The Will: From Metaphysical Freedom to Normative Functionalism

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Free will is regarded by some as the most and by others as the least relevant concept for criminal responsibility. Contributions from religious and philosophical thinkers over the classical and medieval Christian eras demonstrate that, despite the passionate and historically consequential debates over the meaning of "freedom," the unifying theme that joined the will with the intellect remained persistent and pervasive. Leading historical jurists in England eventually dropped the descriptor "free," but retained the central importance of the will to criminal responsibility and emphasized its dependence on the intellect to function properly. Modern rationalist philosophers denied the will's metaphysical freedom, but not its existence. Today the neurosciences reveal more and more about how the will functions, even as lawyers and psychiatrists hesitate to utter the word. In properly avoiding metaphysical freedom within forensic inquiry and discourse, it is a grave conceptual mistake to overlook the will itself. Once greater conceptual clarity on the empirical nature of the will is achieved and accepted, the law itself could rediscover the core mental faculty behind human agency, the will.

J Am Acad Psychiatry Law 36:16–24, 2008

It is widely assumed that people have a relatively unhindered capacity to make choices and to decide what they will do. We assume that the concept of a "free will" is as important to American law as duties, rights, liberty, and justice. A testator exercises her free will when making out her last will and testament. A patient provides informed consent when freely choosing medical treatment. And a criminal, with no insanity or *mens rea* defense, acts with a free will when she decides to commit a criminal offense and then does so. Surely then, an individual's free will would be axiomatic to a forensic psychiatrist who is concerned with such matters as testamentary capacity, various decisional capacities, and criminal responsibility.

As shall be seen, the greater mystery of free will is the concept of freedom. Nonetheless, many examples exist for legal authorities recognizing the importance of freedom. In *Morissette v. U.S.*,[1] for example, the U.S. Supreme Court referenced the importance of free will to criminal law. In *U.S. v. Currens*,[2] Chief Justice Biggs emphasized the assumption that people have the capacity to select and control their behavior. Intentional and decisional capacities are of the will, whether metaphysically or functionally free.

Others find no relevance of free will to the law. Stephen Morse[3] points out that insanity laws make no mention of free will, and he refutes the relevance of the concept to American jurisprudence. He admonishes commentators not to discuss free will within a legal context and scoffs at those who would. Having been forewarned that even discussing the topic can be illusory, the author now chooses to tread upon this uncertain ground and leave for the reader to judge whether this decision was made freely and rationally.

So what is this idea of free will? Where did it come from? What, if any, is its relevance to the law and forensic psychiatry? Space allows only a passing attempt to address these questions, which are in any case intriguing and may be meaningful for an appreciation of our role as forensic psychiatrists. In pursuing these inquiries, the reader is invited to embark on an odyssey that begins in the ancient Middle East;

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moves to Athens, Hippo, and Egypt; and then treks through Europe during the Middle Ages, the Renaissance, the Enlightenment, and Idealism; travels through Celtic, Saxon, and Norman England; and then arrives in today's modern clinics and laboratories. Through this historical review and conceptual analysis, the author will argue that the will, neglected in contemporary legal and scientific discourse, is a useful if under-appreciated concept for psychiatry and the law.

Some Early Philosophical and Theological Perspectives

In Western Asia and Eastern Mediterranean regions, peoples developed beliefs about a person's capacity to choose between good and evil and the spiritual importance of such choices, centuries before the beginning of the Common Era. Monotheistic religious beliefs and ancient Hellenistic systems of thought eventually evolved into the dominant views of the will during the Middle Ages. For this early philosophical and theological background, only three individuals will be discussed: Aristotle, Pelagius, and Saint Augustine.

Aristotelian concepts had enormous influence on Western church doctrine, especially through the Middle Ages, and they correspond with current secular legal theory and practice. In Nicomachean Ethics,[4] Aristotle (384–322 BCE) distinguished between voluntary and involuntary actions. Voluntary good actions are praised, voluntary bad actions receive blame, and involuntary bad actions can be pardoned. Acts due to compulsion or ignorance are not voluntary and therefore are not blameworthy.

