized patients. Assumptions like these rest on more fundamental claims, such as the following.

- People have rights.
- If something increases people's average and total well-being and makes their well-being more equal, then, other things being equal, it makes the world a better place.
- It is good that people are virtuous or get what they deserve.
- Other things being equal, a life that is meaningful is better than one that is not.

If the arguments in this book succeed, then these statements are false or lack a truth-value, depending on one's theory of the truth-value of sentences that fail to refer to anything. The book focuses on non-consequentialist morality because the internal contradictions to it are a main focus of the book, but it explains why the responsibility-based arguments might apply to consequentialist morality.

To the extent that practical reason depends on being able to evaluate reasons for action on moral grounds, these results challenge the way in which we decide how to act. Other areas also depend on the existence of morality. Consider, for example, the arguments for God's existence.

Moral responsibility also lies at the heart of how we view the world. Moral responsibility is central to the notion that people can, and often are, praise- or blameworthy. We have a family of attitudes that presuppose moral responsibility. On the positive side we feel gratitude, pride, reciprocal love, and forgiveness. On the negative side, we feel resentment, indignation, anger, and shame. We also seem to have a distinct sort of love toward those who freely and reciprocally love us. Our daily view of the world is almost, if not completely, unimaginable without responsibility.

The philosophical costs of denying morality and moral responsibility are thus enormous. It does violence to philosophical positions that many people took a lifetime to develop. Worse, it does violence to our everyday view of people. A host of concepts that we rely on daily (desert, virtue, right, wrong, good, bad, praiseworthy, blameworthy, etc.) fail to refer to any property in the world and are thus deeply mistaken. I've come to these conclusions very reluctantly. Yet the arguments in this book are, as far as I can tell, sound. I've spent years discussing, presenting, and publishing them and they have held up. I thus present a series of arguments that threaten to undermine our theoretical and practical worldviews.

Here is a summary of the chapters and their role in bringing about the collapse of our worldview. My analysis breaks into two parts: an argument against morality and an argument against moral responsibility. The first part of the book argues that there is no morality in the sense that acts are neither obligatory nor wrong and results of actions are neither good nor bad or, perhaps more minimally, we do not know whether they are good or bad. The second part of the book argues that no one is responsible or even could be responsible.

1.1 Chapter One: Consent Fails

In the first part of the book, I argue that there are reasons to think that non-consequentialism fails. It fails because the heart of non-consequentialism is an attempt to show how people may treat others in the case of cooperation and conflict. Cooperation occurs via consent because it is through consent and its cousin promise that people voluntarily accept permissions and incur duties. In particular, it is the way in which people voluntarily change their perimeter of rights, specifically to their body and property.

Consent is, roughly, the means by which one waives a right and thus changes his perimeter of rights with regard to another. Consent lies at the heart of many topics in law, medicine, politics, and ethics. A common idea is that consent in itself matters toward the right and the good. This chapter rejects this idea. More specifically, it defends two theses. First, the maximization theory of consent is true. The maximization theory asserts, roughly, consent functions to maximize what justifies

rights (for example, autonomy or interests). Second, because the maximization theory is true, consent does not matter in and of itself. Specifically, consent by itself does not matter for the right or the good. If consent does not matter in and of itself, then non-consequentialism is in real trouble for consent is at the heart of how non-consequentialism handles moral transformation in the context of cooperation.

1.2 Chapter Two: Forfeiture Fails

Morality also has to handle conflict. It must explain who retains what right when one person uses a threat or uses violence against another. On some accounts, the heart of morality addresses what happens when individuals come into conflict. The best theory of what happens is forfeiture theory. It holds that when one person threatens or brings about an injustice to a second, the first forfeits his right against the second. The specific right forfeited (that is, the right to self-defense, punishment, or compensation), depends on where the two parties are in the sequence of unjust harm. Forfeiture not only gets our intuitions right about the mere permissibility of defensive violence, punishment, and compensation, it also explains why they are permissible and does so in a way that suggests that an intended victim does not act unjustly when she uses force. Specifically, she does not owe a duty to apologize for defending herself, demanding punishment, or seeking compensation. If forfeiture theory fails, as I argue it does below, then, again, non-consequentialism is in real trouble.

According to forfeiture theory, a person loses a right if and only if he waives it or forfeits it. Forfeiture theories explain when it is morally permissible to use defensive violence against people, punish them, and make them pay compensation. In this chapter, I focus on defensive violence. The theory asserts that except in the case where violence is necessary to avoid a catastrophe, only those who forfeit their rights are liable to defensive violence.

Consider objections to forfeiture theory. There are issues regarding how rights can be forfeited when what justifies them (for example, the right-holder's autonomy or interest) is still present. Also, forfeiture theory asserts that forfeiture occurs following an attempted attack, rather than a completed one, but it is unclear why an attempt by itself is an injustice at all, let alone one that warrants lethal violence.

The Achilles' heel of forfeiture theory, though, is that it depends on an attacker acting unjustly just in case he imposes an increased risk of a right-infringement (beyond a certain threshold) or imposes a risk that is a right-infringement. The former account (increased risk of a right-infringement) is problematic because posing a risk of right-infringement is not itself a right-infringement. Hence, it is not enough to make the attacker's action unjust. The latter account (increased risk is itself a right-infringement) is better but still problematic. It is problematic because the threshold of risk that justifies defensive violence intuitively seems to be arbitrary and, in any case, does not intuitively seem to be an injustice.

Some non-consequentialists reject forfeiture theory. Even if forfeiture theory fails, non-consequentialist must be able to explain the proportionality constraint on permissible defensive or punitive force. This is because every plausible non-consequentialist account holds that there is proportionality restriction on such violence. In the next chapter, I argue that no such account succeeds. Again, this is a major problem for non-consequentialism because one of the main concerns of morality, if not the main concern, is to handle conflict and defensive and punitive violence are paradigmatic conflicts.

1.3 Chapter Three: Proportionality Fails

In the seventh chapter, I argue that there is no satisfactory theory of proportionality in the context of punishment. By proportionality in punishment, I mean that there is a systematic positive relation between the seriousness of a person's wrongdoing and the maximum severity of punishment she may be given. Proportionality is a feature of most non-consequentialist theories of punishment, including forfeiture theory, retributivism, distributive-justice theory, and punishment as societal defense.

Consider the problems with proportionality. First, the plausible individual factors (responsibility, harm, and rights) do not apply to proportionality in a straightforward manner. Second, the plausible individual factors cannot be combined in an intuitively satisfying manner. Third, proportionality is odd in that it intuitively seems to apply in a different way to different areas of force, specifically, punishment, compensation, and self-defense. Moreover, proportionality does not apply to self-defense in a clear manner if it applies at all. Because this restriction is a central part of non-consequentialist theories of permissible threats and force, such theories are likely mistaken.

Where does the collapse of moral responsibility and morality leave us? If the above arguments succeed, then theoretical and practical frameworks are in tatters. I do not address that here other than to note that it will require a radical reworking of our worldview in the same way as other large-scale changes in our conceptual framework. I don't yet have an answer to how our worldview should change, but hope merely to justify why it must.

1.4 Chapter Four: Rights Fail and Why This Explains the Other Failures

Non-consequentialist theories fail because they depend on moral rights and people do not have moral rights. If people have rights, then they are justified by interests or autonomy, but they are not so justified. For example, interest-promotion is neither necessary nor sufficient for a right. The same is true for autonomy-promotion. The

absence of rights explains why consent does not matter, why people do not forfeit their rights, and why forfeiture is not governed by a principle of proportionality. The explanation is that rights are prior to consent and forfeiture so if the former do not exist, neither do the latter. Because forfeiture is prior to proportionality, there also is no proportionality.

A theory of morality that cannot handle voluntary change in moral relations (consent and promise) or conflict is a failed theory. This is one of, if not the main task, of morality. Because of the failure of rights, non-consequentialism fails.

1.5 Chapter Five: No Responsibility

In the second part of the book, I begin by arguing that individuals are not morally responsible. If an individual is morally responsible, then there is a responsibility-foundation that makes him morally responsible, but there is no such foundation. A responsibility-foundation is a basic responsibility-making fact that does not depend on a person being responsible for something else. This rests on the notion that if there were a responsibility-foundation, it would be either an ungrounded choice or an ungrounded character state and that neither is true.

The chapter then considers three types of objections. First, moral responsibility does not require a responsibility-foundation. Second, a character state can serve as the foundation. Third, we know people are responsible even if we don't know what the foundation is. These objections fail.

The appendices complement the fifth chapter. In the first appendix, I set out a theory of what responsibility is. The purpose of this appendix is that it clarifies what I am denying when I argue that people are not morally responsible. In the second appendix, I argue that God is also not morally responsible. This appendix aims to show that the absence of a responsibility is a conceptual truth and not one that depends on the finite or flawed nature of human beings.

1.6 Chapter Six: If There Were Responsibility, It Wouldn't Do Much Work

In the next chapter, I assume that, contrary to the above argument, individuals are morally responsible and then explore how narrow responsibility would be. Here I argue for internalism in moral responsibility. My argument is that connection and control are what make people morally responsible. Because connection and control consist of, and only of, reasoning (and mental states) that a person is phenomenally aware of, what makes someone responsible is such reasoning. Because such reasoning is an internal feature of a person, internalism in responsibility is true. Internalism in this context leads to a very narrow scope for responsibility. It is so narrow, for

example, the people are at most blameworthy for akrasia. I then explore the implications of this argument with regard to principal-agent responsibility, negligence, attempted versus completed crimes, and akrasia.

If the above analysis is correct, then our everyday judgments of moral responsibility are unreliable. I illustrate this by noting how it undermines our blame for genocidal leaders who used starvation and slaughter to serve their political goals. It also undermines our blame of drunk drivers. Note also that this theory makes moral-responsibility-based reasons, specifically rights and desert, unable to explain American consent-to-sex laws. Thus, if people are morally responsible at all, and they are not for the reasons mentioned in Chap. 2, the very narrow scope of responsibility changes the way we should think about a number of issues about which most of us feel strongly.

My arguments in this section develop and extend various arguments against moral responsibility, specifically Galen Strawson's argument that moral responsibility is impossible, Gideon Rosen and Michael Zimmerman's argument that people are not responsible for negligence, and discussions of responsibility internalism by Michael McKenna, Al Mele, Ishtiyaque Haji, and their interlocutors. My argument is unified by a focus on the foundation of responsibility and how, if there were such a foundation, it would lead to responsibility depending on, and only on, events that occur in the head.

1.7 Chapter Seven: No Responsibility No Morality

This chapter argues that if individuals are not morally responsible, then there is no morality. By no morality, I mean that there are no right or wrong actions, no good or bad states of affairs, and no other things with moral properties or, at perhaps less sweepingly, we do not know whether there are such things. Among the other moral properties that are sometimes thought to be independent of the right and the good are virtue, desert, fairness, meaningfulness, and so on. On my view these properties are sub-species of the right and the good. Hence, because the right and the good do not exist (in the sense that there are no instances of them), then neither do they.

My main argument in this chapter is that if people are not morally responsible, then there is no morality as it relates to matters that are up to us or, at least, we don't know whether there is morality on such matters. When it comes to the right, either consequentialism or non-consequentialism is true. Consider consequentialism. If we don't know whether determinism is true, then we don't know whether there are acts that produce more good than any other act available to the agent and hence we don't know whether there are obligatory or wrong acts.

Consider non-consequentialism. If non-consequentialism is true, then people have rights and rights protect autonomy. The notion that non-consequentialism depends on rights rests on a consideration of the most plausible non-consequentialist theories. The notion that rights protect autonomy depends on a theory of what best fits and justifies rights. Autonomy is inextricably linked to moral responsibility and, as argued above, people do not have it.

1.8 Chapter Eight: Other Responsibility Skeptics

In the last chapter, I compare my findings with the work of other responsibility skeptics: Ishtiyaque Haji, Neil Levy, Derk Pereboom, and Manuel Vargas. I will focus note how their skepticism bolsters my conclusion about responsibility and, also, how their conclusions with regard to morality relate to mine.

1.9 Appendix One: Nature of Responsibility

In the first appendix, I discuss moral responsibility in general terms. Some philosophers appear to analyze moral responsibility. I say “appear,” because it is unclear whether they are analyzing it or merely describing it. Aptness and desert theories of moral responsibility are the two most plausible analyses of it. They are the two accounts in the literature and are the only two that have a chance of being what constitutes moral responsibility. They both fail. As a result, moral responsibility is most likely a conceptually basic notion. It cannot be analyzed in terms of other concepts, although it still can be described and perhaps synonyms can be provided for it. It is similar to other conceptually basic terms, such as morality, obligation, and yellow.

1.10 Appendix Two: God Is not Responsible

In the second appendix, even if moral responsibility is possible, God is not morally responsible. If God is morally responsible, then he is maximally morally responsible. If God is maximally moral responsible, then the relation between his powers at a time and over time are not arbitrary, but they are. A first-order choice, higher-order choice, finite sequence of choices, and infinite sequence of choices all fail to be a non-arbitrary basic responsibility-making feature of him. In addition, there is no satisfactory answer as to whether a maximally responsible being can bind himself. If God is not morally responsible, then neither are people.

Part I
No Non-consequentialist Morality

Chapter 2

How Consent Works



Abstract In the first part of the book, I argue that there are reasons to think that non-consequentialism fails. It fails because the heart of non-consequentialism is an attempt to show how people may treat others in the case of cooperation and conflict. Cooperation occurs via consent because it is through consent and its cousin, promise, that people voluntarily accept permissions and incur duties. In particular, it is the way in which people voluntarily change their perimeter of rights, specifically to their body and property. Consent is, roughly, the means by which one waives a right and thus changes his perimeter of rights with regard to another. Consent lies at the heart of many topics in law, medicine, politics, and ethics. A common idea is that consent in itself matters toward the right and the good. This chapter rejects this idea. More specifically, it defends two theses. First, the maximization theory of consent is true. The maximization theory asserts, roughly, consent functions to maximize what justifies rights (for example, autonomy or interests). Second, because the maximization theory is true, consent does not matter in and of itself. Specifically, consent by itself does not matter for the right or the good. If consent does not matter in and of itself, then non-consequentialism is in real trouble for consent is at the heart of how non-consequentialism handles moral transformation in the context of cooperation. Consequentialism asserts that an act is permissible because, and only because, it brings about, whether directly or indirectly, as much good as any other act available to the agent. The direct-versus-indirect condition is designed to allow for rule-consequentialism. It is compatible with agent-relative or agent-neutral accounts of the good. For example, egoism as a moral theory might be seen as consequentialism about prudential good. On this account, consequentialism does not address things that are not acts (for example, motives), although it does address acts that bring these other things about. Non-consequentialism asserts that there are permissible acts and that consequentialism is false.

2.1 Introduction

In chapters two through five, I argue that non-consequentialism fails. It fails because the centerpiece of non-consequentialism is an attempt to show how people may

treat others in the case of cooperation and conflict. Cooperation occurs via consent because it is through consent and promise that people voluntarily accept permissions and incur duties. That is, it is the way in which people voluntarily change or eliminate their perimeter of rights. Because non-consequentialism is the most plausible theory of the right, this is a reason to think there is no morality.

Morality also has to handle conflict. It must explain who retains what right when one person uses violence or a threat against another. The best theory of what happens is forfeiture theory. It holds that when one person threatens to or brings about an unjust harm to a second, the first forfeits his right against the second. If forfeiture theory fails, as I argue in the next chapter, then, again, non-consequentialism is less likely to be true.

Consent is, roughly, the means by which one waives a right. A promise is, roughly, the means by which one creates a right.¹ Consent and promise lie at the heart of many topics in law, medicine, politics, and ethics. Consent is distinct from forfeiture, which is the unintentional loss of a right.² I will focus on consent here.

Terminology varies in this area. I will use “valid consent” to mean “consent that succeeds in waiving a right.” In law, what is required for valid consent (successful right waiver) varies with the context. To see this consider the following cases.

Case #1: Knowledge (Gambling, Marriage, and Buying a Home)

The law allows people to gamble despite being presented with little, if any, information on gambling odds or how the games work. It requires much more information for consent to medical treatment. The law also allows people to marry with little disclosure from the would-be spouse, but requires considerable disclosure to buy a house.

¹Here is my specific account of consent and promise. Consent occurs when one person waives a claim by using a term (or behavior) with conventional meaning to communicate to another her intention to waive the claim under conditions that result in such a waiver. The consenter loses claim and the recipient gets liberty. On my view, uptake is required. A promise occurs when one person waives a liberty by using a term (or behavior) with conventional meaning to communicate to another her intention to waive the liberty under conditions that result in such a waiver. The promisor loses liberty and the recipient gets claim. Again, uptake is required. The notion that valid consent occurs when one person waives a claim by using a term (or behavior) with conventional meaning to communicate to another her intention to waive the claim under conditions that result in such a waiver comes in part from John Searle, “What is a Speech Act?” in Max Black, ed., *Philosophy in America*, 221–239. Consent, like promise, thus has a bootstrap-like quality. See Charles Fried.

The idea for this account comes from work by Heidi Hurd and Larry Alexander. Heidi Hurd gives a sufficient condition for consent that reduces consent to a fine-grained intention that must match what the second person does. See Heidi Hurd, 121–146, esp. 134. Larry Alexander provides a sufficient condition that reduces consent to a forgoing of objection to, roughly, what the second does. See Larry Alexander, “The Moral Magic of Consent (II),” 165–174, esp. 168.

²People who assert that a criminal forfeits some of his moral rights include Stephen Kershnar, “The Structure of Rights Forfeiture in the Context of Culpable Wrongdoing,” 57–88, A. John Simmons, “Locke and the Right to Punish,” in A. John Simmons et al., eds., *Punishment* 238–252, Judith Jarvis Thomson, *The Realm of Rights* 365–366, Vinit Haksar, “Excuses and Voluntary Conduct,” 317–329, Murray Rothbard, *The Ethics of Liberty*, Alan Goldman, “The Paradox of Punishment,” 30–46; Roger Pilon, *Criminal Remedies: Restitution, Punishment, or Both?* 348–357. These theories differ with regard to whether right forfeiture is a fundamental feature of rights or explained by a more fundamental principle. A forfeiture theory of just war killing can be seen in David Rodin, *War & Self-Defense* pp. 70–77.

Case #2: Voluntariness (Gambling and Tattoo)

The law allows intoxicated people to consent to gamble, but not to get tattooed.³

Case #3: Competence (Surgery and Inheritance)

As a legal matter, confused thought patterns found in some elderly people might not invalidate consent to life-saving surgery, but might invalidate an attempt to revise a will.

In law, the knowledge, voluntariness, and competence required for valid consent varies with the context.⁴ It also appears to hold some people competent to consent to some sexual acts but not others.

Case #4: Teenage Sex (Same Age/Different Age)

A 16-year-old is a member of a private women's running club. The law allows that she can consent to have sex with a fellow 16-year-old, but not with a 35-year-old member.⁵

Case #5: Competence (Rape and Consent)

If a 16-year-old male forces an adult woman to have sex, he can be considered competent and may, and sometimes will, be tried as an adult. If a 16-year-old girl consents to have sex with an adult man, then she is considered incompetent and will not be found to have consented to the sex.⁶

Case #6: Competence (Sex and Moviemaking)

In Canada and in several U.S. states, an adult male may have sex with a 16-year-old, but if he takes a single naked picture of her, then he commits a (federal) felony against child pornography. The latter applies to anyone under the age of 18.⁷

At issue is whether, as a moral matter, consent is also context-dependent.

These cases might be seen to illustrate that valid consent depends on context and trade-offs. However, some of the cases (consider, for example, case #6) might be seen as describing the arbitrary way that the legal system works, not how it ought to work. This might lead us to doubt whether such cases illustrate how consent works morally. Even if some of these cases capture the arbitrary, and perhaps morally objectionable way, that the legal system functions, the below cases of context and tradeoffs intuitively seem to track the way consent works morally. The argument below can rest on them. The above cases illustrate the way in which knowledge,

³The United States Court of Appeals for the Third Circuit has held that under New Jersey dram shop law, a gambling casino patron cannot maintain a tort action against a casino to recover gambling losses that accrued while the casino allowed the intoxicated patron to gamble. See *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291, 292–93 (3d Cir.1995) (explaining dram shop liability refers to liability of tavern for acts of intoxicated patrons). For consent to tattoos, see Alan Wertheimer, “Consent to Sexual Relations,” in Franklin Miller and Alan Wertheimer, eds., *The Ethics of Consent: Theory and Practice* 195–220, esp. 216.

⁴The notion that these competence conditions are morally required for consent can be seen in See John Kleinig, “The Nature of Consent,” in Franklin Miller and Alan Wertheimer, eds., *The Ethics of Consent: Theory and Practice*, 3–24; Franklin Miller and Alan Wertheimer, “Preface to a Theory of Consent Transactions: Beyond Valid Consent,” in Franklin Miller and Alan Wertheimer, eds., *The Ethics of Consent: Theory and Practice*, 79–106.

⁵See NYS Penal Law Art. 130.05(3a), 130.25, 130.30, and 130.35.

⁶See Jess Bering, *Perv: The Sexual Deviant in All of Us*, pp. 149–150.

⁷See Bering, *Perv: The Sexual Deviant in All of Us*, 204–205.

voluntariness, and competence relate to one another and consent. In addition, some of the cases (consider, for example, cases #1 through #3) might track the way we think that consent morally works or, at least, illustrate the asymmetrical role of different factors with regard to valid consent.

2.2 Theses

A common idea is that consent in itself matters toward the right and the good. This chapter rejects this idea. More specifically, it defends two theses.

Thesis #1: Maximization Theory. The maximization theory of consent is true.

The maximization theory asserts, roughly, that consent functions to maximize what justifies rights (for example, autonomy or interests). Leave aside whether it does so in a particular context or in general and whether it does so across a range of actual or hypothetical cases. Specifically, the model asserts that the features (dimensions) of consent depend on, and only on, the degree to which it maximizes the ground of rights.

This thesis in part supports the second thesis.

Thesis #2: Not Matter. Consent in and of itself does not matter.

Specifically, consent by itself does not matter for the right or the good.

The dimensions of consent include its function (when and why it eliminates a right), quality (the degree to which the consentor must be morally responsible to give valid consent), distribution (to whom valid consent is given), and stringency (the moral strength of consent compared to other moral reasons). The dimensions can be moral or legal, depending on the issue. This chapter focuses on its moral dimensions.

The maximization theory has competitors. A satisficing theory of consent asserts that the dimensions of consent depend on, and only on, the degree to which it satisfies the ground of rights. A constant threshold theory of consent asserts that the dimensions of consent do not vary with context. The constancy might hold across people, situations, or both.

Also, here are few more assumptions. A right is a claim. The ground of a right is that it protects or promotes autonomy or, perhaps, an interest. Depending on the account, autonomy is either moral responsibility or the internal conditions necessary for it.

It is a big problem for non-consequentialism if consent, in itself, doesn't matter. This is true even if it derivatively matters for things like interests and autonomy. The reason for this is that consent and promises are the ways in which people change their and others' rights and, thus, the boundaries of their legitimate interests and the sphere in which they may permissibly exercise their autonomy. Consent and promise are the ways in which people directly change these boundaries with others. Versions of non-consequentialism that leave out this ability to directly change their

boundaries leave out an important part of the picture, and perhaps justification of non-consequentialism, the nature and value of a self-shaping life.

The assumption here is that the most plausible versions of non-consequentialism involve deontology at some level (consider, for example, Kantianism and contractualism). This is true even for seemingly non-deontological theories such as virtue theory. The idea behind this assumption is that non-consequentialism is a theory of the right and non-deontological theories have to eventually explain why the right does not always involve maximizing the good. Thus, even a virtue theory must eventually justify a deontological principle. The centrality of consent to deontology, at least the most plausible versions of it, are what make the problem with consent a serious one for non-consequentialism.

2.3 Argument for Thesis #1 (The Maximization Theory of Consent Is True)

The argument for the first thesis is as follows.

- (P1) What constitutes valid consent depends on context and trade-offs.
- (P2) If what constitutes valid consent depends on context and trade-offs, then the maximization theory of consent is true.
- (C1) Hence, the maximization theory of consent is true [(P1), (P2)].

Premise (P1) rests on the idea that what constitutes valid consent depends on context and trade-offs. Consider context. The contextual feature of consent can be seen in three areas: overall competence (quality of consent), the degree to which the consenter has the different aspects of competence (conditions of consent), and the moral force of consent.

First, consider quality of consent. This is the degree to which a person is morally responsible for her consent, that is, the degree to which she is competent. The quality of consent required to change a moral relation (that is, make consent valid) varies with context in part because the degree of threat to a self-shaping life (or interest) varies with context.

Case #7: Marriage and Coffee

Consent to marry a husband is more closely related to a self-shaping life than consent to purchase coffee.

Second, consider the threshold for different aspects of competence. In particular, consider the level of knowledge, voluntariness, and competence required for consent to be effective. This also varies with context because the relevant threat to a self-shaping-life decision (or interest) differs with the situation.

Case #8: Surgery and Sex

Knowledge about what one is consenting to via major surgery is often more closely connected to a self-shaping life than knowledge about one's sexual partner. The opposite might be true of

Table 2.1 Features of Consent

Feature	Change	Varies with context?	Example of contextual variation
Threshold for valid consent	Overall quality of consent required to change a moral relation (specifically, overall level of the combination of competence, information, and voluntariness)	Yes Degree of threat to a self-shaping life varies with context	Case #7
Threshold for conditions of valid consent	Level of knowledge, voluntariness, and competence (taken individually) required for consent to be effective	Yes Relevant threat to self-shaping-life decision varies with context	Case #8
Moral force	Strength of moral duty (or other Hohfeldian relation) that consent overrides or undermines	Yes The moral effect of consent depends on the degree to which the consentor is morally responsible for doing so	Case #9

voluntariness given that in the context of major surgery, there is often extreme psychological pressure and a vast difference in payoffs based on one's choice and, on some accounts, one or more of these factors makes consent less voluntary.⁸

Third, consider the moral force of consent. This is the strength of moral right (or other Hohfeldian relation) that consent would override or undermine.⁹ This varies with context because the moral effect of consent depends on the degree to which an individual is morally responsible for consenting and this varies with the individual and her situation.

Case #9: Teacher [Vladimir Nabokov]

For example, a bright 13-year-old girl who knows something about sex and who very willingly consents to have sex with a 25-year-old teacher might not be able to give consent with sufficient quality to make it permissible, but the sex is less wrong than that involving a slow 13-year-old who knows little about sex and consents out of fear.

Here is a summary of these findings (Table 2.1).

⁸For the notion that psychological pressure is related to coercion and, thus, to undermining voluntariness, see This example comes from Robert Nozick, "Coercion," pp. 440–472 and Joel Feinberg, *Harm to Self*, chs. 23–24.

⁹For a discussion of the strength of a right, see Samantha Brennan, "How Is the Strength of a Right Determined? Assessing the Harm View," pp. 383–93.

Table 2.2 Consent to Sex

Blood-alcohol level for incompetence	Benefit	Cost
High	More sex More drinking Consent to high-level requirement Fewer unfair prosecutions	More unwanted sex More rapes
Medium		
Low	Less unwanted sex Fewer rapes	Less sex Less drinking Dissent from high-level requirement More unfair prosecutions

What constitutes valid consent also involves trade-offs. This is in part because the level of the threshold for quality of consent balances negative and positive freedom. It is also in part because allowing a person to more strongly bind herself at a later time increases her autonomy at an earlier time and lessens her autonomy at a later time. It is in part because allowing second-order preferences to trump first-order preferences increases second-order autonomy and lessens first-order autonomy.

First, consider a case that illustrates the trade-off between negative and positive freedom. This can be seen in the legal blood-alcohol limit for a person to be able to validly consent to sex and its moral analogue. The trade-off for a population looks like the following (Table 2.2).

Second, consider that allowing a person to more strongly bind himself later increases his autonomy at an earlier stage and lessens his autonomy at a later stage.

Case #10: Gambling

In Atlantic City, NJ, a person wants to ban his ability to gamble in the future. He so notifies the casinos.¹⁰

Case #11: Loop in Time

A person circles back in time. His earlier and later selves differ as to whether to marry Alice.

Case #12: Paradox of Sovereignty

¹⁰Here is New Jersey’s description of its self-exclusion program, State of New Jersey, “Self-Exclusion Program For Atlantic City Casino Facilities Including Internet Gaming or Internet Gaming Only,” http://www.nj.gov/oag/ge/docs/brochure_selfexclusion_2013.pdf.

On some accounts, state punishment is justified because offenders consent to it. The consent theory of punishment is defended in C. S. Nino, “A Consensual “Theory of Punishment,” pp. 94–111, C. S. Nino, “Does Consent Override Proportionality?” *Philosophy and Public Affairs* 15:2, 183–187, and C. S. Nino, *The Ethics of Human Rights*. The theory here is similar to the way in which people can ban themselves from casinos.

A legislature binds future legislatures by incorporating its policies into constitutional amendments. It can even change the difficulty of further amending the constitution.¹¹

Case #13: Strict Mother

A strict Catholic mother makes her 18-year-old daughter promise never to have oral or anal sex, even when married, because the mother views these acts as unhealthy and ungodly. A few years later, the daughter promises her new husband to try both as part of sexual experimentation following their purchase of *The Joy of Sex*.¹²

Note the talk of stages does not have to imply that people have temporal parts. Rather, it might refer to the degree to which he has control over his life at any one time.

Third, consider that allowing second-order preferences to trump first-order preferences increases second-order autonomy and lessens first-order autonomy.

Case #14: Lesbian

A religious woman disapproves of her desire to have sex with women and promises herself not to do so. At a moment of weakness, she does. Her decisive commitment and identification are unstable in that they oscillate between the desires at the two levels.

Case #15: Paradox of Omnipotence

An omnipotent but jealous god binds himself so that he cannot do hateful things out of anger or jealousy.¹³

The second-order desires are global (that is, a life-plan) in some cases, but not in others.

Premise (P2) rests on the notion that if what constitutes valid consent depends on context and trade-offs, then it is likely a maximization property. The underlying idea is that these features are evidence of maximization. It also rests on the notion that if what constitutes valid consent is likely a maximization property, then the maximization theory of consent is true. The background idea is that the close relation between consent and a claim-right occurs because they focus on the same thing and depend on the same ground.

The reason that context and trade-offs are evidence of maximization is that such effects are what one would expect if consent functions to maximize interests, autonomy, sovereignty, or so on. Without such a maximization function, it is hard to know what would determine when context is relevant and when one factor is traded off for another. It intuitively seems that the thing to be maximized is what justifies a claim because of the interlocking relation between consent and a claim. Consent functions to waive a claim and, aside from forfeiture, it is the only way that one can lose a claim. The maximization function of consent along with the interlocking relation between consent and a right suggest that what consent maximizes is what justifies

¹¹A related notion is that consent generates political legitimacy in part based on whether people consented to the conditions under which one consent to the state can be seen in See A. John Simmons, "Political Obligation and Consent," 305–328.

¹²The mother's thinking is in line with Catholic doctrine. The Church's doctrines rest on the following principle: sexual pleasure is morally disordered when sought for itself, isolated from its procreative and unitive purposes. See Catechism of the Catholic Church 2351. For an application of this to oral and anal sex, see Ronald L. Conte Jr., "May the Marriage Bed be Immaculate".

¹³The idea for this comes from J. L. Mackie, "Evil and Omnipotence," 200–212.

a claim. Our intuitions about how will and benefit theories would function in the context of consent further bolster this interlocking relation.

2.4 The Argument for Thesis #2 (Consent in and of Itself Does not Matter)

The second thesis rests on the following claims:

- (C1) Hence, the maximization theory of consent is true [(P1), (P2)].
- (P3) If the maximization theory of consent is true, then consent (in and of itself) does not matter.
- (C2) Hence, consent does not matter. [(C1), (P3)].

Premise (P3) rests on the following: If consent functions to maximize something (for example, autonomy or interest), then what matters is maximizing that thing. Consent is relevant, if at all, because it has a causal or evidentiary relation to it.

Let us turn now to objections.

2.5 Objections

2.5.1 *Objection to Thesis #1*

One objection is that context and trade-offs are present because consent protects a certain aspect of autonomy: narrative control. On this account, the value of moral responsibility is a type of self-expression that is similar to artistic self-expression in that the morally responsible individual is writing part of the book of his life.¹⁴ This theory is connected to the idea that life has a narrative structure and this structure affects how well a life goes as well as its meaning and value.¹⁵ The objector might further argue that protecting narrative control involves a side-constraint against interfering with decisions and a side-constraint contradicts maximization.

The problem with this objection is that a narrative control theory still needs to explain the contextual variation in overall quality of consent, required level for each condition of consent, and moral force. It also must handle trade-offs. It is hard to see how this can be done without maximization. The satisficing theory faces the same problems with context and trade-offs and thus also conflicts with side-constraint theories that do not allow for such things. Narrative control arguably just is autonomy at a particular time and if autonomy is valuable, the standard consequentialist concern

¹⁴See John Martin Fischer, "Responsibility and Self-Expression," 277–297.

¹⁵See J. David Velleman, "Well-Being and Time," 48–77.

that, other things equal, it should be maximized reappears.¹⁶ This is true even if the maximization applies only to autonomy in someone's life rather than to the good more generally.

On some accounts, the consentor's autonomy alone is not sufficient for valid consent. Rather, extrinsic features such as successful communication and uptake by the consent recipient are also necessary. Uptake occurs when the consent recipient accepts the consent, thereby activating it in the same way that, in law, an offer and acceptance are both required for a contract to be created. If correct, it is not clear whether other values (for example, fairness) creep in as a way of explaining these other features.¹⁷ The issue, then, is whether these other values in part determine the parameters of consent and do so via maximization.

A second objection is that the constant threshold theory of consent is true. A proponent of this theory might assert that as a moral matter, consent has constant features across different situations (that is, it is contextually insensitive and does not involve trade-offs). The objector might concede that law need not track morality here, but note that this is a common feature of rules that have to be workable and efficient as well as just.

This objection fails because the properties relevant to the thresholds are continuous and sharp cutoffs without a further explanation are arbitrary. The further explanation cannot be in terms of narrative control itself, because we are seeking to explain how narrative control works. The proponent might reply that the threshold-levels and moral force are fundamental features of narrative control. A feature is fundamental when it explains something else but is itself either self-explained or unexplained. However, given the close relation of narrative control to moral responsibility and the continuous nature of moral responsibility, it is hard to see why narrative control would have thresholds that are fundamental features of the moral world.

A third objection is that this argument faces a trilemma. On the above theory, consent depends on maximization. Also, rights depend on consent because they can be lost via consent. However, the objector continues, rights do not depend on maximization. This is true if one accepts the widely held notion that rights trump consequences (for example, utility).¹⁸ The problem with this objection is that the good to be maximized on consequentialism is not necessarily the thing to be maximized on the maximization theory. The latter is confined to what grounds rights (for example, autonomy or interests, perhaps of an individual or population) and might exclude other good things. Examples of the latter might include non-welfarist goods (for example, beauty, virtue, and desert-satisfaction).

¹⁶For the notion that appeals to autonomy beg the question by just asserting that non-maximizing acts are permissible, see Shelly Kagan, *The Limits of Morality*, esp. 236–238.

¹⁷The idea for this point comes from Franklin Miller and Alan Wertheimer, "Preface to a Theory of Consent Transactions: Beyond Valid Consent," 79–106.

¹⁸See Robert Nozick, *Anarchy, State, and Utopia*, pp. 28–32; and Ronald Dworkin, *Taking Rights Seriously*, p. xi.

2.5.2 *Objections to Thesis #2*

One objection is that there are instances when two cases differ morally and the only difference is consent, hence, consent by itself matters.

Case #16: Old Hammer

Neil has an old hammer lost in a field behind his house. In one case, Steve gets Neil's permission to take it. In a second case, Steve doesn't get permission. Because the hammer would not have been otherwise discovered, it does not diminish Neil's autonomy, interest, or whatever else grounds rights. Intuitively, it seems that it is permissible for Steve to take Neil's hammer in the first case but not the second.

The general problem here is that what justifies rights and consent (for example, protecting interests or autonomy) is not always present in each instance in which a right is present or consent is given.¹⁹ Because this issue is a concern for most, if not all, theories of rights and consent, it is not a distinct problem for maximization theory.

Note that at least one person reports that he lacks the supposedly commonsense intuition in the above case. If this intuition is not held or, perhaps, widely held, then the objection against the maximization theory does not get off the ground. The intuition that consent makes a difference in this case may depend on the degree to which one intuits that people have property rights to things they neither want nor value.

Second, a proponent of consent mattering in and of itself, might argue that consent is constitutive of an autonomous decision with regard to changing a moral relation. The idea is that via consent, a person commits to something. Because commitment is the distinctive way in which life is self-shaped and because a self-shaping life matters in and of itself, consent matters in and of itself. The analogy here is to the way in which, via endorsement, a person shapes who he is by decisively committing to certain desires or values.²⁰

The problem with this objection is that it does not solve the parameters of consent (specifically, threshold of quality of consent, threshold in each condition of consent, and moral force). What solves them does the justificatory work and is what, by itself, matters. The ground here might focus on commitment, but not every act of consent is a commitment nor is every commitment an act of consent.

Here is a second version of this objection. An objector might claim that there are other isolation cases when it can be seen that consent is morally effective.²¹ Because my argument is a claim about the way in which morality operates necessarily, the objector notes that all he needs is a possible case when consent is effective. Here is such a case.

¹⁹For a discussion of this issue, see Rowan Cruft, "Why Is It Disrespectful to Violate Rights?" *Proceedings of the Aristotelian Society* CXIII, 201–224; Matthew Kramer, "Refining the Interest Theory of Rights," *American Journal of Jurisprudence* 55, 31–3.

²⁰See Gerald Dworkin, "The nature of autonomy," 203–213 and Harry Frankfurt, "Freedom of the Will and the Concept of a Person," *Journal of Philosophy* 68, 5–20.

²¹I owe this objection to Javier Hidalgo and James Stace Taylor.

Case #17: God's Preference

God wants Alice to marry Bob. God knows that that doing so is in Alice's interest and will increase her autonomy more than her not doing so. Alice knows that God wants this, God only wants what will increase her interest and autonomy (or whatever else grounds rights), and that this applies in her case. Still, it seems that her consent to marry Bob is necessary for the marriage to occur.

Here, the objector continues, it intuitively seems that Alice's consent is morally relevant and my theory cannot account for this.

There are two problems with this objection. First, if Alice is intentionally choosing to do something that is not in her interest and does not suffer from akrasia, then she is irrational. If she is irrational, she is not morally responsible for her decision (at least as far as the particular decision) and hence her consent is morally ineffective.

It is worth noting that on some accounts, ones to which I am sympathetic, akratic actions are always irrational. If so, then Alice is irrational whether or not she suffers from akrasia. I put this condition in the above argument to strengthen the intuition for Alice being irrational.

Second, and more importantly, a divine-command-type dilemma applies here. Consider whether there is something that makes her consent morally effective. If there is, then this is what justifies it. Because the hypothetical prevents there from being any such justifier, the case prevents this horn from being true. If there is no such justifier, then there is nothing that makes consent morally effective. If so, then it is arbitrary, but it cannot be arbitrary that consent is morally effective. Such a dilemma applies to any attempt to show that consent is morally effective by screening out any maximized (or, perhaps, satisfied) factor and then trying to get a case when, intuitively, consent is still morally effective.

An objector might be unimpressed with my claim that, by itself, consent plays no moral role. I defend this claim by arguing that there either is or is not something that makes consent morally effective and that in the first case consent would not play a role in and of itself (instead, the underlying factor would) and in the second case consent would be arbitrary. The objector might respond that arbitrary cannot mean lacking an underlying factor because then the argument would beg the question. Instead, a consent theorist might argue that consent is basic. By this, he means, consent is a fundamental moral justifier in that it justifies actions (that is, makes them right or wrong), but is not justified by something else.

The problem with the objection is two-fold. First, consent intuitively seems to depend on a justifying fact (for example, autonomy). This is why it tracks factors such as competence, voluntariness, and knowledge. It depends on these factors because they (whether individually, collectively, or via a third factor) justify consent in the sense that they make consent matter, if in fact it matters.

Second, consent is not a plausible basic feature of the moral world. Depending on the theory, it is speech act and it is implausible that a speech act is a fundamental feature of the moral world. It does not seem to be the sort of thing that is in itself morally transformative. This is particularly true given that many speech acts are not morally transformative. Similar reasoning applies if consent is a mental event rather than a speech act.

Table 2.3 Objections

Thesis targeted	Objection	Response
#1	Narrative control justifies consent and it doesn't allow for maximization	1. Narrative control can't explain contextual and trade-off features of consent 2. Narrative control alone might not be able to explain the role of aspects of consent that are external to the consenter
#1	The constant threshold theory is true	This theory can't explain the contextual and trade-off features of consent
#1	Maximization theory generates a trilemma 1. Consent depends on maximization 2. Rights depend on consent 3. Rights do not depend on maximization	The good to be maximized on maximization theory is different from what is to be maximized on consequentialism
#2	There are instances when two cases differ morally and the only difference is consent. Hence, by itself, consent matters	This objection is not a distinct problem for maximization theory
#2	Consent matters because it is a type of commitment and a commitment is the way in which one shapes her life	Not every act of consent is a commitment nor is every commitment an act of consent
#2	There is a possible case in which consent matters even though it does not maximize whatever grounds a right	Consider whether there is something that makes consent morally effective 1. If there is, this conflicts with the possible case 2. If there is not, then it is arbitrary that consent is morally effective and it is not

Here is a summary of the objections and responses (Table 2.3).

2.6 Conclusion

This chapter argued that the maximization theory of consent is true and that consent, in and of itself, does not matter. The argument for the maximization theory rests on two premises: what constitutes valid consent depends on context and trade-offs and if what constitutes valid consent depends on context and trade-offs, then the maximization theory of consent is true. The argument for the notion that consent doesn't matter rests on the truth of the maximization theory and the notion that if consent functions to maximize something (for example, autonomy or interest), then

what matters is maximizing that thing. Consent is relevant, if at all, because it has a causal or evidentiary relation to it.

Valid consent depends on context and the context depends on trading off costs and benefits. If this is correct, a cost-benefit analysis (for example, an economic approach) explicitly weighs costs and benefits and thus is likely a good way to determine its context-dependent dimensions and when consent is valid.²²

This result poses a threat to non-consequentialist morality if non-consequentialist morality has rights at its heart and consent is inextricably linked to the loss and gain of rights. The idea behind the former is that non-consequentialist morality largely focuses on side-constraints on the treatment of others and that these side-constraints consist of rights. A right on this account is, or includes, a claim and a claim is a duty from the perspective of the person owed it. One important species of claim is the duty not to interfere with others' bodies or property. A background assumption here is that other non-consequentialist moral properties (for example, desert, fairness, and exploitation) either ground rights or are plausible only within a right-based framework. The notion that consent is inextricably linked to rights depends on the notion that rights set boundaries on what people may do to us and that closely related to this notion is that individuals modify these boundaries via consent and promise.

Virtue-based non-consequentialism might escape this threat, but it is implausible. Virtue-based theories of the right assert that virtue explains how people should treat others. The right-action-making feature has to rest on some feature of the person who is acted upon and the most plausible feature is having a moral right or what grounds it. The right-action-making feature has to rest on some feature of the person because a virtuous attitude or disposition is going to focus on something like whether a person loves something that is good, hates something that is evil, or, alternatively, focuses on the golden mean. First, these attitudes are not specific enough in a particular situation to make an action right or wrong. For instance, a husband's love of an abusive spouse does not by itself tell him whether he should leave her or push for marital therapy. Second, a virtuous attitude need not be accompanied by a true belief and so a person might be virtuous even though his action depends on a mistake. For instance, the virtue of love counsels different things depending on whether a wife is in bed with her husband or, unbeknownst to her, his identical twin. Third, a virtuous attitude is made virtuous in a particular situation because it tracks what it should. It does so only if there is an independent right-action-maker and, if there is, then the right is independent of virtue. Fourth, virtuous attitudes or dispositions may conflict and perhaps do so without one virtue meriting priority. If so, it is unclear that contradictory actions can both be right because they are warranted by competing virtues. Consider, for example, when a son discovers that decades earlier his beloved and now elderly German mother had tortured and executed Soviet prisoners of war

²²I am grateful to Spencer Case, Eric Chwang, Jim Delaney, Neil Feit, David Hershenov, Javier Hidalgo, Alice Hodge, John Keller, Bob Kelly, James Stace Taylor, and Dale Tuggy for their extremely helpful comments and criticisms of this paper. I am also participated in superb conversations of it with the PANTC Bioethics Reading Group and State University of Philosophy Department of Philosophy and with participants in 2016 Ethics of Bodily Commodification Conference and 2015 Rocky Mountain Ethics Congress.

following a series of rapes in her village. It is plausible to think that virtues of love and justice support conflicting actions and that even if they are, in this situation, equally weighty, it is unclear that turning her in and not doing so can both be right.

Chapter 3

Problems with Forfeiture



Abstract The best theory of killing under non-consequentialism, forfeiture theory, has serious problems. At the heart of morality is an attempt to tell people how to behave when there is conflict (for example, threats and violence). If forfeiture is the best non-consequentialist theory and it fails to provide an adequate account of conflict, then non-consequentialism fails at a task that is central to morality.

3.1 Introduction

Morality also has to handle conflict. It must explain who retains what right when one person uses a threat or uses violence against another. On some accounts, the heart of morality addresses what happens when individuals come into conflict. The best theory of what happens is forfeiture theory. It holds that when one person threatens or brings about an injustice to a second, the first forfeits his right against the second. The specific right forfeited (that is, the right to self-defense, punishment, or compensation), depends on where the two parties are in the sequence of unjust harm. Forfeiture not only gets our intuitions right about the mere permissibility of defensive violence, punishment, and compensation, it also explains why they are permissible and does so in a way that suggests that an intended victim does not act unjustly when she uses force. Specifically, she does not owe a duty to apologize for defending herself, demanding punishment, or seeking compensation. If forfeiture theory fails, as I argue it does below, then, again, non-consequentialism is in real trouble.

According to forfeiture theory, a person loses a right if and only if he waives it or forfeits it. Forfeiture theories explain when it is morally permissible to use defensive violence against people, punish them, and make them pay compensation. In this chapter, I focus on defensive violence. The theory asserts that except in the case where violence is necessary to avoid a catastrophe, only those who forfeit their rights are liable to defensive violence.

Consider objections to forfeiture theory. There are issues regarding how rights can be forfeited when what justifies them (for example, the right-holder's autonomy or interest) is still present. Also, forfeiture theory asserts that forfeiture occurs following

an attempted attack, rather than a completed one, but it is unclear why an attempt by itself is an injustice at all, let alone one that warrants lethal violence.

The Achilles' heel of forfeiture theory, though, is that it depends on an attacker acting unjustly just in case he imposes an increased risk of a right-infringement (beyond a certain threshold) or imposes a risk that is a right-infringement. The former account (increased risk of a right-infringement) is problematic because posing a risk of right-infringement is not itself a right-infringement. Hence, it is not enough to make the attacker's action unjust. The latter account (increased risk is itself a right-infringement) is better but still problematic. It is problematic because the threshold of risk that justifies defensive violence intuitively seems to be arbitrary and, in any case, does not intuitively seem to be an injustice.

Some non-consequentialists reject forfeiture theory. Even if forfeiture theory fails, non-consequentialist must be able to explain the proportionality constraint on permissible defensive or punitive force. This is because every plausible non-consequentialist account holds that there is a proportionality restriction on such violence. In the next chapter, I argue that no such account succeeds. Again, this is a major problem for non-consequentialism because one of the main concerns of morality, if not the main concern, is to handle conflict and defensive and punitive violence are paradigmatic conflicts.

