

CRIMINAL RESPONSIBILITY AND CAUSAL DETERMINISM: CORRECTED VERSION

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INTRODUCTION

In analytical jurisprudence, determinism has long been seen as a threat to free will, and free will has been considered necessary for criminal responsibility.¹ Accordingly, Oliver Wendell Holmes held that if an offender were hereditarily or environmentally determined to offend, then her free will would be reduced, and her responsibility for criminal acts would be correspondingly diminished.² In this respect, Holmes followed his father, Dr. Holmes, a physician and man of letters.³ Similar theories, such as neuropsychological theories of determinism, continue to influence views on criminal responsibility, although such theories do not imply that it is physically impossible for accused persons to act other than they do.⁴ This suggests that some amount of free will is compatible with theories of this kind. Nevertheless, the common understanding that accused persons can be free and responsible agents might disappear altogether if people were to accept the truth of causal determinism,⁵ which is the philosophical thesis that there is only one physically possible future consistent with the

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1. Luis E. Chiesa, *Punishing Without Free Will*, 2011 UTAH L. REV. 1403, 1405 (2011); Stephen J. Morse, *Criminal Responsibility and the Disappearing Person*, 28 CARDOZO L. REV. 2545, 2547 (2007) [hereinafter Morse, *Criminal Responsibility*]; Stephen J. Morse, *Determinism and the Death of Folk Psychology: Two Challenges to Responsibility from Neuroscience*, 9 MINN. J.L. SCI. & TECH. 1, 1 (2008) [hereinafter Morse, *Determinism*]. See also *United States v. Grayson*, 438 US 41, 52 (1978), in which Burger C.J. held that “a deterministic view of human conduct . . . is inconsistent with the underlying precepts of our criminal justice system”; *R v. Kennedy* [2007] UKHL 38 [14], [2008] AC 269 [275] (Eng.), in which the House of Lords held that “the criminal law generally assumes the existence of free will.”

2. OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 31 (American Bar Association, 2009) (1881).

3. OLIVER WENDELL HOLMES SR., *Crime and Automatism*, in OLIVER WENDELL HOLMES SR., *THE COMPLETE WRITINGS OF OLIVER WENDELL HOLMES* 349 (Boston, Houghton Mifflin, 1891).

4. Henrik Walter, *Contributions of Neuroscience to the Free Will Debate: From Random Movement to Intelligible Action*, in *THE OXFORD HANDBOOK OF FREE WILL* 515 (Robert Kane ed., 2d ed. 2011). *Contra* Morse, *Determinism*, *supra* note 1, at 2.

5. In this Article, the term ‘accused person’ is used more often than ‘agent’ in order to maintain the focus on criminal, rather than moral responsibility.

past and the laws of nature.⁶ Causal determinism touches the criminal law, because it implies that it is physically impossible for an offender not to offend in the precise way and at the precise time that she does.

Scholars who conclude that free will is incompatible with causal determinism are called “incompatibilists.”⁷ There are, of course, two sides to every scholarly coin. On the other side of this coin are scholars who think that free will is compatible with causal determinism. These scholars are called “compatibilists.”⁸ The purpose of this Article is to argue that incompatibilism is plausible, and, as a consequence, scholars should adopt a view of criminal responsibility and punishment that is consistent with the skepticism that this conclusion should generate. This purpose is motivated by Hart, who defends compatibilism on the basis that incompatibilism is “incautious.”⁹

The body of this Article consists in several parts. In Part I, causal determinism is explained. In Part II, the notion of free will is discussed. In Part III, the neo-Aristotelian compatibilism of Frankfurt, Hart and Morse is considered. In Part IV, van Inwagen’s argument for incompatibilism is examined. In Part V, an attempt is made to defend incompatibilism against Fischer’s neo-Aristotelianism. In Part VI, Hart’s argument for the incautiousness of incompatibilism is studied. In Part VII, Fletcher’s causal indeterminism is explored. In Part VIII, the concept of legal causation is considered. In Part IX, Morse’s normative compatibilism is investigated. In Part X, the concept of *mens rea* is analyzed. Finally, in Part XI, the justification of criminal punishment is questioned.

I. CAUSAL DETERMINISM

H.L.A. Hart makes only a slight attempt to define “determinism,”¹⁰ and often shifts his definition between its neuropsychological and causal variations. This occurs, for example, when he discusses determinism in connection with “physiological or neurological symptoms or independently definable psychological disturbances,”¹¹ on the one hand,

6. PETER VAN INWAGEN, AN ESSAY ON FREE WILL 3 (1983).

7. Stephen J. Morse, *The Non-Problem of Free Will in Forensic Psychiatry and Psychology*, 25 BEHAV. SCI. L. 203, 213 (2007); PETER VAN INWAGEN, METAPHYSICS 271 (4th ed. 2015).

8. Chiesa, *supra* note 1, at 1405; VAN INWAGEN, *supra* note 7, at 271; George R. Wright, *Criminal Law and Sentencing: What Goes with Free Will*, 5 DREXEL L. REV. 1, 8 (2013).

9. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 30 (2d ed. 2008).

10. *Id.* at 28–31, 48, 53, 179, 241.

11. *Id.* at 32.

and “philosophical determinism,” on the other hand.¹² To the extent that Hart does attempt to define causal determinism, it is as the thesis “that human conduct . . . [is] subject to certain types of law, where law is to be understood in the sense of a scientific law.”¹³ Luis E. Chiesa gives a more detailed definition along the same lines. For him, causal determinism is the thesis that every event, even every mental event, is caused by an antecedent event, or antecedent events, together with the laws of nature, such that if the event were not to occur, then either the past would have been different from what it in fact was, or a law of nature would have been violated.¹⁴ This is also the view of classical physics, such as the physics of Newton and Maxwell, or even the earlier physics of Einstein.¹⁵

John Martin Fischer provides a different definition. According to him, causal determinism is the thesis that propositions about the past and the laws of nature logically entail propositions about the future, such that if the future were to be different, then propositions about the past or the laws of nature would be false.¹⁶ Scholars who adopt definitions like Fischer’s do so, because they believe that logical entailment is well understood, whereas causation is “obscure.”¹⁷ Moreover, some advocates of a causal definition, including Stephen Morse, conflate causal determinism with universal causation, which is the view that every event has a cause.¹⁸ While the latter may be true, it does not logically entail causal determinism. For example, agents may be able to cause their own decisions and actions without being causally determined to do so, or causes may not necessarily determine their effects.¹⁹

It is unclear whether Fischer’s definition has any advantage over Chiesa’s, other than to prevent confusion on the part of some scholars. To begin, propositions about laws of nature seem to include *a priori* the concept of causation, since such laws must at least implicitly be treated as the causes of events.²⁰ Moreover, neither definition is compatible with accused persons being able to cause their own decisions and actions

12. *Id.* at 82.

13. *Id.* at 29.

14. Chiesa, *supra* note 1, at 1435.

15. David Hodgson, *Quantum Physics, Consciousness, and Free Will*, in THE OXFORD HANDBOOK OF FREE WILL 57, 57 (Robert Kane ed., 2d ed. 2011).

16. JOHN MARTIN FISCHER, THE METAPHYSICS OF FREE WILL: AN ESSAY ON CONTROL 9 (1994).

17. JOHN EARMAN, A PRIMER ON DETERMINISM 5 (Robert S. Butts ed., 1986).

18. Morse, *supra* note 7, at 212; Morse, *Criminal Responsibility*, *supra* note 1, at 2547; Morse, *Determinism*, *supra* note 1, at 14.

19. Van Inwagen, *supra* note 6, at 4.

20. TIM MAUDLIN, THE METAPHYSICS WITHIN PHYSICS 151–52 (2007).

without being causally determined to do so, or causes not determining their effects of necessity, since on either definition it would be physically impossible for an accused person to do otherwise unless the past were different, or a law of nature were violated. Indeed, the existence of agent causation or unnecessitated causation, although consistent with universal causation, would be evidence of causal indeterminism. This is because agent causation is the thesis that agents are the undetermined causes of their own actions,²¹ while unnecessitated laws of nature would be evidence that something like the thesis of probabilistic causation is true,²² which is only consistent with determinism if deterministic laws underlie probabilistic ones.²³

The upshot is that both definitions imply that there is only one physically possible future consistent with the past and the laws of nature, and so both exclude the possibility of agent causation and genuinely probabilistic causation. For this reason, both definitions are acceptable. If causal determinism is true, then there is only ever one physically possible future open to one, and so, for any given offender, it is physically impossible for her not to offend, in the precise way, and at the precise time, that she does.²⁴ That is to say, causal determinism will yield exactly one physically possible future provided that the past and the laws of nature are fixed. Of course, it is not being claimed that the past and the laws of nature are physically necessary, but rather that if they are fixed, then necessarily only one future will obtain, if causal determinism obtains.

Consider the following thought experiment. Suppose that Wadsworth kills Smith. If causal determinism is true, and if the laws of nature and the past are fixed, then it is physically impossible for Wadsworth not to kill Smith in the precise way and at the precise time that he does. In this example, does Wadsworth exercise free will when he kills Smith? The answer depends, at least partly, on what is meant by the words “free will.”

II. FREE WILL

Caution must be exercised in defining free will. It would be naïve to suggest that free will requires that human actions and choices be entirely undetermined. After all, it is difficult to imagine a human action or

21. Randolph Clarke, *Agent Causation and Event Causation in the Production of Free Action*, 24(2) PHIL. TOPICS 19, 19 (1996).

22. Kenton Machina, *Challenges for Compatibilism*, 31AM. PHIL. Q. 213, 220–21 (1994).

23. *Id.* at 221.

24. VAN INWAGEN, *supra* note 6, at 3.

decision that is not at least partially determined by biological, linguistic, cultural, social, legal, or other factors. On the other hand, if scholars accept too weak an account of free will, then their notion of freedom will be contrary to any reasonable and common sense meaning of the words.

According to some scholars, agents have free will if and only if they have control over their decisions and actions.²⁵ According to others, agents have free will if and only if they have a choice with regard to their decisions and actions,²⁶ while others say that agents have free will if and only if they could have done otherwise.²⁷ For other scholars, agents have free will if and only if they have the actual ability to do otherwise.²⁸ Still others take the neo-Aristotelian view that agents have free will if and only if their decisions and actions are related to their desires, beliefs and intentions, for example, in the appropriate way,²⁹ or that they are appropriately responsive to reasons.³⁰ I suggest that having the right sort of control over decisions and actions may be sufficient for free will, but that the relevant sort of control is not possible if the universe is causally deterministic. The first variety of compatibilism to be discussed is the neo-Aristotelian compatibilism of Frankfurt, Hart and Morse.

25. Randolph Clarke, *Indeterminism and Control*, 32 AM. PHIL. Q. 125, 126 (1995); Fischer, *supra* note 16, at 158–59; John Martin Fischer, *Responsibility and Control*, 79 J. PHIL. 24, 38 (1982); Patrick Francken, *Incompatibilism, Nondeterministic Causation, and the Real Problem of Free Will*, 18 J. PHIL. RES. 37, 38 (1993).

