Thoroughly Modern: Sir James Fitzjames Stephen on Criminal Responsibility

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Sir James Fitzjames Stephen was a judge and a leading historian and scholar of English criminal law in the second half of the Nineteenth Century. He was especially interested in and wrote extensively about questions of criminal responsibility that still trouble us, such as the foundation of responsibility, the nature of voluntary action, and the proper test for legal insanity. This essay considers his views on these issues and argues that virtually all the positions he took then were right for the right reasons. Sir James Fitzjames Stephen's work is more than a century old, but, on issues of criminal responsibility, he was thoroughly modern.

Sir James Fitzjames Stephen was an eminent Victorian, a distinguished jurist, colonial legal administrator, journalist, public intellectual, political pamphleteer and philosopher, and the most important Nineteenth Century English historian of the criminal law and criminal law treatise writer. I was first introduced to Fitzjames's[1] writing on criminal punishment by Sandy Kadish's influential casebook, *Criminal Law and Its Processes*, which I have been using for over three decades with undiminished enthusiasm.[2] In this issue paying tribute to Sandy, I acknowledge yet another intellectual debt by addressing Fitzjames's views on

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[1] Henceforth, I shall refer to James Fitzjames Stephen as "Fitzjames" to distinguish him from his father, Sir James Stephen, an eminent colonial administrator and historian, and from his younger brother, Sir Leslie Stephen, a distinguished literary figure who wrote the first biography of his brother (in fact a hagiography) and was also Virginia Woolf's father. *See* LESLIE STEPHEN, THE LIFE OF SIR JAMES FITZJAMES STEPHEN (2d ed. 1895). *See generally* K.J.M. SMITH, JAMES FITZJAMES STEPHEN: PORTRAIT OF A VICTORIAN RATIONALIST (1988) (excellent, objective, modern biography).

[2] Sandy Kadish confirms that Fitzjames first appeared in the second edition in 1969, and that the Fitzjames excerpt was his contribution (personal communication on file with the author).

criminal responsibility, an issue that also animated Sandy's scholarship.[3] About this issue, Fitzjames wrote especially pithily and well. My basic thesis may be simply stated: Fitzjames presciently understood and almost always correctly resolved the debates about criminal responsibility that still bedevil us. On this issue, he was thoroughly modern.

I begin by diagnosing what I consider the three general recurrent pathologies of modern responsibility analysis, and offer what I think were Fitzjames's answers then and what should be the answers today. Then I turn to his account of the underlying source of responsibility practices and his theory of punishment, demonstrating once again that he was prescient and modern. Finally, I address a number of specific, fraught responsibility topics, arguing yet again that Fitzjames was right then and now. I am not suggesting that all of Fitzjames's arguments were sound or that I agree with all of them, but on most of the important issues he was right most of the time.

I. INTERNAL/EXTERNAL DISTINCTION

Before turning to the heart of the essay, it is important to begin with a distinction between internal and external critiques of an institution, including its doctrines, such as the criminal law. An internalist assumes that the institution can be normatively justified and tries to provide both the best positive and the best normative account of the institution. Internal criticism and suggestions for reform are justifiable; wholesale rejection of the institution is not. In contrast, an externalist questions whether the institution can be justified at all. I interpret Fitzjames as a pure internalist. There is no question that he accepts the general validity of the rules and institutions of criminal law. His *General View*[4] and his *History*[5] attempt to provide the best positive account of the criminal law as he finds it, and the *History* especially also engages in extensive critique and suggestions for reform.

II. THE GENERAL PATHOLOGIES

Now, let us turn to the three general pathologies of modern responsibility analysis: The Determinist Devil, The Medicalization of Morals, and The Illusion of Conscious Will. What they all have in common is the attempt to deprive people of moral agency and potential responsibility and thereby to deprive them of their

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[3] *See, e.g.*, SANFORD H. KADISH, BLAME AND PUNISHMENT: ESSAYS IN CRIMINAL LAW 63–201 (1987) (addressing excuse, justification, and complicity).

[4] JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW (2d ed. 1890). Although there appears to be broad agreement that the second edition is inferior to the 1863 first edition, the second edition is Fitzjames's "last word."

[5] SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) (three volumes) [hereinafter HISTORY].

dignity as autonomous agents who may fairly be said to deserve praise and blame, reward and punishment.

A. *The Determinist Devil*

By the Determinist Devil, I am referring to the congeries of familiar arguments that suggest that if determinism is true—whether the determinism is biological, psychological, sociological, astrological, or some combination of the above—free will and responsibility are impossible.[6] In current debates, the arguments come in two forms: robust incompatibilism and weaker selective determinism, sometimes called the causal theory of excuse. The former, robust incompatibilism, is an external critique. It claims that genuine or ultimate responsibility is impossible *tout court*, so that any regime of criminal law that takes moral blame and punishment and desert seriously based on responsibility ascriptions is incoherent and unjustifiable.[7] The causal theory of excuse claims that once we identify a cause for particular behavior, especially an allegedly abnormal cause, then people are not responsible for that behavior.[8] It claims to be an internal critique, but, properly understood, it reduces to an external critique. Fitzjames would have had none of this.

