

“THE DEVIL MADE ME DO IT”: LEGAL IMPLICATIONS OF THE NEW TREATMENT IMPERATIVE

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I. INTRODUCTION

How we view the nature of human behavior has a great deal to do with how we respond to criminal offenders. If we believe that behavior is the product of the exercise of free will, we will be more inclined to adopt a retributive orientation and punish the offender because he or she deserves it for making a poor choice. On the other hand, if we accept that behavior is less the product of a voluntary decision and more the result of influences beyond the person's control, a response approach intended to effectively alter the offender's behavior will be more attractive. The response approach has most often been justified by pointing to assumptions about the causes of crime. In this essay I argue that the reverse may also be true, that the response choice plays a subtle but significant role in shaping our view of why criminals behave the way they do. This approach is a development that is accelerating with the emergence of what I view as a renewed and compelling interest in treatment as an alternative response to myriad forms of criminal behavior. The movement toward a treatment orientation has been motivated by both traditional social pragmatism and developments in the application of science to the modification of behavioral anomalies. I suggest that a new treatment imperative is likely to fundamentally influence, with attendant social consequences, core conceptualizations in the criminal law concerning the nature of criminal liability and justifications for criminal sanctions.

II. THE HISTORY OF THE REHABILITATIVE IDEAL

When little was known about the nature of human behavior, and crime was thought to be the equivalent of sin, responding to criminal offenders in America was a relatively uncomplicated matter. Believing that given their evil nature, deviants did not offer much prospect for reform, the courts of seventeenth and eighteenth century colonial America chose an appropriate sentence from a wide range of options, including fines, whippings, the

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stocks, and the gallows.¹ While deterrence was certainly a desirable outcome, retribution was a much more realistic and socially cognizable aspiration.² In the aftermath of its independence, America embraced the “Age of Enlightenment,” and began to chart a different course. Intended as an alternative to the cruelty of traditional punishments, the development of the first penitentiaries in the early 1800s made incarceration the norm.³ In this new “thinking” environment, it seemed that the penitentiary offered the best chance for reforming prisoners who, it was reasoned, needed time for contemplation and separation from the corrupt influences that had facilitated their criminality.⁴

Other penal reforms involving alternatives to incarceration required further change in the conceptualization of criminal etiology and, therefore, took a longer time to emerge. For example, probation did not emerge as a sentencing alternative until 1878, when the Commonwealth of Massachusetts took formal notice of the benevolent work of John Augustus by passing a statute.⁵ Furthermore, it was not until many years later and after considerable controversy that community supervision became broadly available throughout the United States.⁶ By necessity, sentences continued to be largely determined by a subjective and arbitrary assessment of how much punishment was sufficient to deter the individual from further criminal behavior, or to remind the community of the perils of violating the law.⁷ The presence or absence of certain factors, such as drunkenness or mental infirmity, may have influenced a Court’s decision. With little ability to either understand or effectively deal with these considerations, however, their impact on sentencing decisions was necessarily limited.⁸

The debate about why we should punish people has persisted throughout the history of the American legal system, with the roots of that

¹DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 15–49 (1971).

²*See id.* *See also* AM. CORRECTIONAL ASSOC., *Manual of Correctional Standards, in* CORRECTIONAL INSTITUTIONS (Robert M. Carter et al. eds., 1972).

³*See* ROTHMAN, *supra* note 1, at 57–83. The writings of Cesare Beccaria influenced early American leaders and led to the adoption of criminal codes that linked the seriousness of crimes with the severity of punishment. At the same time, Americans were rejecting Calvinistic determinism and more seriously considering the influence of social factors in the development of crime. *See id.*

⁴*Id.* at 79–83.

⁵*See* United Nations, *The Origin of Probation in the United States, in* PROBATION AND PAROLE: SELECTED READINGS 11, 12–13 (Robert M. Carter & Leslie T. Wilkins eds., 1970).

⁶*See generally* JOHN ORTIZ SMYKLA, *PROBATION AND PAROLE: CRIME CONTROL IN THE COMMUNITY* 61–83 (1984). Probation was not available in every state until 1956. HARRY E. ALLEN & CLIFFORD E. SIMONSEN, *CORRECTIONS IN AMERICA: AN INTRODUCTION* 120 (1975).

⁷Deterrence has long been one of the primary aspirations of western legal systems and was the cornerstone for the “classical school” of criminological thought. *See* ALLEN & SIMONSEN, *supra* note 6, at 19 (explaining Cesare Beccaria’s position that the purpose of the law is to deter persons from committing crimes).

⁸The reform movement in corrections was largely concerned with avoiding the harshness of corporal punishments and subsequently lessening the inhumane conditions associated with incarceration. *See* THORSTEN SELLIN, *Correction in Historical Perspective, in* CORRECTIONAL INSTITUTIONS 8, 8–17 (Robert M. Carter et al. eds., 1972). Within that context, one could argue that there was concern for criminals who manifested certain debilitating characteristics. John Augustus focused his efforts on people who were considered common drunks, and he appealed to the court to release them to his custody in lieu of incarceration. ALLEN & SIMONSEN, *supra* note 6, at 120.

debate extending well into all of western legal tradition.⁹ Today, legal scholars and commentators continue to argue the merits of “utilitarianism” versus the “deserts” theory,¹⁰ and at times the discussion has been more precisely centered on broader themes, such as the values underlying the criminal process, with noted legal theorist Herbert Packer’s “crime control” versus “due process” analysis shaping the discussion.¹¹ The emphasis on particular goals as well as the response to criminal offenders has always, at least to some extent, reflected our collective intellectual development, the state of our culture’s knowledge, and, more particularly, assumptions we made about the nature of human behavior. Evaluating progress was and remains difficult. Often in the absence of the ability to accurately assess the practical benefit of a sentence or sentencing policy, simply coming to some popular consensus about its inherent “justness” or generalized utility is the only means of concluding that something desirable results.¹²

As confidence in the ability to understand the nature of human behavior increased, the view of criminal behavior grew more complex, and society’s penchant for punitive responses seemed less appealing in contrast to what appeared to be a more enlightened approach.¹³ As it became more apparent that the human character was significantly affected by social interactions, personal attributes, and biological factors, sentencing decisions had to account for these factors. The mere determination of punitive sufficiency came to be seen not only as inadequate, but perhaps primitive. As alcohol and drug addiction came to be regarded as having causes apart from the exercise of will, people sentenced for crimes

⁹See generally THEORIES OF PUNISHMENT (Stanley E. Grupp ed., 1971). See, e.g., Richard Nygaard, *On the Philosophy of Sentencing: Or, Why Punish?*, 5 WIDENER J. PUB. L. 237 (1996).

¹⁰Utilitarian justifications of the criminal sanction have typically included deterrence, incapacitation and rehabilitation, each concerned with achieving some tangible goal. The notion that sentencing should reflect the distribution of “deserts” is most closely tied to retribution as a goal of sentencing. Retribution is the justification least concerned with effectiveness and is often thought of as non-utilitarian. See, e.g., Kent Greenawalt, *Punishment*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1336, 1340–41 (Sanford H. Kadish ed., 1983) (noting that vengeance, often used interchangeably with retribution, is considered by some to have practical value by lessening the frustration of victims and increasing respect for the law). See generally Richard Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUSTICE 363 (1997) (discussing Norval Morris’s accommodation of these divergent theories through the notion of “limiting retributivism”). The idea that one had to pay a price for one’s transgressions is deeply rooted in beliefs about blameworthiness. See *Fuhrman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) (agreeing with the majority in upholding the death penalty, and taking note of the “instinct for retribution” as a powerful component of criminal justice).

¹¹HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 149–73 (1968) (theorizing that there are competing values within the criminal process that encourage differing practices and views about what is important to accomplish within the justice system).

¹²See SAMUEL WALKER, *SENSE AND NONSENSE ABOUT CRIME* 63–92 (2nd ed. 1989).

¹³This orientation emerged only with much debate. Its development has been well captured by Professor Thomas Green in his description of the writings of Roscoe Pound and other legal scholars of the early twentieth century who were confronted with a revolution in medical thought and the emergence of psychology as a science that had practical benefit. Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915 (1995). The later development of an attraction for rehabilitation as a correctional goal has not only been driven by science but also by concerns for expediency and cost effectiveness. See Kai Peranen, *The Social Cost of Alcohol-Related Crime: Conceptual, Theatrical and Causal Attributions*, at <http://www.ccsa.ca/peranen.htm> (last visited Jan. 1, 1999) (presenting a cogent summary of the cost implications of the role of alcohol in the etiology of criminal behavior).

resulting from or influenced by their addiction were seen as deserving some special consideration.¹⁴ And so rehabilitation, by emphasizing more fundamental behavioral change, emerged as a compelling concern.¹⁵ In 1973, the National Advisory Commission on Criminal Justice Standards and Goals went so far as to recommend the adoption of a national policy, making rehabilitation the centerpiece of correctional practice:

Each correctional agency should immediately develop and implement policies, procedures, and practices to fulfill the right of offenders to rehabilitation programs. A rehabilitative purpose is or ought to be implicit in every sentence of an offender unless otherwise ordered by the sentencing court.¹⁶

Characteristic of popular sentiment among many social commentators were former U.S. Attorney General Ramsey Clark's observations:

Rehabilitation must be the goal of modern corrections. . . . Rehabilitation means the purpose of law is justice. . . . Rehabilitation is individual salvation. . . . The end sought by rehabilitation is a stable individual returned to community life, capable of constructive participation and incapable of crime.¹⁷

Implicit in the march toward a policy of rehabilitation was dissatisfaction with incarceration as the dominant correctional strategy. Psychologist Robert Sommer noted that "imprisoning offenders for long periods has failed as a social policy" and "has shown itself to be costly, inhumane and discriminatory."¹⁸ The sentencing policy needed to embrace this enlightened view encompasses two distinct, but related, etiological models. One centers on crime as a function of disease, and the other focuses on the impact of environmental factors. Although neither explains the causes of criminal behavior with empirical precision, each provides a conceptual context for rehabilitative strategies within criminal justice settings as well as a foundation for broader public policy initiatives.

A. THE DISEASE MODEL: CRIME AS A MANIFESTATION OF ILLNESS

The "disease model" is fostered by the assumption that certain offender characteristics, such as drug addiction, alcoholism, mental illness, or

¹⁴Pernanen, *supra* note 13.

¹⁵Defining what is encompassed by rehabilitation is no easy task. While it is generally thought to involve the utilization of non-punitive measures to change criminal behavior, it may well encompass much more. See generally Ernest Van Den Haag, *Could Successful Rehabilitation Reduce the Crime Rate?*, 73 J. CRIM. L. & CRIMINOLOGY 1022 (1982). The emphasis here is on "concern." Rehabilitation by no means became the singular strategy by which the legal system attempted to prevent crime, nor was it universally accepted as the strategy most likely to succeed. See also PACKER, *supra* note 11, at 53-58 (pointing out the limitations of the rehabilitative ideal); Norval Morris, *Impediments to Penal Reform*, in WALTER C. RECKLESS, *THE CRIME PROBLEM* 369, 371-372 (5th ed. 1973). See generally Ernest Van Den Haag, *Could Successful Rehabilitation Reduce the Crime Rate?*, 73 J. CRIM. L. & CRIMINOLOGY 1022 (1982) (arguing for an entirely punitive orientation, the elimination of the indeterminate sentence and parole, and increased reliance on incarceration).