Here I argue that the best theory of killing under non-consequentialism, forfeiture theory, has serious problems. Along with the problems in the previous and next chapters, these problems should warrant our rejecting non-consequentialism. At the heart of morality is an attempt to tell people how to behave when there is conflict (for example, threats and violence). If forfeiture is the best non-consequentialist theory and it fails to provide an adequate account of conflict, then non-consequentialism fails at a task that is central to morality. In the next chapter, I argue that even if forfeiture theory is false, non-consequentialism fails more broadly to provide an adequate account of conflict because it cannot handle proportionality. Proportionality is one of the most intuitively compelling features of non-consequentialism and a reason to adopt it over consequentialism.

3.2 How Forfeiture Works

Here is a brief account of how forfeiture works. A person loses a right if and only if he waives it or forfeits it.¹ One person forfeits his right relative to a second if and

¹A forfeiture theory of just war killing can be seen in David Rodin, *War & Self-Defense*, pp. 70–77. People who assert that a criminal forfeits some of his moral rights include Stephen Kershnar, "The Structure of Rights Forfeiture in the Context of Culpable Wrongdoing," 57–88, A. John Simmons, "Locke and the Right to Punish," 238–252, Judith Jarvis Thomson, *The Realm of Rights*, 365–366, Vinit Haksar, "Excuses and Voluntary Conduct," 317–329, Murray Rothbard, *The Ethics of Liberty*, Alan Goldman, "The Paradox of Punishment," 30–46; Roger Pilon, *Criminal Remedies: Restitution, Punishment, or Both*, 348–357. These theories differ with regard to whether right forfeiture is a fundamental feature of rights or explained by a more fundamental principle.

only if the first acts (or acted) unjustly toward the second or, perhaps, is (or was) an unjust threat to him.

Here are the underlying concepts. One person is a threat if and only if he is all or part of a causal sequence that increases the risk of harm to another. An unjust threat is a threat that occurs via a right-infringement. An innocent threat is one who is innocent and a threat, but not an attacker. An attacker is one who attacks someone. One person attacks a second if and only if the first tries to cause harm to another. An innocent attacker is an attacker who is not blameworthy for his attack. A violent attacker tries to cause harm to another's body or property. Violence is defensive when it responds to an unjust attack. On a subjective account, it must be intended to respond to an attack. On an objective account, it must be causally connected to blunting an attack.

Forfeiture theories explain when it is morally permissible to harm people, make them pay compensation, and punish them. The motivation for this argument is that forfeiture theory provides the best account of self-defense, punishment, and compensation. In this article I focus on defensive violence. The theory asserts that except in the case where violence is necessary to avoid a catastrophe, only those who forfeit their rights are liable for defensive violence. The theory also has implications for which, if any, of the commonly-cited restrictions limit defensive violence (imminence, necessity, proportionality, and discrimination).

Forfeiture theories vary in terms of whether in order to forfeit a right, an attacker must be blameworthy for an attack or morally responsible for putting another at risk.² On my account, forfeiture does not require blame or responsibility. Consider the following case.

Case 1: Psychotic Aggressor

A woman's companion in an elevator goes berserk and attacks her with a knife. There is no escape: the only way for her to avoid serious bodily harm or even death is to kill him with her gun. The assailant acts purposely in the sense that he means to further his aggressive end. He does act in a frenzy or in a fit, yet it is clear that his conduct is non-responsible. If he were brought to trial for his attack, he would have a valid defense of insanity.³

Intuitively, it seems that the woman may defend herself even though the attacker is neither blameworthy for the attack nor responsible for imposing a relevant risk on the woman.⁴ The explanation for why these responsibility-related conditions are irrelevant is that moral rights protect an individual's autonomy and forfeiture is part of this function. A victim's autonomy can be set back by acts for which another is not morally responsible as well as ones for which he is responsible. For example, the woman loses her life and thus her autonomy in the above case when the attacker

²See Jeff McMahan, *Killing in War*, 51–60. Jeff McMahan, "On the Moral Equality of Combatants," 377–393, Jeff McMahan, "The Basis of Moral Liability to Defensive Killing," 386–405.

³See George Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 367–390, esp. 371.

⁴For a similar conclusion, see A defense of the notion that culpability, responsibility, and agency are not necessary for liability to defensive violence, see Judith Jarvis Thomson, "Self-Defense," 283–310 and Judith Jarvis Thomson, "Self-Defense and Rights".

succeeds regardless of whether he is responsible. If moral rights rest on autonomy of the right-holder and forfeiture reflects that justification, then forfeiture can occur regardless of whether the attacker is morally responsible.

If the attacker doesn't have rights in virtue of not being morally responsible, whether temporarily or permanently, then forfeiture does not justify defensive violence against him. One can't lose what he doesn't have. In such a case, the defender has options similar to what happens when the attacker forfeits his rights.

Forfeiture theory is the non-consequentialist's theory's best hope to handle proportionality. This is true because it is the most plausible theory of what makes threats and violence permissible (including defensive, punitive, and compensatory forms). A right normally makes it wrong for one person to use force, fraud, or theft against another. If, in some cases, force, fraud, or theft against someone is permissible, his right against these things must be lost (via consent or forfeiture), overridden, or not in conflict with it by being narrow in scope (thereby allowing the seeming right infringement).

The right is not lost via consent because it is false, as an empirical matter, that aggressors, offenders, and so on consent to lose a right. They simply do not intend to lose a right, even temporarily, and, in some cases, don't think they should have to do so. For example, husbands who think they have a God-given right to beat their wives do not consent to lose a right.

The right is not overridden because overridden rights generate a residue duty. For example, when one person infringes a second's right in order to avoid a catastrophe (for example, by stealing someone's food and giving it to her family to keep them alive), the residue duty results in the first owing compensation or, at least, an apology to the second. Intuitively, though, in the case of just self-defense, the defender does not owe the attacker compensation or an apology.

The narrow scope notion is that a right has a complex content. For example, a person does not have a right to control her body rather she has a right-to-control-her-body-unless-she-unjustly-attacks-someone-or-previously-did-so-or-... . The problem with this theory is that it does not justify when someone may use defensive violence, punish, or enforce compensation. Rather, the complex structure of the right makes it a conclusion of what justifies these things. The problem is that it intuitively seems that rights justify what people may do rather than merely summarizing the balance of justificatory reasons. Also, the narrow scope theory is extensionally indistinguishable from a forfeiture theory because both allow the same actions in the same conditions. The loss of a right functions similar to a right not prohibiting something because both permit the relevant action.

Hence, forfeiture theory is the best hope of explaining why wrongdoers may be defended against, punished, or made to pay compensation. The loss of a right also contains the proportionality requirement that characterizes these things.

3.3 Objections to Forfeiture Theory

Consider objections to forfeiture theory. First, there are issues regarding how rights can be forfeited when what justifies them (for example, the right-holder's autonomy or interest) is still present. Second, forfeiture has to explain a lot. Specifically, it has to explain why violence (consider, for example, wartime killing) is limited by requirements, including, depending on the account, necessity, imminence, proportionality, and discrimination.⁵ This is a lot of explanatory work.

Third, there are discrimination issues. It intuitively seems that many civilians, such as legislators who intentionally cause the military to unjustly attack others, are unjust threats and thus forfeit their rights. Yet they are often considered inappropriate targets. If intention to contribute to an unjust attack is not necessary for forfeiture, then it is unclear why military support staff (for example, truckers, cooks, and construction workers) forfeit rights against attack, whereas non-military support workers (for example, farmers) do not.

Fourth, forfeiture theory asserts that forfeiture occurs following an attempted attack, rather than a completed one, but it is unclear why an attempt by itself is an injustice at all, let alone one that warrants lethal violence. By itself, an attempt need not trespass on another's body or property. If any of these problems are fatal, then we need another account of permissible wartime killing.

Fifth, there are puzzle cases that forfeiture has trouble handling, such as the issue of what happens to the rights of two qualitatively identical people who simultaneously launch unprovoked attacks against the other. In that case, you have an unstable scenario similar to a liar paradox. Each person either has or lacks the right to defend against the other. If one attacker has the right, then the other does not and vice versa. Yet the two are qualitatively identical so it is impossible for one to have the right if the other does not.⁶ I develop this objection below.

Another rival theory, threshold deontology, asserts that consequentialist reasons can justify wartime killing and destruction. A consequentialist override occurs when action is justified because it brings about very good results and the value of these results trump a non-consequentialist side-constraint. Even if this is correct, the results must be very good for it to override stringent side-constraints against killing and destruction. Given that standard trolley and surgeon's harvest cases indicate that a net saving of five lives is not weighty enough to do so and that many wartime killings do not generate a benefit worth more than five lives, the consequentialist override will not justify many instances of wartime killing.⁷ In addition, if someone's right is

⁵Forfeiture provides a unified account of these constraints, perhaps as primitive features of how forfeiture works. For a discussion of these constraints independent of forfeiture, see Brian Orend, *The Morality of War*, ch. 4.

⁶Older versions of this paradox can be seen in Stephen Kershnar, "Consent-Based Permission to Kill People and Break Their Things," 34–53. For a developed exploration of this argument, see Tim Campbell, personal communication.

⁷See Judith Jarvis Thomson, "The Trolley Problem," 1395–1415 and Phillipa Foot, "The Problem of Abortion and the *Doctrine of the Double Effect*," 5–15.

overridden, compensatory justice requires that the person whose right is overridden be given an apology, if not compensation. However, unjust wartime aggressors intuitively seem to be owed neither. Thus, there is reason to doubt that wartime killing is justified by an overriding of military members' rights.

The Achilles' heel of forfeiture theory is that it depends on an attacker acting unjustly just in case he imposes an increased risk of a right-infringement (beyond a certain threshold) or imposes a risk that is a right-infringement. The former account (increased risk of a right-infringement) is problematic in that posing a risk of right-infringement is not itself a right-infringement. Hence, it is not enough to make the attacker's action unjust. The latter account (increased risk is itself a right-infringement) is better but still problematic.

First, it is not clear how to understand risk. Understood as an increased probability (perhaps a significant increase), this notion conflicts with libertarian freedom because human freedom is arguably incompatible with a specific change in probabilities. It also conflicts with determinism because the latter is incompatible with agents increasing the chance an injustice or harm will occur. This might, however, be a reason to reject libertarian and determinist theories of events rather than drop the notion of risk from an account of what justifies self-defense.

Second, the threshold of risk that justifies defensive violence intuitively seems to be arbitrary. Our acts frequently impose risks on others and it is intuitively implausible that there is a specific increase in risk above which a risk-imposition justifies defensive violence and below which it does not.

Third, if there were a determinate threshold, it would likely rest on consequentialist considerations such as the (probability-adjusted) benefit to the individual who imposes a risk and the (probability-adjusted) harm to the one put at risk. For example, consider whether a diseased person who takes a public bus infringes on another passenger's right by risking her health. Imagine that he has Ebola. This depends on what the sick man gains and what the healthy rider loses if the sick man takes the bus. The balance of costs and benefits might also involve third parties. Consider, for example, what is true of the population of bus-riders. The problem is that rights do not rest on such consequentialist considerations, especially if rights trump consequences.⁸

Fourth, the account generates an infinite regress. Forfeiture based on increased risk depends on two claims. (1) *There is a right against unjust risk.* This is true because just defenders may impose very severe risks on an attacker. It is an unjust risk, rather than any risk, that justifies defensive violence. (2) *A risk is unjust just in case it infringes on a right.* This is because an injustice is simply a right-infringement. But the right in question is itself a right against risk. If a defender successfully prevents an attack, then other rights (for example, rights to property or body) are sometimes not infringed. When we combine (1) and (2), *the right against an unjust risk* becomes *the right against risk of an unjust risk*, which in turn becomes *the right against a risk of a risk of an unjust risk* and so on.

⁸Ronald Dworkin, "Rights as Trumps," pp. 153–67 and Alan Gewirth, "Are There any Absolute Rights?" pp. 81–109. See, also, Hillel Steiner, *An Essay on Rights*.

One could escape this by viewing defensive violence justified only if it succeeds in lessening or preventing an attack, but then ineffective defensive violence is wrong. This is implausible as, on this account, a woman who strikes a rapist to make him stop would act wrongly if her strike accomplishes nothing. This is hard to believe.

A forfeiture theorist can argue that narrow-scope theory faces the same issue because it is part of the boundary for the relevant right (for example, the right against violence). The consent theory escapes this objection, but faces the fatal problem that unjust attackers don't consent to allow those whom they target to defend themselves. For now, let us consider whether forfeiture theory, aside from the difficulty with risk, is the best account of wartime killing.

In summary, forfeiture theory is a better account of individual defense than competitor theories, such as narrow scope theory, permissible infringement, and consent theory. On this account, forfeiture is a primitive feature of how rights work and only affects the Hohfeldian relations (claim, liberty, power and immunity) between the one who attacks and the one who defends.

Here is a summary of the objections to forfeiture theory (Table 3.1).

Table 3.1 Objections to Forfeiture Theory

#	Objection	Content
1	Ground	<i>Ground Present.</i> Rights cannot be forfeited when what justifies them (for example, autonomy or interest) is present
2	Explanation	<i>Side-Constraints.</i> Forfeiture has to explain why violence is limited by requirements. Consider, for example, necessity, imminence, proportionality, and discrimination
3	Discrimination	<i>Who Forfeits.</i> Forfeiture has to explain who forfeits a right
4	Attempt	<i>Attempt Not Unjust.</i> Forfeiture theory asserts that forfeiture occurs when there is an attempted attack, but a mere attempt is not an injustice
5	Puzzle Case	<i>Simultaneous Attackers.</i> Consider when two qualitatively identical people simultaneously launch unprovoked attacks against the other. If one attacker has the right to defend against the second, then the second does not and vice versa. Yet it is impossible for one to have the right if the other does not
6	Risk	<p><i>Risk Issue.</i> Forfeiture Theory depends on an attacker acting unjustly just in case he either (1) imposes an increased risk of a right-infringement or (2) imposes a risk that is a right-infringement</p> <p>⇒ <i>No Right Infringement.</i> Option (1) is problematic in that posing a risk of right-infringement is not itself a right-infringement</p> <p>⇒ <i>Right Infringement.</i> Option (2) has these problems:</p> <ul style="list-style-type: none"> • <i>Nature of Risk.</i> It is not clear how to understand risk • <i>Arbitrary/Consequentialism.</i> The threshold of risk is arbitrary or it rests on consequentialist considerations • <i>Regress.</i> The account generates an infinite regress

3.4 The Case of Symmetrical Attackers

On this account, someone forfeits if and only if he acts unjustly or, perhaps, is an unjust threat. More specifically, necessarily, one person forfeits in relation to a second if and only if the first acts unjust or, perhaps, is an unjust threat in relation to the second. There are puzzle cases that forfeiture has trouble handling, such as the issue of what happens to the rights of two qualitatively identical people who simultaneously launch unprovoked attacks against the other. In that case, you have an unstable scenario similar to a liar paradox. This is the Problem of Symmetrical Attackers. Each person either has or lacks the right to defend against the other. If one attacker has the right, then the other does not and vice versa. Yet the two are qualitatively identical so it is impossible for one to have the right if the other does not.⁹ Here are some versions of the problem.

Case 2: Symmetrical Attacker Case (SAC)

Al and Bob are doppelgangers. They both attack the other for no good reason (for example, they love the same woman and wish to see a rival suitor dead).

Case 3: Misunderstood Symmetrical Attacker Case (M-SAC)

Al and Bob are doppelgangers. They both mistakenly, but justifiably, think the other is about to attack him. They both respond with violence that is necessary and that they think is necessary to prevent the attack. As a result, both are not morally blameworthy for their violent response.

Here is the argument.

- (P1) If forfeiture theory is true, then it explains what morally happens in the M-SAC.
- (P2) Forfeiture theory does not explain what morally happens in M-SAC.
- (C1) Hence, forfeiture theory is false. [(P1), (P2)]

Premise (P2) rests on the notion that there are only five candidate solutions to the problem and none succeed (Table 3.2).

This problem is not confined to defensive violence. Specifically, there are other cases regarding compensatory justice and retributivism that involve the same pattern as M-SAC. Consider the following.

Case 4: Symmetrical Compensatory Justice. Same facts as M-SAC.

Al and Bob are injured and demand compensation. One owes compensation if he unjustly harmed another.

A similar problem occurs were the following true: the state should punish a person if he committed an unjust act of force, fraud, or theft and was fully blameworthy for doing so.

⁹Older versions of this paradox can be seen in Otsuka, "Killing the Innocent in Self-Defense," 74–94, esp. n. XX, Stephen Kershnar, "Consent-Based Permission to Kill People and Break Their Things," 34–53, Stephen Kershnar, "Fetuses are like Rapists: A Judith-Jarvis-Thomson-Inspired Argument on Abortion," 88–109. For a developed exploration of this argument, see Tim Campbell, personal communication.

Table 3.2 No Explanation

Solution	Objections
A forfeits, B does not forfeit	Arbitrary
B forfeits, A does not forfeit	Arbitrary
A & B forfeit	<ol style="list-style-type: none"> 1. If A forfeits (a right), then B is not an unjust threat 2. Someone forfeits if and only if he is an unjust threat 3. Hence, B does not forfeit. [1, 2]
A & B do not forfeit	<ol style="list-style-type: none"> 1. If A does not forfeit (a right), then B is an unjust threat 2. Someone forfeits if and only if he is an unjust threat 3. Hence, B forfeits. [1, 2]
A and B neither forfeit nor do not forfeit	<ol style="list-style-type: none"> 1. If A neither forfeits nor does not forfeit, then B neither has a duty not or lacks a duty not to attack A 2. A person cannot have and lack a duty to do something 3. Hence, it is false that A neither forfeits nor does not forfeit. [1, 2]

The Problem of Symmetrical Attackers equally plagues the narrow scope, override, and consent theories of permissible defensive violence. Consider consent.

Case 5: Consent

Charlie consents to have sex with Darlene if and only if Darlene does not consent to have sex with Charlie and vice versa (for example, each believes the other is drunk as a skunk and announces that his or her consent hereby rests on the other being over a 0.2% blood alcohol content). Each believes the other has not consented and so they have sex. They're motivated by the sexual charge they get by having sex with a drunken person and then imagining the shame and degradation the drunken person will feel afterward.¹⁰

¹⁰While it is not clear that people have such fantasies, people frequently have violent sexual fantasies or would do so were they to watch violent pornography and one can imagine other scenarios in which people consent to sex only if the other does not. On one study, over half of the men shown depictions of rape were aroused by it. The experimenters were able to get many of the remaining men aroused by getting them to drink alcohol, think that they had drunk alcohol, change the narration from a man to a woman, or inform them that sexual arousal during the depiction of rape was normal. See Alfred Heilbrun and David Seif, "Erotic Value of Female Distress in Sexually Explicit Photographs," pp. 2447–2457. This study is dated, but I know of no more recent study that explores the tendency of minor changes to arouse previously non-aroused viewers of distressed females in sexual situations. In several studies, a substantial percentage of women (51% in one study) fantasized about forced sex with a man. L. A. Pelletier and E. S. Herold, "The Relationship of Age, Sex Guilt and Sexual Experience with Female Sexual Fantasies," pp. 250–256. Other studies showing the frequency of forced sexual fantasies include D. S. Strassberg and L. K. Licker, "Force in Women's Sexual Fantasies," pp. 403–414; D. Knafo and Y. Jaffe, "Sexual Fantasizing in Males and Females," pp. 451–462. On some interpretations, these are rape fantasies. On some accounts, sexual force fantasies are not rape fantasies. S. Bond and D. Mosher, "Guided Imagery of Rape: Fantasy, Reality, and

The narrow scope theory faces the same problem in that the scope of a right allows violence when the other engages in an unjust attack. The override theory has the same problem in that the consequentialist gain required to override an attacker's right to her body or property might vary depending on whether the attack is just or unjust. In fact, this view can be seen in theories that assert when the attacker is justified in acting, his justification morally prevents him from being liable to defensive violence. That is, justification defeats liability.¹¹

The problem does not apply to a blame-based theory of forfeiture. On this theory, a person forfeits a right just in case he is blameworthy for an attack. He is blameworthy just in case he is in general morally responsible, acts voluntarily, and has evidence that the other is not an unjust threat. The information-requirement depends on whether the evidence required for blameworthiness requires the person be aware of it or merely that he should have been aware of it.

Case 6: Blame

Eric and Frank are symmetrically placed doppelgangers. Because of the evil machinations of a third party, each has very strong evidence that the other is unjustly attacking him. The evidence is strong enough to make each person blameless with regard to his defensive violence (or, perhaps, attempted defensive violence).

On this account, because both are innocent, each is permitted to use defensive violence. This eliminates the problem.

This theory, though, is implausible. It suggests that an innocent attacker (see, for example, Case 1: Psychotic Aggressor) has a right to complete his attack. Worse, his innocent target, if she knows that he is innocent, is not permitted to defend herself. This is strongly counterintuitive. It also suggests that brains in vats with murderous intent can be killed by the person whom they imagine killing because they forfeit relative to her. This assumes that such brains voluntarily commit an act. Perhaps this act is the forming of a plan to kill someone and then willing that it occur. By itself, a brain lacks the power to cause someone's death, but this is not required for blameworthiness.

The internalist blame-based theory also undermines standard side-constraints on just defensive violence (for example, discrimination, imminence, necessity, and proportionality) because it is hard to see how these operate if they also depend on internalist features, that is, the events as envisioned by the attacker. If the side-constraints are externalist, then what justifies forfeiture is solely a matter of what's in the head, but the limits on forfeiture-permitted violence are in part outside the head. That is, they focus on external features, perhaps including factors such as whether, as an

the Willing Victim Myth," pp. 162–183. These fantasies correlate with what appear to be signs of sexual health. Specifically, these fantasies correlate with erotophilia and openness to sex. There also appears to be an indirect relation between a lower level of sexual guilt and forceful sexual fantasy. One researcher, Julie Shulman, hypothesizes that in women, lower sexual guilt brings about greater erotophilic pleasure, which then increases the use of forceful sexual fantasies. The first two claims can be seen in Julie Shulman, "Guilty or Not? A Path Model of Women's Sexual Force Fantasies," *The Journal of Sex Research*, vol. 43 (2006), pp. 368–377.

¹¹See McMahan, *Killing in War*, 51–60, McMahan, "On the Moral Equality of Combatants," 377–393, and McMahan, "The Basis of Moral Liability to Defensive Killing," 386–405.

objective matter, an attacker is an unjust threat. This is implausible because it suggests that there are two different justifications for defensive violence: the internalist justification of forfeiture and the externalist justification of the side-constraints that limit it, with no clear explanation how to fit them together or, if they were to conflict, which one receives priority.

Risk-based theories focus on whether an individual is responsible for imposing a risk on another even if he is not blameworthy for doing so. This type of theory is subject to the Problem of Symmetrical Attackers. This is because if the risk is justicized (that is, the focus is on the risk of *unjust* harm rather than the risk of harm), then the problem reappears because forfeiture will in part explain when a risk is just. If the risk is not justicized, then the theory cannot explain why unjust attackers who impose risks forfeit, but just ones do not.

The above argument is designed to undermine rights-forfeiture theory and proportionality. An objector might claim that these arguments only undermine certain versions of it. For example, if A and B forfeit, then, given the connections between unjust threats and forfeiture posed by forfeiture theory, a logical contradiction follows. However, the objector continues, the problem can be avoided by a version of forfeiture theory that understands an unjust threat not as right-infringing, but instead as a threat that the agent has no right to pose. The problem with this objection is that in most, if not all, cases, rights are relations between two different people. Set aside the issue of whether a person can have a right against himself. As a result, if a person has no right to pose a threat it is because his doing so would infringe another's right.

An objector might argue that some authors deal with symmetrical defense cases in a different way than standard defense cases. In fact, the objector argues, some might think that forfeiture theory does not apply to the former cases. This is a problem, the objector argues, because my argument depends on it applying to symmetrical cases.

My framework assumes there is only one type of forfeiture and justification of it. The reason for this is that, intuitively, forfeiture consists of only one thing: the loss of a right (whether temporary or not). In the context of defense, I assume that the justification of it is an unjust attack. This is because if one person does not try or risk doing something to another's body or property (that is, not attack her) or tries or risks doing so but has the right to do so (that is, the attack is just), then it is intuitively hard to see what would make him forfeit a right. If this is correct, then what forfeiture is and what justifies it operate in the same way in symmetrical and asymmetrical cases.

If the argument in this section succeeds, then the problem of symmetrical attackers falsifies forfeiture theory. This is a severe problem for the following reason. First, some defensive violence is morally permissible. Second, defensive violence is morally permissible only if the attacker's right is forfeited. Third, the Problem of the Symmetrical Attackers suggests that forfeiture theory is false.

3.5 Objections to the Problem of the Symmetrical Attackers

The Problem of Symmetrical Attackers applies whether the narrow scope, forfeiture, consent, or override theory is true. The same problem even applies to other non-consequentialist theories of defensive violence. Consider virtue theory and any desert-based theories.¹² The problem applies to them so long as whether someone is vicious or deserves punishment depends on what evidence he has, there is a symmetrical case when both attackers have sufficient evidence that he is not an unjust aggressor and the other attacker is, and whether one person may (or may not) use defensive violence against a second depends on whether the first is more (or less) virtuous or more (or less) deserving of defensive violence than the second. This can occur whether epistemic justification (and, perhaps, the defeater condition) is internalist or externalist.

The problem also plagues some moralized versions of consequentialism, such as desert- or right-adjusted consequentialism.¹³ The problem even concerns consequentialism in so far as it is better that only one person is killed rather than two in M-SAC and yet the situation is similar to Buridan's ass in that there is no reason to favor killing one over the other and the people do not have available a mechanism that can randomly choose who should be killed. Consider this case.¹⁴

Case 7: Catapult

A villain uses catapults to sling doppelgangers, Grant and Hal, toward each other with enough force so that if one hits the other, both will die. Each is innocent and knows this of himself and the other. Each has a ray gun capable of disintegrating the other. To prevent suicides, the gun is designed so that it cannot shoot the operator. Neither can communicate to the other. Nor do they have access to a random generator.

Furthermore, if God were to rollback what each person does 1000 times. 500 times Grant shoots his ray gun, 500 times he doesn't.¹⁵ The same is true for Hal. Hence, there is a 50% chance that Grant will shoot. The consequentialist, then, cannot use probabilities to provide a solution. The consequentialist solution is for one person to disintegrate the other. The problem is that there is no reason for one person to do so and the other not.

¹²The argument works for Jeff McMahan's moral responsibility theory and a culpability theory of forfeiture. The culpability theory asserts that a person forfeits if and only if he is blameworthy for attacking based on his belief or negligence with regard to the other person's not being an unjust threat. See, also, the Doctrine of Double Effect.

¹³For theories of desert that are compatible with consequentialism, see Fred Feldman, "Adjusting Utility for Justice: A Consequentialist Reply to the Objection from Justice," 567–585, Thomas Hurka, *Virtue, Vice, and Value* chs 1–2; Thomas Hurka, "The Common Structure of Virtue and Desert," 6–31; Shelly Kagan, "Equality and Desert," 298–314; Neil Feit and Stephen Kershnar, "Explaining the Geometry of Desert," 273–298. For a rights-based account, see Amartya Sen, "Rights and Agency," 3–39.

¹⁴The idea for this case comes from Otsuka, *ibid*.

¹⁵See Van Inwagen 2000. "The Eighth Philosophical Perspectives Lecture: Free Will Remains a Mystery." 1–19.

The problem thus applies to every plausible candidate theory of defensive violence and does so in much the same way. This leads to the following defense of forfeiture theory.

- (1) If a problem is equally damaging to every plausible theory of permissible defensive violence, then it is not a reason to reject forfeiture theory.
- (2) The Problem of Symmetrical Attackers is equally damaging to every plausible theory of permissible defensive violence.
- (3) Hence, the Problem of Symmetrical Attackers is not a reason to reject forfeiture theory. [(1), (2)]

The Problem is not damaging to an internalist blame-based theory of defensive violence, but this theory is implausible.

Still, perhaps there is another way to defuse the problem. To see this consider the following.

- (4) Bob forfeits if and only if Al does not forfeit.
- (5) Al and Bob both forfeit or neither forfeits.

The problem here is that the sentences are incompatible. The analogy here is to a two-sentence liar paradox.

- (6) The below sentence is false.
- (7) The above sentence is true.

Either sentence can be true, but the conjunction cannot. The two-sentence liar paradox dissolves if the paradox results because the conjunction is not well-formed or it involves a set that contains itself as a member. It is not clear that either is true. Even if it were true with regard to the two-sentence liar paradox, it is not clear that this solution is available to the Problem of Symmetrical Attackers. Rather, the solution lies in falsifying one of the sentences.

One might think that the benefit theory of a right can solve this. The benefit theory asserts that what justifies someone having a moral right is that he will benefit from the performance of an act or another having a duty.¹⁶ This theory might be thought to allow an initial attack being justified or unjustified independent of whether the other has forfeited and then allowing the defensive violence (second-order response) to depend only on the status of the initial attack. On this account, then, proposition (4) is false in SAC and M-SAC because both can engage in just defense or unjust defense.

If the benefit theory relied on something similar to rule-consequentialism to set out when someone will benefit from a right, then forfeiture would not parallel the two-sentence liar paradox. The benefit theory might depend on rule-consequentialism because we need a way of saying when a class of people would benefit from a type

¹⁶The benefit or interest theory asserts that rights function to protect interests. As such they are constituted by a claim. See, e.g., David Lyons, *Rights, Welfare and Mill's Moral Theory*, Neil McCormick, "Rights in Legislation," 189–209; Joseph Raz, *The Morality of Freedom*, and Matthew Kramer, "Rights Without Trimmings," 7–111.

of act being allowed or a duty being imposed on a population. This solution fails if benefit theory or rule-consequentialism is false.

Rule-consequentialism asserts that what makes an act wrong is that it does not satisfy the rule or rules that would bring about the best results.¹⁷ Versions of rule-consequentialism differ. On one account, an act is morally wrong if and only if it is forbidden by rules the acceptance of which would actually maximize the good. Other versions focus on what would maximize the expected good, focus on rule-compliance rather than rule-acceptance, and make adjustment for when there is more than one set of rules that has maximally good results. Consider the rule: *An individual may kill an innocent attacker*. The rule-consequentialist's idea is that this rule, if it were accepted (or complied with) by all (or most) people, would produce better results than any alternative rule. More specifically, the rule is included in the set or sets of rules that would bring about the best results.

The benefit theory/rule-consequentialist solution fails. If rule-consequentialism fails, even on consequentialist grounds, then the solution does not get off the ground. There are a series of standard objections to rule-consequentialism. First, rule-consequentialism is either extensionally equivalent to act-consequentialism or it is incoherent.¹⁸ Second, rule-consequentialism addresses an epistemic issue (Given our limited knowledge and biases, what procedure is most likely to generate right acts?) rather than the metaphysical issue (What makes an act right?) and it is the latter that is central to moral theory.¹⁹ Third, rule-consequentialism cannot handle conflicts of rules.²⁰ Fourth, the theory has to provide a non-arbitrary degree of compliance or acceptance and it is not clear that it has the resources to do so.

Even if rule-consequentialism is true, there still needs to be an argument as to why the best rule would permit the killing of innocent threats or attackers. A concern is that on some accounts, the rule-consequentialist should not count the costs of getting people to move away from their current moral beliefs.²¹ Without this condition, the moral rules that a population currently holds might be terrible but better than other sets because the high cost of getting people to change their minds. In addition, failure to screen out this cost might result in relativism about moral codes as it would be more costly to move some societies to a new set of rules than to move others.

Even if the benefit theory of a right tracks rule-consequentialism and rule-consequentialism survives the above objections, the proponent of this view still needs to show that the optimal rule does not permit defensive violence when and only when the other person is not an unjust threat and that a person is an unjust threat if and only if he doesn't waive or forfeit his right to attack. That is, the theory must not include

¹⁷For a classic statements of it, see R. B. Brandt, *Ethical Theory*, J. O. Urmson, "The Interpretation of the Moral Philosophy of J. S. Mill," 144–152, S. Toulmin, *The Place of Reason in Ethics*. For more recent accounts, see Brad Hooker, *Ideal Code, Real World: A Rule-Consequentialist Theory of Morality*, T. Mulgan, *The Demands of Consequentialism*.

¹⁸See J. J. C. Smart, "Extreme and Restricted Utilitarianism," 344–354.

¹⁹The idea for this objection comes from Smart, "Extreme and Restricted Utilitarianism," 344–354.

²⁰See B. Eggleston, "Conflicts of Rules in Hooker's Rule-Consequentialism," 329–350.

²¹This idea and the two arguments that follow come from Brad Hooker, "Rule Consequentialism".

a *forfeiture-like rule*. It is plausible that a forfeiture-like rule would be present given that this rule is widely accepted and provides a disincentive for unjust aggression.

In addition, there is good reason to reject the benefit theory. First, interests lead to maximization and rights are supposed to trump utility. Second, whether someone has a right depends on how a claim affects interests of others in the subject's situation or the subject in other situations. A right's existence and stringency should not depend on what is true of others who have nothing to do with the right-holder. On this theory, whether a person has a right depends on what makes life go better for other people who are in similar circumstances. This is a problem if what justifies a right depends on, and only on, features of the person with a purported right and, perhaps, others who interact with him. Third, the theory has incorrect results with regard to contracts. Specifically, if a third party stands to benefit from the fulfillment of a contract, then, on this theory, he has a right that it is fulfilled. Fourth, intuitively, rights tend to correlate with two-way liberties (the permission to do or not do something) and two-way powers (the standing to leave or eliminate a claim or liberty) and the best explanation of this is that rights protect autonomy.

The chapter argues that one reason to reject benefit theory is that it gets the wrong results in the case of contracts. One might wonder whether consequentialism fails in the same way. If so, this appears to not be a good reason to reject non-consequentialism because the problem can generalize. The failure to account for promises and contracts is a distinct problem for non-consequentialism because it is supposed to justify a duty that one person owes a second rather than a duty not owed to anyone and, instead, aimed at maximizing the impartial good. Consequentialism has other advantages, perhaps even counterbalancing ones, but the ability to handle two-person relations, particularly duties and powers, is one of the purported strong suits of theories of rights. Thus, the failure to justify how promises and contracts work is a more significant failing for a non-consequentialist theory.

Outside of the benefit theory, especially the version linked to rule-consequentialism, there are no other plausible ways to reject the problem. This is because other theories of rights, and in fact the most plausible version of the benefit theory, hold that whether one loses a right (via consent or forfeiture) depends on the moral status of his attack on another and this leads to the structural similarity to the two-sentence liar paradox.

A solution to the Problem of Symmetrical Attackers is one that makes the status of the initial attack independent of the status of the other's attack. This allows the initial attack to avoid the inconsistent conjunctive structure of the two-sentence liar paradox. It would also allow second-order actions (defensive responses to the initial attack) to avoid the inconsistent structure. Unfortunately, the most promising way to do this fails.

3.6 Conclusion

The forfeiture theory is falsified by the Problem of Symmetrical Attackers. The problem is equally damaging to every plausible theory of permissible defensive violence, so, perhaps, it is a reason to reject non-consequentialist theories of violence in addition to forfeiture theory. A benefit theory of right cannot, however, get us around the problem. Nor can a rule-consequentialist theory do so.²²

²²I am very grateful to Randy Dipert, Jim Delaney, John Keller, Bob Kelly, Jake Monahan, B. J. Strawser, and especially Neil Feit and David Hershenov for their extremely helpful comments and criticisms of this paper. I am also grateful to the PANTC and Blameless Buffalo Reading Groups for discussing the ideas that led to this paper.

Chapter 4

Against Proportionality: Proportionality Is not a Side-Constraint on Punishment



Abstract In the fourth chapter, I argue that there is no satisfactory theory of proportionality in the context of punishment. By proportionality in punishment, I mean that there is a systematic positive relation between the seriousness of a person's wrongdoing and the maximum severity of punishment she may be given. Proportionality is a feature of most non-consequentialist theories of punishment, including forfeiture theory, retributivism, distributive-justice theory, and punishment as societal defense. Because this restriction is a central part of non-consequentialist theories of permissible threats and force, such theories are likely mistaken.

4.1 Introduction

In the fourth chapter, I argue that there is no satisfactory theory of proportionality in the context of punishment. By proportionality in punishment, I mean that there is a systematic positive relation between the seriousness of a person's wrongdoing and the maximum severity of punishment she may be given. Proportionality is a feature of most non-consequentialist theories of punishment, including forfeiture theory, retributivism, distributive-justice theory, and punishment as societal defense.

Consider the problems with proportionality. First, the plausible individual factors (responsibility, harm, and rights) do not apply to proportionality in a straightforward manner. Second, the plausible individual factors cannot be combined in an intuitively satisfying manner. Third, proportionality is odd in that it intuitively seems to apply in a different way to different areas of force, specifically, punishment, compensation, and self-defense. Moreover, proportionality does not apply to self-defense in a clear manner if it applies at all. Because this restriction is a central part of non-consequentialist theories of permissible threats and force, such theories are likely mistaken.

Where does the collapse of moral responsibility and morality leave us? If the above arguments succeed, then theoretical and practical frameworks are in tatters. I do not address that here other than to note that it will require a radical reworking of our worldview in the same way as other large-scale changes in our conceptual

framework. I don't yet have an answer to how our worldview should change, but hope merely to justify why it must.

In this chapter, I argue that even if forfeiture theory is false, non-consequentialism fails to provide an adequate account of conflict because it cannot handle proportionality. Non-consequentialism asserts that violence, whether defensive or punitive, is permissible only if it is proportional to the threat or past injustice. This feature of non-consequentialism is one of its most intuitively appealing features. If, as I argue below, proportionality fails, the appeal of non-consequentialism significantly diminishes.

4.2 Theses

In this chapter, I argue that proportionality is not a side-constraint on permissible punishment. Proportionality is a feature of most non-consequentialist theories of punishment, including retributivism, forfeiture theory, distributive-justice theory, punishment as societal defense, and punishment as a means to enforce compensatory justice.¹ In particular, I defend this thesis.

By proportionality in punishment, I mean that there is a systematic positive relation between the seriousness of a person's wrongdoing and the maximum severity of punishment she may be given. Depending on the theory, this relation can be ratio or ordinal. A ratio relation has a true zero point and equal intervals on each of the things being related.² Such a scale can be seen in the distance a projectile travels. There is a zero distance point and the distance between 60 and 70 m is the same as the distance between 90 and 100 m.

Consider, for example, the relation between Fahrenheit and Celsius. An ordinal relation preserves the relation between the intervals.³ Consider, for example, a relation when each wrongdoing is more serious than the one below it and each punishment is more severe than the one below it, but the intervals on each of the scales need not be the same size.

Thesis: False. It is permissible that punishment not be proportional to wrongdoing.

Part two of this chapter sets out the concerns that led to a discussion of proportionality. Part three discusses the theoretical arguments against it. Part four discusses the practical arguments against it. Part five summarizes these results and discusses what follows from them.

¹See Michael Moore, *Placing Blame*, (retributivism), Stephen Kershnar, "A Defense of Retributivism," 97–117 (retributivism), Stephen Kershnar, "The Structure of Rights Forfeiture in the Context of Culpable Wrongdoing," 57–88 (forfeiture), Phillip Montague, *Punishment as Societal Defense*, ch. 5 (punishment as societal defense), and David Boonin, *The Problem of Punishment* (punishment-like treatment to enforce compensatory justice). For attempts to fill out proportionality, see Michael Davis, "How to Make the Punishment Fit the Crime," 726–752 and Michael Davis, *To Make the Punishment Fit the Crime: Essays in the Theory of Criminal Justice*.

²See Dictionary.com, "Ratio Scale".

³See Dictionary.com, "Ordinal Scale".

4.3 Motivation

One concern that motivates a challenge to proportionality is that it conflicts with a cost-benefit analysis of punishment. This theory is influential in economic and legal justifications of punishment. On this justification, the length of a sentence for an offender or type of offender (depending on the particular analysis) should be equal to the point at which the marginal gain for additional incarceration equals its marginal cost.⁴

The cost-benefit theory has come under two types of criticisms. First, there are the criticisms of it to the extent that it is a species of consequentialism. Here the theory can be criticized because it does not treat guilt as a necessary or sufficient for punishment (or, perhaps, telishment), uses wrongdoers merely as a means to benefit others, and has no proportionality ceiling on permissible punishment.⁵

Second, there are criticisms of the theory in so far as it is an economic theory of punishment. Here there are criticisms that focus on the economic version of the cost-benefit analysis, specifically, such an incarceration scheme tracks economic value and such value does not track moral value. Economic value might not track moral value because markets are flawed indicators of well-being or because they track well-being but no other things that by themselves make the world a better place.

A second concern about proportionality is its link to forfeiture theory. Because the notion that wrongdoers forfeit their rights is plausible under most non-consequentialist theories of punishment, this connection to proportionality is important. The notion that wrongdoers forfeit their rights is plausible because it explains why punishment is not wrong or unjust. It also explains why punishment does not generate a duty to compensate or apologize to the wrongdoer as is the case when one person infringes another's right.⁶ If forfeiture theory is problematic, though, one of the major motivations for proportionality is weakened.

A third concern is that proportionality has a problem arriving at plausible results for puzzle cases. Consider this case.

Case #1: Steubenville

The Steubenville High School rape occurred in Steubenville, Ohio, on the night of August 11, 2012, when a high-school girl, incapacitated by alcohol, was publicly and repeatedly sexually assaulted by her peers, several of whom documented the acts on social media. The victim was transported, undressed, photographed, and sexually assaulted. She was also

⁴See Richard Posner, *Economic Analysis of Law* 9th ed. (Colorado: Aspen Casebook, 2014).

⁵For the notion of telishment, see John Rawls, "Two Concepts of Rules," 3–32.

⁶Other people who assert that a criminal forfeits some of his moral rights include Stephen Kershnar, "The Structure of Rights Forfeiture in the Context of Culpable Wrongdoing," 57–88, A. John Simmons, "Locke and the Right to Punish," 238–252, Judith Jarvis Thomson, *The Realm of Rights*, 365–366, Judith Jarvis Thomson, "Self-Defense and Rights," 37–42, Judith Jarvis Thomson, "Some Ruminations on Rights," ch. 4, Vinit Haksar, "Excuses and Voluntary Conduct," 317–329, Murray Rothbard, *The Ethics of Liberty*, Alan Goldman, "The Paradox of Punishment," 30–46, and Roger Pilon, "Criminal Remedies: Restitution, Punishment, or Both?" 348–357. These theories differ with regard to whether right forfeiture is a fundamental feature of rights or explained by a more fundamental principle.

Table 4.1 Executing murders and worm-programmers

Execution	Benefit	Cost	Total
Murderer	\$100 million (10 lives saved via deterrence × \$10 million/life)	\$10 million (value of a life)	\$90 million
Worm (Virus)-Programmer	≥\$100 million (0.2% worm reduction x \$50 billion/worms/year)	\$10 million	≥\$90 million

penetrated vaginally by other students’ fingers (digital penetration). Under Ohio law, this is rape. The jocular attitude of the assailants was documented on Facebook, Twitter, text messages, and cell phone recordings of the acts. Two high school football players, Ma’lik Richmond and Trent Mays, both 16 at the time of the crime, were convicted in juvenile court for the rape of a minor. Contrary to the actual case, assume that the victim never discovers what happens to her.⁷

Case #2: Computer Programmer

Consider executing those computer programmers who write worms (and viruses) that infect computers compared to executing murderers. It is plausible that the former cause a lot more harm than the latter and, perhaps also, are more sensitive to deterrence. If the life of a programmer has the same value as a murderer, then a cost-benefit analysis would conclude that the case for executing the former is stronger than the case for executing the latter. Here is a crude estimation of these costs (Table 4.1).⁸

A third case involves attempted murder in which the victim never finds out and her well-being is not set back in any way.

If proportional punishment is the product of culpability for wrongdoing and the harm that it brings about, as is sometimes proposed, then our intuitive sense of proportional punishment does not track this product. The assumption here is that the Steubenville assault and attempted murder do not harm the intended victim because neither sets back the victim’s well-being. If well-being depends on desire-fulfillment or objective-list goods, then this assumption is mistaken. Here is a chart showing how our intuitive sense of an appropriate severity of punishment does not track the product of responsibility and harm (Table 4.2).

If there is reason to accept the cost-benefit analysis with regard to the amount of punishment a wrongdoer should be given or if our intuitions in the puzzle cases are correct, then there is reason to doubt that permissible punishment has a proportionality ceiling. Let us consider some arguments against the ceiling.

An objector might concede that he shares the intuition that the punishment should be medium for the virus-maker, but he notes, this might be explained away. People these days are clamoring for harsher punishments for white collar crimes. This clamor raises the problem of whether and how wrongdoings should be combined to set a punishment ceiling. It is unclear, for example, whether a virus-maker performs

⁷See Wikipedia, “Steubenville High School rape case,” and Steven Landsburg, “The Economic Logic of Executing Hackers”

⁸See Steven Landsburg, “Censorship, Environmentalism, and Steubenville,”

Table 4.2 Puzzle Cases

#	Case	Responsibility (C)	Harm (H)	Proportional punishment (C × H)	Intuitive punishment
1	Steubenville (Case #1)	High	0	0	High
2	Virus-Maker (Case #2)	High	High	High	Medium
3	Attempted murder (victim unaware)	High	0	0	High

one wrongdoing in setting loose a single computer virus that spreads or multiple wrongdoings for each computer that is infected. Paralleling the problem of the number of wrongdoings is the issue of whether the punishment ceiling should increase with an increasing number of wrongdoings, holding constant the amount of harm. In any case, even if our intuitions on the virus-maker permit a high punishment, the two other cases still are a problem for proportionality.

4.4 Theoretical Argument for Thesis #1 (Proportionality Is False)

My strategy in this section is to argue that as a theoretical matter, individual factors do not provide intuitively satisfying components of a proportionality in punishment. I then argue that there is no way they can be combined that constitutes a satisfactory token-token or type-type account of proportionality. I finally argue that proportionally across different types of negative treatment is varied and that this counts against proportionality being a side-constraint on punishment.

4.4.1 Individual Factors

The component-elements of a proportionality equation are responsibility, harm, or rights. The particular combination depends on the particular theory.⁹ These elements are the factors that most plausibly determine the ceiling on permissible punishment. On some theories, they also determine the floor of permissible punishment, but I will not address such theories here.

⁹See Robert Nozick, *Anarchy, State, and Utopia*, Stephen Kershner, Stephen. *Desert, Retribution, and Torture*

First, consider the problems in a responsibility-scale. If people are not morally responsible, then there is no appropriate scale for responsibility.¹⁰ The same is true if responsibility does not flow-through from decisions or willings to wrongdoings that are unjust or harm someone.¹¹ This objection will not gain traction for people who are not skeptical about responsibility in the above ways. I am so skeptical.

More relevant to most theorists is that responsibility does not come in a cardinal amount or percent of maximum responsibility. There is no cardinal unit of responsibility (for example, Frank Sinatra had 34 units). Because perfect responsibility likely involves infinite reason-responsiveness, sanity, desire-alignment, agent-causation, or so on, an individual's responsibility-level cannot be a percentage of maximum responsibility. Maximum responsibility would be God's level of responsibility for guiding one's life.¹²

An objector might claim that full responsibility need not be perfect responsibility.¹³ Let the theorists give their conditions for being fully responsible for something – like having acted from an appropriately reasons responsive mechanism. The objector then argues that if this could be met by a human, which it could, then the human is fully responsible. It could be a scale from zero to one where meeting certain conditions is sufficient for one.

The problem with this objection is that if full responsibility is not perfect responsibility, then it does not warrant the value one. This is because there is greater responsibility possible and hence one is arbitrary. It is not merely that greater responsibility is possible, the different degree to which people are actually reasons responsive makes them in fact differ in their degree or amount of responsibility. An analogy would be hell. If a person merited a stay in hell that is equal to the product of the severity of his sin and his responsibility for that sin, then responsibility could not be arbitrarily set when it is a continuum property that goes from a zero amount to an infinite amount (or has a corresponding unbounded degree-based scale).

Second, consider problems with harm. Attempts do not cause harm and yet intuitively they may merit punishment. Punishment might instead track intended harm. This is discussed later in the section on type-type theories. Also, some completed wrongdoings also do not cause harm. The same is true for some punishments. Consider the following.

