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LAW AND PSYCHIATRY: *DÉTENTE*, *ENTENTE*, OR *CONCOMITANCE*?

David W. Louisell[†] and Bernard L. Diamond[‡]

The plethora of books, articles, and symposia on law and psychiatry since the *Durham* case¹ have advanced the ball only a short distance toward the goal of a shared *modus operandi*—or even a *modus vivendi*—for these two departments of human learning. Perhaps a reason why a touchdown is still beyond the horizon is that the chief protagonists persist in framing the issues on the chalk board of the free-will-determinism abstraction rather than on the gridiron of reality. Thus Jerome Hall recently has said again:

Viewing the contemporary scene from the perspective of a common lawyer, I see a fateful conflict between a powerful movement of thought and the common sense of law. . . . Is it an advance in understanding to interpret philosophy and the lives of great men in terms of the Oedipus Complex, or does that merely confuse meanings with facts and problematic origins?²

And from a psychiatrist, discussing the definition proposed in substitution for that of the *M'Naghten* case³ by the California Commission on Insanity and Criminal Offenders,⁴ comes almost as a taunt the incessant proclamation: "Determinism, which is the fundamental tenet of all science, is violated by the assumption that an individual can wilfully elect to commit an act which, in fact, is the result of causal antecedents."⁵

The lawyer's facile attribution to the law of a rigid free-will posture has its counterpart not only in extremism by psychiatrists but by sociologists as well. Recently Barbara Wootton has argued that since the object of the criminal process is not punishment but prevention, we should abandon *mens rea* as a factor of convictability although retaining it for purposes of personal and social therapy⁶—subordinating the moral significance of the fact that those treated however humanely under such an

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¹ *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

² Hall, "Science, Common Sense, and Criminal Law Reform," 49 *Iowa L. Rev.* 1044 (1964).

³ *M'Naghten's Case*, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843).

⁴ Report by California Special Commissions on Insanity and Criminal Offenders 26 (1st Report, July 7, 1962).

⁵ McGaughey, "Insanity and Criminal Offenders," 99 *California Medicine* 318 (1963).

⁶ Wootton, *Crime and the Criminal Law* 52-53 (1963).

approach would nevertheless be treated as *convicts*. Even one optimistic enough to title law's confrontation with psychiatry as "Cold War or Entente Cordiale?" frames the issue in polar terms: "A basic ethical and psychological stumbling block in an analysis of crucial problems of substantive Criminal Law and of sentencing policy is the ancient enigma about whether man possesses 'freedom of will' or is instead the deluded plaything of deterministic forces completely and always beyond his control."⁷

To us, the stark dichotomy is misleading, or in any event not constructively meaningful. Our law is not, and at least for centuries has not been, absolutist in its application of notions of free will to the defendant at the criminal bar. The law does not adopt the viewpoint of extreme libertarianism. Its concept of *mens rea* proceeds from a theology fully aware of determinants of conduct which potentially reduce or wholly destroy responsibility such as fear, passion and ignorance.⁸ St. Thomas' prescription of criteria relevant to responsibility for acts might well serve as a general check list for the psychoanalyst:

For in acts we must take note of *who* did it, *by what aids* or *instruments* he did it, *what* he did, *where* he did it, *why* he did it, *how* and *when* he did

⁷ Glueck, *Law and Psychiatry: Cold War on Entente Cordiale?* 5-6 (1962).

⁸ St. Thomas Aquinas, *Summa Theologica* (1st complete U.S. ed., literally translated by Fathers of the English Dominican Province, 1947):

[F]or what is done through fear is less voluntary, because when fear lays hold of a man he is under a certain necessity of doing a certain thing. Hence the Philosopher (Ethic.iii 1) says that these things that are done through fear are not simply voluntary, but a mixture of voluntary and involuntary.

2 *id.* at 1722 (pt. 11-11, q. 125, art. 4).

But if by concupiscence we understand a passion, which is a movement of the concupiscible power, then a greater concupiscence, forestalling the judgment of reason and the movement of the will, diminishes the sin, because the man who sins, being stimulated by a greater concupiscence, falls through a more grievous temptation, wherefore he is less to be blamed.

1 *id.* at 914 (pt. 1-11, q. 73, art. 6, reply obj. 2).

In like manner it may happen, on the part of the agent, that a sin generically mortal becomes venial, by reason of the act being imperfect, i.e. not deliberated by reason, which is the proper principle of an evil act, as we have said above in reference to sudden movements of unbelief.

1 *id.* at 982 (pt. 1-11, q. 88, art. 2).

Nevertheless a sin which is generically mortal, can become venial by reason of the imperfection of the act, because then it does not completely fulfill the conditions of a moral act, since it is not deliberate, but a sudden act, as is evident from what we have said above (A.2). This happens by a kind of subtraction, namely, of deliberate reason. And since a moral act takes its species from deliberate reason, the result is that by such subtraction the species of the act is destroyed.

1 *id.* at 985 (pt. 1-11, q. 88, art. 6).

If the ignorance be such as to excuse sin altogether, as the ignorance of a madman or an imbecile, then he that commits fornication in a state of such like ignorance, commits no sin either mortal or venial.

Ibid. (reply obj. 2).

But on the part of the body, in respect of the individual nature, there are some appetitive habits by way of natural beginnings. For some are disposed by their own bodily temperament to chastify or meekness or such like.

1 *id.* at 804 (pt. 1-11, q. 51, art. 1).

it. But Aristotle in *Ethic iii. 1* adds yet another, to wit, *about what* which Tully includes in the circumstance *what*.⁹

Perhaps historically the common law has not been as ready to mitigate or excuse as the moral theologian. "Our general tendency, I think, is to hold an offender legally responsible when we are in doubt about whether he is morally responsible."¹⁰ Chief Judge Bazelon recently furnished a clue to the reasons for differing standards in pointing out that whereas law assesses responsibility in order to punish, moral theology does so as a condition of forgiveness.¹¹ But even so, our law has followed closely in theology's wake from the ancient idea of the "dethronement of reason" through *M'Naghten*,¹² *Wells*,¹³ *Durham*¹⁴ and *Gorshen*.¹⁵ All the relevant tests and concepts—right-wrong, irresistible impulse, product of mental disease or defect, heat of passion, coercion, reduced responsibility—bear witness that the law is no absolutist in applying the philosopher's posit of free will.

