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SOFT-SERVED DESERTS: SOFT RETRIBUTIVISM AS A FREE WILL-INDEPENDENT ALTERNATIVE FOR THE CRIMINAL JUSTICE SYSTEM

Theodore Benson Randles[+]

> Men's actions are subject to general, immutable laws expressed by statistics. In what, then, consists man's responsibility before society, the concept of which follows from the consciousness of man's freedom? That is a question for jurisprudence.[1]
> —Leo Tolstoy

Freedom and statistical certainty make for tense bedfellows, as Leo Tolstoy gamely noted in his ambitious epilogue to *War and Peace*.[2] As science progresses in understanding the world of action and reaction, the justice system, rooted in theories of punishment as old as human civilization, must be analyzed continuously in light of new scientific reality. A collision that threatens to rock our criminal system of justice looms as a stark possibility: how do we square a deterministic account of human behavior—one in which every person's actions are foreordained and unchangeable—with a criminal system that holds people accountable for their crimes?

In August 2012, the journal *Science* plumbed this problem directly when it published a study documenting the sentences imposed by 181 state court judges confronted at the sentencing stage of a hypothetical criminal proceeding with evidence of biomechanical predisposition to psychopathy.[3] The judges faced the case of a convicted murderer who argued that his genetic makeup

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1. LEO TOLSTOY, WAR AND PEACE, 1202 (Richard Pevear and Larissa Volokhonsky, trans., 2007).

2. *Id.*

3. Lisa G. Aspinwall et al., *The Double-Edged Sword: Does Biomechanism Increase or Decrease Judges' Sentencing of Psychopaths?* 337 SCIENCE 846, 846 (2012).

predisposed him to violent crime.[4] The study was loosely based on the sentencing of Stephen Anthony Mobley who, after his conviction for murder, argued he should be tested for a genetic mutation that might explain his crime.[5] In the study, a subset of the judges reviewed brain scans and expert testimony that the defendant's criminal behavior was caused not by an act of volition, but by the chemical composition of his brain.[6] The study, entitled *The Double-Edged Sword: Does Biomechanism Increase or Decrease Judges' Sentencing of Psychopaths?*, found that such evidence significantly affected the sentences those judges imposed.[7]

The judges overwhelmingly found the evidence of a biomechanical cause of the crime to be a mitigating factor, leading to more lenient sentences when compared to the sentences imposed by judges presented with no such evidence.[8] The judges presented with evidence of the criminal's mental predisposition imposed sentences that were, on average, 1.1 years shorter for the same crime.[9] Though the judges rated the criminal to have a high legal and moral responsibility and free will under both versions of the facts, the differing sentences suggest that the judges' intuitions regarding the freedom of a criminal's behavior played a significant role in their judgments concerning his blameworthiness.[10] Confronted with evidence of aberrant brain composition, the judges presumably believed that the criminal's act was less blameworthy because his free will was less than the average person's.[11]

The article's reference to a "double-edged sword" denotes the potential that evidence like the kind presented in the study could influence judges in opposing directions concerning blameworthiness.[12] From a retributive standpoint—concerned with the proper deserts fitting a crime—evidence that the crime was caused by something other than the criminal's free choice constitutes mitigating evidence.[13] However, from a utilitarian standpoint—concerned with future dangerousness—a predisposition toward crime seems to weigh in favor of incarceration as a method of incapacitation.[14] While this article focuses more on the retributive side of this equation, it is helpful to keep these countervailing concerns in mind. The study makes clear that the judges' convictions regarding

4. *Id.*
5. *Id.*; *see also* Mobley v. State, 455 S.E.2d 61, 65–66 (Ga. 1995).
6. Aspinwall, *supra* note 3, at 846.
7. *Id.* at 847–48.
8. *Id.*
9. *Id.* at 846
10. *Id.* at 847.
11. *Id.* at 847–48.
12. *Id.* at 846.
13. *Id.* at 848.
14. *Id.*

the blameworthiness of a criminal's action is in some way tied to their judgments concerning his freedom of will.[15]

This makes sense within the criminal law, since seldom is an action, referred to as the *actus reus*, alone sufficient to render an act criminal.[16] To qualify as a crime, that act must be accompanied by a culpable mental state, called the *mens rea*.[17] While questions of determinism may seem, at first blush, to involve the *mens rea* component of the criminal act, in actuality, much of the discussion of free will and determinism focuses on whether a certain act is voluntary.[18] The Seventh Circuit underscored the essential nature of voluntariness in *United States v. Cullen*, when it noted:

> In the narrowest sense, every crime must be the product of defendant's free will; it must reflect his choice to perform the criminal act. If the act itself was the result of a mere reflex, or muscular spasm, or was caused by physical duress or compulsion, even the narrowest intent would be absent and the defendant would be innocent of crime; indeed, it could be said that he did not act at all.[19]

There seems to be little room for disagreement that a spasm is neither a morally ascribable act, nor the ground for criminal sanction. Scaling up from this intuitive truth, why shouldn't the same be said of the acts of a person with an aberrant brain composition predisposing him to commit a crime?[20] And if physical determinism is true, and all human actions are caused by forces outside of human control, then perhaps no human action is properly morally ascribable.[21] This presents a considerable problem for the justification and administration of criminal punishments.[22]

Defendants have often sought to inject the kind of causal arguments noted above into criminal trials—sometimes as a mitigating factor, sometimes as an affirmative defense, and sometimes to defeat the prosecution's case-in-chief.[23] Such evidence appeals to a common moral intuition: it seems unjust to punish

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15. *Id.* at 847–48.

16. Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1548–49 (2013) (discussing the fundamental importance of both *actus reus* and *mens rea* to criminal culpability).

17. *Id.*

18. *See* Luis E. Chiesa, *Punishing Without Free Will*, 2011 UTAH L. REV. 1403, 1411–12 (2011).

19. United States v. Cullen, 454 F.2d 386, 390–91 (7th Cir. 1971).

20. *See* Mobley v. State, 455 S.E.2d 61, 65–66 (Ga. 1995) (discussing the defendant's motion "seeking funds for expert witnesses to conduct preliminary testing . . . 'suggest[ing] a possible genetic basis for violent and impulsive behavior in certain individuals.'").

21. *See* Aspinwall, *supra* note 3, at 847.

22. *See, e.g.*, *Mobley*, 455 S.E.2d at 66.

23. *See* Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1097 (1985); *see generally* Deborah W. Denno, *Human Biology and Criminal Responsibility: Free Will or Free Ride?* 137 U. PA. L. REV. 615, 616–17 (1988).

someone for a harm he did not cause, or one that was outside of his control.[24] If a person's criminal act is caused not by free choice, but by brain composition or the irresistible push of a strong gust of wind, it seems unlikely that a jury would hold such a person criminally liable—such an action is not morally ascribable to the actor.[25] The study in *Science* seems to confirm such a belief is widespread amongst state court judges, who are responsible for much of criminal sentencing in the United States.[26]

Though little in the *Science* study may be revolutionary,[27] it elegantly raises the tension felt within the law between beliefs in physical determinism and in human free will.[28] How can we punish a criminal who was predetermined by causes outside his control to commit a crime?[29] Is such a person really blameworthy? These questions implicate strong intuitions and have been debated for millennia.[30] Going further, if showing that a criminal's crimes are attributable, at least in part, to factors outside of his control leads to a lesser punishment, then what if science eventually demonstrates that all people are similarly determined by factors outside of their control? Must the criminal law simply collapse, or perhaps take on a solely utilitarian cast, relinquishing any retributive basis?[31] The purpose of this Article is to propose that, even granting incompatibility between hard physical determinism[32] and a robust sense of human free will, the criminal justice system can be established on a footing that remains uncommitted to either alternative without being internally inconsistent.

