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## THE PROBLEM OF FREE WILL IN CRIMINOLOGY

STEPHEN SCHAFER\*

Hardly any intellectual or practical discipline is in a more confused state at present than criminology, and fundamental questions about the nature of crime and punishment remain to confound and should often embarrass the thinker. Crime has been intensively studied for more than a century, but it is doubtful whether we are now much nearer to an understanding of man's criminal conduct. It appears that a considerable amount of theoretical work remains to be done, in particular on the problem of the freedom of the will. However complicated it might be for various scientific and ethical reasons, an ideological stand should be taken that may serve as a foundation on which empirical research can be more intelligently built. Without such a base, the contemporary turmoil over the crime problem may provide ample scope for criminological mischief.

The issue of free will seldom features in conventional criminology textbooks or among titles in professional journals, nor does this profoundly critical problem receive attention in research reports. Yet, a *tour d'horizon* of the immense volume of empirical investigations seems to indicate a covert suggestion that a deterministic inclination—or even strategy—characterizes the work of the quantifying researchers of our time. This is not to say that they would overtly state or even consciously assume that we have no free choice and that our conduct is determined only by external forces, whether superhuman, social or other powers, which annihilate the human will. It may be the case that while they lean toward determinism, present researchers do not even contemplate the problem of free will; in attempts to follow the nineteenth-century scientific thinking about the concept of causality they are so obsessed with techniques employing numbers and tables that they lose sight of basic qualitative issues. For many years quantitative research has been a flourishing industry in which both the funding agencies and the investi-

gators, with some exceptions, place heavy emphasis on the correct construction and use of statistical and methodological rules, clouding the preference for deterministic quantifying techniques by paying lip service to the promise of theoretical propositions. This is one of the major reasons that the distinction between accidental and causal regularities has been much too often missed or misinterpreted. Only through skepticism and its attendant sense of the difficulty of understanding what one sees can one sustain anything like equanimity and avoid cynicism and despair.

There is, beyond doubt, a great benefit from observing and recording man's behavior, and it is not intended to deflect attention from the many solid virtues of a deterministic kind of quantifying; yet there is a danger in accepting these records without making efforts to resolve the relevant theoretical issues. It hardly needs saying that the roots of crime are buried much deeper and their ramifications are vastly more complicated than is usually acknowledged by our deterministically-oriented quantifying researchers, who do not explain why this stand on the problem of free will has been taken. This might be one of the reasons so many of these projects, and even their topics, are remarkably superficial, a deficiency which leads them to a banal conclusion. There are many theoretical problems, a major one being the issue of the freedom of the will, which make a critic cautious about lightly accepting those numbers and figures.

The problem of man's free will is critically important to criminological views, despite its almost insoluble nature and the inordinate Sisyphean intellectual labor required even to take sides in the centuries-old dispute. Three hundred years ago Gottfried Wilhelm Leibniz simply called it "the great question,"<sup>1</sup> and Nicolas Malebranche viewed it as a "mystery";<sup>2</sup> two centuries ago Immanuel Kant,

<sup>1</sup>G. LEIBNIZ, *NOVA METHODUS DOCENDAE DISCENDAE GUE JURIS PRUDENTIAE* (1686).

<sup>2</sup>N. MALENBRANCHE, *DE LA RECHERCHE DE LA VÉRITÉ, OU L'ON TRAITE DE LA NATURE DE L'ESPRIT DE L'HOMME ET DE L'USAGE QU'IL EN DOIT FAIRE POUR ÉVITER L'ERREUR DANS LES SCIENCES* (1675).

