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ARTICLES

A FOOLISH CONSISTENCY: KEEPING DETERMINISM OUT OF THE CRIMINAL LAW

MICHELE COTTON*

I. INTRODUCTION

The criminal law is said to be founded on the idea 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.[1] As a federal circuit court observes, "[t]he whole presupposition of the criminal law is that most people, most of the time, have free will within broad limits."[2] The Supreme Court describes as a "universal and persistent" element of our law the "belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[3] Indeed, "the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems."[4] The Supreme Court has further indicated that the

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* A.B., William & Mary '81, Ph.D., Brandeis '85, J.D., New York University School of Law '89. The author would like to thank Professors Deborah W. Denno, Thomas A. Green, Ronald J. Rychlak, Joseph F. Rychlak, and Kenneth Simons and the Hon. Richard A. Posner for reading and providing thoughtful comments on a draft of this article. The author would also like to thank research assistants Paul Eisenstein and Lindsey O. Worth and for their invaluable assistance, as well as Harvard University's Expository Writing Program for its generous grant funding research assistance and other costs for the article's preparation. The author would also like to thank her colleagues Christopher Bush, Faye Halpern, Charles Henebry, Steve Shoemaker, Cheryl Smith, and Suzanne Young for their helpful comments and suggestions. Any mistakes are of course the author's own.

[1] When courts and legislatures use the words "free will" and "determinism," it is not always clear what they mean by them. However, as this Article shows, they tend to use these terms in their most basic sense, as reflecting whether the defendant could have done other than he did. The nuances and complexities of the various philosophical and legal philosophical conceptions of free will and determinism remain largely beyond the scope of this Article, as they are largely uncontemplated by courts and legislatures.

[2] Smith v. Armontrout, 865 F.2d 1502, 1506 (8th Cir. 1988).

[3] Morissette v. United States, 342 U.S. 246, 250 (1952).

[4] Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937). *See also* Bethea v.

adoption of "a deterministic view of human conduct"—that is, the view that antecedent causes wholly determine behavior and therefore that people are incapable of doing other than they did—would be "inconsistent with the underlying precepts of our criminal justice system."[5]

A substantial body of scholarship has concerned itself with the importance of free will to the theory of the criminal law.[6] Even given the importance of the subject, the quantity of attention is surprising because of the lack of fundamental disagreement among scholars, who overwhelmingly endorse the criminal law's assumption of free will.[7] (Only an ambitious few have been willing to argue that the law's rejection of determinism is in any way problematic.)[8] However, despite such intense academic interest, scholars have paid little attention to the empirical question of how courts and legislatures have actually handled the conflict between free will and determinism when it arises in the law,[9] and none have made that practical concern the subject of focused inquiry. Perhaps many have assumed, from the famous expressions of judicial enthusiasm for free will, that the system has handled the matter straightforwardly. It has not.

As Part II of this Article demonstrates, despite having endorsed free will, courts

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United States, 365 A.2d 64, 83 n.39 (D.C. 1976) (While the deterministic theory of behavior "has some adherents, the notion that a person's conduct is a simple function of extrinsic forces and circumstances over which he has no control is an unacceptable contradiction of the concept of free will, which is the *sine qua non* of our criminal justice system").

[5] United States v. Grayson, 438 U.S. 41, 52 (1978).

[6] Indeed, as one commentator has remarked, "Enough has been written from a philosophical perspective on the relationship between free will and the law that it is not easy to justify yet another such undertaking." Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915 (1995).

[7] *See infra* notes 12 (free will assumption is correct), 13 (free will assumption should be maintained even if determinism is correct, because assumption and present system are compatible with determinism), and 14 (free will assumption is not compatible with determinism, but should be maintained because of social benefits it produces).

[8] *See, e.g.*, Maureen P. Coffey, Note, *The Genetic Defense: Excuse or Explanation*, 35 WM. & MARY L. REV. 353, 399 (1993) ("The model of free will must be reconsidered in light of increasing support for deterministic influences."); John L. Hill, Note, *Freedom, Determinism, and the Externalization of Responsibility in the Law: A Philosophical Analysis*, 76 GEO. L.J. 2045, 2073 (1988) ("In the end, the development of a more enlightened theory of criminal behavior will depend upon a general acceptance of the deterministic framework.").

[9] The limited considerations of practical effect that exist consist of small portions of primarily theoretical works. *See, e.g.*, Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2285-94 (1992) (discussing United States v. Moore, 486 F.2d 1139 (D.C. Cir. 1973) and Powell v. Texas, 392 U.S. 514 (1968)); Rachel J. Littman, *Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will*, 60 ALB. L. REV. 1127, 1151-63 (1997) (presenting overview of defenses that implicate determinism).

and legislatures actually moved to accommodate determinism when it began making incursions into the criminal law in the mid-twentieth century. As a result, by the century's third quarter, the criminal law had accepted a significant amount of deterministic thinking in virtually every one of the areas in which the issue had arisen: the insanity defense, related and analogous defenses, expert witness testimony on mental state, juvenile justice, and sentence mitigation.[10] However, when these accommodations threatened to expand still further and become unmanageable, courts and legislatures retrenched. In the last quarter of the twentieth century and up to the present day, they acted to cleanse the criminal law of deterministic elements. This action sometimes occurred openly, and sometimes it occurred under the pretext of achieving other aims, partly obscuring the scope and relentlessness of the trend. As a consequence of the revision effort, the free will assumption of the criminal law is now, contrary to the sense of some scholars,[11] more securely ensconced (and determinism more thoroughly banished) than at perhaps any time since before 1950.

As Part III explains, the allegiance of courts and legislatures to free will has not necessarily reflected their conviction that it is an accurate description of the cause of human behavior;[12] the initial attraction to deterministic ideas suggests the contrary.

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[10] Exotic evidence and defenses, which are particularly fascinating to scholars, are seldom the concern of courts and legislatures, and so are not considered here. *See, e.g.*, Michael Corrado, *Automatism and the Theory of Action*, 39 EMORY L.J. 1191 (1990) (defense of automatism); Deborah W. Denno, Comment, *Human Biology and Criminal Responsibility: Free Will or Free Ride?*, 137 U. PA. L. REV. 615, 618, 620-22 (1988) (XYY syndrome); Rochelle Cooper Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313, 331 (1992) (hereditary traits as criminal evidence); Steven I. Friedland, *The Criminal Law Implications of the Human Genome Project: Reimagining a Generally Oriented Criminal Justice System*, 86 KY. L.J. 303, 310 (1997-98) (genetic evidence in criminal trials); Marcia Johnson, *Genetic Technology and its Impact on Culpability for Criminal Actions*, 46 CLEV. ST. L. REV. 443 (1998) (same).

[11] *See, e.g.*, Boldt, *supra* note 9, at 2332 ("[Due to the introduction of] new determinist elements into our formal blaming practices .... [t]he ability of the criminal law to perform its institutional role in society, as a consequence, has been placed in jeopardy."); Littman, *supra* note 9, at 1168 ("We currently live in ... a time of externalizing blame and responsibility [in the law]."); Ronald J. Rychlak & Joseph F. Rychlak, *Mental Health Experts on Trial: Free Will and Determinism in the Courtroom*, 100 W. VA. L. REV. 193, 241 (1997) ("Much expert testimony that is routinely accepted in American courts comes from ... experts [who do not believe in free will].").

[12] Some scholars do argue or assume that free will is a correct description of human (and criminal) behavior. *See, e.g.*, Littman, *supra* note 9, at 1168 ("[I]ndividuals are ... rational, free thinkers with strong inner selves and the capacity to exercise free will."); Ronald J. Rychlak & Joseph F. Rychlak, *supra* note 11, at 194 (mental health experts, and courts who accept their testimony, wrongly dismiss free will); *see also* Corrado, *supra* note 10, at 1208 ("Although determinism may well be true, of course, it is also the case that we do not now know that it is true. The incompatibilist, therefore,

However, fear soon arose that any acceptance of determinism could ultimately lead to the complete displacement of free will in the criminal law. In contrast to the compatibilists,[13] who believe that people can be considered free and held morally responsible even if it is true that all actions are causally determined, courts and legislatures have tended to see any acceptance of determinism as irreconcilable with the free will assumption and as requiring fundamental systemic revision, if not the need for a different system entirely. They have agreed with the smaller group of legal scholars who see maintenance of the free will assumption as necessary to the criminal law because of the important social benefits it is perceived as producing.[14]

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is not presently required by what he knows to give up his belief that people are responsible.").

[13] *See, e.g.*, Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1622 (1992) ("All forms of human evil demand our moral denunciation and we deserve to be protected from those who do evil to us. Criminal punishment can be justified as a community act of self-defense that also expresses our moral condemnation of what the criminal has done."); Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 975 (1992) ("[R]esponsibility . . . is validated not by the reality of the choice (and hence the refutation of determinism), but by the reality of one's identification with it."); Denno, *supra* note 10, at 618, 660-63 (argues for a "degree determinism" that would accept free will co-existing with "causal agents"); Friedland, *supra* note 10, at 365 (free will and moral blameworthiness should be embraced, even if deterministic genetic evidence of behavior is accepted); Andrew E. Lelling, Comment, *Eliminative Materialism, Neuroscience, and the Criminal Law*, 141 U. PA. L. REV. 1471, 1530-39 (1993) (describes how existing legal concepts may be redescribed without substantial change even if determinism is correct); Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 720 (1992) ("Regardless of the arguments that can be mounted against it, responsibility for choice is fundamental to the human condition; we cannot do without it."); *see also* Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091 (1985) (surveying many compatibilist viewpoints by which the truth of determinism is not seen as a problem for the criminal law, *id.* at 1114-28, and arguing for a theory of excuse based on "the actor's practical reasoning capacities," *id.* at 1148-49).

[14] *See, e.g.*, SANFORD H. KADISH, BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 77 (1987) ("Much of our commitment to democratic values, to human dignity and self-determination, to the value of the individual, turns on the pivot of a view of man as a responsible agent entitled to be praised or blamed depending upon his free choice of conduct."); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 74-75 (1968) ("The idea of free will in relation to conduct is not, in the legal system, a statement of fact, but rather a value preference having very little do with the metaphysics of determinism and free will . . . . Very simply, the law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were."); Stephen J. Morse, *Brain and Blame*, 84 GEO. L.J. 527, 532 (1996) ("[R]esponsibility and excuse and praise and blame . . . enrich our lives and encourage human flourishing." (footnote omitted)). That Professor Morse is not a compatibilist but a pragmatist is suggested by his remark that "[i]f it is true that an agent really could not help or control herself and was not responsible for the loss of control, blame and punishment are not

This pragmatic acceptance is based on the belief that even though free will may not exist, people behave better if they think it does. Such concern for practical effects motivated the shift away from a seemingly uncontainable determinism.

Part IV of this Article concludes that courts and legislatures are wrong in believing that determinism must be excluded from the criminal law at all costs. Rather, the elimination of deterministic elements has actually reduced the criminal law's coherence and effectiveness. Moreover, the present, almost total rejection of deterministic thinking artificially impedes evolution and innovation in the criminal law. This Article therefore argues that some accommodation of determinism may therefore be a more practical move. However, this is not a brief for compatibilism, which despite scholarly acclamation has not appealed to courts and legislatures, and perhaps rightly so.[15] Rather, it is an argument for holding within the law a mix of contradictory causal accounts in tension with one another. Fear of the threat posed by determinism has driven the law into a foolish consistency that is more troubling and more problematic than the inconsistency from which it escaped. In the present state of knowledge and legal development, courts and legislatures should instead prefer an intelligent inconsistency.

II. DETERMINISM VERSUS FREE WILL IN THE PRACTICAL OPERATION OF LAW

A. The Law's Reaction to the Deterministic Test of Insanity Adopted in Durham

The insanity defense has traditionally been understood as vindicating the free will assumption, and so it might seem a surprising venue for the intrusion of deterministic thinking into the criminal law. Professor Alan Stone has described the insanity defense as "the exception that 'proves' the rule of free will."[16] Judge Leventhal observes that "[t]he concept of lack of 'free will' is both the root of origin of the insanity defense and the line of its growth."[17] Accordingly, insanity defense tests have often explicitly incorporated concern for the exercise of free will in

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justified on any theory of morality and criminal punishment." Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1587-88 (1994).

[15] This Article does not propose to enter into this debate, but given the diversity of approaches compatibilists have taken, *see supra* note 13, which suggests a lack of consensus about important features of the concept, it is rational for courts and legislatures to sidestep a theory that also lacks an immediately apprehensible logic.

[16] Alan Stone, *The Insanity Defense on Trial*, 33 HARV. L. SCH. BULL., Fall 1982, at 15, 21. Blackstone observed that lunatics suffer from a "deficiency in will." WILLIAM BLACKSTONE, 4 COMMENTARIES *24 (1898). Such defects of will, he concludes, prevent the imposition of guilt: "An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the act in question, being the only thing that renders human actions either praiseworthy or culpable." *Id.* at *20-21.

[17] United States v. Brawner, 471 F.2d 969, 986 (D.C. Cir. 1972) (en banc) (footnote omitted).

their formulations.[18] Nonetheless, the insanity defense has been a particularly active site of deterministic invasions.

A pointed example is the infamous *Durham* test, adopted in 1954 by the D.C. Circuit Court of Appeals under the leadership of Judge Bazelon. Under the *Durham* rule, "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[19] Instead of talking about a mental disease[20] that somehow *interferes with* the defendant's capacity to exercise free will, as most insanity defense tests did, *Durham* proposed that a mental disease could actually *produce* the defendant's act.[21] The *Durham* rule did not even presume that there was a capacity for free will that mental disease might interfere with; it only presumed that mental disease might be a determinant of criminal behavior.[22]

Judge Bazelon's august colleague, future Chief Justice Burger, decried the deterministic quality of the *Durham* rule. He remarked that *Durham* "assumed, without discussion, that mental disease can 'produce' or cause criminal acts."[23] The resulting test, he argued, "operated to reject the historic basis of criminal responsibility and to substitute something resembling the 'determinist' thesis that man's conduct is simply a manifestation of irresistible psychological forces . . . ."[24] Although Judge Bazelon had described the test in *Durham* as consistent with the criminal law's free will tradition,[25] Judge Burger derided this claim as mere "lip

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[18] For example, the American Law Institute's Model Penal Code test, adopted by many states, declares in part that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity . . . to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01(1) (1962). Inability to conform one's conduct can be seen as another way of saying lacking in free will. The Explanatory Note to the section remarks that "[t]his part of the standard explicitly reaches volitional capacities." MODEL PENAL CODE § 4.01 explanatory note (1985).

[19] Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954) (footnote omitted).

[20] The word "disease," used by psychiatry at the time of *Durham*, has since been replaced by the term "disorder." However, for convenience's sake, "disease" is used consistently throughout this Article to refer to either "disease" or "disorder."

[21] *Durham*, 214 F.2d at 875.

[22] *Id.* at 875-76.

[23] Blocker v. United States, 288 F.2d 853, 862 (D.C. Cir. 1961) (Burger, J., concurring).

[24] *Id.* at 867-68 (citation and footnote omitted). Judge Burger believed the test had a disproportionate effect in combination with the circuit's low burden of production for defendants and high shifting burden for the prosecution, and a directed verdict rule that applied where all the expert witnesses concurred on the defendant's insanity. *Id.*

[25] *Durham*, 214 F.2d at 876 (footnote omitted) observed:

> The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called *mens rea*), commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect as those terms are used herein, moral blame shall not attach, and hence there

service"[26] and noted that Judge Bazelon had elsewhere acknowledged the influence of determinism on the test.[27] Judge Burger concluded that "all reference to man's capacity to make choices in regulating conduct or any connection between the power to make choices and criminal responsibility was carefully eliminated" from the *Durham* formula.[28] Judge Burger's attack may exaggerate the extent to which the *Durham* rule is irreconcilable with the free will assumption, but its formulation provocatively adopted the deterministic logic of direct causation between mental disease and behavior.

