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Thomas A. Green

University of Michigan Law School, tagreen@umich.edu

Merrill Catharine Hodnefield

The Modern Firm, merrill@themodernfirm.com

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Reflections on Freedom and Criminal Responsibility in Late Twentieth Century American Legal Thought

by THOMAS A. GREEN* AND
MERRILL CATHARINE HODNEFIELD**

Throughout his tenure as editor, Larry Reilly took great pride in nurturing young authors. At the same time, he encouraged collaboration among authors, believing that all works were improved by a joining of effort. It is in this spirit that we jointly tackle below the complex and multi-faceted subject of criminal responsibility.

INTRODUCTION

It is now a commonplace among historians that American criminal jurisprudence underwent a dramatic change something like two-thirds to three-quarters into the last century. Roughly, this development is understood as a shift (or drift) from a more-or-less pure consequentialism to a "mixed theory" wherein retributivism played a major—at times, dominant—role. As the new paradigm remains intact, now approaching a half-century, the development qualifies as a significant historical fact. The fact applies not only to the history of justification for punishment but also to conceptions of the underlying principle of (basis for) responsibility. The two are rightly distinguished: for many scholars of the criminal law, what is usually called "negative retributivism" makes the principle of responsibility a necessary but not a sufficient basis for the imposition

* John P. Dawson Collegiate Professor of Law emeritus and Professor of History emeritus, University of Michigan (tagreen@umich.edu). Member of the Advisory Board of the *American Journal of Legal History*.

** Attorney at Law, Ann Arbor, MI (merrill@hodnefieldlaw.com). J.D., University of Michigan Law School; B.A., anthropology and sociology, Albion College.

of punishment; here, responsibility is stressed as a statement that carries its own force whether or not retributivism-based punishment follows. This responsibility is retributive in its own right; it assigns blame to the individual offender and underwrites greater stigma of criminal conviction than might be the case in a purely consequentialist legal regime.

Historians have, of course, paid attention to the rebirth of retributivism. They have had much to say about the preceding “decline of the rehabilitative ideal.” In some cases, they have assessed the relationship between, on the one hand, academic retributivist ideas—what might be termed “neo-retributivism”—and, on the other, the rhetoric about crime and punishment in late-twentieth-century political life and the actual implementation of policies in the real world of criminal justice administration. Less often have historians investigated the manner, internal to criminal-jurisprudence theory, in which late-twentieth-century legal-academic ideas evolved, though some of the legal academics themselves—writing not as historians, *per se*, but as commentators on the contemporary criminal jurisprudence scene—have made useful contributions to the history of ideas about criminal responsibility and punishment in their own times. Our own just-published work, *Freedom and Criminal Responsibility in American Legal Thought (FCR)*¹ (Green as author, Hodnefield as research and editorial assistant), though far from comprehensive, has sought to provide such an account. *FCR* has also openly encouraged other historians to contribute to the writing of this small but significant subfield of modern American criminal justice history.

FCR tells an only partial story of jurisprudential evolution. Its particular lens is the age-old, time-worn, free will/determinism problem. The book presents twentieth-century legal scholarship largely on its own terms in an investigation of how scholars’ views of the free will problem informed their notions of the proper bases for criminal responsibility. *FCR* thus captures a feature at the heart of criminal jurisprudence, but less a building block of that jurisprudence than, at least for most scholars, a large and troublesome rock that must be removed or worked round in order to build a sound

¹ Thomas Andrew Green, *FREEDOM AND CRIMINAL RESPONSIBILITY IN AMERICAN LEGAL THOUGHT* (2014).

foundation for retributive theory. True blame-based criminal responsibility has commonly been thought to presuppose a particular sort of human agency—real autonomy, even self-origination (or a surrogate for it)—that the determinist perspective calls into question. The problem posed for scholars of criminal responsibility is obvious. How scholars confronted that problem is significantly less so: where some directly confronted determinism's implicit critique of criminal responsibility (some finding it answerable, others accepting it), other scholars' awareness of, and response to, the problem is difficult to discern from the historical record. *FCR* examines selected scholars' positions on the free will problem, and its effects on thinking about criminal responsibility, where such positions were evident. Particularly for earlier-in-century scholarship, *FCR* also attempts to tease out implications of writings that only hint at the free will problem or that implicitly answer the determinist's critique of criminal responsibility.

For most of the twentieth century, the determinist critique of free-will-based moral and legal claims contributed to the dominance (in academic circles) of a non-retributive consequentialist justification of treatment or punishment. That justification had its own aims, of course—deterrence and reformation (or rehabilitation)—that were commonly thought not to require (indeed, often to deny) an affirmation of free will with respect to the criminal defendant. Thus, it is often difficult to clearly distinguish the influence on jurisprudence of concerns about the free will problem. Some criminal law scholars might have been driven to consequentialism precisely to surmount or avoid that problem. Most scholars, however, were probably attracted to consequentialism by its positive virtues (its presumed effectiveness with respect to prevention and cure and its presumed humaneness) in place of retributivism's perceived negative features (its focus on revenge and its tendency to harden the spirit of offenders and to induce recidivism). For these latter scholars, avoidance of the free will problem was merely a welcome bonus. The move back to retributivism within scholarly circles necessitated a more direct engagement with the free will/determinism debate; no longer did a purer consequentialism permit avoidance of the free will problem. Many criminal law scholars explicitly or implicitly adopted a "soft" determinist argument that surmounted the free will problem by holding that determinism and responsibility-bearing action are compatible. But again, where some

scholars might have seen the surmounting of the free will problem both as a critical philosophical step and as an independent good, most treated that victory of law over determinist “science” as no more than a necessary bother. For them, criminal responsibility—generally couched in retributivist terms—seemed destined to prevail (whether because it was thought instrumentally necessary or morally so). But the growing scholarly conversation about the free will problem often required even them to offer at least a nod to compatibilism before moving on to the meat of their specific jurisprudential concerns.

Throughout the century, then, the history of avoiding/grappling with free will and determinism can be seen as both the history of a fundamental issue and the history of a side-show. No less than featured events, side-shows have a history. And if they are in the nature of a predicate of the feature, they might possess an importance equal to that of the feature itself. A special characteristic of the sort of predicate that the free will/determinism side-show constituted is precisely that it is of the something-to-get-around variety. And the more compelling the main feature, the more need to accomplish the getting around. There is a commonplace dynamic at work in some such instances, namely that the getting around might be “over-determined,” especially where the problem to be gotten around is commonly thought to be unresolvable or resolvable only by what many consider a solution of a paradoxical nature.

To be concrete: the argument for compatibilism was viewed by some late-twentieth-century criminal jurisprudence scholars as non-paradoxical, by others as paradoxical, and by still others as a downright non-solution. But all scholars were interested in getting on with discussion of the main feature. That is, they wished to proceed on the background assumption that determinism is not an obstacle to a blame-based desert theory of criminal responsibility in order to reach central jurisprudential questions such as: How does one assess levels of deserved blame (in terms of intention, or of harms produced, etc.)? What constitute the bases of legal excuse? Is retribution merely necessary but not sufficient for punishment, or is it sufficient in itself or, even, in itself demanding of punishment? Each answer to these questions explicitly or implicitly was built on the assumption that determinism does not rule out criminal responsibility. Each became a part of the post-1970 retributivist tide. Yet it turns out that the history of legal-academic thought re-

garding the critical background assumption—that the free will problem is not really a problem—is not always easy to reconstruct. Certainly, *FCR* left a good deal in this regard to its readers' imaginations, to future historical inquiry and—it must be admitted—to the mysteries of life. Along these lines, the book alluded to, but did not fully engage, some necessarily speculative matters, at times leaving concrete history in the dust. The purpose of this article is to proceed beyond *FCR*, to return to—and make more progress on—these speculative ruminations.

