1996

An Epilogue to the Age of Pound

Thomas A. Green
University of Michigan Law School, tagreen@umich.edu

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Recommended Citation
Freedom
and
Criminal Responsibility
in the
Age of Pound

This essay is adapted from the Epilogue of “Freedom and Criminal Responsibility in the Age of Pound” which appeared in Michigan Law Review in June, 1995. The occasion for original publication was the inauguration of the John Philip Dawson Collegiate Professorship of Law to commemorate Professor Dawson’s years at the University of Michigan Law School (1927-58). Reprinted and edited with permission from Michigan Law Review.
Doubts about the reality of criminal offenders' autonomy have sometimes played a role in the movement to abolish, or greatly reduce the reach of, the sanction of capital punishment.

Author's Note: Although the Epilogue of "Freedom and Criminal Responsibility in the Age of Pound" speaks mainly from the perspective of the present, it carries forward some of the historical themes addressed earlier in the article. The "Age of Pound" in the title refers to the first three decades of this century, the period during which Roscoe Pound, perhaps the most prominent legal academic of the Progressive Era, produced his most important writings on criminal justice in America. The main section of "Freedom and Criminal Responsibility" traces Pound's attempt to come to terms with elements of the scientific positivism of his day, especially with his own acceptance of the critique of the concept of free will that the new sciences embodied. Pound remained optimistic that law and science someday would be brought together without sacrifice of the basic principles of either — save for the "irrational" free will requirement for criminal responsibility. Due process, firm but benevolent trial management by a sociologically-informed bench, and respect for the fundamental human spirit (including the consciousness of human freedom) would characterize future criminal justice; how to reach that advanced stage of civilization Pound left for his successors to work out.

Pound's optimism was not shared by all those who recognized the problems that the new sciences posed for the criminal law. The opening section of "Freedom and Criminal responsibility" examines several essays written at the turn of the century by a little-known New York City lawyer named Gino Speranza. Writing on the eve of the era that Pound came to dominate, Speranza launched a critique of the precedent-bound common-law generally and of the non-"scientific" criminal law in particular. But his enthusiasm for scientific positivism waned as he came to consider more fully its implications for criminal responsibility. Jurisprudence, he argued, was founded on the concept of free will and, mythic though it might be, that concept answered to deep human aspirations which science could not — and should not — displace. Speranza looked forward to a "Great Pacifator" who would define the terms of rapprochement between law and science. He perhaps looked forward also to a principled rationalization of the inevitable bifurcation of criminal process — that is, the increasing distance between the trial, wherein the traditional presumption of free will governed the ascription of criminal responsibility, and the sentencing process, which was coming to bear the influence of the deterministic premises of Progressive Era penology. Unlike Pound, who never gave up the hope that the domains of law and science would one day be unified, rather than forever remain parallel, Speranza conceded, in 1901, that ultimately law was not a science. It was, and must remain, "one of the humanities."

"Freedom and Criminal Responsibility" is both a study of Pound and a lengthy commentary on the vicissitudes of criminal justice in late nineteenth and early twentieth century America. It relates Pound's perspective to those of several legal academics and behavioral scientists of the mid-to-late 1920s and it suggests that Pound's intellectual odyssey foreshadows our own attempts to come to terms with the responsibility problem. It suggests also that the history of criminal justice can not be fully understood in isolation from the history of these struggles which daily plague our conscious and subconscious lives.

By Thomas A. Green

We well know how central the problem that Speranza addressed in 1901 remains to our law — and, more generally, to our lives. For most of us, whether we are always or only occasionally conscious of it, the search for a "pacifator" goes on. Just as the bifurcation of the legal process persists, so also does the division within our minds between the competing urges to explain causally and to affix blame, in the strong sense of criminal responsibility. From the Progressive Era forward, the rhetoric of the social and psychological causes of crime have vied — in the law, in the media, in ourselves — with the rhetoric of, and ineradicable belief in human freedom. This ceaseless battle is only partly contained by the view that, though determining factors exist, they are typically not all encompassing: that we — and those whom we blame — have the wherewithal to resist, even if we lack the ability to draw the line between the resistible and the irresistible.