On the other side, it is a mistake to assume that the Freudian psychoanalyst with his emphasis on the specific psychodynamic determinants of behavior abrogates all concept of individual responsibility. Actually, it is an essential part of the value system of psychoanalytic therapy that the individual be willing to accept more responsibility for himself and his behavior than society ordinarily assigns. The psychoanalyst insists that the individual must accept responsibility for his own unconscious as well as for his conscious thinking.¹⁶ As stated by Freud:

Obviously one must hold oneself responsible for the evil impulses of one's dreams. What else is one to do with them? Unless the content of the dream (rightly understood) is inspired by alien spirits, it is a part of my own being. If I seek to classify the impulses that are present in me according to social standards into good and bad, I must assume responsibility for both sorts; and if, in defence, I say that what is unknown, unconscious and repressed in me is not my "ego," then I shall not be basing my position upon psycho-analysis. . . . The physician will leave it to the jurist to construct for social purposes a responsibility that is artificially limited to the metapsychological ego.¹⁷

⁹ 1 *id.* at 624 (pt. 1-11, q. 7, art. 3). Note St. Paul's statement of the free-will versus determinism dilemma: "For I do not the good that I wish, but the evil that I do not wish, that I perform. Now if I do what I do not wish, it is no longer I who do it, but the sin that dwells in me." Romans 7:19-20.

¹⁰ Raab, "A Moralistic Looks at the Durham and M'Naghten Rules," 46 *Minn. L. Rev.* 327, 330 (1961).

¹¹ Bazelon, "The Future of Reform in the Administration of Criminal Justice," 35 *F.R.D.* 100, 103 (1964).

¹² *M'Naghten's Case*, 10 *Clark & F.* 200, 8 *Eng. Rep.* 718 (1843).

¹³ *People v. Wells*, 33 *Cal. 2d* 330, 202 *P.2d* 53 (1949); see Louisell & Hazard, "Insanity as a Defense: The Bifurcated Trial," 49 *Calif. L. Rev.* 805, 816 (1961).

¹⁴ *Durham v. United States*, 214 *F.2d* 862 (D.C. Cir. 1954); see Diamond, "Criminal Responsibility of the Mentally Ill," 14 *Stan. L. Rev.* 59, 66 (1961).

¹⁵ *People v. Gorshen*, 51 *Cal. 2d* 716, 336 *P.2d* 492 (1959).

¹⁶ The German "Ich" here stands for something more like the English "self."

¹⁷ Freud, "Moral Responsibility for the Content of Dreams," in 19 *Complete Psychological*

There is still lacking in the psychoanalytic, psychiatric or psychologic literature a simple and comprehensible statement of the problem of individual choice, decision, volition and moral responsibility which could be applied directly to the decision-making processes of the law. Certainly there is no consensus among the scientific community about these issues with which the law is so directly concerned. The hope expressed in 1955 by Gitelson that psychoanalytic advances may bring us really fundamental insights "into the problem of adaptation as it is related to determinism and free will,"¹⁸ is yet to be fulfilled.¹⁹

cal Works of Sigmund Freud 131 (Stanford ed. 1961). Freud was very pessimistic about the application of psychoanalysis to the law. For discussion of Freud's attitudes towards the legal process, see Diamond, *supra* note 14, at 63. He probably would have been skeptical of the value of any attempts to integrate legal, moral and psychoanalytic concepts. Freud's caution served for many years to justify the psychoanalysts' detachment from any practical application of their theories and clinical experience to the legal process. Nevertheless, the temptation for analysts to at least speculate about the legal and moral implications of their theories was very great. It was inevitable that those psychoanalytic insights which proved fruitful in their implications to art, literature, psychology, anthropology, sociology and to medicine, should also be applied to law and criminology.

The psychoanalyst Alexander collaborated with the jurist Staub in 1929 to produce the first penetrating analytic study of the judicial process, Alexander & Staub, "Der Verbrecher und seine Richter," ein Psychoanalytischer Einblick in die Welt der Paragraphen (1929), translated as *The Criminal, the Judge, and the Public* (1931). Since 1929 a vast array of publications by psychoanalysts have appeared representing a wide variety of speculations and theorizing about morality, responsibility, and the law. The most recent publications have ranged from an attack by Szasz upon the current institution of legal psychiatry and the use of the mental health ethic as a device for authoritarian social control, Szasz, *Law, Liberty and Psychiatry* (1963) to a group of supportive lectures on "the ethical implications of psychoanalytic insight" by Erickson, *Insight and Responsibility* (1964).

¹⁸ Gitelson, "Psychoanalyst, U.S.A. 1955," 112 *American J. Psychiatry* 700 (1956):

Modern neuroanatomy, neurophysiology, cybernetics, animal psychology and the other natural sciences create the climate in which psychoanalysis exists today. Inevitably this affects its context, or, as some might say, the "field" of its operation. We can now have hope that the more recent advances in psychoanalysis, particularly in ego psychology, against this background, may bring us really fundamental insights into the individual nature of men and particularly into the problem of adaptation as it is related to determinism and free will. To the extent to which we do this we are also brought closer to a real solution of the living problems whose present insistence evokes our hectic improvisations.

¹⁹ The current down-grading of psychoanalysis, particularly for forensic purposes, observed by Professor Louisell in various places in Europe was chiefly explained by the European psychiatrists and others by (1) its expensiveness, as implied by the semi-jocular comment—"It's all right for you rich Americans, but we can't afford such luxuries"; (2) an increasing skepticism about its relative value for individual diagnosis as compared to other methods (which would not necessarily imply its denigration as a tool of social understanding); and (3) the general reorientation of European psychiatry towards neurology and biochemistry. See Sargent, "Psychiatric Treatment Here and in England," 214 *Atlantic Monthly* 88 (July 1964); Sargent, "Disturbed Americans: Criticisms and Comments," *id.* at 90 (Oct. 1964). It seems more likely, however, that the key or at least most apparent factor in the decline of psychoanalysis on the European continent was the squeeze between the Nazi oppression of psychoanalysis as a "Jewish psychology" and the Communist position that psychoanalysis is anti-Marxist. Continental Europe was depleted of psychoanalysts and psychoanalytic training centers by the concentration camps or by emigration principally to the United States, England, and Israel. It is only in recent years that small groups of Freudian analysts in such countries as Holland and France have been able to resume activities. But in the meanwhile the void left by European psychoanalysis has been filled by the Pavlovian psychiatry of the iron curtain countries or the existentialism psychiatry of Germany, Switzerland and France. See generally Barton, Farrell, Lenehan & McLaughlin, *Impressions of European Psychiatry* (1961); Bellak, Con-

