

Edited by
Enrique Villanueva

LAW
And the Philosophy of Action

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LAW
And the Philosophy of Action
Social, Political & Legal Philosophy, Volume 3

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Enrique Villanueva



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Presentation

The present volume grew out of the Conference LAW AND THE PHILOSOPHY OF ACTION that took place in the Instituto de Investigaciones Jurídicas of the Universidad Nacional de México in September 2011. I want to thank Dr Héctor Fix-Fierro head of our Institute for his committed support both in the celebration of that Conference, and in the publication of this volume. My gratitude to Ernest Sosa for his kind support in continuing this series in Rodopi.

Law is immersed in the Philosophy of Action and the Philosophy of Action is a fundamental part of The Philosophy of Mind; this in its turn constitutes a central part of the Metaphysics of Persons.

In this volume a number of legal issues are illuminated by resource to the analysis of mental concepts. Issues in Criminal Law, Contract Law, Acceptance of Legal Systems, and the nature of Legal Norms are some of the main issues dealt in the papers that constitute the volume. Conceptual analysis is used and new overtures are made into current findings in the Cognitive Sciences. All of this results in illuminating accounts that throw new light on traditional fundamental legal issues.

This volume is a precursor in the powerful theorizing of the Cognitive Sciences that is being brought to bear in the theory of Law, and that theorizing will increase in the coming years.

Enrique VILLANUEVA
México, January 2014

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Carlos MONTEMAYOR

Compatibilism(s) for Neuroscientists

✦ Michael S. Moore[†]

I. The Challenges to Responsibility Arising out of Neuroscience

Scientific accounts of human behavior like those sought by contemporary neuroscience challenge the idea that we can be responsible and blamable beings. Consider this recent characterization of these challenges as they are thought to emanate from the insights of contemporary neuroscience:

(T)here are scholars and theorists that some have called the “nothing buttists.” Human beings are nothing but neurons, they assert. Once we understand the brain well enough, we will be able to understand behavior. We will see the chains of physical causation that determine actions. We will see that many behaviors like addiction are nothing more than brain diseases. We will see that people don’t really possess free will; their actions are caused by material possesses emerging directly out of

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nature. Neuroscience will replace psychology and other fields as the way to understand action.¹

In earlier work² I have sought to disentangle several separate strands to this enthusiastic rethinking of who we are and whether we are responsible agents.

A. *The deterministic challenge that our choices are caused by factors not within the control of the chooser.* The oldest of these challenges is that stemming from the insight that human choices and actions are as caused as any other natural phenomenon. This is an insight that is hardly unique to neuroscience. Virtually all academic psychologies, be they behaviorist, Freudian, genetic, or whatever, share this same insight. The common skeptical conclusion is that no one can be responsible for any choice or any action because it is unfair to blame anyone for choices or actions caused by factors outside the control of the actor. “Ought implies can,” and on this view, the causation of human choice means one *cannot* choose or do other than he did and so it is unfair to blame him/her.

B. *The challenge that our choices are merely epiphenomenal with our actions and not the causes of those actions.* The epiphenomenal challenge is distinct from the challenges that emanate from determinism.³ The challenge here is to the ability of persons to cause the objects of their willings to exist; it is not the challenge that their wills are caused by factors themselves unwilled. Neuroscience is just the latest science to issue this challenge to responsibility. Behaviorists, Freudians, introspectionists, and other academic psychologies have also long issued such an epiphenomenalist challenge to responsibility.

¹ David Brooks, “Beyond the Brain,” *New York Times*, Op-Ed pages, June 17, 2013.

² Moore, “Responsible Choices, Desert-Based Legal Institutions, and the Challenges of Contemporary Neuroscience,” *Social Philosophy and Policy*, Vol. 29 (2012), pp. 233-279, at pp. 261-272.