Pelagius (ca. 354–420 CE), founder of Pelagianism, taught that God endowed people with the freedom to choose between good and evil. Accordingly, a sin is a voluntary act committed by a person against God's law.[5] Pelagius is thought to have come from the British Isles.[6] If he had come to Rome at the age of 26 as a lay theologian in 380, his arrival would have been before the withdrawal of the Romans and before the Anglo-Saxon invasion. Being of Celtic background, he may have originated from a culture when the Celtic Church was the major religious force on the British Isles.[7] The Celtic culture and the Celtic Church had long held the belief that individuals have a free will and are responsible for their acts.[8] The paradox then would be that Pelagius, a Celt, brought the concept of free will, though at the time unwelcome, to Rome, centuries before the Roman Church introduced it to English secular law.

Although controversial in his own lifetime,[9] Saint Augustine of Hippo (354–430 CE) was perhaps the single most influential saint in shaping beliefs concerning free will, divine grace, and divine predestination for centuries to come. Saint Augustine believed that humans must absolutely and completely rely on God's grace to become righteous. God decides to whom he will give grace and therefore predestines who will receive grace and who will not.

Saint Augustine is known for his theology, but as students of the mind we should appreciate that he contributed much to a description of the mind ("soul") and will. Relying on Hellenistic doctrines to support Christian belief, his tripartite soul consisted of memory, intelligence, and will.[10] Fifteen centuries before Freud, Saint Augustine identified the ego as the structure that possesses and uses these three interrelated faculties. Although Saint Augustine denied that the will is free to love God without God's intervention, he distinguished between a good and a bad will based on the nature of one's desires.[10] The companion power within the soul is the intellect that perceives what is good, whereas the will, using the information, makes choices and initiates actions.[11]

In addition to their theological metaphysical formulations, early thinkers and believers began to describe natural psychological phenomena that contributed to a concept of the will as a faculty of the mind. The conceptual bond between will, whether metaphysically free or predestined, with monotheistic belief through the centuries is obvious. Note as well, however, the strong relationship between will and the intellect or the function of reason.

Now, a chapter of history must be recognized wherein popular belief and conception of the will were completely devoid of reason. It is tragic irony that from the late Middle Ages into the Renaissance with its emphasis on humanism, classical art, and science, a regressive scourge swept Europe: the terror of witchcraft and slaughter of thousands. Even more ironic, the slaughter peaked in the 17th century, during the Age of Reason with its great rationalist philosophers.

The historian of medical psychology, Gregory Zilbourg, concluded that a twisted application of the free will tenet justified or compelled Christians to barbaric rituals:

> The belief in the free will of man is here brought to its most terrifying, although most preposterous conclusion. Man, whatever he does, even if he succumbs to an illness which perverts his perceptions, imagination and intellectual functions, does it of his own free will; he voluntarily bows to the wishes of the Evil One. The devil does not lure and trap man; man chooses to succumb to the devil and he must be held responsible for his free choice. He must be punished; he must be eliminated from the community. More than that, his soul, held in such sinful captivity by the corrupted criminal will within the body must be set free again; it must be delivered. The body must be burned [Ref. 12, p 156].

We should not conclude from the persecution of "witches," as Thomas Szasz[13] seems to have done, that any coercive attempts to help the mentally ill are morally condemnable. Rather, we should conclude that punishment based on belief without reason can result in practices with strict liability and no sense of moral proportionality.

The Renaissance must have eventually become a favorable counterforce to the terror and persecution of witches in Western Europe. The central theme of the Renaissance was humanism, a perspective that emphasized the importance of humans, human values, humans' exalted relationship with God, humans' superiority over nature, and humans' free will.[14] The humanist view would eventually be embraced by philosophers such as Voltaire, Rousseau, Hume, and Kant, as well as American founding fathers such as Franklin and Jefferson.[15]

As we review the history of Western concepts of the will, we should not overlook the history of the "intellect" with which the will is closely associated. The ancient Greek philosophers were interested in the intellect and reason: The Nous or mind of Anaxagoras, the Logos or rational principle of Heraclitus, the world's intelligibility of Pythagoras, and the intellect, the highest component of the soul, of Plato.[16] The intellect with its capacity to reason existed in individual humans and also on a high and divine universal level giving order to the world. The direct connection between an individual's kosmos and the world's kosmos, envisioned by Plato, was a spiritual one. The Aristotelian "rational soul" was accepted by Saint Thomas Aquinas[17] as having been "produced by God alone" (Ref. 17, p 96); the "intellect" makes humans in comparison with other animals more like God (Ref. 17, p 73). The will, functioning hand in hand with the intellect, cannot function without the intellect.