26. Alan Brunton, *A Definitive Non-Solution of the Free Will Problem*, 16 PHIL. INVESTIGATIONS 231, 231–32 (1993); Francken, *supra* note 25, at 48; Van Inwagen, *supra* note 6, at 105.

27. Brunton, *supra* note 26, at 231; Randolph Clarke, *Freedom and Determinism*, 36 PHIL. BOOKS 9, 9 (1995); D. Goldstick, *But Could I Have Wanted to Do That?* 70 PACIFIC PHIL. Q. 99, 99 (1989); Van Inwagen, *supra* note 6, at 106.

28. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 27 (1979); 1 GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL: FOUNDATIONS 273–81 (2007); Peter van Inwagen, *How to Think about the Problem of Free Will*, 12 J. ETHICS 327, 329 (2008); Van Inwagen now avoids the phrase “could have done otherwise” to make clear that an actual ability is necessary and that a mere possibility is insufficient for free will. He has also abandoned reference to ‘choice,’ because of possible problems with this concept. VAN INWAGEN, *supra* note 7, at 268.

29. HARRY G. FRANKFURT, THE IMPORTANCE OF WHAT WE CARE ABOUT 11–12 (2009); Hart, *supra* note 9, at 48; Morse, *Criminal Responsibility*, *supra* note 1, at 2551; Morse, *Determinism*, *supra* note 1, at 5–6.

30. Hart, *supra* note 9, at 48; Fischer, *supra* note 16, at 163, 164–68, 172–75; John Martin Fischer, *Frankfurt-Type Examples and Semicompatibilism*, in THE OXFORD HANDBOOK OF FREE WILL 243, 264 (2d ed., 2011); Morse, *Criminal Responsibility*, *supra* note 1, at 2551; Morse, *Determinism*, *supra* note 1, at 5–6.

III. THE NEO-ARISTOTELIAN COMPATIBILISM OF FRANKFURT, HART AND MORSE

A. *The View Explained*

An important form of compatibilism is neo-Aristotelian compatibilism.³¹ This form of compatibilism originates in the writings of Frankfurt, and jurists, such as Hart and Morse, defend versions of it.³² Neo-Aristotelian compatibilists argue that free will exists even if causal determinism is true, and thus only one future is ever open to agents, because alternate possibilities are not necessary for free will. What is necessary and sufficient for free will, according to these compatibilists, is that an accused person's desires, beliefs or intentions, for example, are related to her decisions and actions in the appropriate way, and that they are amenable to rational consideration and revision.³³

Frankfurt argues that free will consists in the relation between an accused person's desires and volitions,³⁴ and in her ability "to secure the conformity" of her desires to her volitions,³⁵ where volitions are higher-order desires that certain lower-order desires be the desires that move an agent to action.³⁶ With respect to the accused person's desires, she is "free" to make that desire her will by forming a corresponding volition.³⁷ Thus, whatever the will of the accused person, it could have been otherwise.³⁸ Frankfurt argues that free will so described is possible in a causally deterministic universe.

According to Hart, free will, or at least the criminal responsibility for which it appears necessary, consists in the satisfaction that agents derive from being able to make choices that determine their actions, in

31. Neo-Aristotelian compatibilism is defined here as any version of compatibilism that takes free will to consist in doing what one desires, as opposed to being coerced, or in being appropriately responsive to reasons, notwithstanding that Aristotle took both of these conditions to be necessary for free will. See Aristotle, *Nicomachean Ethics*, in 2 THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 1729, 1752–55 (Jonathan Barnes ed., R. D. Ross trans., J. O. Urmson rev., Princeton Univ. Press 1984).

32. Frankfurt, *supra* note 29, at 11–12; HART, *supra* note 9, at 48; Morse, *Criminal Responsibility*, *supra* note 1, at 2551; Morse, *Determinism*, *supra* note 1, at 5.

33. Frankfurt, *supra* note 29, at 11–12; Hart, *supra* note 9, at 48; Morse, *Criminal Responsibility*, *supra* note 1, at 2551; Morse, *Determinism*, *supra* note 1, at 5–6.

34. Frankfurt, *supra* note 29, at 11–12.

35. *Id.* at 20.

36. *Id.* at 16. A volition is, for example, one's higher-order desire that one's lower-order desire not to have a second cup of coffee will prevail over a competing lower-order desire that one may have.

37. *Id.* at 24, 30.

38. *Id.*

conjunction with the capacity to be responsive to reasons.³⁹ More precisely, free will consists in “the real satisfaction that a system of criminal law incorporating excusing conditions provides for [an agent] in maximizing the effect of [an agent’s] choices within the framework of coercive law.”⁴⁰ There are three benefits in specifying that such a system should include “excusing conditions,” such as mental illness, coercion or automatism,⁴¹ which eliminate or reduce criminal responsibility.⁴² First, an agent’s ability to predict the likelihood that her choices will lead to criminal sanctions is maximized.⁴³ Second, an agent is unlikely to be held criminally responsible for a state of affairs that she did not actually choose.⁴⁴ Third, an agent’s ability to weigh the possible satisfactions to be gained from choosing to break the law, on the one hand, against choosing to comply with the law, on the other, is maximized.⁴⁵ That is to say, an agent is provided with “reasons for exercising choice in the direction of obedience,” while still being left to choose.⁴⁶ A system of criminal law that prioritizes choice is apt to maximize satisfaction that an agent has with her choices,⁴⁷ as well as to provide good reasons to act, or to refrain from acting, in certain ways, and this, it is implied, is sufficient for free will.⁴⁸ In this way, Hart attempts to show how a certain type of legal system is compatible with a neo-Aristotelian account of free will and even a necessary condition for his account of free will to work.⁴⁹ Thus, although free will is a necessary condition for both criminal and moral responsibility,⁵⁰ the same account cannot be used to defend moral responsibility.⁵¹

Morse’s account is similarly neo-Aristotelian. Although at one point he states that free will is unnecessary for criminal responsibility,⁵² it is plain that he is talking about “contra-causal freedom,” which is the freedom that requires the ability to do otherwise,⁵³ and that his account of criminal

39. Hart, *supra* note 9, at 44–45, 48.

40. *Id.* at 48.

41. *Id.* at 14.

42. *Id.* at 31.

43. *Id.* at 47.

44. *Id.*

45. *Id.*

46. HART, *supra* note 9, at 44.

47. *Id.* at 46–47.

48. *Id.* at 48.

49. *Id.* at 45.

50. *Id.* at 40.

51. *Id.* at 53.

52. Morse, *Determinism*, *supra* note 1, at 2.

53. *See id.* at 14.

responsibility involves a neo-Aristotelian account of free will. For Morse, free will consists in having certain “desires, beliefs and intentions,”⁵⁴ and in the “capacity to grasp and be guided by good reason” in particular legal contexts.⁵⁵ According to Morse, “free will” is one of the “evergreens” of human existence.⁵⁶ Thus, Chiesa describes Morse as a “classic compatibilist,” who argues that “the sort of free will that is needed to make sense of the criminal law is not at odds with [causal] determinism.”⁵⁷

B. The View Rejected

According to Fischer, the neo-Aristotelian approaches described above are undermined by their structural and ahistorical natures.⁵⁸ They are structural inasmuch as they posit a particular structure of desires, beliefs or intentions, for example, as being sufficient for free will. They are ahistorical inasmuch as they pay insufficient attention to the etiology of an agent’s reasons, decisions and actions. With this in mind, consider the following thought experiment.

Suppose that Nigel is undecided between two conflicting first-order desires. Robbing banks, say, against studying law. Suppose further that a hypnotist, unbeknownst to Nigel, induces in him a volition to rob banks—or whatever neo-Aristotelians may require—through subliminal suggestions. From this time on, *ex hypothesi*, Nigel is able to secure the conformity of his desires to his volitions, be satisfied with the maximizing effects of the criminal law on his choices, or be guided by good reasons in legal contexts. However, since Nigel has no control over his volition, it must be concluded that he is not free when he finds himself preferring to rob banks. Thus, the accounts given by neo-Aristotelians are compatible with situations in which the accused person clearly lacks free will.

It is hard to see the relevant difference between Nigel’s situation and the situation that he would be in if causal determinism is true. Nigel would be no freer if his volition were causally determined because he would have no more say in the matter under the influence of causal determinism than he would under the influence of the hypnotist. After all, if causal determinism is true, then an agent’s neo-Aristotelian mental structures and abilities are causally determined along with everything else.

54. *Id.* at 3.

55. Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 440 (2004); Morse, *Determinism*, *supra* note 1, at 7, 20.

56. Morse, *Criminal Responsibility*, *supra* note 55, at 2575.

57. Chiesa, *supra* note 1, at 1407.

58. FISCHER, *supra* note 16, at 208.

Neo-Aristotelian compatibilists can reply in at least two ways. First, they can argue that there is a relevant difference between the causally deterministic case and the case in which Nigel finds himself. This difference consists in the fact that thought experiments of the above kind often hypothesize the existence of a malevolent hypnotist, or a tumor, for example, that is controlling the accused person. It is these “bogeymen,” as Dennett calls them, that are doing all the work.⁵⁹ Dennett argues that an agent lacks control only in cases in which she is being controlled.⁶⁰ If the bogeymen are removed, then the incompatibilist is left with the uninteresting claim that the accused person’s decisions and actions are causally determined along with everything else. However, it is not the compatibilist’s task to show how the accused person can escape causal determinism. To argue that the accused person’s decisions and actions are not free, because they are causally determined, is to beg the question against the compatibilist.

Second, neo-Aristotelian compatibilists can argue that the etiology of the accused person’s mental states is irrelevant to the question of free will, so long as she has the capacity to make those states her own through a process of rational reflection.⁶¹ It may be supposed that this is what an agent achieves through securing the conformity of her desires to her volitions, *et cetera*. Thus, it does not matter who or what put the mental states there in the first place.

In response to the first reply, the incompatibilist can deny the claim that an accused person lacks control only in cases in which she is being controlled by someone or something else. As Fischer points out, there are at least two ways in which it can be true that an agent lacks free will. An agent lacks free will when that agent is controlled by someone or something or when that agent lacks a locus of control.⁶² Dennett, however, appears to be assuming that the only way in which an agent can lack free will is by being controlled by someone or something else.

In response to the second reply, it can be said that neo-Aristotelians leave the reader to solve the mystery of how an accused person secures the conformity of her desires to her volitions, *et cetera*. These would be mysterious abilities in a causally deterministic universe, especially if, as

59. DANIEL C. DENNETT, *ELBOW ROOM: THE VARIETIES OF FREE WILL WORTH WANTING* 7–10 (1984).

60. *Id.*

61. Richard Double, *Puppeteers, Hypnotists and Neurosurgeons*, 56 *PHIL. STUD.* 163, 167 (1988). See also Daniel C. Dennett, *Brainstorms* 252–53 (1981).

