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ORIGINAL PAPER

Psychological and Political Contributors to Criminal Culpability: Reply to Brink, Howard and Morse

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Abstract
This is a reply to David Brink, Jeff Howard and Stephen Morse's commentaries on my book, *The Age of Culpability.*

Keywords Children · Criminal responsibility · Voting rights · Immaturity

1 Introduction

David Brink, Jeff Howard and Stephen Morse have written outstanding commentaries on my book, *The Age of Culpability.* All three of their essays are trenchant, challenging and generous. I'm very grateful that their remarks are in print.

The sheer volume of different issues, central and peripheral, that are raised by these commentaries makes it impossible to respond to everything. I will focus on two big issues. The first concerns the defensibility of my theory of culpability and the closely related question of the viability of a view according to which leniency towards kids who commit crimes is justified by their psychological immaturity. Both Brink and Morse support such a position, as does virtually everyone who contributes, in the public sphere, to discussion of juvenile justice. Still, I persist in my rejection of this position, and my first task is to explain why. My theory of culpability implies, as any adequate theory must, that where there are relevant psychological differences there are differences in culpability. But there are two further questions: Is every difference in culpability explained by psychological difference? And is the reduced culpability of children best explained that way? I persist in holding, contra Brink and Morse, that the answer to both questions is "no". In fact, as I will suggest in Sect. 2, there is some reason to think that consistency requires Brink and Morse to agree with me.

The second issue on which I focus concerns the defensibility of the theory of the political authority to criminally punish that I take to be essential to a full explanation

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for why kids are owed leniency, in comparison to otherwise identical adults, when they commit the same crimes. Brink has a few important things to say about this issue, but my discussion focuses primarily on Howard's powerful critique of my position. What my position needs, I think, is something a bit more modest than what I unwittingly imply, in the book, I am offering. As I explain in Sect. 3, Howard's remarks have helped me to see that the question of what the legal authority to punish is, how it is structured, and why its structure implies that child criminals are to be given a break, is importantly different from the question of what kind of governmental arrangements we ought to have. My argument requires that the strength of a legal reason for one to act is in part a function of one's political status; it does not require the further claim that it is fully justified, or even a good idea, to structure political authority in such a way that it has that implication.

2 Culpability and Immaturity

Under the theory of culpability that I put forward in the book, culpability consists in a manifestation in wrongful conduct of a mismatch between two things: the way in which a person tends to respond in her deliberations to reason-giving facts, on the one hand, and the way she should, on the other. There are, therefore, two distinct kinds of facts that bear on a person's culpability for wrongdoing: facts about how she actually recognizes, weighs and responds to reason-giving facts, as manifested in her behavior, on the one hand, and facts about how she should, on the other. In the first category are facts about her psychological states and dispositions that tell us about her dispositions for recognizing facts as reason-giving, giving varying degrees of weight to those reasons, and responding to them in her choices and decisions. Those psychological facts bear on the question of how the person exercised the capacities that comprise "normative competence", in Brink's sense. In the second category, there are non-psychological facts that bear on the question of how strongly various features of her possible acts give her reason to either perform or refrain from performing those acts. So, facts about the person's psychology, manifested in her conduct, might tell us that she granted very little reason-giving weight to the fact that an act she performed would cause harm. Facts in the second category will tell us that in the circumstances that feature of the act she performed actually provided her with a powerful reason to refrain from the act. She is culpable, then, because of the mismatch between these two things: she granted little weight to the harm her act would cause, and should have given it substantial weight because it actually provided a substantial reason to refrain.

Under this view, there are, broadly speaking, two very different kinds of excuse that one can offer to someone who accuses one of being culpable for wrongdoing. The first, which are the familiar kind, involve a showing that one's wrongful conduct does not, in fact, manifest the kinds of problematic dispositions for recognizing, weighing and responding to reasons that the accuser charges. The person who says, "But I had no idea that my act would cause harm!" offers this kind of excuse, as does the person who says, "My brakes failed!". Excuses of the second kind, which are much less familiar, involve a showing that one did not

actually have reasons to refrain of the strength that the accuser claims. The person who says, "Your laws don't apply to me!" offers this kind of excuse. Just to keep things clear, let's use the term "psychologically culpable" to refer to the person whose psychology is such that she has no excuse of the first sort. Facts about her psychology manifested in her wrongful conduct contribute to her culpability to exactly the extent claimed by her accuser. And let's use the term "rationally culpable" to refer to the person who has no excuse of the second sort. Facts about the strengths of the reasons provided to her by various features of her act contribute to her culpability to exactly the extent claimed by her accuser. The fully culpable actor is both psychologically- and rationally culpable for her wrongful act. Or so, anyway, the theory I offer in the book has it.