³ I seek to defuse the kind of epiphenomenalist challenge to responsibility coming from contemporary neuroscience in Moore, “Libet’s Challenges to Responsible Agency,” in Walter Sinnott-Armstrong and Lynn Nadel, eds., *Conscious Will and Responsibility* (Oxford: Oxford University Press, 2010), pp. 207-234. Note that this epiphenomenalist challenge does not depend on determinism so long as it does not rely on the premise that a person can cause only if that person is uncaused in his causings.

And it is a real challenge. If our willings and others mental states lack causal efficacy, our responsibility for causing harms to others would indeed be seriously threatened.⁴

C. *The challenge assuming the explanatory inferiority of the folk-psychological states on which responsibility depends.* If one particularizes determinism so that the causes of human choices and actions are physical states of the brain (i.e., one's determinism takes the shape of a physicalism); and if one is a non-reductionist of the mental to the physical; and if one believes that in any explanatory competition physicalistic explanations will beat mentalistic (folk-psychological) explanations hands down; and if one's criterion for what exists is the having of a necessary place in the best explanations we can muster of other things we are sure exist; then the mental states on which responsibility depends do not really exist. And responsibility dies of such an eliminative materialist conclusion.⁵

D. *The challenge from reductionism and the disappearing self.* The thought here begins with the observation that the causes of human choice that are themselves unchosen will necessarily be physical events, not mental events. This means that for choices to be caused by such physical events, they too must be physical events—for what else, consistent with the laws of physics, could they be? Yet if human choices just are complicated physical goings-on in the brain, the active, choosing subject seems to disappear. In the complicated patterns of neural discharge going on in the brain, where is the self? Surely not sitting on some synaptic precipice and willing the crossing of individual vesicles!⁶

E. *The epistemic challenge that we are ignorant of the true causes of our choices and our behavior.* Another long standing challenge to

⁴ In Moore, "Libet's Challenges to Responsible Agency," I defend a limited kind of compatibilism even here.

⁵ E.g., Patricia Churchland, *Neurophilosophy: Toward a Unified Science of the Mind Brain* (Cambridge, Mass.: MIT Press, 1986); Paul Churchland, "Eliminative Materialism and the Propositional Attitudes," *Journal of Philosophy*, Vol. 78 (1981), pp. 67-90.

⁶ This is the picture conjured up, for example, by Greene and Cohen in their "For the Law of Neuroscience Changes Nothing and Everything." I seek to show how tricky it is to make reductionism into an enemy rather than a friend of responsibility, in Moore, "Responsible Choices," pp. 258-261.

responsibility issued by various academic psychologies, of which neuroscience is again only the latest, proceeds not from the fact that human actions are caused, but from the fact that such causes are not known to us to the extent or in the ways we think they are.⁷ I call this the epistemic challenge because it is based not on our lack of freedom but rather on our lack of knowledge. On the supposition that such knowledge is a prerequisite of responsibility, such views become a distinct form of challenge to responsibility.

F. *The challenge to responsibility-based punishment from consequentialist ethics.* Stephen Morse has urged that if the sciences of human behavior ever get to the point that, through their knowledge of the causes of human behavior, they can predict the occurrence of wrongful behavior with great accuracy, our punishment practices based on responsibility may well be displaced.⁸ After all, the deontological restriction of legal sanctions (“punishment”) to those whose culpable wrongdoing makes them deserving of such sanctions, might well yield to the admitted good of preventing the rights-violations that wrongdoing constitutes. We might well choose to protect victims of such wrongdoing over our current deontological restriction protecting those who do not (yet) deserve punishment. This would not challenge the existence of moral responsibility—only its relevance as a trigger and a limit on legal punishment.

While all of these six challenges are genuine challenges to responsibility, I shall here focus on the first only. This is because the skeptical conclusions in the other five arguments each depend on factors in addition to determinism: in the epiphenomenal challenge, that choices are incapable of causing the acts chosen; in the eliminative materialist challenge, that the deterministic explanations of an advanced neuroscience will displace the explanations of the folk psychology because of the explanatory superiority of the former over the latter; in the reductionist challenge, that minds are reducible to brains; in the epis-

⁷ Moore, “Responsible Choices,” pp. 254-258, 272-274. I assessed Freud’s version of this challenge long ago, in Moore, “Responsibility and the Unconscious,” *Southern California Law Review*, Vol. 53 (1980), pp. 1563-1663.

