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FREE WILL AND LEGAL RESPONSIBILITY

INTRODUCTION

On July 20, 2012, James Eagan Holmes walked into a movie theater in Aurora, Colorado during a midnight showing of “The Dark Knight Rises.” At first, he set off tear gas grenades. Then, with multiple firearms, he shot into the audience in the cinema. Twelve people were killed and seventy others were injured that night in one of the deadliest mass shootings in the country.¹ Holmes was charged with two counts of murder in the first degree for each of the twelve deceased victims and with two counts of intent to commit murder in the first degree for each one of the surviving victims.² On April 1, 2013 the District Attorney’s Office announced that it was seeking the death penalty against Holmes³ and on June 4, 2013, the defense entered a plea of not guilty on all counts by reason of insanity.⁴

Holmes’s mental state during the shooting was of significant interest to the court and to the media because it was central in establishing Holmes’s guilt. To the court, Holmes’s sanity and

¹ Judge Carlos A. Samour, Jr., *Effectuating Colorado’s Capital Sentencing Scheme in the Aurora Theater Shooting Trial*, 93 DENV. L. REV. 577 (2016).

² The People of the State of Colorado v. James Eagan Holmes, Complaint and Information, available at https://www.courts.state.co.us/userfiles/file/Court_Probation/18th_Judicial_District/18th_Courts/12CR1522/2012-07-30%2012CR1522%20Complaint.pdf (last visited July 12, 2017).

³ Notice of Intent to Seek the Death Penalty People's Motion P-38, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. Apr. 1, 2013).

⁴ Advisement Regarding Plea of Not Guilty By Reason of Insanity at 1, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. June 4, 2013).

responsibility were inextricably connected. The central question for the court in determining Holmes's capability to distinguish right from wrong - and, by proxy, whether he had the mental capacity to know that he was committing a crime - hinged on whether Holmes's schizophrenia affected his mental capacity to the point that he could not possibly know that he was committing a wrongful act when he walked into the movie theater and shot into the audience that night.⁵ Despite multiple testimonies from Holmes's defense team that Holmes suffered from a psychotic mental illness that was triggered by various setbacks in his life, the jury eventually found Holmes guilty of the crimes after two days of deliberation.⁶ Holmes was sentenced to life in prison without the possibility of parole.⁷

The jury had found that Holmes was responsible for the crime because he had complete control over his actions and was rational throughout the incident. He had a choice - or the free will to choose - between right and wrong and he chose to do wrong. Holmes planned and was meticulous as to the choice of time, location, weaponry, and execution of his crime.⁸ For that reason, the jury rejected Holmes's defense of not guilty by reason of insanity and decided that he was not delusional to the point that he could not tell the difference between wrong and right at the time of the crime. There was some sense of "internal logic" or rationality in Holmes's mind

⁵ Ryan Grenoble, James Holmes Verdict Reached: Theater Shooter Found Guilty, available at http://www.huffingtonpost.com/2015/07/16/james-holmes-verdict_n_7802048.html (last visited July 17, 2017).

⁶ *Id.*

⁷ Death Penalty Information Center, *Mentally Ill James Holmes Sentenced to Life in Prison in Aurora, CO Theater Shooting*, available at <https://deathpenaltyinfo.org/node/6217> (last visited July 17, 2017).

⁸ Natasha Lennard, 'He is sane': James Holmes' trial showed that the insanity plea is a mess, available at <https://fusion.kinja.com/he-is-sane-james-holmes-trial-showed-that-the-insan-1793849238> (last visited July 17, 2017).

when he did what he did, which made him legally sane *at the time he committed the crime*⁹ despite evidence of mental illness presented by the defense.¹⁰ Holmes knew what he was doing that night was wrong and, yet, still made the conscious choice to commit a horrendous act. Holmes had the free will to choose between carnage and civility right up until the time that he pulled the trigger and made his choice. He was both morally and legally culpable in the eyes of the law.¹¹