62. FISCHER, *supra* note 16, at 18.

Frankfurt suggests, they allow an accused person to constitute her will otherwise.⁶³ Indeed, this would smack of the agent causation posited by some indeterminists, and invites the suspicion that neo-Aristotelians are not really compatibilists.⁶⁴ On the other hand, if these abilities are causally determined, then it would be physically impossible for them, as well as their antecedents and consequences, to be otherwise. These abilities would be a part of a process that has only one physically possible path, and over which no one has, or ever had, or ever will have, any control.⁶⁵ In connection with Hart, it is hard to see how adding an extra layer of determinism, in the form of a system that determines satisfaction with choices, and which, *ex hypothesi*, must itself be causally determined, could make free will, as opposed to a mere subjective experience of free will, more likely in a causally deterministic universe. Neo-Aristotelians thus attempt to explain a mystery with a mystery.

IV. VAN INWAGEN

A. *The Consequence Argument*

An argument for the incompatibility of free will and causal determinism that has received much attention is Peter van Inwagen's Consequence Argument.⁶⁶ The argument, in its general form, is that if causal determinism is true, then decisions and actions of agents are the consequence of events that happened before they were born, together with the laws of nature. However, it is not up to them what happened before they were born, or what the laws of nature are. Therefore, the decisions and actions of agents are not up to them.⁶⁷

An early version of this argument employs the concept of "choice necessity,"⁶⁸ which van Inwagen describes as the necessity opposed to free will. The argument relies on two rules of inference. Rule (α) roughly states that if a proposition is true of physical or causal necessity, then no one has, or ever had, any choice about whether it is true. Rule (β) may be expressed in the following way. Suppose that *p* is the case, and that no one has, or

63. FRANKFURT, *supra* note 29, at 24.

64. This is because they would be assuming an ability to do otherwise, and that agents have the power to secure the conformity of their volitions to their desires.

65. See the discussion of Fischer's view of Neo-Aristotelian compatibilism *infra* Part V.

66. Van Inwagen, *supra* note 6, at 16.

67. *Id.*

68. Peter van Inwagen, *Logic and the Free Will Problem*, 16(3) SOC. THEORY & PRAC. 277, 284 (1990).

ever had, any choice about whether p is the case. Suppose further that *if p , then q* is a true conditional, and that no one has, or ever had, any choice about whether this is so. It follows that q , and that no one has, or ever had, any choice about whether q is the case. Readers may think of Rule (β) as an argument within an argument. Thus, choice necessity is said to transfer from the premises to the conclusion of that argument.⁶⁹

In elucidating the relevance of this argument to the present problem, it will be apposite to return to the thought experiment involving Wadsworth. Remember that Wadsworth is a killer. Remember also that if causal determinism is true, and if the laws of nature and the past are fixed, then Wadsworth's killing Smith is the only physically possible outcome. There are compatibilists who admit that causal determinism rules out alternate possibilities, but argue that alternate possibilities are not necessary for free will. The version of the argument being considered is designed to show that choice, which is, according to van Inwagen, the condition necessary for free will, is incompatible with causal determinism.

In setting out this argument, let p be a sentence expressing the conjunction of all the true propositions concerning the past and the laws of nature at a certain instant before the existence of humankind, and let q be a sentence expressing the conjunction of all the true propositions concerning the state of the universe at the instant Wadsworth kills Smith. Assuming that causal determinism is true, it is physically necessary that *if p , then q* is a true conditional. It follows from Rule (α) that no one has a choice in whether *if p , then q* is true. In addition, no one has a choice in whether p is true. Therefore, from Rule (β), no one has a choice in whether q is true.

That is to say, Wadsworth kills Smith, and no one has, or ever had, a choice about whether this is so. Not even Wadsworth. Surely, therefore, Wadsworth is not free. Because the argument concerns any agent, any time, and any true proposition about what is the case at a given time, it is natural to conclude that if causal determinism is true, and if the laws of nature and the past are fixed, then no one ever had, or has, or will have, a choice about anything. If there is no way that an agent can have a choice in her actions, then there is no sense in attributing free will to that agent. Scholars might, of course, take a weaker view of free will to mean that an agent is free insofar as her decisions and actions conform with her desires. However, as evident from the prior discussion of neo-Aristotelian compatibilism, mere conformity of decisions and actions with desires is not sufficient for free will. Be that as it may, it will be apposite to take a

69. FISCHER, *supra* note 16, at 47–58.

closer look at this version of the Consequence Argument and its two rules of inference. Rule (α) is uncontroversial.⁷⁰ However, the validity of Rule (β) is the subject of some controversy.⁷¹

B. Against the Consequence Argument

The most influential argument for the invalidity of Rule (β) comes from Thomas McKay and David Johnson.⁷² The argument involves a direct counterexample to Rule (β), which may be explained as follows.⁷³ First, let p express the proposition that “the coin does not land heads,” and let q express the proposition that “the coin is not tossed.” Assume that someone could choose to toss the coin, but no one does, and that the coin is fair. Because the coin is fair, no one has a choice that p . It is also true that no one has a choice that *if* p , *then* q is true, because its consequent is true, and because no one has a choice about whether the conditional is false, because that would require being able to choose that the coin lands tails. However, it is false that no one has a choice that q , because, *ex hypothesi*, someone could choose to toss the coin. Thus, Rule (β) and the argument that depends upon it appear to be invalid.

If this is true, then an agent may have a choice in her actions, in the sense relevant to free will, even though she has no choice regarding the past or the laws of nature, and even though she has no choice that the past and the laws of nature entail that it is physically impossible for her to do otherwise. That this result is counterintuitive does not mean that it is false. As argued below, however, the incompatibilist has nothing to fear from arguments of the kind put forward by McKay and Johnson. This is despite the fact that van Inwagen admits that McKay and Johnson’s counterexample establishes the invalidity of the Consequence Argument.⁷⁴

70. This seems to be universally accepted by compatibilists. *See, e.g.*, KADRI VIHVELIN, CAUSES, LAWS, AND FREE WILL: WHY DETERMINISM DOESN’T MATTER 158 (2013).

71. *See, e.g.*, Mark Ravizza, *Semi-Compatibilism and the Transfer of Non-Responsibility*, 75 PHIL. STUD. 61 (1994); Michael Slote, *Selective Necessity and the Free-Will Problem*, 79 J. PHIL. 5 (1982); Vihvelin, *supra* note 70, at 157–62.

72. Thomas J. McKay & David Johnson, *A Reconsideration of an Argument against Compatibilism*, 24(2) PHIL. TOPICS 113, 116–17 (1996).

73. The argument also involves a formal logical argument showing that Rule (β) entails the principle of agglomeration, and a counterexample to show that agglomeration is invalid for choice necessity, but a consideration of the direct counterexample will be sufficient for a legal audience. In any event, the direct counterexample is at least as persuasive as the indirect one. Those with an understanding of formal logic may wish to consult the original article.

74. Peter van Inwagen, *Free Will Remains a Mystery: The Eighth “Philosophical Perspectives” Lecture*, 14 PHIL. PERSP. 1, 3 (2000). At least this admission was made by van Inwagen in connection

C. *For the Consequence Argument*

There are at least two *desiderata* for any argument for compatibilism. First, the truth of compatibilism should not be presupposed.⁷⁵ Second, the truth of causal indeterminism should not be presupposed.⁷⁶ The first *desideratum* was suggested by van Inwagen,⁷⁷ and endorsed by McKay and Johnson,⁷⁸ while the second *desideratum* was suggested by McKay and Johnson themselves.⁷⁹ It is thus surprising that McKay and Johnson's counterexample assumes that a coin could be tossed, even though it is not. Either McKay and Johnson's non-toss of the coin occurs in a causally deterministic universe or in a causally indeterministic universe. If the former is the case, then in assuming that it is possible that the coin is tossed, the first *desideratum* is violated. If the latter is the case, then the second *desideratum* is violated. For these reasons, van Inwagen may have capitulated too easily.

McKay and Johnson propose several ways of repairing Rule (β).⁸⁰ One of their suggestions is to express the rule in the following way. Suppose that p and no one has, or ever had, any ability whatsoever to render p false.⁸¹ Suppose further that *if p , then q* is a true conditional, and no one has, or ever had, any ability whatsoever to render this conditional false. It follows that q , and that no one has, or ever had, any ability whatsoever to render q false.

McKay and Johnson contend that if Rule (β) is modified in this way, then their counterexample involving the coin cannot succeed.⁸² This is because if no one has any ability whatsoever to affect the truth of the sentence 'the coin does not land heads', then it follows that no one has any ability whatsoever to affect the truth of the sentence 'the coin is not tossed'.⁸³ According to McKay and Johnson, modifying Rule (β) in this

with McKay and Johnson's indirect counterexample, but, as indicated in *supra* note 73, the direct counterexample is at least as persuasive as the former.

75. Thomas M. Crisp & Ted A. Warfield, *The Irrelevance of Indeterministic Counterexamples to Principle Beta*, 61 PHIL. & PHENOMENOLOGICAL RES. 173, 175 (2000).

76. *Id.* at 180.

77. Van Inwagen, *supra* note 6, at 102–03.

78. McKay & Johnson, *supra* note 72, at 113.

79. *Id.* at 118.

80. *Id.* at 118–21.

81. *Id.* at 119.

82. *Id.* at 119–20.

83. *Id.* at 119.

way makes it valid.⁸⁴ Of course, Rule (α) would have to be expressed in compatible terms in order that the Consequence Argument is made valid.

In more recent writings, van Inwagen appears to have more or less followed McKay and Johnson's suggestion,⁸⁵ although he now calls Rule (β) the "Principle," and has abandoned Rule (α) altogether.⁸⁶ The Principle relies upon the new notion of "untouchable facts." According to van Inwagen, to say that p expresses an untouchable fact is to say that no one is, or ever has been, able to do anything about p , and that no one ever would have been able to do anything about p , no matter what knowledge she might have had, and no matter how lucky she might have been.⁸⁷

It is now possible to explain the Principle in the following way. Suppose that p expresses an untouchable fact, and that *if p , then q* expresses an untouchable fact. It follows that q expresses an untouchable fact.⁸⁸ To accept this principle is to accept that whenever p and *if p , then q* express untouchable facts, q will express an untouchable fact, regardless of what propositions are substituted for p and q .⁸⁹ Suppose that p expresses an untouchable fact about the past before human beings existed and the laws of nature. Suppose further that *if p , then q* is an untouchable fact, because it is a consequence of the truth of causal determinism, and q expresses the proposition that Wadsworth kills Smith. It follows from the Principle that q is an untouchable fact. No one is, or ever has been, able to do anything about whether Wadsworth kills Smith, and that no one ever would have been able to do anything about this, no matter what knowledge he or she might have had, and no matter how lucky he or she might have been.⁹⁰

For van Inwagen, the problem of free will and causal determinism is the problem of how accused persons are able to decide and act in the actual universe, rather than some possible universe with a different past or laws of nature, since, according to him, the ability to add to the actual past in accordance with the actual laws of nature is necessary for free will.⁹¹ Thus, for van Inwagen, if an accused person has no actual ability to decide

84. *Id.*

85. VAN INWAGEN, *supra* note 74, at 8; Peter van Inwagen, *Freedom to Break the Laws*, 28 MIDWEST STUD. PHIL. 334, 350 (2004); Van Inwagen, *supra* note 28, at 329; VAN INWAGEN, *supra* note 7, at 274–76.