The deterministic flavor of the *Durham* "product" test reflected its genesis; it was specifically inspired by psychiatric[29] criticisms of the insanity defense tests generally in use at the time.[30] Because the *Durham* rule more closely adhered to

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will not be criminal responsibility. The rule we state in this opinion is designed to meet these requirements.

[26] *Blocker*, 288 F.2d at 867 (Burger, J., concurring).

[27] Burger quotes Bazelon explaining his thinking in crafting the test:

> Evil, of course, can only be punished or forgiven. But illness is supposed to be ameliorated or cured. Thus the name we put to our failures makes a difference. We all tend to believe in free will when we entertain hopes for the future, but switch to determinism when recalling our past failures. I suggest we extend the same consideration to the failures of others.

Id. at 867 (emphasis omitted) (quoting Bazelon, J., *The Awesome Decision*, SATURDAY EVENING POST, Jan. 23, 1960, at 56).

[28] *Id.* at 865.

[29] "Psychiatry" is used throughout this Article to also include related mental health disciplines of psychology, clinical sociology, psychiatric social work, and so forth, and "psychiatrist" likewise refers not only to psychiatrists, but also to other mental health practitioners.

[30] In most circuits, as in the D.C. Circuit Court of Appeals, the prevailing rule was a combination of the *M'Naghten* test and the "irresistible impulse" test. Under the *M'Naghten* rule, "[t]o establish a defense on the ground of insanity it must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it that he did not know he was doing what was wrong." Daniel M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843). Most circuits, including the D.C. Circuit Court of Appeals, added a second prong to the *M'Naghten* test that permitted acquittal based on the defendant's inability to exercise will. *See, e.g.*, Smith v. United States, 36 F.2d 548, 549 (D.C. Cir. 1929):

> [T]he accused must be capable, not only of distinguishing between right and wrong, but... [it must also be the case that] he was not impelled to do the act by an irresistible impulse, which means before it will justify a verdict of acquittal that his reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong.

The *Durham* rule was based on psychiatric criticisms of both prongs. As for the prong based on the *M'Naghten* rule, *Durham* observed that

psychiatry's deterministic description of human behavior,[31] it unsurprisingly exonerated more defendants than other rules. As a psychiatrist whom Judge Burger quoted said, "[t]here are very few people who could not qualify [as insane] under this test . . . ."[32] While that is of course an overstatement, *Durham* did result in a 36-fold increase in acquittals on the grounds of insanity; the jurisdiction found one in seven defendants insane.[33] Professor Stone's idea of insanity as an exception to prove the rule of free will seemed on the verge of becoming an exception to swallow the rule.

The adoption of the *Durham* test showed that the determinism espoused by psychiatry was influencing judges. Not only had the *Durham* panel been persuaded, but a majority of the D.C. Circuit Court of Appeals rejected a petition to rehear the case en banc,[34] and until 18 years after its adoption[35] regularly declined to overrule it. However, it was also true that the *Durham* test began to be watered down in important respects soon after it was adopted,[36] probably out of alarm over

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> [t]he science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong test, which considers knowledge or reason alone, is therefore an inadequate guide to mental responsibility for criminal behavior.

214 F.2d at 871. *Durham* also criticized the irresistible impulse test because it limited its reach to defendants who had been seized by a sudden psychosis and did not account for those mentally ill persons who may have planned their acts through a long delusional phase of mental illness, but nonetheless similarly lacked self-control. *Id.* at 873.

[31] Psychiatry is generally a deterministic discipline, explaining behavior as the result of genes, upbringing, environmental conditions, and so forth. *See infra* note 74.

[32] *Blocker*, 288 F.2d at 859 (Burger, J., concurring) (quoting Charles Savage, *Discussion*, 111 AM. J. OF PSYCHIATRY 295, 296 (1959)).

[33] The percentage of insanity verdicts in 1954, the year that *Durham* was decided, was 0.4 percent (which was near the national average). The rate of successful insanity defenses increased steadily each year after *Durham*, peaking in 1961, at 14.4 percent. Thomas Maeder, *Crime and Madness: The Origins and Evolution of the Insanity Defense* 92-93 (Harper & Row 1985) (citing Brief of William H. Dempsey, Jr. as Amicus Curiae, Appendix A, *Brawner* 471 F.2d 969 (D.C. Cir. 1972). After modifications were made to the *Durham* rule in 1962 by the *McDonald* case, *see infra* note 36, the success rate was dramatically reduced, down to about 2 percent of all cases. *See Brawner*, 471 F.2d at 989.

[34] *Durham*, 214 F.2d at 862.

[35] *Brawner*, 471 F.2d 969.

[36] *See* Carter v. United States, 252 F.2d 608 (D.C. Cir. 1957) (defining the "product" element of the test more narrowly, as signifying not merely that mental illness played a role in causing the crime but was a necessary cause—the crime would not have occurred "but for" the effect of the mental disease); McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962) (en banc) (narrowing the definition of "mental disease or defect" to mean only one which "*substantially* affects mental or emotional processes and *substantially* impairs behavior controls") (emphasis added).

increased acquittal rates. And although the *Durham* formula was examined and considered by many other jurisdictions, virtually all of them rejected it.[37] Eventually, relying heavily on Judge Burger's critique, the D.C. Circuit Court of Appeals overruled *Durham* and adopted a test that adhered more closely to the old, familiar formulas.[38]

The *Durham* test was in some sense a fluke, the hobbyhorse of a federal circuit with an unusual willingness to innovate. However, it also represented the apex of a larger re-examination of the insanity defense that courts throughout the country made in light of growing interest in deterministic psychiatric descriptions of criminal behavior, leading to a broadening of the insanity defense in many jurisdictions.[39] Interchange between law and psychiatry reached a peak, and the *Durham* rule reflected criminal law's initial receptivity for the deterministic conceptions of psychiatry. Such receptivity was followed, however, by the pattern of reconsideration and retreat seen in the criminal law wherever determinism gains ground. Today, for better or worse, criminal law has moved far away from psychiatry and other sciences and social sciences concerned with human behavior.[40]

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[37] Judge Burger remarked that "[e]very court which considered *Durham* has rejected it." *Blocker*, 288 F.2d at 866 n.22 (citations omitted).

[38] *Brawner*, 471 F.2d 969 (adopting Model Penal Code test quoted *infra* note 41)

[39] As the court observed in *State v. Johnson*,

> The most significant break in the century-old stranglehold of *M'Naghten* came in 1954 when the Court of Appeals for the District of Columbia declared that, 'an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.' . . . *Durham* generated voluminous commentary and made a major contribution in recasting the law of criminal responsibility.

399 A.2d 469, 474 (R.I. 1979). *See also* Maeder, *supra* note 33, at 95-96 ("The [*Durham*] experiment had admittedly failed, though the very magnitude of its failure made it a spectacular success, since the controversies over *Durham* and the interest it sparked in both legal and psychiatric circles caused more studies to be made, more papers to be written, and more law to be refashioned than had been done in the preceding century.")

[40] *See, e.g.*, 1 DAVID L. FAIGMAN, DAVID H. KAYE, MICHAEL J. SAKS, JOSEPH SANDERS, MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 236 (§ 6-1.5) (1997), which observes regarding the current state of the insanity defense:

> Perhaps the principal continuing defect is that most law reforms in this area proceed blithely ignorant of any sophisticated understanding of modern psychology.... [P]erpetuating the current gulf between the state of the art of psychological knowledge and the practice of law will only perpetuate the current incoherent state of legal doctrine. Only through the integration of ideas, values and knowledge can the fields of law and psychology begin to impose rationality on insanity doctrine. For now, insanity doctrine is surely irrational, and perhaps even insane.

B. The Law's Response to Psychiatric Classification of Psychopathy as a Mental Disease

The term "mental disease" can be found in most insanity defense tests, which indicates the attraction of those in the criminal law to the psychiatric, deterministic understanding of behavior.[41] The insanity defense could have instead been based solely on the defendant's ability to understand his act and exercise his will, as Judge Burger recommended,[42] and omitted any reference in the test to the medical concept of mental disease. It is true that the requirement that the defendant establish the presence of a mental disease bolstered the free will assumption by limiting its exceptions. However, by incorporating the disease term in its tests, the law endorsed the deterministic idea that mental disease could play a causal role in the individual's behavior, while at the same time made itself dependent upon a deterministic discipline to identify those whose behavior had been thus affected.

The full extent of the impact of the use of the disease term of the test became clear when psychiatry decided to define chronic criminal offending as pathological. In 1952, the American Psychological Association (APA) classified psychopathy[43] (now known as "antisocial personality disorder" and previously as "sociopathy") as a mental disease.[44] This definition clashed with law's conception of mental disease as a narrow and remote cause of criminal behavior, and thus provoked criticism from the law. Judge Burger complained that this "change in nomenclature . . . was without any scientific basis, so far as we have any record or information."[45] He further insisted that "[t]he medical literature suggests that a large number, perhaps even a majority of psychiatrists do not consider

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[41] *See e.g.*, the widely adopted Model Penal Code test: "A person is not responsible for criminal conduct if at the time of such conduct as a result of *mental disease* or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE, § 4.01(1) (1962) (emphasis added).

[42] Judge Burger proposed the following as the best test:

> The defendant is not to be found guilty as charged unless it is established beyond a reasonable doubt that when he committed the act, *first*, that he understood and appreciated that the act was a violation of law, and *second*, that he had the capacity to exercise his will and to choose not to do it. If, because of some abnormal mental condition, either of these elements is lacking, he cannot be found guilty.

Blocker, 288 F.2d at 871 (footnote omitted). He explained that "[u]nder this form of test or rule there is no particular need to exclude a medical diagnosis if a proper foundation is laid. However, the need to produce such evidence is lessened since the question is whether a medically recognized abnormal mental condition has eliminated the defendant's capacity to understand and to control his acts, rather than whether he has a specific 'disease.'" *Id.* at 871 n.31.

[43] For convenience's sake, the word "psychopathy," rather than the current terminology, is used throughout to refer to this condition.

[44] *E.g., Blocker*, 288 F.2d at 860 n.11.

[45] *Id.* at 860 (footnote omitted).

'psychopathic personality disturbance' a mental disease,"[46] although he did not provide sources to support this assertion, which seems belied by the professional association's own action.

The problem, from the law's perspective, was that most offenders could claim they suffered from psychopathy and use it as the basis for an insanity defense as a result of the APA classification. The risk is evidenced by a later death penalty case before the Supreme Court in which a psychiatrist testified, to Judge Burger's dismay, "that 91% 'of your criminal element' would test as sociopathic or antisocial."[47] The possibility that nine out of ten criminals suffer from psychopathy, a mental disease in which criminal acts are essentially symptoms, imperils the very idea that criminals in general have free will and deserve their punishment. Judge Burger added, moreover, that the psychiatrist's "characterization of [the defendant] as a 'sociopath' may connote *little more than* that he is egocentric, concerned only with his own desires and unremorseful, has a propensity for criminal conduct, and is unlikely to respond well to conventional psychiatric treatment . . . ."[48] The law assumes that criminal behavior reflects a viciousness and callousness that demands condemnation and punishment, not understanding and treatment. As one court observed, "Trite as it may sound to some, the law must distinguish between mental disease and character deformity."[49]

In response to psychiatry's reclassification of psychopathy, the D.C. Circuit Court of Appeals did something quite remarkable. It adopted a *legal* definition of mental disease, as "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls."[50] The acknowledged purpose of this move was to prevent individuals with psychopathy from having access to the insanity defense.[51] Similarly, Congress adopted a requirement for federal jurisdictions that a qualifying mental disease had to be "severe," and indicated that psychopathy was one of the mental diseases barred by this requirement.[52] The American Law Institute (ALI) took the direct approach and

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[46] *Id.* at 860 n.11.

[47] Eddings v. Oklahoma, 455 U.S. 104 (1981). Judge Burger argued that the logic of psychiatrists was circular:

> Normal people, they seem to reason, do not break the law, hence law breakers are not normal. They are "insane" not by *medical* but by *social* standards. They are "insane" because they break the law and they break the law because they are "insane"! This peculiar circular logic, carried full circle, would if accepted by lay jurors require virtually every defendant to be acquitted.

Campbell v. United States, 307 F.2d 597, 609 n.10 (D.C. Cir. 1962) (Burger, J. dissenting).

[48] *Eddings*, 455 U.S. at 126 n.8 (emphasis added) (citations omitted).

[49] State v. Sikora, 210 A.2d 193, 202 (N.J. 1965).

[50] McDonald v. U.S., 312 F.2d 847, 851 (D.C. Cir. 1962).

[51] United States v. Brawner, 471 F.2d 969, 993-94 (D.C. Cir. 1972) (en banc) (this rule guards against problems arising from "an expert's classification that reflects only a conception defining all criminality as reflective of mental illness").

[52] 18 U.S.C. § 17(a) (1984) (*see* quotation *infra* note 68); S. REP. NO. 98-473, at 229

simply excepted psychopathy from inclusion within the term "mental disease" in its Model Penal Code insanity defense test. The exception, adopted by most states,[53] provided that "[t]he terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."[54] This provision was explicitly "designed to exclude from the concept of 'mental disease or defect' the case of so-called 'psychopathic personality.'"[55]

The drafters of the Model Penal Code claimed a substantive basis for this distinction, observing that psychopathy "is a statistical abnormality; that is to say, the psychopath differs from a normal person only quantitatively or in degree, not qualitatively; and the diagnosis of psychopathic personality does not carry with it any explanation of the causes of the abnormality."[56] However, this theory does not provide a basis for distinguishing between psychopathy and other mental diseases accepted under the law as the basis for an insanity defense. It could be said that the paranoid personality is an extreme version of ordinary caution, dissociative reaction of normal aversion to unsettling experiences, bipolar disorder of the more usual ups and downs of mood. These mental diseases also would seem to differ "in degree," not "qualitatively," from normalcy.[57]

Further, although the ALI insisted that "the diagnosis of psychopathic personality does not carry with it any explanation of the causes of the abnormality,"[58] that is not necessarily the case. During the time of the drafting of the Model Penal Code exception, a psychiatrist stated that "[a]n increasing preponderance of evidence suggests that [the psychopath] is made, not born—that his attitudes and distortions *are the result of conditioning relationships*."[59] Furthermore, regarding the Code's exception for psychopathy, he added that the "reasons for such exclusion appear hardly tenable in the light of logic or psychiatric

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(1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3411 ("The concept of severity was added to emphasize that nonpsychotic behavior disorders or neuroses such as... a pattern of 'antisocial tendencies' do not constitute a defense").

[53] *See* People v. Martin, 170 Cal. Rptr. 840, 842 n.2. (Cal. Ct. App. 1981). The federal jurisdictions that had adopted the ALI rule replaced it in 1984 with the Insanity Defense Reform Act (IDRA). *See infra* notes 67-68.

[54] MODEL PENAL CODE § 4.01(2) (1962).

[55] MODEL PENAL CODE § 4.01 comment (Tentative Draft No. 4 1955).

[56] *Id.* (quoting Royal Commission on Capital Punishment 1949-1953 Report 79 (1953)).

[57] *See, e.g.*, GARDNER MURPHY, AN OUTLINE OF ABNORMAL PSYCHOLOGY (1929), *cited in* Roth v. Goldman, 172 F.2d 788, 792 n.17 (2d Cir. 1949) (per curiam) ("The psychiatrist and psychologist fail to find any sharp distinction between... apparently abnormal traits, on the one hand, and similar, though less marked, traits in normal people. The psychoneurotic and insane are, so to speak, 'more so.'").

[58] MODEL PENAL CODE § 4.01 cmt. 6 (Tentative Draft No. 4, 1955).