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historically the first to expose this problem as a confrontation between science and ethics, bitterly complained that a thousand years' work had been expended in vain on its solution,<sup>3</sup> and Jonathan Edwards saw it as the "grand question" that can be approached only with "candor and calm attention."<sup>4</sup> In the twentieth century Nicolai Hartmann found it the real *exemplum crucis* of ethics, the perfect solution of which at the present time cannot be expected;<sup>5</sup> and Heinrich Gomperz has called attention to the fact that conservative and liberal thinkers, inconsistently and illogically with respect to their ideology, tend to reverse their traditional stand on the problem.<sup>6</sup> Indeed, as M. R. Ayers expressed it, "The freewill problem is certainly the heaviest millstone around the neck of anyone who inquires into the nature of potentiality."<sup>7</sup>

On this account it should not be surprising that nothing is further from these thoughts than lightly offering a solution to this troublesome and perplexing "grand mystery." But while this writing has none of the comprehensiveness or coherence suggested by its title, it is the purpose of this paper to point to this problem as the pivotal question of criminology, so sadly neglected by many who venture to treat the struggling issue of crime. The problem of the freedom of will—often called freedom of action<sup>8</sup> or the freedom of the self—actually mirrors the interminable debate on the controversial issue of causality in terms of determinism against indeterminism, ultimately leading to the question of man's freedom of choice in acting or in general behaving himself, and to his consequent responsibility for his conduct. Determinism suggests that man's will—if there is such a thing as "will"—does not motivate action and that our conduct results from extraneous sources. Indeterminism, however, suggests that because the human will is not motivated by physical and environmental factors, man can do anything he wants to do; if "will" did not exist, causal reality would be an illusion.

It is clear from the legion of arguments that an unconditional acceptance of the law of causality (determinism) would be as grandiose an hypothesis as

<sup>3</sup>I. KANT, *KRITIK DER PRAKTISCHEN JERNUNFT* (1788).

<sup>4</sup>J. EDWARDS, *FREEDOM OF THE WILL* (1754).

<sup>5</sup>N. HARTMANN, *ETHIK* 572-79 (2d ed. 1935).

<sup>6</sup>H. GOMPERZ, *DAS PROBLEM DER WILLENS FREIHEIT* 3-11 (1907).

<sup>7</sup>M. AYERS, *THE REFUTATION OF DEFERMINISM: AN ESSAY IN PHILOSOPHICAL LOGIC* 1 (1968) [hereinafter cited as AYERS].

<sup>8</sup>ESSAYS ON FREEDOM OF ACTION at vii (T. Honderich ed. 1973) [hereinafter cited as ESSAYS].

would be the endorsement of unlimited free will (indeterminism) as a metaphysical concept. Should the determinists be correct, criminals, as we understand them now, would not exist, since all impulses from which actions stem are irresistible and consequently only the determining extraneous physical and environmental factors ought to be blamed for crime. Punishing, correcting, or reforming man would be an illogical and meaningless effort. On the other hand, should the indeterminists be right, since culpability is based on "willingness" to commit crimes, punishment ought to be equal for all criminals, unless the value of the criminally-attacked target could in itself justify distinctions. Since man willed his action, and could have acted otherwise, he would be fully and exclusively responsible for his choice of violating the law, regardless of the conduct of his victim and irrespective of his social and physical environment. All empirical research projects in criminology would be rendered meaningless.

The assumption underlying all penal systems seems at first glance to be indeterministic. The philosophy of officially punishing the criminal lawbreaker indicates the lawmaker's premise that the criminal had freedom of choice, and that this choice was to commit a crime. Criminal law assumes that man has freedom of action and, as Morris Ginsberg contended, he is able to form a "more or less impartial judgment of the alternative actions" and can act "in accordance with that judgment."<sup>9</sup> Ted Honderich poses the thesis that to say that something can happen in a given situation is to say that something else is not "caused" to happen.<sup>10</sup> It would be pointless, so the argument runs, to offer the option of reward or punishment if the freedom of choice were not a fact. Criminal law, it appears, operates on several presumptions: (1) that we humans have the free will to decide our action, (2) that we are intelligent and reasoning creatures who can recognize values (whatever the term "value" may cover) and (3) that we can distinguish between right and wrong (whatever these terms may mean). In other words, criminal law seems to assume that only those persons who will to commit a crime or neglect to will otherwise can and should be punished. They should be directly responsible for what they will to do, and they should be held responsible for being careless or negligent in not willing to avoid crime.

At the same time, criminological research, mainly

<sup>9</sup>M. GINSBURG, *ON JUSTICE IN SOCIETY* 168 (1965).

