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MENTAL DISORDERS AND THE “SYSTEM OF JUDGMENTAL RESPONSIBILITY”

ANITA L. ALLEN*

I.

*“Any long period of insanity or deep compulsive obsession ruins a life.”*¹

Justice for Hedgehogs is a big book about one big thing: the truth of “living well and being good.”² Dworkin maintains that “people each have a general, foundational responsibility to live well, to make something of their lives, and that living well is a matter of making appropriate decisions over one’s life.”³ Acting responsibly means acting in a principled way. It is a virtue.⁴ People who might otherwise be responsible are compromised by self-interest, by being pulled in two directions at once (moral “schizophrenia”), and by failing to apply applicable principles across all categories of reflection (moral “compartmentalization”).⁵

People who might otherwise act responsibly are also compromised by the conditions popularly and imprecisely referred to as mental disease, mental illness, mental disorder, being crazy, and insanity. The percentage of people in the United States assigned one of these labels is strikingly large.⁶ It is surprising that moral philosophers do not have more to say – descriptively, analytically, and normatively – about the moral lives and responsibilities of persons affected by mental conditions. For his part, Dworkin states that serious, persistent mental disorder can undercut responsibility and “ruins a life.”⁷

Like most philosophers of moral and ethical responsibility, Dworkin concentrates on “normal” adult men and women. However, in Dworkin’s

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¹ RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (forthcoming 2010) (Apr. 17, 2009 manuscript at 143, on file with the Boston University Law Review).

² *Id.* (manuscript at 138).

³ *Id.*

⁴ *Id.* (manuscript at 67).

⁵ *Id.* (manuscript at 68).

⁶ See Press Release, National Institute of Mental Health, *Mental Illness Exacts Heavy Toll, Beginning in Youth* (June 6, 2005), available at <http://www.nimh.nih.gov/science-news/2005/mental-illness-exacts-heavy-toll-beginning-in-youth.shtml>.

⁷ DWORKIN, *supra* note 1 (manuscript at 143).

chapter entitled “Free Will and Responsibility,” Dworkin seems to take a special interest in psychiatric pathology.⁸ Dworkin draws numerous contrasts between normal adults and people who fall into other categories, including children, idiots (Dworkin’s term), the brain damaged, the insane, and psychopaths.⁹

Dworkin places children and persons with what he calls “serious mental illnesses” in an exceptional category, laboring over the reasons for doing so – reasons it falls to his readers to assess.¹⁰ Indeed, his interpretation of children and persons affected by mental illness as lacking certain creative epistemic and regulative capacities, as opposed to being driven by outside hydraulic forces, plays a key role in his effort to show that determinism is not a threat to regarding normal adults as responsible.¹¹ Ultimately, readers have to ask whether Dworkin’s understandings of mental conditions, responsibility in the context of mental conditions, and the distinction between (1) lacking an epistemic and regulative capacity and (2) being driven by causal forces from the outside are clear, correct, and complete. I begin that task here.

II.

“We do not regard someone as suffering from mental disease if his cognitive and regulative capacities fall only somewhat short of what we take to be normal. They must be low indeed.”¹²

My concern for philosophical accounts of responsibility in the context of mental conditions is prompted by three things. First, government studies suggest that mental conditions are exceedingly prevalent.¹³ Second, with increased openness about mental health, we are learning that mental conditions strike people from all walks of life, including practicing lawyers and judges who shoulder major responsibilities for securing legal services and legal justice. Third, as personal memoirs chronicling mental conditions reveal, intelligent people affected by mental conditions have inner lives in which concerns about personal virtue, moral capacity, moral compliance, moral accountability, and moral repair can loom large. Philosophers have tended to stereotype and short-change the ethical and moral experiences of people affected by mild and serious mental conditions.

A federally funded study by the National Institute of Mental Health (“NIMH”) suggested that at least twenty-six percent of the general population

⁸ *Id.* (manuscript at 137-60).

⁹ *See id.*

¹⁰ *See id.*

¹¹ *See id.* (manuscript at 146).

¹² *Id.* (manuscript at 159).

¹³ Dworkin’s “we” ordinary people, contrasted with “they,” the persons with mental conditions, refers to something of a chimera. Lots of “us” are “them.”

suffers from a diagnosable mental disorder each year.¹⁴ The twenty-six percent figure was conservative, however. It was based on a survey of English-speaking American households and did not poll homeless, hospitalized, or institutionalized people.¹⁵ Nor did it count “some rare and complex psychiatric disorders, such as schizophrenia and autism.”¹⁶ The NIMH figures corroborate a controversial report of the United States Surgeon General, which placed the annual rate of mental illness in America at approximately twenty percent.¹⁷

The group affected by mental disorders includes the high functioning professionals we rely on. Our lawyers, judges, physicians, and politicians all experience mental illnesses. Although, as mental health memoir writer Elizabeth Wurtzel points out, “The measure of our mindfulness, the touchstone for sanity in this society, is our level of productivity, our attention to responsibility, our ability to plain and simple hold down a job.”¹⁸ Major responsibilities shouldered in ordinary life merely place limits on “how much rope” high functioning people with mental conditions have to hang themselves.¹⁹

Among lawyers and judges, mental conditions, including drug and alcohol dependency, are commonplace.²⁰ Sometimes, lawyers and judges with mental problems run afoul of the very law they are sworn to uphold. Consider Stephen Thompson, the once-respected New Jersey judge whose post-traumatic stress disorder was a factor in his decision to have sex with a young boy and collect child pornography;²¹ or Sol Wachter, the Chief Judge of the New York Court of Appeals who became a stalker after the medication he took induced bipolar disorder.²²

Depression is also common among lawyers. Katharine Graham wrote about her brilliant husband Philip, whose suicide associated with bipolar depression occurred following a remarkable career as a Harvard Law School graduate, Supreme Court law clerk, and controlling owner of *Newsweek*, the *Washington*

¹⁴ Press Release, National Institute of Mental Health, *supra* note 6.

