

AN ECONOMIC THEORY OF CRIMINAL EXCUSE

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Abstract: Criminal law, reflecting widely accepted "act theory," typically holds that responsibility depends on a defendant's ability to engage in reason-guided behavior. The criminal law excuses defendants with diminished rationality, such as the insane and those who kill in the heat of passion. Act theory, however, often provides vague, difficult-to-apply legal tests for juries because it often cannot specify how and to what degree rationality must be compromised. As a result, criminal law appeals to such notions as a "person of reasonable firmness" or "adequate provocation." Partly in response to these shortcomings, character or interpretive theorists have rejected act theory as a basis for criminal responsibility. They argue instead that excuse turns on explicitly normative preferences about actors' motivation, personality, or social position. Oddly, this position produces even vaguer and arguably capricious tests for juries to use when determining whether excuse should apply. This Article applies a straightforward economic cost-benefit analysis to clarify act theory so as to produce a more coherent and workable excuse doctrine. It accepts, as a starting point, that criminal responsibility turns on the capacity for reason-responsive behavior or "practical reason." The Article points out, however, that actors can change their responsiveness to reason within relatively broad parameters. This insight makes explicit a moral judgment implicit in criminal responsibility: the law expects actors to achieve and maintain a certain capacity for practical reason so as to avoid criminal acts. Excuse is, therefore, appropriate when the cost of rendering one's behavior legal—by correcting faulty beliefs, illicit desires, or weak will—exceeds the avoided crime's injuriousness, considering the crime's probability or foreseeability. Identifying the specific cost structures of "moral cognitive competence" provides a guide for more concrete, economic tests for the various legal excuses. In application, because of the high costs crimes, particularly violent crimes, impose, culpability would turn on whether actors have sufficient notice of their likelihood to commit crime but failed to improve their practical reasoning. This test offers a vastly

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simplified alternative to the standards the excuses currently employ, such as heat-of-passion's reasonable man or duress's person of reasonable firmness.

INTRODUCTION

Actors who commit a prohibited act with the appropriate mens rea and with no justification should be punished fully for the crime they commit, except when the excuses, like insanity, duress, or the partial excuses, like voluntary manslaughter, apply.¹ Two theoretical justifications exist for excuse.² One camp—to which the Model Penal Code, common law, and the views of "choice" or "act" theorists belong—believes that excuse should be available when actors' ability to follow the law has been compromised or could not be expected to function properly.³ The other camp—which includes character and evaluative theorists—believes excuse should be available when actors behave according to praiseworthy motivations or emotions or display admirable attributes.⁴ Character theorists often view the rules of the common law and act theory as reflecting value judgments about character they aim to confront and make explicit.⁵

The choice theorist's recurring challenge is to define and produce legal standards regarding the incapacity or ability that implicates ex-

¹ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 226 (4th ed. 2006) ("An excuse defense 'is in the nature of a claim that although the actor has harmed society, she should not be blamed or punished for causing that harm.'" (quoting Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1162-63 (1987))); Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUST. 329, 333 (1998) ("An excuse obtains if the defendant's conduct was objectively wrongful, but the defendant was not a responsible moral agent.").

² Stephen P. Garvey, *Passion's Puzzle*, 90 IOWA L. REV. 1677, 1698-99 n.69 (2005) (outlining the differences between the two camps); see also Michael Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL'Y 29, 32-40 (1990).

³ See MODEL PENAL CODE AND COMMENTARIES § 2.01 cmt. at 215-16 (Official Draft and Revised Comments 1985); DRESSLER, *supra* note 1, at 229-32; H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 152 (1968) ("What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities.").

⁴ See generally Peter Arenella, *Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, 7 SOC. PHIL. & POL'Y 59 (1990); Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423 (1995); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996).

⁵ See, e.g., CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 209-12 (2003).

cuse.⁶ The common law and its commentators have identified this capacity variously as free will, choice, voluntariness, or an ability to engage in reason-directed behavior.⁷ According to Blackstone, "All the several pleas and excuses, which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of will."⁸ H.L.A. Hart maintains that excuses exist when an individual's capacity to act as a "choosing being" is somehow diminished.⁹ Joshua Dressler states that the excuses apply when actors lack "the ability to apply what Professor Michael Moore has termed 'practical reasoning' skills."¹⁰ The Model Penal Code (the "MPC") defines a criminal homicide as manslaughter (on the theory of a partial excuse for the conduct) when a homicide is "committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."¹¹

These authorities fail to make clear how and how much the various qualities they identify as necessary for criminal responsibility must be diminished in order for legal excuse to apply.¹² Conversely, the problem for the character theorists is that, although they often make perceptive arguments about moral judgments embedded within the law, they have fared worse than mainstream act theorists in formulating workable rules to explicate the excuses.¹³ Too often, they seem to argue that criminal excuse turns on vague—even free wheeling or ad hoc—rules and jury determinations about actors' character or laudable elements in their personalities.¹⁴

⁶ For a discussion on the evolving conceptions of responsibility, see HART, *supra* note 3, at 186–209.

⁷ See, e.g., MODEL PENAL CODE § 2.01 (Official Draft and Explanatory Notes 1985); HART, *supra* note 3, at 152.

⁸ 4 WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 17 (Wayne Morrison ed., Cavendish 2001).

⁹ HART, *supra* note 3, at 49.

¹⁰ Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1358 (1989) (quoting Michael Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1148 (1985)). Practical reason is defined as "the general human capacity for resolving, through reflection, the question of what one is to do." R. Jay Wallace, *Practical Reasoning*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2008), available at <http://plato.stanford.edu/entries/practical-reason/>.

¹¹ MODEL PENAL CODE § 210.3(1)(b).

¹² See *id.*; HART, *supra* note 3, at 49; Dressler, *supra* note 10, at 1358.

¹³ See LEE, *supra* note 5, at 209–12.

¹⁴ Compare Victoria Nourse, *Passion's Progress: Modern Law Reform and Provocation Defense*, 106 YALE L.J. 1331, 1374 (1997) (stating that the partial excuse of provocation for murder would be available only for social wrongs that are crimes punished by imprisonment), with Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86

This Article brings an economic cost-benefit analysis to the question of criminal excuse in order to produce more workable and coherent legal rules.¹⁵ First, following mainstream act theory, it argues that criminal responsibility depends not on the capacity for free will or choice but on the capacity for practical reason—the ability to conform one's behavior to reflection and thought.¹⁶ Differing from mainstream act theory, this Article emphasizes that human powers of practical reason are inevitably imperfect, and human beings can alter their power of practical reason within broad biological, social, and economic parameters.¹⁷ By recognizing practical reasoning ability as a variable that actors can control, this Article makes explicit a moral judgment which is implicit in the criminal law: the law expects actors to achieve, maintain, and fortify a level of practical reasoning that enables actors to avoid criminal acts.¹⁸

Second, if excuse turns on whether actors could have avoided criminal acts by strengthening their practical reasoning, criminal law must provide juries with a standard to determine how much strengthening is required in any given circumstance.¹⁹ This Article proposes an economic test to answer this question—a cost-benefit analysis of practical reason.²⁰ The law cannot expect us to become saints or moral Spartans with practical reasoning powerful enough to avoid every temptation or even to act legally under all circumstances. There must be some balance or trade-off between the cost of strengthening practical reasoning and the cost of criminal acts themselves.²¹ Excuse is available when it would be unreasonable *ex ante* to expect actors to fortify

MINN. L. REV. 959, 981–82 (2002) (pointing out that this rule is hardly a “bright-line” test, as it requires an inquiry in social moral judgment and may simply reflect “a rule that conveniently bars most domestic violence provocation cases”).

¹⁵ See *infra* notes 214–228 and accompanying text.

¹⁶ See *infra* notes 37–68 and accompanying text; see also Moore, *supra* note 10, at 1148 (“At a bare minimum, the ability to reason practically involves: (1) the ability to form an object we desire to achieve through action, (2) the ability to form a belief about how certain actions will or will not achieve the objects of our desires, and (3) the ability to act on our desires and our beliefs so that our actions form the ‘conclusion’ of a valid practical syllogism.”); R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS 7 (1994) (“[C]onditions of responsibility . . . include the possession of certain rational powers: the power to grasp and apply moral reasons, and the power to control one’s behavior by the light of such reasons.”).

¹⁷ See *infra* notes 89–96 and accompanying text; MODEL PENAL CODE § 2.01; DRESSLER, *supra* note 1, at 229–32; HART, *supra* note 3, at 152.

¹⁸ See *infra* notes 37–96 and accompanying text.

¹⁹ See DRESSLER, *supra* note 1, at 229–32; HART, *supra* note 3, at 152.

²⁰ See *infra* notes 313–402 and accompanying text.

²¹ See Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741, 745–46 (1993).

their practical reasoning against the likelihood that they would commit a particular criminal act.²²

This insight presents a new understanding of criminal responsibility. Rather than turn on whether actors perform prohibited acts with the appropriate mens rea—as traditional doctrine holds—criminal responsibility should turn on whether actors fail to sufficiently fortify their cognitive and volitional capacities in light of reasonably foreseeable circumstances.²³ Or, using the language of the Learned Hand formula, if the marginal costs of avoidance, factored by the probability of circumstances prompting the criminal act, are greater than the marginal cost of the criminal act, excuse is potentially available.²⁴

This reformulation of criminal responsibility extends the long-recognized principle that excuse is generally not available to individuals who cause or contribute to the situation giving rise to the criminal act.²⁵ Drivers who voluntarily get drunk are not excused for crimes they commit while intoxicated.²⁶ The epileptic, who is aware of his condition, is criminally responsible for the car accident that occurs as a result of a seizure.²⁷ By roughly the same token, individuals who fail to fortify their abilities to avoid reasonably foreseeable criminal acts are responsible for the acts they perform.²⁸

In addition, this economic analysis incorporates insights of character theory, fitting its often unwieldy normative framework within the greater parsimony of act theory.²⁹ Brandishing Occam's Razor to the large number of character failings involved in criminal activity, this Article argues that all criminals share one character flaw: insufficient law-abidingness.³⁰ An economic cost-benefit approach to excuse accommodates this character inquiry—excusing criminals when the cost of changing their desires (or characters) is too great in comparison to the harm of their potential criminal acts factored by the likelihood of such acts being performed.³¹ This responds to those—like the character theorists—who seek a richer, less “thin” account of moral agency than

²² See *id.*

²³ Cf. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

²⁴ See *id.*

²⁵ 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 123(a), at 30–31 (1984).

²⁶ *Id.* § 176(a)–(b), at 337–41.

²⁷ *People v. Decina*, 138 N.E.2d 799, 803 (N.Y. 1956).

²⁸ See *id.*

²⁹ See Kahan & Nussbaum, *supra* note 4, at 304.

³⁰ See *infra* notes 333–402 and accompanying text.

³¹ See *Carroll Towing*, 159 F.2d at 173.

that which act theory offers.³² Perhaps most significant, this approach simplifies the tests the excuses now use. Given the great cost that crimes impose, actors who have notice that they would likely commit crimes should invest in avoidance strategies. Whether a defendant failed to invest upon adequate notice is a far easier determination than whether a defendant who kills in the heat of passion had "adequate provocation" or a defendant in duress showed sufficient "firmness."

The Article proceeds as follows. Part I defends practical reasoning as the capacity the compromise of which implicates criminal responsibility.³³ It concludes, however, that current accounts of practical reason cannot adequately explain criminal excuse because they do not describe *how* practical reason can be diminished. Part II sets forth a cost-benefit analysis of practical reason.³⁴ Excuse is available when it would be, in some sense, inefficient to strengthen the actor's powers of reason responsiveness to avoid the crime.³⁵ Part III applies this economic theory to three excuses: heat-of-passion provocation (manslaughter), immaturity, and duress, offering revised legal standards for these excuses.³⁶

I. PRACTICAL REASON AS THE BASIS OF CRIMINAL RESPONSIBILITY

Beginning with the first challenge—defining the capacity that is compromised in criminal excuse—this Article agrees with mainstream criminal act theorists that practical reason is the compromised faculty involved in most excuses.³⁷ Other possibilities, including those currently reflected in the law, such as choice or free will, are inadequate.³⁸

A. Free Will

Courts and commentators have confusingly identified a lack of choice or free will as the incapacity that renders a crime excusable.³⁹

³² See Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1524 (1992).

³³ See *infra* notes 37–96 and accompanying text.

³⁴ See *infra* notes 97–229 and accompanying text.

³⁵ See *Carroll Towing*, 159 F.2d at 173.

³⁶ See *infra* notes 230–402 and accompanying text.

³⁷ See MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 113–65 (1993).

³⁸ See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 598, 600, 603, 611, 649, 672 (1981). This Article provides only a cursory review of the faculties possibly implicated as the basis of criminal responsibility. For a complete account, see Morse, *supra* note 1, at 359–61.

³⁹ See, e.g., *People v. Luther*, 232 N.W.2d 184, 186–87 (Mich. 1975); *State v. Sonko*, No. 95CA006181, 1996 Ohio App. LEXIS 2010, at *11 (Ohio Ct. App. May 22, 1996).

Numerous jurisdictions use this distinction to demarcate excused or partially excused, unintentional acts from unexcused, intentional crimes.⁴⁰ For instance, some jurisdictions hold that provocation is a partial excuse because extreme emotion "destroys" the intention to commit murder.⁴¹ Similarly, some courts have held that the duress excuse is available only when an actor's free will is overborne.⁴²

It is difficult to square the notion of free will with a causal view of the world, under which, of course, all matter is determined by natural law.⁴³ As human beings are material entities, human choice would be similarly determined.⁴⁴ Given this framework, there is no place for free will, and, more importantly, no way to identify situations in which free will is absent.⁴⁵ After all, if everything is determined, how can any act be chosen "freely"?⁴⁶ Thus, free will cannot be the distinguishing compromised capacity involved with excuse.⁴⁷ Nonetheless, numerous courts continue to see free will as the touchstone of criminal responsibility.⁴⁸

B. *Voluntariness or Choice*

Rather than relying on free will, the MPC requires that criminal liability involve a voluntary act.⁴⁹ The commentary to section 2.01 ex-

⁴⁰ See, e.g., *Morgan v. State*, 536 P.2d 952, 960-61 (Okla. Crim. App. 1975) (Brett, J., concurring), *overruled by* *Walton v. State*, 744 P.2d 977, 978 (Okla. Crim. App. 1987).

