

Fall 1984

Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse

Joshua Dressler

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Joshua Dressler, Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse, 75 J. Crim. L. & Criminology 953 (1984)

This Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

COMMENTARY:

REAFFIRMING THE MORAL LEGITIMACY OF THE DOCTRINE OF DIMINISHED CAPACITY: A BRIEF REPLY TO PROFESSOR MORSE

Joshua Dressler*

The *Journal* recently published a lucid and important article by Professor Stephen Morse, regarding the controversial doctrine of diminished capacity.¹ Any article by Professor Morse regarding the intersection of criminal law and psychiatry is valuable and likely to be influential.² Moreover, I am in agreement with much that he says in the essay. I believe he is wrong, however, in his assertion that the defense of diminished capacity ought to be abolished.

Morse correctly distinguishes between two variants of so-called "diminished capacity."³ The first form, which he calls the "mens rea variant,"⁴ is not really a "defense" at all.⁵ Rather, evidence of defendants' mental condition (i.e., their "diminished capacity") is proffered in order to create a reasonable doubt in the minds of jurors regarding the presence of the statutorily required mens rea element of the crime.⁶ So understood, expert testimony by mental

* Professor of Law, Wayne State University Law School. J.D., University of California at Los Angeles, 1973; B.A., University of California at Los Angeles, 1968.

¹ Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984).

² Professor Morse is the Orrin B. Evans Professor of Law and a Professor of Psychiatry and the Behavioral Sciences at the University of Southern California's Law Center and School of Medicine, respectively.

³ Morse, *supra* note 1, at 1.

⁴ See *id.* at 5-20.

⁵ See 1 P. ROBINSON, CRIMINAL LAW DEFENSES §§ 101(a)-(b), at 474-75 (1984).

⁶ In principle, the evidence could serve to negate any mens rea, although for policy reasons, it is often limited to specific intents, such as malice, or premeditation and deliberation in homicide prosecutions. Morse believes that the mens rea variant should apply to all crimes and to all subjective forms of mens rea. See Morse, *supra* note 1, at 13-17.

health professionals is not only relevant, but its exclusion is most likely constitutionally prohibited.⁷ Morse understands this,⁸ although noting that courts frequently confuse this use of psychiatric testimony with the genuine defense of diminished capacity.⁹ Morse provides compelling arguments against the claim that use of expert evidence to disprove mens rea jeopardizes society's legitimate interest in protecting itself from dangerous actors,¹⁰ and he provides intelligent suggestions for reforming the way courts receive such testimony.¹¹

It is when Morse turns to the second variant of diminished capacity—the true diminished capacity defense—which he calls “partial responsibility,”¹² that I find fault. Here, actors commit the prohibited harm with the required mens rea,¹³ but they are adjudged guilty of a lesser degree of crime because of a mental or emotional impairment, short of insanity, that reduces their moral responsibility for the act. It is *this* doctrine that Morse wants to see abolished.¹⁴

⁷ The due process clause requires that the government prove every element of a crime beyond a reasonable doubt. See *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970). Exclusion of relevant evidence regarding mens rea permits the government to convict the party without proving mens rea to that level of certainty. A rule that prohibits the defendant from presenting such evidence may also violate the defendant's sixth amendment right to introduce competent and relevant evidence. See Morse, *supra* note 1, at 5-7.

⁸ See Morse, *supra* note 1, at 5-6.

⁹ See *id.* at 7-8.

¹⁰ Morse points out that mens rea is rarely negated by mental abnormality, no matter how severe the disorder. *Id.* at 40-41. Mental illness is more likely to affect volition, or motivations for action. *Id.* at 41. In fact, diminished capacity is more apt to prove intent, than to negate it. *Id.*

¹¹ Morse recommends, *inter alia*, that courts focus on whether the actor *actually* possessed the requisite mens rea, rather than on the *capacity* to possess the intention. *Id.* at 43. Although absence of capacity is one logical way to prove the actual lack of mens rea, Morse believes conceptualization of the issue in terms of “capacity” confuses both courts and mental health professionals. *Id.* at 42-43. Moreover, the mental health professionals lack expertise regarding the individual's capacity to form a mental state. *Id.* at 42. Innocence is more directly and reliably proven, therefore, by focusing on actuality, not capacity. *Id.* at 43. Morse would exclude testimony on capacity. *Id.* at 44.