⁸ Morse, “Neuroscience and the Future of Personhood and Responsibility,” in Jeffrey Rosen and Benjamin Wittles, eds., *Constitution: Freedom and Technological Change* (Washington, D.C.: Brookings Institution Press, 2011), pp. 113-129, at pp. 125-127.

temic challenge, that knowledge of the causes of actions is lacking to the actors whose actions they are; in the consequentialist challenge, that our knowledge of these causes will lead us to the greater predictive capacities that in turn will lead us to abandon our responsibility-based punishment practices in favor of a purely preventative scheme of legal-sanctions. In other work I have sought to show how these additional suppositions alter the challenge to responsibility, leading me to characterize these as epiphenomenal, eliminative materialist, reductionist, epistemic, and ethical forms of challenges distinct from the challenge presented by determinism unadorned.⁹ A believer in responsibility has to answer these challenges too. Just not here.

II. Taxonomizing the Challenges of the Hard Determinist

Even restricting our focus to the challenges presented by hard determinism unadorned, it is a daunting task to organize the issues and arguments of the free will debate in philosophy these past 50 years. Perhaps the most perspicuous way to do this is by examining the argument(s) for why the skeptic about responsibility—often called, since William James, the “hard determinist”—thinks that causation of human behavior is incompatible with responsibility for that behavior. The burden of proof is after all upon such skeptics, given their challenge to the common sense view that we are responsible. It seems to me that there are essentially three sorts of arguments made by hard determinists in support of their view that causation of choice is incompatible with responsibility for that choice.¹⁰

A. *The argument from incapacity to act otherwise.* The thought here begins with the idea that causes give sufficient conditions for the happening of their effects.¹¹ This means that given the occurrence of the causes, the effects “had to occur.” This means that it was impos-

⁹ Moore, “Responsible Choices, Desert-Based Legal Institutions, and the Challenges of Contemporary Neuroscience.”

¹⁰ See generally Kadri Vihvelin, “Arguments for Incompatibilism,” *Stanford Encyclopedia of Philosophy*, 2007 revision.

¹¹ This is the thesis of the Millian tradition about causation. See Moore, *Causation and Responsibility: An Essay on Law, Morals, and Metaphysics* (Oxford: Oxford University Press, 2009), chapter 19.

sible for those effects not to have occurred and for some other events to have occurred in their stead. This means that when the effect in question is a human choice or a human action, the actor had no capacity—no ability, no power, no freedom, etc.—to have acted or chosen otherwise. This means that he could not have acted or chosen other than he did. He was thus not free, and because not free, not responsible.

B. *The argument from lack of ultimate self-determination.* The thought here begins with the idea that a person causing a result is necessary for that person to be morally responsible for that result. The focus here, thus, at least initially, is on an actor's ability to cause some result he wills, not (initially) on the lack of causation of his will. Yet determinism leads to skepticism about the capacity to cause in the following way. Persons are said to be unlike other putative causes of events in the world. For persons to cause, they need to be *uncaused* causers.¹² A person's agency, in other words, cannot be a mere causal intermediary in the way that the agency of a tree ("the tree shed its leaves") or an acid ("the sulphuric acid dissolved the zinc") can be.¹³ Rather, a person's agency needs to be a *prima causa*. Otherwise, there is no freedom, no self-determination, and no responsibility.