Although robust incompatibilism is a coherent theory, Fitzjames fully understood that "free will," whatever that means, is irrelevant to criminal responsibility. He makes this clear both in the *History*[9] and in his first *Cornhill Magazine* article, which addresses whether a science of history is possible.[10] Simply put, "free will" has never been an element of prima facie criminal liability or of any potential affirmative defense.[11] Stephen thus presaged Sir P.F. Strawson's immensely influential article, *Freedom and Resentment*, in which

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[6] Philosophers sometimes talk about free will as metaphysical libertarian freedom or contra-causal freedom, the ability of an agent to act uncaused by anything other than himself. *See* ROBERT KANE, A CONTEMPORARY INTRODUCTION TO FREE WILL 32–34 (2005). If causal determinism or something like it is the best explanation of the entire physical universe, then of course we do not have this type of freedom. The question is whether this type of freedom is necessary for responsibility. As the text *infra* explains, Fitzjames implicitly did not think it was, and it is certainly not necessary for our positive conception of responsibility in criminal law.

[7] *See, e.g.*, Galen Strawson, *Consciousness, Free Will, and the Unimportance of Determinism*, 32 INQUIRY 3 (1989).

[8] *See, e.g.*, Anders Kaye, *Resurrecting the Causal Theory of the Excuses*, 83 NEB. L. REV. 1116 (2005). For reasons discussed in the text *infra*, this theory is incoherent because, as an internal critique, it rests on a logical error.

[9] 2 HISTORY, *supra* note 5, at 96, 100–05.

[10] Sir James Fitzjames Stephen, *The Study of History*, 3 CORNHILL MAG. 666 (1861) [hereinafter *Study of History I*] (distinguishing the laws of nature from the laws made by persons and arguing that freedom is not negated by causation or regularity).

[11] I have recently made the same argument in detail. *See* Stephen J. Morse, *The Non-Problem of Free Will in Forensic Psychiatry and Psychology*, 25 BEHAV. SCI. & L. 203 (2007).

Strawson argued that the truth of determinism plays no role in our responsibility practices generally.[12]

The causal theory of excuse, argued for by many today, is intellectually incoherent. I term this theory "the fundamental psycholegal error."[13] If the universe we inhabit is best understood by causal laws that explain all the moving and stationary parts, then all behavior, criminal or otherwise, is explained by the full set of causal conditions that account for it. There is no such thing as partial causation or partial determinism, although it is certainly true that we often have only partial causal knowledge of various phenomena, including criminal behavior. Most often, those arguing for the causal theory are simply advocates for excusing one type of defendant or another. For example, those who try to create an excuse for each new mental syndrome allegedly identified are guilty of such confused question-begging. If causation is the criterion for excuse, then no one is responsible for anything and this argument reduces to robust incompatibilism. In sum, even if people wrongly continue to believe that the causal theory can be distinguished from robust incompatibilism, the causal theory cannot explain our rules and practices any better than robust incompatibilism.

Fitzjames understood this. In the *History*, he notes that "the grossest ignorance, the most wretched education, [and] the most constant involuntary association with criminals"—all of which he concedes might causally explain crime—are not excuses.[14] The background causal variables that have produced criminal behavior are not part of the criteria for prima facie liability or for an affirmative defense.

The only causal explanation the criminal law requires is causation by practical reason, the ability to act intentionally for reasons. Other forms of causal explanation may explain why an agent has the desires and beliefs that motivate the agent's intentions, but the final pathway to legal responsibility is practical reason, not the prior, background causally explanatory account.

In contrast to the incompatibilist position, Fitzjames fully accepted the justifiability of deserved blame and punishment. I therefore interpret him as a metaphysical compatibilist, which is today probably the dominant position among those who consider the "free will" debate. Although Fitzjames was not averse to general theorizing about the criminal law, including about freedom of the will, he was not a metaphysician. As a product of his age, Fitzjames may have believed that human beings possess contra-causal freedom, the ability to originate action uncaused by anything but ourselves. Nonetheless, his arguments about free action in *The Cornhill Magazine* articles[15] and in the *History* are argued precisely as a

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[12] Peter Strawson, *Freedom and Resentment*, *in* FREE WILL 59 (Gary Watson ed., 1982). *See generally* R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS (1994) (providing a contemporary and more fully developed "Strawsonian" reactive account of responsibility).

[13] Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1592–94 (1994).

[14] 2 HISTORY, *supra* note 5, at 177.

[15] *Study of History I*, *supra* note 10; Sir James Fitzjames Stephen, *The Study of History II*, 4

modern compatibilist—a person who claims that determinism and moral and legal responsibility are compatible with each other—would argue about "ordinary responsibility." Responsibility is a human construction: Fitzjames says repeatedly that responsibility is a legal question, not a metaphysical question.[16]

Fitzjames claimed that as long as an agent acts consciously, voluntarily, rationally, and in the absence of compulsion, the agent can be responsible. It is clear as a factual matter that some offenders do meet Fitzjames's and modern criteria for voluntariness, rationality and absence of compulsion, and for the lack of action, lack of rational capacity, and compulsion. That is, most offenders in fact meet the positive criteria for criminal responsibility and some do not. All these criteria are consistent with causation or determinism, and they are all that is required for compatibilist responsibility or its lack. Indeed, causation and predictability are markers of free action, rather than the reverse. There is no hint that contra-causal power, metaphysical libertarian freedom, is a criterion of or foundational for responsibility. And I would like to think that although Fitzjames was skeptical about the discovery of scientific laws for human behavior, he was committed to reason. If he had available to him the science and philosophy of today, he would surely reject what P.F. Strawson rightly calls the panicky metaphysics of contra-causal freedom.[17]

The determinism debate will never be resolved, but only compatibilism can explain our commitment to genuine responsibility. Thus, until an incontrovertible argument is provided for why determinism or causation excuses, we have good normative reason to accept the compatibilist view of freedom and responsibility. As Fitzjames's arguments imply, responsibility provides value and dignity in our lives. He took people seriously as persons and moral agents. This is a view of ourselves that we abandon at our peril. The world that we would then inhabit is a dystopia that Fitzjames and I would loathe.