Brink thinks it odd that I use the label "excuse" to refer to facts about the strengths of reasons to refrain in light of which a person can shield himself from the blame or punishment that the accuser predicates on his culpable wrongdoing. As Brink puts it, such facts "sound[] in justification, rather than excuse". He thinks this because he does not distinguish between the strength of a reason, on the one hand, and the strength of a reason *for a particular agent*, on the other. The former bears on the question of whether the act is wrongful, in the sense I have in mind. The latter bears on the question of whether the agent is culpable for the wrongful act. This way of cutting things up is murky when we are discussing moral reasons. If the reasons *for me* to refrain from a violent act are outweighed by the reasons *for me* to perform it, then the act is not wrongful *for me* to perform, one might think. But where there might be sense to the idea of an act being morally permissible *for me* when it is morally wrongful for others—this is, after all, the idea of agent-relative obligation—this is a distorted way to think of legal wrongs. In light of Japan's laws against murder, there are powerful legal reasons to refrain from murder; call them "Japanese-legal reasons". A Japanese person who murders another on Japanese soil has engaged in an act that there was powerful legal reason for him to refrain from engaging in. And, further, his act manifests dispositions to grant far less reason-giving weight to the crucial facts about his act—especially that it involves taking the life of another human being—than those facts actually provided him, thanks to Japanese law. The legal reasons there are also legal reasons *for him*. But in light of the laws of Japan there are no legal reasons *for an American citizen living in the United States*, to refrain from committing murder; Japanese-legal reasons are not reasons *for him*. Still, an American citizen who murders another American on American soil has done something that is legally wrong, *under Japanese law*; his conduct meets the description of a grave offense defined in the Japanese laws prohibiting murder. He has no Japanese-legal justification for his conduct. It would be deeply distorting to suggest that his act was perfectly legal under Japanese law. But, still, he is not Japanese-criminally culpable for that act for the legal reasons in light of which the act is a crime are not reasons *for him*, and so his failure to give the relevant facts much, if any, reason-giving weight is not the failure that would be registered by saying that he is Japanese-criminally culpable for his act. He gave the fact that the act was one of murder precisely the weight that he was required to give it *if we restrict our gaze to Japanese-legal reasons*—namely no weight at all. When

Japanese officials accuse him of a culpable violation of Japanese law, they are right that he violated the law they are authorized to enforce, and wrong that he did so culpably.

To offer a legal justification is to show that there is no legal reason, that the accuser has authority to enforce, to refrain from the act one committed. To offer an excuse of the second sort to criminal culpability, by contrast, is to show that there is less legal reason *for the agent* to refrain from the act than the accuser assumes or asserts and thus that there is no mismatch between the reason-giving weight the agent assigned to the relevant facts and the relevant species of legal reason-giving weight. The latter plea is consistent with granting that there is no justification, or even partial justification, for the act. This is why a showing that there is less reason *for the agent* to refrain than the accuser asserts sounds in excuse, rather than justification. The accuser is not placed under any pressure to assert that the act is supported by reasons more than he claimed when he made the accusation.

Now, Morse, Brink and I are all in perfect agreement that a person's age, as an empirical matter, supports an inductive inference about that person's degree of psychological culpability for wrongdoing. A 16 year-old who steals a car and takes it on a joy-ride is likely to be less psychologically culpable for that offense than a 25 year-old who does the same thing. The reason is that a wide-variety of well-known psychological facts concerning intention, belief, awareness of risk and motive, for a start, bear on psychological culpability, and 16 year-olds and 25 year-olds typically differ psychologically in culpability-relevant ways, even given the same behavior performed in the same circumstances. The 16 year-old, for instance, is less likely than the 25 year old to have harbored the intent never to return the car; he is more likely than the adult not to have given any thought to what he was going to do with the car at the end of the joy-ride than the 25 year old. Assuming that a theft accompanied with such an intention is more culpable (because more psychologically culpable) than one performed without it—a fact reflected in the law in the distinction between the crime of theft and the more serious crime of larceny—the age of the offender might support the conclusion that the offender is diminished in culpability for the crime. If all we knew were that Kid and Adult had each stolen a car and driven it around for fun before being arrested, we would be more warranted in concluding that Adult had committed the more serious, because more criminally culpable, crime of larceny than we would be in reaching that conclusion about Kid. And the same goes for other psychological contributors to criminal culpability. If impulsiveness ameliorates criminal culpability, for instance (which I doubt, but set that aside), then, similarly, we would have reason to think it more likely that Kid is reduced in culpability than Adult, given the same body of evidence about their respective acts and circumstances.