Morse would also prohibit experts from stating their opinion on the ultimate legal issue—defendant's intent. *Id.* at 48. Rather, the expert should “describe in as much rich clinical detail as possible what was going on in the defendant's mind . . .” *Id.* The last step—did the actor have the required mens rea—would be left to the common sense of the jury. *Id.* at 49.

Morse favors preventing the expert from providing diagnoses of the actor's condition (i.e., labelling the actor's condition as “schizophrenia” or some other mental disease). *Id.* at 51-55. Such testimony is irrelevant and confusing.

¹² See *id.* at 20-36, 50-55.

¹³ Therefore, the mens rea variant of diminished capacity is inapplicable.

¹⁴ Professor Morse also suggests evidentiary reforms, similar to those summarized

Morse's objections to the diminished capacity defense are premised on deontological conceptions of fairness, not utility. He concedes that the doctrine he opposes is coherent and workable.¹⁵ In the final analysis, then, society's conclusion regarding the legitimacy of this defense is a function of its conception of a humane system of criminal justice. Morse's vision of that system may indeed be both conceptually acceptable and politically popular.¹⁶ I wish to suggest, however, an alternative, but perhaps less fashionable vision: a system that more fairly evaluates guilt and proportions punishment. It is a system in which the defense of diminished capacity or "partial responsibility" plays an important role.

First, let me lay out Morse's argument. His thesis is that "actors who commit the same acts with the same *mens rea* should, on moral grounds, be convicted of the same crime and punished alike without regard to differences in background, mental or emotional condition, or other factors often thought to necessitate mitigation."¹⁷

Under Morse's approach, all partial excuses would be abrogated. The defense of diminished capacity would be lost. The universally accepted mitigating defense of "provocation" or "heat of passion"¹⁸ would also disappear. Morse acknowledges this, and concedes that a "powerful argument can be mounted"¹⁹ for the proposition that the diminished capacity doctrine he wants to abolish is morally *more* defensible than the generally accepted provocation defense that would fall with it.

Professor Morse would have the law provide a bright line, all-or-none test of criminal responsibility. *All* intentional, non-fully excused killers would be equally guilty of murder. An insane killer would be acquitted, as would be persons so provoked into a heat of passion that they totally and understandably lacked self-control.²⁰ A person suffering from a less substantial mental or emotional condi-

supra note 11, if his arguments for abolition of the partial responsibility defense are ignored. *See id.* at 50-55.

¹⁵ *Id.* at 28.

¹⁶ "Diminished capacity," as a doctrine, is under attack. California, a state that played a major role in its development, has abolished it. CAL. PENAL CODE § 28 (West 1981 & Supp. 1985). As a lesser variant of insanity, another excuse under heavy attack, it is likely to suffer even more legislative impairment in years to come. Professor Morse's call for abolition of the "heat of passion" defense, *see infra* notes 18-20 and accompanying text, is likely to be less well received.

¹⁷ Morse, *supra* note 1, at 30.

¹⁸ Heat of passion reduces first degree murder to manslaughter in 49 states, and to second degree murder in the fiftieth. *See Dressler, Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 422 (1982).

¹⁹ Morse, *supra* note 1, at 30.

²⁰ *Id.* at 34.

tion insufficient to qualify for a full excuse, however, would be convicted of murder.