<sup>10</sup>ESSAYS, *supra* note 8, at 202.

the quantifying kind in the last three decades, seems to assume the power of external forces which do not allow man freely to exercise his will and makes the actions of the criminal agent causally explicable. As seen in the so-called prediction studies, "it can be known *a priori* that every event has a cause;"<sup>11</sup> accordingly, in contrast to the practice of the administration of criminal law, empirical investigators may be seen reaching for the proposition that nobody is ever really, or at least not fully, responsible for his actions. In their search for a cure for crime they believe that crimes, at least most of them, are unfree and involuntary actions, and, although the crimes are obviously not reflexes, they are committed against the will of their performers:<sup>12</sup> with certain regularities, extraneous influences actually determine or guide the lawbreakings. What the empirical researchers really say is that if something does not happen in a given situation it means that something else is caused to happen; they give the impression of actively looking for guilty factors other than the criminal himself. However, even their deterministically-flavored research would prove to be purposeless should the totalitarianistic and strictly deterministically-thinking behavior modifiers be correct; whatever deterministic external factors might be revealed by the researchers, in the behavior modifiers' Fourier-type phalansteries, such technical brainwashing—or, more correctly, "will-washing"—would take place under the pretext of punishment or treatment which makes any research result irrelevant and would overpower all kinds of external forces by determining the choice of man. The determinist behavior modifiers seem to be more deterministic than are the deterministic researchers.

Unless we are ready to deny that freedom is one of the higher attributes of man, and discarding the philosophical and theological aspects of the behavior modifiers' ideas which prefer evil to good, the chances of reaching *the* solution of the problem of free will are necessarily slim. Are we wholly a part of the natural world so that our actions are the necessary outcome of causal processes, or are our actions free so that we can be held responsible for them? Can we suggest that only one of these questions has an answer which would deny the validity of any answer to the other? As materialistic monism concludes in strict determinism, spiritual monism leads to an

absolute indeterminism; and they are so formidably in opposition to each other that neither of them would tolerate the other in the arena of a single monistic view. Many philosophical ideologies tend to divide the human universe into two parts: the world of empirical realities (*mundus sensibilis*), on the one hand, and the world of values and ideas (*mundus intelligibilis*) on the other; but apparently, these ideological views do not offer room for strict indeterminism in the former world and for strict determinism in the latter world. Any monistic view would expose the two independent worlds to an unavoidable and confusing clash, and man would be tormented by not recognizing which of them is his real world. Thus, since man could hardly exist in two independent worlds at the same time, only with a dualistic view can human society function where man's position and role in this functioning universe demand the merger of the two worlds. Victor Cathrein contends that the freedom of the human will does not make the acceptance of the laws of causality impossible;<sup>13</sup> and Constantin Gutberlet claims that the will is so strongly subjugated to causal laws that if this were the only question in the debate of determinism and indeterminism, then even his own indeterministic stand could be qualified as a deterministic view.<sup>14</sup> Gyula Moór also supports the dualistic outlook by suggesting that in the willed choice the idea of value plays an important role since man has the capability of choosing and his choices may develop causal effects.<sup>15</sup>

This is why, as it appears, only a moderate determinism or a moderate indeterminism (the former with a limited range of causality, the latter with an arrested freedom of will) offers at least some answer to the problem of "free will." From a pragmatic point of view, and in order to approach the crime issue somewhat more safely, usable answers have to contain a mixture of both the indeterministic and the deterministic elements. They differ primarily in terms of how much of each element fills in such a compromise. An estimate of the volume of freedom of will (in other words, the relative dominance of the deterministic or the indeterministic view in judging crime) may be necessary because there is no philosophical guarantee either that the adherents of the indeterministic view possess a real freedom of will in reaching their conclusion or that the supporters of

<sup>11</sup> AYERS, *supra* note 7, at 3.

<sup>12</sup> J. PLAMENATZ, CONSENT, FREEDOM AND POLITICAL OBLIGATION 116 (2d ed. 1968) [hereinafter cited as PLAMENATZ].

<sup>13</sup> V. CATHREIN, DAS STRAFRECHT DER ZUKUNFT 366-67 (1896).

<sup>14</sup> C. GUTBERLET, DIE WILLENS FREIHEIT UND IHRE GEGNER 23 (2d ed. 1907).