¹⁶NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, *CORRECTIONS* 43 (1973).

¹⁷RAMSEY CLARK, *CRIME IN AMERICA* 220 (1970).

¹⁸ROBERT SOMMER, *THE END OF IMPRISONMENT* 171 (1976).

perhaps the propensity to violence, are the result of a pathological process akin to the onset of physical disease, although the exact or even approximate mechanism of the affliction may remain unknown.¹⁹ In this conceptualization, criminal offenders are seen as in need of treatment in much the same way that a diabetic needs insulin or an infected person requires an antibiotic. The notion of addressing the underlying cause of criminal behavior has great appeal to those in the criminal justice system with a pragmatic orientation and who are frustrated by the inability to fashion or carry out sentences that effectively curb future criminal behavior. Simply using the word “treatment” provides some measure of comfort because it implies that positive steps are being taken to address the underlying problem, and that crime, as a “symptom” or manifestation of something akin to a disease process, will be eliminated.²⁰

The disease model also encompasses theoretical notions that view crime as the end result of faulty learning. Although learning theorists or “behaviorists,” like those in the tradition of B. F. Skinner, believe that all behavior is the result of the interaction of the species with the environment, their emphasis on the systematic application of scientific principles and the biological foundation of the learning process make their view more congruous with a “disease” analysis than an environmental one.²¹ In a behavioral conceptualization, criminal behavior or deviance is viewed as behavior which is grossly disfavored by a culture; an anomaly of the human condition where a person is, in the behavioral sense, ill.²²

The adoption of a disease model has a direct impact on sentencing decisions as it requires the use of dispositional alternatives regarded as therapeutic. It focuses on the need to take steps to directly affect the offender. For example, counseling, behavior specific programming, or

¹⁹An excellent description of the “disease model” as it applies to alcoholics and drug addicts is contained in Richard Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245 (1992). Boldt recognizes the prevailing thinking concerning the role played by the confluence of biological, environmental, and social cultural factors in the development of the disease process. *Id.* at 2298. Regarding the components of mental illness the American Psychiatric Association has long recognized the criteria for identifying various behavioral maladies as disease. *See generally* AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000) [hereinafter DSM-IV-TR]. *See* Alan I. Leshner, *Addiction is a Brain Disease—and It Matters*, NAT’L INST. JUST. J., Oct. 1998, at 2.

²⁰Long before those in the judicial process or the public at large more generally accepted it, rehabilitation was widely recognized within the correctional system as a legitimate response to criminal behavior. Indeed, as a result of the influence of psychoanalytic thought, twentieth century penology was largely centered on the notion that criminals were sick and in need of treatment, even if an effective mode of treatment had not been precisely identified. *See* Louis Harris & Assocs., *Correctional Personnel’s Attitudes Toward Correction*, in THE CRIME PROBLEM, *supra* note 15, at 588, 588–91; Walter C. Reckless, *Major Principles in Corrections*, in THE CRIME PROBLEM, *supra* note 15, at 614, 614–16.

²¹*See* B.F. SKINNER, ABOUT BEHAVIORISM 9–45 (1974); JOSEPH WOLPE, THE PRACTICE OF BEHAVIOR THERAPY 14–21 (1969). Contributors to behavioral explanations of crime include Hans Eysenck who emphasized the importance of “conscience” as a socially conditioned force in the development of law-abiding behavior. *See, e.g.*, H.J. EYSENCK, CRIME AND PERSONALITY (1977). *But see* ALBERT BANDURA, PRINCIPLES OF BEHAVIOR MODIFICATION 16–19 (1969) (discussing the disadvantages of using a disease model for explaining deviance). For purposes of this discussion this differentiation is a matter of convenience rather than substantive significance.

²²BANDURA, *supra* note 21, at 16–19.

residential treatment may be ordered by the sentencing court to address a myriad of behavioral maladies, from alcohol abuse to prohibited sexual behavior.²³ Consistent with the diverse character of disease, the form and intensity of the intervention will vary greatly as the selected treatment must be both necessary and sufficient to be successful and cost-effective. Of particular significance to the legal system is the need to develop and utilize sentencing dispositions that can accommodate the requirements of various treatment modalities.

B. THE ENVIRONMENTAL MODEL: CRIME AS A MANIFESTATION OF SOCIAL DYSFUNCTION

The environmental model, which is expressed in numerous theoretical perspectives, is predicated on the idea that forces rooted in family, culture, economic conditions, and social structure most significantly influence criminal behavior. Poverty and racism are seen as conditions which lead to criminal adaptation, and peer groups are viewed as playing a significant role in fostering normative patterns of behavior that encompass criminal or other forms of deviant conduct.²⁴ In the environmental model, it is postulated that dysfunctional families, bad peers, and poor schools produce problem children, who in turn engage in criminal conduct. The adherents of this view see criminal behavior as a result of factors that can be modified or manipulated to affect a different outcome.

This model remains a powerful force in shaping criminal justice and social policy and has an effect on criminal dispositions. While it is difficult to fashion sentences that have a direct impact on social conditions, recognition of the role played by social forces certainly may influence the sentencing decision. To the degree that acceptance of this model results in shifting the responsibility of criminal behavior to the social environment, judges may be more inclined to adopt a particular sentencing posture. Moreover, and of no less significance, the efforts of community correctional workers responsible for supervising criminal offenders may be directed toward a reintegration strategy intended to ameliorate the impact of adverse conditions on an individual offender.

C. THE REALITY OF CRIME AND PUNISHMENT

Unfortunately, the tangible benefits of either etiological perspective have been difficult to ascertain. Indeed, the rate of serious crime rose steadily throughout the period of 1960 to 1991 and remained consistently

²³The approaches available to treat aberrant behavior are as varied as the behavior in question. Correction has long acknowledged the need to individualize treatment initiatives. JOHN P. CONRAD, *CRIME AND ITS CORRECTION* 13 (1965).

²⁴Sociological theories purporting to explain criminal behavior are many and diverse ranging from the early theoretical work of Edwin Sutherland, which was premised on the proposition that criminal behavior was learned through interactions with others, to the politically oriented conceptualizations of Richard Quinney. See generally RANDY MARTIN, ROBERT J. MUTCHNICK & W. TIMOTHY AUSTIN, *CRIMINOLOGICAL THOUGHT* (1990).

high, notwithstanding the plethora of rehabilitation strategies initiated during that period, especially during the 1960s and 1970s.²⁵ The lack of measurable success associated with the emphasis on rehabilitation led quite predictably to the return of a more punitive and protective orientation.²⁶ This was not necessarily because of a rejection of the fundamental assumptions underlying the goal of rehabilitation, but rather because of the inability of the proponents to deliver practical results, stem the fear of crime and garner popular and political support.²⁷ Moreover, general deterrence theory, which emphasized the just distribution of legal sanctions, was a much more comfortable fit for a culture, including social scientists, not at all comfortable with deterministic thinking.²⁸

Beginning in 1986, capital outlays for the construction of new correctional institutions jumped drastically (56%) and have remained at historically high levels.²⁹ New construction attempted to keep pace with higher incarceration rates that saw institutional correctional populations rising to 1.8 million in 1999—more than double the population of 1985.³⁰ Overall expenditures for correctional institutions increased from approximately four billion dollars in 1980 to more than twenty-five billion dollars in 1996.³¹ As indicated by the concomitant significant increased rates of incarceration of both white and black males, 87% and 92% respectively, and a doubling of female incarceration rates, these developments were disproportionate to expectations based on projected population increases.³² Significantly, crime rates have steadily declined since 1991.³³ While the role played by the adoption of a more punitive and protective approach including more stringent law enforcement is not entirely clear, there can be little doubt that it has had some impact.³⁴ While

²⁵See generally, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 266 tbl.3.120 (Ann L. Pastore & Kathleen Maguire eds. 1999).

²⁶See generally WALKER, *supra* note 12, at 201–05.

²⁷One cannot discount the importance of public perceptions concerning the threat of crime and the role fear plays in the development of public policy. Even with dramatically declining crime rates it is unlikely that there has been much change in the way in which most people view their relative safety. See generally James Brooks, *The Fear of Crime in the United States*, 20 *Crime and Delinquency* 241 (1974) (fear of crime as a social problem). See also RICHARD HARRIS, *THE FEAR OF CRIME* 17–18 (1969) (describing how the fear of crime during the decade of the sixties led to the development of a national crime strategy manifested in the Omnibus Crime Control and Safe Streets Act of 1968 which *inter alia* provided for broader police powers). See also DOUGLAS LIPTON, ROBERT MARTINSON, & JUDITH WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT* (1975) (concluding that there is very little evidence that rehabilitative programs have much positive impact on criminal behavior).

²⁸See generally Michael R. Gottfredson, *The Social Scientist and Rehabilitative Crime Policy*, 20 *Criminology* 29 (1982).

²⁹BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, TRENDS IN JUSTICE EXPENDITURE AND EMPLOYMENT NCJ 178277, at www.ojp.usdoj.gov/bjs/eande.htm.

³⁰*Id.*

³¹*Id.*

³²BUREAU OF JUSTICE STATISTICS, *supra* note 25, at 497 tbl.6.20.

³³See F.B.I., U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 2000, at 6 (2000).

³⁴Notwithstanding the continuing debate about the precise reasons for the dramatic decreases in crime, one cannot argue with the obvious impact on crime rates of the incarceration of more than two million persons, as predicted to occur by late 2001 by the Department of Justice. Allen J. Beck, U.S. Dep't of Justice, *Prison & Jail Inmates at Midyear 1999*, BUREAU OF JUSTICE STATISTICS BULLETIN NCJ 181643, Apr. 2000, at 2. See generally Jan Chaiken, *Crunching Numbers: Crime & Incarceration*

it cannot be seriously suggested that pursuit of the rehabilitation objective has accounted for the diminution in crime, it is premature and shortsighted to pronounce the rehabilitative ideal as dead, and it is equally dangerous to ignore the prospect of successful treatment initiatives and the concomitant implications for criminal justice.

III. EMBRACING A NEW TREATMENT IMPERATIVE

In recent years there has been strong evidence that the treatment approach is mounting a return to its former position at the top of the dispositional hierarchy.³⁵ Indeed, its appeal has led to much discussion of the advantages of developing a “therapeutic jurisprudence,” where the focus is on curing the problems underlying crime.³⁶

Understanding what has been meant by the term “treatment” has not been an easy task. In Random House’s College Dictionary, it is defined as “the systematic effort to cure illness and relieve symptoms, as with medicines, surgery, etc.”³⁷ Unfortunately, when the term is used in the context of behavioral change, it is often used somewhat cavalierly, as occurs quite frequently in courtrooms throughout the country. “Your honor, if only my client could get some treatment,” is a common refrain from defense attorneys. “My daughter is really a good person, your honor, but the drugs got her and she needs treatment not jail. She is sick, not a criminal,” is a commonly expressed sentiment of parents utterly dismayed at the behavior of their children. Prior to the pronouncement of sentence, offenders often express sentiments similar to the following:

Dear Judge, I will be appearing before you next week for sentencing. I am very sorry for wasting the court’s time. I accept responsibility for my crimes. Since being in jail I have come to realize that I have the disease of drug addiction. I don’t say this as an excuse but to help you understand something about me. I need help and I am willing to do anything to get it. Please, your honor, get me the treatment that I need.