We begin with what we can know as historical fact: that criminal law scholars were well aware—as virtually everyone is—that, taken to its logical extreme, determinism at least appears to rule out legal (and, indeed, all moral) responsibility entirely.² This is the “hard” determinist position—the notion that, determinism rules out true free will and the absence of true free will rules out personal responsibility. The position reaches a dead end rather quickly. There is nowhere to go, nothing to say; there is nothing. The prescriptive concept of ought disappears, so that even the inquiry, “What ought one to do absent a sensible notion of ought?” is a pointless one. Criminal responsibility theorists sometimes appeared to regard such reasoning as a *reductio ad absurdum*. But whether they meant that observation as in itself the basis for a rejection of hard determinism is unclear. Perhaps it was meant only as a description of what human life amounted to under the conditions of hard determinism: “absurd.” But one might equally conclude that the observation meant something more than that, namely the view that: as hard determinism leads nowhere and as we don’t know—perhaps can never know—whether hard determinism is true, we ought to proceed on the assumption that it is not.

This “ought” might be termed a conditional ought. Its base in uncertainty leaves lingering questions about just how much weight it can bear. Perhaps it can underwrite a notion of responsibility sufficiently strong to uphold basic tenets of criminal culpability. But we aren’t aware of much legal-academic writing that openly puts the question: whether proceeding on the basis of this particular conditional ought ought logically to place constraints on the justification

² For an important critique of the view that determinism is a coherent idea worth worrying about, see Peter Westen, *Getting the Fly Out of the Bottle: The False Problem of Free Will and Determinism*, 8 *BUFF. CRIM. L. REV.* 599 (2005).

of responsibility and punishment. Should the uncertainty encourage consequentialist values, reinforcing a sort of half-way-point position wherein the necessity of human responsibility is assumed yet the *reductio* is recognized, uncertainty about the truth of hard determinism is admitted, and—in recognition of such uncertainty—a mitigated notion of responsibility and punishment is adopted? Or would such a half-way point require too great an admission of the uncertainty of meaning in life?

For the historian of twentieth century American legal-academic thought regarding criminal responsibility, such questions point to two main puzzles. The first relates to the initial several decades of the century when a dominant and insistent consequentialism coincided with strong skepticism about—or outright rejection of the idea of—free will, not only with respect to perpetrators of repeated minor sexual offenses and other offenses sometimes associated with “illness,” but with respect to perpetrators of serious felonies as well. One notes little reference to the *reductio* that later attached to a determinist view; determinism and confident prescriptivism seem to have gone hand-in-hand. Which is to say, there is little evidence of self-consciousness about the irony of oughtness in a supposedly determined world. Can that have been the actual state of things?

Second, attention to the *reductio* accompanied the legal-academic affirmation of *desert*-based responsibility and punishment in the century’s final decades. But whereas the impossibility of oughtness lay at the heart of the *reductio*, and whereas that possible (but unverifiable) abyss was sometimes positioned as a license to proceed in the world in which we must proceed, there is less evidence than one might expect that the underlying uncertainty itself was self-consciously made a basis for the mitigation of retributivism. Can an increasing legal-academic movement in that direction—that is, toward heightening the threshold for responsibility and/or mitigating the imposition of punishment due to the underlying scholarly acceptance of the determined nature of individual action—not have been the actual state of things? From most perspectives retributivist crime policy, as actually implemented, showed little sign of a tendency toward mitigation. But the relationship between retributivist policy and politics, on the one hand, and academic retributivism, on the other, is itself an aspect of this second puzzle con-

cerning the ways in which determinism and retributivism coexisted in late-twentieth-century American criminal jurisprudence.

Our emphasis here is on this second puzzle. In an admittedly loose and tentative exploration, we consider some paths historians might follow toward understanding the bases for this coexistence.

1. HISTORY

As background, we offer some generalized historical context for the reemergence of retributivism in the late twentieth century, from precursor early and midcentury jurisprudential developments to coinciding late-twentieth-century criminal justice policy and politics. This includes historians' commentary—such as there has been—on the developments in criminal responsibility/punishment jurisprudence during the last 30 years of the century as well as criminal law scholars' observations, both contemporary to the late twentieth century and in more recent years, on these developments. Here we draw, in part, on a few aspects of the story told in *FCR*, which focused on legal academics' attention to the free will problem as well as on how scholars grappled with an apparent persistent belief in free will in society at large.

Consequentialism and Determinism in Early and Mid-Twentieth Century America

In the early twentieth century, the predominant legal-academic view regarding criminal responsibility and punishment was decidedly consequentialist in America, as it was generally throughout the West. Indeed, pre-World War I American scholars self-consciously promoted a version of the continental sociological positivism that they thought sensibly adjusted criminal justice administration to an essentially deterministic science of human behavior, one that emphasized the prevention of crime both *ex ante* and *post hoc*. To know the causes of crime and to study the actual socioeconomic conditions of life—as well as the psychology and biology of individuals—was to position society to predict criminal behavior and to allow both for intelligent intervention before that behavior occurred and for individualized treatment and reform of those already found to have committed such behavior. The treatment and reform deterred future criminal behavior by the specific individual taken

in hand. The attendant temporary loss of liberty involved deterred, by example, criminal behavior by other prospective criminals. Treatment might be strictly rehabilitative in the benign sense or a form of punishment aimed solely at "reform" through aversive conditions—a form of punishment that was non-retributive in nature. Among American reformers, some were academics—though only a few were specifically legal academics, as criminal law was itself not yet a large field in the law schools of the day, and more were sociologists and other social and behavioral scientists—and some were non-academic criminal justice administration workers connected with, e.g., penal institutions.³

By the interwar years, there was an increasing divide between so-called benign reformers who stressed rehabilitative intervention and the general deterrence school who favored "non-retributive punishment" (the latter accepted rehabilitative reform as well, but only to the extent that it did not weaken the general-deterrent message and effect). Though united in their critique of the conventional and socially pervasive assumption that criminals had acted with free will, the two schools were significantly apart. Reformers accused general deterrent proponents of encouraging a social identification of incarceration with retributivism; general deterrent proponents mocked reformers for naiveté and counterproductive methods. In truth, both schools of thought were attentive to conventional understandings of free will and both sought to accommodate them in so far as necessary, even if pro tem. The reformers took advantage of the scorn and stigma that even rehabilitative treatment would occasion, which might goad the individual offender's impulse to reform and incidentally deter others from committing crime. Deterrence theorists factored conventional morality into their overall utilitarian scheme; given the inherent necessity of public respect for the legal system, lay retributivist mis-impressions would sustain respect for what was in fact professionally understood as non-retributive punishment.⁴

³ For further discussion and references (going beyond even those presented in *FCR*) of early-twentieth-century jurisprudence and the Progressive reform movement, see Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915 (1995).

⁴ See Green, *FREEDOM AND CRIMINAL RESPONSIBILITY*, Chapter 4.

Organic to both styles of consequentialism, then, was a more complex relationship with the free-will-based underpinnings of criminal law than is first apparent from most scholars' determinist leanings. Further, despite reformist gains in the domain of penology, the formal substantive criminal law remained orthodox—which is to say, true to conventional morality—with respect to guilt assessment. The result, for criminal law scholarship, was a necessary accommodation of conventional notions of free will, generally by even the most determinist scholars. And the accommodation only increased with time. By midcentury, the implications of determinism were increasingly challenged even from inside the academy—largely, it is probably fair to assume, by instrumental concerns rooted in our national experience. Scholars confronted whether a state committed to political liberty—and committed to avoiding the sort of despotism that arose from communist and national-socialist experiments abroad—could ever treat its citizens in the paternalistic manner implied by sheer determinism. Indeed, how could a popular democracy support (at least outwardly) a system of criminal law that denied the personal responsibility that seemed inextricably linked to personal autonomy?

Constraint on government was a necessary part of a democratic order, and that alone put the ideal of an objective, scientific perspective on criminal justice in a questionable light. The criminal law, it was insisted, was necessarily a condemnatory process, and one whose moral foundations thus should be at the forefront of all inquiry into reform. But what legal academics actually thought about that moral component is often unclear. *FCR* postulated the emergence, among some scholars, of a hybrid idea: a moral-legal rule of criminal responsibility. Such a rule paid homage to the idea of free will by accepting the condemnatory aspects of conviction alongside, of course, the due-process-based protection of individual rights these aspects implied. But they did not clearly treat the idea of free will as necessarily corresponding to a conventional form of reality. Rather, the continued adherence to a largely treatmentist penology was widespread, perhaps suggesting that so long as punishment remained, in the academic mind, tied to the idea of treatment, the vague and often instrumental invocation of a truly responsible agent could be the more easily abided.⁵

⁵ See *ibid.*, Chapter 5.

