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ARTICLE

RESPONSIBILITY AND THE BOUNDARIES OF THE SELF

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The law often invokes the notion of free will to justify holding individuals responsible for their actions. In this Article, Professor Dan-Cohen argues that we look beyond free will as the sole ground for responsibility. He offers an alternative account of responsibility that views the self as constantly engaged in the process of defining the boundaries of its spatial, temporal, and social identity. According to Professor Dan-Cohen, this alternative account better explains why we attribute or deny responsibility in familiar doctrinal settings — for example, strict and vicarious liability in tort law and the defenses of duress and provocation in criminal law. Professor Dan-Cohen concludes that legal responsibility may defeat itself by constricting our conception of the self to the notion of free will.

I. INTRODUCTION

LEGAL responsibility is not imposed in a moral or a social void. Although the ascription of responsibility is more structured in law than it is in general outside of it, no sharp conceptual division exists. To understand legal responsibility, we must understand responsibility. The most important source of such understanding is morality. Blaming — that is, ascribing moral responsibility for the negative effects of one's behavior — has come to be understood in terms of what I call the *free will paradigm*. In the free will paradigm, responsibility is grounded in the agent's capacity to choose her actions freely. This understanding of responsibility arises most prominently in criminal law, in which the clearest example is the traditional definition of first

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degree murder based on premeditation and deliberation. The law deems that any emotional agitation — any heat of passion — clouds judgment and impairs self-control and thus reduces responsibility.

Important as moral responsibility is to legal responsibility, however, it cannot be the whole story. First, the legal structure of liability cannot be more sound than its philosophical foundations. And these foundations — insofar as they comprise the idea of free will — are notoriously shaky.¹ Try as it may, the law cannot ignore the ubiquitous specter of determinism. Concessions to determinism are as inevitable as they are perilous: they are steps down a slope that, despite enormous philosophical effort, remains a slippery one.²

Second, just as moral responsibility is not the whole of responsibility outside of law, legal responsibility is not coextensive with blaming. For example, in tort law, holding someone responsible need not connote any moral failure. Ascriptions of strict, vicarious, and collective responsibility fall outside morality and involve no blaming. Yet the free will paradigm exerts its influence even here, albeit in a negative way. We tend to think of such forms of responsibility, somewhat apologetically, as exceptions to the free will idea. As seen from the voluntarist perspective, the picture of responsibility is that of a core and a periphery. The conception of responsibility as based on freely chosen actions applies to the core, but it leaves the rather large periphery unexplained. Moreover, from this perspective the relationship of core to periphery is unclear: what, after all, do the various cases of “deviant” responsibility have in common with the core cases characterized by the agent’s free choice?

I propose to answer this question in this Article. I also respond to other difficulties with the dominant conception of responsibility. The response is not a solution to, but rather an evasion of, the problems endemic to the free will paradigm. My aim is to provide an alternative unitary account, in light of which we can make sense of much responsibility-talk without encountering the problems presented by the voluntarist perspective. To introduce this response, however, I must first draw attention to a second prominent feature of the dominant conception of responsibility.

Theoretical discussions of responsibility have traditionally taken the subject of responsibility as given and have explored the conditions under which the relationship of responsibility occurs. I argue, how-

¹ For a leading contemporary philosopher’s testimony that the free will-determinism problem is far from solved, see THOMAS NAGEL, *THE VIEW FROM NOWHERE* 110–37 (1986). Nagel also believes “that the problem of responsibility is insoluble, or at least unsolved.” *Id.* at 120.

² Consider Professor Packer’s blunt move to short circuit the whole issue: “Very simply, the law treats man’s conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were.” HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 74–75 (1968).

ever, that this traditional approach assumes an unduly simplistic conception of the relationship between responsibility and its subject. Implicit in this approach is a conception of the human subject — the self — as possessing some important, immutable attributes to which the law responds, of which free will is most prominent.

The view of the self as a fixed entity defined prior to and independent of social relationships, however, has come under increasing attack.³ I describe an alternative in Part II: “the contingent self.” My sketch draws on a tradition that denies the existence of important fixed human characteristics from which significant normative consequences follow. The concept of self that I use asserts instead the contingency of the self, and hence its “plasticity.” However, this contingency and the many ways in which the self can be “filled in,” or instantiated, are themselves aspects of the human subject that are of critical normative and legal importance. They permit us to understand the potentially dynamic and dialectical relationship between the law and the nature of its subjects.

Specifically, this conception of the self permits us to articulate an alternative to the free will paradigm of responsibility, which I call the *paradigm of self-constitution*, or the *constitutive paradigm* for short. Whereas the free will paradigm treats responsibility as a matter of what we choose to do, the constitutive paradigm treats responsibility as a matter of what and who we are. The latter view enables us to reinterpret disputes about the ascription of responsibility as reflecting the plasticity of the self and as involving a negotiation over the self’s relevant boundaries. The constitutive paradigm also provides a common denominator for the various forms of responsibility we recognize. Volition is one element in our conception of the self, but not the only element; thus, volition is one ground of responsibility, but not the only ground. Accordingly, volitional responsibility is a special case — albeit a particularly important one — of constitutive responsibility. Like volitional responsibility, other forms of responsibility help identify and forge different constituents of the self.

Part II of this Article sketches concepts of responsibility and self that depart from standard approaches and that lay a framework for my discussion of the relationship between the two concepts. Parts III and IV use this theory of self and responsibility to analyze some persisting puzzles concerning the attribution and denial of legal responsibility. Part III demonstrates that familiar forms of responsibility that appear deviant from the voluntarist perspective, such as strict, vicarious, and collective responsibility, can be accommodated within

³ Notable recent examples include DEREK PARFIT, *REASONS AND PERSONS* (1984); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); and ROBERTO M. UNGER, *PASSION* (1984). For a related criticism of legal scholarship for its failure to consider the law-creating subject, see Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991).

the constitutive paradigm as manifesting different aspects of the self. Part IV discusses legal defenses that deny or diminish responsibility. As commonly understood, these defenses run up against the problems inherent in the free will paradigm. By transposing these defenses into the constitutive framework, we can reinterpret them as involving implicit claims regarding the self's proper boundaries. Finally, Part V focuses on certain distinctive features of the legal context and examines their bearing on responsibility and self. I argue that legal responsibility tends to constrict the self's boundaries and to encourage the enactment of a reduced and shrivelled self.

II. THE CONSTITUTIVE PARADIGM

A. *The Dual Structure of Responsibility*

Ordinary linguistic usage often reveals deeper philosophical truths. This section draws attention to the ambiguity of ordinary responsibility statements such as "A is responsible for X" that conceals an important shift of meaning associated with the use of such propositions. Although it is important to distinguish the two meanings, it is equally important to note that these two meanings are ordinarily conveyed by *the same* linguistic form. The close relation between the two senses of ordinary responsibility statements provides the linguistic clue to the meaning of responsibility that I articulate.

The discussion will be more focused if we consider the concept of responsibility through the somewhat distorting, but magnifying, lens of a stipulative definition of responsibility: "consciousness (of) being the incontestable author of an event or an object."⁴ Under this definition, when I take responsibility for a broken vase, I confess my "authorship" of the unfortunate event: I broke it. More generally, X in "A is responsible for X" stands for an object or event of which A is the author. Although this understanding comports with common usage, it is plain that not all phrases of the form "A is responsible for X" fit this analysis. Suppose that my child broke the vase rather than I. You may still be able to pin me down by saying, "You are responsible for your children (or for your children's behavior)." In this statement, X (my child) is not the object of which I am asserted to be the author. Instead, X designates the *ground* of my responsibility for a certain object or event (the broken vase).

⁴ JEAN-PAUL SARTRE, BEING AND NOTHINGNESS 707 (Hazel E. Barnes trans., 1956). I borrow Sartre's definition without subscribing to all his views on responsibility. Note that under Sartre's definition, the ascription of responsibility is independent of its possible *incidents* or *consequences* such as moral censure or punishment. For an example of the contrary view that collapses responsibility into its incidents, see 2 FITZJAMES STEPHEN, A HISTORY OF CRIMINAL LAW 183 (1883) ("[T]he meaning of responsibility is liability to punishment.").

Consider another pair of examples: (1) "A is responsible for the car accident," and (2) "A is responsible for her negligent driving." Once again, in (1) X designates the event whose authorship is ascribed to A (the car accident), whereas in (2) X refers to an aspect of A (A's negligent driving), by virtue of which she is considered the author of that event. As these examples show, the expression "responsible for" may pertain either to the object of responsibility (the broken vase or the car accident) or to the subject of responsibility, in whom the expression identifies the basis of the authorship of certain objects or events (one's child or one's negligent driving).⁵ I call the two senses of the expression "responsible for" *object-responsibility* and *subject-responsibility*, respectively.⁶

This distinction permits us to formulate the two main hypotheses that I elaborate and illustrate in the course of the Article. The first hypothesis concerns the relationship between the two meanings of responsibility that I have distinguished. By assuming or refusing to assume object-responsibility for a certain object or event, I own up to or disown that object or event; I claim or disclaim authorship of it, and in so doing, I use the object or event as a reference point in relation to which I draw my boundaries as subject. Much like the painter whom we know only as "The Master of Flémalle" — that is, as the creator of a certain masterpiece — so also the subject's identity derives from the objects and events deemed to have been authored by her. Consequently, by assuming responsibility for an object or event, I also implicitly affirm a certain aspect of myself as a viable source of *my* authorship and implicitly assume subject-responsibility as well. To use the previous example, by assuming object-responsibility for the car accident, I am identifying with my negligent driving; I implicitly acknowledge my negligent driving as an aspect of myself, by virtue of which the car accident is properly ascribed to me.

Subject-responsibility may sometimes be assumed explicitly. For example, I may explicitly state my responsibility for my negligence. Suppose I am at a dinner party, and the host urges me to stop drinking because I will be driving home soon. I can respond by saying "Don't pester me so much; I am solely responsible for my drunk driving. It is really none of your business." I have taken subject-responsibility

⁵ H.L.A. Hart draws attention to the ambiguity of responsibility statements, although he construes it quite differently. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 186, 196–97 (1968); see also *id.* at 210–30 (discussing other senses of responsibility).

⁶ A sense of responsibility that corresponds to what I call subject-responsibility is suggested in JOEL FEINBERG, *Collective Responsibility*, in *DOING AND DESERVING* 222, 250–51 (1970); and Eugene Schlossberger, *Why We Are Responsible for Our Emotions*, 95 MIND 37 (1986). An account of responsibility for emotions that is based on what I call object-responsibility may be found in Edward Sankowski, *Responsibility of Persons for Their Emotions*, 7 CAN. J. PHIL. 829 (1977).

for my drunk driving. I identify it as an aspect of myself and hence as a responsibility base, which makes me liable to bear certain object-responsibility, primarily responsibility for a car accident if I am involved in one.

In short, the first hypothesis asserts a relationship of mutual implication between object- and subject-responsibility. The ascription of object-responsibility implies a certain responsibility base and hence a certain subject-responsibility. Conversely, the ascription of subject-responsibility *designates* a responsibility base and hence a range of object-responsibility for objects and events that emanate from that base.

Now for the second hypothesis. The ambiguity of the expression "responsible for" is often innocuous; we readily know whether it refers to the object of responsibility or to an aspect of the responsible subject. In our example, the statement that A is responsible for the car accident clearly carries the object-oriented meaning. Such clarity does not always obtain, however. My second hypothesis asserts that in many cases, the same responsibility ascription can be interpreted in terms of both kinds of responsibility that we have distinguished. Consider again the statement "A is responsible for her negligent driving." This statement can clearly carry the subject-oriented meaning: it identifies in A the source of authorship of the accident. But it could also be taken in the object-oriented sense: we may focus on negligent driving as the event whose authorship is in question. By affirming A's responsibility for the negligence, we imply some other aspect of A (for instance, her lack of dexterity or her absent-mindedness) as the ground of her responsibility for the negligent driving.

What are we to make of these two interpretations? One interpretation designates negligent driving as a constitutive element of A, and thus as a responsibility base, whereas the other describes it as an external event whose authorship by A needs grounding in some other responsibility base. To say that A is responsible for her negligent driving in both of these senses seems to imply that negligent driving both is and is not a constitutive element of A. Have we reached a contradiction?

These are the kinds of puzzles that the second hypothesis creates, but the first hypothesis creates no lesser problems. The ascription of responsibility, we said, is a two-sided operation oriented simultaneously toward both the object and the subject of responsibility. By identifying a responsibility base explicitly or implicitly, we determine the subject of responsibility by reference to the object or event whose authorship is at issue. But what does this determination of the subject amount to? How should we understand the metaphor we used, according to which the ascription of responsibility involves drawing the subject's boundaries?