⁴¹ See *id.* at 960-61 ("It is not enough under the law of Oklahoma that it be shown that the intent to kill was formed as the result of a reasonable passion, the passion must be so great as to destroy any intent to kill and indeed render the mind incapable of forming an intent."); see also WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 15.2(a), at 776 (4th ed. 2003) ("[T]he passion must be so great as to destroy the intent to kill, in order to accomplish the reduction of the homicide to voluntary manslaughter.").

⁴² See *Luther*, 232 N.W.2d at 186-87 ("A successful duress defense excuses the defendant from criminal responsibility for an otherwise criminal act because the defendant was compelled to commit the act; the compulsion or duress overcomes the defendant's free will . . ."); *Sonko*, 1996 Ohio App. LEXIS 2010, at *11.

⁴³ See Morse, *supra* note 1, at 346.

⁴⁴ See *id.* ("We only excuse a subset of agents . . . Determinism generalizes to all cases . . .").

⁴⁵ See *id.*

⁴⁶ See Kelman, *supra* note 38, at 598, 600, 603, 611, 649, 672; see also Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 294 (1984).

⁴⁷ See Kelman, *supra* note 38, at 598, 600, 603, 611, 649, 672.

⁴⁸ See, e.g., *Morissette v. United States*, 342 U.S. 246, 250-51 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is . . . as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

⁴⁹ MODEL PENAL CODE § 2.01(1) (Official Draft and Explanatory Notes 1985) ("A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act . . .").

plains that use of the word "voluntary" . . . does not inject into the criminal law questions about determinism and free will."⁵⁰ It understands voluntary action as that which is under "the control of the actor."⁵¹ As for what that means, the comment simply states that "[t]here is sufficient difference between ordinary human activity and a reflex or a convulsion" to make the distinction meaningful in criminal law.⁵²

Ludwig Wittgenstein pithily examined voluntariness—and whether it is different from free will—asking, "[W]hat is left over if I subtract the fact that my arm goes up from the fact that I raise my arm?"⁵³ The MPC—and traditional criminal law—does not answer this question fully.⁵⁴ Perhaps realizing that it is traversing uncertain terrain, the MPC defines voluntary in the negative, excluding from its purview "reflex[es] or convulsion[s]"; movements made "during unconsciousness or sleep"; movements "conduct[ed] during hypnosis or resulting from hypnotic suggestion"; or any "bodily movement that otherwise is not a product of the effort or determination of the actor."⁵⁵ But beyond implying that voluntary action involves an actor's determination and effort, the MPC fails to provide meaningful guidance as to the meaning of "voluntariness."⁵⁶ In short, merely replacing free will with voluntariness does little to clarify the capacity necessary for criminal responsibility, the compromise of which can form the basis for excuse.⁵⁷

C. Reason Responsiveness: Practical Reason

Agreeing with the mainstream view, this Article argues that this necessary capacity for criminal responsibility is what philosophers call practical reason, the general human capacity of controlling one's behavior by reflection or deliberation.⁵⁸ In particular, this Article relies on Aristotle's notion of practical reason and syllogism discussed in *De Motu*

⁵⁰ MODEL PENAL CODE AND COMMENTARIES § 2.01, cmt. at 215 (Official Draft and Revised Comments 1985) (citing HART, *supra* note 3, at 90–112).

⁵¹ *Id.*

⁵² *Id.*

⁵³ LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 621, at 161 (G.E.M. Anscombe trans., Blackwell 1953).

⁵⁴ See MODEL PENAL CODE § 2.01.

⁵⁵ *Id.* § 2.01(2)(a)–(d).

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ M.T. Thornton, *Aristotelian Practical Reason*, 91 MIND 57, 57 (1982).

and the *Nicomachean Ethics*.⁵⁹ That is, the ability to control one's behavior according to beliefs, desires, and, adding an additional faculty to Aristotle, will—an executory function that likely exists to mediate conflicting desires and beliefs.⁶⁰ If we view human behavior as caused by beliefs, desires, and will, it is possible to distinguish intentional behavior from unintentional behavior, regardless of whether one views these beliefs and desires as caused by some natural event or by free will.⁶¹

To illustrate the difference between behavior caused by practical reason and that which is not, consider another Wittgensteinian example: the imagined dialogue of his famous falling leaf.⁶² “A leaf falls in the autumn wind, saying to itself, ‘Now I shall go this way, now I shall go that way.’”⁶³ Of course, leaves do not engage in this type of reasoning; they do not have desires about which way they will fall or have beliefs about how they will fall.⁶⁴ As a consequence, the leaf does not have moral or legal responsibility—not because it lacks free will, but rather because its actions cannot be said to be caused by desires, beliefs, or any deliberative interaction of beliefs and desires.⁶⁵

On the other hand, beliefs, desires, and other reasons control human actions and, therefore, render humans legally responsible.⁶⁶ Beliefs and desires can be responsive to reasons and rules and thus form the basis of criminal responsibility.⁶⁷ A human may ask, “Shall I go this way and rob a bank, or go that way and attend church?” The human will decide which course of action to take because of a reason, such as the desire for money, religious devotion, or the desire to follow the law.⁶⁸ Unlike the leaf, human action is responsive to, and can be caused

⁵⁹ See ARISTOTLE, *DE MOTU ANIMALIUM* 36, 38, 40 (Martha C. Nussbaum ed. & trans., Princeton Univ. Press 1978) [hereinafter *DE MOTU*]; ARISTOTLE, *NICOMACHEAN ETHICS* 191–97 (Martin Ostwald trans., Bobbs-Merrill 1962) [hereinafter *NICOMACHEAN ETHICS*].

⁶⁰ See MOORE, *supra* note 37, at 113–65. The existence and function of the will or “volitions” are controversial in psychology, but many legal theorists have concluded it to be necessary in any account of action or the criminal law. See *id.* (arguing that volition is an intention to execute a basic action).

⁶¹ See Moore, *supra* note 10, at 1112–28 (critiquing the view that natural causation or determinism vitiates legal responsibility).

⁶² See Simon Blackburn, *Only Here, Only Now*, *TIMES LITERARY SUPP.*, Oct. 20, 2006, at 8 (reviewing MICHAEL FRAYN, *THE HUMAN TOUCH: OUR PART IN THE CREATION OF A UNIVERSE* (2007)), available at <http://www.timesonline.co.uk/tol/incomingFeeds/article612855.ece>.

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ See Morse, *supra* note 1, at 337.

⁶⁷ See *id.*

⁶⁸ See *id.*

by, reasons.⁶⁹ As Stephen Morse observes, "Intentional human conduct, that is, action, unlike other phenomena, can be explained by physical causes *and* by reasons for action."⁷⁰ It is this capacity that allows actors to act intentionally.⁷¹ And, that capacity in turn renders actors criminally responsible when they perform prohibited acts for the prohibited reason.⁷² An actor who accidentally pushes someone out the window is not criminally responsible for murder, but the actor who pushes someone out the window intentionally is.⁷³

Making practical reason and the practical syllogism the touchstone of criminal responsibility commits one to the assertion that beliefs and desires are identifiable physical states that cause action.⁷⁴ As Morse states, "One can attempt to assimilate folk psychology's reason giving to mechanistic explanation by claiming that desires, beliefs, and intentions are genuine causes and not simply rationalizations of behavior."⁷⁵ This, in turn, commits one to several controversial assumptions about the philosophy of mind and psychology.⁷⁶ Under plausible and widely shared assumptions, mental states can be identifiable by the *role* or function they play in cognitive systems of representation and control, not any particular physical composition.⁷⁷ Ned Block states, "[M]ental states are constituted by their causal relations to one another and to sensory inputs and behavioral outputs."⁷⁸ The general program, called "functionalism," views beliefs and desires as something roughly analogous to lines in a computer program linking and causing other mental states and, sometimes, actions.⁷⁹ This program has the advantage of ex-

⁶⁹ See *id.*

⁷⁰ See *id.* (emphasis added).

⁷¹ Morse, *supra* note 1, at 337-40.

⁷² See *id.*

⁷³ See, e.g., MODEL PENAL CODE § 210.2(1)(a) ("[C]riminal homicide constitutes murder when it is committed purposely or knowingly . . .").

⁷⁴ See Morse, *supra* note 1, at 339.

⁷⁵ See *id.* This philosophical strategy is known as "functionalism" and is the current "orthodoxy" in cognitive science and philosophy of mind. JOHN SEARLE, *THE REDISCOVERY OF THE MIND* 7 (1992).

⁷⁶ See DONALD DAVIDSON, *ESSAYS ON ACTIONS AND EVENTS* 4 (1980). As Stephen Morse comments, "The social sciences, including psychology and psychiatry, are uncomfortably wedged between the reason-giving and mechanistic accounts of human behavior." See Morse, *supra* note 1, at 338.

⁷⁷ See Ned Block, *What Is Functionalism?*, in *ENCYCLOPEDIA OF PHILOSOPHY SUPPLEMENT 1* (1996), available at <http://www.nyu.edu/gsas/dept/philo/faculty/block/papers/function-alism.pdf>.

⁷⁸ *Id.*

⁷⁹ MOORE, *supra* note 37, at 131-32; SEARLE, *supra* note 75, at 7 (stating that functionalism is the "contemporary orthodoxy").

plaining human behavior in terms of everyday use so that they are appropriate for juries to use.⁸⁰

Examining these difficult issues in psychology, cognitive science, and philosophy is well beyond this Article's scope (or a mere lawyer's competence), but it is worth noting that this view of human brains renders practical reason consistent with natural causation in roughly the same way a computer is.⁸¹ At this time, however, there is no evidence that brains, in fact, work like that.⁸² One can say only that it is a working hypothesis accepted by many cognitive scientists, psychologists, philosophers, and, therefore, a reasonable assumption for the law.⁸³

In sum, criminal responsibility turns not on whether an act was freely chosen but on whether it was caused in a certain way, such as through the belief and desire sets of practical reason.⁸⁴ Criminal responsibility is in a sense a *competence*—an ability of a being to conform one's behavior to the belief/desire sets of practical reason.⁸⁵ Practical reason contains both a cognitive (an actor must have correct belief) and conative (an actor must desire to do the right thing) aspect.⁸⁶ Actors who have this competence can control their behavior according to beliefs, desires, and intentions.⁸⁷ They, therefore, may be held criminally responsible.⁸⁸

D. *The Shortcomings of Practical Reason in Explaining Excuse*

Although practical reason may save the criminal law from the conundrums of free will and choice, it does not inform judges or juries how or how much reasoning ability must be diminished before excuses are available.⁸⁹ For example, just as it is unclear how an act committed in great anger is not a product of free will, it is equally unclear how anger would diminish the capacity for practical reason and allow a partial excuse.⁹⁰ After all, angry murderers desire to harm their victims and know that violent acts will harm them. They act according to practical

⁸⁰ See MOORE, *supra* note 37, at 131–32; SEARLE, *supra* note 75, at 7.

⁸¹ See MOORE, *supra* note 37, at 131–32; SEARLE, *supra* note 75, at 7.

⁸² See HUBERT DREYFUSS, WHAT COMPUTERS STILL CAN'T DO: A CRITIQUE OF ARTIFICIAL REASON 163 (1972).

⁸³ See MOORE, *supra* note 37, at 131–32; SEARLE, *supra* note 75, at 7.

⁸⁴ See Morse, *supra* note 1, at 337.

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1657 (1994).

⁹⁰ See *id.*

reason and should be fully responsible. Furthermore, the notion that emotion may be so great as to "overwhelm" practical reason is equally incoherent.⁹¹ There is no metric to measure the strength of emotion, and even angry actors can conceivably control their behavior.

Even if emotional quanta could be measured, they might very well be meaningless numbers because the moral significance of any quantum of emotion is contextual.⁹² Consider the compulsive hand-washer. If he gets the compulsion and has to leave a business meeting to wash his hands, no one would think anything of it. If, however, his wife were choking and he had to wash his hands before he administered the Heimlich maneuver, then it is less clear whether he would be excused.⁹³ In both cases the man was acting from a "passion"—the passion in both cases may have had the same quantum. But, in each case there is a different moral result because the provocation is different.⁹⁴

Finally, saying that actors are guided by practical reason says little about how they resolve contradictory desires or beliefs and how they can act on the basis of a particular intention. An actor's competence at following the law involves an ability to negotiate conflicting desires—the actor is angry and wants to strike his wife, but he does not wish to violate the law; an actor does not want to smuggle drugs but does not want the mafia drug lord to harm his children; the thief wants to steal the diamond necklace but does not wish to go jail.⁹⁵ In these examples, the actors have the desires and intentions to do *both* considered actions. Practical reason, conceived as simply belief and desire, says little about why one action is chosen over the other.⁹⁶

II. EXCUSE AND COMPROMISED PRACTICAL REASON: A COST-BENEFIT ANALYSIS

Simply identifying practical reason as the capacity necessary for criminal responsibility does not explain its role in the excuses.⁹⁷ A proper explanation requires demonstrating how and to what degree practical reasoning can be diminished and under what circumstances it would be legally relevant.

⁹¹ See *id.*

⁹² See Garvey, *supra* note 2, at 1712–14.

⁹³ I am indebted to Stephen Morse's criminal law class for this example.

⁹⁴ See Garvey, *supra* note 2, at 1712–14.

⁹⁵ See Morse, *supra* note 1, at 337.

⁹⁶ See *id.* at 337–39.

⁹⁷ See *id.*

As an initial point, this interpretation questions the assumption that legal theorists tend to make, at least implicitly, that the ability for practical reason is an all or nothing proposition—like being pregnant.⁹⁸ Human beings are limited in all of their capacities, including practical reason.⁹⁹ For instance, as Cherniak writes, only perfect beings could deduce all of their desires and beliefs.¹⁰⁰ Try it. It is difficult to do. Furthermore, even if humans were to do so, all of their desires and beliefs could not be “activated” at one time.¹⁰¹ It is impossible, given the limits of human cognition, for all of one’s beliefs and desires to influence action at the same time.¹⁰² Some take precedence, others are ignored; some persist throughout time and under a large number of stimuli, while others are fleeting and may only emerge in the presence of a few discrete stimuli.¹⁰³ In addition, not only are our powers of practical reason limited, but we can strengthen our reasoning abilities so as to better follow the law.¹⁰⁴ As discussed below, we can improve our beliefs, change our desires, and strengthen our wills.¹⁰⁵ The question for the criminal law, therefore, becomes *how* and *how much* strengthening is required.¹⁰⁶

This Part also applies economic principles to the intentional categories of the criminal law, which are usually considered immune or irrelevant to such analysis.¹⁰⁷ Richard Posner, in writing about the criminal law, has commented that “one can read many books on economics

⁹⁸ See, e.g., MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITIES, NATIONALITY, SPECIES MEMBERSHIP* 76–78 (2006).