86. Van Inwagen, *supra* note 7, at 274–76, 281, 284–85, 339.

87. *Id.* at 274.

88. *Id.*

89. *Id.* at 275.

90. *See id.* at 274.

91. *See id.* at 267; Van Inwagen, *supra* note 74, at 9–10. *Contra* David Lewis, *Are We Free to Break the Laws?*, 47(3) THEORIA 113, 116 (1981); VIHVELIN, *supra* note 70, at 162–66.

or act other than she does, then there is no way that anyone could sensibly attribute free will to that accused person. Fischer, however, adapts neo-Aristotelian arguments to show that the ability to decide or act otherwise is not necessary for free will.⁹²

V. FISCHER'S NEO-ARISTOTELIAN COMPATIBILISM

A. *The Supposed Irrelevance of the Ability to Decide or Act Otherwise*

Like other neo-Aristotelians, Fischer accepts that if causal determinism is true, then only one future is ever open to an accused person,⁹³ and argues that the ability to decide or act otherwise is not necessary for free will.⁹⁴ He thus denies what Frankfurt calls the “principle of alternate possibilities,”⁹⁵ on the basis that Frankfurt-type examples appear to show that alternate possibilities, or the ability to do otherwise, are irrelevant to questions of free will.⁹⁶

In a Frankfurt-type example, an accused person is deciding between two or more competing courses of action. Unknown to the accused person is the existence of various factors sufficient to ensure that she is unable to decide or act other than she does. These factors, moreover, come into play and prevent the accused person from deciding or acting only when she begins to show a tendency towards deciding to act in another way. However, since the accused person shows no such tendency, these factors do not come into play to affect her decision or action, or constrain her to decide or act in any way. The following is a Frankfurt-type example.

Suppose that Dr. Nefarious, while performing neurosurgery on the unsuspecting Wadsworth, attaches an electronic device to Wadsworth's brain.⁹⁷ This device emits certain signals indicating Wadsworth's neural activity. Suppose also, that Nefarious programs his computer to receive these signals and to intervene via remote control to ensure that Wadsworth decides to kill Smith and actually does so.

In this thought experiment, Wadsworth is unable to do anything other than to decide to kill Smith and actually do so. However, say that Wadsworth, for reasons of his own, decides to kill Smith and actually does

92. FISCHER, *supra* note 16, at 262–65.

93. *Id.* at 180, 188; Fischer, *supra* note 30, at 263.

94. FISCHER, *supra* note 16, at 188; Fischer, *supra* note 30, at 262–64.

95. FRANKFURT, *supra* note 29, at 1.

96. Fischer, *supra* note 30, at 262–64.

97. This example is inspired by Frankfurt's 'Black' example in FRANKFURT, *supra* note 29, at 6–7.

so, such that it is unnecessary for Nefarious to intervene. In such circumstances, surely Wadsworth kills freely. When Wadsworth kills Smith he possesses the free will required for criminal responsibility, even though he is unable to decide or act otherwise. Surely, this is a counterexample to the claim that the ability to do otherwise is necessary for free will.

Strictly speaking, this is not a counterexample to the claim that the ability to do otherwise is necessary for free will. This is because, *ex hypothesi*, Nefarious has that ability. However, say that we get rid of Nefarious. Suppose, instead, that Wadsworth has a brain tumor that will secrete a neurotransmitter that will act upon his brain in such a way that he will develop an irresistible desire to kill Smith. Suppose further, that if Wadsworth decides to kill Smith for reasons of his own, the neurotransmitter will not be activated. Nevertheless, Wadsworth decides to kill Smith, and actually does so, independently of the neurotransmitter's influence. In this example, Wadsworth surely kills freely, in the sense that, at the time of killing Smith, Wadsworth possesses the free will required for criminal responsibility.

To be sure, Wadsworth is not responsible for the fact that the state of affairs, "Wadsworth kills Smith," obtains. Nevertheless, it seems that Wadsworth is responsible for the act of killing Smith to precisely the same degree as he would be if Nefarious or the tumor were not present. After all, neither Nefarious nor the tumor play any role in leading Wadsworth to decide and act as he does. Although Wadsworth has no alternative to killing Smith, he does not do so only because he has no alternative.⁹⁸ He would kill Smith even if he could do otherwise. Thus, Wadsworth kills Smith freely.

This may be stretching the notion of free will too far. After all, free will is typically thought to require the actual ability to do otherwise. That said, surely this is begging the question against compatibilists like Frankfurt who accept that causal determinism rules out alternate possibilities. After all, whether free will exists in the absence of alternate possibilities is precisely the point at issue. However that may be, according to Fischer, the relevant ability is the ability of an agent to guide her actions, and this does not presuppose the existence of alternate possibilities. In making this argument, Fischer distinguishes between "regulative control" and "guidance control."⁹⁹

98. Frankfurt, *supra* note 29, at 8.

99. Fischer, *supra* note 30, at 263.

Consider the following thought experiment, which will be called “Fischer’s motorist.”¹⁰⁰ Suppose that Nigel is driving his motorcar. Insofar as Nigel has the ability to guide his car in a certain direction, he has guidance control over the direction in which the car travels. Insofar as Nigel has the ability to guide the car in alternate directions, he has regulative control over the car’s movements. Imagine that Nigel comes to a fork in the road, decides to take the right hand fork, and proceeds to steer the car to the right. However, suppose that, unbeknownst to Nigel, the steering mechanism in his car has developed a temporary fault, such that should he attempt to steer the car to the left, then the car will travel down the right hand fork just as if Nigel had steered it so. However, since Nigel does not attempt to steer the car to the left, and since the steering mechanism functions properly when he steers the car to the right, it can be said that Nigel—despite lacking regulative control—has guidance control over the movement of the car. According to Fischer, this sort of Frankfurt-type example shows how regulative control and guidance control can “pull apart.”¹⁰¹ Consequently, such examples show how an accused person can have control without having the sort of control that involves alternate possibilities.¹⁰²

Returning to Wadsworth, it is clear that he lacks regulative control. However, if Fischer is to be believed, Wadsworth retains guidance control. If guidance control is sufficient for an agent to have free will in the absence of alternate possibilities, and if Wadsworth’s having guidance control over his decisions and actions explains his criminal responsibility for those decisions and actions, Wadsworth possesses the free will required for criminal responsibility, even though he is unable to decide or act other than he does.

Fischer agrees with van Inwagen that if causal determinism is true, then accused persons lack the ability to decide or act otherwise.¹⁰³ Where Fischer differs from van Inwagen is in his contention that the ability to decide or act otherwise is not necessary for free will.¹⁰⁴ On Fischer’s account, free will requires a certain sort of control over decisions and actions. The possession of the sort of control that involves alternate possibilities, regulative control, is ruled out if causal determinism is

100. See FISCHER, *supra* note 16, at 132–33 (providing a similar example).

101. *Id.* at 133.

102. *Id.*

103. *Id.* at 180, 188; Fischer, *supra* note 30, at 263.

104. FISCHER, *supra* note 16, at 188; Fischer, *supra* note 30, at 262–64.

true.¹⁰⁵ However, according to Fischer, an accused person can have an important kind of control even if she lacks regulative control. That is to say, she can have guidance control even in the absence of alternate possibilities.¹⁰⁶ Thus, although free will is associated with control, it need not be the sort of control that involves alternate possibilities.

According to Fischer, Frankfurt-type examples show that free will depends on what happens in the actual sequence of events leading to a decision or action.¹⁰⁷ In other words, free will depends on the actual history of the sequence of an agent's actions and decisions, and not on the existence or nature of alternate possibilities. Accordingly, an agent possesses free will if and only if she has guidance control over the actual sequence of events leading to her decision or action.¹⁰⁸ Guidance control is thus both necessary and sufficient for free will. It is Fischer's argument that guidance control is possible in a causally deterministic universe.¹⁰⁹

For Fischer, an agent has guidance control over a determined sequence of events if the deliberative mechanism that operates in that sequence is appropriately responsive to reasons.¹¹⁰ An agent is appropriately responsive to reasons when her deliberative mechanism is functioning normally. Conversely, an agent who is, for example, suffering from persecutory delusions and command hallucinations, may not be free, because she may not be appropriately responsive to reasons. It is natural to think, therefore, that the difference between free agents and unfree agents consists in their ability to be appropriately responsive to reasons.

Fischer argues that in Frankfurt-type examples the mechanism that actually operates is reasons-responsive, while the mechanism that would operate in the alternative sequence is not.¹¹¹ In Wadsworth's case, the decision to kill Smith results from an appropriately reasons-responsive mechanism. However, in the alternative scenario, the mechanism that would operate is not reasons-responsive, because Wadsworth is being controlled by Nefarious. The idea is that the mechanism in the actual-sequence, and hence the accused person, can be reasons-responsive even where the accused person is unable to decide or act other than he does.

105. FISCHER, *supra* note 16, at 135, 142, 148, 190–91; Fischer, *supra* note 30, at 263.

106. FISCHER, *supra* note 16, at 132–35, 147, 160–68, 186, 205, 215; Fischer, *supra* note 30, at 263–64.

107. FISCHER, *supra* note 16, at 139, 148–49, 157–58, 163, 184; Fischer, *supra* note 30, at 262–64.

108. FISCHER, *supra* note 16, at 133.

109. *Id.* at 168; Fischer, *supra* note 30, at 263–64.

110. FISCHER, *supra* note 16, at 163, 164–68, 172–75; Fischer, *supra* note 30, at 264.

111. FISCHER, *supra* note 16, at 163.

Fischer distinguishes between weak and strong reasons-responsiveness.¹¹² A mechanism is strongly reasons-responsive if it actually issues in an action or decision, and if there were sufficient reason to do otherwise, and the mechanism were to operate, the accused person would decide and act otherwise.¹¹³ However, according to Fischer, strong reasons-responsiveness, while sufficient, is not necessary for guidance control.¹¹⁴ To see this, consider the following.

Suppose that, as a result of the normal functioning of his deliberative mechanism, Wadsworth decides to kill Smith. Before doing so, Wadsworth recognizes that there is a good reason not to kill Smith. He proceeds anyway. According to Fischer, even an accused person who acts against good reasons can be reasons-responsive if she is responsive to some reasons.¹¹⁵ Such an accused person would be weakly reasons-responsive.¹¹⁶ If the actual sequence of events leading to an action or decision is weakly reasons-responsive, then the accused person in question can be said to possess guidance control over that sequence of events. That is to say, weak reasons-responsiveness is sufficient for guidance control.¹¹⁷

Fischer's argument may be summarized with the following three propositions. First, weak reasons-responsiveness is sufficient for guidance control. Second, guidance control is both necessary and sufficient for free will. Third, guidance control is compatible with causal determinism.

B. Against Fischer

Fischer may have shown, *pace* van Inwagen, that alternate possibilities are not necessary for free will, but he has not shown that free will is compatible with causal determinism. For, if causal determinism is true, then accused persons are not like Fischer's motorist. That is to say, they are not free *homunculi* operating causally determined machines, but rather they are the "machines."

