Introduction

The free will problem inherent in the acts of blaming and punishing is age-old and well-known. It has largely to do with the notion of just deserts. Conventionally, most of us tend to believe that the attribution of guilt and the imposition of punishment are deserved only if it may fairly be said that the actor exercised some degree of free choice, or – as it is often put – could have chosen not to do what he or she did. Yet most of us also believe there are limits to freedom of choice in particular circumstances, and some question whether it can be said that such freedom ever exists. That is, most of us engage in at least some degree of deterministic thinking: we believe free choice may be limited (or entirely precluded) by an individual's age, upbringing, or environmental influences; by mental illness and other psychological, genetic, or biological factors, or (as some would have it) by the inevitable hand of God or fate. We tend to conclude, consciously or otherwise, that at least some acts or choices are determined by forces outside the individual's control. Disagreements abound over the degree to which particular factors limit or preclude freedom, the meaning of free choice, and the question of whether the philosophical debate about the free will/determinism problem creates a false dichotomy – or identifies a real problem at all.

In the end, there is more agreement that the free will "problem" is not something worth worrying about as a general matter, however much it seems necessary on some occasions to consider it in relation to particular circumstances. This area of agreement is, of course, a significant aspect of human life. Those who are parties to the agreement have signed on for a variety of reasons. Some would say that it is obvious humans have free will, at least in most instances. Others would say that we have a powerful and ineradicable *feeling* of being free and could not make sense of our lives if we did not act in accordance with that perception of freedom. Still others would put it a bit differently, saying that life is meaningless – or that voluntary

organization into "free" societies is impossible – unless either we are in fact free or can without too much moment-to-moment doubt proceed as though we are free; thus we simply ought to presume that we are. Some of these last persons are among those who would define "freedom" and "choice" in ways that do not depend on theories about true or metaphysically real "free will" as the phrase is colloquially understood.

The variations on this theme are endless and all too familiar. I need not dwell on them here. Most important is that the problem is always with us and that it arises in every part of our lives, even if we rarely expressly confront it. As a practical matter, we seem quite adept at living – and at evaluating our own and others' conduct – from a sort of midpoint that mediates between perspectives: we assign blame or explain away behavior (as essentially unavoidable), sometimes without conscious reflection, based on what we know about a particular person or circumstance. In fact, we even seem quite comfortable with shifts between these perspectives regarding a single event; we may insist in the heat of the moment that a particular person freely (and blamably) harmed us, yet we might come to think otherwise – to give more weight to the circumstances that influenced him or her – after cooling off.

The criminal law – my subject here – is only one of the very many contexts in which the problem arises and is resolved. But it strikes us as a critical one, both because the deeper discussion of human responsibility necessary to theories of blame and punishment requires direct confrontation with our doubts about the underlying concept of free will and because a good deal rests upon our resolution of the free will problem in this particular context. The liberty, or even life, of an offender may be at stake; the stigma of an assessment of criminal guilt certainly is. The safety of society and the vindication of the rights of those harmed by criminal behavior are at stake, too. Further, criminal adjudication is sufficiently public and deemed sufficiently important that we think its underlying presumption of free will sends a message to society at large about personal responsibility and our duties to each other.

It is therefore unsurprising that the history of criminal law has been intertwined with the free will problem. Nor is it surprising that, in this context, our conventional agreement about how to deal with that problem (that is, to set it aside) has come under some strain or – as a theoretical matter – that there have been disagreements about the resolution of the problem both as to the relevance of particular circumstances said to limit free will and as to the general question of whether the idea of just deserts (that is, of genuine responsibility for our acts) has any basis in truth at all. When we think about it, we quickly recognize that criminal law has been affected by the problem at every level: the definition of criminal offenses; the assessment of responsibility, including the practices we have adopted to reach such an assessment; and the way we deal with those found guilty, both in the formal

sense of the institutions of punishment or treatment and in the informal sense of social views regarding the guilty. That is, when we do think about it, we are likely to think that the history of the criminal law (like the history of many aspects of human relationships and organization, only more so than most other aspects) has been in part the history of the free will problem. To be sure, the very concepts of "criminal law" and "criminal responsibility" have varied over time, and this conceptual history may be seen as overlapping with the history of ideas about free will.