⁹⁹ See CHRISTOPHER CHERNIAK, *MINIMAL RATIONALITY* 12–16 (1986).

¹⁰⁰ See *id.*

¹⁰¹ *Id.* at 21.

¹⁰² See *id.*

¹⁰³ *Id.* at 1–20.

¹⁰⁴ See *infra* notes 131–210 and accompanying text.

¹⁰⁵ See *infra* notes 131–210 and accompanying text.

¹⁰⁶ The analysis in this paper has similarities to that of Kenneth Dau-Schmidt. See Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 35. Indeed, his characterization of criminal prohibitions as “[t]he more costly preference-shaping methods . . . reserved for externalities in which there are substantial social benefits from preference shaping through criminal punishment that exceed its higher social costs” is consistent with this Article’s approach to criminal responsibility in that both view shifting desires as an acceptable goal of the criminal law. See *id.* This Article, however, is agnostic about the final function and justification of the criminal law and considers criminal prohibitions as largely given.

¹⁰⁷ See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1221 (1985).

without encountering a reference to 'intent.'¹⁰⁸ This Article attempts to bridge this conceptual divide.¹⁰⁹

Actors must strengthen their limited powers of practical reason to the degree that it would be economically efficient.¹¹⁰ As with the

¹⁰⁸ *Id.*

¹⁰⁹ This Article is not the first to try. See generally Parker, *supra* note 21. Parker presents a justification for mens rea as an information cost that, if required for criminal responsibility, will increase economic efficiency. *Id.* at 745-46. He argues that, because the criminal law appears to have upwardly biased penalties that seem designed to prohibit completely certain behaviors, the criminal law may over deter certain activities that may be useful, but are potentially criminal. *Id.* at 748. Due to the criminal act's high penalty, actors may simply steer clear of a whole class of behavior for fear of punishment. *Id.* at 745. For example, if we punished speeders with death, many would simply give up driving. See *id.* By requiring mens rea, the law encourages individuals to ask themselves "self-characterizing" questions—such as, "Am I driving within the speed limit?"—that allow them to distinguish between socially useful behavior and crimes. See *id.* at 745-46.

Under the classic Becker model, the criminal law seeks the level of punishment and enforcement that punishes and deters at a level that minimizes crimes as well as the cost of enforcement and punishment. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 180-85 (1968). Parker simplifies Becker's model using this expression:

$$pF^* = H \quad (p = \text{probability of conviction, } F^* = \text{optimal sanction, } H = \text{external harm}).$$

See Parker, *supra* note 21, at 753. In light of this formula, Parker argues that actors should invest in information relating to the legal or illegal nature of their actions (an amount represented by "I") only to the point when $I = pF^* - G$, where G is the criminal's gain from the criminal activity. *Id.* at 774-75. In other words, a crime's optimal sanction should not exceed the criminal's personal gain and information cost or $(G + I)$. *Id.*

Parker states that "the desired amount of investment [in self-characterizing information] is not infinite . . . and indeed is strictly limited by the size of the external harm . . ." *Id.* at 775. One could describe investment in reason-directed behavior as analogous to an information cost. See *id.* Excuse would be available when the investment in information costs/reason-directed behavior exceeds the expected harm of the crime. See *id.* In this way, excuse creates the correct incentive to invest in reason-directed behavior. See *id.* Or, more precisely, excuse discourages over-investment in reason-directed behavior. See *id.* We are not obligated to become monks and avoid or extirpate all temptation. See *id.* Rather, we may indulge in drinking, love affairs, and successful business dealings—those things that make life worthwhile—provided we invest in developing sufficiently finely tuned desires and/or will. See *id.* This leads to legal behavior despite the temptation to engage in bar brawls that escalate to mortal duels, to attack a partner's paramour, or to loot the till. See *id.*

The Article's framework also applies under a retributive or deontological framework, following the view associated with Immanuel Kant—that "can" implicates "should." See generally Robert Stern, *Does "Ought" Imply "Can"? And Did Kant Think It Does?*, 16 UTILITAS 42 (2004). We can have no duty to perform those actions that we cannot, in fact, do—or so the argument goes. See *id.* at 46. Here, given the investment in abilities of reason-directed behavior that was reasonable and correct to do ex ante, the actor could not act legally. See *id.* In that regard, the actor is not blameworthy even under a retributive/deontological framework. See *id.*

¹¹⁰ See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

Learned Hand formula for tort law, actors are required to strengthen practical reasoning only to the extent that the marginal cost of such strengthening is less than the cost of the criminal acts performed, as factored by the likelihood of such acts occurring.¹¹¹ This means that there might be some instances when the marginal cost of developing sufficiently strong practical reason outweighs the marginal utility of avoiding criminal behavior factored by its likelihood.¹¹² In such cases, the law could not expect, at least *ex ante*, actors to behave legally—and this is the place for excuse.¹¹³

A. Practical Reasoning Basics

The rationality of the practical syllogism is not that of formal logic, but it does have a certain form, a form that gives predictability to human behavior and allows people to interpret it.¹¹⁴ Suppose an actor desires X and believes that if he does Y, X will result. If the actor does Y, then he is acting according to practical reason.¹¹⁵ This notion can be expressed as follows:

$$\begin{array}{c} D(X) \\ B(Y \rightarrow X) \end{array}$$

This form allows us to predict human behavior.¹¹⁶ Consider an oft-used example from Sir Arthur Conan Doyle.¹¹⁷ In *A Scandal in Bohemia*, Sherlock Holmes needs to discover where Irene Adler has hidden a photograph incriminating to his client, the King of Bohemia.¹¹⁸ Holmes disguises himself as a clergyman and tricks Irene Adler to gain entrance into her house.¹¹⁹ After Holmes is inside, Watson causes a commotion outside by throwing a rocket through the window and yelling, "Fire!"¹²⁰ Holmes observes Adler rush to a panel in the sitting room, open the panel, and begin to take something out.¹²¹

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See NICHOMACHEAN ETHICS, *supra* note 59, at 61.

¹¹⁵ See *id.*

¹¹⁶ MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 1-17 (1984).

¹¹⁷ See SIR ARTHUR CONAN DOYLE, *A Scandal in Bohemia*, in THE COMPLETE SHERLOCK HOLMES 161-75 (1953).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

Holmes *knows* that Adler is taking out the incriminating photograph from the hidden panel.¹²² Why? Because Adler is a rational actor.¹²³ She desires to preserve from destruction her most valuable possession, the incriminating photograph of her and the King of Bohemia.¹²⁴ She believes that obtaining this photograph when a fire breaks out will achieve this desire.¹²⁵ Therefore, she will retrieve the photograph when it is in danger from fire.¹²⁶ Holmes could predict her behavior based upon the practical syllogism.¹²⁷

Even for the simplifying purposes of this Article, this scheme likely must be complicated with the addition of the will.¹²⁸ It "mediates" contradictory beliefs and desires.¹²⁹ For instance, I desire both chocolate mint and vanilla ice cream. I believe that if I say "I'd like vanilla ice cream" to the guy behind the ice cream counter, I'll get vanilla. I hold the same belief about chocolate mint. What these belief/desire sets do not tell us, however, is why or whether I choose either chocolate mint or vanilla at any given time. Indeed, I like both flavors very much and am usually unsure which I will request until the very moment that the guy behind the counter asks. These types of considerations have led many to theorize the existence of a will or volition that is its own functional state that translates or resolves conflicted desires, beliefs, and intentions and that executes the action performed.¹³⁰

B. *The Avoidance Cost of Incorrect Belief*

Cognitive science and philosophy of mind refer to beliefs and desires as "propositional attitudes."¹³¹ They point out the concepts or "propositions" that the sentences of language express.¹³² Thus, "the snow is white" and "la neige est blanche" refer to the same proposi-

¹²² See DOYLE, *supra* note 117, at 161-75.

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ See DOYLE, *supra* note 117, at 161-75.

¹²⁸ See MOORE, *supra* note 37, at 113-15, 121; Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 373 ("The perplexing question is how the intention became executed . . . [T]he short answer is that no one knows . . . but the best theory is that agents possess volitional abilities—sometimes referred to as the 'will'—that execute those intentions by causing the sufficient bodily movements.").

¹²⁹ See MOORE, *supra* note 37, at 113-15, 121; Morse, *supra* note 128, at 373.

¹³⁰ See MOORE, *supra* note 37, at 113-15, 121; Morse, *supra* note 128, at 373.

¹³¹ GEORGES REY, *CONTEMPORARY PHILOSOPHY OF MIND: A CONTENTIOUSLY CLASSICAL APPROACH* 18-20 (1997).

¹³² *Id.*

tions.¹³³ In a similar way to sentences, beliefs and desires point out propositions.¹³⁴ Both Peter and Pierre believe the Eiffel Tower is in Paris, and both desire to visit London.¹³⁵ These beliefs and desires have the same propositional content.¹³⁶

Propositional attitudes can be statements about the world, like beliefs, or motivations toward some object in the world, like desires.¹³⁷ Both, however, represent the world to the actor.¹³⁸ They provide a picture of the world as the actor understands it or wants it to be.¹³⁹ One aim of the philosophy of mind and cognitive science is to examine *how* neurons connected in massively powerful ways do, in fact, represent the world.¹⁴⁰

Exactly *how* these representations occur, however, is not this Article's concern. Rather, it is simply to point out that *more complex representations are more costly*.¹⁴¹ Propositional attitudes point out ideas, and the more complex the ideas, the more complex the physical structure that points it out.¹⁴² Consider a world that has only two possible propositional attitudes: "I believe yes" and "I believe no." The physical structure that could represent this world is quite simple: an on and off switch. Now, consider the representational capacity of Morse code. It is infinitely more complex and requires more resources. Thus, a longer message would be required to express (in Morse code) the proposition "I desire to kill my Aunt Betty" than "I believe yes." If one were to send this message by telegram, the longer message would be, of course, more expensive.¹⁴³

Aside from the cost of representing beliefs, there is a cost to ensuring correct belief. Human beings have, of course, various feedback mechanisms to discover true beliefs and discard false ones. Some are quite costly. Consider scientific inquiry with its billion dollar cyclotrons and electron microscopes. Its purpose is to produce empirical

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See REY, *supra* note 131, at 18–20.

¹³⁷ See *id.*

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ See, e.g., David M. Eagleman, *Neuroscience: The Where and When of Intention*, 303 SCIENCE 1144, 1144–46 (2004).

¹⁴¹ See Claude Shannon, *A Mathematical Theory of Communication*, 27 BELL SYS. TECH. J. 379, 623 (1948) (examining information theory and the cost of representation), available at <http://cm.bell-labs.com/cm/ms/what/shannonday/shannon1948.pdf>.

¹⁴² *Id.*

¹⁴³ See *id.*

data to confirm the truth of (or, attempt to falsify) various theories. Other feedback systems are not as expensive. A three-year-old boy learns that jumping off furniture is not a good idea when he hurts himself or when his parents punish him.

With the immaturity and insanity excuse, there is a failing of correct belief.¹⁴⁴ The insane person believes that the policeman (whom he just shot) is, in fact, an agent of Satan bent on blowing up New York City.¹⁴⁵ The six-year-old child who shoots his playmate lacks correct belief about the nature and likely result of his action.¹⁴⁶ In both situations, the actor believes the wrong claim about the world to be true.¹⁴⁷ The insane person truly believes that the policeman is Satan.¹⁴⁸ A child's understanding of shooting a playmate—that it is some sort of harmless game—is equally erroneous.¹⁴⁹

These errors of belief are, in theory, correctable, but the expense could be excessive, even infinitely so. With enough time, money, or both, many insane people can be cured, and even six-year-olds can be made to understand that murder is bad and must be avoided—even if perhaps they cannot fully understand mortality. Of course, in some situations, actors cannot have correct beliefs—at least given the therapeutic or pedagogical tools at our disposal right now. Some people may be so insane that they cannot have true belief, and infants who lack the most basic language skills cannot have beliefs, at least in the way adults have beliefs.

¹⁴⁴ See Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 56 (1997) ("The rationality criterion for moral responsibility requires that an agent is capable of understanding the morally relevant facts and the applicable moral reasons governing the conduct under the circumstances.").

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

¹⁴⁷ See *id.* This article uses the "cognitive" view of insanity reflected in the influential *M'Naghten* test, which requires, in order to have a finding of insanity, that the insane defendant lack knowledge about the nature of his or her act or knowledge about whether it was wrong. See JOSHUA DRESSLER, *CRIMINAL LAW* 625 (4th ed. 2007). The cognitive approach contrasts with other approaches to insanity, including the volitional or control test or the product of medical disorder test. See MODEL PENAL CODE § 4.01 (Official Draft and Explanatory Notes 1985) (volitional test); *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954) (product of mental disorder test).

It is a simplification to say that immaturity involves only insufficient belief, as it also probably involves undeveloped will, as younger people tend to be more compulsive. See Morse, *supra* note 144, at 56.

¹⁴⁸ See Morse, *supra* note 144, at 56.

¹⁴⁹ See *id.* at 56–57.

Depending on the harm of the criminal acts caused by erroneous belief and their likelihood, the law requires different responses.¹⁵⁰ If the likelihood of criminality and the cost of inculcating correct belief are too great, the law could require types of control other than practical reasoning—for example, incarceration for the insane.¹⁵¹ On the other hand, if the likelihood is too small that an insane person or child will commit a criminal act (as is usually the case), then society will allow such individuals to be free.¹⁵² The law will not expect a perfect degree of practical reasoning. It will excuse their lapses because the cost of rendering their practical reasoning functional outweighs the cost of their crimes, factored by their likelihood.¹⁵³

C. *The Avoidance Cost of Correct Desire*

One way to behave legally through the use of practical reason is to have lawful desires.¹⁵⁴ Unlike beliefs, we seem to be born with desires—and they seem to be free.¹⁵⁵ We do not have to learn that we are hungry in the same way that we learn that oranges taste better than liver or that some mushrooms are delicious and others can kill you.¹⁵⁶ But consider *correct* beliefs. Clearly, correct beliefs bear a cost—that of experience and experiment.¹⁵⁷ The cost is not associated with having a belief but with *changing* one's beliefs from erroneous to correct.