In each instance there is an expression of the belief that the criminal is in the grip of an illness for which there is a remedy that simply needs to be delivered by the community. It is a very attractive notion that pulls at both our compassion and our overwhelming desire to achieve practical results.

at the End of the Millennium, CORRECTIONS FORUM (May/June 2000) (discussing the various factors which possibly contribute to diminishing crime rates for property crime, rape and violence among inmates).

³⁵The term treatment is used in a very broad sense. It encompasses any strategy calculated to effectively change behavior in a way that reduces the propensity toward criminal conduct. It connotes everything from counseling to behavior management to drug therapy, literally anything for which there is an assertion of likely success. It may well include attempts by the court which are anything but concerted and which are overtly punitive, including intermittent incarceration or threats of the same and house arrest and electronic monitoring. Such strategies are often a part of what might be considered more sophisticated treatment programs such as drug court with its emphasis on counseling.

³⁶Peggy Fulton Hora, William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 462–68 (1999).

³⁷RANDOM HOUSE COLLEGE DICTIONARY 1400 (rev. ed. 1979).

A. THE THERAPEUTIC JUSTICE MOVEMENT

The drug court initiative provides significant evidence of the intellectual, emotional, and economic appeal of successful treatment initiatives. The number of drug courts has skyrocketed and a large bureaucracy has emerged to support their development.³⁸ Currently, in the United States, there are more than one thousand drug courts either operating or in various stages of development.³⁹ The Federal Drug Courts Program Office has disseminated more than fifty million dollars in congressionally authorized funds.⁴⁰ Even though cost-effectiveness is difficult to ascertain and their impact on recidivism beyond the program period is uncertain, drug courts are certainly nudging aside the punitive/protective approach to addiction-related crime.

Drug courts have spurred the development of other behavior-specific adjudicatory programs as well. Mental Health courts now exist in a number of jurisdictions to assure an efficacious treatment response to the seriously mentally ill offender.⁴¹ Like drug courts, mental health courts embrace principles of therapeutic jurisprudence and attempt to assure that mentally-ill persons who have committed crimes are responded to in such a way that the detrimental effects of the legal system are minimized and maximum therapeutic consequences are realized.⁴² The concept has also been extended to cases involving domestic abuse where the court attempts to protect the victim while promoting, through treatment and accountability measures, the diminution of abusive conduct on the part of the perpetrator.⁴³

These approaches to specific types of criminal offenders have emerged as a response to the belief that treatment rather than traditional punishment is a more efficacious and cost-effective alternative.⁴⁴ Frustration with seemingly ineffective correctional responses, in particular what appear to be high incidents of recidivist behavior among addicted offenders, has provided strong motivation to view treatment as a necessary tool in the

³⁸See THE NATIONAL DRUG COURT INSTITUTE, *DUI/DRUG COURTS: DEFINING A NATIONAL STRATEGY*, Monograph Series 1 (1999).

³⁹STEPHEN BELENKO, THE NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., *RESEARCH ON DRUG COURTS: A CRITICAL REVIEW 2001 UPDATE 5* (2001), available at http://www.casacolumbia.org/usr_doc/researchondrugA.pdf.

⁴⁰*Id.*

⁴¹See Leroy L. Kondo, *Therapeutic Jurisprudence: Issues, Analysis, and Applications: Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 24 SEATTLE U. L. REV. 373, 403 (2000). See also John Petrila, Norman G. Poythress, Annette McGaha & Roger A. Boothroyd, *Preliminary Observations from an Evaluation of the Broward County Mental Health Court*, 37 CT. REV. 14, 19-20 (2001) (noting that, while similar to drug courts, there are significant differences in the therapeutic approach embraced by mental health courts).

⁴²See Kondo, *supra* note 41, at 393.

⁴³Randal B. Fritzler & Leonore M.J. Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, 37 CT. REV. 28, 28 (2000). See generally, Randal B. Fritzler & Leonore M.J. Simon, *The Development of a Specialized Domestic Violence Court in Vancouver, Washington*, 69 UMKC L. REV. 139 (2000) [hereinafter *Development of a Specialized Domestic Violence Court*].

⁴⁴Kondo, *supra* note 41; Fritzler & Simon, *Development of a Specialized Domestic Violence Court*, *supra* note 43.

crime fighting arsenal. The results have been mixed but sufficiently positive to sustain the effort.⁴⁵

IV. BIOLOGY, BEHAVIORISM AND MEDICINE: THE TREATMENT FRONTIER

Perhaps most significant is the widely held view that while we, for what are largely practical reasons, regard people as responsible for their conduct, we no longer enthusiastically embrace the notion that behavior, including criminal behavior, is merely the product of the exercise of free will.⁴⁶ Science has given us enough reason to accept the proposition that behavior is strongly influenced, if not controlled by, both biological and environmental forces sufficiently powerful and complex, such that changing the propensity to engage in certain forms of criminal behavior will remain extraordinarily difficult. However, the criminal justice system has been very interested in the development of a technology of human behavior for a very long time.⁴⁷ For example, in the early 1970s, authorities at the Iowa Security Medical Facility adopted a behavior modification program utilizing “aversive” therapy involving the injection of a vomit inducing drug to curb unacceptable behavior. Although its effectiveness was not established and its methods controversial, the United States Court of Appeals for the Eighth Circuit, following a legal challenge, allowed it to continue in certain instances.⁴⁸ Likewise, in *Clonce v. Richardson*, the court reviewed a prison program that utilized a “contingency management” strategy to effectuate behavioral compliance by

⁴⁵The completion rate of drug court participants has most recently been reported to be approximately 47%. The rate of further drug use is highly variable among participants ranging from 18–71%. Re-arrest rates both in-program and post-programs are reported to be generally lower with significant differences among programs. Although meaningful cost-effectiveness comparisons are difficult to make and require in part long-term data, it does appear that costs are lower than more traditional correctional alternatives. BELENKO, *supra* note 39, at 1. Stephen Belenko, *Research on Drug Courts: A Critical Review 1999 Update*, 2 NAT'L DRUG CT. INST. REV. 1 (2000).

⁴⁶This is an issue that has been debated in the law for some time. In *Robinson v. California*, a divided United States Supreme Court decided that narcotic addiction is a disease and that punishing sick people for being sick violates the Eighth Amendment. 370 U.S. 660, 660 (1962). Compare, however, the Court's conclusion in *Powell v. Texas* where, with four justices dissenting, the Court came to a different conclusion concerning alcoholism. 392 U.S. 514 (1968). Of particular significance in *Powell* was the majority's position that, “we are unable to conclude, on the state of this record or on the current state of medical knowledge, that chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication.” *Id.* at 535. It was apparent that the court was avoiding a determination that there existed some constitutional standard for the common law doctrine of mens rea. *See id.* In light of the *Robinson* decision and the Court's use of qualifying language such as “the current state of medical knowledge,” it is apparent that there was considerable ambivalence about punishing people for conduct that they may not be able to control. *See United States v. Moore*, 486 F.2d 1139, 1240–41 (D.C. Cir. 1973); *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966) (the court deciding on non-constitutional grounds that a chronic alcoholic cannot be held criminally responsible for public intoxication). These decisions all beg the question as to whether criminal liability for crimes collateral but related to addiction is permissible or desirable i.e. theft resulting from the compulsion for addictive drugs. *See also* AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 212 (4th ed. 2000) (classifying alcohol-related disorders as mental illness).

⁴⁷*See generally Behavior Modification in Prisons: A Symposium*, 13 AM. CRIM. L. REV. 1 (1975).

⁴⁸*Knecht v. Gillman*, 488 F.2d 1136, 1140 (8th Cir. 1973).

systematically manipulating environmental consequences resulting in the deprivation of certain basic inmate amenities.⁴⁹ Although the court indicated that this approach required at least minimal procedural safeguards, it was not entirely prohibited. The success of correctional programs incorporating “token economies” has been widely reported and such initiatives are commonly utilized in a variety of programs for juvenile offenders.⁵⁰

Recent developments in the mental health field and in the area of drug development have reinforced the notion that aberrant behavior can be effectively modified through the use of medication. The emergence of the Prozac class of drugs has heightened expectations for the successful pharmacological treatment of a greater array of behavioral or emotional anomalies.⁵¹ The relative success of more patient-friendly drugs such as Clozaril (clozapine)⁵² for Schizophrenia, as well as the established efficacy of older medications such as Lithium Carbonate for Bi-polar illness, naturally raises questions about the biological etiology of behavior generally. The positive effects of such medications on a wide variety of individuals who have exhibited behavior sufficiently maladaptive to bring them before the court are well known to trial judges.⁵³ It is reasonable to postulate the potential for the more general application of pharmacological agents to other forms of behavior that may underlie criminal conduct, including everything from drug abuse to anger management. As psychiatrist and author Peter Kramer noted, concerning the effect of Prozac, these agents may go well beyond their intended use and foster fundamental changes in personality.⁵⁴

There is now significant evidence of a relationship between biological or physiological factors and behavior. For a long time, the role of biology in the development of behavior has been debated. The nature versus nurture issue was a common source of academic discussion that took on significance as learning theory developed within an empirically-based conceptual framework, bringing with it an applied science that had demonstrable practical benefit.⁵⁵ Recently, there has been much public discourse on the subject as well.⁵⁶ Since John Watson, and later B.F.

⁴⁹Clonce v. Richardson, 379 F. Supp. 338, 348–52 (W.D. Mo. 1974). See also Wyatt v. Stickney, 344 F. Supp. 373 (1972).

⁵⁰See generally H. COHEN & J. FILIPCZAK, A NEW LEARNING ENVIRONMENT (1972) (reporting on the results of research conducted at the National Training School for Boys concerning the utilization of contingency management in a token economy as a means to improve educational performance among chronically under-performing delinquents).

⁵¹See generally PETER D. KRAMER, LISTENING TO PROZAC (1993).

⁵²National Institute of Mental Health, *Schizophrenia: How Is It Treated?*, at <http://www.nimh.nih.gov/publicat/schizoph.cfm#3schiz3.htm> (last visited Jan. 18, 2002).

⁵³Anecdotally, I have frequently noted the often dramatic improvement of defendants once placed on psychotropic drugs. It is not at all uncommon to observe almost completely dysfunctional defendants regain their ability to rationally interact with their attorneys and the court the days following the administration of medication.

⁵⁴KRAMER, *supra* note 51.

⁵⁵See generally B.F. SKINNER, SCIENCE AND HUMAN BEHAVIOR (1953); BANDURA, *supra* note 21.