The centrality of free will, moral agency, and legal responsibility to the criminal justice system make them important normative concepts to the fair treatment of defendants accused of crimes and to the efficient use of state resources and tax-payer funded programs for the incarcerated and mentally ill. In Holmes's situation, his mental condition put him on a path that ultimately led him to a point where he had very little choice as to which action to take. In some sense, Holmes's criminal act was "predetermined" by his mental and biological make-up, which would negate any form of free will on his part. As the court-appointed forensic psychiatrist, Dr. Jeffrey Metzner, told the court, Holmes was "genetically loaded" for mental illness and had no

⁹ *Id.*

¹⁰ Jordan Steffen and John Ingold, *Psychiatrist: Theater gunman suffers from personality disorder*, available at <http://www.denverpost.com/2015/06/04/psychiatrist-theater-gunman-suffers-from-personality-disorder/> (last visited July 18, 2017)

¹¹ For serious crimes invoking long periods of confinement or the death penalty, criminal law requires that the accused be both morally and legally culpable. See Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1513 (1992).

choice in how the chain of events in his life led to the Aurora shootings.¹² In a significant sense, this meant that Holmes did not really have control over how things turned out in his life.¹³

Our criminal system assesses legal responsibility and moral culpability at the time the crime was committed¹⁴ and pays less attention to extenuating circumstances that might have led the defendant to commit the crime.¹⁵ Unfortunately, this has led to more findings of guilt and imprisonment of defendants, such as Holmes, with mental illnesses or disorders.¹⁶ Prisons have become “de facto mental health institutions.”¹⁷ With undue focus on punishment of those who are mentally ill but not “insane” by the definition of the law, the aims of rehabilitation, redemption, and fairness in the criminal justice system is furthermore undermined.¹⁸ While free will has been an accepted and expected component to the imposition of moral responsibility for

¹² Anne O’Neil, *James Holmes’ Life Story Didn’t Sway Jury*, available at <http://www.cnn.com/2015/08/02/us/13th-juror-james-holmes-aurora-shooting/index.html> (last visited July 17, 2017).

¹³ Anica Padilla, *Theater shooting gunman’s sister Chris Holmes cries as she recalls learning James Holmes was shooter*, available at <http://www.thedenverchannel.com/news/local-news/aurora-movie-theater-shooting-gunmans-sister-chris-holmes-testifies-in-sentencing-phase-of-trial> (last visited July 20, 2017)

¹⁴ *Modern Status of Rules as to Burden and Sufficiency of Proof of Mental Irresponsibility in Criminal Case*, 17 A.L.R.3d 146

¹⁵ Gideon Yaffe, *Dopamine Dysfunction and Addict Responsibility: A Comment on Read Montague’s “The Freedom to Choose and Drug Addiction”*, in *FREE WILL AND MORAL RESPONSIBILITY* 290 (Sinnot-Armstrong ed. 2014) (showing how the M’Naghten Rules, criminal law’s insanity defense, does not apply to a defendant who does not have full control over his or her actions if he has the mental capacity to recognize the wrongfulness of his or her act at the time of the alleged crime).

¹⁶ A 2006 report by the Department of Justice showed that more than half of prison and jail inmates had a mental health problem based on data collected from personal interviews conducted between 2002 and 2004. See <https://www.bjs.gov/content/pub/pdf/mhppji.pdf> (last visited July 20, 2017).

¹⁷ Sarah Varney, *By the numbers: Mental illness behind bars*, available at <http://www.pbs.org/newshour/updates/numbers-mental-illness-behind-bars/> (last visited July 20, 2017).

centuries¹⁹, reflections and writings about free will have been confined to philosophy (and imported into the law) where it is generally assumed that free will exists axiomatically.