<sup>15</sup> G. MOOR, A SZABAD AKARAT PROBLÉMA JA 8 (1943).

the deterministic thesis express their judgment only as mouthpieces of external forces. "Compatilism," the coexistence of the two independent worlds of freedom and physical determinism, is often proposed, but "incompatilism," the inability of these two worlds to coexist, is even more often contended. Yet in a dualistic view only "libertarianism" and not "necessitarianism" seems to offer a viable foundation for judging a person's action or conduct, a position which leans toward freedom but saves deterministic causality. This is without claiming the absolute freedom of will which may lead to the *liberum arbitrium indifferentiae* (where the will in a guideless position may fall into chaos) and without stating the absolute rule of the *causa finalis*, the ultimate cause, which is not really known. Under such an absolute rule the deterministic strength of competing causes can be measured only *ex post facto*, since obviously the one is the stronger that finally "wins" and determines the action.<sup>16</sup>

For the unsophisticated, determinism—and perhaps even incompatilism—is more readily understandable than the freedom of will. It is easy for him to assert that as something cannot come out of nothing, everything must have a cause. But, contends Plamenatz, "whereas it is not at all clear that he requires an event always to have the same cause, he does seem to require the former to be produced by the latter in some sense which makes the causal law something more than a necessity of succession or concomitance."<sup>17</sup> This position, however, gives rise to such questions as how the cause can produce its effect if it ceases to exist at the moment when the latter comes into existence. Determinism, by the nature of its apparent logic, can be easier to comprehend than indeterminism where the will is less tangible and provable; yet even devoted determinists often seem to feel a sort of fallacy in their view, and look for a place for the freedom of choice. Sometimes they even try to arrive at their deterministic position by using the free will as a starting point for argument. Heinrich Rickert, for example, clearly a determinist, places the free will in a "prophysical" world, which is supposed to be a metaphysical sphere that functions before we become acquainted with the realities; thus he adjusted the Aristotelian ideas in favor of the will's freedom.<sup>18</sup> David Wiggins, a "reasonable libertarian," complains against determinism by suggesting that "if determinism is true and every ac-

tion of every agent depends in its particular circumstances upon some specific physical condition being satisfied, then actions cannot be torn free from the nexus of physical effects and fully determining causes." The agent thus could not have done otherwise and, continues Wiggins, "if that is the character of the causal nexus we live within, then it makes no particular difference to this point whether or not actions are identical with movements of matter."<sup>19</sup>

While it is the belief of the libertarians that determinism cannot operate in the real world without accepting the validity of indeterminism, and "it is characteristic of the libertarian to insist that for at least some of the things which the man with freedom does, or plans, or decides to do, he must have a genuine alternative open to him,"<sup>20</sup> strict indeterminism does not exist. As Anthony Kenny pointed out, "the fact that we can do what we want does not mean that we can want what we want."<sup>21</sup> A fully undetermined choice ought to be totally beyond the reach of all influences, but, as was admitted even by the staunch indeterminist Jonathan Edwards, because the choice can be influenced, it can be determined and therefore is not totally free choice. This might be true even in the case of mental disease, as Anthony Flew contrasted it with physical illness, since mental derangement is culturally relative.<sup>22</sup> Jonathan Edwards' free choice refers, for example, to asses who can choose between alternative bales of hay. But there is an important difference between asses and men: when asses make their choice the issue of moral responsibility, or moral blameworthiness or praiseworthiness, does not appear in the question. This is because asses are not moral agents, and only moral agents can properly be subject to moral judgment. What then is meant by a "moral agent" in common speech and in the evaluation of the criminal law system? According to Edwards, a moral agent is a being who satisfies two conditions. First, he has a moral faculty, that is, he is capable of distinguishing between right and wrong. And second, he has the capacity to reason. The latter might be the more important of the two conditions, since it makes the agent subject to influences in his actions by "moral inducements or motives," whether these inducements take the form of commands, exhortations or persuasive arguments.<sup>23</sup> In translating these

<sup>19</sup> ESSAYS *supra* note 8, at 41, 59.

<sup>20</sup> *Id.* at 34.

<sup>21</sup> *Id.* at 91.