This debate thrusts into the arena of criminal law what Leo Tolstoy faced in the historical realm when he wrote in the concluding epilogue of *War and Peace*:

> If we examine a man alone, without his relation to everything around him, his every action appears free to us. But if we see at least some relation to what is around him. Is we see his connection with anything whatever—with the man who is talking to him, with the book he is reading, with the work he is doing, even with the air that surrounds him, even with the light that falls on things around him—we see that

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24. Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L. J. 719, 730–31 (1991–1992).

25. *Id.*

26. *See* Aspinwall, *supra* note 3, at 847–48.

27. *See* Denno, *supra* note 23, at 633–39 (describing studies of neurophysiological abnormalities in criminals and their use in court).

28. *See, e.g.*, Michele Cotton, *A Foolish Consistency: Keeping Determinism Out of the Criminal Law*, 15 B.U. PUB. INT. L.J. 1, 33–35 (2005).

29. The literature confronting this question is large and varied in its approach to the problem. *See, e.g.*, Pillsbury, *supra* note 24, at 730.

30. *See generally* DERK PEREBOOM, FREE WILL vii–x (Derk Pereboom ed., 1997) (discussing historical background of the problem of free will and determinism) [hereinafter FREE WILL].

31. Moore, *supra* note 23, at 1094 (suggesting, but ultimately rejecting such a scheme).

32. Aspinwall, *supra* note 3, at 846 (defining "biological determinism" as "the idea that once we know something about an individual's genes or brain, we can predict or explain his or her behavior").

> each of these conditions has an influence on him and guides at least one side of his activity. And insofar as we see these influences, so far our notion of his freedom decreases and our notion of the necessity he is subject to increases.[33]

If a human being is determined by events outside his control, and is not an independent actor, then how can we hold such a being responsible for his choices? While many would argue that such an inconsistency is illusory,[34] if we push that dispute aside and grant that there is no room for moral responsibility in a deterministic world, then what form should our system of criminal law take?

This Article differs from those works that have proposed there really is no inconsistency between free will and determinism and that our legal system need not confront such problem because the problem itself is illusory.[35] Nor does this article join those works that advocate accepting incompatibility between free will and determinism by instituting a moderated, but ultimately incoherent, system of criminal justice.[36] Rather, this Article argues that, beginning from widely accepted notions of a right to self-defense, a criminal justice system can be fashioned from the concept of "weak retributivism" proposed by Daniel Farrell.[37] This is a concept that is palatable to both those who believe in human free will to the exclusion of physical determinism and to those who believe in physical determinism to the exclusion of human free will.[38] If it can cater to such "incompatibilists,"[39] then such a system should also be acceptable to compatibilists, who believe that there is no true inconsistency between moral agency and physical determinism.[40]

Part I of this Article briefly sketches the problem of free will and determinism as it relates to criminal punishment and discusses the discomfort many in the administration of the criminal law feel to physical determinism. Part II examines the *Durham* test of insanity as an area where the conflict between free will and determinism has had a concrete impact on the criminal justice system. Part III suggests an alternative ground for criminal punishment, based on Daniel Farrell's "weak retributivism,"[41] that can function regardless of whether humans have the free will required for moral responsibility. Part IV presents a general outline of how such a system might look and how it might differ from our current

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33. TOLSTOY, *supra* note 1, at 1205.

34. *See* Peter Westen, *Getting the Fly Out of the Bottle: The False Problem of Free Will and Determinism*, 8 BUFF. CRIM. L. REV. 599, 600–01 (2005).

35. *See id.*

36. *See* Cotton, *supra* note 28, at 5.

37. *See* Daniel M. Farrell, *The Justification of General Deterrence*, 94 PHIL. REV. 367, 368 (1985).

38. DERK PEREBOOM, LIVING WITHOUT FREE WILL 1–3 (2001) [hereinafter LIVING WITHOUT FREE WILL].

39. *Id.* at 1.

40. *See* Moore, *supra* note 23, at 1121.

41. *See* Farrell, *supra* note 37, at 368.

system of punishment. Part V concludes with a look at how current theories of excuse might survive within such a system.

Rather than arguing for a specific metaphysical account and constructing a system of criminal law that is compatible with that account, this Article seeks to propose a system of criminal law that is independent of the various accounts of free will and determinism noted throughout this paper. This attempt is Rawlsian in its cast: the system suggested in this Article does not rely on robust notions of moral agency dependent on human free will.[42] As Rawls sought to construct his political philosophy on as general a metaphysical grounds as possible,[43] so too this Article seeks to explore a plausible system of justice consistent with equally plausible metaphysical theories. This Article neither assumes nor argues for determinism. Rather, it argues that, contrary to the widespread belief that any robust system of criminal justice must have as its presupposition human free will, the punishment of criminals can be justified without reliance on a picture of human free will subject to being undermined by a theory of physical determinism. While this system must be grounded on some suppositions, they are of a general enough character to appeal to most plausible metaphysical accounts, which is as it should be. In a pluralistic society such as ours, our institutions, including our institutions of justice, should be founded on the most widely acceptable, functional basis that can be found.

I. FOUNDATIONAL FREE WILL

When Abraham Lincoln described the United States as a nation "dedicated to the proposition that all men are created equal,"[44] he identified a proposition he believed foundational to American society. Lincoln did not say all men are, in fact, created equal; rather, Lincoln identified the *belief in* and *dedication to* equality as essentially American.[45] Fyodor Dostoevsky illustrated a similar dedication when he said, "[i]f anyone could prove to me that Christ is outside the truth, and if the truth really did exclude Christ, I should prefer to stay with Christ and not with truth."[46] Human equality was undermined by the institution of slavery, yet Lincoln nonetheless urged his countrymen to hold to equality to realize a more perfect Union. Dostoevsky wrestled with doubt, and yet he resolved he would hold with his faith even if the object of his belief proved false.

Within American jurisprudence, particularly within our system of criminal justice, there is a similar foundational belief that undergirds our system: the

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42. *See* John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFFAIRS 223, 240 n.22 (1985).

43. *Id.*

44. *Abraham Lincoln: Gettysburg Address*, https://www.greatamericandocuments.com/speeches/lincoln-gettysburg/, (last visited Feb. 19, 2018).

