FREE WILL IS NO BARGAIN: HOW MISUNDERSTANDING HUMAN BEHAVIOR NEGATIVELY INFLUENCES OUR CRIMINAL JUSTICE SYSTEM

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INTRODUCTION

After Wilbur was found guilty, there was no questioning his immediate future. The executioner led the convicted criminal to the public square near city hall, where he would be formally put to death before a crowd. His actions were truly depraved; the tribunal had found Wilbur guilty of killing a child in a particularly gruesome manner. The tribunal had sentenced Wilbur to be tortured and hanged for his crime. The torture would be of the same nature as that he committed: mutilation and dismemberment. The sentence was carried out: the executioner with a new pair of gloves, the defendant in a new set of clothes, all paid for at the public's expense.

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This may seem like a barbaric punishment to impose upon Wilbur. Indeed, the punishment was a clear application of *lex talionis*—the "retributive principle of taking an eye for an eye and a tooth for a tooth."[1] Today, the Eighth Amendment to the U.S. Constitution has unquestionably helped foster a society that repudiates such primitive punishments.[2] However, many laymen and scholars alike still believe that someone like Wilbur *deserves* to suffer for his wrongdoing and that desires for revenge are both just and moral.[3] After all, how can it be that he could exact such mental anguish upon the family, or such physical pain upon the child, and not have to experience such suffering himself? How would we feel about Wilbur if he had taken our child's life?

It may not surprise you to learn that Wilbur's story is true; the trial and execution occurred in 1386 in Falaise, France.[4] However, an important element has been omitted from the story: Wilbur was not man, but rather, an ordinary French pig.[5] Had you initially known this, would your reaction towards Wilbur's punishment have been the same? Does the pig really *deserve* to suffer for his crime? Although we want to protect other children by containing the pig, does one feel a need to exact revenge on the pig?

The criminal prosecution of animals is no stranger to history,[6] but today it seems like the sentencing of animals is peculiar, if not entirely absurd. So why is it we no longer feel the need to punish animals formally for their wrongdoings? For the same reason that we are hesitant to punish the insane: we do not believe the actor had the capacity to "choose" to engage in his or her criminal behavior.[7] That is to say, animals "have no alternative but to conform with the

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[1] E.P. EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS 140 (1906).

[2] The Eighth Amendment states in its entirety, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend VIII. The United States Supreme Court has stated that this amendment prohibits "punishments of torture, . . . and all others in the same line of unnecessary cruelty," such as disemboweling, beheading, quartering, dissecting, and burning alive, all of which share "the deliberate infliction of pain for the sake of pain." Baze v. Rees, 553 U.S. 35, 48 (2008).

[3] *See* Steven Eisenstat, *Revenge, Justice and Law: Recognizing the Victim's Desire for Vengeance as a Justification for Punishment*, 50 WAYNE L. REV. 1115, 1135 (2004) ("[P]unishments which include an element of suffering are just, and [] it is also moral for a society to mete out criminal punishment for the purpose of causing the wrong doer to experience suffering.").

[4] EVANS, *supra* note 1. However, "Wilbur" was not the actual name of the pig (I can only presume), and the pig was female rather than male. *Id.*

[5] And yes, the pig was dressed up in human clothing. *Id.*

[6] *See generally id.* (describing the history of the criminal prosecution of animals).

[7] *See* Brian D. Shannon, *The Time Is Right to Revise the Texas Insanity Defense: An Essay*, 39 TEX. TECH L. REV. 67, 72–73 (2006) ("In general, behavior is the product of choice, and people who make bad choices are subject to moral condemnation. In cases where mental disease or defect robs people of the capacity to choose not to engage in criminal behavior, the argument concludes, it is inappropriate to condemn them morally and therefore inappropriate to convict them of a crime."). Another reason why we do not hold trials for animals is a diminished belief in demonic possession. *See* EVANS, *supra* note 1, at 4–8 (noting the church's general belief in demonic possession throughout the Middle Ages). However, as it was likely

promptings of their genetically implanted instincts. Thus, we do not subject them to moral praise or blame."[8]

Although scholars have long argued, and will surely continue to argue, what it means to have "free will," it seems clear that most people, most of the time, equate free will with an ability to "choose" among alternatives.[9] As biologist Jerry Coyne phrases it, "if you could rerun the tape of your life up to the moment you make a choice, with every aspect of the universe configured identically, free will means that your choice could have been different."[10] Without the ability to choose between different actions, punishing animals or the insane *simply because they deserve it* seems to make less moral sense, and our focus tends to shift towards preventing harm from occurring and away from inflicting suffering on the actor that caused the harm. But what if you and I were in the same position as Wilbur: unable to act except as the neurochemistry of our brains, which we are wholly unaware of, leads us to act? Would a moral and just legal system punish us—purely for vengeance's sake—for something beyond our control?

This Note explores the relationship between the concept of free will, our ever-growing science of the mind, and the law. Part I discusses the concept of free will and argues that a scientific understanding of human behavior conflicts with the majority's view of free will. Part II examines the role the popular conception of free will has played in our legal structure, focusing on notions of blame, moral responsibility, and retribution, and argues that we must dispense with retribution as a theory of punishment. Part III addresses common concerns with this proposal, and argues that our criminal justice system need not undergo any substantial changes to reflect a modern understanding of human behavior.

I. DO YOU CHOOSE TO THINK WHAT YOU THINK?

A. The Definition of Free Will

Free will has been a subject of debate for over two millennia.[11] As a result, the philosophical arguments on this subject are nuanced and have generated an

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believed that demons exercised free will in taking control of animals, this diminished belief in demonic possession coincides with the belief that animals do not operate freely.

[8] Hugh Miller, III, *DNA Blueprints, Personhood, and Genetic Privacy*, 8 HEALTH MATRIX 179, 217 (1998).

[9] Emad H. Atiq, *How Folk Beliefs About Free Will Influence Sentencing: A New Target for the Neuro-Determinist Critics of Criminal Law*, 16 NEW CRIM. L. REV. 449, 475 (2013); Luis E. Chiesa, *Punishing Without Free Will*, 2011 UTAH L. REV. 1403, 1410 (2011); Melissa Burkley, *Is Free Will a Magic Trick?*, HUFF POST TED WEEKENDS (Feb. 19, 2014, 5:59 AM), http://www.huffingtonpost.com/melissa-burkley-phd/is-free-will-a-magic-tric_b_4467625.html; *see infra* Part I.A (discussing the definition of free will).

[10] Jerry A. Coyne, *You Don't Have Free Will*, CHRON. HIGHER EDUC. (Mar. 18, 2012), http://chronicle.com/article/Jerry-A-Coyne/131165/.

[11] Timothy O'Connor, *Free Will*, STAN. ENCYCLOPEDIA PHIL. (Oct. 29, 2010), http://plato.stanford.edu/archives/spr2013/entries/freewill/.

immense amount of scholarly work.[12] Thus, when the subject arises, several different interpretations of "free will" may come to mind.[13] For example, some identify free will with freedom of action; we have free will as long as we are not coerced or restrained from acting in accord with our own desires (even if we do not choose those desires).[14] Thus, if we want to go to the gym, and nothing is stopping us from going (or forcing us to go) to the gym, then our going to the gym is proof positive of free will.[15]

However, this definition ignores the principal reason why the notion of free will is so widely accepted: most of us feel that "we are the *conscious source* of our thoughts and actions."[16] Not only can we act in accord with our will, but it seems like we are able to *will* what we will.[17] That is to say, we do not feel as if all our desires and actions are determined by prior causes and events. Not only are we aware of our desires, we feel like we are consciously controlling our desires. It also seems like we choose whether to act in accord with our desires. For example, if we deliberate on whether to go to the gym, and reasons come to mind that lead us towards one decision over the other, it feels like we are in complete control of our thoughts: that we are choosing to bring our thoughts into existence, rather than simply witnessing their arrival for reasons beyond our control. As a result, it feels as if *we have made a choice* to deliberate on the matter, not that *a choice has been made for us*.

Studies have shown that most people's understanding of human action is significantly different from that revealed through cognitive science.[18] For example, one study had participants give reactions to two similar vignettes.[19] In both scenarios, a device was continually delivering electric shocks to a rat in an experiment. There was also a power button that, if pressed, would stop the electric shocks to the rat. In the first scenario, a computer had a robotic hand that was positioned next to the button. The computer had the information that if it pressed the button, the shocks would stop. However, all of the computer's software instructions and programming code directed it not to press the button.

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[12] *See generally* BOB DOYLE, FREE WILL: THE SCANDAL IN PHILOSOPHY (2011), *available at* http://www.informationphilosopher.com/books/Free_Will_Scandal.pdf (discussing the "history of the free will problem").

[13] *See generally id.* (discussing the "taxonomy of free will positions").

[14] This is the definition usually promulgated by compatibilists. *Id.* at 157; SAM HARRIS, FREE WILL 16 (2012).

[15] This example is modeled after an example given by Sam Harris. HARRIS, *supra* note 14.

[16] *Id.* at 16–17; *see* Atiq, *supra* note 9, at 450.

[17] HARRIS, *supra* note 14, at 39 n.16. This sentiment originally comes from 19th century German philosopher Arthur Schopenhauer. *See* ILHAM DILMAN, FREE WILL: AN HISTORICAL AND PHILOSOPHICAL INTRODUCTION 165–66 (1999). Einstein also shared this sentiment with Schopenhauer. HARRIS, *supra* note 14, at 39 n.16.

[18] *See* Atiq, *supra* note 9, at 474–75 (citing multiple studies examining the commonsense "folk" notion of free will).

[19] Joshua Knobe & Shaun Nichols, *Free Will and the Bounds of the Self*, *in* THE OXFORD HANDBOOK OF FREE WILL 550–51 (Robert Kane ed., 2011); *see* Atiq, *supra* note 9.

In the second scenario, the computer is swapped for a person. This person is also aware that if he presses the button, the electric shocks will cease. However, it is stipulated that all of the person's "desires and urges—both conscious and unconscious" are not to press the button.[20]

The participants were asked whether they agreed with the following two statements: (1) "Even though all of [the computer's] software and programming code are not to [press the button], it is still possible that [the computer] will [press the button];" and (2) "Even though all of [the person's] urges, desires, thoughts, etc., are not to [press the button], it is still possible that [the person] will [press the button]."[21] The results were predictable—people generally disagreed with the former and agreed with the latter.[22]

Whereas the scientific picture suggests that our actions are the result of determined mental states and processes, the public's understanding generally entails "something more—a separate self that stands outside all these states and processes and can choose to ignore their promptings."[23] Thus, it appears that "the popular conception of free will consists of two assumptions: (1) that each of us could have behaved differently than we did in the past, and (2) that we are the conscious source of most of our thoughts and actions in the present."[24]

B. The Principal Philosophical Positions on Free Will

This notion of free will embodies the philosophical position known as "libertarianism."[25] Libertarianism holds that human agency—that is, the capacity for human beings to make choices—is not bound to physical causality, and is therefore free and undetermined.[26] In contrast with libertarianism, "determinism" is the philosophical position that our decisions are controlled by background causes (prior events, prior conditions, and the laws of nature).[27] Under a deterministic viewpoint, if you could rewind the "tape of your life" to the moment before you made a decision, the same outcome would occur because the same underlying causes would govern your behavior.[28] Libertarianism and determinism are referred to as "incompatibilist" views, as each holds that there is no way for the two to coexist.[29] If our will is fully determined by a chain of

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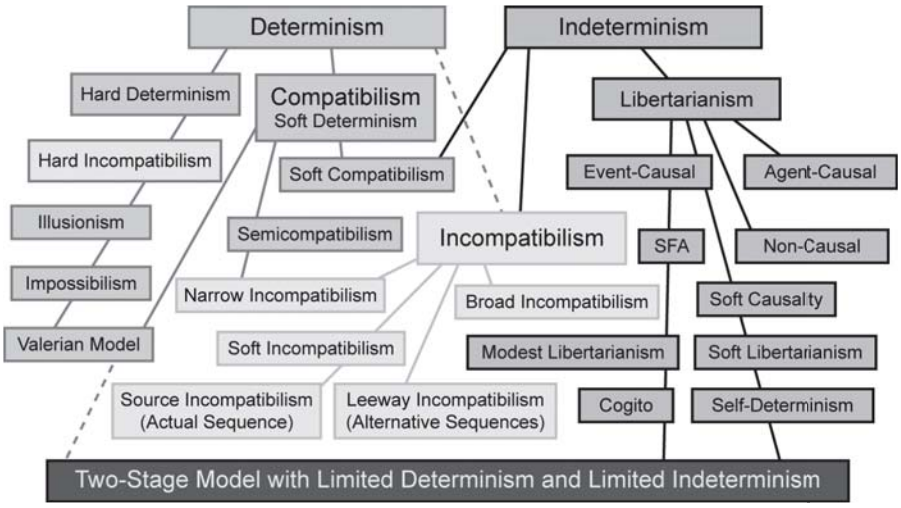
[20] Knobe & Nichols, *supra* note 19, at 550.
[21] *Id.* at 550–51.
[22] *Id.*
[23] *Id.* at 551; Atiq, *supra* note 9.
[24] HARRIS, *supra* note 14, at 6.
[25] 3 ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 745–46 (Edward Craig ed., 1998). It should be noted that philosophical libertarianism has no relation to political libertarianism. Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y B 1775, 1776 (2004); HARRIS, *supra* note 14, at 15.
[26] HARRIS, *supra* note 14, at 15–16.
[27] Carl Hoefer, *Causal Determinism*, STAN. ENCYCLOPEDIA PHIL. (Jan. 21, 2010), http://plato.stanford.edu/archives/spr2010/entries/determinism-causal/.
[28] Coyne, *supra* note 10.
[29] HARRIS, *supra* note 14, at 15.

events leading back to our birth and beyond, the libertarian notion of free will is an illusion.[30] "Compatibilists" do not operate using the libertarian definition of free will, but rather define free will as being synonymous with freedom of action.[31] Under this definition, compatibilists believe that free will and determinism are not mutually exclusive.[32] While these are the general philosophical positions within the free will debate, each one of these positions has several subdivisions within it.