Such observations, offered by *FCR* in print that is barely dry, cannot be fully evaluated absent the detailed analysis of academic writings that constitutes the main body of the book. But they are consistent with—and, indeed, strengthen—the general sense that the critique of rehabilitation that culminated in the mid-1970s, alongside support for an emphasis on *desert*-based sentencing, constituted a great turning point in twentieth century U.S. criminal justice. The turning point, of course, has not gone unnoticed in the historical literature.⁶ But the nature of the free will/determinism debate provoked by the stress on desert has not typically been addressed in that literature. In this regard, *FCR* is something of a new departure. *FCR* addresses the (apparent) mere accommodation of conventional morality during the first two thirds of the century and attempts to reconstruct how that accommodation evolved into more forthright versions of compatibilism that accepted both determinism (or at least the possibility of it) *and* desert-based personal responsibility. Still, *FCR*'s main focus on the free will/determinism debate itself, rather than on the relationship between that debate and the political, philosophical, social and, indeed, psychological contexts in which the debate occurred, leaves some of the interesting questions on the table.

Retributivism and Compatibilism in Later Twentieth Century America

It is commonly accepted that a reinvigorated retributivism dominated much of mainstream criminal responsibility theory in post-1970 America. The seminal contributions of H. L. A. Hart⁷ and Herbert Morris⁸ were followed by a range of more forthright retributivism. Some of it was direct and "positive"; the clearly compatibilist rubric for responsibility offered by Michael S. Moore is a prime example.⁹

⁶ See, e.g., D. J. Galligan, *The Return to Retribution in Penal Theory*, in *CRIME, PROOF AND PUNISHMENT: ESSAYS IN HONOR OF SIR RUPERT CROSS*, ed. C. Tapper (1981); Michael Davis, *Recent Work in Punishment Theory*, 4 *PUB. AFF. Q.* 217 (1990).

⁷ H. L. A. Hart, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* (1968).

⁸ Herbert Morris, *Persons and Punishment*, chap. 2 in *ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY* (1976), originally published in *THE MONIST*, vol. 52, no. 4 (1968).

⁹ Michael S. Moore, *Causation and the Excuses*, 73 *Cal. L. Rev.* 1091 (1985).

It is fair to say, however, that the majority of American legal scholars adopted “negative” retributivist views. As it is commonly put: they found the principle of responsibility to be a necessary but not sufficient basis for the imposition of punishment. That is, a wrongdoer cannot be held liable and punished merely to achieve consequential results, such as punishment-based personal reform or general deterrence; individual responsibility—indeed individual *blameworthiness*—is necessary to justify liability and punishment. But blameworthiness is not sufficient: the fact, length, or nature of punishment still required other bases, including consequential benefits to the individual offender or to society as a whole.

FCR examined late-twentieth century American retributivist (or “neo-retributivist”) scholarship with an emphasis on how legal scholars, who were well aware of the determinist critique, confronted that critique through their rubrics for personal blameworthiness. Most mainstream approaches adopted more and less precise compatibilist formulations. Still, there was a noticeable distinction between what we might call a formal compatibilism that was directly and forthrightly embraced and a rather more diffidently broached compatibilism-in-effect that scholars often at best backed into. The former posits a person with the capacity for rational thought, one whom circumstances allow to act upon reason, without any immediate external compulsion, to achieve satisfaction of a particular desire. Such a person is deemed responsible, both morally and legally, despite the fact that—given the realities of the natural order—in the *ultimate* sense his or her every thought and act is determined. This person has the capacity and opportunity to choose a course of action; within the frame of his or her own (ultimately determined) thought, desires, or willing, he or she has sufficient directive control for responsibility-bearing action.¹⁰

The latter form of compatibilism asserts a similar form of responsibility, under similar conditions, but is far more hesitant to recognize—sometimes even openly denies—that this assertion is a logical truth. What counts for this compatibilist is an amalgam of ideas that the true compatibilist shares but that he or she holds to over and above—or aside from—the formal philosophical position on the relationship among cognitive capacity, control in the here-and-

¹⁰ See Green, FREEDOM AND CRIMINAL RESPONSIBILITY, Chapters 8 and 9.

now, reason, desire, and will that he or she thinks dispositive. These ideas include: that were responsibility not accepted life would be absurd (purposeless, without direction, impossible to imagine); that our everyday virtually universal consciousness of responsibility ultimately justifies our living in accordance with that consciousness, whatever the source of that phenomenon might be; that possessing the capacity to act upon reason is what makes one a “person,” so that not to accord responsibility to one who has that capacity and the opportunity to exercise it is to treat one as less than a person by denying the respect and dignity a person deserves; that the dignity of the person precedes the state, which is designed to protect and foster it, not erode it, as would be the case were the belief in (and vindication) of individual moral and legal responsibility not taken to be a fundamental truth.

Whatever its precise form, much of mainstream legal theory emphasized the responsibility-bearing person and the justice inherent in more or less retributive theories of justice. Criminal punishment, in turn, was justified by individual offenders’ responsibility for their intentional acts, not just by consequentialist notions that offenders should be restrained to effect deterrence or rehabilitation. The theory thus dovetailed, at least on the surface, with American crime policy and political rhetoric. America as a whole was questioning the diversionary and rehabilitation-based penal theory that had dominated the first two-thirds of the century. From the Left, rehabilitation-oriented indeterminate sentencing was criticized both in theory and in practice as paternalistic, racist, and intolerably harsh due to lengthening sentences and failed or absent treatment programs; a broad range of voices, many associated with the civil rights movement, called for reforms aimed at humane, proportional treatment including shorter, fixed sentences.¹¹ From the Right, the voice of law-and-order—initially epitomized by the 1964 Goldwater campaign—cited rising crime and called for more incarceration, criticizing the very same indeterminate, rehabilitation-based sentencing as insufficiently harsh and thus ultimately ineffective in deterring crime.¹²

¹¹ The epitome of such calls for reform is, of course, the American Friends Service Committee report *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* (1971).

¹² James Q. Wilson’s conservative tome along these lines, *THINKING ABOUT CRIME*, was first published in 1975.

Whether it was the result of a faulty rationale or of problems with funding and implementation, the reality certainly was that the rehabilitative ideal, overall, was perceived to be failing.¹³ The call for determinate sentencing proportionate to the offense committed was initially shared across political, theoretical, and social spectrums regardless that, ultimately, this wave of reform was harnessed most successfully by the crime-control efforts of the War on Drugs and harsh penalties for recidivism like California's infamous Three-Strikes-and-You're-Out law. Other areas of legal doctrine, on the whole, similarly emphasized criminal responsibility, rather than excuses based on an offender's circumstances or mental state: strict liability persisted¹⁴ and, in part in the wake of the 1982 acquittal of John Hinckley, Jr., on grounds of insanity, successful grounds for innocence based on legal insanity were narrowly limited.¹⁵

This bare historical sketch of later twentieth century U.S. criminal justice is completed by confronting our unprecedented rates of

¹³ For contemporary observations on the decline of emphasis on rehabilitation, see Francis A. Allen, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981); *Introduction* to Andrew von Hirsch, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (Report of the Committee for the Study of Incarceration) (1976). For reflections on the decline and its aftermath, see, e.g., David Garland, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001), esp. the overview at pp. 8–14, and chap. 3, "The Crisis of Penal Modernism"; James Q. Whitman, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003), esp. the summary on pp. 52–56 on the decline of "individualization."

¹⁴ Legislatures continued to enact strict liability offenses—particularly in the realm of regulatory crimes—and the U.S. Supreme Court did not materially alter its conclusion, stated in *United States v. Dotterweich*, 320 U.S. 277 (1943), and affirmed in *Morissette v. United States*, 342 U.S. 246 (1952), that strict liability is a permissible basis for some crimes. Cf. Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 954–58 (1999) (discussing the persistence of what Kadish calls "liability without fault").

