Resurrecting the Causal Theory of the Excuses

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Anders Kaye*

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I. INTRODUCTION

This Article seeks to resurrect the "causal theory"1 of the criminal law's excuses. While the causal theory fits some of our most important and most humane moral intuitions in a way that no other theory of the excuses does, it gets little play in current criminal theory.2 This Article argues that criminal theory should give causal theory a second look.

Causal theory is one of several competing explanations of the criminal law's excuse doctrines. It makes two general claims. The first is that the criminal law presumes that some human acts are caused by forces beyond the actor's control. The second is that the criminal law adheres to the "control principle,"3 the moral principle that actors cannot be blamed for conduct caused by forces beyond their control. According to causal theory, these two premises explain a host of the

2. Although causal theory is currently disfavored, it was not always so. See, e.g., Stephen J. Morse, Psychology, Determinism, and Legal Responsibility, in The Law as a Behavioral Instrument 35, 41 (Gary B. Melton ed., 1985) (commenting on the "popularity" of the "causal determinist theory" of the excuses at the time).
3. Regarding this term, see infra note 17.
criminal law's defense doctrines—including, for example, the involuntary act doctrine, the irresistible impulse defense, and the duress defense. The law excuses actors under these doctrines, causal theory says, because it presumes that (1) the excused conduct is caused by forces beyond the actor's control and (2) such conduct is not blameworthy.

There is much that is intuitively appealing about causal theory: in our daily lives, nearly all of us act as though we believe that some acts are caused by forces beyond the actor's control, and most of us have the impulse to forgive actors in such cases. Nevertheless, causal theory has few supporters in current criminal theory. Instead, most contemporary explanations of the criminal law contend that it takes the "compatibilist" view that actors can be blamed for conduct caused by forces beyond their control. Since compatibilism holds that causation is irrelevant to excuse, compatibilist criminal theory must show that there are other valid criteria for deciding who to excuse and who to blame, and much of contemporary excuse theory has been preoccupied with trying to work out just what those criteria are. The result is that causal theory has fallen into desuetude.

This Article aims to breathe some life back into causal theory. My efforts will take two forms. First, I will refute an allegedly devastating critique of causal theory. Second, I will argue that compatibilism has several normatively disturbing features that have not been sufficiently acknowledged in current criminal theory. There is other work that could be done to advance causal theory—causal theory's descriptive account of the excuses could be developed in more detail, and current compatibilist theory could be critiqued for its descriptive failings—but the two arguments I offer here seem to me the ones most essential to jump-starting interest in causal theory. Causal theory cannot even get off the ground if it is pinned by a seemingly-devastating critique; that critique must be addressed. And once that has been done, exposing the most disturbing features of the compatibilist view seems to me the best way to motivate exploration and development of the causal theory alternative.

Part II of this Article sets the stage by describing the causal approach and giving concrete examples of its application to the criminal law's defenses. One goal of this Part is to bring out some of the ways in which causal theory is intuitively appealing. Parts III and IV turn

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4. It is possible to avoid the choice between causal theory and compatibilism by embracing consequentialism, but few theorists take this approach. "Virtually all criminal law theorists agree that moral fault is at least a necessary condition of blame and punishment." Stephen J. Morse, The Moral Metaphysics of Causation and Results, 88 CAL. L. REV. 879, 879 (2000). In mainstream, contemporary criminal theory, the two dominant approaches to moral fault are causal theory and compatibilism, and most theorists are compatibilists.

5. I return to this issue in the Conclusion. See infra Part VI.
to the leading critique of causal theory. As Part III explains, the critics’ focus on the theory’s depiction of the criminal law as “partially deterministic.” In the critics’ view, partial determinism is so unpalatable—philosophically and psychologically—that the criminal law could not possibly tolerate it. As a result, causal theory’s account of the excuses is simply implausible. Part IV refutes this critique by showing that it is entirely plausible that the criminal law is partially deterministic. As I explain, determinism and causal accounts of human action trigger deep and justifiable anxieties in us. We manage these anxieties by taking a wary, “provisional” attitude toward causal accounts of human conduct, evaluating them on a case-by-case basis that does not lend itself to generalizations about the causes of human conduct. The result is a prudent partial determinism. If the argument in this Part is correct, there is nothing implausible about causal theory’s depiction of the criminal law as partially deterministic.

Part V turns its attention to compatibilist theory. The purpose of this Part is to reawaken interest in causal theory by exposing some of the most disturbing features of the currently-favored compatibilist approach. Here, I emphasize that compatibilist theory depicts the law as inconsistent with the compelling moral intuition that blame should not be a lottery; that the compatibilist criminal law’s criteria for blame are artificial—they make themselves look more appropriate than they are through a sleight of hand; that the compatibilist version of the law embraces moral complacency where moral engagement is called for; that the compatibilist version of the law is disappointingly unresponsive to advances in our understanding of human behavior; and that the compatibilist criminal law is suspiciously resistant to criticism of social conditions. Insofar as causal theory’s criminal law does not share these dismaying features, causal theory is an appealing alternative to the compatibilist approach, and deserves more attention and elaboration than it has received.

Taken together, then, the arguments in Parts IV and V make this Article’s primary point—that the move away from compatibilist theory and toward causal theory is both possible and appealing. Part VI, the Conclusion, briefly considers what the next steps should be in the resurrection of the causal theory.

II. CAUSAL THEORY DEFINED

Causal theory is a way of explaining the criminal law’s excuse doctrines. It does not maintain that all of the criminal law’s excuses have causal explanations—on the contrary, it recognizes that the criminal law may provide excuses to actors for other sorts of reasons (including, for example, consequentialist reasons). But it holds that the criminal law always excuses caused conduct and that this helps explain some of the criminal law’s excuses. This Part sets out in more detail the two
key claims that causal explanations of criminal law excuses make and provides examples of causal explanations of particular excuses.

A. The Claims Made by Causal Theory

Causal explanations of criminal law excuses entail two essential claims. The first is that the excuse accepts a "causal account" of a certain class of acts—that is, an account according to which those acts are caused by forces beyond the actor's control. The second is that the excuse expresses the "control principle"—that is, that it excuses the acts it excuses precisely because they are caused by forces beyond the actor's control.

1. The First Claim: The Excuse Accepts a "Causal Account"

To claim that an excuse accepts a "causal account" of a certain class of acts is to say that the excuse adopts a particular account of how the acts arise. Caused acts are, first of all, the products of causes. That is, they do not spring into existence from nothing; rather, they are born of prior events, forces and circumstances. Moreover, they are events that are the necessary or inevitable results of these causes. They are not arbitrarily or randomly related to the prior forces, and circumstances that give rise to them; rather, these prior events, forces, and circumstances dictate the form those events will take. A "causal account" of an act goes a step further. For the purposes of this Article, a causal account of an act does not just describe an act as caused; it describes the act as caused by forces beyond the actor's control. The distinction is important, because there are some accounts of human action in which the human actor is the original cause of his own action. That is, there are accounts of human action in which the action is caused, but the cause is not beyond the actor's control. While such acts might be called "caused" acts, we more conventionally call them "free," and it seems obtuse to lump them in with acts that are

6. Some philosophers suggest that the necessitation formulation of causation is incompatible with the allegedly genuine randomness of quantum events and the like. They typically prefer a probabilistic model of the relationship between causes and effects. Penelope Mackie, Causality, in THE OXFORD COMPANION TO PHILOSOPHY 127 (Ted Honderich ed., 1995).

7. Michael Corrado, Automatism and the Theory of Action, 39 EMORY L. J. 1191, 1200 (1990) ("An event may be said to be caused if conditions prior to it were sufficient, causally, to bring it about. Conditions are causally sufficient if those conditions, together with the appropriate laws of nature, entail the occurrence of the event."). See also Mackie, supra note 6, at 127.

8. See also infra section IV.B.
caused by forces beyond the actor's control. Thus, we might say that acts arising from causes the actor does control have “free will accounts,” while acts arising from causes the actor does not control have causal accounts.

For those steeped in modern Western culture, causal accounts of human acts can have a strong intuitive appeal. Part of the reason for this is that they resonate with ideas of fate, necessity, destiny, and God's will that have been a part of Western culture since at least Homeric Greece. In modern times, causal accounts have found fertile soil in the natural sciences, from which they have taken the distinctive language of causation: “[h]eavily influenced by the methodology of the natural sciences, we are inclined to feel that we understand phenomena by perceiving mechanistic connections between cause and effect;” this is the “dominant perspective” “in Anglo-American culture.”

More recently, psychological and sociological sciences have added to the momentum of causal accounts of human acts by asserting the subservience of human motivation to “unconscious conflicts.”

9. As Lenn E. Goodman notes, there appears to be a family relationship between “logical” and “causal” accounts of human conduct and “theological determinism,” insofar as they have in common “images and appeals to external causation,” “whether of stars and lots and destinies . . . or of genes, hormones and Oedipal conflicts in the more recent mythologies.” Lenn E. Goodman, Determinism and Freedom in Spinoza, Maimonides, and Aristotle, in Responsiblity, Character, and the Emotions 107, 128 (Ferdinand Schoeman ed., 1987).

Some strains of popular and scholarly theology have viewed “everything that happens as the unraveling of God's essence, a process whose existence and character are necessary and immutable.” Bernard Berofsky, General Introduction to Free Will and Determinism 2 (Bernard Berofsky ed., 1966); see also Derk Pereboom, Introduction to Free Will vii (Derk Pereboom ed., 1997) (commenting that the determinist view sometimes is driven by “theological concerns that require all events to be causally determined by God”). The determinist tendency can also be seen at work in those strands of Christian theology that have grappled with the conundrums posed by God's perfect knowledge of all that will happen. Ilham Dilman, Free Will: An Historical and Philosophical Introduction 4 (1999); see also Thomas Hobbes, Of Liberty and Necessity, in Hobbes and Bramhall on Liberty and Necessity 41 (Vere Chappell ed., 1999) (Rejecting determinism “destroys both the decrees and the prescience of God Almighty. For whatsoever God has purposed to bring to pass by man as an instrument, or foresees shall come to pass, a man, if he have liberty . . . from necessitation, might frustrate and make not to come to pass; and God should either not foreknow it and not decree it, or he should foreknow such things shall be as shall never be, and decree that which shall never come to pass.”).

10. George P. Fletcher, Rethinking Criminal Law 434 (2000) (adding that such thinking is “prominent” and “of growing influence”). See also Berofsky, supra note 9, at 3 (tracing science-influenced determinism to Empedocles, Heraclitus, and the Stoics); Pereboom, supra note 9, at vii (tracing deterministic thinking to science).

11. John Hospers, What Means This Freedom, in Free Will and Determinism, supra note 9, 26, at 26 [hereinafter Hospers, Freedom]. Hospers returned to this theme frequently. See, e.g., id. at 27 (“[c]ountless criminal acts are thought out in great
behavioral conditioning, cultural, social, and peer influences, and situational scripts.

There is a tendency to equate causal thinking with absolute determinism, according to which "every event has a cause," "every event and state of affairs is 'causally necessitated' by preceding events and states of affairs," and the application of the universal laws of nature to the state of the universe at any given time dictates inexorably what the state of the universe will be at all future times. Many people find this sort of absolute determinism intuitively appealing. Even so, causal accounts of particular human acts do not necessarily entail detail; yet the participants are (without their knowledge) acting out fantasies, fears, and defenses from early childhood, over whose coming and going they have no conscious control); id. at 31 (commands from the unconscious are "exactly like the action of a powerful external force; [they are] just as little within [our] conscious control"); John Hospers, Free Will and Psychoanalysis, in Freedom and Responsibility 471 (Herbert Morris ed., 1961) [hereinafter Hospers, Free Will] ("[T]he domination of the conscious by the unconscious extended, not merely to a few exceptional individuals, but to all human beings . . . . The unconscious is the master of every fate, and the captain of every soul."). The phenomenon of the "repetition compulsion" has struck some observers as especially significant—see, e.g., the discussion in Dilman, supra note 9, at 166–67.

Though they did not use the vocabulary of modern psychological theory, earlier theorists foresaw the ascendance of causal psychological explanation. Kant wrote that "we search through the agent's empirical character until we come to its sources. We locate these in bad upbringing, evil company, partly also in the wickedness of natural makeup that is insensitive to shame . . . ." Immanuel Kant, Critique of Pure Reason 550 (Werner S. Pluhar trans., 1996). Hume pointed out that our social conduct is universally based on expectations about the behavior of others, expectations that he contended must be based on implicit beliefs in some sort of psychological determinism. David Hume, An Enquiry Concerning Human Understanding 56–57, 60 (Antony Flew ed., 1988) (describing a multitude of situations in which we apparently ground assumptions about other human actors in unstated psychological determinism).

13. Barofsky, supra note 9, at 4.
15. See, e.g., Berofsky, supra note 9, at 6 ("A determinist, then, is a person who believes that all events (facts, states) are lawful in the sense, roughly, that for any event e, there is a distinct event d plus a (causal) law which asserts, 'Whenever d, then e."); Peter van Inwagen, The Incompatibility of Free Will and Determinism, in Free Will, supra note 14, 46, at 47 (defining determinism as "the conjunction of these two theses: (a) For every instant of time, there is a proposition that expresses the state of the world at that instant. (b) If A and B are any propositions that express the state of the world at some instants, then the conjunction of A with the laws of physics entails B."). For more colorful commentary see Derk Pereboom, Determinism al Dente, in Free Will, supra note 9, 242, at 250 ("[G]iven physicalist determinism, Ms. White's crime is inevitable given the state of the universe 100 years before she was born and the natural laws.").
16. "The basic determinist thesis that every event is caused is intuitively appealing and widely held." Vuoso, supra note 1, at 1664 n.15.
absolute determinism. A causal account portrays a particular act as "determined" for the actor who performed it—insofar as it maintains that the act was made inevitable by the interaction of events, forces and circumstances beyond the actor's control—but it makes no claim as to whether other or all acts are determined acts.

A causal explanation of an excuse, then, contends that the excuse accepts a causal account of a particular class of acts. That is, it claims, the excuse treats that class of acts as caused by forces beyond the control of the actors involved.

2. The Second Claim: The Excuse Expresses the Control Principle

A causal explanation of an excuse also makes a second kind of claim: it claims that the doctrine excuses the acts it excuses precisely because those acts are caused by forces beyond the control of the actors involved. That is, a causal explanation of an excuse holds that the excuse expresses the "control principle."17

17. Despite the ubiquity of the principle at issue here, there is some uncertainty as to what to call it. It is sometimes associated with "hard determinism" (the view that moral responsibility is inconsistent with absolute determinism and that absolute determinism is true, Roy C. Weatherford, Compatibilism and Incompatibilism, in The Oxford Companion to Philosophy, supra note 6, at 144), and with libertarianism (the view that moral responsibility is inconsistent with absolute determinism, and that absolute determinism is false, Pereboom, supra note 9, at vii), but its association with these views can be misleading: on the one hand, the control principle does not go so far as to take a position on the truth of absolute determinism; on the other hand, the control principle goes further than the view that responsibility is inconsistent with absolute determinism (insofar as it negates responsibility for conduct caused by forces beyond the actor's control even if absolute determinism is false). Thus, the principle at issue here is simply that actors are not responsible for conduct caused by forces beyond their control.

While the control formulation I use does echo the language in some recent scholarship, see, e.g., Corrado, supra note 1, at 916; Dana K. Nelkin, Moral Luck, in The Stanford Encyclopedia of Philosophy § 1 (Spring 2004 ed.), at http://plato.stanford.edu/archives/spr2004/entries/moral-luck, other terminology is available. For example, the term "origination" is sometimes used to describe what is required for moral responsibility: an actor must "originate" his act. See, e.g., Corrado, supra note 7, at 1192 (actions are not voluntary unless they "originate with the agent"); Scott W. Howe, Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold and Loeb, 79 Iowa L. Rev. 989, 1019–21 (1994) (using origination lingo); Pereboom, supra note 15, at 245 n.7 (approving origination terminology). Those who lay out this "origination principle" have so far treated it as though it is congruent with the control principle. I do not use this terminology only because the term "origination" is rich with unexplored connotations that might obscure the equivalence between control and responsibility.

The other problem with using the term "control principle" is that the term "control" is used in a different way in some contemporary theories of moral responsibility. Some contemporary theories hold that a person may have "control" over his or her conduct—in a morally relevant sense—even if his or her conduct is
The control principle is one of several competing approaches to determining moral responsibility in modern Western moral theory. It is generally agreed that an actor is not morally responsible for his actions unless he acted "freely," but there has been tremendous controversy as to whether conduct can be considered "free" if it is dictated by forces beyond the actor's control. The control principle holds that there can be no responsibility without control: "if an action results from a deterministic causal process that traces back to factors beyond the control of the agent, he is not morally responsible for the action"; if an actor is to be blamed for his conduct, he "should be ultimately responsible . . . 'ultimately' in the sense that nothing for which [he

dictated by forces beyond his or her control. See, e.g., Corrado, supra note 1, at 947–48 (discussing Fischer and Ravizza's theory of moral responsibility, which holds that actors are responsible for their acts when they are in control of them, but distinguishes "regulative control" from "guidance control," and defines guidance control such that it does not exclude the actor's conduct being caused by forces beyond the actor's control); see also John Martin Fischer & Mark Ravizza, Responsibility and Control: A Theory of Moral Responsibility (1998). This seems to me a pale sort of control, and it is not the kind envisioned in this Article; perhaps the two kinds of control can be distinguished by calling the pale sort of control "immediate control" and the control at issue in this Article "ultimate control" or, as Susan Hurley suggests, "regressive control." Susan Hurley, Luck, Responsibility and the "Natural Lottery," 10 J. Pol. Phil. 79, 82 (2002) (Regressive control is "control of X's causes as well as of X itself."). If so, the intuition here could be called the "ultimate control principle" or the "regressive control principle." These formulations seem unnecessarily unwieldy, so I have chosen the less wordy version.

18. Tomis Kapitan, Free Will Problem, in The Cambridge Dictionary of Philosophy 326, 326 (Robert Audi ed., 2d ed. 1999) ("most who ascribe moral responsibility acknowledge some sense in which agents must be free in acting as they do"); Pereboom, supra note 9, at vii ("Traditionally, it has been assumed that moral responsibility requires us to exercise some type of free will to generate our actions"); Roy C. Weatherford, Determinism, in The Oxford Companion to Philosophy, supra note 6, at 195 ("Typically, we believe that agents are morally responsible only for those acts that are freely chosen and within the power of the agent to decide."); id. at 292 ("In everyday life, we suppose that free actions in some sense or other are the only ones for which we can hold persons morally responsible."); Vuoso, supra note 1, at 1664 (Criminal responsibility only applies where the actor "exercised his free will.").