Analogously, *changing* one's desires has a cost.¹⁵⁸ We are familiar with these costs; we incur them constantly in efforts to abandon desires that we do not wish to have.¹⁵⁹ For example, children must learn to curb their desires to throw their toys, and adults must learn to curb their desires for fattening foods.¹⁶⁰ Learning to modify desire is a chief challenge of human existence.¹⁶¹

¹⁵⁰ See DRESSLER, *supra* note 1, at 53–54.

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ See *Carroll Towing*, 159 F.2d at 173.

¹⁵⁴ See MORSE, *supra* note 89, at 1607.

¹⁵⁵ See MOORE, *supra* note 37, at 141.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ MARTIN E.P. SELIGMAN, WHAT YOU CAN CHANGE AND WHAT YOU CAN'T: THE COMPLETE GUIDE TO SUCCESSFUL SELF-IMPROVEMENT 3–25 (1995).

¹⁵⁹ See *id.* at 3–5.

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

Moreover, the cost of changing desires is more complex than changing beliefs.¹⁶² For example, a gourmet's desire for coquilles Saint Jacques served with Veuve Clicquot champagne requires a more complex—and neurologically costly—representational system than simply desiring food.¹⁶³ Similarly, certain mens rea involve more complex representation.¹⁶⁴

The methods of changing one's desire can be ranked according to costliness.¹⁶⁵ At the bottom, the "cheapest" methods of desire modification are probably self-consciousness and self-reflection.¹⁶⁶ They involve a "cost" in time, as well as a cost in introspective capacities to examine oneself. This cost is greater in a child or an impetuous person, but it is available to everyone. "Do I really want that cupcake?" dieters ask themselves.

Moving up the scale of costliness, actors can engage in various types of therapies to understand and perhaps change their desires.¹⁶⁷ "Know thyself," the Delphic shrine enjoins—and armies of psychotherapists, psychiatrists, and 12-step self-help experts have heeded the call.¹⁶⁸ One can harness these therapeutic techniques to groups—using an individual's desire to look good in a group and relying on others' emotional support—to enhance behavior modification.¹⁶⁹ Weight Watchers, anger management programs, and certain forms of psychotherapy use groups in this way.¹⁷⁰ Weight Watchers then teaches one to enjoy healthier, less caloric food—thus changing desire.¹⁷¹ It also provides negative reinforcement. People learn to discount the pleasure of eating cream puffs and chocolate sundaes by also adding a disutility to eating such foods, such as having to "weigh-in" at Weight Watchers and experience the shame of failure.¹⁷²

Some desires are quite difficult or costly to change.¹⁷³ Alcoholics have difficulty controlling their desires for alcohol and pedophiles have difficulty changing their sexual preferences.¹⁷⁴ People with an angry

¹⁶² See MOORE, *supra* note 37, at 137–49.

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ See SELIGMAN, *supra* note 158, at 24–27.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.* at 30–45.

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See SELIGMAN, *supra* note 158, at 24–27; Morse, *supra* note 89, at 1607–08.

¹⁷¹ See SELIGMAN, *supra* note 158, at 3–25.

¹⁷² See *id.*

¹⁷³ See *id.* at 198–222.

¹⁷⁴ *Id.*

temperament, which leads to criminal acts, can change or redirect their temperament, but this often takes considerable time and expense.¹⁷⁵

Furthermore, changing ourselves to preclude ever spawning a criminal or immoral desire under *any* foreseeable circumstance would be very costly not simply in terms of money, but also in terms of time, effort, and freedom.¹⁷⁶ Certainly, all of us have tendencies, emotional states, or habits that could lead to criminal desires.¹⁷⁷ A tendency to greed might, under certain circumstances, lead to desires to steal money.¹⁷⁸ Similarly, a tendency to gluttony might lead to desires to steal pastries.¹⁷⁹ Indeed, probably the *only* people who have attempted to so purify themselves would be members of religious orders, like Catholic monks and nuns or American Shakers, who adopt lifestyles specifically designed to inculcate and encourage goodly desires and to extirpate illicit ones.¹⁸⁰ They willingly give up freedom and lead monitored, circumscribed lives.¹⁸¹ Indeed, many desires cannot realistically be conquered. Those with such desires must completely avoid all eliciting stimuli. Thus, recovering alcoholics simply avoid situations (and individuals) that (and who) might lead to the serving of alcohol. This avoidance constitutes a significant cost in planning and foregone experiences.

Surely the criminal law does not require that we all assume the tonsure and start making jam or build elegantly practical wooden furniture while singing "Simple Gifts." Rather, there must be a trade-off between the value of personal freedom—or having tendencies that could lead to illicit desires or even those desires themselves—and the cost of changing every desire to commit a criminal act or every psychological tendency that might lead to such desire under any circumstance.¹⁸² Indeed, inclinations that have the potential to create evil—such as greed, competitiveness, and sexual desire—are essential building blocks of worthwhile human motivation and endeavor.

A well-known Talmudic legend underscores this point. The rabbis once captured the yetzer hara—which in Jewish tradition refers to "evil inclination"—a spiritual presence always in the world. The rabbis hid the yetzer hara in a barrel. As a result, nothing happened in the

¹⁷⁵ *Id.* at 117–34.

¹⁷⁶ See Morse, *supra* note 89, at 1605–10.

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ See 1983 CODE c.277, §§ 1–2 (Canon Law).

¹⁸¹ See *id.*

¹⁸² See Parker, *supra* note 21, at 748.

world: no one went to work and even the chickens stopped laying eggs. The rabbis had to let the yetzer hara go.¹⁸³ The Talmud concludes that, without evil inclination, "no man would build a house or marry a wife."¹⁸⁴ Tendencies towards criminal activity are also tendencies towards useful activity, and the law must balance the value of illicit desire and its likelihood for harm.¹⁸⁵ Section E examines this balance.¹⁸⁶

D. *The Avoidance Cost of Will*

Practical reason conceived of as belief/desire sets fails to explain how individuals resolve conflicting desires. Smokers, dieters, and even voluntary "manslaughterers" frequently claim that they did not want to commit their bad act, but that somehow they were compelled.¹⁸⁷ This is the ancient puzzle of *akrasia*—why do we sometimes lack the will to do what we purport to do?¹⁸⁸ Economists, psychologists, and legal theorists have tried to understand *akrasia* in terms of "time inconsistent preferences."¹⁸⁹ Although this is certainly not the only way to understand this problem, it is the most consistent with the economic approach of this Article.¹⁹⁰

Every first-year finance student knows that a dollar now is worth more than a dollar next year. Applying this notion to utility, we would prefer to have a doughnut now, as opposed to four weeks from now.¹⁹¹ The closer we are to having money or utility, the more we value it.¹⁹² Thus, money expected in the future is "discounted" at a certain rate or

¹⁸³ See BABYLONIAN TALMUD, YOMA 69b.

¹⁸⁴ Genesis Rabbah 9:7.

¹⁸⁵ See Parker, *supra* note 21, at 748.

¹⁸⁶ See *infra* notes 211–229 and accompanying text.

¹⁸⁷ See Morse, *supra* note 89, at 1587.

¹⁸⁸ See ALFRED R. MELE, *IRRATIONALITY: AN ESSAY ON AKRASIA, SELF-DECEPTION, AND SELF-CONTROL* 3–4 (1987).

¹⁸⁹ See Tim O'Donoghue & Matthew Rabin, *Doing It Now or Later*, 89 AM. ECON. REV. 103, 103–04 (1999). For a pioneering account of the importance of time-inconsistent preference in the criminal law, see generally Manuel Utset, *When Good People Do Bad Things: Time-Inconsistent Misconduct & Criminal Law* (Fl. St. Univ. College of Law, Public Law Research Paper No. 232, 2006), available at <http://ssrn.com/abstract=895734>.

¹⁹⁰ This section largely adopts George Ainslie's argument about the will, not because it is uncontroversial, but because Ainslie's view can be best subsumed by an economic interpretation. See Gideon Yaffe, *Recent Work on Addiction and Responsible Agency*, 30 PHIL. & PUB. AFF. 178, 194–209 (2001) (discussing Ainslie's and others' theories of the will).

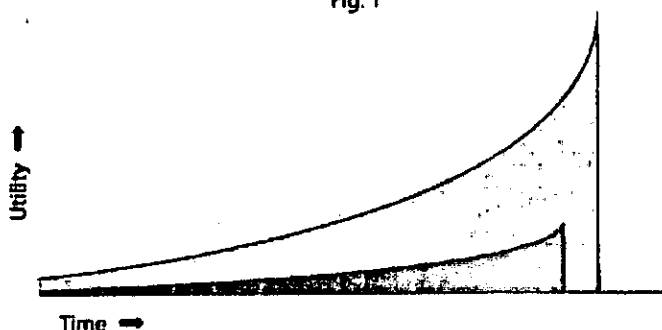
¹⁹¹ GEORGE AINSLIE, *BREAKDOWN OF WILL* 28–35 (2001).

¹⁹² *Id.* at 28.

fraction.¹⁹³ This rate could be geometric, exponential, or hyperbolic.¹⁹⁴ Most present value calculations that bankers use are exponential.¹⁹⁵

There is an important feature about *consistent* discount rates: relative values generally remain constant under a consistent discounting.¹⁹⁶ In other words, if you value A greater than B, you will value A more than B at most points in time—even though the value you place on A and B changes over time.¹⁹⁷ If we plotted this relationship with time on the x-axis and utility on the y-axis under consistent discounting, Figure 1 shows the results:

Fig. 1



What if we value different things at different discount rates? As George Ainslie points out, we could value some things at a hyperbolic rate and others at geometric or exponential rates.¹⁹⁸

Take the analysis further. What if we value conflicting desires at different discount rates? Say we value the pleasure or utility of eating a doughnut at a hyperbolic rate, but being fit at an exponential rate. Interestingly, at a significant period in time we would value the doughnut more even if we valued being fit more in absolute terms.¹⁹⁹ This is because hyperbolically discounted desires are valued to a much greater degree the closer one is to them.²⁰⁰ Figure Two below illustrates this effect.

¹⁹³ *Id.*

¹⁹⁴ *See id.* at 32.

¹⁹⁵ *See id.* Exponential refers to the function that describes the curve, i.e., $y = ka^x$.

¹⁹⁶ *See* AINSLIE, *supra* note 191, at 32.

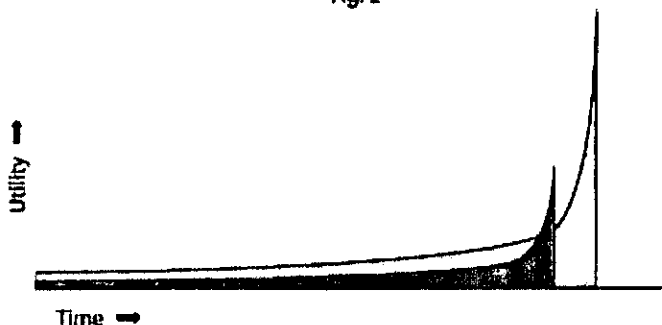
¹⁹⁷ *See id.*

¹⁹⁸ *See id.* Hyperbolic also refers to the function that describes the curve.

¹⁹⁹ *See id.*

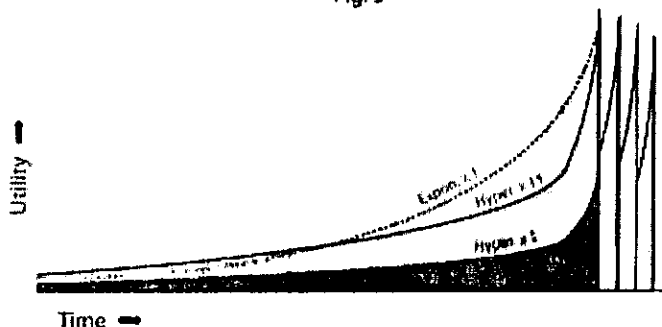
²⁰⁰ *See id.*

Fig. 2



Take the analysis yet another step. Consider individuals balancing their desire to eat the doughnut against the desire of being thin one day. In effect, these individuals compare the utility not of partaking or refraining *at that one instant* but in numerous future instances, because they will get fit only if they commit themselves to refraining in the future.²⁰¹ If one adds the utility curves over time, the hyperbolic curve becomes closer to the exponential.²⁰² In other words, there is consistent valuation, and the doughnut is less attractive in both discounted and absolute terms.²⁰³ The following curve illustrates this concept.

Fig. 3



This suggests that if eating cake is put in the context of future payoffs, the hyperbolic effect diminishes.²⁰⁴ But this is true only to the degree that the actors, in fact, believe they will abstain in the future.²⁰⁵ Under this interpretation, the will is not a matter of some mechanical force overcoming various, contradictory impulses.²⁰⁶ Rather, it is a bet

²⁰¹ See AINSLIE, *supra* note 191, at 78-85.

²⁰² See *id.*

²⁰³ See *id.*

²⁰⁴ See *id.*

²⁰⁵ See *id.*

²⁰⁶ See AINSLIE, *supra* note 191, at 78-85.

or probability distribution—I will abstain now *if* I can trust myself to abstain in the future because *only* if I successfully commit to abstaining will I be better off resisting temptation.²⁰⁷

Given its instability, it is far from clear why individuals would rely on the will to control their illegal impulses. Why not simply eradicate the desire for doughnuts entirely? Or, to use an example more relevant to the criminal law, why not eradicate a tendency toward anger, jealousy, violence, or any other tendency that would create conflicting desires between legal and illegal acts and thus call in the need for the will? The answer is, of course, that it is *ex ante* too costly to eradicate all desires or tendencies that might lead to such conflicts because some tendencies towards criminality have benefits.²⁰⁸ Such a strategy would be like the rabbis putting the yetzer hara in a barrel. Will is the mechanism used to keep in check those tendencies that are useful but may also have harmful, immoral, or illegal results.²⁰⁹

The will is likely less effective at avoiding criminal acts than eliminating all potentially illicit criminal desires.²¹⁰ Nonetheless, relying on the will may be cheaper than completely changing one's desires so as to avoid all criminal actions. In this way, the will might at times be the most efficient mechanism for law-following.