The Will in Pre-Norman England

Now let us take an excursion from our journey through the development of early Greek philosophy and Western monotheism to visit early England. In *Crime and Insanity in England*, Walker[18] traced for us the evolution of the insanity defense in early England. This work is equally useful in examining the central historical importance of the will to criminal responsibility. One might think that free will was unknown prior to the Norman invasion in the 11th century. Not so! Before the Normans, before the Saxons, there were the Celts. That women and men were responsible for their behavior because they had a free will is thought to have been an important assumption within the early Celtic culture.[19] Remember Pelagius (354–420 CE) and his doctrine of free will?

After the Saxons came to England in about the sixth century, signs of Celtic culture all but disappeared, especially in eastern England. Saxon law made no distinction between civil and criminal wrongs.[20] The expectation was that the wrongdoer compensate the victim or the victim's family for the harm that was inflicted. If compensation was not forthcoming, the wrong would be avenged, but this wrong too could be avenged, creating the possibility of an ongoing blood feud. No attempt was made to assess the degree of fault or responsibility of the wrongdoer; rather, attention was affixed on the amount of harm done. An accidental homicide was, for example, not different from an intentional killing. Strict liability applied in private offenses, and so the wrongdoer's mental state and intention were not considered.[18] The wrongdoer was, "implicit in this doctrine . . . an instrument of harm rather than a moral agent . . ." (Ref. 18, pp 13–14).

From a contemporary perspective, Anglo-Saxon law seems primitive, especially with its neglect of moral proportionality. To its credit, however, the principle of compensation offered more tangible satisfaction for the victim than the feeling of revenge through criminal punishment would have.

The Introduction of Free Will and *Mens Rea* Into English Secular Law

Eventually, beginning at least by the 11th century, but especially after the Norman Conquest of 1066, concepts of free will, criminal responsibility and *mens rea*, were introduced into the secular English legal

system. Exactly when and how English law accepted these ecclesiastical concepts is unknown.

Archbishop Wulfstan was, beginning in 1008, advisor to King Aethelred. In drafting laws for the King, the Archbishop addressed the matter of criminal responsibility and free will: "And [if] it happens that a man commits a misdeed involuntarily, or unintentionally, the case is different from that of one who offends of his own *free will*, voluntarily and intentionally" (Ref. 18, p 16; emphasis added). Thus, by the early 11th century, a distinction was made in English law between misdeeds that are voluntary, intentional, and of one's free will on the one hand, and those committed by accident or coercion on the other.

Already very familiar is the so-called "wild beast test" of insanity proposed by Henry de Bracton in the 13th century. This test emphasized lack of understanding and made no mention of the will. However, in further explaining the concept of criminal responsibility, Bracton wrote: "For a crime is not committed unless the *will* to harm be present . . . . In misdeeds we look for the *will* and not the outcome" (Ref. 21, p 5; emphasis added).

The foremost jurist of the 17th century, Sir Matthew Hale, further established the relevance of the will to criminal responsibility and the utter dependence of the will on proper understanding:

> The consent of the *will* is that which renders human action either commendable or culpable . . . . And because the liberty of *choice of the will* presupposeth an act of understanding to know the thing or action *chosen by the will*, it follows that where there is a total defect of the understanding, there is no free act of the will [Ref. 22, pp 630–1; emphasis added].

Although the will is functionally connected to understanding, understanding does not displace the central role of the will in criminal responsibility.

In the *Commentaries*, Sir William Blackstone in the 18th century further developed the strong conceptual relationship between will, *mens rea*, and criminal responsibility, by linking the will with intellectual understanding:

> Those with a "want or defect of will" are incapable of committing crimes and exempted from legal punishment [Ref. 23, p 20].
>
> . . . For where there is no discernment, there is no choice; and where there is no choice, there can be no act of the will . . . he therefore, that has no understanding, can have no will to guide his conduct [Ref. 23, pp 20–1].
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> A deficiency in *will* which excuses from the guilt of crimes, arises from a defective or vitiated understanding, viz, in an *idiot* or a *lunatic* [Ref. 23, p 24; first emphasis added; others preserved].