Where Brink, Morse and I disagree is on the question of whether there is any residual ground for leniency towards the kid when, in fact, the kid is just as psychologically culpable as the adult. I hold the view that the kid is owed a break, in comparison to the adult, *even if both took the car with the intention never to return it.* Do Brink and Morse reject that claim? No. Their shared view is that even when you do not find *that* difference between the kid and the adult—which, they would agree, makes a difference to culpability—you virtually always find some

other psychological difference that is culpability-relevant. So, yes, they would say, chances are the kid is owed a break that the adult is not owed, even when both plan to keep or sell the car. But this is because chances are there is another psychological quality, call it X, that the kid lacks and the adult possesses, where people with X are more culpable than people without it. Of course, we can adjust the hypothetical so that the kid and the adult do not differ even in this respect—in addition to having the same criminal intention, both have quality X. I think there's still a reason to be lenient towards the kid. Of course, Brink and Morse can respond, "Well, even if they are both X, chances are they aren't both Y, and so chances are the kid is less psychologically culpable." But at a certain point, as they are both aware, I stand firm and insist that there's a residual culpability-based ground for leniency, and they deny it insisting that if the kid and the adult are both X, and Y, and Z, and so on, then there is no culpability-based reason for treating them differently.

Morse's and Brink's next steps, at this point, are different from one another. Consider Morse first. As he emphasizes, in the book my argument appeals, at this point, to a brute intuition that may not be shared, namely that even when we control, in the thought experiment, for all the culpability-relevant psychological features, the kid is still owed a break; this is a central premise in my "argument from empirical dependency" that Morse describes. And Morse reports the anecdote that only one of his ten students shared this intuition. (If you, Dear Reader, are the one of Morse's students brave enough to stand up for the truth, please drop me a line!) My general view, however, is that many people who think they do not share this intuition are actually committed to it, a fact that is revealed by their other intuitive commitments. In fact, I think that *Morse himself* is committed to it, and that this commitment is betrayed in his essay.

To see this, note that when considering the question of whether we should be worried about a social policy that gives breaks to some kids who are no different psychologically from some adults to whom the policy gives no breaks, Morse asks a rhetorical question:

> [W]ould it be so objectionable if some young people were not subjected to the full deserved afflictive imposition of state blame and punishment?

I completely agree with Morse: this would not be objectionable, provided that we understand "deserved", as he intends it, to mean what is warranted in light of the child offender's psychological culpability. Unlike Morse, however, I have an explanation for why this would not be objectionable: the young people who are spared are less deserving of punishment, because they are diminished in rational culpability, despite not being diminished in psychological culpability.

But the important point to see is that whatever the explanation for it, what we are in agreement about is precisely what Morse claims he and almost of all of his students deny. Imagine that Kid and Adult, who differ only in age, do the same bad thing, with the same mental states, manifesting the same dispositions for recognizing, weighing and responding to reasons; they are equally psychologically culpable. Under the policy Morse is discussing, which is our current policy, Kid is given a break that Adult is denied. Now imagine a competing policy: give Adult the break and give Kid the full helping of punishment. Under this alternative policy, exactly

the same number of people are "not subjected to the full deserved afflictive imposition of state blame and punishment". So, now ask yourself: which of these two policies do you prefer? Do you prefer that the beneficiaries of our errors in excessive leniency are kids or adults? Or are you indifferent between the two? I submit that if Morse were indifferent, he would not ask his rhetorical question. The power of the question is that he is asking to envision *kids* being given a break in comparison to psychologically identical adults. That image makes intuitive moral sense to us—to *Morse*. He too harbors the intuition—whether he knows it or not—that there is something about being young, beyond the psychology of the young, that supports leniency. If he did not feel this way then he would see a system, our system, in which fully psychologically culpable kids are given breaks denied to adults as just as (un) problematic as one in which fully psychologically culpable adults are given breaks denied to kids. He does not, so we are in intuitive agreement.

However, it is important to see that Morse does not rest solely on the contention that intuition opposes the idea that there is residual importance to age beyond its import as a proxy for the presence of psychological features that matter to culpability. He claims that there is a conception of responsibility under which the category of kids who are psychologically similar to some fully responsible adults in all the ways that matter to responsibility is necessarily empty. It is not just that there are not, in fact, any such kids; rather, there *cannot* be any such kids under the theory of responsibility he envisions. The very concept of responsibility implies that there are not.