As has been the case for generations and perhaps centuries, we sometimes reflect these uncertainties in our tendency to soften the rigor of the sanctions to which we subject those whom we judge. Doubts about the reality of criminal offenders' autonomy have sometimes played a role in the movement to abolish, or greatly reduce the reach of, the sanction of capital punishment. Those to whom it seems equally irrational "merely" to incarcerate an offender on the basis of the traditional understanding of criminal responsibility may be partly appeased by the thought that the chief goal of imprisonment is rehabilitation. Punishment is then viewed as at least largely benign and responsive to the deterministic aspect of human life. This maintains the bifurcated regime of the criminal law but brings a needed peace of mind.

On the very long view, we have grown increasingly aware of the fragility of our own autonomy and increasingly concerned that punishment conjoin a good deal of care for "weakness" with a substantial degree of deterrence and decreasing attention to retribution. But up close, the path of ideas about criminal justice has hardly been linear. It has been, rather, either subject to brief moments of atavism or downright cyclical. We are, as I write, at an especially tense moment — and a lengthy one at that: for several decades now, the ideal of rehabilitation has been under significant pressure. To some extent we have responded to the observation that
In truth, the rhetoric of determinism is now so pervasive that we cannot fully understand the role of the jury without recognizing that we sometimes ask that institution to resolve an issue on which we are deeply divided, not only between groups but also within ourselves.

the indeterminate sentence does not work. Our calls for fixed sentences and our critique of rehabilitation are thus premised in part on the view that a return to older ways is fairer to those we hold responsible and even accords them a greater degree of human dignity. To some extent, too, we simply express our anger, and our natural fears of crime. Not least, however, we seem increasingly captured by the notion that we have gone too far in the direction of absolving one another of personal responsibility. It seems entirely plausible that the due-process and equal-protection based arguments for fixed sentences and for guidelines that ensure that such sentences will not vary from judge to judge reflect a desire to strain out, to a large degree, consideration of background "causal" factors that "led" to the crimes for which the fixed and fair sentences are imposed. If so, theories of will once again come to the fore; the recrudescence of pre-Progressive-Era ideas trades on an endorsement of the dignity of the individual and attention to personal responsibility, so that the resulting approach to sanctions owes nothing — apparently — to a modern version of the theory of incapacitation solely in the social defense.

Within the legal world of bench, bar, and academy, as in society at large, the traditional and fundamentally unstable view prevails. Nor have the values associated with the traditional view altered: political liberty, human dignity, and freedom of the will remain intertwined. Perhaps Professor Kadish has put the matter as well and wisely as anyone:

"Much of our commitment to democratic values, to human dignity and self determination, to the value of the individual, turns on the pivot of a view of man as a responsible agent entitled to be praised or blamed depending upon his free choice of conduct. A view of men "merely as alterable, predictable, curable or manipulatable things" is the foundation of a very different social order indeed. The ancient notion of free will may, in substantial measure, be a myth. But even a convinced determinist should reject a governmental regime which is founded on anything less in its system of authoritative disposition of citizens. Whether the concept of man as responsible agent is fact or fancy is a very different question from whether we ought to insist that the government in its coercive dealings with individuals must act on that premise. [Sanford H. Kadish, "The Decline of Innocence," 26 Cambridge Law Journal 273, 287 (1968) (quoting H.L.A. Hart, Punishment and Responsibility, 182 (1968)]."

If indeed we "ought to insist . . .," we ought also to expect that tensions within the law, and within ourselves as we act out the law's imperatives, will be with us to the end.

In the academy, to be sure, neo-realist analyses and critiques have exploded long-standing orthodoxies: the legal designations of "free" and "unfree," hence guilty or innocent under the criminal law, have been portrayed as conclusions determined by political, social, or psychological circumstances, much in the same way that findings of proximate cause, duty, or a meeting of the minds were portrayed by the realists three-quarters of a century ago. Moreover, the very distinction that legal scholars typically draw between free will and determinism has sometimes been derided as a false dichotomy between "denatured choices." The law, some seem to suggest, should instead look to the role of culture — to prevailing standards of behavior, and to the beliefs that surround behavior, and, especially, to the interaction of "self" and culture — in establishing appropriate guidelines for the attribution of criminal responsibility. It is not always easy to decipher the perspective on the freedom issue that accompanies this approach. One is tempted at times to think that, here, yet another form of determinism appears as one of the innumerable forms of compatibilism that the mind has constructed in its determined search for a place to stand and to judge. However that may be, it is important to note that the new academic stances — neo-realist, critical-legal, or postmodern — remain largely theoretical accounts of the nature of law and of human behavior. Their application in practice might be evidenced at the margins as they come to influence the minds of some judges, lawyers, and penologists. But given their inevitable distance from our current politics, they are even more foreign to society at large than were the ideas of fin de siècle criminal anthropologists and interwar realists, especially with regard to the core issue of personal responsibility — the assessment of criminal guilt.