[59] Harry L. Kozol, *The Psychopath Before the Law*, MASS. L.Q., July 1959, 106 at 108 (emphasis added) (arguing that Psychiatry has accumulated evidence of inconsistent and erratic parental discipline as a major cause of psychopathy). *See, e.g.*, ROBERT G. MEYER, ABNORMAL BEHAVIOR AND THE CRIMINAL JUSTICE SYSTEM 27 (1992) (describing styles of parenting in the background of antisocial personalities).

authority."[60]

A revised Comment to the Code later remarked that "[s]ome critics have regarded this [exception] as a presumptuous legal intervention in the realm of psychiatric theory but there are conceptions of psychopathy and sociopathy as forms of mental illness that were thought to warrant caution of this kind."[61] The revised Comment gives no explanation for what conceptions seemed to "warrant caution," or why the exception should not be seen, as its critics claimed, as an exercise of law beyond its expertise.[62]

Although not explained as such, the psychopathy exception in the Model Penal Code appears to have been another attempt to stem the influx of psychiatric determinism into the criminal law. Courts adopting the Model Penal Code rule did so because they feared the extension of the insanity defense to virtually all criminal behavior. In approving the exception, Judge Leventhal of the D.C. Circuit Court of Appeals warned of "the danger of misunderstanding and injustice that might arise, say, from an expert's classification that reflects only a conception defining *all criminality* as reflective of mental illness."[63] A California court observed that declining to adopt the exception would "open the floodgates since most of our criminal recidivists fit the pattern."[64] In other words, the exception for psychopathy reflects concerns about the scope of the threat posed by psychiatric determinism, not medical distinctions.

The criminal law accepted the deterministic idea that sometimes criminal behavior can best be explained as the result of mental disease. On that theory, criminal law incorporated the medical definition of mental disease into the insanity defense test.[65] However, to preserve the law's free will orientation, mental disease needed to be rare among criminals. On the other hand, psychiatry suggested that mental disease might well be coextensive with criminal offending. When it became clear what the window of mental disease admitted into the insanity defense test, the law closed it.

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[60] Kozol, *supra* note 59, at 116.

[61] MODEL PENAL CODE § 4.01 cmt. 4 at 174 (1962), *supra* note 18, at 174 (footnote listing comments omitted).

[62] It should be noted that although the APA did not change its classification of psychopathy, it acquiesced (however reluctantly) in 1983 to the idea that psychopaths "should, *at least for heuristic reasons*, be held accountable for their behavior" (emphasis added). *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 685 (1983).

[63] United States v. Brawner, 471 F.2d 969, 993-94 (D.C. Cir. 1972) (en banc) (footnote omitted) (emphasis added). However, the Model Penal Code Rule was adopted as a rule to be applied by judges, not as an instruction for juries. *Id.* at 994. *See also* Eddings v. Oklahoma, 455 U.S. 104 (1981) (stating that if jurors accepted psychiatrists' circular logic, nearly all defendants would be acquitted).

[64] People v. Martin, 114 Cal. App. 3d 739, 745 (Cal. Ct. App. 1981).

[65] *See generally* MODEL PENAL CODE § 4.01 cmt.1 at 164-65, cmt. 3 at 168-74 (1985); *see also, e.g.*, Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954).

C. *Killing Free Will to Save It from Determinism: Hinckley, Etc.*

As a means of heading off determinism, courts and legislatures have at times gone so far as to remove any reference to *free will* from the insanity defense test. This behavior may seem perverse if the insane are, in the eyes of the law, the few who are unfree.[66] In practice, however, explicit reference to free will in the test goaded defense lawyers into supplying evidence and theories that supported the idea of a lack of free will on the part of the defendant. As more defendants introduced such evidence and theories, the challenges to free will mounted, and it evidently became strategic for courts and legislatures to eliminate will from the test in order to stem the onslaught of deterministic thinking it occasioned.

Such "killing free will to save it" occurred in the revision of the defense in certain jurisdictions after John Hinckley's acquittal, on the ground of insanity, of attempting to assassinate President Reagan.[67] The resulting reforms, including the law that Congress passed, removed from the typical test the so-called volitional prong that provided for a defense of insanity for individuals who could not exercise will and control their conduct. This revision left only the cognitive prong, the part of the test based on the defendant's ability to understand his act and tell right from wrong.[68] Presumably because deterministic evidence regarding the defendant's ability to control his conduct occasionally persuaded juries to acquit defendants like Hinckley, the solution was to remove the source of the provocation.

Evidence suggests that in adopting its truncated definition of insanity in section 17 of the 1984 Insanity Defense Reform Act (IDRA), Congress actually had the specific goal of thwarting the impact of deterministic thinking. The legislative history regarding the volitional prong notes that "[c]onceptually, there is some appeal to a defense predicated on lack of power to avoid criminal conduct."[69] The history then expresses concern about the kind of evidence that this consideration permits: "A strong criticism of the control test, however, is associated with a

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[66] *See* MODEL PENAL CODE § 4.01(1) (1962); *Brawner*, 471 F.2d at 986 (footnote omitted); *see also supra* note 16.

[67] *See* Insanity Defense Reform Act, 18 U.S.C. § 17 (2000); in the states, *see, e.g.*, ALA. CODE § 13A-3-1 (1994); ALASKA STAT. § 12.47.010 (2004); TENN. CODE ANN. § 39-11-501 (2003). Alaska also has the possibility of a "guilty but mentally ill" verdict. ALASKA STAT. § 12.47.030.

[68] Section 17 of the Insanity Defense Reform Act reads in part:

> (a) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

18 U.S.C. § 17. The wording in the provisions adopted in the states is similar. *See* ALA. CODE § 13A-3-1 (1975); ALASKA STAT. § 12.47.010 (1962); TENN. CODE ANN. § 39-11-501 (2003).

[69] S. REP. NO. 98-473, at 226 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3408.

determinism which seems dominant in the thinking of many expert witnesses."[70] The exception could then swallow the rule: "Such a view is consistent with a conclusion that *all* criminal conduct is evidence of lack of power to conform behavior to the requirements of law."[71] Rather than a principled argument that the volitional prong somehow fails to comport with the law's understanding of criminal guilt, the argument against the volitional prong is a procedural one—that it provides the occasion for inconvenient testimony.

Some courts evidently felt uneasy with the nakedness of this motivation and claimed that the change reflected the desires of *psychiatrists*. The Fifth Circuit Court of Appeals removed the volitional prong from its own insanity defense test even before the passage of the IDRA; its purported reasoning for the revision was that the medical community did not support a volitional prong.[72] Even after Congress had passed the Act and declared its anti-deterministic motives, the Tenth Circuit Court of Appeals nevertheless concluded "Congress chose to eliminate the volitional prong of the insanity defense because of virtually unanimous agreement amongst practitioners that there was no scientifically valid way of assessing volitional impairment."[73]

It is true that the APA favored removal of the volitional prong, although it merely concluded that "[m]any psychiatrists . . . believe that psychiatric information relevant to determining whether a defendant understood the nature of his act, and whether he appreciated its wrongfulness, is more reliable and has a stronger scientific basis than, for example, does psychiatric information relevant to whether the defendant was able to control his behavior."[74] However, the mere fact that *psychiatrists* could not give opinions on the exercise of will does not mean that the *law* would not be concerned with it.[75] The question of the exercise of will

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[70] *Id.*

[71] *Id.*

[72] United States v. Lyons, 731 F.2d 243, 248 (5th Cir. 1984) ("[W]e conclude that the volitional prong of the insanity defense—a lack of capacity to conform one's conduct to the requirements of law—does not comport with current medical and scientific knowledge, which has retreated from its earlier, sanguine expectations.").

[73] United States v. Denny-Shaffer, 2 F.3d 999, 1016 n.19 (10th Cir. 1993) (citing S. REP. NO. 98-473, at 226-29 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3408-11). *See also Lyons*, 731 F.2d at 248.

[74] S. REP. NO. 98-473, at 228 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3410 (citing *American Psychiatric Association Statement on the Insanity Defense*, *supra* note 62, at 685). The statement also remarks that: "[p]sychiatry is a deterministic discipline that views all human behavior as, to a good extent, 'caused.' The concept of volition is the subject of some disagreement among psychiatrists. Many psychiatrists therefore believe that psychiatric testimony (particularly that of a conclusory nature) about volition is more likely to produce confusion for jurors than is psychiatric testimony relevant to a defendant's appreciation or understanding." *American Psychiatric Association Statement on the Insanity Defense*, *supra* note 62, at 685.

[75] Thus it is understandable that a judge in a state abolishing the insanity defense, *see* UTAH CODE ANN. § 76-2-305(1) (2003), saw the reformers as having adopted determinism: "It is odd, indeed, that the Legislature and a majority of this Court would

was ultimately one for the jury, not the psychiatrist. Indeed, courts have long insisted that the insanity defense is not a psychiatric concept, but a legal one, and that it need not comport with psychiatric views.[76]

The rationale given by those states that used only a cognitive test for insanity also suggests that the real goal here was not accommodating the preferences of psychiatrists, but eliminating determinism. Such states, which already had a test like the one adopted in other jurisdictions as a reform, often specifically expressed a desire to avoid legitimizing determinism by adding a volitional prong.[77] Tellingly, this resistance preceded public attention to psychiatrists' doubts about their competence to testify on the volitional prong.

Federal courts had also previously expressed suspicion of the determinism occasioned by the volitional prong, likewise indicating the real motivation behind the law's alteration. The Fourth Circuit Court of Appeals described courts and legislatures as feeling discomfort about the volitional prong specifically because these institutions associated the volitional prong with questions about determinism.[78] Judge Cabranes argued in a district court case for an insanity defense test without any volitional element.[79] He remarked that although the

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accept the deterministic theory of human nature that forms the basis for abolishing the insanity defense." State v. Herrera, 895 P.2d 359, 375 (Utah 1995) (Stewart, J., dissenting).

[76] *See, e.g.*, Holloway v. United States, 148 F.2d 665, 667 (1945) ("[R]econciliation between the medical tests of insanity and the moral tests of criminal responsibility is impossible . . . [because their] purposes are different . . . ."); Blocker v. United States, 288 F.2d 853, 866 (1961) (Burger, J., concurring) ("[W]e say that the standard of criminal responsibility is a legal rather than a medical or scientific problem . . . . As such we may appropriately use scientific aids in the application of the standard, but the standard itself is the law's expression of the collective morality."); *Id.* at 868 ("Fixing standards of criminal responsibility is a legal not a medical problem and if we adopt a test based, as it should be, on legal concepts which grow from our traditional ethical and moral standards, we need not be concerned about reconciling the two.").

[77] *See, e.g.*, Cole v. State, 128 A.2d 437, 439 (Md. 1957) ("A modification of the existing rule to relieve an accused of the criminal consequences of his acts . . . would . . . remove responsibility for a crime where there is some element of determinism in the case . . . ."); Commonwealth v. Weinstein, 451 A.2d 1344, 1349 (Pa. 1982) ("The concept of irresistible impulse . . . is grounded in determinism. It denies choice. For this reason, it is an alternate test of sanity in those jurisdictions, not including Pennsylvania, which accept it.").

[78] The court in *United States v. Gould* remarked: "Though a thoroughgoing philosophical determinism would presumably hold cognition and volition to be equally 'determined' and human responsibility equally absent as to each, street learning is clearly more ready to find the will than the cognition determined by 'uncontrollable' forces. Hence, presumably, the more frequent reliance by criminal defendants on the volitional prong. *Hence also, presumably, the basis for recent judicial and congressional uneasiness specifically withthe* [sic] *volitional prong.*" United States v. Gould, 741 F.2d 45, 48 n.1 (4th Cir. 1984) (emphasis added).

[79] United States v. Torniero, 570 F. Supp. 721, 729 (D. Conn. 1983).

"notion is pervasive in the legal literature" that "the behavior of the insane person is caused by forces other than that person's will," courts should abandon this idea because it is "fraught with difficulties."[80] Like Congress, he worried that the deterministic understanding of the insane defendant's behavior could logically apply to "any defendant," based on "the scientific view . . . that all events, including human behavior, are caused by prior events or circumstances."[81] His assertion therefore proposes that the insanity defense be based on whether "the barrier of mental disease or defect interrupts the possibility of the jury's comprehension" of the defendant's act.[82] The question is then not whether the defendant's will is impaired, but whether the jury finds the defendant's behavior so odd as to be incomprehensible. Uneasiness among courts over its invitation to determinism thus prefigured Congress's removal of the volitional prong.

Given the long tradition of free will in the law, including the Supreme Court's insistence upon its importance,[83] one would expect that the "free-will-free" formulations of the insanity defense embodied in the IDRA and state laws might encounter constitutional problems.[84] But as may be expected from the fact that courts were already themselves reinterpreting the insanity defense prior to the post-*Hinckley* reforms, no such problems were found.[85] For example, the Eleventh Circuit Court of Appeals remarked, regarding the IDRA, "Admittedly, under the new statute, a defendant who is unable to conform his actions to the requirements of

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[80] *Id.*

[81] *Id.* (footnote omitted).

[82] *Id.* at 731 (footnote omitted).

[83] *See* United States v. Grayson, 438 U.S. 41, 52 (1978); Morissette v. United States, 342 U.S. 246, 250 (1952); Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937); *see also* Bethea v. United States, 365 A.2d 64, 83 n.39 (D.C. 1976) (While the deterministic theory of behavior "has some adherents, the notion that a person's conduct is a simple function of extrinsic forces and circumstances over which he has no control is an unacceptable contradiction of the concept of free will, which is the *sine qua non* of our criminal justice system").

[84] For example, a defendant argued that it violated the cruel and unusual punishment clause of the Eighth Amendment to punish a person who as a result of mental disease was unable to exercise free will. United States v. Freeman, 804 F.2d 1574, 1576-77 (11th Cir. 1986).

[85] *Id.* at 1576; Williams v. State, 710 So. 2d 1276, 1309 (Ala. Crim. App. 1996); Hart v. State, 702 P.2d 651, 658 (Alaska Ct. App. 1985); State v. Holder, 15 S.W.3d 905, 913 (Tenn. Crim. App. 1999). Utah, Idaho and Montana abolished the insanity defense altogether, which may also be seen as accomplishing the purpose of preventing the introduction of deterministic accounts of the defendant's behavior. UTAH CODE ANN. § 76-2-305(1) (2003) (allowing the insanity defense only when "under any statute or ordinance . . . the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged."); IDAHO CODE ANN. § 18-207 (2004); MONT. CODE ANN. §§ 46-14-101 to -103 (2003). The abolition of the insanity defense was upheld in each of those jurisdictions. State v. Herrera, 895 P.2d 359, 366-68 (Utah 1995); State v. Rhoades, 809 P.2d 455, 461 (Idaho 1991); State v. Korell, 690 P.2d 992, 1002 (Mont. 1984).

law may be convicted of a crime,"[86] but the court did not find that constitutionally troubling.[87] Finding a constitutional problem would have left the criminal law open to more deterministic accounts of the defendant's behavior.

Concern for the exercise of free will in the modern test for the insanity defense functioned like a red flag to the bulls of determinism. The criminal law responded by removing from the test the very concern for autonomy that has traditionally given the criminal law its basis for blame. As a result, a number of jurisdictions have returned to a purely cognitive understanding of insanity that dates back to 1843, preceding advances in psychiatry and flying in the face of considerable criticism directed at the "primitive" cognitive test.[88] The law had long recognized and credited this criticism, which initially motivated the interest in change from a purely cognitive understanding.[89] Few defendants successfully use the insanity defense anymore,[90] and the law rarely has to grapple with the sticky question of volition.

D. Deterministic Testimony by Mental Health Experts and the Law's Response

Notwithstanding the criminal law's free will orientation, courts and legislatures initially recognized psychiatrists as expert witnesses competent to give opinions about whether defendants met the mental criteria for certain crimes or defenses.[91]

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[86] *Freeman*, 804 F.2d at 1576.

[87] *Cf.* Lambert v. California, 355 U.S. 225, 229 (1957) (finding due process violation where defendant's lack of notice of felon registration requirement meant "the absence of any opportunity either to avoid the consequence of the law or to defend any prosecution brought under it").

[88] *See* Durham v. United States, 214 F.2d 862, 870-73 (1954) ("Medico-legal writers in large number, The Report of the Royal Commission on Capital Punishment 1949-1953, and The Preliminary Report by the Committee on Forensic Psychiatry of the Group for the Advancement of Psychiatry present convincing evidence that the right and wrong test is 'based on an entirely obsolete and misleading conception of the nature of insanity.'" (footnotes omitted)).