To make good on this idea, Morse proposes, in line (at least on the surface) with the view of John Fischer and Mark Ravizza, that a necessary condition of full responsibility for wrongful conduct is "taking responsibility for" the psychological mechanisms that generated the conduct. I have my doubts about this claim. I think that failing to take responsibility for the states and dispositions of oneself that generated wrongful behavior is itself often culpably wrongful behavior. The person who steals my car and then refuses to own the fact that he cares more about the thrill of the joy ride than about my rights to control my property, is worse, not better, than the one who at least accepts that as an important fact about who he is. To suggest that it is an excuse to engage in the kind of wrongful behavior involved in disavowing ownership of who we are is to gets things exactly backwards. Those who refuse to take responsibility for the facts about themselves that gave rise to their wrongdoing do not shield themselves from moral criticism; they open themselves up to a new line of it. But let's set that aside and grant for the sake of argument that defendant D is responsible for crime C only if D takes responsibility for the facts about himself thanks to which he C'd.

Note that granting this does not by itself grant what Morse claims. If taking responsibility for one's psychological states and dispositions is itself a psychological state or disposition then it has no necessary connection with age. Some people might do this early in life, some later, even if it is common to do it after the age of 18. That is, age might be a very good proxy for taking-responsibility-for. The question will thus remain: if you find two wrongdoers who are identical in this respect, among others, but differ only in that one is under 18 and the other is over that age, is there a culpability- based ground for treating the younger of the

two more leniently? The assertion that an overlooked psychological property, distinct from objectionable intent, impulsiveness, or susceptibility to peer influence, for instance—namely the property of taking-responsibility-for—is necessary for responsibility brings us back to where we were before. It recapitulates rather than advances the argument.

But Morse is fully aware of this point. His suggestion is that taking-responsibility-for is a quality that only adults can possibly possess. Any assertion to the effect that a 16- or 17 year-old, for instance, has taken responsibility for who he is is necessarily false. Morse says some things in support of this idea that have a certain appeal. He suggests, for instance, that to take responsibility one needs years to "test one's reasons against experience". Those who haven't had enough experience, just can't do it. I must confess that the more I try to adopt this initially attractive idea, the more darkness surrounds it. If the idea that we all need awhile to take responsibility for who we are were an empirical claim about what's typical or normal, then I think it's probably true; but it would then not be a truth sufficient to the task at hand since taking-responsibility would be just one more thing that ordinarily takes a long time, but could, in theory, be done quickly. But I start to lose my bearings when I think of it any other way. Presumably, some people have indeed taken responsibility for the psychological mechanisms and dispositions that generate their wrongful behavior. Pick one such person who achieves this by the age of 19 and happens to have slept for exactly 10 h per night from birth. Now imagine someone who had identical waking experiences, and reacted to them in exactly the same way, but for each 10 h period of sleep that the first person had, he had only 8 h. His second day of life starts 2 h earlier than the first person's second day but is otherwise the same; his third day 4 h earlier; and so on. Before his 18th birthday, this second person has had exactly the same waking experience as the first person has had by the age of 19. Why would anyone think that the first person has taken responsibility for who he is, but the second cannot have, since he hasn't been around long enough? When did he first turn this trick? Presumably while asleep.

I do not mean to make light of Morse's idea. I think that Morse is giving voice to a picture that is closely allied to one according to which time by its very nature enables certain forms of psychological process that are essential to responsibility quite independently of how that time is spent. It is this idea, perhaps, that underlies the thought that the elderly are worthy of forms of respect that younger people are not, no matter how they have spent their respective years. But to me this is not a theory of responsibility, or of anything else, exactly; it is instead just an expression of the deep intuition that age has some kind of significance to our moral assessments of people that outstrips anything that it indicates about the content of the life lived over those years. This fundamental intuition manifests itself in various ways, most notably for our purposes in the thought that kids are owed leniency when they commit crimes even when nothing of significance has been omitted from their short years of experience that distinguishes them from fully responsible people who are older than they are. In the end, that is, the idea that it is simply not possible to take responsibility for oneself without living to adulthood involves a commitment to, rather than any kind of explanation for, the claim that all else equal kids are owed leniency. To say that all else can be equal and yet that those above a certain age can be responsible

in a way that those below it cannot is just to assert exactly what my book aims to rationally ground.

Perhaps I am misinterpreting Morse. In some of his remarks, Morse seems to suggest that the question of how much time is necessary for a person to take responsibility for his psychological states and dispositions is a matter of social agreement. You haven't taken-responsibility-for before the age of 18 because we've decided that you haven't. That would imply that psychological twins, one of whom is younger than 18 and the other of whom is over, can differ in responsibility for identical wrongful acts. This is to give up on the idea that age matters solely because it is evidence of psychological states and dispositions. It also matters, on this view, because we have decided it matters to the definition of taking-responsibility-for. In fact, if we start to dig into the question of why we would make that decision I think it likely that the view will end up being identical to my own. The most plausible reason for us to stipulate that there is a difference in responsibility between people who differ only in age is because we have already, for distinct reasons, stipulated that there is another difference between them: they differ in how much say they have over the law.