In a Frankfurt-type example, the question is whether a hypothetical free accused person remains free despite certain changes to that accused person's situation. The actual sequence of events leading to the accused person's action is distinguished from an alternative sequence in which the accused person is clearly unfree. In the actual sequence, the accused

112. *Id.* at 164–68.

113. *Id.* at 164.

114. *Id.* at 167–68.

115. *Id.* at 167.

116. *Id.*

117. *Id.* at 168.

person is not compelled to act in any way, and the common intuition is that the accused person remains free. But such intuitions often do not take account of causal determinism and may differ if it were specified that the sequence of events in question is causally determined.

Of course, to say that an accused person lacks free will, because the actual sequence of events leading to her decision and action is causally determined, is to beg the question against the compatibilist. As Fischer points out, the incompatibilist has not given any reason, apart from the fact that causal determinism rules out alternate possibilities, for thinking that causal determinism is incompatible with free will.¹¹⁸ But neither has Fischer shown how an agent can have guidance control over a determined sequence of events.

If causal determinism is true, there is no nefarious neurosurgeon, or tumor, or any such person or thing, waiting to disrupt the course of events if the accused person shows any sign of deviating down a different path. The chain of events leading to an accused person's decision and action proceeds in the only way consistent with the laws of nature, and it is hard to see how an accused person could have guidance control over such a sequence of events. If causal determinism is true, each link in the chain of events leading to an accused person's decision or action is causally sufficient for the event that immediately follows it. By the same token, each link in the chain of events leading to an accused person's decision or action is a causally necessary effect of the event that immediately precedes it.¹¹⁹ Trace this chain of events in any direction, and at no link will the accused person plausibly possess guidance control.

That said, as Fischer argues, for an accused person to have guidance control over a determined sequence of events is just for that accused person's deliberative mechanism to be appropriately responsive to reasons, and that weak reasons-responsiveness is sufficient for guidance control. This aspect qualifies Fischer's account as neo-Aristotelian, and leads to the following criticism.

Suppose that Dr. Nefarious "rewires" the unconsenting Wadsworth's brain in such a way that his desires and volitions are the exact opposite of what they were before the operation. In addition, Nefarious replaces Wadsworth's reasons-responsive mechanism with one he removed from

118. *Id.* at 149.

119. Forgetting for a moment the complexity of diverging causal chains.

the corpse of a homicidal maniac.¹²⁰ One result of this intervention is that Wadsworth now has a first-order desire to kill Smith, and a second-order volition that conforms with this desire. Suppose further that Wadsworth is satisfied that he is deciding and acting within a system that prioritizes choice and is apt to maximize the effectiveness of his choices, and that his reasons-responsive mechanism is such that whenever anyone points out to him that killing Smith will likely lead to a term of imprisonment, Wadsworth wants to kill Smith all the more. The only thing that would constitute a sufficient reason not to kill Smith, as far as Wadsworth is concerned, is if he were to discover that Donald Trump approves of Smith.¹²¹ It appears that since Wadsworth is responsive to at least one reason, he satisfies Fischer's test for weak reasons-responsiveness.¹²² Yet, surely, Wadsworth could not be counted free. Thus, weak reasons-responsiveness, *pace* Fischer, is not sufficient for guidance control.

It may also be argued that strong reasons-responsiveness is not sufficient for guidance control. Suppose that Dr. Nefarious replaces Wadsworth's 'reasons-responsive mechanism' with one he removed from the corpse of a moral and legal saint. One result of this intervention is that Wadsworth now has a strongly reasons-responsive mechanism, and is forever doing good and lawful deeds.¹²³ Surely Wadsworth is not free in his performance of these deeds. Thus, strong reasons-responsiveness is not sufficient for guidance control.

The upshot is that an accused person can have guidance control over his decisions and actions even when he is unable to decide or act other than he does, but he cannot possess guidance control over a determined sequence of events. More precisely, neither strong nor weak reasons-responsiveness is sufficient for guidance control. Indeed, as the counterexamples demonstrate, Fischer's account of guidance control is compatible with situations in which the accused person clearly lacks free will.

120. Of course, imagining that there is a discrete object called the 'reasons-responsive mechanism' is merely an argumentative device. If this part of the story bothers the reader, just imagine that Nefarious achieves a similar effect by interfering in various ways with actual neural structures.

121. To diffuse any objections involving *bogeymen*, suppose that Wadsworth enters a matter transporter and through an unfortunate and unforeseen malfunction of the machine, his matter is scattered and reorganized in such a way that he is qualitatively indistinguishable from the Wadsworth in the above example. Interestingly, in an endnote, Fischer admits that a similar example is a problem for his account of weak reasons-responsiveness and guidance control. Fischer, *supra* note 16, at 243 n.8.

122. *Id.* at 167.

123. Of course, the good and the lawful are not always co-extensive.

VI. HART ON INCOMPATIBILISM

One purpose of this Article is to defend incompatibilism against compatibilism, the motivation for which is given by Hart, who argues that it is ‘incautious’ to be an incompatibilist.¹²⁴ Rather than use the term “incompatibilist,” however, Hart writes about a “determinist who is so incautious as to say that it may be false that anyone has ever acted ‘voluntarily,’ ‘of his own free will,’ or ‘could have done otherwise than he did.’”¹²⁵ The word “determinist” applies only to someone who accepts the truth of determinism. Hart’s use of the word, however, seems to refer to a “hard determinist,” which is someone who is both a causal determinist and an incompatibilist, as opposed to a “soft determinist,” which is someone who is both a causal determinist and a compatibilist.¹²⁶ Hart never considers scholars who combine incompatibilism with the thesis that free will exists,¹²⁷ and who therefore accept that causal *indeterminism* is true.¹²⁸ Neither does Hart commit himself to the truth of causal determinism.¹²⁹ Thus, his argument may be thought of as an argument against incompatibilism *simpliciter*, which is the thesis that *if* causal determinism is true, then there is no such thing as free will.

Hart argues from the premise that free will may not be logically incompatible with causal determinism to the conclusion that incompatibilism is incautious.¹³⁰ His premise is equivalent to the claim that free will may be logically possible and, therefore, not logically impossible, in a causally deterministic universe.¹³¹ However, incompatibilists do not claim that free will is logically impossible if causal determinism is true, but only that it is physically impossible. Thus, Hart is arguing against a straw man. Further, his argument is a *non sequitur*. It does not follow from the logical possibility that a proposition is true, that it would be incautious to hold its negation physically impossible. For example, the proposition that it is logically possible for a person to fly to the moon by flapping her arms is true, because it is not conceptually incoherent. Nevertheless, it is physically impossible that the proposition is

124. Hart, *supra* note 9, at 30.

125. *Id.*

126. VAN INWAGEN, *supra* note 6, at 13.

127. *Id.* at 13–14.

128. Van Inwagen, *supra* note 28, at 330.

129. HART, *supra* note 9, at 30.

130. *Id.*

131. Thus, Hart thinks that incompatibilism is incautious, because compatibilism is not logically incoherent. This is not one of his strongest arguments.

true, because its truth would entail the contravention of one or more laws of nature. Hart's argument also proves too much. If free will is logically compatible with causal determinism, then the *absence* of free will may be logically compatible with causal determinism as well. Either proposition seems to be as plausible as the other. If it is possible to conclude that incompatibilism is incautious from the former premise, then it is possible to conclude that compatibilism is incautious from the latter premise. Therefore, Hart's argument serves only to generate a dialectical stalemate.

Given this conclusion, together with the conclusions of preceding parts, incompatibilism may not seem that incautious. Indeed, most analytical philosophers who specialize in the problem of free will and causal determinism believe that incompatibilism is true.¹³² Of course, to argue from the premise that a thesis is supported by a majority of specialists, to the conclusion that it is true, would be *argumentum ad populum*. Be that as it may, it is not necessary to argue that incompatibilism is true, but only that it is not incautious, and that, as a consequence, a view should be adopted of criminal responsibility and punishment that is consistent with the skepticism that this conclusion should generate.

If incompatibilism is combined with the traditional view that free will is a necessary condition for criminal responsibility, then it follows that there is no such thing as criminal responsibility. However, in addition to the strategies already considered, there are at least four ways to avoid this result. The first is to deny the existence of causal determinism, as some incompatibilists do, and try to show that free will is possible in a causally indeterministic universe.¹³³ The second is to deny the relevance of causal determinism to the criminal law, on the basis that legal theories of causation are distinct from philosophical and scientific theories of causation.¹³⁴ The third is to deny the relevance of causal determinism to the criminal law, on the basis that the concept of criminal responsibility need not conform to any philosophical or scientific facts, because the concept is consistent with legal norms and practices that are firmly

132. Van Inwagen, *supra* note 28, at 338.

133. Jos Andenaes, *Determinism and Criminal Law*, 47 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 406, 408–10 (1957); Chiesa, *supra* note 1, at 1407; Eyal Aharoni, Chadd Funk, Walter Sinnott-Armstrong, & Michael Gazzaniga, *Can Neurological Evidence Help Courts Assess Criminal Responsibility? Lessons from Law and Neuroscience*, 1124 ANN. N.Y. ACAD. SCI. 145, 147 (2008).

134. None of the sources consulted for this Article make this argument, but it may be possible to make it given the distinction made between legal theories of causation and philosophical and scientific theories of causation in several judicial decisions. *See, e.g.*, March v. Stramare (1991) 171 CLR 506, 509, 514, 529–31 (Austl.) (Mason, C.J.); Campbell v. The Queen (1980) 2 A Crim R 157 (Austl.) (Burt, C.J.); Kolian v. The Queen (1968) 119 CLR 47, 69 (Austl.) (Windeyer, J.); Nat'l Ins. Co. of New Zealand Ltd. v. Espagne (1961) 105 CLR 569, 591 (Austl.) (Windeyer, J.).

embraced by society.¹³⁵ The fourth is to deny the relevance of causal determinism to the criminal law, on the basis that the concept of *mens rea* is acausal.¹³⁶

VII. FLETCHER'S CAUSAL INDETERMINISM

If causal determinism is incompatible with free will, and if free will is necessary for criminal responsibility, the result that criminal responsibility does not exist may be avoided by denying the existence of causal determinism, as some incompatibilists do, and by showing that free will is possible in a causally indeterministic universe.¹³⁷ A number of philosophers and jurists have adopted this approach.¹³⁸ Such scholars are sometimes called “libertarians.”¹³⁹ Fletcher’s view will be considered here, since he is perhaps the most influential jurist to have adopted libertarianism.¹⁴⁰

The thesis of causal indeterminism holds that the past and the laws of nature “do not determine outcomes unequivocally, but rather leave open a spectrum of alternative outcomes, with varying probabilities.”¹⁴¹ That the universe is causally indeterministic, at least at the subatomic level, is said to be indicated by quantum mechanics.¹⁴² Even if this is true, it may not follow that accused persons’ conscious decisions and actions are not causally determined, because decisions and actions may have nothing to do with quantum events. That said, *pace* some scholars,¹⁴³ there is scientific evidence that suggests that consciousness may depend on quantum processes in the microtubules of the neurons of human beings.¹⁴⁴ It is not surprising, therefore, that some scholars argue that if quantum

135. See, e.g., Morse, *supra* note 55, at 438–39, 443–44.

136. This approach is suggested by the fact that causation is said to apply to the *actus reus* but not to the *mens rea* of a crime. See, e.g., R v. Hallett [1969] SASR 141 (Austl.); Royall v. The Queen (1991) 172 CLR 378 (Austl.); PENNY CROFTS, CRIMINAL LAW: ELEMENTS, 38 (LexisNexis, Sydney, 4th ed., 2011).