Through the three essays that follow, I have sought to sketch the main contours of twentieth-century American legal-academic thought regarding the implications of the free will problem in criminal law. Hence the ideas are predominantly those of American legal academics, and specifically those of criminal jurisprudence scholars. Some such scholars were well read in philosophy or science (biological, social, psychological), and many others were more indirectly influenced by scholars in fields outside of the law. I draw attention to a few of the many philosophers, scientists, and others who investigated the meanings of free will and determinism in the twentieth century. But, in the main, I treat legal scholars within what has been termed their own "small world."[1] I focus on that cadre because they were distinctively, if not uniquely, a group devoted to a dual role with respect to criminal justice: that of truth-seeker *and* prescriptivist. This is to say, criminal jurisprudence scholars both wrestled with the question of the "true" scientifically, metaphysically, or morally correct bases for responsibility *and* sought to answer real-world questions about the practical attribution of criminal responsibility and the imposition of punishment. As is particularly significant to my work here, these questions required scholars to confront conventional notions of blame that often appeared to be incompatible with – or at least conceived of in very different terms from – scientific "truth." Some other academics and jurists played the sort of dual role I have described, but many of them were, in their professional lives, either mainly truth-seekers who did not take it upon themselves to prescribe, or prescriptivists who were not truth-seekers. In any event, whoever else might be said to have played this dual role professionally, most leading criminal jurisprudence scholars did; they self-identified as such, and they were understood by outside observers as playing that role.

Over the next few pages, I introduce some themes that appear throughout this book – and a few caveats – as context for my discussion of these

[1] Robert Weisberg, "Criminal Law, Criminology, and the Small World of Legal Scholars," *Colorado Law Review*, vol. 63 (1992): 521–68. Further, given my focus on legal scholars, my sparing consideration of evidence of the free will debate apparent in legal enactments or judicial opinions is particularly selective. Michele Cotton offers a much more comprehensive analysis of such evidence of the debate in practice, particularly in the latter half of the century, in "A Foolish Consistency: Keeping Determinism Out of the Criminal Law," *Boston University Public Interest Law Journal*, vol. 15 (2005): 1–48.

scholars and their work. It is perhaps most important to say that the writers I treat are center stage. To be sure, my voice enters, organizes, interprets, analyzes. But, more than is usually the case, I have allowed the writers to speak for themselves: it is the intellectual activity *itself* that I have chosen as my focus. Thus, this book is not aimed at presenting a traditional or fully contextualized argument on my part with regard to its themes; the themes move in and out of the narrative as scholars lived the experience of grappling with ideas about criminal responsibility, which these scholars did – or such is the perhaps fictive premise of my account – mainly in the context of their predecessors' and contemporaries' writings, rather than that of their own social and historical frameworks.

The book adopts a rough, three-Part periodization of twentieth-century American criminal jurisprudence: the 1890s through the 1920s (the Progressive Era), the 1930s through the 1950s, and 1960 to the end of the century. Each period provides the subject matter for each of three essays – or studies – in which I explore legal-academic writing of the time that implicates the free will problem and its relationship to criminal responsibility. Each essay, in turn, has its own distinctive approach, guided by the nature and breadth of the relevant writings. No single study is meant to exhaustively catalog every scholar of the period who meaningfully addressed free will, however. Encyclopedic comprehensiveness is not my aim. Rather, I give attention to particular voices that exemplify historical moments in the evolution of legal-academic thought on the free will problem as it relates to criminal responsibility. What I sacrifice by omission, I endeavor to make up for through an impressionistic narrative that places the writings I discuss in a broader frame.