¹⁵ See, generally *The Insanity Defense: ABA and APA Proposals for Change*, 7 MENTAL DISABILITY LAW REPORTER 136, 210–11 (1983); Lincoln Caplan, *THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY* (1984). Many jurisdictions retreated from the more flexible test for insanity offered in the American Law Institute's 1962 Model Penal Code, instead returning to versions of the longstanding cognitive/*M'Naghten* formulation. For federal crimes, in 1984 Congress enacted a strict version of the cognitive test, limited the testimony of experts, and shifted the burden to the defense to prove insanity. Insanity Defense Reform Act of 1984, Pub. L. No. 98–473, §402(a) (1984); 18 U.S.C. §17. Idaho abolished the insanity defense in the wake of the Hinckley trial, joining Montana as the only other state with no formal insanity defense. (Utah would follow suit in 1993.) See, e.g., Brian E. Elkins, *Idaho's Repeal of the Insanity Defense: What Are We Trying to Prove?*, 31 IDAHO L. REV. 151 (1994).

punitive incarceration that scholars and historians are only beginning to grasp. From roughly the early 1970s to the late 1990s, the number of imprisoned offenders in the U.S. rose by more than 500% (due largely, it should be noted, to drug-related offenses). Further, the average length of prison terms increased and relatively more offenders were sentenced to imprisonment as opposed to non-custodial supervision.¹⁶ By the end of the century, at any given moment, about 2.2 million—or 714 out of every 100,000—Americans were incarcerated.¹⁷ At the same time, prison conditions were (and remain) punitive at best; beyond the shift in focus from rehabilitation to confinement, American prison conditions have been described as “a peculiar version of hell”¹⁸ that, in reality, serve no goal but (at best) punishment.¹⁹

As evidenced by U.S. law and practice, then, retributivism has played a central role in criminal justice from the later twentieth century to the present. With regard both to assigning criminal blame and, once blame is assigned, to punishing the blameworthy, legal doctrine, institutional practice, and public sentiment affirm—or at least accept—a broad view of individual responsibility. Our doctrine, rhetoric, and practice appear to presume the autonomously willed, blameworthy nature of criminal acts, with comparatively little mitigating weight placed on the actor’s internal or external circumstances or on a mere benevolent interest in offering opportunities to reform.²⁰ Yet, while the objective fact of retributivism in the

¹⁶ Garland, *CULTURE OF CONTROL*, 14.

¹⁷ Marie Gottschalk, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006), 1.

¹⁸ Robert A. Ferguson, *INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT* (2014), 1.

¹⁹ See *ibid.*, generally, and esp. chap 5. Ferguson, of course, goes much further, describing prison conditions as deeply inhumane, largely hidden from public awareness, and counterproductive to any worthwhile social goal. Work like that of Ferguson, James Q. Whitman, Michel Foucault, and others cast a shadow on any discussion of punishment, the realities of which may be so distinct from the punishment imagined by retributivist scholars that formal scholarship in this area ultimately could be said, *at best*, to constitute meaningless words on paper. Our discussion in this article is not meant to confront directly this dark abyss, but implicitly reflects it.

²⁰ These observations, of course, do not fully account for ongoing rehabilitative and diversionary practices or the innovations of specialized courts and proceedings such as mental health and drug courts. But, as yet, such practices and innovations appear far from the norm.

U.S. from the late twentieth century to the present is thus quite clear, the relationship between retributivist scholarship, on the one hand, and retributivist legal doctrine and practices, on the other, has rarely been examined in any depth.

Certainly historical and legal-academic approaches to late-twentieth-century retributivist scholarship—both contemporary critiques and present-day analyses—have posited connections between legal-academic retributivism and the American political and social currents of the last three decades of the century. David Garland, for example, describes the traditionally retributive tenor of politics and public opinion as transforming legal-academic theory, stating that “explicit attempts to express public anger and resentment” through the criminal process “transformed the more formal, academic discourse of the philosophy of punishment,” leading philosophers to “create rationales for retributive measures that better express the cultural assumptions and political interests that now shape the practice of punishment.”²¹ Other historical critiques emphasize the influence running in the opposite direction: James Whitman, among others, suggests that, wittingly or not, academic attempts at philosophically pure, compatibilist retributivism lent credence to—and perhaps encouraged—the inhumane, vengeance-based state of penal punishment in the United States.²² Whitman thus echoes the earlier critic, David Dolinko, who urged that mainstream retributivist theory legitimated, or at least unintentionally facilitated, harsh real-world penal practices.²³ More recently, Professor Anders Kaye provides a still more detailed account of the ways in which late-twentieth and early-twenty-first century compatibilist legal scholarship facilitates conservative sociopolitical aims.²⁴ Our own aim at this early stage of historical inquiry is not to

²¹ Garland, *Culture of Control*, 9.

²² James Q. Whitman, *A Plea against Retributivism*, 7 *BUFF. CRIM. L. REV.* 85, 89–90 (2003).

²³ See David Dolinko, *Some Thoughts about Retributivism*, 101 *ETHICS* 537 (1991); David Dolinko, *Three Mistakes of Retributivism*, 39 *UCLA L. REV.* 1623 (1992).

²⁴ Anders Kaye, *The Secret Politics of the Compatibilist Criminal Law*, 55 *U. KAN. L. REV.* 365 (2007). Kaye’s language hovers between that of intention and effect: “The secret politics of the compatibilist criminal law, then, is that it is calibrated to defuse pressure for social change and to facilitate violent enforcement of the status quo” (368).

assess any of these viewpoints. Rather, we hope to encourage further exploration of the relationship between politics and legal scholarship by starting a step farther back, through consideration of the complex internal contours of late-twentieth-century legal-academic retributivism—including how those contours might be informed by a range of political imperatives, by psychology, by ideas about human nature, and perhaps by the irresolvable nature of the free will problem itself.

2. REFLECTIONS

The Puzzle Restated

For the historian, the convergence of late-twentieth-century political conservatism and desert-based, retributivist legal-academic criminal jurisprudence represents both an opportunity and a puzzle. The opportunity inheres in what appears, at first glance, to be an object lesson in the connection between law and politics. On such a view, not only formal law, but also academic legal theory, responded to political objectives. One needn't posit a conscious move to accommodate conservatism: the point is all the stronger when, in accordance with structuralist notions, one can locate a shift in legal thought within a framework of ideas about the individual and about the relationship between the state and the individual that at once transcends overt politics and constitutes a contingent choice of philosophical position—a choice that, it turns out, is driven by the political ideas of the day. The puzzle inheres in the disjuncture between, on the one hand, a philosophical-juridical conception of moral and legal responsibility that accords with scientific (determinist) ideas about the sources and nature of human behavior and, on the other hand, what at least appears to be a similar conception of responsibility arising from a widespread socio-political (and generally free-will-based) conception of the wellsprings of human behavior.

We have noted a few early forays into the thicket of the legal theory-politics relationship, most of which leave room for what we see as the need for further study along the lines of the disjunction we have posited. These forays take their leave from the apparent overlap between politics from roughly the early 1970s forward and the transformation in legal theory of the same years. What they do not engage is the longer *durée*. The foundations of modern legal

theory are traceable to the immediate post-World War II period, so far as the conception of responsibility is concerned, and are themselves a reaction against the strong positivism of the preceding decades. The transformation of politics appears to be more local to the 1970s; but if one takes into account reactions to the welfare state from the New Deal forward, this transformation can be said to have deeper roots, and the relationship between the two transformations seem parallel for much of the century. If conservative politics regarding criminal responsibility and punishment has more of a history than commonly thought, and if that is a story of marginalization until the 1970s, the same might also be said of retributivist criminal law theory. Even on the long view, from the historian's perspective the more-or-less sudden—and, after all “bi-partisan”—critique of rehabilitation (Progressivism's last stand) would remain the key moment, and the convergence of Left and Right, as well as of theory and politics, would remain striking. This, of course, overlooks the substance of the matter: the differences in point of view signaled by the “disjunction,” differences registered not only over the first two-thirds of the century, but still in its later decades.