[89] *Id.*

[90] HENRY J. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM 175 (1993), found that of a six-year, eight-state study of 967,209 felony indictments issued, 8,953 insanity pleas were made, resulting in 2,555 acquittals of not guilty by reason of insanity. Thus, less than one out of a hundred criminal indictments resulted in an insanity plea, and 71% of those pleas were unsuccessful. In other words, approximately 2.5 out of every thousand criminal indictments (.25%) resulted in a successful insanity defense.

[91] See Feguer v. United States, 302 F.2d 214, 242 (8th Cir. 1962), in which Judge (future Justice) Blackmun approved of conclusory psychiatric testimony about whether the defendant "was able to distinguish between right and wrong ... understood the nature of a criminal act and its consequence, and ... [had experienced] an uncontrollable or irresistible impulse." In rejecting the government's argument against admitting such testimony, Judge Blackmun remarked that "[t]his court has long held generally that an expert, as distinguished from a lay witness, may express his opinion on the ultimate jury

Yet courts and legislatures moved toward limiting and barring such testimony when they realized the extent to which it relied upon deterministic theories about the defendant's behavior.

The D.C. Circuit Court of Appeals, for example, initially admitted conclusory testimony by psychiatrists.[92] However, after some experience, it adopted a rule prohibiting such experts from testifying whether the defendant's act was a product of his mental illness under the *Durham* test.[93] This limitation greatly reduced the influence of deterministic testimony: the causal link between the disease and the act became a matter about which the psychiatrist could no longer express any professional opinion. A federal rule adopted after the acquittal of Hinckley further curtailed the use of psychiatric expert conclusions:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto.[94]

A number of states adopted similar rules that, while variously formulated, had comparable effects.[95] Under such rules, the psychiatrist simply cannot say that the

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question." Ake v. Oklahoma, 470 U.S. 68, 80 (1984) (citations omitted), gave defendants the right to obtain psychiatric assistance in preparation for their criminal trials, assumes that conclusory testimony is generally accepted: "psychiatrists... analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions on how the defendant's mental condition might have affected his behavior at the time in question."

[92] *See, e.g.*, Holloway v. United States, 148 F.2d 665, 666 (D.C. Cir. 1945).

[93] Washington v. United States, 390 F.2d 444 (1967).

[94] FED. R. EVID. 704(b).

[95] The Connecticut rule states in full:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did nor did not have the mental state or condition constituting an element of the crime charged or of a defense thereto, except that such expert witness may state his diagnosis of the mental state or condition of the defendant.

CONN. GEN. STAT. § 54-86i (1985); IND. R. EVID. 704(b) (1994) ("Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions"); MD. R. EVID. 5-704(b) (1995) ("An expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may not state an opinion or inference as to whether the defendant had a mental state or condition constituting an element of the crime charged.... This exception does not apply to an ultimate issue of criminal responsibility"). Courts commonly prohibit psychiatric expert testimony on ultimate issues (even given a state rule that permits ultimate issue testimony by experts generally), on the ground that such testimony is not within the witness's expertise. *See* Koester v. Commonwealth, 449 S.W.2d 213, 215-16 (Ky. 1969) (admitting expert opinion on a person's mental capacity or condition but barring testimony regarding

defendant's mental disease was likely to have affected or not affected the mental state that the law says is dispositive of his guilt.[96] The deterministic conclusion that something other than free will was the origin of that particular mental state or the resulting behavior thus cannot come into evidence directly through the expert.[97]

The thwarting of determinism is not the sole reason that lawmakers have given for the adoption of such restrictions upon psychiatric testimony. The legislative history states that the federal rule's purpose was "to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact."[98] Some argue that such rules are necessary to prevent jury intimidation by mental health experts,[99] to eliminate the "undue dominance" of such testimony,[100] and to stop

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specific intent on a particular occasion as a factual determination beyond expert's competence); State v. Flick, 425 A.2d 167, 170 (Me. 1981); Hart v. State, 637 So.2d 1329, 1339-40 (Miss. 1994) (relying on *Flick* and taking note of FED. R. EVID. 704(b)); State v. Clements, 789 S.W.2d 101, 108-10 (Mo. Ct. App. 1990) (relying on *Koester* and taking note of Rule 704(b)); *see also* Haas v. Abrahamson, 910 F.2d 384, 397 (7th Cir. 1990) (listing jurisdictions that have "exclusionary rule" regarding expert testimony about specific intent of defendant); Commonwealth v. Weinstein, 451 A.2d 1344, 1350 (Pa. 1982) ("[W]e hold psychiatric testimony to the effect that a defendant had a compulsion or irresistible impulse to kill irrelevant and, therefore, inadmissible on the issue of the defendant's specific intent to kill").

[96] United States v. Blumberg, 961 F.2d 787, 789 (8th Cir. 1992), *relying on* United States v. Kritiansen, 901 F.2d 1463, 1466 (8th Cir. 1990) (holding that psychiatrists may not testify to whether defendant was unable to appreciate nature and quality of his actions); Hull v. Warden, 628 A.2d 32, 35 (Conn. App. Ct. 1993) ("[The rule] proscribes testimony concerning whether a defendant actually had the relevant mental state at the time the crime charged was committed." (emphasis omitted)); *see also* Hartless v. State, 611 A.2d 581, 588 (Md. 1992) ("[P]sychiatrists have not been shown to have the ability to precisely reconstruct the emotions of a person at a specific time, and thus ordinarily are not competent to express an opinion as to the belief or intent which a person in fact harbored at a particular time").

[97] It is interesting to consider this result in light of how broadly competence has sometimes been defined. For example, *lay* witnesses are sometimes allowed to draw conclusions on the same ultimate issues that psychiatrists have been described as incompetent to answer. *See, e.g.* Love v. State, 909 S.W.2d 930, 938 (Tex. App. 1995) ("When asked if he had an opinion based on his experiences of that day whether or not [the defendant] knew right from wrong the witness [brother-in-law of the defendant] stated: Oh, absolutely did. No doubt. None. Absolutely knew what was right and wrong").

[98] S. REP. NO. 98-473, at 230 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3412.

[99] *See, e.g.*, Blocker v. United States, 288 F.2d 853, 863 (D.C. Cir. 1961) ("The hazards in allowing experts to testify in precisely or even substantially the terms of the ultimate issue are apparent. This is a course which, once allowed, risks the danger that lay jurors, baffled by the intricacies of expert discourse and unintelligible technical jargon may be tempted to abdicate independent analysis of the facts on which the opinion rests; this is also likely where the opinion giver is a skilled forensic performer.")

psychiatrists from drawing conclusions for which they are not competent.[101] However, the "confusing spectacle of competing expert witnesses" only ceased insofar as mental health experts were concerned;[102] all other experts involved in criminal trials—fingerprints experts, forensic pathologists, and so on—have remained free to draw confusing, contradictory conclusions on ultimate issues and to intimidate and confuse juries in the process.[103] Further, since juries exist specifically to decide *disputed* issues of fact, they will necessarily hear a great deal of conflicting evidence. To seek to protect them only from the confusion resulting from conflicting mental health experts suggests an agenda-driven motivation. Moreover, the very idea itself that experts exert undue dominance in the case suggests a value judgment about that testimony.

The legislative history for the federal evidentiary rule proposed that psychiatrists themselves wanted the change. A statement from the APA indicated that psychiatrists were reluctant to draw conclusions about whether the defendant is sane or insane.[104] According to the statement, psychiatrists do not want "to infer or intuit what is in fact unspeakable, namely, the probable relationship between medical concepts and legal or moral constructs such as free will."[105] However, the statement's objection regarding reaching conclusions about sanity or exercise of will precisely eschews only those concepts that have no psychiatric meaning. It does not indicate the absence of a psychiatric basis for giving opinions on other ultimate issues such as the mentally ill defendant's understanding and appreciation of the nature and quality of his act, or the defendant's capacity, given his mental illness or mental defect, for understanding the act's consequences—ultimate issues that are not phrased in terms that lack meaning to psychiatry. The APA statement itself specifically professes the competence of psychiatrists to draw conclusions in these terms.[106] However, the evidentiary rule enacted by Congress eliminated

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[100] United States v. Brawner, 471 F.2d 969, 981 (D.C. Cir. 1972) (en banc) (identifying limitations upon conclusory testimony as intended to prevent such "undue dominance" by the experts).

[101] *See, e.g., Blocker*, 228 F.2d at 863 ("We should, then, firmly prohibit all questions which allow the expert literally 'to tell the jury how to decide the case.' We emphasize that we would bar these opinions not because they are conclusions, but because they are, in this context and for these purposes, *conclusions of law*, for which the psychiatrist has no competence." (footnote omitted)).

[102] S. REP. NO. 98-473, at 230 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3412.

[103] FED. R. EVID. 704(a) explicitly allows other experts to draw conclusions on ultimate issues: "Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Thus, for example, a medical examiner could give a professional opinion that a death was not due to accidental causes but to homicide (where a defendant claimed that he had caused the death accidentally).

[104] S. REP. NO. 98-473, at 231 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3413.

[105] *Id.*

[106] The statement remarks that "[t]he above commentary [concerning the legal standards for an insanity defense] does not mean that given the present state of psychiatric knowledge psychiatrists cannot present meaningful testimony relevant to

testimony by psychiatrists on *all* ultimate issues.[107] Therefore, one cannot reasonably describe the rule as reflecting the psychiatric sense of the extent of competent testimony.

Further, the courts in those jurisdictions that eliminated the volitional prong from the insanity-defense test nonetheless prohibited testifying psychiatrists from drawing any conclusions about whether the defendant had the capacity to conform his conduct to the requirements of law—even though such testimony was no longer on an ultimate issue. Courts justified this exclusion on the vague ground of overlap with the remaining cognitive prong.[108] However, presumably any *relevant* testimony would necessarily "overlap" with ultimate issues; if rigorously applied, this logic would keep out psychiatric testimony altogether. The prohibition on testimony about conforming one's conduct to the requirements of law suggests that the specific concern is deterministic testimony.

The difference between their own world view and the world view of psychiatric experts has long bothered the judiciary.[109] One court notes that "[t]he foundation of the law in free will and free moral agency contrasts starkly with the belief systems of certain founders of psychological science . . . who believed in determinism . . . ."[110] Another court observes that "[t]he legal model's postulate of free will envisions people as morally and legally answerable for their conduct rather than as pigeons in a Skinner box. By contrast, the scientific model in most schools of psychology is largely deterministic . . . ."[111] In one case, the court saw "the psychiatric view" presented by the expert witness as "simply irreconcilable with the basic thesis of our criminal law."[112] The court worried that the psychiatric view could lead jurors to deterministic conclusions: "To grant a role in our existing structure to the theme that the conscious is just the innocent puppet of a nonculpable unconscious is to make a mishmash of the criminal law, permitting—

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determining a defendant's understanding or appreciation of his act." *Id.* at 228. It also states that "[p]sychiatrists, of course, must be permitted to testify fully about the defendant's . . . mental state and motivations . . . at the time of the alleged act . . . ." *Id.* at 231.

[107] *See* FED R. EVID. 704(b).

[108] United States v. Hillsberg, 812 F.2d 328, 332 (7th Cir. 1987), *cert. denied,* 481 U.S. 1041 (1987) (justifying exclusion of answer to question because "mental states that fall under the two prongs are not mutually exclusive."). *See also* United States v. Cameron, 907 F.2d 1051, 1061 (11th Cir. 1990) ("Psychiatric evidence of *impaired volitional control* or inability to reflect on the ultimate consequences of one's conduct is inadmissible whether offered to support an insanity defense or for any other purpose." (emphasis added)).

[109] Courts have been confronted as well with different types of deterministic psychological and psychiatric theory including, in the examples in this paragraph, both behaviorism and psychoanalysis, which may present somewhat conflicting though deterministic accounts of defendants' unlawful behavior.

[110] Weeks v. Jones, 52 F.3d 1559, 1567 n.10 (11th Cir. 1995).

[111] State Farm Fire & Cas. Co. v. Brown, 905 P.2d 527, 535 (Ariz. Ct. App. 1995) (Gerber, J., concurring).

[112] State v. Sikora, 210 A.2d 193, 207 (N.J. 1965) (Weintraub, C.J., concurring).

indeed requiring—each trier of the facts to choose between the automaton thesis and the law's existing concept of criminal accountability."[113] Given these complaints, the most plausible explanation of the prohibition on psychiatric testimony on ultimate issues is that the law does not want this alternative causal theory in the courtroom. In effect, it was not only necessary for law to "kill free will to save it" from determinism by altering the insanity defense to remove the volitional prong; it was also necessary to "kill the messenger" by preventing psychiatrists from testifying to deterministic conclusions.

In a civil case, a court would consider a treating physician's conclusion about how an insurance claimant's mental illness affected his ability to work as useful and important evidence.[114] Indeed, to prevent the trier of fact from hearing the physician's opinion in such a situation would seem to deprive it of crucial information. However, a court will not allow a treating physician to give a professional judgment whether a defendant's condition prevented him from understanding the nature of his action or its wrongfulness, precisely because that information could affect the jury's conclusion whether punishment was appropriate. Perversely, the evidence was once admitted and is now ruled out, because it is so probative.

E. Curtailment of Other Defenses in Order to Contain Determinism

The law found the idea behind the insanity defense—that some mental conditions may interfere with the exercise of free will—sufficiently attractive that it

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[113] *Id. See also* State *ex rel.* D.D.H. v. Dostert, 269 S.E.2d 401, 411 (W. Va. 1980) ("[I]t is a negation of our entire tradition to say that every social transgression is the result of 'illness'."). An expert witness's acceptance of determinism has sometimes itself been treated as discrediting. *See, e.g.*, People v. Liberg, 486 N.E.2d 973, 977 (Ill. App. Ct. 1985) ("The thrust of the State's cross-examination ... was to establish that Dr. Ziporyn was a determinist, a fact relevant to the jury's determination of the weight to be accorded Dr. Ziporyn's opinion that defendant could not conform his conduct to the requirements of law...."). Dr. Ziporyn ran into similar trouble for his avowed determinism in People v. Jackson, 582 N.E.2d 125, 137 (Ill. 1991).

[114] *See* 20 C.F.R. § 404.1527(d)(2) (2000) (Social security disability benefits and supplemental security income, for which the treating physician's opinion of the nature and degree of the claimant's impairment is to be given "controlling weight" if well-supported and not inconsistent with other substantial evidence.). This regulation codified a widely adopted judge-made "treating physician's rule." *See, e.g.*, Schisler v. Heckler, 787 F.2d 76, 81 (2d Cir. 1986) ("[A] treating physician's opinion on the subject of medical disability, i.e., diagnosis and nature and degree of impairment is (i) binding on the fact-finder unless contradicted by substantial evidence; and (ii) entitled to some extra weight because the treating physician is usually more familiar with a claimant's medical condition than are other physicians...."); *see also* Ruiz v. Apfel, 98 F. Supp. 2d 200, 208 (D. Conn. 1999) (citations omitted) ("The ALJ rejected [the treating psychiatrist's conclusions regarding impairment] because he found that such opinions were not supported by substantial evidence. The ALJ is not qualified to know which symptoms are necessary to support [the psychiatrist's] findings.").

eventually extended this idea to justify a related defense of diminished capacity, and even considered further extending it to defenses based on alcoholism and addiction. These defenses similarly described some factor beyond the defendant's will as determining or partially determining his behavior. However, just as the judiciary ultimately resculpted the insanity defense into a form that no longer posed a threat to the free will assumption, it likewise eventually eliminated, squelched, or allowed these related defenses to wither on the vine in order to expunge the deterministic explanation of criminal behavior they occasioned.