45. *Id.*

46. Letter from Fyodor Dostoevsky to Mrs. N.D. Fonvizin (1854) *in* Ethel Golburn Mayne, trans., LETTERS OF FYODOR MICHAILOVITCH DOSTOEVSKY TO HIS FAMILY AND FRIENDS 71, 67–68 (1914).

belief in human responsibility and moral agency founded on an assumption that humans possess free will. While there is much debate on the proper definition of free will,[47] at its most stripped-down, it is a belief that humans are moral agents with the ability to guide their actions without being externally determined.[48] As science has gained a wider and more comprehensive understanding of the physical world, arguments that humans are no more free of the laws of nature than a rock or tree have increased.[49] Our world, the belief runs, is determined by physical laws and the state of physical matter at any given time; a complete picture of both would allow us to predict every future state of the universe, including human action.[50]

American jurisprudence has resisted recognizing such physical determinism because of its possible consequences for criminal law. Most people would find it absurd to hold a meteor that crashes into a home morally accountable for the destruction it wreaks. Likewise, we look backward with puzzlement at the medieval practice of trying animals for crimes.[51] But if humans, like rocks and animals, are simply prey to the laws of nature with no real autonomy, then why should we treat them any differently? The retributive theories of punishment underlying our system support holding a person responsible for his actions just because he chose those actions, and threatens to fall apart if the law recognizes that human action is ordained by physical laws rather than a robust freedom of will.

This fear, the fear of the collapse of the grounds for holding people criminally liable for their actions, can be seen rising to the surface of American jurisprudence within individual court opinions:

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47. *See* LIVING WITHOUT FREE WILL, *supra* note 38, at 1–3 (exploring various historical definitions of free will); *see generally* FREE WILL, *supra* note 30, at vii–x (discussing historical background of the problem of free will and determinism).

48. THOMAS NAGEL, MORTAL QUESTIONS 114-15 (1986). *Cf.* FREE WILL, *supra* note 30, at 233.

> [Free will] presents itself initially as the belief that antecedent circumstances, including the condition of the agent, leave some of the things we will do undetermined: they are determined only by our choices, which are motivationally explicable but not themselves causally determined. Although many of the external and internal conditions of choice are inevitably fixed by the world and not under my control, some range of open possibilities is generally presented to me on an occasion of action—and when by acting I make one of those possibilities actual, the final explanation of this ... is given by the intentional explanation of my action, which is comprehensible only through my point of view. My reason for doing it is the *whole* reason why it happened, and no further explanation is either necessary or possible."

Id. (emphasis in original).

49. *See* Moore, *supra* note 23, at 1112–13.

50. *Id.*

51. Katie Sykes, *Human Drama, Animal Trials: What the Medieval Animal Trial Can Teach Us About Justice for Animals*, 17 ANIMAL L. 273, 276 (2011).

> While philosophers, theologians, scientists and lawyers have debated for centuries whether such a thing as 'free will' really exists, 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 and that they are influenced by society's standards as well as by personal standards. We can, in the abstract, agree with Aquinas that man 'the framer of human law, is competent to judge only the outward acts;
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> * * * God alone the framer of the divine law, is competent to judge the inward movement of wills.[52]

The United States Court of Appeals for the District of Columbia makes a suggestion reminiscent of Lincoln and Dostoevsky: it argues the courts must hold to the notion of free will, not until the debate is resolved once and for all, but "until a firm alternative is available."[53] This choice is pragmatic, reflecting not a deep-seated ideology, but rather a tactical choice that free will is a necessary condition for a working criminal justice system.[54] In its decision, the court explicitly recognizes the dependence of our criminal system on the idea of free will. Even in the face of proof that physical determinism is true, the courts must proceed on the assumption that free will exists until an alternative system of justice not predicated on such a belief can be fashioned.

The United States Supreme Court has echoed the *Blocker* court in holding that "[a] 'universal and persistent' foundation stone in our system of law, and particularly in our approach to punishment, sentencing, and incarceration, is the 'belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.'"[55] Justice Benjamin Cardozo, writing for the Supreme Court, agreed: "Till now 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."[56] The fear of these courts was expressed succinctly by the D.C. Circuit when it wrote, "In the determination of guilt age old conceptions of individual moral responsibility cannot be abandoned without creating a laxity of enforcement that undermines the whole administration of criminal law."[57] The criminal law cannot give up a

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52. Blocker v. United States, 288 F.2d 853, 865 (D.C. Cir. 1961) (Burger, J., concurring).

53. *Id.*

54. *Id.* at 866 (quoting Gregg Cartage & Storage Co. v. United States, 316 U.S. 74, 79–80 (1942) ("[T]he practical business of government and administration of the law is obliged to proceed on more or less rough and ready judgments based on the assumption that mature and rational persons are in control of their own conduct.").

55. United States v. Grayson, 438 U.S. 41, 52 (1978) (quoting Morrisette v. United States, 342 U.S. 246, 250 (1952)).

56. Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937).

57. Fisher v. United States, 149 F.2d 28, 29 (D.C. Cir. 1945).

belief in free will because the consequences would undermine the entire system, which seeks to hold individuals accountable for their criminal actions.

Yet determinism has made inroads into American law, sometimes eliciting fierce reaction from courts. The next Part of this Article will explore the insanity defense as an area of the law where physical determinism has impacted the practical application of our criminal system. It will show the sometimes violent reactions of the legal system to encroachment by determinism, and will also suggest determinism is a problem likely to persist. It would be better for our courts and the society they protect to overcome doubts about determinism by adopting a system not tied to robust conceptions of human free will.

II. DETERMINISM AT THE GATES

The tension felt by American jurists between deterministic accounts of the universe, including human behavior, and the criminal law's dedication to human freedom are not limited to theoretical debates in academic journals. The debate has time and again reared its head in the opinions of cases decided, at least in part, on the basis of the metaphysical leanings of the judge in question.[58] This Part focuses on the insanity defense as an area of law where determinism has had a profound impact. Such an account will animate the search, explained in later Parts, for a system of criminal justice not vulnerable to determinism.

In the middle of the twentieth century, a panel of judges on the United States Court of Appeals for the District of Columbia reevaluated the court's test for criminal insanity.[59] Monte Durham had been convicted at trial of housebreaking, and the trial judge had rejected Durham's defense of insanity on the basis that the defense had failed to establish at trial that Durham "didn't know the difference between right and wrong or that even if he did, he was subject to an irresistible impulse by reason of the derangement of mind."[60] Writing for the D.C. Circuit on review, Judge David Bazelon held that existing tests for insanity were obsolete and inadequate to the then-current understandings of the mental workings of the insane.[61] The court went to great lengths to decry prevailing tests, specifically the "right-wrong test[,]" then in force in that circuit, and the "irresistible impulse" test referred to by the trial judge.[62] In formulating a new test, the court looked to the test for insanity adopted in New Hampshire in 1870, which held "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[63] The *Durham* test, which clearly

58. *See generally* Cotton, *supra* note 28, at 1.
59. Durham v. United States, 214 F.2d 862, 876 (D.C. Cir. 1954).
60. *Id.* at 864–65.
61. *Id.* at 869.
62. *See id.* at 869–74.
63. *Id.* at 874–75.

seems to imply mental disease can *cause* actions, rather than simply influencing the will of the criminal, would become an object of fierce contention.[64]

Durham was controversial from the beginning, but a majority of the D.C. Circuit defeated a rehearing en banc which might have jeopardized the test.[65] Judge Warren Burger expressed his disapproval for the *Durham* test in later opinions, taking issue with the fact that *Durham* "assumed, without discussion, that mental disease can 'produce' or cause criminal acts."[66] The test "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 in which ethical and moral values and standards play a small part, if any part."[67] Burger bristled at the absence of any mention of a person's capacity to make choices in the regulation of his behavior from the *Durham* test.[68] That was the traditional standard for criminal insanity: whether a person was able to understand the criminal choice before him and able to see it was wrong and avoidable.[69] The *Durham* test instead asked jurors to decide whether the act was directly caused by the mental disease.[70]

Durham was overruled in 1972,[71] but not before it effected a 36-fold increase in the number of successful insanity defenses in the D.C. Circuit.[72] The deterministic flavor of *Durham* seems, empirically, to have had a clear effect on juries, given their increased willingness to acquit defendants when applying the test.[73] Like the judges presented with evidence of biomechanical causes of a criminal's actions, the jurors' intuitions concerning moral blameworthiness similarly may have been softened when they focused on whether the insanity *caused* the criminal to behave as he or she did, rather than evaluating whether the criminal's will was overcome by the mental disease.[74] This seems to confirm Judge Bazelon's own reasoning in adopting the *Durham* test—that the name we put to a failure does matter, as noted by the increase in acquittals following the *Durham* test[75]:

> 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

64. *See* Cotton, *supra* note 28, at 5–9.