Morse believes that we ask the wrong question in homicide cases. Rather than focus on the "difficulties, burdens, problems, and misfortunes suffered by the perpetrator,"²¹ we should ask, "how hard is it not to offend the law?"²² Morse's answer, essentially, is "not hard at all." Enormous internal and external forces are arrayed *against* lawbreaking and if "not all such factors operate on all actors, or with great strength,"²³ the criminal law nonetheless asks²⁴ comparatively little of its citizens—not to kill, rob, or rape. Differences between criminal actors regarding their backgrounds and psychologies, Morse feels, are outweighed by the similarities among them. The moral culpability of the healthy person who satisfies the *prima facie* case of murder is fundamentally equivalent to that of the non-insane, but psychologically impaired, killer. Because the function of conviction and sentence is "to punish the actor for what he has done, rather than for who he is,"²⁵ there is no injustice to Morse in treating alike all actors who intentionally kill their victims. This way, he feels that we treat perpetrators with greater respect than if we view them as "helpless puppets buffeted by forces that rob them of responsibility for their deeds."²⁶ Furthermore, we also avoid focusing all our sympathies on the perpetrator, at the expense of the victim.²⁷

Morse applies his moral views to a horrifying case: a mother who was sane, but indisputably suffering from chronic emotional disturbances and depression, intentionally drowned her young son in the bathtub.²⁸ All that the law asked of this mother is that she not drown her child. Why not punish her as a murderer? Why should we consider her psyche? After all, it was uncontroverted that she knew what she was doing, intended what she was doing, and was asked by society "simply to refrain from engaging in anti-social conduct."²⁹ Morse concludes that the moral case for full punishment of the mother—even her execution³⁰—is as compelling as for the pun-

²¹ *Id.* at 30.

²² *Id.*

²³ *Id.* at 31.

²⁴ For purposes of clarity, I, like Professor Morse, am anthropomorphizing the law and the legal system.

²⁵ Morse, *supra* note 1, at 32.

²⁶ *Id.* See also *id.* at 34, 36.

²⁷ *Id.* at 34.

²⁸ Commonwealth v. Tempest, 496 Pa. 436, 437 A.2d 952 (1981).

²⁹ Morse, *supra* note 1, at 31.

³⁰ *Id.* at 33 n.112.

ishment of any terrorist or hired killer who also intentionally takes human life.

I believe that Professor Morse is mistaken. I wish to start, however, by emphasizing our areas of considerable agreement. We both value bright lines in the field of excuses.³¹ I also favor a total excuse (as Morse recommends³²) in a limited number of provoked killings.³³ I also agree with Morse that morally similar cases should be treated alike.³⁴ Finally, like Professor Morse, I value a legal system that treats the criminal actor with dignity by emphasizing the criminal's free will.³⁵ None of these areas of agreement, however, prevent me from disagreeing with Professor Morse's basic thesis.³⁶

My conception of the morally appropriate criminal justice system is one that I believe is more consistent with the moral intuitions of most Americans.³⁷ First, a humane legal system does care greatly about the needs of the victim, as Professor Morse would have it. It is misleading to imply, however, as I believe Professor Morse does, that a person or a legal system ultimately must choose a focus of sympathy—the victim or the mentally impaired perpetrator. "Most intentional killers deserve little sympathy," Morse writes.³⁸ I will go one step further. Most intentional killers deserve no legally recog-

³¹ This is one reason why I rejected Professor Richard Delgado's proposed brainwashing defense. See Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Defendant*, 63 MINN. L. REV. 1 (1978). See also Dressler, *Professor Delgado's "Brainwashing" Defense: Courting a Determinist Legal System*, 63 MINN. L. REV. 335, 354-55 (1979).

³² See *supra* note 20 and accompanying text.

³³ See Dressler, *supra* note 18, at 468.

³⁴ See Dressler, *supra* note 31, at 357.

³⁵ See Dressler, *Substantive Criminal Law Through the Looking Glass of Rummel v. Estelle: Proportionality and Justice as Endangered Doctrines*, 34 SW. L.J. 1063, 1073-79 (1981).