For the most part, as we well know, academic concern with the mysteries of human free will remains just that: academic. In our more public capacities, if not always in our teaching and theorizing in print, we mainly indulge the presumption that underpins the law. As a group, we may express more skepticism about free will than other elements of the legal caste, and so might, like some of our predecessors, endorse, inter alia, broader definitions of legal insanity, but — perhaps out of allegiance to the consciousness of human freedom — when we act in the real world we are, most of us, not so very far from society at large. Like Pound, we leave the working out of the most difficult problems to the future. We play a role defined for us by our culture and our psychology, as generations of legal academics have before us and as those that follow probably will as well. This is a particularly influential role. To be sure, it is only one of many guideposts for our culture at large, and, no doubt, politicians and religious leaders, among many others, send signals that have greater impact.
upon greater numbers, so far as the affirmation of human freedom is concerned. But as perceived guardians of the rules and underlying theories of the law, we hold a special place. If we are a relatively small part of the legions whose destiny it is to reinforce faith in human freedom — political liberty as well as free will, I ought to add — the work of our particular cadre is nonetheless relatively significant.

The current widespread obsession with personal responsibility, it should be noted, reflects a reaction not only against this century's increasingly deterministic rhetoric regarding the causes of criminal behavior, but also against what are taken to be the deterministic assumptions that pervade the welfare state generally. These assumptions relate both to noncriminal and criminal concerns, as government initiatives affect existing concepts of just deserts in distributive justice, regarding, inter alia, property and contract, as well as in retributive justice, the traditional domain of the criminal law. Progressivism is carried forward, but it is also under profound attack across the spectrum of political and social thought. In this, our politics have produced a macrocosmic reflection of the microcosmic experience within each of us.

But who is "us"? Society as a whole is deeply divided between the heirs to Progressivism and those who have now rejected, or who never accepted, its message for criminal justice. Disagreements on responsibility not only track, in the large, religious, social and other alignments, but are also, of course, internal to those and other perspectives, including the recent movements along racial, ethnic, and gender lines. This is not the place for a rehearsal of the multifaceted role of the free-will-determinism issue in modern American society. Nor — even if it were — am I well suited to undertake such a task.

I want only to say that the issue is still very much with us and that, with respect to criminal justice, we are more conflicted than ever. Conflicted to the point that our attitudes defy generalization. The main direction of our present thought and behavior depends entirely on the eye of the beholder. If we tend to speak with greater confidence about main directions in the past, that may well be due to the increased perspective that a historical view affords. Which is to say that we know very little about the past and too much about the present.

About the inscrutable present we might nonetheless venture some final commentary along the lines marked out by our discussion of Speranza and Pound. Speranza was an American lawyer, but at the start of his career he looked at American law from the outside, with ties to, and an understanding of, the continental tradition, and with the sympathies of the scientist. Pound was well inside the common law tradition, albeit — early on — among its more progressive spirits and trenchant critics. Pound's brand of Progressivism propelled him to the forefront of the academy, but it also set limits to his worldview and to his understanding of the relationship of law to behavioral science. It engendered a certain confidence and even complacency as it focused his gaze on overall social functionalism rather than on specific human motivations. I have illustrated that tendency in Pound partly in terms of the evolution in his understanding of the role of the jury. In 1909 he saw ad hoc jury law-finding as at least in part a useful and progressive antidote to the rigidity and old-fashionedness of the law; by 1920, he mainly saw it not only as anachronistic, but also as dysfunctional in a society that had, across the Progressive years, indulged in the rhetoric of rational decision-making and institutional coordination.