The result might be best described as a mosaic. And, importantly, it has not been my goal to situate that mosaic in current meta-narratives, those of critical legal studies or of a Foucauldian sort coming most immediately to mind. Such interpretations have an undeniable relevance to my own concern with the relationship between law and freedom. For critical legal studies, the law safeguards the idea of individual autonomy insofar as it both undergirds and is the expression of capitalist economic relations; thus, even when the law is coercive, it seems to stand for free will and just deserts based on free will. For Foucault, too, freedom is a construct. In one version, the state endows people with an illusory freedom to win the trust of the governed and thereby insure state power. I do not take issue with either of these modes of analysis or with their convergence regarding the question of freedom, and I am ready to grant their validity (and that of many other perspectives) at a meta-level of historical analysis. That meta-level is not, however, the promontory upon which I stand. In fact, I have avoided "promontories" in order to enter into the intricacies of minds grappling with questions that, as they admit no simple resolution, have the power of refusing to die. There is something more. Meta-narratives, across the ideological spectrum, share this: a

resistance to accepting an authority outside themselves. They posit their own determinism. I do not write a grand narrative because I do not want to fit these voices either into a conclusive historical proof or into an imposed pattern, whether progressive, circular, ascending, or otherwise. Regardless of the positions they argued for, the legal academics I present here thought themselves free enough to prescribe. To capture *that* spirit is to seize on the continuing vitality of legal academic thought in the world of the law.

THE FREE WILL PROBLEM AND THE CRIMINAL LAW

Consider the question whether, and to what extent, a criminal act requires a "guilty mind" or, instead, may be any act that, on its surface and without primary regard to the malevolence of the actor's intent, simply violates a legal proscription. Historically, some jurists, political theorists, and other commentators have asserted that the latter sort of act – that is, one that facially violates a previously enacted legal proscription – alone effectively meets the legality principle, *nullum crimen, nulla poena sine lege* (often abbreviated as "*nulla poena*") or (roughly) "no crime and no punishment without a pre-existing penal law." Of course, it is commonly assumed that such an act also has to be voluntary, in the very general sense that the offender acted on his or her own motion, not as the result of an external force (e.g., a physical push from someone or something else) or an internal one (e.g., epilepsy). But the actor's deeper motivation – his or her subjective intent to do wrong – might go unexamined. Other commentators, including most American jurists and scholars, have insisted that – particularly for the serious criminal offenses with which this book is concerned and which raise the free will issue most dramatically (homicide, serious assault, most forms of theft, rape, and arson) – a criminal offense requires both a voluntary act and the intent to do wrong. Such unlawful intent (or mens rea), in turn, presupposes cognitive capacity – in some jurisdictions also absence of an "irresistible impulse" – and the absence of duress or of other justifications, such as self-defense. It presupposes a desire to achieve an end, a belief that a specific action or actions would achieve the end, and the will to act upon the desire. The questions arise: Does an unlawful act accompanied by unlawful intent also have to be "freely" willed? And, if so, what does "freely willed" mean?

Issues surrounding what kind of intent an individual must possess in order for the state to justifiably take action against him or her under the auspices of the criminal law represent just one area, albeit a central one, where the free will question merges with questions concerning the overall goals and premises of the criminal law. As classically formulated, the law might serve various goals, or combinations thereof: crime prevention through incapacitation or deterrence of potential future offenders, retribution or moral condemnation for harms already caused, restitution for those harms, and opportunities for penance or reform of offenders. In simplified,

abbreviated form, we might ask whether, in a particular time and place, the law is more concerned with (backward-looking) retributive punishment for morally culpable wrongdoing, or with the (forward-looking) consequential or utilitarian ends served by convicting and sanctioning (or reforming) offenders. The question of free will most obviously rises to the fore when the law forthrightly embodies moral condemnation or retribution, as both implicate judgment of the offender's intentional authorship of his or her harmful choices. Yet free will could also be viewed as an element of consequentialist goals, such as the reform of offenders, although perhaps more ambiguously: for example, is free will required for an offender to reform him- or herself from a lawbreaker into a law-abider? Or, perhaps, can the right reform regimen or moral education allow a lawbreaker who was previously (relatively) unfree because of determining forces, such as those in his or her home environment, to move beyond the influence of such forces and exercise a free will? Finally, of course, the law's aims are never singular, but are multiple, debatable, and, oftentimes, ambiguous or confused. Moreover, the aims and methods of the criminal law are intimately connected with a society's political and social arrangements; all elements – both the theoretical and the practical – necessarily inform the others, with the potential result being a patchwork of goals and ideals that are often impossible to sort out.