E. *The Hand Formula and Practical Reason: The Cost of Moral Spartans*

To the degree that beliefs, desires, and will are malleable, actors have a legal duty to modify them to the extent necessary to avoid criminal behavior. The question is *how much* change the law requires. This question can be put in economic terms: how much cost—through strengthening practical reason and the will—must individuals expend? It is untenable to require perfection because it costs too much in time, money, and freedom.²¹¹ Most societies and most people do not go to such extremes.²¹² “[T]he criminal law is not perfectionistic. It sets only minimum standards of conduct. It does not, nor should it, function as the moral police, requiring us, upon threat of death or loss of liberty and resulting stigma, to act virtuously.”²¹³ One would imagine that only

²⁰⁷ See *id.*

²⁰⁸ See Parker, *supra* note 21, at 748.

²⁰⁹ See MOORE, *supra* note 37, at 113–15, 121; Morse, *supra* note 128, at 373.

²¹⁰ See MOORE, *supra* note 37, at 113–15, 121; Morse, *supra* note 128, at 373.

²¹¹ See Dressler, *supra* note 10, at 1369.

²¹² See *id.*

²¹³ *Id.*

the die-hard deontologist would assert that the rules of criminal society are so commanding that *all* of society's resources must be devoted to creating moral Spartans capable of acting legally under all circumstances. Rather, some sort of balancing is required.²¹⁴

One can express this maximization more formally by appeal to the Learned Hand formula set forth in 1947 by the U.S. Court of Appeals for the Second Circuit in *United States v. Carroll Towing*.²¹⁵ One would develop correct beliefs, licit desires, and willpower only up to the degree that the marginal expense equals the cost of crimes likely to be committed factored by the likelihood of circumstances leading to the actor having to decide whether to commit a crime.²¹⁶ Thus, excuse is available when the cost of avoiding the crime exceeds its injury, factored by the probability of its occurrence.²¹⁷

Despite relying somewhat on the language of economics, this position is not necessarily utilitarian.²¹⁸ Whether one assumes a deontological (the laws must be followed because following the law is a good unto itself) or a utilitarian (the laws must be followed to maximize utility) approach to the criminal law, one would have to accept, at least to some degree, that resources devoted to practical reason must be optimized.²¹⁹ The deontologist, as Michael Moore states, is a "consequentialist" in that he or she sees as the purpose of the criminal law to *maximize* lawful (or moral) behavior.²²⁰ Assuming, therefore, that all of human effort need not be devoted to cultivating lawful tendencies (we all need not enter religious orders or become Shakers), the deontologist would accept that resources should be allocated to induce the greatest amount of lawful behavior.²²¹ Excuse is available from a deontological perspective when *ex ante* there would be no duty to follow the rule.²²² Given the limited nature of human practical reason and the need to allocate or ration it, even deontologists must concede that there are some lawful rules whose violation can be excused.²²³

²¹⁴ See Parker, *supra* note 21, at 748.

²¹⁵ See 159 F.2d at 173.

²¹⁶ See *id.*

²¹⁷ See *id.*

²¹⁸ See Michael Moore, *When We May Balance Evils: Agent-Relative Restrictions on Consequentialist Justifications* 5–11 (Dec. 13, 2005) (unpublished manuscript, Loyola University Law Faculty Workshop), available at http://www.luc.edu/law/faculty/facworkshops/balance_evils.pdf.

²¹⁹ See *id.*

²²⁰ *Id.* at 6.

²²¹ See *id.* at 7.

²²² See *id.* at 7–10.

²²³ See Moore, *supra* note 218, at 7–10.

Finally, this economic balancing test elucidates excuses—those instances when we could not expect actors to be guided by correct practical reason.²²⁴ But it does not justify or explain *why* the criminal law is concerned with reason-guided behavior, a concern that many, particularly from law and economics, have questioned.²²⁵ Judge Posner does not envision as the purpose of criminal law to punish people for performing prohibited acts with bad intentions, but rather sees intentions as proxies for certain economic goals.²²⁶ He asserts that “the concept of intent in criminal law serves three economic functions: identifying pure coercive transfers, estimating the probability of apprehension and conviction, and determining whether the criminal sanction will be an effective (cost-justified) means of controlling undesirable conduct.”²²⁷ His final justification for the criminal law, as with all law, remains to maximize utilitarian welfare.²²⁸

Whether Judge Posner and the law and economics school are correct is beyond this Article’s scope.²²⁹ The point that must be made, however, is that one can adopt an economic interpretation of criminal excuse without committing oneself to an economic interpretation of the criminal law. In other words, one can hold that illicit intentions have legal and moral significance—regardless of their economic impact—and still maintain, as this Article does, that criminal excuse should be guided by economic concerns.

III. SPECIFIC CRIMINAL EXCUSES, THEIR CURRENT TREATMENT, AND RECOMMENDATIONS FOR REFORM

An economic approach can resolve some of the more intractable questions concerning criminal excuse and partial excuse doctrines. The following examines three of the most difficult and confused excuse doctrines: maturity,²³⁰ duress,²³¹ and—most complicated of all—voluntary manslaughter.²³² Each of these excuses reflects a particular deficiency in practical reasoning—belief, desire, and will, respectively. The following shows how an economic theory of excuse provides better, clearer rules

²²⁴ See *Carroll Towing*, 159 F.2d at 173.

²²⁵ See, e.g., Becker, *supra* note 109, at 194; Posner, *supra* note 107, at 1221.

²²⁶ Posner, *supra* note 107, at 1221.

²²⁷ *Id.*

²²⁸ See *id.* at 1195–97.

²²⁹ See *id.* at 1195–97, 1221.

²³⁰ See *infra* notes 236–272 and accompanying text.

²³¹ See *infra* notes 273–300 and accompanying text.

²³² See *infra* notes 301–402 and accompanying text.

for jurors.²³³ This discussion is necessarily oversimplified in its classifications. For instance, maturity is not simply or only a case of faulty belief.²³⁴ There is evidence that adolescents may be more impetuous than adults, and some have argued the law must take this into account.²³⁵ Nonetheless, the discussion provides a basis for revising the excuse doctrines.

A. Maturity: An Excuse of Faulty Belief

Every jurisdiction recognizes that youth or "immaturity" under certain conditions excuses criminal acts.²³⁶ The traditional common law states that actors seven and under may not be criminally responsible, actors above the age of fourteen may be criminally responsible, and that there is a rebuttable presumption that actors in between these ages lack responsibility.²³⁷ Current jurisdictions differ in the age of conclusive presumption of responsibility and of presumptive maturity, but most maintain some sort of cutoff age.²³⁸

The rules for juvenile criminal responsibility receded in importance with the rise of juvenile courts in the last century.²³⁹ Juvenile courts functioned without the traditional common law courts' procedural safeguards, such as open hearings and rules of evidence.²⁴⁰ Because they "emphasized treatment, supervision, and control rather than punishment," the juvenile courts were not primarily concerned with determining guilt or innocence; rather, they focused on reform and rehabilitation.²⁴¹

Numerous factors have returned the issue of the immaturity defense to the courts since the 1980s and 1990s.²⁴² Several U.S. Supreme Court decisions have required increased procedural formality in juvenile proceedings, and new state laws have both removed status offenders from juvenile court jurisdiction and sent serious offenders to the

²³³ See *infra* notes 365–368 and accompanying text.

²³⁴ See Jay D. Aronson, *Brain Imaging, Culpability, and the Juvenile Death Penalty*, 13 PSYCHOL. PUB. POL'Y & L. 115, 131–32 (2007).

²³⁵ See *id.*; see also *Roper v. Simmons*, 543 U.S. 551, 566–68 (2005).

²³⁶ ROBINSON, *supra* note 25, § 175(a), at 321.

²³⁷ *Id.* § 175(e), at 335 n.32.

²³⁸ *Id.* § 175(a), at 321.

²³⁹ Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 71 (1997).

²⁴⁰ *Id.*

²⁴¹ See *id.*

²⁴² See *id.* at 74.

adult system.²⁴³ Consequently, numerous courts, in a variety of jurisdictions, regularly face questions about juveniles' criminal responsibility.²⁴⁴

Given the new focus on juvenile criminal responsibility, courts have been forced to answer questions about the degree to which youth excuses crimes.²⁴⁵ For example, courts have had to decide whether the death penalty is appropriate for youthful offenders,²⁴⁶ whether criminal sanctions are appropriate for young children,²⁴⁷ and whether immaturity can function as a defense in crimes of specific intent.²⁴⁸

Consistent with this Article's approach, many have described the immaturity defense as an incapacity of proper *belief*.²⁴⁹ Children—at least young children, not adolescents—simply do not have a correct understanding about the world, and, therefore, one cannot hold them morally responsible as practical reasoners.²⁵⁰ When confronted with actors whose maturity is in doubt and instances in which there must be determinations about criminal responsibility, courts typically examine two factors: defect in knowledge of physical consequences of conduct and ignorance of wrongfulness or criminality.²⁵¹ As Paul Robinson states, the immaturity defense “exists because blameworthiness necessitates sufficient maturity to act properly. Where, because of his immaturity, an actor does not *know* the likely physical consequences of his act or its wrongful or criminal nature, his conduct is not a product of meaningful choice”²⁵²

Two justifications for the immaturity excuse include that young people are incapable of forming a criminal intent, and, on general moral grounds, that children should not be punished.²⁵³ The first reason is probably erroneous because children can form intentions to

²⁴³ *Id.*

²⁴⁴ See Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 503–06 (1984).

²⁴⁵ See, e.g., *Roper*, 543 U.S. at 566–68; *In re William A.*, 548 A.2d 130, 131 (Md. 1988); *In re Robert M.*, 441 N.Y.S.2d 860, 861 (N.Y. Fam. Ct. 1981).

²⁴⁶ See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (upholding imposition of death penalty on offenders aged 16 or 17 at the time of their crimes), *overruled by Roper*, 543 U.S. at 553.

²⁴⁷ See, e.g., *In re William A.*, 548 A.2d at 131; see also *In re M.C.H.*, 637 N.W.2d 678, 679–81 (N.D. 2001); *State v. J.B.*, 958 P.2d 368, 369 (Wash. Ct. App. 1998).

²⁴⁸ See, e.g., *In re Robert M.*, 441 N.Y.S.2d at 861.

²⁴⁹ See ROBINSON, *supra* note 25, § 175(a), at 324–25.

²⁵⁰ See *id.* Adolescents are probably indistinguishable from adults as practical reasoners. See Morse, *supra* note 144, at 50. This Article does not address whether adolescents might have greater problems with impulse control.

²⁵¹ ROBINSON, *supra* note 25, § 175(a), at 325.

²⁵² *Id.* (emphasis added).

²⁵³ See *id.* § 175(b), at 328–29.

perform criminal acts.²⁵⁴ The second may be true, but this Article will, of course, assume the opposite.

Although these criminal responsibility principles are not controversial, they are so vague that their application to particular crimes and circumstances can be quite difficult.²⁵⁵ Not surprisingly, disagreement exists over the different standards to be used when applying them.²⁵⁶ Barry Feld argues that the juvenile criminal law system should be abolished, and, in its stead, there should be a juvenile-specific "sentencing policy that integrates youthfulness, reduced culpability, and restricted opportunities to learn self control with principles of proportionality [that] would provide younger offenders with categorical fractional reductions of adult sentences."²⁵⁷ Similarly, Elizabeth S. Scott and Laurence Steinberg suggest a "mitigation model" of juvenile criminal justice in which juvenile offenders would be treated more leniently due to their diminished capacity for moral action.²⁵⁸ All argue for strict age cut-offs for the application of their systems of excuse.²⁵⁹

Feld, like Scott and Steinberg, despairs at the difficulties and vagaries of individualized maturity determinations and prefers categorical cutoffs, largely on the practical grounds that individualized determinations would be difficult to administer and would undermine legality.²⁶⁰ They fear that because the determination is not susceptible to precise scientific psychological definition, it would place too much discretion

²⁵⁴ See Stephen J. Morse, *Not So Hard (And Not So Special), After All: Comments on Zimring's "The Hardest of the Hard Cases,"* 6 VA. J. SOC. POL'Y & L. 471, 474 (1999) ("All offenders who kill on purpose, whether they are young or old, are committing the same offense.").

²⁵⁵ See ROBINSON, *supra* note 25, § 175(b), at 328-29.

²⁵⁶ See, e.g., Feld, *supra* note 239, at 118; Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 829 (2003).

²⁵⁷ Feld, *supra* note 239, at 118.

²⁵⁸ Scott & Steinberg, *supra* note 256, at 829.

²⁵⁹ See *id.* at 836; see also Feld, *supra* note 239, at 121-23.

²⁶⁰ Feld, *supra* note 239, at 121-23; Scott & Steinberg, *supra* note 256, at 836 ("[T]he capacities and processes associated with adolescence are characteristic of individuals in a relatively defined group . . ."). Feld states:

[A] categorical 'youth discount' that uses age as a conclusive proxy for reduced culpability and a shorter sentence remains preferable to an 'individualized' inquiry into the criminal responsibility of each young offender. The criminal law represents an objective standard. Attempts to integrate subjective psychological explanations of adolescent behavior and personal responsibility into a youth sentencing policy cannot be done in a way that can be administered fairly without undermining the objectivity of the law.

Feld, *supra* note 239, at 121-23.

in the hands of the trier of fact and would needlessly and injuriously burden the courts.²⁶¹

As critics point out, however, a categorical rule is inconsistent with basic principles of the criminal law because it could excuse those with the capacity for moral responsibility.²⁶² Robinson concludes that a strict cut-off "has little theoretical support. The law does not excuse an actor because he is seven, but because the actor's youthfulness suggests insufficient maturity for responsible action. Actual maturity must remain the theoretically preferred standard."²⁶³

This Article's approach provides an individualized test for juries and judges to test for maturity. One would expect a juvenile to develop correct beliefs about the world to the degree that the marginal cost of correct beliefs exceeds the cost of crimes likely to be committed factored by the likelihood of circumstances leading to the actor having to decide whether to commit a crime.²⁶⁴

The costs of changing the beliefs of juveniles, however, are greater than for adults for two reasons. First, children have less control over their environment. If they realize that they have a problem with, say, understanding the permanence of death or the likely result of cutting another with a knife, they cannot easily sign up on their own for classes in such subjects. They do not have money, resources, or freedom.

Second, and more important, children may not *realize* that they have a problem.²⁶⁵ Like the insane, they have limited capacity for knowledge—including knowledge of their own benefit and benefit maximization, as well as their own psychological make-up.²⁶⁶ This consideration augurs for a more lenient application of the standard, recognizing that children's "homo economicus" may not function properly. Or, in other words, an economic theory of excuse *assumes* a rational utility calculator. It assumes that following the law maximizes utility and that rational beings would choose to do so. As such, when the "homo economicus" does not function properly, the cost of changing the actor's power of practical reason becomes greater—and excuse should be used more liberally.