FIGURE 1: "A TAXONOMY OF FREE WILL POSITIONS"[33]



As the non-exhaustive diagram above illustrates, philosophers have been hard at work discussing and labeling their different theories on the issue of free will. This Note will not discuss in detail the nuances among the various philosophical theories, but rather will focus on the popular conception of free will as defined in Part I.A, as this is the problematic and commonly held notion of free will that so often influences our laws and legal structure.[34] However, it is useful to note the general differences between determinism and compatibilism, as Justices on the U.S. Supreme Court have made similar arguments in other contexts.[35]

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[30] *Id.*

[31] DOYLE, *supra* note 12, at 157.

[32] HARRIS, *supra* note 14; DOYLE, *supra* note 12, at 157.

[33] The diagram is adapted from Bob Doyle's book, *Free Will: The Scandal in Philosophy*. DOYLE, *supra* note 12, at 63.

[34] This is for two primary reasons: (1) this note is not intended to be a comprehensive philosophical article, and (2) for the sanity of most readers, whose minds grow numb with the addition of each philosophical term of art.

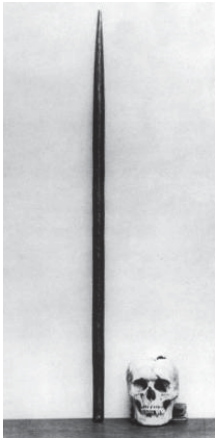
[35] *See infra* Part II.A.

C. The Objective Argument: Your Brain is the Boss

The libertarian notion that one's thoughts and actions are divorced from causal events, and that at any moment we are free to choose our behavior, has become an untenable philosophical argument. Aside from the lack of scientific evidence to support the notion,[36] we now know that unconscious neural events inform our decision-making.[37] If they did not, then changes to our brain's chemistry would not have an effect upon our choices. However, it turns out that even small changes to our brain's chemistry can have a drastic effect on our behavior.[38] For example, when otherwise normal Parkinson's patients were exposed to a drug that caused an imbalance in dopamine levels, several of them became pathological gamblers.[39] These patients engaged in their new addiction by spending an inordinate amount of money on online poker, and by flying to Las Vegas where one man lost over $200,000 gambling at various casinos.[40]

In fact, everything about you—your personality, your desires, your sexual orientation, and so on—is the way it is because of the structure of your brain.[41] Several examples from medical literature suggest that each of these traits is subject to change given the requisite changes to your brain. One fascinating and well-known case is that of Phineas Gage, a healthy twenty-five-year-old railroad foreman who had a three-foot-seven-inch, thirteen-pound metal rod pass through his head due to a rather unfortunate explosion that occurred while he was preparing to blast rock for a roadbed.[42] Amazingly, Gage was conscious and able to speak within minutes of the accident, despite the fact that the rod had taken a sizable portion of his brain with it.[43] Gage retained his cognitive faculties and lived for twelve years after the accident.[44] However, Gage seemed to become another person entirely; he was much more obstinate, impatient, and capricious, and close friends stated he was "no longer Gage."[45]

FIGURE 2: PHINEAS GAGE'S SKULL AND THE IRON ROD



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[36] Atiq, *supra* note 9, at 450 n.1.
[37] HARRIS, *supra* note 14; David Eagleman, *The Brain on Trial*, ATLANTIC, Jul./Aug. 2011, at 112, 114.
[38] Eagleman, *supra* note 37, at 115.
[39] Dopamine is a neurotransmitter that affects our decision-making. *Id.*
[40] *Id.*
[41] *Id.* at 114. This will be demonstrated through several examples.
[42] JOHN M. HARLOW, RECOVERY FROM THE PASSAGE OF AN IRON BAR THROUGH THE HEAD 4 (1869).
[43] *Id.* at 5.
[44] *Id.* at 15–16; Steven K. Erickson, *Blaming the Brain*, 11 MINN. J.L. SCI. & TECH. 27, 47 (2010).
[45] HARLOW, *supra* note 42, at 13–14; *accord* Erickson, *supra* note 44.

Another interesting example involves a forty-year-old husband who developed a sudden and overwhelming interest in child pornography.[46] As this new sexual preference was developing, the man complained of worsening headaches.[47] After being found guilty of child molestation charges, the man underwent a brain scan that revealed a massive tumor in his orbitofrontal cortex (a section of the brain believed to be responsible for decision-making mechanisms).[48] The tumor was removed, and the man's sexual appetite returned to normal.[49] A year after his brain surgery, his pedophilic behavior returned, and doctors discovered that a portion of the brain tumor had been overlooked in the previous surgery.[50] After neurosurgeons removed the remaining tumor, the man's behavior once again returned to normal.[51] There are also documented instances of brain infections causing an individual's sexual orientation to change.[52]

The purpose of these examples is to illustrate that "human behavior cannot be separated from human biology."[53] Even your genes alone can provide information about the behaviors in which you are more or less likely to engage. In fact, just by knowing that you are genetically male (i.e., that you have a Y chromosome), we know that the probability you will commit a violent crime increases about 882 percent over that of a genetic female.[54] The precise structure of your brain is what allows you to resist, or fail to resist, the next impulse that arises. If you resist the urge to order dessert after dinner, this display of "willpower" does not reveal any free choice. If your brain had been different in that exact moment, you would not have been able to resist the urge, and this would also have been through no choice of your own. If your brain were in yet another state, perhaps you would never have felt the urge to begin with. Is this something you would be able to take credit for? Have you chosen not to feel the urge to go gambling right now?

Neuroscience now suggests that our brains make "decisions" before we become consciously aware of them.[55] Physiologist Benjamin Libet conducted a

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[46] Jeffrey M. Burns & Russell H. Swerdlow, *Right Orbitofrontal Tumor with Pedophilia Symptom and Constructional Apraxia Sign*, 60 ARCHIVES NEUROLOGY 437, 437 (2003); Eagleman, *supra* note 37.

[47] Eagleman, *supra* note 37.

[48] *Id.*; *see also* Carmen Cavada & Wolfram Schultz, *The Mysterious Orbitofrontal Cortex: Foreword*, 10 CEREBRAL CORTEX 205 (2000) (summarizing the findings of studies on the functions of the orbitofrontal cortex).

[49] Eagleman, *supra* note 37.

[50] *Id.*

[51] *Id.*

[52] *See* Bruce L. Miller et al., *Hypersexuality or Altered Sexual Preference Following Brain Injury*, 49 J. NEUROLOGY NEUROSURGERY & PSYCHIATRY 867, 869–70 (1986).

[53] Eagleman, *supra* note 37 at 115.

[54] DAVID EAGLEMAN, INCOGNITO: THE SECRET LIVES OF THE BRAIN 158–59 (2011).

[55] *See* Benjamin Libet et al., *Time of Conscious Intention to Act in Relation to Onset of Cerebral Activity (Readiness-Potential): The Unconscious Initiation of a Freely Voluntary Act*, 106 BRAIN 623, 623 (1983).

notable experiment whereby subjects hooked to an EEG[56] were asked to perform simple, voluntary motor acts (e.g., flex your fingers) at the time of their choosing, and to record the moment at which they became aware of their decision.[57] His results showed that the brain had undergone processes indicating a decision to move some several hundred milliseconds before the subjects reported the appearance of a conscious intention to perform the specific act.[58] Interestingly, Libet was not trying to disprove the existence of free will through his experiments. Rather, Libet believed that humans did have free will and that there was some action people could take that did not have any unconscious neural causal precursors.[59] This experiment has also been conducted by measuring brain activity with fMRI,[60] and the results have shown that "the outcome of a decision can be encoded in brain activity of prefrontal and parietal cortex up to 10 [seconds] before it enters awareness."[61]

This research seems to leave little room for free will, as it opens up the possibility that someone else could theoretically know every choice you are going to make before you do.[62] Neuroscientist and philosopher Sam Harris illustrates this with the example of a "perfect neuroimaging device."[63] A device that could perfectly detect even the subtlest changes in brain function would allow an experimenter to continually report what a subject was going to think and do throughout the day *all while the subject still felt free to choose what he was going to do*.[64] Therefore, no matter how much it feels like we are consciously authoring our thoughts and actions, it appears that our brain is the boss.

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[56] Electroencephalography (or EEG) is the "measurement of electrical potential differences across points on the scalp using sensitive equipment. These small potential differences are the result of electrical activity within the brain and are associated with brain function." *Learn More About tDCS / EEG*, NEUROELECTRICS, http://www.neuroelectrics.com/software/ (last visited June 23, 2015).

[57] Libet et al., *supra* note 55, at 624–25.

[58] *Id.* at 635–36.

[59] Stanley Klein, *Libet's Research on the Timing of Conscious Intention to Act: A Commentary*, 11 CONSCIOUSNESS & COGNITION 273, 276 (2002).

[60] Functional Magnetic Resonance Imaging (or fMRI) is a relatively new type of brain scan that observes "blood flow in the brain to detect areas of activity," through the use of radio waves and strong magnetic fields. Stephanie Watson, *How fMRI Works*, HOWSTUFFWORKS, http://science.howstuffworks.com/fmri.htm (last visited May 13, 2015).

[61] Chun Siong Soon et al., *Unconscious Determinants of Free Decisions in the Human Brain*, 11 NATURE NEUROSCIENCE 543, 543 (2008).

[62] It should be noted that even if there were no gap in time between our brain's activity and our subjective awareness of the impulse, a libertarian notion of free will would still not make philosophical or scientific sense, because we would still be unable to control when the impulse arises and what the impulse entails. Thus, an argument against the popular conception of free will is by no means predicated on Libet's experiments being scientifically sound. HARRIS, *supra* note 14, at 9.

[63] *Id.* at 10.

[64] *Id.* at 10–11.

D. The Subjective Argument: Witnessing Your Experience

This section encourages you, the reader, to reflect upon the nature of thought, and provides some thought experiments to guide you along the way. Although it feels like we control our thoughts, beliefs, and desires, some introspection on this point can also reveal the cognitive illusion. Is your belief really subject to your will? Try this first experiment: take something you know to be true (perhaps the fact that George Washington was the first president of the United States), and see if you can genuinely change your belief.[65] You will likely find yourself hostage to your belief.[66] This should expose an important characteristic about your experience; you cannot change your mind, your mind can only change you.[67] The fact is, some neural event—which you exercise no control over—is required for you to change your belief about Washington, and this neural event itself can only be brought about by prior events (neural and external) over which you also have no control. If you did have the freedom to change your beliefs in this way, negative emotions such as depression and sadness would be much easier to overcome, as one could simply change his or her beliefs that were giving rise to the emotion in the first place.