According to Blackstone, the will not only depends on understanding to function properly, the will itself is made defective by lack of understanding.

Archbishop Wulfstan and the laws of King Knute associated free will with intentionality. De Bracton used the term will to mean intent or desire. Sir Matthew Hale associated the will with freedom of choice, which requires understanding. Sir William Blackstone also described the will as a conduct-guiding faculty that depends upon understanding. Thus, from the 11th through the 18th centuries, leading legal authorities in England emphasized the functions and functioning, not the origin of the will—functions and functioning that, by the way, are perfectly consistent with 21st century legal assumptions concerning criminal responsibility.

Criminal responsibility has long been normative (i.e., based on standards), even in early England. It was, however, the concept of will that gave meaning and coherence to these standards, even when will was not mentioned in the standards themselves. The logic of relating responsibility to the will is not lost by emphasizing functional over metaphysical properties. The logic is strengthened.

Now let us return from the evolution of criminal responsibility in England to the scholasticism of the Middle Ages and the emergence of modern philosophy and preeminence of natural causation theory.

The Will of Modern Philosophy

The scholasticism of the Middle Ages incorporated the Aristotelian tripartite soul.[24] The Aristotelian soul consisted of nutritive, sensitive, and rational elements. Functions of the nutritive or vegetative soul, present in all forms of plant and animal life, are assimilation and reproduction. The sensitive or animal soul includes the senses, desires, and locomotion, thought to distinguish animals from plant life forms. The rational soul is capable of deliberation and rational thought and is present only in humans. According to medieval dualism, the soul gives life to the body.[24]

Rene Descartes (1596–1650), more than any other individual, opened the door to modern philosophy. Today he is criticized for having separated the mind from the body (e.g., Demasio[25]). However, as just noted, the soul had already been separated from

the body by theologians and philosophers for centuries and by the dominant thinkers and teachers of medieval scholasticism. By acknowledging that the body has its own vitality, Descartes united the nutritive and sensitive souls of medieval scholasticism with the body but reserved the rational soul, *res cogitans*, as the only real sou1.[24] One measure of the pathbreaking greatness of Cartesian thought is that the philosophers who followed defined their views by critically contrasting them with those of Descartes.

One such 17th-century rationalist was Baruch Spinoza (1632–1677). According to this Dutch metaphysician, the will is the faculty of the mind that makes decisions. Because we are aware of our actions, but unaware of the causes of our actions, we deceive ourselves and believe we have an absolute power to cause our actions. Just as there is no absolute faculty of willing or not willing, neither is there an absolute faculty of loving, desiring, or understanding. What we will is a succession of causes; therefore, our will cannot be free, according to Spinoza.[26] According to Spinoza and other 17th-century rationalists, the will is not free, but it is the decisional or volitional faculty of the mind.

In the last half of the 19th century, idealism, particularly in Germany, was developed by philosophers who envisioned alternative, additional explanations beyond the paradigm that natural causation explains everything. Here will be mentioned only two German idealists whose thinking allows for the existence of freedom of the will: Immanuel Kant and Arthur Schopenhauer.

Like other idealists, Kant (1724–1804) incorporated rationalism into his metaphysical system, but he argued that natural causation and specifically the principle of hedonism do not explain all of human thought and behavior. It will be recalled that his single best known concept is the "categorical imperative." Moral duties of one person to another or to society in general arise from the principle of doing what benefits the common good, not just oneself. In this sense, we can transcend the hedonistic motives that are naturally caused and decide to do what is morally good with some freedom from self-serving drives. This capacity to consider what serves the common good and to act accordingly is evidence, according to Kant,[10,27–29] of a free will. (For brief summaries of Kantian philosophy see: Lavine [Ref. 27, pp 193–8], Marias [Ref. 10, pp 284–96], and Ameriks [Ref. 28, pp 460–6].) Kant argued in support of the retributive theory of criminal punishment.[30] Punishment for a criminal offense is a moral duty of society, regardless of any secondary effects.