²⁶¹ Feld, *supra* note 239, at 121–23; Scott & Steinberg, *supra* note 256, at 836.

²⁶² See ROBINSON, *supra* note 25, § 175(b), at 328–29.

²⁶³ *Id.*

²⁶⁴ See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

²⁶⁵ See ROBINSON, *supra* note 25, § 175(a), at 325.

²⁶⁶ See *id.*

This test responds to commentators' concerns that individualized determinations of maturity are too difficult for courts.²⁶⁷ First, the test recognizes that maturity is a normative determination, not merely a psychological state or condition suitable for scientific explication.²⁶⁸ The test responds to commentators who believe that individual determinations of capacity are impossible because "[d]evelopmental psychology does not possess reliable clinical indicators of moral development or criminal sophistication that equate readily with criminal responsibility or accountability."²⁶⁹ Second, this approach does not present triers of fact with a scientific question of unfathomable complexity but rather asks them to make estimates about everyday occurrences and common psychological expectations. Jurors must estimate the cost of the crime, factored by its likelihood.²⁷⁰ This is precisely the question that the Learned Hand formula asks of triers of fact, a question they been answering for decades.²⁷¹ Jurors must then estimate the cost of correcting juvenile defendants' beliefs, given their limited control over their environment.²⁷²

B. Duress: An Excuse of Faulty Desire

Section 2.09 of the Model Penal Code states:

It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.²⁷³

The MPC relies on a particularly vague standard—"reasonable firmness"—to describe the faculty of control that duress compromises.²⁷⁴ If a person says, "Shoot that innocent, saintly nun over there or I'll kill your child," and you shoot the nun, surely the act is voluntary. It fails to fit any of the categories, like reflex or hypnotic suggestion, that the MPC recognizes as exceptions to a voluntary action.²⁷⁵ You decide

²⁶⁷ See Feld, *supra* note 239, at 121-22.

²⁶⁸ See *id.*

²⁶⁹ See *id.*

²⁷⁰ See *Carroll Towing*, 159 F.2d at 173.

²⁷¹ See *id.*

²⁷² See *id.*

²⁷³ MODEL PENAL CODE § 2.09(1) (Official Draft and Explanatory Notes 1985).

²⁷⁴ See *id.*

²⁷⁵ See *id.* § 2.01.

(quite rationally) that you would prefer to have your child live than the perfectly innocent—perhaps even morally superior—nun. There is nothing particularly soft or firm about your will. You make a choice and take a voluntary action. As Claire Finkelstein states, “[I]t is not clear what other sort of involuntariness there can be, that is, what non-physical involuntariness might mean.”²⁷⁶

Of course, the MPC reflects the common parlance that it would be “hard” or “difficult” not to save your child even if it required killing Mother Theresa.²⁷⁷ Joshua Dressler, although finding that the MPC standard of reasonableness is too liberal, elucidates this notion of the difficulty of following the law in duress.²⁷⁸ He states that the excuse “expresses our intuitive sense about the two types of cases. Society believes that the contract killer is freer to reject a million dollar deal to commit a homicide (and, therefore, is more deserving of condemnation), than someone who is ordered to kill on pain of losing an equivalent amount of money or suffering bodily harm.”²⁷⁹

But, again, appeals to common parlance or usage cannot solve a jury’s problems when confronted with duress issues. We may feel that a contract killer is somehow “freer” than someone ordered to kill on pain of losing an arm, but how is a jury to determine when freedom is compromised enough—or whether a particular actor, indeed, felt compromised? It is not clear how one could measure or approximate its degree of diminution of choice.

Finally, the MPC’s formulation faces a problem of subjectivity and context, as evidenced by its use of the word “reasonable” to modify “firmness.”²⁸⁰ If some conditions affect our faculties of choice, how should the law treat those whose faculties are easily disrupted? Do we excuse the kleptomaniac who is overcome by an urge to steal? Do we excuse the cat lover who kills a nun whom the cat lover mistakenly believes was threatening his cat? Most would answer “no,” and the law of duress clearly agrees.²⁸¹ In other words, all of the problems associated with determining what constitutes choice and quantifying the amount of emotion that can excuse are present here as well.

²⁷⁶ Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense In Law*, 37 ARIZ. L. REV. 251, 269 (1995).

²⁷⁷ See MODEL PENAL CODE § 2.09(1).

²⁷⁸ Dressler, *supra* note 10, at 1337.

²⁷⁹ *Id.*

²⁸⁰ See MODEL PENAL CODE § 2.09(1).

²⁸¹ See *id.*

Duress, when formulated as an excuse and not as a justification, is a failure of desire.²⁸² If a criminal holds a gun to your head and demands that you shoot either your mother or Mohandas Gandhi, and you spare your mother, the desire to kill is not a failing of the will.²⁸³ One really prefers at all times the life of one's mother to that of Gandhi. Furthermore, there is not an issue of cognitive failure. One really knows that the value of one's mother's life is less than those of the worthies and, therefore, there is no necessity defense of any sort.

Duress is available as an excuse, therefore, because it is too hard of a choice, as Stephen Morse would say, to decide between one's mother's life and that of a roster of worthies.²⁸⁴ Joshua Dressler argues that duress is available when we cannot "fairly expect a person of non-saintly moral strength to resist the threat."²⁸⁵ Claire Finkelstein argues that we find worthy the desire to save one's mother and encourage that desire.²⁸⁶ Because it is impossible to differentiate between desires so finely, we excuse choices based upon laudable desires.²⁸⁷

These views are susceptible to an economic interpretation.²⁸⁸ It is inarguable (in most circles) that the desire to save one's mother's life is laudable and that the desire to kill worthies is not. At the same time, one can always imagine circumstances when most people would concede it is the moral thing to kill one's mother. For example, you must choose between your mother—who is a terminally ill 90 year-old evil scientist about to release a killer Ebola-like virus and who previously worked as a guard in a concentration camp and chain smokes cigarettes—and a 28 year-old doctor who works with AIDS patients in Africa.

In an ideal world, we would have the correct desire at the correct times, even if these desires were significantly different from those to which human beings are likely predisposed, like desiring to avoid one's mother's death. Indeed, societies, like those of ancient Sparta or, more recently, Nazi Germany, have attempted to wean people from their natural, morally worthy tendencies to defend friends or family so as to give them desires more associated with (often distasteful or plain im-

²⁸² See Dressler, *supra* note 10, at 1337.

²⁸³ See *id.* ("Fear [under which actors in duress act] . . . is itself a desire, namely, the desire to avoid unpleasant consequences.").

²⁸⁴ See Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397, 399 (2006).

²⁸⁵ Dressler, *supra* note 10, at 1367.

²⁸⁶ Finkelstein, *supra* note 276, at 271-76.

²⁸⁷ *Id.*

²⁸⁸ See Dressler, *supra* note 10, at 1367; Finkelstein, *supra* note 276, at 171-76; Morse, *supra* note 284, at 399.

moral) societal goals.²⁸⁹ Without appeal to such exotic examples, the same point could be made about modern military training here in the United States. Soldiers are trained to follow orders—even if those orders and their actions result *directly* in the deaths of comrades and friends, which might be murder in a civilian context.

In other words, with enough effort and conditioning, human beings can presumably desire to follow virtually any moral or legal code within broad biological or evolutionary psychological parameters.²⁹⁰ With proper training, one would *want* to kill one's former concentration camp guard mother as opposed to the 28 year-old AIDS doctor.²⁹¹

To make the point using a middle brow example, consider Mr. Spock in *Star Trek II: The Wrath of Khan*.²⁹² Mr. Spock sacrifices his life to save the Enterprise and all its crew from death and destruction.²⁹³ He does so because of the "logical" deduction that "the needs of the many outweigh the needs of the few."²⁹⁴ Given Mr. Spock's conditioning and training in logic during his formative years on the planet Vulcan, he *desires* to act logically in accordance to what the screenplay purports to be a binding logical truism.²⁹⁵ He, therefore, *wants* to die.²⁹⁶

Whether it is worth the expense of training actors to *desire* to act according to whatever legal or moral system is an economic question.²⁹⁷ Following this Article's framework, we would train individuals only to the degree that the training's marginal cost is less than the harm factored by its likelihood.²⁹⁸ Here, the circumstances giving rise to situations involving duress are extremely rare. Generally, the desire to follow the law does not conflict with one's desire to avoid harm to a loved one. Given the cost of creating individuals who would follow the law despite harm to a loved one—factored by the low probability of such circumstances requiring such choices—most likely it does not make economic sense to train individuals to act legally under those circumstances.²⁹⁹ They should be excused.³⁰⁰ By the same token, actors for whom duress

²⁸⁹ See generally LISA PINE, NAZI FAMILY POLICY, 1933–1945 (1997) (discussing the Nazi encouragement of children to act as informants on their parents).

²⁹⁰ See *id.*

²⁹¹ See *id.*

²⁹² See *STAR TREK: THE WRATH OF KHAN* (Paramount Pictures 1982).

²⁹³ *Id.*

²⁹⁴ See *id.*

²⁹⁵ See *id.*

²⁹⁶ See *id.*

²⁹⁷ See *Carroll Towing*, 159 F.2d at 173.

²⁹⁸ *Id.*

²⁹⁹ See *id.*

³⁰⁰ See *id.*

might be foreseeable or expected should develop desires and tastes so as to want to act legally.

C. *The Partial Excuse of Provocation: An Excuse of Faulty Will*

With significant differences among the jurisdictions,³⁰¹ current law typically provides that the partial excuse of provocation applies in homicide cases to reduce the criminal act from murder to voluntary manslaughter when there is "a provocative event that results in . . . overwrought emotion," and this provocation is "adequate" or appropriate, so that it "might cause an ordinary person . . . of ordinary . . . temperament . . . to become enraged or otherwise emotionally overcome."³⁰² The doctrine requires that the provocation be adequate, the killing occur while the actor was in the "heat of passion," and the actor's loss of self-control be reasonable.³⁰³ The Model Penal Code has an analogous approach to provocation, stating that a homicide committed under the influence of "extreme mental or emotional disturbance for which there is reasonable explanation or excuse" is manslaughter, not murder.³⁰⁴ According to the commentary, "extreme mental or emotional disturbance" means distress so great that it results in the actor "los[ing] his self-control."³⁰⁵ Although there is significant dispute about whether heat-of-passion provocation is a justification or an excuse, most contemporary lawyers classify it as a partial excuse, and that is the view this Article will adopt without venturing into the controversy.³⁰⁶

Numerous problems emerge with this formulation of the provocation excuse. It is not clear what the phrases "ordinary person"³⁰⁷ and "from passion, rather than judgment"³⁰⁸ mean. Who is the "ordinary" or "reasonable man," and does he create an empirical or normative standard?³⁰⁹ What does it mean to act from one's passion?³¹⁰ Further-

³⁰¹ See Garvey, *supra* note 2, at 1689 n.38 ("An uncontroversial statement of the common law rule is impossible.").

³⁰² Dressler, *supra* note 14, at 972-73.

³⁰³ See *id.*

³⁰⁴ MODEL PENAL CODE § 210.3(1)(b).

³⁰⁵ MODEL PENAL CODE AND COMMENTARIES § 210.3 cmt. at 56 (Official Draft and Revised Comments 1980).

³⁰⁶ See Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 73 (2003) ("According to the majority view, provocation is a partial excuse . . .").

³⁰⁷ Dressler, *supra* note 14, at 973.

³⁰⁸ See *id.* at 998.

³⁰⁹ See *id.* at 973, 987.

³¹⁰ See *id.* at 998.

more, if actors cannot control their passion, provocation should be a total excuse—like insanity—not a partial one.

It is no exaggeration that heat-of-passion provocation is the most controversial of the criminal excuse doctrines.³¹¹ Judges and commentators have struggled to make sense of its categories.³¹² The following offers a new solution to these disputes.

1. A New Approach to the Heat-of-Passion Provocation Excuse

Two objections to provocation in manslaughter cases seem most devastating. First, the MPC or common law cannot define, and juries cannot measure, *how much or what kind of* emotional distress is necessary to make the excuse available.³¹³ The language is vague and metaphoric.³¹⁴ Second, a lack of “choice” cannot form the basis of provocation.³¹⁵ Choice is present even when we act under emotional distress.³¹⁶ An actor could have done differently but chose to act as he or she did.³¹⁷ Speaking of the difference between provocation and self-defense, Cynthia Lee argues that “[g]iven the presence of choice in both provocation and self-defense cases, it is simply incorrect to say these doctrines exculpate the defendant or mitigate the crime because the defendant acted involuntarily.”³¹⁸

These two objections can be reduced to one problem: no one can specify what constitutes choice or emotional disruption of choice, and therefore one can speak only metaphorically about how these faculties function.³¹⁹ Defining “overcome by passion” is simply impossible without reference to further metaphors.³²⁰ Current understanding of psy-

³¹¹ See Morse, *supra* note 1, at 335 (“The common law’s ‘provocation/passion’ doctrine is the most hoary [of the partial excuses].”).

³¹² See *id.* Significant disagreement exists over the contours of the common law doctrine. The doctrinal subtleties are not at issue here.

³¹³ See Tom Stacy, *Changing Paradigms in the Law of Homicide*, 62 OHIO ST. L.J. 1007, 1070 (2001).

³¹⁴ See *id.* (“By design, this provision [of the MPC] provides exceedingly little guidance as to what constitutes a “reasonable excuse or explanation” and leaves jurors essentially on their own. . . . [I]t leads to inconsistent results.”).

³¹⁵ See LEE, *supra* note 5, at 235.

³¹⁶ See *id.*

³¹⁷ See *id.*

³¹⁸ See *id.*

³¹⁹ See *id.*; Stacy, *supra* note 313, at 1069–70.

³²⁰ See Morse, *supra* note 284, at 400.

chology and neurobiology are simply too crude to define these ideas in physical terms.³²¹

Describing human action in terms of practical reason provides a less metaphoric understanding of human action; however, as discussed above, problems remain in determining how practical reason can be disrupted. This is where an economic view of practical reason can clarify. Rather than require some description of when and how practical reason is disrupted—something that current psychological and neurobiological understanding cannot do (and given the normative questions involved, it is unlikely ever to do)—this Article's approach merely requires an estimation of the costs of strengthening practical reason to withstand disruption. Because human beings are constantly involved in the process of altering beliefs and desires and have knowledge about the costs and difficulties of such alterations, juries can competently perform this estimation.