Such questions require us to turn to a consideration of the human subject. The conception of the self that I now outline permits us to answer these questions and allows us to make sense of the various claims that I have made concerning the nature of responsibility ascriptions.

B. The Contingent Self

The conception of the self that I expound holds that we should not understand human beings in terms of some essential properties or in terms of a fixed, unalterable nature.⁷ Many quite diverse views pay allegiance to this negative principle, and I sketch a picture of the self that is a composite of such different views. The sketch is not an exhaustive depiction, but it is designed to contain enough detail to elucidate the relationship between responsibility and the self.

1. *Plasticity*. — The negative principle that the self has no essential properties characterizes the self as having no predetermined boundaries that delineate it and set it apart. Instead, the self can be constituted and bounded in infinitely many ways. Although the existence of each particular self does bind it to, and limit it within, certain contingencies, the radical freedom enjoyed (or suffered) by the individual is embodied in perceiving, to use Sartre's excellent phrase, "the necessity of my contingency."⁸ Even though a particular self's existence requires *some* contingency — a certain configuration of phenomenal properties — it does not require any particular configuration, nor does it place any limitations on the self's possible constituents. Even when I am inescapably entrapped in my particular situation, the self's plasticity manifests itself in that very sense of entrapment that I am always capable of experiencing.

2. *Scalarity*. — Scalarity contrasts with a binary, all-or-nothing conception of the self. The binary conception views all the components of the self as equal and permanent, clearly separated from the external world by sharp boundaries. The scalar imagery, however, better captures important aspects of our self-understanding. Whatever the glue that keeps the self together, be it memory, consciousness, or even bodily continuity,⁹ it is more likely to have a variable force that

⁷ The existentialists, primarily Sartre, are mostly associated with the former formulation. The latter formulation can be traced at least as far back as GIOVANNI PICO DELLA MIRANDOLA, ORATION ON THE DIGNITY OF MAN 5-13 (A. Robert Caponigri trans., 1956).

⁸ SARTRE, *supra* note 4, at 309. Sartre uses this formula in, for example, his discussion of the body. See *id.*

⁹ Memory is perhaps the most widely discussed factor of personal identity; it strings together various events and links them to a single, continuous self. The locus classicus of this position is in JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 558-66 (1879). For the most extensive contemporary treatment, see SYDNEY SHOEMAKER, SELF-KNOWLEDGE AND SELF-IDENTITY (1963).

binds certain elements firmly while keeping others loosely or partially attached. We commonly think of gestures, actions, and expressions of people as being more or less characteristic of them, as embodying or revealing aspects that are more or less central to them. In all of this, the underlying imagery perceives aspects of the self in variable shades of importance or centrality.¹⁰ The scalar imagery thus permits us to envision the self as made up of a relatively hard core that radiates out with decreasing density toward a vaguely defined perimeter.

3. *Temporality.* — In discussing the temporal dimension of the self, I distinguish between a *momentary* and a *total* self. This distinction designates two ways of comprehending the self: one resembling the snapshot, the other a motion picture. These analogies are imprecise, however, and the following remarks are meant to elaborate on them as much as to dispel their misleading connotations.

Of the two analogies, the one between the momentary self and the snapshot is closer. A momentary self refers to all the components and properties of a given self at a certain point in time. In other words, it includes everything that falls within the boundaries of a single self at a single instant.

If the analogy between the total self and a motion picture were accurate, a total self would be simply the series of momentary selves put together sequentially. This is not quite what I have in mind, however. Instead, think of the total self as a single composite picture that incorporates all the momentary selves. The relative salience of various items in this picture depends both on the relative importance of each item in any given momentary self and on the frequency with which any given item appears in all the momentary selves of which the total is composed. To shift from this pictorial to more mathematical imagery, we may say that each element of the total self is weighted both by its importance in each momentary self it appears in and by the number of such momentary appearances it makes.

4. *Self-constitution.* — One need not espouse Sartre's extreme views about the self's absolute freedom in constituting itself to maintain that the self actively participates in its own constitution. The phenomenology of self-constitution is a complex matter that I cannot address here. I refer only to one interpretation of this capacity for self-constitution: the self's ability to *identify* with various elements and thereby integrate them into itself, or to distance itself from them by objectifying them and holding them at arm's length. Such identification or detachment applies to the various dimensions along which the self can be constituted, such as the mental, the physical, and the social.

¹⁰ For an ingenious and sustained argument favoring the scalar view of the self, see PARFIT, *supra* note 3, at 199–306.

Professor Harry Frankfurt, among others, emphasizes our capacity to identify with — or to distance ourselves from — various *mental* characteristics or events.¹¹ For example, I can treat a particular desire as irreducibly me and consider its satisfaction as self-fulfillment, or I can view the desire as an alien, external force that impinges on me and whose satisfaction is my defeat. Sartre and Merleau-Ponty provide the best known phenomenologies of *physical* self-constitution.¹² Normally, when I write, my hand is simply part of me — it is fully absorbed into the writing subject that I am at this time. But my identification with my hand can also extend to my pen: it, too, is just a transparent continuation of my bodily existence as a subject engaged in the endeavor of writing.¹³ Conversely, just as I may incorporate my pen in my physical space, I can also remove my hand from it by temporarily detaching myself from it. For example, by self-consciously observing and contemplating my hand, I can objectify it and create a distance between myself — the observer and contemplator — and my hand. The sociologist Erving Goffman has observed a similar variability in the *social* dimension of the self. His concept of *role distance* describes our capacity either to identify with social roles or to detach ourselves from them and enact the roles self-consciously, as if from a certain distance.¹⁴

The dimensions I have listed — mental, physical, and social — are not the only dimensions along which the self can be constituted. Additionally, given the self's plasticity, none of them is a strictly necessary one. Still, we can safely assume that, at least in "our"

¹¹ See Henry G. Frankfurt's essays *Identification and Externality*, in *THE IMPORTANCE OF WHAT WE CARE ABOUT* 58, 58–62 (1988), and *Identification and Wholeheartedness*, in *id.* at 159, 167–76.

¹²

This is why my body always extends across the tool which it utilizes: it is at the end of the cane on which I lean and against the earth; it is at the end of the telescope which shows me the stars; it is on the chair, in the whole house; for it is my adaptation to these tools.

SARTRE, *supra* note 4, at 325. Compare Merleau-Ponty's view: "To get used to a hat, a car or a stick is to be transplanted into them, or conversely, to incorporate them into the bulk of our own body. . . . It is literally true that the subject who learns to type incorporates the key-board space into his bodily space." M. MERLEAU-PONTY, *PHENOMENOLOGY OF PERCEPTION* 143, 145 (Colin Smith trans., 1962).

¹³ John Dewey gave a similar description:

A piano player who had perfect mastery of his instrument would have no occasion to distinguish between his contribution and that of the piano. In well-formed, smooth-running functions of any sort, — skating, conversing, hearing music, enjoying a landscape, — there is no consciousness of separation of the method of the person and of the subject matter. In whole-hearted play and work there is the same phenomenon.

JOHN DEWEY, *DEMOCRACY AND EDUCATION* 195 (1916).

¹⁴ See ERVING GOFFMAN, *ENCOUNTERS* 85–152 (1961). The concept is applied in ERVING GOFFMAN, *The Underlife of a Public Institution: A Study of Ways of Making Out in a Mental Hospital*, in *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 171, 318–20 (1961).

culture (we need not be very precise as to what "our" covers), people's identity and self-understanding are defined along each of the three dimensions. Capacity for identification or detachment in all three respects plays a role in people's self-constitution.

5. *Modularity*. — Just as identification and detachment represent the active aspect of the self's determination, so modularity represents the social constraints within which that determination takes place. Crudely put, the self must build itself using available (that is, culturally provided) building blocks; it must constitute itself in terms of prepackaged units of signification and meaning.¹⁵

For example, consider the social roles that a person assumes. Insofar as being a waiter or a parent are aspects of the self, such roles involve a diverse and complex set of expectations, modes of behavior, responsibilities, emotional responses, and so on, all of which mold the self and participate in its constitution. The modes of acquisition and integration of such roles are also for the most part culturally or socially prescribed. Whether one becomes a waiter by choice or by birth, the training one undergoes, the amount of time one spends in that role, and the importance one assigns to this role relative to other aspects of one's life are all matters of social practice: they are the ready-made strings attached to the role by means of which the individual who takes that role links it to the rest of his or her person.¹⁶

Similar observations apply to other elements in the self's constitution. Character traits are also modular, both in terms of their content and in terms of their mode of acquisition and their ties within the fabric of the self. To say that one possesses certain character traits is to describe her as a composite of certain preexisting, pre-labeled units. The attribution of each character trait depends upon the exhibition of a complex network of behavioral predispositions. These modular units are clusters of meaning, in terms of which persons are made intelligible both to one another and to themselves.

C. Self and Responsibility

We can now connect the dual conception of responsibility introduced in section A with the contingent self described in section B.

¹⁵ The primary modern text on the social origins of the self is GEORGE H. MEAD, *MIND, SELF & SOCIETY* (1934). For a more recent statement, see PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 173-80 (1966).

¹⁶ To say that the self is constructed of modular units is not to suggest any particular degree of uniformity of such units, nor to claim that any such unit cannot unravel into smaller units of modularity. For example, although a large modular unit under the description "Orthodox Jew" is available, it does not follow that one must espouse it in its entirety or not at all. One can pick subunits out of this package that are themselves modular. However, identifying and applying the appropriate means and criteria of such selective self-definition are difficult issues that I cannot discuss here.

The discussion should clarify how the dialectic interplay between ascriptions of subject- and object-responsibility participates in drawing the boundaries of the self. I do so in two parts. First, I use the newly acquired conception of the self to untangle the puzzles left from the discussion of responsibility in section A. Second, I show how constitutive responsibility provides a more encompassing perspective than the free will paradigm. By the end of this section, the paradigm of constitutive responsibility should be focused enough to allow its application in Part III to a number of more specific — and problematic — ascriptions of responsibility.

1. *Solving the Puzzles.* — My first hypothesis claimed a relationship of mutual implication between subject- and object-responsibility; consequently, every attribution of responsibility plays a role, direct or indirect, in drawing the self's boundary. A much clearer understanding of the first hypothesis is now possible. In light of the self's plasticity, the formula "A is responsible for X" contains no fixed points of departure. We cannot take A and X as given and focus exclusively on their relationship, as we commonly purport to do; the relata are as much at stake in the ascription of responsibility as is the relationship of responsibility itself. When I assume responsibility for the broken vase, I perform an act of self-constitution: I implicitly identify with some aspect of myself by virtue of which I am the vase-breaker. And the self-constitution involved varies depending on whether I assume that object-responsibility because I broke the vase deliberately, because I broke it inadvertently, or because my child broke it. Each of these possibilities involves the acknowledgment and activation of a different responsibility base. In each case I adopt a different source of objects and events as being the basis of *my* authorship of them and hence as a constitutive element of myself.

Interpreting the assumption of responsibility as an instance of self-constitution, however, does not suggest that it is completely up to the individual what stance to take relative to a given event or object. It suggests even less a decision on the individual's part that consciously links her response to some overall conception of herself. The response to the broken vase is most likely to take the form of a certain experience — for example, mortification or shame — by the momentary self. Such an experience is probably the most compelling way of "existing"¹⁷ my authorship of an event and of recognizing myself as implicated in the situation that precipitated that event.

The role of the experience in assigning responsibility must be qualified in two ways, however. First, such an experience does not

¹⁷ Sartre uses this peculiar verb in reference to the relationship between consciousness and the body: "It would be best to say, using 'exist' as a transitive verb — that consciousness *exists* its body." SARTRE, *supra* note 4, at 329. Conscious states, such as pain, are also "existed" by consciousness. *Id.* at 338.

occur in a personal vacuum. The total self — one's prior history of reactions, identifications, and detachments — is likely to manifest itself in the specific, momentary reaction. The total self thus determines the confines within which the momentary self's reaction takes place. Indeed, if the momentary self's reaction departs too far from the pattern characteristic of the total self, the departure itself provides a reason for discounting the event as an aberration and hence for detaching one's self from it.¹⁸ Accordingly, the experience I associate with the responsible stance is not a sufficient condition for responsibility.¹⁹ The second qualification suggests that the momentary experience I have described is also not strictly necessary for responsibility. The reasons are symmetrical to those used in the first qualification. My momentary failure to react responsibly can be discounted as a lapse or aberration when judged by reference to past occasions, on which the responsibility base that seems to be presently at issue was in fact reflected in my responses.²⁰ In such a case, the experiential gap in my momentary self's response can be bridged by extrapolating from my total self.²¹

Like the interplay between the momentary and the total self, the interplay between self-constitution and modularity is also at issue in attributions of responsibility. The assumption of responsibility provides an instance of self-constitution in which the self draws its own boundary by identifying with or distancing itself from a putative responsibility base. Such assumption of responsibility, however, is itself shaped in anticipation of and in response to the ascription of responsibility by others. This reciprocal relationship between the assumption and the ascription of responsibility is mediated by the existence of widely shared social conventions regarding the attribution of responsibility, which are themselves articulations of a shared public conception of the self. This public conception will influence actual enactments of selves within a society and thus will encourage an assumption of responsibility that in turn validates the social practices of responsibility ascription. Specific attributions of responsibility act as either reinforcements or modifications of such social conceptions regarding responsibility and self, whereas changes in the social conceptions affect specific attributions of responsibility.