137. Andenaes, *supra* note 133, at 408–10; Chiesa, *supra* note 1, at 1407; Aharoni et al., *supra* note 31, at 147.

138. See, e.g., FLETCHER, *supra* note 28, at 273–81; Hodgson, *supra* note 15; Robert Kane, *Rethinking Free Will: New Perspectives on an Ancient Problem*, in THE OXFORD HANDBOOK OF FREE WILL 381 (Robert Kane ed., 2d ed. 2011); ALFRED R MELE, FREE WILL AND LUCK (2006).

139. SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY 274–75 (2016); Morse, *Criminal Responsibility*, *supra* note 1, at 2547–52, 2558.

140. FLETCHER, *supra* note 28, at 273–81.

141. Hodgson, *supra* note 15, at 58.

142. *Id.*

143. See, e.g., Chiesa, *supra* note 1, at 1436.

144. Stuart Hameroff & Roger Penrose, *Consciousness in the Universe: A Review of the “Orch OR Theory*, 11 PHYSICS LIFE REV. 39 (2014).

mechanics is true, then accused persons may have the freedom to act other than they do.¹⁴⁵

The basis of Fletcher's libertarianism, however, is not quantum mechanics, but the philosophy of language and the philosophy of mind. In connection with the philosophy of language, he appeals to Chomsky's proof that the number of sentences that human beings are able to command in natural language is infinite.¹⁴⁶ Although this proof is limited to syntactic variations in a language, Fletcher nevertheless holds that it applies, *mutatis mutandis*, to the invention of new words.¹⁴⁷ He observes that "human beings are constantly inventing new words, and in the case of word play in particular, native speakers understand the point of the new word immediately."¹⁴⁸ He also observes that causal determinism presupposes that a finite set of causes can determine all actions, including all acts of speech.¹⁴⁹ Arguing by analogy to computers, as paradigmatically determined, Fletcher states that it is impossible to program a computer to understand words about which the programmer is ignorant.¹⁵⁰ He concludes that human beings cannot be causally determined, because, unlike computers, humankind has the capacity to invent and to understand an infinite variety of novel words.¹⁵¹

In connection with the philosophy of mind, Fletcher appeals to Searle's Chinese Room argument.¹⁵² Searle imagines a man locked in a room with a manual of instructions in English on how to manipulate strings of symbols that the man receives by paper. Unbeknown to the man, the strings of symbols are actually questions in Chinese, and in manipulating the symbols as per the instructions, and in returning these manipulations on paper, the man answers these questions in Chinese. This argument purportedly demonstrates that computers may be able to use rules of syntax, similar to the man within the Chinese room, without being able to understand the semantic content of their answers, any more than the man inside the Chinese room can be said to understand Chinese. According to Fletcher, the argument raises doubts about the thesis of causal

145. Hodgson, *supra* note 15, at 58.

146. FLETCHER, *supra* note 28, at 273–81; *See also* NOAM CHOMSKY, SYNTACTIC STRUCTURES 23–24 (1957).

147. FLETCHER, *supra* note 28, at 278.

148. *Id.*

149. *Id.*

150. *Id.* at 279.

151. *Id.*

152. *Id.* *See also* John R. Searle, *Minds, Brains, and Programs* 3(3) *Behavioral & Brain Sci* 417, at 417–18.

determinism, because it demonstrates that human understanding of a language cannot be determined. Computers, *qua* paradigmatically determined devices, can be programmed to manipulate formal symbols, but they cannot be programmed to understand a language. Therefore, human consciousness must be governed by causal indeterminism.¹⁵³

It is not surprising that Fletcher, who is fluent in seven languages,¹⁵⁴ appeals to arguments in the philosophy of language and the philosophy of mind, since these branches of philosophy are closely related to the discipline of linguistics.¹⁵⁵ Fletcher's account is fascinating, but in its present form it should be rejected.

First, Chomsky's proof that there is an infinite number of sentences that human beings are able to construct in natural language does not entail that human consciousness is causally indeterministic. This is because the infinite variability of language is thought to result from the brain's capacity for recursion, which is the ability to produce an infinite set of utterances from a finite set of rules,¹⁵⁶ and because a finite recursive program can enable a non-quantum computer to produce such infinite combinations of results.¹⁵⁷

Second, it does not follow from Searle's conclusion that computer programs are insufficient for conscious understanding that human beings are not causally determined. His point is that the causal powers of the human brain are necessary for consciousness, and that such powers cannot be given to a computer through programming. While he acknowledges that computers with the requisite hardware may one day have such causal powers,¹⁵⁸ he prefers the view that only a particular kind of organism with a particular biological structure is causally capable of understanding and other intentional states.¹⁵⁹ Fletcher, however, neglects Searle's comments in connection with causal powers and the possibility that such powers can only arise through biological processes. Moreover, as Morse observes, Fletcher does not consider the power of evolution to select novel

153. FLETCHER, *supra* note 28, at 279.

154. GEORGE P FLETCHER, *MY LIFE IN SEVEN LANGUAGES* 277 (Mazo Publishers, Jerusalem, 2011).

155. Blackburn, *supra* note 139, at 211.

156. Vivian Cook & Mark Newson, *Chomsky's Universal Grammar: An Introduction* 18 (3d ed. 2007).

157. Chiesa, *supra* note 1, at 1437.

158. Searle, *supra* note 152, at 424.

159. *Id.* at 422.

deterministic objects, such as brains, that are capable of understanding and other intentional phenomena.¹⁶⁰

Third, even if causal indeterminism is true, the ability to do otherwise is not sufficient for free will. For example, an accused person may have the ability to do otherwise, but if that ability is the result of a random process, then it would be counterintuitive to ascribe free will to that person. In this connection, Fletcher gives no reason to suppose that causal indeterminism is free of randomness. Indeed, if quantum mechanics is true, then it seems that certain indeterministic processes, for example, “quantum jumps in atoms,” happen randomly.¹⁶¹ For these reasons, Fletcher’s account should be rejected.

VIII. CAUSATION IN THE CRIMINAL LAW

The existence of criminal responsibility may be supported by denying the relevance of causal determinism to the criminal law, on the basis that legal theories of causation are distinct from those of a philosophical or scientific nature. This possible counterargument to incompatibilism is motivated by Chief Justice Mason in *March v. Stramare*, who holds that the common law rejects scientific and philosophical theories of causation.¹⁶² Although *March v. Stramare* is a civil case, similar remarks are made in criminal cases.¹⁶³

In the law relating to homicide, causation is a requirement of *actus reus*.¹⁶⁴ It must be shown that the accused’s voluntary action caused the death of the victim to establish the *actus reus*.¹⁶⁵ Voluntary action requires a “willed” or “conscious” choice on the part of the accused.¹⁶⁶ Since it is no part of incompatibilism to deny that human beings make willed or conscious choices, this view of voluntary action is uncontroversial. That is to say, so long as triers of fact do not conflate voluntariness, *qua* the

160. Morse, *supra* note 1, at 2550.

161. ROBERT KANE, *Libertarianism*, in *FOUR VIEWS ON FREE WILL* 5, 9 (John Martin Fischer, Robert Kane, Derk Pereboom & Manuel Vargas eds., 2007).

162. *March v. Stramare* (1991) 171 CLR 506, 529 (Austl.) (Mason, C.J.).

163. *Campbell v. The Queen* (1980) 2 A Crim R 157 (Austl.) (Burt, C.J.); *Royall v. The Queen* (1991) 172 CLR 378, 387–88 (Austl.) (Mason, C.J.); *Kolian v. The Queen* (1968) 119 CLR 47, 69 (Austl.) (Windeyer, J.).

164. *Crimes Act 1900* (NSW) § 18.1(a) (Austl.); Crofts, *supra* note 136, at 38; *The Queen v. Katarzynsky* (2005) NSWCCA 72 (Austl.); *Ryan v. R* (1967) 121 CLR 205 (Austl.).

165. *R v. Katarzynsky* (2005) NSWCCA 72 (Austl.); *Ryan v. R* (1967) 121 CLR 205 (Austl.).

166. *Bratty v. Attorney-General (Northern Ireland)*, (1963) AC 386; *R v. Falconer* (1990) 171 CLR 30 (Austl.); *Ryan v. The Queen*, (1967) 121 CLR 205 (Austl.).

absence of automatism, for example, with freedom of the will, and so long as they do not take the adjective “*reus*” in “*actus reus*” too seriously.

In criminal law, as in civil law, judges and jurists find it useful to divide the concept of causation into “factual causation” and “legal causation.”¹⁶⁷ In regard to factual causation, juries may look to either the necessary cause,¹⁶⁸ or the common sense cause of the victim’s death.¹⁶⁹ In connection with legal causation, the judge may consider whether the accused’s conduct was the “operating and substantial cause” of the victim’s death,¹⁷⁰ or whether there was a *novus actus interveniens*.¹⁷¹

Regarding necessary causation, juries may ask whether the conduct of the accused was a necessary condition (*causa sine qua non*) for the victim’s death.¹⁷² In asking this question, juries apply the “but for” test by asking whether the victim’s death would have occurred “but for” the accused’s conduct.¹⁷³ In relation to common sense causation, juries may determine the cause of the victim’s death by applying their “common sense to the facts as they find them.”¹⁷⁴ The common sense test is important, according to Chief Justice Mason, where there is more than one sufficient cause,¹⁷⁵ and, therefore, no single necessary cause, or where there is a *novus actus interveniens*.¹⁷⁶

Regarding necessary causation, Chief Justice Mason observes that judges and jurists reject Mill’s philosophical theory that the cause of a state of affairs is the set of conditions that is sufficient to produce it, and substitute the theory that any necessary member of this set may be a legal cause of that state of affairs.¹⁷⁷ In connection with common sense

167. *March v. Stramare* 171 CLR 506, 515 (1991) (Mason, C.J.); Crofts, *supra* note 136, at 38–46; MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS AND METAPHYSICS 121 (2009).

168. *Royall v. The Queen* (1991) 172 CLR 378 (Austl.); *R v. White* (1910) 2 KB 124 (Austl.).

169. *R v. Campbell* [1997] 2 VR 585 (Austl.); *Royall v. R* (1991) 172 CLR 378 (Austl.).

170. *Arulthilakan v. R*, [2003] HCA 74 (Austl.); *R v. Hallett*, [1969] SASR 141 (Austl.); *R v. Evans* (No. 2) [1976] VR 523 (Austl.); *R v. Moffatt* (2000) 112 A Crim. R 201 (Austl.); *Royall v. R* (1991) 172 CLR 378 (Austl.).