³⁶ My criticism of Morse's rejection of the diminished capacity defense is not inconsistent with my rejection of Delgado's call for a new, *full* brainwashing defense. See *supra* note 31 and accompanying text. I criticized Delgado for *fully* exculpating people who are morally blameworthy. I believe his arguments undermine the non-determinist premises of the criminal law. Narrower still, I criticized Delgado for failing to provide "clear and just limitations" on the excuse's applicability. See Dressler, *supra* note 31, at 354. On the one hand, Delgado's defense lacked adequate contours; on the other hand, his defense excluded morally equivalent cases. On the matter of bright lines alone, however, I could have accepted such a *partial* defense of brainwashing (if my other criticisms were met), provided it was based on reliable medical testimony of impaired free will. With such a partial defense, we would concede the moral responsibility of the actor, yet we would not lose sight of the unusual psychological conditions under which the actor suffered.

³⁷ I cannot empirically prove this assertion, of course. Indeed, most people probably agree with Professor Morse regarding the narrow issue of diminished capacity. See *supra* note 16 and accompanying text. Nonetheless, I think that the average person probably would agree with my general moral assertions stated in the text.

³⁸ Morse, *supra* note 1, at 34.

nized sympathy. It must be remembered, however, that most intentional killers do not qualify for a partial responsibility claim. We are not talking about what to do with most intentional killers. In the infrequent case where the court is dealing with a mentally or emotionally impaired criminal, however, we can and should express compassion for *both* the victim and the defendant.

Lest it be forgotten, sympathy for such a defendant (expressed by honoring the diminished capacity defense) does not result in acquittal. It merely precludes the execution or life-long imprisonment of someone whom the jury believes³⁹ is not a whole and healthy person and is not responsible for being in such a condition. As a nation, we are an imprisonment-oriented society. We put people in prison for very long periods of time. Partial defenses like diminished capacity serve only to reduce such lengthy terms of imprisonment.

Analytically, the problem with Professor Morse's approach is that he looks at only half of the relevant picture. He focuses almost exclusively on the harm that the criminal commits. He thereby obscures the true function of excuses in the criminal law. Excuses negate personal blameworthiness.⁴⁰ *They do not mitigate in any way the harm that has occurred.* When we acquit the insane killer, we do not imply thereby that the victim's life was unvalued. Acquittal of the insane actor is in no way inconsistent with our deep devotion to the rights of the victim. Rather, we fully condemn the *act* of the perpetrator, but we conclude that it is wrong to cast moral blame on, and punish, the insane *actor*. *A fortiori*, the mitigated conviction and punishment of the *partially* incapacitated criminal in no way implies that the *act* committed—the victim's horrible loss—is any less substantial. Only the blame is reduced.

It is true, as Morse asserts, that the homicide by the mentally impaired mother of her son may be "as horrible, as merciless, and cause as much suffering as the acts of the terrorist or hired killer."⁴¹ In fact, the mother may have caused *more* suffering to her child than a carefully orchestrated taking of life by a contract killer. If so, it could be morally appropriate to set the mother's presumptive punishment at a *higher*, not *lower*, level than that of the hired assassin.⁴²

³⁹ The burden of persuasion regarding partial responsibility properly may be placed on defendants, even to the degree of requiring them to prove the claim beyond a reasonable doubt. See *Patterson v. New York*, 432 U.S. 197 (1977); *Leland v. Oregon*, 343 U.S. 790 (1952).

⁴⁰ See generally 1 P. ROBINSON, *supra*, note 5, § 25, at 91-101 (1984).

⁴¹ Morse, *supra* note 1, at 33.

⁴² That is why we can treat killing accompanied by torture as worse than a homicide that lacks the infliction of gratuitous pain.