However, in 1983, Benjamin Libet and his colleagues published an article which suggested that brain activity occurred by at least several hundred milliseconds before a conscious intention to act was reported, which could be lengthy enough for various influences to affect and control decisions that appear on its face to be free and voluntary.²⁰ Since then, scientific discoveries in the field of cognitive and neuroscience suggest that our capacity to freely decide which action to take might not be as absolute as we think. Published research suggest that our free will is *limited, although not completely negated*, by our capacities to consciously evaluate reasons for a particular action or non-action and actually deciding to act or restrain from acting.²¹ Experiments on brain activity prior to physiological movements indicate that preparatory brain activity occurs seconds before an individual becomes conscious of the decision to act and engages his physiological senses to act or omit from acting.²²

¹⁹ Aquinas

²⁰ Libet, B., Gleason, C. A., Wright, E. W., and Pearl, D. K. (1983). Time of conscious intention to act in relation to onset of cerebral activities (readiness-potential): the unconscious initiation of a freely voluntary act. *Brain* 106, 623–642. doi: 10. 1093/brain/106.3.623

²¹ Eddy Nahmias, *Is Free Will an Illusion? Confronting Challenges from the Modern Sciences*, in *FREE WILL AND MORAL RESPONSIBILITY* 19 (Sinnot-Armstrong ed. 2014).

²² Gabriel Kreiman, *Neural Correlates of Consciousness: Perception and Volition*, in *THE COGNITIVE NEUROSCIENCES* 796-7 (Gazzanuga and Mangau, 5th ed.) (describing experiments that produce evidence, which indicate that specific areas in the brain were engaged some time - ranging from several hundreds to thousands of milliseconds - before an individual is aware of a will to act or not act).

The research poses more questions than offers answers to the millennial question of whether our will to act is truly free or whether free will is an illusion.²³ Many scientists in the field have tended towards the view that free will is illusory and that there may be a need to rethink assumptions about how much control we actually have over our actions.²⁴ One of the areas of the law in which these findings have the greatest impact is criminal law, where the accused's combined mental state (the mens rea) and criminal action (the actus reus), such as Holmes's, are pivotal to the finding of guilt. Were the law to keep up with findings in cognitive neuroscience about the possible association between neural impulses and the actions that follow as a result which potentially limits free will, the question that needs to be asked is how ought the criminal justice system think about legal responsibility and moral culpability?

As there is no single formulation of free will in philosophy literature, the concept of legal responsibility in criminal law must be juxtaposed against what are three standard philosophical responses to the question of whether we have free will, i.e., hard determinism²⁵, libertarianism²⁶, and compatibilism.²⁷ Against this juxtaposition, the criminal justice system seems to be inclined

²³ *Id.*

²⁴ Nahmias, *Is Free Will an Illusion?*, *supra* note 21 at 1.

²⁵ See Kreiman, *Neural Correlates of Consciousness*, *supra* note 22 ("A system is said to be deterministic if its future state is entirely defined by the initial conditions (and any external forces)).

²⁶ Libertarianism is the view that "in order to be freely willed, an action cannot have a fully sufficient cause. Cognitive science might be thought to threaten free will insofar as it suggests that neural states provide fully sufficient causes for all human action." Tim Bayne, *Neural Decoding and Human Freedom*, in *FREE WILL AND MORAL RESPONSIBILITY* 177 (Sinnot-Armstrong ed. 2014).

²⁷ "Compatibilism is the thesis that free will is compatible with the truth of determinism. Owing to their acquaintance with contemporary physics, the great majority of contemporary compatibilists do not believe that determinism is true, but they do believe that even if it were true, that would not preclude our having free will." Alfred R. Mele, *Free Will and Substance Dualism: The Real Scientific Threat to Free Will?* in *FREE WILL AND MORAL RESPONSIBILITY* 202 (Sinnot-Armstrong ed. 2014).