¹⁵ *See id.*

¹⁶ *Id.*

¹⁷ U.S. DEP'T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 46 (1999), available at http://profiles.nlm.nih.gov/NN/B/B/H/S/_/nnbbhs.pdf.

¹⁸ ELIZABETH WURTZEL, PROZAC NATION: YOUNG AND DEPRESSED IN AMERICA 48 (First Replica Books 1999) (1994).

¹⁹ *Id.*

²⁰ See Rick B. Allen, *Alcoholism, Drug Abuse and Lawyers*, 31 CREIGHTON L. REV. 265, 265-66 (1997).

²¹ See Toni Callas, *Jury Split on Judge's Insanity Defense*, PHILA. INQUIRER, Oct. 1, 2005, at B01.

²² See Diana Jean Schemo, *A Prison Term of 15 Months for Wachter*, N.Y. TIMES, Sept. 10, 1993, at B1; *Judge Not*, PSYCHOLOGY TODAY, July 1, 1997, <http://www.psychologytoday.com/articles/199707/judge-not>.

Post, and numerous radio and television stations.²³ Schizophrenia is also not unheard of among successful lawyers. Professor Elyn Saks has written about her exemplary achievements, including attending law school, practicing law, and earning tenure on a law faculty, while struggling with schizophrenia.²⁴

We cannot summarily exclude people with mental problems out of the universe of moral agents, reducing them to the status of rocks, trees, animals, and infants, whether to denigrate them or to protect them from moral and legal wrath, as Michael Moore long ago tried to do in a well-meaning response to Thomas Szasz.²⁵ Nor can we include the group on the false assumption that their moral lives are precisely like the paradigmatic moral lives of the epistemically-sound and well-regulated people never personally touched by a mental condition. The published memoirs, diaries, and correspondences of people who have experienced serious mental illness reveal rich inner ethical lives and social lives that combine impressive moral successes with devastating moral failures.

III.

*“We believe that living well requires that we create not just a chronology but a narrative that weaves together values of character, loyalties ambitions, desires, tastes and ideals. No one creates a narrative of perfect integrity: we . . . act out of character sometimes.”*²⁶

The internal lives of persons with mental conditions are often active narratives of moral and ethical engagement, full of questions and discernment. We know this because we have the benefit of the psychiatric memoir literature, whose contributors range from the sublime William Styron²⁷ to former Massachusetts First Lady, Kitty Dukakis.²⁸

Who am I? Am I the person who self-improves and self-destructs, helps and harms others?

- “I have two identities. Essentially, one is good, one is bad. . . . I really don’t like hurting people. If I inadvertently do, it’s always

²³ See generally KATHARINE GRAHAM, *PERSONAL HISTORY* (1997).

²⁴ See generally ELYN R. SAKS, *THE CENTER CANNOT HOLD* (2007).

²⁵ See MICHAEL S. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 155-81 (1984) (arguing that mental illness is not a myth and thus that the search for the line between the “bad and the sick” must continue).

²⁶ DWORKIN, *supra* note 1 (manuscript at 154-55).

²⁷ See generally WILLIAM STYRON, *DARKNESS VISIBLE: A MEMOIR OF MADNESS* (1990).

²⁸ See generally KITTY DUKAKIS WITH JANE SCOVELL, *NOW YOU KNOW* (1990).

followed by huge tidal waves of guilt. And even if by chance it's on purpose, it always makes me feel awful, so I do it as little as I can."²⁹

- “Both my manias and depressions had violent sides to them. Violence, especially if you are a woman, is not something spoken about with ease. Being wildly out of control – physically assaultive, screaming insanely at the top of one’s lungs, running frenetically with no purpose or limit, or impulsively trying to leap from cars – is frightening to others and unspeakably terrifying to oneself.”³⁰

Are my actions, desires, preferences, and habits a matter of pathology or personality? Am I in control or is mania in control?

- “And my sex life . . . well . . . I was a single person, and I got into what I guess we call free love. I certainly didn’t know it then, but, looking back, I see this as another part of the mania.”³¹
- “I told her about my drug and alcohol abuse, sleepless nights, poor class attendance, my inability to focus, reckless driving, starving myself, and hyperactivity. . . . That began our four-year therapist/client relationship. . . . The mania also transformed me into an extremely outgoing and sociable character. Fueled by drugs and alcohol, I constantly socialized and partied, avoiding the possibility of sliding into a dreaded depression.”³²

Am I accountable? What should I do to make amends? How can I know I am well enough to make meaningful apologies?

- “I fear I am like some deep-sea animal, who cannot rise quickly to the surface without excess decompression. In any event my rise has been slow. . . . Now I wish to say that I have thought through the situation. . . . 1) I wish to apologize fully. 2) My behavior was inhumane and unpardonable.”³³

Modern philosophers often seem to assume all people with serious mental disorders lack ethical and moral capacity and because of it, moral or legal

²⁹ DANIELLE STEEL, *HIS BRIGHT LIGHT: THE STORY OF NICK TRAINA* 93 (1998) (quoting musician Nick Traina).

³⁰ KAY REDFIELD JAMISON, *AN UNQUIET MIND* 120 (1995).

³¹ PATTY DUKE WITH GLORIA HOCHMAN, *A BRILLIANT MADNESS* 19 (paperback ed. 1993).

³² ANDY BEHRMAN, *ELECTROBOY* 20, 22 (2002).

³³ GRAHAM, *supra* note 23, at 303 (quoting Philip Graham).

culpability.³⁴ But philosophers rarely bother to define precisely who counts as having the sort of mental condition that undercuts moral capacity. Dworkin doubts that “psychopaths,” “addicts,” and “compulsives” “act” at all. And even when philosophers acknowledge ethical and moral capacity among people affected by mental conditions, they then fail to incorporate the varieties of ethical and moral engagement common to mental disorder into their accounts of normative life.