It is not necessary to understand all the complicated forms taken by the defense of diminished capacity[115] to appreciate how the threat of deterministic description accompanying it led first to its rise and then to its decline. A defendant generally raised the diminished capacity defense where he "did not have the specific mental state required for a particular crime or degree of crime—even though he was aware that his act was wrongful and was able to control it, and hence was not entitled to complete exoneration."[116] Although only a partial defense, diminished capacity proved particularly troubling to courts and legislatures. This was perhaps because it was less familiar and therefore seemed even less controllable than the insanity defense, and perhaps because as an extension of the principle behind the insanity defense it seemed more susceptible to the slippery slope problem. The state of California, the first to adopt the diminished capacity defense, subsequently eliminated it by statute.[117] A number of states have also repudiated the diminished capacity defense.[118] Additionally, the federal IDRA not only greatly reduced the scope of the insanity defense, but also eliminated diminished capacity as an affirmative defense.[119]

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[115] *See* United States v. Cameron, 907 F.2d 1051, 1062-63 (11th Cir. 1990) (discussing of the different types of diminished capacity/diminished responsibility defenses).

[116] United States v. Brawner, 471 F.2d 969, 998 (D.C. Cir. 1972) (en banc).

[117] CAL. PENAL CODE § 28(b) (1984) ("As a matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse in a criminal action or juvenile adjudication hearing.").

[118] *See, e.g.*, People v. Carpenter, 627 N.W.2d 276, 283-84 (Mich. 2001) (noting the debate on the diminished capacity defense and concluding that the state legislature had not approved it); State v. Bouwman, 328 N.W.2d 703, 706 (Minn. 1984) (rejecting the defense on the grounds that "[t]he law recognizes no *degree* of sanity." (emphasis added)).

[119] IDRA explicitly states that other than insanity, "[m]ental disease or defect does not... constitute a defense." 18 U.S.C. § 17(a) (2000). *Cameron*, 907 F.2d at 1061 (11th Cir. 1990) (explaining that "Congress chose to eliminate any form of legal excuse based upon psychological impairment that does not come within the carefully tailored definition in section 17(a)."). According to the legislative history, IDRA was "intended to insure that the insanity defense is not improperly resurrected in the guise of showing some other affirmative defense, such as that the defendant had a 'diminished responsibility' or some similarly associated state of mind which would serve to excuse the offense." *See* 18 U.S.C. § 17(a) (1984) (*see* quotation *supra* note 68); S. REP. NO. 98-473, at 229 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3411 ("The concept of

The likely basis for this curtailment of the diminished capacity defense is its association with a deterministic description of criminal behavior. Even courts that initially allowed the defense were concerned about its expansion of determinism into a new context. For example, the D.C. Circuit Court of Appeals accepted the defense, but cautioned that it

> does not permit the receipt of psychiatric testimony based on the conception that mental disorder is only a relative concept and that the behavior of every individual is dictated by forces—ultimately, his genes and lifelong environment—that are unconscious and beyond his control. . . . [W]e are not embarked on enquiry that must yield to tenets of the philosophy of determinism. The law accepts free will and blame-worthiness as a general premise.[120]

Concerned that adoption of the defense of diminished capacity might send the undesirable signal of greater accommodation of determinism, the court took pains to block that signal.

Other courts' outright rejection of the diminished capacity defense similarly turned on the threat posed by its deterministic aspect. For example, in a Pennsylvania case where the defendant sought to argue diminished capacity based on an irresistible impulse, the Pennsylvania Supreme Court remarked that "the determinist language of irresistible impulse" was the source of "the general reluctance of many courts to admit such testimony or to recognize the validity and relevance of the irresistible impulse concept."[121] The court noted that "[w]ithin the determinist assumptions of a large and influential school of psychiatry, the negation of intent is an entirely logical corollary. The assumptions of the law—rationality, free will and choice—are otherwise, and within its system the application of irresistible impulse to determine sanity poses deeply troubling contradictions."[122] The court therefore rejected the defense and held the psychiatric testimony inadmissible on the ground that its determinism was simply irrelevant to an assessment of the defendant's criminal intent.[123]

Similar defenses followed the same pattern as diminished capacity. The courts

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severity was added to emphasize that nonpsychotic behavior disorders or neuroses such as . . . a pattern of 'antisocial tendencies' do not constitute a defense"). Although diminished capacity was eliminated as an affirmative defense, psychiatric evidence to negate mens rea is still permitted. *Cameron*, 907 F.2d at 1065-66. *See also* United States v. Pohlot, 827 F.2d 889, 903 (3d Cir. 1987) (defendant may introduce evidence of mental abnormality on the issue of mens rea).

[120] *Brawner*, 471 F.2d at 1002.

[121] Commonwealth v. Weinstein, 451 A.2d 1344, 1349 (Pa. 1982).

[122] *Id.*

[123] *Id.* at 1350. *See also* Commonwealth v. Cain, 503 A.2d 959, 964 (Pa. Super. Ct. 1986) ("[A]ppellant argues that he felt compelled to act on his distorted and irrational thinking. In effect, he contends that he lacked the *freedom* to choose right over wrong. Our law will not accept such an argument to negate specific intent. . . . The law imputes freedom of choice to all, save only a limited class of mentally infirm persons who fit very specific criteria.")

were initially receptive to alcoholism and addiction as potential defenses analogous to insanity. A notable case in this regard is *Robinson v. California*, in which the Supreme Court concluded that narcotics addiction was an illness, and therefore imprisoning a person solely on the basis of addiction was an impermissible "status offense."[124] However, when defendants sought to use the idea of alcoholism as a disease to preclude criminal responsibility for public drunkenness, the Court balked. In *Powell v. Texas*, a plurality of the Court concluded that

> [i]t is one thing to say that if a man is deprived of alcohol his hands will begin to shake, he will suffer agonizing pains and ultimately he will have hallucinations; it is quite another to say that a man has a "compulsion" to take a drink, but that he also retains a certain amount of "free will" with which to resist. It is simply impossible . . . to ascribe a useful meaning to the latter statement. This definitional confusion reflects . . . the conceptual difficulties inevitably attendant upon the importation of scientific and medical models into a legal system generally predicated upon a different set of assumptions.[125]

The plurality was not impressed with the idea that alcoholism, being a disease, affected what could be criminalized. It was instead concerned with the dissonance between the idea of alcoholism as a disease, in which symptoms such as the craving to drink are "compulsory," and the traditional legal idea that defendants are free to override such cravings at will.

Courts considering alcoholism and addiction as defenses were worried about the slippery slope. Justice Black observed in *Powell* that "[t]he rule of constitutional law urged upon us by appellant would have a revolutionary impact on the criminal law, and any possible limits proposed for the rule would be wholly illusory."[126] Likewise, the D.C. Circuit Court of Appeals rejected a similar defense of narcotics addiction, worrying that the exception sought to be carved out simply could not be contained.[127] Alcoholism and addiction resembled the psychiatric diagnosis of psychopathy; a great many defendants could present a defense based on such "diseases."[128] Courts and legislatures, unable to isolate the determinism involved, thus rejected the defenses.

The law probably perceived the innovation represented by diminished capacity and defenses of alcoholism and addiction as a warning sign that determinism was threatening to spread uncontrollably. The resulting suppression derived not from any lack of compelling logic in the defenses, but from the more superficial rationale that these defenses were simply inconsistent with the free will assumption of law. In a sense, the law avoided determinism by categorically denying defenses that raised questions about free will, outside of the very particular and limited exception of insanity. Such denial comes at a cost to the integrity of traditional ideas of

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[124] 370 U.S. 660, 666 (1962).

[125] 392 U.S. 514, 526 (1968) (plurality opinion).

[126] *Id.* at 544 (Black, J., concurring).

[127] United States v. Moore, 486 F.2d 1139, 1146-47 (D.C. Cir. 1973).

[128] *See* Boldt, *supra* note 9, at 2310-13 (providing statistics indicating that addicts and alcoholics commit a large portion of crimes).

criminal guilt. Treating an alcoholic the same as a reckless partygoer contravenes the principles of intent and culpability that otherwise shape our sense of who is punishable and to what degree.

F. Rooting Determinism Out of Juvenile Justice

Although the insanity defense is a notorious target, and other defenses such as diminished capacity have also caused alarm, arguably juvenile justice is the area in which determinism made the greatest inroads in the law. Courts and legislatures came to approve deterministic descriptions of juvenile behavior and on that basis even granted a general exception from punishment to young offenders. However, as in other contexts, courts and legislatures subsequently repudiated this accommodation and reasserted the free will assumption, scrupulously removing from the law any concessions to deterministic thinking.

It may now be difficult to believe, but at one time the juvenile justice system was willing to explicitly denominate itself as "deterministic." Justice White remarked that while "[t]he criminal law proceeds on the theory that defendants have a will and are responsible for their actions[,] . . . . [f]or the most part, the juvenile justice system rests on more deterministic assumptions."[129] Thus, "[r]eprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control."[130] Similarly, one federal court described juvenile justice's rehabilitative ideal as "rooted in a determinist view of young people" that sees them as "essentially products of their environments and so not yet responsible for their own acts."[131] Along the same lines, the Nevada Supreme Court explained that

> [t]he juvenile court from its inception in Illinois in 1899 until approximately the middle of this century was a child-centered institution based on theories taken from the positive school of criminology and especially on the deterministic principle that youthful law violators are not morally or criminally responsible for their behavior but, rather, are victims of their environment . . . .[132]

However, at about the same time that it was explicitly identifying juvenile justice as deterministic, the law was also on the verge of abandoning that conception. The Nevada court writes that "[t]his kind of kindly, paternalistic approach was eventually seen as being ill-suited to the task of dealing with juvenile crime."[133] Courts and legislatures began to object to the idea that something other

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[129] McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971) (White, J., concurring). Many cases quote Justice White's *McKeiver* concurrence. *See, e.g.*, United States v. E.K., 471 F.Supp. 924, 931 (D. Ore. 1979); People v. McFarlin, 199 N.W.2d 684, 688 (Mich. Ct. App. 1972); State *ex rel.* D.D.H. v. Dostert, 269 S.E.2d 401, 410 n.10 (W.Va. 1980).

[130] *McKeiver*, 403 U.S. at 551-52.

[131] United States v. J.D., 525 F.Supp. 101, 103 (S.D.N.Y. 1981).

[132] *In re* Seven Minors, 664 P.2d 947, 950 (Nev. 1983).

[133] *Id.* at 950.

than free will was responsible for juvenile misbehavior.[134] Apparently under the pressure of an increased juvenile crime rate, the system largely abandoned its earlier embrace of determinism and adopted a more punitive model assuming free will.[135]

A 1980 West Virginia Supreme Court of Appeals case illustrates the clash of causal theories in a time of transition. The court noted that, given the nature of the evidence presented in that case,[136] "[t]here is no alternative in our efforts to reconcile the competing goals of the juvenile justice system but to enter reluctantly into a brief discussion of the age-old philosophical controversy about free will and determinism."[137] The court added that "[a]s perplexing as the philosophical argument over free will versus determinism may be, no single concept is as critical to the dispositional stage of a juvenile proceeding."[138] Indeed, the court felt considerable sympathy for the deterministic description of the behavior of the juvenile in that case:

> The facts of the case before us clearly show a child whose sorrows are largely the result of external forces. That she is difficult, ungovernable, and unmanageable is not disputed in the elaborate record before us, yet she was to the social forces around her the "wingless flies in the hands of small boys."[139]

Nonetheless, the court went on to conclude that punitive incarceration was an acceptable disposition[140] because the law "must, for want of any other reasonable alternative, accept the free will model, the goals of which are deterrence and juvenile responsibility."[141] However attractive the court found the deterministic explanation, it still adhered to the norms.

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[134] *See, e.g.*, Anthony Lee R., A Minor v. State, 952 P.2d 1, 7 (Nev. 1997) ("[C]riminal conduct on the part of mentally competent actors cannot be said to have been *caused* by or to be the *result* of substance abuse or other similar problems in the life of juvenile offenders. As we have said, criminal conduct is caused by and is the result of a free-will decision to engage in prohibited conduct." (footnote omitted)).

[135] *See, e.g.*, Barry Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 68 (1997) ("Within the past three decades, judicial decisions, legislative amendments, and administrative changes have transformed the juvenile court from a nominally rehabilitative social welfare agency into a scaled-down, second-class criminal court for young people."(footnote omitted)); Randi-Lynn Smallheer, *Note: Sentence Blending and the Promise of Rehabilitation: Bringing the Juvenile Justice System Full Circle*, 28 HOFSTRA L. REV. 259, 264-75 (quadrupling of juvenile crime was followed by increased "retributization" of the system).

[136] State *ex rel.* D.D.H. v. Dostert, 269 S.E.2d 401, 411 n.11 (W. Va. 1980). The testifying psychologist described the juvenile's "social maladjustment" as "being caused by the conditions under which she had lived, modeling of her environment... and people around her...." *Id.*

[137] *Id.* at 410 (footnote omitted).

[138] *Id.* at 411.

[139] *Id.* (footnote omitted).

[140] *See id.*

[141] *Id.*

Deterministic evidence in capital sentencing involving juveniles has provoked similar tensions. On the one hand, the law evaluates whether the youth deserves the law's most extreme punishment, which implies utmost culpability and blameworthiness; on the other hand, the defense introduces evidence that suggests that the defendant was essentially under the control of his parents and social environment, and the court should therefore not hold him fully responsible for his acts. The Supreme Court evidently felt the bind in *Eddings v. Oklahoma*, a case in which, in spite of evidence documenting a difficult family life and related psychological problems, a 16-year-old faced the death penalty for murdering a police officer.[142] The Supreme Court reversed the capital sentence, finding that this mitigating explanatory evidence did not receive proper consideration by the trial court.[143]

The four-justice dissent in *Eddings*, authored by Chief Justice Burger, complained bitterly about the deterministic tendency of the evidence that had persuaded the majority. Burger's opinion bridled at the testimony of a psychiatrist who was willing to state "that Eddings was 'preordained' to commit the murder from the time his parents were divorced, when he was five."[144] Burger asserted that "[t]his sort of 'determinist' approach is rejected by an overwhelming majority of psychiatrists," although this claim had no supporting citation.[145] The division within the *Eddings* Court itself emblemizes the criminal law's ambivalence toward deterministic evidence.

In *Thompson v. Oklahoma*, the Court again proved receptive to such evidence, ruling that states cannot execute persons 15 years old or younger at the time of committing a capital murder, in part because they lack the free will of adults.[146]

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[142] 455 U.S. 104 (1982).

[143] The Court made a plea for strong consideration to be given to the effect of various factors upon Eddings's behavior:

> In this case, Eddings was not a normal 16-year-old; he had been deprived of the care, concern, and paternal attention that children deserve. On the contrary, it is not disputed that he was a juvenile with serious emotional problems, and had been raised in a neglectful, sometimes even violent, family background. In addition, there was testimony that Eddings' mental and emotional development were at a level several years below his chronological age. All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.

Id. at 116.

[144] *Id.* at 123 n.4 (citation to the record omitted).

[145] *Id.* (citation to the record omitted).

[146] 487 U.S. 815 (1988). "Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." *Id.* at 835 (plurality opinion).

The plurality in *Thompson* cited and quoted one source that observed that "youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth."[147] Another source upon which the plurality relied remarked that "[o]ne thing about [the basic philosophy of juvenile justice] does seem clearly implied . . . and that is an absence of the basis for adult criminal accountability—the exercise of an unfettered free will."[148] Such evidence about youthful offenders does not raise the specter of determinism directly; in the context of sentencing, this evidence speaks in terms of *less* free will rather than lack of free will. The more that mitigating evidence accounts for juvenile behavior, however, the more it impinges upon free will as causation. Further, the *categorical* exemption of children below fifteen from execution implied something deterministic about the extent of their free will.

The Supreme Court subsequently undermined the narrow triumph of determinism represented by *Eddings* and *Thompson*. *Stanford v. Kentucky* held that 16-year-olds were not categorically ineligible for the death penalty.[149] Justice Scalia's plurality opinion in *Stanford* explicitly rejected reliance upon deterministic evidence. He noted that the *amici* in the case had presented "an array of socioscientific evidence concerning the psychological and emotional development of 16- and 17-year-olds"[150] and had argued that this evidence showed that juveniles lacked the moral capacity to be blamed to the same extent as adults.[151] Rather than reject this evidence on the ground that a free will account of youthful behavior was more accurate or more plausible, Scalia instead contended that "[w]e have no power under the Eighth Amendment to substitute our belief in scientific evidence for the society's apparent skepticism."[152] "The battle," he said, "must be fought . . . on the field of the Eighth Amendment; and in that struggle socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon."[153] In other words, even if the Court found them persuasive, the deterministic views of science regarding the capacities of adolescents would not prevail as long as the broader society still did not accept them.