Such differences, we repeat, do not settle the issue. Even if theory resolved itself in terms that were alien to everyday political and social ideas, the resolution—just by virtue of its remaking theory so that it was consonant (on the surface) with the idea of just deserts—might be seen as an accommodation, self-conscious or otherwise, that was driven by larger social initiatives. Whether that is what happened—an “accommodation”—is the puzzle.

Mindways

The affirmation of desert in an era of deterministic thinking is perhaps the most striking aspect of late-twentieth-century criminal jurisprudence. We have suggested that the surmounting of the determinist critique of personal responsibility, though it came to be for many a predicate to this affirmation, can be seen as something of a side-show. Certainly many scholars who endorsed desert either were doubtful about whether the critique had in fact been successfully surmounted by philosophical compatibilism or took for granted that it had done so without looking too closely at the matter.²⁵ Desert

²⁵ See Green, FREEDOM AND CRIMINAL RESPONSIBILITY, Chapters 8 and 9.

theory had come to have its own imperatives, so that it could survive even the seeming plausibility of determinism and the seeming mysteriousness of free will. We have noted the more important—or at least more common—of these “imperatives,” including the reinforcement of autonomous participation in democracy and the due process protections inherent in acknowledging individual freedom vis a vis the state. Now we want to focus on two of them in particular: the “reductio” and the legal scholar’s own experience of an ineradicable consciousness of free will.²⁶

The “Reductio” and the Consciousness of Free Will

The “reductio” is shorthand for the playing out, logically, of a fully deterministic understanding of the world, according to which there is no possible basis for moral or legal judgment, and, hence, no basis for responsibility whatsoever—none even for a purely utilitarian law, as it too invokes an “ought,” the ought of its own justification as a rule of morality or law. Legal academics occasionally noted the possibility of such an understanding, saying that, should it come about, the world of human relations would be totally different from that which we now know, one that is now unknowable, unimaginable, and then settling back into the world as we do in fact know it. Occasionally, as well, they employed the “reductio”—the abyss that rendered human life meaningless—as an argument against taking hard determinism seriously (i.e., into account), usually without revealing whether they thought this very injunction subject to the reductio. Michael Moore first proposed his version of the reductio in “Causation and the Excuses,” observing (in part) that if hard determinism is true, then all behavior is caused and no behavior qualifies for moral responsibility or legal punishment.²⁷ Or, as Stephen Morse put it in 1998, even if determinism is true,

it is not clear what moral rules follow, and we cannot passively wait for determinism to “happen,” to somehow indicate to us what rules, institutions,

²⁶ This inquiry is anticipated, with additional citations and observations, in *FREE-DOM AND CRIMINAL RESPONSIBILITY* at 458-59 n. 95, 479-80 n. 15.

²⁷ Moore, *Causation and the Excuses*, 73 Cal. L. Rev. at 1112-14. “It may be the case that all human conduct is, in fact, compelled by circumstances,” wrote George P. Fletcher in 1978, similarly concluding that “if it is, we should have to abandon the whole process of blame and punishment.” *RETHINKING CRIMINAL LAW*, 801.

and practices we should adopt. We have no rational alternative but to deliberate, using our best moral theories and understanding of human behavior to devise and to justify a system that good reason tells us is likely with justice to promote human flourishing.²⁸

Also occasionally, scholars noted their own consciousness of free will. Indeed, "[i]f freedom is an illusion," urged the utilitarian Richard Posner, "it is one of those illusions . . . that we cannot shake off no matter what our beliefs or opinions are."²⁹ This they treated as a natural and ineradicable phenomenon—usually, however, as though to concede its possible or likely determined status rather than as supposed evidence of the real thing. This consciousness, too, sometimes became an argument for the wisdom of rejecting hard determinism, whether or not hard determinism was true.³⁰

"Conservatism" and the Limits of Retributivism

What, if anything, is the historian to make of this? Besides, that is, noting that it has an all too familiar ring in his or her own life (and, one supposes, in that of many others regardless of discipline). The flight from the implications of the *reductio*—and the oft-stated admission that, regardless of realities, one possesses an ineradicable sense of being free—might signal that the widespread embrace of compatibilism near the end of the twentieth century was both the result of logical analysis and yet overdetermined. Considered in this light, the question whether late-twentieth-century legal scholars

²⁸ Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME AND JUSTICE 329, 348-49 (1998).

²⁹ Richard A. Posner, THE PROBLEMS OF JURISPRUDENCE, 178 (1990). Even philosophers, wrote Michael Corrado, cannot help but adhere to the libertarian "ordinary view of things" holding that "some human choices are not caused (nor merely random either)" when those philosophers "are not at work." *Addiction and Causation*, 37 SAN DIEGO L. REV. 913, 917-18 (2000).

³⁰ Joshua Dressler observed that "no matter how logically compelling the case for determinism may seem," we "intuitively feel that we ordinarily have freedom of choice, and we develop our rules of criminal responsibility on the basis of this feeling." "Determinists can tell us, of course, that these feelings are themselves determined (as are, of course, the determinists' own beliefs), and that a view of human will that rejects logic and science for intuitions is suspect. Ultimately, however, if determinism is correct, there is no independent way to determine its accuracy, since we are determined to believe whatever it is we believe." *Reflections on the Excusing of Wrong-Doers: Moral Theory, the New Excuses and the Model Penal Code*, 19 RUTGERS L. J. 671, 688 n. 91 (1988).

accommodated a conservative politics may be recast; one is bound to think that, at base, all politics—liberal as well as conservative—are conservative at least in the sense of conserving the ideas of responsibility and desert, thus of rejecting the *reductio* and preserving our innate sense of individual freedom.

With this more fundamental notion of conservatism as a baseline, it might be important where individual scholars go from there. A liberal legal-academic politics, one might suppose, would distinguish proceeding on the basis of a robust embrace of freedom that flies in the face of the determinist critique from proceeding on the basis of a commitment to desert that both affirms personal responsibility and (yet) operates as a built-in limitation on punishment that responds to the determinist critique. This identification of liberalism with a scaled-down conception of responsibility and desert—a splitting of the difference—is familiar enough. But it may be thought to scale down the meaning of conservatism as well, if one concludes that the foundations of responsibility and desert inhere for all parties—liberals as well as conservatives—in the struggle to vindicate meaning in life.

Still, there are important differences in the two paradigmatic perspectives that exist at either end of the spectrum of retributive/compatibilist responses to the determinist critique of responsibility (that is, confident rejection of the critique and troubled rejection of it *cum* concessions to it). The question remains whether the historian can make use of this proposed dichotomy to better understand the more hidden roots and aspects of late-twentieth-century academic retributivism, as well as the relationship of that retributivism to politics and penal practices.

In light of the apparent broad academic contribution to the retributivist tide, it is particularly of note that “negative” and “limiting” retributivism—often based on a reluctant or “agnostic” compatibilism—was likely more common than a forthright and confident retributivism based on formal compatibilism.³¹ This softer retributivism is evident in scholarship regarding criminal responsibility, and is

³¹ See Green, *FREEDOM AND CRIMINAL RESPONSIBILITY*, Chapters 8 and 9, esp. pp. 462–63. Others have made similar observations, for example with regard to the commonness of “limiting” retributivism. E.g. Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY, 1293, 1302 (2006) (limiting retributivism “is very widely accepted and may be “the consensus model”).

particularly transparent with regard to sentencing theory. Its manifestation is well illustrated by the American Law Institute's 2007 reconsideration of its Model Penal Code sentencing provisions in light of the sentencing law and practices that grew out of the late-twentieth-century retributivist movement. Revised MPC §1.02(2)(a)(i) adopted blameworthiness (as opposed to rehabilitation or deterrence) as a primary aim of sentencing based on scholar Norval Morris's "limiting retributivism," which originated in the 1970s and 80s and emphasized individual desert for wrongdoing. Here, desert or blameworthiness is not a mere threshold for the state's right to punish. Rather, desert is a measure used, in the interest of parsimony, as a *limit* on state-imposed punishment and incarceration. Such a theory is retributive in that it is backward-looking and based on the offense committed; it permits punishment and/or confinement commensurate to the harm caused or depravity exhibited by the offense in question. But it is "limiting" because it allows nothing more: its aim is to prevent individuals from being detained for longer than they "deserve" for other express or implicit reasons, such as the state's interest in rehabilitation or in general deterrence, or invidious race- or class-based discrimination that seeps into the judicial process.³²

Of course, some doctrines and scholarship surrounding sentencing generally—including the use of capital punishment—display a more direct dualism, accepting retributive condemnation based on individual fault for crimes committed, but allowing for mitigation of punishment at the sentencing phase sometimes based on the offender's compromised mental/emotional state or other unusual, instigating or coercive circumstances. That is, punishment may be reduced—even the death penalty can be avoided—based in part on the sort of internal and external forces commonly accepted by determinists/compatibilists to have "caused" a higher likelihood of criminal (albeit non-excusable) behavior.³³

³² See Norval Morris, *MADNESS AND THE CRIMINAL LAW* (1982), esp. pp. 196–202; American Law Institute, *MODEL PENAL CODE: SENTENCING*, TENTATIVE DRAFT NO. 1 (2007), esp. the *Forward* at pp. xiii–iv, the *Reporter's Introductory Memorandum* at pp. xxvii–xxxvii, the *Comment* to §1.02(2) at pp. 3–24, and the *Reporter's Note* on §1.02(2) at pp. 24–45.