Some commentators, like Stephen Morse, argue that those who kill in the heat of passion have the same capacity for practical reason as any other person, and, therefore, these commentators argue for the abolition of the partial excuse.³²² Similarly, Kyron Huigens argues that culpability turns on the actor's "quality of . . . practical reasoning in light of his wrongdoing before we impose criminal liability It is the question of fault. . . . [T]hat question is adequately answered by the finding of a purpose to kill" that is present in provocation.³²³

³²¹ See *id.* ("[A]t present, neuroscience is insufficiently advanced to offer persuasive data that will be genuinely legally relevant.").

³²² See Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 290 (2003) ("[T]he criminal law should jettison the provocation/passion doctrine and should not adopt a generic partial responsibility doctrine because neither was morally necessary, the practical costs of adopting a generic partial defense would be unacceptably large, and provocation/passion was applied unfairly. I continue to believe, buttressed by more recent feminist analysis, that traditional provocation/passion doctrine is unwise.") (footnote omitted).

³²³ Kyron Huigens, *Homicide in Aretaic Terms*, 6 BUFF. CRIM. L. REV. 97, 134, 137 (2002) (stating that provocation "ought to be abolished as pernicious and unnecessary"). Garvey's recent attempt to justify provocation suffers from a failure to respond to this argument. Garvey, *supra* note 2, at 1732. He states:

[T]he reasonable loss of self-control requirement cannot mean what it says. . . . Virtuous actors never experience temptation and so never need to exercise self-control. . . . Alas, ordinary folks are never always virtuous. . . . They sometimes have to battle with temptation, and sometimes they lose, which is why provocation is commonly and fairly characterized as a "concession to human frailty."

Id. (quoting Suzanne Uniacke, *What are Partial Excuses to Murder?*, in *PARTIAL EXCUSES TO MURDER* 13, 13 (Stanley Meng Heong Yeo ed., 1990)).

On the other hand, a response to these commentators is possible if one identifies a defect in practical reasoning that distinguishes manslaughter from other homicides and explains why this defect in practical reasoning carries moral significance.³²⁴ This Article maintains that time-inconsistent preference is a failure of will and the defect found in the definition of manslaughter that separates it from other types of homicide. This defect has moral significance warranting excuse because, given its avoidance costs, it may be ex ante inefficient for actors to fortify their wills so as to avoid these crimes.

a. *Time-Inconsistent Preferences as the Distinguishing Feature of Heat-of-Passion Provocation*

Willpower and time-inconsistent preferences can distinguish voluntary manslaughter (resulting from provocation) from murder.³²⁵ Actors experience struggle when their desires conflict—they temporarily prefer an object that, in the long run, they would not otherwise prefer.³²⁶ In this sense, voluntary manslaughter is a crime of akrasia—actors kill in a “moment of ignorance, in which the actor honestly believes the law allowed him to kill, or in a moment of weakness, in which the actor’s will executes a desire to kill despite his belief that he should comply with the law and despite his countervailing (though insufficient) desire so to comply.”³²⁷

Willpower is the competence that allows one to “correct” incorrect discount values so that the truly preferred object is chosen.³²⁸ It involves numerous psychological tricks, strategies, and bargains.³²⁹ For instance, actors may learn to divert themselves from one type of behavior and to focus their attention on another, nondestructive behav-

Merely stating that provocation is a concession to human frailty does not explain why a jilted boyfriend’s sexual anger at his girlfriend can excuse but the impoverished, mistreated cousin’s premeditated murder of a worthless, wealthy uncle cannot. *See id.* Although this Article agrees that akratic murderers should be treated differently, criminal theory must have a moral, not merely descriptive, theory as to why certain weakness should be excused but not others. *See id.*

³²⁴ See Huigens, *supra* note 323, at 134, 137; Morse, *supra* note 322, at 290.

³²⁵ See Michael Louis Corrado, *Behavioral Economics, Neurophysiology, Addiction, and the Law* 9–27 (Univ. N.C. Legal Studies Research Paper No. 892007, 2006), available at http://papers.ssrn.com/abstract_id=892007. This is *not* the only approach to understanding failure of will in the context of legally adequate provocation or weakness of the will in general. *See id.* It is, however, the most amenable to economic explanation. *See id.*

³²⁶ See Garvey, *supra* note 2, at 1729.

³²⁷ *See id.*

³²⁸ See AINSLIE, *supra* note 191, at 78–79.

³²⁹ *See id.*

ior. Or, actors delay, promising themselves to indulge their hyperbolically valued desire at a later date.³³⁰

Most of these strategies involve actors convincing themselves that they will not succumb in the future so that the long run, preferable objects will, in fact, be preferable.³³¹ If one's volition withstands temptation once, but then succumbs in the future, this is the worst result for the actor because one will experience some disutility from withstanding the temptation but then never experience the utility of withstanding temptation in the future.³³²

Heat-of-passion provocation involves situations in which the actor's desire to kill is time-inconsistent. The actor only wishes to commit the prohibited act over a small time period. Other types of homicide involve consistent desires over time. This is, of course, obvious in premeditated murder. Even second degree murder, which requires no planning, presents potentially an impulsive act—but there is no claim that the impulsiveness is somehow conflicted or in tension with other desires.

b. *The Legal and Moral Significance of Failure of the Will: A Utilitarian Approach*

Although defining heat-of-passion provocation as involving time-inconsistent preferences may distinguish voluntary manslaughter from other types of homicide, this difference may not bear legal or moral significance. One could argue from a deontological perspective that one who kills in the heat of passion is less blameworthy because, under most circumstances, his or her intentions are good.³³³ But—as Morse or Huigens would respond—so what?³³⁴ Given the severity of the crime, even a person who acts on murderous intentions some of the time deserves the same punishment as someone who acts on them under a greater number of circumstances.³³⁵

Rather than argue from the deontological position that voluntary manslaughter is not "just as bad" as unprovoked murder—or rely on the lawyer's argument that the criminal law recognizes a difference in these types of homicide and, therefore, there must be a moral difference between them—this Article argues from a utilitarian perspective

³³⁰ See *id.*

³³¹ See *id.* at 78–89.

³³² See *id.*

³³³ See Huigens, *supra* note 323, at 134, 137; Morse, *supra* note 322, at 290.

³³⁴ See Huigens, *supra* note 323, at 134, 137; Morse, *supra* note 322, at 290.

³³⁵ See Huigens, *supra* note 323, at 134, 137; Morse, *supra* note 322, at 290.

that it would be inefficient *ex ante* to punish voluntary manslaughter. This is because the cost of avoiding such homicides is, in certain circumstances, greater than their cost, when factored by the likelihood of their occurrence.³³⁶ Giving provocation the same level of deterrence in punishment as other homicides would, therefore, over deter it.³³⁷

Avoiding voluntary manslaughter has a different cost structure than avoiding second-degree or first-degree murder—one that would make it rational to invest less in its prevention and deterrence in certain situations. Provocation is distinguished by two features.³³⁸ First, the tendency towards emotional violence is not criminal, or even morally wrong, in all circumstances—as are preferences, for example, towards violent sexual sadism or contract murder.³³⁹ To eliminate all tendencies towards voluntary manslaughter would impose an extra cost, greater than that required to eliminate tendencies towards other homicides.³⁴⁰ Second, actors would have to expend more effort to discover whether they have weak wills than to learn that they have illicit desires.³⁴¹ Unlike desires, which tend to be more consistent, the will is far more contextual and variable.³⁴² This raises the cost of avoiding criminal acts when relying on the will. These points will be discussed below.

One could easily imagine certain desires, say a violent sexual desire for children, that an actor would have to change. Even though the cost of changing sexual desires is very high, the harm of the crime, even factored by its likelihood, is too great.³⁴³ Applying this insight to homicide, the law expects actors to avoid intentional murder—first degree or second degree—because an actor's powers of practical reason are fully engaged.³⁴⁴ If an actor entertains a specific desire to kill, the law can expect the actor's practical reason to properly control such desire.³⁴⁵

The tendencies that lead to faulty will are of more ambiguous value.³⁴⁶ Anger, sexual jealousy, and aggression would be not only

³³⁶ See *Carroll Towing*, 159 F.2d at 173.

³³⁷ See *id.*

³³⁸ See *Parker*, *supra* note 21, at 748.

³³⁹ See *id.*

³⁴⁰ See *id.*

³⁴¹ See *MOORE*, *supra* note 37, at 141.

³⁴² See *id.*

³⁴³ See *id.*

³⁴⁴ See *MODEL PENAL CODE AND COMMENTARIES* § 210.2, cmt. at 13.

³⁴⁵ See *id.*

³⁴⁶ See *Parker*, *supra* note 21, at 748.

costly to change, but their elimination would cost society.³⁴⁷ Anger can be a useful motivating force, sexual jealousy no doubt plays some role in cementing romantic relationships and marriage, and pugilistic aggression is required in such jobs as soldiery and law enforcement.³⁴⁸ A man prides himself on his pugilistic nature or fighting because it elicits respect from those around him and is required for certain necessary pursuits like soldiery.³⁴⁹ Such a man, who in fact kills in a mutual combat, therefore, cannot be completely blameworthy for not eradicating his pugilism.³⁵⁰

It makes sense not to compel eradication of these tendencies and qualities, but to require actors' wills to balance them. Ainslie's model of the will, however, is inherently unstable.³⁵¹ It requires a "side bet" in which actors—deciding whether to lose self control and commit a "bad" act—must compare the clear benefit of committing the act against the benefit of restraint, which will be a benefit only if they continue to restrain in the future.³⁵²

One could argue that tendencies towards first-degree and second degree murder also can be valuable. After all, the hit man wants to earn a living, and certainly *that* is a worthy goal. The difference, however, is that the will is not involved in these types of murders.³⁵³ Rather, contract killing involves desires with known objects—objects that are clearly wrong.³⁵⁴ The cost of eliminating these specific desires with known, unquestionably wrong objects is without doubt less than the cost of eliminating a tendency toward pugilism, a tendency that could have good or bad objects.³⁵⁵

In short, society wants people with tendencies toward anger and, to some degree, jealousy.³⁵⁶ This societal preference comes at a cost—a reliance on the imperfect faculty of will. This raises the avoidance cost of the will. In instances in which failures of the will are not very foreseeable, it might be inefficient to make the expenditure.

In addition, as discussed earlier, the importance of the requirement that actors control their behavior increases as the likelihood that

³⁴⁷ See *id.*

³⁴⁸ See *id.*

³⁴⁹ See *id.*

³⁵⁰ See *id.*

³⁵¹ See AINSLIE, *supra* note 191, at 94.

³⁵² See *id.*

³⁵³ See MOORE, *supra* note 37, at 113–15, 121; Morse, *supra* note 128, at 373.

³⁵⁴ See MOORE, *supra* note 37, at 113–15, 121; Morse, *supra* note 128, at 373.

³⁵⁵ See Parker, *supra* note 21, at 748.

³⁵⁶ See *id.*

they will violate the law increases—the more likely that a crime will occur, the greater the effort that must be made to avoid the crime.³⁵⁷ This expense and effort could involve strengthening powers of practical reason, or, in a case where practical reason is unlikely to prevent the crime, avoidance of the dangerous circumstance. Courts accept this principle in cases involving epileptics who kill others while driving despite their known tendency towards seizures.³⁵⁸ They are held responsible for their actions, arguably because the harm was foreseeable and the cost of avoidance minimal.³⁵⁹ Similar considerations guide decisions concerning voluntary intoxication in which actors know it is unlikely that their volition will be able to correctly guide their actions.³⁶⁰

The will, however, is inherently unstable and thus unpredictable.³⁶¹ Indeed, law abiding citizens have little reason to believe that they will commit a homicide in the heat of passion. The avoidance cost of strengthening the wills of individuals with no indication of the extent of their violent tendencies would be unjustifiably large. Thus, it would be inefficient to attempt to avoid every failing of the will.

Taken to its logical extreme, this position would excuse the actor for whom a murderous emotion was completely alien and utterly unexpected. This outcome would be acceptable because it would be analogous to split personality individuals.³⁶² A “person’s” actions could be controlled by one personality over whom the other personality has no control or even predictive power.³⁶³ As has been persuasively argued, such individuals probably should not face punishment to the extent their law-abiding personality dominates.³⁶⁴

2. Restating the Economics of Criminal Excuse and Proposing a New Test for Heat-of-Passion Provocation

If one finds this Article’s discussion of the value of human life in terms of avoidance cost to be either overweening, immoral economic

³⁵⁷ See *Carroll Towing*, 159 F.2d at 173.

³⁵⁸ *People v. Decina*, 138 N.E.2d 799, 803 (N.Y. 1956).

³⁵⁹ *Id.* This legal judgment clearly has an economic interpretation. See *id.* Most would probably agree that epileptics who drive are responsible for those whom they kill while having seizures. The judgment would be different, however, if an epileptic were rushing an injured child to the hospital.

³⁶⁰ See *id.* at 804.

³⁶¹ See AINSLIE, *supra* note 191, at 94.

³⁶² See Elyn R. Saks, *Multiple Personality Disorder and Criminal Responsibility*, 25 U.C. DAVIS L. REV. 383, 434–35 (1992).

³⁶³ See *id.*

³⁶⁴ See *id.*

analysis, or impossibly vague and immune from serious attempts at calculation, then its approach to the excuses can be recharacterized. The heat-of-passion provocation partial excuse should be available when actors do not have adequate warning and notice about their own personalities—and therefore cannot be expected to take corrective action.

The practical impact of this revised approach would be to make the partial excuse available primarily to the young, the inexperienced, and those for whom the stressful circumstances that give rise to their homicidal behavior is unexpected. The MPC's formulation of the excuse is as follows:

Criminal homicide constitutes manslaughter when a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.³⁶⁵

This Article suggests the following rewrite:

Criminal homicide constitutes manslaughter when a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance or desire which the actor could not reasonably be expected to anticipate and avoid. Whether an actor could be expected to anticipate and avoid an extreme mental or emotional disturbance or desire shall be determined by examining the history of the actor's behavior, the likelihood that the actor would face the circumstances that gave rise to the homicide, and the difficulties the actor would have faced in changing his behavior.

