FREE WILL'S ENORMOUS COST: WHY RETRIBUTION, GROUNDED IN FREE WILL, IS AN INVALID AND IMPRACTICAL PENAL GOAL

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"[O]ur criminal law is so rooted in theological ideas of free will and moral responsibility and juridical ideas of retribution . . . that we by no means make what we should of our discoveries."[1]

"Prison is for the people we're scared of, not the people we're mad at."[2]

INTRODUCTION

In August 2008, fifty-two-year-old Daniel Mosley purchased four ounces of methamphetamine from his drug dealer in Norman, Oklahoma.[3] He was pulling out of the dealer's driveway when he was apprehended and arrested by local police.[4] Mosley cooperated with law enforcement, admitting that he had purchased meth and that he had previously been arrested for meth-related offenses.[5] In the past, Mosley suffered from drug and alcohol addiction, leading to convictions ranging from DUI to possession of marijuana and methamphetamine.[6] After being released on bond, Mosley voluntarily checked himself into an inpatient drug treatment center, admitting that he

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1 Roscoe Pound, *Book Review*, 3 AM. POL. SCI. REV. 281, 283–84 (1909) (reviewing MAURICE PARMELEE, THE PRINCIPLES OF ANTHROPOLOGY AND SOCIOLOGY IN THEIR RELATION TO CRIMINAL PROCEDURE (1908)).

2 Eric Zorn, *'Prison Is for the People We're Scared of, Not the People We're Mad At'*, CHI. TRIB. BLOGS (July 3, 2014, 8:32 AM), http://blogs.chicagotribune.com/news_columnists_ezorn/2014/07/prison-is-for-the-people-were-scared-of-not-the-people-were-mad-at.html.

3 State v. Mosley, 257 P.3d 409, 410 (Okla. Crim. App. 2011).

4 *Id.*

5 *Id.*

6 AM. CIVIL LIBERTIES UNION, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 107 (2013) [hereinafter ACLU REPORT], https://www.aclu.org/sites/default/files/field_document/111813-lwop-complete-report.pdf.

was addicted to drugs and alcohol.[7] He was convicted under Oklahoma law for buying the meth.[8]

In a presentence report, Mosley's parole officer noted his successful completion of the drug treatment program and the drug-free lifestyle he had since avowed. The officer determined that Mosley was not a threat to the public, and recommended a one-year community sentence.[9] The judge stated that she wanted to show mercy, but her hands were tied.[10] Under Oklahoma's habitual drug offender statute, Mosley's prior convictions mandated that he receive life without the possibility of parole for his conviction.[11] Due to a nonviolent crime, a man deemed a nonthreat by his parole officer was sentenced to die in prison.

Mosley's sentence is not exceptional,[12] and neither are the circumstances that led him to a life of addiction and drug abuse. He grew up in a house of drug and alcohol addicts, leaving home at the age of seventeen to escape physical abuse from family members.[13] In treatment, Mosley acknowledged that his upbringing likely led to his own abuse of drugs.[14] Examining Mosley's story, it is hard to view him as completely free in his actions. To start, environmental factors increased his chances of becoming an addict in the first place.[15] Second, once he was addicted, the force of addiction undoubtedly compelled Mosley to buy drugs to satisfy his addiction.[16] It is odd, to say the least, that a man so diligently seeking to reform himself could

7 *Id.* at 107–08. Mosley stated, "I needed long-term extensive treatment and therapy but did not get it in prison. Prison did not work. I got to this very effective treatment program. I actually get into recovery!" *Id.* at 108 (internal quotation marks omitted).

8 *Id.* at 107.

9 *Id.* at 108. The parole officer stated, "[Mosley] does not appear to pose an immediate threat to the community . . . it seems it would be most beneficial to work with him in a community setting." *Id.* (omission in original).

10 *Id.*

11 *Id.*

12 For an extensive list of current prisoners sentenced to life without possibility of parole for nonviolent crimes, see generally *id.*

13 *Id.* Science suggests that some people have a genetic predisposition to addiction, making children of addicts more likely to become addicts themselves. *See* NAT'L INST. ON DRUG ABUSE, DRUGS, BRAINS, AND BEHAVIOR: THE SCIENCE OF ADDICTION 8 (2014), https://www.drugabuse.gov/sites/default/files/soa_2014.pdf ("The influence of the home environment, especially during childhood, is a very important factor. Parents or older family members who abuse alcohol or drugs, or who engage in criminal behavior, can increase children's risks of developing their own drug problems. . . . Scientists estimate that genetic factors account for between 40 and 60 percent of a person's vulnerability to addiction; this includes the effects of environmental factors on the function and expression of a person's genes.").

14 ACLU REPORT, *supra* note 6, at 108.

15 *See supra* note 13 (discussing how environmental factors and genetic predisposition make a person more likely to become an addict).

16 *See* NAT'L INST. ON DRUG ABUSE, *supra* note 13, at 7 ("[I]mpairment in self-control is the hallmark of addiction. Brain imaging studies of people with addiction show physical changes in areas of the brain that are critical to judgment, decision making, learning and memory, and behavior control. Scientists believe that these changes alter the way the brain

be sentenced to life without parole for feeding an addiction that was all but thrust upon him by the cards he was dealt.

In the context of addiction, it is easy to understand that the addict might lack free will, as his brain is fundamentally altered by the drugs he takes.[17] Addiction is an obvious case of lessened or lacking freedom, and is easily understood: drugs act on the brain and change its chemistry, altering the drug user's behavior. But this Note takes the position that addiction is merely one *example* of the nonfreedom that pervades the human experience. External, environmental factors, working on and with the brain, are sufficient to determine activity. Brains are made of matter, which operates in a deterministic way, in accord with the laws of biology, chemistry, and physics. Therefore, consciousness and decisionmaking arising from that material brain must be similarly determined. In the addiction context, the forces sufficient to determine activity are early environmental exposure to drug use, genetic predisposition, initial recreational use, and so forth. With everyday decisions, like what to eat for breakfast,[18] there are similarly forces external to conscious control that, when taken together, are sufficient for the brain to make the choice one way or the other.

The pervasive penological goal of retribution runs afoul of this determinism. It stands for the idea that people deserve punishment when they tear the moral fabric of society by breaking laws. It presupposes free will, because to deserve punishment, one has to have a free choice to break the law in the first place. Part I of this Note describes retribution's role as a major penological goal. Part II argues that since free will is a necessary assumption for retribution, free will's nonexistence renders the penological goal illogical. Part III examines two major drug laws whose passage and enforcement were predicated, in large part, upon retributive morality. It discusses an appeals court case in which the merits of a common-law defense of free will to drug possession were considered and ultimately rejected. Part IV discusses the enormous cost imposed upon society by the retributive passage and enforcement of drug laws. Finally, Part V of this Note briefly surveys the utilitarian-based goals of rehabilitation, deterrence, and incapacitation, offering them as superior alternatives due to their focus on benefitting society.

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works and may help explain the compulsive and destructive behaviors of addiction." (footnote omitted)).

17 *See id.*

18 *See* JOHN DIES AT THE END (Touchy Feely Films 2013) ("There are a [ton] of subatomic particles in the universe, each set into outward motion at the moment of the big bang. Thus whether or not you move your right arm now or nod your head or choose to eat fruity pebbles or corn flakes next Thursday morning was all decided at the moment the universe crashed into existence seventeen billion years ago.").

I. RETRIBUTION AS A GOAL OF PUNISHMENT

There are several justifications behind punishing people for criminal acts. The first is retribution, "punishment's traditional moral purpose."[19] Retribution presupposes that criminal action "inherently merits punishment."[20] It stands for the proposition that the punishment must match the crime.[21] While most adherents to a retribution-based model of justice do not take the "eye for an eye" mantra literally, many still believe that murdering another warrants a death sentence for the convict, for example. Unlike the other penological justifications of rehabilitation, deterrence, and incapacitation, retribution is not aimed at any practical social good.[22] It stands for the proposition that those in violation of moral laws necessarily deserve punishment, as they chose to shatter the moral fabric of society. To make the claim that one's choices determine her blameworthiness, one must assume that free will exists.[23] If free will is an illusion, it would make no sense to consider a person blameworthy for acts not freely chosen. This Note argues that since there is no free will, people cannot logically deserve punishment on account of their choices. As such, retribution should not be used as a justification for punishment. In its place, legislatures and judges should apply rehabilitation, deterrence, and incapacitation as penological goals to use punishment as a means to an end: social benefit.[24]

II. ATTACKING FREE WILL, A NECESSARY CONDITION FOR RETRIBUTION

On one hand, as human beings, we have an abiding sense that we are free to act in whatever way we please. We are convinced that we are the unbound, unfixed sources of our own decisions.[25] On the other hand, we know that the universe operates deterministically, governed by the laws of

19 Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1313–14 (2000); *see also* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1 (2003).

20 Cotton, *supra* note 19, at 1315.

21 Adil Ahmad Haque, Lawrence v. Texas *and the Limits of the Criminal Law*, 42 HARV. C.R.-C.L. L. REV. 1, 3 (2007) (referring to "the retributive goal of penalizing rights violations in proportion to the harm caused and the violator's culpability").