19. Pereboom, supra note 15, at 246. As Martha Klein and others have recently highlighted, participants in the debate about blame have long conflated two very different ways of stating the principle at issue here. The better way of stating it is in terms of control: a person is not responsible for his conduct if some force beyond his control caused his conduct. The other way of stating it is to say that a person is not responsible for his conduct if he "could not have done otherwise." This second formulation is a red herring; what adherents of this view really care about is not what the actor "could have" done, but, rather, why he did what he actually did. See Martha Klein, Determinism, Blameworthiness, and Deprivation (1990); Corrado, supra note 7, at 1203–08; Robert Kane, Reflections on Free Will, Determinism, and Indeterminism, para. 4–5, 8, in Determinism and Freedom Philosophy Web Site (Ted Honderich ed.), at http://www.ucl.ac.uk/~uctytho.htm (last visited Dec. 15, 2003); Pereboom, supra note 15, at 250–52.
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was) not responsible should be the source of [his] [conduct]. If agents' acts are caused by factors for which they are not responsible, then how can they be morally responsible for acting as a result of those factors? In short, conduct caused by forces or circumstances the actor does not control is not sufficiently "free" to justify attributions of moral responsibility.

The control principle is intuitively appealing. As Steven Morse has written, "Many people seem to believe that 'real' responsibility is impossible unless people have freedom in the strongest sense. Unless, that is, people have genuine 'contracausal' freedom, are 'prime movers unmoved' and the like . . . they cannot be 'really' responsible." In the same vein, Michael Moore observes that "Common sense often adopts . . . the French proverb, 'tout comprendre c'est tout pardonner.' This common sense urges that we should excuse whenever we come to know the causes of behavior." Not surprisingly, then, this view has been extensively defended in the academic philosophical debate about responsibility, where it is associated with two longstanding philosophical traditions—libertarianism and "hard" determinism—and with

20. Klein, supra note 19, at 51. Kane uses a formulation very similar to this one. Kane, supra note 19, para. 4–5 ("[T]o be ultimately responsible for an action, an agent must be responsible for anything that is a sufficient reason (condition, cause, or motive) for the action's occurring.").

21. Klein, supra note 19, at 50. See also Corrado, supra note 1, at 915 ("If there is an unbroken causal history for a certain action, extending back to some event over which the agent had no control, the agent is not (morally) responsible for that action"); Corrado, supra note 7, at 1201, 1225 ("I am responsible only for those things that are up to me; to be responsible, I must have some say in the matter. But I have no say in the matter of caused actions"); for an actor to be responsible for an act, "the volition . . . that leads to the behavior must be the first event in a causal chain . . . and must itself be uncaused."). Similar formulations use the term "origination" to describe what is required. See Corrado, supra note 7, at 1192, 1212 ("Actions are not voluntary [that is, sufficiently free to justify blame] unless they are up to the actor, and actions that are caused by prior conditions are not up to the actor . . . [T]he action must originate with the actor, and not be the outcome of a causal chain that extends outside of him; that can be called the requirement of spontaneity."); Weatherford, supra note 17, at 144 ("The incompatibilist defends his view by arguing that a free act must involve more than [the absence of coercion]—it must involve the freedom to choose called origination.").

22. Steven J. Morse, Excusing and the New Excuse Defenses: A Legal and Conceptual Review, 23 CRIME & JUST. 329, 345 (1998). See also Corrado, supra note 1, at 916 (defining causal theory and stating that causal theory "certainly has some natural appeal," follows from a "principle many find hard to reject"); Thomas Nagel, Moral Luck, in FREE WILL, supra note 14, 174, at 179 (explaining the control principle as "intuitively plausible," at least "prior to reflection"); Vuoso, supra note 1, at 1661 (noting "widely held belief that a disadvantaged socio-economic background can mitigate or eliminate responsibility").

23. Moore, Causation, supra note 1, at 1091.

24. Regarding the connection between the control principle and libertarianism, see supra note 2. Libertarianism is discussed more fully infra section III.A.
the pervasive intuition that attributions of responsibility should not turn on "moral luck." 26

A causal explanation of a criminal law excuse contends that the excuse expresses this control principle: the excuse excuses a class of acts for the reason that acts caused by forces beyond the actor’s control are not blameworthy acts.

B. Causal Explanation and the Criminal Law’s Excuses

Many of the criminal law’s excuses seem susceptible to causal explanations. They involve conduct that lends itself to at least a rudimentary causal account, and they excuse the apparently caused conduct, just as the control principle would require. Taken in isolation, excuses with these characteristics can be explained in a variety of ways, but the broader pattern invites the conclusion that there is a correlation between causal accounts and excuse in the criminal law, just as causal theory would predict.

A common example is the involuntary act doctrine. 27 While this doctrine encompasses a diverse array of situations, 28 it is associated with certain paradigmatic cases, and these cases seem to involve self-evidently “caused” conduct. The classic cases are those in which a person’s movements do not involve even the organized contraction of the person’s muscles, as when movements are produced by the application of external forces to the human body (e.g., the person’s arm flails because it is buffeted by a gust of wind, or because another, stronger person has seized it and thrown it forward), 29 and cases in which the person’s movements do involve the person’s muscles, but do not involve her thoughts even in the loosest sense, as when movements are

25. Regarding the connection between the control principle and hard determinism, see supra note 2.
26. See, e.g., Nagel, supra note 22, at 24–38; Nelkin, supra note 17.
27. For standard descriptions of the doctrine, see MODEL PENAL CODE § 2.01 (1985); Joshua Dressler, Understanding Criminal Law 83–97 (3d ed. 2001); 2 Paul H. Robinson, Criminal Law Defenses 259–74 (1984). See also Corrado, supra note 7, at 1191–92; Denno, supra note 12, at 275–78.
28. Conduct has been labeled involuntary in cases in which the defendant’s body was moved by another person, or by a reflex action, or because of convulsions associated with epileptic or hypoglycemic seizures, or while the actor was asleep or unconscious, or while the actor was under the influence of posthypnotic suggestion. 2 Robinson, supra note 27, at 262; Moore, Causation, supra note 1, at 1106.
29. Denno cites as the classic example the case where A pushes B such that B collides with C, knocking C into a precipice. B’s act was not voluntary. Denno, supra note 12, at 361 (quoting 2 James Fitzjames Stephen, A History of the Criminal Law of England 100 (1883)). For other similar examples, see Fletcher, supra note 10, at 802; Sanford H. Kadish, Excusing Crime, 75 Cal. L. Rev. 257, 259 (1987) (“discussing cases of physical compulsion . . . or being pushed”); Michael S. Moore, Responsibility and the Unconscious, 53 S. Cal. L. Rev. 1563, 1567, 1572 (1990).
caused by brute biological events (e.g., the person’s arm flails because she is having an epileptic seizure, or because someone has tapped her elbow with a mallet and triggered a reflex action). Because the physical and biological phenomena in these paradigmatic cases are beyond the control of the person moved, and because they dictate her “act” in the same way a puppet master dictates his puppet’s “acts,” it is easy to give these acts a causal account. And once these “acts” have been given this causal account, it is easy to imagine that this account explains why the law excuses them: with causes this brute and obvious, it feels natural to blame the cause instead of the actor.

Other defense doctrines seem to call out for causal explanations too, although it is fair to say that efforts to sketch out the actual causal mechanisms involved generally have been quite crude. Several defenses, for example, have been interpreted as treating us as puppets to reflex-like impulses or drives. In the case of the irresistible impulse prong of the insanity defense, the impulse springs from psychological disease or defect that somehow enables “unconscious desires” or emotional urges to overwhelm inhibition or self-control and produce uninvited action. Because the actor himself has had no say in either the existence of the disease or defect or the condition that interacts with it to trigger the impulsive conduct, the conduct seems susceptible to a “causal account.” And again, once the causal account has been articulated (even in this crudely schematic way), the possibility that causation is the reason for excuse emerges: now we feel the urge to blame defects in biological and psychic structure rather than the actors themselves.

30. Michael Moore uses examples such as these. Moore, supra note 29, at 1567, 1572. See also Kadish, supra note 29, at 259; Jeffrie G. Murphy, Involuntary Acts and Criminal Liability, 81 ETHICS 332, 333 (1971); id. at 334 (“when Prince Mishkin, in an epileptic seizure, flails his arms and breaks a valuable vase”). Dressler describes one subset of these cases as ones that involve “the human brain” but not “the human mind.” DRESSLER, supra note 27, at 86.

31. The irresistible impulse defense is available “when a mental disease or defect impairs an actor’s ability to control his conduct to such an extent that he can no longer be fairly held accountable for it.” 2 ROBINSON, supra note 27, at 301. See also DRESSLER, supra note 27, at 349–50 (various formulations).

32. 2 ROBINSON, supra note 27, at 303 (“The most dramatic instances of mental disorders that impair control are those that impair consciousness and thus appear to allow unconscious desires to control behavior . . . . This occurs in dissociative disorders, and may manifest itself as somnambulism, fugue, and multiple personality.”).


34. Morse notes the temptation to think that “a powerful desire—really, really, really wanting something—[should] be assimilated to the patellar reflex.” Morse, supra note 22, at 361. See also Parsons v. State, 2 So. 854, 859 (Ala. 1887) (Impulse “destroy[es] the power of the victim to choose between the right and the wrong.”), quoted in Kahan & Nussbaum, supra note 33, at 337.
Duress, the (rarely recognized) necessity excuse, and even self-defense have also sometimes been cast in terms of reflexive impulse—though now the impulses at issue are said to spring from something healthy and universal, namely, the survival drive or the “fight-or-flight” instinct. Hints of this idea are said to be present in the writings of Bacon, Kant, Hobbes and—more vividly—Blackstone, who wrote that self-protective acts are “excusable from the great universal principle of self-preservation, which prompts every

35. The essence of the defense is that “an actor is excused for his conduct . . . if as a result of . . . being in a state of coercion caused by a threat that a person of reasonable firmness in his situation would not have resisted . . . the actor is not sufficiently able to control his conduct so as to be held accountable for it.” 2 Robinson, supra note 27, at 348.

36. The necessity excuse has generally only been recognized implicitly rather than explicitly in Anglo-American law. Ideally, it tracks the duress defense, except that it arises when natural (rather than human-made) circumstances put the actor in danger. Fletcher, supra note 10, at 828–29. See also Dressler, supra note 27, at 310–11 (using term “situational duress”); 2 Robinson, supra note 27, at 177 (“There is some authority for a duress excuse for conduct coerced by other than a human source.”) Kant gave one famous example: two shipwrecked sailors, in danger of drowning, struggle for a board that can keep one of them afloat. One takes the board from the other, and the second sailor dies. Fletcher, supra note 10, at 819–20 (citing Immanuel Kant, Introduction to the Science of the Right 52–53 (W. Hastie trans., A.M. Kelley 1974). Another famous example arises in the caselaw: a prisoner is in danger of being killed—by a raging fire or by murderous fellow inmates—and saves himself by breaking out of the prison. People v. Lovercamp, 118 Cal. Rptr. 110, 116 (1974); Dressler, supra note 27, at 307–10. In such cases, courts tend toward “doctrinal approximations of necessity as an excuse.” Fletcher, supra note 10, at 829. The rationale given is that the actor’s conduct springs from “the instinct to save one’s life,” an instinct that produces “overwhelming pressure,” or “irresistible force.” Id. at 819–20 (citing Kant, supra, at 52–53).

37. Self-defense is, of course, generally classified as a “justification” rather than an “excuse,” meaning that it exculpates because the self-defensive conduct is seen as desirable from a moral or utilitarian standpoint, rather than because the circumstances make it an excusable wrong. See 2 Robinson, supra note 27, at 69–70; see also Fletcher, supra note 10, at 857–58, 860–61. In general, justifications are not amenable to causal explanations. But it has not always been so clear that self-defense is a justification rather than an excuse. In fact, self-defense “suffers from . . . a commixture of purpose—to justify and to excuse.” Fletcher, supra note 10, at 855. See also Dressler, supra note 27, at 232–34. It “is torn by its conflicting and uncertain premises”—“Is it a justification based on the premise that thwarting aggression is the proper thing to do?” or is it an excuse based on the necessity of preserving life and limb?” 1 Robinson, supra note 27, at 109. Thus, self-defense can be seen as having excuse-like features, and the possibility of a causal explanation is not so jarring.

38. Fletcher, supra note 10, at 819 (attributing the view that fear of death could cause “overwhelming pressure” to act to Bacon and Kant).

39. Thomas Hobbes, Leviathan, pt. II, ch. 27 (1651) (speculating that conduct could be “compelled” by “the terror of present death” to the extent that it would not be effectual to “oblige a man to abandon his own preservation”), quoted in Dressler, supra note 27, at 276.
man to save his own life preferably to that of another," and that the violent self-defensive reaction is both natural and as fixed as law—"it represents the ‘primary law of nature.’"\textsuperscript{40} Again, these seem to be causal accounts of human conduct: the actor has had no say in either the creation of the mechanism that produces the impulse (the survival drive, genetically programmed) or the conditions (the threat to life) that interact with it to trigger the impulse. And again, once these causal accounts are brought out, it is easy to imagine that the law excuses such acts, because that is what the control principle requires.

An impulse theory of a more ambiguous sort appears to animate the provocation doctrine.\textsuperscript{41} The core idea is that certain experiences can trigger a temporary state of heated passion during which self-control is suspended and conduct is driven by an irresistible need for vindication. The origin of the impulse remains murky: where the survival-drive defenses might be said to point to impulses generated by a desirable feature of the human mechanism (the self-preservatory instinct), and the irresistible impulse doctrine seems to point to impulses produced by idiosyncratic flaws, the law treats the source of provoked impulses as at once both normal and tragic. Thus, it is said that the defense is an "indulgence to the frailty of human nature,"\textsuperscript{42} a "concession to human weakness" and "the infirmity of passion,"\textsuperscript{43} and "the legal system's recognition of the weaknesses or infirmity of human nature."\textsuperscript{44} At least on one view, these are causal accounts of the provocation doctrine: they portray the actor as though he were programmed—perhaps unfortunately—to respond to certain trigger-

\begin{itemize}
\item[40.] 3 William Blackstone, Commentaries On The Laws Of England 3–4 (1979); see Hobbes, supra note 39, ch. 27 (self-defensive action as something "to which he is prompted by nature"—something the actor cannot willfully resist—"which no prudential motives are strong enough to restrain"); 4 Blackstone, supra, at 27 (Certain threats to life can produce "a . . . species of defect of will," "a constraint upon the will whereby a man is urged to do that which his judgment disapproves.").
\item[41.] The provocation defense reduces a killing to manslaughter if it "is [1] committed in the 'heat of passion' produced by [2] an 'adequate provocation,' and . . . [3] occurs without sufficient 'cooling time.'" Kahan & Nussbaum, supra note 33, at 305; see also Dressler, supra note 27, at 490. The "passion" at issue need not be anger; it can be "any violent, intense, high-wrought, or enthusiastic emotion," and can include "fear, jealousy, and wild desperation" among others. Id. The Model Penal Code formulation is somewhat different. Model Penal Code § 210.3(1)(b) (1985) (reducing murder to manslaughter where an offense was the result of extreme mental or emotional disturbance having a reasonable explanation or excuse).
\item[42.] Kahan & Nussbaum, supra note 33, at 314 (quoting People v. Maher, 10 Mich. 212, 218 (1862)).
\item[43.] Model Penal Code § 210.3, cmt. at 55.
\item[44.] State v. Cook, 3 Ohio Dec. Reprint 142, 144 (1859).
\item[45.] Dressler, supra note 27, at 536.
\end{itemize}
ing events by venting his rage, indignation, hurt, or jealousy.\textsuperscript{46} Again, the conjunction of these causal accounts with legal excuse invites the conclusion that the doctrine excuses in accord with the control principle, just as causal theory predicts.

Thus, many\textsuperscript{47} of the criminal law’s defense doctrines appear susceptible to causal explanations. They excuse kinds of conduct that lend themselves to causal accounts (though these causal accounts have only been worked out in rudimentary ways\textsuperscript{48}), and in each case it

\begin{itemize}
\item \textsuperscript{46}Kevin Jon Heller, \textit{Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases}, 26 AM. J. CRIM. L. 1, 24 (1998) (“These explanations of why provoked acts should be excused are all explicitly determinist.”).
\item While the causal conception of provocation has important features in common with the causal conception of the survival drive defenses, it is worth noticing some of the ways in which the causal mechanism of provocation is different from that behind the survival-drive defenses. Note, for example, that the survival-drive defenses revolve around the core idea of conduct driven by an urgent demand, a need that cannot conceivably be addressed at some later time. In this sense they are, at least on their own terms, rational—they posit a need and then a conduct that follows logically from it. Provocation defenses, on the other hand, do not seem quite so rational. The trigger of the defense—the provoking act—has ended; the provoked person cannot undo, prevent, or forestall it. “Whatever harm was inflicted through the victim’s misconduct has already occurred.” Andrew von Hirsch & Nils Jareborg, \textit{Provocation and Culpability}, in \textit{Responsibility, Character, and the Emotions} 241, 241 (Ferdinand Schoeman ed., 1987). Thus, the provoked person’s reaction does not seem to serve the same obviously instrumental function that the survival-driven actor’s reaction does. Perhaps, then, it seems less plausible that it is “caused.”
\item The sophisticated causal theorist, however, will point out that this distinction is based on a less-than-penetrating account of what drives the provoked person. It is true, of course, that no circumstance in his physical world demands an urgent response; but there is a psychological condition that does. The provoked person feels an overwhelming surge of emotion, emotion that seems to demand release; in the calculus of the psyche, the urgency of the demand for psychological release may be just as great as the demand for action is in a survival-drive scenario.
\item \textsuperscript{47}Causal accounts of other defenses have been suggested from time to time. Regarding the most important defense not thus far discussed—the cognitive prong of the insanity defense—see Stephen J. Morse, \textit{Brain and Blame}, 84 Geo. L.J. 527, 529 (1996) (noting that “claims of legal insanity are usually supported and explained by using mental disorder as a variable that at least in part caused the defendant’s offense,” but criticizing the causal account); Morse, supra note 22, at 339–40; Moore, \textit{Causation}, supra note 1, at 1108 (1985) (noting the theory that “insanity excuses because it causes criminal acts” insofar as mental illness can be a “propelling, uncontrollable power”) (citing State v. Pike, 49 N.H. 399, 441–42 (1869)). Regarding causal theory arguments for addiction as a defense, see Corrado, supra note 1. Michael Moore, criticizing the causal theory of the defenses, acknowledges that causal explanations have been suggested for “duress, necessity, provocation, addiction, entrapment, mistake of law, involuntary intoxication, and insanity.” Moore, \textit{Determinist Theory}, supra note 1, at 911.
\item \textsuperscript{48}The illustrative causal accounts offered here are rudimentary, and might be seen as placeholders for more sophisticated causal accounts. \textit{See infra} Part VI.
is intuitively appealing to conclude that the law excuses the conduct at issue precisely because that conduct is caused, just as the control principle requires. That there are several such doctrines adds credence to the notion that there is a correlation between causal account and excuse in the criminal law and, thus, bolsters causal theory.

III. THE CONTEMPORARY CRITIQUE

There is much about the causal theory of the excuses, then, that resonates with widespread intuitions about both human conduct and moral responsibility. It does not seem strange to say that human acts can be explained by pointing to causes beyond the actor’s control; nor does it seem strange to say that actors should not be blamed for conduct caused by forces beyond their control.