The truth of our circumstance is hidden in plain sight; thoughts simply appear in consciousness, and we cannot control which thoughts are promoted to consciousness.[68] As Dr. Harris states, having this control would require that we "think [our thoughts], before we think them."[69] To illustrate this, try this thought experiment: among all of the cities you know of, select one, and observe what this conscious process is like.[70] This should be as free a choice as one can make. After you have settled on one, disregard it, and think of another city. Once you have decided on a new city, reflect on what this process was like yet again. Were you free to choose any city you wanted? What about the cities you are aware of, but whose names did not occur to you to pick? Perhaps London, Paris, and Tokyo came to mind, but perhaps Tel Aviv, Cairo, and Nashville were not forthcoming. Did you *choose* not to have Tel Aviv arise in thought? "*Were you free to choose that which did not occur to you to choose?*"[71]

If you pay close enough attention, you can notice that we no more control the inner workings of our brains than we do the functioning of our livers.[72] Although this may appear controversial, there are times where many would con-

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[65] SAM HARRIS, THE MORAL LANDSCAPE: HOW SCIENCE CAN DETERMINE HUMAN VALUES 139 (2010).
[66] *Id.*
[67] HARRIS, *supra* note 14, at 37–38.
[68] Skeptic Magazine, *Sam Harris on "Free Will"*, YOUTUBE, at 12:30 (Mar. 27, 2012), http://www.youtube.com/watch?v=pCofmZlC72g.
[69] *Id.* at 14:00.
[70] This example is from a lecture given by Dr. Harris. *Id.* at 19:05.
[71] *Id.* at 21:18.
[72] *See* Chiesa, *supra* note 9, at 1404.

cede this is so. Imagine the following situation: a twenty-five-year-old, upstanding student (former Eagle Scout, former marine) kills thirteen people in a shooting rampage at his university's campus.[73] After the incident, the police discover a suicide note, where the killer has requested that an autopsy be performed to see if his recent "overwhelming violent impulses" were the result of changes to his brain.[74] During the subsequent autopsy, it is discovered that the student had developed a tumor that was pressing against his amygdala, which is a portion of the brain that regulates fear and aggression.[75] There is little doubt that the tumor was a proximate cause of the student's actions.

This story may sound familiar to you; the student was Charles Whitman (the "Texas Tower Sniper"), and the incident occurred in 1966.[76] The existence of Whitman's brain tumor seems to absolve him of responsibility. He certainly did not choose to have a brain tumor, nor could he choose how the brain tumor impacted his behavior. He appears to have been profoundly unlucky; to be a mere "victim of biology."[77] However, a brain tumor is simply an easy way to identify why your thoughts and actions were as they were.[78] If we could clearly identify why a murderer without a brain tumor acted as he did (perhaps his brain's neurophysiology was such that he lacked empathy for others and had an irascible temperament), such a discovery would be as exculpatory as the brain tumor.[79] While it is unfortunate for Whitman that he developed a brain tumor, he will at least be remembered in a sympathetic light due to the tumor; any criminal who behaves in a similarly abhorrent manner without such a salient sign of illness will be remembered as a monster, although equally "in control" of his thoughts and actions.

Although we notice changes in our day-to-day experience, we are completely unaware of, and do not exercise control over, the neurophysiological events that produce those changes.[80] Thus, thoughts arise in consciousness unauthored, and we are unable to "choose" their contents or arrival. However,

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[73] Eagleman, *supra* note 37, at 112, 114.
[74] *Id.* at 114.
[75] *Id.*
[76] *Id.* at 112.
[77] HARRIS, *supra* note 14, at 53–54.
[78] *Id.* at 5.
[79] *Id.*
[80] HARRIS, *supra* note 65, at 103. I have avoided using labels to describe the philosophical position described throughout most of this article, as I fear such terms are more likely to turn off readers than to actually promote the transfer of ideas. However, for those who are interested, the position argued for in this article is most closely aligned with Hard Incompatibilism. This article does not suggest that strict determinism is true, and that every possible event (including neural events) is necessarily predictable. Quantum indeterminacy may provide for some randomness on the molecular level, thereby interrupting a pure chain of cause and effect; however, the addition of any degree of randomness does not offer support for the popular conception of free will, as randomness still would not allow one to choose their thoughts or actions.

most people do not view this as the case. As a result, the libertarian attitude towards human behavior continues to influence our legal system.

II. FREE WILL AND THE LAW

A. Legal Recognition of Free Will

The notion of free will seems to touch upon many aspects of our lives. It is considered a central "tenet of Judeo-Christian morality" and the basis for holding people accountable for their actions.[81] It also seems to bear upon "feelings of guilt and personal accomplishment," and what P.F. Strawson calls "participant reactive attitudes."[82] Given its widespread acceptance and impression, it seems all but inevitable that the notion of free will has influenced our laws and legal structure in various ways.

The U.S. Supreme Court has addressed free will, stating that individuals have an "ability and duty . . . to choose between good and evil," and that the recognition of human free will is "universal and persistent in mature systems of law."[83] The Court has even contrasted free will with a "deterministic view of human conduct that is inconsistent with the underlying precepts of our criminal justice system."[84] Justice Scalia, the longest-serving current justice on the Court, has echoed the most common understanding of free will, stating:

> Besides being *less* likely to regard death as an utterly cataclysmic punishment, the Christian is also *more* likely to regard punishment in general as deserved. The doctrine of free will—the ability of man to resist temptations to evil, which God will not permit beyond man's capacity to resist—is central to the Christian doctrine of salvation and damnation, heaven and hell. The post-Freudian secularist, on the other hand, is more inclined to think that people are what their history and circumstances have made them, and there is little sense in assigning blame.[85]

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[81] Chiesa, *supra* note 9, at 1410–11.

[82] HARRIS, *supra* note 14, at 1; *see generally* P.F. Strawson, *Freedom and Resentment*, *available at* http://people.brandeis.edu/~teuber/P._F._Strawson_Freedom_&_Resentment.pdf (last visited May 13, 2015) (arguing that, regardless of whether people have free will, people would not give up feeling and describing their "participant reactive attitudes").

[83] Staples v. United States, 511 U.S. 600, 605 (1994) (quoting Morissette v. United States, 342 U.S. 246, 250 (1952)); *see* HARRIS, *supra* note 14, at 48.

[84] United States v. Grayson, 438 U.S. 41, 52 (1978); Michele Cotton, *A Foolish Consistency: Keeping Determinism Out of the Criminal Law*, 15 B.U. PUB. INT. L.J. 1, 1–2 (2005); HARRIS, *supra* note 14, at 48. However, some argue that the Court was referring to fatalism rather than philosophical determinism. *See, e.g.*, Richard Carrier, *Free Will in American Law: From Accidental Thievery to Battered Woman Syndrome*, FREETHOUGHT BLOGS (Jul. 9, 2013), http://freethoughtblogs.com/carrier/archives/4073.

[85] Antonin Scalia, *God's Justice and Ours*, FIRST THINGS, May 2002, at 17, 19.; *accord* Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 709 (2004).

In fact, the Court has at times distinguished between alternative definitions of free will, although not explicitly. For example, in *Colorado v. Connelly*,[86] the Court addressed when an individual's waiver of his Miranda rights is "involuntary" under the Fifth Amendment. In this case, Francis Connelly walked up to a police officer, "stuck out his hands in front of him and asked to be arrested."[87] When the officer asked why, Connelly confessed to a murder he had committed a year before.[88] Connelly was "neatly dressed and did not appear to be under the influence of drugs or alcohol."[89] The police repeatedly informed him of his Miranda rights (the right to remain silent, etc.).[90] Connelly stated that he understood his rights, but that he wished to speak about the matter anyway, as it had been weighing on his conscience.[91] Unbeknownst to the police officers at the time, Connelly suffered from chronic paranoid schizophrenia.[92] Connelly believed that he was the reincarnation of Jesus, and that his father, God, was commanding him to confess his prior actions through voices in his head.[93] Connelly had been hospitalized for psychiatric reasons on five separate occasions before this incident, and was initially found incompetent to stand trial.[94]

The Colorado Supreme Court stated that confessions and waivers such as Connelly's are not "voluntary" because they are not "the product of a rational intellect and a free will."[95] However, the U.S. Supreme Court rejected this argument and invoked a compatibilist definition of voluntariness, stating that police coercion was necessary to defeat voluntariness and that a "mere examination of the confessant's state of mind can never conclude the due process inquiry."[96] The Court specifically stated that "voluntariness" under the Fifth Amendment was "not [based] on 'free choice' in any broader sense of the word," and that typical notions of free will were inappropriate in the Miranda waiver context.[97]

Justices Brennan and Marshall dissented, arguing that the Court had ignored "200 years of constitutional jurisprudence" by narrowly focusing on whether the police had engaged in coercive conduct.[98] However, the important

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[86] Colorado v. Connelly, 479 U.S. 157 (1986).
[87] William T. Pizzi, Colorado v. Connelly: *What Really Happened*, 7 OHIO ST. J. CRIM. L. 377, 381 (2009).
[88] *Id.*; *Connelly*, 479 U.S. at 160.
[89] Pizzi, *supra* note 87.
[90] *Connelly*, 479 U.S. at 160.
[91] *Id.*
[92] *Id.* at 174 (Brennan, J., dissenting).
[93] *Id.* at 174–75.
[94] *Id.*.
[95] *Id.* at 162 (majority opinion).
[96] *Id.* at 164–65.
[97] *Id.* at 170.
[98] *Id.* at 176 (Brennan, J., dissenting). The dissent cites many previous cases where the Court discussed whether a confession was a product of free will. *Id.* at 177 n.2.

point this case illustrates (with respect to this Note) is that the Justices did not disagree about what "free will" was, but rather disagreed about whether one's freedom of will is of constitutional significance in determining whether a confession was "voluntary." Both the majority and dissenting opinion suggest that to have free will, you must have the ability to choose between alternatives. Indeed, Justice Stevens stated that the majority's argument was "incomprehensible" with regard to Connelly's post-custodial statements, because it violated a simple syllogism: (1) Free will is synonymous with the ability to engage in a "free and deliberate choice;" (2) For a waiver to be voluntary, it must be the "product of a free and deliberate choice;" (3) Therefore, a waiver is not voluntary if it isn't the "product of . . . the defendant's 'free will.' "[99]

As the Supreme Court contrasts free will with its deterministic counterpart, speaks of free will in terms of "choos[ing] between good and evil," and holds the criminal law as a means of punishing "abuses of free will," it appears that the Supreme Court generally refers to the popular conception of free will when it uses the term, rather than any philosophically nuanced version of it.[100] And while it is not always clear what other courts mean when they use the term "free will," it appears that most of the time courts refer to the term as understood by the majority of people (and as defined in this Note): "whether the defendant could have done other than he did."[101]

Not only do courts often acknowledge and respect a traditional notion of free will, our laws are shaped in part by the public's perception of free will. Our laws are animated by our beliefs about what is right and wrong. It seems natural to believe that "the paradigmatic case of wrongdoing is that of a free agent confronted with a choice between doing right and doing wrong and freely choosing . . . to do wrong."[102] This intuition leads to the retributive impulse that people should "get what they deserve," and causes politicians to act "tough-on-crime" to gain popular support.[103] Moreover, while we condemn behavior we see as freely chosen, we excuse behavior we see as beyond the actor's control. And as our views change as to what actions are freely chosen, the law tends to change with it.

For example, according to a recent Gallup poll, 47 percent of Americans see homosexuality as something you are "born with," compared to 33 percent

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[99] *Id.* at 173 (Stevens, J., concurring in judgment and dissenting in part).

[100] *See* Cotton, *supra* note 84. On an arguably related side note, every justice that has served on the United States Supreme Court has been religious, with the possible exception of David Davis. *See Religious Affiliation of the U.S. Supreme Court*, ADHERENTS.COM, http://www.adherents.com/adh_sc.html (last visited May 13, 2015); Bob Ritter, *Does a Supreme Court Justice's Religion Matter?*, HUMANIST NETWORK NEWS (May 19, 2010), http://americanhumanist.org/HNN/issue/details/2010-05-does-a-supreme-court-justices-religion-matter.

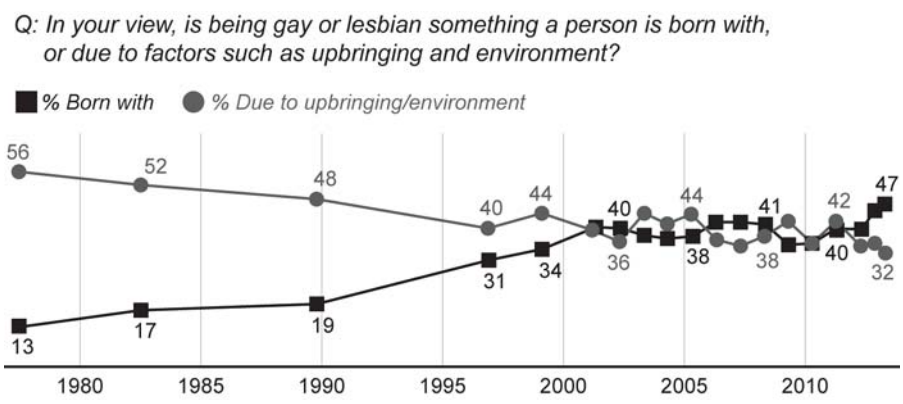
[101] Cotton, *supra* note 84, at 1 n.1; *see supra* Part I.A.

[102] Chiesa, *supra* note 9, at 1415 (internal quotations omitted).