22 Cotton, *supra* note 19, at 1316.

23 *See* United States v. Moore, 486 F.2d 1139, 1145 (D.C. Cir. 1973) ("[T]he common law has long held that the capacity to control behavior is a prerequisite for criminal responsibility." (internal quotation marks omitted) (citation omitted)).

24 *See* Cotton, *supra* note 19, at 1316.

25 *See* Azim F. Shariff et al., *Free Will and Punishment: A Mechanistic View of Human Nature Reduces Retribution*, 25 PSYCHOL. SCI. 1, 1 (2014) ("Although few people deny that humans regularly make uncoerced choices and exercise self-control, many scientists and philosophers have taken issue with the idea that conscious humans can generate spontaneous choices and actions not fully determined by prior events . . . .").

physics, biology, chemistry, and so forth.[26] So how could it be that human beings, composed of matter (much like everything else) are free from the deterministic laws of science, and able to function as the undetermined sources of our volitions? If the neurons in our brain, interacting among themselves and with the rest of the body, create consciousness, it hardly seems that we can be free.[27] After all, neurons are just cells, made of matter, transmitting signals according to discernable (though not fully understood) scientific laws.[28]

Due to principles of cause and effect, our whole mental existence may be the effect for which the action of our neural machinery is the cause. And causes determine effect.[29] On the other hand, if there is something nonphysical about our conscious selves, such as a soul, then that could be the uncaused, unfixed source of the decisionmaking process. Resultantly, whether or not free will exists turns on what the source of consciousness is. Free will, or libertarianism, necessarily involves belief in something apart from the physical.[30] Determinism involves the belief that matter, governed by science-based laws of cause and effect, creates our consciousness.[31] If this is true, then consciousness and decisionmaking are fixed by the physical, biological, and chemical processes that underlie them.

A. The Libertarian Position

Libertarians adhere to the belief that free will exists. Together with the strong, intuitive experience of freedom, the historical roots of free will provide an explanation for its unshakable place in modern thought. Early beliefs in free will trace back to Hellenistic philosophers. The influential philosopher Plato (428–347 BCE) believed that human beings have a soul and that freedom was a faculty of the soul. The "rational part of the soul . . . govern[s] the lower, passionate parts of the soul."[32] Plato's conception of the passionate aspects of the soul implies their nonfreedom: passions are things that just happen to us.[33] The rational soul, in its freedom, rules over

26 *See* JOHN T. ROBERTS, THE LAW-GOVERNED UNIVERSE 1 (2008) ("Scientific inquiry has revealed to us a universe that is governed by laws of nature. . . . The laws of nature govern the universe in the sense that the universe cannot but conform to them . . . .").

27 *See* David Eagleman, *The Brain on Trial*, ATLANTIC (July/Aug. 2011), http://www.theatlantic.com/magazine/archive/2011/07/the-brain-on-trial/308520/ ("The drives you take for granted . . . depend on the intricate details of your neural machinery.").

28 NAT'L INST. ON DRUG ABUSE, BRINGING THE POWER OF SCIENCE TO BEAR ON DRUG ABUSE AND ADDICTION (2007), https://d14rmgtrwzf5a.cloudfront.net/sites/default/files/1923-bringing-the-power-of-science-to-bear-on-drug-abuse-and-addiction.pdf.

29 *See* MANICKAM NAMBI, THE END OF KNOWLEDGE: A REDUCTION OF PHILOSOPHY 150 (2011) ("The commonly accepted view is that the cause determines effect. It means the outcome is determined by the cause.").

30 *See infra* Section II.A.

31 *See* JOHN R. SEARLE, MIND: A BRIEF INTRODUCTION 216 (2004).

32 Phillip Cary, *A Brief History of the Concept of Free Will: Issues That Are and Are Not Germane to Legal Reasoning*, 25 BEHAV. SCI. & L. 165, 167 (2007).

33 *See id.*

those passions.[34] Another of the most influential proponents of the existence of free will was the Christian philosopher and theologian Augustine (354–430 CE).[35] He believed that the will was a "distinct power of the soul."[36] It conferred upon people the "innate ability to act or to feel . . . free[ ] from external coercion."[37]

René Descartes (1596–1650 CE) also had an enormous influence[38] on people's view of the self and free will.[39] Writing several centuries after the Hellenistic philosophers and Augustine, Descartes was presented with challenges by newly developed laws of science.[40] Consider gravity, a rudimentary law of physics. If a pen is dropped several feet above a table, with nothing obstructing its path, it will invariably fall.[41] The release of the pen is causally sufficient for its fall to the table. The law of gravity and the manifold laws of science suggest that the physical world is deterministic, with rules external to physical objects fixing their behavior. Why would consciousness be an exception, since human beings are part of the physical realm? Descartes's answer was to divide the universe into two realms: the mental and the physical.[42] He considered the mind to be an "immortal soul," free from scientific investigation, thus free from causal determination by the laws of the physical realm.[43]

Descartes would have granted, though, that there is a material realm that is "determined by the laws of physics."[44] But this realm would include our bodies; and, positing that our undetermined minds inhabit physically determined bodies creates a problem: "How does anything in the mind cause anything in the body?"[45] Our bodies are required for the carrying out of conscious, free acts. If the body is determined by laws of physics, the free

34 *Id.* (stating that the theme of the rational soul ruling over our passions is key to the ancient understandings of human freedom).

35 Michael Mendelson, *Saint Augustine*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2010), https://plato.stanford.edu/entries/augustine/.

36 Cary, *supra* note 32, at 172.

37 *Id.* Belief in the soul, requisite for belief in freedom, is as entrenched as the conviction of free will. For an opinion on why this is so, see SEARLE, *supra* note 31, at 41 ("[M]ost [of those believing in the soul] are people who hold this view for some religious reasons . . . . It is a consequence of [belief in freedom and the soul] that when our body is destroyed our soul can continue to survive; and this makes the view appealing to adherents of religions that believe in an afterlife. But among most of the professionals in the field, [the belief in separation of mind and body] is not regarded as a serious possibility.").

38 *See* Gary Hatfield, *René Descartes*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2014).

39 *See* SEARLE, *supra* note 31, at 13.

40 *Id.* at 14.

41 *See id.* at 216.

42 *Id.* at 14.

43 *Id.* at 15.

44 *Id.*

45 *Id.* at 17.

mind would hardly be able to assert an effect on the determined limbs.[46] Fixing this quandary requires accepting that the mind, like the rest of the body, is physically governed, with neurons giving rise to our consciousnesses, determining our thoughts and actions.

B. The Determinist Position

The determinist believes that "[e]very event that happens in the physical world is determined [or caused] by preceding physical events."[47] In the case of human consciousness and the decisionmaking process, the event preceding consciousness is the interactive network of communications between neurons with each other and with the rest of the body. The theory is that the complex, microscopic interactions in the brain cause, and thus determine, the state of consciousness and the decisionmaking process at any given time.[48] It does not take a neuroscientist or advanced philosopher to understand this. One must simply believe that consciousness lives and dies by neuronal brain activity. It requires believing not only in a correlation between brain activity and the conscious mind, but in a causal force flowing from the brain, resulting in and determining the mind.

1. Brain Pathology Studies

Interestingly, some of the more bizarre cases of brain-damaged patients provide support for the conclusion that the brain causes the mind. In 1848, twenty-five-year-old railroad worker Phineas Gage received severe damage to his ventromedial prefrontal cortex (VMPFC),[49] an area of the brain thought to have some role in the social decisionmaking process.[50] Gage was working on the railroad when an iron rod shot through his skull during an unintended explosion, taking much of his VMPFC with it.[51] Shockingly, Gage survived, but was considered by friends to have become a completely different person.[52] Some accounts hold that Gage changed "from 'a reliable, well-liked, respected, and organized' to a 'garrulous, sexually promiscuous, reckless, unreliable, and irresponsible—essentially a pseudo-psychopathic individ-

46 *See id.* The idea of the soul inhabiting the determined body is referred to by some as "the ghost in the machine." *Id.* at 15 (internal quotation marks omitted) (quoting GILBERT RYLE, THE CONCEPT OF MIND (1949)).

47 *Id.* at 24.

48 *See id.* at 150–58.

49 Stephan Schleim, *Brains in Context in the Neurolaw Debate: The Examples of Free Will and "Dangerous" Brains*, 35 INT'L J.L. & PSYCHIATRY 104, 107 (2012).

50 Wouter van den Bos & Berna Güroglu, *The Role of the Ventral Medial Prefrontal Cortex in Social Decision Making*, 29 J. NEUROSCIENCE 7631, 7631 (2009).