171. *R v. Evans* (No. 2) [1976] VR 523 (Austl.); *R v. Jordan* (1956) 40 Cr. App. R. 152 (Austl.); *R v. Hallett* (1969) SASR 141 (Austl.); *R v. Malcherek*, (1981) 2 All ER 422 UK; *R v. Pagett* (1983) 76 Cr App R 279 (Austl.); *R v. Smith* (1959) 2 QB 35 (UK).

172. Eric Colvin, *Causation in Criminal Law*, 1(2) BOND L. REV. 253, 255, 262, 267 (1989); *R v. Martyr*, Qd R 398 (1962) (Austl.) (Mansfield, C.J.).

173. Colvin, *supra* note 172, at 254–257; *Royall v R* (1991) 172 CLR 378 (Austl.).

174. *Campbell v. R* (1980) 2 A Crim R 157 (Austl.) (Burt, C.J.). *See also* *Royall v. The Queen* (1991) 172 CLR 378 (Austl.).

175. *March v. Stramare* (1991) 171 CLR 506, 516 (Austl.) (Mason, C.J.).

176. *Id.* at 517.

177. *Id.* at 509, 529–30.

causation, his Honor seems merely to assume that it is neither philosophical nor scientific.¹⁷⁸

In response to Chief Justice Mason's assertion that the common law rejects scientific and philosophical theories of causation, it is worth noting that 'philosophical causation' and 'scientific causation' are considered synonymous with 'factual causation.'¹⁷⁹ It may also be worth noting that judges and jurists derive the concept of necessary causation from Mill's philosophy.¹⁸⁰ In any event, Hart and Honoré's common sense notion of factual causation,¹⁸¹ which is accepted by the Chief Justice,¹⁸² is inseparable from ordinary language philosophy.¹⁸³ Moreover, according to Moore, the concept of *novus actus interveniens*, which is one element in legal causation, and which the Chief Justice mentions in his judgment,¹⁸⁴ is not distinct from philosophical causation, if Hart and Honoré's common sense view is accepted.¹⁸⁵ This is because Hart and Honoré ground the concept of *novus actus interveniens* in the concept of common sense causation.¹⁸⁶ In this connection, it is important to note that the Chief Justice also grounds the concept of *novus actus interveniens* in Hart and Honoré's concept of common sense causation.¹⁸⁷

For these reasons, it is difficult to accept Chief Justice Mason's claim that legal theories of causation are distinct from philosophical and scientific theories of causation. It may also be difficult to accept that the former ought to be distinct from the latter, although it may be thought that judges should update the theoretical underpinnings of legal causation, given that ordinary language philosophy is long extinct.¹⁸⁸ However that may be, if this argument against incompatibilism were plausible, then it would be difficult to explain why so many jurists argue for the compatibility of free will and causal determinism, including those who

178. *Id.* at 515–16, 518–19, 522–24, 530, 532, 535.

179. *Butterworths Concise Australian Legal Dictionary* 64 (Peter Butt ed., LexisNexis Butterworths, 3d ed. 2004). Although this is interesting, no great significance can be attached to a name. A case in point is 'The Holy Roman Empire,' which, as Voltaire famously said, was neither holy, nor Roman, nor an empire. That is, "*le saint empire romain n'était en aucun manière ni saint, ni romain, ni empire.*" See Voltaire, *Essay Sur L'histoire Générale, Et Sur Les Moeurs Et L'esprit Des Nations, Depuis Charlemagne Jusqu'a Nos Jours* (2010) (1756).

180. *March v. Stramare*, (1991) 171 CLR 506, 509, 529–30 (Austl.) (Mason, C.J.).

181. H.L.A HART & TONY HONORÉ, *CAUSATION IN THE LAW*, ch. 2 (1985).

182. *March v. Stramare*, (1991) 171 CLR 506, 529 (Austl.) (Mason, C.J.).

183. MOORE, *supra* note 167, at 256, 278.

184. *March v. Stramare* (1991) 171 CLR 506, 517 (Austl.) (Mason, C.J.).

185. MOORE, *supra* note 167, at ch. 12.

186. HART & HONORÉ, *supra* note 181, at 5; *Id.* at 255.

187. *March v. Stramare* (1991) 171 CLR 506, 518 (Austl.) (Mason, C.J.).

188. See, e.g., SAUL KRIPKE, *NAMING AND NECESSITY* (1981).

write extensively on causation and responsibility.¹⁸⁹ If such an argument were viable, it would be unnecessary to defend the thesis that criminal responsibility is compatible with causal determinism.

If the common law does not reject philosophical and scientific theories of causation, *pace* Chief Justice Mason, then there may be no principled reason why the law could not take into account the theory of causal determinism. However, even if legal theories of causation were completely independent of philosophy and science, it might be asked whether there is such a thing as legal causal determinism, about which scholars would need to be compatibilists or incompatibilists. It might be argued that, regardless of the legal position, judges and accused persons remain subject to the laws of nature, and that no judicial decision can make that otherwise. This is similar to the reply that might be given to Lord Justice Steyn, who claims a distinction between legal logic and formal logic.¹⁹⁰ It is one thing to claim such a distinction, and quite another to claim that judges are not constrained by the limits of logical possibility. Of course, judges may rule that round squares are possible, for example, but they cannot actually make them so. Similarly, it may be held, as Chief Justice Mason holds, that theories of legal causation are independent of the theories of philosophers and scientists, nevertheless, the decisions and actions of judges, and of the people over whom they sit in judgment, would remain subject to causal determinism, if causal determinism is true.

IX. MORSE'S NORMATIVE COMPATIBILISM

Jurists may deny the relevance of causal determinism to the criminal law, on the basis that the concepts of moral and criminal responsibility need not conform to any philosophical or scientific facts, because the denial of these concepts would falsify many of society's norms and normative practices. This approach, which is adopted by Morse, takes normative facts about free will and responsibility to be compatible with causal determinism.¹⁹¹ In this connection, it is apposite to consider the reactive attitudes.

189. See, e.g., Hart & Honoré, *supra* note 181; Hart, *supra* note 9; Michael S. Moore, CAUSATION AND THE EXCUSES, 73 CAL. L. REV. 1091 (1985); Moore *supra* note 167; Morse, *supra* note 55; Morse, *supra* note 7; Morse, *Determinism*, *supra* note 1; Stephen J. Morse, *Thoroughly Modern: Sir James Fitzjames Stephen on Criminal Responsibility*, 5 OHIO ST. J. CRIM. L. 505 (2008); Morse, *Criminal Responsibility*, *supra* note 1.

190. Lord Justice Johan Steyn, *The Intractable Problem of the Interpretation of Legal Texts*, 25 SYDNEY L. REV. 5, 6 (2003).

191. Morse, *supra* note 55, at 438–39, 443–44. See also Moore, *supra* note 189, at 1145;

Reactive attitudes are attitudes that are thought to be essential to moral existence.¹⁹² Examples of such attitudes are gratitude, forgiveness, resentment, love, praise and blame.¹⁹³ In arguing for compatibilism based on reactive attitudes, Morse argues that if incompatibilism is true, and there is no such thing as moral or criminal responsibility, then agents would have to dispense with such attitudes, and this would undermine moral existence.¹⁹⁴ Morse also assumes that moral realism is false. That is to say, according to Morse, there are no mind-independent facts about the universe upon which the truth of moral judgments and practices depend, because such judgments and practices are merely human constructs.¹⁹⁵ For Morse, incompatibilism undermines attitudes that are essential for moral existence, and, because moral judgments and practices do not depend upon philosophical or scientific facts about causation, incompatibilism should be rejected.¹⁹⁶

In response to Morse, it may be replied that the claim that moral realism is false, and therefore, that moral antirealism is true, may offend against the maxim *affirmanti non neganti incumbit probatio*,¹⁹⁷ especially when the only reason that Morse gives for accepting antirealism is that it is a ‘common and plausible assumption.’¹⁹⁸ Even if antirealism is ‘unprovable,’ as Morse asserts,¹⁹⁹ his colleagues might expect at least some argument to underpin the thesis, particularly when realism enjoys the support of several important, contemporary philosophers.²⁰⁰

HERBERT MORRIS, ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY (1976). These scholars are indebted to Strawson. See, e.g., P. F. STRAWSON, FREEDOM AND RESENTMENT AND OTHER ESSAYS (2008).

192. Strawson, *supra* note 191, at 6.

193. *Id.* at 3, 5, 200.

194. Morse, *supra* note 55, at 433.

195. *Id.* Although Morse claims that his position is incompatible only with an “extreme metaphysical moral realism,” it is clear that his position is incompatible with any form of moral realism, since moral realism is the view that moral propositions can be true or false independently of human constructs. With respect to Morse, his characterization of his position as being incompatible only with “extreme metaphysical moral realism” serves only the rhetorical purpose of making his own position look less extreme. See THOMAS NAGEL, THE VIEW FROM NOWHERE, 139 (1986). See also Blackburn, *supra* note 139, at 251; Felmon John Davis, *Discourse Ethics and Ethical Realism*, 2(2) EUR. J. PHIL. 125, 132 (1994); Cristina Lafont, *Moral Objectivity and Reasonable Agreement*, 17(1) RATIO JURIS. 27, 27 (2004).

196. Morse, *supra* note 55, at 433.

197. “*Affirmanti non neganti incumbit probatio*” may be translated as “proof falls upon the one who affirms, not the one who denies” (this author’s translation).

198. Morse, *supra* note 55, at 438.

199. *Id.*

200. See, e.g., Richard Boyd, *How to Be a Moral Realist*, in ESSAYS ON MORAL REALISM 181 (Geoffrey Sayre-McCord ed., 1988); DAVID BRINK, MORAL REALISM AND THE FOUNDATIONS OF

In any event, if incompatibilism is true, then the attitudes that must be abandoned may not be morally essential. For example, although it makes little sense to ascribe blame if incompatibilism is true, it is not clear that abandoning such ascriptions would be morally undesirable. Chiesa argues that while blame may not be disagreeable in itself, it often gives rise to “resentment,” and sometimes leads to a desire for “vengeance” or “revenge.”²⁰¹ According to Chiesa, abandoning blame “might lead to a less vengeful and violent society,” which would be a “salutary development.”²⁰²

Alternatively, if incompatibilism is true, then the attitudes that are essential to morality may not need to be abandoned. For example, praise may need to be abandoned, but there would be no need to abandon admiration or love.²⁰³ As Chiesa observes, it is possible to admire or love others for qualities for which they are in no way responsible,²⁰⁴ such as the color of their eyes.²⁰⁵ Thus, if incompatibilism is true, it does not follow that all reactive attitudes must be abandoned.

Finally, even if Morse is right that incompatibilism entails undesirable consequences, it does not follow that incompatibilism is false. Arguing that a conclusion must be affirmed, because its denial entails undesirable consequences, is the very definition of *argumentum ad baculum*.²⁰⁶ Thus, it does not follow that the existence of criminal responsibility should be affirmed, just because its denial may upset established norms and practices.