For these reasons, my consideration of the free will question unavoidably overlaps questions about the purposes and meanings of the criminal law over time. But it is important for me to stress that, although I touch on these latter complex questions when they are particularly relevant, such broad questions are not my primary focus.[2] Rather, the free will question is. Relatedly, I stress that my focus on ideas about free will is not meant to

[2] Of course, much has been written on the historical aims of the criminal law, albeit often without specific attention to the free will issue. One noteworthy exception is Gerald Leonard's important article, "Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code," *Buffalo Criminal Law Review*, vol. 6 (2003): 691–832. Leonard draws a general distinction between what he labels as the "public" and "private" aims of the law. Public aims are largely consequentialist, with the goal of protecting social order. Private aims are more concerned with "individual moral and legal justice" (695). He aptly establishes that these "dual commitments" (804) or "double impulses" (733) of the law are each generally present, often overlapping, but just as often in tension. He also posits a strong relationship between the subjective intent requirement – along with its implication of an internal "choice to do evil" (726) – and the law's more condemnatory and retributive aspects. A central topic of Leonard's article involves the significant suspension of the intent requirement – even at times when such a requirement was generally thought necessary for serious offenses – found in statutory rape laws. Such laws illustrate a rare instance of strict liability (which was usually reserved for minor or regulatory crimes) for a serious crime; a man could be adjudged guilty of violating laws establishing an age-based requirement for consensual sex even if he reasonably believed that the girl was of age. Statutory rape laws thus embody one particularly stark point where the free will issue bleeds into questions concerning the purposes or meaning of the criminal law and the degree to which criminal

give the impression that scholars' resolution of the free will problem was the driving force behind the evolution of the criminal law theory and practice I canvass. Legal scholars' positions on the free will issue might lead them to favor certain purposes or procedures within the criminal law but, at any given historical moment, other factors are always at play, thus providing independent or intertwined motivations for the same prescriptions.[3]

The free will issue is just one element – and one that, although it touches everything, is remarkably elusive. Few legal scholars have put their thoughts about it into print, whether because scholars deemed it unimportant, uninteresting, or simply unresolvable; its influence on concrete changes in the criminal law and its administration is usually a matter of inference. This book expressly concerns the work of those scholars either who *did* confront the free will issue directly or whose thinking about criminal responsibility was most clearly shaped by the issue. That is, I seek to trace the ways in which confrontation with the free will problem *itself* evolved in American legal thought. Thus I have allowed the extant legal academic literature on free will to govern my main points of focus, essay by essay, and have been, for the most part, no more than suggestive about the influence on criminal justice administration of the academic ideas that I trace. Where some comment on the criminal justice system is nonetheless needed in order to contextualize views on the free will problem, I will refer the reader selectively to others' in-depth work on the subject. In other

responsibility depends on a knowing, subjectively intended or willed act. For just one other example, Michele Pifferi touches on themes germane to the free will issue in his comparative account of the aims of the English and American legal systems during the nineteenth and twentieth centuries, the two countries' divergent interpretations of the legality principle, and the resulting implications for how free will and moral responsibility affected the state's power to convict and punish its citizens. Pifferi, "Indetermined Sentence and the *Nulla Poena Sine Lege* Principle: Contrasting Views on Punishment in the U.S. and Europe between the 19th and the 20th Century," in *Comparative Studies in Continental and Anglo-American Legal History, Vol. 31: From the Judge's* Arbitrium *to the Legality Principle, Legislation as a Source of Law in Criminal Trials*, ed. Georges Martyn, Anthony Musson, and Heikki Pihlajamäki (Berlin: Duncker and Humblot, 2013), 387–406.