C. *The argument from manipulation by second agents.* This thought proceeds from the sense that to be the puppet whose strings are pulled by an intelligent puppeteer is peculiarly to be unfree and non-responsible. If this is clear intuitively, then the next step of the argument is to claim that there is no relevant difference (to our degree of freedom) between an intelligent puppeteer and inanimate nature pulling our strings. As Gary Watson puts it, "My freedom to dance is equally impaired whether my legs are paralyzed by organic disease or shackled by human hands."¹⁴ Therefore, the argument concludes, de-

¹² See e.g., Robert Kane, *The Significance of Free Will* (Oxford: Oxford University Press, 1995).

¹³ As famously argued by Roderick Chisholm and Richard Taylor. See, e.g., Chisholm, "Human Freedom and the Self," Lindley Lecture University of Kansas, 1964, reprinted in D. Pereboom, ed., *Free Will* (Indianapolis: Hackett Pub., 1997); Taylor, *Action and Purpose* (Englewood Cliffs, N.J.: Prentice-Hall, 1966).

¹⁴ Gary Watson, "Free Agency," *Journal of Philosophy*, Vol. 72 (1975), pp. 205-220.

terminism of human choices by natural causes renders us not free and not responsible—we are all the puppets of nature.¹⁵

I shall deal only with the first of the three hard determinist challenges just distinguished. I do this because the first is to my mind by far the most serious. The third, the manipulation argument, pulls the rug out from under itself by urging that manipulation by some second human agent, some “puppeteer,” ultimately doesn’t matter—this, after having started the argument by asserting that it *did* matter, that this feature *did* present a clear case of non-responsibility.¹⁶ The “source-incompatibilist” argument to my mind is equally, and equally obviously, unsuccessful. It simply asserts that “ultimate” source-hood is needed for responsibility; this is just to assert that freedom from causation is necessary to responsibility.¹⁷ This was supposed to be the conclusion of the source-incompatibilist argument, and as such it cannot be a non-question-begging reason for reaching that conclusion.

In any case, I intend to focus on the argument from incapacity, sometimes called the “consequence argument.”¹⁸ The answers to such an argument, answers defending responsibility from the hard determinist challenge, are numerous. To make the list manageable, I taxonomize such answers in three groups: the libertarian answers, the fictionalist answers, and the compatibilist answers.

We need to clear up a bit of terminology before we start. The third answer to the hard determinist challenge I call the “compatibilist answer.” This labeling is based on what I shall call the *narrow sense* of

¹⁵ See, e.g., Derk Pereboom, *Living Without Free Will* (Cambridge: Cambridge University Press, 2001); Pereboom, “Free Will Skepticism and Criminal Punishment,” at pp. 58-60.

¹⁶ I question arguments of this form in Moore, “Thomson’s Preliminaries About Causation and Rights,” *Chicago-Kent Law Review*, Vol. 63 (1987), pp. 427-521, reprinted in Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford: Oxford University Press, 1997), at p. 352.

¹⁷ Some source-incompatibilists such as Robert Kane seek to ground their demand for an ultimate source in PAP. So construed, source-incompatibilism drops away as a challenge to responsibility independent of the incapacity to do otherwise challenge I examine in detail below.

¹⁸ The name given to it in the seminal essay by Peter van Inwagen, *An Essay on Free Will* (Oxford: Oxford University Press, 1983). Van Inwagen’s versions of the argument simply assumes (as he recognizes) that the “could not have done otherwise” of PAP has only the incompatibilist reading.

compatibilism. What compatibilism asserts to be compatible, in this narrow sense, is *free will* with determinism. Libertarian answers are not compatibilist in this sense because they keep the meaning of “free” in “free will” to mean contra-causal freedom; and nothing can be both caused (determinism) and not caused (free will).

There is, however, a broader sense of “compatibilism” in which the second as well as the third strategy I am about to explore is compatibilist. This broader sense involves the compatibility of *responsibility* with determinism. For the last two views—fictionalism and compatibilism in the narrow sense—each hold that causal determination of human choice and behavior is true, and yet that we are responsible nonetheless. Thus, many of those who hold the second view are commonly called “compatibilists,” and so long as it is understood that this is only in the broader sense, this is harmless enough.