¹⁸ The occurrence of such an aberrant reaction, however, may assume different significance over time. For example, if such "aberrations" recur, they may have to be incorporated into the ever revisable picture of the total self and thus change its constitution.

¹⁹ For example, an experience of shame is not a sufficient condition for responsibility when the experience results from a factual mistake: as it turns out, it was not really me who overturned the vase; it was the wind, or someone else.

²⁰ Here again, the simplest case is one that involves a factual mistake: I did not notice at first that it was my hand that overturned the vase.

²¹ As in the corresponding case mentioned in note 18 above, persistent failure to assume a responsible stance under similar circumstances will eventually be incorporated in the total self and will suggest a revision of its boundaries.

These clarifications of the relationship between subject- and object-responsibility bear directly on another important issue: the relationship between *ascribing* responsibility and *assuming* it. As we have seen, the self's modularity — the correspondence between socially sanctioned conceptions of the self and particular selves in that society — secures a certain degree of fit between assumption and ascription of responsibility. Similarly, the continuity between a momentary and a total self suggests that a momentary self's responsible stance will tend to be consistent with the total self's attitudes and characteristics. Accordingly, we can imagine a situation of full harmony among these aspects of responsibility: the momentary self's response fits the total self's composition, which in turn fits social expectations and conventions. When I speak of the assumption and the ascription of responsibility somewhat loosely and interchangeably, I indulge the simplification involved in assuming such harmony. However, neither of the congruities I have mentioned need be perfect. Responsibility can sometimes be based on extrapolation from the total self without the phenomenological support of the relevant momentary self's reaction and experience; conversely, a judgment of responsibility can rest on the momentary self's reaction alone and treat it as signaling a modification in the total self's constitution. Similarly, the ascription of responsibility may sometimes reflect an aspect of a shared public conception of self and ignore the particular subject's deviant self-constitution, or it can assume the individual's perspective despite its departure from the socially sanctioned self.

Finally, the possible disparities between the different aspects of responsibility open up the necessary space for depicting contested judgments of responsibility by the metaphor of negotiating the self's boundaries. The negotiation may concern the most accurate way to draw a particular self's boundary; the best interpretation of a certain aspect of the applicable social conception of the self; or the question of which of the two ways of drawing a self's boundary — the individual or the social — should determine legal responsibility in any given context. I do not pursue these questions in the abstract any further. Instead, I use this rough outline of the relationship between responsibility and self as a background for a number of concrete examples of the constitutive interpretation of responsibility.

I turn now to the puzzles associated with my second hypothesis. Some ascriptions of responsibility can be understood only in terms of object-responsibility, whereas others clearly involve subject-responsibility. But some responsibility statements, such as "A is responsible for her negligent driving," can be interpreted either way.²² How, we wondered, can the same item appear as both subject and object; how can it both be and not be part of A? The solution to this puzzle rests

²² See *supra* pp. 962–63.

on the realization that the structure of responsibility simply mirrors the structure of the self.

Two points are especially relevant. The first is the self's *scalarity*. Under this heading, we have described the self as projecting out from a relatively cohesive core with gradually decreasing density. No sharp and durable boundaries exist between subject and object. Different "items" can be located closer to the self's "core" and thus be more completely and permanently bound up with it. They may also occupy the "periphery," where they become increasingly detached from the self and correspondingly more object-like. Inasmuch as the structure of responsibility reflects this picture of the self, the distinction between subject- and object-responsibility is also gradual and relative. Negligent driving may serve as a responsibility base — and thus as a constitutive element of the self — relative to an event outside the self's boundary (for example, the car accident). It can also be seen as an object external to the self for which authorship derives from constitutive elements of the self that lie closer to its "core" and that are, relative to the negligent driving, more firmly bound up with it.

The other aspect of the self that helps remove the apparent contradiction in the structure of responsibility is *temporality*. Responsibility, understood as a stance taken by the self, implicates the distinction between the momentary and the total self. The assumption of responsibility typically involves a stance taken by a momentary self. It derives its specific content from the particular engagements of that moment. Thus, the questions of what my responsibility base is and what I am object-responsible for arise in, and are answerable in terms of, a particular context. When I run over a pedestrian, this event occupies my attention as the overwhelming object of my responsibility, and my stance toward it is determined by my awareness of my negligent failure to notice the red light in front of me. On another occasion, however, when my spouse tells me that I have just run a red light, I probably focus on this episode of negligent driving as the object of my responsibility, and my stance toward it is determined by a surge in my awareness of my history of carelessness and inattention.

In summary, the capacity of the same item to be me and not-me, subject and object, and hence to serve as a responsibility base as well as the object of responsibility, can be understood both spatially and temporally. First, the scalarity of the self suggests that whether we think of a given item as a responsibility base or as an object of responsibility depends on whether the judgment of responsibility relates that item to more central or more peripheral elements in the self's geography. Second, as a result of the self's capacity to detach itself from any particular element of its constitution and temporarily objectify it, an item with which I identify at one time may on a different occasion appear as an external object whose authorship by me is at issue.

2. *Responsibility for Voluntary Actions, for Character, and for Self.* — I have already mentioned the general grounds for dissatisfaction with the free will paradigm of responsibility.²³ The inadequacy of the paradigm is seen best by considering the role that character plays in ascriptions of responsibility. It would be difficult to deny or ignore the importance of character traits in both legal and extra-legal ascriptions of responsibility. Explaining an action in terms of the agent's character ordinarily corroborates rather than defeats the ascription of responsibility. The role that character plays in explaining action and in grounding responsibility, however, is a notorious source of embarrassment for the free will paradigm. If my action of stealing your money is a product of my greed, it is not simply a matter of the free exercise of my will, and accordingly my responsibility should be mitigated or extinguished. In this way, character is the Achilles' heel of the voluntarist conception of responsibility.

My purpose in drawing attention to character, however, is not simply to criticize the free will paradigm further. My aim is to demonstrate how the constitutive paradigm and the dual conception of responsibility it employs can accommodate character as a central factor in ascriptions of responsibility. I then show how the same account applies to voluntarist responsibility itself. As interpreted within the constitutive paradigm, volition and character appear as complementary rather than as hostile or mutually exclusive sources of responsibility. Finally, I extend the proposed account to what I view as the most inclusive category of responsibility: responsibility for self. Accordingly, in this section I use character as the Archimedean point from which we can dislodge the free will paradigm as the dominant interpretation of responsibility; instead, voluntarist responsibility appears as a special case of a more comprehensive responsibility for self articulated by the constitutive paradigm.

The best known effort to incorporate character into a voluntarist conception of responsibility is Aristotle's.²⁴ He invented the idea of "responsibility for character" as the alleged bridge between character and voluntarist responsibility. In Aristotle's view, people are responsible for their character traits because people form their own characters. Thus, even if I am constrained by my character traits, I chose and developed those character traits, and hence I am responsible for the actions that follow from them.

The bridge that Aristotle proposes, however, is illusory. If character traits are necessary to make choice intelligible and human action possible, how do we account for the choices that lead to the formation of character? Those choices too must presuppose some preexisting character traits, either innate or the products of early education. If

²³ See *supra* pp. 960–61.

²⁴ See ARISTOTLE, *NICOMACHEAN ETHICS*, book III, ch. 5.

character traits are preexisting, however, a person's responsibility does rest not on his own choices, but rather on characteristics that are beyond (or rather prior to) his control. But if the person forges his character freely — *ex nihilo* as it were — then we lack an account for the actions and processes of character formation: they remain unintelligible.²⁵

We can diagnose the source of difficulty in Aristotle's position by applying to it the distinction between the two senses of responsibility. In my terminology, responsibility for character is construed by Aristotle as a matter of object-responsibility: I am the author of my character. Hence, my character is seen as a product — as an object for which I take responsibility. Under this interpretation, my character is not who I am. I relate to it from some deeper, more central point of view with which I identify — namely my free will — whose operations progressively forge my character. But if one believes, as Aristotle does, that character is itself essential for action and responsibility, this construal of responsibility for character as a matter of object-responsibility must fail. Some character traits must be in place before I can be the author of anything, including my own character.

Nonetheless, the idea of "responsibility for character" contains an important insight that is brought to light once we transpose it from the voluntarist paradigm to the constitutive paradigm of responsibility. Seen from the latter perspective, "responsibility for character" should be interpreted as asserting not object-responsibility, but subject-responsibility. Using this interpretation, we can understand responsibility for character not as derivative from voluntary responsibility, but as coequal with it. I am responsible for my character in the sense that my character's emanations and manifestations are simply generated by *me*. I am their author (and hence, bear object-responsibility for them) because I *am* my character. Responsibility for character does not rest on some "deeper" self that somehow creates a bond of responsibility between itself and the character. To the contrary, asserting subject-responsibility for character affirms my identity with my character as that by virtue of which I am the author of certain objects and events.

This reconstruction of the idea of responsibility for character can now be used as a model for recasting the meaning of voluntarist responsibility itself. We can interpret responsibility for voluntary actions in both the object- and subject-regarding sense. I am object-responsible for the consequences of my actions (I am responsible for the injury that I have intentionally inflicted on Y) simply because I

²⁵ For an interpretation (or rather a reconstruction) of Aristotle's theory of moral responsibility that tries to avoid this problem, see T.H. Irwin, *Reason and Responsibility in Aristotle*, in *ESSAYS ON ARISTOTLE'S ETHICS* 117, 126–44 (Amelie O. Rorty ed., 1980).

identify with my actions. I take them to be the most important mode of my authorship of objects and events — hence my subject-responsibility for my actions. Suppose, however, that the action itself (the blow that I inflicted on Y) is the event whose authorship is in question. I am responsible for my actions because I am their author; I am their author because, being voluntary, they issue from my will. As in the case of character, we can now affirm our responsibility for our will by interpreting it as a species of subject-responsibility. By accepting our responsibility for the will, we simply affirm the will as a constituent of the self, a constituent whose operations are the grounds for our object-responsibility for voluntary actions and their consequences.²⁶

Note that for the will to serve as a responsibility base, it need not be free in the metaphysical, anti-determinist sense. In other words, construing responsibility for our volition as a matter of subject-responsibility is a variation on the compatibilist view, according to which responsibility for voluntary actions is consistent with determinism.²⁷ On my version of this general position, responsibility for voluntary actions simply marks them as constituents of the self. It expresses the self's identification with a certain range of events, roughly characterized by the absence of external coercive circumstances and by an *experience* of free choice. Such responsibility is accordingly validated not by the reality of the choice (and hence the refutation of determinism), but by the reality of one's identification with it. By "identification with our choices" I simply refer to the stance that we ordinarily take toward the products of what we designate as our "voluntary actions," namely that of being their "incontestable authors."

Transposing voluntarist responsibility into the constitutive framework also opens up the possibility that candidates other than the will may be eligible as potential constituents of the self and therefore as bases of responsibility. As we have seen, this possibility is fully realized in the case of character traits. We commonly hold a person responsible for an action precisely because it exhibits her character. We need not stop here, however. Will and character do not exhaust the composition of the self, and they are not the only possible bases of responsibility. Instead, by extrapolating from the discussion of will

²⁶ This is in one sense Kant's own solution; roughly, we are responsible not because we "will our will" but because we *are* our will as noumenal selves. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 101-02 (H.J. Paton trans., 1948); see also Allen W. Wood, *Kant's Compatibilism*, in *SELF AND NATURE IN KANT'S PHILOSOPHY* 73 (Allen W. Wood ed., 1984) (defending Kant's reconciliation of freedom and determinism through the noumenal self).

²⁷ See, e.g., ALFRED J. AYER, *Freedom and Necessity*, in *PHILOSOPHICAL ESSAYS* 271 (1954); John V. Canfield, *The Compatibility of Free Will and Determinism*, *PHIL. REV.*, July 1962, at 352, 352.

and character, we can now formulate the most inclusive category of responsibility within my proposed framework: responsibility for self.