51 Schleim, *supra* note 49, at 107.

52 *Id.*

ual.'"[53] Gage's doctor's report also stated that he acted "very childish" and that he was "uncontrollable by his friends" after the accident.[54]

In another case, patient "EVR" had a large brain tumor successfully removed through extensive brain surgery.[55] During the surgery, part of EVR's brain tissue surrounding the tumor was extricated.[56] The damaged portion overlapped, in part, with the same portion of Gage's brain that was removed by the rod.[57] Like Gage, EVR experienced severe behavioral changes post-incident. He struggled with "severe social problems . . . lost his job, savings, wife and children, [and] was unable to sustain a stable work relation."[58]

In a third example, a forty-year-old man in an otherwise normal state of health developed a strong interest in child pornography.[59] He also made sexual advances towards his prepubescent stepdaughter, as well as workers at a rehabilitation facility.[60] Shortly after exhibiting these behaviors, doctors discovered that he had a sizeable brain tumor.[61] His tumor was removed, and his erratic sexual behavior completely subsided.[62] However, several months later, the man developed a persistent headache, and the urge to view child pornography was rekindled within.[63] As it turns out, the man's tumor had grown back; upon its removal, his behavior improved again.[64]

In each of these cases, a person's injury to a discrete area of the brain was coupled with a drastic change in behavior. These studies support the proposition that changes in brain activity cause changes in a person's mental state and behavior. "When your biology changes, so can your decision-making and your desires. The drives you take for granted ('I'm a heterosexual/homosexual,' 'I'm attracted to children/adults,' 'I'm aggressive/not aggressive,' and so on) depend on the intricate details of your neural machinery."[65] The above studies are extraordinary examples of the causality between the physical and the mental, but they illustrate the principle impeccably. It

53 *Id.* (internal quotation marks omitted) (quoting Adrian Raine & Yaling Yang, *The Neuroanatomical Bases of Psychopathy: A Review of Brain Imaging Findings*, *in* HANDBOOK OF PSYCHOPATHY 278, 279 (Christopher J. Patrick ed., 2006)).

54 *Id.* (internal quotation marks omitted) (quoting J.M. Harlow, *Passage of an Iron Rod Through the Head*, 39 BOS. MED. & SURGICAL J. 389 (1848)).

55 *Id.* at 108.

56 *Id.*

57 *Id.*

58 *Id.* For an additional example, see *id.* for the story of JZ, another patient for whom the removal of part of his VMPFC caused a disturbance in his social decisionmaking faculties.

59 *Id.*

60 *Id.*

61 *See* Jeffrey M. Burns & Russell H. Swerdlow, *Right Orbitofrontal Tumor with Pedophilia Symptom and Constructional Apraxia Sign*, 60 ARCHIVES NEUROLOGY 437, 437 (2003).

62 *Id.* at 438.

63 *Id.*

64 *Id.* For an example of a patient whose brain damage improved his behavior, see Schleim, *supra* note 49, at 109.

65 Eagleman, *supra* note 27.

would be difficult to claim that the above patients, after their respective accidents, freely chose to change their behavior so drastically, when alterations to the brain more easily account for the changes. The latter is the simpler, more cogent theory.[66] While Phineas Gage's mental aberrations were caused by a freak accident, the criminal predilections of others are caused by less obvious, but similarly physically-determined phenomena. In place of an iron rod, the causes of a criminal's choices include a brain being genetically predisposed towards violence,[67] as well as other prior events external to the criminal, processed in his brain according to scientific laws, resulting in behavior.

2. Direct Support

Strong direct support also exists for the proposition that free will is an illusion. In 1982, Benjamin Libet conducted a landmark study on the nature of consciousness, decisionmaking, and their neural correlates.[68] In Libet's experiment, subjects were instructed that at any given point, they were to flex their wrists.[69] They were asked to view a high-speed clock during the process and to record exactly the point when they experienced the conscious desire to flex the wrist.[70] During the experiment, Libet recorded when the specific electrical charge that causes wrist flexion was initiated in the brain.[71] His primary question was this: Which comes first, the initiation of the electrical charge, or the conscious desire to flex the wrist? The study showed that the electrical charge begins 550 milliseconds before the actual activity.[72] The conscious desire to act occurred two hundred milliseconds before the act, several hundred milliseconds *after* the electrical charge started to work its way from the brain to the muscle.[73] If unconsciously-felt electrical charges that cause motor movement precede the conscious will to move, the experience of volition may be a determined byproduct or result of something unconscious and uncontrolled.[74] Libet showed that "'I choose to move' is more of

66 *See Occam's Razor*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Occams-razor (last updated June 4, 2015) (stating "of two competing theories, the simpler explanation of an entity is to be preferred").

67 *See* Matthew Jones, Note, *Overcoming the Myth of Free Will in Criminal Law: The True Impact of the Genetic Revolution*, 52 DUKE L.J. 1031 (2003).

68 Benjamin Libet, *Do We Have Free Will?*, 6 J. CONSCIOUSNESS STUD. 47, 49 (1999).

69 *Id.*

70 *Id.* ("[T]he subject report[ed] a 'clock time' at which he/she was *first aware* of the wish or urge to act.").

71 *Id.*

72 *Id.*

73 *Id.* at 47.

74 *Id.* at 55 ("The conscious feeling of exerting one's will would then be regarded as an epiphenomenon, simply a by-product of the brain's activities but with no causal powers of its own.").

an afterthought than the causal determining force during a simple motor task."[75]

Follow-up studies demonstrated similar results. In one study, experimenters gave subjects two buttons, instructing them to press either one immediately when the desire to do so arose.[76] At the same time, subjects viewed a screen that flashed one letter at a time on the screen for a small period of time.[77] Subjects were asked to report which letter they saw on the screen when the conscious desire to hit a button arose.[78] This way, experimenters could record at what point the conscious desire to act started. On average, subjects pressed the button 21.6 seconds after the onset of the experiment.[79] Fortunately, this allowed sufficient time for the brain unconsciously to initiate the decisionmaking process before a conscious decision to act began. Experimenters found that the parts of the brain associated with voluntary movements in the hands exhibited neuron activity, of the type that leads to the final movement of pressing a button, up to *ten seconds* before the conscious desire to move even arose.[80] Once again, the evidence suggests that the series of brain activities resulting in movement is initiated earlier in time than the conscious desire to act even arises.[81]

C. Implications

The nonexistence of free will has implications for the validity of retribution as a penological goal. Moral responsibility, under the theory of retribution, rests on the idea that a person *should have* acted differently in a given context, assuming that the person *could have* acted differently.[82] As argued, free will is an illusion and all events are determined by laws of nature; as such, the wrongdoer *could not have* acted differently, given that multiple antecedent conditions determined his behavior. This means that retribution has no logical justification.

Drug laws are examples of proscriptions that rely on preserving the moral fabric of society, a feature of retribution, for justification. They are thus fundamentally flawed. Such laws ignore the compelling force of addiction. Even further, in the context of nonaddicting drugs the choice is similarly nonfree; in that context, the determining events leading to the choice are simply more numerous and less obvious than the single compulsion of

75 Joe Pierre, *The Neuroscience of Free Will and the Illusion of "You": How Hard Determinism Could Inform the True Nature of the Self*, PSYCHOL. TODAY (Nov. 8, 2014), https://www.psychologytoday.com/blog/psych-unseen/201411/the-neuroscience-free-will-and-the-illusion-you.

76 Chun Siong Soon et al., *Unconscious Determinants of Free Decisions in the Human Brain*, 11 NATURE NEUROSCIENCE 543, 543 (2008).

77 *Id.*

78 *Id.* (this method emulated the recording of the "clock time" in Libet's experiment).

79 *Id.*

80 *Id.* at 544.

81 *See supra* note 75 and accompanying text.

82 Shariff et al., *supra* note 25, at 1–2.

addiction. Since retribution is not justified in either case, it should be removed from consideration in the making of drug laws. Our criminal justice system should bring the other penological goals to the fore, as they seek societal wellbeing instead of the fulfillment of the outmoded theory of retribution. If Congress or states choose to keep drugs illegal, they should do so solely through utilitarian justifications, eschewing retribution.

III. Free Will and Retribution in the Law

It has been said that "free will . . . is the *sine qua non* of our criminal justice system."[83] Without confronting the matter head-on, courts interpreting law implicitly accept judgments of the legislature that certain acts are inherently evil and must be punished as committed. Laws proscribing the possession and consumption of drugs are examples of banning behavior due to the judgment that it is evil, intrinsically warranting punishment. But the crippling, compulsive effect of addiction is a reason to alter the way we treat addicts. Addiction, most would recognize, can impel otherwise law-abiding people continually to consume drugs, and therefore break the law.

As such, many objectors to our drug laws make an argument analogous to determinism: if addicts are rendered without the ability to control their urge to get high, they should not be held criminally liable. This is an easier pill to swallow than determinism full-stop, because many scientific studies have directly proven how difficult addiction is to resist.[84] Studies support the proposition that factors outside of personal control govern behavior, so we should not criminalize such actions based on a theory of retribution. In addition, laws prohibiting the use and possession of nonaddictive drugs, like marijuana, have roots in retribution; such laws are aimed, in part, at preventing people from damaging the moral fabric of society. But the "choice" to use such drugs is fundamentally nonfree, even outside of the addiction context. Once more, manifold factors are sufficient for someone to consume or to avoid drugs. As a result, laws establishing criminal prohibitions on marijuana cannot be justified on the grounds of retribution. Whatever their current justifications, drug prohibitions cannot be upheld on retributive grounds. History provides several examples of drug laws' foundation in retribution.