³³ Jeffrey L. Kirchmeier addresses free-will-related issues raised by the separate trial and penalty phases in capital cases in *A Tear in the Eye of the Law: Mitigating Factors and the Progression toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631 (2004).

We might simply call this justice. But we might also ask: Is such parsimony or mitigation of punishment what Lloyd Weinreb referred to when he observed that, "in practice, we often split the difference, our uncertainty whether the person is truly responsible at all mitigating the punishment"?³⁴ In particular, the invocation of individual desert at conviction, but then consideration of the surrounding circumstances at the sentencing stage, reflects essentially the same bifurcation of criminal process that some earlier-in-century scholars expressly relied on to accommodate determinist principles. Earlier determinist scholars often reluctantly—or merely pro tem—accepted jury-based convictions on the basis of a conventional belief in free will (or, perhaps, the conventional drive for retribution). But many were optimistic that the sentencing phase, "different in methodology and aim" from the trial stage,³⁵ might take determinism into account by considering an offender's external and internal circumstances (usually to determine what sort of treatment might then cause the offender to reform and thus deter him or her from future crime).³⁶

Yet late-twentieth-century legal scholars rarely cited doubts about the concept of free will as an explicit reason to mitigate or limit punishment. They might have conceived of determining factors in particular cases—including a defendant's environment, upbringing, or perhaps even political disenfranchisement—as weighing in favor of mitigation, but such "selective determinism" did not necessarily threaten the law's basic assumption beyond creating a form of "slippery slope." Did legal scholars go the further step of harboring doubts about free will, *tout court*, but nonetheless choose not to say so out loud? Or did they not perceive holistic determinist principles as informing their "negative" or "limiting" retributivism? Even if they did not, we still might wonder if their advocacy for parsimony or mitigation reflected, in some part, the determinist tendencies that many admitted or implied through other aspects of their scholarship.

³⁴ Lloyd L. Weinreb, *OEDIPUS AT FENWAY PARK: WHAT RIGHTS ARE AND WHY THERE ARE ANY* (1994), 54.

³⁵ Sheldon Glueck, *CRIME AND JUSTICE* (1936), 225-26.

³⁶ The bifurcation of criminal trial process and promotion of applying determinist principles at the sentencing phase are discussed throughout Green, *FREEDOM AND CRIMINAL RESPONSIBILITY*, e.g. 16-17, 35-38, 119-21, 197, 331-32.

The Meaning of Retributivism

This is all simply to illustrate the many facets of the cultural/intellectual puzzle presented by the late-twentieth-century mainstream legal-academic embrace of retributivism. The tendency toward limiting or mitigating punishment could suggest the influence of scholars' underlying determinist/compatibilist orientations toward free will. Yet, despite their professed acceptance of determinism, their conceptualizations of criminal responsibility and justifications for criminal confinement differed from those of much of mainstream Progressive Era scholarship. There are certainly many reasons for this—some, like intervening historical events and failed social experiments, are more obvious; others are more obscure. We have touched on the question whether, perhaps, the implications of the “*reductio*” and the unavoidable human consciousness of free action were determining factors in the late-twentieth-century turn back toward retributivism. And we have implied that such factors might be considered essentially non-political.

Any such conclusion presumably would fail to explain, however, the non-retributive, responsibility-denying scholarship of the earlier part of the century. Thus it is worth thinking somewhat more deeply about the commonplace notion that humans are by their very nature driven (we now sometimes say “hard-wired”) to experience themselves as free. For, even if so, it is still to be expected that this essential state of being operates differently for different individuals in a given culture (not to mention among individuals in different cultures). On this view, specific cultural factors—all playing upon the underlying essential freedom-seeking quality of persons—determine much of human consciousness, the nature of human reasoning, and the receptivity of individuals to the apparent outcomes of such reasoning, including, of course, a person's point of view regarding threats to the idea of freedom. Indeed, we may posit that just one interwoven set of such determinants constitute what we might call “politics,” the culturally-determined explanations we are attracted to with regard to our defense of the freedom we unavoidably sense that we and others actually have.

With these thoughts in mind, the relationship between late-twentieth-century American politics and legal-academic scholarship appears complex to the point of indescribability. It becomes obscured by mysteries of human nature, psychology, and culture.

Which is not to say that further study is impossible or unfruitful. Indeed, we, ourselves, seek clarity about legal ideas where it can be found, including regarding their role in a particular time and place, and we encourage others to do the same. But, just as we posit that later-twentieth-century legal academics in the main may have seemed bound to endorse notions of individual responsibility, we observe that the historian of ideas and actions (ourselves included) might be determined to organize the world along lines that make description possible and seemingly plausible. For him or her, too, deterministic analysis becomes, at some point, debilitating. The history of the issues we address—we doubt you will disagree—is in any case not a science of any sort, but an art form.

Pathways

Where certainty and prescription are beyond our grasp, we nonetheless may persevere on the thought that none of this necessarily makes *description* logically impossible. Here perhaps there are still endless possibilities, all subject to relative unknowability, given the nature of the object under observation and the available facts with respect even to more concrete matters, such as the unrecorded influences, sympathies, or predilections of late-twentieth-century legal academics. In the spirit of contributing some small seed to the historical conversation, we introduce two hypothetical states of affairs, both borrowed (and summarized in the briefest of terms) from academic philosophy, one from the dawn of the period under discussion, the other from that period's endpoint: Peter Strawson's seminal 1962 essay, "Freedom and Resentment,"³⁷ and Saul Smilansky's splendid 2000 book, *Free Will and Illusion*.³⁸ Taken together, these accounts suggest the sorts of things the historian might look for in offering a fuller—if inevitably incomplete—picture of the late-twentieth-century academic retributivist tide.

Strawson famously stared down the determinist critique, which he professed not to understand³⁹ but sought to show made no dif-

³⁷ P. F. Strawson, *Freedom and Resentment*, chap. 1 in *FREEDOM AND RESENTMENT AND OTHER ESSAYS* (1974), original publication: 48 *PROCEEDINGS OF THE BRITISH ACADEMY* 1 (1962).

³⁸ Saul Smilansky, *FREE WILL AND ILLUSION* (2000).

³⁹ Strawson, *Freedom and Resentment*, 1.

ference even were one to take it on its own announced terms. We all, he said, experience resentment when we are harmed by someone we understand as capable of uncoerced reasoned intention and as acting within the scope of that capacity. We abandon that subjective reaction when we understand the harming actor as unable to form such an uncoerced intent. We resent and blame the uncoerced, rational actor because we believe ill intentions motivate him or her. We excuse children and those with deep-rooted psychological abnormalities because we conclude that they were not acting rationally based on ill intentions. We are all naturally prone to these subjective attitudes, Strawson argued; they characterize the normal relationships central to human life and we could not put them aside even if we desired to do so.⁴⁰

This so-called “naturalization” of blame via “reactive attitudes” proved influential in some legal-academic circles, though its presumed status as sheer description led some to reinforce it with more traditional compatibilist principles; the latter principles were thought to do the important work in underwriting a prescriptive standpoint in a determined world.⁴¹ Strawson himself appears to have thought his analysis by itself allowed for prescription despite the supposed reality of determinism; his analysis was based on the fact of our natural reactions to rational behavior, alone, and did not require free will—in his words, it did not require resort to the “panicky metaphysics of libertarianism.”⁴² His language mirrored the conventional compatibilist claim that people could fairly be held morally and legal responsible for their actions if they possessed the capacity and opportunity for practical reasoning, though it was couched in terms of what we in fact do rather than what we ought to do.