65. *Durham*, 214 F.2d at 876.

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

67. *Id.* at 867.

68. *Id.* at 865.

69. *Id.*

70. *Id.* ("When it came to explaining to the jurors the standards they were to use, we see 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.").

71. United States v. Brawner, 471 F.2d 969, 1006 (D.C. Cir. 1972) (en banc).

72. Cotton, *supra* note 28, at 8.

73. *See id.*

74. *See* Aspinwall, *supra* note 3, at 847–48.

75. Cotton, *supra* note 28, at 8.

> 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.[76]

When the emphasis is placed not on the criminal's choice to commit a crime, but rather on the causal role a mental disease may have played in the crime, then intuitions concerning moral blameworthiness seem to diminish.

If nothing else, the history of the *Durham* test shows that how we frame questions of human will and determinism have a profound practical impact on the application of the law. It stands to reason, therefore, that a system which could accommodate determinism, as Justice Burger clearly felt that our current system cannot,[77] would be less vulnerable to shifting beliefs favoring free will on the one hand and determinism on the other.

III. SELF-DEFENSE AND "WEAK RETRIBUTIVISM"

Having attributed the apprehension felt within the criminal law to physical determinism, the question then becomes: can a system which can address the potential of determinism to undermine justifications for criminal punishment be developed? Since it is exactly the belief in free will that determinism undermines, at least in the minds of many, the more specific project is to construct a system which does not rely on free will to measure culpability.[78] Although there is much room for debate on the compatibility of free will and determinism, assuming free will and determinism *cannot* coexist, is it possible to develop a system of justice satisfactory to both? This Part considers what Daniel Farrell calls the concept of "weak retributivism" as the potential basis for such a system.[79]

In his article *The Justification of General Deterrence*, Farrell develops a system of general deterrence he characterizes as a form of "weak retributivism," which is based on a theory of distributive justice.[80] While Farrell uses the example of self-defense against an unjust aggressor to develop this idea, Derk Pereboom argues that Farrell's theory may be justified even without the existence of moral responsibility and free will and suggests extending Farrell's theory to one that can exist in a physically determined world without free will.[81] Thus, Farrell and Pereboom, together, provide a plausible system of criminal

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76. Blocker v. United States, 288 F.2d 853, 868 n.24 (D.C. Cir. 1961) (Burger, J., concurring) (quoting David L. Bazelon, *The Awesome Decision*, SATURDAY EVENING POST, Jan. 23, 1960 at 56.).

77. *See id.* at 865 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937) ("[A]ll law in Western civilization is 'guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of (legal) problems.'").

78. *See, e.g.*, *id.* at 876.

79. *See* Farrell, *supra* note 37, at 368.

80. *Id.*

81. *See* LIVING WITHOUT FREE WILL, *supra* note 38, at 168–74.

justice which can satisfy determinists, who believe the lack of human free will makes most criminal punishments unjustifiable, while simultaneously allaying the courts' fears that abandoning free will and moral responsibility would be fatal to a robust system of criminal justice.

Farrell's approach to general deterrence is grounded in the individual right to both direct and indirect self-defense.[82] Direct self-defense, as Farrell uses it, is a person's right to inflict the amount of harm needed to stop an unjust aggressor from harming the victim in the face of a threat.[83] Indirect self-defense is the individual's right to *threaten* to inflict harm in order to prevent an unjust aggressor from harming the victim in the face of a threat.[84] Farrell argues the intuition that such acts of self-defense are justified is founded on a notion of distributive justice.[85] That is, if a harm is inevitable and we must choose whether to allocate it to an innocent victim or an unjust aggressor, then it seems right to allocate that harm to the unjust aggressor.[86] Our criminal justice system already has this feature: it protects the innocent against the acts of the unjust aggressor, or criminal. Yet it is Farrell's next movements that provide a practical foundation to a system of general deterrence not dependent on the existence of free will.

If our right to direct and indirect self-defense was limited to inflicting or threatening to inflict the minimum harm needed to prevent an unjust aggressor's attack, then the application of this approach to a system of criminal justice where the criminal is already in custody and incapacitated would seem questionable.[87] Since the aggressor is no longer a threat, there does not seem to be any justification to punish the person any longer on the grounds of self-defense.[88] Self-defense, therefore, would be limited to cases of immediate danger, likely only in the province of individual citizens and perhaps the police in their role of protecting the innocent.[89] Yet Farrell builds from our basic intuitions regarding self-defense to a society-wide system of criminal justice which, he believes, rests upon self-defense rather than more hard-to-defend notions of hard retributivism.[90] Farrell notes the difference between his system as thus:

> And this, I shall say, is one version of the thesis of weak retributivism: one must suffer, once one has done wrong, not (simply) because of one's decision to do wrong, as in classical or 'fierce' retributivism; rather, one must suffer if one's decision to do wrong makes it

82. *See* Farrell, *supra* note 37, at 369.
83. *Id.*
84. *Id.*
85. *Id.* at 372.
86. *Id.*
87. *See* LIVING WITHOUT FREE WILL, *supra* note 38, at 172.
88. *Id.*
89. *Id.*
90. *See* Farrell, *supra* note 37, at 370.

> necessary that someone must suffer and that sufferer must either be the wrongdoer or some innocent victim.[91]

Farrell distinguishes between special and general deterrence, defining the former as punishment inflicted to prevent the individual criminal from repeating his crime and the latter as punishment inflicted to prevent the population at large from committing the same type of crime or crimes in general.[92] Special deterrence, to Farrell, is the easier practice to justify—he argues that special deterrence is really nothing more than the right of indirect self-defense exercised at a societal level.[93] General deterrence is harder to justify on Farrell's account, for how do we justify inflicting pain on an unjust aggressor when it is not to prevent that aggressor's actions but to prevent the actions of society at large?[94] Unlike special deterrence, this practice seems unjustifiable on a theory of direct and indirect self-defense, for we are not seeking to defend ourselves from the aggressor's actions, but rather, the feared actions of society at large.[95] Why that burden should fall upon the criminal as opposed to any other person in society is not obvious at first blush.