¹⁰For the notion that people are not responsible for negligence, see Gideon Rosen, "Skepticism about Moral Responsibility," 295–313, Gideon Rosen, "Culpability and Ignorance," CIII. For the notion that people are not responsible at all, see Galen Strawson, "The Impossibility of Moral Responsibility," 5–24, Neil Levy, *Hard Luck: How Luck Undermines Free Will & Moral Responsibility*, Derk Pereboom, *Free Will, Agency, and Meaning in Life*, and Stephen Kershnar, "Responsibility and Foundationalism," 43 (2015): 381–402.

¹¹For the notion that responsibility flows through for later acts, see John Martin Fischer and Martin Ravizza, *Responsibility and Control: A Theory of Moral Responsibility*

¹²There is an issue as to whether God is morally responsible at all. See Stephen Kershnar, "Moral Responsibility in a Maximally Great Being," 97–113. Let us sidestep this concern.

¹³I owe this objection to Neil Feit.

Case #3: Neil's Hammer

Neil has an old hammer lost in a field behind his house. In one case, Steve gets Neil's permission to take it. In a second case, Steve doesn't get permission. Because the hammer would not have been otherwise discovered, it does not diminish Neil's autonomy, interest, or whatever else grounds rights. Intuitively, it seems that it is permissible for Steve to take Neil's hammer in the first case but not the second.¹⁴

Case #4: Victim's Death

An accomplished car thief steals the car of a NYC man vacationing in Africa. The victim is in Africa and is killed by a hippo moments after the car is stolen. The latter never finds out about theft and there is no causal connection between the events. On hedonic and some plausible objective-list theories of well-being, the victim is not harmed.

Case #5: Heaven

Jim is going to heaven. Heaven consists of a finite amount of well-being per day (100 utils/day) over an infinite amount of time. Punishing him temporarily will not affect his total or average well-being.

There is also the issue as to whether the relevant harm is *prima facie* or all-things-considered with problems attaching to each. For example, it is unclear why we should focus on *prima facie* harm when some wrongdoings that do not warrant punishment cause such harms (consider, for example, breach of contract) and some wrongdoings that do warrant punishment do not cause such harms (consider, for example, an attempted killing of someone who is already dead).

On the other hand, some wrongdoings might not cause the victim all-things-considered harm if they kill her and death does not harm the decedent. The same is true for wrongdoings (for example, batteries) that cause the victim to change in ways that, overall, make her life go better. Consider, for example, if Hank batters Sadie, sending Sadie to the hospital, these theories should say Hank should be punished – even if Sadie meets and then marries the handsome, wealthy physician who attends to her, thus making the battery all-things-considered beneficial.

Also, there is an issue as to whether the relevant factor for proportionality is the amount of harm the wrongdoer brought about or the victim's well-being level. Our intuitions are not so clear. Consider the following.

Case #6: Flourishing Wrongdoer

A white college fraternity rapist has looks, friends, and money. His life is going well (on average, 20 well-being units per day). His victim is a drug-addicted prostitute whose daughter has been taken away from her. Her life is going poorly (on average -10 well-being units per day). The rape reduces her for a year to, on average, -20 well-being units per day). Consider whether the rapist's well-being should be reduced to 10 well-being units per day or -20 well-being units per day.

Similar problems plague the notion that, at least in part, right-infringement determines punishment. Similar to harm, on some accounts mere attempts do not infringe on a victim's right, rather they only risk doing so. Also, as seen in Cases 3 and 4 above, some completions do not lessen autonomy. Infringing someone's property

¹⁴I owe this example to Neil Feit.

rights might in general lessen the degree to which they are autonomous (specifically, lead a self-shaping life), but need not always do so. If autonomy is seen as a capacity (the capacity to lead a self-shaping life) rather than an exercise of a capacity, then some property-right infringements might increase someone's capacity. Consider, for example, when a bully destroys an addict's drug stash, causing him to stop using drugs and thereby increases his capacity to shape his own life.

A right-based account in which autonomy grounds rights also does not permit punishment for what is done to incompetents.¹⁵ If such an account makes more autonomous people have more stringent rights than less autonomous people, and it intuitively seems to do so, then more severe punishment is permitted when the former are victimized.

In addition, if there are only two rights (body and property), then all punishments will have to satisfy one of two ceilings depending on which right is infringed. If the ceiling-maker is not only the identity of the right that is infringed, but also the degree to which it is infringed then this theory reduces to harm. This is because the degree to which a right is infringed is likely a function of the degree to which a person's interest or autonomy is set back and this just is part or all of harm. In fact, this will not cleanly reduce to harm because a right can be infringed without interest (or autonomy) being set back. Consider the hammer case or where a person cultivates some small portion of another's land, unbeknownst to the other.

4.4.2 *Token-Token Proportionality*

Even if the individual factors that go toward proportionality are plausible, it intuitively seems that they cannot be combined in a token-token way that is plausible. Below are some equations for a proportionality ceiling on permissible punishment. Here C = culpability (moral responsibility for the wrongdoing), H = harm, R = significance of right-infringement, x = product, and v = disjunction. Consider one equation that expresses a ceiling on permissible punishment.¹⁶

$$\text{Ceiling}_{\text{punishment}} = C \times (H \vee R)$$

This has a very low ceiling for permissible punishment if the wrongdoer is not very responsible for what he does (for example, if C = 25%).

More importantly, C and (H v R) do not share a metric. That is, they do not have the same units so the product of them does not yield an amount of punishment.

¹⁵The autonomy-based theory of rights is called the "will theory of rights." This theory asserts that rights function to protect choices. As such they always include a Hohfeldian power plus the other Hohfeldian elements over which the power ranges. See, e.g., H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory*, Carl Wellman, *A Theory of Rights*, and Hillel Steiner, *An Essay on Rights*.

¹⁶See Robert Nozick, *Anarchy, State, and Utopia*.

An objector might note that it is not clear that a shared metric is important. If culpability is somewhere between zero and one—as the objector claims above—then that could simply be a weighting factor on the product of the other quantities. As a comparison, consider momentum as a physical quantity. This is the product of a body’s mass and its velocity. Mass and velocity don’t have the same units, but it makes perfectly good sense to multiply an object’s mass and velocity. The resulting unit would be something like kilogram meters per second. If culpability is not somewhere between zero and one, as I argue above, then this objection does not get off the ground. The same is true if the degree of responsibility is between zero and one but the intervals are not equal in size. Consider, for example, if the difference in responsibility between 0.0 and 0.1 is larger than the difference between 0.9 and 1.0.

The same problem applies to a sum of these factors.

$$\text{Ceiling}_{\text{punishment}} = C + (H \vee R)$$

Also, the ceiling is too high because it allows a wrongdoing to be punished in excess of the harm caused or significance of right infringed and, perhaps, well in excess of them. Again, there is no shared metric.

Consider an equation that combines harm and right-infringement.

$$\text{Ceiling}_{\text{punishment}} = (H \times R) \vee (H + R)$$

Like the above equations, this has no shared metric. This theory also double counts what the wrongdoer does. For example, a batterer commits a serious injustice and causes his victim serious harm, but the two do not combine to permit an even greater punishment than would be permitted were the ceiling set by either factor by itself.

An objector might claim that contrary to the above account, proportionality might refer to the general idea that the punishment must fit the crime, where this fit does not refer to any scale or, even if it does, the scale might be complex somehow uniting desert, liability, and, perhaps, social factors. The objector notes that my discussion is problematic in part because it is unwilling to incorporate social factors.

Proportionality is a covarying relation between some feature of a wrongdoing and the type or severity of the response (defense, punishment, or required compensation). Intuitively, it is hard to see how there might be a covarying relation that cannot be represented via a scale. The problem with social factors is that they include facts other than those about the attacker and the person who is attacked. Such facts do not seem relevant because it is intuitively implausible that whether one person retains or loses a right with regard to a second person depends on facts about a third. If this is correct, then social factors about third parties might be morally relevant, but not with regard to forfeiture.

Note that a theory of proportionality that focuses on evidence-based theory of liability for defensive harm will not get around the above problems.¹⁷ This is because

¹⁷For a discussion of an evidence-dependent theory of self-defense, see Jonathan Quong, “Liability to Defensive Harm,” 45–77 and Michael Zimmerman, *Living with Uncertainty*.

it depends on what the evidence is of and this requires consideration of the above factors. The same thing is true of an evidence-based theory of type-type proportionality.

4.4.2.1 Type-Type Proportionality

Nor can these factors be combined by focusing on the type of wrongdoing that the agent performed and the type of harm the victim suffered rather than a token-token analysis. The types in this classification can only be filled out via categories justified by consequentialism or something similar to it.

As an example, consider this type-type equation.

$$\text{Ceiling}_{\text{punishment}} = C_{\text{type}} \times H_{\text{type}}$$

Here C_{type} = the degree of culpability that is typical (perhaps statistically average) for that type of wrongdoing and H_{type} = the amount of harm that is typical (again statistically average) for that type of wrongdoing. On other versions, the degree of culpability or amount of harm might be a function of what is true of paradigmatic instances of that type of act.

There is also a problem in grounding. It intuitively seems that when A wrongs B, what may be done to A should depend on what A did to B and on features of A and B. It should not depend on what C does or features of C. Yet the type-type analysis does precisely this because it sets the ceiling based on what is true of other wrongdoers and victims.

Also, it is unclear if punishment should depend on type-aspects of the victim alone or, instead, on aspects of the victim and victimizer. For example, it is odd that the typical low level of responsibility for batterers lower the ceiling for a wrongdoer who is fully responsible.

These objections to the individual factors and two ways in which these factors can be combined (token-token and type-type) are independent of one another. If either succeed, proportionality is not a side-constraint.

4.4.3 Proportionality and Different Negative Treatments

There is also a further concern about the different proportionality standards for different negative treatments of people. While it is possible that morality and justice are complex, it intuitively seems odd for the proportionality side-constraint to vary greatly with context.

For punishment, responsibility matters. Consider, for example, the below equation.

$$\text{Ceiling}_{\text{punishment}} = C \times (H \vee R).$$

For compensation, responsibility does not matter or matters but in a different way than punishment (negligence). Consider, for example, this equation.

$$\text{Ceiling}_{\text{compensation}} = H$$

Successful self-defense involves no right-infringement or harm because it prevents these from happening. Also, the aggressor need not be morally responsible to for his attack for the defender to be permitted to use defensive violence. Consider the following.

Case #7: Psychotic Aggressor

A woman's companion in an elevator goes berserk and attacks her with a knife. There is no escape: the only way for her to avoid serious bodily harm or death is to kill him with her gun. The assailant is non-responsible. If he were brought to trial for his attack, he would have a valid defense of insanity. It intuitively seems that self-defense is permissible here even though the assailant is not blameworthy for the attack.¹⁸

Case #8: Innocent Threat

An aggressor picks up a third party and throws him at you down at the bottom of a deep well. The third party is innocent and a threat; had he chosen to launch himself at you in that trajectory he would be an aggressor. Even though the falling person would survive his fall onto you, you use your ray gun to disintegrate the falling body before it crushes and kills you.¹⁹

Consider, for example, this equation for self-defense. Counterfactual (R v H) is the disjunction of responsibility and harm were the attack to succeed instead of its being prevented by defensive violence.

$$\text{Ceiling}_{\text{defensive violence}} = \text{counterfactual (R v H)} .$$

An objector might wonder why we should expect self-defense to have a similar ceiling as punishment. He might claim that it is not clear why they should have the same type of proportionality. Contra the objector, if there are multiple senses of proportionality, then there is less likely to be a type of proportionality that is intuitively satisfying. While not decisive, this does intuitively seem to be a reason to think that proportionality varies between negative treatments and, perhaps, even within a specific type of negative treatment (for example, compensation).

Proportionality also applies to self-defense in a way that differs from punishment. Consider the following.

Case #9: Gang Attack

A woman may severely wound or kill a group of men who are trying to beat and rape her even though she wouldn't have the right to kill them as punishment for having beaten and raped her.

¹⁸See George Fletcher and Luisa Chiesa, "Self-Defense and the Psychotic Attacker," *Criminal Law Conversations*.

¹⁹See Robert Nozick, *Anarchy, State, and Utopia*.

The assumption in this case is that she cannot merely wound them so that the only way to prevent the attack is to kill the attackers.

Other constraints on permissible self-defense (discrimination, imminence, and necessity) are independent of proportionality in that they intuitively seem to apply in a way that differs from proportionality. It is not even clear that proportionality applies to self-defense in a straightforward manner. In the below cases, defensive violence intuitively seems permissible even though it is unlikely to be proportional to any valuable outcome the defender will bring about or expect to bring about.

Case #10: Morty

In prison, the Aryan Brotherhood decides to send a message to the Jewish inmates by giving one Jewish inmate a severe beating, thereby showing the rest that they are all vulnerable and should transfer out of C-Block. They attack Morty. He knows that any defensive violence is unlikely to stop the attack and in fact is likely to make it even more savage.

Case #11: Cavalry Defense

Polish horse cavalry face overwhelming force by a Nazi blitzkrieg. Cavalry members know that launching horse based attacks will likely result in their death, their horses' death, and the fruitless killing of a few Nazi soldiers.

4.5 Practical Argument for Thesis #1 (Proportionality Is False)

Even if there were a theoretical ceiling on permissible punishment, there are practical problems with implementing such a ceiling. There is currently, no practical way to measure responsibility. This is in part because there is no workable scale of responsibility.

Focusing on practical issues might be seen as irrelevant as the essay focuses on the theoretical justification of proportionality. While focusing on practical problems is a minor point, it is a concern about a theory that it cannot currently be implemented in anything like a rough approximation. This is particularly true for a principle that governs when and how people use violence and coercion.

There is also no practical way to measure the significance of right-infringement without focusing on harm or typical harm. In practice, this means that a right-based account of proportionality will be filled out in terms of a harm-based account. A harm-based account is available, but it will not be connected to the features that make someone liable for punishment, namely, being morally responsible for having infringed another's right. Also, as a practical matter, there is no shared metric by which the above factors can be combined.

If practical problems are relevant to permissibility, and it is not clear they are, then the proportionality ceiling is in still more trouble.

4.6 Objections

In this chapter, I sought to defend two theses. The moderate thesis is that proportionality cannot be a side-constraint on punishment. The more ambitious thesis is that proportionality is false full stop. An objector might argue that my arguments pose a more serious challenge to the first, rather than to the second, thesis. A defender of proportionality might think he can get around my arguments for the ambitious thesis.²⁰ He can do so by (a) holding that desert tracks expected, rather than actual, harm (b) accepting that there can be non-experiential harms, (c) accepting that one can be fully responsible while having a finite set of beliefs, (d) positing a lexical ranking between radically qualitative and quantitatively different harms, or (e) accepting Shelly Kagan and Peter Vallentyne's solution about infinite good or by adopting other plausible views.

4.6.1 Objection #1: Proportionality Tracks Desert

Above, I argue that proportionality requires that there is a systematic positive relation between the seriousness of a person's wrongdoing and the maximum severity of punishment she may be given. An objector might respond that, instead, it requires that there is a systematic positive relation between the seriousness of a person's wrongdoing and the maximum severity of punishment she *deserves* to be given.

The problem with the objector's notion is that proportionality might be thought to apply to non-consequentialist theories of punishment that are not desert-based (consider, for example, forfeiture and distributive-justice theories). People might not deserve things even though non-consequentialism has a proportionality ceiling on punishment. Consider, for example, if desert entails responsibility and people are not responsible. Also, if one thinks, as I do, that desert is a mathematical function that (a) relates well-being and intrinsic value and (b) rests on virtue not actions, then it is not relevant to proportionality.²¹ In any case, desert is often considered to be a theory of the good, not the right. If this is correct, then it is not relevant to at least some non-consequentialist theories, including the ones considered here.

Here is a summary of this objection and the responses to it. The objections that come from Travis Timmerman are listed under Timmerman (Table 4.3).

²⁰These objections come from Travis Timmerman.

²¹For a book-length defense of this view of desert, see Stephen Kershnar, *Desert and Virtue: A Theory of Intrinsic Value*.

Table 4.3 Nature of Proportionality

Kershnar	There is a systematic positive relation between the seriousness of a person’s wrongdoing and the maximum severity of punishment she may be given
Timmerman	There is a systematic positive relation between the seriousness of a person’s wrongdoing and the maximum severity of punishment she <i>deserves</i> to be given
Objections to Timmerman	<p>1. <i>Objection #1: Non-Desert Theories.</i> Proportionality might be thought to apply to non-consequentialist theories of punishment that are not desert-based (consider, for example, forfeiture and distributive-justice theories)</p> <p>a. <i>Objection #1a: No Desert.</i> People might not deserve things even though non-consequentialism has a proportionality ceiling on punishment. Consider, for example, if desert entails responsibility and people are not responsible</p> <p>b. <i>Objection #1b: Ground.</i> Desert is a mathematical function that (a) relates well-being and intrinsic value and (b) rests on virtue not actions. It is thus not relevant</p> <p>c. <i>Objection #1c: Good.</i> Desert is a theory of the good, not the right, and thus is not relevant to at least some non-consequentialist theories</p>

4.6.2 Objection #2: Proportionality Tracks Expected Harm

I further argued that in some cases, punishment is intuitively permissible even when harm-based proportionality does not permit it. Consider, for example, mere attempts. Also, consider some completed wrongdoings. Examples include cases when theft (a) produces no setback in terms of what makes someone’s life go better (pleasure, desire-fulfillment, or objective-list goods), (b) is followed by the victim’s death, (c) is followed by heaven, or (d) causes an increase in the victim’s all-things-considered well-being because it leads to a good event (for example, meeting one’s spouse).

A second objector might claim that proportionality tracks *expected* rather than *actual* harm. The problem is that if expectation is a psychological state of the agent, then this reduces to the responsibility element. This is because expectation is then a function of what the agent in fact expected and this is a part of what makes him morally blameworthy for his act.

There are other problems. The wrongdoer’s or victim’s expectation about harm might be mistaken. Also, one or both might have no expectation about harm. In addition, it is not clear whether the relevant amount of harm on this account should be expected, rather than intended, harm. This is relevant if the wrongdoer did not intend harm even if she expected her act would bring it about.

If, instead, expectation is a type-notion (for example, statistically likely harm), then the (a) category is arbitrary and (b) it makes punishment for what one person did to a second depend on facts about a third. It is arbitrary because there are different ways to construe the type of action that the agent performs. It makes punishment for one person depend on what another did because the statistical expectation is set by the effects of what a class of wrongdoers did or, perhaps, will do.

4.6.3 Objection #3: Proportionality Has a Lexical Ordering

A third objector might argue that proportionality only generates the intuitively incorrect verdicts in *Computer Programmer* if we also assume that there is no lexical ranking between quantitatively and qualitatively distinct harms. He continues that defenders of a lexical view can and, in fact, should hold that the murderer deserves greater punishment than the computer programmer. If one accepts that there is a lexical ordering of goods, then a proponent of proportionality should have no problem holding that the programmer deserves a greater punishment than the murderer. The problem, then, with my theory is not a problem with proportionality, per se. Rather, it is a problem with how to rank quantitatively and qualitatively distinct outcomes.

The problem with this objection is that lexical ordering is at most plausible as a theory of right action, but not of harm. Interests (and, also, goodness) intuitively seem to come in cardinal amounts. Consider, for example, pleasure or desire-fulfillment. Hence, even if there is lexical ordering in rightness, this will not allow various measures of proportionality (for example, $C \times H$) to do needed explanatory work.

There are lexical ordering views that seem to concern well-being. Consider, for example, the idea that no amount of pleasure is as good as any amount of virtue. These go to harm, not right action. These views, however, are so implausible as to allow us to sidestep them. It intuitively seems, for example, that there is some amount of torture-related harm in innocents that outweighs an incredibly small loss of virtue.

Here is a summary of the last two objections (Table 4.4).

4.6.4 Objection #4: Responsibility Comes in a Cardinal Amount or Percent of Maximum Responsibility

The article argues that responsibility does not come in a cardinal amount or percent of maximum responsibility. The reason I give is that perfect responsibility involves infinite reason-responsiveness, sanity, desire-alignment, agent-causation, or so on. Hence, an individual's responsibility-level cannot be a percentage of maximum responsibility because it cannot be a percentage of an infinite amount. An assumption here is that if X grounds Y and X comes in a smooth continuum of degree or amount, then, other things being equal, more X grounds more Y. Consider, for example, happiness and goodness.

An objector might argue that one only needs a finite set of beliefs to be fully responsible. The problem is that a person's degree of responsibility is a function of his reason-responsiveness. A person's reason-responsive is a function of how much he can control (strength of desire he can overcome) and how much he knows about reasons. Because there is no limit to the degree to which one can control or know about reasons, maximum responsibility depends on infinite capacities. Reasons responsiveness is a function of the degree to which an individual can know about and control what he does, so it too does not have a limit.

Table 4.4 Objection to harm-factor

Kershnar	<p>In some cases, proportionality permits punishment when there is no harm. Consider mere attempts and some completions. Also, consider cases when</p> <ol style="list-style-type: none"> a. theft produces no setback in terms of the bases of well-being - pleasure, desire-fulfillment, or objective-list good, b. theft is followed by the victim’s death, c. theft is followed by heaven, or d. theft causes an increase in the victim’s all-things-considered well-being
Timmerman	<p>Proportionality tracks <i>expected</i> harm rather than <i>actual</i> harm.</p> <ul style="list-style-type: none"> • <i>Reply #1: Subjective.</i> If expectation is a psychological state of the agent, then this reduces to the responsibility element • <i>Reply #2: Objective.</i> If expectation is a type notion (for example, statistically likely harm), then the (a) category is arbitrary and (b) it makes punishment for what one person did to a second depend on facts about a third person
Timmerman	<p>Proportionality only generates the intuitively incorrect verdicts in <i>Computer Programmer</i> if we also assume that there is no lexical ranking between quantitatively and qualitatively very distinct harms. Defenders of a lexical view can (and would want to) hold that the murderer deserves greater punishment than the computer programmer. On the other hand, if one denies that there is a lexical ordering of goods for theoretical reasons, then defenders of this view should have no problem holding that the programmer deserves a greater punishment than the murderer</p> <p>This is not a problem with proportionality, per se. Rather, it is a problem with how to rank quantitatively and qualitatively distinct outcomes</p> <ul style="list-style-type: none"> • <i>Response: Lexical Ordering.</i> Lexical ordering is plausible as a theory of right action, but not of harm. Hence, C x H does not do the explanatory work <p>In any case, this is merely a motivation</p> <ul style="list-style-type: none"> • <i>Response: Reject Lexical Ordering.</i> The intuitive problem reappears

The objector might reply that we should adopt a satisficing criteria for full responsibility and determine degrees of responsibility relative to this finite set of justified beliefs. The problem with this is that the relation between permissible punishment and what grounds it does not have a threshold as does the satisficing criterion.

Even if satisficing has a threshold and responsibility and harm do not, a satisficing threshold will be have an odd grounding or, perhaps, an arbitrary basis for a ceiling on permissible punishment. It will have an odd grounding in that in general factors like R and H will increase the ceiling on punishment, perhaps in a linear relation, up to a point at which they suddenly have no moral impact. This is strange. The threshold will be arbitrary if the above oddity is avoided via stipulation.

By analogy, consider wrongdoing. Wrongdoing can be increasing worse depending on the importance of the right infringed or severity of harm caused or intended. As a result, there is not (finite) maximum wrongdoing.

The objector might instead reply that we should remove the degree-of-responsibility variable from the proportionality equation or make the category bivalent, assigning 1 or 0 in each case. As an intuitive matter, though, people do not merit punishment for acts for which they are not morally responsible (e.g., sleep-raping). Nor does it intuitively seem that responsibility is bivalent. For example, consider theft

by a slow 16-year-old and a smart and disciplined Wall Street trader. It is implausible that they have the same degree of responsibility.

Still another reply the objector might make is that we should measure responsibility by an ordinal, rather than cardinal, ranking. This would introduce some vagueness into the amount of punishment one deserves. The problem is that ordinal rankings will not ground proportional punishment. They might covary with ordinal ranked punishments, but we need cardinal rankings to have intuitively just ceilings.

The objector might reply that no shared metric is needed. Consider this case.

Example: Coffee. Steve and Yishai bump into Neil and make him spill coffee all over himself, thereby incurring a kind of moral debt. Steve and Yishai each ought to pay half of Neil's dry cleaning bill and give him several beers for his pain and suffering.

This is coherent *even though moral debt* and *monetary debt* do not share a metric.

The problem with this reply is that a percentage makes sense for cause, but not for responsibility. We need an amount and this requires a unit. By analogy, there is no way to divide responsibility between people. How should responsibility be divided between Steve and Yishai? If there is no way to divide responsibility between people, there is no amount of percentage for a particular person compared to full responsibility.

Above I argue that if people are not responsible for negligence and, perhaps, not responsible at all, then there is no appropriate scale for responsibility. An objector might argue that there could be such a scale, but actual people who are not responsible for their actions and so, according to proportionality, would not deserve any punishment. That's not a problem for proportionality, the objector argues, but merely for its applicability to current people. He concedes that other objections to proportionality still apply, but this one does not. The problem with this objection is that proportionality is supposed to function as a side-constraint to the actual world as it is roughly constituted. If it is applicable only to possible worlds that bear little resemblance to the actual world, then it will not do no moral work in the actual world.

Here is a summary of the objections and responses (Table 4.5).

4.7 Conclusion

In this chapter, I began by noting that proportionality is at odds with a cost-benefit analysis of punishment, proportionality is an essential part of forfeiture theory, and a plausible version of the proportionality ceiling deviates from our intuitions in puzzle cases. I then argued that proportionality is not a ceiling on permissible punishment.

This rests in part on theoretical problems with proportionality. First, the plausible individual factors (responsibility, harm, and rights) do not apply in a straightforward manner. Second, the plausible individual factors cannot be combined in an intuitively satisfying manner, whether in a token-token or type-type manner. I further noted proportionality is odd in that it seems to apply in a different way to different non-consequentialist areas, specifically, punishment, compensation, and self-defense. In

Table 4.5 Objection to responsibility-factor

Kershnar objection	<p>Responsibility does not come in a cardinal amount or percent of maximum responsibility <i>Reason: Infinite Ground.</i> Perfect responsibility likely involves infinite reason-responsiveness, sanity, desire-alignment, agent-causation, or so on. Hence, an individual’s responsibility-level cannot be a percentage of maximum responsibility <i>Assumption: Ground.</i> If X grounds Y and Y comes in a smooth continuum of degree or amount, then, other things being equal, more X grounds more Y. Consider, for example, happiness and goodness</p>
Timmerman response	<ol style="list-style-type: none"> 1. One only needs a finite set of beliefs to be fully responsible. <ul style="list-style-type: none"> • <i>Reply: Infinite Responsibility</i> – <i>Degree of Responsibility.</i> A person’s degree of responsibility is a function of his reason-responsiveness – <i>Degree of Reason-Responsiveness.</i> A person is more reason-responsive is a function of how much he can control (strength of desire he can overcome) and knows about reasons – <i>Infinite Reason-Responsiveness.</i> There is no limit to the degree to which one can control or know about reasons 2. Adopt a satisficing criteria for ‘full’ responsibility and determine degrees of responsibility relative to this finite set of justified beliefs. <ul style="list-style-type: none"> • <i>Reply #1: Reject Satisficing.</i> The relation between permissible punishment and what grounds it does not have a threshold. By analogy, consider wrongdoing 3. Remove the ‘degree of responsibility’ variable from the proportionality equation or make the category bivalent, assigning 1 or 0 in each case. <ul style="list-style-type: none"> • <i>Reply: False.</i> As an intuitive matter, people are not responsible for acts for which they are not morally responsible (e.g., sleep-raping). Nor does it intuitively seem that responsibility is bivalent. For example, consider theft by a slow 16-year-old and a smart and disciplined Wall Street trader 4. Measure responsibility by an ordinal, rather than cardinal, ranking. This would introduce some vagueness into the amount of punishment one deserves <ul style="list-style-type: none"> • <i>Reply: Arbitrary.</i> Ordinal rankings are arbitrary

addition, proportionality does not apply to self-defense in a clear manner if it applies at all. Also, self-defense has other side-constraints (discrimination, imminence, and necessity) that intuitively seem to be independent of proportionality.

The failure of the proportionality-ceiling also might rest in part on practical problems with proportionality in that there is no practical way to measure one of the constraints (responsibility) and a second plausible constraint (right-infringement) likely would have to be measured by a third (harm). A harm-based account will likely not be connected to what makes someone liable for punishment, namely, being morally responsible for having infringed another’s right. In addition, as a practical and theoretical matter, there is no shared metric by which the factors can be combined.

The upshot of this is that proportionality is likely not a constraint on permissible punishment. Because this constraint is a central part of non-consequentialist theories

of permissible punishment, such theories are likely mistaken. This leaves open the possibility that punishment, if justified at all, is justified on consequentialist grounds. This is best done via a cost-benefit analysis.²²

Above I argue that a reason to be concerned with proportionality is that it conflicts with a cost-benefit analysis of punishment. Later, I argue that there is reason to accept the cost benefit analysis of punishment, which in turn provides reason to reject proportionality. An objector might argue that proportionality wouldn't be inconsistent with a cost-benefit analysis unless proportionality is thought to be a constraint that cannot be overridden. A reasonable deontologist, the objector continues, allows proportionality to be overridden by considerations such as a strong difference between a punishment's cost and benefit.

The problem with this objection is that the proportionality side-constraint is supposed to be plausible and a stringent consideration in the context of self-defense and punishment. If proportionality cannot be filled out in a plausible way and gives way to a cost-benefit analysis in most, if not all, cases, then it and any deontology that depends on it are problematic.

The objector might respond that proportionality can be incorporated into a cost-benefit analysis. For example, the objector notes, giving someone their just deserts would be a benefit of a given punishment. Also, he points out, being unable to provide resources to needy people because of the expense of giving someone their just deserts would be a cost of a given punishment.

Contra the objector, this objection works only if proportionality can be set out in a plausible manner. If the above argument succeeds, it cannot. Also, in its most plausible form, proportionality competes against a cost-benefit analysis in so far as the former is backward-looking and the latter is forward-looking. If they compete in this way, then the former cannot be incorporated into the latter. Perhaps the cost-benefit analysis could incorporate the proportionality requirement via a desert-based account of costs and benefits (or, more generally, a desert-based consequentialism). This would not escape the objections to the plausibility of proportionality, but would explain how such an incorporation can occur.

²²I am extremely grateful to David Boonin, Spencer Case, Neil Feit, Ryan Jenkins, Duncan Purves, George Schedler, and especially Travis Timmerman and participants in the 2016 Rocky Mountain Ethics Congress conference for their very helpful comments and criticisms of this paper.

Chapter 5

Rights Fail and Why This Explains the Other Failures



Abstract Non-consequentialist theories fail because they depend on moral rights and people do not have moral rights. If people have rights, then they are justified by interests or autonomy, but they are not so justified. For example, interest-promotion is neither necessary nor sufficient for a right. The same is true for autonomy-promotion. The absence of rights explains why consent does not matter, why people do not forfeit their rights, and why forfeiture is not governed by a principle of proportionality. The explanation is that rights are prior to consent and forfeiture so if the former do not exist, neither do the latter. Because forfeiture is prior to proportionality, there also is no proportionality. A theory of morality that cannot handle voluntary change in moral relations (consent and promise) or conflict is a failed theory. This is one of, if not the main task, of morality. Because of the failure of rights, non-consequentialism fails.

5.1 Thesis

Rights, forfeiture, and proportionality lie at the center of much of the discussion of non-consequentialism. This chapter argues that individuals do not have rights and that this explains why consent does not matter, people do not forfeit rights, and there is no defensible theory of proportionality that can be applied in the context of punishment, defense, or compensation.

The first part of the chapter argues that people do not have rights. The argument is that if people have rights, then they are justified by interests or autonomy, but neither do so. For example, interest-promotion is neither necessary nor sufficient for a right. The second part of the chapter argues that the absence of rights explains why consent, by itself, does not matter, why people do not forfeit their rights, and why right loss is not governed by a principle of proportionality. The argument will be that rights are prior to consent, forfeiture, and proportionality, so that if there are no rights, then these other things are not part of morality.

To see an example of why rights matter, consider the different criticisms of overcriminalization. This is an important example because the state is arguably an organization that claims a monopoly over violence in a region and one of the main forms of violence (or related coercion) involves punishment. Critics of overcriminalization (consider, for example, Douglas Husak) argue that some criminalized activities (for example, drug manufacture, sale, or use) do not infringe on anyone's moral rights, do not satisfy minimal non-consequentialist conditions for just punishment, or fail a liberty-prioritizing cost-benefit analysis.¹ Others argue that punishment (and, hence, criminalization) is unjustified at least in part due to rights-based or Kantian considerations. Consider, for example, David Boonin's argument that legal punishment cannot satisfy the requirements of justice. Specifically, there is no theory that can justify punishing all and only morally guilty people and can also justify imposing a punishment that is proportional to the crime.² Consider, also, Randy Barnett's argument that legal punishment is unjust in part because backward-looking theories fail to show that there is a conceptual link between what the wrongdoer did and intentionally making him suffer and because forward-looking theories do not satisfy the Kantian requirement that people not be treated merely as a means.³ Still others argue that overcriminalization is wrong because it has unjust effects. Consider, for example, Michelle Alexander's argument that overcriminalization is unjust because it is racist.⁴ Others argue that the byzantine and wide-ranging criminal code results in threats to our liberty because Americans do not know when they have broken the law.⁵ These critics of overcriminalization assume that people have moral rights. In this chapter, I argue that this is mistaken.

A right is usually thought to be a claim that acts as a side-constraint on permissible action.⁶ One person has a claim against a second if the second owes the first a duty. Sometimes a right is thought to demarcate a perimeter of two-way permissible action. The two most widely held theories assert that rights are justified by interests or autonomy (for ease of presentation, I will focus on interests).⁷

¹See Douglas Husak, *Drugs and Rights*, Douglas Husak, *Overcriminalization: The Limits of the Criminal Law*, and Douglas Husak, *The Philosophy of the Criminal Law*.

²See David Boonin, *The Problem of Punishment*.

³See Randy Barnett, "Restitution: A New Paradigm for Criminal Justice," 279–301.

⁴See Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.

⁵See Harvey Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* and Gene Healy, *Go Directly to Jail: The Criminalization of Almost Everything*.

⁶For the notion that a right is a claim, see, also, Joel Feinberg, "The Nature and Value of Rights," 243–257. For the notion that a right is a side-constraint on the pursuit of the good, see Robert Nozick, *Anarchy, State, and Utopia*.

⁷For the notion that rights are justified because they protect interests, see Matthew Kramer, "Rights Without Trimmings," pp. 7–112 and Matthew Kramer, "Some Doubts about Alternatives to the Interest Theory," 245–63. For the notion that either the benefit or will theory of a right is true, see Matthew Kramer and Hillel Steiner, "Theories of Rights: Is There a Third Way?" 281–310.

5.2 Part Two: Token-Token Theory

Consider a token-token right theory that holds that the content and stringency of a right correlates with the right-holder's interest.⁸ An example of this is Jones' alleged right to put this packet of meth into his body at a specific time. This claim is justified by the specific right-holder's interest. The problem is that people intuitively seem to have rights that are not justified by their interests and vice versa. Assume that interest here is all-things-considered interest, that is, overall, what makes someone's life go best. Intuitively, a person has a right to smoke even though the right makes his life go worse because smoking shortens his life.⁹ Similarly, a starving individual has an interest in eating another person's sandwich (and, perhaps, the other person) even though he intuitively does not have a right to it.

The problem worsens if we focus on rights and interests at a particular time. At one time, the psychological gain from smoking a cigarette might be great enough to make it in the smoker's interest. This would not be true at other times. It is odd that a right to something (for example, smoking) would go in and out of existence based on momentary changes in a person's interest. The time that a right exists might be for more than a momentary duration, but this does not make the problem go away. In addition, because some people might have an interest in something while another does not, similarly situated people might have different rights. It is implausible that a person gains and loses a right over time and that people have very different sets of rights.

I argue that there is a problem with rights going in and out of existence. This is so for a couple of reasons. Rights are supposed to be action-guiding and they would have a hard time playing this role if they blink in and out of existence. In addition, such a blinking picture is intuitively distasteful. A woman's right to not to be threatened or forced to have sex with another intuitively seems constant rather than blinking in and out of existence depending on how seemingly gross injustices might affect her and others' future development. It intuitively seems distasteful that the right would

⁸The "interest theory of rights" asserts that rights function to protect interests. As such they are constituted by a claim. See, e.g., David Lyons, *Rights, Welfare, and Mill's Moral Theory*; Neil MacCormick, "Rights in Legislation," pp. 189–209; Joseph Raz, *The Morality of Freedom*; and Matthew Kramer, "Rights Without Trimmings," pp. 7–112.

In contrast, the autonomy-based theory of rights is called the "will theory of rights." This theory asserts that rights function to protect choices. As such they always include a Hohfeldian power plus the other Hohfeldian elements over which the power ranges. See, e.g., H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory*; Carl Wellman, *A Theory of Rights*; and Hillel Steiner, *An Essay on Rights*. I should mention that on my version of the will theory, rights are constituted by claims, although these claims are often accompanied by powers.

⁹On some accounts of addiction, addicted people sometimes do not enjoy the activity they are addicted to, but can have a desire to do it even if doing it does not bring them pleasure. This strengthens the case for some addictive activity (for example, smoking) not being in the user's interest if liking an activity is more important to the user's interest than wanting it. See Richard Holton and Kent Berridge, "Addiction between Compulsion and Choice," pp. 239–268. Also, addictive activity might not be in an addict's interest in part because it is akratic.

depend on the ever shifting trajectory of others' lives as they intersect with different potential acts of sexual aggression toward her.

An objector might note that interest theorists do not need to rest rights on such fleeting occurrent interests like the desire to eat a sandwich or smoke a cigarette. Even if there are such fleeting interests, there are easy modifications of an interest view to handle this worry (consider, for example, dispositional interests and ideal interests). Moreover, more fundamental standing interests might ground more fundamental rights (consider, for example, an interest in pursuing one's own life goals or in non-interference of autonomous choice). More particular rights might be derivative of these. My right to smoke might be derivative on my right to pursue my life goals. It's less counterintuitive if the rights that were changing and varying through time and from person to person were these derivative ones.¹⁰

The problem with this objection is that some of these grounds (for example, dispositional or ideal interests) might, and probably do, vary by the moment depending on the benefit and cost they bring about in a particular instance. For example, sometimes a nap makes my life go better, sometimes it doesn't. The problem with making rights derivative of more fundamental standing interests is that sometimes an activity promotes the standing interest (for example, life-goal satisfaction or autonomous shaping of one's life) and sometimes it doesn't. That is, grounding a right in fundamental standing interests does not escape the result that this generates a constant change in the stringency (and, perhaps, existence) of the right because of the momentary changes in the way the fundamental standing interest is promoted or set back.

Nor does this change if the interest is in having claims or in having choices (that is a second-order interest) because this interest can be enhanced, lessened, or eliminated by a claim depending on the context. Consider, for example, when a right to become a slave reduces a person's opportunity for claims or choices.¹¹ The second-order does not change the intrapersonal and interpersonal variation.

One might argue that the interest that gives right to a second-order claim (or second-order choice) is not instrumentalist. That is, the interest justifies a second-order right even if this undermines first-order rights or even the second-order one. The problem is that this can occur only if there is a third-order right, which then just pushes back the problem. The proponent of this second-order solution might claim that the right, while justified by an interest, is a side-constraint and, hence, not dependent on whether it promotes the interest. This makes it mysterious, though, how an interest justifies a right. If a right does not protect or promote an interest in some way, then it is hard to see how the latter can justify the former. The proponent might claim that there is an intrinsic relation between an interest and a claim, but it is hard to see how this relationship could be a justificatory one if it does not have some effect on the interest.

On some accounts, rights rest on an individual's interest in the future (or, depending on one's theory of interest, future interest). Consider, for example, the notion that

¹⁰I owe this objection to Robert Kelly.

¹¹For a related point focusing on the relation between autonomy and paternalism, see Douglas Husak, "Paternalism and Autonomy," 27–46.

a child has a right to an open future.¹² The problem is that if a current right depends on a future event, then the future event has a backtracking justification of the right that preceded it. That is, what right someone has will depend on what will be true of him many years into the future. If the future is uncertain because it is open, the existence and stringency of the right will be indeterminate. It is implausible that a right's existence or stringency is indeterminate. Similar to a physical force, it intuitively seems that a normative force must be determinate.¹³ If rights depend on the interests of past events, then an analogue of the Egyptology problem in population ethics occurs.¹⁴ Specifically, what rights a person has will depend on what was true of him many years before.

Above the chapter argues that rights cannot be indeterminate. It rests on the notion that if rights are indeterminate then duties are indeterminate and that indeterminate duties are implausible. This is true even if there is metaphysical vagueness in the world, rather than all vagueness being epistemic. It's simply impossible to conceive of a situation in which one person neither has nor does not have a duty toward a second.

A critic might argue that the problem with future-dependent rights is merely epistemic. He argues that we just don't know what will happen so we don't know the stringency. The same can be said of utilitarian views of right-making. Future events determinately make an action right even if we don't know what will happen. The same is true, the critic argues for hedonism. An action is good for someone now because of the future pleasure it will produce.¹⁵ It is odd that whether a person now has a right to marry someone (for example, a woman who has anti-social personality disorder) depends on what is true of the marriage thirty years, specifically how well the marriage goes were he to have married someone else. The same is true of the stringency of the right. The oddity is far worse, though, if the existence and stringency of the right are indeterminate due to the open future. After all, it cannot be that a person neither has nor does not have a claim against another.

If the focus is on other-things-equal interests rather than all-things-considered interests, then the above problems disappear, but a worse one appears. On this theory, evildoers have a (prima facie) right to murder, rape, steal, etc. if their doing so is in their other-things-equal interest. This is implausible.

If interests are moralized (only morally legitimate interests count), then there is a concern for circularity. This is because if the interest refers to a person's just interest, sphere of legitimate sovereignty, area of rightful control, claim to be left alone, etc. and these considerations depend on rights (perhaps implicitly), then a legitimate interest justifies and is justified by rights. This is circular.

¹²See Joel Feinberg, "The Child's Right to an Open Future," pp. 124–53. See also Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self*, 325–326.

¹³One might object that normative force need not have an ordinal rather than cardinal value and, hence, need not be determinate. The problem is that a specific ordinal ranking is determinate just as a cardinal ranking and so this does not eliminate the concern.

¹⁴For the Egyptology objection, see Derek Parfit, *Reasons and Persons*.

¹⁵I owe this objection to Bob Kelly.

If, instead, an interest is made legitimate by another type of moral consideration (for example, virtue or desert), then these other moral considerations would justify rights. This would make rights derivative of these considerations, which intuitively seems false. Rights theories sometimes assign a more fundamental role to rights.¹⁶ For example, we often think there is a right to do vicious actions or fail to give people what they deserve.¹⁷ For example, it seems that people have a right to say hateful things about various groups. Similarly, an ungrateful daughter has the right not to take in her sick mother, despite the fact that the mother was wonderful to her and that it is both a demand of gratitude and desert that she be taken in. Also, such a theory would not work for theories that make the other type of moral consideration (for example, desert) depend on whether a person respects other people's rights.¹⁸ Even for moral pluralists, such as W. D. Ross, rights have a fundamental role that is not dependent on other *prima facie* duties.¹⁹

If interests of people who might be affected by a right are balanced against one another, then a series of problems arise. First, it intuitively seems that people can have rights even when other people's interests are greater than the purported right-holder's interest.²⁰ For example, if Smith's interest in selling various goods and services (for example, alcohol, religious tracts, or sex) are outweighed by her buyers' overall interest in her not selling these goods, then she has no right to sell them. Yet, intuitively she does have a right to do so. If there were a utility monster, people would have few, if any, rights that conflicts with the monster's interests.

Second, the problem of changing intra- and interpersonal interests again results in one person having different rights over time and multiple people having different rights at a time. Given competing interests, an unchanging person might gain or lose rights. This analogue to a Cambridge change is odd.

Third, when people have equal but conflicting rights to something (for example, a hammer), then there is an indeterminate situation when someone neither has nor lacks a right to something. This is impossible as one person either owes or does not owe a duty toward a second.

Another major problem has to do with proportionality in rights. Assuming that not all rights are equally stringent and that rights sometimes trump consequences, there

¹⁶See H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* and Hillel Steiner, *An Essay on Rights*. Some theories assert that rights are justified by fairness or equality. See, for example, John Rawls, *A Theory of Justice*.

¹⁷For a theory that makes rights, or at least right forfeiture, depend on a desert-like consideration, see Jeff McMahan's theory that in order to forfeit a right, an attacker must be blameworthy for an attack or morally responsible for putting another at risk. See Jeff McMahan, *Killing in War*, 51–60; Jeff McMahan, "On the Moral Equality of Combatants," 377–393; and Jeff McMahan, "The Basis of Moral Liability to Defensive Killing," 386–405.

¹⁸For an example of such a theory, see Fred Feldman, "Adjusting Utility for Justice: A Consequentialist Reply to the Objection from Justice," 567–585.

¹⁹Ross recognizes right-like relations (for example, reparation and gratitude) and natural rights. See W. D. Ross, *The Right and the Good*, 26–27, 48–56. On his theory, rights do not depend on other types of duties. For example, they do not depend on duties of justice (these appear to be desert-related) or beneficence.

²⁰This idea is set out in Judith Jarvis Thomson, *The Realm of Rights*, ch. 6, esp. p. 152.

is a proportionality relation between the strength of an interest and the stringency of a right.²¹ The proportionality relation, though, is hard to make out in that there is no shared metric between interest strength (for example, intensity and duration) and duty strength (for example, stringency). Perhaps the proportionality is fundamental and does not involve a shared metric. Still, it is an odd fundamental relation in that one would instead expect that there is an explanation as to why a specific strength of interest generates a duty of a specific stringency, not merely that it does so. The fundamentality notion blocks such an explanation.

Similar problems occur if autonomy, rather than an interest, justifies a right. Specifically, there are problems with an individual's rights going in and out of existence, different people having different rights, rights depending on future facts in a way that leads to a backtracking justification, and rights depending on past facts in a way that is counterintuitive. There is also a problem with proportionality. If rights depend on the degree to which different people have conflicting spheres of autonomy, then there is a need to rank setbacks to autonomy in order to determine who has what right. This comparative measure would have to rank the importance of the setback between the relevant parties. It is hard to see how this might be done unless the degree to which someone's autonomy is set back is filled out in terms of interests. It might be done by goodness, but this would also seem to rest on the degree to which someone's interest is set back. In addition, an autonomy theory would result in non-autonomous individuals (for example, animals and children) not having rights and right stringency varying with whatever constitutes autonomy (for example, rationality and free will).²²

A different, but related, problem that a token-token account faces is that of explaining why an intended victim's right is set back in cases in which an aggressor performs an unsuccessful attack or when the intended victim successfully defends herself. A right against risk is necessary to explain why a person is sometimes allowed to use violence to prevent an attack and, perhaps, why in some cases a person may be punished for a mere attempt. Risk, however, is a product of probability and severity of harm relative to some baseline.²³ The product and baseline, however, are nicely

²¹One way of filling out the Trump notion is that a right is an exclusionary reason that excludes the consideration of various other factors. See Joseph Raz, *The Morality of Freedom*. On another version, a reason undermines other moral factors. See Francis Kamm, *Intricate Ethics*. What is at issue here is the strength of the trumping, exclusionary, or undermining reason.

²²For the notion that the stringency of people's rights varies with their degree of autonomy, see Stephen Kershnar, "Intrinsic Moral Value and Racial Differences," 205–224.