Attempts to state a *modus vivendi* for psychoanalyst and moralist inevitably reflect the emphasis of each viewpoint. Thus John Hospers says:

If practicing psychoanalysts were asked this question [Is there, taking into account psychoanalysis' extension of the notion of compulsion to include determination by unconscious forces, any freedom left in human behavior?] there is little doubt their answer would be along the following lines: they would say that they were not accustomed to using the term "free" at all, but if they had to suggest a criterion for distinguishing the free from the unfree, they would say that a person's freedom is present *in inverse proportion to his neuroticism*; in other words, the more his acts are determined by a *malevolent* unconscious, the less free he is. Thus they would speak of *degrees* of freedom. They would say that as a person is cured of his neurosis, he becomes more free—free to realize capabilities that were blocked by the neurotic affliction. The psychologically well-adjusted individual is in this sense comparatively the most free.²⁰

On the other hand, Choisy puts it: "Liberty is born when determinisms are totally integrated. Freudian determinism is the liberty to create by starting out from mechanisms known and accepted."²¹

About the most we feel able to agree upon—but we think it enough for practical interprofessional cooperation—is that there is ample evidence from psychoanalysis, psychiatry and the other behavioral sciences that the more free the individual is from the internal pressures of psychopathology and the less he is burdened with the detrimental forces of adverse social, economic and cultural conditions, the more he is able to make choices and decisions, to select among alternative patterns of behavior, in a manner which appears to approximate our traditional notion of free will.²²

temporary European Psychiatry (1961); May, Angel & Ellenberger, *Existence, A New Dimension in Psychiatry and Psychology* (1958); Winn, *Psychotherapy in the Soviet Union* (1962).

²⁰ Hospers, "Free-Will and Psychoanalysis," in *Readings in Ethical Theory* 560, 574-75 (1952). Cf. Knight, "Determinism, Freedom, and Psychotherapy," in *1 Psychoanalytic Psychiatry and Psychology* 365 (Friedman ed. 1954). However intellectually unsatisfying the psychoanalytic assaults on the free-will—determinism dilemma may be, can one fairly conclude that the philosopher has done much better? Or the theologian, e.g., in reconciling Divine prescience with human freedom? Perhaps the fact of greatest practical significance for present purposes is that the classical argument for freedom of most direct import for society, that the moral law subsumes freedom, has in psychoanalytic theory a pragmatic counterpart in that "there exist in the deeper layers of the mind the strongest, and probably ineradicable, motives creating what may be called the 'sense of free will,' closely connected with the sense of personality itself and retained so long as this is retained, i.e., until insanity, delirium, or death dissolve it." 2 Jones, *Essays in Applied Psychoanalysis* 186 (1951).

²¹ Choisy, "Psychoanalysis and Catholicism" in *1 Cross Currents* 75, 82 (No. 3, Spring 1951).

²² So long as "blameworthiness" is for society the cornerstone of criminal responsibility the law must acknowledge that those persons who lack the capacity or the opportunity for choice and decision—all those who are not masters of their own ships—cannot be held to the same standard of accountability as the generality of mankind. Clearly the law has already accepted this principle insofar as it concerns the mentally ill, e.g., *Durham v.*

May not, therefore, the lawyer and the psychiatrist pretermite the free-will-determinism dilemma and get on with the practical business of society? "The real question, from the point of view of science in general and psychology in particular, is not whether there is such a thing as human freedom, but rather how much of it there is, and wherein it consists."²³ And from the juridical viewpoint the practically significant question is, what if any determinants of human conduct does the law assimilate as relevant to the assessment of responsibility? Law's confrontation with psychiatry is rendered meaningful and seminal by inquiry as to what determinants the two disciplines hold in common to be relevant, wherein their appraisals differ, and why.²⁴

The selection of and relative emphasis upon determinants of conduct considered to be significant, whether by law or psychiatry, is largely a function of the assumed purpose, goal or potential of the criminal law. Whether one believes primarily in deterrence, retribution or rehabilitation largely governs his selection and classification of the determinants that he is willing to take into account. The choices and emphases do not so much separate the lawyer and the psychiatrist as such, as they divide men generally according to their individual philosophies, religions, temperaments and life experiences. It is therefore well to refresh recollection as to the chief approaches to the criminal law's problem of punishment.

United States, 214 F.2d 862 (D.C. Cir. 1954); *People v. Wolff*, 61 Cal. 2d 123, 394 P.2d 959, 40 Cal. Rptr. 271 (1964); *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959); *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949); *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961); Diamond, "From M'Naghten to Currens, and Beyond," 50 Calif. L. Rev. 189 (1962). It remains to be seen whether society can afford and the law assimilate the idea that cultural and economic deprivation may at least partially deprive certain individuals of their capacity for volitional choice and so negate or diminish their criminal responsibility.

²³ "Free Will," 9 *Encyclopedia Britannica* 747 (1948).

²⁴ Possibly supportive of the feasibility of the consensus we urge is the argument of Ernest Jones "that in practical daily life it does not seem to make any difference whether a given person, community or religion adopts one or the other belief, in free will or determinism." 2 Jones, *supra* note 20, at 180. He goes on to state:

The Babylonians, who firmly believed that one's destiny was fixed at birth by the influence of the stars then in conjunction, were not in the least a fatalistic people, as one might have expected, but on the contrary a people full of enterprise and initiative with evident powers of original thought. The Calvinists who hold to predestination strive to lead as good a life as other Christians, although theoretically it would appear to be irrelevant to their fate in the next life. The part played in Greek tragedy by Fate, from which there was no escape, does not prevent the struggles and conflicts there depicted from being of just the same order as in a modern drama. The determinist Stoics were as set on following the path of duty and leading a moral life as the libertarian Epicureans. . . .

. . . .