[3] Take, for example, the consequentialist (as opposed to retributive) goals that dominated much discussion of the aims of the law during the American Progressive Era, where the story told in this book begins. One did not need to reject free will – or even to give much thought to it – to reject retributivism and to support consequentialism: one might simply conclude that retributivism, particularly when conceived of as sheer revenge, should be rejected as barbaric, wasteful, or simply counterproductive; and the alternative Progressive methods for crime prevention and the reform of criminals could be deemed enlightened, humane, and socially useful. Yet much of the selected criminal jurisprudence I will introduce from this period can be read as insisting upon an emphasis on the hereditary, social, and psychological causes of crime, and on rejecting the notion that crime is the product of a truly "free" will. Given the overlapping goals, concerns, and, indeed, silences of Progressive Era legal scholarship, it must remain an open question just how important the rejection of free will was *generally* to Progressive (and post-Progressive) legal scholars and, even for those who addressed the free will issue, whether it was foundational to their criminal jurisprudence, or largely incidental.

words, I seek to tell only a small part of the story of American criminal jurisprudence, which I hope will shed light on or contribute to other stories told from other points of focus, while also being an interesting and illuminating tale in itself.

THE FREE WILL PROBLEM IN TWENTIETH-CENTURY AMERICAN CRIMINAL LAW

Twentieth-century America provides fertile ground for exploration of scholarship on the free will problem for many reasons, an initial one being the broad currents of deterministic thought that, although hardly new, confronted American legal scholars with special force by the end of the nineteenth century.[4] Much criminal law theory of the Progressive Era reflected the influence of scientific-determinism, which was part of a fairly general scientific-positivist movement in the West, and which occasioned direct confrontation with what I will refer to as the "determinist critique" of free will. The Progressive iteration of determinism, in its most extreme form, accepted a universal determinism positing that all human choices and actions ultimately could be explained by a person's heredity, environment, or both. Less extreme (or "selectively deterministic") views suggested that, at a minimum, serious criminal acts were caused by undesirable background forces that impeded a freedom of will or ability to abide by the law that law-abiders – "normal" people – generally possessed. Thus, many scholars across various disciplines questioned the retributive aspects of the criminal law as unjust – and, potentially, as inefficient – because they implied the assignment of blame to actors who did not genuinely control, or freely will, their actions. This scientific-determinist mind-set would continue to influence legal scholarship throughout the century, augmented by the deterministic implications of advancing work in psychiatry and the developing behavioral and social sciences generally (and, even later, by neuroscience and gene sequencing) as well as by trends in academic philosophy. Much science and philosophy throughout the century seemed to agree that human thought and action merely occupied a place in the natural chain of universal causation. In accord, legal scholars commonly eschewed the separation, famously proposed by Kant in justifying criminal condemnation and punishment, between the "phenomenal" and the "noumenal" worlds, according to which the former – the natural world – is governed by physical laws of cause and

[4] See Susanna L. Blumenthal, *Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture* (Cambridge, MA: Harvard University Press, forthcoming 2015) for a pioneering account of legal (mainly judicial) thought across the long nineteenth century. Blumenthal details the nature, and locates the influence, of deterministic ideas (both religious and secular) and examines the responses to them in relation to many areas of law, primarily – but not entirely – private law.

effect and the latter – the world of mind (or reasoning) – is not, but instead imports its own (first) cause.[5] Thus, at least for those legal scholars inclined to confront deeper questions bearing on criminal condemnation – that is, the group that I selectively draw upon in these studies – any discussion of criminal responsibility or penal theory inescapably required attention to the determinist critique.

But countervailing forces – theoretical, political, and cultural – were also at play, and legal scholars concerned about the determinist critique were uniquely positioned at the ever-negotiated intersection of determinist theory and the concrete application of the rule of law. As the century proceeded, the practicality of some hoped-for Progressive reforms (many of which were rooted in a deterministic mind-set) would be questioned. Concerns about excessive state power would receive heightened attention in the wake of both World Wars. And America's particular struggles with internal class and race divisions deepened the urgency of our insistence on individual rights – along with individual and state accountability. Indeed, particularly at issue for the twentieth-century American scholars I discuss was a second aspect of human freedom: political liberty. These two aspects of, or ideas about, freedom – free will and political liberty – interlace throughout our story in ways that might be viewed *either* as complementary or as in tension with each other, both theoretically and practically. On one hand, as is particularly important to the story told in these pages, political liberty might be understood to require adherence to a notion of free will underlying individuals' rights to self-determination and to freedom of action without state intervention or coercion. So understood, political liberty might restrict to exceptional circumstances progressive intervention into individuals' lives via scientifically informed therapeutics or other "benign" treatment for apparent criminal tendencies. On the other hand, political liberty might be conceived of as requiring the state to recognize the absence of free will by refraining from condemning and punishing, via the criminal law, those who could not have avoided criminality because their acts were determined by forces outside their control (including, some would say, by the environmental forces that arise directly from our social and political arrangements). This latter notion of liberty from unwarranted state condemnation might