⁵⁶Wray Herbert, *How the Nature vs. Nurture Debate Shapes Public Policy—And Our View of Ourselves*, U.S. NEWS & WORLD REPORT, Apr. 21, 1997, at 72–81. See also David Brown, *Between*

Skinner, argued that it was the human organism's interaction with the environment that resulted in the development of idiosyncratic behavior, much has happened to further the view that understanding biology and physiology is indispensable to discovering the etiology of human behavior. This has been a particularly compelling notion within the fields of criminology and criminal justice, where theories ranging from defective chromosomal arrangements to the role of diet have been advanced as explanations of behavioral anomalies.⁵⁷ For example, evidence has been reported regarding the relationship between deficient diet, aggression, mood, and hyperactivity, all of which have been implicated in criminal behavior.⁵⁸ Recently, much attention has been drawn to the possible relationship of the neurotransmitter serotonin and aggression.⁵⁹ Moreover, there is a strongly held belief among some researchers that damage to the brain or brain dysfunction account for at least some criminal behavior, particularly among chronic violent offenders.⁶⁰ This view is probably expressed most convincingly with regard to drug and alcohol addiction, which has been directly attributed to brain anomalies.⁶¹ Moreover, as widely reported in the popular press, there is considerable interest in the role genes play in behavior, with this new frontier of genetic research only beginning to yield information challenging conventional notions concerning the relationship of biology and criminal conduct.⁶²

Of particular interest are developments concerning the treatment of sex offenders, particularly, but by no means exclusively, pedophiles. In California, treatment of certain child sex offenders with the testosterone-

Madness and Badness, WASH. POST, Mar. 1, 1998, at C01; Sharon Begley, *Is Everyone Crazy?*, NEWSWEEK, Jan. 26, 1998, at 50–55.

⁵⁷See RICHARD NYGAARD, SENTENCING: AS I SEE IT 270 (2000) (presenting a thoughtful discussion and commentary on the complexities of sentencing and the attractiveness of scientific solutions to the crime problem).

⁵⁸*New Studies Show Strong Links Between Diet, Behavior*, CRIME TIMES 4–1, at 1 (1998), at <http://www.autismtv.com/crimetimes/98a/w98ap2.htm>. It has been reported that the introduction of dietary supplements reduced the incidence of antisocial behavior among prisoners. C. Bernard Gesch, Sean M. Hammond, Sarah E. Hampson, Anita Eves & Martin J. Crowder, *Influence of Supplementary Vitamins, Minerals and Essential Fatty Acids on the Antisocial Behaviour of Young Prisoners*, 181 BRIT. J. OF PSYCHIATRY 22 (2002).

⁵⁹*Large-Scale Study Links Serotonin Levels and Aggression*, CRIME TIMES 4–2 (1998), at <http://www.autismtv.com/crimetimes/98b/w98bp1.htm>. See also *Low Serotonin, Aggression Once Again Linked*, CRIMES TIMES 6–4, at 1 (2000), at <http://www.autismtv.com/crimetimes/00d/w00dp2.htm>.

⁶⁰See Malcolm Gladwell, *Damaged*, THE NEW YORKER, Feb. 24, 1997, at 135–38.

⁶¹See Leshner, *supra* note 19, at 3–6. “The addicted brain is distinctly different from the nonaddicted brain, as manifested by changes in brain metabolic activity, receptor availability, gene expression, and responsiveness to environmental cues.” *Id.* at 4.

⁶²Cecilee Price-Hush, *Comment: Born to Kill? “Aggression Genes” and Their Potential Impact on Sentencing and the Criminal Justice System*, 50 SMU L. Rev. 603, 605–12 (1997). Ms. Hush provides an excellent catalogue of the major implications of the progress in genetic research for explaining criminal behavior. She notes current thinking and research concerning the behavioral predispositions that may be affected by genetic endowment including the tendency toward aggression. See *id.* at 608–12. See also Joseph McInerney, *Genes and Behavior*, 83 JUDICATURE 112 (1999). Most recently, researchers have demonstrated the relationship between variation in the genecoding of a neurotransmitter (monoamine oxidase A) and the propensity of maltreated children to subsequently engage in anti-social behavior. Avshalom Caspi, Joseph McClay, Terrie E. Moffitt, Jonathan Mill, Judy Martin, Ian W. Craig, Alan Taylor, & Richie Poulton, *Role of Genotype in the Cycle of Violence in Maltreated Children*, 297 SCIENCE 851 (2002).

reducing drug Depo-Provera is required upon parole.⁶³ Testosterone is a known contributor to the male sex drive and the use of Depo-Provera has been shown to be very effective in curbing recidivist acts of pedophilia.⁶⁴ The precise mechanism by which aberrant sexual behavior, including the attraction to children, is triggered is unknown, but, as Kathryn Smith notes, the etiology of pedophilia is complex and unlikely a purely biological phenomenon.⁶⁵ What is significant, however, is the effectiveness of a biological agent in controlling the offensive behavior, strongly implying a biological component beyond the will of a perpetrator.⁶⁶

The strong attraction for solutions to the lingering problem of crime has, more than any other factor, compelled us to develop a pragmatic, or as it is often expressed in the legal literature, a “utilitarian” perspective when it comes to sentencing policy.⁶⁷ The notion that we can solve the crime problem if we only bring to bear sufficient resources and a rational perspective remains an attractive refrain that will continue to influence public policy. For example, Judge Richard Nygaard of the United States Court of Appeals for the Third Circuit recently noted:

[W]hat I believe and state with great confidence is that if we begin to show a measure of faith in the offenders who wish to correct their behavior, and who have been isolated from the incorrigible and indifferent, if we treat all facets of these persons, if we call upon all the allied sciences as potential contributors to treatment, if we place the onus upon the offenders to change, and if we expect change, we will begin to see some.⁶⁸

That the treatment imperative is driven perhaps more by ambitious societal goals than the efficacy or progress of science is of secondary significance, at least in the short term, to its attractiveness as a dispositional platform.

A. REALITY IN THE COURTROOM

One cannot ignore the compelling experience and intense interest of those who labor in the criminal justice system and their effect on how

⁶³Kathryn L. Smith, *Making Pedophiles Take Their Medicine: California's Chemical Castration Law*, 17 BUFF. PUB. INT. L. J. 123, 145 (1998–1999).

⁶⁴*Id.* at 142. *But see* In the Matter of R.B., 765 A.2d 396 (2000) (determining that a seventeen-year old juvenile sex offender may not consent to treatment with Depo-Provera because the approach is still considered experimental and its efficacy on adolescents not sufficiently demonstrated through scientific studies).

⁶⁵Smith, *supra* note 63, at 133–39.

⁶⁶Certain sex offenders report a compulsive interest in children or in other forms of criminal behavior involving sexual overtones. *See id.* *See also* Jenine E. Elco, *Recent Decision*, 36 DUQ. L. REV. 471, 471–78 (1998) (describing the circumstances concerning the civil commitment of Leroy Hendricks, a long term pedophile). *See generally* Michael Ross, *The Urge to Hurt*, UTNE READER, Jul.–Aug. 1997, at 43 (giving an autobiographical description of “sexual sadism”).

⁶⁷*See generally* Jody L. Sundt, *Is There Room for Change?: A Review of Public Attitudes Toward Crime Control and Alternatives to Incarceration*, 23 S. ILL. L. J. 519 (1998) (commenting on the receptivity of citizens to the use of various correctional alternatives including a strong preference for the use of incarceration).

⁶⁸NYGAARD, *supra* note 57, at 120.

criminal behavior is viewed. Judges, attorneys, and probation officers are witness to many individuals whose criminal conduct is quite simply inexplicable and to countless others whose behavior intuitively seems understandable. These personal interactions play a significant role in the development of attitudes concerning the nature of criminal behavior, which in turn, is communicated to a much wider audience and reinforced through judicial decision-making. In order to appreciate the impact of personal experience in the justice system on attitude formation, consider the following descriptions amalgamated from numerous actual case histories of offenders sentenced in my courtroom:

George: Convicted by plea of three counts of forgery and three counts of credit card fraud, George came from a family of eight children and three different fathers. He made it through the seventh grade and completed the Job Corps program, where he learned to be an auto mechanic. Born with multiple physical anomalies, including a deformed spine, he had a history of difficulty with social interaction and spent three years in juvenile institutions and group homes. His prior crimes included an attempted sexual assault as a juvenile, two adult convictions for drug possession, and a conviction for theft for which he was serving a probation sentence at the time of his current arrest.

Theresa: Currently before the court on a charge of aggravated assault for scalding her two month old child in a hotel sink, Theresa was adopted at birth and did not exhibit any problematic behavior until the age of eighteen. During her freshman year of college, she began to experience hallucinations. Just prior to spring recess, she was found wandering in an unsavory part of the city in only her underwear. Following a brief civil commitment, she was diagnosed with Schizophrenia and was prescribed medication that had serious side effects and which she only took intermittently. She has improved, but continues to suffer episodes of paranoia, with periodic use of crack compounding her problems. She was arrested numerous times for retail theft and was convicted once for prostitution.

Jango: Jango was back before the court on a probation revocation proceeding, having been caught with drug paraphernalia and testing positive for marijuana. He started using drugs when he was thirteen and had been addicted to heroin for at least ten years. He has been in and out of rehab a number of times, and at the time he was taken into custody, he was regularly attending a twelve-step program. He has served time in both adult and juvenile institutions for crimes ranging from Driving Under the Influence and Simple Assault to Motor Vehicle Theft and Delivery of a Controlled Substance.

Santo: Now facing a ten-year incarceration for involuntary manslaughter as a result of a drunk driving incident where his fifteen year old niece was killed, Santo had been convicted of Driving Under the Influence on three previous occasions. He has always maintained employment and supports

three children. In the past, he completed two out-patient drug and alcohol counseling programs and maintained his sobriety for as long as six months. On the night of the incident, he had been drinking with a few friends while celebrating a birthday at a local tavern. On parole at the time, he was forbidden to drink or frequent bars.

Anthony: When Anthony was seven, his stepfather began to rape him and continued to do so until Anthony's mother casually mentioned to a friend that she suspected something was wrong because the child was bleeding a lot. He was arrested for setting fires when he was nine and placed in foster care for six months. Although his teachers found him to possess above average intelligence, he continued to get into trouble. At age twelve, he was caught trying to burn a neighbor's cat with an electric curling iron and was referred to counseling. Later, at age fourteen, he was adjudicated delinquent for the robbery and beating of a physically disabled youngster. Following his release from a secure juvenile facility, he was convicted in adult court of assaulting his girlfriend, the mother of his one-year old child, by pouring boiling water on her back.

Daryl: Daryl grew up in a middle class household, played little league baseball, and joined Boy Scouts. Always somewhat shy and a bit self-conscious about his reddish hair, he never really had a girlfriend until he dropped out of college. By age thirty-two, he had been convicted of indecent exposure four times. He now faces similar charges arising out of four incidents where he was caught driving in an affluent neighborhood literally with his pants down. In each incident, he stopped his car near a woman or girl, opened the door, and began to masturbate. He did not assault the women or use aggressive behavior, and was typically caught within a block of the incident. He was married, had three children, and held a good job in the construction industry. Three prior counseling experiences and two periods of incarceration in the local jail had little effect. His wife recently left him. In court he was extremely remorseful.