Similarly with the philosopher. No one could say that Spinoza, Leibnitz, David Hume and John Stuart Mill, convinced determinists, led a restricted life or strove less than other people to perfect their character and ethical behavior. *Id.* at 180-81. Quare, whether the foregoing observations apply as much to belief as to profession of belief. The fact that most people act as if they could in a measure control their destiny, whatever they profess, accords with one of the predicates of the classic arguments for free will, viz., the universality of belief in duty and moral obligations.

(1) *Deterrence*. This utilitarian approach justifies punishment of the criminal in order to deter others (and the criminal himself). A recent exposition from the sociological viewpoint appears in Barbara Wootton's "Crime and the Criminal Law."²⁵ Deterrence embraces concepts of social defense or protection, and the instillation and alleviation of fear.²⁶

(2) *Balancing the scales of justice: retribution*. Of all theories of penal sanction this concept probably most sharply separates the psychoanalyst and the moralist. For the former, it is essentially a remnant of superstition;²⁷ for the latter, it may be a condition of expiation and therefore of the fulfillment of justice.²⁸ But an accommodation adequate to the needs of society lies in the fact that the psychoanalyst, however much he may deprecate retribution as a goal, acknowledges the practical universality of the demand for it and hence its pragmatic importance.²⁹ And the moralist must realize that not to hold the instinct in leash is to commit the sacrilege of playing God. "*Vengeance is mine; I will repay, says the Lord.*"³⁰ Significant to the accommodation is the increasing social awareness of the possibilities of distinction between "crime," which is within society's competence, and "sin," within only conscience's domain.³¹

²⁵ Wootton, *supra* note 6.

²⁶ See Zilboorg, *The Psychology of the Criminal Act and Punishment* 27, 77 (1954); Ehrenzweig, "A Psychoanalysis of the Insanity Plea—Clues to the Problems of Criminal Responsibility and Insanity in the Death Cell," 73 *Yale L.J.* 425, 433-39 (1964).

²⁷ "The superstition is by no means dead, even among civilized persons. There are many people today who habitually regard every calamity as some kind of retribution for guilt. . . . [T]he naive mind is always seeking for an explanation [of the cruel chances of life], and if it cannot find one in nature itself, it will readily supply an imaginary one of an anthropomorphic kind. I cannot help believing that notions of retributive punishment really belong to the same order of thinking—or, more accurately perhaps, of feeling." Allen, *Aspects of Justice* 20-21 (1958).

²⁸ Leviticus 24:20; Mercier, *Criminal Responsibility* 16 (1905); Edward Fry, quoted in Mercier, *supra*, at 13; cf. the attitude of the legal historian, 2 Stephen, *History of the Criminal Law of England* 81-82, 91 (1883):

I think . . . that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred [T]here are in the world a considerable number of extremely wicked people, disposed, when opportunity offers, to get what they want by force or fraud Such persons, I think ought in extreme cases to be destroyed.

See Yardley, "Current Attitudes to Capital Punishment II," 4 *The Lawyer* No. 2, 33, 34 (1961): "There is nothing inherently wrong in the idea of retribution as the basis of punishment Is it not proper that the disapproval of society . . . should be shown by the severity of the punishment, so that murder . . . is punished by death? . . . [T]he revulsion of English society should be suitably expressed." Compare Traynor, J. in *People v. Love*, 53 *Cal. 2d* 843, 856, 350 *P.2d* 705, 713 (1960).

²⁹ Premitting the problem of the moral justification for retribution, the psychoanalyst points out that there is a deep seated instinct in man that, when evil has occurred, it can somehow be neutralized by some gesture of equivalence; that the process of "noxa" has been common in many systems. As explanation in psychoanalytic terms is that retribution justifies, for example, the death penalty as a vicarious punishment for crimes committed vicariously; punishment gives the law-abiding a release. Hazard & Louisell, "Death, the State, and the Insane: Stay of Execution," 9 *U.C.L.A.L. Rev.* 381, 386 (1962).

³⁰ "Do not avenge yourselves, beloved, but give place to the wrath, for it is written, *Vengeance is mine; I will repay, says the Lord.*" St. Paul, *Romans* 12:19; see also *Deuteronomy* 32:35; *Hebrews* 10:30.

³¹ "But where private practices cannot affect anybody but the voluntary adult actors,

(3) *Segregation.* This concept in its simplest meaning is clear: criminals too dangerous to be at large should be confined until safe, or at least for a definite period. But the psychiatrist often perceives in it a deeper significance, the notion of the criminal as an outcast different in essence as well as in activity from others; as a pariah who contaminates society and must therefore be isolated. Dissenting from this notion, the psychiatrist may unconsciously fall into the role of combatant for the custody of the defendant, a challenger of the legitimacy of the court's claim to the exercise of society's control. The court may react by restricting psychiatric evidence or otherwise diminishing the impact of the potential psychiatric contribution and by stressing other goals such as deterrence or retribution. Soon judge and psychiatrist, at least unconsciously, cast each other in the role of "enemy" and cooperative communication is impeded. Finally, the judge effects his power to exercise society's control of the defendant; the psychiatrist arbitrarily rejects the decision of the court; the block is complete. The solution to this impasse is for psychiatrists to realize objectively and state frankly that they have no legitimate claim to the custody of defendants, and for judges to recognize that psychiatric testimony is not a threat to legal supremacy and the right to custody but only an aid to their more intelligent exercise. The problem for both judge and psychiatrist is at root a moral one: the subordination of hubris.

(4) *Political control.* This approach sees the criminal law as the agent of political power. Its most extreme modern exponents have of course been Nazism and Communism. A classic tenet of Communism is that the law of any given age is a function of the way in which economic power is distributed in that age.³²

(5) *Rehabilitation.* This goal is founded upon the medical notion of treatment or therapy, with the objective of restoration of the criminal to the community as efficiently, promptly and securely as possible. Punishment for retributive purposes is impermissible or in any event irrelevant; it is valid only insofar as it is therapeutically helpful. In this area the lawyer may see the psychiatrist as the potential victim of labeling, and point out that "hospitalization" when involuntary may be as confining, and hence as disruptive of liberty, as "imprisonment."³³ As Fuller re-

the mere dislike of what is being done by others, or even the knowledge that others harm themselves by what they do, provides no legitimate ground for coercion." Hayek, *The Constitution of Liberty* 145 (1960). But quare, whether in this connection the social scientists are paying enough attention to the educative significance of rules of law. See St. John-Stewas, *Life, Death and the Law* 35-49 (1961).