Scalia and the justices joining him did concede that if *conclusive* contrary evidence could be presented—if it were clearly proven that 16-year-olds were

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[147] *Id.* at 834 (quoting TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 7 (1978)).

[148] *Id.* at 835 n.41 (citing S[ANFORD J.] FOX, THE JUVENILE COURT: ITS CONTEXT, PROBLEMS, AND OPPORTUNITIES, 11-12 (1967)).

[149] 492 U.S. 361 (1989) (plurality opinion). The majority concluded that states had reached no consensus decision against the execution of 16-year-old murderers, and therefore the Eighth Amendment did not prohibit it. *Id.* at 373.

[150] *Id.* at 377-78.

[151] *Id.* at 377 (joined by Rehnquist, C.J., and White and Kennedy, JJ.). The same evidence also supported an argument that youths could not be deterred by the death penalty. *Id.*

[152] *Id.* at 378.

[153] *Id.*

incapable of exercising free will to the same extent as adults—then the rational basis requirement of Fourteenth Amendment analysis (rather than the Cruel and Unusual Punishment Clause of the Eighth Amendment) would require the Court to invalidate the law in question.[154] Proving determinism to this extent would be exceedingly difficult, if not impossible, yet this position envisions that the courts could revise the free will assumption of the law on a constitutional basis. However, the plurality indicates that the Court cannot even join issue on the question of free will versus determinism as long as the evidence is anything less than *conclusive*. It is unclear why it would not be cruel and unusual punishment to execute a defendant who has presented highly persuasive—but not conclusive—evidence that he belongs to a class of people whose behavior was beyond their control.

The Supreme Court recently overruled *Stanford* in *Roper v. Simmons*, concluding that the execution of minors over fifteen is not consistent with the Eighth Amendment.[155] In the Court's decision, language pertaining to the relative free will of minors versus adults has disappeared entirely. Nowhere does the majority (or dissent) frame the issue in terms of the relative capacity of juveniles to exercise will; it has simply dropped out of the equation.[156] Its disappearance is perhaps analogous to the disappearance of the volitional prong from the insanity defense, banished as a provocation and a nuisance, without resolution.

It could not have escaped lawmakers that the same bad upbringing and environmental conditions that had exempted juveniles from criminal punishment

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[154] If "such evidence could conclusively establish the entire lack of... moral responsibility," then "the Equal Protection Clause of the Fourteenth Amendment would invalidate these laws for lack of rational basis." *Id.* (citation omitted).

[155] 125 S. Ct. 1183, 1200 (2005).

[156] The closest the Court comes to acknowledging a role for free will or determinism in its justification is when it remarks that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.* at 1195. The Court then cites a remark in *Eddings*: "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Id.* (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)). Lest the reader get the impression that the Court is alluding to deterministic forces, it adds that "[t]his is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment." *Id.* The Court furthermore cites a source to the effect that "[a]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting[.]" *Id.* (citing Laurence Steinberg and Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)). The Court has reinterpreted *Eddings* as being not about the lesser ability of juveniles to exercise will, but instead about their lesser control over their environment. This moves the question (using Hobbes's formulation) from being "free to will" to being "free to do"—from being able to act autonomously to being able to act free from coercion. *See The Questions Concerning Liberty, Necessity, and Chance*, *in* 5 THOMAS HOBBES, THE ENGLISH WORKS OF THOMAS HOBBES OF MALMESBURY (William Molesworth, ed., 1841).

did not disappear or lose all effect when juveniles became adults,[157] and that raised the implicit question why the law understood and addressed adult offenders so differently from juveniles. Perhaps out of fear of extending the juvenile exception, or from the perception that it already represented too stark a contrast to adult criminal justice, the law backed away from determinism in juvenile justice and moved to make juvenile justice consistent with the adult system.

G. *Coping with Deterministic Evidence in Sentence Mitigation*

As the juvenile cases suggest, the question of determinism versus free will has played a substantial role in criminal sentencing. This role is surprising because, by the time of sentencing, either the defendant has essentially conceded causation of his act or the court has found the causation to be under the defendant's control. However, sentencing seeks to punish the more free to a greater extent than the less free, sometimes bringing determinism in through the back door.

In *Eddings v. Oklahoma* the Supreme Court had displayed receptivity to deterministic evidence by insisting that *any* evidence that was mitigating had to be admitted and considered in capital sentencing, most saliently including deterministic evidence about the defendant's family life and psychological background.[158] This permissive standard,[159] combined with the virtual elimination of the insanity defense and the "retributization" of juvenile justice, led to deterministic evidence largely shifting to the sentencing context. Psychiatrists and sociologists then said in sentencing proceedings the kinds of things they used to say in the context of the insanity defense or the juvenile proceeding, namely that the defendant's behavior was caused by a mental disease or his criminogenic milieu.[160]

Because the evidence presented in sentencing has at times been so deterministic that it seems to relitigate the question of the defendant's guilt, courts have actually become confused about what standard they are supposed to be applying in determining its admissibility and effect. For example, in *Eddings*, a psychiatrist testified during the sentencing

> that at the time of the murder, Eddings was in his own mind shooting his stepfather—a policeman who had been married to his mother for a brief period when Eddings was seven. The psychiatrist stated: "I think that given the

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[157] Professor Morse points out that "it would be preposterous to believe that the behavior of children is caused or determined but that the behavior of adults is not and that is why children are excused." Stephen J. Morse, *Delinquency and Desert*, 564 ANNALS AM. ACAD. POL. & SOC. SCI., July 1999, at 56, 66 (1999).

[158] 455 U.S. 104 (1982).

[159] *See also* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that "the Eighth and Fourteenth Amendments require that the sentencer... not be precluded from considering, as a mitigating factor, *any* aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (emphasis in original omitted) (emphasis added)).

[160] *Id.*

> circumstances and the facts of his life, and the facts of his arrested development, he acted as a seven year old seeking revenge and rebellion; and the act—he did pull the trigger, he did kill someone, but I don't even think he knew that he was doing it."[161]

Given its denial of Eddings's self-control and its assertion of his incomprehension of his act, this evidence sounded so much like that presented in an insanity defense that the state courts apparently mistook it as such. The Oklahoma Court of Criminal Appeals explained its affirmance of Eddings's death sentence as follows:

> There is no doubt that the petitioner has a personality disorder. But all the evidence tends to show that he knew the difference between right and wrong at the time he pulled the trigger, and that is the test of criminal responsibility in this State. For the same reason, the petitioner's family history is useful in explaining why he behaved the way he did, but it does not excuse his behavior.[162]

As the U.S. Supreme Court recognized in reversing, whether the defendant knows the difference between right and wrong is a test of insanity, not a determinant of what is mitigating for sentencing purposes.[163] And the fact that this evidence does not "excuse" the defendant's behavior does not address whether it reduces his guilt for the purposes of assessing appropriate punishment. The Oklahoma court's mistake is not surprising, however.[164] It heard what sounded like evidence on insanity, albeit in a sentencing hearing.

The awkward fit between such evidence and sentencing has led courts in at least one circuit to resist even this lower-stakes, last-resort context for determinism.[165] In some sense analogous to *Eddings* is the Seventh Circuit Court of Appeals case of *Stewart v. Gramley*, in which the defendant argued that explanatory information about the causation of his crime that was not presented in his original trial entitled him to a resentencing, because it would have made it less likely that a sentence of death would have been imposed.[166] Judge Posner's opinion for the court allows that "[i]f the defendant's crime can be seen as the effect of a chain of causes for which the defendant cannot be thought responsible—his genes, his upbringing, his character as shaped by both, accidents of circumstance, and so forth—then a judge

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[161] *Eddings*, 455 U.S. at 108 n.2 (citation to the record omitted).

[162] Eddings v. Oklahoma, 616 P.2d 1159, 1170 (Okla. Crim. App. 1980) (citation omitted).

[163] *Id.*

[164] Other courts used the insanity defense as a measure of what was acceptable as mitigation. *See* State v. Richmond, 560 P.2d 41, 52 (Ariz. 1976) (en banc), where the court held that since psychopathy was excluded under state law as a mental impairment for the purposes of the insanity defense, it also could not qualify as mitigating in a capital case.

[165] The fact that Eddings was again sentenced to death after the reversal and remand implies continued judicial suspicion of the significance of his deterministic evidence.

[166] Stewart v. Gramley, 74 F.3d 132, 136 (7th Cir. 1996), *cert. denied*, 519 U.S. 838 (1996). *See also* United States *ex rel.* Coleman v. Ryan, No. 97-C2067, 1998 U.S. Dist. LEXIS 8456, at *51-52 (N.D. Ill. May 28, 1998) (following *Stewart*).

or jury is less likely to think it appropriate that he should receive a punishment designed to express society's condemnation of an evil person."[167] However, Posner also indicates that the natural home of this evidence is the guilt-innocence determination, and that it might be *irrelevant* to sentencing. He observes: "Causality is mitigation, the lawyer argued. *Tout comprendre c'est tout pardonner.* It is not an absurd argument. It exploits the tension between belief in determinism and belief in free will."[168] Posner points out that we excuse ("*pardonner*") rather than mitigate behavior that is explained, implying that the evidence belongs in the guilt determination itself, not sentencing. He adds that an explanation of behavior would be "possibly relevant under a *tout comprendre* defense if one existed."[169] Since such a defense does not exist, the logical inference is that the relevance of such evidence is questionable in sentencing, to the extent that it makes an oblique attack on guilt.[170] Moreover, such evidence might not be relevant to sentencing as such, because "it is obviously not the theory of capital punishment that murderers are compelled to murder by their past and therefore should not be punished."[171]

Professor Thomas A. Green has remarked that "the extent of the incursion" of determinism in law "has been limited by the deployment of mechanisms of evasion."[172] "This largely unselfconscious maneuver," he adds, "has led to a substantial degree of incoherence in both the theory and the practice of our system of criminal justice, even as it has borne testimony to our determination to uphold the underlying concept of free will."[173] Although Professor Green does not supply supporting examples, the *Stewart* case suggests a contortion of law to remove determinism from the guilt-innocence determination that has led to such perverse consequences. A murder defendant with strong evidence that he was not able to control his behavior might no longer be able to present an insanity defense. However, under Posner's theory, the defendant should not be able to present such evidence during his capital sentencing on the ground that it is not relevant to sentencing but to guilt. This logic leads to the result that a capital defendant whose evidence once supplied the basis for complete exoneration could have that evidence rejected as irrelevant in sentencing, whereas a defendant with weaker such evidence would be able to have it admitted and thereby stand a better chance of avoiding execution.

Notwithstanding doubts expressed in the Seventh Circuit Court of Appeals, capital sentencing (and other types of sentencing) remains an area in which

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[167] *Stewart*, 74 F.3d at 136.

[168] *Id.* at 136. Posner himself is apparently a compatibilist. *See generally* RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 174 (1990).

[169] *Stewart*, 74 F.3d at 137. Posner also considered the quality of the evidence that would have been presented as not very favorable to the defendant and rested some of his reasoning on this fact. *Id.*

[170] *See id.*

[171] *Id.* at 136.

[172] *Supra* note 6, at 1916-17.

[173] *Id.* at 1917.

deterministic evidence continues to have a role. Perhaps because such evidence is still perceived as persuasive to some extent in its account of the defendant's behavior, it has not been eliminated altogether from the practical operation of law. Even in this context, where the threat to the free will assumption is more attenuated than it is in the trial on guilt, it is still subject to concerns about creeping determinism, as the *Stewart* case indicates.

III. THE CRIMINAL LAW'S AMBIVALENCE: NO CHOICE BUT CHOICE

If one looks casually at the encomiums courts address to free will, such as the remarks that began the introduction of this Article, one might get the false impression that courts are strong believers in free will as an accurate description of the origin of criminal behavior. Although courts occasionally describe free will this way,[174] such description is unusual. The law more commonly acknowledges the problematic truth value of free will and endorses it nonetheless on the ground of practicality.

Indeed, upon closer examination, the judicial encomiums to free will are qualified approvals. When Justice Cardozo describes "freedom of the will as a working hypothesis in the solution of the [law's] problems,"[175] he is not saying that free will accurately describes the causation of human behavior. Instead, he points out the provisional nature of free will by calling it a "working hypothesis." Similarly, although Justice Jackson describes the "belief in freedom of the will" as "universal and persistent in mature systems of law,"[176] he also notes that free will "has been debated throughout the ages by theologians, philosophers, and scientists."[177] He does not take a position on the proper outcome of this debate but concludes that "[w]hatever doubts they have entertained as to the matter, the practical business of government and administration of the law is obliged to proceed on the assumption that mature and rational persons are in control of their own actions."[178] Jackson's endorsement of free will is founded not on its correctness, but on the conclusion that law is "obliged" to proceed on the

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[174] Smith v. Armontrout, 865 F.2d 1502, 1506 (1988) ("[People] are capable of conforming their actions to the requirements of the law...."); Kwosek v. State, 100 N.W.2d 339, 345 (Wisc. 1960) ("A human being has inherently and within himself a free will—the power of self-control"); Cole v. State, 128 A.2d 437, 439 (Md. 1957) ("it may be that the weakness of the appellant's control over his behavior was a product of disease and hence not 'determined' by him; nevertheless [other factors] were subject in some degree to his free will and he must be held responsible for them"); United States v. Moore, 486 F.2d 1139, 1151 (D.C. Cir. 1973) ("Moore could never put the needle in his arm the first and many succeeding times without an exercise of will. His *illegal acquisition and possession* are thus the direct product of a *freely willed illegal act.*" (footnote omitted)).

[175] Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937).

[176] Morissette v. United States, 342 U.S. 246, 250 (1952).

[177] Gregg Cartage & Storage Co. v. United States, 316 U.S. 74, 79-80 (1942).

[178] *Id.*

assumption for "practical" reasons, whatever the doubts.[179]

Judge (later Chief Justice) Burger also takes note of this debate and concludes that "society and the law have no choice in the matter. We must proceed, until a firm alternative is available, on the scientifically unprovable assumption that human beings make choices in the regulation of their conduct . . . ."[180] Free will, he argues, is an "unprovable assumption" that we rely upon because no "firm alternative is available."[181] Judge Leventhal of the D.C. Circuit Court of Appeals, Burger's former colleague, concurs that the law "ultimately rests on a premise of freedom of will" out of "a governmental fusion of ethics and necessity"[182]—not because free will is viewed as a compelling description of how people act. Another court remarks that "[t]he law may not *serve its purpose* . . . should it embrace the doctrine of determinism."[183] And another concludes that "*[f]or protection of society* the law accepts the thesis that all men are invested with free will . . . ."[184] The law gives the service of some end as the ground for the maintenance of the free will assumption, not its accuracy as an account of human behavior. Courts evidently feel they have no alternative but to adopt free will, because of its perceived practical value. This equivocal view makes it unsurprising that the career of determinism in the criminal law has been a complex and paradoxical one, notwithstanding repeated emphatic endorsements of free will.

The precise practical value of free will is often left unclear. Although Justice Cardozo endorses it "as a working hypothesis in the solution of [law's] problems,"[185] he does not say how it helps solve them. Judge Leventhal describes acceptance of free will as "a governmental fusion of ethics and necessity,"[186] although he does not reveal what makes free will necessary. Justice Jackson approves free will as conducive to "the practical business of government,"[187] although how it furthers such practical business is not disclosed.

Courts nevertheless forecast cataclysmic effects from the abandonment of free will. More than a hundred years ago, a state court judge made a dire prediction for the law if it accepted determinism. He acknowledged that "[i]t is quite possible that a brain in some sense diseased may produce a fit of jealousy, anger, or revenge,"[188] but added that "the law is, that that species of insanity is crime, and, as such, must be punished."[189] This is necessary, he said, because "[a]ny other legal doctrine

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[179] *Id.*

[180] Blocker v. United States, 288 F.2d 853, 865 (D.C. Cir. 1973), *quoted in* United States v. Ceccolini, 435 U.S. 268, 282 (1978) (Burger, C.J., concurring).