toward a compatibilist response. Hard determinism, by asserting determinism and rejecting free will, cannot provide an adequate response to the problem of free will and legal responsibility for fair outcomes to be achieved in the criminal justice system because it does not account for blatantly deliberate conscious choices made by individuals to commit a wrongful act despite their upbringing, environment, or genetic make-up. The law is only too familiar with the individual who grew up in a loving and nurturing family but who yet chooses a life of crime. James Holmes was just one example of an individual who departed from what would have been a predetermined good and law-abiding life because of the loving family in which he was raised and the happy home in which he grew up.²⁸ Neither can libertarianism, which asserts that individuals are always free to make their own choices completely free from the constraints of predetermined facts, explain the law's willingness to consider similarly extenuating factors and mitigate legal responsibility in criminal cases, such as where an individual accused of a violent crime had been continuously abused by his victim and erupts in a sudden fit of rage that led to the crime. Compatibilism, which views free choice as compatible with determinism, offers the best legal response to the problem of free will as it accounts for both the imposition and mitigation of legal responsibility in criminal law.

The extent to which criminal law's compatibilist response to the problem of free will can withstand research findings about the neural limitations to free will remains to be seen. As these findings provide empirical evidence from the natural and social sciences, naturalizing our ethical and *normative* expectations of what the criminal justice system should do when it comes to

²⁸ Padilla, *Theater shooting gunman's sister Chris Holmes cries as she recalls learning James Holmes was shooter*, *supra* note 13 (last visited July 25, 2017). Ted Kaczynski

imposing legal responsibility, more and more legal scholars and commentators have come to agree that our environment and surrounding circumstances influence our choices more than philosophers had initially thought. Situational factors, such as the closeness of the victim-offender relationship, location of the offense, or the availability / accessibility of weapons²⁹, that do not appear to constrain choice have been shown to have an actual effect on an individual's ability to choose freely, such as when a request for a particular action is framed to trigger an expected psychophysical response by appealing to an individual's aversion to risk³⁰, social group affiliation³¹, or even the desire for physical warmth.³² Some scholars have responded to these observations by pointing out that situational factors have a profound influence on decision-making and effectively limit an individual's ability to consciously make free choices.³³

These scholars argue that because free will is bounded by an individual's circumstances, the law needs to be more paternalistic as it considers these limitations on an individual to make rational choice and how these limits affect or control manifested human behavior.³⁴ In imposing legal responsibility for wrongful acts, psychologists Joshua Greene and Jonathan Cohen suggest that the law needs to have a deterministic response to the problem of free will and should view

²⁹ Deborah W. Denno, *Victim, Offender, and Situational Characteristics of Violent Crime*, 77 J. CRIMINAL LAW AND CRIMINOLOGY 1143 (1986).

³⁰ Kahneman & Tversky, 2000

³¹ Harris & Fiske, 2006

³² Williams & Bargh, 2008

³³ Joshua Green and Jonathan Cohen, *For the law, neuroscience changes nothing and everything*, OXFORD HANDBOOK OF NEUROETHICS (Judy Illes and Barbara J. Sahakian, eds., 2011)

³⁴ Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008).

sentencing as having a rehabilitative rather than retributive purpose.³⁵ This suggestion urges a similarly paternalistic rather than punitive approach towards the individual. However, with conflicting and inconclusive research findings about the human capacity to reason and make conscious choices, the more fundamental normative question needs to be what the criminal justice system should make out of these findings? What would be the most ethical stance for the law to take given the emerging studies of neural circuits in the human brain and human consciousness in cognitive neuroscience?