³² See Sutherland & Cressey, *Principles of Criminology* 305 (6th ed. 1960).

³³ See Louisell, "The Psychologist in Today's Legal World," 39 *Minn. L. Rev.* 235, 258 n.66 (1955).

cently put it, "When . . . rehabilitation is taken as the exclusive aim of the criminal law, all concern about due process and a clear definition of what is criminal may be lost. If the worst that can happen to the defendant is that he should be given a chance to have himself improved at public expense, why all the worry about a fair trial?"³⁴ The resolution lies in adequate and judicially enforceable protection against involuntary confinement arbitrarily imposed under whatever label. Rehabilitation reflects not only the medical notion of treatment but also the theological concept of repentance and forgiveness. For whatever philosophic underpinnings of rehabilitation may be subsumed—whether deterministic or free-will—its effectuation seems generally accordant with theology's concept of forgiveness consequent upon contrition and commitment to reformation.

(6) *Certainty and objectivity vs. individualization.* The psychiatrist, clinically observant of varieties of influences on human conduct as multifarious as the experiences of the unconscious, views each patient as a unique problem, each man as a law unto himself. He is apt to see in the lawyer's quest for objective norms and certainty of result only indication that men "have not yet relinquished the childish need for an authoritative father and unconsciously have tried to find in the law a substitute for those attributes of firmness, sureness, certainty and infallibility ascribed in childhood to the father."³⁵ But the lawyer sees objective standards as the *sine qua non* of liberty—"Discretion is a softer word for arbitrary."³⁶ This conflict well illustrates the concretization, on a meaningful experiential level, of the free-will-determinism dilemma. An aid to practical accommodation is the realization that both the lawyer's commitment to objective standards, and the psychiatrist's emphasis on individualization of approach, have a common ultimate aim—the maximum fulfillment of each person's worth and dignity, which may be only a synonym for liberty.³⁷

The behavioral scientist places his emphasis and makes his value judgments upon what he conceives to be the observable and measurable phenomena of the world. He may even go so far, as has Piaget, to postulate an "additional force"³⁸—some quality or attribute which resides within the individual—which tips the balance of choice and decision over and above the ordinary determinants of the act. Piaget describes this "addi-

³⁴ Fuller, *The Morality of Law* 165 (1964).

³⁵ Frank, *Law and the Modern Mind* 22 (Anchor ed. 1963).

³⁶ *Walcot's Case*, K.B. 680, 90 Eng. Rep. 1275 (1793).

³⁷ But the significance of the tug between objective standards, on the one hand, and individualization of approach to the criminal, on the other, cannot be wished away. See Louisell & Williams, *The Parenchyma of Law* 397-414 (1960).

³⁸ Piaget "Will and Action," 26 *Bull. Menninger Clinic* 138 (1962).

tional force" as arising "directly from the permanent scale of values"³⁹ of the individual which, it is assumed, is in itself determined by the particular cultural influences and individual learning experiences of the person.

The Christian theologian perhaps sees in this "additional force"—or at least in that part of it which is not susceptible of materialistic analysis—a power of divine origin which, by its very nature, is unmeasurable and indescribable by the methods of material science. But even here, the theologian's idea of actual grace, a free gift of God which moves the will to the good, produces a concept of "free will" not at all that of libertarianism which would leave the will utterly unlimited, unfettered and uninfluenced. While explanations as to the *modus operandi* of grace in relationship to the will have varied from that of Pelagius to Calvin, the theological issue which is pertinent to the law seems to be the relative significance of the operation of grace on the final choice of its individual benefitee. Despite the theological roots of our criminal law, the problem of grace as a determinant appears too complex and mysterious for systematic juridical attention, at least in a theologically pluralistic society. "The wind blows where it will, and thou hearest its sound but dost not know where it comes from or where it goes."⁴⁰ Certainly, the doctrine of grace as an element in the exercise of the free will of the individual does not describe freedom of the will as the logician's random choice. Rather, the Christian theologian insists that there may be determinants of choice which are outside the realm of the natural sciences and which are divine in origin. It is perhaps paradoxical that modern emphasis of scientific proof in the laboratory sense tends to denigrate alike "unscientific" psychoanalytic observation and spiritual experience as sources of human insights.⁴¹

It is still true that sometimes judicial language dramatically, one might say sloganistically, proclaims absolute free will as the cornerstone of moral accountability.⁴² Irrespective of its absolutist proclamations, in actual practice the law does not, and has probably never, conceived of moral choice and decision as occurring in a philosophic vacuum. The criminal law, sometimes overtly, sometimes covertly, does take into consideration innumerable determinants of the criminal deed. For its own historical reasons, the law chooses to maintain the fiction that motivation is not an essential part of the definition of a crime. Yet motivation creeps

³⁹ *Id.* at 145.

⁴⁰ John 3:8.

⁴¹ Cf. Ward, *Faith and Freedom* 281 (1954).

⁴² E.g., *People v. Wolff*, 61 Cal. 2d 123, 130, 394 P. 2d 959, 971, 40 Cal. Rptr. 271, 283 (1964): "The doctrine of 'irresistible impulse' as a defense to crime is, of course, not the law of California; to the contrary, the basic behavioral concept of our social order is free will."

into the criminal process in many ways, usually disguised as a hidden element of the *mens rea*, as substantiating evidence of intent, design, and malignancy of heart.

When the law ascribes a criminal act to a motivation of greed, avarice, revenge, or moral depravity, is it not stating what it believes to be the determinant of the crime? The logician can make out a good argument that the only pure act of free will would be that decision which is made entirely as a random choice. Hence, the logician's free will defies all principles of causality and rational intellectual activity. In such terms, a computer programmed for random choice becomes the only organism capable of absolute free will, the libertarian's concept of the ultimate quality of the human mind.⁴³

But the law, for all its absolutist proclamations, is not in fact that impractical. It, above all social institutions, has been interested in the down-to-earth, realistic elements of human behavior. Hence the law, in determining moral responsibility and guilt and in assessing the severity of punishment, painstakingly analyzes the determinants of the crime. It is interesting to catalogue the wide variety of determinants which the law implicitly and explicitly utilizes in assessing the moral accountability of the defendant. Such determinants, as traditionally applied within the criminal law, must number in the scores, if not in the hundreds. In some instances the law refuses to recognize them or at least not officially acknowledge that they are utilized in the judgment of responsibility. Thus, a prejudiced juror might find a defendant guilty simply because the defendant is a Negro. To such a juror, the defendant's color is considered to be the determinant of the criminal act. To such a violently prejudiced mind the *cause* of the criminal act is the defendant's race. No further explanation is needed, and no amount of evidence to the contrary will dissipate the juror's belief that the criminal act has been adequately explained and a proper judgment rendered.