²³There are various other explanations of the infringement. Among them are that imposing another to an increased risk is wrong when done from a certain motive or intention. This requires that motive (or intention) be a wrong-making feature. Alternatively, imposing an increased risk on another might be wrong because it harms the intended victim by setting back a dignitary interest. See Adriana Placani, "When the Risk of Harm Harms," 77–100. The first account depends on a motive-base theory of the right that should be rejected. The second account is implausible because a mere risk does not set back an interest. For example, it does not set back an individual's level of pleasure, frustrate a desire, or result in having fewer objective list goods or have them to a lesser degree. Even if it did setback an interest, this is not enough to show that it is wrong in that not every harm is wrong.

explained by trade-offs that fit cleanly into a cost-benefit analysis, but poorly into right theory. Also, setbacks that infringe rights intuitively seem to be present in cases when the right-infringing agent does not cause harm because she performs an unsuccessful attempt, contributes to an overdetermined harm, or contributes to a set of harms any subset of which maximizes the setback to an interest.²⁴ Some right theorists assert that there are procedural rights that must be satisfied before an authority can punish someone.²⁵ It is unclear if such a right is different from a right against risk or is just an instance of it.

There are still other problems in terms of what rights people have and what general category they fit into. Some right theorists assert that there are rights to be treated with dignity, not to be humiliated, and not to be subject to an unfair fight.²⁶ These contrast with theories that view all non-remedial and non-punitive rights as property rights.²⁷ There is thus a question of whether rights focus on attitudes, actions, or property. Perhaps these types of rights are equivalent. I am doubtful, though, given their different justifications. It is worth noting that, at least to my mind, the attempts to justify private property rights have failed.²⁸ For this discussion, let us sidestep this concern.

Here is a summary of the objections (Table 5.1).

5.3 Part Three: Type-Type Theory

One response to the above concerns is to adopt a type-type right theory. This theory holds that what rights an individual has depends on a population's interests. On this theory, an individual has a right just in case it would promote the interests of the population.

The difficulty is that whether one person has a right against a second should not depend on features of a third person. For instance, whether one person has a right to sell sex should depend on some feature of her and an actual or potential buyer. It should not depend on the number of people in Calcutta who would lose from there being a right to sell sex or the number in Beijing who would benefit from it.

Alternatively, it might be wrong because the risk is wrong because it involves asymmetrical risk-taking, unjustly enriching risk-taking, substantial risk-taking, or risk-taking relative to special interests. The problem with this is that if the risk is of a wrong, then the wrong cannot depend on risk. If these are the wrong-making features, though, then the wrong depends on risk and, hence, the theory is circular. See Heidi Hurd, "The Deontology of Negligence," 249–272.

²⁴Perhaps this can be filled out via the notion of plural harm. See Neil Feit, "Plural Harm," 361–388.

²⁵See Nozick, *Anarchy, State, and Utopia*.

²⁶For a discussion of dignity-based rights, see Jeremy Waldron, *Dignity, Rank, and Rights* and Dan Demetriou, "Our Dignity-Right to Guns," see David Sussman, "What's Wrong with Torture?" 1–33. For an objection to torture suggesting that there is a right not to be subject to an unfair fight, see Henry Shue, "Torture," 124–143.

²⁷See Nozick, *ibid*.

²⁸For a criticism of the historical theories, see Jeremy Waldron, *The Right to Private Property*.

Table 5.1 Objections to the token-token theory of Rights

#	Objection	Content	Example
1	Neither necessary nor sufficient	Interest-promotion is neither necessary nor sufficient for a right	A person intuitively seems to have a right to smoke even though it is not in her interest to have such a right
2	Change and variation	If a right depends on an interest at a time, then rights vary within and between lives	A person can quickly gain, lose, and gain a right to use powder cocaine
3	Future	If a right depends on a person’s future, then a right has a backtracking justification or is indeterminate	Whether a 20-year-old has a right to purchase alcohol depends on what will be true of him when he is 80
4	Past	If a right depends on a person’s past, then a right depends on an irrelevant fact about the right-holder’s past	Whether an 80-year-old has a right to purchase alcohol depends on what was true of him when he was 20
5	Prima Facie Interests	If a right depends on prima facie interests, then rights depend on other moral considerations (for example, virtue or desert)	Whether one person has a right to marry someone of another race depends on how virtuous he is or what he deserves
6	Trump	If a right depends on which conflicting interest is strongest, then rights do not trump the aggregate well-being or the good	Whether there is a right to insult Islam depends on whether those who are insulted would lose more than the speaker would gain
7	Proportionality	The proportionality relation between interest strength and claim stringency is unexplained	A person’s interest in speaking freely has to explain how much harm his right to do so trumps before it is overridden
8	No harm	If a right depends on interest, then unsuccessful attempts or non-harmful aggressions do not infringe rights	If an aggressor’s arson attack will cause no harm because the harm is overdetermined, then the intended victim may not use defensive violence

It might be objected that interests can depend on features of a third person. Suppose Al has a claim against Bob because the latter promised him that he would bring back his book today. Bob calls Al to ask if he can bring it over now. However, Al finds out that Bob’s stalker is waiting in the bushes to murder him upon arriving with the book. It seems like Al is obligated to tell Bob to wait until tomorrow. Bob does not have to make good on his promise and it is precisely because of the stalker and his

intentions. This is a case of a third party's features altering one person's claim against a second.²⁹

This objection is mistaken. First, the stalker does not eliminate Al's right against Bob to have the book returned. The right remains in place. Second, if it were to eliminate the right, this is because of its effects on the interests of the right-related parties (Al and Bob) and not on those a third party (stalker). The stalker is merely an interest-affecting cause. This is different from the right depending on a third party's interest, which is what the type-type posits.

Also, it matters if it is the total or average interest of a population that is promoted.³⁰ On a totalist account, there would be no right to things such as contraception that reduce the total number of happy people, where the cost of fewer happy people outweighs the benefit of existing people being happier. Totalist considerations might, and probably do, make rights differ significantly from what rights we intuitively think people have, especially if we consider purported reproduction-related rights.³¹

This theory becomes even less plausible if the relevant interests include those of past and future people. Similar to a parallel objection in population ethics, whether a woman today has the right to sell sex today should not depend on what was true of women in ancient Egypt. Were the right to depend on facts about future people, then rights would either have a backtracking justification or be indeterminate. They would be indeterminate if rights were to depend on future facts and these facts are indeterminate because the future is open.

In addition, the type-type theory is unable to explain why rights trump utility or other collective moral considerations. If the existence and stringency of a right were to depend on what makes a collection's lives go best, then rights would not be trumps (or be preemptive or undermining reasons) against aggregate well-being. The same is true if what justifies rights is what maximizes the good rather than what makes a collection's lives go best.

Similar problems occur with regard to rights to do actions that affect which individuals come into creation (see the non-identity problem).³² For example, there would be no right to have a disabled child if one could have easily waited and had a healthy one instead. The nature of a right suggests that it is impossible that there could be a right against doing an action that wrongs no one. It intuitively seems that right violations always wrong someone, namely, the right-holder. This is not true, though, if rights are justified by total well-being or goodness.

Given the possibility of multiple right-assignments that satisfy a population's interests to an equal degree, this theory is arbitrary because it can justify more than one conflicting set of rights. With regard to whether one person has a right to do

²⁹I owe this objection to Bob Kelly.

³⁰It also matters whether the total or average applies to actual or possible individuals. For an argument that possible individuals matter, see Caspar Hare, "Voices from Another World: Must We Respect the Interests of People Who Do Not, and Will Never, Exist?" 498–523.

³¹It gets even more complex if we consider animals. More and happier people might result in fewer and less happy animals.

³²See Parfit, *Reasons and Persons*, and David Boonin, *The Non-Identity Problem and the Ethics of Future People*.

Table 5.2 Objections to the type-type theory of rights

#	Objection	Content	Example
1	Ground	Whether one person has a right against a second cannot depend on a fact about a third	The right of one person to have sex with a second cannot depend about facts about a third person
2	Future people	If a right depends on the interests of future people, then rights have a backtracking justification or are indeterminate	Whether people have the right to practice Judaism now cannot depend on what is true of people 1000 years from now
3	Past people	If a right depends on the interests of past people, then rights depend on irrelevant facts	Whether people have a right to practice Judaism now cannot depend on what was true of people 1000 years ago
4	Trump	If a right is justified by aggregate well-being, then a right does not trump aggregate well-being	If the right to free speech is justified by, and only by, what maximizes aggregate well-being, then the right cannot trump aggregate well-being
5	Arbitrariness	There are incompatible rights	If an assignments of property rights to older people, poorer people, or women equally maximize aggregate well-being, then the assignments are equally justified and, perhaps, more justified than other right-distributions

something to another, it cannot be true that he neither has nor does not have a right to do it. For example, assignments of property rights to older people, poorer people, or women might all equally maximize aggregate well-being. If none were better than the others and all three are better than other alternatives, then all three right assignments would be equally justified and more justified than other right-distributions.

Here is a summary of the objections (Table 5.2).

5.4 Part Four: Right Waiver

A third problem on token-token or type-type theory focuses on the justification of right waiver. If a person’s power (standing) to waive a right is justified by an interest, then it cannot justify rights that allow an individual to set back or, perhaps, risk that interest. Yet on some accounts, a person has a right to set back her overall and

Table 5.3 Right-waiver objection

#	Objection	Content	Example
1	Self-defeating	If well-being justifies waiving a right, then the waiver cannot set back his well-being	If a right to waive one's right to bodily control is justified on the basis of her interest in it, then the waiver cannot rest on this interest

particular interests (for example, suicide). Some rights theorists argue that all rights are waivable.³³ On some accounts, people have the right to endanger their interests by performing risky acts (for example, risky wartime missions). The above problem also applies to right forfeiture.³⁴

An attempt to justify a right-waiver that depends on the value of a person having narrative control over her life converts an interest-based theory into an autonomy-based one. As argued above the autonomy-based argument will have to be interest-based in some way. Perhaps it focuses on an interest in autonomy. This is necessary if we are to rank individuals' competing realms of autonomy. Here is a summary of the main argument in this section (Table 5.3).

5.5 Part Five: Underlying Problem

The underlying problem is that rights are prior to interests or they are not. If they are prior, then interests do not ground rights and, thus, rights are ungrounded. If interests are prior, then we lose the tidy picture of equal, unchanging, and interest-trumping rights. The same problems occur if autonomy justifies rights.

Introducing epistemic considerations into the justification of a right does not change the above concerns. If what justifies a right is that there is good reason to believe that a right promotes an individual's or population's interest, then there are epistemic analogues of many of the above problems. For example, changing evidence would allow for an individual to quickly gain and lose a right and for rights to vary between people. Similarly, the evidence that one right is favored by people's conflicting interest would prevent there from being a right that trumps weightier conflicting interests.

³³See Hillel Steiner, "Directed Duties and Inalienable Rights," 230–44.

³⁴Others who assert that a criminal forfeits some of his moral rights include Stephen Kershnar, "The Structure of Rights Forfeiture in the Context of Culpable Wrongdoing," 57–88; A. John Simmons, "Locke and the Right to Punish," pp. 238–252, Judith Jarvis Thomson, *The Realm of Rights*, 365–366, Vinit Haksar, "Excuses and Voluntary Conduct," 317–329, Murray Rothbard, *The Ethics of Liberty*, Alan Goldman, "The Paradox of Punishment," 30–46; Roger Pilon, "Criminal Remedies: Restitution, Punishment, or Both?" 348–357. These theories differ with regard to whether right forfeiture is a fundamental feature of rights or explained by a more fundamental principle.

The autonomy (will) theory of rights is less plausible than the interest (benefit) theory because autonomy is unlikely to justify a deontic relation if it does not make someone's life or the world better. The former is an interest and thus a version of the interest theory.³⁵ It is hard to see how autonomy could make the world a better place if it does not make someone's life go better.³⁶ Having a right depend on an interest in autonomy explains what would determine who has what right when people have conflicting spheres of autonomy. Specifically, it will allow us to weigh the degree to which one right assignment promotes one person's autonomy and sets back another's. It is difficult to see, though, why one type of interest, autonomy-related interest, should be more important than other types of interests in justifying a right. There is no reason to give priority to autonomy-related interests when it comes to what is good for a person or good simpliciter, so it is hard to see why it would take priority with regard to moral rights.

A consequentialist justification of rights would fall prey to almost all of the above objections to the type-type model. More importantly, rights would be legal rather than moral. The criticism of overcriminalization does not focus on the notion that arresting, incarcerating, and fining far too many people violates their legal rights because changes in the law could remedy this.

5.6 Part Six: Objections

One objector might claim that this argument treats debates about the best conception of rights as an argument against rights. He might continue that we have strong intuitive support for non-consequentialism. Non-consequentialism avoids problems with morality requiring too much, permitting too much, and going haywire if there are infinite gains or losses. Consequentialist morality requires too much if, for example, it justifies duties to reproduce, give to the point of marginal utility, sacrifice one's loved ones for others, kill the depressed, and bring about the repugnant world. Consequentialist morality permits too much if, for example, it permits sacrificing people such as the fat man, punishing the innocent and not punishing the guilty, and cheating when it is not going to be discovered. If non-consequentialism is true and central to non-consequentialism are side-constraints that are best understood as rights, then there is strong intuitive support for rights.

Filling out rights is much like filling out other issues in non-consequentialism. Consider, for example, filling out proportionality in punishment, consequential overrides of rights, and, in the context of consent, sliding thresholds for adequate volun-

³⁵For an assumption that the interest theory of rights subsumes the will theory because autonomy grounds a right only if the right-holder has an interest in it, see John Oberdiek, "Towards a Right Against Risking," p. 371 n. 4.

³⁶The assumption here is that welfarism is true. That is, something makes the world a better place only if it makes someone's life go better. Even if one rejects welfarism, perhaps by asserting that virtue or desert affects the goodness of the world, this does not strengthen the case for the will theory.

tariness, knowledge, and competence. These details need to be worked out, but the moral entities are well-established.

The problem with this objection is that the intuitive appeal of rights collapses once we try to make out the notion. Consider token-token theories. Rights that quickly go in and out of existence and whose stringency varies by the minute are strongly counterintuitive. The underlying picture here is that what makes a person's life go better can, and sometimes does, vary over short periods of time, perhaps depending on context or shifting wants. The same is true for rights that lack a trumping function or that are not infringed when aggression is harmless due to harm overdetermination. A self-defeating waiver function makes this notion even less plausible. Worse, if an old man's rights depend on what was true of him when he was a boy or a boy's rights depend on what will be true of him when he is an old man, rights have jumped the shark.

A second objector might claim that rights are a rule-consequentialist notion. This explains why they are stable, trump the good, do not backtrack or have Egyptology problems, and get violated when an aggressor fails to injure his intended victim or contributes to an overdetermined harm. The objector concedes that this is a type-type theory, but claims that the counterintuitive price for the above objections to a type-type theory are not too great. In addition, the general attractiveness of rule-consequentialism in general adds to the attractiveness of the rule-consequentialist theory of rights to bolster the case for such a theory.

Rule-consequentialism asserts that what makes an act wrong is that it does not satisfy the rule or rules that would bring about the best results.³⁷ Versions of rule-consequentialism differ. On one account, an act is morally wrong if and only if it is forbidden by rules the acceptance of which would actually maximize the good. Other versions focus on what would maximize the expected good, focus on rule-compliance rather than rule-acceptance, and make adjustment for when there is more than one set of rules that has maximally good results. Consider the rule: *An individual may not use another's body without her permission*. The rule-consequentialist's idea is that this rule, if it were accepted (or complied with) by all (or most) people, would produce better results than any alternative rule. More specifically, the rule is included in the set or sets of rules that would bring about the best results.

If rule-consequentialism fails, even on consequentialist grounds, then the solution does not get off the ground. There are a series of standard objections to rule-consequentialism. First, rule-consequentialism is either extensionally equivalent to act-consequentialism or it is incoherent.³⁸ Second, rule-consequentialism addresses an epistemic issue (Given our limited knowledge and biases, what procedure is most likely to generate right acts?) rather than the metaphysical issue (What makes an act

³⁷For classic statements of it, see R. B. Brandt, *Ethical Theory*, J. O. Urmson, "The Interpretation of the Moral Philosophy of J. S. Mill," 144–152 and S. Toulmin, *The Place of Reason in Ethics*. For more recent accounts, see Brad Hooker, *Ideal Code, Real World: A Rule-Consequentialist Theory of Morality* and T. Mulgan, *The Demands of Consequentialism*.

³⁸See J. J. C. Smart, "Extreme and Restricted Utilitarianism," 344–354.

right?) and it is the latter that is central to moral theory.³⁹ Third, rule-consequentialism cannot handle conflicts of rules.⁴⁰ Fourth, the theory has to provide a non-arbitrary degree of compliance or acceptance and it is not clear that it has the resources to do so.

A concern is that on some accounts, the rule-consequentialist should not count the costs of getting people to move away from their current moral beliefs.⁴¹ Without this condition, the moral rules that a population currently holds might be terrible but better than other sets because of the high cost of getting people to change their minds. In addition, failure to screen out this cost might result in a relativism-like pattern about moral codes as it would be more costly to move some societies to a new set of rules than to move others.

There are additional arguments against rule-consequentialism.⁴² There is an issue as to what the correct version of rule-consequentialism is. One issue is what relation people must have to the rule. Depending on the theory, they could follow or accept the rule. Whether a person follows a rule depends on how he acts. Whether he accepts a rule depends on how he thinks. If there is no fact of the matter which relation makes one rule better than another, then rule-consequentialism is false. For now, let us focus on rule-following.

Even if there is a right answer as to the relation to a rule that makes a rule a better rule, there is another issue as to whether the best rule is the one that brings about the best results when everyone follows it or when some, but not all, people follow it. The notion that the best rule is one that everyone follows is counterintuitive because, in some cases, this is extremely unlikely and it is unclear why rightness should depend on extremely unlikely scenarios. It is also odd that a non-conformist can change the right, perhaps significantly, merely because he wants to act differently from everyone else.

If only some people need follow a rule for it to be the best, the issue is how many people must follow it. It might be that the best rule is the one that brings about the best rule at every rate of people following it. The problem is that sometimes there will be no such rule. It might instead be that the best rule is the one that brings about the best result when at least a percentage follow the rule (for example, 57% or more of people follow the rule). The problem is that the percentage intuitively seems arbitrary. Alternatively, the best rule might be the one that is a function of the consequences that occur at different rates of rule-following. On one account, the consequences are determined for each of the 0 to 100% rates of rule-following. On this account, the value of a rule is a function of the average value for all of these rates. On a different but related account, the value of a rule is a function of the total value for all of these rates. The problem with these two accounts is that it is implausible

³⁹The idea for this objection comes from Smart, "Extreme and Restricted Utilitarianism," 344–354.

⁴⁰See B. Eggleston, "Conflicts of Rules in Hooker's Rule-Consequentialism," 329–350.

⁴¹This idea and the two arguments that follow come from Brad Hooker, "Rule Consequentialism."

⁴²The idea for the next few paragraphs come from Douglas Portmore, "Parfit on Reasons and Rule Consequentialism," 135–152.

that a percentage of rule-following affects a rule's rightness when it is incredibly unlikely that percentage of people will follow the rule.

Even if there is a right answer as to the relation and the number of people that follow the rule, rule-consequentialism still generates situations in which people are morally required to perform an act that does not bring about the best results or are morally required to perform an act that is not part of a set of acts that would bring about the best results. This is problem for a consequentialist theory.

Even if rule-consequentialism survives the above objections, the proponent of this view still needs to show that the optimal rules include rights to one's body and property and, perhaps, various civil liberties (for example, rights to free speech, freedom of religion, and privacy). That is, the theory must not include *right-like rules*. It is plausible that it would. Thus, this theory might work if (a) rule-consequentialism survives the above devastating objections and (b) the intuitive costs of objections relating to a right's ground, its relation to past and future people, trumping function, and arbitrariness are not too high. I think (a) and (b) are false.

Third, there are still other justifications of rights that are possible, such as contractualist and public reason theories.⁴³ Like rule-consequentialist theories, they justify rights through constrained reasons that leave out some things of value in particular cases. Even if they succeed, and I don't think they do, they do not justify the sort of moral rights that play a fundamental role in morality. Rather, they merely indicate a deeper reason that justifies the constraint. Such theories do not allow that rights that, depending on the theory, constrain or compete against contractual obligations or public reasons. Intuitively, it seems that rights should constrain or compete against them.⁴⁴ Also, it is not clear that contractualist or public-reason-justified rights have all of the features ordinarily thought to characterize rights. Consider, for example, two-way liberties. Still, these justifications might get us much of what we want from rights. I just don't think these theories work.

Still other justifications of rights are possible. In addition to benefit, will, rule-consequentialist, and contractualist or public reason theories of rights, there might be some rights that rest on relationships or roles.⁴⁵ Consider the notion that there are relationship-based duties one person owes another (for example, her parents or fellow citizens). These duties are just claims viewed from the perspective of the one who owes the duty. Similar to basic negative rights, these rights do not rest on a voluntary act. The proponent of such a right argues that people have an intrinsic reason to be in a relationship because, by itself, a relationship makes someone's life go better (or at least does so when it is just, reasonable, etc.). He further argues that

⁴³See, for example, T. M. Scanlon, *What We Owe to Each Other* and John Rawls, *Political Liberalism*.

⁴⁴Rawls asserts that the setup of the original position aims to respect people as equal and respect people's autonomy. It does so in part by having justice as fairness come as close as a society can to being a voluntary scheme. This suggests an underlying right, namely, the right of people to be treated as equal autonomous beings. See John Rawls, *A Theory of Justice*, ch. 3.

⁴⁵For an argument for relationship-based duties, see Samuel Scheffler, "Relationships and Responsibilities," 189–209. For an argument for role-based duties, see Michael Hardimon, "Role Obligations," 333–363.

a relationship has as an essential feature of it having a (special) duty to those with whom one stands in a relationship. In essence, this is a type of benefit theory because it focuses on what is in someone's interest.

The main problem with this justification of rights is that even if it succeeds, it only justifies relationship-based rights and not the bulk of rights that are ordinarily thought to shape our moral world. For example, it does not justify any rights held against strangers. Second, the argument itself falls prey to the above sort of objections. A particular relationship might enhance or lessen a person's friendship-based well-being, for example, by excluding better and more meaningful relationships. It might also enhance or lessen other bases of well-being, for example, pleasure or knowledge. In fact, a relationship might make one person's life go better and the person with whom she has a relationship go worse, thereby making a relationship-based right in one party to a relationship but not the other. The relationship-based right proponent might argue that an individual's interest is in having a relationship, whomever it turns out to be with, rather than a particular relationship. The problem with this theory is that an abstract relationship does not affect one's well-being. Rather only concrete ones do and these depend on the particular relationship and its opportunity cost.⁴⁶

Here is a summary of the objections and responses (Table 5.4).

5.7 Part Seven: The Failure of Rights Explains Other Failures

The absence of rights explains why consent, by itself, does not matter, why people do not forfeit their rights, and why forfeiture is not governed by a principle of proportionality. The argument is as follows. Rights are prior to consent and forfeiture in the sense that the latter concepts include the former. Hence, if there are no rights, then there is no consent or forfeiture. The reason rights are prior to consent and forfeiture is that the latter two are ways of changing rights. Consent is a way of intentionally and, perhaps, voluntarily changing rights. For example, when one person consents, she waives a claim against a second, thereby, creating a liberty (absence of a duty) in the second. Promise is roughly the same, except that it creates a claim in the person to whom the promise is given. Forfeiture occurs, roughly, when one's unjust trespass against another leads to the trespasser losing his right. Using Robert Nozick's analogy, rights provide the boundaries of non-interference and consent and forfeiture change the boundaries.⁴⁷ If there are no boundaries, then there are no ways to change them. This is especially true if the absence of rights is necessarily true, which is what the above argument supports. Because forfeiture is prior to proportionality, there also is no proportionality. A parallel argument applies against a system of rights that includes positive rights that are natural.

⁴⁶A concrete relationship is one that holds between individuals (that is, concrete particulars).

⁴⁷See Nozick, *Anarchy, State, and Utopia*, 171.

Table 5.4 Objections to the above argument

#	Objection	Responses
1	<i>Intuitive Appeal of Non-Consequentialism.</i> The intuitive appeal of non-consequentialism shows it to be true and rights are central to non-consequentialism	<i>Intuition Problems.</i> Once we try to fill out how rights work, their intuitive appeal of rights goes away
2	<i>Rule-Consequentialism.</i> Rights are justified by rule-consequentialism	<ol style="list-style-type: none"> 1. <i>False.</i> Rule-consequentialism is false. It is false even if consequentialism is true 2. <i>Connection to Rights.</i> It is unclear whether rule-consequentialism justifies right-like rules
3	<i>Contractualist or Public-Reason Theories.</i> Contractualist or public-reason theories justify rights	<ol style="list-style-type: none"> 1. <i>False.</i> The theories are false 2. <i>Constrain or Compete.</i> Intuitively, rights to constrain or compete against contractual obligations or public reasons. These theories do not allow that they do so 3. <i>Features.</i> Such theories might not result in rights having the features we ordinarily think they have (consider, for example, two-way liberties or two-way powers)
4	<i>Relationship- or Role-Based Rights.</i> Some rights are based on relationships or roles	<ol style="list-style-type: none"> 1. <i>Rights against Strangers.</i> This will not generate many of the rights we care about, which are rights that we have against strangers 2. <i>Context.</i> On this theory, one only has a relationship based right if the relationship is in his interest. In a person, this can vary over time. It can also vary between people

Consent might be thought to function independently of rights (claims), but then it is hard to see consent doing the moral work it is thought to do. Intuitively, consent is thought to (a) waive a claim and (b) create a liberty or, perhaps, a power in a second person. A Hohfeldian power is the moral standing that allows one to retain, eliminate, or modify another Hohfeldian element such as a claim or liberty. These interlocking notions are inextricably tied to rights. If there are no rights, then consent does not do (a) and (b). In fact, it is unclear what it would do. Consent might be thought to have an effect on fairness or justice rather than rights. It is hard to see, however, how something could be unfair or unjust without the poorly treated individual having a claim that is infringed.

Consent might be thought to determine what people deserve. The problem is that desert is better thought of as a feature of the good.⁴⁸ For example, we often think that

⁴⁸The notion that desert is a part of the good rather than the right is the dominant view in the desert literature. See Fred Feldman, “Adjusting Utility for Justice: A Consequentialist Reply to the

good people deserve happiness and bad people deserve to suffer. This is true even if the former inadvertently caused a disaster and the latter inadvertently benefited the world. For example, if Robert Oppenheimer was a good person but made the world far worse through his role in developing the atomic bomb, it intuitively seems better that he is happy rather than unhappy. The opposite is true for a sadistic prison guard whose brutality helped make Victor Frankl (influential psychiatrist) into who he is and thereby benefitted the many who benefitted from Frankl. This suggests that desert is independent of what effects people have on the world. It is also independent of his act in that the rightness of wrongness of what Oppenheimer and the prison guard did will likely have to be set out in terms of claims or other things that presuppose claims (for example, fairness or justice). It is even independent of people's action-related motives in that a person's action-related motive intuitively seems to affect his desert only if it reflects his character. We care about a person's motive, if at all, because of what it tells us about him, not what it tells us about his act. On some accounts, desert is a function that relates well-being and intrinsic value on the basis of some feature of an individual. On my account, that feature is his virtue-level.⁴⁹ For instance, it tells us how intrinsically good a state of affairs is in which someone has a well-being level and a virtue-level. If the ground of desert is virtue rather than an act, the main function of consent would not be to determine what people deserve.

Parallel reasoning applies to forfeiture. That is, it is hard to see what an unjust attacker would forfeit if not a right. Desert cannot explain the moral work done by forfeiture for the above reasons. Desert focuses on the good not the right. It also focuses on a person's character rather than his actions or motives. Forfeiture has the opposite foci.

Proportionality is a constraint on forfeiture. It tells us what people forfeit when they forfeit. If people do not forfeit, then there is no constraint on forfeiture. This is significant in that forfeiture is relevant to the most central areas of conflict: punishment, defensive violence, and compensation for past harm. The non-existence of rights makes it unsurprising that proportionality cannot be set out in a satisfactory equation involving culpability, harm, or injustice. It also makes it unsurprising that proportionality intuitively seems to vary greatly between the three areas of conflict.

A theory of morality that cannot handle voluntary change in moral relations (consent and promise) or conflict is a failed theory. One of the main tasks of morality, if not the main task, is to tell people how to change their moral relations and what to do when there is conflict. Because of the failure of rights, non-consequentialism cannot handle either. Hence, it fails.

Objection from Justice," 567–585; Shelly Kagan, "Equality and Desert," and Owen McLeod, eds., *What Do We Deserve?* 298–314; Thomas Hurka, "The Common Structure of Virtue and Desert," 6–31; Neil Feit and Stephen Kershnar, "Explaining the Geometry of Desert," 273–298.

⁴⁹See Stephen Kershnar, *Desert and Virtue: A Theory of Intrinsic Value*.

5.8 Part Eight: Conclusion

Non-consequentialist theories fail because they depend on moral rights and people do not have moral rights.⁵⁰ If people have rights, then they are justified by interests or autonomy, but they are not so justified. For example, interest-promotion is neither necessary nor sufficient for a right. The same is true for autonomy-promotion. The absence of rights explains why consent does not matter, why people do not forfeit their rights, and why forfeiture is not governed by a principle of proportionality. The explanation is that rights are prior to consent and forfeiture so if the former do not exist, neither do the latter. Because forfeiture is prior to proportionality, there also is no proportionality.

A theory of morality that cannot handle voluntary change in moral relations (consent and promise) or conflict is a failed theory. This is one of, if not the main task, of morality. Because of the failure of rights, non-consequentialism fails.

⁵⁰I am thankful to Jim Delaney, Neil Feit, David Hershenov, Alice Hodge, Jake Monaghan, Travis Timmerman, Dale Tuggy, and especially Bob Kelly for their excellent comments and criticisms of this paper.

Part II
Why There is no Non-consequentialist
Morality

Chapter 6

No Responsibility (Responsibility and Foundationalism)



Abstract In the second part of the book, I begin by arguing that individuals are not morally responsible. If an individual is morally responsible, then there is a responsibility-foundation that makes him morally responsible, but there is no such foundation. A responsibility-foundation is a basic responsibility-making fact that does not depend on a person being responsible for something else. This rests on the notion that if there were a responsibility-foundation, it would be either an ungrounded choice or an ungrounded character state and that neither is true. The chapter then considers three types of objections. First, moral responsibility does not require a responsibility-foundation. Second, a character state can serve as the foundation. Third, we know people are responsible even if we don't know what the foundation is. These objections fail. The appendices complement the part of the book that focuses on responsibility. In the first appendix, I set out a theory of what responsibility is. The purpose of this appendix is that it clarifies what I am denying when I argue that people are not morally responsible. In the second appendix, I argue that God is also not morally responsible. This appendix aims to show that the absence of a responsibility is a conceptual truth and not one that depends on the finite or flawed nature of human beings.

6.1 Introduction

In this chapter, I argue that people are not morally responsible because there is no moral-responsibility-making foundation. A responsibility foundation is something that makes someone morally responsible without itself depending on something for which he is morally responsible. I argue that this is true whether one is a finite or infinite being (consider, for example, God).

In the next chapter, I argue that even if people were morally responsible, responsibility wouldn't do much work because the responsibility would be limited to the content of a relevant conscious state or decision and the time at which the state or decision occurs. This can't do too much work because the limited content of the conscious state or decision and short time when the state or decision occur do not make a person responsible for much. The scope of responsibility would be limited

to what happened in the person's head. Again, though, the argument is that people are not responsible, the limited scope argument is merely a conditional claim.

Galen Strawson's argument for the impossibility of moral responsibility attempts to undercut compatibilist and incompatibilist theories of responsibility.¹ The basic version of the argument proceeds from the notion that you do what you do because of the way you are and concludes that to be morally responsible you must be responsible for the way you are. It then adds that you cannot be responsible for the way you are unless you are self-created and this is impossible.²

In this chapter, I provide a Strawson-inspired argument against people being morally responsible. My chapter consists of two parts. The first part argues that people are morally responsible only if something grounds this responsibility (more specifically, something is the foundation of responsibility) and that there is no such ground. In the second part, I respond to objections to the argument. Here is the thesis.

Thesis: No Responsibility. Individuals are not morally responsible.

This applies to human beings, God, and even beings that circle in time.³ An example of a circular being is the mythical Chuck Norris who allegedly went back in time to impregnate his own mother.⁴

¹See Galen Strawson, *Freedom and Belief*, Galen Strawson, "Consciousness, Free Will, and the Unimportance of Determinism," 3–27, Galen Strawson, "The Impossibility of Moral Responsibility," 5–24; Galen Strawson, "Libertarianism, Action, and Self-Determination," 13–31; Galen Strawson, "The Unhelpfulness of Indeterminism," 149–155; Galen Strawson, "Bounds of Freedom," 441–460.

²See Galen Strawson and Tamler Sommers, "The Buck Stops—Where? Living Without Ultimate Moral Responsibility."

³Michael Istvan argues along Galen-Strawson lines that God is not responsible if he is not self-caused. This is a more minimal point about God and a responsibility-foundation. See Michael Anthony Istvan Jr., "Concerning the resilience of Galen Strawson's Basic Argument," 404 n. 9.

⁴See Chuck Norris Facts, <http://www.chucknorrisfacts.com/>, April 22, 2014.

An objector might claim that my account assumes that more is at stake regarding moral responsibility than really is. He continues that my account assumes that the notion that people are deserving of praise or blame entails that wrongdoers deserve considerable suffering or retribution. A less full-blooded account, the objector asserts, just means that they deserve to be reformed or morally corrected in a corrections institute or atone and be penitent in the penitentiary rather than be quarantined, medicated, or treated in a psychiatric ward. The objector continues that for people to qualify for such a response they just need to be properly exercising a certain nature that isn't thwarted or bypassed by manipulation, ignorance, pathology, and so on.

Contra the objector, my account takes no position on whether morally responsibility entails retributivism or even non-consequentialism. As a result, it neither assumes a full-blooded account nor the author-preferred account of responsibility. It is also neutral on whether people should be punished, morally reformed, or in some cases required to atone or be penitent rather than be quarantined, medicated, or treated in a psychiatric ward. If moral responsibility and consequentialism are true, then the latter responses cannot be ruled out without considering the costs and benefits of alternative policies under particular circumstances.

6.2 Argument

It is helpful to begin by setting out some concepts that will play a central role in my argument. Because my argument is that responsibility requires a foundation and neither choice nor character state is an adequate foundation, it is helpful to lay out these notions.

Responsibility is a basic notion by which I mean that it cannot be reduced to other notions. It is synonymous with apt for praise or blame. This assumes that responsibility is moral responsibility and that there is only one type. These claims are controversial and I shall not defend them here.⁵ Thus, I will always mean “moral responsibility” whenever I use the term “responsibility.”⁶

Some beliefs (foundational ones) are justified, but not justified by another justified belief. Rather, they are self-justified or justified by something that is not a justified belief (for example, direct acquaintance). A self-justified belief is one that a person is justified in believing it in virtue of fully understanding it. On some accounts, Descartes’ statement, “I exist,” is self-justified.

A character state is an individual’s psychology or, perhaps, her psychology at a time. A psychology is a complete set of mental states and the relations between them. A choice is the means by which a person cuts off deliberation. On some accounts, it is a mental event that generates an intention. Let us leave aside whether choice includes willing (that is, execution) of an intention as my argument is independent of this issue.⁷

⁵For the notion that there is one type of responsibility, see Angela Smith, “Control, Responsibility, and Moral Assessment,” 367–392. For the notion that there are two types, see Gary Watson, “Two Faces of Responsibility,” 227–248. For the notion that there are three types, see David Shoemaker, “Attributability, Answerability, and Accountability: Toward a Wider Theory of Moral Responsibility,” 602–632.

⁶It might be thought that giving an account of responsibility in terms of being apt for praise and blame is a reductive account in that a primitive notion cannot be explicated or unpacked. That is, it is more similar to the reduction of bachelorette to an unmarried adult female than a nonreductive synonym, such as a doctor is a physician. If praise and blame are no more than positive and negative responsibility judgments, then it is not clear that this account is non-reductive. In any case, nothing rests on this issue so let us sidestep it.

⁷On some accounts, a choice merely forms an intention because it need not cut off deliberation. A purported example is when a professor chooses to stare at an attractive student without deliberation. It is unclear whether such a unreflective perception is a choice. In any case, my account remains the same if choice is merely the way in which people form intentions, rather than a way of ending deliberation.

There is a concern that this account of character cannot account for the notion that people act out of character and that children and teenagers have unformed characters. Even if this concern is correct, my argument can be restated substituting “psychology” for “character” and “psychology at a time” for “character state” without weakening it. My account does not rule out people performing out-of-character acts in that on some libertarian accounts a person can make a choice that neither reflects nor flows from her psychology.

My account does not allow for unformed characters. Children and teenagers might not have beliefs, desires, or intentions about many things, or else have inconsistent mental states, but this results in their having less extensive characters rather than unformed characters. In addition, adults differ

Here is my argument.

- (P1) If an individual is morally responsible, then there is a responsibility-foundation that makes him morally responsible.
- (P2) There is no responsibility-foundation that makes an individual morally responsible.
- (C1) Hence, an individual is not morally responsible. [(P1), (P2)]

Premise (P1) rests on the following principles.

Principle #1: Act to Choice. If a person is responsible for an act, then he chose that act and is responsible for that choice.

The background idea is that intuitively it is hard to see how someone can be responsible for an act if he did not choose it. If it were to result from an unconscious choice or something which is not chosen at all (and not volitional, if choice and volition are different), then it would intuitively seem not something that should be credited to the agent. A common view, although not one I hold, is that people are responsible for negligent acts. If this is correct, then this principle should be modified to the following: *If a person is responsible for an act, then he chose that act or was negligent with regard to it and is responsible for that choice or negligence.* My account is compatible with this modified principle.

First, consider that what makes someone responsible must be something that ties what he thinks or does to him.

Principle #2: Choice to Character State. If a person is responsible for his choice, then it flowed, at least in part, from his character state and he is responsible for that state.

The central idea here is that if a person is responsible for a choice, then it (in part) flowed, at least in part, from who he is and he is responsible for who he is and that a person (at a time) is in part a character state. This principle rests on a central feature of responsibility, namely, that a person must have a *connection* to his thought or act. This connection-feature is essential to an adequate theory of responsibility.

Second, consider that what makes someone responsible must be something under his control.

Principle #3: Character State to Choice. If a person is responsible for his character state, then his choice brought about that state, at least in part, and he is responsible for that choice.

Here the notion is that if a person is responsible for something, then he has control over it and if a person has control over something, then it resulted from a choice. This principle rests on a second central feature of responsibility, namely, that a person must have *control* over his thought or act. This control-feature is essential to an adequate theory of responsibility.

from children and teenagers only in the degree to which they have these defects, not in kind, so it is hard to see why we should think the latter have unformed characters. If an unformed character is one that has less defects than some threshold level, then children and teenagers have unformed characters. This is consistent with my theory, although “unformed” is a misleading way to refer to the defect.

If these principles are true, then there must be a foundation for responsibility. A foundation for responsibility is something that makes an individual responsible and that does not do so because of something else for which the individual is responsible. A foundation is a ground of responsibility. If the principles are true, then (a) an infinite series of choices and states grounds responsibility, (b) a circular series grounds responsibility, or (c) a particular choice or state (or a conjunction or disjunction of them) grounds responsibility. We should reject (a) and (b). In an infinite series of choices and states, there is nothing to add responsibility to the infinite series. The same is true for a circular series. The analogy here is to extrinsic value. Extrinsic value is value that something has in virtue of its relation to something else. Something has extrinsic value only if another thing has intrinsic value because the latter grounds the value of the former. A similar thing must be true for responsibility.

Another way to see that there must be a foundation is by considering God. If he makes an infinite number of choices that flow from a preceding character state and has an infinite number of character states that flows from preceding choices, then he has no states or choices that are not under his control or connected to him. Yet, this is insufficient for moral responsibility in that if no choice or character state (or conjunction or disjunction) grounds responsibility, then an endless series of them won't do so either. If there is a choice or character state that grounds responsibility, then the individual has a responsibility-foundation.

Many libertarians can be interpreted as asserting that a choice is the ground of responsibility, whereas many soft determinists can be interpreted as asserting that a character state is the ground of responsibility. The former focus on things such as self-shaping acts, acts whose source is the person (not merely his psychology), and acts that break the chain of physical causation. The latter focus on whether acts reflect an individual's deep self (who he really is), sane deep self, reason-responsive mechanism, alignment of different-order desires (or values), identification with effective desires, psychology, and so on. This focus is on states rather than choices.

Premise (P2) rests in part on the following assumptions.

Assumption #1: Choice Not Foundation. An ungrounded choice is not a responsibility-foundation.

If a choice grounds responsibility, then (i) the choice did not result from his character state or (ii) it did result from the character state but the individual is not responsible for the state. Respectively, the analogies for these two are to a foundational belief that is (i) self-justified or (ii) justified by something that is not itself justified.

The first option, (i), is not a responsibility-foundation. I think it helpful to make this claim in a way that fills out part of the first assumption.

Assumption #1a: Not From Character State. It is false that a choice that did not result from an individual's character state is a responsibility-foundation.

To see this, consider that either the choice resulted from something other than his mental states or it resulted from his mental states but did so in a way that did not reflect the relations between them (for example, preference- or value-ordering). If a person's choice was grounded (justified and caused) by something outside his mind,

it is external to him. The choice fails to *connect* his choices to him. The same is true for reordering content. If the choice was external to him, then it cannot ground responsibility. This is because it does not have the necessary connection to him. This is analogous to the criticism lodged against libertarianism that a choice that does not flow from a person's mental states is a matter of luck (that is, random or arbitrary) and thus not something that grounds responsibility.

The second option, (ii), is also not a responsibility-foundation. Again, I think it is helpful to state this in a way that fills out part of the first assumption.

Assumption #1b: From Character State/Not Responsible for State. It is false that a choice that resulted from a character state for which the individual is not responsible is a responsibility-foundation.

A choice is largely a mechanism by which locally relevant mental states (for example, beliefs, desires, and intentions) and events (deliberation) get translated into an intention. The mere translating function does not intuitively appear special enough to be the fundamental ground of responsibility. The translating function is not more fundamental to responsibility than the input it translates. That is, a choice is not *special enough* to ground responsibility.

By analogy, consider a computer function that translates various preferences encoded in the software. It does not seem more important to what the computer does than the preferences themselves. Similarly, choice translates an individual's beliefs, desires, and intentions and the way in which he has deliberated about them into an intention (that is, a plan) that must then be executed (perhaps by a willing). It does not intuitively seem that the choice is more important than these other elements.

An objection is that choices can be self-shaping in that they are in some sense independent of the agent's character state and make the person who he is.⁸ In virtue of making him who he is, the choice is, in some sense, self-creating in that it creates the individual's character state in a way that does not flow from a previous state. The not-flowing notion isn't merely causal, the content of the choice (that is, what is chosen) does not depend on the preceding character state.

The reason this fails is that were the content to depend on the preceding character state, which the objector denies, then the choice would seem to be no more than an implementation of the state, thus pushing the responsibility-ground back to the character state. Libertarian proponents of this view in some sense admit this when they explain that their theories do not yield contrastive explanations of why a person chooses one thing rather than another.

[I]f an agent is capable of causing any of a range of intentions that would result in different corresponding actions, the reason(s) that inclined the agent to do what he in fact does serve

⁸See Robert Kane, *The Significance of Free Will*, esp. ch. 5 and Robert Kane, "Responses to Berofsky, John Martin Fischer and Galen Strawson," 157–167. For other choice-related objections to the Strawson argument, see Randolphe Clarke, "On the Possibility of Rational Free Action," 37–57, Randolph Clarke, "On an Argument for the Impossibility of Moral Responsibility," 13–24, Chris Tucker, "Agent Causation and the Alleged Impossibility of Rational Free Action," 17–27, and Alfred Mele, *Autonomous Agents: From Self-Control to Autonomy*, 223–225.

to explain it even though there may be no explanation of why he did that rather than any of the alternatives.⁹

It is the content of a choice that is precisely what does the work here because what needs to be explained is why he thought or did something or why a person is who he is.

The underlying idea is that responsibility is an *aggregate* notion. A person is responsible for his life to the extent that he is responsible for the things that comprise it, specifically, what he thinks and does. This is analogous to the notion in political philosophy that the rights people have to things are a function of the particular rights they have to specific bodies, objects, and so on.¹⁰ An individual is responsible for a particular thought or act to the degree to which he is connected to it. The connection cannot come about via an event not tightly tied to him.

The above argument depends on the claim that there is nothing to ground responsibility in an infinite series of choices and states. This argument relied in part on the analogy of intrinsic and extrinsic goodness. An objector might argue that we need to ground responsibility in the act itself rather than a previous choice or character state. As a result, he is not moved by the notion that there needs to be a responsibility foundation. Also, as a result, he is also not moved by the analogy to intrinsic and extrinsic value. The problem with the objection is that there still has to be a responsibility-maker with regard to the act itself. That maker is either the choice that is a feature of it or the character state that brought it about. If this is correct, then focusing on the act does no more than support the need for a responsibility-foundation.

If a choice is not a foundation, then perhaps a character state is the foundation.¹¹

Assumption #2: Character State Not Foundation. A character state that was not chosen is not a responsibility-foundation.

If a character state grounds responsibility, then (iii) the character state was not chosen or (iv) the character state was chosen but the individual is not responsible for the choice. The analogies for these two respectively are, again, a foundational belief that is self-justified or justified by something that is not itself justified. Let's consider each option.

⁹See Tim O'Connor, "Agent-Causal Power," p. 376. This point is related to the notion that agent-causal power by itself cannot explain why an agent acts at one time rather than another. See Randolph Clarke, *Libertarian Accounts of Free Will*, pp. 201–202.

¹⁰Robert Nozick explains that there is no general right to equality or equal opportunity because rights are exhausted by specific rights to particular things (for example, bodies and objects). See Robert Nozick, *Anarchy, State, and Utopia*, ch. 8.

¹¹For a character-based criticism of Strawson's argument, see John Martin Fischer, *Deep Control: Essays on Free Will and Value*, pp. 171–172. For the character-based theory underlying it, see Fischer develops the notion of guidance control in John Martin Fischer, *The Metaphysics of Free Will: An Essay on Control*, John Martin Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility*, John Martin Fischer, *My Way: Essays on Moral Responsibility*, and John Martin Fischer, *Our Stories: Essays on Life, Death, and Free Will*. A similar argument that responsibility for a choice must depend on at least some responsibility for a character state can be seen in Derk Pereboom, *Living without free will*, 66–68.

The third option, (iii), is not a responsibility-foundation. I think it is helpful to make this claim in way that fills out part of the first assumption.

Assumption #2a: Not From Choice. It is false that a character state that was not chosen is a responsibility-foundation.

Here the reason is that the individual did not have *control* over it because he did not choose it. To see this consider the following case.

Case #1: Monster (Derk Pereboom)

Dr. Frankenstein creates an individual (the monster) with a complete psychology. A psychology is a complete set of mental states and the relations between them. The monster's acts flow from his psychology, environment, and the laws of nature. Leave aside whether these determine or merely probabilistically shape his acts. His psychology is such that he is a rational egoist in all circumstances, except when he interacts with other monsters, then he is a pure altruist. The monster is weakly reasons-responsive, sane, has aligned desires, and freedom of action and the will. Immediately after creation, the monster kills a little girl because he enjoys doing so. We might even make him the (libertarian) source of his act.¹²

It intuitively seems that the monster is not morally responsible. This is because he did not choose his character state and hence he had *no control* over it or the choice that flowed from it.¹³

Some proponents of the notion that character state grounds responsibility might bite the bullet on this case and assert that the monster is responsible. The problem is that if the monster is responsible, then people are responsible even when their choices result from manipulation that changes thought content but protects the responsibility-relevant features, such as those found in *Monster*. Manipulation includes neurosurgery, hypnosis, brain-washing, and so on. But it is false that people whose choices result from manipulation are responsible. This is true even when the manipulation creates or preserves the individual's reasons-responsiveness, sanity, aligned desires (or values and desires), identification with desires (or values), freedom of action and the will, and so on.