Farrell argues that a practice of general deterrence *can* be developed from our rights of direct and indirect self-defense.[96] The justification hinges on the fact that when a person commits a crime, in addition to the harm of the crime itself, the criminal also harms society by making it more likely that others will commit acts of that same kind.[97] If this vulnerability of society to a greater amount of crime is attributable to the actions of the criminal, then, Farrell argues, it is justifiable to inflict the amount of harm on the criminal needed to counter that vulnerability.[98] This is just another aspect of the principle of distributive justice at work in special deterrence.[99]

It is not immediately apparent how this system of self-defense based on distributive justice could be applied to society at large. A person may have a right to defend against unjust aggressors, but why that right should motivate a penal system with the state as the distributor of punishment is unclear. Yet even if the state could distribute punishments in this way, the principle of self-defense discussed would only allow the state to impose the punishment needed to protect society from the vulnerability introduced by the criminal's actions. If, as the almost-universal practice is amongst systems of criminal justice, uniform systems of punishment are developed and applied to criminals in different contexts, then this often may lead to criminals punished in excess of the amount

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91. *Id.* at 373.
92. *Id.* at 370, 373.
93. *Id.* at 370.
94. *Id.* at 373–75.
95. *Id.* at 373–74.
96. *Id.* at 383.
97. *Id.* at 384.
98. *Id.* at 383.
99. *Id.* at 386.

of harm justified on self-defense grounds.[100] Farrell takes up this question, largely on grounds of administrability, and his discussion will become central to the next Part of this Article, which will examine the broad outlines of a system of criminal justice founded on Farrell's principles.[101]

Farrell maintains his system, based on a principle of distributive justice, is a form of what might be called "weak retributivism."[102] This is because "one's wrongful choices make one liable, morally, to treatment to which one would ordinarily not be liable."[103] Thus, a criminal is liable to punishment because of his actions: the wrongdoer is simply receiving his deserts. This approach to general deterrence has the benefit of avoiding the pitfall inherent in many utilitarian-based systems, as the system cannot justify punishing an innocent person even if such punishment would benefit society at large.[104] This system of general deterrence, founded on common-sense notions of the right of self-defense, only justifies punishing those who unjustifiably harm members of society or society as a whole.[105]

Yet Farrell's account is predicated on self-defense where the criminal is an unjust aggressor.[106] His account "presupposes that the wrongdoer in question is both causally and morally responsible for [society's] increased vulnerability to others' wrongdoing."[107] His view, then, seems unavailable if we are searching for a basis for criminal justice not reliant on free will. In *Living Without Free Will*, however, Derk Pereboom argues that Farrell's principles can be put on a "hard incompatabilist" footing which rejects free will and accepts physical determinism.[108]

Pereboom argues for the position of "hard incompatibilism" – the view that "freedom of the sort required for moral responsibility is incompatible with determinism" – because human actions and choices are determined by external forces.[109] Though he finds some accounts of free will are coherent in themselves, Pereboom views the existence of free will as empirically unlikely.[110] After making the case for hard incompatibilism and rejecting the existence of moral responsibility, Pereboom turns to the consequences of such a view on

100. *Id.* at 387, 392.
101. *Id.* at 392.
102. *Id.* at 368.
103. *Id.*
104. *Id.* at 371.
105. *Id.*
106. *Id.*
107. *Id.* at 385.
108. *See generally* LIVING WITHOUT FREE WILL, *supra* note 38, at 168–74.
109. *Id.* at 127.
110. *Id.* at 129 ("I have argued . . . that there is one indeterminist position—agent-causal libertarianism—that yields a coherent conception of human morally responsible agency, and that it might well be possible for us to be agent-causes.").

human life and institutions.[111] In the context of criminal behavior, after ruling out retributivism as incompatible with determinism,[112] Pereboom examines Farrell's argument in *The Justification of General Deterrence* as a possible means of motivating a system of criminal justice.[113]

It is not obvious, Pereboom argues, that the right to self-defense is triggered only by attacks by an unjust aggressor.[114] Most of us would agree that a victim can defend himself from an attack whether the attacker is morally responsible or not —even if the attacker is compelled to attack, such as instances of psychopathy or involuntary movement.[115] Of course, in such instances, the victim should inflict the minimum amount of harm needed to deter the threat, but this is just the system for which Farrell argues.[116] Thus, if Pereboom is right and the right to self-defense is not dependent on the blameworthiness of an attacker, then everything Farrell has argued can be of use even if the attacker is not morally blameworthy for his actions.[117] As Pereboom explains:

> [A] Farrell-style deterrence theory is grounded in the powerful moral intuitions that underlie the right to harm in self-defense. Since – at least initially – this right would seem to be ours even if hard incompatibilism were true, it would appear that the hard incompatibilist could avail himself of Farrell's theory in arguing for the legitimacy of criminal punishment. Then he might not be at a disadvantage with respect to the competing positions in justifying an effective response to criminal behavior.[118]

Thus Pereboom puts Farrell's theory of general deterrence on a footing which can exist in a deterministic world. Though Farrell developed his system on the grounds of punishing a morally blameworthy attacker, we see that his system can also justify punishing an attacker who is not morally blameworthy, or who lacks free will entirely.[119] Beginning with the fundamental right of self-defense, one can fashion a system of general deterrence based not just on punishing to prevent the criminal from committing his crime again (special deterrence) but also on punishing to address the added vulnerability any criminal act contributes to society. If we *must* choose between inflicting harm on society or a criminal (who is, by admission, not responsible for his crime), then we may choose to

111. *See id.* at 158, 187.

112. *Id.* at 159–61.

113. *Id.* at 168–69.

114. *Id.* at 169.

115. *Id.* at 170.

116. Farrell, *supra* note 37, at 387-88. *See also* LIVING WITHOUT FREE WILL, *supra* note 38, at 171–72 (summarizing Farrell's argument).

117. LIVING WITHOUT FREE WILL, *supra* note 38, at 160–70.

118. *Id.* at 171.

119. *Id.* at 170.

inflict that harm on the criminal without thereby blaming him for his actions.[120] John Wigmore articulated a similar view in 1924:

> The measures of the modern penal law are not based on moral blame, but on social self-defense. When there is a weed in your garden, and you cut it down, you do not do this on any theory of the moral blame of the weed, but simply on the theory that you are entitled to keep weeds out of your garden. Society is entitled to use appropriate measures to repress antisocial acts. Society's right of self-defense is equally valid even when the human weed was predetermined by nature and environment to do just what he did.[121]

Pereboom and Farrell, together, provide the basis for a system of criminal justice not dependent on free will. We punish the criminal not because he is responsible for his actions, but because we *must* choose between a harm befalling the criminal or the society. Part IV will explore a means of implementing a criminal justice system based on the system discussed here.

IV. THE BETTER ANGELS OF OUR NATURE

Part III explored a theory of criminal deterrence based on the right to self-defense. This Part will draw the broad outlines of how such a system might look in practice as an alternative to the current system of criminal punishment. It begins by discussing how Farrell makes the movement from individual self-defense to a society-wide regime of general deterrence. It then turns to a discussion of how Farrell's system can be adapted to a system free of moral blame and along the lines of Pereboom's discussion in *Living Without Free Will*.[122]

As noted in Part III, it is unclear how Farrell's theory of general deterrence, founded as it is on the individual right of self-defense, could motivate a system of criminal justice where the state threatens to, and actually does, impose punishment to criminals for their actions when those criminals are already in

120. Following his discussion of Farrell's theory, Pereboom raises the possibility that Farrell's theory of general deterrence is actually retributive in nature. If this concern is correct, then it would render Farrell's system unavailable to our project, because such a system would maintain our current criminal justice system's dependence on free will. *See* LIVING WITHOUT FREE WILL, *supra* note 38, at 172. Yet it does not seem that just because we choose the criminal as the object of punishment we are committing ourselves to his blameworthiness. As between society at large and the individual criminal, it may just be that society chooses to punish the criminal because he or she presents the more convenient and consistent means of deterring crime, and that even if the criminal is not morally responsible for his or her crime. Such a choice may run afoul of Oliver Wendell Holmes, Jr.'s view that "[t]he general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 64 (1881).