Pure natural determinists would counter that even apparently ethical and altruistic behavior is naturally caused. Utilitarians would argue that punishment of an offender makes the least sense if the offender acted with a metaphysically free will, because the punishment would have no effect on the offender. Of course, the consequences of punishment are not important from a retributivist's perspective. No one should deny, however, that ethical conduct is consistent with a fully functional will.

Schopenhauer (1788–1860) maintained that the will is the fundamental metaphysical principle and that the exercising of the will is the dominant force in our lives.[31] The will, according to Schopenhauer, is the "inner moving force" that is motivated by things and events in external reality, or more specifically by our perception of such things. Schopenhauer describes three types of freedom of the will, each defined by its opposite or the type of restriction of freedom: moral, physical, and intellectual. Schopenhauer's third freedom, intellectual freedom, is of special interest in considering mental responsibility for criminal acts.

A person with an intellectually free will acts as a reaction to stimuli that arise in the external world (Ref. 32, p 89). In humans, the intellect processes these stimuli. Whatever the external stimulus to act, cognition and consciousness must be actively involved for free exercise of the will. Thus, if cognitive functions are sufficiently disturbed, freedom is compromised. The intellect can be altered by "madness," for example. Schopenhauer therefore endorses the view that a will so afflicted is not free and that the offender should not be punished. Schopenhauer also advances the notion of partial criminal responsibility when intellectual freedom is partially compromised, such as from emotion or intoxication.[32]

Regardless of whether we accept Schopenhauer's axiom that a free will is not caused by anything, his description of intellectual freedom and its restrictions correspond with phenomena familiar to forensic psychiatrists. His application of intellectual freedom supports principles and practices concerning criminal responsibility and the fairness principle of moral proportionality in guilt and punishment.

Some Contemporary Philosophical and Legal Perspectives

Today, thinkers who join the free will discussion belong to one of the following three philosophical frameworks: metaphysical libertarianism, incompatibilism, and compatibilism.[33] According to metaphysical libertarianism, people can freely make choices and be held responsible. Incompatibilism maintains that human decisions and actions are caused and therefore are naturally predetermined. Any perception of self-control or self-volition is illusory. Thus, hard-core incompatabilists assert that people should not be held morally responsible for their behavior. Compatibilists recognize the pervasiveness of natural causation, but believe in the possibility of freedom through either autonomy or spontaneity.[34]

None of these three philosophical categories is satisfactory for forensic psychiatry. Forensic psychiatrists should be free to follow in their personal lives whatever religious beliefs or philosophical system they choose. However, for forensic work they must remain within the empirical realm of natural causation. Metaphysical, spiritual, and theological explanations are not appropriate as clinical and scientific input for forensic experts. All three of these philosophical approaches are irrelevant, even compatibilism, even incompatibilism, because as long as forensic psychiatrists function professionally within the empirical realm, there is no need to consider whether a metaphysically free will is compatible with natural determinism.

This conceptual distinction and separation of empirically based knowledge from other ways of believing and understanding is not an argument for forgetting our past and changing our language. The concept of a mind is not discarded because the stoics believed it to be consubstantial with the Godhead, or the unconscious because of a similar belief by the Gnostics, or the intellect because Saint Thomas Aquinas taught that it was uniquely created by God. And within the empirical realm of forensic work, forensic psychiatrists need not strive for such empirical correctness that they overlook the functions of the will and hesitate to utter the word. Forensic psychiatrists have no trouble discussing corollary mental qualities and functions such as consciousness, self-control and the ability to recognize that an act is wrong. Why not the decisional/intentional faculty that serves to develop and implement intentions?

As was mentioned earlier, Morse[35] makes a strong argument that the concept of a metaphysically free will is unnecessary for sustaining the purposes of the legal system in the United States, including the theory of retribution. Morse is correct on this important point. The law bases capacity for responsibility on normative functions, not a metaphysically free will. However, the very functions that he identifies as critical for responsibility—consciousness, self-control, rationality, and intentionality—are consistent with a naturally functional will.