In short, it seems to me that Morse's proposed theory of responsibility, under which taking-responsibility-for is a necessary condition for culpability, either offends the intuition that he and I tacitly share, or else amounts to a view that, when developed, will be no different from my own. I therefore claim Morse as an ally, while recognizing that he will view himself as, at most, an involuntary conscript.

Turn now to Brink. He presses an idea that Morse, too, proposes, namely that there are sometimes pragmatic reasons to adopt categorical public policies—such as the policy of treating *all* children more leniently than otherwise identical adults—even where there is no good reason to think that the substantive distinction that we hope to mirror is categorical. There is little reason to think that the best way to get public actors, like prosecutors and judges, to behave as we want them to is to tell them exactly how we want them to behave. The darts player who finds that he tends to miss to the right aims to the left of the bullseye, rather than at the bullseye, to compensate. Similarly, if we think that public actors are likely to screw up if instructed to punish in accordance with psychological culpability, thereby too harshly punishing a lot of people who are diminished in psychological culpability, then we might instruct them to do something different, like give a break to all the kids regardless of their degree of psychological culpability, and thus get better results. We might instruct them, essentially, to aim away from the target we hope they will hit.

Brink suggests a variety of things that he thinks support the idea that a categorical policy will get us closer to apportioning punishment to psychological culpability than a non-categorical policy. One of these is an epistemological observation: it is difficult to reliably identify the psychologically culpable children.[1]

[1] The Supreme Court has said that olnly the incorrigible children who commit murder should ever receive the sentence of life without parole (LWOP). Many juvenile justice advocates have noted that it is very difficult to say confidently that any given child really is incorrigible and so the LWOP sentence should be vanishingly rare. My remarks in the main text are intended to be compatible with this point.

In general, of course, we should not punish a person at a level that would be appropriate for someone with a given characteristic, and because she has it, unless we are confident that she does, indeed, have that characteristic. And the confidence level here must be high. This is what underlies the adoption of the "beyond a reasonable doubt" standard of proof in criminal trials. Further, psychological culpability is hard to establish to this level of certainty. It is hard to establish, for instance, that the car thief intended never to return the car. Still, it can be done. If he said to the police that he was intending to sell it, or if an informant told the defendant in advance he would buy the car, then there can be very good evidence of psychological culpability. When we are interested in subtler facts—such as whether the defendant was aware of a 20% rather than a 10% chance that his act would cause harm, or whether he is exceptionally impulsive—then it's harder, of course. But the question is this: when we hold fixed both the question about psychological culpability that we are trying to answer, and hold fixed the evidence that bears on it, are there reasons to doubt the inference about the child that do not apply to the adult who is the same in these respects? If all we know is that both had a buyer for the car when they stole it, is there any reason to doubt that the child had the same culpable intention as the adult? Of course, those who decry our capacity to assess the psychological culpability of children will insist that they are not talking about easy-to-detect things like an intention never to return a car. Fair enough. But when they identify hard to detect qualities, perhaps essential to what Brink calls "normative competence", they still need to show that those qualities are *even harder* to detect in children. The truth is that nobody who has asserted that we can't say with confidence which children are psychologically culpable has met this burden.

In order to make inferences from observable behavior to psychological culpability you need to understand the person you are assessing. And it is true that for many of us it is easier to do this when you share important features, including but by no means limited to age, with the person whose psychological culpability you are assessing. After all, we mostly reconstruct the minds of others by asking ourselves what we would have been thinking if we had been in their circumstances and behaved the way they did. But there is really no reason to think that adults are any less good at assessing the psychological culpability of children than, for instance, women are at assessing the psychological culpability of men, or than Black people are at assessing the psychological culpability of Asian people, or than poor people are at assessing the psychological culpability of rich people, and so on. In all of these cases, there is a risk that the person making the assessment will make a bad inference and so recommend too harsh a punishment. But in none of these cases would we say that the risk supports the claim that the right policy is one of categorical leniency. So why does it seem to so many that it supports that clam when it comes to children? It seems to me that those who say, as Brink does, that it is best to adopt a categorical policy of leniency, given how hard it is to identify the psychologically culpable children, are really just certain that *something* that they cannot articulate makes children less culpable than adults. That is, support for this idea is just another way of evincing commitment to the very conviction that I aim in my book to explain, namely that age has importance to responsibility that goes beyond what it tells us about the psychology of the young.