The problem with Morse's reasoning, however, is that the law does not stop there—but he does. The harm caused by the actor is only the starting, not the ending point of the analysis. We assume, as we should, that criminal actors are fully responsible for their actions. We calibrate punishment to harm based on that assumption. But we do, and ought to, take into consideration any reasonably provable factor that tends to demonstrate that the actors' accountability for their actions is less than that of normal persons under normal circumstances.⁴³ That is precisely why we properly consider provocation to be a mitigating factor. And, that is precisely why diminished capacity ought to be relevant.

Professor Morse might say, however, that by my "liberal" approach, I treat the perpetrator with less dignity than he does because he places a higher premium on personal responsibility. I am not so sure; but even if he were right, it must also be pointed out that his approach may result in a potentially cruel outcome. Yes, we must and do consider that all people are capable of free will. Yes, we must and do hold that persons are responsible for their willed actions. But, of course, the person sent to prison for manslaughter (rather than murder) is being held responsible. In our quest to treat people with dignity, we also must not cruelly ignore evidence of illness or other relevant forms of impairment. Each person is unique. We treat criminal actors with dignity when we treat each individual as unique. That means we should consider, and not ignore, the ways in which they differ from other people.⁴⁴ One difference may be their mental impairment. If all people, as a species, possess free will, not all people command an equal degree of free will.

Ultimately, the non-insane but psychologically impaired person does have sufficient free will to avoid committing a crime. Thus, punishment is appropriate. Yet, as Morse freely concedes,⁴⁵ internal forces that serve to prevent law-breaking do not operate equally, or at all, on all people. Where there exists reliable⁴⁶ evidence that a particular defendant suffers from some condition, the existence of which has substantial explanatory force regarding the criminal events and helps to explain why the actor committed the crime, then we have learned something very important about the actor (but not

⁴³ See G. FLETCHER, *RETHINKING CRIMINAL LAW* 461-63 (1978); Dressler, *supra* note 35, at 1106-09.

⁴⁴ See Dressler, *supra* note 35, at 1075.

⁴⁵ See *supra* note 23 and accompanying text.

⁴⁶ Obviously, there is substantial debate about the propriety of the use of psychiatric testimony in insanity and diminished capacity cases. For purposes of this essay, I, like Professor Morse, put those issues aside. See Morse, *supra* note 1, at 28.

about the ultimate harm) that ought not to be ignored. We should not punish persons for possessing bad character, nor should we mitigate or exculpate because of good character. But we ought to consider explanations for behavior that indicate that the actors' personal blameworthiness for the events—their moral accountability for the harm—is less than we ordinarily would expect.⁴⁷

The difference between insanity and diminished capacity is one of degree. Just as we differentially punish people because of gradations in *mens rea*,⁴⁸ no principled basis exists for ignoring gradations here. The proffered evidence is no less reliable in the case of diminished capacity than with insanity. As long as the jury, not the "expert," resolves the moral issues of accountability, there is no good reason for closing our eyes to partial responsibility claims.⁴⁹

Professor Morse justifies his argument through a terrible murder by a mother of her son. When I first read the facts of the case a few years ago, I remember feeling my stomach turn. Tears for the little boy welled up in my eyes. As a father of a child about the same age as the victim, the incident was nearly too awful to imagine. But, again, the issue is not how awful was her *act*, but the presence or

⁴⁷ This does not confuse the issue of causation with that of moral responsibility. Professor Morse warns against such an error. Morse, *supra* note 1, at 31 n.106 & 33 n.111. I do not suggest that we treat defendants more leniently merely because they suffer from some mental abnormality, or even because the abnormality is causally related to their behavior. When the abnormality impairs free will in a substantial and verifiable way, however, we ought to consider the abnormality. Choice-making capabilities are impaired if the defendant's mental or emotional condition substantially affects volitional or cognitive functions. See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 134 (1968). Although the actor's conduct still may be intentional, see Morse, *supra* note 1, at 40, the actor has less meaningful free will.