Notice the practical advantages of this approach: there is no reliance on troublesome notions of free will, choice, emotional quanta, or suitable provocations.³⁶⁶ Juries would have to ascertain whether the homicide was committed in some type of emotional disturbance and judge this disturbance's predictability from the actor's perspective. Although not an inquiry as clear as determining the weight of a cabbage, the inquiry does focus on definable entities: the cost of changing one's willpower and the foreseeability of a failure of willpower.

³⁶⁵ MODEL PENAL CODE § 210.3(1)(b).

³⁶⁶ *See id.*

There is an evidence issue: this approach inquires into the actor's past actions and even past criminal actions, inquiries that the rules of evidence generally forbid.³⁶⁷ Past acts are admissible, however, to show motive, and arguably a failure of will is, indeed, a type of motive.³⁶⁸ Further, heat-of-passion provocation is best viewed as a defense. A party who voluntarily raises it could be reasonably required to waive certain evidentiary protections.

3. Further Problems

Although the issues centering on choice and emotional quanta are probably the most central, the heat-of-passion provocation partial excuse has been criticized on many other grounds.³⁶⁹ First, heat-of-passion provocation requires some moral judgment about the provocation: defending one's husband from a vicious attacker might excuse killing the attacker, but responding to an insult about one's husband does not.³⁷⁰ This Article's theory accommodates the moral significance of provocation. What constitutes a "reasonable provocation" turns largely on its foreseeability. A compulsive hand washer who knew his disorder and did nothing about it would be culpable for his wife's death. A person who had not learned about his disorder—or perhaps even lacked the means to correct it even if he or she knew about it—would be treated more leniently.³⁷¹

A second objection found in case law is that the "reasonable man" is too malleable of a standard.³⁷² Consider the case of *Regina v. Camplin*.³⁷³ A 15 year-old boy murdered the man who raped him and laughed at him after completion of the crime.³⁷⁴ The application of

³⁶⁷ See FED. R. EVID. 404(b).

³⁶⁸ See *id.*

³⁶⁹ See Dressler, *supra* note 14, at 972.

³⁷⁰ See *id.* According to Dressler,

The law considers only some provocations "adequate" to reduce a homicide to manslaughter. If we believe that the provocation is the type that entitles a person to feel anger, or even more strongly, if we feel that the provocation should make a person feel anger or outrage, e.g., when a person is verbally insulted or spat upon, then we may characterize the emotion as, in some sense, "justifiable" or, if you will, appropriate.

Id.

³⁷¹ See Garvey, *supra* note 2, at 1712–14.

³⁷² See [1978] A.C. 705, 705–06 (H.L.) (appeal taken from U.K.).

³⁷³ See *id.*

³⁷⁴ See *id.*

the "reasonable man" standard in this context is obscure.³⁷⁵ Should it reflect a reasonable 15 year-old boy, a reasonable 15 year-old boy who has been raped, or a reasonable 15 year-old boy who was raped and laughed at?³⁷⁶ If it is completely objective, then the partial excuse would never be available because reasonable people do not kill.³⁷⁷ If the standard includes the characteristics of the defendant, then it could potentially excuse virtually any defendant because, in the end, the only person who possesses the defendant's characteristics is the defendant—and he, in fact, committed the crime.³⁷⁸ If the reasonable man standard does not instruct the jury about which characteristics to include, it becomes hopelessly vague.³⁷⁹

The reasonableness standard endorsed by this Article does not require juries to identify an empirical or normative ideal; rather, it requires juries to establish the cost or difficulty of changing one's beliefs, desires, and willpower. Of course, the cost of change for each individual is different. Nonetheless, the cost of the injury will be objective, as will the probability. Thus, the approach is objective in that every crime has the same cost, but subjective in that each actor has different avoidance costs. Differences in actors' avoidance costs open the door for consideration of issues such as gender, race, and class in criminal excuse—at least to the degree that these factors affect avoidance costs.

A third objection is that heat-of-passion's status as a partial excuse is questionable.³⁸⁰ If an actor does not have the capacity to choose when in the heat of passion, the defense should be complete—as it is with diminished capacity or automatism.³⁸¹ The actor has the capacity for choice or not.³⁸² A similar criticism can be made against this Article's proposed theory of excuse: either it is efficient or it is not to fortify one's power of practical reason. A response to this objection relies on the second formulation of the principle advocated: the provocation excuse should be available only in instances in which the actor does not have adequate warning and notice about his or her own personality and, therefore, cannot be expected to take corrective action. Calculation of the cost of fortifying one's practical reason and forecasting cir-

³⁷⁵ See *id.*

³⁷⁶ See LEE, *supra* note 5, at 209–12.

³⁷⁷ See *id.*

³⁷⁸ See *id.*

³⁷⁹ See *id.*

³⁸⁰ See Garvey, *supra* note 2, at 1708.

³⁸¹ See *id.* ("If the adequately provoked actor's loss of self-control really was reasonable, then he should be entitled to a full defense.").

³⁸² See *id.*

cumstances in which it will fail are vague and uncertain. A failure to properly fortify one's will in these circumstances could constitute, therefore, a blameworthy deficiency—but a deficiency that is not as wrong as failing to fortify one's will against more known illicit desires.

4. Character Theory, Economics, and Criminal Excuse

Character theory is another response to the law's problematic reliance on act and choice.³⁸³ Under such theory, law punishes those who display character, emotions, or attitudes that are blameworthy.³⁸⁴ For instance, Dan Kahan and Martha Nussbaum argue that:

[B]oth voluntarism and narrow consequentialism fail, as a descriptive matter, precisely because they are mechanistic. Quite often, criminal law doctrines are structured to assess not the effect of emotion on volition, or the contribution of emotional dispositions to desired states of affairs, but rather the moral quality of the values that a person's emotions express. When this is so, it is possible to make sense of the law only by imputing to it a theory of moral accountability consistent with the evaluative conception of emotion.³⁸⁵

Under this approach, voluntary manslaughter would be available to a defendant only if society approved of the actor's motivating anger.³⁸⁶ Thus, killing *in flagrante delicto* would qualify as provocation in the nineteenth century—when men were supposed to be sexually proprietary towards their wives—but would not in the twenty-first century when we, of course, have abandoned such antediluvian views.³⁸⁷ The character approach offers strengths and weaknesses.³⁸⁸ On the strength side, it avoids many of the problems with the traditional choice theorists—of the sort mentioned above.³⁸⁹ Further, character theorists often convincingly argue that existing law is best understood by seeing the objective rules of the criminal law as reflecting or springing from certain moral judgments or prejudices.³⁹⁰

³⁸³ See Kahan & Nussbaum, *supra* note 4, at 304.

³⁸⁴ See *id.*

³⁸⁵ *Id.*

³⁸⁶ See *id.*

³⁸⁷ See *id.* at 311–13.

³⁸⁸ See Kahan & Nussbaum, *supra* note 4, at 304.

³⁸⁹ See *id.*

³⁹⁰ See *id.*

On the weakness side, this approach is vague—a problem that could raise legality concerns.³⁹¹ Juries find facts or apply standards. Arguably, they are not competent to make free-wheeling judgments on the moral value of actions. Further, given the huge number of moral rules that could apply to any one situation, character theory cannot provide clear rules of decision. As Scott and Steinberg argue in sum,

Character theory . . . seems to invite an open-ended assessment of blame on the basis of criteria that are only indirectly linked to the wrongful act. By limiting the inquiry about culpability to the connection between the quality of the actor's decision and her conduct, choice theory requires a more bounded assessment. Yet, although its normative appeal may be contested, character theory has considerable explanatory power in some areas of doctrine and practice.³⁹²

This Article does not attempt to settle the feud between the character and act theorists. Rather, it merely points out how the failures of choice theory motivate character theorists in their arguments and that resolving these objections (as this Article does) might be preferable to abandoning act theory altogether. Victoria Nourse, in an influential article on heat-of-passion provocation, studied extreme emotional distress ("EED") cases decided under the MPC definition of the excuse.³⁹³ She found that juries import their sexist and misogynistic views, so as to exculpate perpetrators of domestic violence when deciding EED cases.³⁹⁴ She argues that the reasonable person standard hides normative judgments.³⁹⁵

Because she found the standard to be *de facto* normative, Nourse argues for reform of provocation into an explicitly normative test.³⁹⁶ In these cases, she would have juries

³⁹¹ See *id.*

³⁹² Scott & Steinberg, *supra* note 256, at 824.

³⁹³ Nourse, *supra* note 14, at 1398–99.

³⁹⁴ See *id.*

³⁹⁵ See *id.* Nourse states:

No matter how much we try to tie the defense to behavior, no matter how insistent the rhetoric of subjectivity, decisions applying this defense express judgments about when defendants "should" exercise self-control. The law can continue to deny this if it chooses, to bury it within the qualities of a reasonable person, but it pays a heavy price—one not only of incoherence, but of intellectual passivity and circularity.

Id.

³⁹⁶ See *id.* at 1401.

compar[e] . . . the defendant's asserted reasons for his emotions against the reasons that both victim and defendant would share, *ex ante*. In many cases, this comparison will simply place the defendant's claims to personal retribution in the mirror of what the law itself assumes as a proper basis for publicly sanctioned violence.³⁹⁷

In other words, she would have the trier of fact determine the motives and motivating emotions of the actors, the purposes of the law, and whether there is sufficient overlap.³⁹⁸

Part of Nourse's reason for giving the trier of fact so much discretion is her claim that, "decisions applying this [EED provocation] defense express judgments about when defendants 'should' exercise self-control."³⁹⁹ She rejects choice-based theories because she believes act theory

depend[s] upon an analogy with physical coercion: The emotion is seen as the "gun to the head" of the defendant. The problem with this analogy is that there is no intellectually defensible stopping point: If true, we should be excusing almost all defendants (because almost all defendants kill in a state of high emotion), and the provocation defense should not be a mitigating factor but a full defense.⁴⁰⁰

As do most character theorists, Nourse relies on the typical arguments against choice theory in order to buttress her position that it is not supportable—and that character theory with its vagueness is preferable.⁴⁰¹ One response to the character theorists would be to defend choice theory, as this Article does. This Article, however, does so in a way that embeds the defendant's crime within choices made well before the crime's commission—the choice to strengthen or not strengthen the actor's power of practical reason.

In this way, the Article agrees with the character theorist that criminal acts cannot be evaluated outside of a context and history.⁴⁰² The economic inquiry focuses on each individual's costs in strengthening his or her practical reason—this differs often in ways identifiable with race, gender, and class variables. For instance, given the di-

³⁹⁷ See *id.*

³⁹⁸ See Nourse, *supra* note 14, at 1401.

³⁹⁹ *Id.* at 1398.

⁴⁰⁰ See *id.* at 1398 n.390.

⁴⁰¹ See *id.*

⁴⁰² See *id.* at 1398.

minishing marginal value of a rich person's income, it would cost *less* for a rich person to attend anger management therapy than it would for a poor person who has much less disposable income. Further, given the important demands on the poor's income (i.e., food and shelter), the opportunity cost of spending money on therapy and character reformation is much greater for the poor than for the rich. Or, in uneconomic terms, it is simply easier for the rich to gain access to practical reasoning improving resources.

The differences between different individuals' diminishing marginal value of income and opportunity costs might very well result—on an individual basis—in a different treatment of heat-of-passion manslaughterers on the basis of economic class. If both a rich and destitute defendant each had equal notice of his tendency toward angry outbursts during physical fights, a jury therefore might be more lenient to the poor person.

5. Can Juries Engage in a Cost-Benefit Analysis of Practical Reason?

One might object that no jury could possibly conduct a cost analysis of practical reason. Calculating the costs of changing one's desires or strengthening one's will seems an impossibly vague, even bizarre, exercise. How would a jury even attempt such a calculation? Would a jury have to estimate the cost of self-reflection, anger management, or whatever method employed of changing desire or strengthening free will—factored by the likelihood of success?

Indeed, such a calculation seems absurdly complex, but, in practice, this Article's approach would not require juries to even attempt such a calculation. This is because crimes of violence, which the excuses and partial excuses typically involve, impose incredibly high costs. If actors have any reasonable inkling that they have criminal desires or a weak will, then there would be an obligation to strengthen their practical reason. For instance, a wife beater is on notice that he might be susceptible to heat-of-passion provocation. Similarly, an individual involved with the mafia and who witnesses its violent ways is on notice that his associates could make him a victim of duress. He should develop law-abiding tendencies sufficient to withstand such pressures. Failure to take corrective action renders the excuses unavailable to him.

In this sense, this Article's approach moves the jury's gaze away from the moment of the *actus reus*. It also moves it from the strange, undecipherable tests like provocation's "reasonable man" facing "adequate provocation" or duress's person of "reasonable firmness."

Instead, the jury asks whether an actor had notice that he or she were capable of such a crime and, if so, whether the actor attempted reasonable corrective action. If an actor failed to take corrective action, such failure would end the inquiry. The jury's job would simply be to ascertain that the actor should have—and, in the vast majority of instances, the actor should have.

Determining what constitutes reasonable corrective action is a determination eminently suitable for jury determination and does not really require any fine-grained determinations. We all make efforts to overcome anger, jealousy, and greed. The "cost" of behavior modification is part of being human and, as such, juries, the representatives of the community at large, possess the ability to sense, in a broad way, what constitutes a reasonable corrective action.

CONCLUSION

It is appropriate to end with a comment about what this Article is *not*. It does not purport to be an economic theory of crime. It does not attempt to state the goals or overarching rules of the criminal law in economic or transactional terms. This Article does not take a view as to whether the criminal law should be viewed as simply a tool to induce proper behavior or discourage undesirable types of transactions. Whether such a theory of the criminal law is either possible or desirable is left to others.

What this Article has tried to do is respond to a deficit Jules Coleman identified: "the key moral notions of criminal responsibility—of guilt and fault—are simply absent from the economic infrastructure."⁴⁰³ This Article attempts to show how an economic analysis can elucidate criminal responsibility based upon practical reasoning. In particular, it shows that an optimal investment in practical reasoning will likely *not* result in perfect adherence to criminal standards. Criminal excuse is available to actors who experience circumstances for which it would be inefficient (or unreasonable or even unfair) to strengthen their practical reasoning abilities to behave legally. Conceiving of criminal excuse in this manner allows juries to consider an individual's specific avoidance costs for any given crime.

⁴⁰³ Jules L. Coleman, *Crime, Kickers, and Transaction Structures*, in *CRIMINAL JUSTICE: NOMOS XXVII* 313, 323 (J. Roland Pennock & John W. Chapman eds., 1985).