At any given moment, America’s mentally troubled are invisibly integrated into the moral fabric of society, whether philosophers choose to deal with that fact or not. They function as participants in the ethics of care, concern, and practical responsibility. It is worth considering whether the fact that Dworkin is writing in an era of heightened awareness of the pervasiveness of mental disorders and intellectual disabilities makes a difference in how he conceptualizes judgmental responsibility. A society with a formative agenda of cultivating character excellence cannot simply ignore the existence of mental disorders.

IV.

*“We ordinary people have no reason to think that a crazy person’s decisions have any less – or any more – causal independence or originality than our own.”*³⁵

People with mental conditions are stock characters in moral philosophy.³⁶ They are *dramatis personae* with bit roles. They are brought in as specimens to make a point, not to be part of the conversation.³⁷ Philosophers typically introduce people with mental conditions at the point in laying down a moral theory when they believe they must acknowledge that there are exceptions to the otherwise proud and universal ascription of moral responsibility to adult members of the human family.

Does *Justice for Hedgehogs* follow this regrettable pattern? People affected by mental conditions first appear in Dworkin’s chapter entitled “Free Will and Responsibility,” in which Dworkin focuses on the proper ascription of a dimension of living well and being good that he refers to as “judgmental responsibility.”³⁸ Judgmental responsibility is an ethical and moral capacity: “Someone has judgmental responsibility for an act if it is appropriate to hold

³⁴ See, e.g., DANIEL C. DENNETT, *ELBOW ROOM: THE VARIETIES OF FREE WILL WORTH WANTING* 45 (1984).

³⁵ DWORKIN, *supra* note 1 (manuscript at 151).

³⁶ See, e.g., DENNETT, *supra* note 34, at 157 (“We also find it plausible to judge that nonhuman animals, infants, and those who are severely handicapped mentally are not responsible at all.”).

³⁷ See *id.*

³⁸ DWORKIN, *supra* note 1 (manuscript at 137-60).

him responsible for it: to blame him or praise him for it.”³⁹ Judgmental responsibility is, it seems, part of the “freedom, reason and/or feeling” package philosophers traditionally refer to as “moral agency.” Judgmental responsibility is something Dworkin wants badly to ascribe to as many people as possible to dignify and motivate them; but he implicitly assumes certain marginal populations stand in the way. So he puzzles over the “exceptions” he refers to as “idiots” and “psychopaths.”⁴⁰

How can anyone – sane or insane – be responsible for their actions if those actions are not “free” but “determined” by forces beyond their control?

The discipline of moral philosophy has established a drill. Before a philosopher can ascribe moral and ethical responsibility to individuals, he or she must first prove that either individuals possess freedom of will or that freedom of will does not matter. Accordingly, in a big book about living well, Dworkin would be expected to tackle the classic “free will versus determinism” problem before advancing a conception of ethical and moral responsibility. And so he does.

Now, determinism is a scientific theory holding that every “decision[], reflective as well as unreflective, is fully determined by processes and events that precede it and lie outside the control of the decider.”⁴¹ Epiphenomenalism is the scientific claim that the “causal chain that ends in movements of nerve and muscle” does not include decisions at all.⁴² Decisions, which may appear to a person as prompting action, are “epiphenomena” of external processes and events.⁴³

Some philosophers (the “incompatibilists”⁴⁴) have argued that moral responsibility ascriptions would be false or pointless if either determinism or epiphenomenalism were true. Dworkin offers an end run around the threat to responsibility seemingly posed by determinism and its teammate, epiphenomenalism, with his own unique compatibilism.

Dworkin argues that neither determinism nor epiphenomenalism is a personal responsibility showstopper.⁴⁵ We can meaningfully ascribe judgmental responsibility to normal adult men and women and to many youths and people with mental disorders, even if determinism and epiphenomenalism are scientifically true. This argument relies on his trademark interpretative turn.

For Dworkin, judgmental responsibility is an “interpretative concept” whose point and value is relevant to its understanding and application.⁴⁶ Embracing

³⁹ *Id.* (manuscript at 139).

⁴⁰ *Id.* (manuscript at 150-53).

⁴¹ *Id.* (manuscript at 137).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* (manuscript at 141).

⁴⁵ *See id.* (manuscript at 137-60).

⁴⁶ *Id.* (manuscript at 139).

judgmental responsibility is a better ethical fit with the overall fabric of our lives than rejecting it on account of scientific determinism or epiphenomenalism. A “responsibility system” exists in our lives, and we “must try to justify as well as we can.”⁴⁷

The responsibility system ascribes judgmental responsibility to a person not just in case the person is scientifically free, but if he or she (1) has a minimal ability to form true beliefs about the world, other people’s mental states, and the likely consequences of what they do; and (2) the ability to make decisions that fit “the agent’s normative personality: his desires, preferences, convictions, attachments, loyalties and self image.”⁴⁸ These are epistemic and regulative capacities, respectively.