[103] Kirchmeier, *supra* note 85, at 704, 725 n.334.

who believe homosexuality is caused by "external factors."[104] Thirty-seven years ago, these numbers were 13 percent and 56 percent respectively.[105]

FIGURE 3: GALLUP POLLING DATA ON VIEWS OF GAY/LESBIAN ORIENTATION[106]



It is hard not to notice that being "born that way" is another way of saying that one's sexual orientation is beyond his or her control, whereas attributing one's sexual orientation to "external factors" is a way of identifying some degree of control or choice.[107] Not surprisingly, as more Americans view homosexuality as an immutable trait rather than a choice, they have correspondingly become more accepting of homosexual relations[108] and more accepting of same-sex marriage.[109] At least in part due to this societal change in perspective, thirty-seven states now have legal same-sex marriage, twenty-one of which have attained this status in either 2014 or 2015.[110]

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[104] Jeffrey M. Jones, *More Americans See Gay, Lesbian Orientation as Birth Factor*, GALLUP (May 16, 2013), http://www.gallup.com/poll/162569/americans-gay-lesbian-orientation-birth-factor.aspx.

[105] *Id.*

[106] *Id.*

[107] In a viral video, heterosexuals were asked whether they thought people chose to be gay. The common response was that homosexuality is a mixture of both nature and nurture, a choice that was largely informed by their upbringing and environment. However, when asked if they chose to be straight, they all answered in the negative; this revelation would in turn change many of their initial answers to reflect that people also do not choose to be homosexual. Radley Balko, *'When Did You Choose To Be Straight' Video Asks Heteros What Gay People Are Often Asked*, HUFFINGTON POST (May 10, 2013), http://www.huffingtonpost.com/2013/05/10/choose-to-be-straight-video-_n_3247301.html.

[108] Lydia Saad, *U.S. Acceptance of Gay/Lesbian Relations Is the New Normal*, GALLUP (May 14, 2012), http://www.gallup.com/poll/154634/Acceptance-Gay-Lesbian-Relations-New-Normal.aspx.

[109] Jeffrey M. Jones, *Same-Sex Marriage Support Solidifies Above 50% in U.S.*, GALLUP (May 13, 2013), http://www.gallup.com/poll/162398/sex-marriage-support-solidifies-above.aspx.

[110] *37 States with Legal Gay Marriage and 13 States with Same-Sex Marriage Bans*, PROCON.ORG (Apr. 17, 2015, 1:00 PM), http://gaymarriage.procon.org/view.resource.php?resourceID=004857. These thirty-seven states are Alabama, Alaska, Ari-

The subject of addiction also illustrates the influence a notion of free will has had on our laws. Indeed, "courts are now universally unwilling to criminalize the mere status or condition of being currently addicted to an illegal drug" due to "assumptions of free will and responsibility."[111] Suffering from an addiction is tantamount to suffering from the common cold—both are illnesses over which the victim has no control.[112] Thus, the addict's drug dependency should not be viewed as a moral failing, but rather as a medical condition requiring treatment.[113] The U.S. Supreme Court has stated that criminalizing the "status" of being an addict would be equivalent to criminalizing someone for being "mentally ill, or a leper, or to be afflicted with a venereal disease," laws which would "doubtless[ly] be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[114] Even proponents of free will are likely to concede limitations to the will's power: one does not choose to be mentally ill, and thus is not responsible for being mentally ill. Likewise, the mentally ill are unable simply to choose to be mentally competent, just as a blind person cannot choose to have sight. However, some people remain skeptical about the disease model of addiction, viewing addicts as people who could have acted otherwise but instead chose to act poorly.[115] Whether the addict is portrayed as a victim suffering from an illness or as a person who simply makes poor choices cannot help but influence our laws, because it changes the problem society is dealing with. If crime were viewed as a sign of underlying brain pathology, the focus shifts to helping the afflicted and preventing future harm, rather than on determining punishment based on the wrongful conduct.[116]

Most of us feel that "people evaluate their environments, make choices, and impose those choices to the best of their ability on the world."[117] As a result, we tend to criminalize conduct and punish behavior that we view as freely chosen. There is a significant and clear nexus between the popular conception of free will and our willingness to hold an actor morally responsible for his

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zona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* Given the rapid change over the last couple of years, this list is likely to be inaccurate shortly after this note is published. *Id.*

[111] R. George Wright, *Criminal Law and Sentencing: What Goes with Free Will?*, 5 DREXEL L. REV. 1, 32 (2012).

[112] Robinson v. California, 370 U.S. 660, 667 (1962).

[113] Chris Wright, *Do Addicts Have Free Will*, ALTERNET (Nov. 30, 2012), http://www.alternet.org/do-addicts-have-free-will.

[114] *Robinson*, 370 U.S. at 666.

[115] Join Together Staff, *Choice and Free Will: Beyond the Disease Model of Addiction*, PARTNERSHIP (Sept. 14, 2006), http://www.drugfree.org/join-together/addiction/choice-and-free-will-beyond.

[116] Erickson, *supra* note 44, at 61–62.

[117] *Id.* at 56.

conduct.[118] When society recognizes that someone lacks the free will necessary to choose between alternatives, we tend not to hold them as legally culpable agents.[119] As a result, "[d]rug and alcohol addicts argue that their addictions rendered them unable to exercise free choice; defendants claim that they were neurologically incapable of premeditating their crimes; serotonin levels are submitted as evidence of impaired impulse control."[120] In fact, it is likely that the number of judicial opinions drawing from neuroscience has more than doubled since 2005, with one study revealing more than 1,500 appellate judicial opinions wherein the judge "mentioned neurological or behavioral genetics evidence that had been used as part of a defense in a criminal case."[121] Thus, the game has become "how much can we blame you for your conduct?"

B. The Blame Game

The popular conception of free will is "embedded in the very fabric of our system of criminal justice."[122] It can influence the elements of a crime, the defenses that can be raised, and the sentence one can receive. The role free will, or "free choice," plays is not subtle either. It is generally recognized that three conditions must be satisfied in order to view an individual as blameworthy, and thus responsible, for his or her conduct: "(1) the actor understood what she was doing; (2) the actor understood that what she was doing was wrong; and (3) the actor could have acted otherwise."[123] Free will is regarded as a central feature and integral component of the retributive conception of culpability.[124] The legal arithmetic is straightforward. If your conduct was not the product of free will, you cannot be blamed for it. And if you cannot be blamed for your conduct, then you are relieved of responsibility.[125]

The commonly held notion of free will plays a part in almost every element of a crime: the actus reus, or wrongful act, where the Model Penal Code[126] re-

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[118] *See* Russell Dean Covey, *Exorcizing Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS CONST. L.Q. 189, 231–32 (2004).

[119] Erickson, *supra* note 44, at 55–56.

[120] Kate Becker, *Neuroscience, Free Will, and the Law*, INSIDE NOVA (Feb. 19, 2012), http://web.archive.org/web/20120426193545/http://www.pbs.org/wgbh/nova/insidenova/2012/02/neuroscience-free-will-and-the-law.html; *see, e.g.*, Hill v. Ozmint, 339 F.3d 187, 201–02 (4th Cir. 2003) (defendant argued that his aggressive impulses arose from a serotonin deficiency due to his genetics); United States v. Moore, 486 F.2d 1139, 1150 (D.C. Cir. 1973) (defendant argued that he was compelled to use narcotics due to his addiction).

[121] Gary Stix, *My Brain Made Me Pull the Trigger*, SCI. AM. MIND, May/June 2014, at 14, 14; Becker, *supra* note 120.

[122] Chiesa, *supra* note 9, at 1406.

[123] Covey, *supra* note 118.

[124] *Id.* at 230–31.

[125] *Id.*

[126] The Model Penal Code is instructive when considering the impression free will has on our criminal law. This is because of the differences in criminal law from state to state. The Model Penal Code was an attempt by the American Law Institute (a "non-governmental or-

quires the act to be voluntary or the "product of the effort or determination of the actor;"[127] the mens rea, or guilty mind, where the Model Penal Code draws distinctions between levels of culpability;[128] and the determination of proximate cause, where one's freely willed act may be seen as a superseding cause of a crime (e.g., when the freely willed act of suicide relieves another of liability who provided that person with the means to commit suicide).[129] It also informs the basic excuses within substantive criminal law, such as duress, infancy, insanity, mistake, and provocation.[130] However, free will's influence over each of these different aspects of the criminal law boils down to one simple concern: are you morally responsible for your conduct?

For an individual to be subject to criminal punishment, he or she must have committed a voluntary act. Some believe that the voluntary act principle reflects the "deeply held belief that it is unfair to punish someone for engaging in acts that are not the product of a free will."[131] However, not only does the definition of "voluntary" change depending on the legal issue at hand (e.g., voluntary act principle vs. voluntary waiver of Miranda rights); it also changes depending on the court with specific regard to the voluntary act principle.[132] For example, the Ninth Circuit has addressed the voluntary act principle, stating:

> A voluntary act is one in which the individual has the ability to choose his course of conduct. The only question is whether the person could have refrained from doing it, or whether he was controlled by some irresistible power. If he could have refrained, the act is voluntary; but, if he was impelled by some irresistible force, it is involuntary.[133]

Although this may seem like an action must be a product of free will in order to be voluntary, that is not necessarily the case. The Model Penal Code states that a "bodily movement that . . . is not a product of the *effort or determination of the actor*, either conscious or habitual," is not a voluntary act.[134]

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ganization of highly regarded judges, lawyers, and law professors") to draft a code that states might use in drafting their own respective criminal codes. Paul H. Robinson & Markus Dirk Dubber, An Introduction to the Model Penal Code (Mar. 12, 1999), *available at* https://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf. Although there are parts of the Model Penal Code that states have yet to adopt, it is, "more than any other code, . . . the closest thing to being an American criminal code." *Id.* at 1.

[127] ELLEN S. PODGOR ET AL., CRIMINAL LAW: CONCEPTS AND PRACTICE 83 (2d ed. 2009).

[128] *Id.* at 107–08.

[129] Chiesa, *supra* note 9, at 1413–14.

[130] Covey, *supra* note 118, at 231; Chiesa, *supra* note 9, at 1406.

[131] Chiesa, *supra* note 9, at 1412.

[132] *See* State v. Lara, 902 P.2d 1337, 1338 (Ariz. 1995) ("We acknowledge that the word 'voluntary' has been used in two separate senses, and this contributes to the confusion that surrounds the issue.").

[133] United States v. Loera, 923 F.2d 725, 728 (9th Cir. 1991) (internal quotation marks omitted). In this case, the court was addressing an instance where someone drove while intoxicated. The individual argued that the operation of the motor vehicle was not voluntary because he became so drunk that he "[lost] the power to control his action." The court rejected this argument. *Id.*

[134] MODEL PENAL CODE § 2.01(2) (1962) (emphasis added).

Therefore, even if a person suffers from a brain impairment that reduces his ability to exercise judgment (which may lead one to question whether that person has "free will"), his action may still be voluntary under the voluntary act principle if he was relentless in pursuing his objective, demonstrating effort and determination.[135]

If viewed as a corollary of free will, the voluntary act principle explains why people are held liable for what they do, rather than who they are (e.g., acquiring or using a drug rather than *being* an addict, or engaging in homosexual conduct rather than *being* homosexual).[136] This tracks our ability to attribute blame; while you may not be able to choose your sexual orientation (and thus, we cannot blame/punish you for it), it seems like you are able to choose to engage in certain conduct (and therefore, we feel justified in blaming/punishing you). The D.C. Circuit phrased it thusly:

> [C]riminal responsibility is assessed only when through "free will" a man elects to do evil, and if he is not a free agent, or is unable to choose or to act voluntarily, or to avoid the conduct which constitutes the crime, he is outside the postulate of the law of punishment.[137]

The voluntary act requirement protects behavior that we generally view as not the product of effort or determination: reflexes or convulsions, conduct occurring during hypnosis, and movements during unconsciousness or sleep.[138] In fact, several individuals have been acquitted of homicide because they committed the act while sleepwalking, and thus did not act voluntarily.[139] Although many view this as protecting behavior that is not freely chosen, as one does not choose his actions while unconscious, the current standard for what constitutes a "voluntary act" makes legal and practical sense even without harboring a notion of free will.

In most circumstances, an individual must have the requisite mindset along with the voluntary act in order to be found guilty of a crime.[140] However, the crime you commit, and the punishment you receive, may change depending on the mindset with which you committed the act, despite the fact that the damage done may be the same in each case.[141] Part of the reason we punish people

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[135] *Lara*, 902 P.2d at 1338–39. Arizona's statutory definition of voluntary act in this case is comparable to the Model Penal Code's definition.

[136] Chiesa, *supra* note 9, at 1411. Of course, while sodomy laws do not violate the voluntary act principle, they suffer from other constitutional issues. *See* Lawrence v. Texas, 539 U.S. 558 (2003) (striking down sodomy laws on due process grounds).

[137] United States v. Moore, 486 F.2d 1139, 1151 (D.C. Cir. 1973) (quoting dissenting Judge Wright on his exposition of "established principles").

[138] PODGOR ET AL., *supra* note 127.

[139] *See generally* Beth E. Teacher, *Sleepwalking Used as a Defense in Criminal Cases and the Evolution of the Ambien Defense*, 1 DUQ. CRIM. L.J. 127 (2010) (detailing the history of the sleepwalking defense in criminal cases).