Case #2: Igor

Dr. Frankenstein manipulates an individual (Igor) by redoing his whole psychology and destroying his memory of the old one. A psychology is a complete set of mental states and the relations between them. Igor's acts flow from his psychology, environment, and the laws

¹²The idea for this case comes from Derek Pereboom, "Determinism Al Dente," 21–45. Note that the sanity condition includes knowledge of the right and the good. For the first two models, see John Martin Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* and Susan Wolf, *Freedom Within Reason*. For the second two models, see Harry Frankfurt, "Freedom of the Will and the Concept of a Person," 5–20 and Gary Watson, "Free Agency," 205–220. For the historical-sequence aspect, see John Martin Fischer, "Responsibility and Control," 24–40 and John Christman, "Autonomy and Personal History," 1–24.

¹³While I do not develop this argument against expressive theories of responsibility, my strategy in attacking it would be similar. These theories hold that an agent is responsible for something just in case it is expressive of her evaluative judgments, that is, expressive of her real self. See, for example, Angela Smith, "Control, Responsibility, and Moral Assessment," 367–392; Angela Smith, "Responsibility for Attitudes: Activity and Passivity in Mental Life," 236–271; Matthew Talbert, "Blame and Responsiveness to Moral Reasons: Are Psychopaths Blameworthy?" 516–535.

of nature. Leave aside whether these determine or merely probabilistically shape his acts. His new psychology is such that he is a rational egoist in all circumstances, except when he interacts with monsters, then he is a pure altruist. Igor is weakly reasons-responsive, sane, has aligned desires, and freedom of action and the will. Immediately after creation, Igor kills a little girl because he enjoys doing so. He might even be the (libertarian) source of his act.

The proponent of the notion that a character state grounds responsibility might respond that neither the monster nor Igor is responsible because enough time has not yet passed since the creation or manipulation.¹⁴ Alternatively, the proponent might respond that neither monster nor Igor is responsible because neither has the opportunity to revise (or endorse, identify with, will, etc.) the particular features that comprise the character state. The problem with this notion is that time and the opportunity to revise one's character is an attempt to sneak in a choice-foundation. What the proponent is doing is requiring that the individual approve of none, some, or all of his character state (or choose not to consider the issue) in order for him to be responsible. The approval is a choice and so the proponent is sneaking in the choice element, whether as a particular choice or decision not to choose. This returns us to the earlier notion that choice is the responsibility-foundation.

One might wonder if the passage of time is necessary for the monster to be responsible not because he must endorse his character, where endorsement is a type of choice, but rather because his true character or deepest values take time to emerge. This is false because if the content of his mental states and the relations between them do not change over time, then there is no emergence of a true character or deepest values. Such things do emerge if they require reflection, reasoning, and approval, but this is to again sneak in choice.

An objector might argue that the monster is not reasons-responsive in the way that matters to advocates of the reasons-responsive theory of responsibility. The objector notes that the monster can't act virtuously except when he acts toward monsters. That is, there is nothing that can ever be done to make him respond much differently to non-monstrous children. That, the objector continues, is why he is not responsible. It is not, he argues, because his psychology was created by Dr. Frankenstein.

There are two problems with this objection. First, the reasons-responsive theory put forth by Fischer and Ravizza asserts that a person is responsible just in case he is weakly reasons-responsive and he takes responsibility for his choices. On their theory, weak reasons-responsiveness means that in some possible worlds, he would have acted differently had reasons been different. The theory is not relativized to a certain type of situation or interaction with a certain type of individual.

The objector might respond that the theory should be so relativized, even if the theory's discoverers did not think so. Fair enough. The hypothetical can then be modified whereby the monster acts as a rational egoist relative to non-monsters

¹⁴It is present in Fischer's model in that he requires a certain historical sequence to ground responsibility, where the sequence screens out choice-undermining features like manipulation, coercion, and force. It is present in Frankfurt's model in that the agent must decisively commit to or identify with a desire in order to cut off the regress of ever higher-order desires. It is not clear if it is present in Wolf's account.

except in those cases in which the non-monster very clearly exhibits a kind-and-caring character to the monster and in the case of the murdered child, she exhibits no such character. Again the intuition is the same.

The objector might claim that what matters is that the monster have weak reason-responsiveness in the particular situation he is in. The version of the theory moves away from a theory about a reasons-responsive mechanism to a theory about reason-responsiveness in a particular situation. It also begs the question as to whether the monster is reasons-responsive in the particular situation he is in. Given his situation, were the child to have very clearly exhibited a kind-and-caring character (which she could have done), he would not have killed her. Thus, he is reasons-responsive in the situation he is in.

On a libertarian account, perhaps one that incorporates reason-responsiveness, God could roll time back to the point at which the monster makes his decision and in 999 out of 1000 times, the monster kills the child.¹⁵ The actual world is one of the 999. On this account, the monster's character is the same in every case up until he makes a choice. Still, it intuitively seems to me that the monster is not responsible because his character is created in full and his choice flows from it.

The objector might concede that the monster is not blameworthy because his character was created in full and his choice flowed from it, but argue that this case is indistinguishable from manipulation. Manipulation, he continues, undermines responsibility on any account (for example, Frankfurt's and Watson's deep-self theories, Fischer and Ravizza's reasons-responsiveness theory, Wolf's sanity theory, and so on). Manipulation involves an external agent imposing a new character on a persisting individual without her being related to the imposition in the right way. For example, she does not endorse the imposition beforehand or it does not come about via a responsibility-preserving causal pathway. This does not happen here because the monster had no character beforehand and would not have had one without Dr. Frankenstein's imposing one on him.

The objector might respond that part of an individual's being related to his character in the right way involves it not coming about from external creation, but the most likely reason for this is that the individual did not choose it. It is hard to see why a being created in full would lack responsibility initially and gain it later because he comes to be related to it in the right way, if the right way did not involve his actively connecting to it via endorsement, wholehearted identification, volitional alignment, taking responsibility for it, self-revision, and so on. All of these ways of being related to something in the right way have a choice as a component. Specifically, with regard to one's character (or a feature of it), an individual can endorse it, wholeheartedly identify with it (in a way that cuts off the issue from further consideration), volitionally align oneself to it, take responsibility for it, or revise one's self to include it only if he makes a choice.

A different objector might argue that the monster is responsible in that from the monster's first-person perspective, his mental states (for example, beliefs, desires,

¹⁵For the notion of exploring libertarianism by rolling back time and seeing what the agent does in the same situation, see Peter Van Inwagen, "Free will remains a mystery," 1–19.

values, and intentions) appear to be responsibility-grounding. From this perspective, he has a deep self, wholeheartedly identifies with his deep self, knows the true and the good, is reasons-responsive, seems to have libertarian freedom, and so on. If we imagine ourselves to be the monster, it seems that we are autonomous or, more revealingly, that others could violate our autonomy immediately.

What this shows is that the first-person perspective is not sufficient for moral responsibility. The same perspective is present for someone who has recently been manipulated, whether the manipulation is just a small part of his psychology or all of it, and manipulation undermines moral responsibility. This is particularly true if the manipulation radically changes the individual's deep self and her wholehearted identification with it.

An objector might argue that the monster in Case #1 intuitively seems responsible. He notes that I should say something about people who adopt this hard line response. The response to this is three-fold. First, it is intuitively implausible to me and many others. Second, a person who is created from nothing is in the same position with regard to his character state and the choices it brings about as someone who is manipulated to a maximum degree. Neither has more control over his character state than the other. Neither has the character state as part of an ongoing psychology and thus neither is closely connected to it, although the manipulated individual might, on some accounts, be less connected to it. If control or connection are necessary for responsibility, neither is responsible. Third, even if one did intuit that the monster is responsible, this conflicts with the intuitions about a responsibility-maker. I see no reason to think the former is stronger evidence.

The fourth option, (iv), is not a responsibility-foundation. Here is a statement of this notion.

Assumption #2b: From Choice/Not Responsible for Choice. It is false that a character state that resulted from a choice for which the individual is not responsible is a responsibility-foundation.

Here again, the individual has no *connection* to the character state. It did result from his choice, but the choice is not tied to him in a meaningful way. The choice might as well be random for all the connection it has to the individual. A random or arbitrary event cannot make an individual's character state his any more than a creative or manipulative act by someone else can do so. It is also worth noting that the control- and connection-conditions come apart. This is likely what prevents either character state or choice from being the responsibility-foundation.

A problem with both character-state theories is that what matters for responsibility is not the having of the relevant capacity (for example, reason-responsiveness or knowledge of the true and good), but the exercise of it. If an individual is morally responsible for a particular act or mental state, it is through the exercise of the relevant capacities. This is because it is through such an exercise that an individual controls these features and connects them to him. Thus, the mere capacity to do something (even to engage in a self-creating or -shaping act) is not sufficient for

moral responsibility.¹⁶ Having a character state is a capacity, not the exercise of it, and so the character state is not by itself the sort of thing that can be a responsibility-foundation.

An objection to my argument is that even if the argument shows that responsibility must have a foundation and even if no one choice or character state grounds responsibility, a conjunction or disjunction might do so. Consider conjunction. The idea behind a conjunctive foundation is that the foundation would thereby have the necessary connection- and control-features. The problem is that it is hard to intuitively see how if a particular choice cannot ground responsibility and a particular character state cannot do so, how the two together provide such a ground. Worse, order matters here. If the choice comes first, its lack of connection to the person would deprive the resulting character state of its ability to ground responsibility. If the character state comes first, then there is a problem with control. If the order does not matter, then it might be choice_n and character state_{n+1} or character state_n and choice_{n+1}. On this account, the particular foundation is arbitrary and an arbitrary fact cannot ground responsibility. A disjunction is just as arbitrary and cannot ground responsibility for the same reason.

One might think that even if neither choice nor character can ground responsibility, the two together can do so because there is an organic-unities-type effect.¹⁷ An organic unity effect occurs when two things combine in a non-additive way. For example, on some accounts, it is an intrinsically good (or, perhaps, less bad) when an evil person suffers, even though evil people and pain are bad.¹⁸ By analogy, combining two poor-tasting ingredients can be combined to produce a delicious food. This will not do because choice and character can combine to produce responsibility only if each one flows from the other in the right way. This order-requirement and the fact that it is not met prevents there from being an organic-unity effect from a finite subset of them.

Another objection is that the ground is not a choice or character state, but the whole system (or, perhaps, the system at a time) including the relevant state (character state) and events tied to it (specifically deliberation, choice, and willing). Unfortunately, adding other elements to a character-state-choice conjunction does not solve the above problem with a conjunction theory and thus this purported basis fails for the same reason.

In summary, I argued that if an individual is morally responsible, then there is a responsibility-foundation that makes him morally responsible, but there is no responsibility-foundation that makes him morally responsible. This rested on the notion that if there were a responsibility-foundation, it would be either an ungrounded choice or an ungrounded character state and that neither can serve as the foundation.

¹⁶For a theory that explicitly makes autonomy a capacity (the capacity to change his preferences and effectuate them into action), see Gerald Dworkin, *The Theory and Practice of Autonomy*

¹⁷For discussion of the additive fallacy, see Shelly Kagan, "The Additive Fallacy,"

¹⁸See Thomas Hurka, "The Common Structure of Virtue and Desert," 6–31; Thomas Hurka, *Virtue, Value, and Vice*, and Fred Feldman, "Adjusting Utility for Justice: A Consequentialist Reply to the Objection from Justice, 567–585.

Table 6.1 Argument steps

Claim	Argument	Analogy
Responsibility requires a responsibility-foundation	Neither infinite regress nor circular account explains responsibility	Extrinsic value
Choice not a responsibility-foundation	<ol style="list-style-type: none"> 1. If choice does not result from a character state, then it is not <i>properly connected</i> to individual 2. If choice results from character state but individual is not responsible for character state, then it is not <i>special enough</i> to ground responsibility 	<ol style="list-style-type: none"> 1. Self-justified belief 2. Belief justified by something that is not itself a justified belief
Character state not a responsibility-foundation	<ol style="list-style-type: none"> 1. If character state was not chosen, then the individual does not have <i>control</i> over it and hence it cannot ground responsibility 2. If character state was chosen but the individual is not responsible for the character state, then it is not <i>properly connected</i> to him 	<ol style="list-style-type: none"> 1. Self-justified belief 2. Belief justified by something that is not itself a justified belief

If a choice does not flow from a character state, then it is not properly connected to the individual and cannot be the basis for responsibility. The choice would appear to be arbitrary and thus not something for which the agent can be credited. If the choice does flow from a character state and the individual is not responsible for it, then it is not special enough to be the basis for responsibility. The mere conversion of reasoned deliberation about the individual’s beliefs, desires, and intentions into a plan places too much emphasis on the conversion and not enough on other elements.

If a character state does not flow from a choice, then the individual has no control over it and hence it cannot be the basis of responsibility. Like the monster and Igor, when the character state is created or imposed upon the individual, it is not something for which he can be praised or blamed. If the character state does flow from a choice, but the individual is not responsible for the choice, then the state is not properly connected to him. If the choice does not, in some sense, reflect a responsible self, then it is unable to transmit responsibility to the resulting character state. Let us consider objections that are most directly target parts of this argument.

This chart summarizes these arguments (Table 6.1).

6.2.1 *Objections*

The objections to the argument target the two objections or rest on the notion that we have enough epistemic justification to reject the conclusion and hence justifiably infer that one of the premises are wrong even if we do not know which one.

6.2.2 *Objection to (P1)*

An objector might claim that foundationalism is false or, at least, false in the context of responsibility. She might claim that responsibility is grounded by a network of choices, character state or states, and, perhaps, acts.¹⁹ It is hard to see how a network of mental states, choices, and acts can ground responsibility instead of a conjunction of a particular choice and character state. The oddity here is that if a conjunction cannot ground responsibility, for the reason mentioned above, then it is hard to see why a system of choices and character states along with related states and events do so. Also, if coherentism does not work for epistemic justification, then it likely does not do so for responsibility. The idea in both cases is that there is nothing to add the relevant property (justification or responsibility) to the system.

The objector might argue, as responsibility-proponents sometimes do, that over time the sequence of choices and increasingly complex and self-endorsed character state ground responsibility. If, however, no one choice, character state, or conjunction or disjunction adds some responsibility to a system, then aggregations of them will not do so. By analogy, if one loses money on each sale, it cannot be made up on volume. The objector might respond that there is composition here, so the system as a whole grounds responsibility, much as an aggregation of interacting neurons is the basis for consciousness, even if no one neuron is conscious. The objector might further note that responsibility is a matter of degree and hence an individual's responsibility might increase in the same way that complexity of consciousness increases. Still, on this response, there must be a change at some point in time that transforms an individual who is not responsible to one who has some degree of responsibility, however minimal. This requires a particular ground and this returns us to the no-foundation problem.

The objector might respond by questioning why there is likely a foundation for knowledge, but not responsibility. A foundation for knowledge consists of beliefs that are justified, non-inferentially justified, and that justify other beliefs. A foundational

¹⁹On Laura Waddell Ekstrom's account, a person's action is autonomous only if it expresses an authorized preference. On her account, a preference is authorized just in case it coheres with her character. Laura Waddell Ekstrom, "A Coherence Theory of Autonomy," 599–616. It is not clear if this account conflicts with a Strawsonian principle. On another theory, mental states, specifically desires, are more or less constitutive of the self. Robert Noggle, "Kantian Respect and Particular Persons," 449–478, esp. 466. If these mental states are authorized by the degree to which they cohere with other mental states, then this account might move in the direction of a coherentist responsibility-ground.

belief might be self-justified or justified by something other than another justified belief. Similarly, a foundation for responsibility is a choice or character state for which a person is responsible and for which his responsibility does not depend on another choice or character state. The difference is that there is a truth-connectedness feature present for a knowledge-foundation that is not present for a responsibility-foundation. The truth-connectedness is some feature of the foundational belief that makes it true, makes it likely to transmit truth, links it to the external world, or something along these lines. This feature appears to be present whether one adopts an externalist account of justification (for example, reliabilism or proper-function theory) or an internalist account (for example, evidentialism or phenomenal conservatism).²⁰

In contrast, choice lacks a parallel feature to truth-connectedness. A character-state might be thought to be truth-connected if it tends to track the truth, external world, or morality, or something along these lines. However, this is not enough to make the character state a responsibility-foundation because having such a connection is not the essence of responsibility. The essence of responsibility is that an individual's thoughts and actions are tied to him because they are under his control. For example, even if the monster has a character state that is truth-connected, he still is not responsible because his state was not under his control. Truth-connectedness is not enough for the connection and control conditions.

6.2.3 *Objections to (P2)*

6.2.3.1 **Responsibility Rests on a Character State with the Relevant Feature(S) Because This Is All the Freedom that One Can Have or Want**

Here I will focus on objections that assert that a character state is the foundation of responsibility. One objector might argue that a character state with the relevant features is the most freedom we can have or want and this is enough for responsibility.²¹ Depending on the account, the relevant feature might be weak reasons-responsiveness (able to understand and act on moral reasons), ability to revise the deep self, sanity (knowledge of the true and good), aligned desires (higher order desires or values align with lower order desires), and freedom of action and the will (individual does what she wants to do and wills what she wants to will).

This is not all the responsibility we want. The monster and Igor have these features and are not morally responsible. These features might be sufficient for all the freedom we want, although I doubt it, but this merely shows that freedom and responsibility

²⁰Phenomenal conservatism is the theory that individuals are *prima facie* justified in believing that things are as they appear.

²¹For a classic discussion of all the freedom one can have or want, see Frankfurt, "Freedom of the Will and the Concept of a Person," 5–20.

are not the same. It might also show that what we want is impossible. This is not a contradiction in that one can want contradictory things. For example, a woman might want to go back in time and kill her abusive father when he was still an infant. She also might want to have her cake and eat it too.

Even if this is all the freedom one can want or have, then perhaps what this shows is that we shouldn't want responsibility. For example, maybe what we should want for our children is for them to be happy, have objectively good things in life (specifically, love, family, and knowledge), and be virtuous. If we discover that this is entirely a product of their genes and environment, this should not bother us, although perhaps it would. The same is true if we discover that our children lack whatever compatibilist feature grounds responsibility.

6.2.3.2 Responsibility Rests on a Character State Because Moral Norms Focus on an Individual's Psychology

An objector, such as George Sher, might argue that if responsibility entails control and control entails choice, then the searchlight theory is true.

Searchlight Theory: if a person is responsible for something, then he is consciously aware of it.²²

But the searchlight theory is false. Here are three cases in which Sher argues that it is intuitively clear that the people are responsible despite lacking conscious awareness of what they do (or omit to do) or of the relevant facts.²³

Case #3: Hot Dog

Alessandra, a soccer mom, has gone to pick up her children at their elementary school. As usual, she is accompanied by the family's border collie, Sheba, who rides in the back of the van. The pickup has never taken long so, although it is very hot, Alessandra leaves Sheba in the van while she goes to gather her children. This time, however, she is greeted by a tangled tale of misbehavior, ill-considered punishment, and administrative bungling which requires several hours of indignant sorting out. During that time, Sheba languishes, forgotten, in the locked car. When, Alessandra and her children finally make it to the parking lot, they find Sheba unconscious from heat prostration.

Case #4: On the Rocks

Julian, a ferry pilot, is nearing the end of a forty-minute trip that he has made hundreds of times before. The only challenge in this segment of the trip is to avoid some submerged rocks that jut out irregularly from the mainland. However, just because the trip is so routine, Julian's thoughts have wandered to the previous evening's pleasant romantic encounter. Too late, he realizes that he no longer has time to maneuver the ferry.

Case #5: Bad Weather

It is 1968 and amerika (a nom de guerre) is a member of the Weather Underground. Sensitive and conscientious as a child, amerika has been rethinking his moral beliefs. In a series of

²²See George Sher, *Who Knew? Responsibility Without Awareness*, esp. ch. 1.

²³See George Sher, *Who Knew? Responsibility Without Awareness*, ch. 2, esp. 24–28; George Sher, "Out of Control," 285–301.

stages, he has become convinced, first, that capitalism is deeply unjust; next, that nothing short of revolution will bring change; and finally, that the need to rectify massive injustice far outweighs the rights or interests of mere individuals. To procure funds for the Revolution, amerika takes part in a robbery in which a bank guard is killed.

In these cases, Allessandra and Julian fail to be aware of relevant facts and amerika fails to be aware of the relevant moral norm. Sher argues that in the above cases, the three people's blameworthiness rests on their having fallen below the applicable norms and their failure to recognize the relevant facts having resulted from their constitutive attributes.

If Sher's argument succeeds, then a choice need not ground moral responsibility. This is true if we make the following assumption: if a person chooses something, then he is consciously aware of it. Perhaps this is not true if people can make unconscious choices, but it is true in the sense of responsibility-grounding choice that is the focus here.²⁴ This is because an unconscious choice does not have to involve an agent acting on behalf of her deep self. The deep self is the set of mental states with which a person most identifies or endorses. On one account, for example, these are an individual's highest order desires. My assumption here is that the deep self is one that is consciously accessible. In attacking the searchlight theory, Sher provides an argument for an individual's psychology as a responsibility-foundation.

There is a problem with holding the people in the above three cases responsible if two claims are true. First, a person is responsible for something only if he has control over it. Second, a person has control over something only if it resulted from a choice. The first claim is often viewed as intuitively obvious. The second results from the notion that control results from reason-guided deliberation and it is a choice that ends such deliberation by forming an intention. Sher argues that our intuitions about the above people, and ones like them, are strong and unclouded by theoretical assumptions that they give us reason to doubt that responsibility entails control.²⁵

However, it is not clear that the intuition about the above people doesn't rest on the notion that they were responsible for a previous act that flowed through to the act or omission in question.²⁶ If so, then the intuition that they are morally responsible also rests a theoretical concept (the flow-through notion) that is flawed. This is because it is unclear how a person's being responsible for one act plus a causal statement can make him responsible for a second act. In any case, the flow-through theory just pushes the issue of responsibility one step back.

²⁴For the notion of an unconscious choice, see Benjamin Libet et al., "The Unconscious Initiation of a Free Voluntary Act," 623–642 and Benjamin Libet, "Unconscious Cerebral Initiative and the Role of Conscious Will in Voluntary Action," 529–566. See, also, later variants of his study. For example, consider M. Matshuhashi and M. Hallett, "The Timing of Conscious Intention to Move," 2344–2351.

²⁵For criticism of Sher's early attempt to claim that his theory provides a commonsense sense of control, see Neil Levy, "Restoring Control: Comments on George Sher," 213–221. He is responding to Sher's argument in George Sher, "Out of Control," 285–301. Sher responds in George Sher, "Who's in Charge Here? Reply to Neil Levy," 223–226.

²⁶For the idea of the flow-through notion, see Alan Wertheimer, *Consent to Sexual Relations*, esp. 238–243.

Sher's attributionism, however, fails to satisfy our intuition in *Monster*.²⁷ Attributionism is the position that what grounds responsibility is an individual's having a certain attribute, specifically, a psychology with a specific feature (for example, reason-responsiveness). In *Monster*, it intuitively seems the monster is not morally responsible for the killing because he did not choose his character. Sher might respond that if the absence of choice undermines responsibility for one's character, then it should undermine responsibility for negligent acts and it doesn't. Sher would likely argue that the intuition in *Monster* is either not as strong as the ones in cases #3 through #5, or cases like them, or the intuition has another explanation. Alternatively, Sher might argue that the monster is not responsible because he has not had the opportunity to change some or all of his character. As argued above, this would convert his theory into a choice-foundation theory and this is likely not what Sher has in mind.

Note that on Sher's account, the monster is likely morally responsible for his act (more specifically for the act's morally or prudentially relevant feature) because it was voluntarily done. This assumes that the voluntariness condition can be met when an individual is created with a complete psychology. Citing voluntariness does not do much to address the responsibility-foundation issue. Alternatively, Sher might argue that moral norms focus on a person's psychology because a certain type of psychology is what makes him responsive to reasons.²⁸ However, this does not get us far. The having of a psychology (even one that is reasons-responsive, sane, has aligned desires, etc.) is just the having of a particular character state and it still has not been shown that an ungrounded character makes one responsible. Thus, even if the searchlight theory is false, we still need an argument that ungrounded character state is a responsibility-foundation.

Also, there is reason to believe the searchlight theory is true. One such argument comes from Gideon Rosen.²⁹ Rosen argues that if a person is blameworthy for acting on ignorance, it is because he is morally responsible for the ignorance. He further

²⁷An attributionist theory asserts that an act is responsible to an act if it is attributable to who he is. George Sher's full epistemic condition asserts the following. When someone performs an act in a way that satisfies the voluntariness condition, and when he also satisfies any other condition for responsibility that is independent of the epistemic condition, he is responsible for his act's morally or prudentially relevant feature if, but only if, he either (1) is consciously aware that the act has that feature (that is, is wrong or foolish or right or prudent) when he performs it; or else (2) is unaware that the act is wrong or foolish despite having evidence for its wrongness or foolishness his failure to recognize which (a) falls below some applicable standard, and (b) is caused by the interaction of some combination of his constitutive attitudes, dispositions, and traits; or else (3) is unaware that the act is right or prudent despite having made enough cognitive contact with the evidence for its rightness or prudence to enable him to perform the act on that basis. See Sher, *Who Knew? Responsibility Without Awareness*, 143.

²⁸See Sher, ch. 7, esp. 114–115.

²⁹See Gideon Rosen, "Skepticism about Moral Responsibility," 295–313; Gideon Rosen, "Culpability and Ignorance," CIII: Part 1; Gideon Rosen, "Kleinbart the Oblivious and Other Tales of Ignorance and Responsibility," 591–610. For criticisms of Rosen's argument, see William Fitz-Patrick, "Moral Responsibility and Normative Ignorance: Answering a New Skeptical Challenge," 589–613; Alexander Guerrero, "Don't Know, Don't Kill: Moral Ignorance, Culpability, and Caution," 59–97; Elizabeth Harman, "Does Moral Ignorance Exculpate?"

argues that if a person is morally responsible for the ignorance, then his ignorance is the upshot of a prior act or omission for which he is responsible. This is because an act from ignorance or being ignorant of a fact is not something for which an agent can be originally responsible. On this account, a person is derivatively responsible for an act or omission only because he is independently responsible for some other act or omission. A person is originally responsible for something when he is responsible for it and not derivatively responsible for it.

On Rosen's account, the prior act or omission that makes someone responsible for being ignorant about something must be a conscious failure to satisfy a procedural epistemic obligation.³⁰ Such a failure must therefore be an *akratic* act. An *akratic* act, according to Rosen, occurs when an agent does an act despite a persisting judgment that all things considered, he should do something else. The requirement for *akrasia* in the context of blameworthy acts involves the type of conscious awareness required by the searchlight theory. On Rosen's theory, no one is blameworthy if people do not actually do *akratic* acts or if *akrasia* undermines responsibility.³¹ I think the latter is true, but let us sidestep this issue here.

If Rosen's argument succeeds, then Sher's support for character as a responsibility-foundation fails. Sher's strategy depends on the claim that a person can be originally responsible for ignorance or because he is responsible for something other than an act or omission (for example, a character state). Again, going back in time to the first moment of responsibility, the subject of a character state is no more originally responsible for it than are the monster and Igor.

6.2.4 *Objection to (C1)*

A third line of objection is that we have more justification for moral responsibility than for either or both premises. If phenomenal conservatism is true, then the having of a strong intuition is some evidence, albeit weak, of the intuitional content. The objector might argue that we have a strong intuition that people are responsible. This rests in part on our intuitions about a wide range of attitudes and practices that presuppose responsibility. Among the former are reactive attitudes such as gratitude, love, pride, shame, anger, blame, and indignation.³² Among the latter are the guilt- and proportionality-limitations on punishment. Another such practice is the *prima facie* requirements and legal excuses that prevent punishment such as incompetence, provocation, duress, and ignorance. Also, in politics, people often respond well to the notion that people deserve some benefits (for example, those that flow from their

³⁰See Rosen, "Skepticism about Moral Responsibility," 295–313.

³¹For an argument that compulsion does not always undermine responsibility, see Gary Watson, "Skepticism about Weakness of Will," 316–339. Watson argues that it does not do so when a person is blameworthy for allowing the compulsion to develop in her. Rosen's argument can be used to undermine a person's blameworthiness for non-akratically allowing a compulsion to develop in her.

³²See Peter Strawson, "Freedom and Resentment," 1–25.

contribution, hard work, or sacrifice), but not others (for example, those that flow from luck). An example of the former includes the holidays, benefits, and praise lavished on veterans.³³ An example of the latter is the poverty that results when disabled people are unable to make a living.

The problem with this objection is that we lack evidence for the objection to (C1). If there is widespread error on moral-responsibility-related beliefs, then we do not have much justification, if any, for this proposition. There is such widespread error. First, people often think that they are more responsible than they are. For example, people often see themselves as responsible because how they act depends on what they think, not on the situation in which they are located. However, social psychologists have argued that the situation explains their behavior and does so in a surprisingly uniform way. This suggests that the people are not morally responsible. On some psychological theories, for example, situations can make good people do horrible things. For example, this has been applied to the Milgram obedience experiment, Zimbardo prison experiment, and one of the main players in Abu Ghraib.³⁴ One prominent theory of responsibility holds that people in the past were not fully responsible because they had mistaken beliefs about the true or good and were not in the position to know this.³⁵ For example, Susan Wolf argues this applies to the racism of the founding fathers, confederate state sympathizers, and the sexism of earlier generations before the rise of women's liberation.

The way in which people think and act is affected by priming effects. For example, wearing fake designer clothes, observing others' dishonest behavior, and being tired all increase the likelihood that people will be dishonest, without their being aware of these effects. The underlying idea is that people will be more dishonest when it is easier to rationalize the dishonesty even if they do not actually rationalize the dishonesty or consider doing so.³⁶ People sometimes can't even identify their own motivation. In one famous case, people hypnotized to open a window on a cue explained what they did in terms of a motivation that did not in fact move them.

On the responsibility theory, there is disagreement on different accounts of responsibility (libertarianism versus soft determinism), the particular accounts within these

³³Stephen Kershnar argues that the veterans are not especially worthy of benefits and praise. See *Gratitude Toward Veterans: A Philosophical Explanation of Why Americans Should Not Be Very Grateful to Veterans*.

³⁴For the classic experiment illustrating situationism, the notion that the situation, at least in part explains what someone does, consider obedience to authority, see Stanley Milgram, "Behavioral Study of Obedience," 371–378. For Milgram's more in-depth discussion of the effect, see Stanley Milgram, *Obedience to Authority: An Experimental View*. The effect holds across different cultures. See Thomas Blass, "Understanding Behavior in the Milgram Obedience Experiment: The Role of Personality, Situations, and Their Interactions," 398–413. For a discussion of the prison experiment and its application to Iraq, see Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil*.

³⁵For the notion that people in the past are not fully responsible for their acts when they reflect their times because they didn't know and couldn't reasonably be expected to know the true or good, see Susan Wolf, "Sanity and the Metaphysics of Responsibility," Ferdinand Schoeman, ed., *Responsibility, Character, and the Emotions: New Essays in Moral Psychology*, 46–62.

³⁶See Dan Ariely, *The (Honest) Truth About Dishonesty*.

overall theories, whether people are responsible for negligence, and what room there is for responsibility after genetic and environmental effects are screened out. An example of this has to do with genetics and what children grow up to do. Parents think they can have an enormous influence on their children.³⁷ However, genetic effects are quite strong, parental effects are surprisingly not. Twin research studies show that parents' child-rearing practices have little to no effect on life expectancy, overall health, happiness, and self-esteem.³⁸ Parents might have a small effect on smoking, drinking, and drug problems, but not a large one. They have little effect on their child's success. By "success," I mean high income and educational achievement. Parents have little to no effect on their children's intelligence, grades, income and wealth.³⁹ Also, parents have little to no effect on character traits (for example, conscientiousness and agreeableness) and values (for example, religious attitudes and behavior and political attitudes and behavior).⁴⁰ Parents have little or no effect

³⁷For a summary of the literature, see Bryan Caplan, *Selfish Reasons to Have More Kids: why being a great parent is less work and more fun than you think*, ch. 2.

³⁸For life expectancy, see Anne Herskind et al., "The Heritability of Human Longevity: A Population-Based Study of 2872 Danish Twin Pairs Born 1870–1900," 319–323; Anatoli Yashin et al., "Half of the Variation in Susceptibility to Mortality is Genetic: Findings from Swedish Twin Survey Data," 11–19. For health, see Kaare Christensen et al., "A Danish Population-Based Twin Study on General Health in the Elderly," 49–64; Pia Svedberg et al., "Age and Sex Differences in Genetic and Environmental Factors for Self-Rated Health: A Twin Study," 171–178; Raija Leinonen et al., "Genetic Influences Underlying Self-Rated Health in Older Female Twins," 1002–1007; Jennifer Harris et al., "Age Differences in Genetic and Environmental Influences for Health from the Swedish Adoption/Twin Study of Aging," 213–220. For the happiness claim, see David Lykken, *Happiness: The Nature and Nurture of Joy and Contentment*, 57. For self-esteem, see K. S. Kendler et al., "A Population-Based Twin Study of Self-Esteem and Gender," 1406.

³⁹For the claim about intelligence, see Thomas Bouchard et al., "Sources of Human Psychological Differences: The Minnesota Study of Twins Reared Apart," 23, Robert Plomin et al., "Variability and Stability in Cognitive Abilities are Largely Genetic Later in Life," 214, and Danielle Postuma et al., "Genetic Contributions to Anatomical, Behavioral, and Neurophysiological Indices of Cognition," p. 143, and John Loehlin et al., "Hereditry, Environment, and IQ in the Texas Adoption Project," p. 123. For the claim about grades, see Karri Silventoinen et al., "Heritability of Body Height and Educational Attainment in an International Context: Comparison of Adult Twins in Minnesota and Finland," 544–555 and Francois Nielsen, "Achievement and Ascription in Educational Attainment: Genetic and Environmental Influences on Adolescent Schooling," 193–216. For the claim about financial success, see Samuel Bowles and Herbert Gintis, "The Inheritance of Inequality," 16 and David Rowe et al., "Hernstein's Syllogism: Genetic and Shared Environmental Influences on IQ, Education, and Income," 419.

⁴⁰See character traits and values. For the claim about character traits, see John Loehlin, "Resemblance in Personality and Attitudes Between Parents and Their Children," in Samuel Bowles et al., eds., p. 198; Thomas Bouchard, "Genes, Environment, and Personality," 1700–1701; Rainer Riemann et al., "Genetic and Environmental Influences on Personality: A Study of Twins Reared Together Using the Self- and Peer Report NEO-FFI Scales," 449–475; John Loehlin et al., "Heritabilities of Common and Measure-Specific Components of the Big Five Personality Factors," 431–453. For the claim about religious values see Laura Koenig et al., "Stability and Change in Religiousness During Emerging Adulthood," 532–543; Laura Koenig et al., "Genetic and Environmental Influences on Religiousness: Findings for Retrospective and Current Religiousness Ratings," 471–488; Thomas Bouchard et al., "Genetic Influence on Social Attitudes: Another Challenge to Psychology from Behavior Genetics," 92–95. For the political claim, see Peter Hatemi et al., "Is There a 'Party'

Table 6.2 Objections to Argument

Premise	Objection	Response
(P1)	In the context of responsibility, foundationalism is false	There is no good reason to think that foundationalism is false in the context of responsibility
(P1)	Over time the pattern of choices and increasingly complex and self-endorsed character state ground responsibility	If no choice, character state, or particular conjunction or disjunction adds responsibility to a system, then larger aggregations will not do so
(P2)	A character state with the relevant feature is the most freedom we can have or want. Hence, this is enough for responsibility	1. This is not all the freedom we want 2. Even if this is all the freedom we want, it is still not sufficient for moral responsibility
(P2)	If responsibility entails control and control entails choice, then the searchlight theory is true, but it is false	1. The searchlight theory is true 2. Even if the searchlight theory is false, there still is no reason to think that an ungrounded character state is a responsibility-foundation
(C1)	We have more justification for moral responsibility than for either premise or both premises together. Hence, one of the premises is false, even if we don't know which one	We do not have more justification for moral responsibility than for either or both premises. See situational and historical factors, priming effects, disagreements on the central issues in responsibility, and the role of genetics

on teen pregnancy and adult sexual behavior.⁴¹ None of this is consistent with the idea that people have a good understanding of whether they are responsible.⁴²

Here is a summary of the objections and why they fail (Table 6.2).

in *Your Genes?*" Tables 3, 5; Thomas Bouchard and Laura Koenig, "Genetic and Environmental Influences on the Traditional Moral Values Triad—Authoritarianism, Conservatism, and Religiousness—as Assessed by Quantitative Behavior Genetic Methods," pp. 27–29; John Alford et al., "Are Political Orientations Genetically Transmitted?" 153–167.

⁴¹For the claim about teenage pregnancy, see Mary Waldron et al., "Age at First Sexual Intercourse and Teenage Pregnancy in Australian Female Twins," 440–449; Joseph Rogers et al., "Nature, Nurture and First Sexual Intercourse in the USA: Fitting Behavioural Genetic Models to NLSY Kinship Data," 29–41. For the claim about adult sexual behavior, see Lynn Cherkas et al., "Genetic Influences on Female Infidelity and Number of Sexual Partners in Humans: A Linkage and Association Study of the role of the Vasopressin Receptor Gene (AVPR1A)," 649–658; Khytam Dawood et al., "Genetic and Environmental Influences on Sexual Orientation," in Yong-Kyu Kim, ed., p. 271; Victor Jockin et al., "Personality and Divorce: A Genetic Analysis," 288–299; Hans-Peter Kohler et al., "Is Fertility Behavior in Our Genes? Findings from a Danish Study," 253–288.

⁴²A concern is that the social scientific results mean that we are more often getting it right about what we are responsible for. Given the main argument in this chapter, I don't think this is what it shows. Instead, the results show that our everyday beliefs regarding our actions and outcomes are far less justified than we ordinarily suppose. As a result, we should be skeptical about whether we know that people are responsible for their actions and what results from them.

6.3 Part Three: Conclusion

In conclusion, if an individual is morally responsible, then there is a responsibility-foundation that makes him morally responsible, but there is no responsibility-foundation that makes him responsible. This rested on the notion that if there were a responsibility-foundation, it would be either an ungrounded choice or an ungrounded character state and that neither can serve as the foundation. The chapter then considered three types of objections. First, moral responsibility does not require a responsibility-foundation. Second, a character state can serve as the foundation. Third, we know people are responsible even if we don't know what the foundation is. These objections fail.⁴³

⁴³I am very grateful to attendees at the 2012 Central Division Meeting of the American Philosophical Association and the 2014 Free Will conference at the Center for Cognition and Neuroethics, the State University of New York at Buffalo philosophy department, Blameless Buffalo reading group, and Andy Cullison, Jim Delaney, Neil Feit, John Keller, Philip Reed, George Sher, Matthew Talbert, and Dale Tuggy, for their very helpful comments and criticisms of this work.

Chapter 7

If There Were Responsibility, It Wouldn't Do Much Work (Responsibility and Internalism)



Abstract In this chapter, I assume that, contrary to the above argument, individuals are morally responsible and then explore how narrow responsibility would be. Here I argue for internalism in moral responsibility. My argument is that connection and control are what make people morally responsible. Because connection and control consist of, and only of, reasoning (and mental states) that a person is phenomenally aware of, what makes someone responsible is such reasoning. Because such reasoning is an internal feature of a person, internalism in responsibility is true. Internalism in this context leads to a very narrow scope for responsibility. It is so narrow, for example, the people are at most blameworthy for akrasia. I then explore the implications of this argument with regard to principal-agent responsibility, negligence, attempted versus completed crimes, and akrasia. If the above analysis is correct, then our everyday judgments of moral responsibility are unreliable.

7.1 Introduction

In this chapter, I assume that, contrary to the above argument, individuals are morally responsible and then explore how narrow responsibility would be. Here I argue for internalism in moral responsibility. My argument is that connection and control are what make people morally responsible. Because connection and control consist of, and only of, reasoning (and mental states) that a person is phenomenally aware of, what makes someone responsible is such reasoning. Because such reasoning is an internal feature of a person, internalism in responsibility is true. Internalism in this context leads to a very narrow scope for responsibility. It is so narrow, for example, the people are at most blameworthy for akrasia. I then explore the implications of this argument with regard to principal-agent responsibility, negligence, attempted versus completed crimes, and akrasia.

If the above analysis is correct, then our everyday judgments of moral responsibility are unreliable. I illustrate this by noting how it undermines our blame for genocidal leaders who used starvation and slaughter to serve their political goals. It also undermines our blame of drunk drivers. Note also that this theory makes moral-responsibility-based reasons, specifically rights and desert, unable to explain

American consent-to-sex laws. Thus, if people are morally responsible at all, and they are not for the reasons mentioned in chapter six, the very narrow scope of responsibility changes the way we should think about a number of issues about which most of us feel strongly.

My arguments in this section develop and extend various arguments against moral responsibility, specifically Galen Strawson's argument that moral responsibility is impossible, Gideon Rosen and Michael Zimmerman's argument that people are not responsible for negligence, and discussions of responsibility internalism by Michael McKenna, Al Mele, Ishtiyaque Haji, and their interlocutors. My argument is unified by a focus on the foundation of responsibility and how, if there were such a foundation, it would lead to responsibility depending on, and only on, events that occur in the head.

In this chapter I argue that if people were morally responsible, responsibility wouldn't do much work because the responsibility would be limited to the content of a relevant conscious state or decision and the time at which the state or decision occurs. Responsibility wouldn't do much work because the restricted content of the conscious state or decision and short time when the state or decision occurs.

It is often assumed that if people are morally responsible, then they are responsible for a wide array of acts. For example, people often blame Hitler, Stalin, and Mao for slaughtering and starving tens of millions of people.¹ This is true even according to those who view them as doing what they honestly thought was right. It is often asserted, and the law allows, drivers to be convicted of serious crimes for killing people while driving drunk even if at the time at which they lost control they were doing the best they could given their state of intoxication. In a number of high profile cases, universities expelled drunken men who had intercourse with equally drunk women and who likely didn't even consider whether they were doing something illegal or immoral.² The law prosecutes people for having sex with girls even if they didn't know they were underage and couldn't reasonably have known they were underage.³ The same is true for some environmental crimes.⁴ American law presumes that people know the law even though the law is incredibly complex and not in fact known. Many Americans, for example, break three or more laws a day without knowing it.⁵

There are many other areas where we intuitively think people are responsible, and the law often finds them to be responsible, even though they didn't do the wrongdoing in question, didn't know what they were doing, or didn't know that their action was

¹See Stephane Courtois, *The Black Book of Communism* and R. J. Rummel, *Death by Government*

²See Katie Thomas, "Ex-Student Sues Brown Over Rape Accusation."

³See Model Penal Code 213.3.

⁴For examples, see Michael C. Ford, "Reconciling Environmental Liability Standards After Iverson and Bestfoods," 231–33, Keith Onsdorff and James Mesnard, "The Responsible Corporate Officer Doctrine in RCRA Criminal Enforcement: What You Don't Know Can Hurt You," 10099, 10102–04, and Kathleen Brickey, "The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform," 125–135.

⁵For the claim that the average American adult performs three felonies a day, see Harvey Silvergate, *Three Felonies A Day: How the Feds Target the Innocent*.

wrong. One area where this is true is principal-agent liability. People are often judged blameworthy and found guilty for what their agents do. Consider the following case.

Case #1: Pamela Smart

Pamela Ann Smart (born August 16, 1967) conspired with her 15-year-old lover, William “Billy” Flynn, and three of his friends to kill her 24-year-old husband, Gregory Smart, on May 1, 1990, in Derry, New Hampshire. Assistant Attorney General Diane Nicolosi portrayed the teenagers as naive victims of an “evil woman bent on murder.” The prosecution portrayed Pamela Smart as the cold-blooded mastermind who controlled her young lover. Nicolosi claimed that Smart seduced Flynn to get him to murder her husband, so that she could avoid an expensive divorce and benefit from a \$140,000 life insurance policy.⁶

Pamela Smart was found guilty on the basis of her having conspired to have her agent commit murder even though she didn’t commit the murder. Some laws, such as the Racketeer Influenced and Corrupt Organization Act (RICO) don’t even require that the person conspired to commit the crimes that are part of the basis of the RICO conviction.⁷

Also, people are often judged blameworthy, and legally face additional penalties, if their acts caused harm rather than whether they merely tried to cause harm.

Case #2: Doppelgangers’ Shooting

Two doppelgangers shoot at the President. The first hits and kills the President. The second misses because of a sudden gust of wind.

These cases involve two individuals who are intrinsically identical. Hence, if the first is blameworthy for something the second is not, then blameworthy rests, at least in part, on an extrinsic feature of someone.

The intuitive role for intrinsic features can be seen if the snipers shot the President from a long distance and they both are annihilated before the bullets hit and miss respectively.⁸ It is intuitively hard to see how a person can be blameworthy for an event that occurs after he ceases to exist.

People are often judged blameworthy and convicted of crimes even if they didn’t know that they did a wrongful act that caused harmed or didn’t know that they omitted to do something that allowed harm to occur. The same is true if the agent knows what he did, but didn’t know it was wrong. Here is an instance of two of the types of negligence.

Case #3: Hot Dog

Allessandra, a soccer mom, has gone to pick up her children at their elementary school. As usual, Allessandra is accompanied by the family’s border collie, Sheba, who rides in the back of the van. The pickup has never taken long so, although it is very hot, Allessandra leaves Sheba in the van while she goes to gather her children. This time, however, she is greed buy a tangled tale of misbehavior, ill-considered punishment, and administrative bungling which requires several hours of indignant sorting out. During that time, Sheba languishes,

⁶See Wikipedia, “Pamela Smart,” June 28, 2016, https://en.wikipedia.org/wiki/Pamela_Smart.

⁷See 18 U.S.C. sec. 1961–1968.

⁸Today’s military snipers have killed people more than a mile away. See Michael Smith, “Hotshot sniper in one-and-a-half mile double kill,”

forgotten, in the locked car. When, Alessandra and her children finally make it to the parking lot, they find Sheba unconscious from heat prostration.

Case #4: Bad Weather

It is 1968 and amerika (a nom de guerre) is a member of the Weather Underground. Sensitive and conscientious as a child, amerika has been rethinking his moral beliefs. In a series of stages, he has become convinced, first, that capitalism is deeply unjust; next, that nothing short of revolution will bring change; and finally, that the need to rectify massive injustice far outweighs the rights or interests of mere individuals. To procure funds for the Revolution, amerika takes part in a robbery in which a bank guard is killed.⁹

Also related to internalism is the intuitive pattern of blaming newly created people for what they did but not blaming manipulated people, despite their similarity with regard to non-historical compatibilist criteria. Consider these cases.

Case #5: Beth

Ann and Beth are both philosophy professors but Ann is far more dedicated. Wanting more production out of Beth and not scrupulous about how he gets it, the dean gets neurologists to 'implant' attitudes into easy-going Beth Ann's hierarchy of values. The 'implanted' attitudes are practically unsheddable. The implantation results in Beth's being, in relevant respects, the psychological twin of Ann, but leaves unscathed values, beliefs, desires, and so forth, which pre-manipulated Beth possessed and which can co-exist harmoniously with the engineered-in pro-attitudes.

A pro-attitude is practically unsheddable for a person at a time if, given her psychological constitution at that time, ridding herself of that attitude is not a 'psychologically genuine option' under any but extraordinary circumstances.¹⁰

Case #6: Suzie-Instant

Suzie-Instant is God's handy work. She comes into existence at an instant as a psychologically healthy woman much like any other normally functioning thirty-year-old. She has robust and consistent false beliefs about her history, beliefs similar to those a psychologically healthy person would have. She thinks she lived a normal human life for thirty years and acquired her values through sustained effort. That is, she thinks she is responsible for who she is.

Suzie satisfies Frankfurt's hierarchical account of freedom of action and freedom of the will, is moderately reason-responsive, sane, and has the capacity to revise her psychology. That is, Suzie satisfies the non-historical compatibilist criteria.¹¹

Case #7: Suzie-Normal (Michael McKenna)

Suzie Normal is a doppelganger to Suzie-Instant, but her mental states track her actual history.