X. MENS REA

Some may deny the relevance of causal determinism to the criminal law, on the basis that the concept of *mens rea* is acausal. The fact that causation is said to apply to the *actus reus*, but not to the *mens rea* of a crime, suggests this approach.²⁰⁷ The term “*mens rea*” is often associated with Coke, who wrote, in the margin of one of his reports, “*actus non facit*

ETHICS (1989); Nagel, *supra* note 195; MARK DE BRETTON PLATTS, WAYS OF MEANING (1979); Peter Railton, *Moral Realism*, 95(2) PHIL. REV. 163 (1986).

201. Chiesa, *supra* note 1, at 1447–48.

202. *Id.* at 1448.

203. *Id.* at 1448–49.

204. *Id.* at 1448.

205. *Id.* at 1408, 1440, 1448–9.

206. Blackburn, *supra* note 139, at 23–24.

207. R v. Hallett [1969] SASR 141 (Austl.); Royall v. R (1991) 172 CLR 378 (Austl.); Crofts, *supra* note 136, 38.

reum nisi mens sit rea,²⁰⁸ but is traced by Justice Stephen as far back as *Leges Henrici Primi*,²⁰⁹ which is from the early twelfth century.²¹⁰ The *mens rea* is the mental element of an offence.²¹¹ In the law relating to homicide, the *mens rea* is thought to consist in an intention, recklessness, or negligence.²¹² Thus, it appears that the *mens rea* consists in a culpable state of mind,²¹³ however “ambiguous and imprecise” concepts like intention, recklessness, or negligence may be.²¹⁴

If the concept of *mens rea* is acausal, and being in a certain state of mind is necessary and sufficient for criminal responsibility, then the concept is neo-Aristotelian and suffers from the same defects as neo-Aristotelian compatibilism. If, on the other hand, intention, recklessness or negligence, for example, is insufficient for *mens rea*, as the defense of mental illness demonstrates, then the concept of *mens rea* may be causal.²¹⁵

That *mens rea* is a causal concept is suggested by the thought that two agents could be in exactly similar intentional states, and yet one would have the *mens rea* for murder and the other would not, simply because one agent’s intention would be caused by mental illness and the other’s would not. *M’Naghten* may suggest the importance of causation in *mens rea*, because it appears to ask whether the mental state of the accused was caused by mental illness such that her understanding of her behavior and its consequences were diminished.²¹⁶ Be that as it may, in *R v. Porter*, Justice Dixon is explicit in holding that something must “cause” a defect of reason for the defense of mental illness to be successful.²¹⁷

208. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON; AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 6 (6th ed. 1680). See *R v. Tolson* (1889) 23 QBD 168, 187 (Austl.) (Stephen, J.) (discussing the association of *mens rea* with Coke’s statement). “*Actus non facit reum nisi mens sit rea*” = “The act is not made culpable, unless the mind is culpable” (this author’s translation).

209. *R v. Tolson* (1889) 23 QBD 168, 186 (Austl.) (Stephen, J.). “*Leges Henrici Primi*” = “The Laws of Henry I” (this author’s translation).

210. *Leges Henrici Primi* 311–12 (L.J. Downer trans., 1972).

211. *He Kaw Teh v. The Queen* (1985) 157 CLR 523 (Austl.).

212. *Crimes Act 1900* (NSW) § 18.1(a) (intentional or reckless murder); *R v. Crabbe* (1985) 156 CLR 464 (Austl.) (reckless murder); *R v. Lavender* (2005) 222 CLR 67 (Austl.) (negligent manslaughter); *R v. Miller* [1951] VLR 346 (Austl.) (intentional murder); *Nydam v. R* [1977] VR 430 (Austl.) (negligent manslaughter).

213. *He Kaw Teh v. The Queen* (1985) 157 CLR 523, 565, 583 (Austl.) (Brennan, J.).

214. *He Kaw Teh v. The Queen* (1985) 157 CLR 523, 530 (Austl.) (Gibbs, C.J.).

215. See, e.g., *Mental Health (Forensic Provisions) Act 1990* (NSW) § 38; *M’Naghten* [1843–60] All ER Rep 229, 233 (Eng.).

216. *M’Naghten* [1843–60] All ER Rep 229, 233 (Eng.).

217. *R v. Porter* (1933) 55 CLR 182, 189 (Austl.).

If *mens rea* is a causal concept, which it seems to be, and courts may look beyond mental states to their causes, then there may be no principled reason to disregard causal determinism in connection with *mens rea*. Of course, if courts were to consider causal determinism in this connection, and were appropriately skeptical about compatibilism, then perhaps no one would be held criminally responsible for any crime. However, so long as the adjective “*rea*” in “*mens rea*” were not taken literally, courts could retain the concept to determine those persons who pose a risk to society.

XI. CRIMINAL PUNISHMENT

Glanville Williams argues that even if incompatibilism were true, and there were no such thing as criminal responsibility, criminal punishment would be justified on the consequentialist basis that it would be causally effective as a deterrent to others.²¹⁸ This view is rightly criticized by van Inwagen, because a prisoner who objects to being punished on the grounds that only a miracle could have prevented his offending should not be met with the reply that his punishment will nonetheless be effective as a deterrent to others.²¹⁹ Similarly, it would be unjust to reply to such a person that he is causally determined to be punished, just as it was unjust for the philosopher, Zeno, to tell his slave, who claimed that he was fated to steal, that he was also fated to be beaten.²²⁰ Such responses may be clever, and even darkly humorous, but they do nothing to lend authority or legitimacy to the criminal law.

That is not to say that a consequentialist response to punishment could never be justified in a universe without criminal responsibility. For example, Chiesa argues that a consequentialist theory of punishment that punishes on the basis of the “dangerousness” of the offender, in order to protect society from harm,²²¹ could be “more humane and efficient” than the current system.²²² Under such a system, punishment could be reconceptualized as a kind of “quarantine in which individuals who are not responsible for the conditions that make them dangerous are deprived of certain liberties for the protection of others.”²²³ Such a system would be

218. GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 346–47 (1953).

219. Van Inwagen, *Metaphysics*, *supra* note 7, at 273.

220. John T. Fitzgerald, *The Stoics and the Early Christians on the Treatment of Slaves*, in *STOICISM IN EARLY CHRISTIANITY* 141, 161 (Tuomas Rasimus, Troels Engberg-Pedersen & Ismo Dunderberg eds., 2010).

221. Chiesa, *supra* note 1, at 1453–59.

222. *Id.* at 1452.

223. *Id.* at 1409.

aimed not only at the protection of others, which is closely related to general deterrence, but also at rehabilitation, which is closely related to specific deterrence.²²⁴

Since retributive theories of justice presuppose blameworthiness,²²⁵ and blameworthiness is incompatible with causal determinism,²²⁶ then perhaps a consequentialist response to punishment is required, so long as convicted persons reveal themselves as dangerous through the commission of an actual crime and are not punished preemptively.²²⁷ If there is a problem with Chiesa's view, it is in the consequentialist assumption that punishment is justified when its benefits outweigh its costs.²²⁸ There are two problems with this assumption. First, Chiesa does not specify what constitutes valuable consequences. Second, he does not specify how to perform consequentialist calculations. The latter is a problem for consequentialism generally because, as history shows, unethical decisions can be made in the name of maximizing good consequences.²²⁹ Indeed, as Hart suggests, consequentialism could lead to punishing the innocent if doing so would maximize the desired good.²³⁰

I prefer a view grounded in an ethics of care and the principles of therapeutic jurisprudence.²³¹ For example, applying language drawn from the *Mental Health Act* to the criminal law,²³² the concept of punishment might be replaced by the concept of the "care, treatment or control" of a person, and be justified if it is "necessary for the protection of others from serious physical harm,"²³³ and takes place in the "least restrictive environment" that is causally efficacious in preventing such harm.²³⁴ Although permitted in psychiatry, preventative detention need not be part of the criminal law,²³⁵ and offenders need not be kept in custody for their

224. *Id.* at 1453.

225. Holmes, Jr., *supra* note 2, at 27.

226. Chiesa, *supra* note 1, at 1453.

227. *Id.*

228. *Id.*

229. See, e.g., Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 235, 239, 271 (2006) (discussing the role of Attorney General Jay S. Bybee in torture, and his apparent consequentialist justification).

230. HART, *supra* note 9, at 82.

231. See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE (1990).

232. *Mental Health Act 2007* (NSW).

233. *Mental Health Act 2007* (NSW) § 15(b).

234. *Mental Health Act 2007* (NSW) § 68(a).

235. Cf. *Mental Health Act 2007* (NSW) §§ 14–15, 19–20, 22.

own protection from harm,²³⁶ or for the protection of others from non-physical harm.²³⁷

If such a view were to predominate, then offenders, regardless of whether they were in custody, would not be perceived as criminals deserving punishment, but as people requiring care. For this reason, they might find themselves involved in various psychosocial programs focused on their habilitation or rehabilitation. This would be a more humane and caring response to offenders, but it might also generate a more humane and caring society. A positive commitment to incompatibilism would not be required to make this shift. All that would be needed would be a healthy skepticism about free will and criminal responsibility.

SUMMARY

It has been the purpose of this Article to argue that incompatibilism is plausible, and that, as a consequence, a view of criminal responsibility and punishment should be adopted that is consistent with the skepticism that this conclusion should generate. This purpose has been motivated by Hart, who defends compatibilism on the basis that incompatibilism is ‘incautious.’²³⁸ In attempting to achieve this purpose, it has been convenient to consider the meaning of concepts such as free will and causal determinism, as well as various arguments for and against the view that criminal responsibility is compatible with causal determinism. It has also been convenient to discuss criminal punishment.

CONCLUSION

Some may accept Hart’s assurance that incompatibilism is incautious and that blaming and punishing criminals is justified, or one may accept Williams’s assurance that even if incompatibilism were true, such that a miracle would have been required for an accused person not to have offended, her punishment would nonetheless be causally effective as a deterrent to others, and would be justified on that account. In this Article, however, it has been argued that these assurances are ill-founded. This may be an uncomfortable conclusion for someone like Jean-Paul Sartre, who is said to have lamented that “determinism is a bottomless well of

236. *Cf. Mental Health Act 2007* (NSW) §§ 14(1)(a), 15(a).

237. *Cf. Mental Health Act 2007* (NSW) §§ 14(1)(b), 15(b).

238. HART, *supra* note 9.

excuses.”²³⁹ However that may be, it has not been argued in this Article that determinism is true, only that incompatibilism is plausible, and that jurists should adopt a view of criminal responsibility and punishment that is consistent with the skepticism to which this conclusion should give rise. In any event, Sartre’s lament is no more than *argumentum ad baculum*. That being the case, it is sufficient to repeat the words of Nietzsche, who wrote, “If you wish to strive for peace of soul and happiness, then believe; if you wish to be a disciple of truth, then inquire.”²⁴⁰

239. VAN INWAGEN, *supra* note 7, at 283. Sartre seems to have used the word ‘determinism’ in the sense of ‘hard determinism’. That is to say, the view that accepts both the truth of causal determinism and incompatibilism.

240. R. J. HOLLINGDALE, NIETZSCHE: THE MAN AND HIS PHILOSOPHY 32 (Cambridge University Press, rev. ed. 1999) (quoting Friedrich Nietzsche, Letter to His Sister (Bonn, 1865)).