In selecting a sentence in each of these cases, it is likely that the judge will come to some conclusion as to why each person committed the crime. It is exceedingly probable that the criminal behavior of each will be attributed to some phenomenon other than the volitional desire to commit a crime—whether it be drug or alcohol use or addiction, mental illness, or simply character deficiencies associated with adverse personal or socio-economic conditions. But the need to fashion a sentence that diminishes the likelihood that the undesirable behavior will occur in the future is more important than explaining why the crimes were committed in the first place.

Each of these individuals was presented to the court as someone other than the impersonal and stereotypical figure depicted in media descriptions of reported crime and perpetrators. As a result, when Jango comes into the courtroom, one is immediately drawn to his reticent demeanor, hunched posture, and frail appearance. When he addresses the court, his poor social

skills and the debilitating consequences of a life of addiction become apparent. How about Anthony? His demeanor is more confident, his remorse is more exaggerated, and his experience with the system is easily recognizable. When he speaks, his command of the language belies his current predicament. With both Jango and Anthony, there will be a strong temptation to try to figure out what went wrong.

Did his stepfather's abusive conduct play any role in the development of Anthony's remarkable insensitivity to the suffering of others? Perhaps Jango's physical attraction for heroin was not willful. Intuitively, one might conclude that there were forces at work in their lives that they had limited control over and which profoundly affected the choices they made. Could anyone actually desire to have such a pathetic life? For Jango, it is apparent that the lure of drugs was more powerful than avoiding the misery of incarceration. Anthony, on the other hand, seemed to have no control over his violent impulses.

What about wandering Theresa? Was her decision to traverse the community in her underwear born of her free will? Is Schizophrenia merely a life-style choice from which she needs to be deterred? Does her schizophrenia have anything to do with the abhorrent treatment of her own child? Her repetitive thievery caused significant concern among the retail establishments in her small community, but incarceration seemingly has had little effect. Perhaps there is a biological explanation for the sudden change in her behavioral repertoire, as she seems to have less ability to control her conduct than most members of the community.

Although little can be said about Daryl, consider the more obvious questions. Why on earth would he repeatedly subject himself and his family to the humiliation resulting from his behavior? How did he ever develop a sexual affinity for exhibitionism? Why doesn't he stop, even when threatened with incarceration and social ostracism? Perhaps he simply wants to pursue an alternative and deviant lifestyle, or has decided to experiment with sexual fetishes. Is the remedy simply a matter of adopting a more conventional approach to sexual gratification?

The question of how to deal with these lawbreakers who have caused so much alarm and human suffering still remains. Aside from feelings of retribution or for that matter, compassion, it seems that preventing future transgressions and averting tragedy should be of paramount importance. The hope of effectively responding to Jango, Anthony, Daryl, and Theresa, in addition to George and Santo and all those who comprise the court's roster of inexplicable behavior, is a powerful incentive driving the treatment imperative.

The rehabilitative ideal is alive, if not necessarily well, and perhaps on the verge of re-emergence as the dominant sentencing objective and correctional strategy, born of the desire for workable solutions to a most tenacious social problem. After all, even with evidence of significantly

diminished serious criminal activity, the rate of crime in America remains approximately 80% higher than that reported in 1965.⁶⁹ By the end of 2000 the number of incarcerated males had increased by 77% since 1990, and the annual cost of incarceration increased more than 600% between 1980 and 1997.⁷⁰ It is likely that we will never be satisfied with an entirely punitive or protective approach, as it is expensive and often leads to perceptions of injustice.⁷¹

The more recent emphasis on incarceration and punishment may have begun to lose some of its appeal as crime rates significantly diminished, as the inherent limitations of the penal system became apparent, and as the availability of ostensibly new treatment alternatives emerged.⁷² It does not matter that one etiological model is preferred to another so long as one accepts the notion that human behavior, and in particular criminal behavior, is caused by something that is susceptible to modification through various forms of planned intervention most often characterized as treatment. It is this assumption that challenges the conceptual foundation of the criminal law and compels a close examination of the public policy underlying sentencing.

V. TREATMENT, RESPONSIBILITY, AND THE LAW

It seems to have become quite fashionable in recent years for those who work in the justice system, as well as those who are generally concerned about the state of human behavior, to focus on the need to hold people who violate laws “accountable” for their actions. It is routinely noted that a person must accept responsibility for his or her conduct so that progress toward change can be made. Oftentimes, repentant, or at least informed offenders, will preface their plea for leniency by noting that they have accepted responsibility for their crimes. Within the context of the criminal law, where responsibility is the cornerstone of culpability, this is a most desirable attribute.⁷³ It is also very attractive to a society that has

⁶⁹U.S. DEP’T OF JUSTICE, *supra* note 29.

⁷⁰Allen J. Beck & Paige M. Harrison, U.S. Dep’t of Justice, *Prisoners in 2000*, BUREAU OF JUSTICE STATISTICS BULLETIN NJC 188207, Aug. 2001, at 1; BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1998, at 11–13 (Kathleen Maguire & Ann Pastore eds., 1999).

⁷¹Hora, *supra* note 36, at 456–62. Racial disparity in the application of drug laws has been a concern. Boldt notes that the “war on drugs,” which has focused on stiffer prison sentences, has had a disproportionate impact on African American and Hispanic offenders. Boldt, *supra* note 19, at 2316–22.

⁷²*See generally* U.S. DEP’T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES (2000). *See* Thomas Castellano, *Limits of the Criminal Sanction in Controlling Crime: A Plea for Balanced Punishments*, 23 S. ILL U. L. J. 427, 435–41 (1998) (arguing that the current punitive approach inaccurately assesses the effectiveness of imprisonment and generally overstates the deterrent effect). *See generally* John Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923 (2000) (discussing the advantages of the drug court approach to treatment over traditional correctional alternatives such as probation); Lynne Brennan, *Comment: Drug Courts: A New Beginning for Non-Violent Drug Addicted Offenders—An End to Cruel and Unusual Punishment*, 22 HAMLINE L. REV. 355 (1998).

⁷³The concept of responsibility in the criminal law is usually addressed in determining whether one engaged in a voluntary act while possessing the requisite mental state. *See, e.g.*, ROLLIN M.

become increasingly weary of the “blame game.” Predictably, but perhaps unwittingly, by embracing the treatment imperative, we will significantly diminish the usefulness of our assumptions about the role played by individual responsibility in the development of behavior. This is not to say that manifestations of responsibility will not be both important and necessary. Within the realm of therapeutic intervention, there will likely continue to be benefits derived from admissions of blameworthiness, assertions of remorse, commitment to change, and other indications of accepting responsibility.⁷⁴ However, the belief that a person is actually capable of “willing” new behavior into existence, in some unfettered way, is incompatible with either the disease or the environmental model and the resultant treatment imperative.⁷⁵

Fully embracing a correctional response calculated to address individual deficiencies leading to criminal conduct will directly challenge the view of the human species as “autonomous,” worthy of blame for the bad, and deserving of credit for the good.⁷⁶ Indeed, the very idea that criminal conduct is “treatable” necessarily implies that its initial emergence was the result of some force quite apart from a freely generated determination to engage in socially offensive conduct. Blame can be ascribed to any etiological model, but not on the basis of individual responsibility. To conclude that criminal behavior is nothing other than the product of a freely exercised will is fundamentally incompatible with the premise that therapeutic intervention is meaningful. If treatment works, it does so because there is some condition that is treatable. Regardless of its genesis, there is an assumption that there is something not part of the normal repertoire of behavior that can be remedied by extrinsic

PERKINS, PERKINS ON CRIMINAL LAW 741-42 (1969). While the concept of *actus reus* directly requires voluntary action, the *mens rea* requirement only implies that it is required. *Id.* In either case, however, the underlying assumption is that a person is responsible and therefore blamable for his or her behavior, as long as the crimes were engaged in freely so as to justify punishment. See ARISTOTLE, FREEDOM AND RESPONSIBILITY: READINGS IN PHILOSOPHY AND LAW 25 (H. Morris ed., 1961). When, prior to sentencing, a convicted person accepts responsibility, the court is assured that the punishment it is about to impose is legally justified. See also JOHN KAPLAN, CRIMINAL JUSTICE: INTRODUCTORY CASES AND MATERIALS 9-27 (1973).

⁷⁴This is currently an issue that surfaces in cases where the therapist believes that an admission of responsibility is a necessary, if not sufficient, condition of therapeutic success. It is common to see persons convicted of sex crimes who maintain their innocence, refuse to accept blame, and as a consequence, are precluded from therapy, and perhaps, release on parole. Similarly, the twelve-step approach to change, utilized by Alcoholics Anonymous and other groups, heavily relies on assertions of responsibility, although tempered by submission to a “higher power.”

⁷⁵A distinction must be made between “willing” conduct to occur and doing so freely. This matter was the subject of discussion by the *Moore* court where Judge Wilkey made the following observation concerning the defendant who was addicted to drugs, “Moore could never put the needle in his arm the first and many succeeding times without an exercise of will. His illegal acquisition and possession is thus the direct product of a freely willed illegal act.” *United States v. Moore*, 486 F.2d 1139, 1151 (D.C. Cir. 1973). The fact that one makes a choice, even a conscious one, is not an affirmation of the ability to act independent of outside forces. The inescapable assumption that flows from the conclusion that criminal behavior results from either a disease process or environmental contingencies is that the behavior is the product of encumbered choice.