The fact that the law does not overtly sanction or condone such irrationalities—but may conceal them under the form of a general verdict

⁴³ One of the signs often proposed to distinguish Androids from men is that men are endowed with "free-will." The only pragmatic test of free-will is that the behavioral outcome is unpredictable. There is no difficulty at all in endowing computers with randomizing devices which will make their response to a situation wholly unpredictable . . . and since their calculations are so rapid, their answers are in any case unpredictable in point of fact. The proponent of such a test may feebly reply that, although he cannot define it, he feels in his bones that free-will entails something more than this. To this, no, reasoned reply is possible, except to challenge him to propose a test which can be applied to an Android which will prove that it does *not* enjoy free-will The obstinate fact is . . . that there is no *logically*-sufficient condition which will determine whether a set of responses has been given by a human being or by a suitably designed computer.

Taylor, "The Age of the Android," 21 *Encounter* 36, 44 (1963).

—does not obviate the harsh fact that they exist. A racial attribute of the defendant so becomes a determinant (in the mind of the decider) of the criminal act. More representative of the legal process are those instances when the law ascribes the cause of the crime to elements of human behavior described in a framework derived from ancient, common-sense psychology. For example, a killing may be ascribed to the motive of revenge or jealousy. Such a homicide is never attributed to a random choice, a decision made in a psychological and circumstantial vacuum. The law, in effect, says that the determinant (i.e., cause) of the slaying was the emotional state of the killer. In a case of robbery, the crime may be explained as caused by the greed and moral depravity of the defendant. These attributes of the robber are thus regarded by the law as determinants of the crime. Common-sense psychology may go further and attribute these criminal determinants to other determinants, in turn. The moral depravity is considered to be the result of lack of religious belief and training. The greed may be attributed to laziness; the laziness to spoiling and indulgence in childhood; and these in their turn attributed to the irresponsibility and sinfulness of the parents. Thus we have chains of determinants—one event or attribute causing another until at the end of the chain is the deed and its accompanying *mens rea* which define the crime.

What does the law mean when it insists upon the element of free will in such cases? Simply that the law believes that right up to the moment of the deed other determinants might have been brought into operation by the offender to alter the course of action. The defendant might have exercised powers of volitional control and inhibited his acting upon his motive of jealousy or greed or moral depravity. But even here, the law accepts the realistic view of human nature that the act of volition has determinants. Thus, the law may say that he did not wish to exercise his volition because he was a sinful person and possessed an “abandoned and malignant heart.”

In fact, the law's theories and procedures as to assessment of criminal responsibility seem to be essentially those of conventional psychology, however much professional terminologies vary. The lawyer's historic mainstay, common sense, is largely a recognition, classification, and ordering of the determinants of the criminal act and the *mens rea*. Thus his concept of “insanity” as exculpating from or mitigating liability to penal sanctions is essentially a recognition that “insanity” is one determinant of conduct.⁴⁴ This is true whether his test conforms to the verbal

⁴⁴ As put by Hayek, *supra* note 31, at 77:

The complementarity of liberty and responsibility means that the argument for

formula of *M'Naghten*,⁴⁵ or *M'Naghten* as modified by the irresistible impulse test,⁴⁶ *Durham*,⁴⁷ *Currens*,⁴⁸ *Baldi*,⁴⁹ *Wells-Gorshen*,⁵⁰ the American Law Institute,⁵¹ or the California Insanity Commission.⁵² Somnambulism⁵³ and automatism⁵⁴ may be forms of insanity which exculpate. Historically age has been recognized as radically significant. "[F]rom birth until seven years of age an infant is conclusively presumed incapable of committing any crime whatever. From seven to fourteen the presumption continues, but is no longer conclusive, and grows gradually weaker as the age advances towards fourteen;"⁵⁵ under today's Juvenile Court philosophy, youths well into adolescence may be wholly excused, at least in theory, from criminal responsibility even for heinous acts.⁵⁶ Intoxication under varying formulae is a determinant which may tend toward exculpation.⁵⁷

The function of fear, duress, compulsion, or desperation as potential determinants of conduct is recognized.⁵⁸ Necessity or duress of circumstance, as when men are thrown from an overloaded life boat, may reduce murder to manslaughter.⁵⁹ Such a reduction frequently occurs under the "rule of provocation" where killings are in the heat of passion.⁶⁰ Reason-

liberty can apply only to those who can be held responsible. It cannot apply to infants, idiots, or the insane. It presupposes that a person is capable of learning from experience and of guiding his actions by knowledge thus acquired; it is invalid for those who have not yet learned enough or are incapable of learning. A person whose actions are fully determined by the same unchangeable impulses uncontrolled by knowledge of the consequences or a genuine split personality, a schizophrenic, could in this sense not be held responsible, because his knowledge that he will be held responsible could not alter his actions.

⁴⁵ *M'Naghten's Case*, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843).

⁴⁶ *Perkins*, *Criminal Law* 756-63 (1957); *Keedy*, "Irresistible Impulse as a Defense in the Criminal Law," 100 U. Pa. L. Rev. 956 (1952).

⁴⁷ *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

⁴⁸ *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961).

⁴⁹ *United States ex. rel. Smith v. Baldi*, 192 F.2d 540 (3d Cir. 1951), *aff'd*, 344 U.S. 561 (1953).

⁵⁰ *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959); *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949).

⁵¹ Model Penal Code § 4.01 (Proposed Official Draft 1962).

⁵² Report by California Special Commissions on Insanity and Criminal Offenders 26 (1st Report, July 7, 1962).

⁵³ See *Tibbs v. Commonwealth*, 138 Ky. 558, 128 S.W. 871 (1910).

⁵⁴ *State v. McCullough*, 114 Iowa 532, 87 N.W. 503 (1901).