The law does not address whether an agent acted with a metaphysically free will. The law's approach to mental criminal responsibility and other legal mental competencies can best be described as normative functionalism. The law defines mental responsibility and competence by the presence or absence of certain capacities or functional abilities or by the specific actual, active functions such as specific intent and deliberation. This functional approach is normative in that, by specifying mental standards, the law, as public policy, defines the qualifying mental criteria. "Free" will is not involved.

To say that the law of criminal responsibility is normative is descriptively accurate but, by itself, unsatisfying. After all, standards can be arbitrary and without a justifying rationale. The rationale for competencies is that people are expected to be able to do whatever they are allowed or required to do. This expectation is as true for driving a car as it is for standing trial. Mental criminal responsibility in some contrast involves the ability not to have committed the crime. Mental criminal responsibility is therefore most meaningful if one assumes a relative natural ability to develop intent, which in turn presumes its corollary, a relative natural ability to have decided otherwise. The assumption of a naturally functional will gives meaning to the standards.

It could be argued that psychopathy involves deranged function of the will more than the intellect. Whether this impairment would qualify for diminished criminal responsibility is a normative, public policy issue that will not be debated here. Suffice it to say that not any disturbance of the will necessarily affects criminal responsibility.

Upon considering the relevance of will to individuals, one should also consider the needs of society in assigning responsibility to individuals. The concept of responsibility was a major advancement over the ancient Saxon practice of strict liability for all harm-

ful conduct. Not only in criminal law but in virtually all legal matters, people are treated as though they have some power to interact with others. Notwithstanding the concatenation of natural causes for decisions and actions, people must be treated as individuals for society to function. They are called agents. More important is the assumption that individuals have a will (i.e., some capacity to control and direct their actions to interact with their environment). A person is capable of having an effect from a force originating within the person regardless of the internal and external causes. Thus, people can be expected to follow the speed limit, pay their taxes, and resist criminal temptations when expectations and consequences are made known to them.

Despite causes that shape human intentions, the law will continue to regard individuals as agents with a locus of control. This attitude is necessary for people to function in relationship to society and for society to make use of and serve its component members. But if individuals are to be held accountable for their intentional acts, justice also requires that consideration be given to pathologic impairment of the faculties involved.

Contemporary Scientific Perspectives

Ancient Greek philosophies and Western monotheistic church beliefs shaped principles of secular law, although secular law would eventually distance itself from its religious origins. Scholasticism transitioned into modern philosophical perspectives that struggled to dissociate themselves from their origins, as well. Modern philosophers of the ego, the self, the spirit, the soul, and the psyche and of human psychological phenomena and behavior were the pioneers for later psychological theorists such as James Watson, known for behaviorism, and Sigmund Freud, for psychoanalysis. Emerging theories of behavior and the mind brought forth their own brands of natural determinism.

A towering contemporary thinker known for developing social learning theory, Albert Bandura, has in recent years substantially advanced the discussion of the will without using the term. He renounces the term free will as antiquated in its medieval theological origin and uses instead the term agent, more familiar in legal parlance. He defines an agent as one who "influence(s) intentionally one's functioning and life circumstances" (Ref. 36, p 164), but it is the faculty of the will that allows one to do this. Intentionality, aforethought, self-reactiveness, and self-reflectiveness are properties that Bandura posits to be involved in human agency. Indeed, the human will is central to human agency.

Today, information about the will is coming from the neurosciences. Two areas of neuroscientific research are especially relevant to psychological functions attributed to the will: the neuroscience of decision-making and the nature and role of consciousness. Just as there are different structures and neurocircuits for different types of memory functions, different parts of the brain are involved in different aspects of decision-making. Experiments in decisional tasks monitored by functional magnetic resonance imaging (fMRI) demonstrate that the amygdala is the emotional system for mediating decisional bias.[37] The orbital and medial prefrontal cortex function to provide more "rational" responses. Where a decision must be made that runs counter to a person's general behavioral tendency, or when conflict is detected between the "emotional" response of the amygdala and the "analytical" response of the prefrontal cortex, the anterior cingulate cortex becomes involved. This is but one example of where functional brain imaging is further defining structures involved in various aspects of forming and executing one's desires and intentions.