[181] *Id.*

[182] United States v. Brawner, 471 F.2d 969, 995 (D.C. Cir. 1972) (en banc) (citation omitted).

[183] United States v. Chandler, 393 F.2d 920, 929 (4th Cir. 1968) (emphasis added).

[184] State v. Sikora, 210 A.2d 193, 202 (N.J. 1965) (emphasis added).

[185] Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937).

[186] *Brawner*, 471 F.2d at 995.

[187] Gregg Cartage & Storage Co. v. United States, 316 U.S. 74, 79-80 (1942).

[188] Taylor v. Commonwealth, 109 Pa. 262, 267 (1885).

[189] *Id.*

must result in resolving society into its original elements, and compel every man to protect himself."[190] That this sense of catastrophe continues is evidenced by a federal court repeating this same theme more recently. The Fourth Circuit Court of Appeals stated that "[t]he law must proceed upon the assumption that man, generally, has a qualified freedom of will," because "[s]hould the law extend its rule of immunity from its sanctions to all those persons for whose deviant conduct there may be some psychiatric explanation, the processes of the law would break down and society would be forced to find other substitutes for its protection."[191] And it is this sense of the role of the assumption of free will in preserving civilization as we know it that leads other courts to describe it as "a first principle of any sane society"[192] and "universal and persistent in mature systems of law,"[193] implying that societies without free will cannot be sane or mature. These courts imply that without a fundamental principle of free will, a state of nature would prevail.

These remarks suggest that courts see belief in free will as necessary to motivate general obedience to law. Burger quotes a law professor, accordingly, that "[t]he lawyers in all countries will answer 'if there is no reason, no choice, no will, then there can be no law . . . ."[194] The Supreme Court might even have been thinking something along those lines when it complained of "a philosophical determinism by which choice becomes impossible."[195] A federal circuit court observes, "[i]t is only through this assumption [of free will] that society has found it possible to impose duties and create liabilities designed to safeguard persons and property."[196] These courts imply that free will must exist or must be assumed to exist because without it the law cannot make people obey and people cannot make themselves obey.

Courts frequently state that free will is necessary because it facilitates the law's deterrent effect. For example:

> We must proceed, until a firm alternative is available, on the scientifically unprovable assumption that human beings make choices in the regulation of their conduct *and that they are influenced by society's standards* as well as by personal standards.[197]

> Our jurisprudence . . . ultimately rests on a premise of freedom of will. This is not to be viewed as an exercise in philosophic discourse, but as a governmental fusion of ethics and necessity, *which takes into account that a system of rewards and punishments is itself part of the environment that*

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[190] *Id.*

[191] United States v. Chandler, 393 F.2d 920, 929 (4th Cir. 1968).

[192] Howell v. State, 425 A.2d 1361, 1363 (Md. Ct. Spec. App. 1981).

[193] Morissette v. United States, 342 U.S. 246, 250 (1952) (footnote omitted).

[194] Blocker v. United States, 288 F.2d 853, 867-868 (D.C. Cir. 1961), quoting [Harold J.] Berman, *Law as an Instrument of Mental Health in the United States and Soviet Russia*, 109 U. PA. L. REV. 361, 366 (1961).

[195] Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937).

[196] United States v. Currens, 290 F.2d 751, 773 (3d Cir. 1961).

[197] *Blocker*, 288 F.2d at 865 (emphasis added).

influences and shapes human conduct.[198]

> Essentially these duties and liabilities are intended to operate upon the human capacity for choice and control of conduct *so as to inhibit and deter socially harmful conduct.*[199]

It is difficult to understand the connection between the idea of free will and the idea of deterrence, which immediately follows it. The omitted step is apparently the phenomenon of blame that free will facilitates. Blame presumably aids deterrence by strongly stigmatizing criminal behavior, thereby disincentivizing it, and enhancing enthusiasm for punishment and therefore presumably its impact. Courts apparently conclude that without the blame that free will promotes, deterrent effect may be greatly undermined.

While courts associate free will with deterrence, they do not openly associate free will and retribution. This is surprising because free will is often understood as essential to retribution.[200] Nonetheless, courts may reject determinism because they believe accepting it would preclude its presumed corollary of retributive punishment. Courts and legislatures are strongly attracted to retribution as a purpose for punishment.[201] Some support of free will may therefore be unexpressed attachment to the retribution it facilitates. Certainly, efforts to beat back determinism have suggestively coincided with a broader movement to make retribution a more prominent and visible element of law, and to stiffen criminal penalties and generally "get tough" on crime. Determinism is a particularly likely target in such an environment because it threatens to eliminate the blame attached to criminal behavior,[202] and thus threatens the legitimacy of punishment.

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[198] United States v. Brawner, 471 F.2d 969, 995 (D.C. Cir. 1972) (en banc) (emphasis added).

[199] *Currens*, 290 F.2d at 773 (emphasis added). For other associations of free will and deterrence, see State v. Reece, 486 P.2d 1088, 1091 (Wash. 1971) ("the entire criminal law proceeds upon the assumption that a rational man can control his acts and can be deterred by fear of punishment"); Orme v. Rogers, 250 P. 199, 200 (Ariz. 1927) ("the punishment... was intended to act directly upon the offender by making the unpleasant consequences of his breach of law so great that his will would be properly exercised if the temptation again presented itself, and indirectly by example on all others who might find themselves under similar temptation").

[200] *See, e.g.*, Morse, *supra* note 14, at 1587-88 ("If it is true that an agent really could not help or control herself and was not responsible for the loss of control, blame and punishment are not justified on any theory of morality and criminal punishment"); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 291 (1981) ("[H]ow can we punish someone or hold him responsible for an action if his doing it was causally determined, eventually by factors originating before his birth, and hence outside his control?").

[201] Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313 (2000) (documenting judicial resistance to utilitarian purposes for punishment and support for retribution).

[202] *See* State v. Sikora, 210 A.2d 193, 202 (N.J. 1965) (emphasis added); Powell v. Texas, 392 U.S. 514, 526 (1968) (plurality opinion).

Although courts say little about the connection between free will and retribution, they articulate a close tie between the free will assumption and the criminal law's essential ingredient of blame.[203] They have not accepted the compatibilist idea, common among legal scholars, that it is rational to hold people morally responsible even if all their actions are causally determined. Because courts see free will as a necessary element of blame, they often describe medicalization, not compatibilist co-option, as the likely consequence of departing from the free will assumption:

> While science may be deterministic, the law cannot be. If the law were to come to define insanity—which is a legal, not a medical, concept and which means, in effect, that someone cannot be found guilty—as being the same thing as mental illness, *then the administration of criminal justice would be handed over to the expert psychiatric witnesses.*[204]

> A modification of the existing rule to relieve an accused of the criminal consequences of his acts, merely because of impaired ability to resist temptation, would, as we have pointed out, remove responsibility for a crime where there is some element of determinism in the case, and thus *substitute treatment for punishment in virtually all criminal cases.*[205]

Courts often view acceptance of determinism as resulting in the annihilation of criminal justice as we know it, and its replacement with a therapeutic system.

The idea that psychiatry could displace law has accounted in part for the ultimate reluctance of courts to embrace determinism. It is not merely a question of turf, although some of the resistance may have to do with a reluctance to concede power. The reluctance to embrace determinism also appears to stem from courts' perception that embracing such a system involves a complete revolution in world views. Courts are accustomed to thinking in ways that make psychiatry seem alien

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[203] Holloway v. United States, 148 F.2d 665, 666-667 (D.C. Cir. 1945) ("Our collective conscience does not allow punishment where it cannot impose blame."); Smith v. Armontrout, 865 F.2d 1502, 1506 (8th Cir. 1988) ("Without this fundamental moral and legal assumption [of free will], punishment, one of the principal purposes of the criminal law, would be an irrational exercise."); United States v. Currens, 290 F.2d 751, 773 (3d Cir. 1961) ("[T]he sanctions of the criminal law are meted out in accordance with the actor's capacity to conform his conduct to society's standards, through the capacity for choice and control which he possessed with respect to his act."); United States v. Lyons, 739 F.2d 994, 1000 (5th Cir. 1984) (Rubin, A., dissenting) ("By definition, guilt cannot be attributed to an individual unable to refrain from violating the law.").

[204] United States v. Torniero, 570 F. Supp. 721, 729-730 (Conn. Cir. Ct. 1983) (emphasis added).

[205] Cole v. State, 128 A.2d 437, 439 (Md. 1957) (emphasis added). *See also* State v. Reece, 486 P.2d 1088, 1091 (Wash. 1971) ("[T]he entire criminal law proceeds upon the assumption that a rational man can control his acts and can be deterred by fear of punishment. *If medical science discovers that this is a false assumption, that there is no 'free will,' then what is called for is an entirely new legislative approach to the problems of antisocial conduct.*" (emphasis added)).

and unappealing. They often express an almost visceral recoil from psychiatric and deterministic thinking. For example, some courts remark that psychiatry "envisions people . . . as pigeons in a Skinner box"[206] and relies upon "the automaton thesis" of human behavior.[207] A difference in "culture" may thus account for some of the law's resistance to adopting determinism.

Further, courts doubt that substituting psychiatry for law would actually address the problem of crime. Indeed, they often belittle psychiatry as an "undeveloped art,"[208] an "infant science,"[209] and an "esoteric and largely unproved field."[210] Sometimes judges convey an almost bitter resentment toward the ineffectiveness of psychiatry at rehabilitating those who break the law. For example, the Eleventh Circuit Court of Appeals speaks of "the uncertain nature of psychiatric theory" and denies that withholding the insanity defense from the mentally ill is cruel and unusual punishment "[w]hen psychiatrists are unable to diagnose, much less treat, such individuals."[211] According to other courts, psychiatry's inability to address the problem of criminal deviants justifies employing the default—criminal punishment.[212] Thus, many courts view determinism as calling for an alternative system to our current criminal justice system, a consequence which the law finds both conceptually and empirically unsatisfactory.

As a result, courts and legislatures uphold free will as necessary to achieving the social benefits of obedience and deterrence, to preventing psychiatry from displacing law, and to maintaining our criminal law as we know it with its blaming and stigmatizing properties. Notwithstanding all of these perceived virtues, determinism attracted the courts and legislatures to the extent that they attempted to accommodate it. The problem has been that the exception sought to be created soon threatened the beneficial rule. A narrow insanity defense gradually but substantially broadened, new defenses were created and considered under its principles, a whole class of criminals (juveniles) obtained exemption from

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[206] State Farm Fire & Cas. Co. v. Brown, 905 P.2d 527, 527 (Ariz. Ct. App. 1995) (Gerber, P.J., concurring).

[207] State v. Sikora, 210 A.2d 193, 207 (N.J. 1965).

[208] Powell v. Texas, 392 U.S. 514, 526 (1968) (plurality opinion).

[209] Blocker v. United States, 288 F.2d 853, 860 (D.C. Cir. 1961).

[210] Steele v. State, 294 N.W.2d 2, 13 (Wisc. 1980). *See also* Roth v. Goldman, 172 F.2d 768, 792 n.17 (2d Cir. 1949) (per curiam) ("Of course, psychiatry is not an infallible science but an art still in its period of adolescence, and, with many psychiatrists, tainted by a superfluous deterministic philosophy.").

[211] United States v. Freeman, 804 F.2d 1574, 1576-77 (11th Cir. 1986).

[212] *See* State *ex rel.* D.D.H. v. Dostert, 269 S.E.2d 401, 411 (W. Va. 1980) ("Some things we have enough knowledge to treat and other things we do not have enough knowledge to treat... Where, however, no factor or factors can be isolated which we can treat... we must, for want of any other reasonable alternative, accept the free will model, the goals of which are deterrence and juvenile responsibility."); *see also* United States v. Lyons, 731 F.2d 243, 248 (5th Cir. 1984) ("[W]e conclude that the volitional prong of the insanity defense—a lack of capacity to conform one's conduct to the requirements of law—does not comport with current medical and scientific knowledge, which has retreated from its earlier, sanguine expectations.").

punishment, and sentencing grew increasingly more permissive toward deterministic criteria. Predictably, the law roused and beat back these incursions, with the possible (and perhaps temporary) exception of sentencing. When faced with the specter of determinism, courts worry that "any defendant, adopting what might be called the viewpoint of science (especially of social, psychological, and medical science), could argue that his acts were presumptively determined by forces beyond his control."[213] This concern for the slippery slope was repeatedly expressed and given as a motivation for the law's rejection of determinism.[214] Unlike compatibilists, courts have seen determinism as an all-or-nothing proposition, perhaps because of the experience that giving any quarter to determinism has led to an expansion of its influence that has been perceived as threatening important legal and social benefits.

IV. THE BENEFITS OF INCONSISTENCY

It may be true that free will achieves the benefits its proponents identify. However, it is also plausible that those benefits have been overestimated, and that significant unacknowledged costs reside in the law's decision to keep out all determinism, militating in favor of a more ecumenical approach. For instance, the common assumption that free will facilitates or is necessary to obedience to law is questionable and possibly illogical. Some courts and legislatures make the mistake of conflating determinism with fatalism, of thinking that 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.[215] Indeed, this mistake

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[213] United States v. Torniero, 570 F. Supp. 721, 729 (Conn. Cir. Ct. 1983).

[214] *See, e.g.*, United States v. Moore, 486 F.2d 1139, 1147, 1151 (D.C. Cir. 1973) ("The obvious danger is that this defense [addiction as a defense to possession] *will be* extended to all other crimes—bank robberies, street muggings, burglaries—which can be shown to be the product of the same drug-craving compulsion . . . [A]ny possible limits proposed for the rule would be wholly illusory."); Powell v. Texas, 392 U.S. 514, 535 (1968) (plurality opinion) ("If Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a 'compulsion' to kill. . . . [I]t would seem impossible to confine the principle within the arbitrary grounds which the dissent seems to envision.").

[215] *See Question LXXXIII. Of Free Will, in* THOMAS AQUINAS, SUMMA THEOLOGICA (2nd ed., 1922) (presenting a riposte which foreclosed determinism: "Man has free will: or otherwise counsels, exhortations, commands, prohibitions, rewards and punishments would be in vain."); *cf.* SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY *137 (1994) ("Fatalism is wrongly confused with determinism, which by itself carries no implications that human action is ineffectual."). One judge's observations discount the impact of a court's decision on the potential plaintiffs and defendants, as well as the future behavior of the litigants before it. Goldberg v. R. Grier Miller & Sons, Inc., 182 A.2d 759, 762 (Pa. 1962) ("[I]t should be quite obvious that if there were no free will, there could be no reason for courts since in that event neither plaintiff nor defendant could have done anything to avoid what was already destined to take place.").

may reside in Burger's quotation of the remark (which he describes as "answering" the determinists) that "[t]he lawyers in all countries will answer 'if there is no reason, no choice, no will, then there can be no law . . . .'"[216] But properly understood, determinism holds out more capacity than free will for law to influence the behavior of others. One whose actions are determined by outside forces has no choice but to factor in the effects of law to some degree (if aware of them). In the deterministic view, law and its consequences operate as a factor in people's decision-making, just as any other environmental condition does. On the other hand, a person who truly has free will should be able to choose to disregard the law completely when making decisions. To the extent that jurists reject determinism on the grounds that only free will provides a theory under which people may obey the law, they seem to be making an error of logic.

Further, the idea that free will facilitates obedience may represent a mere wish. If it is true that determinism is correct, many things besides law and punishment affect behavior. People thus simply lack the power to override other factors and ensure their own obedience. On the other hand, if free will is real, then people could at least be called upon to assert their will and obey, whatever other factors were operating. As scientist Konrad Lorenz observes, "our longing for freedom [of the will] is to prevent our obeying other laws than [moral laws]."[217] Legal endorsement of free will may therefore be wishful thinking that prefers the account that at least makes it theoretically possible for all people to obey under all circumstances. However, a naive illusion would not be a good basis for supporting a free will assumption.