<sup>22</sup> A. FLEW, *COME OR DISEASE?* 67 (1973).

<sup>23</sup> A. KAUFMAN & W. FRANKENA, *INTRODUCTION TO J. EDWARDS, FREEDOM OF THE WILL AT XVII-XVIII* (1969).

<sup>16</sup> See W. WINDELBAND, *ÜBER WILLENSFREIHEIT* 38 (2d ed. 1905).

<sup>17</sup> PLAMENETZ, *supra* note 12, at 108.

<sup>18</sup> H. RICKERT, *SYSTEM DER PHILOSOPHIE* 201 (1921).

theses and thoughts into the understanding of the issue of crime, "it follows from these premises that our actions are never free or voluntary," yet "the theses of determinism . . . are incompatible with the existence of this responsibility."<sup>24</sup> Although Thomas Hobbes is known as a determinist, at least a scientific determinist, still in his description of "liberty" a man can act freely even though he acted necessarily and could not have acted otherwise.<sup>25</sup>

However, *in thesi*, one may claim that even moderate indeterminism does not exist and that, because of the force of socialization processes, the will has no freedom whatsoever.<sup>26</sup> The socializing measures develop man's bias and prejudice, likes and dislikes, beliefs and disbeliefs, affirmations and negations regarding the basic and guiding questions of the world in which he is expected to live, to choose, to decide and to function. The ideas of this world and the prescriptions of the ruling social-political power are infused into man before his faculties of knowing, reasoning, evaluating and choosing have had a chance to develop to maturity. "[P]rescribed socialization makes the individual what he is."<sup>27</sup> He knows, reasons, assesses and makes his choices; but normally what he would will to know, how he would will to reason, and what choices he would will to make are influenced by the ideas socialized into him and limited by the social-political power that in fact dictates the range of his choices. Moreover, he is expected to will as other persons, who are more powerful than he, will him to will. He is not deprived of his choices, and almost always he "can do otherwise." But how many and which of these choices will be at his disposal, what he can do otherwise, and what he can want to want are influenced, limited and arrested by the socialization processes, which in turn are assumed to operate according to the influencing, limiting and arresting prescriptive will of the ruling power of the given world. The question, therefore, is

not whether physically he can *do* otherwise; rather, it is the question of whether he can *will to do* otherwise. If the role of the socialization processes is posed here correctly, he cannot will to do otherwise. Consequently, it might be safe to say that man does have a freedom of will, yet it is a will that has been influenced, limited, and arrested even before it has evolved to the stage where man could will to will freely.

A qualitative concentration on this point may guide the quantifying researchers better to understand what they are doing, and it may assist the administrators of criminal law better to understand what they are judging. Clearly, the less effective the socialization process, the broader is the freedom of man's will; and the more successful the socializing operation, the narrower is the freedom of will and the range of choices from which man can will his actions. Where the socialization process is weak, there is more space to will an action that is qualified as crime; where socialization is strong, only such actions can be willed which do not pull one into the territory of criminality. The state of crime in different cultures may support this proposition. In the former alternative man may will to belong to a world other than the one he inhabits under the rule of its social-political power; in that case, he sees no reason to restrain his will or not to will what he can will,<sup>28</sup> and his undesirably extensive or even unlimited freedom of will may create a potentiality of crime or even a revolt against those dominating social-political powers who will his freedom to be influenced, limited, and arrested by their reasons, assessments and choices.

If the foregoing is true, is it correct to blame and punish the criminal? Is *he*, rather than those who failed correctly to influence, limit, and arrest his will, really responsible for his crime; or are we *making* him responsible? Do we, for example, have juvenile delinquents or criminal parents? As it appears, man does have a freedom of will, but one's indeterminism, at least in its range, is determined by other indeterminists.

<sup>28</sup>*Id.* at 139-40.

<sup>24</sup> ESSAYS, *supra* note 8, at 205, 208.

<sup>25</sup> T. HOBBS, ELEMENTS OF PHILOSOPHY (1841).

<sup>26</sup> AYERS, *supra* note 7, at 4-5.

<sup>27</sup> S. SCHAFER, THE POLITICAL CRIMINAL: THE PROBLEM OF MORALITY AND CRIME 109 (1974).