B. *The Medicalization of Morals*

The medicalization of morals is the lamentable view that all criminal (or otherwise morally undesirable) behavior is simply the symptom or sign of a disease.[18] Blame and punishment are, therefore, morally unjustifiable and monstrously cruel responses to "crime," and they are ineffective preventive and remedial measures. The implication is that society should jettison rules and institutions premised on moral responsibility and should turn the crime problem

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CORNHILL MAG. 25, 40–41 (1861).

[16] *E.g.*, 2 HISTORY, *supra* note 5, at 183 ("The question, 'What are the mental elements of responsibility?' is, and must be, a legal question. It cannot be anything else . . . .").

[17] Strawson, *supra* note 12, at 80.

[18] *See generally* PETER CONRAD & JOSEPH W. SCHNEIDER, DEVIANCE AND MEDICALIZATION (Expanded ed., Temple Univ. Press 1992) (1980) (providing a general historical and conceptual overview and specific case studies).

over to the doctors for the therapeutic, technological fix. Medical authorities argued this in Fitzjames's day. In modern times, this position was famously taken in England by Lady Wootton[19] and in the United States by the late, eminent psychiatrist, Dr. Karl Menninger.[20] In more recent times, the argument has gained impetus from new neuroscientific discoveries concerning the causes of crime. People who make this claim usually implicitly base it on an incompatibilist metaphysics.[21]

Once again, Fitzjames would have none of this. And, once again, he was right. Most medicalization proponents simply do not understand the criteria for responsibility. Biological or any other kind of determinism or causation, including causation by abnormal biological variables, is not per se an excusing condition. If a biological cause produces a mechanism, such as a reflex movement that causes harm, the agent has not acted at all and is not responsible. But if an agent acts, responsibility analysis is possible no matter how the action was caused. For example, simply because certain allegedly deviant actions, such as seeking and using controlled substances, may plausibly be considered signs of the disease of drug addiction, does not mean that the action cannot be morally evaluated and must necessarily be excused.[22] Action can always be independently morally evaluated, whether or not it is a product of a disorder. Thus, the medicalizers wrongly believe that they have effectively sidestepped the question of moral evaluation for actions.

Fitzjames's account of responsibility leads him firmly to resist the lure of medicalization. He says in the *History* that lawyers are right to be suspicious of claims that "crime is of the nature of disease, and that the very existence of criminal law is a relic of barbarism."[23] He writes further, "[r]eluctance to punish when punishment is needed seems to be to me not benevolence but cowardice, and I think that the proper attitude of mind towards criminals is not long-suffering charity but open enmity . . . ."[24]

Although Fitzjames seems to make this argument based on consequential concerns for deterrence and incapacitation, as I shall suggest below, he is also implicitly committed to retributive desert. He believes that we are right to hate responsible criminals because they deserve our enmity for violating criminal prohibitions, for unjustifiably violating the rights of fellow members of society.

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[19] BARBARA WOOTTON, CRIME AND THE CRIMINAL LAW: REFLECTIONS OF A MAGISTRATE AND A SOCIAL SCIENTIST (1963); BARBARA WOOTTON, SOCIAL SCIENCE AND SOCIAL PATHOLOGY (1959).

[20] KARL MENNINGER, THE CRIME OF PUNISHMENT (1968).

[21] *E.g.*, Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y: BIOLOGICAL SCI. 1775 (2004).

[22] *See* Stephen J. Morse, *Addiction, Genetics and Criminal Responsibility*, 69 LAW & CONTEMP. PROBS. 165 (2006); Stephen J. Morse, *Voluntary Control of Behavior and Responsibility*, 7 AM. J. BIOETHICS 12 (2007).

[23] 2 HISTORY, *supra* note 5, at 126.

[24] *Id.* at 179.

The sentiment is expressed more harshly than modern sensibilities prefer, but the underlying suggestion that we are justified in resenting wrongdoers is sound.

Here, Fitzjames is once again anticipating later critics of medicalization and the therapeutic state. For example, in an impassioned and important article, C.S. Lewis argued that medicalizing criminal and other deviant behavior dehumanizes and demeans those it allegedly means to help.[25] More recently, H.L.A. Hart in his critique of Lady Wootton,[26] and Michael Moore in his critique of paternalistic reform as a justification for punishment,[27] have both echoed Fitzjames's earlier rejection of medicalization and for many of the same reasons. Once again, treating people as potentially responsible moral agents, rather than simply as potentially dangerous mechanisms, is crucial to the value and dignity of our lives.

Finally, to the extent that the medicalization view is just a variant of robust incompatibilism, Fitzjames would rightly reject it for the reasons earlier discussed.