A. The Harrison Act, Addictive Drugs

The United States' punishment of drug-related offenses is historically rooted in retribution. In 1914, Congress passed the Harrison Tax Act ("Harrison Act"),[85] which was intended as a regulatory measure.[86] It was designed

83 Bethea v. United States, 365 A.2d 64, 83 n.39 (D.C. 1976); *see also* Pound, *supra* note 1, at 283–84 ("[O]ur criminal law is so rooted in theological ideas of free will and moral responsibility and juridical ideas of retribution . . . that we by no means make what we should of our discoveries.").

84 *See supra* note 16.

85 Harrison Tax Act, Pub. L. No. 63-223, 38 Stat. 785 (1914).

to produce revenue for the federal government from legal sales of narcotics, while bringing the practice into the open to regulate it more closely.[87] The Act set up a licensing system, wherein purveyors of opiates and cocaine-based drugs were required to keep records of their transactions.[88] The regulations were primarily aimed at "disreputable 'pushers.'"[89] At the time, doctors prescribed patients small doses of narcotics, like morphine and cocaine, "for relief of [withdrawal] conditions incident to addiction."[90] However sound that practice was, it signifies that doctors sought to treat addicts as patients.[91] Congress never suggested that it intended to change the status quo of treating drug addicts as "sufferers" in need of treatment.[92] In fact, the Act specifically exempted from its requirements "the dispensing or distribution of any of the aforesaid drugs to a patient by a physician . . . in the course of his professional practice."[93]

Over time, the intent of the Act was derailed, and the statute was used by the government as a draconian penal measure for the stigmatization of addiction.[94] The paradigm of the "dope fiend" contributed to the government's drive to prosecute addicts and those that treated them.[95] In June of 1919, the Treasury Department released a report on the state of drug trafficking throughout the country.[96] In the report, there is a section titled "Effect of Addiction on Morals."[97] It reads, in part:

> From information in the hands of the committee, it is concluded that, while drug addicts may appear to be normal to the casual observer, they are usually individuals *weak in character and will, and lacking in moral sense.* The opium or morphine addict is not always a hopeless liar, a moral wreck, or a creature sunk in vice and lost to all sense of decency and honor, but may often be an upright individual except under circumstances which involve his affliction, or the procuring of the drug of addiction. *He will usually lie* as to the dose necessary to sustain a moderately comfortable existence, and *he will*

86 John M. Murtagh, *Book Review*, 91 YALE L.J. 363, 363–64 (1961) (reviewing DRUG ADDICTION: CRIME OR DISEASE? INTERIM AND FINAL REPORTS OF THE JOINT COMMITTEE OF THE AMERICAN BAR ASSOCIATION AND THE AMERICAN MEDICAL ASSOCIATION ON NARCOTIC DRUGS (1961)).

87 Rufus G. King, *The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick*, 62 YALE L.J. 736, 737 (1953).

88 *See* Harrison Tax Act § 2.

89 *See* King, *supra* note 87, at 737.

90 *See* Linder v. United States, 268 U.S. 5, 18 (1925).

91 *See* King, *supra* note 87, at 737 ("Narcotics-users were 'sufferers' or 'patients' in those days; they could and did get relief from any reputable medical practitioner . . . .").

92 *See id.*

93 Harrison Act § 2(a).

94 *See* King, *supra* note 87, at 737.

95 *Id.*

96 INTERNAL REVENUE SERV., U.S. TREASURY DEP'T, TRAFFIC IN NARCOTIC DRUGS: REPORT OF SPECIAL COMMITTEE OF INVESTIGATION APPOINTED MARCH 25, 1918, BY THE SECRETARY OF THE TREASURY (1919).

97 *Id.* at 25.

> *stoop to any subterfuge* and even to theft to achieve relief from the bodily agonies experienced as a result of the withdrawal of the drug.[98]

Such thinking led to widespread use of the Harrison Act as a tool to incarcerate drug sellers and users.[99]

The Supreme Court upheld a reading of the Act that allowed convicting doctors that prescribed narcotics for ambulatory treatment. In *United States v. Behrman*,[100] the Court was faced with the question of whether a physician doling out narcotics to treat addicts' withdrawal symptoms violated the Harrison Act.[101] The Court held that treating addicts with narcotics did not exempt doctors from the Act, because it did not entail "the dispensing or distribution of any of the aforesaid drugs to a patient by a physician . . . in the course of his professional practice."[102] This holding criminalized a doctor's treatment of addicts, deeming it not within "the course of . . . professional practice."[103] In its brief, the United States had argued for removing an intent requirement and illegalizing the prescribing of narcotics to addicts, the position the Court sustained. By criminalizing the treatment of addicts as such, the Court removed the need to prove that the doctor *intended* to distribute drugs for reasons other than treatment. The United States grounded its argument in morality: "[I]t is a well known fact, of which this court has taken notice, that drug addicts as a class are persons weakened materially in their sense of moral responsibility and in their power of will."[104] As a result, the United States argued, "irrespective of the intent or knowledge, the transfer of drugs [for treatment purposes] would not be, as a matter of law . . . in the legitimate practice of a physician's profession."[105] The Government sought to deem addicts moral defectors, to punish them through an overbroad reading of the Harrison Act on account of their immorality. This is an early example of penalizing drug activity on the grounds of retributive morality.

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98 *Id.* (emphasis added). *But see id.* at 26 ("Among the addicts of the underworld, practically all show a low mentality, a lack of decency and honor. This condition, however, is not entirely due to the effect of these drugs as might be inferred, but is largely the result of degeneracy due to environment and association."). Despite stigmatizing the drug addict as a "hopeless liar" and "moral wreck," the report still acknowledged that uncontrolled environmental factors *cause* the moral loss, leading to addiction, not necessarily vice versa. *Id.* at 25.

99 *See* King, *supra* note 87, at 738 n.12 (stating that by June 1928, of the 7738 prisoners in federal penitentiaries, 2529 were serving sentences for narcotics).

100 258 U.S. 280 (1922).

101 *Id.* at 285. It is unlikely that the defendant, Dr. Behrman, was actually prescribing narcotics for ambulatory treatment. He doled out large quantities of narcotics to addicts for use at their own discretion. But the Government drew up a "trick-indictment," seeking a holding that even prescriptions for ambulatory treatment violated the Act. King, *supra* note 87, at 742.

102 Harrison Act § 2(a).

103 *Id.*

104 Brief for United States at 281, *Behrman*, 258 U.S. 280 (No. 582).

105 *Id.* at 282.

In *Linder v. United States*,[106] ambulatory treatment of addicts received a theoretical victory. Dr. Linder, the defendant, prescribed one tablet of morphine and three tablets of cocaine to an addict, to be used at her discretion, for the treatment of her addiction symptoms.[107] The Government's indictment was worded nearly identically to the *Behrman* indictment, accusing the defendant of violating the Harrison Act simply by treating an addict, regardless of good faith or intent.[108] The Court effectively disagreed with the holding in *Behrman*, stating that "[t]he enactment under consideration levies a tax . . . and may regulate medical practice in the States only so far as reasonably appropriate for or merely incidental to its enforcement."[109] The Court added, "[The Act] says *nothing* of 'addicts' and does not undertake to prescribe methods for their medical treatment. They are diseased and proper subjects for such treatment."[110] It refused to "conclude that a physician acted improperly or unwisely or for other than medical purposes solely because he has dispensed to one of them, in the ordinary course and in good faith, four small tablets of morphine or cocaine for relief of conditions incident to addiction."[111] In so holding, the Court deemed that ambulatory treatment was within the course of professional practice, exempting the defendant from coverage under the Act. It also stated that addicts should be viewed as diseased and in need of treatment, rather than subjects of moral regulation.

Despite this holding, the Bureau of Narcotics continued to punish the use of ambulatory treatment by doctors, using the language of a federal regulation to flout the holding in *Linder*.[112] The long-standing regulation provided:

> An order *purporting* to be a prescription issued to an addict or habitual user of narcotics, not in the course of professional treatment but for the purpose of providing the user with narcotics sufficient to keep him comfortable by maintaining his customary use, is not a prescription within the meaning and intent of [the Act], and the person filling such a order . . . shall be subject to . . . penalties.[113]

As the Bureau continued to enforce the Harrison Act against doctors, a large-scale propaganda campaign was initiated, leading to the view that the drug user was a "menace" rather than a person in need of treatment.[114] By 1963,

106 268 U.S. 5 (1925).

107 *Id.* at 11.

108 Brief for United States at 10, *Linder*, 268 U.S. 5 (No. 183).

109 *Linder*, 268 U.S. at 18.

110 *Id.* (emphasis added).

111 *Id.*

112 *See* United States v. Moore, 486 F.2d 1139, 1222 (D.C. Cir. 1973) (Wright, J., dissenting).

113 26 C.F.R. § 151.392 (1971), *repealed by* 36 Fed. Reg. 7778 (Apr. 24, 1971) (emphasis added).