If free will is not a correct description of criminal behavior, the system's capacity to achieve optimal public safety is in question. We may even be caught in a kind of epistemological cul-de-sac because we cling to an account of behavior that is wrong, and therefore divert our efforts from developing solutions based on a correct understanding. The distortions in the law that occur in order to preserve the free will assumption are themselves costs. Further questions of credibility emerge where the law relies upon an account that is rejected by many other disciplines and perceived as being based on folk concepts of human behavior. Additionally, the fact that the vast majority of those punished in our justice system are poor, members of ethnic minorities, and from abusive and disadvantaged backgrounds may undermine some citizens' confidence in the intelligence of the idea that people freely choose their behavior and therefore are justly blamed. There are resulting costs in social disaffection, commitment, and support.

We should reconsider the high barrier the law has erected for the incorporation of determinism. Although many disciplines, such as psychiatry and sociology, have accepted determinism as a more plausible account of behavior than free will, the law indicates that it will similarly embrace determinism only upon dispositive proof of

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[216] Blocker v. United States, 288 F.2d 853, 867-868 (D.C. Cir. 1961) (Burger, concurring) (citing Berman, *supra* note 194, at 366).

[217] KONRAD LORENZ, ON AGGRESSION 232 (Marjorie K. Wilson trans., Helen and Kurt Wolff Books & Harcourt, Brace & World, Inc. 1966) (1963).

its correctness.[218] When one court observes that "[n]either this Court nor anyone else in the world will ever definitively answer the question whether mankind is determined or is possessed of free will,"[219] it suggests that definitive proof is the relevant standard. Some members of the Supreme Court call for *conclusive* proof before giving determinism a constitutional effect.[220] This high burden is interesting in light of the self-presentation of the criminal law generally. Part of what the criminal law tells us about itself is that defendants are condemned to punishment only when their guilt has been proven beyond a reasonable doubt. However, what constitutes guilt as we understand it depends on a concept of free will that could not meet a preponderance of the evidence standard. Our sense of the reliability of the criminal law, notwithstanding the ostensibly high burden placed on the prosecution in the criminal trial,[221] is undermined by such a basic contradiction.

Whether criminal justice as it exists is better at addressing the problem of criminal offending than is psychiatry or any other alternative available is also open to question. The many unknowns that go into the idea that law cannot deter without free will and the blame it facilitates include: how much deterrent effect the current system actually accomplishes, what the difference in deterrent effect would be if a primarily therapeutic regime replaced the current punitive system, whether a therapeutic regime would better rehabilitate individuals, and whether the rehabilitation achieved would be sufficient to make up for any loss in deterrence. These questions are difficult to answer, and what little evidence exists is highly controversial. Moreover, our massive punishment system cannot be shown to substantially decrease crime,[222] and the most likely offenders are recidivists.[223] The

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[218] The burden of proof in the insanity defense presents an interesting comparison. It has varied; in some instances it rests on the prosecution to prove sanity beyond a reasonable doubt. *See* Tatum v. United States, 190 F.2d 612, 615 (1951) ("[S]anity, like any other fact, must be proved as part of the prosecution's case beyond a reasonable doubt."). At times, the defendant has the burden to prove insanity by clear and convincing evidence. *See* 18 U.S.C. § 17(b) (2000) ("The defendant has the burden of proving the defense of insanity by clear and convincing evidence.").

[219] State *ex rel.* D.D.H. v. Dostert, 269 S.E.2d 401, 410-411 (W. Va. 1980).

[220] Stanford v. Kentucky, 492 U.S. 361, 378 (1989).

[221] Whether this burden on the prosecution is actually as high as it appears to be is a separate question. *See* Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105 (1999) ("The results of [my] inquiry point to a single conclusion: standard reasonable doubt instructions focus the jury on the defendant's ability to produce alternatives to the government's case, and thereby shift the burden of proof to the defendant.").

[222] Efforts to demonstrate a correlation between punishment and crime reduction have largely been unavailing. For example, the death penalty, the most severe punishment in our criminal system, should havea measurable effect. However, it has not been shown to reduce the murder rate. In Gregg v. Georgia, 428 U.S. 153, 185 (1976), the joint opinion concluded that empirical evidence regarding the deterrent effects of the death penalty was "inconclusive." The Panel on Research on Deterrent and Incapacitative Effects likewise concluded that "the available studies provide no useful evidence on the deterrent effect of capital punishment." THE PANEL ON RESEARCH ON DETERRENT AND

ineffectiveness of psychiatric treatment does not provide a pragmatic basis for rejecting determinism, if we lack evidence that the justice system is a better resort. If the choice is between two fairly ineffectual systems, the law is in no position to be arrogant or exclusionary about the determinism of psychiatry.

The law should also accommodate determinism because courts generally suspect that determinism will one day supersede free will as the prevailing account of criminal behavior. Judge Posner remarks that "[p]erhaps some day we will learn enough about human behavior to be able to attribute every criminal act to a specific hereditary or environmental factor outside the criminal's control . . . ."[224] Another court says of the same idea that "[i]t may be that we shall reach that point . . . ."[225] Another observes, "[t]he state of society and the science of medicine may some day arrive at the point at which . . . a man's medical condition can be equated with his legal responsibility."[226] Others qualify the acceptance of free will as required "[i]n the present state of scientific knowledge"[227] or conclude that "[i]t is simply not yet

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INCAPACITATIVE EFFECTS, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 9 (Washington, D.C., National Academy of Sciences 1978). As a result, "no sound, empirically based conclusions can be drawn about the existence of the [deterrent] effect, and certainly not about its magnitude." *Id.* at 41.

[223] *See* JOHN DIIULIO, COUNCIL ON CRIME IN AMERICA, THE STATE OF VIOLENT CRIME IN AMERICA 58 (1996) (rating the rate of recidivism or violent offenders at more than 90 percent.); *see also* WILLIAM J. BENNETT, JOHN J. DIIULIO, JR. & JOHN P. WALTERS, BODY COUNT: MORAL POVERTY... AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 99 (1996) (Wisconsin study concluded that "91 percent of prisoners had a current or prior adult or juvenile conviction for a violent crime."); *id.* at 103 (Virginia study concluded that "more than three-quarters of all violent criminals in [state] prisons in 1992-93 had prior convictions."). *But see id.* at 95 (citing BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE PRISON INMATES (1992)) (indicating that in 1991, 13 percent of prison inmates had been convicted in the past for a violent crime, while another 32 percent had been sentenced in the past to probation or incarceration for a nonviolent crime); Thomas P. Bonzcar, U.S. Dept. of Justice, *Characteristics of Adults on Probation 1995* at 4 (Table 5) (1997) (estimating that about half the prison population in 1995 consisted of repeat offenders). The variations probably reflect different sampling techniques and different criteria for determining what constitutes a prior offense. In any event, a likely majority of prisoners have been previously incarcerated.

[224] United States v. Beserra, 967 F.2d 254, 256 (7th Cir. 1992).

[225] Cole v. State, 128 A.2d 437, 439 (Md. 1957). *See also* State v. Maharras, 224 N.W. 537, 539 (Iowa 1929) ("We have not reached the point in the administration of the criminal law that we can . . . [assert] the utter futility of punishment of the criminal.").

[226] State v. Crose, 357 P.2d 136, 139 (Ariz. 1960). Another insists that "[t]he law must proceed upon the assumption that man, generally, has a qualified freedom of will," but adds "[a]t least, we must proceed upon that assumption until there have been devised more symmetrical solutions to the many faceted problems of society's treatment of persons charged with commission of crimes." United States v. Leisterr, 393 F.2d 920, 929 (4th Cir. 1968).

[227] State v. Sikora, 210 A.2d 193, 202 (N.J. 1965). *See also* State v. Reece, 486 P.2d

the time" to do otherwise.[228] Of course, the one day to which courts allude may be far in the future; a case as far back as 1927 opined that "[i]t may be that eventually it will be decided that the determinist school of penology is right . . . ."[229] However, these frequent remarks of courts suggest a sense that determinism is a plausible successor to free will, and that the real question is not so much if but when, and under what conditions.

Thus, there is the sense that "the writing is on the wall." As the courts indicate, what will change the law is probably not better arguments on the merits or truth-value of free will or determinism, whether made by legal scholars or philosophers. The law will instead have to adopt determinism when social acceptance becomes sufficiently widespread or when psychiatry or some other therapeutic approach achieves clear success in preventing crime. Just as medicine drove out demonology as an explanation for human ailments when it was able to demonstrate that it was better at curing them than was exorcism, a deterministic approach would drive the mythology of free will out of the law when it clearly exceeded punishment at controlling crime—and probably not before.[230]

Courts and legislatures should stop seeing themselves as the foremost champions of demonology in this situation. As they recognize, they are in a particularly good position to appreciate the difficulties with the free will account and the attractions of determinism as an explanation. While behaving responsibly in recognizing the danger in making dramatic changes away from the status quo, they should not resist determinism so relentlessly. Then again, it is not entirely the fault of courts that the law has closed off most of the avenues to determinism that once existed. With regard to the insanity defense, courts at one time seemed to be engaging in a dialectic open to both free will and determinism. However, legislatures, responding to public panic about crime,[231] led a movement away from the

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1088, 1091 (Wash. 1971) ("If medical science discovers . . . that there is no 'free will,' then what is called for is an entirely new legislative approach to the problems of antisocial conduct."); United States v. Lyons, 731 F.2d 243, 249 (5th Cir. 1984) ("[I]t may be that some day tools will be discovered with which reliable conclusions about human volition can be fashioned.").

[228] Powell v. Texas, 392 U.S. 514, 537 (1968) (plurality opinion).

[229] Orme v. Rogers, 250 P. 199, 203 (Ariz. 1927).

[230] Of course, retributionists may still call for punishment in such a scenario. It would be interesting to see how the resulting separation of utilitarian and deontological theories of punishment would play out in the law.

[231] For example, the U.S. Supreme Court acknowledged the role of the public outcry over the *Hinckley* verdict in inspiring legislative reforms of the insanity defense. Shannon v. United States, 512 U.S. 573, 577 (1994). The Court remarked that "[t]he acquittal of John Hinckley on all charges stemming from his attempt on President Reagan's life, coupled with the ensuing public focus on the insanity defense, prompted Congress to undertake a comprehensive overhaul of the insanity defense as it operated in the federal courts." *Id.* The public was indeed focused on the defense. After *Hinckley*, 80 percent of those polled said they disapproved of the insanity defense, and nearly as many said that the *Hinckley* case had "weakened [their] faith in this country's system of justice." WILLARD GAYLIN, THE KILLING OF BONNIE GARLAND 351 (1983) (citing *Public*

deterministic description perceived as too condoning of criminal behavior. Much the same has happened with juvenile justice.[232] As numerous examples attest, courts have vigorously abetted this movement; yet as courts are somewhat more immune to majoritarian pressures, they ought to have provided more tension.

Courts seem to accept the idea that nothing less than a paradigm shift should change their perspectives. However, law's usual path (as opposed to science's) involves incremental, glacial change that buffers social upheaval. Considering this, courts' sense that determinism might one day be accepted itself presents an implicit argument for why the law ought to effect some accommodation now: to keep out an account of behavior that is seen as a plausible replacement for the current one frustrates the ordinary process of evolution. Some acceptance of determinism, accompanied by artificial but not insurmountable barriers to its spread, might be necessary to help the law play its proper incrementalist role.

Rather than seeking to bar the gates entirely, courts (and legislatures) should be willing to accept some inconsistency between free will and determinism in the criminal law—an inconsistency that would necessarily be part of any evolutionary process. This does not require compatibilism, a position which has not attracted courts (perhaps for good reason). Rather, accepting some inconsistency accommodates the law's idea that the two accounts are fundamentally inconsistent. However, a kind of federalism of philosophies could be adopted to rationalize the inconsistency. Just as in the federal system, different states may prescribe contrary laws—with the resulting inconsistency formally accepted—so too could different jurisdictions and different areas of the criminal law adopt different theories of the nature of behavior, with the resulting inconsistency likewise accepted. Rather than reacting with retrenchment in the face of inconsistency, courts and legislatures should seek ways to manage the tension. The federal system tolerates inconsistency between states to promote experimentation that allows us to both learn from different ways of doing things and use localization to enhance the law's

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Opinion 27 (August-September 1982)). Prior to the intervention by Congress, the federal courts had spent many years developing the contours of the insanity defense through judge-made law. In the D.C. Circuit Court of Appeals, for example, the defense evolved a great deal: beginning with the judicially-established combination right-wrong and irresistible impulse test. *See* Daniel M'Naghten's Case, 8 Eng. Rep. 718, 722 n.28 (1843). The defense then changed to the *Durham* test devised by Judge Bazelon, see Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), to the modified *Durham* test, and finally to the American Law Institute Model Penal Code test, which the en banc circuit in *Brawner* adopted. *See* U.S. v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (en banc); McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962); Carter v. United States, 252 F.2d 608 (D.C. Cir. 1957). The circuit based its test on prior precedent, psychiatric advances, and the court's own experience. *See Brawner*, 471 F.2d at 981-82, 986. However, this process halted with the passage of the Insanity Defense Reform Act, 18 U.S.C. § 17 (1984), which established the law on the insanity defense for all federal courts to a test that closely resembled the original right-wrong test. The irresistible impulse supplement no longer existed.

[232] *See supra* note 135 and accompanying text.

efficiencies.[233] These benefits should accrue here as well and motivate a tolerance for inconsistency.

For example, rather than trying to make juvenile justice consistent with the assumption of free will implicit to the adult system, a given jurisdiction might instead comport its juvenile justice system with principle offered in *Eddings*,[234] that youth are determined by upbringing and environment. A legislature could adopt a program to bring about this change, but courts might also effectuate some version of it by admitting and giving weight to deterministic evidence in juvenile dispositions to the extent permitted by existing law. Contrary to *Eddings*, the guiding principle should not be that there is an actual well-demonstrated difference between the free will of children and adults[235] (a difficult psychological and philosophical position to take), but rather that the evidence of the factors controlling the behavior of children is sufficiently manifest that treating them differently from adults is logistically justifiable. We can readily access information about the family life and schooling of juveniles as well as supporting research showing the effect of such factors. For adults this evidentiary trail has in individual cases gone stale, and as a related result, less research exists supporting such causation. This difference intelligently justifies different treatment of juveniles and adults, and functionally provides a limiting principle to manage the slippery slope problem (even if the source of traction is somewhat artificial). Such an exception for juveniles also provides an intelligent basis for change and expansion in the law, should sociological and psychological understanding of the causes of adult behavior improve.

On the other hand, some other jurisdiction might continue to eschew the deterministic view and instead insist upon a free will orientation that supports punitive dispositions for juvenile cases, an approach that might make sense where juvenile crime is a particular problem and deterrence is therefore an especially attractive possibility to pursue. The latter jurisdiction would preclude deterministic evidence as counterproductive to achieving the law's articulated goals (and not merely because it implies a violation of some sacred free will assumption).

V. CONCLUSION

The adoption of contradictory theories of causation within the criminal law,

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[233] As the Supreme Court says, "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." Addington v. Texas, 441 U.S. 418, 431 (1979).

[234] Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) ("[W]hen the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.... [I]t is a time and condition of life when a person may be most susceptible to influence and to psychological damage" (footnote omitted)).

[235] S[ANFORD J.] FOX, THE JUVENILE COURT: ITS CONTEXT, PROBLEMS, AND OPPORTUNITIES, 11-12 (1967), *cited in* Thompson v. Oklahoma, 487 U.S. 815, 835 n.41 (1988).

however unsettling, would be better than the forced resolution the law currently maintains. Although under such a mixed regime the criminal law would abandon consistency in its account of the nature of criminal behavior, the resulting variations would themselves be consistent with evidence or objectives that are currently impeded from consideration by the law's single-minded pursuit of theoretical consistency. The law could also support the diversity of approaches that leads to advancement, and perhaps a more maintainable future consistency. Such a strategy, however adulterate, would be less artificial than the current attempt at achieving a prelapsarian criminal law, devoid of any taint of determinism.