In several places, Brink equates the idea of categorical leniency towards children with unqualified opposition to trying juveniles as adults, in adult courts—the practice of "transfer". He favors, instead, the approach recommended by the Model Penal Code, under which transfer is possible for 16- and 17 year-olds, but only when a presumption of reduced psychological culpability is rebutted. I think, however, that one could favor categorical leniency towards children, as I do, and still allow the possibility of transfer. The reason is that it is far from clear, as a general matter, that a child will be treated more leniently in the juvenile court system than in the adult. This is often true, but there are many factors. The absence of jury trials in juvenile court, for instance, can cut either for or against a defendant, depending whether the judge is really willing to consider the possibility that the defendant is innocent. Further, judges in juvenile court often have enormous discretion to extend the sentences of kids who do things like mouth-off to teachers, where the equivalent bad behavior in adult prisons and jails would never result in increased sentences. And consider another, often overlooked factor: It is common for the parents or guardians of children tried in juvenile court to be assessed by the judge, either formally or informally, in deciding what punishment to issue to the child. If the judge has a favorable impression of the parents, she is much more likely to tolerate that at least some significant piece of the child's sentence is served under parental supervision, rather than in juvenile detention—perhaps with an ankle bracelet that allows the child's location to be monitored when she goes from home to school and back again. The result is that a child whose parents are likely to please the court can expect leniency in the juvenile system due to that fact where it will provide him with nothing in the adult system. But, by contrast, a child whose parents are either absent, or because of criminal records, or evidence of other serious problems, are unlikely to be thought reliable by the court, may end up with longer terms of confinement than a similar offender would have received in the adult system, especially for minor crimes that are typically dismissed or pled down to very little when committed by adults. A juvenile who paints graffiti on a building, and whose parents are thought unreliable or criminal by the court, is likely to spend more time in juvenile detention than an adult who did the same thing would spend in jail.

My point is not to argue for transfer; far from it. I think it is much more likely that the fact about children that makes them worthy of leniency—namely that they have less say over the law than adults—will be overlooked when a child is tried in adult court. The decision to transfer the child, that is, is very likely to be viewed by those who must determine what punishment to give the child as a license to ignore the fact that any leniency is warranted; it is likely to be understood as a finding to the effect that the child is unworthy of the leniency appropriate for other children. In fact, I think this error is exacerbated by the view that children are owed leniency only to the extent that they are reduced in psychological culpability. And fair enough: if the child is transferred because he is shown to be psychologically culpable, and if there is no other reason to be lenient to children, then there is no reason to be lenient to the child who has been transferred. For this reason, this is not, like so many philosophical errors, a harmless one.

3 Justifying Democracy and the Structure of Political Authority

As Brink notes, one might think (and I do think) that leniency towards child criminals is justified by their diminished political status. One might think (although I do not think) this is because the standing of the government to punish a person is a function of that person's political status; more status, more standing. On this view, the diminished political status of the punish*ed* tells us something about the punish*er*, which is relevant to the punisher's mandate. On this view, status is like jurisdiction. The punisher has standing to punish an offender only if the offender is in his jurisdiction. So, the punisher might not be warranted in giving twin offenders twin punishments, since one might be outside of his jurisdiction entirely, or only partly inside it. Political status, on that way of developing the political view, is like that.

There might be a way to develop this line of thought so as to fill the obvious explanatory gap—namely the gap between offender status and government standing. But I think, and argue in the book, that political status matters *to culpability*. Children's diminished status diminishes the strength of the legal reasons for them to refrain from criminal conduct, and so diminishes the gap between the weight they assign to those reasons and the weight they should assign. Put crudely: When the adult and the kid both give a -2 to the fact that the violent act they are considering is violent, and then go ahead and perform it, the kid is less criminally culpable because he should have given the act a -10 in light of its violence, while the adult should have given it a -20. (Note: there probably is no such difference when what is at issue is *moral* culpability.) Since what matters to culpability is the size of the gap between the way in which the wrongdoer recognizes and weighs reasons, on the one hand, and the way in which she should, on the other, the child is less criminally culpable than the adult, even though the child is just as *psychologically* culpable as the adult. Both are criminally culpable to some degree, but the child is less culpable. If these numbers meant anything, we would have a difference also in *degree* of criminal culpability: the child is 8 points off, the adult 18.