C. *The Illusion of Conscious Will*

I borrow the phrase "the illusion of conscious will" from the title of a recent book by an eminent psychologist, Daniel Wegner.[28] Using various forms of scientific evidence, it is a claim that attacks the very model of personhood that the law implicitly adopts. In extreme form, it proposes that most of us, most of the time, are in automatic states when we apparently are acting as intentional, self-directing agents. In other words, our mental states play no causal role in our behavior and are simply post hoc rationalizations for what our brains have already mechanistically produced. In less extreme form, the claim is that automaton-like behavior is allegedly far more common than we believe. In short, it is allegedly scientifically naive or misguided to believe that most human beings most of the waking time are conscious, intentional and potentially rational. Any rules or practices based on conscious intentionality and rationality, such as moral blame and deserved punishment, are therefore equally misguided. Once again, this is an external critique of moral blame and punishment and it is often associated with highly reductionist theories concerning the relation of mind and brain.

To the best of my knowledge, this particular modern claim was not advanced in Fitzjames's time and he makes no counter-arguments to it. Nonetheless, he would have had none of it as a matter of positive law. And he would be right to reject it theoretically and normatively if it were advanced. Fitzjames recognized that the law's view of the person is a being capable of practical reason, a being capable consciously and rationally to act for reasons—to form intentions arising from the agent's desires and beliefs. He understood that law could guide action only if it operated through the practical reason of the agent. That is, law can

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[25] C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224 (1953).

[26] H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 193–209 (1968).

[27] MICHAEL MOORE, PLACING BLAME 85–87 (1997).

[28] DANIEL M. WEGNER, THE ILLUSION OF CONSCIOUS WILL (2002).

potentially guide action only if it provides reasons to behave one way or another. In the first *Cornhill* article, Fitzjames wrote, "[R]eason on the part both of the governor and the governed is essential to the very notion of law . . . ."[29] Law is not effectively addressed to automatons, and it would be unfair to blame and punish automatons if they are not properly guidable and guided. To the best of our knowledge, only humans are fully capable of acting for reasons and can be guided by rules. That is why there is no chimp legislature, no dolphin judiciary, and no avian Ms. Manners. Fitzjames implicitly accepted what is known as the "folk psychological" theory of mind and action, the theory that our intentional actions can be explained by our desires and beliefs. This is still the law's implicit theory and the theory we all use everyday to understand ourselves and others.

But what would Fitzjames have made of the modern claim that conscious will is an illusion? As a thinker committed to reason, common sense and the normative desirability of treating people as autonomous agents rather than as automatons, he would have been open-minded but skeptical of the evidence and of its implications. His common sense, based on ordinary observation, would surely have caused him to argue that proponents of the illusion theory should bear the burden of persuasion to convince the public and lawmakers that our very view of ourselves as conscious, intentional agents who can be guided by reasons is radically wrong.

I very much doubt that Fitzjames would have been convinced, but perhaps I am special pleading because at present I am unconvinced on empirical and conceptual grounds.[30] For example, lack of knowledge of all the causes of one's actions does not mean that one does not act fully consciously, intentionally and rationally. Who could ever be aware of all the causes of one's actions? Indeed, even if one were entirely unaware of the causes for one's action, this is not inconsistent with performing that action consciously and intentionally. Further, one should not generalize too much from the pathological examples often used to support these claims. Finally, demonstrations that brain activity may precede the conscious awareness of some types of intention to act are hardly surprising and, anyway, do not indicate we are automatons. Even if these laboratory findings were generalizable to all types of intentions and actions, including those when important interests were at stake, where else would intentions begin if not in brain activity? The argument and evidence upon which the illusion of conscious will claim rests are either conceptually confused or empirically unprepossessing as support for the

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[29] *Study of History I*, *supra* note 10, at 668. His claim is echoed by modern jurisprudence. *See, e.g.*, Scott J. Shapiro, *Law, Morality and the Guidance of Conduct*, 6 LEGAL THEORY 127, 131 (2000).

[30] Stephen J. Morse, *Determinism and the Death of Folk Psychology: Two Challenges to Responsibility from Neuroscience*, 9 MINN. J. L. SCI. & TECH. (forthcoming 2008); Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J.L. & PUB. POL'Y 51 (2003). New scientific evidence could conceivably convince me that personhood is an illusion, but it is hard at present to envision what type of study could be so persuasive.

claim that we are automatons. As the great philosopher of mind, Jerry Fodor writes:

> [I]f commonsense intentional psychology really were to collapse, that would be, beyond comparison, the greatest intellectual catastrophe in the history of our species; if we're that wrong about the mind, then that's the wrongest we've ever been about anything. The collapse of the supernatural, for example, didn't compare . . . . Nothing except, perhaps, our commonsense physics . . . comes as near our cognitive core as intentional explanation does. We'll be in deep, deep trouble if we have to give it up . . . . But be of good cheer; everything is going to be all right.[31]

I believe Fitzjames would heartily agree. Until we solve the mind-brain problem—which will revolutionize our sense of biological possibility and our sense of ourselves—we may with justified conviction retain our view of ourselves as practical reasoners and moral agents.

III. THE UNDERLYING SOURCE OF RESPONSIBILITY AND THE THEORY OF PUNISHMENT

Now let me turn to Fitzjames's account of the underlying source of our responsibility practices and his theory of punishment.