Nevertheless, contemporary legal theory rejects causal explanation of the criminal law’s excuses. According to contemporary theory, causal theory is vulnerable to a number of serious criticisms. The most important of these is that causal theory is too broad: if causal theory were correct, this critique maintains, every human act would be excused; since the criminal law does not excuse every human act, causal theory is an overbroad theory of the excuses. This common formulation of the critique, however, makes little sense, unless a more fundamental claim is also true—namely, that it is implausible that the criminal law endorses partial determinism. Thus, current theory’s most basic objection to the causal approach is that it portrays the criminal law as partially deterministic. This Part reviews the overbroadness critique, shows that it is rooted in a more fundamental objection to partial determinism, and brings out the critics’ reasons for this more fundamental objection.

49. Moore, Causation, supra note 1, at 1091 (“I shall urge that we must reject the causal theory of excuse. It [does not] describe... accurately the accepted excuses of our criminal law”); Moore, Determinist Theory, supra note 1, at 911; Morse, supra note 47, at 527 (“Causation is not an excuse.”); Morse, supra note 22, at 347 (“Determinism or its lack is never the real reason we excuse or hold people responsible.”); id. at 349 (“Determinism is... the most... confused general explanation for specific excuses.”); Samuel H. Pillsbury, The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility, 67 IND. L.J. 719, 729 (1992) (“The criminal law generally rejects excuses based on causal accounts of criminality”); see also DRESSLER, supra note 27, at 211–12 (noting objections to causal theory). But see Corrado, supra note 1 (arguing for causal explanation of our attitudes toward addiction); Corrado, supra note 7 (arguing for causal explanation of involuntary act doctrine).

50. There is also a secondary critique, which is that the causal theory cannot account for the corrugated contours of the excuse doctrines. This critique typically assumes that causal theory is limited to simplistic causal accounts of human acts. I return to this issue, briefly, in the conclusion. See infra Part VI.
A. The “Overbroadness” Formulation

The current critique of causal theory typically proceeds by asserting that causal theory is too broad. If causal theory is true, say the critics, then the criminal law should excuse all conduct. Since the criminal law does not excuse all conduct, causal theory cannot be true.

Many prominent criminal theorists have laid out this argument. Michael Moore, for example, says that if the causal theory is true, it is hard to see why everyone is not excused for all actions. Causal theory might contribute to an argument for radical reform of our criminal law by the elimination of any liability to punishment, but it is hard to see how it could serve as a theory of the existing excuses of criminal law.51

Stephen J. Morse says something similar: “If causation were an excuse, no one would be responsible for anything,” and “society would not be concerned with moral and legal responsibility and excuse.”52 Sanford Kadish contends that “[e]xplanations are not excuses. Otherwise, there would be no basis for moral responsibility in any case where we knew enough about the person to understand him. And that would mean every case, because ignorance about a person could hardly stand as a justification for blaming him.”53 And, coming at the same issue from a slightly different angle, George Fletcher explains that the criminal law cannot incorporate such explicitly causal defenses as the rotten social background defense, because such defenses would “lead[] us into the cul-de-sac of environmental determinism,” with the intolerable result that “the theory of excuse would begin to absorb the entire criminal law” and “we should have to abandon the whole process of blame and punishment.”54 In short, these theorists maintain, if the causal theory were true, the criminal law would excuse everyone. Since the criminal law does not excuse everyone, the causal theory is overbroad.

53. Morse, supra note 47, at 532. He illustrates by positing that “the behavior of legally crazy people is no more or less determined by the laws of the universe and antecedent events than the behavior of people without disorders.” Morse, supra note 22, at 349.
55. Fletcher, supra note 10, at 801. See also Joshua Dressler, Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits, 62 S. CAL. L. REV. 1331, 1380 (1989) (Criminal law cannot excuse conduct for being caused by social adversity because “causation alone . . . cannot be the basis for excusing, for if a person were to be excused whenever his criminal conduct was caused by some factor over which he had no control, all crime would be excusable. All crime, like all other behavior, is an effect of earlier causes.”); Pillsbury, supra note 49, at 732 (approving the rejection of defenses based on socioeconomic background, reasoning that “if causation excuses, it excuses all human behavior—because all behavior is caused,” and this “contradicts the human commitment to choice and responsibility”).
B. The Underlying Objection to "Partial Determinism"

To the causal theorist, the overbreadness formulation is puzzling. After all, there is nothing about the combination of the causal theorist's two basic claims—that the criminal law accepts causal accounts of certain acts, and that the criminal law adopts the control principle's view that caused acts must be excused—that mandates universal exoneration.

The trick to this puzzle is that the proponents of the overbreadness formulation amend one of the causal theorist's fundamental propositions. They replace the proposition that the criminal law presumes causal accounts of certain acts with the proposition that the criminal law presumes causal accounts of all acts. Once the causal theorist's second claim has been rewritten this way, the overbreadness analysis makes perfect sense, for then it is certainly true that the criminal law cannot excuse acts that have causal accounts unless it excuses all acts. Once causal theory has been amended in this way, causal theory is indeed overbroad.

This explains why current critics call causal theory overbroad, but it raises another question: why do the critics replace the proposition that the criminal law accepts causal accounts of particular acts with the proposition that it presumes causal accounts of all acts? This is a brazen revision: what justifies it? The answer is that the critics of the causal theory find it entirely implausible that the criminal law would take the position that some, but not all, human acts are caused by forces beyond the actor's control. Thus, the critics amend causal theory in order to save causal theory from the embarrassment of postulating a partially deterministic criminal law.

The propriety of this maneuver, of course, depends upon the presumption that it is implausible that the criminal law would endorse partial determinism. Critics of the causal theory arrive at this presumption from more than one direction. One line of analysis seems to offer a psychological argument: it holds that once one starts down the road of causal description, one cannot help but slip into absolute determinism. "A causal orientation," the argument goes, "issues often... in a deterministic view of human conduct. If our only way of comprehending human conduct is to trace it back to its causes, we are inclined to think of all human acts as the product of circumstances." On this argument, then, it is implausible that the criminal law is par-

56. Michael Corrado describes this amending phenomenon. Corrado, supra note 1, at 917. For a vivid example, see Moore, Determinist Theory, supra note 1, at 914–15 (discussed more fully infra note 67).
57. Out of the frying pan and into the fire, of course.
58. Fletcher, supra note 10, at 434. See also id. at 435–36 ("Some people who advance the methodology of the natural sciences might be committed to a deterministic philosophy of human conduct").
tially determinist, because, due to some aspect of our psychology, some “inclination” born of our epistemic limitations or biases, once we open ourselves to causal accounts, we are unlikely to stop until we have explained everything in causal terms.

Another line of attack holds that partial determinism is so philosophically unimpressive that no one could seriously endorse it. Critics in this vein maintain that it is “wildly implausible” that causal accounts of particular acts can be true without absolute determinism also being true. Once you have conceded that rules of causation apply to events in this universe, they say, exempting some human acts from the influence of those rules is absurd: “If this is a causal universe then it strains the imagination also to believe that some human behavior somehow exits the causal stream.” It follows that partial or “selective determinism” is a spurious “dodge”: “Determinism is true or not ‘all the way down’”; “to speak of being partly determined or partly free makes as much sense as to speak of being partly pregnant”; it is “metaphysically preposterous.” The thrust of these arguments is that partial determinism is “philosophically impure,” “unpalatable,” the sort of notion that is only endorsed by those who are de-

59. Morse, supra note 47, at 533. Moore uses precisely the same “wildly implausible” formulation. Moore, Determinist Theory, supra note 1, at 914. See also Vuoso, supra note 1, 1667 (“untenable”), 1669 (“incoherent”), 1677-78 (“utterly mysterious,” “totally unsatisfactory and unhelpful,” “does not seem to be even intelligible”).

60. Morse, supra note 47, at 533; Morse, supra note 22, at 351. Moore puts it this way:

[H] is it not extraordinary to think that part of our most basic metaphysical picture of what the universe is like—in terms of causal relations—should have no application to persons? Is it not extraordinary to think that agents who can clearly cause changes to occur in the world are themselves uncaused?

Moore, Causation, supra note 1, at 1112. See also Howe, supra note 17, at 1016 (stating that “a characterization of the human agent as acting at the beginning of a causal chain seems an artificial exemption from the natural order”).


62. Morse, supra note 22, at 349.

63. Moore, Causation, supra note 1, at 1114–16 (Moore applied this critique to degree determinism in particular, but he would likely extend the same sentiment, if not in quite the same formulation, to all forms of partial determinism.). In related contexts, Moore suggests the terms “gerrymandering,” id. at 1135, and “halfway house[.]” Moore, Determinist Theory, supra note 1, at 918.

64. Morse, supra note 22, at 349.


66. Moore, Causation, supra note 1, at 1113. There is something almost aesthetic about Moore’s complaint here. The same sort of seemingly aesthetic revulsion can be seen elsewhere. See, e.g., P.F. Strawson, Freedom and Resentment, in FREE WILL, supra note 14, 59, at 75 (“Would it not be grotesque to think of the development of the child as a progressive or patchy emergence from an area in
cluded or who have not followed their own views through to the finish line.

What these psychological and philosophical arguments have in common is that they give us reason to doubt that we—or our criminal law—think in partially determinist terms. If they are correct, the critics' amendment to causal theory makes sense. A causal theorist who tries to portray the criminal law as partially determinist is working with an embarrassingly implausible model. Any sensible causal theorist would accept the critics' amendment and agree that if the criminal law believes any acts are caused by forces beyond the actor's control, it must believe all acts are caused by forces beyond the actor's control. The critic merely assumes the sensible causal theorist, and amends the theory accordingly. And once the causal theory is amended, it is a simple matter to show that the causal theory is overbroad, and therefore false.

The crux of the leading critique of causal theory, then, is the claim that it is implausible that the criminal law is partially deterministic. It is this claim that makes the allegation of overbroadness coherent. If this claim is true, causal theory must fail, despite its intuitive appeal. But is the critics' claim about partial determinism true? Is a partially determinist criminal law really implausible?

IV. "PROVISIONAL DETERMINISM"—A PLAUSIBLE PARTIAL DETERMINISM

In this Part, I argue that a partially deterministic criminal law is plausible—and, indeed, likely. If I am right, then the leading critique of the causal theory is false, and causal theory need not be abandoned.

The first section of this Part shows that the argument against partial determinism has been overstated by the current critics. They are right that partial determinism is philosophically problematic; but the critics' claim that a partially determinist criminal law can be dismissed as implausible is undermined by the persistence of robust libertarian theories in contemporary philosophy and popular common sense. The next two sections of this Part make the case for a partially determinist criminal law. I argue that it is entirely plausible that we ground our criminal law in partial determinism—despite partial de-

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67. Thus, for example, Moore amends Norval Morris's degree determinist causal theory, saying "the upshot of all this is that there is no defensible version of selective determinism. Morris must thus give up the [selective determinism] premise. Yet if this is done, then those who subscribe to Morris's first premise, the determinist theory of excuse, are thrust into an uncomfortably cynical position . . . . the conclusion is inevitable that everyone should be excused." Moore, Determinist Theory, supra note 1, at 914–15.
terminism's problematic features—because we are deeply anxious about absolute determinism, and, therefore, typically adopt what can be called a provisional attitude toward causal accounts of human conduct. By saying that we take a provisional attitude toward determinism, I mean that, while we acknowledge that acts can be caused, we resist absolute determinism and evaluate causal accounts as they come to us, one by one. Justifiable prudence makes us provisional—and thus partial—determinists.

A. How the Critics Overstate the Case Against Partial Determinism

Contemporary criminal theorists confidently assert that it is implausible that the criminal law endorses partial determinism. This argument is, to say the least, overstated. For one thing, it takes a cavalier attitude toward the philosophical plausibility of partial determinism, an attitude not warranted by partial determinism's status in contemporary philosophy. For another, it ignores the persistence of libertarian thinking in popular "common sense"—which should be acknowledged in any attempt to explain the criminal law.

Regarding the philosophical argument, the critics express great certainty on matters about which there is, in fact, no consensus. The critics' position reflects only one side of an ongoing and robust debate. On the critics' side are the determinists, who hold that genuine human freedom is impossible. On the other side are the libertarians, who maintain that genuinely free human conduct is possible despite the seemingly ubiquitous operation of cause and effect.68 Libertarianism is not a fringe or crackpot view. By various accountings, the ranks of the libertarians have included Lucretius, William of Ockham, Thomas Reid, and William James, and, more recently, Richard Taylor, Roderick Chisholm, Randolph Clarke, and Robert Kane.69 Aristotle and Kant are sometimes added to the list as well.70

68. See Pereboom, supra note 9, at vii ("[A]ccording to libertarianism, we can choose to act without being causally determined by factors beyond our control, and we can therefore be morally responsible for our actions."); Watson, supra note 14, at 9 (A libertarian is an "incompatibilist who affirms freedom.").

69. See Kapitan, supra note 18, at 326 (Reid, Kane); Moore, Causation, supra note 1, at 1113 (William James); Pereboom, supra note 9, at vii–viii (Ockham, Reid, Chisholm, Clarke and Lucretius).

For representative libertarian arguments, see Roderick M. Chisholm, Human Freedom and the Self, in FREE WILL, supra note 14, at 24–45; Randolph Clarke, Agent Causation and Event Causation in the Production of Free Action, excerpted in FREE WILL, supra note 9, at 273–300; Kane, supra note 19; Richard Taylor, Determinism and the Theory of Agency, in DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE 224 (Sidney Hook ed., 2d ed. 1968).

70. Taylor suggests that both Aristotle and Kant may be read as endorsing agent causation, and thus libertarianism. Taylor, supra note 69, at 224, 228.
Libertarians conceive of human freedom in different ways. The most influential branch of contemporary libertarian philosophy,\textsuperscript{71} agent-causal theory,\textsuperscript{72} holds that there are two forms of causation relevant to human experience. One is the "event causation" that has been so heavily emphasized by modern natural sciences and that we usually envision when we discuss cause and effect; the other is "agent causation," a property or power of an agent by which the agent can bring about—originate—events that were not dictated by prior forces and circumstances.\textsuperscript{73} It is the existence of this second sort of causation that makes genuinely free human action possible. It makes each of us capable of being a "prime mover unmoved," such that "we cause certain events to happen, and nothing—or no one—causes us to cause those events to happen."\textsuperscript{74}

It is agent-causal theory that has provoked the charges of "absurdity" and "panicky metaphysics" so often invoked by the critics of causal theory. But, as the agent-causal theorists and other, nonlibertarian philosophers have pointed out, the seeming oddness of agent causation may flow from the difficulties posed by causation and freedom generally, rather than from failings of agent-causal theory in particular. As Chisholm reminds those who question how an agent can "cause" an event, no one has yet supplied any satisfactory explanation.

\textsuperscript{71} In addition to agent-causal theory (the leading form of libertarianism, discussed in the text above), there are other forms of libertarianism. Some libertarians, for example, hope to find a basis for genuinely free human conduct in the alleged indeterminacy of the physical universe. Lucretius foresaw such arguments when he theorized that atoms swerve in arbitrary ways, and that such arbitrariness might unmoor the human mind from necessity. See Pereboom, \textit{supra} note 15, at 252–53 (citing \textsc{Lucretius, De Rerum Natura}, 2.216–293 (W.H.D. Rouse trans., 1982)). Modern theorists in this vein typically point to quantum theory and/or chaos theory to support the contention that there is indeterminacy in the universe, and therefore room for human choice. Kane, \textit{supra} note 19, para. 34; Pereboom, \textit{supra} note 15, at 253, 255. As is frequently observed, however, it is a long leap from atomic or quantum indeterminacy to free will, both because randomness is not a foundation for responsibility (a person is not responsible for acts if they are random), and because indeterminacy at the quantum level may not translate into indeterminacy at any level that has a bearing on human conduct. Pereboom, \textit{supra} note 15, at 253, 255–56.

\textsuperscript{72} The term "agent causal theory" is from Pereboom, \textit{supra} note 9, at vii–viii.

\textsuperscript{73} Watson, \textit{supra} note 14, at 10 (Agent-causal theory distinguishes "two kinds of 'causation': causation by events, and causation by agents"; agent causation is "causation of a unique kind."). Chisholm calls event causation "transeunt causation" and agent-causation "immanent causation." Chisholm, \textit{supra} note 69, at 28.

Taylor, Chisholm, and Clarke, among others, lay out variations of this two-tiered scheme. See Chisholm, \textit{supra} note 69, at 43–55; Clarke, \textit{supra} note 69, at 273–300; Taylor, \textit{supra} note 69, at 224. See also Corrado, \textit{supra} note 7, at 1226 (discussing agent-causal theory).

\textsuperscript{74} Chisholm, \textit{supra} note 69, at 32. \textit{See also} Pereboom, \textit{supra} note 9, at viii ("[F]reedom of the sort required for moral responsibility is accounted for by the existence of agents who, as substances, possess a causal power to make choices without being determined to do so.").
for how an event can cause another event either.75 (Indeed, Chisholm suggests that, if anything, we have better evidence that agents cause events than that events cause events, for our experiences of ourselves as agent causes are the model from which we have derived our concept of event causation).76 Coming at the same idea from the opposite direction, Clarke contends that “if it is possible for one kind of concrete particular, an event, to cause an event, but impossible for another kind of concrete particular, a substance [i.e., an agent], to cause an event, then there must be some reason, stemming from differences between particulars of these two kinds, why”;77 and “It is no good to claim here that the impossibility is self-evident . . . . the objection that a substance cannot be a cause requires some argument”—argument that has not, as of yet, been provided.78 Beyond these points about the general difficulties of causation theory, Gary Watson—who is not a libertarian—proposes that the difficulties posed by libertarianism may reflect problems with our understanding of who we are, rather than problems with libertarianism in itself: “Libertarianism may be obscure,” he says, “But . . . . that may be as much a charge against the central features of our self-conception as it is a charge against the philosophies that go by this name.”79 Thus, one observer comments, while “determinism may well be true, of course, it is also the case that we do not now know that it is true”;80 in this light, the libertarian “is not presently required by what he knows to give up his belief that people are responsible.”81

In the dispute between the libertarians and their critics, then, neither side has prevailed, despite their Herculean efforts. On the contrary, both sides robustly continue to churn out new arguments and new replies. If so, the claim that partial determinism is so philosophically unimpressive that the criminal law could not plausibly embrace it seems at least an exaggeration. Perhaps philosophers will some day make the case against partial determinism so powerfully that only crackpots will endorse it; but that day has not yet come. In the meantime, the claim that partial determinism is so philosophically

75. Chisholm, supra note 69, at 31.
76. Chisholm credits Reid for this argument. Id.
77. Clarke, supra note 69, at 299.
78. Id. at 282.
79. Gary Watson, Free Action and Free Will, 96 Mind 145, 169 (1987); see also id. (“controversy in these areas is controversy about a proper and defensible self image.”); id. (While it is possible that “free agency . . . is illusory,” or that compatibilism is true, it is also possible that “free agency is ineffable.”). Watson also defends agent-causation against “charges of ‘panic’ and ‘obscurity’” by pointing out that it may not be “any more empirically dubious than the idea that some events have a kind of nondeterminist explanation in which a reference to the agent, qua agent, is essential.” Watson, supra note 14, at 10.
80. Corrado, supra note 7, at 1208.
81. Id.
implausible that the criminal law could not possibly embrace it is itself implausible.

