

The Boundaries of Free Will and Responsibility:

From Academic Debate to the Real World

Professor Ken M Levy

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The Boundaries of Free Will and Responsibility: From Academic Debate to the Real World

For almost thirty years, **Professor Ken M Levy** of Louisiana State University Law School has been thinking and writing about free will and responsibility. In several articles and his recent book, *Free Will, Responsibility, and Crime: An Introduction* (Routledge 2020), Professor Levy discusses a wide range of subjects, including the myth of the 'self-made man', whether psychopaths are culpable for their crimes, and the increasingly popular but highly controversial theory of responsibility scepticism. Professor Levy's research has profound implications for law, ethics, and society.

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At the Intersection of Philosophy and Reality

Professor Ken Levy of Louisiana State University Law School is an exceptionally clear and rigorous thinker and writer. With a background in both philosophy and law, most of his work is less a detached pursuit of abstract concepts than an attempt to connect these philosophical abstractions with the real world – that is, with a real society full of real people with real problems. Among these real problems is a criminal justice system that delivers a significant amount of injustice, in large part because it exaggerates offenders' free will and minimises other people's responsibility for the social ills that contribute to this criminal activity.

Unravelling the Myth of Self-Made Individuals

In Chapter 5 of *Free Will, Responsibility, and Crime: An Introduction* ('Contrary to Responsibility Skepticism, Metaphysical Libertarianism Is Metaphysically Possible'), Professor Levy defends metaphysical libertarianism, which is the theory that genuine free will and genuine responsibility require at least some of a person's choices and behaviour to be at least partly up to her and her alone, not entirely up to external forces outside her control. Metaphysical libertarianism is, paradoxically, the most intuitive theory of free will and the least popular among contemporary philosophers. Most of the latter believe that this position is ultimately incoherent and therefore false.

While Professor Levy is among the relatively few philosophers to defend metaphysical libertarianism, in the very next chapter ('The Dark Side of Metaphysical Libertarianism'), he turns right around and seriously critiques its social implications. One of these implications is the quintessentially American myth of the 'self-made man', the idea that individuals have (nearly) full control

over their life trajectory and are therefore solely responsible for their successes and failures. A self-made person, according to this perspective, has achieved his status or accomplishments (almost) entirely through his own will, determination, and hard work; external factors such as upbringing, privilege, cultural norms, and just plain good luck played little or no role.

Professor Levy argues that individuals' metaphysical control over their actions – that is, their free will – is either extremely limited or, if the free will sceptics are correct, non-existent. The factors influencing the self that is normally thought to have this control – genes, brain, environment, and the laws of nature – are passively received rather than self-created. Even efforts, which seem to be the strongest candidates for metaphysical control, are at most only *immediately* self-created, not *ultimately* self-created. Ultimate self-creation would have taken bringing myself into existence, which is both physically and metaphysically impossible.

No matter how socially or politically powerful a person may be, the fact of the matter is that every last one of us was born into a body that was created by two other people. This body then developed entirely from the interplay of the outside forces listed above: genes, brain, environment, and the laws of nature.

The environment includes situations. In every moment of our lives, we are in one situation or another. Whether we are driving to work, sitting in class, watching a football game, eating, or sleeping, each situation involves a specific person with a specific psychological state at a specific time, in specific surroundings (society, culture, politics, and so on), with a specific history. All of these specifics include the individual's psychological state, which itself is only the latest in a long line of psychological states tracing back to birth, when the individual certainly had no metaphysical control over her choices or behaviour. Our whole lives, then, amount to one unbroken string of 'situational luck'.



We certainly have no metaphysical control over – no magical power to determine or change – our genes surroundings, or history. The only plausible candidates for metaphysical control are our current psychological state and behaviour. But once again, behaviour and the psychological state that causes or motivates it are ultimately determined by non-ultimately-self-created forces. So, it seems that whatever metaphysical control we thought we had either vanishes or is vanishingly small. It is either mostly or entirely swallowed up by the forces over which we clearly have no metaphysical control.

Even if we have a tiny sliver of free will – that is, even if genes, brain, environment, and the laws of nature leave some ‘wiggle room’ for the self to exert metaphysical control over its choices and behaviour – we still are mostly creatures of luck. What situation we find ourselves in at any given time is much less a result of freely made choices and much more a result of what family we were born into, what society (or societies) we grew up in, what education (information and values) we passively received, what level of wealth and privilege we enjoyed or didn’t enjoy, what friends and enemies we have, what opportunities we were granted or denied, what accidents harmed us, what gifts benefited us, and so on.