In the first *Cornhill* article, Stephen finally asks why we blame and punish at all. His answer is that "human nature" is constituted so.[32] Fitzjames claims that we are constituted to have what Strawson referred to as the "reactive emotions,"[33] the emotions we are predisposed to feel when another person breaches or complies with a normative obligation, such as a rule of morality or law. Fitzjames recognized that what justifies having these emotions could vary temporally and geographically, but claimed that all human beings have them and that all human societies will create "responsibility" practices based on them.[34] Interestingly, in a later lecture, Strawson, too, thought that such emotions were part of our nature.[35]

In adopting this implicit naturalistic theory, Fitzjames thus presaged one of the dominant Anglo-American compatibilist accounts of responsibility of the last half of the Twentieth Century—an account based on the place of the reactive emotions in our moral life. The reactive emotion theory of responsibility is concerned with whether we are justified in having a particular emotional reaction when an agent has breached or complied with a normative obligation. To hold

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[31] JERRY FODOR, PSYCHOSEMANTICS xii (1987).

[32] *Study of History I*, *supra* note 10, at 678.

[33] *See* Strawson, *supra* note 12, at 62–67.

[34] *Study of History I*, *supra* note 10, at 678.

[35] P.F. STRAWSON, SKEPTICISM AND NATURALISM: SOME VARIETIES 32–34 (1985).

someone responsible is justifiably to feel and to express an appropriate reactive emotion. For example, we hold people responsible for a breach if we are justified in feeling and expressing emotions such as anger, indignation and resentment.

Social constructivists might object to this account of essential human nature, but recent empirical evidence supports the claim that we are predisposed to be retributivists and that the social emotions generally are part of our innate repertoires.[36] This does not suggest, of course, that we should act on these predispositions because, it is commonly held, we cannot derive a normative *ought* from an empirical *is*. Nor does it mean that we cannot try to rise above our innate predispositions if they lead to morally and socially undesirable practices.[37] But desert-based claims about blame and punishment fare no worse than deontological desert claims in other contexts that are a regular feature of our moral and legal landscape. Indeed, the notion of desert is intimately related to value and dignity. Fitzjames appears to be on firm ground both empirically and normatively.

It is commonplace knowledge that Fitzjames was a consequentialist theorist about the criminal law. The *History* and *General View* are replete with arguments in favor of rules that would maximize deterrence by giving potential miscreants good reason to refrain from violating the law. But, I claim, Fitzjames was a mixed theorist, who refined his consequentialism with retributive concerns. For example, in his discussion of the insanity defense he argues that people who really cannot control themselves are not "morally blamable," and to punish them would be to put the law out of harmony with morals.[38] Fitzjames believes that people deserve praise and blame for conduct.[39] Once again, Fitzjames is terribly modern. A mixed theory of punishment, which awkwardly and uncomfortably amalgamates consequentialism and retributivism, is the regnant orthodoxy today. There are a few pure retributivists, but almost no one is a pure consequentialist. Indeed, the criminal law we have cannot be explained fully consequentially or fully retributively.

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[36] *See* Ernest Fehr & Simon Gachter, *Altruistic Punishment in Humans*, 415 NATURE 137 (2002). More recent, consistent evidence suggests that, at least in men (who do most of the punishing for free riding), empathic responses are shaped positively by fair treatment by others and negatively by unfair treatment. Tania Singer et al., *Empathic Neural Responses Are Modulated by the Perceived Fairness of Others*, 439 NATURE 466 (2006). Other cooperative primates exhibit behavior best interpreted as expressing resentment when they perceive that they are treated undeservedly unequally. *See* Sarah F. Brosnan & Frans B. M. de Waal, *Monkeys Reject Unequal Pay*, 425 NATURE 297 (2003).

[37] Later commentators have differed about a seemingly naturalized account of the reactive emotions theory of responsibility. *Compare* GEORGE SHER, IN PRAISE OF BLAME 1 (2005) (criticizing Strawson), *with* Andrew Oldenquist, *An Explanation of Retribution*, 85 J. PHIL. 464 (1988) (arguing for a naturalized account of retribution).

[38] 2 HISTORY, *supra* note 5, at 172.

[39] *Study of History I*, *supra* note 10, at 672.

IV. SPECIFIC RESPONSIBILITY ISSUES

Fitzjames's model of the responsible agent is one who acts voluntarily, consciously, and rationally ("knowingly" is his preferred way of putting this), and without compulsion. In the course of explaining that model, he makes many illuminating and still relevant arguments. Too many current scholars and lawyers continue to make the conceptual errors that Fitzjames clarified so persuasively. I shall address his views about the meaning of voluntariness and compulsion, the insanity defense, needed reforms of the doctrines pertaining to mental abnormality and criminal responsibility (e.g., the need for a control test for legal insanity), a new verdict of partially responsibility, and the potential need to excuse psychopaths.

A. *Voluntary Action and Compulsion*

By "voluntary" action, which was and is a prerequisite for responsibility, Fitzjames meant nothing more than an intentional bodily movement performed by a conscious agent.[40] Thus, an agent whose body moves purely as a result of mechanism, say, a reflex or a spasm produced by a neurological abnormality, has not acted at all and cannot be punished if the movement caused harm. This was entirely uncontroversial then and is so today.