The problem is that if Beth is similar to Suzie-Instant in relation to responsibility-making properties and if the latter is responsible, then so is the former. Beth appears to be similar with regard to responsibility-making properties because she satisfies non-historical compatibilist criteria to the same degree as does Suzie-Instant and has as much control (Table 7.1).

⁹These examples come from George Sher, *Who Knew? Responsibility Without Awareness* and George Sher, "Out of Control," 285–301.

¹⁰See Al Mele, *Autonomous Agents: From Self-Control to Autonomy*, p. 172.

¹¹See Michael McKenna, "Responsibility and Globally Manipulated Agents," 169–192, esp. 180–181.

Table 7.1 Argument

(P1)	Suzie-Instant is responsible for A-ing (A is an act)	If someone (a) satisfies the compatibilist and incompatibilist conditions for responsibility and (b) has not been manipulated, then he is responsible
(P2)	If Suzie-Instant is responsible for A-ing, then Beth is responsible for A-ing	1. Beth satisfies (a) 2. Beth has as much control over her act and her act reflects her real self as much as does Suzie-Instant's act
(C1)	Hence, Beth is responsible for A-ing	(P1), (P2)

Yet it seems intuitively obvious that Beth is not morally responsible. In this chapter, I argue for the following theses.

Thesis #1: Internalism. Internalism in moral responsibility is true.

Thesis #2: Narrow. Moral responsibility is very narrow.

My argument rests on several notions. Moral responsibility is a fundamental concept in that it cannot be analyzed in terms of other concepts. It is co-extensive with being apt for praise and blame. The reason this is not an analysis is that praise and blame are positive and negative moral responsibility judgments respectively and so such an analysis would be circular.

Internalism holds that an internal property of an individual is an intrinsic property of him. Responsibility is very narrow just in case it is a spatially and temporally intrinsic property of the responsible agent.

In part two, I argue that internalism about moral responsibility is true. In part three, I argue that responsibility is very narrow. Its narrowness prevents it from supporting our moral judgments and, perhaps, also our legal judgments. In part four, I apply these results to three areas of interest: famous true believers, drunk driving, and sex when there are issues of consent. In part five, I discuss akrasia and whether there is anything for which people are morally responsible.

7.2 Argument for Thesis #1 (Moral responsibility has at most a limited scope)

Here is the argument for the first thesis.

- (P1) Connection and control are what make a person responsible for an act.
- (P2) Connection and control are solely a function of an intrinsic feature (or features) of the agent's (phenomenal) conscious mental states.
- (P3) If (P1) and (P2), then what makes someone responsible is an intrinsic feature of the agent's conscious mental states.
- (C1) Hence, what makes someone responsible is an intrinsic feature of the agent's conscious mental states. [(P1)–(P3)]

(P4) If what makes someone responsible is an intrinsic feature of the agent's conscious mental states, then responsibility is an internal property.

(C2) Hence, moral responsibility is an internal property. [(C1), (P4)].

Premise (P1) (Connection and control are what make a person responsible for an act) rests on our intuitions and the literature. It intuitively seems that we are responsible for acts that reflect who we are and that we control. Both are rock bottom notions in that they intuitively seem to be fundamental features of responsibility.

The notion that connection and control are required for responsibility also tracks the free will and responsibility literature. Some theorists assert that a person is responsible for an act because it reflects his real self.¹² A person's real self is his network of mental states, that is, his mental states and the relations between them. This is his psychology or, perhaps, his psychology at a time. Other theories assert that a person is responsible for an act because he controls it.¹³ Both theorists have features of the other type of theory in their approach as connection requires some type of causal connection between who a person is and what he does that approximates control. Control requires connection in that control theories require that control be exercised by a person's real self.

Premise (P2) [Connection and control are solely a function of an intrinsic feature (or features) of the agent's (phenomenal) conscious mental states] rests on two parallel set of assumptions about connection and control.

- (1) *Connection to Real Self.* If a person is connected to something, then it is connected to his real self.
- (2) *Real Self to Phenomenal Reasoning.* If something is connected to a person's real self, then it is connected to reasoning (and states) that he is phenomenally aware of.
- (3) *Control to Real Self.* If a person controls something (regulative or guidance control), then his real self guides it in the right way.
- (4) *Real Self to Phenomenal Reasoning.* If a person's real self guides something in the right way, then reasoning (and states) that he is phenomenally aware of guide it.

Assumption (2) (If something is connected to a person's real self, then it is connected to his reasoning that he is phenomenally aware of) rests on three arguments. The first argument is from well-being and involves the following claim: If well-being is necessarily connected to phenomenal awareness, then (2) is true. Consider a person

¹²See Sher, *Who Knew? Responsibility Without Awareness*, Angela Smith, "Control, Responsibility, and Moral Assessment," 367–392 and Matthew Talbert, "Unwitting Behavior and Responsibility," 139–152.

¹³For reasons-responsiveness, see John Martin Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility*. For the sanity theory, see Susan Wolf, *Freedom Within Reason*. For the mesh theory, see Harry Frankfurt, "Freedom of the Will and the Concept of a Person," 5–20 and Gary Watson, "Free Agency," 205–220.

For incompatibilist models of control, see Roderick Chisolm, "Human Freedom and the Self," Robert Kane, *The Significance of Free Will*, Timothy O'Connor, *Persons and Causes: The Metaphysics of Free Will*, and Randolph Clarke, *Libertarian Accounts of Free Will*.

who does not have any phenomenally aware pleasure, desire-fulfilment, or objective-list elements (specifically, friends, knowledge, and virtue). He could have accessed some of the relevant states (for example, desire) through minimal effort, but never did so. It intuitively seems that he does not have a positive well-being level and, moreover, does not have any well-being level. This suggests that phenomenal awareness is necessary for well-being. The most likely explanation of this is that it is necessary for a person's life to go well that what makes it go well is connected to his real self. If this is correct, then it is plausible that phenomenal awareness is necessary for a person's act to be connected to his real self.

The notion that a person could have pleasure, desire, or an objective-list element without being consciously aware of it is hard to imagine. If such a state were impossible, this further strengthens my argument. Such impossibility would suggest that the link between well-being and conscious awareness is not merely that conscious awareness is necessary for a well-being-maker to actually make someone's life go better, but that the well-being-maker can't exist without conscious awareness. This is a stronger claim than is needed for the above argument.

A second argument is that mental elements that a person is not phenomenally aware are not always mental states, but sometimes mere dispositions to have mental states. A dispositional state is a counterfactual attribute. A counterfactual attribute is not part of a network of mental states, but merely a tendency for such a state to be present were certain conditions to occur. As such, it is not part of a person's real self unless it is in some sense created when a dispositional state becomes occurrent. By analogy, the speed at which a person would run a marathon under certain conditions is not an actual running time.

It might be argued that a person can be responsible for an unconscious mental state, even if he not aware of it, so long as he could become aware of it. This argument is similar to the above argument with regard to a disposition to have a mental state that one does not currently have.¹⁴ The arguments are parallel because there is a responsibility-related difference on the above reasoning between a mental element in one's conscious network and something that merely could be part of the network because one could create it or transfer it from the unconscious to the conscious.

A third argument is that a responsibility-maker cannot depend on another responsibility-maker. As mentioned above, a disposition depends on (a) an external condition or (b) the subject making an effort to change a disposition into an occurrent state. The problem is that it is even more plausible that effort grounds responsibility and one responsibility-ground cannot directly depend on another ground. The concern is that what explains why someone is responsible in scenarios involving dispositions is the effort that creates the occurrent state and not the disposition itself. In cases in which a situation and not effort creates the occurrent state, control is not present and, hence, the individual is not responsible. It is that feature to which we now turn.

¹⁴I owe this point to Travis Timmerman. See Travis Timmerman and Sean Clancy, "Book Review of Levy, N., 'Consciousness and Moral Responsibility'," 109–111.

Assumption (4) [If a person's real self guides something in the right way, then reasoning (and states) that he is phenomenally aware of guide it] rests on the intuitive way in which moral-responsibility-relevant control depends on phenomenal awareness.

Case #8: Conversion

Steve and Bob convert to Islam. This mystifies their friends as they were hardcore atheists. They could have accessed these states had they tried moderately hard to do so, but never tried. That is, they do not phenomenally know what caused and justified their new beliefs.

Case #9: Patty Hearst

For weeks, Patty Hearst is beaten, raped, sleep-deprived, and lectured to about the SLA's leftist program. She comes to believe in the SLA's program, despite its being an implausible-and-radical break in her previous thinking. She does not phenomenally know what caused and justified her new belief system (specifically, which beliefs, desires, and intentions did so), but would know if she had tried hard to discover what changed her belief system.¹⁵

The amount of effort (moderate in Case #8 and significant in Case #9) is irrelevant as it is a distinct ground of responsibility. In addition, if effort is something that a person must be phenomenally aware of, it further supports the notion that an individual must be phenomenally aware of the ground of responsibility.

Premise (P3) (If (P1) and (P2), then what makes someone responsible is an intrinsic feature of the agent's conscious mental states) is trivially true. Premise (P4) (If what makes someone responsible is phenomenally aware reasoning, then responsibility is an intrinsic property) rests on the concept of an internal property.

An objector might claim that the argument works for intrinsic responsibility (what one is responsible for in itself) but not for extrinsic responsibility (what one is responsible for in virtue of its relation to an object of intrinsic responsibility. Extrinsic responsibility is also known as derivative, indirect, or secondary responsibility. It can be seen in the idea that one can be directly responsible for some acts (doing many jello shots while knowing one has to drive later) and indirectly responsible for the effects of those acts (hitting someone because the driver passed out while driving). It can also be seen in that one is responsible not only for his thoughts (for example, attempted crimes), but also what his thoughts are about (for example, completed crimes).

Secondary responsibility is not true responsibility because it is not the minimal set of responsibility-making features. Consider a basic intrinsic-value state. This is the minimal set of features of a state of affairs that makes something intrinsically valuable (for example, a state of affairs that obtains).¹⁶ By analogy, there are basic intrinsic-responsibility states. This is the minimal set of features that make someone morally responsible.

Extrinsic value depends on its relation to intrinsic value. The former is valuable because it causes or is part of an intrinsically valuable thing. Extrinsically valuable things are not themselves intrinsically valuable.¹⁷ Similarly, secondary responsibility

¹⁵See Patty Hearst and Alvin Moscow, *Patty Hearst: Her Own Story*.

¹⁶See Fred Feldman, "Basic Intrinsic Value," 319–346.

¹⁷See Noah Lemos, *Intrinsic Value: Concept and Warrant* and Ramon Lemos, *The Nature of Value*.

Table 7.2 Intrinsic Value and Intrinsic Responsibility

Concept	Description	Relation	Actually valuable or responsible?
Intrinsic value	The minimal set of facts that makes something intrinsically valuable		Yes
Extrinsic value	Standing in the right sort of relation to something that has intrinsic value	Causes or is part of an intrinsically valuable thing	No
Intrinsic (primary) responsibility	The minimal set of facts that makes someone morally responsible		Yes
Extrinsic (secondary) responsibility	Standing in the right sort of relation to something that has intrinsic responsibility	An intrinsically responsible thing causes or is part of it	No

depends on intrinsic (primary) responsibility because its connection to responsibility depends on its being caused by something for which the agent is primarily responsible or is a whole that has something for which someone is morally responsible as a part. An extrinsically responsible thing is not something for which a person is morally responsible in and of itself. Depending on the account, the basic intrinsic responsibility state might be a person with a capacity, a person with a capacity to make a decision, a person who makes a decision, and so on.

Note that the relation between extrinsic value and extrinsic responsibility is reversed relative to the intrinsic correlative. An extrinsically valuable thing causes an intrinsically valuable thing or is a part of it. An extrinsically responsible thing is caused by an intrinsically responsible one or is a whole of which the intrinsically responsible thing is a part. The first brings about an intrinsically valuable thing, the latter is brought about by an intrinsically responsible thing.

While we often talk as if extrinsic value is a type of value, it is not. This can be seen in that the total moral value of a universe is solely a function of its basic intrinsic-value states and the way in which they combine (consider, for example, a sum, average, or organic unity). Were two universes to have equal amounts of intrinsic value but different amounts of extrinsic value, they would be equally valuable. For example, God would have equal reason to create or destroy them. Similarly, we often talk as if secondary responsibility is a type of responsibility, but it is not. Here is a chart summarizing the ideas (Table 7.2).

7.3 Argument for Thesis #2 (Moral responsibility is very narrow)

Here is the argument for Thesis #2.

(C2) Hence, moral responsibility is an internal property. [(C1), (P4)].

(P5) If moral responsibility is an internal property, then it is very narrow.

(C2) Moral responsibility is very narrow. [(C1), (P3)].

Premise (P5) rests on the notion that intrinsic features are very narrow. This argument is independent of debates over compatibilism and the foundation of responsibility (character state or choice).

Here is a table summarizing the overall argument in this section (Table 7.3).

The argument for (C3) has applications to the above responsibility issues. First, people are not responsible for the actions of another agent. The reason is that what one person does or thinks is not an internal feature of another person. Internalism thus prevents the second from being responsible for what the first does. This is at odds with some sense of collective responsibility.¹⁸ Also, this is not true in law where there are various derivative responsibility penalties in both criminal and civil law. In criminal law, the Racketeering Influence Corrupt Organization act makes one person legally responsible for what fellow members of a criminal organization do. In the felony-murder rule, one person can be convicted on the basis of what his partner in crime did.¹⁹ In civil law, a principle can be held liable for the harm his agent causes or the deal to which his agent agrees.²⁰ These laws might be justified on consequentialist, and perhaps even fairness grounds, but not on the basis of moral responsibility or anything that focuses on it (for example, desert). This is not quite as stark as it sounds, though, because one person can be blameworthy for trying to wrong another when the trying involves another's action.

Second, internalism entails that someone is responsible only when he has the relevant occurrent thought and only where the thought occurs (or, perhaps, where he is when he has that thought). In short, responsibility is confined to the time and location of the responsibility-maker. As a result, moral responsibility for attempted crimes is the same as for completed ones.²¹ Similarly, there is no flow-through feature of responsibility. For example, a person who gets intoxicated to the point of no longer being responsible is responsible for getting drunk and not from what flows from it. Neither is consistent with American law. The law has substantially stronger penalties for completed crimes over attempted ones and holds people responsible for crimes done while very drunk even though it was not reasonably foreseeable that getting so drunk would lead to crime.

¹⁸For the notion that collective responsibility might support responsibility externalism, see Michelle Ciurria, "Moral Responsibility Ain't Just in the Head," 601–616, esp. 607.

¹⁹See American Law Institution, Model Penal Code § 210.2(1)(b) (1962).

²⁰See Restatement (Second) of Agency.

²¹For an argument to the contrary, see Michael Moore, *Placing Blame: A Theory of Criminal Responsibility*.

Table 7.3 Argument for Theses

(P1)	Connection and control are what make a person responsible for an act	• See intuitions and literature
(P2)	Connection and control are solely a function of an intrinsic feature (or features) of the agent’s (phenomenal) conscious mental states	<p>Part One: Connection</p> <p>(1) <i>Connection to Real Self</i>. If a person is connected to something, then it is connected to his real self</p> <p>(2) <i>Real Self to Phenomenal Reasoning</i>. If something is connected to a person’s real self, then it is connected to reasoning (and states) that he is phenomenally aware of</p> <p>Part Two: Control</p> <p>(1) <i>Control to Real Self</i>. If a person controls something (regulative or guidance control), then his real self guides it in the right way</p> <p>(2) <i>Real Self to Phenomenal Reasoning</i>. If a person’s real self guides something in the right way, then reasoning (and states) that he is phenomenally aware of guide it</p>
(P3)	If (P1) and (P2), then what makes someone responsible is an intrinsic feature of the agent’s conscious mental states	Trivially true
(C1)	Hence, what makes someone responsible is an intrinsic feature of the agent’s conscious mental states	(P1)-(P3)
(P4)	If what makes someone responsible is an intrinsic feature of the agent’s conscious mental states, then responsibility is an internal property	See concept of an internal property
(C2)	Hence, moral responsibility is an internal property	[(C1), (P4)]
(P5)	If moral responsibility is an intrinsic property, then it is very narrow	Intrinsic features are very narrow
(C3)	Moral responsibility is very narrow	(C2), (P5)

Also, because of internalism, acts are right or wrong only when the agent is doing something for which he is morally responsible. That is, the time of a right or wrong act is limited to the time the responsibility-maker occurs. This dovetails with the notion that people are no more responsible for a completed crime than the attempt that is part of it.

A similar thing is true of the location of responsibility. A person is responsible only where his occurrent thought occurs or, perhaps, where he occurs when having this

thought.²² For example, the location of blame for Nazis who shot V1 buzz bombs from the French and Dutch coasts at London was where the Nazi shooters were located (for example, Pas-de-Calais) and not in London or over the English Channel.

Third, people are not morally responsible for negligent acts.²³ For example, if a person does not know she is subjecting another to wrongful risk, then she is not blameworthy. This is true even if a reasonable person would have known she was doing so.²⁴ Furthermore, this is true not only in cases in which a person does not know what she is doing, but also in cases in which she does not know what she is doing is wrong. An above example of not knowing that one is doing wrong is Bad Weather (Case #3). It is also true that moral monsters such as Hitler, Stalin, and Mao are not blameworthy if they truly believed what they were doing was morally right.

Fourth, if someone is responsible for anything, then he is responsible for akrasia. This feature of responsibility follows from the notion that if responsibility is very narrow, then it is based on, and only on, reasoning that the subject is phenomenally aware of. If this is so, then he is blameworthy only if he does something that he believes he ought not to do all things considered. If someone is blameworthy only if he does something that he believes he ought not do all things considered, then he is blameworthy for akratic acts, if anything.

Here is a chart summarizing these applications of internalism in moral responsibility (Table 7.4).

The above limits on moral responsibility prevent it from doing a lot of the work we normally think it does. Specifically, it undermines many of the ways in which we assign praise and blame for what people think and do.

First, we often blame people for having certain attitudes. For example, we blame people for having racist attitudes. Sometimes we blame them for lacking certain attitudes. This occurs, for instance, when we blame someone for being ungrateful to his mother after all the sacrifices she made for him. Because people often do not know that their ugly attitudes are mistaken, they are often not morally responsible for having these attitudes. The same is true for attitudes one lacks but should have.

People might still merit blame for decisions that led to having or lacking certain attitudes, but not only is this a different matter, sometimes there were no such decisions. Many of the attitudes we most dislike are non-decisional in that one didn't

²²For the view that responsibility at some later time can depend on what a person thought or did earlier, see John Martin Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility*, Chap. 7.

²³Gideon Rosen also argues that people are not responsible for negligence. See Gideon Rosen, "Skepticism about Moral Responsibility," 295–313; Gideon Rosen, "Culpability and Ignorance," CIII: Part 1; Gideon Rosen, "Kleinbart the Oblivious and Other Tales of Ignorance and Responsibility," 591–610. For criticisms of Rosen's argument, see William FitzPatrick, "Moral Responsibility and Normative Ignorance: Answering a New Skeptical Challenge," 589–613; Alexander Guerrero, "Don't Know, Don't Kill: Moral Ignorance, Culpability, and Caution," 59–97; Elizabeth Harman, "Does Moral Ignorance Exculpate?" unpublished manuscript. See, also, Sher, *Who Knew? Responsibility Without Awareness* and Michael Zimmerman, "Negligence and Moral Responsibility," *Nous* 20 (1986): 199–218.

²⁴The notion that negligence supports externalism about responsibility can be seen in Ciuurria, "Moral Responsibility Ain't Just in the Head," 603–604.

Table 7.4 Intrinsic Property Restrictions

1	Subject	Subject of mental state or event	<i>Principal-Agent Responsibility.</i> No principal-agent responsibility
2	Occurrent	Actual mental state or event (attitude, decision, or willing)	<i>Negligence.</i> No moral responsibility for negligence (perhaps for akrasia)
3	Time	Time of responsibility-maker	1. <i>Attempts.</i> Responsibility for attempts is the same as responsibility for completed acts 2. <i>Flow Through.</i> No flow-through responsibility. That is, the <u>historical theory of responsibility</u> is false 3. <i>Deontic Status.</i> Acts are right or wrong only when the agent is doing something for which he is morally responsible
4	Location	Location of responsibility-maker	See above
5	Ground	The sole ground of blame is akrasia	1. <i>Blame to Phenomenal Awareness.</i> Blame rests on, and only on, phenomenally aware decisions or acts 2. <i>Phenomenal Awareness to Akrasia.</i> Only Akritic decisions or acts merit blame solely for internal features

choose them and, perhaps, are non-reflective in that the thinker never thought about challenges to them or how she might respond to such challenges. For example, it is reported that in ancient Greece, the issue of freeing the slaves did not appear to receive a lot of discussion and thus was likely not a contested issues.²⁵ Still, it intuitively seems that we might blame Greeks for having a lack of compassion toward slaves.²⁶

Second, as mentioned above, when a person is negligent about something, this is not a conscious thought and need not occur when someone was consciously thinking. Negligence occurs when someone should have known something, or at least been aware of it, but didn't.

In particular, these limits tell us that someone cannot be responsible for not thinking of something, that is, a non-comparative absence of a thought. Not thinking something is not itself a thought or decision and hence not something for which someone can be responsible for given the limited scope of responsibility. Nor can she be morally responsible for thinking of one thing rather than another (a compar-

²⁵See Plato, *Republic*, 4:435a–436a. and Aristotle, *Politics*, 7:1327b, and Heraclitus, frag. 53.

²⁶For the notion that people in the past are not fully responsible for their acts when they reflect their times because they didn't know and couldn't reasonably be expected to know the true or good, see Susan Wolf, "Sanity and the Metaphysics of Responsibility," Ferdinand Schoeman, ed., *Responsibility, Character, and the Emotions: New Essays in Moral Psychology* 46–62.

ative absence of a thought) if the thought pattern was without an awareness that one could or should think differently. Not going down a better, rather than worse, mental path is not by itself a thought or decision.²⁷

Here are a few examples of non-responsible negligence. Consider examples of moral negligence in which the person should have known certain moral facts but didn't.²⁸

Case #10: Bad Policy

Sylvain, a college professor, is empathetic to a fault. He identifies readily with troubled students and freely grants their requests for opportunities to earn extra credit. Because he enters so completely into each trouble student's perspective, he often forgets that there are other, less aggressive students who would eagerly welcome the same chance. As a result, his grading policy is inconsistent and unfair.

Case #11: Mismatch

A Division I champion wrestler and a bouncer are about to get into a fight. The wrestler gets the consent of the bouncer to fight until both sides no longer wish to fight. The bouncer agrees, not knowing whom he is up against. The wrestler who knows that he is extremely likely to win, presses the attack long after the bouncer can no longer intelligently defend himself. He breaks the bouncer's eye socket, arm, ribs, and collar bone. The bouncer challenged the wrestler to a fight upon hearing the latter badmouthing the second Iraq war. The wrestler is a strict rights theorist and is convinced he didn't do anything wrong. After all, he reasons, consent was given.

Next, consider examples of non-moral negligence in which the person does not know certain non-moral facts, but should have. In particular, here the people lose track of the relevant facts.

Case #12: Wrestling at a Wedding

Two Cornell fraternity brothers date similar looking women and accompany them to a wedding. After the wedding, the brothers are quite drunk. Upon leaving the bar, they engage in a spirited wrestling match (they were excellent high school wrestlers) that results in their room keys being scattered on the floor. Each accidentally pick up the other's key, go into the wrong rooms, and mistakenly have sex with the wrong women. When daylight comes, the women are initially horrified and then furious.

Case #13: On the Rocks

Julian, a ferry pilot, is nearing the end of a forty-minute trip that he has made hundreds of times before. The only challenge in this segment of the trip is to avoid some submerged rocks that jut out irregularly from the mainland. However, just because the trip is so routine, Julian's thoughts have wandered to the previous evening's pleasant romantic encounter. Too late, he realizes that he no longer has time to maneuver the ferry.

In addition, there are examples of non-moral negligence that occur when people make poor judgments in situations requiring an immediate choice.

²⁷For the notion that people are responsible for negligent thoughts, see George Sher, *Who Knew? Responsibility Without Awareness* and George Sher, "Out of Control," 285–301.

²⁸Cases #10 and #13–15 come from Sher, *Who Knew? Responsibility Without Awareness*.

Case #14: Home for the Holidays

Joliet, who is afraid of burglars, is alone in the house. Panicked by sounds of movement in her kitchen, she grabs her husband's gun, tiptoes down the stairs and shoots the intruder. It is her son, who has come home early for the holidays.

Case #15: Jackknife

Father Poteet, a good driver, is gathering speed to enter a busy freeway. Because the merge lane is very short, he must either pull in front of a looming eighteen-wheeler or stop abruptly. He makes the split-second decision that he has room to merge, but is wrong. The trucker hits the brakes hard, his truck jackknives across four lanes of traffic, and many people are seriously injured.²⁹

In addition, there are examples of non-moral negligence that occur when people deceive themselves.³⁰

Case #16: Mother

Despite the weight of evidence of which she is aware, a mother believes that her son is innocent of a horrible rape-murder. She thinks that he just couldn't have done such a horrible thing. This leads her to tip him off about the investigation. He hides in the Pacific Northwest and attacks four more women.

Case #17: Jealous Husband

An insecure, jealous husband is convinced that his wife is having an affair despite his having only flimsy evidence for that proposition. He can just feel it. This leads him to be hostile, which in turn causes her to withdraw still further from him. He views this as yet more evidence that she is cheating.

Case #18: Remembering Father

Beth is a child of a man who died prematurely. Owing partly to her desire to be her father's favorite, she finds it comforting to attend to memories and photographs that place her in the spotlight of her father's affection and unpleasant to attend to memories and photographs that place a sibling in that spotlight. Accordingly, she focuses her attention on the former and is inattentive to the latter.

Case #19: Above Average Professors

A survey of university professors found that 94% thought they were better at their jobs than their average colleague.

If the scope and time limits apply to moral responsibility, then it seems that people are praise- or blameworthy only when they knowingly do wrong. That is, they are responsible only for akratic decisions, specifically, when they judge an act to be something they ought not do, all things considered, and do it anyway. Consider the following.

²⁹See Sher, *Who Knew? Responsibility Without Awareness*.

³⁰Examples #13–14 come from Al Mele, *Self Deception Unmasked*. Mele's examples #14 comes from Thomas Gilovich, *How We Know What Isn't*, p. 77

Case #20: Elliot Spitzer

Elliot Spitzer believes one should not have sex, let alone unprotected anal sex, with prostitutes. He's spoken out against people who patronize prostitutes and prosecuted them for doing so. He later pays a high-end prostitute, Ashley Dupre, to have sex with him.³¹

This still further limits the scope in that many people do not believe they ought never to do wrong acts either because they haven't considered the issue or because they think (perhaps mistakenly) that wrong acts have a normative status that has to compete against prudential concerns. Consider, for example, the notion that saints are boring or that all work and no play makes Jack a dull boy.³²

In contrast to the above argument, John Martin Fischer and Mark Ravizza argue for a historical theory of responsibility.³³ On their account, roughly, a historical property depends on the past being a certain way.³⁴ They argue that responsibility is historical in the sense that responsibility depends on what happened in the past. They provide two cases a historical account is needed for: negligence and manipulation.

Case #21: Drunk Driver

[A] drunk driver careens out of control and plows into a toddler on a tricycle. Even if, at the time of the accident, the driver was so intoxicated that he was not, in any relevant sense, in control of his actions, we nevertheless intuitively hold him responsible for crushing the toddler. This is because the driver had guidance control of his heavy drinking, and he could reasonably expect that it might lead to a horrible tragedy of this sort. In contrast, if we discovered that alcohol might have been injected into the driver against his will, and that, highly intoxicated, he had been placed behind the wheel of a running automobile, then our intuitions concerning his responsibility would certainly change.³⁵

Case #22: Manipulation

Robert, who is genuinely undecided between two conflicting first-order desires X and Y, is visited by a hypnotist who decides to "solve" his problem by putting him in a trance and inducing in him a second-order volition in favor of X; as a result of having this second-order volition, Robert then acts to satisfy X, never suspecting that his decisiveness has been induced by the hypnotist. ... we would all surely deny that Robert acts of his own free will, when he acts from the second-order volition induced by the hypnotist.³⁶

Fischer and Ravizza's argument is the driver is morally responsible in the first case and not in the second because of what happened in the past, hence responsibility is historical. Because the drunk driver, on their account, is responsible even if he were to pass out behind the wheel, responsibility can occur during times the person is

³¹The scandal was first reported in the following article: Alan Feuer, "Four Charged With Running Online Prostitution Ring,"

³²For the notion that moral saints are boring, see Susan Wolf, "Moral Saints," 419–439.

³³See John Martin Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility*, Chap. 7, John Martin Fischer, *Deep Control: Essays on Free Will and Value*, Chap. 12, John Martin Fischer, "Responsiveness and Moral Responsibility," pp. 81–106, esp. 103–105, and John Martin Fischer, "Responsibility and Control," 24–40. For a similar approach, see John Christman, "Autonomy and Personal History," 1–24.

³⁴See Fischer and Ravizza, *Responsibility and Control: A Theory of Moral Responsibility*, p. 201.

³⁵See *ibid.*, 195.

³⁶See *ibid.*

not consciously thinking. Because an individual can be blameworthy for outcomes he did not foresee, but reasonably should have, it is not limited to what he actually thought about and is thus not limited to cases of akrasia.

I assume here that an individual's mental states (and events) are in the head. On some accounts, this is not true because sentence or propositional content has content that involves external referents, a causal history, or depends in part on what is going on in other people's heads.³⁷ Even if sentence or propositional content is not in the head, it does not follow that the mental states themselves are not in the head or that mental-state content is external. Even if sentence or propositional content is external, it does not follow that mental-state content is as well. Even if mental-state content is not internal because its content depends on externalist propositional content, my argument can be modified to assert that aside from the externalist content of attitudes, specifically beliefs, moral responsibility depends on what's in the head. This will not weaken the argument.

Fischer and Ravizza note that many features are historical. Here are some such that are widely held in philosophy.³⁸ Hillary Putnam argued that words refer in a causal historical manner. Medical theorists argue that disorders are diagnosed on historical grounds (for example, it matters whether a patient's paralysis followed his taking a drug or not). Alvin Goldman argued that justification of belief and knowledge have a historical-causal condition in that the belief must have been caused by the appropriate object. Robert Nozick argued that distributive justice is historical in that it matters how people came to acquire certain goods and not a matter of how they are distributed at one point in time. Separately, Nozick also argues that love is historical in that it is directed at a particular person via a historical bonding.³⁹

The main problem with Fischer and Ravizza's argument for the expanded scope of moral responsibility is that it runs head on into the internalist intuitions. The latter are stronger in that it is strongly intuitive that responsibility is in the head and far less plausible that it extends outward in the manner Fischer and Ravizza suggest. This can be seen by the above argument and by three additional problems that plague their theory.

One additional problem is that responsibility is not always historical. There has to be a first moment of responsibility when an individual goes from a zero-level of responsibility to a positive level. At this point in time, responsibility is not historical. If it occurs in a short amount of time (perhaps momentary or perhaps the duration of a complete thought or set of thoughts) in one case, it is less strange to think that it always occurs in a short amount of time.

Fischer and Ravizza might respond that while there is a first moment of responsibility, it must follow a preceding duration during which things happen that make

³⁷For the notion that semantic content isn't in the head and is a matter of causal history, see Hillary Putnam, "The Meaning of 'Meaning'," pp. 131–193 and Saul Kripke, *Naming and Necessity*.

³⁸The examples come from *ibid.*, 173–183 citing Putnam, "The Meaning of 'Meaning,'" 131–193, Alvin Goldman, "A Causal Theory of Knowing," 355–372, Robert Nozick, *Anarchy, State, and Utopia*, and Amelie Rorty, "The Historicity of Psychological Attitudes: Love is Not Love Which Alters When It Alteration Ends," pp. 399–411 and Robert Kraut, "Love De Re," pp. 413–430.

³⁹See Robert Nozick, "Love's Bond," 418.

the individual responsible at the first moment. This is less plausible if what makes someone responsible is the exercise of a capacity (for example, responding to reasons) rather than a capacity (for example, the ability to respond to reasons) because the exercise can occur in a short time and, perhaps, a moment. This leads us to the next problem.

Another problem occurs if one thinks that responsibility is a matter of a person governing himself, not merely having the capacity to do so. This line of thought holds that responsibility is an exercise of a capacity, rather than a capacity itself. Some of the best accounts of responsibility (for example, Harry Frankfurt's hierarchical theory and Fischer and Ravizza's guidance control theory) have some sort of endorsement of one's other mental states as a necessary condition of responsibility that fits nicely with the notion that responsibility is an exercise-property. For Frankfurt, depending on the account, the endorsement can be wholehearted identification, decisive commitment, or satisfaction with the theory.⁴⁰ For Fischer and Ravizza it is a person taking responsibility for acting from his decisional mechanism.⁴¹ If this is correct, it is not clear why responsibility would occur when no one is exercising a capacity, specifically, when one is not exercising a capacity for self-governance. For the same reason, people would not be responsible for something they are not consciously thinking about because this is not an exercise of a self-governance capacity.

A third problem is the way in which, on Fischer and Ravizza's account, a person is morally responsible over time. On their account, a person is responsible over time, even after manipulation, if he has had a fair opportunity to accept or reject the manipulated changes. The problem is that fair opportunity is best interpreted to mean he can be praiseworthy or blameworthy for keeping or eliminating the manipulated change. The difficulty is that one cannot fill out the conditions of responsibility (or blame) in terms of when the person is now responsible (or blameworthy). That this is the best interpretation can be seen when one considers that without such an interpretation, fairness in this context is neither intuitively basic nor dependent on any moral notion other than responsibility-related ones.

Even if there were a sense of fairness in this context that was not responsibility-based, it would make moral responsibility a moralized notion rather than an explanation of a moralized notion and it is not clear that the explanation should itself be moralized. We often think responsibility-related notions should explain fairness, rights, desert, and so on rather than the opposite being true.

In short, Fischer and Ravizza fail to show that responsibility does not have a limited scope. With this limited scope in mind, let's consider three areas where we often blame people, and do so in high dudgeon, and yet are mistaken. In particular, in these areas our everyday judgments of moral responsibility are unreliable and in need of revision.

⁴⁰See Harry Frankfurt, "Freedom of the Will and the Concept of a Person," 5–20 and Harry Frankfurt, "Identical and Wholeheartedness," pp. 27–45.

⁴¹See Fischer and Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* and John Martin Fischer, *My Way: Essays on Moral Responsibility*.

7.4 Applications

Here are three cases where we need to revise our view about who is blameworthy and what justifies the law.

7.4.1 *Application #1: True believers are not blameworthy*

Adolf Hitler, Joseph Stalin, and Mao Tse Tung recklessly and intentionally starved and killed tens of millions of people.⁴² On some historical accounts, they believed that the starvation, killings, and lack of freedom were the right thing to do. They took big risks with their own lives in support of their ideology well before it was clear that their ideas would be implemented or that they wouldn't be imprisoned or killed for trying to do so. They also did so well before it was clear that their efforts would be rewarded by power, money, fame, or women. They even knowingly put their family's and friends' lives at stake by doing so. That they were true believers is also supported by the alignment between their articulated views and actions, consistency of articulated views over time, and consistency of actions over time. They might have been negligent in believing that dictatorship, socialism, communism, and military aggression were right and good, but, if they were true believers, this at most makes them grossly negligent for their evil deeds. If the above argument works, then negligence is not a basis for blame and hence some of the worst leaders in history are not blameworthy for their blood soaked policies in pursuit of misguided ideas.

7.4.2 *Application #2: Some, and perhaps a lot, of drunk driving is not blameworthy*

Many people drive drunk and, when they do, there is only an extremely small chance of their injuring someone. Yet people get very upset when they hear a drunk driver injured someone. In addition, the courts often treat drunk drivers harshly.

Per incident, driving drunk is not dangerous. In 2009, there were 1.1 traffic deaths per 100 million miles driven.⁴³ When legally drunk (0.08% blood alcohol content), one's chance of being in an accident involving a traffic death triples, but even then, 3.3 traffic deaths per 100 million miles driven is very small.⁴⁴ To put it in perspective,

⁴²See Courtois, *The Black Book of Communism* (1997) and Rummel, *Death by Government*.

⁴³See United States Census Bureau, "Table 1103. Motor Vehicle Accidents—Number and Deaths: 1990 to 2009,"

⁴⁴The number comes from Christopher Ingraham, "How just a couple drinks make your odds of a car crash skyrocket," In 2009 in the U.S., there were 210 million people with driver's licenses and the annual licensed driver drove 14,000 miles. See Federal Highway Administration, "Our Nation's Highways: 2011,"

the average licensed driver driving drunk whenever he drives would, roughly, have to drive for more than 2000 years before being involved in a traffic death. Another way to put it is that a person who drives drunk every time he drives and who drives the average distance per driver per year would have to go more than 27 lifetimes before he was involved in a traffic death.⁴⁵

Here is another way to see the danger using older numbers. The chance of dying in a five-mile car trip is about one in ten million.⁴⁶ The typical driver with a blood alcohol level of 0.1% is five times more likely than someone sober to be in an accident.⁴⁷ Since the initial risk is so incredibly low, anything that multiplies that risk even tenfold would not create a substantial risk. Note that this likely overstates the risk as the fatalities per mile driving are decreasing. The increased risk of drunk driving relative to sober driving is equivalent to that imposed by a nighttime drive by a seventy-year-old as compared with a daytime drive by a forty-year-old.⁴⁸

Not only is drunk driving not dangerous per incident, it is quite common. In 2008, 20% of drivers self-reported having driven after drinking and 8% of drivers self-reported having driven drunk.⁴⁹

Consider whether someone who drives moderately drunk is blameworthy. Among the large number of moderate drunk drivers, there are people who don't consider the risk, judge the risk worthwhile, or are akratic about it. On the above account, only people from the third group are blameworthy. Intuitively, though, we think that the first two are blameworthy and perhaps even as blameworthy as the akratic. In addition, it is unclear whether akratic individuals really are imposing an unjustified risk on others; it is their thought process that makes them blameworthy. Most people do not think that, at times, driving tired or night-driving for three hours or more is unjustifiably dangerous and yet these pose roughly the same risk as driving drunk.⁵⁰

⁴⁵The average U.S. citizen lives for 79 years and the average person with a driver's license in the U.S. drove 14,000 miles. See Organization for Economic Cooperation and Development and Federal Highway Administration, "Our Nation's Highways: 2011,"

⁴⁶H. Laurence Ross, *Confronting Drunk Driving*, 35.

⁴⁷The number comes from Christopher Ingraham, "How just a couple drinks make your odds of a car crash skyrocket,"

⁴⁸See Ken Bogen, "Of Apples, Alcohol, and Unacceptable Risk," 199.

⁴⁹See National Highway Traffic Safety Administration, "National Survey of Drinking and Driving attitudes and Behaviors,"

⁵⁰See Sylvie Blazewski et al., "Factors Associated With Serious Traffic Crashes: A Prospective Study in Southwest France," 1039–1041 and Joris Verster et al., "Prolonged nocturnal driving can be as dangerous as severe alcohol-impaired driving," 585–588.

7.4.3 *Application #3: The law on consent to sex does not track moral responsibility*

A responsibility-based theory cannot explain the law on consent to sex even if one were to reject the notion that moral responsibility has a limited scope. With a limited scope, the law is inconsistent at least in so far as it is justified by moral responsibility.

In many states, the law holds that some drunk people are not competent to consent to sex but are competent to be guilty of rape.⁵¹ It is hard to see how the same level of intoxication could make someone incompetent to agree to sex but competent to perform criminal non-consensual sex. This can result in two people being guilty of rape when they have drunken sex with each other.⁵²

In many states, statutory rape is a strict liability offense. So if a male believes a female is old enough to have intercourse, his belief is reasonable, and the girl led him to have this reasonable belief, this will still not shield him from punishment if she is below a certain age.⁵³ According to the Model Penal Code, the age at which strict liability applies is when one party is less than 10.⁵⁴ There are cases when a 10-year-old looks like a 16-year-old.⁵⁵

In Canada and in several U.S. states, an adult male may have sex with a 16-year-old, but if he takes a single naked picture of her, then he commits a (federal) felony against child pornography. The latter applies to anyone under the age of 18.⁵⁶ Again, it is hard to see why a female would be competent enough to consent to sex, but not competent enough to consent to having racy photos taken.

The law might be justified on consequentialist grounds, but this is a problem for accounts that view the motivation and justification of the criminal law in terms of moral-responsibility-based notions such as moral rights and desert.

Above, I argue that in some instances, the internalist view of responsibility conflicts with the law. Consider the second and third applications above. The actual law might be justified on consequentialist grounds. The law is mistaken, though, if it is justified by moral responsibility. This illustrates the more general point that an internalist theory of responsibility will require we revise, and likely significantly revise, the way we think about law and morality.

Here is a chart summarizing these findings (Table 7.5).

⁵¹For the former, for example, see New York State Penal Code Article 130—Sex Offences, especially 130.00 (5) and 130.05(2). For the latter, see New York State Penal Code Article 15.25.

⁵²See Jed Rubinfeld, “The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy,” 1372–1444.

⁵³In some Jurisdictions, there appears to be a good faith defense when the victim tricked the defendant into falsely believing she is old enough for legal intercourse. See *United States v. Kantor*, 858 F.2d 534 (9th Cir. 1988).

⁵⁴See Model Penal Code 213.3.

⁵⁵For a real life case of this, see Jonathon Morgan, “Judge lets off rapist of 10-year-old because girl wore “provocative” clothing,”

⁵⁶See Jesse Bering, *Perv: The Sexual Deviant in All of Us* 204–205.

Table 7.5 Applications of Limited-Scope Conclusion

Area	Intuitive View	Implications of limited-scope responsibility
True believer	They are very blameworthy	They are not blameworthy
Drunk Driving	They are very blameworthy	Only akratic drunk drivers are blameworthy
Law on consent to sex	The law rests on moral responsibility	The law does not rest on moral responsibility

The conclusion so far is that if people are blameworthy for anything, then they are blameworthy for akratic acts. If they are not blameworthy for akratic acts, they are not blameworthy for anything. By parallel reasoning with regard to praiseworthy acts, they would also not be morally responsible for anything. Below I argue that this is true.

7.5 Akrasia

People are also not blameworthy for akratic acts and as a result, there is nothing for which they can be blameworthy. An akratic act is a voluntary and intentional action that conflicts with an agent's judgment about what it would be best to do all things considered.⁵⁷ The best-to-do judgment need not be moral and, instead, can consist of a judgment about the balance of moral or non-moral reasons. To see why, consider the following argument inspired by work by Neil Levy.⁵⁸

(P1) A person fails to do what he judges to be best because of the following

- (a) *ignorance* (not knowing what he judges best),
- (b) *overpowering desire* (desire overpowers his judgment of what is best), or
- (c) *second-order failure* (failure to do what is necessary to avoid first-order akrasia).

(P2) Conditions (a)–(c) are not responsibility makers because

- (a) *non-culpable ignorance*,
- (b) *something akin to compulsion*, or
- (c) an *akrasia regress* does not ground responsibility.

(P3) If (P1) and (P2) are true, then people are not responsible for akrasia.

(C1) People are not responsible for akrasia. [(P1)–(P2)]

⁵⁷A classic discussion of this issue occurs in Gary Watson, "Skepticism About Weakness of Will," 316–339.

⁵⁸See Neil Levy, *Hard Luck: How Luck Undermines Free Will & Moral Responsibility*, Chap. 6.

Premise (P1) rests on the plausible explanations for why an agent acts akratically. The lack of responsibility for (a) rests on the above argument regarding negligence. The lack of responsibility for (b) rests on the way in which the explanation depends on a desire overpowering a person's decision-making and the similarity to why people are not responsible when they act from compulsive desires that overcome their practical reasoning. The lack of responsibility for (c) rests on the notion that responsibility for failing to take steps to avoid first-order akrasia might be the result of either negligence or second-order akrasia. The first is the same non-culpable ignorance found in (a), the second is an akrasia regress.

If people are responsible for at most akratic acts and, in fact, they are not responsible for them, then they are not responsible. I have argued for both parts of the antecedent and, as a result, conclude that people are not morally responsible.

7.6 Conclusion

In this chapter, I argued that internalism in moral responsibility is true and that as a result moral responsibility is very narrow. So narrow, in fact, that people are blameworthy for at most akrasia. I then argue that connection and control are what make people morally responsible. Because connection and control consist of, and only of, reasoning (and mental states) that a person is phenomenally aware of, what makes someone responsible is such reasoning. Because such reasoning is an intrinsic property, internalism in responsibility is true. I then explored the implications of this argument with regard to principal-agent responsibility, negligence, attempted versus completed crimes, and akrasia.

If the above analysis is correct, then our everyday judgments of moral responsibility are unreliable. I illustrated this by noting how it undermined our blame for true believers who used starvation and slaughter to serve their political goals. It also undermined our blame of drunk drivers. Note also that this theory makes moral-responsibility-based reasons, specifically rights and desert, unable to explain American consent-to-sex laws. Thus, if people are morally responsible at all, and they are not for the reasons mentioned above, the very narrow scope of responsibility should change the way we think about moral responsibility.⁵⁹

⁵⁹I am very grateful to Neil Feit, David Hershenov, Bob Kelly, and the participants in the June 2016 Blameless Buffalo conference for their extremely helpful comments and criticisms of this chapter.

Chapter 8

No Responsibility No Morality



Abstract This chapter argues that if individuals are not morally responsible, then there is no morality. By no morality, I mean that there are no right or wrong actions, no good or bad states of affairs, and no other things with moral properties or, at perhaps less sweepingly, we do not know whether there are such things. Here I focus on right and wrong actions. My main argument in this chapter is that if people are not morally responsible, then there is no morality as it relates to matters that are up to us or, at least, we don't know whether there is morality on such matters. When it comes to the right, either consequentialism or non-consequentialism is true. Consider consequentialism. If we don't know whether determinism is true, then we don't know whether there are acts that produce more good than any other act available to the agent and hence we don't know whether there are obligatory or wrong acts. Consider non-consequentialism. If non-consequentialism is true, then people have rights and rights protect autonomy. The notion that non-consequentialism depends on rights rests on a consideration of the most plausible non-consequentialist theories. The notion that rights protect autonomy depends on a theory of what best fits and justifies rights. Autonomy is inextricably linked to moral responsibility and, as argued above, people do not have it.

8.1 Introduction

In the previous part of the book, I argued that people are not morally responsible and that if they were, the scope of responsibility would be very narrow. In this chapter, I argue that there is no morality. To keep the discussion lined up with the first half of the book, I focus on non-consequentialism and the right and do not address the good. My thesis is neutral on whether the no-morality claim means there is no property of the right or there being such properties but no instances of it. The argument against the right existing in the consequentialist sense, or at least our not knowing whether

it does, depends on our not knowing whether determinism is true. The argument against the right existing in a non-consequentialist sense depends on the notion that the most plausible version of non-consequentialism assumes the existence of moral rights and moral rights being something had by, and only by, morally responsible agents.

The first part of the book aims at non-consequentialist theories of cooperation and conflict. The former is seen via consent (and promise). The latter is seen via forfeiture and proportionality. They support the notion that the heart of non-consequentialism (guidelines for cooperation and conflict) is false and, hence, non-consequentialism is false. Because non-consequentialism is the most intuitive theory of morality, the arguments in both parts of the book suggest that there is no morality.

While the book focuses on non-consequentialist morality, it is helpful to consider the argument against consequentialist morality. Because the purpose of the book is to show there is no morality at all, it is helpful to see how the argument against consequentialism would go, even if the argument for rejecting it is brief.

Some philosophers argue that no one is morally responsible. Derk Pereboom argues that if causal determinism is true then it prevents people from being morally responsible.¹ Galen Strawson argues that moral responsibility is impossible because only self-created beings can be morally responsible and it is impossible to be self-created.² Stephen Kershnar argues that no one is morally responsible because there has to be a foundation for responsibility, analogous to a foundation for knowledge, and there is no plausible foundation.³ The issue this chapter addresses is whether morality would exist if no one is morally responsible.