[140] *See* Chiesa, *supra* note 9, at 1414.

[141] For example, the difference in mens rea accounts for the differences between first-degree murder, second-degree murder, voluntary manslaughter, and involuntary manslaughter. In

based on their level of intent is because we attribute blame to them in accordance with their level of intent.[142] Intentional acts appear more blameworthy, as they are more representative of your state of mind, and thus seem to appear more as the result of clear, conscious choice.[143] If our criminal law is "based upon a theory of punishing the vicious will," it seems only natural to punish actions that are freely chosen more severely than those that arise by accident.[144]

Many defenses also touch upon a notion of free will. For example, the insanity defense is considered to "reflect[] the fundamental moral principles of our criminal law."[145] A determination of guilt is not only a legal judgment that the defendant "pulled a trigger, took a bicycle, or sold heroin," but also a "moral judgment that the [defendant] is blameworthy."[146] Although the exact requirements for an insanity defense differ depending on the jurisdiction,[147] in each case the defense is allowed "not because the act was justified, but because society cannot blame the offender for his conduct."[148] Justice Breyer has stated that while insanity may not show the absence of mens rea, it does reveal the absence of a "vicious will."[149]

The most popular test for evaluating whether a defendant was insane is the M'Naghten test.[150] This test arose in 1843, when Daniel M'Naghten shot and killed Edward Drummond in an attempt to assassinate England's Prime Minister, Sir Robert Peel.[151] Under the test, an accused is not criminally responsible for his actions if he was, at the time of the incident, suffering from a mental disease or defect of reason that prevented him from appreciating the nature,

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each crime, the result is the unlawful killing of a human being. PODGOR ET AL., *supra* note 127, at 275–76.

[142] Chiesa, *supra* note 9, at 1415.

[143] However, blameworthiness does not necessarily have to scale with level of intent. For example, some argue that a person guilty of premeditated murder may be less culpable than one without premeditation. *See* Michael Vitiello, *The Expanding Use of Genetic and Psychological Evidence: Finding Coherence in the Criminal Law?*, 14 NEV. L.J. 897, 901–02 (2014).

[144] Chiesa, *supra* note 9, at 1415 (quoting Roscoe Pound, *Introduction* to FRANCIS B. SAYRE, A SELECTION OF CASES ON CRIMINAL LAW, at xxix, xxxvi–xxxvii (1927)).

[145] United States v. Lyons, 739 F.2d 994, 994 (5th Cir. 1984) (Rubin, J., dissenting).

[146] *Id.*

[147] There are four types of insanity defenses: the M'Naghten test, the irresistible impulse test, the Durham product test, and the substantial capacity test. Each of these tests has been adopted in at least one jurisdiction. Margaret E. Clark, *The Immutable Command Meets the Unknowable Mind: Deific Decree Claims and the Insanity Defense After* People v. Serravo, 70 DENV. U. L. REV. 161, 162–63 (1992).

[148] Vitiello, *supra* note 143, at 917.

[149] Dixon v. United States, 548 U.S. 1, 24 (2006) (Breyer, J., dissenting).

[150] Clark, *supra* note 147, at 164; WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 7.2 (2d ed. 2003).

[151] LAFAVE, *supra* note 150; *From Daniel M'Naughten to John Hinckley*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/history.html (last visited May 20, 2015). Drummond was the Prime Minister's private secretary. LAFAVE, *supra* note 150.

quality, or wrongfulness of the act.[152] When an individual lacks the capacity to distinguish between right and wrong actions, his ability to make "choices between alternative courses of action" is diminished and his reasoning is impaired.[153] Punishing an individual who lacks the capacity to reason appears to be "as undignified and unworthy as punishing an inanimate object or an animal."[154]

With respect to insanity defenses generally, the D.C. Circuit has stated, "[a] man who cannot reason cannot be subject to blame. Our collective conscience does not allow punishment where it cannot impose blame."[155] Thus, when an individual is unable to choose his course of action—when he lacks free will—we tend not to attribute moral responsibility or blame to him. Indeed, many acknowledge that our criminal law revolves around the precept that "persons can be held responsible for their actions because they have freely chosen them, rather than had them determined by forces beyond their control."[156]

Necessity and duress defenses also draw upon the popular conception of free will. Generally, an individual acts under duress if he is coerced to act "by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist."[157] In such a situation, the individual's conduct, although made voluntarily and intentionally, does not reveal "any semblance of a meaningful choice."[158] An individual acts out of necessity when he or she is confronted with a choice of two evils: committing a crime, or engaging in some other behavior that "constitutes a greater evil."[159] The Ninth Circuit contrasted necessity with duress thusly: "The theory of necessity is that the defendant's free will was properly exercised to achieve the greater good and not that his free will was overcome by an outside force as with duress."[160]

Although the aforementioned defenses play an important role in the guilt phase of a criminal trial, there are free-will-based corollaries within the penalty phase as well. Sentencing in capital cases requires the sentencer to consider a list of mitigating factors.[161] The following are all common mitigating factors

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[152] LAFAVE, *supra* note 150; Chiesa, *supra* note 9, at 1415–16.

[153] Chiesa, *supra* note 9, at 1416 (quoting State v. Esser, 115 N.W.2d 505, 529 (Wis. 1962) (Hallows, J., dissenting)); *accord* Holloway v. United States, 148 F.2d 665, 666 (D.C. Cir. 1945); s*ee also* United States v. Lyons, 739 F.2d 994, 995 (5th Cir. 1984) ("An acquittal by reason of insanity is a judgment that the defendant is not guilty because, as a result of his mental condition, he is unable to make an effective choice regarding his behavior.").

[154] *Holloway*, 148 F.2d at 666; *see supra* note 6 and accompanying text.

[155] *Holloway*, 148 F.2d at 666–67.

[156] Cotton, *supra* note 84, at, 1.

[157] Rebecca Emory, Comment, *Losing Your Head in the Washer—Why the Brainwashing Defense Can Be a Complete Defense in Criminal Cases*, 30 PACE L. REV. 1337, 1343 (2010).

[158] *Id.*

[159] United States v. Contento-Pachon, 723 F.2d 691, 695 (9th Cir. 1984).

[160] *Id.*

[161] Kirchmeier, *supra* note 85, at 655.

that can render a defendant less culpable than otherwise (and the list is not exhaustive): the defendant's age, brain damage, childhood abuse, drug addiction, extreme mental or emotional disturbances, intoxication, substantially impaired capacity, and mental retardation.[162] Why do these factors warrant a less severe punishment? They all tend to show that the defendant's behavior was not freely chosen, but rather was controlled by prior causes.[163] Indeed, all of the factors listed "relate to the development of the defendant's brain and the idea that neurological or psychological problems show that the defendant is not as responsible as someone acting under 'normal' conditions."[164]

Our criminal law is largely focused on whether, and to what degree, someone is responsible for his or her conduct. We have created many doctrines in attempting to find the answer, from the general elements composing a crime to the excuses available to criminals. Although most of these doctrines have some utility beyond evaluating responsibility (e.g., regardless of how responsible you are, acting under duress or out of necessity may show you to be less dangerous than otherwise), some aspects of our criminal justice system would have to be jettisoned or reformed, such as the theory of retribution.

C. Retribution and Legal Punishments

There are generally two ways to classify justifications for legal punishment: consequentialist justifications and retributivist justifications.[165] As the name suggests, consequentialist justifications determine the value of a punishment from its consequences.[166] The principal consequentialist theories of punishment include the following: rehabilitation, which attempts to reform the offender so he will not commit future crimes; isolation, which requires incapacitating the offender so he cannot commit crimes during the term of his imprisonment; and deterrence, which attempts to discourage either the offender or others in society from committing future crimes.[167] If a consequentialist theory of punishment inflicts suffering upon the offender, it is not because such suffering is justified in and of itself, but rather that such suffering leads to some positive result.[168]

Conversely, retribution is the belief that "desert is a sufficient condition for punishment."[169] In other words, punishing an offender is justified simply because the offender deserves it, regardless of the actual consequences that result

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[162] *Id.* at 673–83.
[163] *Id.* at 684.
[164] *Id.*
[165] Greene & Cohen, *supra* note 25, at 1776–77.
[166] Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 856 (2002).
[167] *Id.* at 857.
[168] *Id.* at 864.
[169] Chiesa, *supra* note 9, at 1452.

from the punishment.[170] In this sense, punishment is not a means to any positive result, but is an end in itself.[171] I submit the following motto for retributivism: All else being equal, it is intrinsically better that the wrongdoer suffers than flourishes.[172] Retribution was likely the first articulated justification for legal punishment, having been "borne out of the harsh and rigid justice of the Old Testament."[173] In fact, retribution as a legal punishment has been traced all the way back to the Code of Hammurabi, a Babylonian law code that predates even the earliest writings of the Bible.[174]

Although the theory of retribution may seem antiquated or of little significance in modern-day sentencing, this is not the case. It is true that consequentialist justifications for punishment appeared to be the central goal of the criminal justice system during much of the twentieth century.[175] In 1949, the U.S. Supreme Court even stated that "[r]etribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals."[176] However, critics and proponents of retributivism alike agree that it has enjoyed a striking and vigorous comeback since the early 1970s.[177] Indeed, philosophers and legal scholars generally recognize retribution as the dominant theory of punishment, calling it "the leading philosophical justification for the institution of criminal punishment,"[178] and "the criminal law's central objective."[179]

So what does retribution have to do with free will? While retributivists typically do not argue for an "eye-for-an-eye" formulation of retribution,[180] they do hold to the maxim that one should be punished in accord with his desert.[181] This leads to an important question: when does someone deserve to be punished for his or her conduct? The answer relies on the popular conception of free will: "A person deserves to suffer for doing 'X' if, and only if, it is fair to blame him for having done 'X.' "[182] Another question arises: when is it fair to blame someone for his or her behavior? Recall that if someone lacks free

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[170] Christopher, *supra* note 166, at 847–48.
[171] *Id.* at 864.
[172] *See id.*
[173] *Id.* at 847; *accord* Meghan J. Ryan, *Proximate Retribution*, 48 HOUS. L. REV. 1049, 1053–54 (2012).
[174] Ryan, *supra* note 173.
[175] *See* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 1–2 (2003).
[176] *Id.* at 6.
[177] Christopher, *supra* note 166, at 845–47 (noting that the return of retributivism as a dominant theory of punishment has been termed a "revival," "resurgence," "renaissance," and "rise").
[178] *Id.* at 846–47.
[179] Alschuler, *supra* note 175, at 1.
[180] *Id.* at 19.
[181] *Id.*
[182] Chiesa, *supra* note 9, at 1452.

will—that is, if he or she lacks the ability to choose to act differently—we typically feel as if his or her conduct is not blameworthy (e.g., the insane, animals, inanimate objects or events).[183] Thus, without free will, retributive justifications for punishment lose any footing, as there is no basis on which to blame people for their actions and no sense in which one deserves to be punished.[184]

This will likely appear to be an absurd, or at least unappealing, conclusion to most readers. After all, seeking vengeance against a wrongdoer seems to lie at the core of our sense of justice,[185] and retribution has its roots in "vengeance, bloodlust, revenge, retaliation, and an eye for an eye."[186] This reaction is understandable, partly due to just how deep the desire for retribution can run. Take Ariel Castro for example, who kidnapped three women and held them captive in his Cleveland home for nearly a decade, during which time he repeatedly raped them and fathered a child with one.[187] The women were discovered on May 6, 2013, when one of Castro's neighbors heard them screaming from inside the home.[188] Castro claimed that he was addicted to sex and was unable to control his impulses.[189] He pled guilty to hundreds of charges, and was sentenced to life in prison plus one thousand years.[190] About a month into his sentence, Castro hanged himself in his prison cell.[191]

The public's reaction to this news was telling, if not shocking. Understandably, many viewed Castro as a monster and believed he deserved to be punished for his heinous crimes.[192] However, many people wanted more than justice in the legal arena; they wanted Castro to languish in prison for decades so

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[183] *See supra* Part II.B; Chiesa, *supra* note 9, at 1422.

[184] Chiesa, *supra* note 9, at 1452. There are retributivists that have tried to dodge this argument by arguing for a "character-based" retributivism rather than a "choice-based" retributivism. This argument asserts that offenders are not punished based on their acts, but rather, their acts are indicative of a bad character, and a bad character can be punished since the offenders are responsible for creating and shaping their character. Covey, *supra* note 118, at 233. It should be clear that this theory of retributivism is as flawed as the former—you are no more responsible for your character than you are for your height.

[185] Eisenstat, *supra* note 3, at 1148.

[186] Christopher, *supra* note 166, at 848.

[187] Mark Memmott, *DNA Shows Cleveland Suspect Is Girl's Father, State Says*, NPR (May 10, 2013), http://www.npr.org/blogs/thetwo-way/2013/05/10/182819562/cleveland-kidnapping-suspect-could-face-thousands-of-charges.