⁴⁸ *E.g.*, a negligent killing is punished less severely than a reckless one, even though the differences between the two killings may be only in the degree of risk. See W. LA FAYE & A. SCOTT, *CRIMINAL LAW* 208 (1972). Similarly of course, statutes frequently divide intentional killings into degrees of homicide based on the strength of the intention (i.e., whether it was premeditated and deliberate).

⁴⁹ Morse considers all-or-none tests the rule, not the exception, pointing particularly to the excuse of duress. See Morse, *supra* note 1, at 34-35. From this, he concludes that "partial responsibility proponents must claim and justify either that present all-or-none tests are improper" or they must distinguish some of these tests from mental abnormality. *Id.* at 35. I choose to do the former. I have questioned the validity of the common law rules regarding duress. See Dressler, *supra* note 18, at 463. It is hard to defend the absolute rules regarding duress in light of our lenity regarding heat of passion. Whereas Morse would abolish the latter, I would extend the former. (Unlike Morse, however, who believes the burden of persuasion in this debate belongs on proponents of the diminished capacity defense, see Morse, *supra* note 1, at 35, I am not convinced that it is useful to talk about such burdens when discussing deontological arguments regarding fairness. If burdens must be placed, I am not sure why the burden is not on the person who would create a rule that abolishes the age-old provocation doctrine. See Dressler, *supra* note 18 and accompanying text.)

absence of mitigating excuses. I, too, will make my point by looking at a recorded case. In this second case,⁵⁰ the defendant, Fisher, intentionally strangled a librarian. Fisher was not insane. Under Professor Morse's all-or-nothing approach, he was properly convicted of murder. His death sentence was not inappropriate. Yet, Fisher was mentally subnormal. It was said he suffered from an aggressive psychopathic condition that affected his behavior.⁵¹ He killed suddenly, but intentionally; yet, he acted only after the victim called him a "black nigger."⁵² Are these factors individually or collectively irrelevant to his moral guilt and deserved punishment? Is it wrong for the jury to be permitted to evaluate their moral relevance? The Court said yes. Morse would say yes. I would say no. I agree with the observations of Justice Frankfurter:

A shocking crime puts law to its severest test Fisher is not the name of a theoretical problem. We are not hear [sic] dealing with an abstract man Murder cases are apt to be peculiarly individualized The bite of law is in its enforcement. This is especially true when careful or indifferent judicial administration has consequences so profound as . . . life and death.⁵³

Fisher's impairment, and the victim's racial epithet, may not have been the legal causes of his conduct. His free will acts were the cause. Because he had free will, and chose to kill, he should be punished. But my intuition tells me that the information proffered by the defense would have been highly relevant to morally sensitive jurors in their decision regarding Fisher's degree of moral guilt. Jurors might conclude that it was harder for Fisher than for the juror *not* to kill.⁵⁴

It is easy for any of us to give in to our fear of crime and to our natural anger at those who perpetrate it. It is much easier to defend the interests of the victim than those of the perpetrator. But, as Ramsey Clark has warned: "Reason fades as fear deprives us of any concern or compassion for others. When fear turns our concern entirely to self-protection . . . this can destroy our desire for justice itself."⁵⁵

Obviously, Professor Morse wants justice as much as I do. But I believe a fuller, more balanced conception of justice—one that serves the interest of both the victim and the perpetrator, and one that still expresses society's condemnation of crime and the impor-

⁵⁰ *Fisher v. United States*, 328 U.S. 463 (1946).

⁵¹ *Id.* at 464.

⁵² *Id.* at 479 (Frankfurter, J., dissenting).

⁵³ *Id.* at 477, 478, 484 (Frankfurter, J., dissenting).

⁵⁴ See *supra* note 47 and accompanying text.

⁵⁵ R. CLARK, *CRIME IN AMERICA* 19 (1970).

tance of personal responsibility—is found in a legal system that does not lose sight of the occasional presence of mitigating psychological factors. My concept of a just legal system is one in which diminished capacity, even in its controversial form as “partial responsibility,” is recognized as a legitimate excuse.