Smilansky’s account also featured an important observation about our acting and blaming practices. Here, what we do, at least in part, is think and act as though we and others have ultimate responsibility in the sense of true “up-to-usness.” In fact, he posits,

⁴⁰ *Ibid.*, 11, 18.

⁴¹ E.g. Moore, *Causation and the Excuses*, 73 Cal. L. Rev. at 1144; Stephen J. Morse, *Psychology, Determinism and Legal Responsibility*, in NEBRASKA SYMPOSIUM ON MOTIVATION 1985, VOL. 33: THE LAW AS A BEHAVIORAL INSTRUMENT, ed. Gary B. Melton (1986), 58.

⁴² Strawson, *Freedom and Resentment*, 25.

we do not have this capacity. To this degree, at least, hard determinism must be admitted: the sense of ultimate freedom must be understood—at least by scholars—as an illusion. At the same time, it seems undeniable that there is a reasonable distinction between one who is entirely incapacitated and one who acts on the basis of practical reasoning. The latter may be said to have an important, and relevant, degree of control, even if not ultimate control, and has enough of it to underwrite a compatibilist position if—and only if—that position is held alongside a recognition of hard determinism (that is, a recognition that, ultimately, it is not “up to us”). This “Fundamental Dualism” both defines reality and is defensible philosophically, in Smilansky’s terms.⁴³ But it is not, he argues, the total of our experience of reality. Rather, we experience the world as allowing for true free will, an inevitable—and salutary—illusion.⁴⁴

Both of these constructions—that of Strawson and of Smilansky—are intricately worked out philosophical arguments. Like most such arguments, they draw at points on observations regarding conventional thought and behavior. They are especially apt for our purposes in this latter respect: though neither is set forth as a reading of history, each incidentally presents the historian with material worth considering in relation to such a reading. We address only a few of the possible lines of inquiry.

Strawson postulated what might be called a pre-political stance toward responsibility and punishment. Just what the source of the natural “reactive attitudes” is, he did not say, but it has the feel of the biological rather than the cultural. Strawson tells us who we are, whether we like it or not. His strategy could be variously described—indeed, the follow-on literature has been substantial.⁴⁵ But we settle for the lesson that we have no good reason not to like what we are, however we have come to be that. Late-twentieth-century scholars had the opportunity to read Strawson. Some did and made use of him. Others either didn’t or might have but

⁴³ Smilansky, *FREE WILL AND ILLUSION*, 92-93, 95ff.

⁴⁴ *Ibid.*, 188-91. (“The important thing, however, is to grant that this grand illusion is so much of what makes our morality possible and our lives meaningful, that, overall, we must say that illusion is not always a bad thing.” p. 191).

⁴⁵ See, e.g., R. Jay Wallace, *RESPONSIBILITY AND THE MORAL SENTIMENTS* (1994); Michael McKenna and Paul Russell, eds., *FREE WILL AND REACTIVE ATTITUDES: PERSPECTIVES ON P. F. STRAWSON’S “FREEDOM AND RESENTMENT”* (2008).

didn't cite him, though many must have been aware of him at least through his explicit interpreters. In any case, Strawson's perspective is one to look for as underlying even the legal scholarship that does not explicitly cite him.

Interestingly, Strawson had no truck with the *reductio*: his essay is designed to fend off simple "pessimism," much more so the abyss. Nor did he draw upon the consciousness of freedom as such, though his readers might see it as integral to the psychology that expresses itself in our reactive attitudes. Thus a question the historian might ask is: Did scholars accept such attitudes as sufficient bases for the ascription of moral and legal blame even while imagining them to be sheer biological or universal psychological phenomena and not carriers of a consciousness of freedom that justified such blame? No historian, to our knowledge, has asked that question and examined legal-academic thought accordingly (though among contemporary legal scholars, Lloyd Weinreb—coming at the question from a different angle—has, in our consideration, contributed importantly to such a project⁴⁶).

The question in fact has relevance for the history of criminal law thought across the entire twentieth century. One supposes that early in the century, when legal writers assumed either an holistic determinism or a determinism that applied to the commission of serious criminal offenses, many of them deemed both the reactive attitudes and the consciousness of freedom to be mere determined biological/psychological drives and, as such, to be unfit for use in the ascription of criminal responsibility (though of course of use in general social control, including the process of reforming those found to have breached social-order regulations). There is less certainty with respect to later legal scholars' perspectives. The mid-century scholarly drift toward an instrumental acceptance of the law's need to keep faith with conventional morality's acceptance of a robust notion of free will presents difficulties. Here, one might find some who may fairly be described in Strawsonian terms: the basis for their instrumentalism might turn out to reflect an acceptance of the relevance of bare reactive attitudes to guilt assessment. Just as likely, however, for many scholars instrumentalism signaled

⁴⁶ Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 LAW AND CONTEMP. PROBS. 47 (1986).

an ongoing underlying pessimism and a compromise with what those scholars themselves nonetheless viewed as “panicky metaphysics.”

Although Smilansky, for his part, recognized the importance of Strawson’s work, he shed doubt on the moral and legal claims said to flow from the mere “naturalization” of blaming practices that inspired it and that it elucidated.⁴⁷ Those practices, in and of themselves, hardly fended off the *reductio*. Within the terms of his own theory of responsibility, Smilansky, as noted, accepted a bounded compatibilism, one premised on the sort of control that most scholars thought accrued to uncoerced deliberation, but also one that he believed must share mental space with recognition of ultimate incompatibilism. The reactive attitudes might accurately describe human interactions, but, philosophically speaking, not much flowed from them. Or put another way, what seemed to flow from them had to be described in different terms. Those terms were consistent with an association of biological/psychological response with the consciousness of freedom—Smilansky was one of those who fit that mold. But for him, of course, that consciousness was illusory: that is, it indeed turned the reactive attitudes into carriers of the illusion of the reality of true free will. From the theorist’s perspective, this was crucial, for it defined the limited terms on which a compatibilist theory of responsibility could logically exist. It reined in that responsibility, keeping it always in tension with the recognition of the ultimate fact of a fully determined universe.

The historian might expect it unlikely that this Saulist strain of thought can be located in explicit terms among many late-in-century theorists. And he or she is probably right in that expectation. Nonetheless, Smilansky’s way of putting the matter helps one understand what might be called the “faux compatibilism” of those who remained agnostic about formal compatibilist theory while endorsing desert-based responsibility on the basis of human values and the nature of human existence, including, as we have seen, the capacity for the consciousness of freedom. In short, we suspect that what *FCR* describes as a compatibilism-in-effect in the 1980s and beyond accepts an illusion-in-effect, renaming it agnosticism about formal compatibilism and combining it with acceptance of values that are grounded in human capacity for the consciousness of free-

⁴⁷ Smilansky, *FREE WILL AND ILLUSION*, 220-33.

dom. This capacity was of special importance for Herbert Morris in 1968,⁴⁸ and although Morris seems to have marshaled it as evidence of a form of true freedom, his insight, we suggest, reduces to a recognition of a distinctive aspect of human nature that Smilansky would call "illusion." Much the same might be said regarding the (often inchoate) views of many post-Morris scholars. What remains for the historian is an attempt to identify and trace out this strain of thought and to identify—if possible—an unspoken recognition of the role of illusion, down to, and beyond, the publication of Smilansky's important book.