[5] This is, of course, a very rough encapsulation. See Immanuel Kant, "Critique of Practical Reason," in *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy*, ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), 133–271 ("Critique of Practical Reason" originally published 1788). There are hints of this Kantian conceptualization of the free will problem, especially after 1960 when Kant's more familiar appeal to the right of every human to be conceived of as an autonomous being received fairly widespread acceptance. But only hints. In the main, the reception and forwarding of that "Kantian" appeal to a right was couched in relation to arguments for a merely hypothesized form of free will that did not require (or, in some cases, even allow for) a separate such "noumenal" sphere.

support on a wide basis the use of the very therapeutics or treatment (in lieu of punishment) that the former notion of political liberty would frequently call into question.[6]

Relatedly, where the legitimacy and efficacy of the law was at stake among the "free" people of a democratic nation, common views – or what I will generally refer to as "conventional morality" – could not be read out of the equation, no matter that determinist theories suggested that such views rested on wrongheaded and antiquated notions of human behavior. Legal scholars commonly – and likely correctly – assumed that conventional morality was rooted in a belief (or, perhaps, unself-conscious presumption) that human beings possess free will in the robust sense of a genuinely self-initiating power to think and act that justifies the attribution of moral and legal blame; that is, scholars assumed that conventional morality was premised on "true" free will, although it also incorporated selective deterministic thinking with regard to some people under some circumstances.[7] Hence the additional challenge: despite the commonness of deterministic (or quasi-

[6] The phrase "political liberty" generally relates to freedoms that individuals or groups possess with respect to participation in the creation of, or ongoing shaping of, government – its institutions, procedures, policies, etc. The rights to vote, to hold public office, or to serve on juries are three of many obvious examples. I am using the phrase broadly, however, to include also freedom from governmental coercion of a variety of sorts. Strictly speaking, this is a personal liberty interest (and sometimes referred to as such herein), although one relative to the state. Indeed, this latter aspect of political liberty (as I use that phrase) is the dominant one in this book. The "freedom-to" and "freedom-from" sides of political liberty are sometimes closely related. To illustrate, an individual's right to jury service, the jury's right to determine criminal guilt (whether by mere fact-finding or through a claimed right to find law), and the criminal defendant's right to trial by jury each also implicate the defendant's rights to be free from state condemnation and incapacitation that is considered unwarranted by a jury of peers.

[7] To be clear, my aim here is not to define the actual historical contours of conventional morality. Rather, I refer to "conventional morality" as imagined by scholars and as reflected in their thinking about the rule of law in the criminal context – including their thoughts about the extent to which the law could survive openly expressed doubts about the free will that they associated with conventional morality, and thus how their worries that law could *not* survive such doubts shaped theorizing about criminal responsibility. Thus, my focus is essentially on a critical perspective toward "conventional morality" that echoes H. L. A. Hart's distinction between conventional and critical views. See Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 181: "it cannot seriously be disputed that the development of law, at all times and places, has in fact been profoundly influenced both by conventional morality and ideas of particular social groups, and also by forms of enlightened moral criticism, urged by individuals whose moral horizon has transcended the morality currently accepted." Most of the scholars I discuss indeed considered their own skeptical positions on free will more "enlightened" than that embedded in conventional morality. All this said, however, I myself do not mean to privilege the scholarly view in my work, but to take note of it as a historical fact. Moreover, I tend to think that this particular assumed aspect of conventional morality – this presumption of free will alongside a recognition of causal forces – is something of a universal; that is, I suspect that even those scholars who most adamantly rejected the conventional understanding of human behavior, and who wrote and taught in line with that rejection, nonetheless often unself-consciously hewed to the conventional view in their everyday lives.