The idea of responsibility for self has been introduced into contemporary philosophy by Charles Taylor in a form that places it squarely within the voluntarist paradigm. According to Taylor, we are responsible for ourselves (our selves) because of our alleged capacity, through "deep reflection," to examine, challenge, and ultimately transform even the deepest recesses of the self.²⁸ Taylor's account accordingly tries to ground responsibility for self in our freedom to choose who we are and thus to be our own creators.²⁹ We are the authors of our own selves, and hence, in my terminology, we are object-responsible for them. This conception of responsibility for self bears obvious resemblance to Aristotle's version of responsibility for character, and it raises similar difficulties. Object-responsibility for the self casts the self in the role of an object; but this deprives the relationship of responsibility of its subject. To assume the responsible stance toward my own self, I must detach myself from it in its entirety, objectify it, and consider myself as its author. I can succeed in transforming my self into an object of responsibility only at the cost of eliminating the "author" from the scene.

Of course, we can imagine the process of self-constitution described by Taylor in piecemeal rather than global terms. Although I cannot detach myself from my entire self, given the self's contingency I can do so with respect to each segment, one at a time. By identifying each time with one subset of its constituents while revising some others, the self can incrementally transform itself in its entirety; by the end of the day, *all* of the self's elements will be of its own creation or authorship. Incremental self-constitution makes sense, however, because it supposes that, at any given stage, a subject exists that is not undergoing a transformation at that stage. This implies that the entire series of transformations must be launched by a preexisting subject whose constitution — itself not of the self's making — must shape the incremental constitutive steps that follow. To be sure, this process may come full circle and eventually transform or replace the constituents of the initial, launching self. But no matter how large the circle and how long the chain, the nature of all the links will still depend on the constituents of the starting point.

The process of incremental self-constitution rests at bottom on a historical self that cannot be the product of such a process. Insofar as one's object-responsibility for one's self depends on having authored it, the incremental picture standing alone does not provide an adequate account of such responsibility. Again, as in the case of char-

²⁸ Charles Taylor, *Responsibility for Self*, in *FREE WILL* 111, 112 (Gary Watson ed., 1982).

²⁹ See *id.* at 126.

acter, we can make better sense of the idea of responsibility for self by transposing it into the constitutive paradigm and by using the notion of subject-responsibility. Object-responsibility for any aspect of the self presupposes the prior notion of subject-responsibility for the self. To be the incremental author of my self and thus bear object-responsibility for it, I must be subject-responsible for the self to whom my authorship is ascribed.

The notion of subject-responsibility for the self is not only primary, but also in a certain sense trivial. The self, being simply who I am, is trivially the ground of my responsibility, namely that by virtue of which I am the author of certain objects and events. "Responsibility for self" in its subject-oriented meaning merely restates the basic view of the self as the ineliminable subject. This restatement is a useful one, however. It serves as a reminder of an important normative implication of ascertaining the boundaries of the self. Everything encompassed within the boundaries of my self serves as a possible ground of my authorship of objects and events and hence as the potential source of my object-responsibility. Conversely, the contours of the self can be determined from the kinds of object-responsibility that we bear. Focusing on specific responsibility bases and on the resulting types of object-responsibility consequently provides concrete guidance with regard to the boundaries of the self and the corresponding contours of responsibility. The preceding discussion of responsibility for volition and for character presents us with a model that can now be extended by considering other constitutive elements of the self and the forms of responsibility that they create.

III. ASCRIBING CONSTITUTIVE RESPONSIBILITY

The task of this Part is to investigate ascriptions of responsibility as revealing different conceptions of the self's constitution and boundaries. Volition and character traits, discussed in the preceding section, belong to the *mental* aspect of the self. In this Part, I consider three additional dimensions along which the self can be constituted: the spatial, the temporal, and the social.³⁰ The spatial dimension refers to our capacity and propensity to identify with certain physical objects, including prominently, but not exclusively, our bodies. The temporal dimension may be understood in a number of different ways, but I mean to emphasize the idea of biography: a diachronic string of events that are not just "mine," but are irreducibly *me*. Finally, the

³⁰ Metaphors are supposed to carry us away, but hopefully not too far afield. These "dimensions" should not be reified and rigidly separated. They are merely heuristic aids meant to facilitate a mental grip on the unitary category of the self. As explained below, *see infra* pp. 980-82, the same phenomena can sometimes be explained by reference to different dimensions of the self.

social dimension refers to the way in which social roles serve as building blocks of one's self.

Under the constitutive view of responsibility, each of these dimensions behaves in a way similar to that of volition and character traits. Each can serve as a responsibility base on which subject-responsibility is predicated and that may give rise to certain kinds of object-responsibility. Put another way, we can understand the ascription, or assumption, of certain kinds of responsibility as an affirmation of our spatial, temporal, or social identity. Conversely, we may construe denials of responsibility as an effort to disown a particular segment of one of these dimensions. In this Part, I show how the constitution of the self along each of the three dimensions organizes a different category of responsibility: the spatial dimension refers to strict responsibility; the temporal dimension helps account for responsibility for actual harm; the social dimension is the basis for collective responsibility. In Part IV, I illustrate the use of "distancing devices" as defenses against the ascription of responsibility in all three dimensions.

A. The Spatial Dimension: Responsibility for Body and Other Objects

1. *Responsibility for Body.* — At a party, A is engaged in a heated conversation. He does not notice that a glass of wine has been placed next to him. Suddenly, upon hearing someone call his name, he inadvertently knocks over the glass. Suppose that A could not have been expected to be more careful than he was. Still, it would be perfectly natural for him, as well as expected of him, to feel some embarrassment and to offer to wipe up the spilled wine. By his attitude and behavior, A takes responsibility for the spilling of the wine, just as the others' expectation ascribes to him such responsibility. He presents himself, and is perceived as, the author of this event. This object-responsibility implies a certain subject-responsibility. The most natural locus of responsibility in this case is A's body; A takes responsibility for his body, including its unintended, inadvertent gestures. By his embarrassment and willingness to undo the damage, A meets the social expectation that he own up to his bodily movements as to an aspect of himself, and hence as a responsibility base that gives rise to object-responsibility. By his responsible stance, A reclaims his body from the status of a mere object that he most of the time successfully manipulates and invests it instead with the significance and meaning of an aspect of himself as subject.³¹

³¹ This is not to say that people are responsible for all the effects traceable to their bodies. In Part IV, I illustrate some of the ways in which one can try to avoid responsibility by distancing oneself from certain aspects of one's bodily existence.

Accordingly, when the law imposes liability on A in these circumstances, its intervention should be interpreted in terms of more than its moral or policy connotations. It also represents a move within the game of self-constitution that the wine-spilling incident inescapably excites. I comment later on the peculiar nature of the legal intervention in this context,³² but I now extend the discussion to some other cases of strict liability. The interpretation of the wine-spilling case as an attribution of subject-responsibility for the body will serve as our model as we examine these other cases.

2. *Responsibility for Property.* — Tort liability often extends beyond the unintended consequences of one's bodily involvement. The famous tort cases involve escaping water³³ and straying animals,³⁴ but for our purposes a more mundane example will do. An unexpected wind blows a vase out of my living room, and the vase lands on a passerby's head. Assume that no fault was involved in the placement of the vase (indeed, I did not even place it — the cleaning person did). Yet I would be mortified more intensely than my neighbor, while we both helplessly watch the vase traveling toward the passerby, and I would be expected and inclined to rush to the rescue with greater urgency than any Good Samaritan who happened on the scene.

Notice first how closely the phenomenology here resembles the wine-spilling case: just as bodily involvement was the source of responsibility for the wine-spilling, the vase links me inexorably to the passerby's injury. Stated in reverse, my reaction to the passerby's injury enacts an intensified momentary identification with my vase, which is very similar to the way A's response to the wine-spilling enacted his identification with his body. Translated into the language of responsibility, this description marks me as subject-responsible for my vase and as object-responsible for the passerby's injury.³⁵ Using the spatial metaphor described above, this allocation of responsibility amounts to locating the vase at the critical moment within the boundary that circumscribes my self and separates it from the rest of the world.

³² See *infra* Part V.

³³ See *Rylands v. Fletcher*, 3 L.R.-E. & I. App. 330 (H.L. 1868).

³⁴ See *Page v. Hollingsworth*, 7 Ind. 317 (1855).

³⁵ The language used by the court in an old case to explain the defendant's tort liability for his straying animals is instructive on this point: "[W]here my beasts of their own wrong without my will and knowledge break another's close I shall be punished, for I am the trespasser with my beasts" WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 496 (4th ed. 1971) (quoting 12 Hen. VII, Keilway 3b, 72 Eng. Rep. 156). On the identification of the owner with his slaves and property in old tort law, see John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 330-37 (1894).

This conclusion finds support in two different philosophical traditions. The first conceives property as an extension of the self.³⁶ The view of the self that I have presented, with its emphasis on the self's plasticity and indeterminacy, is plainly hospitable to that conception of property. The second is represented by a number of writers, mainly existentialists, who have emphasized important similarities between the self's relationship to the body and its relationship to other physical objects. Recall the depiction of my relationship to my pen in the discussion of *identification* in Part II: in the course of writing, my pen, like my hand, is fully absorbed in "me," as a transparent part of the integrated whole who is the writing subject.³⁷ Similarly, when I walk through a door — to use Merleau-Ponty's example³⁸ — I do not stop to measure the distance above my head to verify that I can clear the door safely. This immediate, unreflective security in the spatial location of my body parts is an aspect of my identity with them. The same would be true, however, even if I wore my hat while walking through the door. The hat would not normally present me with a new problem of clearance. It would be fully and transparently absorbed into "my" space and would provide me with an immediate and integrated knowledge of my increased height.

This Article is not the occasion for a full-scale consideration of the relationship of property to self, and the preceding remarks are obviously no substitute. However, they help clarify the phenomenological basis of my responsibility for the falling vase. They do so by placing this episode in a broader, if vaguely defined, context that suggests the frequency with which the self is associated with different material objects.

The falling vase example requires two additional clarifications. First, by suggesting that the special mortification I feel due to the flying vase constitutes the vase as part of myself, I mean to focus exclusively on the momentary self's response to this particular dramatic event. I do not consider whether the vase is a constitutive element of myself at other, calmer times. Second, analogizing responsibility for the falling vase to responsibility for one's body does not imply that vase and body are equally constitutive of the self. The notion of *scalarity* permits us to express the intuitive idea that property items are likely to be more peripheral and more easily detachable from one's self than are parts of one's body. The former may nonetheless be sufficiently bound up with the self to constitute a respon-

³⁶ The most succinct statement of this view of property is probably von Jhering's: "Property is but the periphery of my person extended to things." RUDOLPH VON JHERING, *THE STRUGGLE FOR LAW* 59 (John J. Lalor trans., 2d ed. 1915). For a recent exposition of this perspective, see Margaret J. Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 959 (1982).

³⁷ See *supra* note 12 and accompanying text.

³⁸ See MERLEAU-PONTY, *supra* note 12, at 143.

sibility base that supports object-responsibility for certain objects and events.

3. *Vicarious Responsibility.* — Vicarious responsibility is a form of strict responsibility in which the responsibility base is another individual, in most cases one's child³⁹ or employee.⁴⁰ We can therefore analyze it on the model of responsibility for body, described in the present section, and also on the model of collective responsibility examined in section C below. The phenomenological basis for vicarious responsibility is amenable to either interpretation.

Consider again the wine-spilling example. Our intuitive response would not change much if it were A's infant rather than A who inadvertently overturned the glass. A should still feel somewhat embarrassed and offer to wipe the spilled drink. The propriety of A's response would not depend, it seems, on the presence of any of the policy considerations that supposedly justify holding parents accountable for their children's mischief. A's response to the accident that his child wrought would be appropriate regardless of the child's exemplary education or A's lack of opportunity to restrain his child and avert the accident. Moreover, A's response is likely to have the phenomenological quality that I have associated with the responsible stance, and it will closely resemble his mortification stemming from his own spilling of the wine. As on many other kinds of occasions, the shame and pride parents often feel on their children's behalf may have the same intensity and character as their first person responses.

These remarkable similarities between the two wine-spilling scenarios — the one in which it was A who overturned the glass and the one in which it was his child — strongly suggest that the two cases show the same underlying structure of responsibility. Just as the object-responsibility for the spilled drink in the one case implies subject-responsibility for one's body (and thus a view of oneself that incorporates the body and its unintended manifestations), so the same object-responsibility implies subject-responsibility for the child, and hence a conception of the self that extends to one's children. By taking responsibility for his infant, the father confirms it as part of his self and pronounces its actions and their consequences to be authored by him.