Unlike most of his fellow metaphysical libertarians, Professor Levy is quite candid about the dim prospects for free will. And very much like his theoretical opponents, free will sceptics, Professor Levy draws moral and political implications from these dim prospects. He uses the example of a low-level drug dealer, ‘Slinger’, to illustrate how external circumstances like poverty can significantly influence choices and outcomes. He then argues that, to the extent that Slinger lacks genuine free will – that is, to the extent that Slinger is entirely or almost entirely a victim of bad luck – it is unjust to blame him for his bad choices and actions. He might

still need to be punished, but we should not mistake our deep-seated desire to punish these crimes and the deterrent benefits of punishment for *justice*.

Conversely, Professor Levy argues that beneficiaries of good luck – for example, people who inherit significant wealth from their parents – do not deserve any more credit for their successes than Slinger deserves blame for his failures. These are not self-made individuals, despite all their self-aggrandising protestations to the contrary. Yes, many successful people work hard. But even just having the ability to work hard and having the opportunity to be rewarded for this hard work are matters of situational luck – good situational luck. Through no fault of their own, too many people in both the United States and other countries lack either this ability or opportunity (or both).

These dark truths—that successful people are no more metaphysically deserving of their successes than unsuccessful people are metaphysically deserving of their failures—should humble the wealthy and powerful. Unfortunately, however, too many of them never ‘received the memo.’ Too many of them never learned – or willfully ignore the fact – that their position in society is almost entirely a product of forces outside their control. The luckiest people generally believe that luck has nothing to do with it and (therefore) that everybody gets more or less what they deserve. (As the saying goes, they were born on third base, but think they hit a triple.) On the basis of this self-serving illusion, they too often favour social norms and public policies that perpetuate their own advantages at everybody else’s expense, including millions of people more or less like Slinger.



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Are Psychopaths Responsible?

In Chapter 7 ('Criminal Responsibility Does Not Require Moral Responsibility: Psychopaths'), Professor Levy discusses an issue that has grabbed the public's attention since 2015: psychopathy. Specifically, he asks whether the conventional wisdom that psychopaths are responsible for their anti-social behaviour, particularly for their crimes, is correct. Some scholars have suggested that they are not. Their argument rests on two premises: (a) Psychopathy is just as debilitating a mental illness as schizophrenia and Obsessive Compulsive Disorder (OCD), and (b) unlike most other mental illnesses, there is no treatment currently available for psychopathy. Professor Levy partly agrees and partly disagrees. He agrees (at least for the sake of argument) that psychopaths are not morally responsible, but he disagrees that psychopaths are not criminally responsible. This position may seem self-contradictory; criminal responsibility certainly seems to entail moral responsibility. Professor Levy, however, argues against this entailment. And so far, he is alone in this position; no other scholar has joined him. Yet Professor Levy remains confident that he is right.

Professor Levy's central argument rests on the assumption that moral responsibility requires something that criminal responsibility does not: moral knowledge or understanding. Psychologists generally agree that psychopaths have, at most, only a cognitive understanding, not an *emotional* or *affective* understanding, of right and wrong. They may know, for example, that it is wrong to hurt other people, but they have little or no idea *why* hurting others is wrong. This ignorance derives from their psychological inability to feel compassion, which is the core attribute of psychopathy. They can feel bad only for themselves, not for others. Some philosophers and legal scholars have inferred from this psychological deficit that psychopaths lack moral knowledge and therefore moral responsibility. And because, these

same scholars assume, moral responsibility is necessary for criminal responsibility, it follows that psychopaths lack criminal responsibility as well.

Professor Levy accepts the first conclusion but not the second. He accepts (at least for the sake of argument) that psychopaths lack an emotional understanding of the moral rules and therefore moral knowledge. But he does not accept the further inference that psychopaths therefore lack criminal responsibility. As he explains in his book: 'Criminal responsibility, unlike moral responsibility, does not require an individual to be able to grasp and follow moral reasons; it requires only that the individual be able to grasp and follow *criminal laws*. Even if psychopaths are unwilling or unable to be sufficiently motivated by morality and respect for the law, they are still criminally responsible, and therefore criminally punishable, for breaking the law as long as they knew that they were breaking the law and that breaking the law would likely mean getting punished if they were caught. This, after all, is why we have a criminal justice system in the first place; it is a fail-safe, last-ditch option to use against those who, for whatever reason, are not sufficiently motivated by morality and respect for the law to comply with the law.' (p. 94)

The most obvious objection to Professor Levy's position here is that it would be totally unfair to blame and punish psychopaths if they are not morally responsible for their crimes. Again, this is precisely what some legal scholars have written: that psychopathy is a form of insanity, a mental illness that undermines their ability to know right from wrong, and therefore this condition should be treated as an exculpatory factor. Professor Levy argues, however, that psychopathy is not a form of insanity. Unlike legally insane individuals, psychopaths at least cognitively understand both the moral and legal rules. And even if emotional understanding may be necessary for moral responsibility, it is *not* necessary for *criminal* responsibility. According to Professor Levy, all that is



necessary for criminal responsibility is cognitive understanding. And, once again, psychopaths do indeed have this.