We do hold people accountable and we also make moral judgments about right and wrong, Dworkin maintains. We have an “internal sense of deliberate action”;⁴⁹ we have a sense of pushing and being pushed and we make a distinction between the two, he says.⁵⁰ Scientific possibilities provide no basis for an individual to cease his or her ethical quest to live well, which includes asking, “Am I responsible for what I decided to do?” Dworkin’s ethical subject views herself as a decider, a person with reasons for acting and a person who views others as having reasons for acting.⁵¹

Dworkin’s attack on determinism includes an argument that people cannot coherently believe that scientific perspectives like determinism undercut responsibility. Such a belief’s “annihilating power is catholic across reasons.”⁵² If determinism were true and meant we have no judgmental responsibility then “we are all – hurricanes and people – just carried on nature’s sea.”⁵³ The best fitting conception of responsibility does not allow scientific possibilities to undercut the practice of praising or blaming ourselves and others. Determinism and epiphenomenalism are technically consistent with, but psychologically in tension with, the general practice of giving reasons and the specific ethical practice of giving reasons – “the responsibility system” which “[o]ur culture has handed us.”⁵⁴

With the threats of determinism and epiphenomenalism out of the way, Dworkin forges ahead to elaborate judgmental responsibility. When is it appropriate for someone to judge his or her own behavior critically (as a matter of personal ethics) and for others to judge him or her that way (as a matter of moral evaluation)? Judgmental responsibility is appropriately ascribed when a

⁴⁷ *Id.* (manuscript at 143).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Note that people with mental illness have this internal sense of deliberate action, too.

⁵¹ See DWORKIN, *supra* note 1 (manuscript at 145).

⁵² *Id.* (manuscript at 141).

⁵³ *Id.*

⁵⁴ *Id.* (manuscript at 154).

combination of capacities is obtained – a minimal ability to form true beliefs, understand consequences and act reliably in accord with personality.

An understanding of judgmental responsibility may have implications for law, but clearly, Dworkin's "judgmental responsibility" is not the same thing as ordinary legal responsibility. The law sometimes, for policy reasons, assigns legal responsibility to natural persons who are not judgmentally responsible or fully judgmentally responsible simply because they have caused harm. For example, a person utterly and permanently deluded as to reality by schizophrenia can be held liable for intentional torts as if they were perfectly sane.⁵⁵ Moreover, the law, for policy reasons, assigns legal responsibility to entities who, as non-natural persons, cannot be ascribed judgmental responsibility at all. For example, a court, under the doctrine of vicarious liability, held that a corporation serving in the role of general contractor on a construction project can be legally responsible for harms caused by the employee of an undercapitalized sub-contractor.⁵⁶ Judgmental responsibility, like moral agency, makes human beings special and confers importance and dignity. Sadly, not all human beings have judgmental responsibility. Their importance stems from other morally relevant potential, traits, and relationships.

V.

*"We are not responsible when someone pushes us or manipulates our mind But we are also not responsible when we are small children or seriously mentally ill."*⁵⁷

Challenged by their disorders and illnesses, persons afflicted with mental conditions struggle to conform to basic societal expectations of right as opposed to wrong, virtue as opposed to vice, good as opposed to evil, and justice as opposed to injustice. They may be especially unlikely to succeed. How should persons with mental illness respond to moral failure in their personal lives; ethical failure in their professional lives? And conversely, what special pride ought they take in their successes?

Do persons with mental conditions possess judgmental responsibility? I believe most do, most of the time, and that only a very few of the people to whom DSM-IV diagnoses could be applied do not at all.⁵⁸

Dworkin's account of judgmental responsibility, his "adverbial" ethics, shifts toward the narrative/internal/creative and away from the

⁵⁵ See, e.g., *Johnson v. Lambotte*, 363 P.2d 165, 166 (Colo. 1961).

⁵⁶ See *Becker v. Interstate Props.*, 569 F.2d 1203, 1209, 1214-15 (3d Cir. 1977).

⁵⁷ DWORKIN, *supra* note 1 (manuscript at 150).

⁵⁸ See AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS*, at xxi-xxiii (4th ed. 1994).

executive/causal/external/hydraulic.⁵⁹ This is good news for moral philosophers looking for a normative framework within which to explain why, and in what way, people with mental illnesses are moral agents. People with symptoms of bipolar disorder, depression, anxiety, obsessive compulsive disorder, dissociative identity disorder, schizophrenia, and the like are creative actors, narrative builders. They are intelligent; they are not robots. They are not the people Dworkin indelicately terms “idiots” who do not know that guns kill.⁶⁰ Yet the narratives of responsibility shaping Dworkin’s interpretation of responsible actors are the narratives of mental wellness not mental disorder or illness.

Mental disorders are not a marginal phenomenon, meriting a parenthetical or a footnote in ethics books. There can be no adequate theory of moral agency or of “judgmental responsibility” that omits a perspective on the moral and ethical capacities and responsibilities of persons affected by mental disorders. When should we blame? What is an excuse? What, if anything, do people affected by mental illness owe the people they harm? What special ethical and moral obligations of prudence, of warning, of advance directives, if any, pertain to people with mentally disorders? Philosophers have plenty of work to do on such questions before getting to questions of ideal legal responsibility, such as whether people with mental disorders are liable for intentional torts, negligence, crimes, and commercial breaches. Philosophers of value should spend more time than most traditionally have spent fleshing out the moral and ethical responsibilities of people affected by mental disorders.

High-functioning people who are ill with bipolar disorder, major unipolar depression, schizophrenia, and other DSM-IV mental illnesses have rich and difficult moral lives. Often educated, well-brought up, and well-employed, people with mental illnesses typically know right from wrong. Yet sometimes they do the wrong thing. They hit, lie, cheat, brag, extort, bribe, abuse, and molest. Many of their most hurtful, damaging, and illegal acts seem to be a direct result of illnesses that unleash negative impulses and distort judgment. But bad behavior is not the only problem. Persons affected by mental illness may suffer from low self-esteem; they may inappropriately judge and criticize themselves.

The biographies and autobiographies of persons diagnosed with mental illness reveal individuals who sometimes succeed at meeting their responsibilities and who sometimes fail. When they fail, mentally troubled people of all ages and many walks of life experience deep, even debilitating, guilt, shame, and remorse. Actress Patty Duke has written that after losing control of emotions in front of her family, she often felt overcome with pathological degrees of shame: “Now I had to run to the bathroom and try to kill myself because that was the only way to save face.”⁶¹ For their misdeeds,

⁵⁹ DWORKIN, *supra* note 1 (manuscript at 124).