While I shall retain the label “compatibilist” and reserve it for the third view only, it may be that a better way to see the relations between all three views is as follows. All three views—the libertarian, the fictionalist, and the compatibilist—seek to salvage responsibility in the face of the challenge of hard determinism. The libertarian does this by: (1) weakening or eliminating the determinism of human behavior, while (2) retaining the judgment that contra-causal freedom is demanded for moral responsibility, and while (3) retaining the judgment that “responsible” names a real moral property. The fictionalist, by contrast: (1) admits that human behavior is as caused as is any other phenomenon, (2) admits that contra-causal freedom is demanded for true responsibility, but (3) denies that the responsibility we care about is a real property, being only a fiction of the kind that can be supported by a fictional “freedom.” The compatibilist: keeps the realism about responsibility (3) and keeps the belief in determinism (1); but she (2) denies that contra-causal freedom is necessary to being (really) responsible. The three routes to defending responsibility thus each play with what we mean by (1) determinism, (2) freedom, or (3) responsibility.

III. The Libertarian Answers to the Incapacity Challenge of Hard Determinism

A. *Metaphysical libertarianism: human choice as such is free.* A forthright, unabashedly metaphysical libertarianism is the most honest of the libertarian strategies I will describe. Human choices, while causing events in the world, are themselves free in the sense of uncaused. Such choices join the Big Bang, microphysics, and God as forms of uncaused causers, Aquinas' "*prima causa*." The view is often bolstered with a commitment to metaphysical dualism, the doctrine that mental events like choices exist in a realm different from the physical realm of these entities, properties, and relations that have spatial location, mass, and energy in addition to the temporal location also possessed by mental states.¹⁹

As a general response to the challenge to responsibility posed by hard determinism, this view is subject to the devastating response that this is a wildly implausible metaphysics.²⁰ It is not for nothing that one talks of the view requiring a ghost in the machine, for like the ghosts of popular imagination the mind on this view can cause real world physical events to occur yet is itself immune to the causal influence of such physical events. Ghosts can throw real rocks but somehow cannot be hit by them. Can anyone explain the physics of this? The second problem with such a general libertarianism (or libertarianism-cum-dualism) in the present context is more specific. The problem is that attributing contra-causal freedom to human choice as such is too indiscriminating; for if human choice as such is necessarily free, then compelled and ignorant choices are also free, and there are no excuses. Such an unrestricted libertarianism saves one from the ultra-liberal conclusion that no one is responsible only to land one in the equally undesirable camp of the ultra-conservative who denies that anyone is ever excused for his intentional choices and actions. Plainly needed

¹⁹ The locus classicus for charting this move from libertarianism to dualism remains Gilbert Ryle's *The Concept of Mind* (London: Huteson, 1949).

²⁰ Try, for example, to make sense of one of the late Sir John Eccles' mind/brain interface charts. John Eccles, "The Initiation of Voluntary Motor Movements by the Supplementary Motor Area," *Archives of Psychiatry and Neurological Sciences*, Vol. 231 (1982), pp. 423-441; Eccles and Popper, *How the Self Controls Its Brain* (Berlin: Springer-Verlag, 1994).

are some restrictions on libertarian metaphysics if it is to distinguish those who are excused from those who are not.

B. Occasional libertarianism: only some choices are free. The obvious move for the metaphysical libertarian is to regard only some choices as contra-causally free; that leaves room for other choices being caused and thus excused. Such an “occasional libertarian” will probably have to shed any supporting metaphysical dualism—for caused choices are still choices on this view, and so exist only as mental states and thus do not exist on the physical side of the dualist’s line between the two. But dualism is a burden of which the libertarian is well rid anyway.²¹