114 For a potent example of antidrug propaganda, see REEFER MADNESS (Motion Picture Ventures 1936), released nationally in 1936. At the beginning of the film, the foreword reads:

when the President established a commission to investigate narcotic abuse, the Government admitted that "[o]ut of a fear of prosecution many physicians refuse to use narcotics in the treatment of addicts . . . . In most instances they shun addicts as patients."[115] The Government admitted that lack of ambulatory treatment was troubling, as "[a]brupt withdrawal, the so-called 'cold turkey' treatment, is very painful and can be dangerous. . . . According to current medical opinion, the most humane method is to bring about withdrawal by a gradual reduction of dosage."[116] So by the executive branch's own admission, the stigmatization of drug use and enforcement of the Harrison Act led to neglect of treatment of addicts. This faulty reading of the Harrison Act represented an early attempt to stigmatize and punish those that would treat addicts as afflicted, rather than morally degenerate.

B. The Controlled Substances Act and Nonaddictive Drugs (Marijuana)

The retributive, moralistic purpose of drug laws is further exemplified in the history of the Controlled Substances Act (CSA), contained within the Comprehensive Drug Abuse Prevention and Control Act of 1970,[117] particularly, with the inclusion of marijuana as a Schedule I substance, the most restrictive classification.[118] To be classified in Schedule I, the drug must "[have] a high potential for abuse . . . [, have] no currently accepted medical use in treatment in the United States," and "[t]here [must be] a lack of accepted safety for use of the drug."[119] Marijuana is accompanied by heroin and LSD in the Schedule I category, while cocaine and methamphetamine are listed in the less restrictive Schedule II category.[120] This seems incongruous, as marijuana is widely considered low-risk, causing less harm to people than alcohol or tobacco (which are not controlled substances at all under the Act).[121] Marijuana's classification is especially suspect because it has widely-

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> The motion picture you are about to witness may startle you. It would not have been possible, otherwise, to sufficiently emphasize the frightful toll of the new drug menace which is destroying the youth of America in alarmingly-increasing numbers. Marihuana is that drug—a violent narcotic—an unspeakable scourge —The Real Public Enemy Number One!

Id. The film was produced in close collaboration with the Bureau of Narcotics, the direct predecessor of the Drug Enforcement Agency (DEA). JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT 24 (2d ed. 2012).

115 PRESIDENT'S ADVISORY COMM'N ON NARCOTIC & DRUG ABUSE, FINAL REPORT 57 (1963).

116 *Id.* at 53.

117 Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1242.

118 21 U.S.C. § 812(c) (2012).

119 *Id.* § 812(b)(1).

120 *Id.* § 812(c).

121 *See* Dirk W. Lachenmeier & Jürgen Rehm, *Comparative Risk Assessment of Alcohol, Tobacco, Cannabis and Other Illicit Drugs Using the Margin of Exposure Approach*, SCI. REP. no. 5:8126, Jan. 30, 2015, at 4.

accepted medical uses,[122] which should knock it out of the scope of Schedule I.[123]

Marijuana's inclusion in the Schedule I category was ultimately a result of its moral stigma among government officials rather than its actual effects on health, or even the public's view. In the 1960s, leading up to the passage of the Controlled Substances Act, a popular consensus was building against harsh punishments for marijuana users,[124] despite the fact that marijuana use and distribution was largely prohibited by the states and the federal government's Marihuana Tax Act.[125] The increase of casual marijuana use on college campuses as well as the "psychedelic movement" changed the thinking that marijuana users were all "addicts" exhibiting signs of "mental deterioration, psychosis, and violent crime."[126] The belief that marijuana was tied to moral degeneracy began to evaporate.[127] Instead of violent criminals, marijuana users were "sons and daughters of the middle and upper classes."[128] The culture of civil disobedience and protest also led to a backlash against laws passed under the specious flag of morality.[129] Widespread popular movements against war and in favor of civil rights, free speech, and ecological preservation "weakened the moral force of the law as an institution by illustrating the evil which could be codified by secular authorities."[130]

122 *See* Jennifer Welsh & Kevin Loria, *23 Health Benefits of Marijuana*, BUS. INSIDER (Apr. 20, 2014), http://www.businessinsider.com/health-benefits-of-medical-marijuana-2014-4. Widely-accepted benefits include treatment of glaucoma, epilepsy, anxiety, multiple sclerosis, PTSD, and more. *Id.*; *see also* Rita Rubin, *Many States Have Legalized Medical Marijuana, So Why Does the DEA Still Say It Has No Therapeutic Use?*, FORBES (Nov. 16, 2016), http://www.forbes.com/sites/ritarubin/2016/11/16/many-states-have-legalized-medical-marijuana-so-why-does-dea-still-say-it-has-no-therapeutic-use/#44655e1535a1 (stating that "[m]ore than half the states—28, to be exact—including Arkansas, Florida and North Dakota as of the Nov. 8 election, and the District of Columbia have legalized marijuana for certain medical conditions").

123 21 U.S.C. § 812(b)(1)(B) (stating that Schedule I drugs "[have] no currently accepted medical use in treatment in the United States").

124 *See* RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, THE MARIHUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES 222–47 (1974).

125 Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551; Helia Garrido Hull, *Lost in the Weeds of Pot Law: The Role of Legal Ethics in the Movement to Legalize Marijuana*, 119 PENN. ST. L. REV. 333, 337–38 (2014) ("Congress elected to utilize a tax as an indirect method to prohibit the production, use, and distribution of cannabis within the states. . . . [T]axes [were] prohibitively high . . . [and violators were] subject to fines of up to $2000 dollars and imprisonment of up to five years. . . . States quickly followed, and by the end of 1937, 46 out of 48 states had officially classified cannabis as a narcotic . . . ." (footnote omitted)).

126 BONNIE & WHITEBREAD, *supra* note 124, at 222–24.

127 *Id.* at 225 (stating "the causal relationships between marihuana and crime, idleness, and incapacitation were now more difficult to maintain").

128 *Id.*

129 *Id.* at 224.

130 *Id.*; *see also id.* at 226 ("A . . . trend, well underway during the sixties, was de-emphasis of the criminal law as a means of social control. Increasing numbers of legal scholars and social scientists were beginning to indict the process of 'overcriminalization' under

Accordingly, the moral force of drug laws was weakened by the tenor of the times.[131]

Despite the public view, marijuana ended up listed among the most dangerous drugs in the Controlled Substances Act. This can be explained by Congress's and the Nixon Administration's approach to marijuana. Some congressmen, before the Act passed, believed that marijuana users should be punished retributively for rupturing the moral fabric of society.[132] Senator Robert Byrd, for example, argued that "drug abuse in the United States . . . is eating away at the moral fiber of our nation."[133] One congressman, in support of an amendment that would treat drug users leniently, suggested that without such a measure, the law was a "mere vehicle for moral indignation."[134] Others were less sure in their support of the Act, because around the time of its passage, experts hotly debated the extent to which marijuana actually harmed users.[135] As a result, Congress opted to preserve the legal status quo, listing marijuana with the most dangerous drugs under Schedule I.[136] But Congress intended to defer the question of how marijuana should be classified in the long run.[137] A committee report on the House version of the bill recommended that marijuana should be "retained within Schedule I at least until the completion of certain studies now underway."[138] The Act established the Presidential Commission on Marijuana and Drug Abuse ("the

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which the sphere of criminal conduct had been too broadly drawn. . . . The view that criminal law was not the only, or even the best, way for society to express its disapproval of certain behavior was certainly a notion foreign to early twentieth-century policy makers.").

131 The reduction in sentencing for marijuana possession in Virginia is representative. In 1969, twenty-year-old Frank P. Lavarre was arrested for possessing around $2500 in marijuana. Because he did not release the names of those he dealt to, his bond was set at $50,000. Following his guilty plea, Lavarre was sentenced to twenty-five years in the state penitentiary, with parole eligibility after five years. Less than a year later, the governor pardoned Lavarre, which was applauded locally. In response to this incident, Virginia reduced first-time possession of marijuana to a misdemeanor punishable by $1000 or less than twelve months in jail. *Id.* at 240–41.

132 Members of Congress made moral arguments with undertones of retribution in favor of illegalizing drugs. *See* 116 CONG. REC. H33603, at 33,648 (daily ed. Sept. 24, 1970) (statement of Rep. Don H. Clausen) (stating "I view the drug problem in America as part and parcel of the rising specter of moral, social, and national decay that is creeping over America"); *id.* at 33,654 (statement of Rep. Harold Donohue) (stating "[t]o save our own children and our neighbor's children, it is absolutely essential that we join together in strengthening our Federal law to prevent this evil plague from spreading its infectious poisons any deeper into the moral fabric of our youth").

133 116 CONG. REC. S1159, at 1183 (daily ed. Jan. 26, 1970) (statement of Sen. Robert Byrd).

134 116 CONG. REC. H33603, at 33,616 (daily ed. Sept. 24, 1970) (statement of Rep. Robert Giaimo).

135 BONNIE & WHITEBREAD, *supra* note 124, at 246.

136 *See id.*

137 *See id.*

138 *Id.* at 247 (quoting H.R. 1444, 91st Cong. (1970)).