There are two main pillars to this line of thought: the theory of culpability, and the theory of legal reasons under which their strength for a particular person varies with the amount of say that person has over the law. Howard accurately reconstructs my reasons for accepting this claim about the strength of legal reasons. I think that a feature of a particular act (e.g. it is violent) provides a legal reason *for* one to refrain from the act thanks to one's complicity in the set of social facts in light of which that feature provides a legal reason for refraining. Thanks to Japanese law, there is a legal reason not to commit murder, but it does not provide a legal reason *for me* because I'm not complicit in Japanese law. And I think that one is complicit in the relevant sense to the extent that one has a say over the law. More say, more complicity, stronger legal reasons for one to refrain, greater culpability constituted by a given set of manifested dispositions for recognizing and weighing reasons. Roughly: you are culpable when your wrongful acts reflect a failure to take the perspective on reasons that you ought to take; and you ought to take the law's perspective on what reasons there are to the extent that it's *your* law; and it's your law to the extent that you have a say over it. That's the idea.

Howard holds that this line of thought depends on a Rousseauian view of political authority, as I suggest in the book. And he notes, quite rightly, that such a view is out of fashion. Further, he claims that the link that I see between diminished political status, on the one hand, and diminished criminal culpability, on the other, is missing under other, attractive justifications for democracy. Say one thinks, for instance, that people should have a say over the law—the central, if vague, principle to which democracies conform—because the laws that we end up with when this is so better serve our joint interests. Such a view has no implication to the effect that the strength of legal reasons varies with one's say over the law, notes Howard.

The book contains no serious engagement with contemporary accounts of what makes democracy a good idea. This is largely because when I wrote the book I did not think I was assuming either that democracy is a good idea (although I suppose it is), or that a Rousseauian explanation for why it is (roughly: it is necessary for unwanted government action to be in harmony with individual autonomy) is the right one. So how should all of my Rousseauian talk in the book be understood?

To see what I am up to, I think it helps to consider an analogy. Consider the distinctive normative power that we exercise when we make promises. When we exercise this power, we make it the case that certain features of actions we are considering give us moral reason to perform and refrain from those acts, where, prior to the promise, they did not. So, for instance: I promise not to divulge an embarrassing piece of information about you. Now I am considering performing an act that would divulge that information. That feature of the act gives me both non-promissory and promissory reasons to refrain from the act. The non-promissory reasons, let's suppose, derive from the fact that the act would fail to respect your privacy, given that it has this feature. That might or might not have been the reason that I promised not to divulge the information; perhaps you gave me no additional incentive to make the promise, for instance, or perhaps you did. In any event, thanks to the promise this feature of the act gives me a promissory reason to refrain from it. Further, and importantly, the fact that it gives me a promissory reason can change. You can release me from my promise. When you do, the act still provides me with all the same non-promissory reasons to refrain, but the promissory reason disappears. The presence or absence of the promissory reason provided by the feature of the act I am considering varies with the presence or absence of your act of release.

What I just offered was a brief description of the structure of reasons generated by an exercise of the normative power involved in promising: their presence or absence tracks the presence or absence of the promisee's act of release. Nothing was said about whether it is a good idea to have the promissory power, or whether it is a good idea for me to exercise it as I did. What was described is independent from any particular answer we might give about why it is a good idea for people to have a power to make a feature of an act reason-giving by saying, "I promise", or why it is a good idea for others, promisees, to have the power to undo all that by releasing the promisor. In fact, it is perfectly consistent with the view that everything would be better if promisees lacked the power of release. Say it would. Say that our joint interests would be far better served if promisees lacked this power—if, that is, the presence or absence of a promissory reason did not track the presence or absence of the promisee's act of release. That would be an interesting thing to learn and it might

suggest that we should fundamentally alter our entrenched promissory practice, if we could, so as to rid it of this feature. But it would not show that, as things are, promissory reasons are independent of promisee release; they are not.

Now imagine two people, P1 and P2, both of whom make a promise, to X1 and X2, respectively, not to divulge an embarrassing piece of information about the promisee. Later, both divulge the embarrassing information, giving no weight whatsoever to the prior promise in their deliberations, and thereby harm X1 and X2, respectively. But there is a difference between them, let's imagine: prior to the divulging of the information, X1 released P1 from her promise, while X2 did not release P2. It follows from my theory of culpability that P1 is less culpable for her harmful act than P2 is for his. Why? Because the features of the act that made it of the type that P1 and P2 promised not to engage in gave no *promissory* reason to P1 to refrain, while they did give P2 a promissory reason to do so. The difference is not in the psychology of P1 and P2; their psychology is the same. They manifest the same dispositions with regard to what facts they treat as reasons and with what weight. The difference is that in failing to grant any weight to the fact that the act was one of divulging embarrassing information, one of them failed to respond to reasons as he ought (P2) in a respect that the other (P1) did not. If we were in the mood to blame or punish P1 and P2, the general principle requiring us to proportion blame and punishment to culpability would mandate leniency towards P1 in comparison to P2.