⁷⁶See B.F. SKINNER, BEYOND FREEDOM AND DIGNITY 1-55 (1971). Skinner uses the term “autonomous” to refer to the conceptualization of the species as free. He notes that the development of a science of human behavior challenges conventional notions of dignity because behavior is attributed to environmental contingencies, and not expressed as an exercise of will.

intervention. While all of this is less clear and certainly less compelling when treatment is unsuccessful, as long as we espouse the adoption of a treatment approach, we reinforce the view that human behavior is the product of forces unassociated with any conceptualization of individual responsibility.⁷⁷

Of course, the better at it we become, the more likely that a particular change strategy will be accepted, regardless of its character. If the systematic use of a vomit-inducing drug in a behavior modification program employing aversive therapy (the Clockwork Orange approach) proves effective in eliminating sexual aggression, it not only encourages a deterministic view of criminal behavior, but also reinforces it as a legitimate correctional alternative.⁷⁸ It has been the failure of treatment, however, to systematically and predictably change criminal behavior that has forestalled having to confront determinist thinking. For example, although estimates of treatment success vary greatly for drug and alcohol addiction, it remains clear that failure rates remain high even when treatment is delivered in a coercive setting, such as drug court, where on average only about 47% of referees complete the program.⁷⁹ When treatment is unsuccessful, it is much more tempting to blame the patient's failure to accept responsibility, rather than the limitations of therapeutic intervention. After all, one might suggest that Jango (the heroin addict), or any of the other previously described individuals, had the opportunity to change his or her criminal ways, but instead made bad choices and now must be held accountable. However, a strong desire to find the ultimate solution remains above the daily practical challenges associated with responding to criminal offenders. Judge Nygaard cogently expressed this sentiment:

The treatments for cancer, the vaccines for polio, and the cures for a myriad of diseases that once plagued us did not just appear. They began as dreams and came about because some of the best and brightest scientists, socially motivated and properly funded, dared to follow their vision and applied themselves to the task. Unless America makes an identical or greater commitment to discovering the causes and cures of crime, and implements its discoveries into systemic changes, we will

⁷⁷When treatment is only marginally successful, we can avoid the difficult issues associated with deterministic thinking. In such circumstances, it is much easier to attribute treatment failure to an individual's poor choices, refusal to accept responsibility, or to some other self-induced deficiency. Perhaps, more importantly, the lack of treatment efficacy can be the source of resistance to accepting a change in our view of criminal responsibility, even where there is an intuitive recognition of a pathological process. Consider Justice Marshall's observations made in support of his conclusion that Leroy Powell should be held accountable for his drunken behavior in public: "There is as yet no known generally effective method for treating the vast number of alcoholics in our society. . . . [T]here is no consensus as to why particular treatments have been effective in particular cases and there is no generally agreed upon approach to the problem of treatment on a large scale." *Powell v. Texas*, 392 U.S. 514, 527 (1968). Later, speaking of alcoholics, he notes: "But before we condemn the present practice across the board, perhaps we ought to be able to point to some clear promise of a better world for these unfortunate people. Unfortunately no such promise has yet been forthcoming." *Id.* at 530.

⁷⁸See generally *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973).

⁷⁹Belenko, *supra* note 39, at 1.

permit crime insidiously to seduce or victimize our citizens and bleed our economy. We can no longer afford either the human or the material cost of failing to contain, or alternately, failing to correct, those who fail to obey our laws.⁸⁰

So then what will be the consequences of our success? When those dedicated scientists uncover the “causes and cures of crime” what will it say about the nature of human behavior and the fundamental assumptions underlying the administration of justice?

In American criminal jurisprudence, the foundation of criminal culpability is the notion that members of the species exercise free will and are therefore responsible for their behavior, both legally and morally.⁸¹ “The theory of free will embraces the idea that individuals are self-determining agents, capable of being held morally responsible for their chosen actions.”⁸² An effective behavioral technology rooted in science and directed toward those who have violated the community’s standards challenges fundamental notions of criminal liability and erodes the traditional legal conceptualization of the species as free—inevitably leading to a deterministic view of human behavior in the law. What is said about the malleability of human behavior when a trip through drug court is successful at curtailing future illicit drug use? When sex offenders are successful in avoiding further violent sexual conduct only after completing a sexual offenders program, perhaps with a follow-up course of Depo-Provera or Lupron, something about the nature of sexual behavior is being communicated to the community.⁸³ If “anger management” programs become so effective that upon completion the absence of further domestic violence is predictable, one is hard pressed to view the offender as a “self-determining agent.” When the young man, who had spontaneously begun to aimlessly roam the streets of the city while speaking in tongues, is treated with psychotropic drugs and returns home and stops accosting women in a threatening manner, something very profound has been said about the nature of his behavior. While efficacy in treatment will cause us to respond to criminal behavior far more pragmatically, it will also force us

⁸⁰NYGAARD, *supra* note 57, at 120.

⁸¹Here, I use the word “responsible” to mean that individuals have the capacity to act freely in selecting their behavior. It is the manifestation of human dignity that allows us to attribute credit as well as blame. Although the free will issue has a long history of debate within the legal community, it remains of critical importance both at the adjudicative phase and the sentencing phase of the criminal process. See generally Thomas A. Green, *Freedom and Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915 (1995). The critical distinction of past debates was the relatively weak position of science, both in terms of its public standing and its ability to empirically support a deterministic view of human behavior.

⁸²Rachel J. Littman, *Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will*, 60 ALB. L. REV. 1129, 1131 (1997).

⁸³Both Depo-Provera and Lupron belong to a class of drugs described as anti-androgens, which suppress testosterone production and have been used to curtail interest in sexual activity among sex offenders. CNN Interactive, *California Child Molesters Could Face Chemical Castration*, at www.cnn.com/us/9608/29/castration/ (last visited Aug. 28, 2001). The treatment of juvenile sex offenders with antiandrogens is actively undertaken in Pennsylvania for purposes of chemical castration in circumstances where it appears that a youth is not able to control sexual impulses. See Pennsylvania Department of Public Welfare, *Antiandrogen Therapy Use Protocol* (1999) (on file with author).

to reconsider the significance of individual responsibility as a condition of criminal liability.

American courts that have addressed the issue of the relationship between crime and disease have largely been concerned with the question of whether someone who is afflicted with an addictive disease may be held criminally responsible. In *Robinson v. California*, the United States Supreme Court decided that an addict, defined as one who could not control the craving for drugs, could not be subjected to criminal sanctions for being an addict.⁸⁴ In *Robinson*, the defendant was convicted pursuant to California law of being a narcotic addict. The Court concluded that imprisoning such a person constituted cruel and unusual punishment and thus violated the Fourteenth Amendment.⁸⁵ However, when confronted six years later with a case involving an alcoholic defendant who was convicted of being drunk in a public place, the Court did not perceive the same barrier to punishment.⁸⁶ In *Powell v. Texas*, the divided Court affirmed Leroy Powell's conviction even though there was little doubt that he was addicted to alcohol and that when he was drinking he had no control over his conduct.⁸⁷ In distinguishing its decision from that in *Robinson*, the Court noted that Texas was not attempting to punish Powell for a "mere status" but for "public behavior which may create substantial health and safety hazards . . . and which offends the moral and esthetic sensibilities of a large segment of the community."⁸⁸ So it seems that criminal liability may attach to an addicted defendant if the crime is classified as one involving conduct other than a prohibition of the addictive condition per se.⁸⁹

A. CRIMINAL LIABILITY

If behavioral change through treatment is the goal of the criminal system it is of little consequence that someone acted recklessly, intentionally, or knowingly *before* liability may be imposed. Mental state, or *mens rea*, is only an essential concept in a legal system that is concerned with ascribing blame and assuring that the punishment fits the crime.⁹⁰ While knowing what a person was thinking, or perhaps what knowledge the person possessed at the time a crime was committed, may have some significance within a particular treatment orientation—the therapeutic response may be different if the victim was shot intentionally rather than

⁸⁴See generally *Robinson v. California*, 370 U.S. 660 (1962).

⁸⁵*Id.* at 667.

⁸⁶See generally *Powell v. Texas*, 392 U.S. 514 (1968).

⁸⁷*Id.*

⁸⁸*Id.* at 532.

⁸⁹This was the subject of much discussion in *Moore* with Judge Wilkey taking the position that criminal liability may properly be imposed upon an addict for the possession of drugs even though the state of addiction was beyond his control: "[I]t is the craving which may not be punished under the Eighth Amendment, and not the acts which give in to that craving." *United States v. Moore*, 486 F.2d 1139, 1150 (1973).

⁹⁰The Model Penal Code identifies four mental states: purpose, knowledge, recklessness, and negligence. MODEL PENAL CODE § 205 (1962); Sayre, *The Present Signification of Mens Rea in the Criminal Law*, in FUNDAMENTALS OF CRIMINAL LAW 233–34 (Paul H. Robinson ed., 1988).

accidentally—its role in opening the door to legal liability will likely be of secondary concern. In short, mental state will have diminished significance in a system that embraces the treatment imperative. The degree of guilt, which very often is determined by an assessment of the offender's state of mind, will only be of marginal importance in influencing the correctional response, which is focused not on culpability but on the effectiveness of behavior change strategies. For example, in a system that accepts or simply behaves as though criminal behavior is determined rather than willed, a person who is convicted of a crime involving a negligent or reckless act would not be any more blameworthy than a person who committed a crime with a conscious purpose or a specific intention.⁹¹ Where the validity of either the disease or environmental model is acknowledged, the offender needs to have the underlying reasons for the conduct successfully addressed through some sort of treatment initiative. Assuming of course the treatment response has been formulated on the basis of science, its character will not be determined by the egregiousness of the offense, but rather by the relevant characteristics of the offender and the efficacy of available remedies. The criminal sanction becomes a matter of expediency and the nature of what is considered just will have to be reconsidered.

As it promotes a deterministic view of criminal behavior, the treatment imperative will predictably lead to the mitigation of the usefulness of the mental state requirement. Strict, but not absolute, liability is compatible with either etiological model, as it serves as a gatekeeper for providers who are less interested in culpability and far more concerned with practical results.⁹² Once it is determined with legal certainty that the accused is the one who engaged in the prohibited conduct, the remaining decision is by definition focused entirely on a remedy for the indicated deficiency. State of mind considerations are of no significance unless related to the functionality of a change strategy.

The traditional requirement of a voluntary act or omission, however, is compatible with the goal of treatment. American jurisprudence generally requires that before an act can be characterized as criminal, it must be proscribed by statute and engaged in volitionally.⁹³ This concept prevents

⁹¹The Model Penal Code makes distinctions in degree of culpability based on mental state. For example, Negligent Homicide is graded as a felony of the third degree while Murder, which includes acts committed purposely or knowingly is graded as a felony of the first degree. MODEL PENAL CODE § 210.4, 210.2 (1962). Pennsylvania's statutory provisions make distinctions in culpability on the basis of intent as well. Murder in the first degree requires a showing of intent to kill. PA. STAT. ANN. tit. 18 § 2502 (West 1998). Involuntary manslaughter requires proof that a person acted recklessly. PA. STAT. ANN. tit. 18 § 2504 (West 1998).

⁹²Absolute liability would require a treatment response even in circumstances where there was no voluntary act such as where a person was unconscious or laboring under a physical condition that inhibited the volitional body movement, and therefore, would include at least some circumstances where it would be of no value.

⁹³Emily Grant, *Note: While You Were Sleeping or Addicted: A Suggested Expansion of the Automatism Doctrine to Include an Addiction Defense*, 3 ILL. L. REV. 997, 998 (2000) (arguing that an addiction defense should be recognized with a conceptually similar rationale as an "automatism")

the community from punishing those who could not exercise control over their physical movement. Quite simply, there is no societal value in imposing sanctions where the consequence would not diminish in any meaningful way the likelihood of recidivism and could have no practical effect on the prognostic conduct of others in a similar position.⁹⁴ Similarly, any intended moral or emotional satisfaction associated with punishing an act not willed by the actor would ring hollow.⁹⁵ Although applicable in only the most limited circumstances, the *actus reus* requirement manifests our interest in limiting punishment to only those actions where there is something to be gained. The treatment imperative is unlikely to have any effect on the continued relevance of this concept and indeed it may embrace the *actus reus* rationale as the treatment imperative's own, providing a platform for the legitimacy of its likely legal implications. There is no reason to "treat" offenders who do not need therapeutic remediation. Those who have met the voluntary act requirement need some response, no matter how therapeutically simplistic, in order to address the cause of the anomalous condition that led to the criminal behavior.