It is also surely relevant to any effort to explain the criminal law that most laypeople—and even most philosophers, when they have put aside their pens—generally conduct their daily lives in accord with the assumption that metaphysically free human action is possible. As Michael Corrado, who is sympathetic to causal theory, notes, "libertarianism . . . capture[s] pretty well one side of the ordinary view of things, the view that even philosophers hold when they are not at work."82 Indeed, even the critics of causal theory concede that in contemporary Western culture, libertarianism is the "common sense" view. Moore, a critic of partial determinism, acknowledges that "certain commonsense intuitions" favor degree determinism.83 George Vuoso, another critic, laments that "[l]ibertarianism is a significant part of the fabric of Western thought."84 And Ted Honderich, a determinist philosopher, writes that "almost all of us, at least in one great tradition of culture, do not in fact believe in determinism."85 In short, libertarians and critics alike do agree on one thing: whatever its philosophical status, libertarianism is influential among laypeople.

This is important if we are attempting to offer an accurate explanation for the contours of the criminal law. If those who draft and shape the law do not find genuinely free human conduct or agency causation "implausible" or "panicky"—if, indeed, they generally assume that libertarianism is true—then it is entirely plausible that the criminal law reflects this view too. Again, the critics' claim that a partially determinist criminal law is implausible seems like an overstatement.

82. Corrado, supra note 1, at 917. See also Pereboom, supra note 15, at 249 ("In making moral judgments in everyday life, we do not assume that agents' choices and actions result from deterministic causal processes that trace back to factors beyond their control. Our ordinary intuitions do not presuppose that determinism is true, and they may even presuppose that it is false."); Pereboom, supra note 9, at vii (libertarianism is "arguably" "the commonsense position"); Peter van Inwagen, The Mystery of Metaphysical Freedom, para. 29, excerpted in Determinism and Freedom Philosophy Web Site, supra note 19 ("[E]veryone really believes in metaphysical freedom, whether or not he would call it that name. . . . I am not disputing the sincerity of those philosophers who . . . have denied in their writings the reality of metaphysical freedom. I am saying rather that their beliefs are contradictory. [They are like] . . . the Japanese astronomer who was said to have believed, in the 1930s, that the sun was an astronomically distant ball of hot gas vastly larger than the earth, and also to have believed that the sun was the ancestress of the Japanese imperial dynasty.").

83. See, e.g., Moore, Causation, supra note 1, at 1115.

84. Vuoso, supra note 1, 1686; id. at 1679 n.56 (stating "actually I would agree with the claim that our traditional conception of moral responsibility is not a compatibilist one"; conceding that libertarianism is the traditional view).

Still, to say that partial determinism is more defensible than the critics claim is not to say that it is necessarily a good footing for the criminal law. On the contrary, to build the criminal law on a partially determinist theory would be to put faith in the possibility of forms of causation that no one has yet conceptualized in a concrete way. Thus, even if the critics of the causal theory overstate the case against partial determinism, they are right to point out the dangers and uncertainties it involves. It does seem unlikely that we would lay the foundation for our criminal law on such shaky ground without good reason. The question, then, is whether there is any good reason to ground the criminal law in partial, rather than absolute, determinism, despite the problems that doing so might entail. The next two sections address this question.

B. The Anxiety That Makes Us Partial Determinists

I argue that we—and our criminal law—do have good reason to be partial determinists: absolute determinism is deeply threatening to us, and even discrete causal accounts of particular human acts or kinds of behavior are dangerous. Thus, while causal accounts of human acts can sometimes be convincing, we take what can be called a provisional attitude toward such causal accounts. That is, we evaluate causal accounts of human conduct as they come to us, one by one, accepting some and rejecting others, and never reaching, let alone conceding, the truth of absolute determinism. This approach leaves us provisional—and thus partial—determinists.

This section sets out some of the reasons for our provisional attitude. Though there are surely many, I discuss three. The first has to do with the threat that absolute determinism poses to certain of our existential aspirations. The second has to do with the way causal thinking threatens to undermine our social and political lives. The third has to do with the way causal accounts of particular acts work: given our epistemic limitations, the causal accounts we encounter are always glaringly incomplete, such that we cannot endorse them without making anxiety-laden leaps of faith. Taken together, these anxieties give us good reason to take a provisional attitude toward causal accounts of human conduct, and thus to be partial, rather than absolute, determinists.

1. "Existential" Anxieties: Threats to Our Aspirations for Our Selves

"Determinism," it has been written, "can be a black thing . . . . It can . . . weigh on our existence like an incubus."86 Part of the reason
for this is captured in the recurring claims that in a determined world, man would be a cog in a rigid machine, or a machine himself, or a puppet or a worm wriggling on a fish-hook that he would be as helpless to influence his course in the world as a stone thrown through the air or falling rain and that, whatever he does, he is really no

14, at 1 ("We are sometimes struck (and some of us chronically) by the disquieting thought that free will is an illusion."). In a fairly ardent expression of this anxious attitude, Isaiah Berlin wrote that, were we to embrace determinism, "the change in the whole of our language, our moral terminology, our attitudes toward one another, our views of history, of society, and of everything else will be too profound to be even adumbrated . . . Our words—our modes of speech and thought—would be transformed in literally unimaginable ways." ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 113 (1969), quoted in HONDERICH, supra note 85, at 481.

87. "Spinoza . . . represents human beings as merely a small part of a huge machine that grinds on relentlessly. The motion of the machine goes through each of us, transmitted through the motion of the wheels within us . . . giving us the illusion that we do some of the moving." DILMAN, supra note 9, at 128. See also IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 118 (T. K. Abbot trans., 1996) (The so-called freedom we enjoy in the determinist universe is "at bottom nothing better than the freedom of a turnspit, which, when once it is wound up, also accomplishes its movements of itself.").

88. See, e.g. Watson, supra note 14, at 1 (In a determinist world "[w]e may seem like . . . machines"); Brand Blanshard, The Case for Determinism, in DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE, supra note 69, at 25 ("only a machine, a big foolish clock"); see also HONDERICH, supra note 85, at 66 (If we adopt determinism, "our state of feeling toward human actors is "related to our states of feeling toward machines."); Hospers, Free Will, supra note 11, at 465, (determinist freedom is the "freedom of the machine to stamp labels on cans when it has been devised for just that purpose"); Moore, Causation, supra note 1, at 1124 ("complicated bits of dumb clockwork"); Morse, supra note 52, at 64 ("We fear that we may simply be mechanisms. It is an ancient anxiety."); Thomas Pink, Holbach, Paul-Henri Thiry, Baron d', in THE OXFORD COMPANION TO PHILOSOPHY, supra note 6, at 371 (According to Holbach's determinism, "man is an organic machine.").

89. "He is like a puppet on a string." DILMAN, supra note 9, at 128 (characterizing Spinoza's conception of the person engaged in seemingly self-interested conduct); HONDERICH, supra note 65, at 13 (noting "thoughts that determinism . . . makes us puppets"); Blanshard, supra note 88, at 25 (describing "a Punch-and-Judy show . . . everything . . . mechanically regulated by wires from below"); Hospers, Free Will, supra note 11, at 466 (commenting on "the invisible wires inside him pulling him inevitably to do the thing he does"); id. at 468 (stating that "the analogy of the puppet whose motions are manipulated from behind by invisible wires, or better still, by springs inside, is a telling one at almost every point"); Watson, supra note 14, at 1 (In a determinist world "we may seem like puppets.").

More macabrely: man in a determinist universe is like a "poor dead thing mastered by man." F.H. BRADLEY, The Vulgar Notion of Responsibility in Connection with the Theories of Freewill and Responsibility, in ETHICAL STUDIES 1, 20 (1927), quoted in HONDERICH, supra note 85, at 97.

90. Hospers, Freedom, supra note 11, at 34 (describing human acts as "the wriggling of a worm on a fisherman's hook").

91. Spinoza used the thrown-stone metaphor to make a point about the illusion of free will, explaining that "if a stone thrown and flying through the air had consciousness, it would imagine that it was flying of its own free will." DILMAN,
more than an "earthquake[, an] epidemic[,]") or a "rattlesnake." These descriptions, run through with intimations of helplessness, degradation, and alienation, highlight that some of our most fundamental anxieties about determinism revolve around the threat determinism poses to our aspirations for ourselves. While these anxieties can be teased apart in various ways, one way to break them down is to say that they go to our aspirations for control, stature, and selfhood.

a. Loss of "Control"

Absolute determinism threatens a commonly cherished belief—the belief that we have some measure of control over the courses our lives take. This fear may be the one expressed by the common lament that determinism makes us "puppets."

At least in the context of modern Western culture, it is common to equate having control over one's fate with security and happiness, and to equate lack of control with insecurity and unhappiness. It is good to be "in control," to be "the boss," "to be in the driver's seat," to have your fate "in your own hands."\(^95\) It is bad to "lose control," "to be bossed around," to be a "helpless passenger," to have your fate "in someone else's hands." It is better to be the river than the flotsam,\(^96\) happier to be the puppetmaster than the puppet. We equate control with power, with protection from danger, and with satisfaction of desires. Lack of control means powerlessness, vulnerability, and dissatisfaction.\(^97\) Thus, we prefer to perceive ourselves as having control in and over our lives.

Determinism can seem to conflict with this aspiration. For one thing, determinism renders us unable to change whatever the future holds for us. The determinist universe is, as William James put it, an

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\(^92\) Watson, supra note 14, at 1 ("[I]n a different simile, our behavior is like the 'falling rain.'"). See also Bradley, supra note 89, at 25, quoted in Honderich, supra note 85, at 97 (Determinism takes "man to be free in no other sense than... running water.").

\(^93\) Pereboom, supra note 15, at 261.

\(^94\) See, e.g., Thomas Nagel, The View from Nowhere 123 (1986) (noting one ramification of determinism (and like doctrines) is that wrongdoers become indistinguishable from rattlesnakes in terms of blameworthiness).

\(^95\) Id. at 118 (using the notion of having our lives in our own hands to capture this anxiety).

\(^96\) Id. at 112 (using the flotsam metaphor to capture this anxiety).

\(^97\) As Thomas Nagel put it, if we "think of the possibility that all actions are causally determined... That conception, if pressed, leads to the feeling that we are... helpless." Id. at 110. The "objective view" that can arise from seeing the world in causal terms "produces a sense of impotence and futility." Id. at 111–12.
"iron block";98 it is hard and immutable. If it contains for us an unhappy fate, that fate cannot be avoided. If it contains dissatisfaction, we are doomed to dissatisfaction.99 If we are especially optimistic, we might imagine our lives as rollercoaster rides, and hope for a good ride; but even if we are optimists, we know that there is nothing we can do to change whatever outcome awaits. The determinist universe, then, leaves us utterly, frighteningly impotent. It makes a man "the sport of all that goes before him and is applied to him."100

We are likely to be especially sensitive to this loss of control when we think about the way it strips us of any say in the things our own bodies and minds do. This may be even more frightening than the denial of control over our fate, for this seems even more personal and violative. We occupy our bodies and minds; we are known to others through what we say and do; shouldn't our bodies and minds, at least, be up to us? Determinism seems to say "no." Whether my hand will press the key on the computer before me was written in stone before I was born; whether I will say "yes" or "no" to a proposition has already been decided. "Our very acts of volition," said Hospers, who articulated a Freudian determinism, "are but facades for the expression of unconscious wishes, or, rather, unconscious compromises and defenses."101 This "is not welcome news."102 On the contrary, it means

98. WILLIAM JAMES, The Dilemma of Determinism, in ESSAYS ON FAITH AND MORALS 145, 150 (1962) ("[T]he whole is in each an every part, and welds it with the rest into an absolute unity, an iron block, in which there can be no equivocation or shadow of turning.").

99. HONDERICH, supra note 85, at 129 ("Given the theory of determinism, my feeling that my life has so far not gone so well as I hoped cannot be dealt with by means of the thought that I have a certain radical capability of achievement in the future."); id. at 20 (Given a choice, we would prefer "futures that are not settled," for a settled future is one that we cannot improve.); JAMES, supra note 98, at 179 (the advantage of an indeterminate universe is that "the future may be other and better than the past has been"); Martha C. Nussbaum, Luck and Ethics, in MORAL LUCK 75 (Daniel Statman ed., 1993) (noting the "raw sense of passivity of human beings and their humanity in [the] world of nature, and a response of both horror and anger at the passivity," which the early Greeks grappled with); id. at 77 (suggesting that part of the appeal of Kantian ethics is that they posit a domain—the moral domain—in which we can retain control despite the apparent truth of determinism); Pereboom, supra note 15, at 258 ("One instinctive reaction to hard determinism is that if it were true, we would have no reason to attempt to accomplish anything—to try to improve our lives or the prospects of society—because our deliberations and choices could make no difference.") (Pereboom thinks this anxiety is misguided). See also William Barrett, Determinism and Novelty, in DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE, supra note 69, at 46 (articulating the related idea that "one of the main motives in the rebellion against determinism . . . [is] the desire for freshness, novelty, genuine creation—in short, an open rather than a closed universe").

100. The quote is from Clarence Darrow's closing argument in the Leopold and Loeb trial. See Howe, supra note 17, at 1008 (1994) (citing MAUREEN MCKERNAN, THE AMAZING CRIME AND TRIAL OF LEOPOLD AND LOEB 254 (1989)).

101. Hospers, Free Will, supra note 11, at 466.
that we are helpless to influence even the most personal expressions of our "selves."

The loss of control does not just make us vulnerable, it demeans us. I feel that I should have a "say in the matter." This is, after all, "my life." Nothing and no one can possibly care as much about how it goes as I do; nor can anyone know as well as I do whether and when it is going well. By rights, then, it seems as though I should have something to say about how it will proceed; yet determinism, depriving me of the capacity to "originate" anything in this life, seems to shut me out. Despite my investment in my life, I am put in the demeaning position of a spectator. My status is wildly out of whack with my investment. It is a galling indignity.03

Not surprisingly, then, we prefer "genuine" free will. The libertarian vision of the human actor as an originator posits that there is some part of us—our "will"—that is beyond the reach of the forces and circumstances around us, and thereby empowers us to disrupt the otherwise predictable and inexorable chains of causation. This is a less cruel vision: there is not quite as much to fear, nor quite as much indignity. In this light, anxiety about determinism—anxiety about being a puppet, or a cog in a machine, or a worm on a hook—can be construed as anxiety about the consequences of having no "control."

b. Loss of Stature

Strong currents in Western culture have long endorsed the view that to be human is to be something uniquely valuable, to have a special "stature" in the universe.04 Because this special stature has been bound up with the capacity for genuinely free choice, determinism threatens our special stature.

Our special stature has been yoked to our capacity for genuinely free choice in a variety of ways. In theological settings, it is often said that "free will" is a gift to man from God, and thus evidence that man has value in God's eyes. Early Christian theologians Augustine and

102. Id. Indeed, it is an invasion that can penetrate to the deepest and most private parts of ourselves: "we are not free with respect to the emotions that we feel—whom we love or hate." Id.

103. "What most affronts him . . . is the suggestion that he is only a machine, a big foolish clock that seems to itself to be acting freely, but whose movements are controlled completely by the wheels and weights inside, a Punch-and-Judy show whose appearance of doing things because they are right or reasonable is a sham because everything is mechanically regulated by wires from below." Blanshard, supra note 88, at 25. See also Sidney Hook, Necessity, Indeterminism, and Sentimentality, in Determinism and Freedom in the Age of Modern Science, supra note 69, at 189 ("One feels lessened as a human being if one's actions are always excused or explained away . . . . Our dignity as a rational human being . . . leads us to protest.").

104. Honderich, supra note 85, at 114.
Aquinas saw "free will . . . as a gift of God," and the view that free will is a "privilege" or "blessing" conferred on man by God continues to this day. Free will is more than just a token of God's esteem, though. It is also the thing that elevates us above all the rest of the mundane universe that surrounds us. This has been true in religious and secular circles alike. For example, both religious and secular discourse have expressed a need to distinguish man from the animals, and both have looked to our capacity for genuine choice as the thing that distinguishes us from the beasts that make up the animal kingdom. Our free will is also often seen as the thing that distinguishes us from the insensate, inanimate objects that make up the rest of the natural universe. It distinguishes us, for example, from machines: we and they both engage in complex and seemingly-purposeful activity, but only we do so by genuine choice. More fundamentally, free will distinguishes us from all the anonymous, inanimate matter that makes up the physical universe. "To have the power of origination would be to escape or rise over nature." It makes us "distinct in kind from the rest of what we experience, all of which is subject to causation." Our capacity to transcend nature in this way is "the fact which gives dignity to human existence." It has been "taken as one of the characteristics, the most important, separating us from animals and inanimate objects."

105. DILMAN, supra note 9, at 1. See also Berofsky, supra note 9, at 2 (noting St. Augustine's endorsement of free will).

106. Rachel J. Littman, Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will, 60 ALB. L. REV. 1127, 1133 (1997) (noting importance placed on free will by "various world religions"); id. at 1147 ("Judeo-Christian theory" and "Jewish thought" consider free will a "privilege" or "blessing" granted to man by God). See also TED HONDERICH, MIND AND BRAIN 176 (1988) ("Indeterminism have a source too in religious commitments or aspirations."); HONDERICH, supra note 85, at 5 (tracing resistance to determinism, in part, to "spirituality and residual religiousness," and to dedication "to the preservation of the human mystery"); id. at 114 (The status given us by our capacity for choice "has to do with a life true to the great reality asserted by religion.").

107. Taylor, supra note 69, at 226–27, 229 (using libertarian freedom as a basis for distinguishing humans from animals); see also DILMAN, supra note 9, at 1 (Augustine and Aquinas on free will as God's gift to man and on "the way we differ from the animals in our possession of it"). In this vein, one ardent libertarian derided Thomas Hobbes's compatibilist "liberty" as "a ridiculous liberty," "such a liberty as in brute beasts, as bees and spiders." J. Bramhall, A Defense of True Liberty, quoted in HONDERICH, supra note 85, at 90.

108. HONDERICH, supra note 106, at 176 ("Indeterminist theories are also owed to a more vague spiritual inclination to have the mental somehow above or beyond the ordinary physical universe, or really different in kind.").