From our own perspective, the optimism of the Progressive Era and of Pound's majestic account seems a mute naive. And the irreducible problem of human freedom thus looms all the larger. The story of the post-1930 period — as yet untold — has an ending with which we are familiar. On the most fundamental issue, that of human accountability, we have made little progress. This is reflected as much as anywhere in our own thinking about the jury, which is, to be sure, more complex than was Pound's. We are still to great extent history-bound, although for us history includes the rights revolution of the post-World-War-II era and the dramatic developments in participation on juries of women, and blacks, and of many ethnic groups that formerly were not represented. But our perspective on the jury is also characterized by our awareness of the impact, subconscious or otherwise, of some of the newest forms of "science" on those who serve. As a result, our instincts about what jurors may appropriately take into account reveal conflict about long-settled, formal divisions of power. In truth, the rhetoric of determinism is now so pervasive that we cannot fully understand the role of the jury without recognizing that we sometimes ask that institution to resolve an issue on which we are deeply divided, not only between groups but also within ourselves. We alternately condone or condemn a particular jury that at least seems to have applied some notion of mitigated responsibility to which the law does not formally give recognition. Sometimes we recognize how contradictory we are in this regard; sometimes we do not.

In thinking about the relationship between the criminal trial jury and the duality of our responses to those whose actions displease us — our tendencies to blame or to explain away — we ought to recall that the jury is both constrained by legal rules and a plaything of social forces. That relationship has, therefore, taken a variety of forms: At times the jury has been relatively resistant to expression of doubts about human freedom; at others it has allowed their expression fairly freely. Even when jurors or
members of society at large have expressed such doubts, they have usually
done so in the spirit of recognizing in a
particular case an exception to what they
perceive in general as valid rules
regarding responsibility. Thus, when the
jury has gone outside the rule of law, it
has often fortified the presumption of
human freedom by providing a release
point where otherwise that presumption
might have been called into doubt. In
this fashion, the jury has at times
functioned as a legitimator at the trial
stage, just as some substantive doctrines
have done against the background of
the unprovable premise that underlies
our traditional theory of criminal
responsibility. That has not necessarily
been anyone's intention, any more than
we are necessarily selfconscious about the
manner in which we — in our private
lives — shore up our own blaming
instinct by giving way in particular
instances where insistence upon blame
might lead us to suspect, rightly or
wrongly, that there is always something
rationally indefensible about that
insistence.

The legal constraints within which
juries operate can, of course, be
understood as reflections of the interests
of authorities in husbanding the power to
withhold or to grant release from the
rules of criminal responsibility on their
own terms. But that does not do full
justice to the long history of the jury's
power to find, or to nullify, the law. The
English bench has at times encouraged
juries to play that very role, at times
sought to set distinct but far from total
limits on that practice, and at times
attempted to eliminate it altogether. On
the American side, the story has been —
and remains — equally complex. From
yet another perspective, limitations upon
the jury have often reflected attention to
the rule of law as a general matter and
have been only incidentally related to,
though they may have had significant
impact upon, the tensions regarding
responsibility that I have been discussing.

Finally, jury nullification in cases
involving the issue of human autonomy
bears an important relationship to jury
nullification in so-called political cases.
In the latter, the jury is often in the
position of affirming human freedom:
even where the jury is mainly registering
opposition to a particular law, the
defendant who is thereby treated
mercyfily is sometimes thought to have
challenged that law on the basis of deep
moral beliefs, of his or her own free will.
This is the tradition of jury latitude that
was long the backbone of the jury law-
finding doctrine and it remains central to
the modern jury nullification debate.
Social and legal recognition of the
legitimacy of this form of jury behavior—
or even mere toleration of its occasional
manifestation — cannot help but fortify
jury nullification where the jury
disaffirms human freedom: most
notoriously, in some cases where the
defendant has raised a legal insanity
defense, but also, more generally,
routine criminal cases, where juries have
sometimes responded intuitively to what
might be termed commonplace social
constraints upon freedom of thought and
action. There has never been, in the
Anglo-American tradition, an effective
separation between arguments for jury-
based law-finding in these very different
kinds of cases. The age old practice of
freedom-disaffirmance, in its most
general forms, has traded on the
longstanding tradition of freedom-
affirmance in cases raising the question of
political liberty, and vice versa.