[188] Elizabeth Chuck & Polly DeFrank, *Timeline of the Ohio Kidnappings: Three Women's Shared Nightmare*, NBC NEWS (May 7, 2013), http://usnews.nbcnews.com/_news/2013/05/07/18103952-timeline-of-the-ohio-kidnappings-three-womens-shared-nightmare.

[189] Memmott, *supra* note 187.

[190] Doreen McCallister, *Ariel Castro, Ohio Man Who Held Women for Years, Is Dead*, NPR (Sept. 4, 2013), http://www.npr.org/blogs/thetwo-way/2013/09/04/218758961/ohio-man-who-held-women-for-decades-found-dead-in-prison.

[191] *Id.*

[192] *See* Cliff Pinckard, *Ariel Castro's Death Continues to Bring Strong Reactions, Raises Questions*, CLEVELAND (Sept. 5, 2013), http://www.cleveland.com/metro/index.ssf/2013/09/ariel_castros_death_continues_1.html.

he could experience as much mental and physical suffering as possible.[193] Here are some of the common reactions to Castro's suicide from a popular forum discussing the news (spelling and grammar in its original form): "Its great hes dead, but it would be better if he was forced to live out the rest of his miserable life in that hole;" "He took the easy way out. Scumbags like him don't deserve such simple exits;" "[O]n one hand I wish he's alive to suffer as much as possible, but on the other hand I don't want to waste our money on scums like him;" "I would have gladly paid to keep a piece of shit like Castro in jail and suffering."[194]

This is not to suggest that vengeance is synonymous with retribution.[195] However, it is clear that both are motivated by a desire to see the offender suffer.[196] The reactions to Castro's suicide illustrate precisely why retribution is such a strong force in our society. When someone commits a heinous crime, we instinctively feel the need to blame him for his conduct; we feel he deserves to suffer for his crime; and we are almost guaranteed to fail to see the true causes of human behavior.

D. The Precarious Punishment of Retribution in Action

The contrast between our disdain for someone like Ariel Castro and our sympathy for someone who commits a crime while apparently lacking free will (e.g., the insane) is the result of a moral illusion that underlies our retributive impulses. Of course, this is not the first time someone has argued against retributive punishments on philosophical grounds, and any argument would be remiss to not mention perhaps the most famous case where the issue was raised: the 1924 case of Leopold and Loeb.[197] The nation's press described the

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[193] *See id.*

[194] These posts are taken from the popular website Reddit. It should be noted that the number of "points" each comment has indicates the community's view of that comment. For example, the comment "Its great hes dead, but it would be better if he was forced to live out the rest of his miserable life in that hole," has a score of 1006, indicating that a large number of people agreed with the sentiment stated. *Ariel Castro Dead After Suicide*, REDDIT (Sept. 3, 2013), http://www.reddit.com/r/MorbidReality/comments/1lp1vu/ariel_castro_dead_after_suicide/; *Ariel Castro, Convicted Cleveland Kidnapper, Found Dead in Cell*, REDDIT (Sept. 3, 2013), http://www.reddit.com/r/news/comments/1lozp6/ariel_castro_convicted_cleveland_kidnapper_found/. These reactions are not limited to specific forums on Reddit; even Prosecutor Timothy McGinty shared these sentiments. *See After Ariel Castro Suicide, Elation Is Scarce*, CBS NEWS (Sept. 4, 2013), http://www.cbsnews.com/news/after-ariel-castro-suicide-elation-is-scarce/.

[195] *See generally* Dan Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1190 (2009) (detailing the distinctions between retributive punishment and revenge).

[196] *See* Eisenstat, *supra* note 3, at 1128 ("Indeed, I would argue that inherent under Retribution theory, for there to be just punishment, the victimizer must experience a sense of suffering, and that such suffering must not be disproportionally less severe than the suffering which was experienced by the victim.").

[197] *See generally* Kevin O'Kelly, *Leopold & Loeb: The Case that Capped Darrow's Career as a Criminal Lawyer*, 19 EXPERIENCE 24 (2009) (detailing the Leopold and Loeb case).

case as the "Crime of the Century!" Eighteen-year-old Richard Loeb and nineteen-year-old Nathan Leopold had kidnapped fourteen-year-old Bobby Franks, murdered him, and held him for ransom on the pretense he was still alive.[198] The significance of the case arises from the backgrounds of the two defendants and the defense put on by none other than Clarence Darrow, arguably the most famous trial lawyer in America at the time.[199]

Leopold and Loeb both appeared to have impeccable and fortunate backgrounds. Although in their teens, both had already attained undergraduate degrees and were set to attend law school.[200] In fact, Leopold was considered a child prodigy with an IQ of 210, and Loeb graduated college at an age where most were juniors in high school.[201] They were also the descendants of two of Chicago's wealthiest families: Leopold's father was in charge of a box manufacturing business, and Loeb's father was a lawyer who went on to become the vice president of the department store company Sears and Roebuck.[202] Given their upstanding backgrounds, and their obvious lack of need for money, investigators likely doubted that these two could be the perpetrators of the crime.[203]

As it turns out, they were what many might classically think of as evil; the two friends and lovers had spent six months carefully planning "the perfect murder."[204] Why? "[F]or the experience."[205] It was what many would call a "thrill kill"; they had murdered a boy just to see what it felt like.[206] At trial, there was no doubt they had committed the crime, as they had repeatedly confessed to the act.[207] Indeed, if there were ever two men who deserved to be punished for their behavior, this appeared to be the case. They had no noble motive which would mitigate their blame. They showed no remorse for their actions, and even appeared to be proud of them. They were not insane (a sentiment even Darrow shared). They did not have brain tumors or any other salient physical ailment many might perceive as foreclosing their ability to exercise free will. And to top it off, virtually all of the public and press were against them.[208] As

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198 *Id.* at 25; Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold and Loeb*, 79 IOWA L. REV. 989, 989, 994 (1994).

199 *See* O'Kelly, *supra* note 197, at 28.

200 *Id.* at 26; Howe, *supra* note 198, at 995; Douglas O. Linder, *The Leopold and Loeb Trial: A Brief Account* (1997), http://law2.umkc.edu/faculty/projects/ftrials/leoploeb/accountoftrial.html.

201 O'Kelly, *supra* note 197, at 26; *Nathan Leopold Biography*, BIO, http://www.biography.com/people/nathan-leopold-227820 (last visited May 18, 2015); *Richard Loeb Biography*, BIO, http://www.biography.com/people/richard-loeb-227821 (last visited May 18, 2015).

202 O'Kelly, *supra* note 197, at 26; Howe, *supra* note 198, at 995; *Richard Loeb Biography*, *supra* note 201; *Nathan Leopold Biography*, *supra* note 201.

203 *See* O'Kelly, *supra* note 197, at 26.

204 Howe, *supra* note 198, at 994.

205 O'Kelly, *supra* note 197, at 27.

206 *Id.*; Howe, *supra* note 198, at 990.

207 Howe, *supra* note 198, at 989–90.

208 *See id.* at 990 n.5; O'Kelly, *supra* note 197, at 28, 30.

renowned English jurist William Blackstone stated, "punishments are . . . only inflicted for abuse of that free will, which God has given to man," and this appeared to be a simple case where two young men had chosen to abuse their free will.[209]

Darrow's goal was to have the boys sentenced to imprisonment rather than death.[210] In his efforts, Darrow delivered a twelve-hour plea that is regarded by many as "one of the most remarkable legal arguments in the history of advocacy,"[211] and that reportedly even brought the judge to tears.[212] Darrow's arguments reflected a deterministic view of human behavior.[213] In essence, he argued that Leopold and Loeb could not be blamed for their childhood development, and that they had "diseased or abnormal makeups" due to hereditary and environmental factors that were entirely beyond their control.[214] Here is an excerpt from Darrow's final arguments:

> What had this boy to do with it? He was not his own father; he was not his own mother; he was not his own grandparents. All of this was handed to him. He did not surround himself with governesses and wealth. He did not make himself. And yet he is to be compelled to pay.
>
> There was a time in England . . . when judges used to . . . call juries to try a horse, a dog, a pig, for crime. . . . Animals were tried. Do you mean to tell me that Dickie Loeb had any more to do with his making than any other product of heredity that is born upon the earth?[215]

In the end, Darrow succeeded, and Leopold and Loeb were sentenced to life in prison plus ninety-nine years.[216]

Darrow's reasoning has been echoed many times since then. One recent example occurred on June 15, 2013, when sixteen-year-old Ethan Couch drunkenly drove into several people standing by the side of a road with his Ford F-350 pickup truck, killing four and injuring others.[217] On December 10 of that

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[209] Alschuler, *supra* note 175, at 2; 4 WILLIAM BLACKSTONE, COMMENTARIES *27. Blackstone concluded his sentiment by stating that is was therefore "highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion." *Id.* To emphasize the influence of Blackstone's words, it should be noted that "[a]ll of our formative documents—the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall—were drafted by attorneys steeped in [Blackstone's *Commentaries*]." Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 2 (1996) (citing ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 11 (1984)).

[210] *See* O'Kelly, *supra* note 197, at 28.

[211] Howe, *supra* note 198, at 991.

[212] *Id.* at 1012.

[213] *Id.* at 1006.

[214] *Id.* at 1008–09.

[215] *Quoted in* Alschuler, *supra* note 175, at 5.

[216] O'Kelly, *supra* note 197, at 35.

[217] Deborah Hastings, *New Details, 911 Calls Come to Light in Texas 'Affluenza' Case of Teen Ethan Couch*, DAILY NEWS (Dec. 14, 2013, 11:09 A.M.), http://www.nydailynews.com/news/national/new-details-emerge-affluenza-teen-trial-article-1.1547671; Mitch Mitchell, *Teen Sentenced to 10 Years Probation, Rehab in 4 Deaths*, STAR-TELEGRAM

same year, Ethan was sentenced to ten years of probation for his actions.[218] How was Ethan able to avoid imprisonment for his crime? It just so happens, Ethan suffered from "affluenza," or so his lawyers claimed.[219] The defense's argument took the following form: Ethan was a spoiled child whose wealthy parents gave him everything he wanted (e.g., motorcycles, cars, money, etc.) and never taught him that "sometimes you don't get your way."[220] Because Ethan had been raised to believe he could always do what he wanted, he had grown up "emotionally flat." Therefore, he could not be responsible for behavior that resulted from his stunted upbringing.[221] While it is not clear that the judge bought the argument hook, line, and sinker, the sentence suggests that the argument was effective.[222]

If someone is not responsible for his or her actions, a harsh retributive punishment seems inappropriate. However, since notions of moral responsibility and blame rest on a cognitive illusion, we will continually be struggling to identify when someone is or is not responsible for his behavior.[223] The unfortunate case of Patricia ("Patty") Hearst is demonstrative.

In 1974, nineteen-year-old Patty Hearst, the granddaughter of newspaper magnate William Randolph Hearst, was kidnapped in the middle of the night from her apartment, forced into the trunk of a car, and imprisoned in a closet for fifty-seven days where she was blindfolded and repeatedly raped and tortured.[224] Her captors were members of the Symbionese Liberation Army ("SLA"), a radical left-wing organization determined to enact a proletarian revolution that would bring down the "capitalist state."[225] The SLA hoped to bring media attention to the group to help facilitate its goals.[226] While in captivity, the SLA attempted to "brainwash" Patty by subjecting her to "an unrelenting campaign of mental cruelty, sensory deprivation, malnutrition, threats of death and injury, and the constant confusion of affection and abuse."[227] Their efforts

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(Dec. 10, 2013), http://www.star-telegram.com/2013/12/10/5408563/teen-sentenced-to-10-years-probation.html.

[218] Mitchell, *supra* note 217.

[219] Madison Gray, *The Affluenza Defense: Judge Rules Rich Kid's Rich Kid-ness Makes Him Not Liable for Deadly Drunk Driving Accident*, TIME (Dec. 12, 2013), http://newsfeed.time.com/2013/12/12/the-affluenza-defense-judge-rules-rich-kids-rich-kid-ness-makes-him-not-liable-for-deadly-drunk-driving-accident/.

[220] Gray, *supra* note 219; Mitchell, *supra* note 217.

[221] Josh Voorhees, *A Wealthy Teen's Defense for a Deadly Drunken-Driving Crash: "Affluenza"*, THE SLATEST (Dec. 12, 2013), http://www.slate.com/blogs/the_slatest/2013/12/12/ethan_couch_affluenza_texas_teen_spared_prison_time_in_deadly_drunk_driving.html.

[222] *Id.*

[223] *See infra* note 283.

[224] Frances E. Chapman, *Implanted Choice: Is There Room for a Modern Criminal Defense of Brainwashing?*, 49 CRIM. L. BULL. 1379, 1418–19 (2013); Emory, *supra* note 157, at 1348.

[225] Emory, *supra* note 157, at 1348.