⁶⁰ *Id.* (manuscript at 141).

⁶¹ DUKE, *supra* note 31, at 236.

they apologize, pay compensation, and submit to shunning and criminal punishment. Thus, people with mental illness combine active, rich inner moral lives with public accountability within the “responsibility system.”

People with mental illness can be excessively “good,” religious, or exacting – to a fault. For example, the insane delusions of Margery Kempe led her to reject worldliness and adopt a religious life.⁶² Similarly, Foucault tells the story of Glenadel, a “polite” man who begged to be chained down to prevent him from carrying out an impulse to murder his sister-in-law.⁶³ Sigmund Freud observed that some of his manic-depressive patients blamed themselves and refused to blame themselves to a pathological extent.⁶⁴ Freud diagnosed what are now called “mood” or “affective” disorders in some of his patients and was fascinated by their implications for morality. “It is a most remarkable experience to see morality,” he wrote in 1933, “which is supposed to have been given to us by God and thus deeply implanted in us, functioning [in these patients] as a periodic phenomenon.”⁶⁵ Freud observed that during periods of normalcy, his patients were morally balanced.⁶⁶ They recognized right and wrong and could generally make accurate, socially acceptable judgments.⁶⁷ However “melancholy” or depressed patients were, their over-severe super-egos tended to heap undeserved blame on themselves.⁶⁸ Freud’s ego-driven “maniac” or manic patients were amoral, tending toward uninhibited gratification of immoral desires.⁶⁹

VI.

“A toddler or idiot or madman makes decisions and makes them, perhaps, with some sense of responsibility for them. But he should reject judgmental responsibility for those decisions later, when he grows or if he recovers, and the rest of us should reject them now. We think – and the toddler, at least, will later come to think – that it would be right not to count those decisions in deciding how well he has lived. If we accept the creative principle as the ethical basis for our responsibility system we can await the latest discoveries

⁶² ROY PORTER, MADNESS: A BRIEF HISTORY 173-77 (2002).

⁶³ MICHEL FOUCAULT, ABNORMAL: LECTURES AT THE COLLÈGE DE FRANCE 1974-1975, at 143-45 (Arnold I. Davidson ed., Graham Burchell trans., Picador 2003) (1999).

⁶⁴ See SIGMUND FREUD, NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS 60-61 (James Strachey ed. & trans., W.W. Norton & Co. 1965) (1933).

⁶⁵ *Id.* at 61 (alterations in original).

⁶⁶ *Id.*

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ *See id.*

*about the electro-dynamics of our brains with boundless curiosity but no terror.”*⁷⁰

Suppose a well-educated and gainfully employed adult storms into a friend’s apartment during an episode of bipolar rage, smashes a framed work of art to the floor, and assaults the friend with a shard of glass. Should she blame her own behavior critically and should others judge her that way? Following Dworkin, the offender is judgmentally responsible if she has the capacity to recognize truth, comprehend consequences, and act in accord with normative personality. The adult who has had a bipolar rage attack is someone who probably satisfies the epistemic prong of judgmental responsibility; but not, on the occasion of the attack, the regulative prong.

We can imagine, though, that overwhelmingly, the person does act in accord with normative personality sufficient for judgmental responsibility’s regulative prong. She could be like Kay Jamison, the successful bipolar medical school professor. The interplay of inner life and public accountability is movingly displayed on the pages of Dr. Jamison’s autobiographical best-seller, *An Unquiet Mind*.⁷¹ Jamison writes of madness and recovery, aided by supportive friends, family, and lithium. A professor at Johns Hopkins University, Jamison described how suicide attempts are “deeply bruising” to the people who care about you.⁷² Concerns about hurting others mix easily in her writing with concerns about self-concept and identity. Notably, Jamison wrote of how bruising it is for the mentally ill to live with the “discrepancies between what one is, what one is brought up to believe is the right way of behaving toward others, and what actually happens” while ill.⁷³

We must therefore reject understanding judgmental responsibility as a matter of development or degree. Judgmental responsibility has another axis. Further complicating this inquiry is the reality that it is also a distinctly episodic phenomenon. It is a set of traits that can come and go. The set can come and go rapidly and frequently, as it might for the people psychiatrists diagnose as having rapid-cycling bipolar disorders and/or intermittent explosive disorder. Or it can come and go occasionally, as it might for people whose affective disorders erupt once or twice in their lives and are otherwise well-controlled by lifestyle, medication, and therapy.

Failing to recognize the distinct episodic quality of ethical and moral capacity (and the brands of moral engagement it precipitates precisely because it is episodic) is a mistake. The mistake prompts philosophers to class adult persons affected by mental illness with children. But children’s internal narratives and mental illness-affected adults’ ethical narratives are worlds apart. Children have yet to experience reliable epistemic and regulative

⁷⁰ DWORKIN, *supra* note 1 (manuscript at 157).

⁷¹ See generally JAMISON, *supra* note 30.

⁷² *Id.* at 120.

⁷³ *Id.* at 121.

competence; and to have complex work, family, and public service lives built-up around them. For an adult, the lack of epistemic and/or regulative capacity is often a matter of “losing it” and being saddled with all the practical consequences of falling short.

VII.

*“Would I think myself responsible, in retrospect, if I had the kind of incapacity the defendant’s act revealed? That is the spirit of the attractive thought, ‘There but for the grace of God go I.’”*⁷⁴

The ideal moral agent will avoid lying, cheating, stealing, promise breaking, unfairness, injustice, abuse, and violence. Histories of psychiatry reveal that Westerners used to consider mental illness a spiritual defect or a per se defect of character.⁷⁵ It is neither. Mental health professionals recognize that poor moral and ethical judgment may be a result of very real, treatable abnormalities of brain chemistry and function.⁷⁶ Mental health interventions are enablers of better ethical living and moral goodness. The availability of such interventions means that neither brief nor extended bouts of mental illness inevitably ruin lives.