Fitzjames also thought that if the agent committed a harm while suffering from an altered state of consciousness, such as sleepwalking, this too negated action.[41] This claim is more controversial today and, I should add, it is not the type of claim that science is likely to solve. It is conceptual and normative. Everyone agrees that an agent who suffered from substantially altered states of consciousness at the time of the crime should not be held responsible, but two theories are possible: first, the agent did not act; second, the agent *did* act, but should be excused because substantially divided consciousness compromises the agent's rationality, and rationality is the touchstone of responsibility. Current positive law is consistent with Fitzjames's position, but there is some authority to the contrary and many philosophers believe that the second theory is more coherent and consistent with the facts.

The opposite of voluntary action, as Fitzjames understood and many still do not, is involuntary action and not compulsion.[42] For Fitzjames, compulsion arises when an agent is presented with a choice of evils, a very hard, do-it-or-else choice, in which he or she can avoid great pain only by violating the criminal law. The opposite of compulsion is freedom. A voluntary actor acts freely just in case he or she acts in the absence of compulsion.[43] Fitzjames also recognized that

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[40] 2 HISTORY, *supra* note 5, at 99–101.

[41] *Id.* at 100.

[42] *Id*. at 101–02.

[43] *Id*. at 101–03.

compulsion does not arise just because an agent is caused by something to act as he does. Indeed, the causal regularity of the world contributes to our freedom by making informed, rational action more possible.[44] Causation is not the equivalent of compulsion.

Fitzjames also understood that compulsion is not based on the agent's feeling of psychological pressure, which is a confusion about the doctrine that persists in many quarters. He comprehended that compulsion is a thoroughly normative claim about when a choice is too hard to expect the agent to comply with the law. This is entirely consistent with current doctrine, which is, however, somewhat more forgiving than Fitzjames's view.

As might be predicted, Fitzjames expected the criminal law to give people the strongest reason to comply when temptation was at its height.[45] Thus, he argued that a defense of compulsion should not be available, but it could be taken into account at sentencing.[46] Here I think Fitzjames was not entirely fair. If some circumstances sufficiently reduce responsibility to justify considering them at sentencing, in all fairness, should not the law make a doctrinal mitigation or excuse available, rather than leaving the matter entirely to the sentencing judge's discretion?

B. *Legal Insanity*

Fitzjames repeatedly says, and he was right then and he is still right, that whether insanity should excuse and the criteria for the excuse are legal questions.[47] They are decidedly not scientific questions. Fitzjames did not commit the naturalistic fallacy. He was entirely and properly receptive to medical and other experts providing information that might help the law make normative judgments, but no normative judgments were logically entailed by that information. Many forensic mental health experts still do not fully grasp the distinction, claiming, say, that various forms of the insanity defense are scientifically unjustified.

Fitzjames's view of the justification for establishing the excuse of legal insanity is based not on the causal role that mental abnormality may play in criminal conduct, but on how that abnormality affected the agent's practical reasoning at the time of the crime. He understood that crime is not a disease and that all defendants with mental disorder are not legally insane.[48] This view is precisely correct, and is in sharp contrast to those who consistently make the fundamental psycholegal error of thinking that causation per se excuses.

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[44] *Study of History I*, *supra* note 10, at 673–74.

[45] 2 HISTORY, *supra* note 5, at 107.

[46] It is interesting to note, in contrast, that Fitzjames did suggest the need for a "control" test for legal insanity. *See infra* note 54.

[47] 2 HISTORY, *supra* note 5, at 149, 183.

[48] *Id.* at 125–26.

Fitzjames argued that mental abnormality excuses if it prevents rational understanding of what one is doing or the ability to pass rational, calm judgment upon the moral quality of the act.[49] In brief, mental abnormality excuses if it deprives the agent of his capacity for rationality in the context in question. Thus, even if the abnormal agent acted voluntarily and in the absence of compulsion, he or she still might be excused if the agent was irrational. Indeed, passages of his discussion in the *History* are almost identical to the arguments the United States Supreme Court gave concerning diminished rationality that supported its decisions categorically to prohibit capital punishment for murderers who suffered from retardation,[50] or for adolescents who murdered before reaching their eighteenth birthdays.[51]

Fitzjames was once again on firm ground when he argued that the justification for excusing some people with mental abnormalities was cognitive. The question for him was how cognitive criteria should be interpreted and whether they were sufficient. Fitzjames conceded that a very narrow cognitive interpretation of the M'Naghten[52] rules was possible[53]—as indeed is the case in some states—but he argued on moral and consequential grounds for a more expansive view of what knowledge and rationality require. More interestingly, he also argued for a "control" test for legal insanity.[54] As is well known among criminal lawyers, these are precisely the issues that are still being debated as jurisdictions try to decide what criteria to adopt for legal insanity and whether to have an insanity defense at all.

For example, suppose a person kills because she delusionally believes that she needs to save her children from the devil's eternal tortures. She kills the children intentionally and she knows the legal and moral rules, but can she properly be said to know what she is doing? In a narrow sense, of course she knows. But, to use Fitzjames's words, can this person form a rational judgment on the moral quality of the act? Is she capable of calm, sustained thought upon action related to the delusional belief? Can she keep good reason present to her mind? To take another

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[49] *Id.* at 163–64. There is perhaps an inconsistency in Fitzjames's argument. He writes:

> My own opinion . . . is that, if a special Divine order were given to a man to commit murder, I should certainly hang him for it unless I got a special Divine order not to hang him. What the effect of getting such an order would be is a question difficult for any one to answer until he gets it.