Professor Levy's position that psychopaths are, in fact, criminally responsible may seem to conflict with his position on free will. Recall that he thinks that if we even have free will, it is extremely limited; that most of our choices and behaviour are mostly or entirely determined by factors outside our control: genes, brain, environment, and the laws of nature. But there are two ways to reconcile these positions.

First, psychopaths – like the rest of us – may have just enough free will to be genuinely responsible for their crimes. They certainly seem to have the same level of control over their choices and actions as do the rest of us non-psychopaths. Yes, their choices and actions are not informed or motivated by a concern for others, but this absence does not necessarily mean that they are compelled to act as they do. Reasons other than empathy and sympathy – for example, their desire to stay out of trouble – may still motivate them to make the right decisions. And precisely because they *can* make the right decisions, precisely because they can choose to comply with the law, it is perfectly fair to hold them legally responsible when they do not.

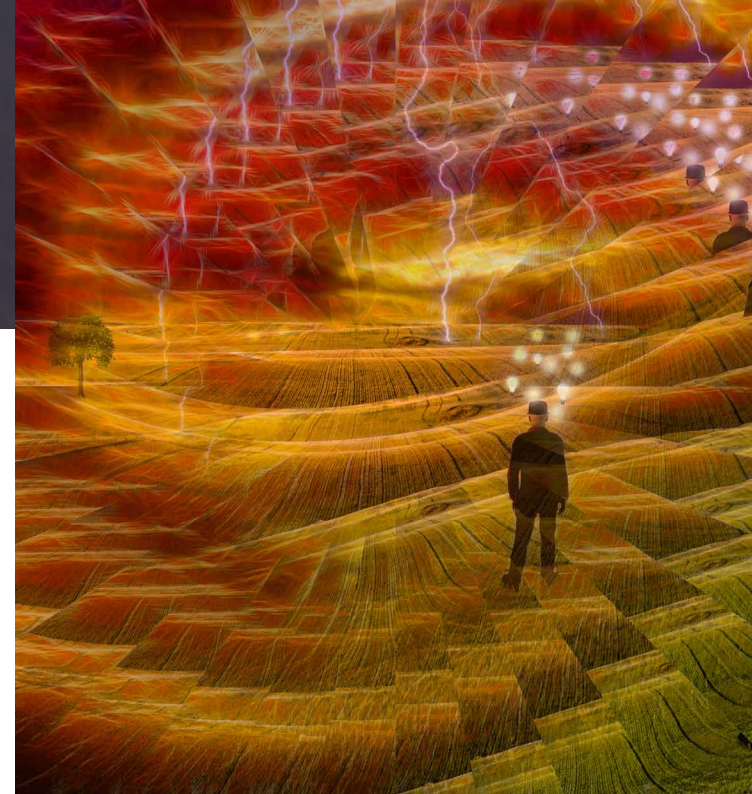
Second, legal responsibility does not necessarily presuppose metaphysical responsibility. In fact, the two issues are generally kept separate. The criminal justice system just presumes that adults are fully responsible for their unlawful behaviour; it cannot wait around until the metaphysics of free will is fully resolved, something that will likely never happen. Metaphysics is rich and exciting, but lawyers and judges simply do not have the luxury of engaging in this rich and exciting enterprise. They must act—now—in the face of philosophical uncertainty. And acting now requires them to make, and proceed on, unavoidably questionable philosophical assumptions.

The Perils of Responsibility Scepticism

Having challenged both the idea of self-made individuals and the orthodoxy about the relationship between moral responsibility and criminal responsibility, Professor Levy most recently attacked the increasingly popular position of responsibility scepticism in his article *Let's Not Do Responsibility Scepticism*. Prior to this article, in Chapter 5 of his book, Professor Levy did tangle with responsibility scepticism; he argued there that responsibility sceptics' main metaphysical arguments against metaphysical libertarianism can be rebutted. In *Let's Not Do Responsibility Scepticism*, however, Professor Levy offers a practical critique. He argues that responsibility scepticism, if implemented, would be thoroughly counterproductive.

As we saw above, our current justice system simply presumes 'responsibility realism', the idea that all adults are presumptively legally responsible for their behaviour. By definition, responsibility sceptics reject responsibility realism. They claim that free will is an illusion and therefore that genuine responsibility, which is generally thought to require free will, is an illusion as well. In the end, despite what we are taught from a very young age, none of us are ever genuinely responsible for our choices or behaviour. Responsibility is nothing more than a useful fiction.