109. Id. at 135.

110. Id. at 114.

111. Id. at 114.

112. Weatherford, supra note 17, at 910–11.
Absolute determinism threatens to gut these notions. If God did not give us genuine freedom, instead leaving us as enslaved to the chains of causation as any other part of the universe, then what proof is there that we have any special standing in His eyes? Likewise, if we do not enjoy genuine freedom, then there is little to distinguish us from the brutes, no way to differentiate us from clocks and can-stamping machines,113 and no way to draw a line between us and infinite ocean of mindless matter. “A man would be another and a lesser thing, a thing far smaller in significance, if he lacked choice.”114 In the end, we are forced to face the possibility that what makes us seem “special” is not some unique and valuable feature, but, rather, an entirely mundane, predictable, and egocentric self-affection. Determinism, then, makes us anxious, because it pricks our pride and exposes our love for ourselves.

Indeed, determinism may strike even more deeply at our standing in this universe. If the structure of a causal explanation is that of a chain, or a web of chains, with the present event only the last link in a sequence of causes and effects receding into the infinite past, then behind the single link that is the human act, there looms a universe of inanimate objects and insentient phenomena. Against this backdrop, the hope that the human actor transcends all the rest can come to seem sentimental or even futile, an embarrassing delusion. Thus, determinism can make us shift, as though under peer pressure, from the “human” perspective to that of the natural world: “As the external determinants of what someone has done are gradually exposed”—as the chains of causation are traced farther and farther back—“it becomes gradually clear that actions are events and people things.”115

Determinism, then, not only negates the evidence in favor of our special status, but actually makes the case against it. It reverses the familiar tide: rather than anthropomorphizing things, it thingifies man. Hence, the distinctively lifeless and cold metaphors determinism inspires—in a determinist universe, the human is a machine or a puppet; he or she is a falling stone or windblown tile; the human is, in the end, just another natural phenomenon.116

113. Morse, supra note 52, at 64 (“Scientific discoveries about the brain . . . seem presently to threaten ordinary conceptions about the nature of human life . . . . We fear that we may simply be mechanisms.”).
114. Honderich, supra note 85, at 64–65 (attributing this view to Aristotle). See also Littman, supra note 106, at 1133 (stating that “free will” “validates and gives purpose to human existence”).
115. Nagel, supra note 22, at 184–85. Clarence Darrow also captured this nicely in his arguments in the Leopold and Loeb trial: “every human being is the product of the endless heredity back of him and the infinite environment around him.” Howe, supra note 17, at 1008. See also Fletcher, supra note 10, at 436 (“[P]erceiving human conduct as human” requires “de-emphas[izing] causation.”).
116. See supra notes 87 to 94 and accompanying text (discussing common inanimate object metaphors for human actors in the determined universe). See also Hook,
c. Loss of the “Self”

Another related but conceptually more elusive source of existential anxiety may be at work here too. Determinism may threaten something even more fundamental to us than our sense of control or our special stature, for it may call into question whether we even have “selves” at all.

Determinism threatens our selfhood in two ways. The first is that it seems to erase the boundaries between “us” and the rest of the physical universe. Although causal explanations may start with a brief account of some features of or events within the human actor, they immediately yoke those features and events into an unbreakable chain with other features of the external world and with events that occurred outside of and, inevitably, before the existence of the actor. As the explanation proceeds, the weight of the external features and events overwhelms that of the internal ones, and, as Thomas Nagel writes, “the self which acts . . . is threatened with dissolution by absorption of its acts and impulses into the class of events . . . . [The] responsible self seem[s] to disappear, swallowed up by the order of mere events.”117 For this reason, F.H. Bradley considered determinism a “perplex[ing]” and “outrage[ous]” attack on the self, calling it “the construction of [the] self out of what is not himself” and asking “[w]here is [the] self gone to? It is . . . broken up into selfless elements.”118 This leaves us, in the end, “with no one to be.”119 “To explain the origin of a man is utterly to annihilate him.”120

The second way that determinism threatens our selfhood is that it undermines our “possession” of ourselves. If I do not make any meaningful choices, or have any meaningful say in my conduct, how is my self “mine? If I do not really dictate where my arm goes, in what sense is my arm my own? Indeed, if my thoughts and feelings are just the predictable results of things that happened before I was born, isn’t it true that even they do not belong to me? “Eventually nothing remains which can be ascribed to the responsible self.”121 As Bradley put it, “Nothing remains which is specifically his. The sanctum of his individuality is outraged and profaned.”122

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117. Nagel, supra note 22, at 184–85. See also Nussbaum, supra note 99, at 74 (We feel that we face a “deep dilemma” in “the thorough intermingling of what is ours and what belongs to the world, of ambition and vulnerability, of making and being made . . . . To what extent can we distinguish between what is up to the world and what is up to us, when assessing a human life?”).
118. Bradley, supra note 89, at 15–20, quoted in Honderich, supra note 85, at 97.
119. Nagel, supra note 22, at 185.
120. Bradley, supra note 89, at 15–20, quoted in Honderich, supra note 85, at 97.
121. Nagel, supra note 22, at 184–85.
122. Bradley, supra note 89, at 15–20, quoted in Honderich, supra note 85, at 97.
2. Social and Political Anxieties: Corruption of Attitudes Toward Others

One reason we resist absolute determinism, then, is because it causes us an array of existential anxieties: it seems to deprive us of control, strip of us of our stature, and dissolve away our very selves. A second, related but distinct reason we resist the lure of absolute determinism has to do with our social and political attitudes: the more we think about each other in causal ways, the more likely it is we will develop undesirable attitudes toward each other.

a. Corruption of Social Attitudes

It is frequently said that deterministic thinking about human behavior inevitably leads to undesirable changes in our interpersonal attitudes. We value each other less, and we develop an "objective" attitude toward each other that is incompatible with satisfyingly complete human relationships.

In the same way that determinism degrades our sense of self, it can also degrade others in our eyes, with the result that we value others less. In determinism's harsh light, we seem impotent creatures, with no control over our fates or futures. We have no special standing in the universe and are indistinguishable from all the inanimate objects and insentient phenomena that make up the universe. Indeed, we may not have any identifiable self at all. If we now turn the spotlight of determinism from ourselves and place it on those around us, they seem similarly devalued too. At least by our traditional standards, such creatures can seem of little worth. They merit little sympathy or regard, and whatever warmth or admiration they provide is of little consequence. The results are anxiety-producing on two fronts. First, valuing others less, we are more likely to treat them badly. Thus, determinism seems likely to increase the level of mistreatment and suffering in society as a whole, with bad consequences for both ourselves and others. Second, valuing others less, we take less sustenance from our relationships with them, and our lives are thereby impoverished. The less special the other is, the less satisfaction the other can give us.

For those whose intuitions include the control principle, the threat that determinism poses to interpersonal attitudes appears even greater. If we believe an actor's conduct is determined, and also be-

123. It may seem strange to talk of anxieties about determinism that are contingent on belief in the control principle; after all, such anxieties could be attributed just as much to the control principle as to determinism. But if the control principle is, as I contend, a widespread and hard-to-shake intuition, then it is perfectly sensible to talk about the sorts of anxieties that determinism causes the person who is dedicated to the control principle, and to imagine that these anxieties influence the law's attitude toward causal explanation.
lieve she cannot be held responsible for determined conduct, then we will find ourselves foreclosed from having a whole range of feelings that are essential to satisfying human relationships as we know them today. In the most elementary terms, we will not feel that we can blame others for their wrongdoings, or credit them for the good they do.\textsuperscript{124} We will be cut off from our feelings of "resentment and gratitude," forgiveness and anger\textsuperscript{125}—that is, from what one seminal paper calls our "reactive attitudes."\textsuperscript{126}

These "reactive attitudes" are said to be essential to all the most rewarding social relationships we can have.\textsuperscript{127} They are the "feelings...which belong to involvement or participation with others in interpersonal human relationships," necessary for "the sort of love which two adults can sometimes be said to feel reciprocally for each other."\textsuperscript{128} They "enrich our lives and encourage human flourishing."\textsuperscript{129} Were we to cease to experience these reactive attitudes—as both the subject and the object of them—our lives would become pallid and shallow.\textsuperscript{130} We would be left relating to others with an "objective

\textsuperscript{124.} Honderich, \textit{supra} note 85, at 40.
\textsuperscript{125.} Strawson, \textit{supra} note 66, at 122–24.
\textsuperscript{126.} \textit{Id.} at 122–23, 24. Strawson took the position that these cherished reactive attitudes were impervious to reason, and therefore not jeopardized by determinism. See \textit{id.} But many who agree that we cherish these reactive attitudes do not see why the attitudes should be seen as impervious. See Honderich, \textit{supra} note 85, at 41 (This dimension of appreciative and resentful feelings is "inconsistent with the theory of determinism"); if the analysis given is true, "appreciative and resentful feelings, the first kind entrenched and of great value to us, the second kind at any rate entrenched, are out of place given the truth of determinism."); \textit{id.} at 157; Pereboom, \textit{supra} note 15, at 266–67.
\textsuperscript{127.} Strawson, \textit{supra} note 66, at 124, 129, 130, 135, 139, 141. \textit{See also} Moore, \textit{Causation, supra} note 1, at 1144 (treating "attitudes of resentment, moral indignation, condemnation, approval, guilt, remorse, shame, pride, and the like" as essential to our lives); Pereboom, \textit{supra} note 15, at 67.
\textsuperscript{128.} Strawson, \textit{supra} note 66, at 126–27.
\textsuperscript{129.} Morse, \textit{supra} note 47, at 532.
\textsuperscript{130.} "To have nothing of the love of others, their acceptance of us and their sustenance in adversity, and to get no honour, esteem, or marks from them, is to have merely a grey time in this world...to exist in a less than full human way." Honderich, \textit{supra} note 85, at 32 (adding that: "Few parts of our experience are as satisfactory as our experience of the love of others for us, and their affection, loyalty, trust, goodwill, and support...as well as their admiration, their approval, their commendation...[these things] enrich our lives, give delight to them, and sustain them.").

The threat here is not only to our credit-giving feelings toward others—which we surely enjoy—but also to our future receipt of credit from others and from ourselves. "I am not...morally responsible for my actions, and hence not a subject for approval or disapproval. I get no credit of a certain kind...[my] occasional moral pride...rests on illusion." \textit{Id.} at 68–69; Hovers, \textit{Freedom, supra} note 11, at 34 (Once we see the crimes of bad actors as no more than "the wriggling of a worm on a fisherman's hook...we shall no longer flatter our
attitude"—the attitude we have toward infants, machines, and animals, the one that contemporary society reserves for those who are "abnormal" or "undeveloped" or "unintelligible," for those who are not "morally responsible agent[s]," those who are "inappropriate object[s] of [the] . . . demand for goodwill or regard"—in short, those who cannot be "member[s] of the moral community." This objective attitude is conducive to "avoid[ance]," "repulsion or fear . . . [or] pity"; it may feed "elitism and condescension"; but it is not conducive to "concern or respect," or to balanced, mutual relationships.

In short, without our reactive attitudes, we live disengaged and detached, our connections with others ugly, colorless and superficial. Determinism—at least when yoked to the control principle—threatens us with this fate. It deprives us of feelings that are nurturing and satisfying, supplants them with other, uglier feelings, and threatens us with a terrible "human isolation." "In the absence of any forms of these attitudes it is doubtful whether we should have anything that we could find intelligible as a system of human relationships, as human society." Indeed, "the world would be quite a cheerless place in general."

b. Corruption of Political Attitudes

The more we develop our causal explanations of human conduct, the more we think about how human actors are "made" and how they

feeling of moral superiority by calling him personally responsible for what he did.

131. Strawson, supra note 66, at 119-42.
133. Strawson, supra note 66, at 126, 133, 134.
134. Id. at 134.
135. Id. at 125.
136. Id. at 134.
137. Id.
138. Moore, Causation, supra note 1, at 1147 (The feelings of sympathy we have for those whose conduct we explain in causal terms are "often (and perhaps invariably) connected with" "elitism and condescension"; "[t]o stand back and refuse to judge because one understands the causes of criminal behavior is to elevate one's self over the unhappy deviant."). See also Kadish, supra note 29, at 284-85 (1987) ("[E]xplanations" of conduct can be an "insult" insofar as they reduce the "human being" to "an infant, a machine, or an animal.").
139. Morse, supra note 52, at 63 (Our capacity for moral responsibility "endow[s] us with dignity and make[s] us worthy of concern and respect just because we are people.").
140. Id. at 129.
141. Strawson, supra note 66, at 141. See also Morse, supra note 52, at 63 ("Personhood, morality, and responsibility are human constructs that give meaning and value to our lives. They are what we care about"; were we to accept causal accounts of human behavior "we would lose much that enriches us.").
142. Morse, supra note 47, at 532 n.4.
"work." This mechanistic attitude toward the human actor makes it easier and more natural to contemplate manipulation of the actor. Combined with degraded attitudes toward others, this emphasis on manipulability is conducive to two dangerous political attitudes. One is totalitarianism—the tendency to treat humans as means, rather than ends. The other is paternalism—the tendency to override others' judgments about what is best for them. Both pose threats to our autonomy, our dignity, and our safety from state violence.

The premise for these anxieties is that explaining human behavior lends itself naturally to an interest in manipulating human behavior. To embrace causal explanation is to shift from mystery to mechanism: as the deterministic account deepens and develops, human conduct becomes less and less the ineffable expression of a putatively opaque box such as the soul, and more and more the predictable output of a body of interlocking parts and pieces that can be tinkered with or influenced just like a car engine or a computer program. As this shift proceeds—as the mysterious account of human conduct is displaced by the mechanistic one—the potential for practical, purposeful manipulation of the human actor comes into vivid focus. Such manipulation was inconceivable, but now is conceivable; it was impossible, but now is possible. When this shift in focus is joined with some of the other alleged results of determinism—the degraded sense of the value of human beings, the emergence of the objective attitude—the potential for manipulative attitudes toward others seems great.

The prospect of such manipulative attitudes makes us anxious. For instance, if the manipulative person is wantonly self-indulgent, the manipulative attitude lends itself to treating others as means to the manipulator's self-interested ends and, ultimately, to totalitarian politics. Once in possession of the mechanistic picture of the human actor, self-indulgent manipulators will be inspired to tinker with the mechanism—to change the environmental, cultural, psychological, and biological determinants of conduct—in ways that will produce conduct that will advance their own interests. They will see others as the "object[s] of social policy . . . to be managed or handled or cured or trained." To make them "less dangerous" or "more productive," more malleable or less inconvenient, they will "treat" or "rehabilitate" them, "condition" them like Pavlov did his dogs or Skinner his hypothetical boy, or program them a la 1984 or Brave New World.

143. Id. at 527 ("The discovery of biological pathology that may be associated with criminal behavior lures many people to treat the offender as purely a mechanism and the offensive conduct as simply the movements of a biological organism.").
144. Strawson, supra note 66, at 126.
145. Id. at 126.
146. "[S]uccessful totalitarian propaganda and social conditioning derive equally from a knowledge of how to predict and manipulate human behavior. Brave New World and 1984 are not baseless fantasies." A. C. Macintyre, Determinism, in
“Success in explaining behavior is,” it has been said, “Janus-faced,” “for success in explaining and predicting can never be divorced from success in manipulating and controlling.”

Not all manipulators will use the information provided by causal explanations self-indulgently; but even “beneficent” manipulation will be paternalistic, and paternalism is threatening too. Armed with a sophisticated, mechanistic description of the human actor, beneficent manipulators will believe themselves better qualified to direct the actor’s life than even the actor himself. They will imagine that by tinkering with the environmental, cultural, psychological, or biological determinants of an actor’s acts, they can make the actor’s life better than the actor himself would have been able to. Indeed, where the actor is seen as an object—a puppet or machine—he seems to lack the sort of control over himself that an autonomous entity should have, making it all the more natural for the beneficent manipulator to step in and fill the void—and all the more natural to ignore the actor’s protests if he should make any.

Whether the manipulator is totalitarian or paternalistic, the result produces anxiety. Both attitudes are conducive to egregious violations of autonomy. We value our freedom, not only in the metaphysical sense, but against each other. It is a social good that both gives us pleasure in itself and maximizes the likelihood that we will end up with the life that is best for us. Both the totalitarian and the paternalist are threats to our autonomy. They both take the mechanical picture of the human actor as a justification for supplanting our will, for putting themselves in control where we would like to be.

FREE WILL AND DETERMINISM, supra note 9, at 241. William James saw the same problem from a somewhat different angle. In his view, a preference for causal explanations suggests “a temper of intellectual absolutism, a demand that the world shall be a solid block, subject to one control.” JAMES, supra note 98, at 158.

147. Macintyre, supra note 146, at 241. See also HONDERICH, supra note 85, at 164 (noting that the desire to “direct or influence future behavior” survives hard determinism better than retributive desires do).

148. JOEL FEINBERG, HARMLESS WRONGDOING (1990). See also FLETCHER, supra note 10, at 430 (noting that making determinations about potentially dangerous actors on the basis of “sociological predictors” (e.g., race, experience, social trauma, etc.) is threatening to autonomy); id. at 430–31 (In order to protect “[t]he autonomy of all members of the community,” “[t]he state is bound to respect” the principle that all citizens are presumptively self-actuating, responsible agents.).

149. Sometimes hard-determinists seem insensate to this danger. John Hospers, for example, once wrote that “Those of us who can discipline ourselves and develop habits of concentration of purpose tend to blame those who cannot, and call them lazy and weak-willed; but what we fail to see is that they literally cannot do what we expect; if their psyches were structured like ours, they could, but as they are burdened with a tyrannical superego ... and a weak defenseless ego whose energies are constantly consumed in fighting endless charges of the superego, they simply cannot do it, and it is irrational to expect it of them.” Hospers, Freedom, supra note 11, at 37–38.
more self-indulgent manipulator—the totalitarian—poses further threats. History suggests determinist ideas serve him too well. Regimes and political movements committed to tyranny have repeatedly cited mechanistic conceptions of human conduct to justify harsh and oppressive social programs. Others, aiming at ethnic oppression or genocide, have made mechanistic accounts of the behavior of particular groups central parts of their propaganda. In short, determinist thinking gives us yet another sort of reason to be anxious: it is ripe with the potential to corrupt our political lives in intolerable ways.

3. Epistemic Anxieties About Causal Accounts

There is another reason why we resist the leap from particular causal accounts to absolute determinism: this one revolves around the unavoidable fact that we are epistemically limited beings. Given our epistemic limitations, our causal accounts of human acts are inevitably incomplete, and, as a result, endorsing a causal account of a human act necessarily entails a leap of faith. Since such leaps make us anxious, causal accounts make us anxious, and we do not endorse them lightly, let alone generalize them to every act and event.

The problem here is that when we try to construct causal accounts, we aspire to something we never can achieve. The aspiration is to explain particular events as the necessary and inevitable progeny of the interaction of particular prior events, forces and circumstances. The insurmountable hurdle is that we are hamstrung by the limits of the human senses, cognition, and knowledge. It is beyond our capacities to compile a genuinely complete catalog of all the forces and circumstances in play at the time of an event, let alone all the forces that brought these forces and circumstances to the scene. We cannot perceive them all; we cannot understand them all; and, in any event, we do not know about them all. As a result, the typical causal account of an event can do no more than point to a smattering of phenomena that occurred immediately prior to the incident at issue, in physical proximity to the incident, and in form perceptible by the human senses (or by some constructed measuring device) or inferable from circumstantial evidence. Even the very best causal accounts only push one or

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150. Morse captures the feel of this while discussing cases in which defendants try to trace their conduct to particular biological pathologies.