The debate that has emerged in legal circles concerning the adoption of either the "choice theory" or "character theory" of culpability has focused attention on the nature of human behavior as a critical element in the assessment of criminal responsibility.⁹⁶ Moreover, there has been an ongoing discussion of the general implication of the assessment of criminal behavior as being more or less free and there are differing views as to the degree that one's actions are the result of free will.⁹⁷ These remain theoretically important questions that are in effect resolved once treatment is accepted as goal of the criminal sanction. If we behave as though criminal behavior may be remedied by resort to some form of intervention then we have assumed for both practical and theoretical purposes it was caused by something other than free will, and therefore, it can be changed without the need to exercise it. While the underlying and more profound question concerning the etiology of human behavior may not be directly resolved, the result will be the same. The notion of what Skinner refers to as the "autonomous man" will be greatly diminished as a working proposition for characterizing the species, and therefore, as a conceptual foundation for imposing punishment.⁹⁸ In such circumstances what will be the dimensions of criminal liability?

defense, while recognizing the requirement of a voluntary act. An addicted person should be treated rather than punished).

⁹⁴WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 198 (West Publ'g Co. 1986) (1972).

⁹⁵*Id.*

⁹⁶See Rachael Hill, *Character, Choice and "Aberrant Behavior": Aligning Criminal Sentencing with Concepts of Moral Blame*, 65 U. CHI. L. REV. 975, 987-93 (1998).

⁹⁷Rachael J. Littman, *Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will*, 60 ALB. L. REV. 1127, 1134-37 (1997) (noting "hard" and "soft" determinism).

⁹⁸SKINNER, *supra* note 76.

B. CHANGE AS THE PRIMARY PURPOSE OF SENTENCING

It has long been acknowledged that there is more than a single purpose of the criminal sanction. While deterrence, specific and general, incapacitation (or protection), rehabilitation, and retribution are uniformly recognized as goals of sentencing, in reality they speak to more narrow objectives.⁹⁹ It is fair to say that when someone is punished, which almost always occurs to some extent following a determination of guilt, society is interested in stopping further crime and exacting some measure of suffering from the person who harmed others or the community generally. Deterrence, incapacitation, and rehabilitation all are descriptions of approaches to limiting the likelihood of future crime. The vehicle for accomplishing this goal almost always includes some measure of punishment ranging from relatively minor limitations on individual liberty such as community supervision or fines, to life imprisonment or death. What occurs within the context of a particular sanction is a different matter but one thing remains constant: the offender's compliance will be coerced. Most notable, for purposes of this discussion, is the recognition that treatment, while perhaps less painful, is not necessarily less punitive in nature than any other response. It is not a matter of choice. It is occurring because an individual has broken a rule and the state has the right to restrict the offender's freedom by requiring that he or she submit to some kind of change strategy.¹⁰⁰ While a "treatment" experience may not have the same aversive characteristics as certain other dispositions, it is nonetheless a sanction. As science provides society with more effective "treatment" tools which increase the probability of long-term behavior change, the greater the loss of liberty and, at least theoretically, the more punishing the consequence. Of course, the punishing characteristics of most treatment modalities are likely to be far less apparent because their aversive qualities are diminished.

1. *The Proportionality Concern*

Adopting treatment as the primary if not singular sentencing strategy will be more palatable as science provides strategies that work.¹⁰¹ The

⁹⁹See Kent Greenawalt, *Commentary: Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343 (1983).

¹⁰⁰Nowhere is this more apparent than in the context of the therapeutic experience of drug court. The very core of the drug court concept is the notion that the failure to comply with treatment rules will result in punishment, euphemistically thought of as accountability, including incarceration. Of course, this implicates the use of incarceration as an essential component of the treatment component per se.

¹⁰¹For example, the use of apomorphine at the Iowa Security Medical Facility. In *Knecht*, after a review of divergent opinions of the effectiveness of aversive therapy, the court concluded:

The use of apomorphine, then, can be justified, only if it can be said to be treatment. Based upon the testimony adduced at the hearing and the findings made by the magistrate and adopted by the trial court, it is not possible to say that the use of apomorphine is a recognized and acceptable medical practice in institutions such as ISMF. Neither can we say, however, that its use on inmates who knowingly and intelligently consent to the treatment, should be prohibited on a medical or a legal basis.

Knecht v. Gillman, 488 F. 2d 1136, 1138-39 (8th Cir. 1973). This certainly begs the question as to whether legal acceptability is substantially influenced by the efficacy of the treatment modality. See

sentencing decision will be guided largely by utilitarian considerations. And with the exception of cost-benefit considerations in the choice of treatment responses, proportionality will not necessarily be an issue where the justice system does not ascribe blame to the individual. Fitting the punishment to the crime will be a practical decision not encumbered by subjective notions of fairness, justice, or other similar manifestations of the values underlying the legal system and the community. Based upon traditional standards of justice, we may err both by providing too great and too little punishment. It may take much more time or a greater deprivation of liberty to change the behavior of a drug addict or alcoholic who has committed petty theft than a non-addicted person who has embezzled millions of dollars.¹⁰² While this is likely to present very strenuous legal challenges for both legislatures and courts, considering the very dim likelihood of a successful federal constitutional challenge on the basis of proportionality, it is likely to remain a public policy matter left to individual states and therefore shaped more by expediency than principle.¹⁰³ Moreover, success may require control strategies more intrusive but less overtly punishing than traditional incarceration. If, for example, assumptions about the role played by biology in the development of behavior expressed in the disease model continue to be affirmed by scientific research, “medicine” may well prove to be the source of a remedy that will not appear to be onerous or punitive at all, but its effect on one’s behavior may be more dramatic and far-reaching than sitting in a prison cell or wearing an electronic monitor.¹⁰⁴ And the more effective the

also *Kaimowitz v. Michigan Dep’t. of Mental Health*, 42 U.S. L. WEEK 2063, 2063–64 (Mich. Cir. Ct., Wayne Cty., July 10, 1973) (lower court deciding that an involuntarily committed mental patient could not consent to “experimental” psychosurgery).

¹⁰²This is not an insignificant problem at present although the context is different. Disproportionality, while perhaps of somewhat diminished federal constitutional significance, remains both a fairness and practical concern, often when the court is required to impose a legislatively mandated sentence or where sentencing guidelines limit judicial discretion. Reducing the adverse impact of disproportionate sentences is more likely the result of the exercise of prosecutorial discretion and the operation of informal norms at work in the court system. See SAMUEL WALKER, *SENSE AND NONSENSE ABOUT CRIME AND JUSTICE* 43–48 (2nd ed. 1989). It has also been argued that determinate sentencing adversely impacts minorities, women and the poor. Christopher M. Alexander, Note, *Indeterminate Sentencing: An Analysis of Sentencing in America*, 70 S. CAL. L. REV. 1717, 1717 n.1 (1997). Indeed a substantial motivation for the development of sentencing guidelines was the belief that there was too much disparity in sentencing among trial judges. It is often argued to the court and in more general public forums that a sentence contemplating “treatment” is a more appropriate disposition for non-violent offenders. *Id.* at 1743–46. While it is assumed that such a sentence would be less punishing, this is not necessarily true in a system where treatment per se has become the general means of reducing crime. In these circumstances it is the nature of the treatment that may be the issue. The restrictions on liberty necessary to initiate the treatment imperative are by no means entirely known.

¹⁰³The United States Supreme Court severely limited, some would argue eliminated, the circumstances under which “proportionality” was a matter of Eighth Amendment concern. Compare *Harmelin v. Michigan*, 501 U.S. 957, 962–67 (1991) (holding that the Eighth Amendment does not include a proportionality guarantee and a sentence must be reviewed in terms of whether it is both cruel and unusual, with Justice Scalia concluding that even “cruel” sentences, which are not uncommon, are acceptable) with *id.* at 996–1009 (Kennedy, J., concurring) (joined by Justices O’Connor and Souter, expressing an opinion that the Eighth Amendment encompasses a narrow proportionality principle). See also Stephen T. Parr, *Symmetric Proportionality: A New Perspective On the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41 (2000) (advocating for the adoption of a “symmetrical” proportionality requirement where too lenient, as well as too severe, punishments would be proscribed).

¹⁰⁴See generally, PERRY LONDON, *BEHAVIOR CONTROL* 195–228 (1971).

treatment, the more likely we are to affirm its acceptability, fostering a view of the species as something less than autonomous.¹⁰⁵

Most recently, the United States Supreme Court has muddied the conceptual waters of proportionality jurisprudence in a manner that manifests the ambivalence toward deterministic thinking. In *Atkins v. Virginia*, the Court decided that it was unconstitutional to execute a mentally retarded defendant.¹⁰⁶ In this case, the defendant was convicted of murder after he abducted at gunpoint and subsequently shot an individual eight times. Previously, he had been convicted of four robberies and assaults. The Court apparently, although not explicitly, concluded that the defendant met the American Psychiatric Association's criteria for mental retardation and that as a retarded person, his criminal culpability was such that a death sentence would be excessive under the Eighth Amendment.¹⁰⁷ The Court, implicitly accepting the notion that mental retardation results from forces beyond a person's control,¹⁰⁸ noted that "only the most deserving of execution" should be put to death.¹⁰⁸

There are, of course, many unanswered questions raised by the Court's analysis in *Atkins*. It is noteworthy, for example, that while concluding that a mentally retarded person was likely to have a lesser ability to mount a death penalty defense because of the limited ability to assist counsel and persuasively testify, the *Atkins* majority did not suggest that such a person's underlying conviction would necessarily be suspect.¹⁰⁹ Nor did the Court comment on the potential constitutional significance of etiological differences in the development of intellectual limitations, or address the issue of the more general role of intellectual functioning in culpability assessments. For example, the question arises as to the potential for asserting the converse position to the *Atkins* view: Should higher-functioning defendants be considered more blameworthy? And perhaps most significantly, are there other conditions, biological or otherwise, that would require a result similar to the conclusion of the *Atkins*' Court? If addiction and mental illness are diseases of the brain, then why would the addicted or mentally ill murderer be any more deserving of the death penalty than the retarded murderer?¹¹⁰ In concurring opinions in a recent

¹⁰⁵The *Knecht* court's requirement of consent to allow the administration of apomorphine clearly had been formulated only because of its ambivalence about its efficacy. The experimental nature of a particular change strategy has made us adopt prophylactic measures to avoid legal entanglements. Requiring knowing and voluntary consent, the traditional threshold requirement for otherwise unauthorized intrusion by the state, is a useful exercise. *Knecht*, 488 F. 2d at 1140. However, to the extent that successful treatment reinforces a determinist view of behavior, consent becomes a superfluous requirement and a vestige of "autonomous man."

¹⁰⁶*Atkins v. Virginia*, 122 S.Ct. 2242, 153 L.Ed. 335 (2002).

¹⁰⁷The Court noted testimony concerning the defendant's retardation at the time of trial, as well as the dissenters on the Supreme Court of Virginia, who found the testimony of the prosecution's expert attributing the defendant's poor academic performance to bad choices to be "incredulous as a matter of law." *Id.* at 2246.