121. Harry Olson, Homer Cummings, & John H. Wigmore, *A Symposium of Comments from the Legal Profession: The Loeb-Leopold Case (Concluded)*, 15 J. AM. INST. CRIM. L. & CRIMINOLOGY 395, 404 (1924).

122. LIVING WITHOUT FREE WILL, *supra* note 38, at 160–70.

custody and, therefore, no longer pose an imminent threat to society. If that system takes the form of a uniform schedule of punishments imposed for various crimes, it does not seem that Farrell's system, which seems to require an individualized response to each criminal act, can be of aid. Yet Farrell deals with both of these objections in turn, basing his answer in part on the more feasible administrability of a schedule of punishments than a system that individualizes punishments to individual cases.[123]

Farrell deals with two branches of this objection separately: first, what justifies the state in threatening to punish people for certain classes of action, and second, what justifies the state in carrying out those punishments when a criminal commits one of the prohibited acts.[124] In the first instance, Farrell's argument is pragmatic. He recognizes a uniform system of threats akin to a criminal code may be objected to on the grounds that it will often times threaten people more than is necessary to deter them from that crime.[125] For instance, most of us, it seems, do not need the threat of the death penalty to deter us from murder. Why, then, is the state justified in threatening us *all* in this way, rather than merely threatening those who are likely to commit murder *but for* the threat of punishment? Farrell imagines a "very simple social setting" where it would be possible to issue specific threats of this sort.[126] Yet in a large society like our own, the implementation of such a system would require us to "construct, at incalculable expense, an unimaginable bureaucracy that does nothing but issue particular threats to particular people."[127] The choice seems obvious: if we must issue general threats of punishment or face having no criminal code at all, Farrell argues it is reasonable to believe we are justified in issuing the general threats.[128]

Assuming that individuals of a society have a general entitlement to be free from criminal activity, Farrell's suggestion may be characterized as a preference for a liability rule of entitlement as it applies to criminal activity, rather than a property rule of entitlement.[129] Calabresi and Melamed famously argued that liability rules—rules where "someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it"—are preferable in environments where fixing the value of an entitlement to its owner is either difficult or exceedingly costly.[130] In the criminal context, ideally, the state would threaten each individual in society with only the amount of punishment

123. Farrell, *supra* note 37, at 379–81.

124. *Id.* at 379–80.

125. *Id.* at 380.

126. *Id.* at 380–81.

127. *Id.* at 381. This discussion does not touch the Equal Protection Clause and other constitutional objections that might be raised against such a system.

128. *Id.*

129. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) (differentiating between two types of rules of entitlements: property rules and liability rules).

130. *Id.* at 1092, 1106–07.

needed to deter that individual from crime; in reality, however, it would be extraordinarily cumbersome for the state to determine such individual values across society, even assuming a reasonably accurate method of measurement existed, and that seems unlikely.[131] In such a case, therefore, it seems reasonable for the state to make a general estimate of the punishment needed to deter criminals and protect the entitlement.[132] As Calabresi and Melamed note, "liability rules involve an additional stage of state intervention: not only are entitlements protected, but their transfer or destruction is allowed on the basis of a value determined by some organ of the state rather than by the parties themselves."[133] The generally issued threats proposed by Farrell are just this sort of state-determined, general estimate of the value of the cost of crime.[134]

Farrell then turns to a justification for actually implementing the threatened punishments when a person commits one of the proscribed acts.[135] Farrell notes that, at times, punishing a person according to the general threat may lead to a punishment that is greater than necessary to deter that criminal from behaving criminally in the future.[136] This seems like improperly using the criminal for the good of society—something we want to avoid if we are to remain uncommitted to the moral blameworthiness of the criminal because it seems to imply the criminal is vulnerable to punishment of this kind because it is deserved.[137] Farrell's response to this objection is to introduce his theory of general deterrence: we are justified in punishing the criminal above the amount needed to deter his criminal threat because *someone*, either the criminal or society at large, must bear the increased vulnerability to crime the criminal has introduced by his action.[138] We are justified in punishing criminals according to the generally issued threats if society has established those punishments as an estimate of the amount of vulnerability the criminal act exposes to society.[139]

Farrell proposes important limiting criteria which would stand as upper and lower limits on the amount of punishment that can rightly be dispensed under such a regime.[140] First, Farrell argues an important limiting principle can be found in the fact that, because it is based on a theory of self-defense, his system only justifies doing no more "than we have to do in order to protect ourselves against the harms made likely by any given wrongdoer's attack."[141] Thus, if a criminal threatens to or actually does commit a minor battery, most people

131. Farrell, *supra* note 37, at 381–82.
132. *Id.* at 381. *See also* Calabresi, *supra* note 129, at 1092.
133. Calabresi, *supra* note 129, at 1092.
134. *See* Farrell, *supra* note 37, at 381.
135. *See id.* at 381–83.
136. *Id.* at 382.
137. *Id.*
138. *See id.* at 383–85.
139. *See id.* at 384–85.
140. *See id.* at 387–92.
141. *Id.* at 389.

would not find that killing the attacker would be a proportionate response.[142] How punishments will be fitted to certain types of crimes under this principle is, for Farrell, an empirical matter estimating the harm that would be done to society at large by the criminal's actions if punishment was not imposed.[143] Such a determination may be difficult, and estimates of this kind may often seem capricious or arbitrary. Yet fitting punishments to crimes is something our laws and courts regularly do, and it does not seem that such a determination would be any different than fixing the punishment a criminal "deserves" in our current, largely retributive system.

The second limiting principle is more criminal-specific than crime-specific.[144] Though we may make efforts to estimate the harms differing classes of crimes impose upon society, the theory of self-defense is very context-specific.[145] We are justified, on this theory, only in imposing the punishment necessary to prevent the harms stemming from the criminal's actions; since, in most cases, the threat of actual harm will have passed by the time the criminal is punished, the courts will have to impose punishment commensurate with the needs of special and general deterrence.[146] Farrell calls these "case-relative" limits *"a posteriori*" because they are not readily predictable: we can only divine the harm any criminal has done after he has done, or sought to do, that harm.[147] We are again faced with the demand of tailoring every punishment imposed to the specific harm done by any particular criminal, and the "unimaginable bureaucracy" fears that Farrell discussed earlier in his article resurface.[148]

Yet there seem to be two responses available to these *a posteriori* limits.[149] First, as Farrell suggests, if the right to self-defense is a right to do what is reasonably necessary to defend oneself and if requiring an individualized response rather than a society-wide schedule of penalties is unreasonable, then we seem to be justified in taking the reasonable step of normalizing the system of punishments across society based on a good-faith empirical estimate of the harms different types of crimes introduce.[150] Second, it seems the ability to custom-tailor a punishment to the particular harm of a criminal's action already exists within our system because of the discretion afforded to trial judges in sentencing. The *Science* study demonstrates just this point: judges confronted with certain deterministic evidence at sentencing tended to find such evidence mitigating and to impose lesser sentences accordingly.[151] While a harm-based