A view of the self as extending to one's children explains the strong intuition that upholds one's vicarious responsibility for them. This

³⁹ Although the common law does not generally recognize parents' vicarious liability, many jurisdictions have statutory provisions to this effect. For a survey, see Note, Emogene C. Wilhelm, *Vicarious Parental Liability in Connecticut: Is It Effective?*, 7 U. BRIDGEPORT L. REV. 99, 121-24 (1986).

⁴⁰ For one commentator's testimony of the difficulties encountered in this area, see GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 8.5, at 649 (1978) ("Tort scholars have been puzzled for decades to explain the tort rule in employer liability cases.").

theoretical advantage, however, does not in and of itself establish the validity of such a conception of the self. Indeed, this picture may strike many contemporary readers as bizarre. Given the plasticity of the self and the role that the social dimension plays in its constitution, the very fact that a certain conception of the self is perceived as strange or implausible may cast doubt on the validity of that conception. Accordingly, my aim is not to override whatever misgivings one might have regarding the inclusion of children within the boundary of the self. I merely demonstrate the capacity of this particular drawing of the self's boundary to account for a certain widely shared intuition and a salient set of social practices (concerning parents' vicarious responsibility for their children's misconduct), as well as its compatibility with the metaphysical conception of the self that I have presented.

Although it is easier to think of children as extensions of the self than to think so of employees, one can nonetheless imagine a plausible case involving employees. Consider a great artist who regards his apprentices as participants in what remains throughout *his* enterprise; or the devoted surgeon who treats the members of her trained team as extensions of her own well-honed skills. The painter takes full object-responsibility for the painting and the surgeon for the operation simply because each is subject-responsible for his or her team: their respective identities as master painter and expert surgeon are constituted in part by the roles played in their professional lives by other individuals. In many other less dramatic instances of employer-employee relationships, however, the collective responsibility account presented below is more suitable. No matter which version we choose, the result is an account of certain cases of vicarious responsibility in terms of an expanded and enriched conception of the self.

B. The Temporal Dimension: Actual Results as Constitutive Events

A and A' shoot at V and V' respectively. A's bullet hits V and kills her; a sudden wind diverts the bullet of A' and saves V'. B and B' both knowingly drive cars with faulty brakes. A pedestrian crosses the street in front of B's car, the car does not stop, and the pedestrian is killed. No pedestrian tries to cross in front of B'. These are standard examples of one of the most perplexing issues in law and morality: A' will be held responsible only for attempted murder and will be punished less severely than A, and B' may not be held liable at all. But what accounts for this difference between the treatment of A and A' and between B and B'? The source of this familiar puzzle is the claim that the different results in the two pairs of cases are an external fortuity that should have nothing to do with our evaluation,

and hence treatment, of the various protagonists.⁴¹ Note that the attack on the distinction is double-barrelled: it claims that the actual consequences are both fortuitous and external to the agents involved. I address these two points separately as I consider the puzzle.

The first objection is that the diversion of A's bullet by the wind was totally fortuitous. This objection draws its force from our widely shared yearning to purge our life — at least our moral life — of the incidents of luck. As some writers suggest, however, the claim of fortuity alone may not defeat even moral responsibility.⁴² With the possible exception of the most ardent Kantians, everyone must admit the inevitability of at least one kind of fortuity: the circumstances of birth and upbringing that to a large extent determine who we are — what Professor Bernard Williams calls constitutive luck.⁴³ No moral judgments and no ascriptions of responsibility would be possible if they depended on first removing all the incidents of such fortuities. Therefore, the sheer luck that determined the different courses of events is not as alarming as it may seem at first. Once we realize that the role played by fortuity in all aspects of our lives is inescapable, including the moral aspect, the issue is no longer whether luck can enter our moral judgments, but rather when it should and when it should not.

This conclusion highlights the second standard objection. The fortuity of the victims' death or survival is allegedly external to the respective actors; such a fortuity is far removed from the kind of constitutive luck, internal to the agent, that must bear on the agent's responsibility. In light of the conception of the self that I have outlined, however, this argument fares no better than the first one. Its weakness results from the sharp and non-problematic division that it envisions between what is "internal" and what is "external" to the individual. The argument presupposes an oversimplified conception of the self's boundaries. Once we recognize that drawing the self's boundaries is highly problematic, the argument loses its force. It can no longer rest on some simple-minded interpretation of the internal-external metaphor as seeking to distinguish, for example, what happens inside a person's head from what happens outside of it. This realization creates the possibility that the victim's death or survival is internal to the agent and constitutive of his self.

But how can the victim's death (or survival) possibly affect the constitution of the actor's self? Here, too, the distinction between

⁴¹ For a comprehensive examination and rejection of the different arguments that might uphold the relevance of actual harm, see Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974).

⁴² See, e.g., THOMAS NAGEL, *Moral Luck*, in MORTAL QUESTIONS 24, 24 (1979); BERNARD WILLIAMS, *Moral Luck*, in MORAL LUCK 20, 20 (1981).

⁴³ See WILLIAMS, *supra* note 42, at 20–22.

subject- and object-responsibility proves helpful. Consider A shooting at V. When we raise the question of A's responsibility for V's death, we may think of it in terms of object-responsibility: V's death is the event whose authorship by A is asserted. Two features of such an ascription of responsibility are important. First, V's death is clearly posited as an event external to A. Second, our attention is drawn to certain aspects of A that make A responsible for V's death, primarily A's intentional act of shooting at V. Whether V's death is actual or putative then seems to make no difference: the responsibility base on which A's object-responsibility for V's death rests — the intentional shooting — is equally revealed in A', undiminished by the external circumstances of V's miraculous survival.

All of this changes, however, when we realize that the assertion "A is responsible for V's death" can be also used to ascribe subject-responsibility instead of object-responsibility. The entire episode of killing V (which involves, of course, the fact of V's death) can be incorporated in the relevant conception of A, and it can be invoked (implicitly or explicitly) in some other attribution of object-responsibility to A. To see this more vividly, imagine V's widower blaming A for the widower's devastation and agony: "You are responsible for all this suffering." If A were foolhardy enough to inquire why, a natural answer would be "Because you are the one responsible for my wife's death." The initial accusation is a matter of object-responsibility. The second statement, made in support of this accusation, is in terms of subject-responsibility; it identifies "the killing of V" as the relevant aspect of A, by virtue of which the widower's ensuing misery can be rightfully placed at his doorstep.

This attribution of subject-responsibility to A correctly captures the phenomenological quality of the situation. In the imaginary confrontation with the widower, "having killed V" is likely to be the most prominent and relevant element in A's biography. This entire event (and not just some mental part of it, such as A's intention to kill V) gives rise to A's shame and remorse when A confronts the widower's grief. Support for the subject-oriented interpretation of A's responsibility can be found in the ease with which V's widower could have explained his grievance against A in an alternative form. Instead of saying "You are [subject-] responsible for my wife's death, and that is why you are [object-] responsible for my misery," the widower could have simply retorted: "You are my wife's killer!" My point here is that this statement can be taken quite literally as an attribution of a certain identity or characteristic to A — that of being a killer. This linguistic form is not at all surprising. Being a killer is in fact a recognizable social role, and as such it is a candidate for participation in the self's constitution. Because one's victim must actually die for one to "be a killer," the fortuity of whether this happens becomes a piece of *constitutive* luck.

It should now be clear how this second construal of the ascription of responsibility to A for killing V successfully distinguishes this case from the case of A'. The present construal converts V's death from a fact that is external to A to one that is internal. V's death or survival can play, in principle, a legitimate role in various judgments of A in ways that a purely external fact cannot.

The present account not only helps make sense of practices (such as criminal punishment) that differentiate between A and A', but also throws light on our hopelessly conflicting intuitions on the matter. Both the view that V's death or survival is an external fortuity that should have no direct bearing on our assessment or treatment of A and the opposite intuition that the victim's actual fate heavily influences our attitude toward A make a strong claim on our allegiance. This ambivalence, however, is not just a matter of confusion or indecision. The conflict reflects the corresponding viability of the two pictures of the subject of responsibility that these intuitions respectively assume. Seen in one context and at a particular moment, V's death can be perceived as an external event that A brought about; in a different context and time, that same event is seen as part of A's biography, an ineluctable fact within A's boundaries that constitutes his identity as a murderer.

C. The Social Dimension: Collective Responsibility and Social Role

Unlike individual responsibility, collective responsibility draws immediate attention to the problematic nature of its subject. Accustomed to an individualistic moral ontology, we normally talk about individual responsibility as responsibility simpliciter and add the explicit designation of a subject only when we speak of "collective" responsibility.

The struggle over the proper subject of collective responsibility has traditionally followed two opposing paths. One, a non-reductionist or holistic approach, presents the collectivity as the bearer of a kind of non-distributive responsibility. Collectivities are non-reducible ethical entities capable of "authoring" objects and events the way individuals do, and they are therefore the primary bearers of direct responsibility for those objects and events.⁴⁴ The second, reductionist approach views collective responsibility as a species of vicarious responsibility. The only real entities in this view are individuals: collective actions and their consequences are always fully reducible and in principle traceable to those of particular individuals. By ascribing

⁴⁴ See, e.g., FEINBERG, *supra* note 6, at 248-51; Thomas R. Flynn, *Collective Responsibility and Obedience to the Law*, 18 GA. L. REV. 845, 846-52 (1984); Virginia Held, *Moral Responsibility and Collective Action*, in INDIVIDUAL AND COLLECTIVE RESPONSIBILITY 101, 108-09 (Peter A. French ed., 1972).

responsibility to a collectivity, we implicitly hold some individuals responsible for the actions of others.⁴⁵

The difficulties of both these accounts are well known. The non-reductionist view cannot adequately explain the repercussions on the collective entity's individual members that often result from holding the collectivity responsible.⁴⁶ The reductionist account avoids this difficulty by explaining collective responsibility in individualistic terms. Its model of vicarious responsibility, however, severs the direct relationship between the subject and the object of responsibility and renders highly problematic both the grounds for ascribing responsibility to a particular individual and the meaning of the responsibility so ascribed.⁴⁷

My purpose is not to critique these two traditional approaches to collective responsibility. Instead, I present another account of collective responsibility, according to which the subjects of collective responsibility are individuals whose responsibility is primary and direct rather than secondary or vicarious. The key is to recognize that one's social identity is a genuine constituent of the self⁴⁸ that can serve as an individual responsibility base for the group's collective endeavors.

An athletic team provides a good illustration of this point. Every player on a baseball team is likely to use the first person plural pronoun in speaking about the team's victories or defeats, even if he did not participate in the game in which the victory or the defeat took place. By doing so, the player fully inhabits his role as member of the team. He lives the actions of other individuals as his own. He feels pride or shame with respect to them. The actions of other individuals in their capacity as team members become one of the ways in which the particular player authors objects and events. By talking about the victory as "our" victory, the player experiences and enacts what may be called the "collective moment": he subscribes as an author to an event (or an object) whose intelligibility (as a "game") depends on the existence of a number of similarly situated individuals (team members) who interpret the consequences of other individuals' actions as their own.

⁴⁵ See, e.g., FEINBERG, *supra* note 6, at 233.

⁴⁶ "From our attribution of an action, and moral responsibility, to a collectivity, it does not follow that the collectivity's members are morally responsible for the action of the collectivity." Held, *supra* note 44, at 109 (footnote omitted).

⁴⁷ Thus, some writers deny the intelligibility of collective responsibility altogether. See, e.g., H.D. Lewis, *The Non-Moral Notion of Collective Responsibility*, in *INDIVIDUAL AND COLLECTIVE RESPONSIBILITY*, *supra* note 44, at 119, 121-32. Note that Lewis speaks only about responsibility "in the proper ethical sense," *id.* at 121, rather than in the more general sense addressed in this article.

⁴⁸ See, e.g., JOHN P. HEWITT, *SELF AND SOCIETY: A SYMBOLIC INTERACTIONIST SOCIAL PSYCHOLOGY* 91-95 (1976).

By generalizing this example, we can now extend the analysis to more complicated cases, such as that of being an American.⁴⁹ To be an American is to espouse and enact a self that defines itself, in part, by implicit reference to multitudes of other individuals, their language, practices, expectations, history, and culture. To say that someone (say, an individual named A.C.) is an American is to designate what is likely to be an important aspect of her self. As such, being an American is something for which A.C. bears subject-responsibility. By assuming subject-responsibility for being an American, she acknowledges her American identity as a constitutive element of herself. Every ascription of subject-responsibility, however, implies some object-responsibility as well. By taking subject-responsibility for being an American, A.C. accepts her American identity as a responsibility base implying object-responsibility for certain objects and events. What are they?