In this chapter, I argue for the following.

Thesis: No Morality or Known Morality. Either there is no (decision-making) morality or we don't know whether there is.

Decision-making morality is morality relevant to deciding what to do. The argument rests on four assumptions.

Assumption A: No Responsibility. No one is morally responsible.

Assumption B: Morality. Morality consists of, and only of, the good and the right.

Assumption C: Knowledge. We do not know whether determinism is true or whether every event is necessary.

One version of determinism asserts that every event has a necessitating cause. A second version, asserts that necessarily, every truth (including truths about events) is entailed by facts about the past before there were any human beings and the laws of nature.⁴ Every event is necessary if determinism is true and the first event or events are necessary.

¹ See Derk Pereboom, *Living without free will* and Derk Pereboom, *Free Will, Agency, and Meaning in Life*.

² See Galen Strawson, "The Impossibility of Moral Responsibility," 5–24.

³ See Stephen Kershnar, "Responsibility and Foundationalism," 381–402.

⁴ See Peter van Inwagen, "The Incompatibility of Free Will and Determinism," 185–199.

Table 8.1 Deontic Logic

Term	Definition	Symbolization
Obligation	Primitive notion	O_A
Wrong	Obligation not to do	$W_A = \text{df } O_{\sim A}$
Permission	Not wrong	$P_A = \text{df } \sim W_A$

Assumption D: Deontic Concepts. A building block account of deontic logic is true.

Obligation is a fundamental deontic concept and a property of an act. A concept is fundamental if it is not analyzable in terms of other concepts. On this account, an act is wrong if there is an obligation not to do it and an act is permissible if it is not wrong. Here is a table setting out this notion (Table 8.1).

The next part of this chapter sets out the argument for the thesis.

8.1.1 Argument

Here is the argument for the thesis.

- (P1) People are not morally responsible.
- (P2) (Decision-making) morality consists of, and only of, the right and the good.
- (P3) If people are not morally responsible, then there is no (decision-making) right or we do not know whether there is.
- (P4) If people are not morally responsible, then there is no (decision-making) good or we do not know whether there is.
- (C1) Hence, there is no (decision-making) morality or we do not know whether there is. [(P1)-(P4)].

Premises (P1) and (P2) rests on Assumptions A and B respectively. Premise (P3) rests on the notion that the right is either consequentialist or not. Below I argue that if the right is consequentialist, then there is no (decision-making) right or we don't know whether there is; if it is nonconsequentialist, then there is no (decision-making) right. Let us consider consequentialism first. The argument for (P4) would have a similar structure as the argument for (P3), but for the reasons mentioned above I do not discuss it here.

8.1.2 Theory #1: Consequentialism

In this context, in saying the right is consequentialism, I mean that if there are right actions then consequentialism is true. Roughly, consequentialism asserts that the right maximizes the good. More specifically, it asserts that an obligatory act maximizes the good relative to some other act available to the agent.

There are three reasons to think that if the right is consequentialist then there is no (decision-making) morality or we do not know whether there is. First, it intuitively seems that moral agents alone do right and wrong and if no one is morally responsible then there are no moral agents. A moral agent is one who has the feature or features that make him subject to moral duties. Consider this example.

Case #1: Gecko

A gecko eats a praying mantis, but he could have eaten a cricket, which would have tasted better. Assume that being eaten would equally harm the mantis and cricket.

Intuitively, the Gecko does not act wrongly even though he fails to maximize the good. Someone might respond that a consequentialist could argue that the Gecko acts wrongly, but is not blameworthy. Others claim that rightness is a feature of the actions of moral agents and Geckos are not the sort of creature whose actions are obligatory or wrong. Here I have the latter intuition and guess that you do as well. Also, here I sidestep the issue of whether insects are sentient or can be harmed.

Perhaps a defender of this intuition about there being rightness might rest his position on some recent versions of consequentialism. He might argue that consequentialism should not take into account the agent's own well-being.⁵ Alternatively, he might argue that consequentialism need only involve satisficing the good.⁶ If these versions of consequentialism are less plausible than the agent-neutral maximizing version, and I think they are, then this objection doesn't succeed. For example, one might think that the first version runs afoul of the notion that the location of the good does not matter and that the second fails to make the good prior to the right. In any case, the hypothetical can be modified so that the mantis loses more well-being than the cricket would and the difference is large enough so that the gecko fails to satisfice the good.

Second, consider a type of ought-implies-can argument.

- (1) If (decision-making) morality exists and an act is wrong, then a person could have not done it in a relevant way.
- (2) If a person could have not done an act in a relevant way, then he has guidance or regulative control and this is the basis for his being morally responsible.
- (3) It is false that a person has guidance or regulative control and this is the basis for his being morally responsible.

Premise (1) rests in part on the notion that consequentialism is a comparative notion. Under consequentialism, wrongness in particular is comparative. An act is wrong because it produced a worse outcome than another outcome that the agent could have brought about. By analogy, consider harm. A person is harmed if he is made worse off than he otherwise would be.

Premise (1) also rests in part on the notion that (decision-making) moral truths depend on what is done in a relevant way. Things that come in the relevant way are

⁵See Douglas Portmore, *Commonsense Consequentialism: Wherein Morality Meets Rationality*.

⁶See Michael Slote, "Satisficing Consequentialism I," *Proceedings of the Aristotelian Society*, pp. 139–163, Philip Pettit, "Satisficing Consequentialism II," *Proceedings of the Aristotelian Society*, pp. 165–176, Jamieson, D., and Elliot, R., 2009. "Progressive Consequentialism," 241–251.

under the agent's control and connected to him. The idea here is that these features are what make something up to us. That is, these features are essential to decision-making morality focusing on right or wrong.

Premise (2) rests on the notion that (decision-making) morality focuses on ways of doing or not doing something that is under our control and connected to us. These conditions most likely turn out to be the conditions essential to moral responsibility. The two most plausible control conditions are regulative (difference-making control) and guidance control (actual-sequence control).⁷

Premise (3) rests on Assumption A.

Third, if we do not know whether the right is necessary, then we don't know whether there are obligatory or wrong acts. The underlying idea is again that consequentialism requires comparative facts be true of obligatory (and wrong) acts. Specifically, obligatory acts must bring about better results than every other act available to the agent; wrong acts must bring about worse results than at least one other act available to the agent. Hence, consequentialism requires that other acts and outcomes be available to the agent. This is not true if events are necessary or necessitated.

Here is the argument underlying the third reason.

- (1) We do not know if every event is necessary.
- (2) If every event is necessary, then there is no (decision-making) rightness, specifically obligatory or wrong acts.

The argument is the same if the right is necessitated rather than necessary.

Premise (1) rests on Assumption C. Premise (2) rests on the notion that if every event is necessary, then there will not be comparative facts necessary for acts to be obligatory or wrong. The same is true for permissible acts if a permissible act is one that is not worse than another act available to the agent. If a permissible act is merely not wrong, then necessary (or necessitated) acts can be permissible. I think the former reading of a permissible act is better because it ensures that deontic properties under consequentialism (obligatory, wrong, and permissible) all have a similar structure.

The third argument is epistemic rather than metaphysical. It argues that we don't know if there are right and wrong acts, rather than arguing, as in the earlier two arguments, that there are no right and wrong acts. It can be strengthened if one adds the claim rightness and wrongness cannot depend on obscure and unimportant findings by physicists and that the truth of determinism is one of those findings.⁸ This additional principle is less clear if physicists locate a type of undetermined human control that is insufficient for moral responsibility, but still enough for the comparative judgments necessary for consequentialism. The comparative judgments

⁷John Martin Fischer develops the notion of guidance control in John Martin Fischer, *The Metaphysics of Free Will: An Essay on Control*, John Martin Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility*, John Martin Fischer, *My Way: Essays on Moral Responsibility*, and John Martin Fischer, *Our Stories: Essays on Life, Death, and Free Will*.

⁸The idea for this comes from John Martin Fischer's notion that the availability of other paths of action and our view of ourselves as agents who could select the path the world takes should not depend on arcane conditions of theoretical physics. See John Martin Fischer, "Compatibilism," 44–84, esp. 46.

Table 8.2 Consequentialism

Reason	Argument	Support
Agents	Moral agents alone do right and wrong	Case #1: Gecko
Relevant ought implies can	<ol style="list-style-type: none"> 1. <i>Morality to Relevant Way</i>. If (decision-making) morality exists and an act is wrong, then a person could have not done it in a relevant way 2. <i>Relevant Way to Moral Responsibility</i>. If a person could have not done an act in a relevant way, then he has guidance or regulative control and this is the basis for his being morally responsible 3. <i>No Moral Responsibility</i>. It is false that a person has guidance or regulative control and this is the basis for his being morally responsible. [Assumption A] 	<ol style="list-style-type: none"> 1a. <i>Morality to Relevant Way</i> Consequentialism is a comparative notion. Wrongness in particular is comparative (analogy: harm) (Decision-making) moral truths depend on what is done in a relevant way 2a. <i>Relevant Way to Moral Responsibility</i> (Decision-making) morality focuses on ways of doing or not doing something that is (a) under our control and (b) connected to us. This is what it means for something to be up to us. The most likely account of (a) and (b) is control connected to moral responsibility
Knowledge	<ol style="list-style-type: none"> 1. <i>Lack of Knowledge</i>. We do not know if every act is necessary 2. <i>Necessity and Rightness</i>. If every act is necessary, then it is not relevant to (decision-making) rightness 	

might not involve people doing things in the relevant way, but this is to return us to the second argument rather than being relevant to the third.

A quick point about the argument structure might be helpful here. If we know the consequent of (2) is true, then we know part of my conclusion about the right is correct. The same holds if we don't know whether the consequent is true. If we know the consequent is false, then we know the antecedent is true and this conflicts with Assumption C.

Hence, if no one is morally responsible and consequentialism is true, then there is no (decision-making) rightness. Here is a chart summarizing these arguments (Table 8.2).

One objection to this argument is that the second two reasons depend on the notion that ought implies can and there is reason to doubt this. Consider this argument.⁹

⁹This argument comes from David Widerker, "Frankfurt on 'Ought Implies Can,'" *Analysis* 51 (1991): 222–224, Gideon Yaffee, "'Ought Implies Can' and the Principle of Alternative Possibilities," 218–222, and John Martin Fischer, "'Ought Implies Can,' Causal Determinism, and Moral Responsibility," 244–250. For the notion that ought implies can is true, but that alternative possibilities are not necessary for moral responsibility, see Ishtiyaque Haji, *Moral Appraisability and Ishtiyaque Haji, Deontic Morality and Control*.

- (1) If a person is blameworthy for an act, then he acted wrongly.
- (2) If a person acted wrongly, then he ought not have done an act.
- (3) If a person ought not have done an act, then he could not have done it.
- (4) Hence, if a person is blameworthy for an act, then he could have not done it. [(1)–(3)].

The objector argues that (4) is false because a Frankfurt-style example shows that there are cases when a person is blameworthy, but could not have done otherwise.¹⁰ These occur when a third party (evil demon, neuroscientist, God, etc.) sets up a situation when a person either freely does an evil act or the third party takes over and controls the person's thought process (via a radio transmitter, mind control, etc.) to ensure that he does the evil act. In the relevant case the third party never intervenes and the person freely does the evil act and is therefore blameworthy for doing so. Because the counterfactual intervention would have occurred before he could even have tried to do something else, he could not have done otherwise. The objector continues that if (4) is false and (1) and (2) are true, then (3) is false. If there is a possible case when (3) is false, then ought does not imply can.

There is an issue as to whether the Frankfurt-style example fails. It might be thought to fail in that the person could not have done the act in question in the sense that had he hesitated a different act-token would have resulted and it is the act-token, not act-type, that is the focus of blame.

Premise (1) is also unclear. Both in ordinary conversation and in moral thought we allow that people can be blameworthy for doing the right thing and praiseworthy for doing the wrong thing.¹¹ This can be seen in the common notion that people did the right thing for the wrong reason and the wrong thing for the right reason. Perhaps this is not true for basic acts. A basic act is an act that is not done via another act. For example, one might intentionally move his finger as a way of flipping a switch, which in turn is a way of scaring a burglar, but one does not do another act to intentionally move his finger. Still, it is unclear whether (1) is true for basic acts, let alone other acts.

The problem with this objection is that even if, in general, ought implies can is not true, it is true of consequentialism. On consequentialism, obligatory and wrong acts are comparative because they focus on better and worse outcomes available to the agent and better and worse are comparative notions. This can be seen in that were every action available to an agent over his lifetime to necessarily produce the same amount of good, then, under consequentialism, it would be impossible for him to do obligatory and wrongs acts.

There are other arguments that attempt to show that ought implies can is true by reinterpreting "can." James Hobbs argues that it is true on an interpretation of "can"

¹⁰See John Martin Fischer, "Responsibility and Alternative Possibilities," 27–52, John Martin Fischer, *The Metaphysics of Free Will: An Essay on Control*, 131–159, and Harry Frankfurt, "Alternate Possibilities and Moral Responsibility," 829–839.

¹¹For a discussion of the notion that people can do right acts for the wrong reason and vice versa in the context of virtue-based ethics, see Michael Brady, "Against Agent-Based Virtue Ethics," 1–10 and See David Copp and David Sobel, "Morality and Virtue: An Assessment of Some Recent Work in Virtue Ethics," 514–554, esp. 548–549.

that takes into account the agent's abilities and opportunities, but not motivation.¹² Others interpret the "can" in an axiological sense that is distinct from a specific action demand.¹³ If these approaches cannot support the comparative truths at the heart of consequentialism, and I do not think they can at least in the robust sense needed, then they entail that ought implies can conflicts with consequentialism. Even if they can support the comparative truths, they still will not work if the control- and connection-aspects are not present and, as argued above, they are not.

Consequentialism and non-consequentialism exhaust theories of the right. Let us turn to non-consequentialism.

8.1.3 Theory #2: Non-consequentialism

Here the right being non-consequentialist means that if there are right actions they are not right solely because they maximize the good. The first reason to think that if no one were morally responsible, there would be no morality is the same as above, specifically, moral agents alone do right and wrong and people would not be moral agents. The same intuition concerning the gecko applies. The intuition here is even stronger because any tendency to think the gecko acts wrongly likely rests on his failure to bring about the best result. Without this being the sole criterion of rightness, there is no intuitive case for his acting wrongly. The gecko's action intuitively seems to be amoral if morality of actions concerns things such as rights, intentions, motives, maxims, and virtue.

The second reason to think that if no one were morally responsible then there would be no morality rests on the role of rights in non-consequentialism. Here is the argument.

- (1) If non-consequentialism is true, then people have rights.
- (2) If people have rights, then they are morally responsible.
- (3) People are not morally responsible.

As above, premise (3) rests on Assumption A.

Premise (1) rests on the notion that the most plausible non-consequentialist theories all contain some notion of rights. Here are rough versions of the most plausible non-consequentialist theories.

- a. *Harm Principle*. Other things being equal, it is wrong to harm someone.
- b. *Doctrine of Doing and Allowing*. Other things being equal, it is worse to do harm than to allow it.¹⁴

¹²James Hobbs, *Ought Claims and Blame in a Deterministic World*.

¹³See Derk Pereboom, *Free Will, Agency, and Meaning in Life*, ch. 6.

¹⁴Warren Quinn offers an account of the doing/allowing distinction that fills out the notion that doing harm is worse than allowing harm according to which an agent is positively relevant to a harmful upshot when his most direct contribution to the harm is an action, whether his own or that of some object. See Warren Quinn, "Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing," 287–312.

- c. *Doctrine of Double Effect*. Other things being equal, it is worse to intentionally infringe a moral norm than to merely foreseeably do so.¹⁵
- d. *Doctrine of Causing/Not Causing*. Other things being equal, it is worse to cause something bad or wrong than to not cause it.

On the harm principle, we have to decide when someone has a legitimate interest. This presupposes a theory of rights. Consider the following.

Case #2: Paris Hilton

Paris Hilton makes a video of her making love to Rick Salomon. This causes some of her fans to be heartbroken and thus harms them.¹⁶

Intuitively, Paris did not act wrongly even though she sets back her fans' interests. This is because, on a non-consequentialist account, they do not have a legitimate interest in whom she has sex with.

For the other doctrines (doing/allowing, intending/foreseeing, and causing/not causing), we have to decide whether we are in the realm where a doing, intending, or causing is the sort to make an act worse or wrong. The realm is demarcated by rights. Consider Case #2 above. Whether Paris runs afoul of the Doctrine of Doing and Allowing depends on whether her videotaped lovemaking is the sort of doing that is disallowed. This in turn depends on whether it is any of her fans' business, which is just a way of asking whether they have a right over what she does with her body.

Case #3: Freshman

College freshman Al masturbates to the image of senior Betty. He uses her to get an image of her to run his fantasy.

On the Doctrine of Double Effect, his intention makes his action wrong only if he does something to her or takes something that is hers. Whether he does so depends on what rights she has.

Case #4: Ogler

Al ogles Betty for 3 seconds through mirrored sunglasses. She doesn't notice him, let alone his ogling.

Again, Al fails to satisfy the Doctrine of Double Effect only if he affects her or takes something that is Betty's. Whether he does so depends on what rights she has. A similar thing is true of whether his act is wrong because of what it causes to happen.

Even pluralist theories of the right, such as W. D. Ross' account of prima facie duties, make injustice and promise-breaking wrong-making features and these

¹⁵On Warren Quinn's view, the doctrine of double effect "distinguishes between agency in which harm comes to some victims, at least in part, from the agent's deliberately involving them in something in order to further his purpose precisely by way of their being so involved (agency in which they figure as intentional objects), and harmful agency in which either nothing is in that way intended for the victims or what is so intended does not contribute to their harm." See Warren Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect," 334–351, esp. 343.

¹⁶Paris Hilton's pornography film ("A Night in Paris") is the best-selling pornography film in 2005. See Adult Video News.

involve rights.¹⁷ Even when other prima facie duties are the right-making feature (for example, beneficence and gratitude), injustice and promise-breaking must be absent or overridden and hence rights are always relevant.

The reason the most plausible non-consequentialist theories all contain some notion of rights rests on the idea that, according to the most plausible versions of non-consequentialism, a wrong act always wrongs someone. One individual wrongs a second only if the first infringes a duty owed the second. If a right is a claim and a claim is one person owing a second a duty, then a wrong action always involves a right-infringement. It might involve something else as well, for example, a wrong-making intention, but this is consistent with my argument.

It might be objected that there are plausible versions of non-consequentialism that do not depend on rights. On one line of thought, rightness depends on virtue in a way that is independent of rights.¹⁸ On other accounts, acts are wrong because of what is true of the agent. For example, the agent has a degrading attitude toward the person who he acts upon or the way in which he thinks about what he does is irrational or not universalizable.¹⁹ Contra the objector, these theories smuggle in rights or are implausible. A virtue-based theory of the right still has to explain why certain acts are vicious and, also, has to explain this in terms of what is done to the person who is acted upon. For example, we don't think that rape and battery are wrong solely because of what happens to the rapist or batterer. We intuitively think at least part of the reason it is wrong depends on what is done to the victim. In fact, an agent who refrains from committing heinous acts like rape and battery because of what it would do to him rather than the victim fails to focus on the central wrong-making fact and is a moral narcissist.²⁰ The same is true for theories that focus exclusively on the agent's attitudes rather than what he does to another.²¹

Premise (2) rests on the notion that a right's features depend on moral responsibility. Consider these features. First, claims and liberties overlap in rights. A right standardly has (or is connected to) claims and liberties and they cover the same actions.

Case #5: Marriage

A person has a right to marry whomever she wants. This includes both a claim against others interfering and a liberty to marry (no duty not to marry) whomever she wants so long as

¹⁷See W. D. Ross, *The Right and the Good*.

¹⁸See G. E. M. Anscombe, "Modern Moral Philosophy," 1–16 and See Michael Slote, *Morals from Motives*.

¹⁹In the context of sex, some theorists argue that it is wrong to degrade, demean, or objectify sex partners. For a discussion of objectification, see Martha Nussbaum, "Objectification," *Philosophy and Public Affairs*, 249–291. Immanuel Kant argues that an act is wrong just in case its maxim is not universalizable. Kant, Immanuel. *The Metaphysics of Morals*.

²⁰The idea for this point comes from Thomas Hurka, "Aristotle on Virtue: Wrong, Wrong, and Wrong," 9–26.

²¹Immanuel Kant's ends-in-themselves version of the right focuses on how an agent treats the person toward whom one acts and not just the way an agent thinks of him. See Immanuel Kant, *The Metaphysics of Morals*. Because there is only one right-making feature in Kant's moral system, it is not clear he runs afoul of the above point.

the other consents. For example, Elizabeth Taylor has a claim against others preventing her from marrying Richard Burton and a liberty to do so.

A liberty is the absence of a duty not to do something.

Case #6: Property

A person who owns property has a claim against interference and a liberty to do what she wants with the property. A person can put up a different type of shed on her property or leave it without a shed.

The best explanation for the alignment of claims and liberties is that they create space for a self-shaping life and a self-shaping life is one for which one is morally responsible.

A second feature is that many rights protect choices. People often have rights to make choices regarding thought, speech, marriage, reproduction, religion, and sex. The best explanation for the widespread protection of choices is that rights protect a self-shaping life.

In Hohfeldian terms, choices are protected in part because people have powers and immunities. A power is the standing to eliminate, leave in place, or modify another Hohfeldian element (for example, a claim or liberty). An immunity is the absence of a power in another.

A third feature is that rights trump consequences (for example, utility).²² Again, the best explanation for this is that they give a self-shaping life limited priority over the best results.

Case #7: Fatman and Trolley

George is on a footbridge over the trolley tracks. He knows trolleys, and can see that the one approaching the bridge is out of control. On the track back of the bridge, there are five people; the banks are so steep that they will not be able to get off the track in time. George knows that the only way to stop an out-of-control trolley is to drop a very heavy weight into its path. But the only available, sufficiently heavy weight is a fat man, also watching the trolley from the footbridge. George can shove the fat man onto the track in the path of the trolley, killing the fat man; or he can refrain from doing this, letting the five die.²³

Case #8: Surgeon's Harvest

David is a great transplant surgeon. Five of his patients need new parts—one needs a heart, the others need, respectively, liver, stomach, spleen, and spinal cord—but all are of the same, relatively rare blood-type. By chance, David learns of a healthy specimen with that very blood-type. David can take the healthy specimen's parts, killing him, and install them in his patients, saving them. Or he can refrain from taking the healthy specimen's parts, letting his patients die.²⁴

A fourth feature is that rights are not justified solely because they protect interests. If interests justified rights, then an individual cannot have (a) a right to do something when he has no interest in doing it or (b) an interest in something to which he has no right and one can have these things.

²²See Robert Nozick, Robert. *Anarchy, State, and Utopia* and Ronald Dworkin, *Taking Rights Seriously*, p. xi.

²³See Judith Jarvis Thomson, "The Trolley Problem," 1395–1415.

²⁴See Thomson, "The Trolley Problem," 1395–1415.

Case #9: Right without Interest

Neil has left a rusty old hammer in a far corner of his 100-acre property. He has much better hammers and this one is associated with bad memories. Hence, he has no interest in the hammer. Steve takes the hammer without Neil's permission. Steve infringes on Neil's right even though he does not set back Neil's interest.²⁵

Case #10: Interest without Right

A farmer's disorganization results in his failing to satisfy his contractual promise to deliver his tasty mangos to a street merchant. The merchant's customers love the mangos. They have an interest in the mangos being delivered but not a right that the farmer do so.

Outcomes (a) and (b) are also possible if the focus is on prima facie rights rather than rights or if we focus on legitimate interests rather than interests.

The benefit theory of a right is usually cast as a theory of legal rights rather than moral rights precisely because of the lack of necessary alignment of rights and interests.²⁶ This can be seen in that the benefit theorists assert that right-holders are the sort of individuals, who in a particular situation, usually have an interest that justifies the claim.²⁷ People might also have interest in things that can only be had by force, fraud, and theft without having a right to it. For instance, a starving man might have an interest in eating fruit from his neighbor's refrigerator without having a right to it. The same is true for a diabetic who desperately needs insulin and can only get it on the black market by stealing a car and trading it for the insulin. An objector might have different intuitions than those I report for Cases #9 and #10. Contra the objector, I suspect the intuitions I report are widespread and strong. If one claims that there is no right in Case #9 or there is a right in Case #10, then it is hard to see how moral rights might trump the good in the sense that, in some cases, a moral right makes it wrong to do an action that maximizes the good. The assumptions here are that the good depends on, and only on, aggregate interests and that maximizing (or, perhaps, satisficing) the good is what justifies Neil not having a right to the hammer or the costumers having a right to the mangos. The intuitions drawn above with regard to Cases #9 and #10 also fit nicely with the notion that most, if not all, moral rights are to one's body or property or to punishment or rectification if one of the first two rights are infringed. The intuitions I draw above with regard to these cases also fit with the notion that a right to property is lost only if a person waives or forfeits it. Neil has done neither and the farmer has done neither with regard to the customers.

A fifth feature of rights can be seen when we consider that it intuitively seems that interests support maximization, not side-constraints. Consider, for example, Robert Nozick's theory of Kantianism (and rights) for people and utilitarianism for animals.²⁸ This dovetails with the failure of a benefit theory as a theory of moral rights.

²⁵This example comes from Neil Feit.

²⁶The idea for this point comes from Rowan Cruft, "Why Is It Disrespectful to Violate Rights?" 201–224, esp. 207.

²⁷See Matthew Kramer, "Refining the Interest Theory of Rights," 31–39, Matthew Kramer, "Some Doubts About Alternatives to the Interest Theory of Rights," 245–263, Joseph Raz, *The Morality of Freedom*.

²⁸See Nozick, Robert. *Anarchy, State, and Utopia*.

An objector might claim that rights do not depend on moral responsibility. He might argue that rights depend on an interest, which is why non-human animals have rights.²⁹

Alternatively, he might argue that rights depend on neither interests nor autonomy. This might explain why, on some theories, groups can have rights that are not the mere sum of its members' rights. The underlying assumption here is that having an interest requires having or possibly having well-being levels and this in turn requires a mind. Groups don't have minds. If interests or autonomy are the most plausible justification of rights and neither does so, then rights are unjustified. This is false if, as proponents assert, rights have moral force because something justifies them.

The problem with this, as argued above, is that a right can occur without an interest and vice versa. Hence, every right is not justified by an interest, whether other things equal or all things considered. A system of rights might depend on interests in a rule-consequentialist justification, but this is irrelevant for a non-consequentialist system. Also, if rule-consequentialism is false for the standard reasons, and I think it is, then this purported justification is beside the point. The common objections are that it is irrational to focus on rules rather than acts and that there is no non-arbitrary way to determine the generality of the rules and the number of people who follow the rule. Rule-consequentialism might be thought to justify legal rather than moral rights.

The objector might respond that a person has an interest in having his collection of rights satisfied. If, however, a person does not have an interest that justifies a particular right, nothing is gained by claiming that he has an interest in the collection being satisfied for nothing is gained when others satisfy the collection rather than the collection minus the particular right.

It is also worth noting that the above ought-implies-can argument might also apply here. If these assumptions hold: (a) the non-consequentialist right is comparative, (b) ought implies can, (c) determinism entails that one can't do differently, and (d) we don't know whether determinism is true, then we don't know whether there are right acts. If the above arguments against the non-consequentialist right succeed, and I think they do, then we can sidestep this argument.

In summary, if non-consequentialism is the best version of the right, then the absence of moral responsibility undermines morality. Here is a summary of the above argument (Table 8.3).

Hence, the absence of moral responsibility entails that actions are not right or wrong.

There is an issue as to whether morality includes non-decision-making good even if it can't include non-decision-making right. Perhaps it does, although it is unclear why we should care about it. If it is unrelated to our decisions, then it is unrelated to what we should care about in terms of practical considerations. Perhaps it is relevant to issues relating to theism (for example, whether the actual world is the best possible world), although I doubt it. My focus here has been on the right. If the good is essentially comparative or action-guiding, and these features are controversial, there is no non-decision-making good or we don't know whether there is this type of good.

²⁹See Tom Regan, *The Case for Animal Rights*.

Table 8.3 Non-Consequentialism

Reason	Argument	Support
Agents	<i>Agents.</i> Moral agents alone do right and wrong and people are not moral agents	Case #1
Rights	<ol style="list-style-type: none"> 1. If non-consequentialism is true, then people have rights 2. If people have rights, then they are morally responsible 3. People are not morally responsible 	<p>1a. <i>Theories.</i> All plausible non-consequentialist theories contain some notion of rights. On the harm principle, we have to decide when someone has a legitimate interest. This presupposes a theory of rights. See <i>Case #2</i></p> <p>Other doctrines (doing/allowing, intending/foreseeing, and causing/not causing), we have to decide whether we are in the realm when a doing, intending, or causing is enough to trigger the rule. The realm is demarcated by rights. See <i>Cases #3 & #4</i></p> <p><i>Explanation.</i> The reason the most plausible non-consequentialist theories all contain some notion of rights rests on the following: <u>wrongs acts wrong someone and someone is wronged via right-infringement</u></p> <p><i>2a. Features.</i> A right's features depend on moral responsibility</p> <p><i>Reason #1: Claim and Liberty.</i> A right standardly has (or is connected to) claims and liberties and they cover the same actions. The best explanation for this is that they create space for a self-shaping life. See <i>Cases #5 & #6</i></p> <p><i>Reason #2: Content.</i> People often have rights to choose with regard to thought, speech, marriage, reproduction, religion, and sex. The best explanation for this is that rights protect a self-shaping life</p> <p><i>Reason #3: Trump.</i> Rights trump consequences. The best explanation for this is that they give a self-shaping life limited priority over the best results. See <i>Cases #7 & #8</i></p> <p><i>Reason #4: Benefit Theory.</i> Rights do not protect interests otherwise an individual cannot have (a) a right to something when he has no interest in it or (b) an interest in something to which he has no right. Both are possible. See <i>Cases #9 & #10</i></p> <p><i>Reason #5: Benefit Theory Again.</i> Interests support maximization, not side-constraints. Consider Robert Nozick's theory of Kantianism for people and utilitarianism for animals.</p>

There is also an issue as to whether morality could consist of the good and not the right. If there is non-decision-making good, then this is possible. Again, though, it is unclear why we should care about it.

8.2 Conclusion

In this chapter, I argue that either there is no (decision-making) morality or we don't know whether there is. I assume that people are not morally responsible, morality consists of, and only of, the right and the good, and we don't know whether determinism is true or every event is necessary. My argument consists of seeing what was left of the right given these assumptions. I claim, but do not argue for it here, that a similar argument applies to the good.

There is a further concern in that if there is no morality, then statements about morality are probably best understood as false according to an error theory.³⁰ Consider statements such as "It's always wrong to torture people" and "Malicious pleasure is always intrinsically bad." On an error theory, these statements assert that there are wrong and bad things and that torture and malicious pleasure are instances of them. As such, the statements are false. So are conflicting statements, such as "It's sometimes permissible to steal" and "Stealing is always wrong." There is an issue as to whether the denial of morality asserts that there are no moral properties or that there are moral properties but nothing satisfies them. The denial of moral properties is the better theory if, as I believe to be the case, moral responsibility is impossible and moral properties presuppose moral responsibility.

If the impossibility of moral responsibility is metaphysical or resting on the laws of nature, then the impossibility of morality has the same status. It is not clear, though, what work can be done by morality that is logically possible, but at odds with metaphysical or natural laws. Nor is it clear that we could understand such morality or, even if we could, whether they would look anything like our current moral notions. On my theory, the denial of moral responsibility has the same error-theory structure as the denial of morality.

There is a further issue of what happens to our conceptual framework if there is no morality. Since so much of our mental lives depend on moral justifications, the concern is that this result threatens to collapse our world view. Morality intuitively seems to explain and justify many of our rules, including promise-keeping, conventions, laws, etiquette, rules of play, and so on. Perhaps prudential concerns can justify and explain many of these rules via hypothetical imperatives, although I doubt it. In any case, this is best discussed elsewhere.³¹

³⁰For the classic statement of error theory as it relates to morality, see J. L. Mackie, *Ethics: Inventing Right and Wrong*.

³¹I am grateful to Randy Dipert, Neil Feit, David Hershenov, Duncan Purves, and Travis Timmerman as well as participants on the 2016 Rocky Mountain Ethics Congress conference and the PANTC group for their extremely helpful comments and criticisms of this chapter.

Chapter 9

Responsibility Revisionists and Skeptics



Abstract In this chapter, I compare my findings with the work of other responsibility skeptics: Ishtiyaque Haji, Neil Levy, Derk Pereboom, and Manuel Vargas. I will focus how their skepticism bolsters my conclusion about responsibility and, also, how their conclusions with regard to morality relate to mine.

9.1 Introduction

In this chapter, I look into how the arguments in preceding chapters relate to the work of other responsibility revisionists and skeptics. A revisionist of the type I am interested in here holds that we are systematically mistaken in the way we think about responsibility. Specifically, the way we think about responsibility (diagnostic account) differs from how we should think about it or differs from the reactive attitudes or practices we ought to have with regard to it (prescriptive account).¹ A responsibility skeptic holds that people are not morally responsible. A revisionist can be a responsibility skeptic if she thinks that how we think about the responsibility differs from how we should think about it. Here, though, I will focus on revisionists who are not skeptics. I do not address some of the main debates between realism and anti-realism because my arguments based on the lack of boundaries (specifically, rights) and changes to them (see discussion of consent, forfeiture, and proportionality) do not cleanly engage the realist literature. In this chapter, I argue for two specific findings.

Thesis #1: Responsibility. My no-responsibility finding survives the revisionist and responsibility-skeptic arguments.

Thesis #2: No Responsibility So No Morality. My finding that if there is no responsibility then there is no morality survives the responsibility-skepticism literature.

Let us consider the first thesis.

¹The idea for this account comes from Manuel Vargas, “The Revisionist’s Guide to Responsibility,” *The Determinism and Freedom Philosophy Website*, <http://www.ucl.ac.uk/~uctytho/dfwVargas.html>, accessed July 19, 2017.

9.2 Revisionist and Skeptic Arguments

In the first part of this book, my argument against non-consequentialism is independent of the responsibility-revisionists' and skeptics' arguments. Specifically, my arguments with regard to the nature of non-consequentialist boundaries between people (rights) and changing those boundaries (via consent, promise, and forfeiture) are independent of the responsibility-revisionists' and skeptics' arguments. Specifically, their arguments do not address whether such boundaries exist and can be changed.

Consider next the revisionists' arguments. If my argument in chapter six succeeds and the revisionist is not a skeptic, then she has to reject the requirement that there is a responsibility-foundation or defend one of the candidates for such a foundation: choice or character state. Alternatively, she might view responsibility as the result of norms designed to promote certain values and, thus, not requiring a metaphysical foundation.

Here is the argument from Chap. 6.

- (P1) If the no-foundation argument is sound, then people are not responsible.
 (P2) The no-foundation argument is sound.
 (C1) Hence, people are not responsible [(P1), (P2)].

Premise (P1) is trivially true. Premise (P2) rests on the following.

Assumption: Foundation Candidate Arguments. The most plausible responsibility-foundations are a character state or choice and neither is a foundation of responsibility.

I argued for this in Chap. 6. In this section, I argue that the attempt to revise the way in which we think about moral responsibility, and thus eliminate the need for a responsibility-foundation, does not defeat the argument.

One argument for responsibility is Peter Strawson's argument that people are responsible because they are properly subject to the practice of holding people responsible for their actions.² This practice is justified by psychological necessity or the value of viewing people in personal rather than objective terms.³ On this account, treating someone in personal, rather than objective, terms depends on judging her according to whether she has a proper concern for others (that is, a proper quality of will). The necessity justification for such attitudes is no justification at all because it merely asserts that these attitudes are unavoidable. That they are unavoidable does not show that they are true, warranted, or justified. If, instead, the justification is value-based, then reactive attitudes are justified by their being valuable or having desirable results. This leads us to the next theory.

Strawson's argument might differ from that found above. He might not be interested in justification at all. He might be trying to explain what responsibility is. Alternatively, he might be arguing that some of our practices justify some of our reactive attitudes and not claiming that responsibility is constituted by either of them. My

²See P. F. Strawson, "Freedom and Resentment," 1–25.

³For a defense of the claim that such reactive attitudes are not necessary, see Derk Pereboom, *Living Without Free Will* and Gary Watson, "Responsibility and the Limits of Evil," 256–286.

interest is in the position found in the above interpretation. I leave open whether it is the best interpretation of Strawson's theory.

A second argument for responsibility can be seen in Morris Schlick's and J. J. C. Smart's arguments that people are responsible in the sense that our moral-responsibility-related practices are justified.⁴ On this account, they are justified because they get people to behave in desirable ways. Desirable, on Smart's theory, is utility maximizing. On this account, then, praise and blame are justified because they influence behavior in utility-maximizing ways. Thus, to be responsible is to be properly subject to praise and blame. To be properly subject to praise and blame is to be capable of being influenced in a utility-maximizing way or, perhaps, capable of being influenced in a utility-maximizing way through praise and blame.

This theory is subject to a series of objections. First, it does not distinguish between responsible and non-responsible agents. This is because it does not distinguish between being responsible and being appropriately held responsible. On this theory, it can be appropriate to hold responsible a non-responsible individual because doing so brings about desirable results. Also, it can be appropriate not to hold responsible individuals who are in fact responsible for the same reason.

Second, this theory does not distinguish between moral and non-moral influences. That is, it does not distinguish between the different ways in which someone might be induced via force, coercion, or manipulation rather than reasoning or incentives into behaving in a desirable way. These different means of influencing behavior are equally permissible because there is no side-constraint that can focus on respecting someone as a responsible agent.

Third, on this account, forward-looking reasons justify praise and blame rather than backward-looking ones. On such an account, responsibility-related attitudes are not clearly reactive if reactive attitudes are necessarily justified by backward-looking reasons. A revisionist might respond that reactive attitudes such as gratitude, pride, indignation, anger, and shame are backward-looking in content but not justification. Intuitively, though, it seems that at least some, if not all, of the attitudes have a backward-looking justification. For example, it is intuitively odd that whether one should feel shame now depends on facts about the distant future.

A third argument is Manuel Vargas' argument for his Agency Cultivation Model. This model holds that responsibility norms (norms of praising and blaming) are justified by their role in cultivating a type of agency. The type of agency is an agency sensitive to and governed by moral considerations.⁵ On his account, blame-related norms reflect an evaluation of whether an agent is properly concerned about morality. On Vargas' theory, this focus is justified because participation in and perpetuation of the responsibility system is justified by the value of people being agents with such concerns.

⁴See Morritz Schlick, *The Problems of Ethics*, ch. 7 and J. J. C. Smart, "Free Will, Praise, and Blame," 291–306. The discussion of Smart was informed by Richard Arneson, "The Smart Theory of Moral Responsibility and Desert," 233–258.

⁵See Manuel Vargas, *Building Better Beings: A Theory of Moral Responsibility* ch. 6, esp. pp. 173 and 196 and Manuel Vargas, "Revisionism," chs. 4 and 8. The value promoted need not be maximized. See Vargas, *Building Better Beings: A Theory of Moral Responsibility*, 194.

On Vargas' account, the powers that constitute free will are those that are sufficient to support moralizing praising and blaming practices.⁶ In particular, he argues, such practices should make people more frequently act on moral considerations. This is done in part by expanding the contexts in which they do so.

This model sidesteps the need for a responsibility foundation because it holds that responsibility, or at least the norms governing responsibility-practices, depend on the value of cultivating moral-reason-responsive agency. On this account, a foundation is not needed because responsibility is forward-looking rather than an intrinsic feature of a person. This is implausible because whether a person is responsible (for example, blameworthy) at one time cannot depend on facts about the world after he no longer exists.

On Vargas' theory, an agent is morally responsible for an act in a particular context because he is a morally responsible agent and the act is morally praiseworthy or blameworthy.⁷ On this theory, roughly, an agent is responsible if and only if he has the capacity to detect the relevant moral considerations and (volitionally) control oneself with respect to these conditions. On Vargas' theory, then, an agent is properly subject to responsibility-norms of moralized praise and blame because, and only because, he has the capacity to recognize and respond to moral considerations. On his account, these capacities can be exercised regardless of whether determinism is true. The model is thus compatibilist. Also, on this account, an agent is blameworthy for an act if and only if he is a responsible agent and acts with ill will. Ill will is a failure of concern in light of morality.

Vargas argues that if a theory better explains the nature of responsibility and why responsibility-norms are justified than do its competitors (including responsibility-skepticism), then the theory is likely true. The agency cultivation model better explains the nature of responsibility and why responsibility-norms are justified than its competitors. Hence, it is likely true. It is a revisionist theory because it asserts that the way we think about responsibility, in incompatibilist terms, is not the way we ought to think about it.

Vargas' theory does not escape the need for a responsibility foundation. Consider whether on Vargas' account, the nature of moral-responsibility agency depends solely on the value of cultivating morality-focused agency. If the nature of moral-responsibility agency depends solely on the value of cultivating morality-focused agency, then the theory does not distinguish between being responsible and holding responsible. This is because there is no independent property (or set of them) that makes someone morally responsible. Rather, there is merely a justification for treating people a certain way in order to bring about a set of desirable personality features. Because Vargas distinguishes between being responsible and holding responsible, he cannot respond by saying this just is his theory rather than a criticism of it.

If the nature of moral agency does not depend solely on the value of cultivating morality-focused agency, then the theory distinguishes between being responsible and holding responsible. If the two are independent, then what makes someone

⁶See Vargas, ch. 7, esp. p. 213.

⁷See Vargas, chs. 6 and 7, esp. pp. 203, 213, and 214.

responsible is independent of how different norms promote a goal (for example, promoting moral-reason-responsive agency). On this interpretation, there must be a responsibility-maker. In particular, there must be a foundation. Given this interpretation, Vargas should be understood as suggesting that moral-reason-responsive agency is the foundation of responsibility. That is, the foundation of responsibility is a character state. We've seen that this does not work because a person does not have control or, perhaps, the right sort of control over his character state. This can intuitively be seen in people instantly created in full. By instantly created in full, I mean that they are created in a moment and are created as adults with a complete psychology.⁸

Vargas leaves it open that the responsibility-norm system has a forward-looking justification while the particular norms are backward-looking.⁹ This allows his theory to escape some of the objections to Smart's utilitarian theory of responsibility. This split-level system is implausible. If what justifies the system of norms (or rules) are solely forward-looking reasons, then the rules that comprise the system cannot be justified on backward-looking grounds. This is because the system just is the set of norms (or rules) and the relations between them. If the set is justified solely by future events, then each member of the set has a similar justification. Even if the split-level justification were coherent, and I don't think it is, Vargas' theory depends on there being morality, specifically non-consequentialist morality, because of the backward-looking norms. If the argument in the first half of the book succeeds, then morality, at least non-consequentialist morality, doesn't exist.

Because the arguments in the first part of this book (against non-consequentialism) do not depend on skepticism about moral responsibility, the arguments in the two sections of the book are independent of one another. In contrast, Vargas' split level theory depends on non-consequentialist morality. My argument is that if non-consequentialist morality does not exist, this dependence is a problem for his theory.

By analogy, the same objection similarly applies to a split-level justification of punishment.¹⁰ If the system of punishment is solely justified on utilitarian grounds, then particular acts within that system cannot be justified on retributivist grounds. If the rule-utilitarianism were to do the justificatory work, then a retributivist-like rule might justify punishment, but only on forward-looking grounds. If the system is justified by a combination of utilitarianism and retributivist side-constraints, then retributivism can justify some acts. On such a mixed theory, retributivism is part of what justifies a system of punishment. This is not a split-level theory.

Even if the theory were to have a responsibility-foundation, did not assume that non-consequentialism is true, and did not have an objectionable split-level justification, and if Vargas' theory has a rule-consequentialist structure, this would raise the standard objections to rule-consequentialism. If Vargas' theory is consequen-

⁸The idea for this comes from Michael McKenna, "Responsibility and Globally Manipulated Agents," 169–192.

⁹See John Rawls, "Two Concepts of Rules," 3–32.

¹⁰For a discussion of this argument, see Stephen Kershner, "The Justification of Deserved Punishment via General Moral Principles," 461–484.

tialist, then it is rule-consequentialist, because he argues that what is justified is a system of norms rather than each particular norm. Among the standard objections are the following. Rule-consequentialism is irrational because it puts a rule between the agent and what he knows is the best result. Also, if there can be different and conflicting sets of rules that bring about equally good results, then it is possible that, all things considered, a particular rule ought to be and ought not to be followed. This is impossible. It is not impossible within a particular system of rules assuming no two conflicting rules are equally effective. Still, rule-consequentialism has to rank competing systems of rules.

Also, on some rule-consequentialist theories, the correct rule depends on most people satisfying or accepting (that is, internalizing) a rule. If there is a continuum in the number of people satisfying or accepting the rule, no natural threshold, and the correct set of rules depends on the number of people who meet the relevant condition, then there is nothing to make one set of rules correct rather than another. Vargas himself is neutral on what normative theory justifies the system of norms governing praise and blame.

Vargas' account also runs the risk of circularity. Consider, on his account, whether moral responsibility is filled out in terms of morality (for example, being appropriately responsive to morality). If it is, then if morality focuses on moral responsibility, the account is circular. This is because moral responsibility would be filled out, at least in part, in terms of morality and morality would be filled out, at least in part, in terms of moral responsibility. If morality does not focus on moral responsibility, then there is no reason to believe that it is right or good to distinguish between someone being responsible and being held responsible, at least if we are focusing on intrinsic rightness or goodness. This is because we ought to value morality and moral responsibility would have only an instrumental relation to it.

In this section, I began by restating my earlier argument that people are morally responsible only if there is a responsibility-foundation and there is no such foundation. I looked at three revisionist challenges to the argument. A revisionist holds that the way we think about morality (diagnostic account) differs from how we should think about it or differs from the attitudes and practices we ought to have with regard to it (prescriptive account). Here is a summary of the revisionist challenges (Table 9.1).

Galen Strawson and Neil Levy are leading responsibility skeptics. Galen Strawson is an impossibilist. He argues that responsibility is impossible. Here is a rough version of his argument.¹¹

- (1) A person is responsible for what he does only if he is responsible for who he is.
- (2) No one is responsible for who he is.
- (3) Hence, no one is responsible for what he does. [(1), (2)]

¹¹ See Galen Strawson, "The Impossibility of Ultimate Moral Responsibility," 289–306, esp. pp. 290–291 and 296–297. For a similar argument against compatibilism, see Saul Smilansky, *Free Will and Illusion*.

Table 9.1 Responsibility revisionists' theories

Theorist	Content	Objection(s)
Peter Strawson	People are responsible because they are properly subject to the practice of holding people responsible for their actions and this practice is justified by the necessity or value of viewing people in personal rather than objective terms	<p><i>Objection #1a: No Justification.</i> The necessity justification for such a practice (or the attitudes that underlie it) is no justification because it merely asserts that these attitudes are unavoidable</p> <p><i>Objection #1b: Next Theory.</i> If the justification is value-based, this leads us to the next theory</p>
J. J. C. Smart	People are responsible because our moral-responsibility-related practices are justified. They are justified because they get people to behave in desirable ways	<p><i>Objection #2a: Responsible Agents.</i> The theory does not distinguish between being responsible and being appropriately held responsible</p> <p><i>Objection #2b: Influences.</i> This theory does not distinguish between moral and non-moral influences because it does not distinguish between the different ways in which someone might made to behave in a desirable way</p> <p><i>Objection #2c: Forward-Looking Reasons.</i> On this theory, forward-looking reasons justify praise and blame rather than backward-looking ones</p>
Manuel Vargas	Responsibility norms are justified by their role in cultivating an agency governed by moral considerations	<p><i>Objection #3a: Dilemma.</i> Does moral-responsibility agency depend solely on the value of cultivating morality-focused agency? If it does, the theory fails to distinguish between being responsible and holding responsible. If it does not, the theory needs a responsibility-foundation</p> <p><i>Objection #3b: Split-Level Theory.</i> If the system of responsibility-norms justified solely by forward-looking reasons, then the individual norms that comprise the system cannot be justified by backward-looking reasons</p> <p><i>Objection #3c: Non-Consequentialism.</i> If the theory is non-consequentialist, then it runs afoul the arguments in the first half of the book</p> <p><i>Objection #3d: Rule-Consequentialism.</i> If the theory is rule-consequentialist, then the standard objections to rule-consequentialism apply</p>

On Strawson's theory, no one is responsible for who he is because he would have to intentionally create himself or choose his features and not do so on the basis of previous features. Neither is possible.