142. *Id.* at 389–90.
143. *Id.*
144. *Id.* at 390–93.
145. *Id.* at 391.
146. *Id.*
147. *Id.* at 390–91.
148. *Id.* at 381.
149. *See id.* at 392.
150. *Id.*
151. Aspinwall, *supra* note 3, at 846.

system of sentencing would need to be recalibrated to accord with our revised penalogical goals within this system, it does not demand anything not already in practice in our current justice system.[152]

Introducing Pereboom's interpretation of Farrell's system at this point raises a very important question to be resolved if we are to rest our system upon Farrell's weak retributivism: avoiding, as we are, that any person is morally responsible for his actions, how do we make room for defenses based on mental incapacity, infancy, compulsion, and the like? These defenses have traditionally rested upon our intuitions regarding the degree of moral responsibility attributable to a person's conduct.[153] But if no one is morally responsible in this sense, then our traditional categories threaten to fall apart. The reasoning of the Second Circuit Court of Appeals in *United States v. Freeman* would seem to apply to every person:

> What rehabilitative function is served when one who is mentally incompetent and found guilty is ordered to serve a sentence in prison? Is not any curative or restorative function better achieved in such a case in an institution designed and equipped to treat just such individuals? And how is deterrence achieved by punishing the incompetent? Those who are substantially unable to restrain their conduct are, by definition, undeterrable and their 'punishment' is no example for others; those who are unaware of or do not appreciate the nature and quality of their actions can hardly be expected rationally to weigh the consequences of their conduct. Finally, what segment of society can feel its desire for retribution satisfied when it wreaks vengeance upon the incompetent? Although an understandable emotion, a need for retribution can never be permitted in a civilized society to degenerate into a sadistic form of revenge.[154]

Under our theory, are all people not "substantially unable to restrain their conduct" if that conduct is determined not by a will that is free, but by physical laws working toward predictable and unavoidable outcomes?[155]

The discussion of the insanity defense above serves as a valuable proxy for our discussion here.[156] Alan Stone argues the "involuntariness" of the insane person's actions is what makes him morally blameless.[157]

We can readily acquiesce to this view of insanity and moral culpability without undermining our system, for we are not punishing the criminal because

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152. Farrell, *supra* note 37, at 392–93.

153. *See, e.g.*, United States v. Brawner, 471 F.2d 969, 986 (D.C. Cir. 1972) (en banc) (opining that "[t]he concept of lack of 'free will' is both the root of the insanity defense and the line of its growth").

154. United States v. Freeman, 357 F.2d 606, 615 (2d Cir. 1966).

155. *Id.*

156. *See generally*, Cotton, *supra* note 28, at 1.

157. Alan Stone, *The Insanity Defense on Trial*, 33 HOSP. & CMTY. PSYCHIATRY 636, 640 (1982).

he is culpable, but only because we choose, as a matter of societal self-defense, to harm the criminal rather than have that harm be borne by society at large.[158] Yet retaining defenses like insanity seems important even if we are discarding the notion of free will as the animating basis of our criminal justice system. How can we effectively differentiate the insane person from those we would punish on our account?

V. EXCUSING EXCUSES

As suggested in the previous Part, an obvious difficulty for a system based on weak retributivism is how to maintain the division between those who are punished for their crimes and those who are excused because of some mitigating factor. One common means of differentiation is between those acts chosen (or caused) by the criminal versus those caused by factors outside of the criminal's control; this is unavailable to us, however, if we are to avoid assuming free will.[159] If we are to avoid running afoul of determinism at this point, we cannot base our system of excuse on the causal origins of a crime, for every action of the criminal is caused by external factors outside of his control.[160] This presents a difficulty because, at least at a superficial level, many of the excuse defenses within the criminal law seem founded on the very notions of free will that we are seeking to avoid.[161]

The excuses, and our general conceptual framework for attributing blame in American law, generally adhere to a causal model of responsibility.[162] On a causal account, we distinguish acts that may appear criminal but are caused by unchosen influences on the accused person from crimes that are chosen and fairly attributable to the criminal.[163] Excuses like duress, necessity, addiction, insanity, and infancy all seek to divide actions of a criminal nature from those caused by outside or alien influences on a person.[164] The *Durham* test, while controversial for seeming to assume physical determinism, adhered to this view of crime, asking whether the criminal act was caused by the criminal or by his mental disease.[165] Acts caused by forces outside the control of the actor cannot be criminal because they are not properly morally ascribable to the actor.[166] And if an act is not morally ascribable to a person, it would be inappropriate to punish

158. *See* Farrell, *supra* note 37, at 384–86.

159. *See* Pillsbury, *supra* note 24, at 730–31 ("[T]he approach builds on the common intuition that, while persons are generally responsible for their own character, extraordinary environmental or genetic influences may preclude such responsibility.").

160. Moore, *supra* note 23, at 1112–14.

161. *See* Pillsbury, *supra* note 24, at 744–45.

162. *See id.* at 730–32.

163. *Id.* at 730–31.

164. *See* Moore, *supra* note 23, at 1098–1100.

165. Durham v. United States, 214 F.2d 862, 874–75 (D.C. Cir. 1954).

166. Pillsbury, *supra* note 24, at 730–31.

the person for that act.[167] H.L.A. Hart describes this free will grounding of our system of justice:

> [M]ost lawyers, laymen and moralists, considering the legal doctrine of *mens rea* and the excuses that the law admits, would conclude that what the law has done here is to reflect, albeit imperfectly, a fundamental principle of morality that a person is not to be blamed for what he has done if he could not help doing it. This is how Blackstone at the beginning of modern legal history looked at the various excuses which the law accepted. He said they were accepted because 'the concurrence of the will when it has its choice either to do or avoid the act in question' is the only thing that renders human actions praiseworthy or culpable.[168]

Such an account runs afoul of our system, for it seems to rest criminal liability on whether an act is causally ascribable to an actor's free choice.[169] This means of differentiating culpable criminal acts from those which are excused cannot be made on the assumption that all actions are externally determined.[170] While the causal model is not itself inconsistent with physical determinism, it threatens to excuse all crime.[171] For if all crimes caused by external factors are excused, and we concede the determinist's point that *all* human behavior is caused by external factors, then it seems to follow that all acts should be excused from punishment.[172] If our system is to withstand deterministic accounts of human behavior and still punish some crime, then it must find an alternative means of excusing crime—a workable picture of the causal account rests on free will assumptions inconsistent with our system.[173]

In addition to the practical disadvantages of the causal model, there are independent reasons to doubt its accuracy in describing the legal excuses. As Michael Moore argues in his work *Causation and the Excuses*, the causal model does not fit as a theory of legal excuse.[174] Moore makes this point using the example of duress.[175] No jurisdiction, Moore argues, has adopted a test of duress that merely asks whether an external threat *caused* the person to act in a criminal matter.[176] Rather, the test always ties the excuse of duress to whether a reasonable person would have been overcome by the threat.[177] The focus,

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167. *Id.*

168. H.L.A. HART, *Punishment and Responsibility: Essays in the Philosophy of Law*, 174 (1968).

169. Pillsbury, *supra* note 23, at 730–32.

170. *Id.* at 732.