How should persons with mental illness respond to moral failure in their personal lives; ethical failure in their professional lives? And conversely, what special pride ought they take in their successes?

Consider Jeremy (not his real name), a man over fifty with two master’s degrees. He supports his three teenage children by teaching full time in a public elementary school in New York City and selling his own high-quality original artwork. A father, teacher, and artist, Jeremy’s life is hardly a “ruined” life.

Yet Jeremy is seriously mentally ill. Jeremy lives with memories of a father who repeatedly beat him and raped his sisters in earshot of a mother immobilized by morbid obesity. Since childhood, he has cycled through bouts of catatonic sadness and energetic, selfish pleasure-seeking. Jeremy has been violently aggressive; more often suicidal. Once, he flung himself through a third-story window and spent a month in the hospital. He is well when in therapy and medicated with a cocktail of mood-stabilizers, anticonvulsants, antidepressants, and second-generation antipsychotics. He prefers the tremors, sexual dysfunction, and other side effects of medication to the emotional extremes he experiences without them.

⁷⁴ DWORKIN, *supra* note 1 (manuscript at 159).

⁷⁵ See LILIAN R. FURST, *BEFORE FREUD: HYSTERIA AND HYPNOSIS IN LATER NINETEENTH-CENTURY PSYCHIATRIC CASES* 17-33 (2008).

⁷⁶ See Kenneth Tardiff, *Mental Illness: Assessment and Management of Violent Patients*, in 2 *ENCYCLOPEDIA OF VIOLENCE, PEACE, CONFLICT* 413, 416 (Lester Kurtz ed., 1999).

Mental illness can lead people to feel awful and to do awful things. Contrary to popular stereotypes, however, the sober mentally ill population is not a special threat to the community. Yet, poor judgment, irritability, abuse, and violence are hallmarks of major mental disturbances. Even though an individual knows what is morally right and has a firm foundation of moral education, it may be impossible to do the right thing when mental illness strikes. Moreover, mental illness can cause a person to act out of character. Because the mentally ill often wish to be morally compliant members of their communities, their ethical failings can be a source of considerable regret and shame.

When assessing his responsibility for his outrageous assaults and property damage, Jeremy cannot say, “There, but for the grace of God, go I.” He must say, “Despite the grace of God, here I am.” He must assess his own epistemic and regulative capacities. He must wonder if he is in control or if he is a tumbleweed. Jeremy believes his regulative capacities are impaired and that it is a medical problem prescription drugs can relieve. But he also believes he is driven, willy-nilly, to behave badly by genetic inheritance from his schizophrenic father and childhood abuse. The internal dialogue combines the creative and the hydraulic.

VIII.

“[Y]ou must treat the success of your own life as of intrinsic and objective importance.”⁷⁷

People with mental illness are often written out of the ethics game or given a bum script. We should acknowledge their actual roles and their potential. If everyone is crazy, is anyone to blame? Moralism is always a risk when dealing with illness, but I believe praise and blame very often apply to the conduct and characters of people with mental illnesses. We must encourage greater respect for the moral potential and contributions of people with mental illness, through identifying realms of moral responsibility and legal liability that properly – and improperly – apply to them.

It is not always clear what greater respect means. What modes of accountability are fitting? What is a morally committed person obligated to do to address the fallout of hurt feelings and injury caused by his or her mental illnesses? Should society hold individuals morally accountable when chronic or short-term mental disability distorts their judgments about right and wrong? People who suffer from mental illness typically look and act normally. We may be disinclined to shelter them from blame the way we shelter the mentally retarded. The Supreme Court has held that criminal offenders with IQs below seventy may not be put to death.⁷⁸ Yet contemporary United States laws

⁷⁷ DWORKIN, *supra* note 1 (manuscript at 162).

⁷⁸ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

sternly impose criminal and civil liability on high-functioning mentally ill persons all the time.

For what are you responsible when you are perfectly intelligent and yet illness makes you irresponsible? After a manic rage or a messy suicide attempt, what do the high-functioning mentally ill owe the people they may have offended, harmed, or worried? Dworkin suggests people with mental illness owe nothing for the wrong they do when ill. Yet we can imagine alternative schools of thought. A “full accountability” school would say: the mentally ill owe complete apologies and compensation for the wrong they do, to the extent that they recover from mental illness and are capable of performing moral repair. They should face the same punishments and liability as everyone else. The “partial accountability” school says: the mentally ill have an obligation to try to seek and follow medical advice, but otherwise only to offer brief factual explanations of illness-caused injuries. They should not be subject to the same criminal and civil burdens as ordinary people. Both schools of thought purport to recognize the humanity of the mentally ill in different ways. The full accountability approach does so by treating the ill no differently from others who injure; the partial accountability approach by acknowledging that the ill suffer bona fide disabilities, which are no fault of their own.

The insane can be good, the sane bad. No one can help some degree of moral failure. With or without fault, the mentally ill sometimes cannot meet basic conventional expectations of moral behavior. There is much that science and psychology may one day tell us about the relationship between the brain, mental health, and behavior. Perhaps one day we will blame less, and do a much better job of helping the mentally ill control antisocial behaviors.

Being at risk of ethical and moral failure on account of mental conditions entails special responsibilities of self-care and harm prevention. A person prone to bipolar mania, for example, is obligated to take reasonable steps to prevent bouts of acute illness, and, if something akin to the “partial accountability” approach is the right one, acknowledge hurtful behavior. A twenty-six percent prevalence rate of mental illness calls for access to moral and ethical capacity building through access to effective mental health services. Without access to good physicians, medications, and hospitals, people with mental illness cannot do what they should. A just society will assist people adversely affected by mental illness, both as a matter of sound public health and as a matter of sound ethical policy.