The stunning problem for this part-time or “occasional” libertarian strategy is that cases where there is obvious causation of choice do not track cases of intuitively plausible excuse. I may cause you to do something bad by:²² getting you drunk enough that you do what you would never have done if sober; getting you angry enough that you do what you never would have done if unprovoked; merely suggesting to you the possibility of such an action; cuing you with prompts to think of doing such an action; paying you a lot of money to do such an action; indoctrinating/educating you to the belief that the action is not bad but good and to be desired; etc. Yet none of these ways of causing choice seem at all diminishing of the responsibility of the one doing the choosing. Conversely, some excuses exist even if we are unable to identify some causation of choice. If insanity is a status excuse, as I have argued, then there need be no identification of causation of criminal behavior by mental disease for there to be an excuse.²³

C. Patchy libertarianism: all choices are “sort-of” free and “sort-of” not free, in varying degrees. A common response to examples of causing responsible choices such as those just given is to say that there is no “strong” or “full” causation of choice in such

²¹ Of which some libertarians are well aware. See Robert Kane, *The Significance of Free Will* (Oxford: Oxford University Press, 1996).

²² Some of these examples are culled from Joel Feinberg, “Causing Voluntary Actions,” in Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970), pp. 157-158.

²³ Or so I argue, Michael S. Moore, *Law and Psychiatry: Rethinking the Relationship* (Cambridge: Cambridge University Press, 1984), chapter 6.

examples. Rather, it is said, the causes of choice in such examples are weak or partial and as such they do not remove the genuine possibility of choosing against such causes. Such weak causes thus leave room for some freedom, some power, some ability to do otherwise, and thus, some responsibility.

The closer one looks at patchy libertarianism, the worse it looks. I have long thought that Peter Strawson got this one right: “Whatever sense of ‘determined’ is required for stating the thesis of determinism, it can scarcely be such as to allow of compromise, borderline-style answers to the question, ‘Is this bit of behavior determined or isn’t it?’”²⁴ For what would it mean to say that a choice was, say 40% free and 60% caused?²⁵ It makes perfectly good sense to say that one factor was 40% the cause of some event while other factors were 60% of the cause of that event.²⁶ (One instance of this is the nature/nurture debate about adult human choices.) But the sense of that comparative causal judgment does nothing to make intelligible the quite different idea that the totality of causes can add up to, say, 40% (of what?), the remainder being free. Strawson’s epithets—that this is both “grotesque” and symptomatic of a “desperate and panicky metaphysics”²⁷—seem spot-on for this incoherent if popular view.

²⁴ Peter Strawson, “Freedom and Resentment,” *Proceedings of the British Academy*, Vol. 48 (1962), pp. 1-25, reprinted in Gary Watson, ed., *Free Will* (New York: Oxford University Press, 1982).

²⁵ For explicit examples of such patchy libertarianism, see Sheldon Glueck, *Law and Psychiatry: Cold War or Entente Cordiale?* (Baltimore: John Hopkins Press, 1962), pp. 12-13 (a feeble-minded person’s acts are 10% “free-choosing” and 90% predetermined, a psychopath’s acts are 30-45% “free-choice,” “the balance rigidly controlled,” and the average, responsible adult has a “free-choosing capacity” of 50-65%, “leaving a 50 to 35 percent quantum of solid-line dominance.”); Norval Morris, *Madness and the Criminal Law* (Chicago: University of Chicago Press, 1982), p. 61 (there are “degrees of freedom of choice on a continuum...”).

²⁶ Michael S. Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford: Oxford University Press, 2009), pp. 71-73, 102, 104-105, 118-123, 275-279, 299-302, 396-399, 477-478, 508, 543-544. I discuss scalarity of causation further in Moore, “Moore’s Truths About Causation and Responsibility,” *Criminal Law and Philosophy*, Vol. 6, (2012), pp. 445-462, and in Moore, “Further Thoughts on Causation Prompted by Fifteen Critics,” in B. Kahmen and M. Stepanians, eds., *Causation and Responsibility: Critical Essays* (Berlin: de Gruyter, 2013), pp. 333-416.

²⁷ Strawson, “Freedom and Resentment.”