To begin, biological causation will only be part of the causal determinants of any intentional conduct, which is always mediated by one's culture, language, and the like. The best accounts of the relations between brain and behavior suggest that no discrete bit of physiology always and everywhere produces exactly the same brain states in all people responding to it, and that no bit of exactly the same behavior emitted by different people is attended by exactly the same brain state in all the similarly behaving agents.

Morse, supra note 47, at 534.
another of these epistemic limits a bit further; none come close to genuine completeness and transparency.

Our common sense, then, tells us that causal accounts of events are, without fail, incomplete. The paltry data we do have about why the incident occurred is juxtaposed against all that we do not know about it. For us to sign on to a causal account under these conditions requires us to put our faith in the promise that the account has not misled us, despite all that it does not take account of. The leap of faith required makes us wary.

Causal accounts require another kind of faith as well. Especially when they are offered to explain human acts, such accounts often seem to consist of a melange of concepts and theories only one notch above superstition and dime-store psychology. A contemporary causal explanation of a complex human act, for example, might draw on Freud or Skinner or some descendent therefrom, or on modern sociological theories that seem as much political as theoretical, or on claims made by “cutting-edge” neurobiologists whose training is in chemistry and brain structure, not thoughts, motives, and deeds. While we are likely to see each of these fields as producing useful insights into human behavior, it is also likely that we are skeptical that they “really” explain why human beings do what they do. Thus, a causal account cast in the terms these sciences generate may well leave us with the uncomfortable suspicion that we might as well be stone-age barbarians trying to explain the retrograde motion of the stars. Even if we share the intuition that there is a causal account of a particular act, then we are likely to doubt the details of the best available articulation of that causal account. Again, endorsing a causal account of a particular act will require a leap of faith—faith that our bumbling efforts to articulate determinist intuitions are good proxies for something more accurate and more complete.

In short, causal accounts are never entirely complete and never entirely accurate. Indeed, they almost certainly never will be. This has not always stopped us from endorsing causal accounts, but it means

151. Morse, supra note 2, at 43–44 (noting that determinist accounts of human acts typically draw on biology, psychology, and sociology).
152. See, e.g., Theodore Y. Blumoff, A Jurisprudence for Punishing Attempts Asymmetrically, 6 BUFF. CRIM. L. REV. 951, 967 n.53 (2003) (noting obstacles to causal accounts, including “the absence of individual historical records, the immaturity of genetics as a science, our inability to describe mental states objectively, the inexactness of our understanding of personality theory and the like”); Lee Ross & Donna Shestowsky, Contemporary Psychology’s Challenges to Legal Theory and Practice, 97 NW. U. L. REV. 1081, 1112 (2003) (“Unfortunately, contemporary psychology cannot provide thoroughly satisfying answers to the questions of when and why particular actors commit particular crimes”); Watson, supra note 14, at 5 n.6 (criticizing John Hospers for treating psychoanalytic explanations of human conduct as genuinely deterministic explanations).
that when we do so, we must make a leap of faith. Because such leaps entail uncertainty and the possibility of error, they make us anxious. Thus, we are anxious about endorsing causal accounts of human acts, and we resist the invitation to generalize from particular causal accounts to absolute determinism.

C. How Anxiety Makes Us Provisional—and Thus Partial—Determinists

We have many reasons, then, to be anxious about absolute determinism. Absolute determinism threatens our sense of control, our stature in the universe, and even the existence of our self; causal thinking has the potential to degrade our social lives by devaluing others for us and taking away our reactive attitudes, and to corrupt our political culture by leading us into paternalism and totalitarianism; individual causal accounts are daunting to us, both because the specter of absolute determinism looms behind them, and because their unavoidable incompleteness requires us to make a leap of faith if we are to believe them.

In this light, it should not be surprising to find that the criminal law is only partially deterministic. It turns out that there are many good reasons why we find absolute determinism and even localized causal accounts threatening. In the face of these threats, it is entirely plausible and likely that we take a cautious approach to causal accounts of human acts—that we take them one by one, that we judge them account by account, that we avoid unnecessary generalization, and that we never reach, let alone concede, the truth of absolute determinism. In short, prudence about the dangers inherent in causal accounts makes us provisional—and thus partial—determinists.

This being the case, the overbroadness critique of the causal theory misses the mark. The causal theory is only overbroad if it is implausible that the criminal law is partially deterministic. But neither of the standard arguments against the plausibility of a partially deterministic criminal law seem so compelling once our anxiety about determinism is taken into account. The psychological argument, for example, seems too simplistic. Perhaps it would make sense to say that an inclination toward scientific causal accounts inclines one, in the end, toward absolute determinism—if there were no perceived costs to endorsing absolute determinism; but there are very significant costs to endorsing absolute determinism, and these costs counterbalance our "inclination" toward absolutism. Thus, even if a person likes the "taste" of a particular causal account, his appetite for other causal ac-

153. If we judge causal accounts as they come to us, one by one, what criteria do we use? I return to this question in the Conclusion. See infra Part VI.
counts may well be significantly checked by his anxiety about the consequences of absolute determinism.

Something similar can be said about the argument that partial determinism is so philosophically "impure" that the criminal law would not embrace it. Philosophical "impurity" might be a reason not to take a certain view of things, but not if the "impure" view is better than the alternatives, and here, the alternatives are dangerous. They threaten our aspirations for ourselves, they challenge our social and political lives, and they require epistemic leaps of faith. Thus, while there might be aesthetic reasons to prefer absolute determinism over partial determinism, such aesthetic considerations seem less impressive when juxtaposed against the potentially devastating consequences of the leap to absolute determinism. To the theorist who says it should be "all or nothing," then, the partial determinist might quite sensibly reply, "you go on ahead if you'd like, but I'm taking this one step at a time."

The overbroadness critique, then, misses the mark. Its assumption that the law's occasional endorsement of a causal account of an act or class of acts would necessarily commit the law to absolute determinism fails to take account of the law's understandable anxiety about determinism. It fails to see that while there may appear to be a slippery slope from particular causal explanations to absolute determinism, we have strong motives to dig in our heels and resist sliding down that slope. And it fails to see that the aesthetic argument for favoring absolute determinism over partial determinism can seem inconsequential, given what is really at stake. Once the dangers posed by determinism and by causal accounts of human acts are acknowledged, it is entirely plausible that the law takes determinism provisionally, and is therefore "only" partially determinist. Indeed, the provisionally determinist approach seems the most prudent one.¹⁵⁴

¹⁵⁴ Moore sets up and shoots down a theory of the excuses based on a reluctant determinism having some surface similarities to the one described here. He imagines the "ignorance determinist," a person who believes that all human conduct is determined, but who does not excuse conduct unless he knows the conduct's causes. Moore, Causation, supra note 1, at 1118. He concedes that, at first glance, ignorance determinism appears to salvage the relationship between causal explanation and the excuses: without falling into the "nonsense" of degree determinism, it explains why some conduct might be excused for causal reasons while other conduct is punished. But, as Moore points out, ignorance determinism would seem morally grotesque. For one thing, it would lead to the punishment of actors who were known to be morally undeserving of punishment. For another thing, it would make decisions about who to punish depend upon luck: it would excuse those lucky enough to commit acts we could explain, while punishing those unlucky enough to commit acts we had not yet figured out. Moore concludes that an explanatory theory with these flaws is too grotesque to be plausible. Id. at 1119. See also Morse, supra note 2, at 55 (offering a similar critique of "as if responsibility").
If so, causal theory survives the overbroadness critique. That critique is based on the premise that partial determinism is so unpalatable that it is simply not plausible that the criminal law would endorse it. But partial determinism is not so unpalatable. On the contrary, provisional determinism is a prudent and appealing stance regarding almost intractably difficult aspects of human experience.

V. SOME MOTIVATION FOR REVISITING CAUSAL THEORY: THE DISTURBING FEATURES OF THE COMPATIBILIST CRIMINAL LAW

So far, this Article has been devoted to establishing that the causal theory of the excuses is viable by showing that the most fundamental contemporary critique of the causal approach is misguided. If what I have said so far is true, then causal theory need not be given up for dead.

This Part goes a step further and argues that there is good reason to revisit causal theory. The approach used here is to show that the currently-favored alternative to causal theory—the compatibilist the-

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Provisional determinism is not ignorance determinism. For one thing, unlike ignorance determinism, provisional determinism does not require the punishment of actors who it is known do not "really" deserve punishment. The ignorance determinist believes in absolute determinism, but only excuses actors who can show exactly how their conduct was determined. The result is that the ignorance determinist imposes punishment on actors he knows do not "really" deserve punishment any more than other, excused actors. The provisional determinist is different. Unlike the ignorance determinist, the provisional determinist does not start out endorsing the absolute determinist premise; on the contrary, he is agnostic regarding absolute determinism, uncertain of its truth, anxious about its ramifications, and quite possibly hopeful of its falsity. When a defendant fails to satisfactorily articulate a causal explanation of his conduct, then, the provisional determinist is left genuinely uncertain as to whether the actor's conduct was determined. It follows that, when he imposes punishment on the actor, he is not imposing punishment on an actor he "knows" does not deserve it.

Nor is provisional determinism as gratuitously arbitrary as ignorance determinism. It is true, the provisional determinist must concede, that his limited knowledge will likely result in mistakes in punishment. There will be times when, using anxiously exacting standards, he does not accept a causal account, even though an omniscient observer would know the causal account to be true. But this is just the inevitable arbitrariness of any attempt to ascertain blameworthiness. It is not particular to provisional determinism. What makes ignorance determinism so grotesque, in contrast, is that ignorance itself seems like an especially poor reason to withhold the law's forgiveness. It has the airless, clerical feel of refusing to stop the execution because the governor forgot to initial the order. Anxiety is not such a poor reason. It reflects a judgment that there are real costs to crediting causal accounts, and that those costs should not be lightly incurred. Put another way, both the ignorance determinist and the provisional determinist punish when they do not "know" the causal explanation for a human act; but the ignorance determinist cites ignorance itself as a justification for doing so, while the provisional determinist points to genuine uncertainty, and to all the very real dangers that determinism poses to self and community.
ory of the excuses—has disturbing consequences for the law that causal theory does not share. The first section describes the compatibilist theory of the excuses; the second section brings out some of compatibilist theory’s distinctive disturbing consequences. It is my contention that these disturbing consequences of the currently-favored compatibilist approach should inspire us to revisit causal theory.

A. Compatibilist Criminal Theory

According to the dominant view in contemporary criminal theory, we have a compatibilist criminal law. The compatibilist tradition takes its name from its defining feature—its contention that the fact that an act is caused by forces beyond the actor’s control can be compatible with the act being blameworthy.155 This contention may seem surprising at first glance, but compatibilists typically defend it by setting forth evidence that blaming practices are an intrinsic part of “our society” and perhaps even “our nature,” and by arguing that our moral intuitions indicate that we still would levy blame even were we convinced we lived in a determined universe.156 If this is so, say the com-

155. Most conventionally, compatibilists hold that absolute determinism and attributions of blame are compatible. The compatibility of absolute determinism and attributions of blame is generally assumed to entail the compatibility of causal accounts of particular acts with attributions of responsibility to the particular actor, whether or not absolute determinism is true. See Pereboom, supra note 15, at 242 (compatibilism is the view that “we possess the freedom required for moral responsibility, that determinism is true, and these views are compatible”); Weatherford, supra note 17, at 292 (The basic premise of comptabilism is that while moral responsibility requires freedom, the kind of freedom required for moral responsibility “is not the [kind] that involves origination and is opposed to ‘caused’ or ‘determined.’”). Compatibilism sometimes travels under other names. See Berofsky, supra note 9, at ix (“reconciliationism”); James, supra note 98, at 149 (“soft determinism”). By whatever name, compatibilism is the majority view in the philosophical literature about free will. Pereboom, supra note 15, at 242.

For representative articulations of compatibilist criminal theory, see Dressler, supra note 27, at 212–14; Fletcher, supra note 10, at 800–02; Peter Arenella, Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability, 39 U.C.L.A. L. REV. 1511 (1992); Meir Dan-Cohen, Responsibility and the Boundaries of the Self, 105 Harv. L. Rev. 959 (1992); Stephen A. Garvey, The Moral Emotions of the Criminal Law, 22 Quinnipiac L. Rev. 145 (2003); Moore, Causation, supra note 1; Morse, supra note 22; Vuoso, supra note 1, at 1679–85.

156. Pereboom, supra note 9, at viii–ix; see also Pereboom, supra note 15, at 266 (“Hume and . . . Strawson . . . advance the psychological thesis that our reactive attitudes cannot be affected by a general belief in determinism, or by any such abstract metaphysical view.”). See also Fletcher, supra note 10, at 801–02 (“The point is simply that the criminal law should express the way we live. Our culture is built on the assumption that, absent valid claims of excuse, we are accountable for what we do.”); Corrado, supra note 7, at 1202 (explaining compatibilist position as follows: “If we learned that in fact all actions are caused, the features of action on which we predicated our judgments of voluntary or involuntary would
patibilists, it cannot be true that conduct must be genuinely, "metaphysically" free in order to be blameworthy. Something else must be going on in our blaming judgments—something other than a determination as to whether an actor's conduct was caused or not.157

The great challenge for compatibilism is to say what that "something else" is, and a good deal of compatibilist literature is devoted to providing criteria for determining when conduct that is caused is nevertheless blameworthy. Classic compatibilists like Hume and Hobbes focused on whether the actor was subject to concrete physical "constraints" like chains: in the absence of chains, a man was free and (therefore) blameworthy.158 This fairly crude conception of freedom has been continuously refined, with compatibilists constructing increasingly elaborate and subtle criteria for identifying acts which, though "caused," are sufficiently "free" to justify attributions of blame.

While there is no consensus among compatibilist criminal theorists regarding the criminal law's precise criteria for blame and excuse, most propose that the criminal law looks to some combination of the following factors. First, it is commonly held that the criminal law does not deem an act "free" unless it qualifies as an "act" in the first place. While it will generally be the case that an actor's movements are uncontroversially "acts," some human movements are so disconnected from the mover's person or character that they cannot fairly be called "acts" at all. This happens, for example, in cases in which the actor's body was moved by an external force (e.g., the wind or a malicious

not disappear, and we would continue to make such judgments as before. Questions of responsibility, therefore, cannot be affected by claims about causation."); Kadish, supra note 29, at 265 ("[B]lame and punishment give expression to the concept of personal responsibility which is a central feature of our moral culture."); Morse, supra note 22, at 346; Pillsbury, supra note 49, at 726 (following Strawson, holding that "our commitment to responsibility for choice is fundamental"); Strawson, supra note 66, at 129.

157. "For it is not when my action has any cause at all, but only when it has a special sort of cause, that it is reckoned not to be free." A.J. Ayer, Freedom and Necessity, in Free Will, supra note 14, 15, at 21.

158. See David Hume, An Enquiry Concerning Human Understanding and A Letter from Gentleman to His Friend in Edinburgh 63 (Hackett 1977) ("By liberty, then, we can only mean a power of acting or not acting according to the determinations of the will . . . . this hypothetical liberty is universally allowed to belong to everyone who is not a prisoner and in chains"; blame is inappropriate where acts "are derived altogether from external violence."); Hobbes, supra note 9, at 38 ("Liberty is the absence of all the impediments to action that are not contained in the nature and intrinsical quality of the agent"; "he that is tied wants the liberty to go, because the impediment is not in him, but in his bands."); Roy C. Weatherford, Freedom and Determinism, in The Oxford Companion to Philosophy, supra note 6, at 292. See also Corrado, supra note 7, at 1203-04 (The "best known attempt" to articulate compatibilist criteria is the "conditional analysis of freedom," according to which "freedom means not being constrained" and "constraint consists of external force or coercion.").
police officer), rather than by a contraction of one of her own muscles. 159

It is also generally agreed that the law does not hold an actor responsible unless that actor qualifies as a "moral agent" or "person." At a minimum, this means that the actor must be capable of rational thought vis-à-vis his desires, interests, or goals. 160 It may also mean that he must have the capacity to experience certain emotions, such as empathy, in so far as such emotions are crucial to development of an "affective understanding" of moral norms (arguably necessary for genuine moral choice-making),161 or that she must have "the power . . . to appraise the moral worth" of her conduct. 162 Actors who do not meet some version of these minimal requirements for moral agency cannot engage in the sort of practical reasoning essential to meaningfully free choice, and, therefore, are not subject to blame. Some theorists see this happening in cases of insanity, infancy, and the like; others extend this model to cases in which the actor's "opportunity to reason practically is seriously undermined . . . due to passion or coercion." 163

Finally, it is sometimes said that the criminal law does not deem an act free if, because of the circumstances, the act cannot be treated as a good indicator that the actor has a flawed character or undesirable character traits. 164 One version of this idea is that while most

159. Kadish, supra note 29, at 259.
160. Dressler, supra note 27, at 212–13; Arenella, supra note 155, at 1560; John Gardner, The Gist of Excuses, 1 Buff. Crim. L. Rev. 575, 589 (1998) (stating that the actor must be able "to reason intelligibly through to action"); Kadish, supra note 29, at 262–63, 282–83; Morse, supra note 22, at 340–41, 390–94 (requiring rationality; recognizing that rationality measurements will entail normative judgments, and suggesting that an alternative name for what is required here is "normative competence"); Morse, supra note 47, at 530; Moore, Causation, supra note 1, at 1137 ("[R]ationality" is one of the "essential attributes of personhood and necessary for "moral evaluation."); Vuoso, supra note 1, at 1672 (must be a "rational agent"). Some efforts have been made to define the rationality required. Morse gives a short definition—"it is the ability to act for good reasons"—and a long definition—"[I]t is the ability to perceive accurately, to get the facts right, and to reason instrumentally, including weighing the facts appropriately and according to a minimally coherent preference ordering." Morse, supra note 22, at 392. Kadish adds that "lack of the minimal capacity for rational action required for moral agency may be manifested not only by the inability to know the nature and wrongfulness of one's actions, but also by . . . bizarre and unintelligible purposes." Kadish, supra note 29, at 282–83. Similar definitions can be found in Moore, Causation, supra note 1, at 1148 and Dressler, supra note 27, at 213.
161. Arenella, supra note 155, at 1565, 1593; Morse, supra note 22, at 392–93.
162. Moore, supra note 29, at 1624–25; see also Kahan & Nussbaum, supra note 33, at 344 (requiring "some form of mental competence," "the cognitive capacity to appreciate her circumstances and to form appropriate judgments about them").
163. Dressler, supra note 27, at 213.
164. The idea is sometimes stated in the positive: actors can be held responsible for acts that do reflect their character. Vuoso, supra note 1, 1670, 1672; id. at
human acts say something meaningful about the actor's character, it occasionally happens that something in the circumstances leading to the act severs the link between the actor's conduct and his character, such that his "actions do not reflect badly on him." This can happen to actors faced with "compulsion[s] or coercion[s]" or "hard choices"; the acts of actors who cave in to such pressures are not expressions of their character, and it is therefore inappropriate to blame them.