The answer for A.C. is much more complicated than it is for the baseball player, because the collective identity we ascribe to A.C. — being an American — is more complex: its ingredients are less clearly defined, and it mediates a collectivity composed of a vast number of individuals. We should expect neither uniformity nor clarity concerning the question whether being an American entails collective responsibility with regard to, for example, the comparative quality of American cars. Whatever the variability and ambiguity, however, there must be a group of objects and events — the space shuttle and the Vietnam War are perhaps good examples — that are so prominently linked to American identity that virtually every American sees herself as the author of at least some of them and feels pride or shame with regard to them. Denying responsibility for all such objects and events is tantamount to repudiating one's American identity altogether.⁵⁰

Collective responsibility for certain objects and events does not presuppose the individual's positive evaluation of them. One's assent may be an additional basis for responsibility, but it is not necessary to establish the collective responsibility here under consideration. One bears collective responsibility even with respect to objects and events toward which one has a negative attitude and despite one's efforts to prevent them. Indeed, such efforts may be motivated precisely by an individual's awareness of the responsibility he or she will ineluctably bear if the object or event comes to pass. In this vein, Americans'

⁴⁹ My discussion focuses on the social or cultural meaning of "American identity," not on the possible formal meaning, as with citizenship requirements.

⁵⁰ The collective identity I describe admits the possibility of *alienation*: one can be distanced from a role with which one is generally expected to identify. Moreover, "alienation" here is not at all a negative term. Depending on the nature of the role, one may be better off, ethically speaking, being alienated from it than identifying with it.

knowledge that they bore responsibility for the Vietnam War in a way that others did not may explain why they were more actively opposed to the war than were, say, the English.⁵¹

The law, especially criminal law, professes an individualistic ethic that allegedly precludes any form of collective responsibility.⁵² But the law's practices belie this profession. Although little uniformity exists in this area, "[t]he notion that one is responsible for the substantive crimes of fellow conspirators in furtherance of the conspiracy has often been expressed in the cases."⁵³ Similarly, "the established rule" of accomplice liability is that it "extends to acts of the principal in the first degree which were a 'natural and probable consequence' of the criminal scheme the accomplice encouraged or aided."⁵⁴ According to both doctrines, a defendant can be held liable for criminal offenses in which he did not actively participate. Still, despite persistent criticism,⁵⁵ the doctrines of conspiracy and accomplice liability (and related ones, such as the felony murder rule) die hard; their survival attests to their intuitive grip. It is worth trying to articulate the underlying intuition even if we do not ultimately find it a sound basis for criminal liability.

Consider Rudolph Kessler, who waited in the escape car outside a tavern while his two unarmed companions entered the building to commit burglary. His companions were surprised by the owner inside the tavern, and one of them shot and wounded the owner with a gun taken during the burglary.⁵⁶ Can Kessler be convicted of both burglary and attempted murder?

I now add a further, imaginary segment of the story. The same evening, after the burglary but before his apprehension, Kessler meets his girlfriend. He excitedly recounts to her the day's adventures, which culminate with the owner's unexpected intervention: "Everything seemed lost at that point; but then we got this guy's gun and we hit him pretty hard. We nearly killed him. Then we ran away." What additional light does this missing segment in the narrative cast on Kessler's responsibility?

The key is that it is altogether natural for Kessler to use the first person plural pronoun in describing the situation. Kessler's pride in

⁵¹ See Stanley Bates, *My Lai and Vietnam: The Issues of Responsibility*, in *INDIVIDUAL AND COLLECTIVE RESPONSIBILITY*, *supra* note 44, at 145, 155-57, 161-63.

⁵² "[I]t is of the very essence of our deep-rooted notions of criminal liability that guilt be personal and individual" Francis B. Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 717 (1943).

⁵³ WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *HANDBOOK OF CRIMINAL LAW* § 6.8, at 588 (2d ed. 1986) (footnote omitted).

⁵⁴ *Id.* § 6.8, at 590 (footnote omitted).

⁵⁵ See, e.g., Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137 (1973).

⁵⁶ See *People v. Kessler*, 315 N.E.2d 29, 30-31 (Ill. 1974).

what he considers the group's successful operation and his adoption or ratification of the various actions as his own are constitutive moves that warrant his usage. By adopting the responsible stance toward the offenses committed, Kessler occupies the collective moment relative to the other accomplices. When the law holds Kessler liable for the shooting, it takes him at his own word: the word "we" that we can imagine him uttering proudly to his girlfriend. The law thereby confirms the social understandings that license Kessler's first person plural recounting of the story. This conclusion seems to capture the intuitive underpinnings of the court's decision and the doctrine it exemplifies.⁵⁷

Our analysis cannot stop here, however. The ascription of legal responsibility can be seen as at least partly self-defeating, in that it motivates a redrawing of the self's boundary in a way that eliminates or attenuates the basis of the ascription. To see this, we must modify the previous scenario. Kessler no longer makes it safely to his evening date. Instead, he and his friends are intercepted and arrested at the scene of the crime. The first person to whom Kessler tells his story is the police officer, who has just read to him his Miranda warnings. We can expect a very different version than before. The contrast, however, does not lie in the expression of shame and remorse in lieu of pride. Rather, with the prospect of an extended jail sentence looming ominously before him, Kessler will attempt to flee responsibility altogether. He will at once abandon the collective standpoint and withdraw from his role by proclaiming defensively though sincerely: "But *I* did not shoot the owner!" I comment in Part V more generally on this possible effect of the legal context on Kessler's reaction. Here I merely point out how the inner withdrawal and the flight from responsibility in the face of its legal consequences complicate the account I have offered.

IV. DENYING CONSTITUTIVE RESPONSIBILITY

The binary structure of responsibility that I have described implies a correspondingly binary structure of defenses against it: defenses can seek to deny either subject- or object-responsibility. For example, when charged with responsibility for the broken window allegedly smashed by a ball thrown by his daughter, A's statement "I am not responsible for the broken window" may mean "It was not my daughter who threw the ball." This assertion denies A's object-responsibility

⁵⁷ This does not amount to an endorsement of the decision or the doctrine. Responsibility, as discussed in this Article, is a necessary but not a sufficient ground for criminal liability; the latter also requires blame. The conclusion that the defendant is not responsible for an offense precludes liability, but finding responsibility does not by itself authorize criminal punishment. Further conditions of blameworthiness must be satisfied, but they fall outside my present topic.

for the damage by severing the alleged link between the responsibility base (the daughter) and the event (the broken window). At the same time, it implicitly concedes — or at any rate does not challenge — A's subject-responsibility for his daughter's conduct. Alternatively, A's denial of responsibility may mean: "My daughter is the one who should pay for the window; she is now an adult, and I am no longer responsible for her." Here A denies his subject-responsibility by attempting to sever the link between the putative responsibility base (his daughter) and himself.

This example is a simple one because in it the separation between the two forms of responsibility is sharp and the distinction between their respective denials is therefore clear. In other cases, the situation is murkier: the same denial of responsibility can be interpreted as addressing either object- or subject-responsibility. The former interpretation is more common, but it often leads to unresolved difficulties. By emphasizing the latter interpretation, we can avoid some of these problems, if not solve them. The previous example suggests the general structure of defenses as I interpret them: they deny a particular assignment of object-responsibility by disavowing its putative responsibility base. Defenses can be seen as *distancing devices* — refusals to identify with some potential constituents that place the constituents outside the self's boundary. Inclusion and exclusion are not, however, the only possibilities in this context. Given the self's scalarity, we can think of defenses in continuous and relative terms: they can consist in decreasing the degree of identification with a particular element without completely eradicating it, which would attenuate but not completely avoid responsibility.

As with the ascription of responsibility, its denial can take place along the different "dimensions" of the self. Accordingly, my discussion of defenses follows the same division as the preceding discussion of responsibility ascriptions.

A. Involuntariness, Provocation, and Bodily Distance

Although the body is commonly a basis of responsibility, we can sometimes successfully distance ourselves from aspects of our bodily existence and deny the responsibility we would otherwise bear. The device most commonly used is the idea of disease. *Regina v. Charlson*⁵⁸ provides a vivid illustration.

The defendant hit his ten-year-old son over the head and threw him out of the window.⁵⁹ The cause of this otherwise inexplicable behavior, Charlson maintained, was a brain tumor. Charlson's de-

⁵⁸ 1 W.L.R. 317 (1955).

⁵⁹ See *id.* at 317.

fense — involuntariness⁶⁰ — is often interpreted as amounting to a total denial of responsibility equivalent to the statement: "I didn't really do it." This construal can be read with two different intonations. The more common emphasizes the word "do." On this reading, Charlson denies object-responsibility for the child's injury by attempting to refute his authorship of it. This attempt raises formidable difficulties. It invokes action-theoretical issues regarding the necessary constituents and the proper analysis of human action.⁶¹ It also raises the free will conundrum by calling for an investigation of the counterfactual question whether Charlson could have behaved otherwise.

It is possible, however, to read Charlson's "I didn't do it" with an intonation that stresses the "I," as in, "It was not really *me* who brought about the injury, it was the tumor." This defense consists of two steps. The first seeks to lodge the causal origins of the child's injury in the tumor. The second step requires us to view the tumor as an external and intrusive agency rather than a part of Charlson himself. Charlson is not subject-responsible for his tumor — it is simply not part of him.

What makes this reading of Charlson's defense especially compelling is its graphic imagery. The tumor presents a clearly demarcated, detachable, and hostile object in Charlson's body. It is easy to think of the causal chain traced back to the tumor as sidestepping Charlson himself. To appreciate the force of this metaphor, consider some variations. Assume that the effect of the tumor in Charlson's brain was to create what legal doctrine calls "an irresistible impulse." Charlson's defense of involuntariness would probably still lead to an acquittal.⁶² Consider now the case of Karlson, who is charged with rape. Suppose that Karlson raises a defense of involuntariness and maintains that he was overcome with such uncontrollable lust that he, like Charlson, acted out of an irresistible impulse. Why does Charlson's claim of involuntariness seem compelling and Karlson's frivolous and perverse?

It is tempting to solve the puzzle and dismiss this example by distinguishing it from Charlson's case on evidentiary grounds: we simply do not believe that Karlson could not have controlled his sexual impulse, no matter how powerful it may have been, and we are unpersuaded by the alleged causal connection between the sexual urge and Karlson's violent behavior. But this attempt to convert the issue into an empirical matter is deceptive. The notion of irresistible im-

⁶⁰ See *id.* at 322–24.

⁶¹ Criminal law theory casts this issue as a dispute over the adequate definition of "act" — that is, whether the definition should include a reference to the element of voluntariness. See, e.g., HERBERT MORRIS, *FREEDOM AND RESPONSIBILITY* 105–07 (1961).

⁶² There are in fact references in the decision to the impairment of Charlson's self-control as a result of the tumor. See *Charlson*, 1 W.L.R. at 320–22.

pulse is obscure, and in trying to clarify it, we easily experience the vertigo often felt in the vicinity of the free will-determinism dispute. If we are nonetheless willing to accept the involuntariness hypothesis in the Charlson case, it would seem dogmatic to disallow a jury to entertain "a reasonable doubt" under some circumstances (no matter how extreme) concerning the voluntariness of the rape. Our adamant refusal to allow for such a possibility seems to rest on a deeper foundation than a mere difference in credibility between the two claims.

Such a foundation can be provided by the radical difference in the relationship between the respective sources of the alleged involuntariness and the self. Unlike a brain tumor, the sexual drive, even at its most overwhelming, is commonly perceived as an important constituent in our picture of the self. Its hormonal or other physiological underpinnings, far from undermining this perception, ground it in a widely shared image of the "lived body," itself an indispensable element in our prevailing self-understanding.⁶³

The contrast between Charlson and Karlson, however, must be seen against the background of the self's plasticity and contingency. Although it takes some effort, we can imagine a self for whom the sexual drive is an intrusive external force no different in kind from the pernicious emanations of a brain tumor. The effort needed to imagine such a self, however, is evidence that our culture (by which I mean at least contemporary Western culture) does not encourage the enactment of such a self. Hence the relative ease with which Karlson would be held responsible: "I am not responsible for my sexual drive" is simply not a viable argument in our culture. One of the ways in which this culture helps constitute a self that inexorably integrates the sexual drive but not a brain tumor is by ascribing responsibility for the former while withholding responsibility for the latter.