I have, on another occasion, alluded to
an important aspect of the relationship
among the English criminal trial jury, law
reform, and the problem of responsibility
that we do well to keep in mind as we
attempt to situate Pound in relation to
our own time and place. The reform of
sanctions in the early Victorian era may
have been undertaken in part as a
reaction to the tendency of jurors to give
weight to the social conditions that
produced crime as they searched for
reasons to nullify the capital sanction for
what they viewed as less than the most
heinous of offenses. Here, the interests of
political and legal authorities in
maintaining the integrity of the orthodox
theory of responsibility mixed with their
interests in deterrence and in simple
humanitarianism. The reform of
sanctions then combined with ongoing
property qualifications for jury service
and with the development of a culture of
deferece to the bench to produce over
time a self-restrained English criminal
trial jury. Some early-twentieth century
American critics of the criminal trial jury,
including Pound, drew lessons from the
English experience and sought to make
over the American trial in the image of its
English counterpart. But not all such
critics shared the same agenda. Among
the common lawyers, Pound was, if not
unique, something of an odd man out.

Pound wrote about the sources of the
extensive powers of the American jury at
some length. For the most part, he
situated the jury within the history of
political liberty. With respect to human
autonomy, he stressed, as we have seen,
jury-based acceptance of the frontier
urges of vindication of honor — the
assertion of individual liberty — rather
than jury-based recognition of the social
and psychological constraints upon
human freedom. Pound favored a more
limited role for the jury, but not in order
to shore up the orthodox common-law
theory of criminal responsibility. Rather,
he deemed jury-based law-finding
dysfunctional precisely because, whether
it was progressive or retrogressive, it was
relative to a theory of responsibility that
he thought irrational. Pound sought to
husband for the bench the powers that
the positivists sought to reserve for
scientific experts, and like the positivists,
he did so in the name of substituting a
new theory of responsibility for the
orthodox free-will-based theory of
common law criminal jurisprudence.
Pound’s hopes for a true melding of law, science, and morals came to naught; even he could not squarely confront the implications of the sermon he preached. The positivist program relative to a new applied theory of criminal responsibility has largely collapsed. Orthodoxy has prevailed, albeit amidst the heightened tensions produced by the rhetoric regarding the causes of criminal behavior that the positivists boldly set in motion and the Progressives furthered in their own more tentative fashion. This is the situation in which modern American society, including the institution of the criminal trial jury, now finds itself.

We are confronted daily with evidence that seems to confirm Pound’s insistence upon a particular form of American exceptionalism (our “frontier attitude”) regarding the intensity of our attraction to individual rights, the frequency of our recourse to violent self-help, and the depths of our suspicion of the state. What Pound deemed an unhealthy, “held over” attachment to will theory probably strikes some as Americans’ ongoing embrace of the deepest truth, others as recourse to a useful belief (conducive both to the preservation of political liberty and the cultivation of a sense of personal well-being), and still others as too great a rejection of what — like it or not — we already know about the nature of ourselves. Among even these last there may be some who nonetheless believe that an appropriate balance between the “religion” of free will and the “science” of determinism is struck in the rituals by which we now live. And among these rituals are the practical and symbolic aspects of jury-based determination of guilt — in some cases, of punishment— in accordance neither with pure legal abstraction nor with supposed scientific precept, but, as we are wont to say, with the “common sense” and the “conscience” of the community.

Perhaps as testimony to this perspective, the phenomenon of bifurcation of the criminal process has developed increasing prominence. In capital cases, to take a leading, though admittedly exotic, example, the sentencing stage in most states is left in the hands of the jury, so that the same persons first assess guilt on the basis of the limiting terms of the law of evidence and then, if they convict of capital murder, sometimes reassess it (de facto) in the context of affixing punishment in light of information that, had it been before them at the trial stage, might have led them to a different result. The ad hoc aspect of lay decisionmaking has been harnessed to the process at sentencing — the potentially more “scientific” stage — a turn of events that would have appalled Pound even as it might have pleased the Speranza of 1901. Decisions must not only be made, they must also be lived with. So, too, must incoherence be lived with, and — evidently — its lessons allowed to temper our judgment as we, case by case, see fit. Not only with respect to the marketplace wherein Professor Dawson traced the history of economic duress, but in the domain of criminal justice administration as well. Perhaps there more than anywhere. For it is one thing to observe academically that we can’t prove beyond a reasonable doubt that the defendant was a free agent; it is another actually to have to pass judgment upon persons who society has agreed must be held responsible — indeed, who are said to have a right both with respect to human dignity and as against overweening political authority to be conceived of as personally responsible. The resulting tension can be very great, and the ritual of judgment is sometimes no less than an act of faith. One feels a certain truth — shall we say, a certain consolation? — in the observation that, after all (let Speranza’s words be my last): “Law is one of the Humanities.”