Why should a person be responsible for his character? One answer is "because in general it is up to individuals to shape their own evaluations of people and things in accordance with good norms." Sometimes the argument that we are responsible for our characters has a "just because" feel to it. Gardner, supra note 160, at 576 (taking the "Aristotelian view" that when "our actions exhibit our unfitness for the role we are occupying [i.e., a flaw in our character], or more broadly the life we are leading," there is no further question whether our unfitness, in turn, reflects badly on us), id. at 587 ("[I]ncapacity, far from militating against unfitness, is a mode of unfitness in its own right."). See also Vuoso, supra note 1, 1681 ("The sort of character a person has is relevant to assessing his moral responsibility for an action, but not how he came to have that character.").

165. Gardner, supra note 160, at 576 (calling this the "Humean' view"). See also Dressler, supra note 27, at 212–13 (describing this version of "character theory"); Fletcher, supra note 10, at 799 ("The distinguishing feature of excusing conditions is that they preclude an inference from the act to the actor's character."); id. at 800 (explaining duress, necessity, mistake, and insanity in these terms); Vuoso, supra note 1, at 1684–85.

166. Morse, supra note 22, at 341.

167. Moore articulates the "hard choice" formula especially clearly. See, e.g., Moore, supra note 29, at 1663–64 (explaining duress, the necessity excuse, and provocation in terms of "hard choices"). Others also invoke the hard choice formula in more and less explicit ways. See, e.g., Dressler, supra note 27, at 213, 302; Kadish, supra note 29, at 261–62, 273–74.

168. Moore, Causation, supra note 1, at 1130. See also Dan-Cohen, supra note 155, at 998–99; Morse, supra note 22, at 341; Morse, supra note 47, at 530; Vuoso, supra note 1, at 1672. Another approach denies that compulsions and hard choices can genuinely sever the link between character and conduct, but holds that we excuse those who cave in to these sorts of pressures because the trait the actor reveals in caving in is a normatively acceptable one. This might be called the evaluative view. See Gardner, supra note 160, at 578 (A "valid excuse" recognizes that the actor's acts were wrong, but did "not cast the person who did them in an unfavorable light, but, at worst, an indifferent light"); "the gist of an excuse is not that the action was 'out of character' [but that] . . . the person with the excuse lived up to our expectations" by showing "as much resilience, or loyalty, or thoroughness, or presence of mind" as we believe she should have.); id. at 597–98 ("Contrary to the popular myth the gist of an excuse . . . is not that one had no capacity to conform . . . to the standards of character which were demanded of one. On the contrary
Compatibilist criminal theory maintains that criteria such as these make it possible to explain the criminal law's excuses without reference to causation. Some excuses, it is said, are available to actors whose acts, however destructive, are not really "acts" in the human sense at all, such as those whose bodies are moved by external physical forces. Others are available to those who do not qualify as moral agents—such as those who are so deranged that they cannot think rationally. And some are available to those whose acts do not fairly show the actor's character to be flawed, as when actors cave in to unduly hard choices. That we might be able to explain the conduct of the actors in these cases in causal terms is beside the point, say the compatibilist criminal theorists; we excuse them not because their conduct was caused, but because they did not genuinely "act," or because they were not moral agents, or because their acts did not reflect badly on their characters. Thus, the compatibilists claim that they can put aside causation and look to other, quite different criteria for blame that yield results that align nicely with the criminal law's blaming judgments. In short, say contemporary criminal theorists, compatibilism is a viable alternative to the causal explanation of the excuses.

B. Disturbing Features of the Compatibilist Criminal Law

The compatibilist theory is the dominant theory in explanations of the criminal law's excuses, and a great deal of labor has been poured into working out compatibilist criteria that account for all the convolutions of the excuse doctrines. Those criteria do not appear to provide entirely successful explanations, and compatibilist theory occasionally has been critiqued on these grounds. But I want to highlight something else about the compatibilist theory: I want to show that it has several disturbing ramifications for the criminal law that causal theory does not.

Though this may sound like a normative argument against compatibilism, I do not mean it to be one. Rather, I highlight the disturbing features of the compatibilist's criminal law in order motivate closer scrutiny of the claim that compatibilism best accounts for the criminal law. We are more likely to question a descriptive theory of the criminal law if we perceive its normatively disturbing features.

In cataloguing the compatibilist criminal law's disturbing features, I am inspired, in a general way, by Kant, who called conventional com-
patibilism a “wretched subterfuge,” and William James, who dubbed it a “quagmire of evasion,” and by those philosophers who have recounted that their philosophy students “recoil” with indignation when they first are introduced to compatibilist theory. I suspect that a compatibilist criminal law should provoke the same reactions, and I seek to get at why. I focus on five ways in which the compatibilist version of the criminal law is more disturbing than the causal one. First, because the compatibilist version of the criminal law is not tethered to the control principle, its attributions of blame are, in an important sense, arbitrary. Second, the compatibilist criminal law’s criteria for blame are artificial—they make themselves look more appropriate than they are through a sleight of hand. Third, the compatibilist criminal law is morally complacent where the causal version is morally engaged. Fourth, the compatibilist version is less responsive to changes in our understanding of human behavior than the causal version. And, fifth, the compatibilist version is more resistant to criticism of social conditions and the social order generally than causal theory’s version. These are disturbing features of the compatibilist account of the criminal law. They give us good reason to scrutinize compatibilist theory and to give causal theory a second look.

1. The Arbitrariness of the Compatibilist Criminal Law

Blaming actors for things that are beyond their control has been characterized as arbitrary: it is said to make blame a kind of lottery, dependent on “moral luck.” The compatibilist account of the criminal law makes it out to be tolerant of this kind of arbitrariness; causal theory’s version does not.

The argument that it is arbitrary to blame someone for something beyond her control is often made in the context of the law of criminal attempts. Factors beyond the actor’s control can make the difference between an attempted crime and a completed crime, as when one actor fires a shot at her victim and the bullet hits the mark, while an-

170. “[H]ow can a man be called quite free at the same moment, and with respect to the same action in which he is subject to an inevitable physical necessity? Some try to evade this by saying that the causes that determine his causality are of such a kind as to agree with a comparative notion of freedom . . . . This is a wretched subterfuge . . . a petty word-jugglery . . . . In fact, in the question about the freedom which must be the foundation of all moral laws . . . it does not matter whether the principles which necessarily determine causality by a physical law reside within the subject or without him . . . .” Kant, supra note 87, at 118.

171. James, supra note 98, at 149.

172. van Inwagen, supra note 82, para. 20 (“[A]lmost without exception, the undergraduates to whom I lecture . . . join Kant in regarding the merely negative freedom of Hobbes and Hume [that is, compatibilist freedom] as a wretched subterfuge.”); Pereboom, supra note 9, at viii (“Beginning students typically recoil at the compatibilist response to the problem of moral responsibility.”).
other fires a shot at his victim only to have the bullet blown just off course by the wind. Although many jurisdictions would punish the successful crime more severely than the failed attempt, most criminal theorists characterize this difference in punishment as arbitrary, at least with respect to the blameworthiness of the actors.173 They say it turns moral judgment into a "lottery";174 it makes blame and punishment turn on "moral luck."175

Compatibilism does not demand that blame be tied to uncontrollable consequences, of course, so compatibilist criminal theory need not produce the arbitrary results suggested by the example above. But the problem of moral luck is not limited to luck-in-consequences. On the contrary, moral luck arises whenever "a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him in that respect as an object of moral judgment."176 What seems "irrational" to us is to hold actors responsible not only for their own acts, but "for the contributions of fate as well."177 Since there are many ways for fate to contribute to an act, there are many ways for luck to interject itself into attributions of blame.178

173. Joel Feinberg, Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It, 37 ARIZ. L. REV. 117 (1995); Sanford H. Kadish, Foreword: The Criminal Law and the Luck of the Draw, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994); Kimberly D. Kessler, The Role of Luck in the Criminal Law, 142 U. PA. L. REV. 2183, 2215 (1994); Morse, supra note 4, at 881; Steven Sverdlik, Crime and Moral Luck, in MORAL LUCK, supra note 99; see also Daniel Statman, Introduction to Moral Luck, supra note 99, at 16 (Should luck-in-consequences influence moral worth? "Most critics believe that, when we think about it, the answer to this question seems to be negative.").

174. See, e.g., Kadish, supra note 173, at 691 (rejecting one theorist's clever attempt to defend the lottery aspect of the doctrine, because "the basic injustice of a lottery in allocating punishment remains: to allow one of two offenders equally deserving of punishment to receive less punishment if she wins a lottery detaches punishment from desert").

175. The seminal modern formulations of the problem of moral luck are in Nagel, supra note 22, at 24–38, and Bernard Williams, Moral Luck, in MORAL LUCK, 20, 20–39 (1981). For somewhat divergent overviews of the problems in and scholarship on moral luck, see Daniel Statman, Moral Luck, in 8 ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 520–22 (Edward Craig ed., 1998), and Nelkin, supra note 17, § 1. Important papers are collected in Moral Luck, supra note 4.

While moral luck poses a host of problems for the criminal law, criminal theorists have paid most of their attention to the problem discussed in the text above—namely, whether luck with respect to results should influence our moral judgments about acts. See, e.g., Russell Christopher, Does Attempted Murder Deserve Greater Punishment Than Murder: Moral Luck and the Duty to Prevent Harm, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419 (2004); Kadish, supra note 173; Michael S. Moore, The Independent Moral Significance of Wrongdoing, 5 J. CONTEMP. LEGAL ISSUES 237 (1994).


177. Id. at 31.

178. Thomas Nagel set forth one now-classic taxonomy of the ways luck might threaten to infect moral judgments, including on the list not only luck in how
The criminal law envisioned in compatibilist criminal theory tolerates moral luck in ways that causal theory's criminal law does not. This is especially evident in the way the compatibilist criminal law handles what is sometimes called "constitutive luck"—"luck in who one is, or in the traits and dispositions that one has."179 Compatibilist criminal theorists do not dispute that phenomena that influence who one is—such as "genetic endowments and the nature and context of . . . childrearing"180—should be seen as "but-for causes" of conduct "over which agents have no control."181 But even if this is true, they say, the compatibilist criminal law need not provide any excuse for conduct caused by these constitutive forces unless they exert their influence in one of the ways identified by compatibilism's criteria for excuse—that is, unless they render the actor less than a moral agent, or make his act not an act at all, or subject him to a compulsion of some sort. Since constitutive forces like genetic endowment and childrearing rarely work their effect in these narrow ways, the compatibilist criminal law will seldom be obligated to excuse conduct traceable to constitutive forces, even when such forces are concededly causes of conduct and even when they are beyond the actor's control: in most cases, the fact that "bad luck . . . played a causal role" in who an agent is and thus in the agent's behavior is "no reason to excuse the agent."182 Thus, the compatibilist criminal law tolerates a kind of moral luck—constitutive luck. It holds actors responsible for their conduct even when doing so means blaming them for the "contributions of fate" to who they are.183

Causal theory's criminal law comes out differently on this issue. Causal theory maintains that the criminal law takes the control principle as one of its fundamental principles, and the control principle holds that actors cannot be blamed for conduct caused by forces beyond their control. It follows that actors cannot be blamed for conduct when that conduct is caused by constitutive forces over which those
actors have no control. Thus, if genetic endowment or upbringing causes an actor to commit a certain act, and exercises its influence such that the actor cannot control his conduct, the causal version of the criminal law issues an excuse—it declines to punish the actor for the "contributions of fate." In this sense, the causal version of the criminal law is less arbitrary than the compatibilist one.

It is fair to point out, of course, that we are generally unable—in actual practice—to persuasively demonstrate that particular constitutive forces cause particular acts. What difference does it make, then, that the compatibilist criminal law would not issue excuses in such cases if we had such cases? There are at least two answers here. One is that the law's authority and legitimacy depend in part on whether the law tolerates arbitrary blame even in principle, and this is true even if the opportunity for arbitrary blame has not yet arisen in fact. If so, the causal version of the law is preferable to the compatibilist version, because, declining in principle to endorse a lottery of blame and punishment, it does less damage to the authority and legitimacy of the law.

Another answer is that the law's attitude toward arbitrary punishment in this context has ramifications for its attitude toward other sorts of arbitrariness as well. Consider, for example, the law's handling of luck-in-consequences, mentioned above. The law commonly punishes actors according to the results of their conduct, even when doing so means distinguishing among actors according to factors over which they have no control. Most criminal theorists characterize this scheme as arbitrary and argue that the law should be reformed. Some theorists, however, defend the tailoring of punishment to consequences.184 One argument these theorists offer is that this sort of arbitrariness is an inextricable element of the criminal law as a whole. And one piece of support for this contention is that the criminal law tolerates constitutive moral luck, as shown by its refusal to issue excuses for conduct caused by constitutive forces beyond the actor's control.185 This argument, of course, is only valid if the compatibilist version of the criminal law is correct and the causal theory of the criminal law is wrong. Thus, because the choice between the compatibilist approach and the causal approach is a choice between an arbitrary approach and a nonarbitrary approach, it has concrete ramifications for whether we tolerate arbitrariness in other areas of the law. To the extent that we prefer a law that is not arbitrary—one that does not make blame and punishment a lottery, one that does not blame and


185. Moore, supra note 175, at 271–80; O'Day, supra note 184, at 243–45; Dan-Cohen, supra note 155, at 982–84.
punish actors for the contributions of fate—compatibilist theory's arbitrariness is dismaying, and should inspire us to give causal theory another look.

2. Artificial Criteria for Blame

The compatibilist account of the criminal law is disturbing in another way: it gives us a criminal law that embraces artificial criteria for excuse and blame, criteria that—like simulated sweetener—disguise their lack of substance by mimicking the taste of something else familiar and substantial. The compatibilist criminal law pulls off this trick by reverse-engineering its criteria for blame and excuse from provisionally determinist causal moral judgments.

Consider the sorts of conditions that compatibilist criminal theory considers sufficient to excuse. The most basic exonerating condition is that the actor did not genuinely act at all—as when an overpowering physical force (the wind) moved the actor's body like a puppet, or a physical constraint (a chain) prevented the actor from doing something she would otherwise have done. Actors are also excused if they are subject to compulsion or hard choice, as when acting under duress, or, perhaps, necessity. And actors are excused if they are not capable of rational thought, as when they suffer from delusions or are unable to construct simple syllogisms. These conditions all have some things in common. Generally speaking, they involve what the causal theorist would call brute and familiar causes of human conduct—causes whose influence is easily conceptualized and whose stories can be told in simple terms and short paragraphs. Anyone familiar with the physics of daily life will have no trouble understanding how a gust of wind moved a man's hand, or how a chain kept a man from moving. A person who has himself experienced or seen the normal range of fear and desperation will know, without being told, how a gun to the head can lead a person to do something he would not otherwise do. And while it may not always be quite so easy to conceive of the link between irrationality and particular acts, the sort of irrationality that excuses in the compatibilist criminal law is really a brute thing too—a catastrophic breakdown of the actor's mind, an inability even to put two premises together and reach a conclusion. This kind of irrationality, like physical constraint and circumstantial hard choice, exerts its influence on behavior in a way we can all readily grasp and explain without needing to leave the realm of common sense. The paradigmatic cases of compatibilist excuse, then, also happen to be cases in which we are able to articulate important parts of the causal account of the actor's act, and to take the unarticulated part of the causal account on faith. In short, they are the sorts of cases in which the provisionally determinist is most likely to call the actor's conduct "caused," and thus to grant the actor an excuse.
Now consider the sorts of case in which the compatibilist version of the criminal law most notoriously refuses to contemplate excuses. First, compatibilist criminal law takes the position that genetic heritage cannot be the basis for an excuse: human genes do not exercise their influence through physical constraint, or compulsion, or irrationality, and therefore have no place in pleas for excuse. Second, formative experiences in upbringing do not excuse: even if there is some connection between a person’s bad act and some pathology in her childhood family’s values or some traumatic experience of parental abuse, the person is not excused; for neither pathological family values nor past abuse can be characterized as physical constraints or compulsions or forms of irrationality (on the part of the actor). Third, social conditions do not excuse: even if there seems to be some link between the person’s act and the political culture in which she is situated or her “rotten social background,” such social conditions themselves do not fit the short list of excusing conditions, and compatibilist criminal law declines to contemplate an excuse.

Genetic heritage, upbringing, and social environment are much murkier things (for us) than the metal chains, guns to the head, and catastrophic mental breakdowns that the compatibilist treats as excusing conditions. While we are familiar with their effects in a very general way, our common sense does not provide us with any equations by which we can say that a certain genetic heritage or a certain upbringing or a certain social condition will produce a specific act on a specific occasion. When we make an effort to establish a convincing causal link between a known genetic heritage or formative experience or social condition and a particular act, we inevitably find ourselves providing book-length explanations, rather than laying out the sentence or short paragraph we would use to explain how a gust of wind or a gun to the head or an insane delusion caused an act. We know that these are phenomena with innumerable and diverse moving parts, and we know that we are not able to perceive or account for them all. Thus, if they are “causes” of human behavior, genetic

186. It is possible, of course, to be irrational because of genetic heritage, as in the case of someone who inherits a genetic predisposition to a severe mental illness. But the cases in which genetic heritage makes itself known in this way are comparably rare.

187. Fletcher, supra note 10, at 801. See also Dressler, supra note 55, at 1380.

188. Ayer noticed that some causes are more “visible” than others: “if my act can be causally explained in terms of my history or my environment, or whatever it may be . . . the chains of causation by which I am bound are no less effective for being invisible.” Ayer, supra note 157, at 21.

We are beginning to discover the genetic or early experiential factors and their cognitive and psychological residues that can be linked statistically to a host of . . . adolescent and adult pathologies and adjustment problems. Most of this work, however, remains far from definitive in identifying the exact links between the relevant causal factors and the
heritage, upbringing and social environment are much more obscure ones than physical constraint, compulsion, or irrationality. In this light, it might be said that the conditions which the compatibilist criminal law most notoriously declines to treat as excusing conditions also happen to be ones that the anxiously prudent provisional determinist declines to call causes, at least at this point in the development of our understanding of human behavior.

The compatibilist criminal law’s criteria for blame and excuse, then, look suspiciously like they have been reverse-engineered from the results of provisionally determinist causal judgments. The line that compatibilist criminal theory draws between conditions that excuse and conditions that do not is really nothing more than a rough proxy for the line between the causes of human conduct about which we feel reasonably certain, and those about which we are in doubt.

It is just the veil that separates the world of brute, perceptible, com-

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Ross & Shestowsky, supra note 152, at 1109--10.

189. Blumoff notices our epistemic difficulty with evidence of genetic inheritance, upbringing, and social conditions: "genetic predispositions... may play... a potentially critical causative role in the development of character and the like, but we are still some distance from possessing a sufficient understanding of that phenomenon, if it ever comes"; "it is also true that courts cannot routinely stage a parade of witnesses whose purpose is to catalogue each event in every wrong-doer's life to effectual causal-based sentencing reductions." Blumoff, supra note 152, at 1003-04.