[226] *Id.*

[227] Chapman, *supra* note 224, at 1423.

paid off: Patty Hearst, reborn as "Tania," joined the SLA in committing several crimes, most notably a bank robbery in San Francisco.[228] She even stated in taped messages that she had willingly given up her previous lifestyle, that she had not been "brainwashed, drugged, torture[d], hypnotized, or in any way confused," and that she was committed to fighting alongside her captors.[229] The police found her in an apartment in San Francisco on September 18, 1975, and charged her with robbery, kidnapping, assault with a deadly weapon, and assault with intent to commit murder.[230]

The case seemed to revolve around one question: did Patty Hearst freely choose to join the SLA and participate in the crimes (an exercise of free will that would render her blameworthy, and thus deserving of punishment), or was she forced to participate due to either duress or indoctrination (circumstances that would have impaired her free will, and thus relieved her of responsibility)?[231] In confronting this question, one of the government's expert witnesses stated, "I think she entered that bank voluntarily in order to participate in the robbing of that bank. This was an act of her own free will."[232] The jury agreed and found her guilty.[233] The judge, in rejecting the argument that her unfortunate circumstance should serve as a mitigating factor, sentenced her to seven years of imprisonment.[234] The Ninth Circuit affirmed the district court's ruling, and the U.S. Supreme Court denied certiorari.[235]

The public's attitude towards Patty Hearst is fascinating. Initially, most people strongly detested Patty Hearst, considering her a "spoiled brat" that might get off the hook because she was the wealthy heiress of a famous family (a sentiment oddly similar to that expressed towards Ethan today).[236] In fact, polling data reveals that in 1975, about 90 percent of the general public believed she was responsible for her actions and that she should be sentenced to prison.[237] However, over the course of several years, the public grew sympathetic, developing a "widespread visceral sense that a young, impressionable girl who was unduly influenced by her kidnappers is somehow not entirely responsible for her acts."[238] Eventually, President Carter commuted her sentence,

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[228] *See* United States v. Hearst, 563 F.2d 1331, 1335 (9th Cir. 1977); Emory, *supra* note 157, at 1348–49.

[229] Chapman, *supra* note 224, at 1420; Emory, *supra* note 157, at 1348.

[230] Emory, *supra* note 157, at 1349.

[231] Chapman, *supra* note 224, at 1420.

[232] *Hearst*, 563 F.2d at 1350–51. On appeal, the defense argued that this testimony was inadmissible under Federal Rule of Evidence 704, as it had a witness give his opinion on the "ultimate issue" before the court, when such considerations should be left for the jury to decide. The court rejected this argument. *Id.*

[233] Emory, *supra* note 157, at 1350.

[234] Chapman, *supra* note 224, at 1423.

[235] Hearst v. United States, 435 U.S. 1000, 1000 (1978).

[236] *See* Diane Johnson, *The People v. Patty Hearst*, N.Y. REV. BOOKS (Apr. 29, 1976), http://www.nybooks.com/articles/archives/1976/apr/29/the-people-v-patty-hearst/.

[237] Chapman, *supra* note 224, at 1425.

[238] *Id.*

stating that Patty had only joined the SLA because of the horrific personal experiences she had endured, and thus she did not deserve her punishment.[239] In 2001, President Clinton granted her a full pardon.[240]

These cases illustrate one of the major problems with retribution: it concentrates a court's attention on unfounded and confused metaphysical notions of desert and blame (i.e., issues like who is blameworthy, how blameworthy are they, how responsible were they for their conduct, etc.), rather than on how best to protect everyone from future harm. Imagine that we had the knowledge and tools to help someone like Leopold or Loeb. What if there was an hour-long procedure they could undergo that would completely restore their sense of empathy and compassion for other human beings to the degree of that of a normal person? Would it make any moral sense to kill them or jail them for life when this procedure exists?[241] Or what about Whitman? Had he not committed suicide and his brain tumor was discovered, would he have deserved to suffer with his brain tumor for the remainder of his life?[242] Or imagine an extreme version of the Patty Hearst case: if I were able to take full control of your mind and force you to commit a crime, would you deserve to be punished for it? Would you deserve to have me remain at the controls?

The theory of retribution rests on the public's erroneous conception of free will, and perpetuates a moral confusion. Furthermore, by instituting retribution as a legitimate punishment, we waste our scientific and legal efforts on creating spurious distinctions in responsibility when we should be evaluating the efficacy of, and enhancing, our other theories of punishment.[243] Thus, as Roscoe Pound wrote in 1922, "in order to deal with crime in an intelligent and practical manner we must give up the retributive theory."[244]

III. A WORLD WITHOUT FREE WILL

A. Could We Still Adequately Punish Criminals?

This Note has argued that the popular conception of free will is an illusion, and that its widespread acceptance has influenced our law and legal structure in a deleterious manner, especially with regard to retribution. These arguments are by no means generally accepted,[245] and it is very likely that many readers may have concerns regarding this proposal. This section will attempt to address

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[239] *Id.*
[240] *Id.*
[241] This line of questioning is inspired by questions from philosopher Sam Harris. HARRIS, *supra* note 14, at 55.
[242] *See supra* Part I.D.
[243] *See infra* Part III.A.
[244] Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Dec. 17, 1925), *quoted in* Alschuler, *supra* note 175, at 4.
[245] Kirchmeier, *supra* note 85, at 650; Cotton, *supra* note 84, at 2.

these concerns, and reassure the reader that no major reformation of our government or way of life is required in a world without free will.

One of the most common reactions to the idea that humans lack free will, and thus cannot be blamed for their behavior, is the belief that we are then under an obligation to free all criminals from confinement and that all basis for punishing criminals is lost. As Judge Evelle Younger stated, "If society is wholly responsible, why not apologize to the cutthroat and pension him for life? If you don't hang him, why imprison him? He surely needs neither gallows nor cell if the blame is all on the universe at large."[246] In terms of retributive punishments, this is true. There is no sense in which one deserves to be hanged or deserves to be incarcerated. However, consequentialist punishments do not rely on notions of free will, blame, or moral responsibility.[247] Regardless of whether you freely choose to act, punishing you may: (1) deter you (or others) from committing similar conduct and harming others; (2) reform you so you are less likely to commit similar conduct and harm others, or; (3) incapacitate you so you are unable to commit similar conduct and harm others.[248] As Oliver Wendell Holmes, Jr. phrased it in a letter to British political theorist Harold Laski:

> If I were having a philosophical talk with a man I was going to have hanged . . . I should say, I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises.[249]

To illustrate the utility of punishments in the absence of free will, again, an analogy to animals seems appropriate. When a bear escapes a zoo and roams the streets, thereby endangering everyone nearby, we typically do not think of the bear as freely choosing its behavior.[250] Rather, most of us recognize that a bear has no choice except to act in accord with its genetically derived instincts.[251] Nonetheless, this does not, and should not, prevent us from recognizing the real threat the bear poses to others and taking action accordingly.[252] Capturing and confining the bear seems like an ideal solution; reforming the bear so it became as friendly as a domesticated dog would be even better if it were possible.

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[246] Kirchmeier, *supra* note 85, at 650.

[247] *See* David A. Ward et al., *Rational Choice, Deterrence, and Theoretical Integration*, 36 J. APPLIED SOC. PSYCHOL. 571, 573 (2006); *see also* Alschuler, *supra* note 175, at 3.

[248] *See* Christopher, *supra* note 166, at 857.

[249] Alschuler, *supra* note 175, at 3.

[250] *See* Miller, *supra* note 8.

[251] *Id.*

[252] *See, e.g.*, *Bears, Tigers, Lions, and Wolves Escape From Ohio Zoo*, BBC NEWS (Oct. 20, 2011), http://www.bbc.com/news/world-us-canada-15364027 (providing an example of how we (correctly) take action when dangerous animals escape from a zoo without getting bogged down by notions of free will).

The value incapacitation serves regardless of the existence of free will seems rather self-evident; regardless of the true origins of human behavior, locking you up will prevent you from harming others in open society.[253] However, the value of deterrence in a world without free will seems to merit special attention, as many legal scholars and courts are under the impression that deterrence, like retribution, would cease to be an effective legal punishment.[254] The argument is as follows: "deterrence can only be effective where the actor can consider the consequences of her acts and make a rational choice to refrain from the act because of the threat of punishment," and thus "the only truly deterrable acts are ones that are also freely chosen."[255] After all, the bear from the previous example certainly seems undeterrable, so one might wonder why a human would be any different.

There is a point to this argument: not all behavior is effectively deterrable. Involuntary behavior, or behavior that occurs without the felt intention of carrying it out (e.g., shivering, yawning, sleepwalking, sneezing, etc.), would be difficult to deter.[256] However, the idea that voluntary behavior cannot be deterred without free will is simply false, and a negative relationship between punishment and crime rate is compatible with a deterministic view of human behavior.[257] In theory, all that is required for deterrence to be effective is that the actor is capable of understanding the potential consequences of his conduct, and that the actor can be influenced by that understanding.[258] If we could successfully communicate to all bears that they will be hunted down and killed the moment they attack any human (i.e., if bears were capable of understanding what that meant), many bears probably would be deterred from attacking humans. While it is impossible to communicate in this way to bears, no such problem exists with regard to humans.

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[253] David S. Abrams, *The Imprisoner's Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 917 (2013).

[254] *See* Cotton, *supra* note 84, at 38 ("Courts apparently conclude that without the blame that free will promotes, deterrent effect may be greatly undermined."); *see also* Covey, *supra* note 118, at 236.

[255] Covey, *supra* note 118, at 236.

[256] *See* Louise Marlane Chan, Note, *S.O.S. from the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy*, 21 FORDHAM URB. L.J. 199, 225 (1993) ("Punishing involuntary, addictive behavior is unlikely to deter that behavior, since the actor is unable to control her actions."). For practical purposes, these involuntary behaviors seem undeterrable. However, one can come up with hypotheticals to show that people may take extreme precautions to avoid the occurrence of these involuntary behaviors if the punishments are severe enough. For example, while we usually do not intend to shiver, if the punishment for shivering was death (and this was regularly enforced), we might very well wear extra layers of clothing at all times to reduce the chance of our shivering. In other words, we may take proactive steps to prevent the rise of involuntary behavior, thereby deterring us from conducting the behavior.

[257] Ward et al., *supra* note 247.

[258] *See* VALERIE WRIGHT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 3 (2010), *available at* http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf.

Even though people are theoretically capable of being deterred, the degree to which they actually are deterred by certain punishments is a legitimate question that has drawn much attention, yet remains largely inconclusive.[259] This is largely due to the difficulty in accurately identifying the causal relationship between a change in punishment (e.g., an increase in sentence length), and the deterrent effect.[260] However, there is less of a debate on whether incarceration has some deterrent effect on the general population, and more of a debate as to the extent of the deterrent effect.[261] There are generally two ways in which punishments deter behavior. First, they influence our understanding of how *certain* we are to be punished (e.g., if the police department always has an officer watching a certain street for speeding, and the public knows this, chances are fewer people will speed on that street).[262] Second, they influence our understanding of how *severely* we will be punished (e.g., the rationale underlying mandatory minimum sentences and "three-strikes" laws).[263] Although the efficacy of changing the certainty and severity of various punishments in deterring behavior is an open question for the sciences, attempting to find moral ways of increasing the deterrent effect of various punishments is a legitimate project regardless of the underlying causes of human behavior. Furthermore, an argument that deterrence is an ineffective justification for legal punishment is a non sequitur if used to show that retribution is either moral or justified as a legal punishment. The same is true concerning the efficacy of rehabilitative programs.

Deterrence also merits special attention because people often conflate determinism with fatalism.[264] The confusion arises from the following faulty logic: "if everything is determined, then law cannot affect people's behavior because they are already destined to engage in whatever behavior they do engage in."[265] This is the view the government's attorney took in the case against Leopold and Loeb, declaring that under Darrow's philosophy, "there ought not to be any law and there ought not to be any enforcement of the law."[266] However, this is simply not the case. Actions are not "destined" to arise, regardless of

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[259] *See* Avinash Singh Bhati & Alex R. Piquero, *Estimating the Impact of Incarceration on Subsequent Offending Trajectories: Deterrent, Criminogenic, or Null Effect?*, 98 J. CRIM. L. & CRIMINOLOGY 207, 207 (2007).

[260] David S. Abrams, *Estimating the Deterrent Effect of Incarceration Using Sentencing Enhancements*, 4 AM. ECON. J. 32, 32 (2012); Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 802–03 (2010).

[261] *See* Paternoster, *supra* note 260, at 801–02; *see also* Abrams, *supra* note 253; Bhati & Piquero, *supra* note 259, at 211.

[262] *See* WRIGHT, *supra* note 258, at 2.

[263] *Id.*

[264] HARRIS, *supra* note 65, at 105.

[265] Cotton, *supra* note 84, at 41.