⁵⁵ Cal. Pen. Code § 26. See *State v. George*, 20 Del. (4 Penne) 57 (Gen. Sess.), 54 Atl. 745 (1902).

⁵⁶ *People v. Oliver*, 1 N.Y.2d 152, 134 N.E.2d 197, 151 N.Y.S.2d 367 (1956).

⁵⁷ Cal. Pen. Code § 22; *People v. Freedman*, 4 Ill. 2d 414, 123 N.E.2d 317 (1954); *People v. Bartz*, 342 Ill. 56, 173 N.E. 779 (1930); *Gower v. State*, 298 P.2d 461 (Okla. Crim. 1956); *Bentham*, *A Fragment on Government and an Introduction to the Principles of Morals and Legislation* 284 (Harrison ed. 1948).

⁵⁸ *Rhode Island Recreation Center, Inc. v. Aetna Cas. & Sur. Co.*, 177 F.2d 603 (1st Cir. 1949); *State v. St. Clair*, 262 S.W.2d 25 (Mo. 1953); Cal. Pen. Code § 26; N.Y. Pen. Law § 859.

⁵⁹ *United States v. Holmes*, 26 Fed. Cas. 360 (C.C.E.D. Pa. 1842).

⁶⁰ *State v. Yanz*, 74 Conn. 177, 50 Atl. 37 (1901); *McHargue v. Commonwealth*, 231 Ky. 82, 21 S.W.2d 115 (1929); *State v. Robinson*, 353 Mo. 934, 940, 185 S.W.2d 636, 640 (1945); *Perkins*, *supra* note 46, at 43.

able apprehension of immediate danger of death or grievous bodily harm from an assailant legitimizes determinants grounded in instincts of self-defense.⁶¹

The law historically has recognized that traits of character, reflected in reputation, are relevant to the question of guilt of alleged offenses, because such traits may help to show the likelihood *vel non* of specific acts.⁶² It is only a matter of policy that the prosecution is precluded from a showing of bad traits until the defendant has proved good traits.⁶³ Recently one state's law has gone from the "crucible of the community to the couch of the psychiatrist" in permitting a showing of character not only from community reputation but from psychiatric testimony of lack of lustive tendencies of a perverted nature.⁶⁴

Foolishness or bad judgment may reduce culpability from criminal to only civil concern;⁶⁵ the law's historic distinction between criminal and civil negligence is fundamental.⁶⁶ And even where determinants of background or environment are irrelevant to ascertainment of guilt or innocence, they are often taken into account in fixing punishment. Although economic necessity has never been accepted as a defense to a criminal charge, it is frequently invoked in mitigation of punishment.⁶⁷ In sentencing, the broadest kind of consideration is given to the circumstances of the crime and the character and prior history of the defendant.⁶⁸ Thus military service is relevant.⁶⁹ Wide scope is given the tribunal to appraise the manner of man before it from his attitude and conduct in court.⁷⁰

It appears to us that the psychiatrist, the sociologist, and other behavioral scientists are doing essentially the same thing as the lawyer when they offer their explanations of the criminal act. They too believe the crime to be determined, and not a random act. If they are sincere believers in their own professional, scientific knowledge, they will sometimes prefer to think that the determinants which they emphasize provide

⁶¹ *Brown v. United States*, 256 U.S. 335 (1921); *People v. Ligouri*, 284 N.Y. 309, 31 N.E.2d 37 (1940).

⁶² *Edgington v. United States*, 164 U.S. 361, 363, 366 (1896); *Carnley v. United States*, 274 F.2d 68 (5th Cir. 1960).

⁶³ *McCormick*, Evidence 333 (1954).

⁶⁴ *People v. Jones*, 42 Cal. 2d 219, 266 P.2d 38 (1954). See Falknor & Steffen, "Evidence of Character: From the 'Crucible of the Community' to the 'Couch of the Psychiatrist,'" 102 U. Pa. L. Rev. 980 (1954).

⁶⁵ *Heglin v. State*, 236 Ind. 350, 140 N.E.2d 98 (1957).

⁶⁶ *State v. Tankersley*, 172 N.C. 955, 90 S.E. 781 (1916).

⁶⁷ See *State v. Moe*, 174 Wash. 303, 24 P.2d 638 (1933).

⁶⁸ See *Pennsylvania ex. rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937); *United States v. Finn*, 136 F. Supp. 375, 378 (S.D. Cal. 1955); *Blue v. State*, 224 Ind. 394, 67 N.E.2d 377 (1946), cert. denied, 330 U.S. 840 (1947).

⁶⁹ See *State v. Owen*, 73 Idaho 394, 402-04, 253 P.2d 203, 207-08 (1953); compare *Grant v. Commonwealth*, 240 S.W.2d 572, 576 (Ky. 1951).

⁷⁰ See *State v. Hutchison*, 95 Iowa 566, 64 N.W. 610 (1895).

a superior, a more authentic, explanation of the criminal mind and deed. The psychiatrist may prefer to ascribe the crime to the hallucinations and delusions of the defendant, which in turn are determined by the existence of schizophrenia. Or the sociologist may emphasize the socio-economic deprivation resulting from the offender having been raised in a high-delinquency slum area. The psychoanalyst may assert that what appears to be greed (attributed by conventional morality to sinfulness and irresponsibility) may in actual fact be a form of compulsive anal-eroticism which in turn is determined by peculiarities of the offender's toilet training in early infancy. Further, the offender's failure to exercise volition to inhibit his illegal action may be attributed to a defect in ego structure or to an intolerance of anxiety and frustration. He will thus conclude that the defendant could not have exercised his powers of choice and decision. The moral theologian is saying very much the same thing when he insists that weakness of will is the determinant of the offender's failure to exercise self-control.