Many people are periodically and intermittently just too sick to do the right thing. Anxiety, depression, bipolar disorder, and schizophrenia get in the way of conforming to basic standards of moral conduct. Challenged by their illness, persons afflicted with mental illness struggle to conform to basic societal expectations of right as opposed to wrong, virtue as opposed to vice, good as opposed to evil, and justice as opposed to injustice. They may be especially unlikely to succeed.

Society has done little to help them. Moral educators have not worked under the assumption of widespread mental disorders and diseases in the past. Yet the data suggest that a high percentage of the bright children and teens, to whom we are trying to teach values in high school and college, may be struggling with problems of mood and judgment.⁷⁹ Mental health professionals today recognize that poor moral judgment may be a result of very real, treatable abnormalities of brain chemistry and function.⁸⁰ Mental illness is too common among the general population to overlook or to marginalize the issues of moral compliance, moral accountability, and societal obligation. With access to therapy, medical care, and social services, even people with serious mental illnesses, like Jeremy, can hope to survive to live what are on balance ethically and morally worthy lives.

IX.

“Did the accused lack one or the other of the pertinent capacities to such a degree that it is inappropriate to ascribe responsibility to him?”⁸¹

The law books are full enough of stories of men and women who live basically normal lives, but who, at some point or intermittently, damage property, engage in vice, or hurt other people through negligence or aggression because they are mentally ill. People whom mental illness does not affect make mistakes of reason. But mentally ill persons, even the very intelligent and well intended, cannot always recognize which choices are decent and best. Their intermittent incapacities neither reduce their human dignity nor relieve them as thinking, creative, narrative-building subjects from the responsibility system that often ignores their special challenges and experiences.

“Normal” people commonly ignore the demands of conscience and conventional morality. People experiencing acute mental illness may fail to hear the genuine demands of conscience or see the value in conventional morality. Florid mania and psychotic delusions can lead to bad, even dangerous and deadly, choices. Depression, anxiety, and obsessions can lead to mistakes of action and inaction.

- Anthony Costello, who suffered from bipolar disorder, was fired from his job at Johns Hopkins University. He went to work one day wielding a hockey stick, threatening violence. Because he was

⁷⁹ See Richard A. Friedman, *Uncovering an Epidemic: Screening for Mental Illness in Teens*, 355 NEW ENG. J. MED. 2717, 2717 (2006) (“[H]alf of all serious adult psychiatric illnesses – including major depression, anxiety disorders, and substance abuse – start by 14 years of age, and three fourths of them are present by 25 years of age.”).

⁸⁰ See Tardiff, *supra* note 76, at 416.

⁸¹ DWORKIN, *supra* note 1 (manuscript at 158).

terminated for misconduct, Costello was denied the usual unemployment benefits.⁸²

- Depressed after his wife's death from lupus, Ronald Gossage began taking the medications Xanax and Prozac. He shot two women in their home, denying any memory of the event. He was convicted of "assault under extreme emotional disturbance" and sentenced to six years in prison.⁸³
- A forty-one year old "John Doe" with schizophrenia was evicted from his rented apartment, after skipping his medication and becoming psychotic. While psychotic, he spray-painted the stove, radiator, and windowsills of his apartment and then damaged a neighbor's front door with a hammer.⁸⁴
- Margie Wodarz left the scene of one automobile collision, only to cause another more serious collision a few minutes later. Witnesses said her behavior at the scene of the accidents was "bizarre." Wodarz said she "wiggled out." She explained that her family had "a history of mental problems" and conjectured that she "just freaked out."⁸⁵
- Erma Veith was driving down the road when suddenly it seemed to her that God took hold of the steering wheel. She stepped on the gas when she saw a truck coming in her direction. She believed she could fly like Batman. The driver of the truck was seriously injured and sued. A psychiatrist testified that "Veith was suffering from 'schizophrenic reaction, paranoid type, acute'" at the time of the collision.⁸⁶

These things can happen. You can hurt people while mentally ill. Or, you may simply hurt yourself, sleeping too much to the point of utter debilitation. You may abuse drugs or alcohol and waste your money. While ill, you may commit the ultimate act of self-injury: suicide.

- Sandra Kaiser, a fourteen-year-old who had been diagnosed with conduct disorders, developmental disorders, and aggression, committed suicide by jumping off a bridge into oncoming traffic. She

⁸² *Johns Hopkins Univ. v. Bd. of Labor*, 761 A.2d 350, 351 (Md. Ct. Spec. App. 2000).

⁸³ *Gossage v. Roberts*, 904 S.W.2d 246, 247 (Ky. Ct. App. 1995).

⁸⁴ *Stuyvesant Assocs. v. Doe*, 534 A.2d 448, 449 (N.J. Super. Ct. Law Div. 1987).

⁸⁵ *Bashi v. Wodarz*, 53 Cal. Rptr. 2d 635, 637 (Ct. App. 1996).

⁸⁶ *Breunig v. Am. Family Ins. Co.*, 173 N.W.2d 619, 622 (Wis. 1970).

had recently gotten an abortion, and her boyfriend had announced he had impregnated another girl.⁸⁷

- A woman, called G.D. in court records, took a lethal dose of the prescription medication Elavil, obtained with the help of her stepfather, through a physician who did not know her. Her husband sued the stepfather and the doctor, alleging both that the physician's negligence and the stepfather's history of abusing his stepdaughter were the true causes of the suicide.⁸⁸

Most people, whether or not they have a mental disorder, are capable of moral feeling and caring about themselves. A few people with mental illness are incapable of caring much about their futures or other people. These few seem cut off from ordinary human feeling and emotion, which is so key to genuine moral commitments and action. They seem oddly indifferent to moral concerns even though they mouth the vocabulary of morality. As Dworkin points out, if United States criminal defendants are found to have a "mental disease" they may be able to use an insanity defense to avoid the harshest punishments.⁸⁹ In the past, being found to have had knowledge of right and wrong could mean a person with a mental illness would be denied an insanity defense.