Shafer Commission") to study the effects of marijuana, intending to leave the final classification of marijuana to the President and his Commission.[139]

Any argument from the Commission that marijuana prohibitions should be lessened would face an uphill battle, as President Richard Nixon ardently opposed lax marijuana laws. When asked about his feelings towards marijuana, he said, "I can see no moral or social justification whatever for legalizing marihuana."[140] He also stated at a press conference, "I am against legalizing marihuana. Even if the Commission does recommend that it be legalized, I will not follow that recommendation."[141] In a private conversation, Nixon told Shafer, the chairman of the Commission, "I think there's a need to come out with a report that is totally, uh, uh, oblivious to some obvious, uh, differences between marijuana and other drugs . . . [despite that] there are differences."[142] So that the Commission would reach the result he sought, Nixon "stacked [the] deck" by appointing members that would likely support his anti-marijuana agenda.[143] On March 22, 1972, the Commission released its report titled "Marihuana: A Signal of Misunderstanding."[144]

Despite the ostensible bias of his Commission, President Nixon did not receive the results he had hoped for.[145] The Shafer Commission concluded that "[n]o significant physical, biochemical, or mental abnormalities could be attributed solely to . . . marihuana smoking."[146] It also noted that "[m]ost users, young or old, demonstrate an average or above-average degree of social functioning, academic achievement and job performance."[147] As a policy matter, the Shafer Commission concluded that "[m]arihuana's relative potential for harm to the vast majority of individual users and its actual impact on society does not justify a social policy designed to seek out and firmly punish those who use it."[148] In fact, the Commission recommended changing the law so that marijuana possession for personal use was no longer

139 *Id.* Today, the Attorney General has the authority to change the classification of drugs. *See* 21 U.S.C. § 811 (2012). However, the Attorney General traditionally has delegated this role to the DEA. *See* All. for Cannabis Therapeutics v. Drug Enf't Admin., 15 F.3d 1131 (D.C. Cir. 1994).

140 BONNIE & WHITEBREAD, *supra* note 124, at 256.

141 *Id.*

142 *September 9, 1971, Between 3:03 PM and 3:34 PM: Oval Office Conversation 568-4: The President Met with Raymond P. Shafer, Jerome H. Jaffe, & Egil G. ("Bud") Krogh, Jr.*. COMMON SENSE FOR DRUG POL'Y, http://www.csdp.org/research/nixonpot.txt (last visited Apr. 7, 2017).

143 BONNIE & WHITEBREAD, *supra* note 124, at 255–56 (discussing how Nixon's appointees' average age was fifty-four and included a former police officer, the executive producer of *Sesame Street*, the president of Rockford College, and two men vying for federal judgeships, including the chairman of the Commission, Governor Raymond Shafer).

144 NAT'L COMM'N ON MARIHUANA & DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING (1972) (hereinafter SHAFER COMMISSION).

145 Gregg A. Bilz, *The Medical Use of Marijuana: The Politics of Medicine*, 13 HAMLINE J. PUB. L. & POL'Y 117, 122 (1992).

146 SHAFER COMMISSION, *supra* note 144, at 61.

147 *Id.* at 96.

148 *Id.* at 130.

an offense.[149] It also recommended removing transfer of small amounts of marijuana for insignificant value from prohibition.[150] As he had promised, Nixon ignored the recommendations of the Commission. Instead of removing prohibitions on marijuana or rescheduling it, he commenced the War on Drugs.[151]

In doing so, President Nixon changed the fabric of the drug criminalization debate. The classification and criminalization of marijuana was now highly politicized, with science taking a backseat.[152] Time has revealed Nixon's reasons for retaining marijuana as a heavily restricted Schedule I drug in the face of his own hand-picked Commission recommending a contrary result. After Nixon's resignation in 1974, tapes containing 3700 hours of conversations taking place during his presidency were released.[153] One recorded conversation occurred between Nixon, Chief of Staff H.R. Haldeman, and Domestic Affairs Advisor John Ehrlichman. During the discussion, Nixon said, "[L]et's look at the strong societies. The Russians. . . . Do you think the Russians allow dope? Hell no. . . . You see, homosexuality, dope, *immorality* in general: These are the enemies of strong societies."[154] Nixon's purpose was a moral one: he sought to root out marijuana users because what they were doing, in his view, was immoral by itself, regardless of the harm it actually caused to society.

Today, marijuana retains its place on the list of Schedule I drugs.[155] The DEA, with principal responsibility for reclassification, has recently chosen to keep marijuana in Schedule I.[156] Its reasoning is that marijuana does not have an accepted medical use, justifying its place in the Schedule I cate-

149 *Id.* at 152 ("Possession of marihuana for personal use would no longer be an offense . . . .").

150 *Id.* ("Casual distribution of small amounts of marihuana for no remuneration, or insignificant remuneration not involving profit would no longer be an offense.").

151 *See* Bilz, *supra* note 145, at 123.

152 *See* BONNIE & WHITEBREAD, *supra* note 124, at 248 (stating that "use of the drug had so easily been translated into a political symbol," "politics would continue to dominate the rhetoric," and "fact-finding was irrelevant to [the] outcome").

153 Evan Thomas, *The Untapped Secret of the Nixon Tapes*, ATLANTIC (July 29, 2014), http://www.theatlantic.com/politics/archive/2014/07/the-untapped-wealth-of-secrets-in-the-nixon-tapes/374868/.

154 *May 13, 1971, Between 10:30 AM and 12:30 PM: Oval Office Conversation 498-5: Meeting with Nixon, Haldeman and Ehrlichman*, COMMON SENSE FOR DRUG POL'Y, http://www.csdp.org/research/nixonpot.txt (last visited Apr. 7, 2017) (emphasis added); *see also May 26, 1971, Between 10:03 AM and 11:35 AM: Oval Office Conversation 505-4: Meeting with Nixon and H.R. "Bob" Haldeman*, http://www.csdp.org/research/nixonpot.txt (last visited Apr. 7, 2017) (Nixon: "You know it's a funny thing, every one of the bastards that are out for legalizing marijuana is Jewish. What the Christ is the matter with the Jews, Bob, what is the matter with them?").

155 21 U.S.C. § 812(c)(10) (2012).

156 Carrie Johnson, *DEA Rejects Attempt to Loosen Federal Restrictions on Marijuana*, NPR (Aug. 10, 2016), http://www.npr.org/2016/08/10/489509471/dea-rejects-attempt-to-loosen-federal-restrictions-on-marijuana.

gory.[157] The federal government's perpetuation of the status quo runs contrary to the shifting of the status quo in favor of legalizing medical marijuana for the benefits it provides.[158] Although the DEA does not espouse a retributive purpose in its total proscription on marijuana use, marijuana's placement and early retainment in Schedule I must be attributed, in large part, to retributive morality.

C. Appeals Courts Encounter the Question of Free Will

On a few occasions, appeals courts have addressed whether drug users can be penalized for prescribing or consuming drugs. In *Linder v. United States*, the Supreme Court avoided a reading of the Harrison Act that would illegalize the prescription of small amounts of narcotics to addicts to treat withdrawal symptoms.[159] The Court opined that addicts are "diseased" and "proper subjects for . . . treatment."[160] As such, it held that ambulatory treatment was "in the course of professional practice," exempting doctors' narcotic prescriptions from the control of the Harrison Act.[161] Viewing addicts as afflicted rather than moral agents implied the addict's lack of freedom in the matter. In *Robinson v. California*,[162] decades later, the Court resurrected *Linder*'s idea that addicts are diseased and in need of treatment rather than subjects of moralistic criminal punishment. In that case, a California statute made it a crime for a person to be addicted to narcotics.[163] The Court likened proscribing addiction to illegalizing mental illness, leprosy, and the common cold.[164] Citing *Linder*, it held that the Fourteenth Amendment's ban on cruel and unusual punishment was violated because punishing addiction was tantamount to punishing illness, something contracted "innocently" and "involuntarily."[165]

About a decade later, the Court of Appeals for the District of Columbia Circuit discussed the merits of a federal drug crime defendant's "free will" defense in *United States v. Moore*.[166] This case provides an example of the flawed reliance on free will to maintain the validity of drug laws. Defendant Moore was charged with possession of heroin under a federal statute.[167] The Government stipulated that Moore was addicted to heroin.[168] Though Moore admitted to being addicted to the drug, he claimed to have never

157 *Id.*
158 *See supra* note 123 and accompanying text.
159 268 U.S. 5 (1925); *see also supra* notes 106–12.
160 *Linder*, 268 U.S. at 18.
161 *Id.* at 20.
162 370 U.S. 660 (1962).
163 *Id.* at 660.
164 *Id.* at 666.
165 *Id.* at 667.
166 486 F.2d 1139 (D.C. Cir. 1973) (per curiam).
167 *Id.* at 1142.
168 *Id.*

engaged in drug trafficking.[169] On these grounds, he sought to assert a common-law defense of "free will": since he had become overpowered by addiction, Moore claimed that he could not be held criminally liable for simple possession of a drug that so strongly compelled him to consume it.[170] Interestingly, the court only upheld the conviction of Moore by a 5-4 majority.