Our point is this: the criminal law with its traditional common-sense psychology derived from Greco-Judaic-Christian morality is not permanently separated from the modern behavioral sciences by the unbridgeable gulf of the free-will versus determinism dilemma. It is true that at the present time the breach between law and science may be wide in various contexts. But this is not necessarily due to irreconcilable difference. It is largely due to the inability of the behavioral sciences, especially psychiatry, to come forth with convincing demonstrations of the validity of their selection of determinants of criminal behavior. Only too often psychiatry can provide no answer whatsoever to the questions which most concern the criminal law.⁷¹

Simply to ascribe the discrepancy between the historic morality concepts of the law and the behavioral concepts of psychiatry to the free-will-determinism dilemma, and be done with it, is too easy a solution; it is in fact an evasion. For the difference between the two disciplines' approaches proceeds not so much from irreconcilable philosophic principles as from pragmatic judgment as to the particular chains of determinants to emphasize. The law's emphasis is a function of common-sense psychology; psychiatry attempts to add deeper and more comprehensive insights from systematized observation and study. The choice of emphasis, as well as the accompanying value judgment, is in itself partly determined by the differences in historical background and conceptual framework of law and science, although as earlier noted the emphases among

⁷¹ Diamond, "With Malice Aforethought," 2 *Archives of Crim. Psychodynamics* 1, 27 (1957); compare *Fisher v. United States*, 328 U.S. 463, 493 (1946) (Murphy, J., dissenting).

determinants do not so much separate the lawyer and the psychiatrist as such, as they divide men generally according to their individual philosophies and life experiences. In any event, neither law nor science proclaims itself omniscient and immutable. Both law and science evolve; their concepts and explanations of human behavior do change, sometimes slowly, sometimes perhaps too rapidly to permit assimilation and cross-fertilization of the two disciplines. Instances exist where the law has been willing to modify some of its basic traditional views as the result of insights from modern behavioral science, despite the fact that often the views of psychiatry are uncertain and difficult to prove objectively.⁷²

The behavioral sciences have values to offer to the criminal law. The law can be taught that in some instances the explanations of crime provided by psychiatry and sociology may be superior to the traditional explanations of common sense. They are superior when they explain more; when they account for more facets of human behavior in more rational terms; when they open up new possibilities for investigation and experimentation, which in turn may lead to greater knowledge and more effective practical solutions to urgent social problems. Further, the behavioral sciences can sometimes demonstrate that what passes for traditional common sense is nothing but superstition which has become so familiar through centuries of habituation that it has become a natural truth only because no one thinks of questioning it.

As pointed out above, the law's acknowledgment of determinants of crime depends largely upon society's goals in the administration of criminal justice. It seems reasonable to hope that if psychiatry and other behavioral sciences increasingly validate particular determinants beyond the control of the offender as causes of criminal conduct, society and hence the law may be educated to a correspondingly growing willingness (i) to diminish the infliction of pain as an act of institutionalized social revenge upon the evildoer, for if "to know all is to forgive all," increasing knowledge of the determinants should aid us to hold in leash the aggressive and retributive instincts; (ii) to pretermite the essentially theological function of adjudicating ultimate moral responsibility, concentrating its limited human intelligence and energies on rehabilitating the offender and restoring him to the community while constructing as best it can the social defenses against crime.

Often the law retains its time-honored phrases, maxims, and definitions

⁷² Doubtless the outstanding illustration is the abandonment of the rule that youths past 14 years of age are responsible as adults; and the substitution of the principle under Juvenile Court acts that juvenile delinquency is not criminal (except where there is discretion in the prosecutor or tribunal to elect to prosecute as with an adult), but instead is conduct evoking therapy by the state as *parens patriae*.

even as it evolves through changing the operational meaning of its words and phrases.⁷³ Because the words, themselves, remain fixed for centuries, the behavioral scientist is often unaware of the vast changes in the law which have been accomplished.⁷⁴

The behavioral sciences can assist the law further to evolve the operational meanings of its time-honored words. The definitions of such terms as intent, malice, premeditation, insanity, responsibility, depravity, turpitude, negligence, passion, and many kindred words in our penal codes seem to be largely products of the ethos of the generation, as are "due process" and "equal protection."⁷⁵ Good could be accomplished by evolving newer and more insightful meanings for these words and phrases which would reflect advances in our scientific knowledge of human behavior, when in fact there have been advances. If the contemporary evolution of newer meanings for ancient words produces changes in basic concepts, will not the process accord with historic methods of the mind's development? The behavioral sciences, especially psychiatry, can contribute to such a process of evolutionary development.

Only those who shut their eyes to recent changes of the criminal law can fail to see how much has already been accomplished—how thoroughly certain modern scientific concepts have already been integrated into the law.⁷⁶ The philosophic problem of free will versus determinism can safely be relegated to the logicians who perhaps will always have to classify it in that hopeless category of questions which can never be answered simply because they are not asked in a logical form which permits a logical answer. Further theological elucidation may always have to acknowledge an impenetrable mystery. In the meanwhile, the behavioral scientist can continue his explorations of human behavior and feel confident that his discoveries will be utilized by the criminal law in proportion as their significance can be meaningfully communicated to the legal mind and their utilitarian value can be demonstrated.

But the behavioral scientist will not advance the ball by pretending to know what is not known or by dramatic incantations against freedom of the will. Until he is able demonstrably to remove the veil still enveloping the unknown, *i.e.*, the precise operation of choice and decision after the

⁷³ E.g., the meaning of "malice aforethought" in the definition of murder has radically changed. Diamond, "With Malice Aforethought," supra note 71; Perkins, supra note 46, at 30.

⁷⁴ California still applies the M'Naghten rule, supra note 3, in its original language in the determination of the criminal responsibility of the mentally ill. Yet the meaning of the words spoken in 1843 has been substantially altered by recent decisions, e.g., *People v. Wolff*, 61 Cal. 2d 123, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

⁷⁵ Compare *Plessy v. Ferguson*, 163 U.S. 537 (1896), with *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁷⁶ See, e.g., the cases cited in notes 1, 13, 14, 15, and 48 supra.

determinants have expended themselves—a mystery before which philosophy, theology, and the psychological sciences still bow humble heads—it behooves him as it does all men to acknowledge the limitations of his expertise. To demonstrate that the human drama is played on a set stage, is not to disprove variation in the quality of the dramatic art. To know in part is not to know all.⁷⁷

⁷⁷ As put by Ryle, *The Concept of Mind* 80-81 (1964):

The fears expressed by some moral philosophers that the advance of the natural sciences diminishes the field within which the moral virtues can be exercised rests on the assumption that there is some contradiction in saying that one and the same occurrence is governed both by mechanical laws and by moral principles, an assumption as baseless as the assumption that a golfer cannot at once conform to the laws of ballistics and obey the rules of golf and play with elegance and skill.