Finally, the contrast between the brain tumor's relationship to the self and that of the sexual glands, even though a sharp one, is not absolute. This contrast is mitigated by the ambivalence regarding the relationship of eros to self that characterizes the history of sexuality in Western culture. I do not address this ambivalence here, but one current manifestation of it bears directly on our discussion of the Karlson hypothetical and somewhat qualifies our conclusions: the attitudes and practices pertaining to child molesters. Although they would not have a valid legal defense if prosecuted, these offenders are quite routinely permitted to undergo a voluntary rehabilitative

⁶³ The relationship between sexuality and the self has important constitutional ramifications. See *Bowers v. Hardwick*, 478 U.S. 186, 203-13 (1985) (Blackmun, J., dissenting). In arguing against the constitutionality of a Georgia statute criminalizing sodomy, the *Bowers* dissent relies on "[t]he fact that individuals define themselves in a significant way through their intimate sexual relationships with others." *Id.* at 205.

procedure in lieu of criminal prosecution.⁶⁴ Much like Charlson's tumor, their sexual drive is seen as an aberration or even as a disease. It is perceived (although with some ambiguity and uncertainty) as an alien presence that should be removed and discarded rather than affirmed as an aspect of the self.

Similar issues of self-constitution come to the fore even more explicitly in the case of the partial defense of provocation. Consider *Bedder v. Director of Public Prosecutions*.⁶⁵ Accused of murder, Bedder, who was sexually impotent, claimed that his victim — a prostitute with whom he had attempted in vain to have sexual intercourse — had provoked him by jeering at him and by hitting and kicking him.⁶⁶ The issue raised by Bedder's defense was whether, in applying the "reasonable person" standard to determine whether sufficient provocation existed to reduce the charge from murder to manslaughter, that standard should include the physical peculiarities of the accused (in this case, Bedder's impotence).⁶⁷

To sustain a defense of provocation, the defendant must satisfy two tests: a subjective one, that the defendant acted "under the influence of extreme mental or emotional disturbance,"⁶⁸ and an objective one, that a reasonable person would be similarly provoked in the same circumstances. The free will paradigm easily explains the subjective standard. To see this, recall that it is premeditation and deliberation that aggravates a murder charge to first degree murder. The symmetrical structure of homicide offenses suggested by those aggravating elements is clear. Premeditated and deliberate action is the paradigm of free action, and a view that links responsibility to freedom puts one's responsibility in such a case at its peak. In contrast, heat of passion detracts from rational self-control and therefore diminishes responsibility. This account, however, leaves no room for the "objective" component in provocation. If what we measure when we assess the severity of the killing is the degree of composure and self-control, the causes of the reduced self-control are irrelevant to our judgment.

The commentary to the Model Penal Code's manslaughter provision suggests a different account. The "essential rationale for the law of provocation" is supplied by the observation that "some instances of intentional homicide may be as much attributable to the extraordinary nature of the situation as to the moral depravity of the actor."⁶⁹ By

⁶⁴ For data concerning the treatment of child molesters in a number of jurisdictions, see INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES 9-134 (Josephine Bulkley ed., 1981).

⁶⁵ 2 All E.R. 801 (H.L. 1952).

⁶⁶ See *id.* at 802.

⁶⁷ See *id.* at 803.

⁶⁸ MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft 1962).

⁶⁹ MODEL PENAL CODE AND COMMENTARIES Part II § 210.3, at 56 (Official Draft and Revised Comments 1980).

counterfactually casting the morally wholesome reasonable person in the defendant's circumstances, we can assess the degree to which the killing was the product of the defendant's moral depravity. For this test to perform its assigned task, however, we must assume that the "circumstances" (or the "situation") in which the killing took place and the defendant's "moral depravity" are mutually exclusive and jointly exhaustive factors. Only with this premise can placing the reasonable person in the defendant's "situation" reveal the role that the defendant's "moral depravity" must have played in the homicide.

As *Bedder* vividly reminds us, however, the external circumstances of the action, together with the person's traits and characteristics in which his moral depravity resides, do not exhaust the causal factors that might lead to an action. Instead, the idea that there are morally reprehensible characteristics of the person implies a third group of factors, namely morally indifferent personal characteristics that are not the seat of moral depravity. As a result, the counterfactual thought experiment required by the reasonable person standard is ill-suited for the task of separating out and assessing the factors that define the defendant's "moral depravity."

The discovery that the reasonable person standard malfunctions is not new. It baffled the Royal Commission on Capital Punishment, which ultimately adopted the test despite misgivings about its fairness.⁷⁰ A leading commentator described it as "paradoxical."⁷¹ Professor George Fletcher maintains that "[t]he basic moral question in the law of homicide is distinguishing between those impulses to kill as to which we as a society demand self-control, and those as to which we relax our inhibitions."⁷² Resort to the reasonable person standard, he argues, is an attempt by courts and commentators "to evade this moral issue,"⁷³ an attempt symptomatic of "the general decline of moral thinking in the analysis of liability for homicide."⁷⁴

Professor Fletcher links his construal of the role played by the reasonable person standard in Anglo-American jurisprudence to the latter's

unresolved anxiety about sociological and psychological determinism that leads many people to believe . . . [that] [i]f we know everything about the defendant, we will invariably excuse him. . . . If the defendant's head injury or impotence is considered in assessing the likely behavior of a reasonable person, then why not consider his irascibility, greed, jealousy or even his wickedness as a person?⁷⁵

⁷⁰ ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953 REPORT 52-53 (1953).

⁷¹ GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 548 (2d ed. 1983).

⁷² FLETCHER, *supra* note 40, § 4.2, at 247.

⁷³ *Id.*

⁷⁴ *Id.* § 4.2, at 249.

⁷⁵ *Id.* § 6.8, at 513.

Professor Fletcher has no difficulty sorting out the various factors involved:

The obvious difference between the irascible man and the impotent man is that, absent a documentable psychological impediment, we properly expect people to control their anger as we expect them to control greed and jealousy. Therefore persons who are irascible, greedy or given to jealousy hardly warrant preferential treatment in the assessment of their conduct. These are character traits for which people are properly held accountable, not excused. Yet no one is to be blamed for impotence, and therefore it is a feature of the defendant that must be considered in assessing whether he was adequately provoked by taunting or teasing related to his impotence.⁷⁶

The "deterministic anxiety" that Fletcher mentions is serious, however, and it does tend to shake one's confidence in the sharp division between the two sets of factors drawn in the quoted paragraph. Indeed, as soon as we depart from the view that self-control is the only measure of culpability, we are hard-pressed to explain why being cursed with excessive jealousy, for example, is morally worse than being afflicted with impotence when the two misfortunes both result in homicide.

This difficulty helps explain the temptation to evade the moral issues, framed in the idiom of free will, in this area. But we are still left with the puzzle of what exactly this evasion accomplishes. After all, even the most severe critics of the reasonable person standard do not maintain that its use is the equivalent of throwing dice or measuring the length of the judge's foot. If the reasonable person standard does not successfully assess the defendant's moral turpitude, what does it measure instead? We can now give quite a graphic and precise answer to this question. As we saw, the counterfactual thought-experiment mandated by the reasonable person standard does not help us draw the "internal" line between the person's morally relevant and morally indifferent characteristics. Instead, the reasonable person standard invites us to assess the self's outer perimeter by drawing the line between the self's constituents (whether or not of moral significance) and elements that are external to the self and fall outside its boundary.

We can also now see why this inquiry is not just a hollow exercise (as throwing dice would be) even as it evades the *moral* questions. In the present account, the reasonable person standard helps us assess *responsibility*. Factors contributing to the homicide that are external to the defendant — circumstances that surround him rather than traits that constitute him — mitigate the defendant's responsibility for the killing. If the factor under consideration is determined to be outside

⁷⁶ *Id.* § 6.8, at 513-14.

the boundaries of the self, the "moral" question, as understood by critics such as Fletcher, may indeed be avoided: the defendant's responsibility should be reduced by the fraction that can be attributed to the external source. We then need not confront the difficulty of identifying morally reprehensible traits with which a person may be helplessly and inescapably burdened.

This account brings into sharper focus both the decision in *Bedder* and the criticism of it. When we transpose *Bedder* from the voluntarist paradigm into the self-constitution paradigm, we can clearly identify the main issue it raises: the relation of impotence to the self. To benefit from the defense of provocation, *Bedder* must distance himself from his impotence and portray it as an affliction that impinges on him rather than as a trait of himself. Similarly, by rejecting this defense, the House of Lords placed impotence on the self's side of the divide between *Bedder* and his "situation."

Seen in this light, the issue in *Bedder* was the choice between two characterizations of *Bedder's* affliction: *disease* or *handicap*.⁷⁷ The relevant difference between the two concepts can be best described in terms of *coping*.⁷⁸ A disease is something with which one copes. Consequently, a disease is vanquished by being cured, that is, removed or extinguished. A handicap, in contrast, is a condition or factor in terms of which or by means of which one copes. Unlike a disease, a handicap is vanquished by being integrated with a person's life and absorbed into the background of attributes that shape and condition a particular form of life. We need not delve further into the phenomenology of disability; for our purposes, the difference between a disease and a handicap can be indicated (and perhaps somewhat exaggerated) by pointing out that a wheelchair may provide the paraplegic with a form of mobility that is similar in principle to walking for other people. For the permanently disabled person, the wheelchair is absorbed into the background of capabilities that are simply taken for granted. By means of these capabilities, one copes with whatever obstacles one encounters as one moves along. In contrast, the crutch is a constant impediment to the mobility of a broken-legged person; it is one of the obstacles to which he must pay careful attention and against which he must constantly cope until his leg heals.

We can now appreciate both the plausibility and the pertinence of the Lords' determination in *Bedder* that, in applying the objective test of provocation, impotence should not be ascribed to the reasonable person. The decision implicitly classifies impotence as a handicap

⁷⁷ The ordinary use of these terms only approximates the conceptual distinction I want to make.

⁷⁸ For the centrality of the notion of "coping" in Heidegger's conception of the self, see HUBERT L. DREYFUS, *BEING-IN-THE-WORLD* 67-75 (1991).

rather than a disease. As an enduring, pervasive, and possibly incurable condition, impotence may well qualify for that classification. Characterizing impotence in this way also has important implications for the question of responsibility: if impotence is a constituent of Bedder's identity, he is subject-responsible for it and hence is object-responsible for its external manifestations. Accordingly, when Bedder cites the role that impotence played in the killing, he merely identifies another responsibility base rather than lodging part of the responsibility for the killing in an external source as he hopes to do.

To say that the Lords' approach to Bedder's impotence is both plausible and pertinent, however, is not to stem the dissatisfaction with their decision. After all, the critics' main complaint is that the decision fails to come to grips with the distinctively *moral* aspects of the situation. This may be true. Still, we now have a better understanding of the Lords' evasive move. As we have observed, given the dominance of the free will paradigm in our moral thinking, an assessment of blameworthiness would have to be conducted exclusively in terms of freedom and self-control. The objective test, and its protagonist the reasonable person, would drop out of the picture altogether.

B. Duress and Temporal Distance

My next example involves the temporal dimension, specifically the train of constitutive events that make up one's biography. The defense of duress performs a role in the temporal dimension that is similar to the role that the defense of involuntariness performs in the bodily dimension. First, however, I expose difficulties with the conventional view of duress that my alternative account can avoid.

Unlike the defense of involuntariness, the defense of duress does not suggest a total lack of choice. Instead, the defendant points to a severe limitation of choice caused by a serious threat made against him. His capacity to choose the preferred path has been overwhelmed, the defendant maintains, by dire circumstances. The source of this plea's exculpatory force is open to two interpretations. One interpretation is that the defendant does not deny her responsibility for the offense, but appeals to our compassion aroused by his predicament. The second is that duress resembles involuntariness in its attempt to disconnect the offender from the offense: the effacement of choice due to the dire circumstances is sufficiently dramatic, the argument goes, to warrant exculpation.⁷⁹

Both of these construals provide plausible accounts of the defense of duress. Yet both are vulnerable to the same objection. Think of

⁷⁹ These two interpretations of duress seen as an excuse are elaborated in FLETCHER, *supra* note 40, §§ 10.3–10.3.4, at 798–810.