This paper argues that the law still needs to adopt a compatibilist approach to free will but with a deeper understanding of its limitations in light of emerging findings from the research. Scientific observations at this time does nothing to prove nor disprove the philosophical underpinnings of the notion of free will and its basis for legal responsibility. Laws must project a certain level of certainty in society to manage individual behavior and social relations. To achieve this level of certainty, laws must assume, in spite of research that point towards determinism, that individuals are still capable of making free choices and choosing the paths that they find themselves on and, for the criminal law, impose criminal liability when individuals choose to commit crimes and/or infringe the rights of persons. The criminal justice systems needs to demonstrate that individuals who are able to freely make choices bear the consequences of their choices - both Nobel Laureate John Nash and convicted “Unabomber” Theodore Kaczynski were brilliant mathematicians who had paranoid schizophrenia as a mental disease. But while Professor Nash was ill from the disease when he worked on his theory of non-

³⁵ Green and Cohen, *For the law, neuroscience changes nothing and everything*, *supra* note 32.

cooperative games that earned him the Nobel prize³⁶, former Professor Kaczynski, who was also ill with the same disease, spent two decades committing domestic terrorism.³⁷ Kaczynski is serving a life in prison sentence without the possibility of parole. His insanity defense was, like Holmes, rejected.³⁸

Despite a compatibilist approach to free will, there is still a need for the criminal justice system to understand how neural circuitry in the brain, caused by genetics, illness, or situational factors, determine an individual's actions. The criminal justice system may need to review the extent of legal responsibility and revise sentencing policies as new findings emerge from scientific studies into human cognition and psychology to answer normative questions, which will inevitably arise as a result of these findings, about the purposes of the criminal justice system. One normative question that arises from cases such as Holmes's and Kaczynski's is the justice of exposing seriously mentally ill defendants to the death penalty. One possible position that the criminal justice system may take as a policy matter is for Federal, State and County prosecutors to restrain from seeking the death penalty in cases, which involve seriously mentally ill defendants. Another possible policy outcome from understanding brain research and the limitations on free will is to develop a more widely accepted "Guilty but Mentally Ill" plea, which would allow for hospitalization and treatment instead of imprisonment of the defendant.

³⁶ John F. Nash Jr. - Facts, available at http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1994/nash-facts.html; John F. Nash Jr. - Biographical, available at http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1994/nash-bio.html (last visited July 25, 2017)

³⁷ Alton Chase, *Harvard and the Making of the Unabomber*, available at <https://www.theatlantic.com/magazine/archive/2000/06/harvard-and-the-making-of-the-unabomber/378239/> (last visited July 25, 2017)

³⁸ *Id.*

PART 1: FREE WILL

Humans generally believe that we are endowed with free will which allows us to make independent choices about what to do or what not to do. As humans, we tend to believe that the choices we make are unconstrained by external or internal human conditions. As a result of such beliefs, humans who come together in society tend to suppose that moral culpability and legal responsibility should be premised on an individual's conscious and willing decision to deviate from established social norms and legal standards. Thus, an individual accused of a crime will only be convicted if his intention to commit the crime can be firmly established. When that intention cannot be firmly established, such as when the accused is insane, the accused is not held legally responsible for his action because he did not act voluntarily. Research findings from the rapidly growing fields of cognitive neuroscience and moral psychology, however, challenge philosophical assertions about the human ability to make independent, free, and unconstrained choices. These findings introduces new insight into this legal orthodoxy and raises many interesting questions about the nature of legal responsibility.

Free will can be defined by three conditions:

- i) the “ability to do otherwise”
- ii) the “control over one's choices”
- iii) the “responsiveness to reasons.”³⁹

³⁹ Andrea Lavazza, *Free Will and Neuroscience: From Explaining Freedom Away to New Ways of Operationalizing and Measuring It*, FRONT. HUM. NEUROSCI. (2016), available at <http://journal.frontiersin.org/article/10.3389/fnhum.2016.00262/full> (last visited July 25, 2017)

CONCLUSION

The legal system is built on an intricate understanding of rights and duties, which depends on clear rules about when an individual who breaches his duty and violates another person's rights will be legally responsible. A legal system cannot afford to protect and excuse all individuals who deviate from a society's moral fabric and established legal structure just because they may be influenced by situational factors that are beyond their conscious control. Situational factors may mitigate legal responsibility but they should not, save for medically proven illnesses, exonerate a wrongful act.