Id. at 160 n.1.

It is difficult to imagine that an agent is exercising rational, calm moral judgment if the agent is acting in response to a delusional belief that the agent must obey a "Divine order." Shame on Fitzjames, but it is an amusing, memorable passage.

[50] Atkins v. Virginia, 536 U.S. 304 (2002).

[51] Roper v. Simmons, 543 U.S. 551 (2005).

[52] M'Naghten's Case, (1843) 8 Eng. Rep. 718 (H.L.).

[53] 2 HISTORY, *supra* note 5, at 168 (but doubting that this construction is an accurate interpretation).

[54] *Id.* at 153–86.

example, if John Hinckley tried to assassinate President Reagan motivated by the belief that this act would gain Jodie Foster's attention and perhaps love, did he really know what he was doing? Fitzjames clearly opts for treating such people as lacking the requisite knowledge. He needed to characterize this issue in terms of knowledge because he was committed to the positive law as he found it, and the law spoke in terms of knowledge. Note, however, that the more general question of the capacity for rationality in the context is at issue.[55]

Now let us turn to control tests for legal insanity. One of the alleged reforms of the Model Penal Code insanity test, which was widely adopted legislatively and judicially in the 1960s and 1970s, was its purportedly realistic control or volitional prong: As a result of mental disorder or defect, did the defendant lack substantial capacity to conform his conduct to the requirements of law?[56] This was supposed to be a separate and independent ground for legal insanity, to augment the cognitive prong. But control tests and how they should be understood continue to be fiercely debated. They have been both criticized for asking a question—could the defendant have controlled himself?—that we do not understand conceptually and lack the resources to answer empirically,[57] and applauded for providing a route to justice when severe cognitive difficulties may be absent.[58] In the wake of Hinckley's insanity acquittal, most reform, including the federal Insanity Defense Reform Act,[59] has been to abolish the control tests and to return to a more cognitive test. Would Fitzjames have approved?

Fitzjames argued strenuously that the law should adopt a control test on moral and consequential grounds because insanity could affect the will as much as the intellect, and could deprive people of the ability to prevent themselves from violating the criminal law. Thus, proponents of control tests appear to have a formidable ally. I believe, however, that Fitzjames mistook his own argument, but came very close to the best analysis of why people who suffer from untoward cravings, impulses, or desires have trouble controlling themselves. Here, from *History*, is his explanation of control problems:

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[55] Critics of a rationality-based account of responsibility often claim that proponents have no good theory of rationality, but if ordinary life and the law needed to wait for an uncontroversial, normative account of rationality, successful human interaction would be impossible. An ordinary notion of the sort that all of us use every day to assess ourselves and others is more than sufficient. This notion includes, *inter alia*, the reasonable ability to get the facts right, to weigh and consider one's actions in light of coherent preferences, and the ability to be moved by evidence and logic.

[56] MODEL PENAL CODE § 4.01(1) (1962).

[57] Whatever defects an account of rationality may present, they pale compared to the defects of the notion of "control," about which there is no ordinary understanding or operationalizable variables with which to measure it. *See* Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025 (2002).

[58] *See* United States v. Lyons, 731 F.2d 243 (5th Cir. 1984) (Rubin, J., dissenting).

[59] 18 U.S.C. § 17 (1994).

> No doubt, however, there are cases in which madness interferes with the power of self-control, and so leaves the sufferer at the mercy of any temptation to which he may be exposed; and if this can be shown to be the case, I think the sufferer ought to be excused. The reason for this will appear from considering the nature of self-control . . . . The man who controls himself refers to distant motives and general principles of conduct, and directs his conduct accordingly. The man who does not control himself is guided by the motives which immediately press upon his attention. If this is so, the power of self-control must mean a power to attend to distant motives and general principles of conduct, and to connect them rationally with the particular act under consideration, and a disease of the brain which so weakens the sufferer's powers as to prevent him from attending to or referring to such considerations, or from connecting the general theory with the particular fact, deprives him of the power of self-control.[60]

I contend that this is simply another argument concerning rationality and is not a rationale for an independent control test. Fitzjames is really saying that people cannot control themselves when they cannot keep good reason present to their minds; when they cannot make a calm rational judgment about the moral quality of the act. Fitzjames confirms this himself when he follows the quoted language by asking how a defendant lacking the ability to compare his conduct to more general rules and to appreciate such rules can be said to *know* that what he proposes to do is wrong.

> Can it be said that a person so situated knows that his act is wrong? I think not, for how does any one know that any act is wrong except by comparing it with general rules of conduct which forbid it, and if he is unable to appreciate such rules or to apply them to the particular case, how is he to know that what he proposes to do is wrong?[61]

Although Fitzjames thought he was proposing a control test, I think he correctly explained why some people with disorders of desire should sometimes be excused: at the time of peak craving, they cannot rationally consider their actions.

Not surprisingly, Fitzjames was cautious about the cases for which the purported control test was appropriate. He excluded cases in which the defendant lacking self-control was in that state through his own fault.[62] For example, an out-of-control drunk defendant should be deprived of the excuse because he was responsible for becoming drunk in the first place.