D, a hopelessly unemployed teenager, uneducated, raised in a broken home, whose only viable escape from a bleak future of destitution is membership in the neighborhood gang. Is his criminal activity any less compelled than, for example, the false medical certificate provided by Dr. Toscano under extortion in *State v. Toscano*?⁸⁰ If extortion provides Dr. Toscano with a defense of duress, should not a similar defense be supported by D's extreme deprivation?⁸¹

If one uses only the two interpretations of duress mentioned above, the law's negative answer to these questions is by no means obvious. If compassion rather than sanction is the proper response to Dr. Toscano's predicament, a similar attitude seems all the more called for in D's case. Insofar as Toscano's choice was overwhelmed by the dire circumstances created by the threats, D's choice is similarly affected; he also faces a radically impoverished choice-set, and he tries to divert the blame for the crime from himself to his extreme life-situation. Yet Toscano has a valid defense of duress, whereas D (or D's lawyer) would probably not even consider raising one. Of course, allowing people in D's situation to escape liability may impair law enforcement to an extent that excusing someone like Toscano does not, but this result only bolsters the arguments of critics who attack the integrity of the duress defense. The limited reach of the defense, they maintain, cannot be justified on principled grounds, but only by considerations that are at best prudential and at worst cynical.⁸²

Here again, my aim is not to assess the competing arguments, but rather to examine what new light the present framework can throw on the issues. My suggestion is to look at duress not as a plea for compassion that concedes responsibility, nor simply as a denial of object-responsibility, but rather as concerned with subject-responsibility. By denying responsibility for the fraudulent certificate he provided, Toscano may be trying to repudiate or disown the entire episode that led to the criminal event. This is the temporal analogue to Charlson's attempt to detach himself from the physiological source — the brain tumor — of his criminal behavior. In somewhat similar fashion, Toscano attempts to bracket the extortion as a detachable

⁸⁰ 378 A.2d 755 (N.J. 1977). Dr. Toscano, a chiropractor, was charged with aiding the preparation of a fraudulent insurance claim by making out a false medical report and was convicted of conspiring to obtain money by false pretenses. Toscano claimed that he had been under threats to his own and his wife's safety. The conviction was reversed on appeal. See *id.* at 756–57.

⁸¹ Judge Bazelon has argued for an expanded insanity defense that extends to extreme social deprivation. See David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 394–98 (1976); see also Richard Delgado, *Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 L. & INEQ. J. 9, 12 (1985) (urging serious consideration of a “rotten social background” defense).

⁸² See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 643–44 (1981).

temporal segment that should not be counted in the flow of his momentary selves. His grounds for doing so are clear, although not necessarily compelling. The circumstances that gave rise to the defense were so dramatic, overpowering, and incongruous with the rest of his life that they render the entire episode a disruption rather than a manifestation of his true identity.

This interpretation resonates with some familiar intuitions. We sometimes express a similar sentiment when, baffled by our own unexpected response to some set of highly unusual circumstances, we exclaim: "That wasn't really me!" This exclamation does not necessarily establish the discontinuity between the unexpected behavior and the self. It may equally betray a failure in self-knowledge; the unexpected conduct may turn out to be highly revealing about some hidden or novel aspect of the self. However, the conception of the self that I espouse is hospitable to the other possibility as well. Under certain conditions, the individual's repudiation of a particular episode may be genuine, and he may be successful in disassociating himself from it.

It is now easy to see why the defense of duress may succeed in Toscano's situation but can hardly apply in the gloomier case of D. Unlike Toscano, who wants to deny subject-responsibility for a single, temporally localized occurrence that can plausibly be seen as tangential to his life, D must repudiate poverty and desperate aimlessness that define every chapter of his life. He cannot refuse to take responsibility for them (by fending off his object-responsibility for their criminal consequences) without thereby disowning lasting and pervasive parts of the self that he consistently inhabits and enacts.

I have two concluding observations. First, I have not considered whether a self that recoils from its social and economic circumstances and consistently treats them as external encumbrances is possible. My analysis implies only that such a conception of the self is not a common one and that, at least in the ordinary case, applying duress to D requires that he disown a greater part of his life and his identity than he should be expected to do. Second, the refusal to treat D's predicament as a case of duress is undeniably harsh. My account of this harsh result, however, reminds us of one of the deeper horrors of social and economic deprivation: that such deprivation is not just a highly undesirable situation for people to be in, but also participates, as other social circumstances do, in the very constitution of their selves.

C. Official Duty and Role Distance

Almost everyone would agree that an executioner (to take a dramatic example of official duty) is not guilty of murder. The conventional account of this conclusion, however, is not altogether satisfac-

tory. The executioner's defense to a charge of murder conventionally is seen as a matter of justification. The defense is no different in principle from that of self-defense; in both cases, what would otherwise be criminal behavior is justified because, under the circumstances, it comports with overriding social norms.⁸³ This explanation seems unexceptionable as far as it goes, but it does not go far enough. Classifying official duty as a case of justification fails to capture an important difference between the executioner and the killer in self-defense.

By interposing a justification defense, the self-defender concedes his responsibility for the killing. It is precisely because of this responsibility that the self-defender must demonstrate that the killing was justified. This position is not the only one open to the executioner, however. She may deny being a killer, even if a justified one. The executioner may instead attempt to avoid any personal responsibility for the killing altogether.⁸⁴

The idea of social role serves as her vehicle toward this goal. This phenomenon can be understood as the reverse of my account of collective responsibility.⁸⁵ I have described how by embracing a role, identifying with it, and enacting it transparently, I can become subject-responsible for it and through it become object-responsible for other people's actions and their consequences. The case of official duty marks the opposite movement: rather than being a responsibility base, the social role is now used as a buffer against responsibility.

This movement is well captured by the concept of *role distance* that we encountered earlier:⁸⁶ the self can assume a detached and instrumental attitude toward a particular role and can play it in a self-conscious and alienated fashion. Central to the interpretation of the official-duty defense is the experience of impersonality that we commonly associate with carrying out such a duty. The official's comportment and attitude toward the objects of her duty can be colloquially transcribed as saying: "I have nothing personal against you." This message is reinforced by the formal insignia of the official role, such as the uniform or the judicial robe. These trappings convey the message of impersonality not only to the objects of the official role, but also to its subjects.

My interpretation of the executioner's defense as a denial of subject-responsibility is corroborated by the following hypothetical. Sup-

⁸³ Blackstone, for example, lists the execution of condemned criminals as the first item in his discussion of justified homicide; self-defense appears later in that discussion. See 4 WILLIAM BLACKSTONE, COMMENTARIES *178.

⁸⁴ She does not, of course, deny her equal share of the *collective* responsibility for the execution.

⁸⁵ See *supra* pp. 985-89.

⁸⁶ See *supra* p. 967.

pose that the executioner fails to show up for the execution because of a bout of moral qualms or a common cold. The execution is postponed, but on the following night the executioner, now fully recovered, breaks into jail and kills the convict. The executioner is clearly guilty of murder, and not merely of a disciplinary offense of spoiling the official ceremony and disrupting orderly procedures. Viewing official duty as a justification does not fully account for this dramatic shift in the legal understanding of the executioner's action. The belated killing of the prisoner is no less justified than his scheduled execution would have been the day before. The killing, however, has to be carried out by an official and in her capacity as such.

To be sure, not all public officials maintain role distance in the ways that I have intimated. But the law is unfazed by such variation. By recognizing official duty as barring responsibility, the law codifies a specific conception of the self, regardless of whether this conception applies in each particular case. In doing so, the law is offering its servants a version of the Faustian bargain. This version may not seem more attractive or wholesome than the original one, but it may nonetheless be the lesser of inevitable evils. Detachment may be the self's preferred strategy for dealing with "dirty hands" types of situations, in which social norms call for the performance of horrifying or otherwise repugnant tasks.⁸⁷

V. DILEMMAS OF LEGAL RESPONSIBILITY

I have thus far treated law as part of the larger social arena in which the self's boundaries are constantly negotiated. I conclude by speculating about how some distinctive features of the legal context might bear on the relationship between self and responsibility that I have depicted and how they create a serious dilemma, perhaps even a paradox, of legal responsibility.

We may begin by observing that we commonly expect the law to comport with our ordinary notions of responsibility. The law is expected to reinforce people's sense of responsibility by making an explicit public pronouncement regarding a certain instance of responsibility and by dramatizing its significance through severe sanctions. The legal recognition of my authorship of a certain object or event is supposed to strengthen my identification with the appropriate responsibility base.

Legal support for ordinary notions of responsibility may backfire, however. While trying to reinforce our sense of responsibility, the law

⁸⁷ On the notion of "dirty hands," see THOMAS NAGEL, *Ruthlessness in Public Life*, in MORTAL QUESTIONS, *supra* note 42, at 75; BERNARD WILLIAMS, *Politics and Moral Character*, in MORAL LUCK, *supra* note 42, at 54; Michael Walzer, *Political Action: The Problem of Dirty Hands*, in WAR AND MORAL RESPONSIBILITY 62 (M. Cohen, T. Nagel & T. Scanlon eds., 1974).

may in fact weaken it. The drastic consequences commonly attached to legal responsibility provide a potent incentive to recoil from responsibility. We have already seen that one of the strategies for avoiding responsibility — and sometimes the only viable one — is to deny subject-responsibility by repudiating that aspect of the self that is the basis for the ascription of legal responsibility. For example, when my car hits and injures a pedestrian, I am so mortified by the drastic legal ramifications (in addition to my horror at the sight of the harm I have wrought) that I immediately and instinctively try to convert my intoxication from a responsibility base (as in *in vino veritas*) to an excuse: due to my unusual state, it was not really me who hit the pedestrian. I am not the author of the event. Such avoidance of responsibility can also take a more general form. If we learn that the law applies some of its most draconian measures to the operations of our free will, we may respond by progressively contracting the latter's domain. We may increasingly describe actions in a deterministic vocabulary designed to place them at the periphery of the self or even completely outside its boundaries.

A second, perhaps simpler, way that legal responsibility may lead to minimalist forms of self-constitution is to deter people from participating in the forms of life that give rise to those responsibilities. Of course, this result is sometimes the explicit goal of legal sanctions; the law tries to dissuade people from becoming murderers or arsonists. In other cases, however, a similar result may be unintended and unwelcome. If the mishaps associated with driving, performing surgery, or running a corporation carry with them severe legal repercussions, I may decide to give up driving, to stop practicing medicine, and to stay away from the boardroom. Such a decision can be personally rational and even socially desirable. Still, by avoiding responsibility bases they might otherwise occupy, individuals draw the boundaries of their selves more narrowly than they otherwise would have done.

Because of the severity of its coercive measures, the law is frequently reluctant to impose liability even when non-legal responsibility obtains. The law's reticence can assume two different forms: it can take a narrow view of object-responsibility by denying (or ignoring) authorship when it generally would be thought to exist, or it can adopt a minimalist approach to subject-responsibility that recognizes only narrowly drawn responsibility bases. An example of the former strategy is the Anglo-American approach to the Good Samaritan issue. Many people would be astonished to learn that the person who deliberately refrains from pulling the drowning child out of the pond is not legally responsible for the child's death.⁸⁸

⁸⁸ See generally LAFAVE & SCOTT, *supra* note 53, § 3.3, at 211-12 (discussing the duty to rescue in Anglo-American law).

Criminal law provides a large-scale example of the second way in which the law tends to hedge its drastic measures by insisting on a narrowly delineated responsibility base. The core of criminal law doctrine, centered around the concept of *mens rea* and the variety of criminal excuses, probably comes closer than any other set of social practices to an instantiation of the Kantian conception of the responsible human subject as the noumenal self, characterized exclusively by a rational free will unencumbered by character, temperament, and circumstance.⁸⁹ Criminal law's preoccupation with rationality and free choice, no matter how compromised these concepts are in theory and how diluted in practice, represents a remarkably narrow view of the constituents through which individuals become the responsible authors of objects and events.

Highlighting this narrowness, however, is not a criticism of criminal law. Such a criticism would require, among other things, an examination of the goals of criminal punishment, which is not my present aim. Moreover, given the consequences of criminal responsibility — brutally coercive measures — a narrowly drawn responsibility base is hardly distressing. My point is rather that by establishing and enacting a socially salient set of practices that embody a narrow responsibility base, the criminal law helps inculcate a conception of the human subject commensurate with such a minimalist responsibility base.

The dilemma of legal responsibility should now be clear. When the law attempts to support our ordinary sense of responsibility, it provides us with a potent incentive to flee it. On the other hand, when legal responsibility is narrowly circumscribed, it codifies and presents us with a shrivelled public image of our selves. In either case, the law poses the danger of constricting responsibility and hence of shrinking the self.

Finally, why is the contraction of responsibility and the shrinking of the self a danger to be avoided? An attempt to answer this question would take us too far afield. Moreover, some may even doubt the premise upon which this question proceeds. In stormy waters, they may point out, the temptation is great, and often justified, to dump some cargo to save the ship. We may nonetheless get an intimation of a possible answer to our question if, staying with the same metaphor, we observe that in the case of the self, there is no ship-and-cargo; it is *all* ship, or perhaps all cargo. If we dump too much, the voyage may indeed become easier, but it may hardly be worth making.

⁸⁹ For a Kantian interpretation of criminal law's primary doctrines, see David Richards, *Human Rights and the Moral Foundations of Substantive Criminal Law*, 13 GA. L. REV. 1395 (1979).