190. As Blumoff says, "it is precisely because causation is so complex that our practical reasoning demands line-drawing." Blumoff, supra note 152, at 1003-04. See also id. n.94 ("Why criminal law ignores those uncontrolled forces which conduce to criminal conduct [such as genetic inheritance and upbringing]... probably implicates matters of... practicality (including limited resources and perceived limitations on epistemology."). See also Kahan & Nussbaum, supra note 33, at 369 (Evaluative compatibilist theory holds that "for reasons of determining guilt or innocence, it is right to look into the quality of the agent's motivations and emotions at the time of the offense, but not to raise large cumbersome issues about the person's whole history and process of character formation"). Pillsbury comes at this phenomenon from a slightly different angle. Pillsbury, supra note 49, at 725 ("We might imagine a zoom lens that can be focused on events near or far along the causal chain. The scientist, with his interest in causation according to genetics and environment, adjusts the lens to telephoto length and looks beyond the conscious reasons for a decision to its causal origins. By contrast, the philosopher or lawyer adjusts the lens to the everyday perspective of human experience, in which reasons for choice dominate the foreground while genetic and environmental causes remain in the distant background"); id. at 726 (contrasting the "God-like view of the universe," in which moral judgments take account the total causal picture, with the "particular perspective of humanity," in which judgments are made based on causes that we can understand).
prehensible causes from the world of complex, invisible, hard-to-conceptualize possible causes. Tracking our causal judgments, these criteria produce results that “taste right” to us—results that line up with our tentative judgments about what is caused and what is not, and thus feel familiar and predictable. But these feelings of familiarity and predictability are really the product of an artifice: compatibilist criteria may get us to the results we expect, but they do not get to these results by the same provisionally causal route we do.

At this point, the compatibilist criminal theorist might reply that it is just as likely that provisionally determinist judgments about causation are reverse-engineered from compatibilist intuitions, rather than vice versa. This, however, seems implausible. The struggle to see and discover cause and effect is a pervasive part of human experience—both in and beyond the realm of moral judgment. We are ceaselessly engaged in it, whether we are driving in rush-hour traffic, or seeking to influence others. Our confidence that the wind can cause a person’s hand to move, or that a gun to the head can do something similar, stands on its own feet, independent of moral judgment; so too our doubt and anxiety about whether social conditions can cause conduct. It makes much more sense, then, to say that the reason our moral judgments excuse in the former cases and indict in the latter is that our moral judgments revolve around our best guesses at causation, than to say that we use entirely separate criteria for making moral judgments, but coincidentally find that our moral judgments happen to track our judgments about causation. If there is reverse-engineering going on here, it is much more plausible that compatibilist theory’s moral criteria take their cues from causal judgments than vice versa.

Provisionally determinist causal judgments and compatibilist judgments, then, both “taste” more or less “right” to us; but they taste right for different reasons. Provisionally determinist causal judgments line up with judgments we make about events and acts both within and outside the moral realm; compatibilist judgments taste right because they imitate our causal judgments.

Compatibilism’s seemingly reverse-engineered artificiality should worry us; why would a moral theory strive to entice us with familiar-tasting moral judgments, but detach those judgments from their familiar roots? The next three subsections highlight some dismaying possible answers.

3. A Morally Complacent Criminal Law

No one would deny that a great deal turns on the criminal law’s judgments: they determine who we stigmatize, imprison, and execute. With so much riding on them, such judgments call for deep moral engagement, but the compatibilist criminal law chooses the path that
entails less engagement—less labor, and less angst—over the one that entails more. This complacency should give us pause.

Compare the way the compatibilist criminal law determines who to excuse with the way the causal criminal law does it. The compatibilist criminal law judges whether an otherwise-bad act should be excused by looking for indications that the act was not really an act at all, for circumstances that created compulsions or hard choices, and for evidence that the actor was irrational; once this checklist (or one like it) has been exhausted, the compatibilist inquiry is over.

Causal criminal law's inquiry is a different sort of task. For one thing, it is more labor-intensive: the causal criminal law's commitment to the control principle requires it to be open to claims based on much more obscure and complex influences, including genetic heritage, upbringing, and social conditions. Indeed, the control principle requires the law to be open to any causal explanation at all—the law must at least listen to any causal account, in case that causal account is sufficiently persuasive to overcome our anxious resistance. The causal criminal law's approach also entails a kind of angst that the compatibilist law's approach does not. One who is committed to the control principle knows that caused acts must be excused, but (if she is human) she also knows that her ability to determine whether an act was caused or not is poor, given her perceptual and cognitive limitations. Thus, the person who is dedicated to the control principle knows that she is not well-situated for this task, and that she is likely to make errors. As a result, while she is committed to exonerating actors whose conduct was dictated by forces beyond their control, she is also humbled by the near certainty that she will make tragic errors regarding who to excuse and who to blame.191

This contrast brings out a disturbing feature of the compatibilist version of the criminal law: as compared to the causal version, it seems dismayingly complacent. Faced with a choice between a broader, more labor-intensive moral inquiry, and a narrower, more discrete one, it chooses the latter; faced with a choice between humble angst and self-satisfied repose, it chooses repose. In short, notwithstanding the high stakes, the compatibilist approach prefers the easier route.

Indeed, this may be part of why compatibilism triggers the indignant charge that it is a "subterfuge": putting aside whether it is cor-

191. In the course of his critique of the causal theory, Michael Moore appears to express this very anxiety:

It is hard to imagine how different our praising and blaming practices would be if we really tried to cabin them to situations in which we could think of no causal explanation for a person's behavior. We would always be in doubt as to whether a person really deserved praise or blame.

Moore, Causation, supra note 1, at 1145.
rect on the merits, it appeals to us because it offers us an escape. When we try to work with the control principle, we are forced to see ourselves as flawed moral judges who inevitably make errors; when we work with compatibilism's moral criteria, we appear less flawed, and less likely to make errors. The former view makes us unhappy with ourselves and doubtful of our moral judgments; the latter allows us more satisfaction with ourselves and less insecurity about our moral judgments. This makes the compatibilist criminal law more alluring to us than the causal version. The problem, of course, is that a moral theory's ability to make us feel good about ourselves has no correlation with its validity. Indeed, there probably is good reason to believe that a moral theory that makes us feel good about ourselves will have at least some appeal to us even if it is wrong. In this sense, then, compatibilist criminal theory has the aura of a "subterfuge": it is attractive to us not because of its merits, but because of the escape it offers us.

This is not an appealing vision of the criminal law. A description of the criminal law that makes it out to be so complacent undermines its moral legitimacy, while setting the stage for the law to turn a blind eye to morally relevant information in other contexts as well.

4. Unresponsive to Advances in Our Understanding of Human Behavior

The compatibilist criminal law is also strangely unresponsive to advances in our understanding of human behavior. As such, the compatibilist vision gives us a rigid, inflexible law—a law that is likely to resist the development of doctrines that reflect new knowledge, and thus likely to fall out of touch with social mores.

We are, of course, intensely interested in the causes of human behavior. We have always used philosophy and the arts to search for them, and in our more recent history we have made substantial efforts to get at them through the biological, psychological, and social sciences. Predictably enough, our ability to articulate causal explanations of at least some kinds of human behavior has improved, and it likely will continue to do so.

It seems natural that as our understanding deepens, our moral judgments of human conduct should evolve, but the law envisioned by compatibilist criminal theory makes little room for such evolution. Compatibilist criminal theory's criteria are only receptive to causal accounts of very limited sorts—causal accounts that go to whether the actor was subject to coercive physical force, or compulsion, or irrationality. The set of causes that "count" is a small one, and it is closed. Moreover, it excludes precisely the sorts of causes to which we have been devoting much of our attention for the last century. The sorts of things in which we have been interested largely have been the sorts of
things that compatibilist criminal law says do not matter—things like genetic inheritance, upbringing, and social environment.

To illustrate, consider compatibilist criminal theory's attitude toward the proposed rotten social background defense.\textsuperscript{192} The proposal springs from sociological insights into the relationship between social environment and antisocial behavior.\textsuperscript{193} In a typical form, the proposal requires the law to excuse actors when their conduct is caused by very bad social conditions. As of yet, the criminal law has declined to recognize such an excuse. Both causal theory and compatibilism can explain the law's stance. On causal theory, the problem with the rotten social background defense is that no one has yet articulated the relationship between a social condition and a particular act with sufficient clarity to overcome our general, anxious resistance to causal accounts; more work will have to be done, says the causal theorist, before the law will accept such a defense. On compatibilist criminal theory, the problem with the rotten social background defense is not that the alleged causes have not been worked out sufficiently well, but that even if they were fully worked out, they would be irrelevant. It does not matter if social conditions cause conduct, say the compatibilist criminal theorists, for these are not the sorts of causes that excuse.\textsuperscript{194} Social conditions do not exercise their alleged causal force by physically coercing the actor, or by subjecting him to a compulsion, or by making him irrational. Perhaps social conditions exercise some causal force by shaping character, but character traits are never in themselves the basis for an excuse.\textsuperscript{195} In short, social conditions defenses are incompatible with the compatibilist criminal law's criteria.

Thus, though biology, psychology, sociology and the other sciences of human behavior continue to work away at the causes of human con-

\textsuperscript{192} Illustrative proposals can be found in Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 LAW & INEQ. 9 (1985), and David L. Bazelon, The Morality of the Criminal Law, 49 S. CAL. L. REV. 385 (1976).

\textsuperscript{193} See, e.g., Delgado, supra note 192, at 23–37 (cataloguing sociological and psychological research as of 1985).

\textsuperscript{194} Fletcher, supra note 10, at 801; Dressler, supra note 55, at 1380.

\textsuperscript{195} Fletcher explains that:

Social deprivation and particular forms of social interaction might conceivably fashion a person's character to be heedless of the rights of others. If that should be the case, the influence of experience would be too pervasive to constitute an excuse . . . . [E]xplaining a life of crime cannot excuse particular acts unless we wish to give up the entire institution of blame and punishment.

Fletcher, supra note 10, at 802. See also Morse, supra note 22, at 359 (“[I]f a person lacks protective predispositions and is exposed to a criminogenic environment, it will, all else being equal, be considerably harder for that person to avoid offending than for a person who is more fortunately endowed and exposed to a more benign environment. Nonetheless, morality and current law do not excuse unless the agent is incapable of rationality or faced with a hard choice.”).
duct, and though nearly all of us are naturally interested in what these sciences can tell us, the law envisioned by compatibilist criminal theory sets its face against them. Because it recognizes only a handful of conditions and circumstances as morally significant, it is poorly positioned to accommodate the sorts of changes and advances in our understanding of human behavior that are likely to emerge through these sciences.

This is not a desirable vision of the law. While it may be able to explain the law's current catalog of excuses as well as the causal version does, it gives the law a less appealing future. It makes the law out to be rigid, artificially detached from evolving human experience and human knowledge, likely to fall out of step with social mores, and likely to exclude from consideration information that most people consider morally relevant.196

5. Resistant to Criticism of Social Conditions

We should also be skeptical of the compatibilist version of the criminal law because it is more resistant to criticism of social conditions than the causal alternative.

Compare the sorts of moral inquiries required in a compatibilist system to those that are required in a causal one. Inquiries conducted in a compatibilist system are unlikely to explore whether an actor's conduct was caused by social conditions. As we have seen, when the compatibilist criminal law considers whether an excuse should be granted for a certain kind of conduct, it engages in a narrowly circumscribed inquiry: it asks whether there is reason to doubt that the sort of conduct at issue is really human action at all, whether it occurs under conditions that constitute a compulsion or hard choice, and whether the actors involved should be considered moral agents. Even in theory, it is hard to conceive of social conditions that would render an act not a genuine act at all, or that would make an actor irrational in the catastrophic sense compatibilism requires, and while we may be able to imagine circumstances in which social conditions could be characterized as so catastrophically bad that they are compulsion-like, such catastrophically bad social conditions are at least exceedingly rare.197 Thus, given the compatibilist criminal law's circumscribed criteria for excuse, social conditions will generally appear irrelevant to the standard compatibilist inquiry.

Inquiries conducted in a causal system will have a very different attitude toward social conditions. As we have seen, causal theory does

196. On causal theory's greater receptivity to defenses incorporating the sort of information raised in the rotten social background defense, see Corrado, supra note 7, at 1192–93.
197. See Dressler, supra note 55, at 1381–83 (skeptical that social conditions can be so adverse as to amount to duress).
not limit the sorts of causes that can be considered morally significant: physical coercions, hard choices, and irrationality count; but so too can any other sort of cause. Thus, there is no *a priori* reason why exposure to a certain social condition cannot be deemed an excusing cause of some particular kind of conduct. If so, an inquiry conducted under the causal system may end up explaining an actor's conduct by pointing to features of the social order. Indeed, given the steady march of the psychological and sociological sciences, it seems eminently likely that such explanations will come to seem increasingly plausible, and thus increasingly significant to the sort of moral inquiry the causal criminal law requires.

The difference between these two sorts of inquiries has obvious ramifications for criticism of social conditions. The compatibilist inquiry deems social conditions irrelevant; those engaged in the compatibilist inquiry will therefore have no reason to identify links between social conditions and unwanted conduct. When actors commit bad acts, the compatibilist system will place blame on the actor, but not on the social conditions in which his act occurred. The compatibilist system will therefore channel any impetus for correction toward the actor, not his social environment. The causal inquiry, in contrast, must always be open to the possibility that social conditions are relevant; those engaged in the causal inquiry will therefore have reason to identify the links between social conditions and unwanted conduct (if such links exist). They may sometimes place blame for bad acts on the actor's social environment, rather than on the actor; and in such cases, it will seem natural to call for changes in the social environment. Thus, the compatibilist version of the criminal law is likely to be dramatically less conducive to social criticism than the causal version.

This, too, is a reason to be skeptical of the compatibilist vision of the criminal law. That version of the law seems unduly solicitous to the social order, and too willing to "soothe our collective social conscience." It gives us a law that too blithely casts its lot with the social conditions we have, rather than one that is open to exploring the social conditions we should have.

### C. Shaking Off Compatibilism and Looking for New Alternatives

This Part has tried to highlight some of the troubling ramifications of explaining the criminal law's excuses in compatibilist terms. The compatibilist explanation gives us a law that blames arbitrarily and according to artificial criteria, one that indulges moral complacency and turns a blind eye to advances in our understanding of human behavior, and one that channels criticism away from social conditions at

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198. See Arenella, *supra* note 155, at 1533.
the expense of individual actors. It is a law that seems to show system- 
atic preferences for excluding potentially significant information 
from the moral calculus, for appealing to us through subterfuge rather 
than on the merits, and for blame rather than sympathy. In short, it 
is in many ways an ugly criminal law.

These ugly features of compatibilist criminal law should inspire us 
to explore alternative views. Causal theory is one such alternative 
view. It offers to explain the contours of the criminal law’s defenses, 
but without making the law out to be so arbitrary, so artificial, so com-
placent, so rigid, and so protective of the existing social order. That is, 
it offers us a more intuitively appealing and humane criminal law. It 
merits a second look.

VI. CONCLUSION

This Article has made two related claims. The first is that the 
causal explanation of the criminal law is plausible. The allegedly-dev-
astating “partial determinism” critique turns out not to be so devast-
tating after all, once our anxious attitude toward determinism and 
causal explanation is brought out. The second is that the currently-
favored compatibilist alternative has several normatively disturbing 
features that causal theory does not. It gives us a criminal law that is 
arbitrary and artificial, complacent and unresponsive, and suspi-
ciously solicitous to the existing social order. If these claims are right, 
criminal theory should revisit causal theory: it is descriptively viable, 
and it is normatively preferable to the currently-favored compatibilist 
approach.

Of course, challenges will immediately confront those who revisit 
causal theory. Two will seem especially urgent. One has to do with 
the causal accounts that underlie the causally motivated defenses. If 
causal theory is to explain the irresistible impulse doctrine or the du-
ress doctrine or cognitive insanity as doctrines that reflect judgements 
about what kinds of conduct are caused, it must bring out the causal 
accounts on which the criminal law relies. To date, descriptions of 
causal theory have adverted to only the most rudimentary causal ac-
counts of human conduct. Perhaps this is because it is assumed that 
we and our law are, in fact, very primitive about the causes of human 
conduct—that we have common-sense notions about what is caused 
and how it is caused and, therefore, do not care much about the exact 
details. If so, this idea should be defended; otherwise, causal theory 
should set about the task of discovering just what causal theories the 
law is working with.

The second challenge is to explore whether causal theory can ex-
plain the often baroque corrugations of the criminal law’s defense doc-
trines. Can a causal theory account for the fact that the duress 
doctrine excuses conduct driven by a threat to safety, but not by a
threat to cherished property or reputation, or that it excuses conduct motivated by a human threat, but not conduct motivated by a threatening force of nature? Can a causal theory explain why some defense doctrines—provocation, imperfect self-defense—provide only partial exoneration?

It is possible that efforts to address the first challenge (articulating the law’s causal theories) will produce answers to the second challenge (showing how these theories account for the baroque corrugations of the criminal law’s defenses). Perhaps it will turn out that the law’s conception of duress depends on an exquisitely nuanced machinery, one that can explain the convolutions of the doctrine. Another possibility is that better answers will be found by keeping in mind our provisional attitude toward causal accounts. It may be that the corrugated contours of the defense doctrines are dictated not only by the content of our causal accounts, but also by the degree of anxiety that those causal accounts cause us. Some causal accounts may be more threatening than others. Endorsing them is more costly. We react to them by digging in our heels and refusing to take them whole-hog. And, as a result, we hedge in the defenses they generate in ways that reflect our root anxieties about causal accounts. The curious contours of the criminal law’s defenses may reflect this sort of dynamic interaction between nuanced causal accounts and the anxiety they provoke.

Working out these problems likely will be a labor-intensive task. I hope that this Article has made the prospect of working out answers to these sorts of questions more palatable. By debunking the most fundamental objection to causal theory—the “partial determinism” critique—I have shown that one of the purported obstacles to causal theory is an illusion. By showing that the contemporary compatibilist account of the criminal law has normatively disturbing features, I hope to have made the project of working out causal theory more urgent. Causal theory offers a viable purchase for certain humane intuitions that current compatibilist criminal theory cannot accommodate: it is worth another look.

199. For example, our anxiety about causal accounts may be proportional to the extent to which they appear generalizable. That is, a causal account that appears likely to overflow the context in which it is offered is likely to make us more anxious than one that does not appear likely to overflow its context. Perhaps causal accounts that point to allegedly universal impulses (“fight or flight”) are more threatening (in the generalizability sense) than ones that point to idiosyncratic mental illnesses; the former makes us all puppets to a certain machinery; the latter makes only a few of us puppets.

The depth and accessibility of the account may also influence the extent of our anxiety. The more “complete” a causal account seems to us, the less likely we are to be anxious about it. The feeling of completeness likely turns on the depth of detail marshaled by the account and the ease with which we understand the details presented.