Here is a more in-depth statement of his argument.

- (1) If a person is responsible for an act, then it reflects his mental state (or states) and he is responsible for that state because he consciously and explicitly chose it.
- (2) If an act reflects a person's mental state (or states) and he is responsible for that state because he consciously and explicitly chose it, then he chose it on the basis of a principle (or principles) of choice for which he is responsible.
- (3) Hence, if a person is responsible for an act, then he chose it on the basis of a principle (or principles) of choice for which he is responsible. [(1), (2)].
- (4) If a person chose an act on the basis of a principle (or principles) of choice for which he is responsible, then he consciously and explicitly chose it on the basis of another principle (or principles) of choice.
- (5) If (4), then a person is responsible for a principle of choice only if he chose an infinite series of principles of choices.
- (6) No one chose an infinite series of principles of choices.
- (7) Hence, no one is responsible for an act. [(3)–(6)].

Strawson's argument is compatible with my argument against responsibility. While this argument claims that responsibility requires an infinite series of choices, my theory denies that an infinite series of choices would make an individual responsible because there still would be no responsibility-maker. For example, God would not be responsible even if he existed infinitely far back in time. My theory requires that there be a foundation and this foundation cannot be met even if a person created himself or his psychology from nothing. My theory also sets out two candidates for the foundation (choice or character state), whereas Strawson focuses on choice. However, my points are in line with Strawson's general emphasis on being responsible for what you do because you are responsible for who you are and the impossibility of being responsible for who you are. His theory is thus compatible with mine.¹²

In the context of compatibilism, Neil Levy argues that our actions are the product of present luck or constitutive luck. Both types of luck prevent someone from being morally responsible because luck reflects a lack of control. Present luck is luck at the moment of action or decision.¹³ It occurs when luck governs an individual's act in the sense that it was not settled by his reasons. Such luck is not under his control in a responsibility-relevant way. Constitutive luck is luck in the traits or dispositions that

¹²A criticism of Strawson's and my theories is that it requires too much control for responsibility. See John Martin Fischer, *Deep Control: Essays on Free Will and Value* ch. 10. For the claim that in fact factors beyond our control explain much of our action, see Gregg Caruso, *Free Will and Consciousness: A Determinist Account of the Illusion of Free Will*.

¹³See Neil Levy, *Hard Luck: How Luck Undermines Free Will & Moral Responsibility*, ch. 4, esp. p. 84. For the notion that goes all the way our lives, see Saul Smilansky, "Compatibilism: The Argument from Shallowness," 257–282.

make someone the kind of person he is.¹⁴ It occurs when luck governs an individual's having reasons on which he can act. Such luck is also not under his control in a responsibility-relevant way.

Levy argues that on a compatibilist account, people's acts either must reflect their psychology or not. Consider, for example, a person shaping her psychology at one time on the basis of her psychology at an earlier time. If they must, then they are subject to constitutive luck. If they need not, then they are subject to present luck. He then argues that libertarianism is subject to the same problem, especially if it relies on present luck when the relevant event- or agent-causation occurs.

In the context of blameworthiness, Levy argues that people are responsible only if they have epistemic control. Levy argues that an agent acts immorally because of ignorance (he mistakenly thinks that he is doing the right thing or some consideration outweighs morality) or because he acts akratically. On Levy's theory, a person is responsible for ignorance only if he knowingly and freely passed up an opportunity to gain the relevant knowledge in full awareness of the significance of it.¹⁵ Such passing up is a benighting act. Often there is no benighting act.

If there is a benighting act, Levy argues, it is akratic or, perhaps, results from *akrasia*. He notes that such *akrasia* would result from ignorance (it is not really *akrasia*), overwhelming desire (the agent didn't know how to avoid an akratic act), or present luck (some random event interfered with the agent executing his plan). None of these sources ground responsibility. Earlier ignorance as a cause of later ignorance merely pushes the issue one step back. Overwhelming desire indicates lack of control and does not ground responsibility. Nor is a person blameworthy due to present luck. Hence, Levy concludes, people are not responsible. Note that this argument with regard to blame can be set out in a way that is independent of the above luck-pincer argument.

Levy's theory is consistent with mine. While his theory focuses on control over acts, mine focuses on the combination of control over acts and their connection to who one is. My second condition, however, might be seen as part of what it means to control something. His present luck/constitutive luck dilemma allows for responsibility only if a responsibility-maker escapes present or constitutive luck. My foundation argument suggests nothing does so. His ignorance-*akrasia* dilemma fits cleanly with a similar argument I make in chapter six. It also fits nicely with the overall argument that even if people were responsible, they wouldn't be responsible for much.

Strawson's theory fits nicely with Levy's theory. It is the lack of ultimate responsibility that explains why people's acts are subject to present or constitutive luck. It is this lack that also explains why wrong acts result from ignorance or *akrasia*. My no-foundation argument explains why people are not ultimately responsible and, thus, fits nicely with both theories. Here is a summary of the relations between the arguments (Table 9.2).

¹⁴See Levy, *Hard Luck: How Luck Undermines Free Will & Moral Responsibility*, 29.

¹⁵For a developed argument that consciousness is necessary for moral responsibility, see Neil Levy, *Consciousness & Moral Responsibility*.

Table 9.2 Responsibility skeptics' theories

Person	Theory	Relation to other theories
Galen Strawson	A person is not morally responsible because he is not ultimately responsible. He is not ultimately responsible because he did not consciously and explicitly create himself or his psychology from nothing	Kershnar's theory explains Strawson's theory because the lack of a foundation explains why a person cannot in a responsibility-making way create himself or his psychology
Neil Levy	A person is not responsible for an act because it results from present or constitutive luck	Strawson's theory explains this because only ultimate responsibility could avoid present or constitutive luck
Neil Levy	A person is not blameworthy for a wrong act because it results from ignorance or akrasia	Strawson's theory explains this because ultimate responsibility for a wrong act would be neither ignorant nor akratic
Stephen Kershnar	A person is not morally responsible because responsibility requires a foundation and there is no foundation	Levy's ignorance-akrasia dilemma relates to Kershnar's claim that if people were responsible, they would not be responsible for much

9.3 Morality and Responsibility

In the last chapter, I argued that if people are not responsible, then there is no morality. The first reason to think that if no one were morally responsible there would be no morality is that moral agents alone do right and wrong and people would not be moral agents. The second reason to think that if no one were morally responsible there would be no morality rests on the role of rights in non-consequentialism. Here is the argument.

- (1) If non-consequentialism is true, then people have rights.
- (2) If people have rights, then they are morally responsible.
- (3) People are not morally responsible.
- (4) Hence, non-consequentialism is false [(1)–(3)].

Premise (1) rests on the notion that the most plausible non-consequentialist theories all contain some notion of rights. Consider the harm principle and the doctrines of doing and allowing, double effect, and causing/not causing. The reason the most plausible non-consequentialist theories contain some notion of rights rests on the idea that, according to the most plausible versions of non-consequentialism, a wrong act wrongs someone. One individual wrongs a second only if the first infringes a duty owed the second. If a right is a claim and a claim is one person owing a second a duty, then a wrong action involves a right-infringement. It might involve something else as well, for example, a wrong-making intention, but this is consistent with my argument.

Premise (2) rests on the notion that a right's features depend on moral responsibility. The argument is that its features are best explained by this dependence. Consider these features. First, many rights protect choices. Second, claims and liberties overlap in rights and liberties. A third feature is that rights trump consequences (for example, utility). A fourth feature is that rights are not justified solely because they protect interests. If interests justified rights, then an individual cannot have a right to do something when he has no interest in doing it or an interest in something to which he has no right. If there are rights, then one can have these things. In general, the value of interests support maximization, not right-like side-constraints.

Dependence on responsibility, specifically the value of a self-shaped life, explains what justifies choices and the projects choices allow for. It explains why individuals are morally free (that is, have a liberty) to pursue their projects even at the expense of making the world better. The value of project pursuit explains the side-constraint function of rights. Side-constraints protect project pursuit from others' interference.

Morally protecting choices (for example, project pursuit) is not merely about avoiding others' coercive interference. If it were, this would just be to avoid other people's responsibility over one's actions. This would be another appeal to responsibility.

Derk Pereboom argues that moral practices such as blame and, more generally, morality exist in the absence of moral responsibility.¹⁶ Consider his discussion of blame and punishment. Pereboom's model of blame is not grounded in basic desert. Rather, it is grounded in the following factors. First, immoral actions are often harmful and people have a right to protect themselves and others from such harm. Second, immoral actions can impair relationships and people have a moral interest in undoing such impairment through reconciliation. Third, people have a moral interest in the formation of moral character and the conduct that results from it. Blame grounded this way is forward-looking, since its aims are future protection, reconciliation, and moral formation.¹⁷ The same is true for praise. This theory of blame is related to reason-responsiveness. It does not depend, though, on basic desert and reactive attitudes inextricably related to moral responsibility.¹⁸

The free will skeptic calls into question any blaming practice that presupposes that the agent being blamed is morally responsible in the basic desert sense.¹⁹ The desert is basic in the sense that the agent would deserve to be blamed or praised just because she has performed the action, given an understanding of its moral status, and not, for example, merely by virtue of consequentialist or contractualist considerations. The cognitivist position of such a reactive attitude involves as a component a belief that its target basically deserves to be blamed for an action. On this conception, it would be doxastically irrational for a free will skeptic to have such an attitude.

The challenge of free will skepticism is that it has to explain how to think of relationships and related modes of communication that doesn't involve linking attitudes

¹⁶See Derk Pereboom, *Free Will, Agency, and Meaning in Life*, chs. 6–8.

¹⁷See Pereboom, *Free Will, Agency, and Meaning in Life*, p. 12.

¹⁸See Pereboom, pp. 14–15.

¹⁹See *ibid.*, ch. 6.

to basic desert.²⁰ Pereboom's argument, then, is that we should preserve blame and that if we should preserve blame, then the best forward-looking theory is true. If the best forward-looking theory is true, then Pereboom's model of blame is true (a type of blame that aims to reduce harm, reconcile impaired relationships, and affect moral formation). In addition, Pereboom argues, there can and should be blame without reactive attitudes. He argues that non-reactive-attitude-blame (NRAB) is as effective and morally better. Such blame lacks resentment and indignation and replaces them with sadness and disappointment. Pereboom argues that NRAB is as effective and less destructive than reactive-attitude blame. If NRAB is as effective as and less destructive than reactive-attitude blame, then we should adopt NRAB. Hence, he concludes, we should adopt NRAB.

Pereboom further argues that retributive punishment is mistaken because it rests on basic desert.²¹ He argues that we should reject the moral education view because there is no evidence that punishment morally educates offenders. In addition, he argues that there is good reason to prefer ways of educating offenders that are not punishment-based. He also argues against deterrence theory. There are two types of deterrence theory: utilitarian and rights-based. The utilitarian theory has standard objections. It does not justify punishing all and only guilty people and does not track proportionality.

Instead of punishment, Pereboom supports a quarantine theory. Quarantine does not presuppose moral responsibility.²² It is subject, he argues, to the least restrictive alternative and compensation requirements.

Pereboom's overall approach presupposes non-consequentialism. This can be seen in the various non-consequentialist conditions Pereboom uses to test theories of punishment. Consider, for example, the requirement that the state punish all and only guilty people, impose proportionate punishment, and use force only when it is the least restrictive alternative. If non-consequentialism fails, and the various arguments mentioned above suggest they do, then this approach fails because it depends on non-consequentialism.

In addition, if Pereboom justifies blame, punishment, and so on at the level of the system of praise and blame, then the same system-wide objections to Vargas apply here. Specifically, if the system is solely justified on forward-looking grounds, then the standard objections to rule-consequentialism or something like it apply. Consider, for example, rule-worship, contradictory but equally effective sets of rules, and the continuum of a population's satisfying or accepting the relevant rule. Also, on a solely forward-looking justification, the various non-consequentialist conditions that Pereboom relies on would be mistaken because a system of norms cannot be justified on the basis of a moral principle that conflicts with the norms that comprise the system.

A similar set of objections apply to a non-consequentialist justification of the system of norms governing praise and blame. If the system as a whole were justified

²⁰See *ibid.*

²¹See *ibid.*, ch. 7.

²²See *ibid.*

Table 9.3 Morality when no one is responsible

Theory	Objections
The system of praise and blame is justified by future protection, reconciliation, and moral formation. These are independent of moral responsibility	<p><i>Objection #1: Rights.</i> This does not address the moral-agent and moral-right arguments</p> <p><i>Objection #2: System-Wide Objection.</i> If the praise-and-blame system is solely justified on forward-looking grounds, then the standard objections to rule-consequentialism apply: rule-worship, equally effective but inconsistent sets of rules, and continuum of following or acceptance of the rule. A similar problem applies to a non-consequentialist justification of the system</p>

by these norms, then norms governing individual acts would be the same as the ones justifying the system. That is, it is hard to see why the reasons that justify a collection of acts would not also justify the particular acts that comprise the collection. This, however, does not appear to be Pereboom’s view because he gives no indication that he thinks resentment or indignation are permissible in those cases when they are more effective and produce less harm than sadness and disappointment. Hence, his justification occurs at the system-wide level. Similar objections apply to the non-consequentialist justification of a system as apply to the rule-consequentialist version.

In this section, I revisited my argument that if no one is morally responsible, then there is no non-consequentialist morality. I began by restating my two arguments. First, moral agents alone do right and wrong and people would not be moral agents. Second, if non-consequentialism is true then people have rights and if people have rights then they are morally responsible. Here is a summary of Pereboom’s theory and objections to it (Table 9.3).

9.4 Conclusion

In this chapter, I looked into how these arguments relate to the work of other responsibility revisionists and skeptics. Specifically, I argued that my no-responsibility finding survives the revisionist and skeptic literature. I also argued that the view that if there is no responsibility then there is no morality survives Derk Pereboom’s responsibility skepticism.²³

²³I am grateful to Alice Hodge and Robert Kelly for their extremely helpful comments and criticisms.

Appendix A

What is Moral Responsibility?

Abstract In Appendix A, I discuss moral responsibility in general terms. Some philosophers appear to analyze moral responsibility. I say appear, because it is unclear whether they are analyzing it or merely describing it. Aptness and desert theories of moral responsibility are the two most plausible analyses of it. They are the two accounts in the literature and are the only two that have a chance of being what constitutes moral responsibility. They both fail. As a result, moral responsibility is most likely a conceptually basic notion. It cannot be analyzed in terms of other concepts, although it still can be described and perhaps synonyms can be provided for it. It is similar to other conceptually basic terms, such as morality, obligation, and yellow.

Introduction

Before we can determine whether people are morally responsible, we first have to discover what moral responsibility is. This is the focus of the first part of the book. Here I argue that it is a basic concept in the sense that it does not depend on other concepts. In the second part of the book, I argue that people are not morally responsible.

My target in this chapter is philosophers who appear to analyze moral responsibility. I say appear, because it is unclear whether they are analyzing it or merely describing it. This is sometimes done in terms of aptness and sometimes in terms of desert. Let us consider these accounts.

Apt for Praise and Blame

Moral responsibility elsewhere is defined in terms of being apt for praise or blame.¹

(1) Moral responsibility = being apt for praise or blame

The equal sign stands for identity. Praise and blame are positive and negative moral responsibility attributions. If apt means appropriate, suitable, or fitting,² then

(2) asserts the following.

(2) Moral responsibility = being appropriate for positive and negative moral responsibility attributions.

This gets us nowhere as saying that someone is appropriate (or suitable) for positive and negative moral-responsibility attributions is just a way of saying that she is positively or negatively morally responsible. This just is an awkward way of saying that someone is morally responsible.

Desert or Deserving Praise and Blame

A different analysis of moral responsibility is that it is the control required for a person to have basic desert or be deserving of praise for moral actions and deserving of blame for immoral ones.³ One account labels this the *merit-based view* [of moral responsibility], according to which praise or blame would be an appropriate reaction toward the candidate if and only if she merits—in the sense of ‘deserves’—such a reaction.⁴ It is unclear whether this account is intended as an analysis. Here are two statements of these positions.

(3) Moral responsibility = having basic desert

(4) Moral responsibility = deserving praise for moral actions and deserving blame for immoral actions.

The desert definition of moral responsibility doesn’t work if the standard accounts of desert are used. Desert can be seen as a feature of the good or the right. One account of desert views it as a feature of the good.⁵ On this account, it is a

¹See Robert Kane, *The Significance of Free Will*.

²See Dictionary.com. Apt, <http://dictionary.reference.com/browse/apt> (2015).

³See Derk Pereboom, *Free Will, Agency, and Meaning in Life* and Galen Strawson, *The Moral Impossibility of Desert*, 5–24.

⁴See Andrew Eshleman, *Moral Responsibility*.

⁵See Fred Feldman, *Adjusting Utility for Justice: A Consequentialist Reply to the Objection*, 567–585, Fred Feldman, *Justice, Desert, and the Repugnant Conclusion*, 189–206, Shelly Kagan, *Equality and Desert*, 298–314, Louis P. Pojman, *Does Equality Trump Desert*, 283–297, Thomas Hurka, *The Common Structure of Virtue and Desert*, *Ethics* 112 (2001): 6–31, and Thomas Hurka, *Virtue, Value, and Vice*.

relation that in part determines the intrinsic value of a basic state. Specifically, it is a function that, depending on the account, determines an intrinsic-value level based on a ground (that is, an aspect of the individual) and a well-being level.⁶ An example of the ground is an individual level of virtue.

- (5) Desert = a function that determines intrinsic value based on a ground and well-being level.

What things are related in desert depends on the theory. Consider for example, whether what a person deserves is a momentary or lifetime feature of him. The account is theory-dependent, but no more so than other concepts in morality. For example, whether a right is a (Hohfeldian) claim or claim and power depends on whether rights are justified because they protect interests or choices.⁷

It might be the case that the right side of (5) merely describes rather than analyzes desert because (5) would allow desert to be true if welfarism is true. Welfarism asserts that intrinsic value is a function of, and only of, well-being and it is a competitor to desert theory. This is because the function in a welfarist account would be a one-to-one weighing of intrinsic goodness and individuals' interests. For example, 4 units of well-being would be equal to 4 units of intrinsic value. If so, then desert is a distinctive type of function and needs to be further specified. If this can't be done, (5) would be a mere description of desert and not a correct one. Perhaps one could modify (5) by specifying that it is a non-linear relation (weighting function is not 1.0). Let us set aside this concern.

Analyzing moral responsibility in terms of goodness-related desert is mistaken. Consider this analysis of moral responsibility.

- (6) Moral responsibility = having a function that determines intrinsic value based on a ground and a well-being level.

This is incorrect for several reasons. First, some people assert that desert does not presuppose moral responsibility.⁸ As a result, desert can occur without moral responsibility. If correct, then moral responsibility cannot be filled out in terms of desert and vice versa. However, others argue that desert entails responsibility.⁹

Second, the two intuitively seem to be different notions. Moral responsibility is a feature of a person alone, that is, a monadic property. In contrast, desert is a relation between three things (ground, well-being, and intrinsic value), that is, a relational property. A monadic property is not analyzable as a relational property.

Third, on some accounts, moral responsibility is an intrinsically good prudential or moral property,¹⁰ but desert by itself is not an intrinsic prudential or moral good. Even positive desert is not an intrinsic prudential or moral good. Positive desert is not prudentially good because, by itself, it does not make someone's life go better.

⁶See Stephen Kershnar, *Desert and Virtue: A Theory of Intrinsic Value*.

⁷See Matthew Kramer, *Rights without Trimmings*, 7–60.

⁸See Fred Feldman, *Fred. Desert: Reconsideration of Some Received Wisdom*, 63–77.

⁹See Stephen Kershnar, *Desert and Virtue: A Theory of Intrinsic Value*.

¹⁰See Robert Nozick, *Anarchy, State, and Utopia*.

It is not intrinsically good because it can be the basis of an intrinsically bad state of affairs. An example occurs when a saint suffers terribly.

Fourth, the above objections apply if (6) is either an analysis or description of desert, so the earlier sidestepping of this issue makes no difference.

Hence, it seems that if desert is understood as an aspect of the good, it is not part of a correct analysis of moral responsibility.

A different account of desert views it as a feature of the right. On this account, people can deserve punishment,¹¹ a job,¹² or a specific income¹³ in the sense that it is prima facie right that they get it. On this account, desert is a fittingness relation between a ground (for example, culpably harming someone) and an outcome (for example, state punishment imposed because of the culpable harming). On this account, here is an analysis of desert.

- (7) Desert = right-related fittingness relation between a person's ground and an outcome involving her

On this account, moral responsibility is the following.

- (8) Moral responsibility = having a right-related fittingness relation between a person's ground and an outcome involving her

The view of desert as a feature of the right is problematic in part because desert has an obscure relation to moral and legal rights (that is, claim-rights) and in part because it intuitively seems that a person might deserve something but no one is obligated to give it to him and vice versa. Even if it were not problematic, the first two objections to desert as a feature of the good apply here. Desert is independent of moral responsibility and moral responsibility is monadic and desert is not.

A third objection is that, were this account true, desert would not be closely linked to praise and blame. This is because praise and blame can occur independent of the specific outcomes that characterize this desert relation (for example, an individual receiving a specific punishment, job, or income). Similarly, the specific outcome could occur without praise and blame (for example, were the person who is punished or given a job or income to be insane).

A fourth objection is that on this line of desert theory, desert-satisfaction is a right-making feature. A parallel thing is not true of moral responsibility in that moral-responsibility-satisfaction is not by itself a right-making feature. Respect for moral responsibility might be a right-making feature, but respecting something and satisfying it are different notions.

These same objections apply if desert as a part of the right is a conceptually basic notion rather than an analyzable notion. This is parallel to the way in which the

¹¹See Joel Feinberg, *Doing and Deserving* and Michael Moore, *Placing Blame*.

¹²See James Rachels, *What People Deserve*, 136–148.

¹³See Owen McLeod, *Desert and Wages*, 271–282 and Stephen Kershnar, *Giving Capitalists Their Due*, 65–87.

objections to moral responsibility in terms of desert as a theory of good apply even if good-focused desert were primitive.

Because desert is either a property of the good or the right and either analyzable or not and all of these accounts fail to allow for a correct analysis of moral responsibility, moral responsibility cannot be analyzed in terms of desert.

Desert is Conceptually Basic

Aptness and desert theories of moral responsibility are the two most plausible analyses of it. They are the two accounts in the literature and, as far as I can tell, the only two that have a chance of being what constitutes moral responsibility. They both fail. As a result, moral responsibility is (most likely) a conceptually basic notion. It cannot be analyzed in terms of other concepts, although it still can be described and perhaps synonyms can be provided for it. It is similar to other conceptually basic terms, such as morality, obligation, and yellow. Here is a chart summarizing the above argument (Table A.1).

The above argument is useful because it tells us that investigations of aptness (perhaps understood as fittingness) and desert are somewhat independent of discussions of moral responsibility. Thus, discussions of what the fittingness relation

Table A.1 Accounts of Moral Responsibility

Theory of desert	Objections
Apt for praise and blame	This is not an analysis of moral responsibility because it is a way of saying that a person is positively and negatively morally responsible
Deserving praise and blame (feature of the good)	<ol style="list-style-type: none"> 1. Desert can occur without moral responsibility 2. Moral responsibility is monadic, desert is not 3. Moral responsibility is an intrinsically (prudential or moral) good, desert is not
Basic desert (feature of the good)	See above
Deserving praise and blame (feature of the right)	<ol style="list-style-type: none"> 1. Desert can occur without moral responsibility 2. Moral responsibility is monadic, desert is not 3. Desert is linked to specific outcomes rather than praise and blame, the opposite is true for moral responsibility 4. Desert-satisfaction by itself is a right-making feature, moral-responsibility-satisfaction is not
Basic desert (feature of the right)	See above
Conceptual basic	None

is, what makes the world a better place, what punishment offenders deserve, and so on are distinguishable from the nature of moral responsibility even if the subjects of these discussions overlap to a large degree.¹⁴

¹⁴I am grateful to Neil Feit, David Hershenov, and Bob Kelly and participants in the PANTC conference for their extremely helpful comments and criticisms.

Appendix B

God is Not Morally Responsible

Abstract

In the Appendix B, even if moral responsibility is possible, God is not morally responsible. If God is morally responsible, then he is maximally morally responsible. If God is maximally moral responsible, then the relation between his powers at a time and over time are not arbitrary, but they are. A first-order choice, higher-order choice, finite sequence of choices, and infinite sequence of choices all fail to be a non-arbitrary basic responsibility-making feature of him. In addition, there is no satisfactory answer as to whether a maximally responsible being can bind himself. If God is not morally responsible, then neither are people.

Introduction

The argument against responsibility based on there being no foundation in chapter two purported to show that responsibility is impossible even for infinite beings. One might wonder, though, whether responsibility is possible for a supreme being, such as God, whose very nature explains not only his existence, but also his mental states. The underlying idea is that a supreme being's nature explains his mental states and thus he is self-shaping in a way sufficient for moral responsibility. The argument for this parallels the ontological argument. Because his mental states are an essential feature of who he is, he is, in some sense, self-created (more specifically, self-explained in the sense that his nature explains why he exists).¹⁵ Hence, God is morally responsible.

¹⁵For discussion of the notion that a self-created being can be morally responsible, see Galen Strawson, *The Impossibility of Moral Responsibility*, 114–124.

For the notion that God is free because the constraints on his action are internal rather than external and that this is compatible with his being morally responsible for his action, see Edward Wierenga, *The Freedom of God*, 434 and Thomas Talbott, *On the Divine Nature and the Nature of Divine Freedom*, 3–24.

In this chapter, I argue against this idea. Specifically, I defend this thesis.

Thesis #1: Divine Responsibility. God is not morally responsible.

This thesis also provides support for the conclusion of chapter two.

Thesis #2: People. (Human) people are not morally responsible.

In the rest of this section, I set out the relevant concepts. In the next two sections, I argue for the theses.

First, God is the greatest possible being. The modal ontological argument runs as follows.¹⁶ Necessary existence is a great-making property because a (good) being whose existence does not depend on another being or on a random event is greater than he otherwise would be were he to depend on another or a random event. That is, a necessarily existing (good) being is better than he otherwise would be if he were contingent. The greatest possible being has every (compatible) great-making property to a maximum degree, hence, he has the property of necessary existence. If the greatest possible being is a possible being, then he exists in a possible world. In that world, he has the property of necessary existence and hence must exist across all possible worlds. If he exists in all possible worlds and the actual world is a possible world, then he exists in the actual world. Hence, he exists.

The ontological argument underlies the cosmological argument because the latter tries to show that there is a self-existing being.¹⁷ A self-existing being is not explained by another thing, rather he causes himself to exist or his nature provides the reason for his existence. A thing cannot cause itself to come into existence. Hence, the self-existing being's nature provides the reason for his existence. Because this reason is almost undoubtedly his maximal greatness or perfection and this is the ontological argument, the cosmological argument depends on the ontological argument. Arguably, a similar thing is true of the fine-tuning argument, which argues that the universe has an intelligent designer, because an explanation is needed for why the designer exists.

Second, a property is great-making if, in part or whole, it makes a thing have more intrinsic value than it otherwise would have were it to lack that property. In short, greatness is a matter of intrinsic moral value. While this might not be the view of all, or even most, proponents of the ontological argument, no other interpretation of greatness is plausible. Greatness per se is not itself a property. Hence, it has to be filled out in terms of the way in which something can be great. Other than intrinsic moral goodness, no other way of being great entails necessary existence and infinite power, knowledge, and love.

Third, moral responsibility is a basic notion. A synonym for it is being apt for praise and blame. This is a synonym because praise and blame are merely positive

¹⁶See Alvin Plantinga, *The Nature of Necessity* ch. 10; Peter van Inwagen, *Metaphysics* ch. 5.

¹⁷This idea for this interpretation of the cosmological argument comes from William Rowe, *The Cosmological Argument*, 20–23. Rowe's main target is Samuel Clarke, *A Demonstration of the Being and Attributes of God* (1705).

and negative responsibility judgments. Responsibility rests on a standard explanation. Consider, for example, guidance control, sanity theory, freedom of the will and action, agent causation, sourcehood, and so on.¹⁸

Fourth, a being has maximal responsibility if he has the responsibility-making property to a maximum degree. Maximal responsibility compatible with being essentially all-good might be less than maximal responsibility simpliciter because such an individual is not responsible for avoiding evil thoughts and actions.¹⁹ The idea for God's being less than maximally responsible depends on God's being essentially all-good.

If someone is essentially all-good, then he cannot be motivated to do evil. In particular, he cannot have a desire, belief, or intention that could motivate him to do evil, because a responsible agent can't make an unmotivated choice. Something has to move him to choose something. Hence, God cannot be motivated to do evil.²⁰ If someone cannot be motivated to do evil, then he cannot choose evil.²¹ If he cannot choose evil, then he is not responsible for avoiding it. Hence, God cannot be responsible for avoiding evil.²² It might seem that a maximally responsible being is responsible for avoiding evil. If so, then God is not maximally responsible, although this is not a flaw in him.²³

¹⁸The idea for this case comes from Derk Pereboom, *Determinism Al Dente*, 21–45. Note that the sanity condition includes knowledge of the right and the good. For guidance control and sanity models, see John Martin Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* and Susan Wolf, *Freedom Within Reason*. For freedom of the will and freedom of action models, see Harry Frankfurt, *Freedom of the Will and the Concept of a Person*, 5–20 and Gary Watson, *Free Agency*, 205–220.

¹⁹See Stephen Kershner, *Moral Responsibility in a Maximally Great Being*, 97–113. A different approach argues that God is not essentially all-good. See Thomas Guleserian, *Can Moral Perfection Be an Essential Attribute?* 227. One objection to Guleserian is that he does not provide an explanation of how God's moral nature could vary between possible worlds.

²⁰This is true if God's all-goodness flows from his knowledge and freedom. For a defense of this position, see Richard Swinburne's argument that God's perfect goodness follows deductively from his omniscience and perfect freedom. Richard Swinburne, *The Existence of God*, 97–102.

²¹On some accounts, God has the power to choose evil even if he can't be motivated to do evil. This approach can be seen in Erik Wielenberg, *Omnipotence Again*, 37–44, esp. 40.

²²God might be responsible for other things, such as creation. The focus on the freedom of creation can be seen in Richard Swinburne, *The Christian God*, 134–135 and Thomas Flint, *The Problem of Divine Freedom*, 255–264.

²³An approach linking divine responsibility and goodness might be seen in an account of omnipotence that depends on the omnipotent being having a perfect will. See K. L. Pearce and A. R. Pruss, *Understanding Omnipotence*, 403–414. A different approach can be seen in Nelson Pike's argument that the divine office of God involves both necessary goodness and omnipotence. This office or role is best seen as a property since no individual must occupy it. Pike argues that the individual who occupies the divine office does not do so essentially and hence the individual, Pike calls him Yahweh, has the power to sin. See Nelson Pike, *Omnipotence and God's Ability to Sin*, 208–216. This does not help the theist out of the more general problem which is whether Yahweh is both maximally great and morally responsible, and the distinction between the divine office and its occupant does not solve it. A similar conclusion is drawn by W. R. Carter in *Omnipotence and Sin*, 102–105.

God can be maximally morally responsible if there is no possible world in which there is a being with greater responsibility. This might not be such a world because God's existence and nature limits what is possible.²⁴ We can sidestep this issue, though, because nothing in this section rests on whether God is maximally responsible.

Argument for Thesis #1 [God is Not Morally Responsible]

Here is the argument for the first thesis.

- (P1) If God is morally responsible, then he is maximally morally responsible.
 (P2) God is not maximally morally responsible.
 (C1) Hence, God is not morally responsible. [(P1), (P2)].

Premise (P1) rests on the notion that whatever makes someone morally responsible, God has to a maximum degree. This might not be true if God is not morally responsible for avoiding evil, but, again, let us set aside this issue.

Premise (P2) rests on the following assumptions.

Assumption #2a: Maximal Power. If God is morally responsible, then he has maximal moral responsibility (compatible with his being essentially all-good).

God has maximal moral responsibility if he is morally responsible for everything that it is possible to be responsible for and has maximum responsibility for each of these things. Were he not all-powerful (at least in a way compatible with his being essentially all-good), then there would be things he would not be responsible for, in virtue of not being able to control them, and for which someone could be responsible.

However, God's power cannot be arbitrary. If the relations between God's powers at a time and over time were arbitrary, then they would not be explained by his nature. They would either lack an explanation or be explained by something else. This contingency would be a worse-making property because it would involve a lack of independence from other things or randomness. The modal ontological argument assumed that independence is a great-making property. Hence, we have our second assumption.

Assumption #2b: Power Not Arbitrary. If God has maximal moral responsibility (compatible with his being essentially all-good), then the relation between his powers at a time and over time is not arbitrary.

God's power, though, is arbitrary. A relation between God's powers is arbitrary if it does not depend exclusively on his nature or on what moral responsibility

²⁴For an approach along these lines, see A. R. Mele and M. P. Smith, *The New Paradox of the Stone*, 283–290.

requires. That is, it is arbitrary if it cannot be explained by something external to him or his greatness or if it lacks an explanation altogether. This leads us to the third assumption.

Assumption #2c: Arbitrary. The relation between God's powers at a time and over time is arbitrary.

Consider that one thing (specifically, a choice or mental state) authorizes a second in the sense that a person is responsible for the second because, at least in part, he is responsible for the first and the first brings about (or sustains) the second. For example, God is responsible for hardening Pharaoh's heart when his choice to do so has a basic or derivative responsibility-making feature. A basic responsibility-making feature is a feature that by itself makes someone morally responsible. The feature is an intrinsic responsibility-maker. This is similar to how, on a utilitarian picture, an individual experiencing pleasure is a basic intrinsic-good-maker.²⁵ A derivative responsibility-making feature occurs when something makes an individual responsible in virtue of something extrinsic to it, for example, his doing something else.

The basic responsibility-maker is a choice or a sequence of choices or a mental state or sequence of mental states. The concerns are the same for both choices and mental states. For simplicity, I will focus on choices. If it is a choice, then it could be first- or higher-order. A first-order choice is about an action. A higher-order choice is a choice about a choice. A sequence of choices might be finite or infinite. The first issue, then, is whether God has a basic responsibility-maker.

Basic Responsibility-Maker

A first-order choice alone is not sufficient for maximal power. An example of such a choice is one to create a world with certain features. This is because maximal power includes the power to revise one's self and such revision involves authorizing other choices. Such authorization might be direct when a person approves of his choices or indirect as when one approves of changes to how he goes about making choices (perhaps by changing his character). A first-order choice depends on an unchosen character (psychology) and an unchosen character that generates only first-order choices does not intuitively seem enough for maximal power. In particular, it leaves out the power of a person to change himself. The background notion is that the power of a person to change himself is second-order because it is in part aimed at shaping future choices.

A finite higher-order choice is also insufficient for maximal power. On Harry Frankfurt's account, a person cuts off the regress of desires through a choice (decisive commitment) or a mental state (identification).²⁶ Frankfurt argues that this is

²⁵See Fred Feldman, *Basic Intrinsic Value*, 319–346.

²⁶See Harry Frankfurt, *Freedom of the Will and the Concept of a Person*, 5–20 and Harry Frankfurt, *Identification and Wholeheartedness*, pp. 166–169.

how people ensure they have freedom of action and freedom of the will. The problem is that such a choice is arbitrary. For example, if a decisive commitment just is a third-order choice approving of a sequence of causally linked second- and first-order choices, it is hard to see why the third-order choice would be a basic responsibility-maker any more than would the second. If it is not a basic responsibility-maker, then the person has not authorized it. This is particularly true if the basic responsibility-maker justifies and causes the thing for which a person is derivatively responsible. A finite higher-order choice is unauthorized and hence arbitrary. For example, why would a third-order choice suffice for maximal responsibility rather than a fourth-order one? It is thus hard to see why it is the basis for maximum power.

A higher-order choice is also not more basic to responsibility than the lower-order choices. Merely having higher-order content does not in itself make a choice more fundamental to responsibility.²⁷ It is thus arbitrary in that it is unexplained why the higher-order is more fundamental than the lower order.

The notion that the basic responsibility-maker is a sequence is also problematic. First, a finite sequence has the same problems as the finite higher-order choice. It is arbitrary as to why it cuts off at that level. Again, the highest order choice is unauthorized.

It is also unclear why if no one choice is a basic responsibility-maker, a sequence of them is. That is, it is hard to see why justification- or causation-linked choices make someone responsible when no choice in particular does so. The analogy here is that it is false that a sequence of states or events, each of which is extrinsically valuable, could be intrinsically valuable, particularly where the sequence is nothing more than a collection of extrinsically valuable states.

Similar problems plague an infinite sequence of choices. An infinite sequence hides the problem of authorization because every choice is authorized by a higher-level choice, but lacks an explanation why the sequence as a whole is authorized. The analogy here is to an infinite sequence of events and objects that the cosmological argument tries to explain. The proponent of such an argument notes that while every event and object in the sequence is explained, the sequence itself lacks an explanation.²⁸ A similar thing is true of an infinite ascending sequence of choices, each of which is authorized by the choice one level up.

Also, as with the finite sequence, it is hard to see why the basic responsibility-maker would be the sequence rather than the choices that compose it. There does not seem to be anything especially fundamental to responsibility that accompanies a sequence of choices rather than the choices that compose it. A conjunction of choices does not intuitively seem to have a responsibility-making feature that is not also present in a particular choice, albeit to a lesser degree.

²⁷See Irving Thalberg, *Hierarchical Analyses of Unfree Action*, 211–226 and Marilyn Friedman, *Autonomy and the Split-Level Self*, 19–35.

²⁸See Rowe, *The Cosmological Argument*, 20–23.

Even if God does have a basic responsibility-maker, there is an issue of whether it is reflexive. This can be seen by asking whether God can bind himself.

Whether the Basic Responsibility-Maker is Reflexive

A similar problem of arbitrariness concerns whether it is within a maximally responsible being's power to bind himself. This involves the paradox of omnipotence because a maximally responsible being must be all-powerful, at least with regard to tasks that are compatible with his being maximally responsible and all-good.²⁹

Assume that maximal power includes the ability to actualize anything that is possible and that is compatible with God's being all-good.³⁰ If the first-order power is the key to omnipotence, then the failure to bind one's self is merely an inability to do an impossible task.³¹ By analogy, an omnipotent being's failure to create a rock so large that even he cannot lift it is not a limitation on his power if he has unlimited lifting ability.³² If a higher-order power is the key to omnipotence, then the ability to bind one's self is a possible task and hence something that an omnipotent being can do. The problem is the need to prioritize a level of power for both maximal responsibility and omnipotence and to do so in a non-arbitrary way.

Even if God is essentially all-good, so that his choices or preferences at different levels cannot conflict, the issue still arises as to the level of control that makes him omnipotent.³³ That is, there still is an issue as to the basic power-making feature even if the issue cannot arise.

The same problem arises if the basic power-maker is a mental state or a web of mental states. Specifically, we are again faced with the problem of whether higher order mental states can bind lower order ones. This might be true, for example, when one intends not to form an intention to work on Chanukah.

In summary, then, if God is morally responsible, then he is maximally morally responsible. If he is maximally morally responsible, then he has maximal power. Maximal responsibility and power for God might actually be less than maximal

²⁹See J. L. Mackie, "Evil and Omnipotence," 200–212.

³⁰See Ciro De Florio and Aldo Frigerio, *Two Omnipotent Beings?* 309–324, esp. 312.

³¹At least one theist argues from God's being contingently all-good to his lacking such a second-order power. Theodore Guleserian, *Can God Change His Mind?* 329–351. Thomas V. Morris presents an argument designed to show that if God is all-good then he cannot cease to be all-good. Thomas V. Morris, *Properties, Modalities, and God*, 35–55, esp. 51–54; Thomas V. Morris, *Impeccability*, 106–112, esp. 108–109. His argument rests on the notion that if God did evil then he would have intended to do evil at an earlier time, intended to intend to do evil at an earlier time, etc., with the end result being that he was never all-good. Morris's argument does not support my own but it helps to emphasize the stable nature of God's traits.

³²See C. Wade Savage, *The Paradox of the Stone*, 74–79.

³³By analogy, two omnipotent beings might exist if it were impossible for their wills to conflict. See De Florio and Frigerio, *Two Omnipotent Beings?* 317–319 and J. Baillie and J. Hagen, *There Cannot Be Two Omnipotent Beings*, 21–33.

Table B.1 Basic Responsibility-Maker

Choice level	A first-order choice, higher-order choice, finite sequence of choices, and infinite sequence of choices all fail to be a non-arbitrary basic responsibility-maker
Objections	<ol style="list-style-type: none"> 1. <i>First-Order Choice</i>. A first-order choice cannot make a being responsible for shaping himself because it leaves out an individual's power to change himself 2. <i>Higher-Order Choice</i>. A finite higher-order choice is unauthorized and arbitrary 3. <i>Finite Sequence</i>. A finite sequence is unauthorized and has an arbitrary ceiling. Also, it is unclear why the basic responsibility-maker is the sequence rather than the choices that compose it 4. <i>Infinite Sequence</i>. An infinite sequence is unauthorized. Also, it is unclear why the basic responsibility-maker is the sequence rather than the choices that compose it <p>The same problem arises if the purported basic responsibility-maker is a mental state or sequence of them</p>

Table B.2 Whether the basic responsibility-maker is reflexive

Choice interaction	Consider whether a maximally responsible being can bind himself
Specific objection	1. <i>Arbitrary</i> . An answer depends on whether being all-powerful depends on first- or higher-order ability. It is arbitrary to prioritize first- or higher-order ability

simpliciter because he is essentially all-good, but we can sidestep this issue. If God has maximal power, then the relations between his powers at a time and over time are not arbitrary. However, they are arbitrary. This is true whether the basic responsibility-maker is a choice, sequence of choices, mental state, or sequence of mental states. Hence, God is not morally responsible.³⁴

Here is a summary of the problems (Tables B.1 and B.2).

³⁴There are additional concerns about God's being responsible. Here is one example. There is an issue as to whether he knows with certainty what he will choose (for example, which world he will choose to create). If he knows with certainty what he will choose, then it makes no sense for him to rationally deliberate over what he will choose. If he knows with certainty what he will choose, then it intuitively seems that he is neither responsible for his choice nor did he do it freely. This is because rational deliberation (regardless of whether it occurs in time) is the way in which someone responds to reasons or makes a decision and one or both of these intuitively seems necessary for responsibility and freedom. He might know what he will choose prior to making the choice in time or at the same time he makes the choice but in a way that is as explanatorily basic as the choice.

If God does not know with certainty what he will choose, then he does not fully understand himself and, thus, can't predict what he will do or fully understands himself but can't predict his arbitrary choice. Neither option is palatable for a perfect-being theist. If God is omniscient he fully understands himself. Also, it is unclear what he would make an arbitrary choice about. The idea for this argument comes from Yishai Cohen, *Counterfactuals of Divine Freedom*, 185–205.

Argument for Thesis #2 [(Human) People Are Not Morally Responsible]

If God is not morally responsible, then neither are other people. Here is the argument for this.

- (C1) Hence, God is not morally responsible. [(P1), (P2)]
- (P3) If God is not morally responsible, then people are not morally responsible.
- (C2) Hence, people are not morally responsible. [(C1), (P3)].

Premise (P3) rests on two assumptions. First, if people are morally responsible and God is not, then they have a responsibility-making feature and God does not. Second, there is no responsibility-making feature that people have but God lacks. In fact, the relevant property is present in God to a far greater degree.

If the arguments in chapters one and two succeed, then responsibility requires a foundational choice or mental state that authorizes one's other mental states or choices. In addition, if these arguments succeed, then the foundation must be occurrent for it to authorize mental states or choices. That is, a responsible agent must consciously think about the foundation and how it authorizes other mental states or choices for it to authorize them and they are so authorized only when he is thinking about the foundation in the right way. While God can be continuously and completely aware of the foundation and the choices and thoughts it authorizes, this is not true for ordinary people.

Occurrent mental-state- or choice-based authorization involves a person consciously justifying and causing further states. Here I will focus on mental states but the reasoning for choices is identical. It is in part a second-order thought because it requires an awareness of the state and its relation to other states. The limited consciousness of most people prevents them from thinking about the authorizing state and what it authorizes too often and, when they do think about it, their limited focus only allows them to authorize a few states at a time.

The argument for the authorizing mental state having to be occurrent is that moral responsibility involves someone self-shaping his life, not merely having the ability to do so, and the self-shaping is a conscious exercising of a capacity. That is, it is an exercise, not a capacity. This is because the value of the capacity is explained in terms of the value of the exercise of it, not vice versa. It is hard to see why a world, or individual in it, is better when he can shape his life and does not do so versus when he cannot do so. In neither case is his life his own artistic creation, following his own narrative, a life with integrity, or one with any other clear aesthetic or moral value.

By analogy, consider the way in which the value of the capacity to have a true belief is explained by the value of having of it, the value of the capacity to be virtuous is explained by the value of being virtuous, and the value of the capacity to be in love is explained by the value of being in love. Controlling one's own life is valuable in much the same way that knowledge, virtue, or love are valuable rather than merely the ability to have these things. More fundamentally, it is exercise, and

not capacity, that connects people to the world in the right way (to, depending on the account, facts, goodness, or people).³⁵

God can consciously consider a larger number of responsibility-foundation elements and what they authorize. Not only can God do so, he does do so. This is because there is nothing to be gained in his having merely a disposition to have various thoughts. For him, a disposition is not needed to protect limited mental resources. Because he can and does consider more, God is more self-shaping than are human beings. Since self-shaping is at the heart of moral responsibility, God has a greater degree of moral responsibility than do human beings. Hence, if he is not morally responsible, neither are they.

If the problem of evil is solved in part by the free will defense and the free will defense depends on people being morally responsible, then the problem of evil threatens perfect-being theism.³⁶ On some accounts, the problem of evil is a matter of God's failure to create the best possible world. It might be thought that there is no such duty because there is no best possible world, only an infinite sequence of them.³⁷ Alternatively, God's failure to create the best possible world is not wrong because it does not harm anyone, infringe on someone's right, or reveal a character defect.³⁸ Whether the problem of evil is solved in this way is an issue I will sidestep here.

Conclusion

Even if moral responsibility is possible, God is not morally responsible. If God is morally responsible, then he is maximally morally responsible, but he is not. If God is maximally morally responsible, then the relation between his powers at a time and over time are not arbitrary, but they are. A first-order choice, higher-order choice, finite sequence of choices, and infinite sequence of choices all fail to be a non-arbitrary basic responsibility-maker for him. In addition, there is no satisfactory answer as to whether a maximally responsible being can bind himself. If God is not morally responsible, then neither are other people.³⁹

³⁵See Robert Nozick, *Philosophical Explanations*.

³⁶See, e.g., Plantinga, *The Nature of Necessity*, ch. 9 and Richard Swinburne, *The Problem of Evil*, 610hx2013;624. A related argument here is that if God can be determined to do only good acts, then he could have created beings who were also so determined. Thomas Guleserian, *Divine Freedom and the Problem of Evil*, *Faith and Philosophy* 17 (2000): 348-360.

³⁷For example, William Rowe and Daniel and Francis Howard-Snyder clash over whether a maximally great being is possible if such a being has a duty to create the best possible world and there is an infinite series of better worlds. Daniel Howard-Snyder and Frances Howard-Snyder, *How an Unsurpassable Being Can Create a Surpassable World*, 260-268; William Rowe, *Can God Be Free?* 405-424; William Rowe, *The Problem of No Best World*, 269-271.

³⁸These arguments come from Robert Adams, *Must God Create the Best?* 317-22.

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