The majority framed the problem by stating that "[a]ppellant attempts to justify only the acts of possession and purchase of narcotics, both illegal, and both prohibited because if successfully prohibited they would eliminate drug addiction," ostensibly beyond the appellant's control.[171] It shot down the conclusion that lack of free will, due to the compulsion to take drugs, could clear Moore of criminal liability. The court reasoned that there are two factors that define "self-control (or absence thereof)": "the physical craving to have the drug"[172] on one hand, and the addict's "character" or "moral standards" on the other.[173] The court granted that "[d]rug addiction of varying degrees may or may not result in loss of self-control, depending on the strength of character opposed to the drug craving."[174] In stating so, the court implied that, sometimes, the strength of one's character should be sufficient to overcome physical addiction.

The court attributed the loss of self-control to the refusal of a person, through good morals and high character, to fight off the urge.[175] It implies that this fight between the person's moral side and his physical addiction is his chance to exercise free will by staving off the compelling urge to take drugs. The court held that the mental act resulting in the possession or purchase of drugs, the succumbing of morality to physical craving, is free, and therefore reprehensible. Once morality fails and compulsion takes over, the resulting nonfree acts are punishable. Essentially, the court recognized that once an addict-to-be succumbs to the craving, he loses control. Yet, since he let his morality fall by the wayside in the first place, he acted freely and can properly be held criminally liable. The court's second argument against the free will defense was that recognizing a "lack of free will" defense would lead to an illogical result. It reasoned that the bank robber, taking money by force to fund his drug addiction, is clearly less in control if driven to such extreme measures.[176] If courts refuse to punish simple possessors because of their lack of freedom, they could not punish such bank robbers, as they possess even less free will. Even if there is no free will for the addict,

169 *Id.*

170 *Id.*; *see also id.* at 1145 ("The gist of appellant's argument here is that 'the common law has long held that the capacity to control behavior is a prerequisite for criminal responsibility.'" (quoting the appellant's brief)).

171 *Id.*

172 *Id.*

173 *Id.*

174 *Id.*

175 *See id.*

176 *Id.* at 1146.

the thinking goes, it would force the conclusion that the bank robber is similarly nonfree.

The D.C. Circuit's characterization of addiction exhibits the fundamental misunderstanding of addiction and the decisionmaking process in general. First of all, it assumes that a person's moral character may be sufficient to overcome physical cravings.[177] Otherwise, those who were powerless to overcome addiction would be thought nonfree, and per the court's own reasoning, not responsible. As this Note has argued, multiple forces external to the person, acting on and with the person's neurons, determine her behavior.[178] In the addiction context, a panoply of forces including genetic predisposition towards addiction, powerful environmental factors, and early recreational use distort the decisionmaking process in a way sufficient to make someone become an addict.[179] Once a person becomes addicted to narcotics, the chemicals she consumes have an immensely compelling force on her behavior.[180] Conscious experience changes, the chemicals create a pleasure response in the brain, and the brain is wired to seek repetition of activity that causes pleasure.[181] So under scrutiny, the court's two-factor theory of addiction is flawed. It reasoned that "[i]n the case of any addict there are two factors that go to make up the 'self-control' (or absence thereof) which governs his activities, and which determines whether or not he will perform certain acts."[182] The two factors (the addict's moral character and the physical craving to take drugs[183]) are underinclusive. This approach, in its misguided simplicity,[184] fails to account for the multitude of antecedent conditions sufficient to cause one to become an addict. This case got wrong what *Linder* and *Robinson* got right: that in the legal context, as well as scientific reality, addicts are properly viewed as nonfree, afflicted with an illness outside of personal control.

177 *See id.* at 1145.

178 *See supra* Part II.

179 *See* NAT'L INST. ON DRUG ABUSE, *supra* note 13, at 8–9 (stating that "[t]he influence of the home environment, especially during childhood, is a very important factor. Parents or older family members who abuse alcohol or drugs, or who engage in criminal behavior, can increase children's risks of developing their own drug problems," "[s]cientists estimate that genetic factors account for between 40 and 60 percent of a person's vulnerability to addiction; this includes the effects of environmental factors on the function and expression of a person's genes," and "early use is a strong indicator of problems ahead, including addiction").

180 *See id.*

181 *Id.* at 17–18.

182 *Moore*, 486 F.2d at 1145.

183 *Id.*

184 *See id.* ("Putting it in mathematical terms, if the addict's craving is 4 on a scale of 10, and his strength of character is only 3, he will have a resulting loss of self-control and commit some illegal act to acquire drugs, perhaps only an illegal purchase and possession.")

D. *Examples in Sentencing*

The sentencing context is another in which the assumption of free will arises. The Model Penal Code places a heavy emphasis on retribution as an important end in sentencing criminals.[185] It instructs that sentences should be given as "proportionate to the *gravity* of the offense . . . and the *blameworthiness* of offenders."[186] While the word "retribution" is not used in the section,[187] the foregoing phrases demonstrate the same reliance on intrinsic moral wrongness of actions as justification for punishment. Under the MPC, people are to be punished, principally, for the evil inherent in their actions.[188] Florida's Criminal Punishment Code takes an even stronger stance: "The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment."[189] As such, the sentencing context provides another opportunity for adherents to a retributive model of justice to increase the number of drug offenders and inmates nationwide.

IV. The Cost of Free Will

In addition to the illogicality of retribution as a penal goal, enormous costs have been incurred in its name. While retribution was not the sole justification for the passage of laws proscribing drug use and distribution, at least one member of Congress admitted supporting the law to preserve "the moral fiber of our Nation."[190] Another's comments suggest that without lenient treatment of drug users, the bill was a "mere vehicle for moral indig-

185 The MPC provides:

> The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are: (a) in decisions affecting the sentencing of individual offenders: (i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders; (ii) when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in subsection (a)(i); and (iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(i) and (a)(ii) . . . .

Model Penal Code: Sentencing § 1.02(2)(a)(i–iii) (Am. Law. Inst., Tentative Draft No. 1, 2007).

186 *Id.* (emphasis added).

187 *See id.* Reporter's Note, cmt. 3 (indicating that the word "retribution" was intentionally omitted to avoid its "ideologically charged" connotations).

188 *See id.* § 1.02(2)(a)(i). *But see id.* § 1.02(2)(a)(ii) (stating that where *reasonably feasible*, utilitarian aims such as rehabilitation, deterrence, and incapacitation are to be used). This Note takes the position that those aims should be the principal aims, and that judges should not be able to eschew these goals in favor of retribution.

189 Fla. Stat. Ann. § 921.002 (West 2016).

190 116 Cong. Rec. S1159, at 1183 (daily ed. Jan. 26, 1970) (statement of Sen. Robert Byrd).

nation."[191] As such, the theory of retribution bears some responsibility for the epidemic of mass policing and incarceration of drug users and distributors. To start off, the War on Drugs has been extraordinarily costly to local, state, and federal governments. Combined, they have spent over one *trillion* dollars on policing and punishing drug offenders.[192] From arrest to adjudication, sentencing to incarceration, local, state, and federal governments spend fifty-one billion dollars per year.[193] Further, as recently as 2011, the Bureau of Justice Statistics reported that nearly half (48%) of federal prison inmates were serving time for drug offenses.[194] In 2014, the Federal Bureau of Investigation (FBI) estimated that there were a total of 1,561,231 arrests nationwide for drug offenses.[195] Of these, 83.1% were for possession only.[196] Of all drug arrests, 39.7% were for marijuana possession.[197] In 2014, in total, over 620,000 people were arrested for marijuana possession, which means more than one arrest per minute, every day.[198] Simple marijuana possession accounted for over 5% of *all* arrests nationwide in 2014.[199] The taxpayer money spent policing and adjudicating drug offenses could be spent rehabilitating drug offenders, or on public health, education, or entitlement programs.[200] Additionally, money spent enforcing drug laws could be spent on investigating, prosecuting, and incarcerating violent criminals.[201]

Taxpayers are not the only ones suffering at the hand of drug prohibitions. Communities have been decimated as a result of the lawlessness incumbent in black market narcotic trafficking.[202] In most contexts, people or businesses can have their disputes ruled on by a judge in a court of law. In the world of drug trafficking, disputes over drug deals escalate to violent confrontations because drug dealers have no legal recourse for complaints. Traffickers resort to their own law enforcement techniques, which involve

191 116 CONG. REC. H33603, at 33,616 (daily ed. Sept. 24, 1970) (statement of Rep. Robert Giaimo).

192 *Wasted Tax Dollars*, DRUG POL'Y ALLIANCE, http://www.drugpolicy.org/wasted-tax-dollars (last visited Apr. 7, 2017).

193 *Id.*

194 E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011 (2012), https://www.bjs.gov/content/pub/pdf/p11.pdf.

195 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2014, https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/persons-arrested/main.

196 *Id.*

197 *Id.*

198 Christopher Ingraham, *Every Minute, Someone Gets Arrested for Marijuana Possession in the U.S.*, WASH. POST (Sept. 28, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/09/28/every-minute-someone-gets-arrested-for-marijuana-possession-in-the-u-s/.