Some responsibility sceptics have gone one step further by arguing that responsibility is not a useful fiction but rather a useless fiction. Responsibility realism, they insist, does much more harm than good. The assumption that adults are fully responsible, juveniles are largely responsible, and even older children are at least somewhat responsible for their choices and behaviour underlies two pernicious practices: blaming and punishing. Blaming and punishing are pernicious because (a) they are motivated by an ugly desire to exact revenge, and (b) their costs –



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people's suffering, hardship, and deprivation—are generally much greater than whatever benefits these practices might yield, such as deterrence and rehabilitation. Just as time-outs for children are much more humane and effective than brutal spankings, so too treating each offender's particular needs is much more humane and effective than simply throwing them into miserable, dangerous prisons for lengthy periods of time.

So instead of starting with the vengeful responsibility-realist assumption that offenders deserve to be blamed and punished, responsibility sceptics claim that we should instead start from the opposite assumption: offenders are no more responsible for their misconduct than people who contract a disease (for example, tuberculosis) are responsible for exhibiting symptoms (for example, coughing, weight loss, and fatigue). And just as we generally should isolate and treat sick people until they are well again, all with the forward-looking goal of restoring their physical health, so too we should isolate and treat offenders until they no longer pose a danger to others (or themselves), all with the forward-looking goals of restoring them to optimal mental health and re-integrating them into society.

Professor Levy certainly shares the ideals of the responsibility sceptics. He certainly agrees that blaming and punishing can be vindictive, excessive, and either unproductive or counterproductive. Yet he does not agree that we should abandon these practices altogether. If we did this, Professor Levy argues, there would be several unintended consequences: diminution of some of our most deeply held values, further dehumanisation of criminals, an exacerbation of mass incarceration, and punishment of an even greater number of innocent people (non-wrongdoers).

So, while responsibility sceptics have their hearts in the right place, implementation of their theory would not achieve the cost-benefit balance that their hearts so desire. While responsibility sceptics are indeed correct to advocate a greater role for restorative justice in the criminal justice system, they are wrong to suggest that restorative justice should replace retributive justice. Instead, both kinds of justice should be sought in equal measure.

Professor Levy qualifies his position in one key respect. He concedes that his argument depends on the background assumption that most of society is responsibility-realist – that is, that most of society simply assumes that adults are generally responsible for their choices and behaviour. If, however, most of society were to convert from responsibility realism to responsibility scepticism, then it would no longer make sense for the criminal justice system to continue treating offenders as if they were genuinely responsible for their crimes. The criminal justice system is, after all, a part of society. So, if it is to work optimally, it cannot just go its own way. Instead, its values must align with society's values, and so too its norms, beliefs, and attitudes. Otherwise, there would be not only the kinds of unintended consequences listed above but also the kinds of social and emotional harms that arise whenever there is significant tension between the public and its institutions.



When It Comes to Free Will and Responsibility, We Are All Worthy Philosophers

Philosophers often refer to 'the' problem of free will and responsibility. In fact, there are many problems of free will and responsibility. Some of them have been around since the pre-Socratics, others have been introduced more recently, and still others will likely gain traction as technology (like artificial intelligence) advances. What's important is not that all of these problems be definitively resolved. Philosophy is not engineering or business; it does not need to worry about satisfying consumers or investors. Rather, what's important is that these issues continue to be discussed and debated. As Professor Levy's work demonstrates, these discussions and debates are not the exclusive province of philosophy professors and their students. Because they have such serious moral, social, political, and policy implications, we are all worthy philosophers. Unless and until we achieve some sort of permanent utopia, which is highly unlikely, we all need to keep thinking and talking about free will and responsibility.

MEET THE RESEARCHER



Professor Ken M Levy, Holt B Harrison Distinguished Professor of Law, Paul M Herbert Law Center, Louisiana State University, Baton Rouge, LA, USA

Professor Ken Levy obtained his Ph.D. in Philosophy from Rutgers University in 1999 and Juris Doctor from Columbia University School of Law in 2002. He is the author of *Free Will, Responsibility, and Crime: An Introduction* (Routledge 2020); over 20 articles and chapters in constitutional law, criminal law, criminal theory, and various areas of philosophy; and over 30 op-eds and short essays. Professor Levy is currently writing about a wide variety of topics – specifically, causation, hate speech, and indoctrination – and is co-editing (with Professor Raff Donelson) the *Palgrave Handbook on the Philosophy of Criminal Responsibility*, which is expected to be published in 2025. At LSU Law School, Professor Levy teaches Advanced Criminal Law, Criminal Law, International Criminal Law, and White Collar Criminal Law. He has also taught Torts and will start teaching Criminal Procedure in 2025.



CONTACT

klevy@lsu.edu

<https://law.lsu.edu/directory/profiles/ken-levy/>

<https://www.threads.net/@kenlevy2020>

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FURTHER READING

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