Notice that, and this is the most important point, nowhere does this line of reasoning depend on any claim to the effect that it is a good thing that promisees have the power of release. It simply depends on the claim that they do, in fact. Now, what is the evidence for the claim that promisees have the power of release? Mostly, it's just manifest that they do. But if we were to try to prove it to someone who doubted it, we would probably do so by explaining how a fundamental purpose of the practice of promising is furthered by that fact. That is, we are almost certainly going to resort to a certain kind of teleological explanation. Or perhaps "teleological" is the wrong term. The explanation will show how it *makes moral sense* for the promisee to have the power of release. This can seem odd. After all, if you doubt that human activities are causing climate change, the best way to convince you is not to show you that it would make moral sense for this to be so. But when it comes to the structure of normative powers, the only way to infer how things are, when it is not manifest to you how they are, is from consideration of how they ought to be. And, of course, you might get it wrong in offering such an explanation. For instance, you might say that thanks to the fact that promisees have the power of release, the practice of promising does a better job of securing our joint interests. Or you might say that thanks to that fact the autonomy of individuals involved in promissory transactions is enhanced. These are competing explanations. And it is hard to know which one is correct. But for the purposes of the argument for reduced culpability just rehearsed, it does not matter which one is correct, so long as it granted that, in fact, promisees have the power of release.

I see my argument for the reduced culpability of kids as directly parallel to the one just offered for the reduced culpability of those who have been released from their promises not to do wrong, in comparison to those who have not been

released. There is such a thing as a legislative power; it is a normative power—it is a power that, when exercised, changes the reason-giving force of features of actions. And like the promissory power, the question of what the structure is of the reasons its exercise produces is distinct from the question of whether it is a good idea for people to have that power, or a good idea for the relevant reasons to have that structure. The legislative power is a power to make law and thereby to make it the case that certain features of acts have reason-giving force that they would not have had independently of the legislative act. When the legislature passes a law against credit card fraud, for instance, it makes it the case that there is a legal reason to refrain from an act in light of the fact that the act involves a credit card and would deceive someone. These features of the act might have given someone reason to refrain from the act prior to the enactment of the legal prohibition. But, still, these features provide a legal reason to refrain thanks to the legislative enactment. Further, I claim, a subset of these legal reasons—those generated by *criminal* prohibitions—have the following feature: the less say over the law someone has, the less weighty those legal reasons are for her.

If you doubt that the reasons in question really have that structure, the only strategy for convincing you involves showing how that would make moral sense. I try to do that in the book. The basic observation is that to make moral sense our punishment practices have to support the idea that the offender brought the punishment on himself. When criminal legal reasons have the structure I hypothesize—their strength for a person varies with her say over the law—then our practices take a step towards making moral sense in this way. For those who already think this is true, this is an explanation; for those who do not, it's an argument. Either way, it does not depend at all on the right justification for democracy, or any other form of government. It only depends on the fact that there is such a thing as legal authority—as, that is, a normative power to make law and thereby constitute facts as legal reason-giving. It is also true, however, that when we're wondering about the structure of the reasons created through the exercise of such a normative power, all we can do is reason from how things would make moral sense to how they actually are. So, yes, I think it makes a certain moral sense for the strength of (criminal) legal reasons *for* a particular person to vary with her say over the law. And since what we are talking about is the structure of the reasons produced through the exercise of a normative power—the legislative power—the best we can do to convince those who do not see things as we do is to point this out.

I should say, by way of mea culpa, that I did not see clearly when I wrote the book the distinction between, on the one hand, explaining why a certain form of government is a good idea and, on the other, explaining how a structural feature of our legal reasons (e.g. that their strength varies with our say over the law) would make moral sense and so is likely to be so. Reflecting on Howard's commentary has helped me to see that what I care about is the latter kind of explanation rather than the former. I am grateful to him for helping me to understand better what I am up to in the book.

4 Conclusion

Political philosophers, philosophers of law, moral philosophers, philosophers of cognitive science, and psychologists should recognize that when it comes to describing the appropriate punitive responses to peccadillos, sins, misdemeanors and crimes by children, they need to work together. Of course we need to know how children differ psychologically from adults. But we also need to know what standards of culpability they are subject to—standards that are shaped, at least when it comes to *criminal* culpability, within a complex structure of political authority, unequally distributed among those who are to be held to those standards. I owe Brink, Howard and Morse thanks for giving me the opportunity to clarify further my position on these socially important, and philosophically complicated matters.