Patricia Tempest coolly drowned her five-year-old in the bathtub and then sat down to watch a movie, ate a banana, and waited until her husband came home.⁹⁰ Patricia was convicted of first degree murder, despite the testimony of a psychiatrist that she was suffering from "chronic schizophrenia, acute type" at the time of the homicide.⁹¹ She was not insane in the eyes of the law, however. She knew right from wrong. When asked why she drowned her son, she said he was "too demanding" and "got on her nerves."⁹² A friendless recluse, she did not want her outgoing son and husband in her life anymore.⁹³ She told the police that she had first thought of killing her son days earlier.⁹⁴ This admission was evidence that the killing was an intentional, premeditated act. She also told the police that she had apologized to her son for causing his death.⁹⁵ Her apology to the victim counted as legally good evidence that she was not insane at the time of the crime.⁹⁶ She knew exactly what she was

⁸⁷ *Eidson v. Reprod. Health Servs.*, 863 S.W.2d 621, 622-24 (Mo. Ct. App. 1993).

⁸⁸ *R.D. v. W.H.*, 875 P.2d 26, 28 (Wyo. 1994).

⁸⁹ See DWORKIN, *supra* note 1 (manuscript at 158-59).

⁹⁰ *Commonwealth v. Tempest*, 437 A.2d 952, 953 (Pa. 1981).

⁹¹ *Id.* at 954.

⁹² *Id.* at 953.

⁹³ *Id.* at 954.

⁹⁴ *Id.* at 955.

⁹⁵ *Id.* at 954.

⁹⁶ *Id.*

doing. Patricia's own words did her in with the legal system. But the words may have been just words, robotic, no real moral performance of accountability and repair at all.

Mental illness can lead to moral compartmentalization. Heinous crimes are sometimes committed by people who are seeking, in their own minds, to act in the best interest of others – certain select others. David Paul Martin, for example, had a history of poor judgment and poor impulse control.⁹⁷ One afternoon in 1991, David and his second wife, Connie Lynn Martin, had a screaming match.⁹⁸ Connie screamed that she would like to see David in jail, and David screamed at Connie for imposing too many chores on their daughter Brandy.⁹⁹ David then knocked Connie down and choked her to death.¹⁰⁰ After the killing, David took a shower, gave Brandy and her brother some cash, and then turned on the television.¹⁰¹ The police arrived and arrested David, who was indicted for first-degree murder.¹⁰² Psychiatrists who performed a court-ordered mental examination told the trial court that in their professional opinion, David was suffering from a mental illness or defect at the time of the crime – specifically major depression and a dissociative disorder.¹⁰³ David was subsequently found guilty of the lesser charge of voluntary manslaughter and sentenced to five years in jail.¹⁰⁴

I would not deny that some few people are too sick for ethics and morality and cannot be understood as subject to the responsibility system at all. I agree with Dworkin that “mental illness may savage either or both of the judgmental capacities in anyone.”¹⁰⁵ Like him, I worry whether the law is consistent or correct in how it regards people with losses of epistemic or regulative capacity, let alone irresistible impulses or knowledge of right and wrong.¹⁰⁶

Because Dworkin's agenda is preserving the notion of freedom for the sake of the responsibility system as it applies to normal (“we ordinary”) people, he stresses that “if we accept that mentally ill criminals should be excused because they are not responsible,” we need not agree with pessimistic incompatibilists that “for that reason . . . no one is ever responsible because everyone is actually in the same position” of being steered by external hydraulic forces.¹⁰⁷ Dworkin would excuse the criminally accused when they “lack one or the other of the pertinent capacities to such a degree that it is

⁹⁷ See *State v. Martin*, 950 S.W.2d 20, 21 (Tenn. 1997).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 22.

¹⁰⁴ *Id.* at 21.

¹⁰⁵ DWORKIN, *supra* note 1 (manuscript at 156).

¹⁰⁶ See *id.*

¹⁰⁷ *Id.* (manuscript at 150).

inappropriate to ascribe responsibility.”¹⁰⁸ He endorses capacity-based approaches (both epistemic and regulative) to the assignment of legal liability for serious crime. He asserts that American jurisdictions that now limit the insanity defense to persons with “mental disease[s]” as on the right track, to the extent that mental diseases are associated with diminished epistemic and regulative capacities.¹⁰⁹

Tennessee, the state that convicted wife-strangler David Paul Martin of manslaughter rather than first-degree murder, has subsequently made it harder for defendants claiming mental illness to benefit from an insanity defense, by establishing a tough burden of proof. I conclude with a footnote from the court’s opinion in Martin’s appeal describing the change:

At the time of the offense, insanity was a defense to prosecution if “at the time of such conduct, as a result of a mental disease or defect, the person lacked substantial capacity either to appreciate the wrongfulness of the person’s conduct or to conform that conduct to the requirements of law.” Tenn. Code Ann. § 39-11-501(a) (1991). If the evidence raised a reasonable doubt as to the person’s sanity, the burden of proof fell to the state to establish sanity beyond a reasonable doubt. *State v. Jackson*, 890 S.W.2d 436 (Tenn. 1994). Effective July 1, 1995, the law was amended to provide that the defendant must prove, by “clear and convincing evidence,” that “as a result of a severe mental disease or defect, [he or she] was unable to appreciate the nature or wrongfulness of [his or her] acts. Tenn. Code Ann. § 39-11-501(a) (Supp. 1995).¹¹⁰

¹⁰⁸ *Id.* (manuscript at 158).

¹⁰⁹ *Id.* (manuscript at 159).

¹¹⁰ *State v. Martin*, 950 S.W.2d 20, 22 n.1 (Tenn. 1997).