For the historian who would seek to uncover what Anders Kaye calls the "secret politics" of late-twentieth-century legal-academic compatibilism—and those of desert theory more generally—the philosophical perspectives of both Strawson and Smilansky thus offer opportunities, though, obviously, of differing kinds. Both Strawson and Smilansky open up ways of understanding the influence of theorists' own preexisting consciousness of freedom on their acceptance of desert-based criminal responsibility. One route for the historian is through language that evidences the pull—the seeming self-justifying quality—of the very human reactions we all experience, reactions that are only indirectly identified with the consciousness of freedom. Another is through language that more directly founds responsibility on the seeming relevance of the very human consciousness of freedom itself.

In the former case, the focus is bound to be on language surrounding the identification and interpretation of reactive attitudes toward those whose "criminal" acts might be thought driven by especially constraining socio-economic circumstances. Here, the shadow of the *reductio* looms—the notion "*tout comprendre c'est tout pardonner*" has disturbing ramifications for the very foundations of criminal law. It is likely to have been more disturbing to some than to others, and the degree and nature of the disturbance is likely to have conditioned one's views regarding where the lines of legal excuse ought to be drawn in such instances. That in turn may well have conditioned reactive-attitudes discourse. In other words, whether or not the historian believes that Strawson himself drew clear and non-political lines, the historian is bound to recog-

⁴⁸ Morris, *Persons and Punishment*, 56-57.

nize that Strawson's observations were (and remain) open to unselfconscious variation. The degree to which any of us fears that a particular official recognition of legal excuse is likely to explode the very concept of criminal responsibility has a bearing on our application of non-excuse rationales.

The latter case is more complicated, though also likely more common. Invocation of the consciousness of freedom is ubiquitous and can hardly be thought to signal any particular perspective on desert-based responsibility. What Smilansky teaches us is that illusion is always at work; what we might infer is that it is that much more salient among legal scholars who countenance ultimate "non-up-to-usness" alongside what Smilansky considers defensible compatibilism, i.e., alongside the relevance of what might be seen as immediate control via uncoerced deliberation. Once one has located consciousness-of-freedom talk in this particular context, he or she is likely to perceive some variation regarding what this consciousness is thought to license. It won't always be openly recognized as illusory. Smilansky himself posits that some philosophers and other theorists will understand that it is, but he sensitively assesses—and endorses—the proposition that it's best this understanding not (in our words) "go public."⁴⁹ If we employ Smilansky's ideas in our attempt to reconstruct the history of legal-academic thought, we might well suppose that, among theorists themselves, the "political" ramifications of our ingrained, freedom-based habits of thought have been modest: the skeptical element regarding ultimate freedom will have acted as an internal constraint on the justificatory compatibilist position. But this is where the perceived confluence of desert-based theory and real-world policy gets particularly complicated. Theorists might offer benignly-inspired rubrics for criminal responsibility tempered by their awareness of the true, illusory state of freedom. Yet, the fact that (as it were) unenlightened folk experience the "illusion" of free will as truth has significant ramifications: for what, among those true believers in society at large, is to work toward constraint on desert-based retributivism? What the historian might find are ambiguous scholarly expressions that imply logical limits to criminal responsibility, but that also recognize a widespread robust belief in true-free-will-

⁴⁹ Smilansky, *FREE WILL AND ILLUSION*, 258-280.

based ideas of criminal responsibility. But it will not necessarily be easy to interpret the meaning or impact of such a state of affairs. Did elites thereby “use” the natural tendencies of society at large toward belief in free will and reactive vengeance to further their own unstated political ends? Did scholars neither share nor respect the general social view, but avoid openly challenging it as mere illusion for the kinds of reasons Smilansky recommends they not “go public”?⁵⁰ Did the conventional social view—which, after all, resided to some extent in scholars’ own consciousness, regardless of their logical rejection of it—play upon scholars and, at a subconscious level, coopt their motives?⁵¹

CONCLUSION

These reflections, hypotheses and suggestions are just that, not a set of arguments. If they express an overall point of view, it is that there is plenty of room for further historical study of the manner in which late-twentieth-century legal scholars thought about the free will problem. This is true in general, and it is especially true (as a first step) for historians concerned with placing legal-academic thought in relation to the politics and policies of the day.

Beyond an heuristic use of Strawson and Smilansky for purposes of imagining tendencies in legal-academic thought, we have said little about free will theory of the sort that has dominated the great outpouring of work on that subject in academic philosophy over the same period (another intriguing coincidence for historians to ponder). Rather, we have focused on two features of free will discourse common enough in formal philosophy and of special importance among legal academics: the conclusion that strict determinism leads ultimately to a kind of absurdity; and the notion that the omnipresent consciousness of freedom ipso facto demands attention and accommodation in law and morals. In the thought of the day, these two ideas were interrelated; the troubling implications of de-

⁵⁰ *Ibid.*, 255.

⁵¹ Similar questions are asked with regard to legal scholars’ relationship to the conventional morality of the public, as represented by criminal trial juries, at the close of Thomas A. Green, *The Jury and Criminal Responsibility in Anglo-American History*, 9 CRIM. L. & PHIL. (Forthcoming 2015, also available at <http://dx.doi.org/10.1007/s11572-013-9267-0>).

terminism endowed the personal sense of free will with a degree of authority that fended off determinism's potential abyss.

This interrelationship was itself an age-old phenomenon—in legal theory, of course, but also more generally in everyday thought, or psychology. In American legal thought, for reasons still not well understood, it had been possible well into the century to avoid lending much authority to the consciousness of freedom. Perhaps, among many pre-WWII legal scholars, determinism was not embraced holistically but was deemed germane with regard mainly to seriously abnormal behavior and not necessarily more broadly. This would explain the difference between those scholars and some of their counterparts in the behavioral and social sciences, particularly those in the sciences who would do away with “criminal” law altogether. Or perhaps legal scholars allowed some space for the law's commonplace presumption of free will—for instrumental or other reasons—countering it in what seemed to them the most egregious circumstances but otherwise accommodating it. In any event, so far as we can tell, the implications of the consciousness of freedom remained off-stage for legal scholars so long as determinism—shallow or selective or otherwise inconsistently applied—did not raise the specter of utter meaninglessness in law and morals. Interestingly, as the idea of freedom took on greater prominence across the century and was increasingly embraced (even if mainly instrumentally), determinism was confronted increasingly for what it truly implied. Perhaps—we do not yet know—this confrontation was made possible (and less threatening) by the rescue of freedom, first as a recognition of the law's legitimate role in keeping faith with the deepest of social beliefs, then as a result of the revival in legal-academic domains of a compatibilism never entirely absent from academic-philosophy circles. In either case, the transformation is open to “political” explanations. But so too are the imperatives of politics intertwined with the imperatives of human psychology. At this level, the working out of the origins of the late-in-century embrace of retributivism still awaits its historian. In this specific—albeit critical—regard, we have endeavored to go beyond *FCR* by way of establishing some of the contours of the problem, but we have made no attempt definitively to resolve it.

FCR employs the term “neo-retributivism” to signal the reception of the relationship between the idea of desert and the idea of the

dignity of the person thought inherent in possessing the capacity for being personally responsible. (An older version of retributivism, based on the idea of one's being a deserving object of revenge, had long since slipped from legal thought even as it remained—and intensified—at a broader social level.) The new retributivism itself had roots partially in liberal movements of the 1960s and '70s that stressed a dignity of, and respect for, the individual that was open to cooptation by a conservative understanding of personal responsibility, an irony that throws a conventional understanding of the relationship between criminal jurisprudence and politics into some disarray.

Our own suggestion regarding an approach to this historical problem is itself no doubt open to being seen as political, as its focus on everyday (and perhaps universal) human psychology might seem to call for an apologetics on behalf of (supposed) liberals. It might have that effect. But that, obviously, is not our intent, which is instead simply to examine "the conditions of freedom" at the level of longstanding concerns with the free will/determinism problem. Not that the problem is itself shielded from social and political forces: when and how one thinks about it is, of course, contingent on such forces, but is also contingent on much else, from biology, to deep and—as it were—pre-political psychology, to habits of reasoning shared on all sides. It is possible to declare that everything is politics, but, then, not all politics are things of a similar nature. Lumping them together is certain to obscure—whereas splitting them apart holds some hope of revealing—what has happened in the past. Even a historian who possessed true free will (if such a thing exists) couldn't effectively choose to banish that fact and still do history.