¹⁰⁸*Id.* at 2251.

¹⁰⁹*Id.*

¹¹⁰See, e.g., Leshner, *supra* note 19. In supporting its position that execution for a retarded person is an excessive sanction, the majority in *Atkins* pointed to the Court's decision in *Robinson v.*

case decided by the New Jersey Supreme Court, two justices, relying in part on the reasoning in *Atkins*, expressed the view that the New Jersey Constitution prohibited the execution of a person with an “impaired state” as a result of a long history of mental illness and psychological problems.¹¹¹ All of this begs the question of the proper legal context for a discussion of the relevancy of intellectual capacity or other disabling states.¹¹² It certainly can be argued that the “punishment fits the offender” approach to the proportionality question, as embraced by the Supreme Court in *Atkins*, has more definitively set the jurisprudential stage for the justification of disparate sentencing in furtherance of the treatment imperative.

2. *The Deterrence Question*

Having the ability to effectively change behavior is likely to have great implications for prioritizing the justifications for punishment. If nothing else, the appeal of retribution and general deterrence, as sanctioning justifications, will be altered. While it is difficult to imagine the complete amelioration of societal vindictiveness, the satisfaction of inflicting punishment in a justice system where blame is less certain will most certainly be diminished. The emotional appeal and moral certitude of exacting “just deserts” are not nearly as compelling in circumstances where treatment efficacy has resulted in etiological ambivalence.

General deterrence is more problematic because, as has been long noted, its usefulness depends on the ability to communicate to the public fear of the likelihood of punishing consequences for criminal conduct.¹¹³ To the degree that “treatment” is perceived by society-at-large as less punishing, the deterrent effect of arrest and conviction may be reduced. However, the deterrent effect is also intertwined with other less tangible considerations, such as the stigma or “shame” associated with criminality; therefore, measuring the actual impact of a treatment-oriented justice system is difficult and certainly to some degree speculative.¹¹⁴ Shame is a consequence of the belief that one has done something quite wrong, or at least the perception that one has done something that others, particularly those whose opinions are important, believe is wrong.¹¹⁵ Shaming strategies are generally intended to bring into focus the scorn of the community when reminded of the transgressions of an offender, at least

California, noting that a term of imprisonment may not be imposed for the status of narcotic addiction. *Atkins*, 122 S.Ct. at 2247.

¹¹¹State v. Nelson, 2002 N.J. LEXIS 1089 (2002) (Zazzali, J. & LaVecchia, J., concurring).

¹¹²See *Banks v. State*, 2002 Ala. Crim App. Lexis 157 (Ala. 2002) (noting increased concern about the propriety of a custodial interrogation in light of the Supreme Court’s comments about the potential for false statements from mentally retarded suspects during interrogation).

¹¹³See Cesare Beccaria, *On Crimes and Punishments*, in THEORIES OF PUNISHMENT 117, 124–25 (Stanley E. Grupp ed., 1971).

¹¹⁴See generally Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733 (1998) (pointing out that the impact of public acts of expiation, such as displaying demeaning indicia of one’s criminality, on others may be more significant than on the individual offender. “Shaming” serves as a means to educate the public with regard to the moral offensiveness of the behavior in question.).

¹¹⁵See *id.*

theoretically reducing the chances of others engaging in similar conduct.¹¹⁶ One consequence of a treatment orientation may well be a lessening of the view that certain forms of criminal conduct, and in particular public order type offenses, while socially dysfunctional, are morally wrong. Perhaps more importantly, it will certainly be more difficult to heap scorn upon someone whose behavior is the consequence of a treatable condition.¹¹⁷

Nonetheless, it seems reasonable to conclude that the deterrent impact of headlines reporting that an offender was sentenced to an indefinite period of “treatment” or that an arsonist was “required to undergo intensive therapy,” may be less than what would be expected for more pejorative assertions.¹¹⁸ So, while treatment may be successful in modifying the behavior of a particular defendant, the pursuit of the treatment imperative may result in a diminution in the public’s perception of the punishing consequences of a criminal conviction and a general reduction in the social opprobrium associated with being labeled a criminal.¹¹⁹

While deterrence is probably most thought of in terms of its direct and immediate effect on behavior, its efficacy may well be manifested through a different mechanism. It has long been pointed out that punishment carries with it an educative impact, which is nonetheless important to the long-term interests of a culture.¹²⁰ It must be recognized that punishment has traditionally played a broader role in setting forth the parameters of acceptable behavior, and thus, over time, contributing to the establishment of normative conduct.¹²¹ Sanctions associated with formal rules

¹¹⁶*Id.* See also Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, in 23 CRIME AND JUSTICE 1 (Michael Tonry ed., 1998) (noting that research suggests that the deterrent effect is largely the result of the fear of social stigma); Rothman, *supra* note 1, at 49 (noting that the use of the “stocks” as a shaming device was recognized for its deterrent value by colonial Americans who believed that the avoidance of injury to one’s reputation was a powerful incentive within small communities).

¹¹⁷This, of course, may not diminish the urge for retribution which is not necessarily the result of dispassionate thinking about the nature of criminal behavior. It has been convincingly observed that, notwithstanding the direct manifestation of a different intent in the law, retribution has repeatedly emerged as a compelling justification for the criminal sanction. See Michele Cotton, *Back With A Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313 (2000).

¹¹⁸Learning theory has taught us that the effect of punishment on the emergence of behavior is dependent upon many factors including the “intensity, frequency and distribution of aversive consequences.” BANDURA, *supra* note 21, at 295. Communicating about the nature of sanctions and their likelihood of imposition are critical to maximizing the deterrent effect. See also Toni M. Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880, 1883 (1991) (identifying the conditions necessary for maximizing the effectiveness of shaming practices).

¹¹⁹*But see* Gottfredson, *supra* note 28, at 35 (noting that general deterrence is not realized exclusively through the imposition of criminal sanctions but is also significantly associated with other social sanctions such as “fear of loss of personal affinity”).

¹²⁰JOHS ANDENAES, *General Prevention—Illusion or Reality?*, in THEORIES OF PUNISHMENT (Stanley E. Grupp ed., 1971) (the long term consequences of encouraging habitual law-abiding behavior and strengthening moral inhibitions are more important than short term deterrence of crime). *But see* Garvey, *supra* note 114, at 772–75 (suggesting that the educative role of punishment may be inconsistent with the notion of the “liberal state”).

¹²¹See ROTHMAN, *supra* note 1, at 49–50. See generally, KAI ERICKSON, WAYWARD PURITANS 196 (1966) (recounting the Puritan experience in responding to deviance and pointing out the definitional significance of overt manifestations of public scorn for conduct inconsistent with

communicate to the listening audience the intensity of a community's feelings about the appropriateness of behavior. In this way, the law speaks through the response imposed upon violation and defines behavior as wrong, more or less.¹²² What happens, then, when the response is not perceived or perceived less as punishment? Assuming that treatment does not require or is not accompanied by incarceration or other forms of overt punishment or is simply the perceived consequence of criminal conviction, will the habituation of law-abiding behavior be affected? Perhaps more significantly, will the morality building effect of the law be lessened? As a culture we have accepted without much reservation that the law is influenced by and, to some extent, reflects normative moral behavior.¹²³ What is less clear is the extent to which the enforcement of the law, and in particular the invocation of sanctions to voice the community's disfavor, contributes to the weave of society's moral fabric. Assuming some impact, it will be necessary to consider these implications and perhaps devise strategies to offset the lack of normative clarity associated with the moral ambiguity of the treatment imperative.

VI. CONCLUSION

Many years ago, at the height of concern about the proliferation of the use of various techniques of behavior modification, and amid much academic discussion about the culture's capacity to exercise sophisticated control of human behavior, noted psychiatrist and author Perry London observed:

As long as change comes slowly enough and quietly and mingles any poisons that it bears with compensating pleasures (or at times just with relief), it can take hold. Nature will not cry out, offended, nor will men. She and they, will simply change whichever way they must to meet the new conditions that impose on them.¹²⁴

London's comments were directed toward what he believed to be the inexorable development of the "technology of behavior control."¹²⁵ Although such a technology has not been forthcoming to anywhere near the degree that some feared, I believe that London's observation aptly describes the eventual manner in which a new rehabilitative ideal will be embraced with the concomitant challenges of the "new conditions" it will impose.

While individual change through treatment may become a more favored goal of sentencing, how it is practically accomplished is another

community norms "deviant persons often supply an important service to society by patrolling the outer edges of group space and by providing a contrast which gives the rest of the community some sense of their own territorial identity").

¹²²See generally GORDON HAWKINS, *Punishment and Deterrence: The Educative, Moralizing, and Habitative Effects*, in THEORIES OF PUNISHMENT 163-77 (Stanley E. Grupp ed., 1971).

¹²³See H.L.A. HART, THE CONCEPT OF LAW 181-207 (1961).

¹²⁴LONDON, *supra* note 104, at 11.

¹²⁵*Id.* at 7.

matter. It is unlikely that policy makers will directly confront the larger issue of the fundamental nature of human behavior and shape the criminal law accordingly. This would be too painful a process and perhaps not productive, given the limitations of science in providing conclusive information to support what is otherwise intuitively or experientially known. Judge Wilkey, writing in *United States v. Moore*, noted that it is not necessary to understand why someone behaves the way he does in order to meet the traditional goals of sentencing. "Almost all of the traditional purposes of the criminal law can be significantly served by punishing the person who in fact committed the proscribed act, without regard to whether his action was 'compelled' by some elusive 'irresponsible' aspect of his personality."¹²⁶ Indeed, this characterizes precisely how the criminal justice system currently behaves. While we may not know exactly why people do what they do, we are nonetheless required to respond in a way that meets our objectives.

Because, aside from vengeance, society is largely concerned with stopping crime, we tend to select a sentencing alternative that we believe has the best chance of success. While Judge Wilkey's observations accurately describe the current dilemma, the subtle implication may be less apparent. Success in "treating" persons who engage in criminal conduct, even in the absence of a precise understanding of the mechanism of the malady, will be a very attractive development and certainly command much public attention. Consider if Mr. Moore's addiction could have been predictably remedied through participation in some sort of court-required intervention described as treatment. In that case, the "rehabilitation" objective would have been realized, the "incapacitation" issue would be moot, and at the least, the "specific" side of deterrence would no longer be of concern.

This is not to say that conflicts between legal and scientific notions concerning the nature of human behavior will entirely abate. It is likely that significant conceptual discrepancies, particularly with regard to connotations of the term "responsibility," will continue, perhaps for political reasons.¹²⁷ Ultimately, the compatibility of the control dynamic underlying the behavior of the legal system, with the ambitions of the treatment imperative, will make them comfortable bedfellows. Perhaps now is the time to give it some thought.

¹²⁶*United States v. Moore*, 486 F.2d 1139, 1147 (D.C. Cir. 1973).

¹²⁷See generally SKINNER, *supra* note 55, at 342-44 (noting, but harmonizing, the differences between traditional legal conceptions of responsibility and those associated with a scientific analysis of human behavior).