[266] Howe, *supra* note 198, at 997, 1006.

previous conditions and circumstances. On the contrary, actions arise as a direct result of previous conditions and circumstances.

To help demonstrate the point, imagine the following hypothetical. Imagine that you have been pulled over for speeding (or, if you actually have been pulled over for speeding, reflect on that moment). Were you destined to be pulled over at that moment, regardless of what laws existed at the time? What if there had been a widely known and frequently enforced law that made the penalty for speeding death by guillotine? Would you have still gone over the speed limit? Even if you would have, would everyone else?

There is no "destiny" that transcends causation. This is precisely why we have laws—to encourage people to do things they might not otherwise do in absence of the law, and to deter people from engaging in certain conduct they might otherwise engage in without the law. The law really does affect behavior. "[I]ndividuals do tend to buy less candy when the price rises and steal fewer televisions when the penalty increases."[267] Thus, deterrence (like incapacitation and rehabilitation) is a valid justification for punishment even in the absence of free will.

B. How Much Would Have to Change?

Many believe that something important about our subjectivity would be lost without the conventional notion of free will. Legally, many worry that, without some form of retribution, any alternative efforts to meet a victim's needs would be inadequate. Psychologically, many worry that we would be rendered mere "meat machines" or "meat computers" without free will, and thus much of the magic and beauty of our experience would be unfounded.[268] However, recognizing the true causes of human behavior need not diminish our experiences or irreparably harm our system of punishment.

One reason many find retribution to be a necessary justification for punishment is that the victims of various crimes (and often, the family and friends of the victims) need the psychological satisfaction of observing the punishment of an offender, and that alternatives would not adequately meet this need.[269] This is an interesting point, as most of us have experienced a powerful, if not overwhelming, desire for revenge, whether it be from a real life event or from empathizing with characters from works of fiction.[270] However, this argument is not a justification for retribution. If we implemented punishments due to this concern, we would not be punishing offenders because they *deserved* it; rather,

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[267] Abrams, *supra* note 253, at 916.

[268] *See* Jerry A. Coyne, *Why You Don't Really Have Free Will*, USA TODAY (Jan. 1, 2012), http://usatoday30.usatoday.com/news/opinion/forum/story/2012-01-01/free-will-science-religion/52317624/1; John Horgan, *We Have No Souls*, EDGE, http://www.edge.org/response-detail/10879 (last visited May 19, 2015).

[269] *See generally* Eisenstat, *supra* note 3 (arguing that retribution is required to adequately meet a victim's desire for revenge).

[270] *See supra* Part II.C (showing reactions to Ariel Castro's suicide).

we would be punishing offenders because of the beneficial consequences that result from such punishments (e.g., the emotional and psychological satisfaction of the victims). Thus, such punishments would have a consequentialist justification, not a retributive one.

Nevertheless, this consequentialist justification for punishment is also problematic. Aside from merely establishing a "sham form of retribution," it merely perpetuates the deeper problem; most people do not understand the underlying causes of human behavior, and this misunderstanding leads to unnecessary anguish and bitterness.[271] Victims often desire retribution and revenge because of the illusion of free will. We should not be encouraging or indulging these desires on an institutional level; we should be exposing their fallacious underpinnings. In fact, recognizing the true causes of human behavior and disposing of desires for revenge can be psychologically beneficial. For example, in 2006, when Charles Roberts barricaded himself within an Amish schoolhouse, tied up ten young girls, and systematically shot each one before taking his own life, the community reacted in the most inspiring way.[272] Rather than living with hatred and bitterness from the event, they showed nothing but love and forgiveness for the killer and his family.[273] They even attended the killer's funeral.[274] Notably, Roberts had apparently been "acting out in revenge for something that happened [twenty] years ago."[275] This reveals a striking and instructive contrast: while Roberts had been overwhelmed by anger due to an event that occurred twenty years ago, the community did not spend a single day harboring such caustic thoughts.[276] Which mindset would you rather live with, a mind riddled with hate or one that is at ease?

Another concern many have with the idea that humans lack free will is that such a thesis would force us to abandon many of our natural reactive attitudes (e.g., "regret, resentment, blame, praise, love") and that such an abandonment is utterly unappealing or would entirely strip our lives of meaning.[277] Therefore, many feel that we must continue to live and act as if we have free will, regardless of whether we do in fact have it.[278] There are several ways to address this concern. First, it must be conceded that some of these reactive attitudes

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[271] *See* HARRIS, *supra* note 14, at 58.

[272] Michael Rubinkam, *Family of Amish Schoolhouse Shooter Shares Hopeful Story of Forgiveness, Reconciliation*, PITTSBURGH POST-GAZETTE, Dec. 9, 2013, at A3; Mark Scolforo, *Gunman Kills Girls, Himself at Amish School*, ORLANDO SENTINEL (Fla.), Oct. 3, 2006, at A1.

[273] Rubinkam, *supra* note 272.

[274] *Id.*

[275] Scolforo, *supra* note 272.

[276] Rubinkam, *supra* note 272.

[277] Chiesa, *supra* note 9, at 1439; Saul Smilansky, *Free Will and Moral Responsibility: The Trap, the Appreciation of Agency, and the Bubble*, 16 J. ETHICS 211, 235 (2012). English philosopher P.F. Strawson argued this point in his famous essay *Freedom and Resentment*. *See supra* note 82.

[278] *See* DOYLE, *supra* note 12, at 253; Smilansky, *supra* note 277.

would need to be relinquished.[279] However, attitudes such as resentment and antipathy underlie our desires to blame and condemn others for their conduct. These sentiments only give rise to vitriol analogous to the reactions to Ariel Castro's suicide mentioned earlier.[280] It is hard to see what appreciable loss would arise if we no longer shared these sentiments, and doing so would likely foster a more compassionate society, where we focus on helping and treating others rather than blaming them. Additionally, we would not be rendered insensate without free will. Not all of our emotions and reactive attitudes are dependent upon our viewing others as conscious agents who are able to behave differently. Indeed, emotions such as love and fear would be unaffected by the loss of free will.[281]

Secondly, the realistic goal is not to rid each and every individual of his or her sense of free will.[282] Even those who believe free will is an illusion often develop the urge to blame others for their conduct.[283] Rather, the goal is to create a criminal justice system that transcends the moral failings of the individual. If we cease to recognize retributive justifications for punishment as legitimate, our day-to-day reactive attitudes would be largely unaffected. Noticeable change would only occur within the legal sphere, where we could attempt to avoid outcomes driven by a notion of free will, such as Patty Hearst's conviction. This is something worth striving for, not something to be concerned about.

Our system of criminal justice is no less important in a world without free will. Regardless of whether you freely chose to commit a crime, we still need to know whether it was you who in fact committed the crime, and what risk you pose to others in the future. Our substantive criminal law would not need to undergo substantial changes either. Rather, we would merely alter the way in which we describe much of it. A "voluntary act" would be an act that is accompanied by the felt intention of carrying it out, rather than one that is the result of free choice.[284] We could still distinguish between someone who committed a crime intentionally and someone who did so negligently; we simply would not

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[279] Chiesa, *supra* note 9, at 1439.

[280] *See supra* Part II.C.

[281] *See* Chiesa, *supra* note 9, at 1439–40; *see also* Sam Harris, *Free Will and the Reality of Love* (July 31, 2013), http://www.samharris.org/blog/item/free-will-and-the-reality-of-love.

[282] The theory of evolution has been around for 150 years and is widely accepted in scientific circles, yet almost half of Americans reject it, in favor of the notion that God created man in his present form. Frank Newport, *In U.S., 46% Hold Creationist View of Human Origins*, GALLUP (June 1, 2012), http://www.gallup.com/poll/155003/Hold-Creationist-View-Human-Origins.aspx. In light of this fact, one can hardly imagine a world where the common conception of free will has dissipated.

[283] I have used some fantastically horrible people in my examples (Ariel Castro, Leopold and Loeb, Charles Whitman). As a result, I fear many readers may find the context of these examples as either dismissive of their behavior, or otherwise revealing of a cold and callous attitude towards such events. I would like to make it clear that this is not the case. I simply recognize that it is only by luck that I do not have a similar neurology that would lead me to act similarly. As was once famously said, "There, but for the grace of God, go I."

[284] HARRIS, *supra* note 14, at 12.

view the offenders as more or less blameworthy, but rather as more or less likely to perpetrate future harm. We could recognize that persons who act out of necessity, or under duress, are less of a threat to society without being bogged down by questions of whether the actor had free will or whether his will was overborne. We could acknowledge that there is a continuum of possible mental stability, defined by the stable majority on one end and the classically "insane" on the other, without engaging in some sort of responsibility calculus.[285] We could recognize that those at the "insane" end of the spectrum may pose more of a threat to society, and thus require special attention with regard to punishment. However, our sympathy would go out not only to the "insane," but also to the Leopold and Loeb types, whose genetics have placed them among their ranks.[286]

In fact, our language need not even change. Statements like "I chose," "he decided," and "you should have" are still useful in a world without free will. Saying, "I went to Baskin Robbins and chose chocolate ice cream," simply states that while you were at Baskin Robbins, you understood that there were several different flavors of ice cream, reasons were coming to you that were making certain flavors more appealing than others, and that you ended up selecting chocolate for one reason or another. Although in a deeper, philosophical sense you did not have the capacity to "choose" a different flavor, saying that you chose a certain flavor still accurately reflects your mindset at that time. Saying, "You should have chosen vanilla; that's their best flavor," simply means that you think he would have been happier if the state of the universe had been slightly different in a way that led him to select vanilla, and that perhaps he should do so in the future. It need not imply that you actually had the capacity to bring about the other scenario in the past.

Most concerns about the deleterious effects of a world without free will are exaggerated or confused. A sweeping overhaul of our criminal justice system would not be necessary (or even desirable), and our subjective experience would be no less important or valuable. In fact, recognizing the true causes of human behavior would likely lead to a more compassionate society, where we are no longer encumbered by a desire to see others suffer.

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[285] As long as we operate under the current system, we will be struggling to identify exactly when someone is, and is not, criminally responsible for his actions. This is why defenses will continually arise and be debated, such as the "rotten social background" defense, the "brainwashing" defense, or as previously mentioned, the "affluenza" defense. *See* Kirchmeier, *supra* note 85, at 643. *See generally* Chapman, *supra* note 224. At some point, we must realize that we are chasing a distinction that does not exist.

[286] This is not to say that the classically insane and the Leopold and Loeb types are, and should be treated as, synonymous. The distinction between (1) someone who has no idea what he is actually doing (e.g., he believes he is squeezing a lemon, but he is really strangling someone), and (2) someone who knows exactly what he is actually doing (e.g., the Leopold and Loeb type) may be crucial when it comes to the type of punishment we should implement. However, when it comes to the danger each poses to society, they may both tend to fall on one end of the spectrum.

CONCLUSION

In 1909, Roscoe Pound made clear what many are unwilling to accept today: "[O]ur criminal law is so rooted in theological ideas of free will and moral responsibility and juridical ideas of retribution, and both criminal law and procedure are so thoroughly mechanical, that we by no means make what we should of our [scientific] discoveries."[287] He considered our criminal law to be "the most archaic part of our legal system."[288] Although his words are now over one hundred years old, they are as true today as they were then.

Philosophically, this Note does not suggest that strict determinism is true.[289] Rather, this Note argues that the libertarian notion of free will is false. We simply do not have the ability to control the content or arrival of our thoughts, and thus, there is no sense in which we could have chosen to behave differently in the past. As most people believe that we do have this freedom of will, the notion has largely shaped our criminal law and societal attitude towards punishable behavior. Most significantly, we feel that offenders deserve to be punished when they engage in behavior that is a product of their free will. This feeling is the result of a cognitive illusion, and validating a theory of retribution only perpetuates this confusion by shifting our legal focus from assessing risks to society, to assessing blameworthiness.

Fortunately, a legal recognition that we do not have free will would not require drastic changes to our day-to-day life or to our system of criminal justice. The legal parlance surrounding our substantive criminal law would change in some respects, but a total abolition of the doctrines that may touch upon a notion of free will (e.g., actus reus, mens rea, insanity, duress, necessity, etc.) would be far from necessary. However, retribution as a valid theory of punishment must be forgone. Fortunately, since the common conception of free will fosters our desire to hate and blame others, the long-term consequences of abolishing the theory of retribution would have a salutary effect upon our system of criminal justice and society in general. At some time, we must recognize that our metaphysical notions of free will, blame, and moral responsibility do not make scientific or moral sense—this Note submits that now is as a good a time as any.

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[287] Alschuler, *supra* note 175, at 2–3; Roscoe Pound, *The Principles of Anthropology and Sociology in Their Relation to Criminal Procedure. By Maurice Parmelee, M.A.*, 3 AM. POL. SCI. REV. 281, 283–84 (1909) (book review).

[288] Alschuler, *supra* note 175, at 2; Pound, *supra* note 287, at 284.

[289] *See supra* note 80.