199 *Id.*

200 *See Wasted Tax Dollars*, *supra* note 192.

201 *See* GRAY, *supra* note 114, at 73 ("Every dollar spent on the investigation, prosecution, and incarceration of drug users and drug dealers is a dollar that cannot be spent on the investigation, prosecution, and incarceration of other criminals.").

202 *Id.* at 72 ("[T]he sale of large quantities of illicit drugs can be a dangerous activity that generates violent crime.").

intimidation and violence.[203] Also, drug dealers become violent with one another in competing for control over geographical markets.[204] Whole city blocks have been abandoned by police forces because drug traffickers have made the areas too dangerous to enter without heavily armed forces.[205] As a result, drug dealers create and enforce their own laws, victimizing women and children.[206] Finally, as a result of artificially high drug prices, drug users engage in criminal behavior to obtain the money to buy drugs.[207] The full-scale prohibition on drugs has thus led to a black market that creates dangerous conditions for communities. If drug laws were designed to promote social good, community health and safety may not have fallen by the wayside.

V. The Solution

Retribution should be removed from criminal justice because it has proven illogical and costly. First of all, science suggests that its central assumption, free will, does not exist. Second of all, retributive passage and enforcement of drug laws come at enormous cost to taxpayers as well as communities. As such, if any drug laws are to pass muster, they must be crafted according to alternative penological goals. Rehabilitation, deterrence, and incapacitation are referred to as "consequentialist"[208] or "utilitarian"[209] because they are ends-based, ordaining the use of punishment as a means to the end of social good. These goals, contrasted with retribution, are properly characterized as forward-looking instead of backward-looking.[210] Rather than punishing offenders by focusing on the prior wrongs they committed, utilitarian goals punish offenders insofar as the punishment will benefit the offender and society in the future.

One of those goals is rehabilitation, which calls for the personal improvement of the offender and reduction in the probability of his future offending.[211] Rehabilitative measures can build offenders' skills in the marketplace and treat psychological problems as well as drug addiction.[212] This makes rehabilitation an important penal goal in the sentencing of drug offenders. Drug addicts should be conceived of as "diseased and proper sub-

203 *Id.* ("Sellers of illicit drugs . . . are left to their own enforcement techniques, which almost always include intimidation and violence.").

204 *Id.* ("[T]here is the substantial violence between rival drug dealers. There is both the immediate violence of a shooting or knifing and also, on occasion, the danger that one dealer will try to ruin another by deliberately putting out a bad batch of drugs in his rival's territory.").

205 *Id.* at 73.

206 *Id.*

207 *Id.*

208 Alschuler, *supra* note 19, at 2.

209 Cotton, *supra* note 19, at 1316.

210 *See* Alschuler, *supra* note 19, at 2 ("Like the rest of law, criminal punishment should look forward, not backward.").

211 Cotton, *supra* note 19, at 1316.

212 *Id.* at 1316–17.

jects for . . . treatment."[213] For much of the nineteenth century, courts acknowledged rehabilitation as a vital goal in choosing sentences for drug offenders.[214] But with the dawn of the 1980s and the War on Drugs, rehabilitative sentencing measures were viewed by some as overly soft on criminals.[215] Since that time, the number of prisoners serving time for drug offenses has greatly increased.[216]

Despite the fact that the United States incarcerates a majority of nonviolent criminals, violence runs rampant in our jails and prisons,[217] which may suggest that violent tendencies are created in otherwise nonviolent offenders during incarceration. As such, inmates should receive treatment for their drug addictions and psychological problems in an environment that does not breed hostility.[218] One program, created by the San Francisco County Sheriff's Department, employed a rehabilitation-based model of incarceration that completely eliminated inmate violence.[219] In its Resolve to Stop Violence Project (RSVP), the San Francisco Sheriff's Department put violent inmates together in a dormitory. Each day, the inmates were instructed on recognizing the multiple factors that lead to repeat violence and criminal recidivism.[220] An open, conversational environment was fostered, and the inmates were kept under close supervision throughout the day.[221] As a result of the program, violent incidents went extinct.[222] Given the extremely compelling force of addiction and other harmful proclivities, inmates should be given such treatment-based sentences.[223] The foregoing program provides an example of how focusing on rehabilitating offenders benefits both the offenders and society by reducing violent tendencies.

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213 Linder v. United States, 268 U.S. 5, 18 (1925).

214 *See* Williams v. New York, 337 U.S. 241, 248 (1949) ("Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.").

215 Peter T. Elikann, *Book Review*, 88 MASS. L. REV. 112, 112 (2003) (reviewing JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT (2003)).

216 *See supra* Part IV.

217 Bandy Lee & James Gilligan, *The Resolve to Stop the Violence Project: Transforming an In-House Culture of Violence Through a Jail-Based Programme*, 27 J. PUB. HEALTH 149, 149, 153 (2005).

218 *See, e.g.*, Matt Stout, *DA Program Aims to Help Addicts: Middlesex Effort Could Be State's Largest*, BOS. HERALD (Nov. 30, 2016), http://www.bostonherald.com/news/local_coverage/2016/11/da_program_aims_to_help_addicts#join-conversation (discussing one Massachusetts district attorney's office's efforts to divert first-time drug offenders from jail to treatment programs).

219 *See* Lee & Gilligan, *supra* note 217.

220 *Id.* at 150.

221 *Id.* at 150, 153.

222 *Id.* at 153.

223 *See* NAT'L INST. ON DRUG ABUSE, *supra* note 13, at 7 ("[I]mpairment in self-control is the hallmark of addiction. Brain imaging studies of people with addiction show physical changes in areas of the brain that are critical to judgment, decision making, learning and memory, and behavior control. Scientists believe that these changes alter the way the brain works and may help explain the compulsive and destructive behaviors of addiction." (footnote omitted)).

Deterrence is another utilitarian penal goal, and it comes in two varieties. General deterrence uses punishment to discourage potential criminals from offending.[224] Specific deterrence seeks to persuade a particular offender from repeating after serving her sentence.[225] In the context of drug addicts, deterrence cannot have much use. The addict, whose brain and behavior are altered by the chemical agents in drugs, has enough reason to cease drug use. The cost of buying drugs, the painfulness of withdrawal symptoms, and general negative effects on the user would likely cause him to halt use if he could. But as argued, the force of addiction is so compelling that it overcomes deterrent factors like the possibility of being caught and charged with drug possession. But deterrence may well have a place in other areas of the law. Offenders who committed white collar crimes, for example, may more carefully weigh the consequences of their actions when determining whether to offend.[226] As a result, the knowledge of deterrence-based laws will be a factor that acts on the brain, hopefully a force causally sufficient to prevent offending.

Finally, the goal of incapacitation uses punishment to isolate especially dangerous offenders from society.[227] In the context of laws affecting nonviolent drug addicts, incapacitation has no place. Many people view incapacitation as a draconian, pessimistic penal goal, opting to believe that people can be rehabilitated, even sex offenders.[228] In the context of addiction, addicts violating drug laws to feed their addiction are best viewed as diseased and in need of treatment. While threats to themselves, addicts do not pose obvious threats to society. Accordingly, they should not be punished purely to isolate them from their communities. Due to the harshness of incapacitation, it should only be used to prevent the most violent offenders from the rest of society.

Conclusion

Shedding the belief in free will is a difficult leap. It is counterintuitive. After all, for the vast majority of decisions we make, we feel neither forced nor coerced. But the truth or falsity of determinism must not rest on our intuitive experience of decisionmaking, but on the principles of cause and effect, given by biology, chemistry, and physics. It does not take an expert in neuroscience or an advanced philosopher to understand the argument: our brains give rise to our consciousness and thus to our decisionmaking process. And our brains, like all other matter, operate according to specific scientific principles. As such, the input the brain receives works with our neural machinery in a way sufficient to determine our conscious state at any given

224 Cotton, *supra* note 19, at 1316.

225 *See id.*

226 *See, e.g.*, Government's Sentencing Memorandum at 12, United States v. Madoff, No. 1:09-cr-00213, 2009 WL 1899501 (S.D.N.Y. Apr. 3, 2012).

227 *See* Cotton, *supra* note 19, at 1316.

228 *See generally* Paul Eric Stuhff, Comment, *Utah's Children: Better Protected than Most by New Civil Sex Offender Incapacitation Laws?*, 24 J. Contemp. L. 295 (1998).

time. There is no room for an unfixed, unbounded, free decisionmaking process.

The lack of free will in human experience causes clear problems for criminal punishment. Free will is a central assumption of retribution; without the free choice to tear the moral fabric of society, one's actions cannot warrant that she receives punishment. Historical evidence suggests that the enforcement of drug laws like the Harrison Act and the classification of marijuana as Schedule I occurred for retributive purposes. The Controlled Substances Act and state drug laws have worked in tandem to effectuate mass incarceration and proliferation, rather than reduction, of violence stemming from drug trafficking. For its invalidity and cost, retribution should not be used as a penological goal in the creation of laws or sentencing. Utilitarian goals, aimed at the social good, should be used in retribution's place.