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[60] 2 HISTORY, *supra* note 5, at 170.

[61] *Id.* at 170.

[62] *Id.* at 177.

Fitzjames's approach to this issue tended too much towards accepting strict liability. Getting drunk is not a crime, and if the defendant is not aware of his potential for committing the crime in question when drunk, it is a harsh rule to prevent him from raising a defense.[63] Still, Fitzjames understood the distinction modern philosophers draw between diachronous and synchronous responsibility. One may be in an excusable state at the time of acting—that is, not synchronously responsible—but may nonetheless be held responsible if the agent was previously capable of taking steps to prevent being in this state and had reason to take those steps. For example, the addict or the pedophile, when quiescent, knows of his or her proclivities and must take steps to avoid doing wrong. If they do wrong, we are entitled to punish them because they are diachronously responsible.

C. *Diminished Capacity*

Fitzjames understood that the capacity for rationality is a continuum. The law as he found it, and largely as we find it today, draws a bright line with only two possibilities: guilty and not guilty by reason of insanity. Compromised rationality that does not justify a finding of legal insanity is, with a few exceptions, considered only at sentencing and then as a matter of discretion. In contrast, Fitzjames proposed a generic third verdict, "Guilty, but his power of self-control was diminished by insanity," and suggested that the manner of the punishment to follow this third verdict should be altered to reflect diminished responsibility.[64] No jurisdiction that I know of has adopted such a generic mitigating doctrine applicable to all crimes, but it has been suggested by various recent commentators.[65] Such commentators use language concerning rationality rather than self-control, but Fitzjames anticipated the argument for most of the right reasons.

Moreover, the law already has made a few inroads in the direction Fitzjames proposed. Both the English rule of "diminished responsibility," adopted in 1957, which reduces the gravity of a killing from murder to manslaughter,[66] and the Model Penal Code's "extreme mental or emotional disturbance" rule,[67] which has the same effect, are in principle generic mitigating doctrines based on mental abnormality. Consider the language of the English rule: a killing is treated as manslaughter if the killer suffered "from such abnormality of mind as substantially

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[63] The Supreme Court has approved such a rule, however. *See* Montana v. Egelhoff, 518 U.S. 37 (1996).

[64] 2 HISTORY, *supra* note 5, at 175.

[65] *See* HERBERT FINGARETTE & ANNE HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY 199–261 (1979); Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289 (2003).

[66] Homicide Act, 1957, 5 & 6 Eliz. 2, c. 2, § 2, sched. 1 (Eng.).

[67] MODEL PENAL CODE § 210.3(1)(b) (1962).

impaired the mental responsibility for acts and omissions."[68] The MPC rule treats a killing that would otherwise be murder as manslaughter if the defendant suffered from "extreme mental or emotional disturbance for which there was reasonable explanation or excuse."[69] I contend that there is nothing about the language of either test that suggests that it is necessarily exclusively connected with homicide. Suppose a person commits arson under the influence of an abnormality of mind or of an extreme emotional disturbance. Fitzjames was on the right track and I hope that the law follows.

D. *Psychopathy*

Although Fitzjames made many other instructive, useful, and modern observations and arguments about mental abnormality and the law, let me conclude with his analysis of moral insanity, or what we would today call "psychopathy." This is a condition marked essentially by a lack of capacity for empathy and a lack of conscience.[70] Psychopaths are like morally colorblind people: the interests of other people and morality are colors they do not see. Fitzjames, like many moderns, was ambivalent about such people.[71] Are they mad or just very, very bad? The law then and the law now do not provide an insanity defense or any other defense for such people, but Fitzjames was unwilling to reject an insanity claim outright. He considered it possible that some people with moral insanity might be deprived of the knowledge and self-control required for responsibility. Thus, in some cases the question should be left to the jury. On the other hand, psychopaths do fear punishment, he reasoned, and perhaps that is sufficient reason to hold them responsible.

Fitzjames's analysis is identical to current debates. Almost all philosophers think that psychopaths should be excused because they lack the central rational capacities necessary to behave well—the capacity to understand others' interests and the difference between right and wrong. It is these capacities, and not fear of detection and punishment, that motivates most people to behave well. For what it is worth, I concur. On the other hand, the best moral argument for holding psychopaths responsible is that they understand the rules and fear punishment, and these provide sufficient rational capacity to justify punishment.

Fitzjames was on target yet again. I should add that we are now learning a great deal about the psychological and neurological differences between psychopaths and non-psychopaths. It will be interesting to see how the law responds to this new knowledge. Fitzjames would understand that it must all be filtered through the prism of practical reason if it is to affect the law.

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[68] Homicide Act, *supra* note 66.

[69] MODEL PENAL CODE § 210.3(1)(b) (1962).

[70] JAMES BLAIR ET AL., THE PSYCHOPATH: EMOTION AND THE BRAIN 7–12 (2005); ROBERT D. HARE, WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US 2 (1993).

[71] 2 HISTORY, *supra* note 5, at 184–85.

V. CONCLUSION

Fitzjames understood the dilemmas of criminal responsibility we still face, was startlingly advanced and sophisticated in his views, and virtually always is still instructive to read. He was thoroughly modern, and a paragon of clear-minded common sense. Fitzjames and Sandy Kadish are two of a kind.