171. *See* Moore, *supra* note 23, at 1112–13; *see also* Pillsbury, *supra* note 24, at 732.

172. Moore, *supra* note 23, at 1112–13.

173. *Id.*

174. *Id.* at 1129.

175. *Id.* at 1131–32.

176. *Id.* at 1132.

177. *Id.*

therefore, is on whether the practical reasoning faculties of the threatened person were compromised by the threat, not whether the threat *caused* the crime (whatever that might mean).[178] The causal model is over-inclusive as an account of the excuse of duress.[179]

This is apparent if we return to the *Durham* test. While the *Durham* test was cast in terms of the causal role played by the mental disease, the true issue in any insanity defense is whether the rational capacities of the person affected were so compromised that the person lacked the capacity to make a reasoned choice.[180] Moore argues that no matter what tests may be applied, the test for insanity, as applied by testifying mental health experts and by juries, focuses not on a causal account of the crime but rather on whether the person afflicted could make a reasoned decision at the time of the act.[181] Thus, in addition to being undermined by determinism,[182] an account of the excuses that turns on the causal model fails to accurately capture the rationale exercised in excusing a crime.[183]

What is really at the heart of our theories of excuse is a determination of whether the accused was capable of exercising a rational choice free of coercion.[184] Evidence of insanity, of duress, or other coercive or influencing factors only serves to establish that a person's rational faculties were compromised in a way that excuses.[185] Moore sums this view up, writing, "[i]n one or another of these ways, our legal and moral excuses all reflect the moral judgment that responsibility can only be ascribed to an individual who has both the capacity and the opportunity to exercise the practical reasoning that is distinctive of his personhood."[186] Focusing on the human rational faculty, which is not subject to doubt in the same way as the human capacity for free will, such an account of excuse is not undermined by determinism in the way that the causal model was.[187]

This method of accounting for excuse is also coherent with the system described above, resting, as it does, on notions of self-defense and a general system of punishments that seeks to deter criminal activity.[188] While no one may bear moral responsibility, given Farrell's understanding of general deterrence, there is nothing inconsistent in excusing some harmful acts because the actor's rational faculties were compromised at the time of their criminal

178. *Id.*
179. *Id.* at 1136.
180. *Id.* at 1137.
181. *See id.* at 1138–39.
182. *See id.* at 1112–14.
183. *Id.* at 1129.
184. Pillsbury, *supra* note 24, at 727.
185. *See* Moore, *supra* note 23, at 1148.
186. *Id.* at 1149.
187. *Id.* at 1112–14.
188. Farrell, *supra* note 37, at 368.

activity.[189] The focus is not on whether the person's actions were caused by external factors, for it may well be that all actions are so caused.[190] Rather, we ask whether, in making his decision, the actor was possessed of the rational faculties requisite for considered human choice.[191] Since a person who lacks rational capacity does not seem deterrable, if such faculties were compromised or absent, then we excuse that actor from punishment.[192] This distinction may not bear the deep moral resonance that causal accounts bear, but it is not threatened by a widespread belief in physical determinism in the ways that a causal account is.[193]

VI. CONCLUSION

Beginning from an account of the universal right to self-defense, a system of general deterrence can be constructed that does not require belief in free will.[194] Such a view is compatible with a belief in physical determinism, even a physical determinism that precludes free will and, consequently, blameworthiness for crime.[195] Such a system punishes the criminal not because he deserves to be punished in a moral sense, but because the negative effects of the crime must either rest with the criminal or with society itself.[196] Society may choose, on this account, to deter crime through the punishment of criminal acts.[197] Upon this general scheme, an account of excuse can be constructed that depends not on the causal origins of the crime, but on whether the criminal was possessed of his rational faculties at the time the criminal act was committed and was not coerced in the decision to perform the criminal act.[198] Such a theory of excuse logically fits with our general theory of excuse, perhaps more aptly than the causal model,[199] and can be justified on the grounds that there seems little benefit in attempting to deter those who chose a crime in a moment of coercion or during the loss of rational faculties.

Consciousness of free will or its absence has a peculiar character: though it changes nothing about our world, it changes everything about how we perceive that world. Even if society grants that there is no free will, the individuals composing that society will continue to behave as though they are free. They will weigh options in making rational choices which will then motivate their actions, all the while knowing that they are not the "author" of those actions. In

189. *See* Moore, *supra* note 23, at 1111–12; *see also* Pillsbury, *supra* note 24, at 732.
190. Moore, *supra* note 23, at 1112–14.
191. Pillsbury, *supra* note 24, at 732.
192. Moore, *supra* note 23, at 1112–13; Pillsbury, *supra* note 24, at 732.
193. Moore, *supra* note 23, at 1112–14.
194. Farrell, *supra* note 37, at 369.
195. *See* LIVING WITHOUT FREE WILL, *supra* note 38, at 168–74.
196. Farrell, *supra* note 37, at 367–68.
197. *Id.*
198. Pillsbury, *supra* note 24, at 727.
199. *See* Moore, *supra* note 23, at 1112–14.

this way the problem of free will is much like the problem of absurdity: even if society admitted that human existence is, ultimately, meaningless, and that the seriousness with which the individuals in that society engage in our lives is absurd, individuals would continue to engage in their lives in a serious way. Albert Camus believed that confronting the question of absurdity was inextricably linked to the question of suicide: if human beings are absurd and cannot escape such a state in living, why not escape living entirely?[200] Yet other philosophers, Thomas Nagel amongst them, have argued that recognizing our absurdity need not lead to such an extreme outcome: it should give way instead to a humble irony in our approach to life.[201] After the recognition of absurdity, the whole color of life will change, even as it remains much the same in action.[202]

The apprehension that courts feel towards determinism can be akin to Camus's fear concerning the absurd; the courts believe accepting determinism would mean suicide for criminal justice.[203] Yet such a calamitous outcome hardly seems necessary. Rather than resist determinism, as courts have done,[204] we can attempt to mediate the divide between free will and determinism by developing a criminal justice system that depends on neither. While this work has been cursory and the issues constituting this debate are manifold, this Article modestly attempts to suggest a foundation for criminal justice free of the ideological underpinnings that are threatened by a widespread acceptance of physical determinism. I do not wade into the controversy between those who believe in human free will and those who do not; I merely address an issue that must be addressed in either case: what do we do about criminal behavior in our society?

Our courts defend the rights of the many against the aggressions of the few. This role is indispensable in an ordered society. Yet if our courts turn from the work of punishing the criminal as a wrongdoer and simply look to inflict the punishment needed both to deter the criminal from further crime and to safeguard society from the vulnerability that criminal activity creates, we can continue effective criminal punishment free of the nagging fear that a criminal, like a meteor or a tree, is just a product of his environment and should not be blamed for his actions. And this is not a small thing to achieve.

200. ALBERT CAMUS, THE MYTH OF SISYPHUS 28–31 (1955).
201. NAGEL, *supra* note 48, at 22–23.
202. *Id.*
203. *See, e.g.*, Fisher v. United States, 149 F.2d 28, 29 (D.C. Cir. 1945).
204. *See* Blocker v. United States, 288 F.2d 853, 865 (D.C. Cir. 1961).