Recent research on the phenomenon of consciousness, itself difficult to define to everyone's satisfaction, suggests that consciousness may not be involved to the extent and in the way that most people assume. Much of what one does from minute to minute and hour to hour, from brushing or combing one's hair to riding or driving to work, is done without much conscious guidance. Freud was criticized for attributing much of our behavior and experiences to unconscious drives and conflicts. Now neurophysiologists are demonstrating that very little of our behavior is consciously directed and even conscious intentions may have been unconsciously "decided" or put into physical action before we became consciously aware of them. The experiment by Libet *et al.*,[38] who used action potentials to show a delay in conscious awareness of action already initiated, illustrates the lack of conscious direction. Although not suggested by Libet himself, a person's conscious awareness could simply be a review and monitoring of what she has already decided and done. This

would be like watching a movie with the illusion of the present when the film itself was actually made earlier.

Now, for the first time, empirical research provides evidence that unconscious motivation affects deliberate acts. fMRI has shown motivational functions to be located bilaterally in the basal forebrain. These structures can be accessed by a cortical route through the orbitofrontal or the anterior cingulated areas. Alternatively, the hippocampus or amygdala can input the basal forebrain subcortically, and evidence for subliminal motivation has been demonstrated experimentally.[39]

There is some fear that if conventional conceptions of consciousness are disproved, the legal doctrine of responsibility will collapse —an unlikely scenario. Continuous, dynamic feedback "circuits" interact between conscious and unconscious processes that take into account both internal and external stimuli. Thus, in a normally functioning brain, complex goal-oriented action involves both conscious planning and unconscious, more automatic, instinctive, or learned functions.

At last, the will should be defined. Most have no difficulty at least conceptually distinguishing the psychological faculty of the will from the metaphysically free will. More problematic is the common error of mistaking the will for desire. The will is simply the intentional faculty: Through motivation and decision the will settles upon and then implements an action. The legal concept of agency is related, but is not the psychological construct of the will.

Some would argue against attaching the importance of criminal responsibility to a single faculty of the mind because of the pervasive interconnectivity and interdependence of mental faculties. From this perspective the psychoanalytic construct, the ego, fits better than the circumscribed will. Asserting that insight or understanding and self-control are often indistinguishable, Janzarik[40] proposed the concept of "insight-control" (Einsichtssteuerung) to denote this combined function. Von Oefele and Sass[41] argued that the distinction between insight and will is artificial, because the capacity for determinations by the will is predicated on combined processes of control and thought. The dependence of the will on control and thought is clear; yet the distinction between control and thought remains a useful one, as does the recognition of an intentional faculty of the mind, even with its dependence on other mental processes.

Summary and Conclusions

The concepts of free will and criminal responsibility were great social advances when they were introduced into English secular law beginning in the 11th century. Over the ensuing centuries, the will was given continued importance by English jurists, though the descriptor "free" was discarded. The intentional functioning of the healthy will was described as rational, and eventually rationality came largely to replace will. However, rationality, too, is subject to diverse definitions. *Mens rea* is so diversely regarded by various jurisdictions in the United States that its continued viability as a coherent legal principle could become jeopardized. No wonder the word "will" has lost currency in these discussions!

Upon completing this odyssey, one must ask where this leaves forensic psychiatry with regard to will. Forensic psychiatrists can appreciate the religious and philosophical origins of the concept just as they appreciate origins of other constructs of the mind such as the intellect. Forensic psychiatrists can respect different religious beliefs about free will, without bringing such tenets into the empirical work of forensic psychiatry. However, in creating and maintaining distance from such tenets, forensic psychiatrists need not discard the concept of the intentional facility (i.e., the will). And forensic psychiatrists should be able to address pathological conditions that can compromise free exercise of the will. For forensic consultations and courtroom testimony, they must avoid those concepts that are poorly understood. They must train their attention on the psycholegal criteria relevant to the instant case, criteria that invariably remain mute about the will. They should strive to keep themselves informed as neuroscientific and other findings further define the will and its functions. To the law, the will, a relatively, naturally functional will, not a metaphysically free will, could regain significance in validating (and invalidating), in principle, individual responsibility.

References

1. Morissette v. U.S., 342 U.S. 246 (1952)
2. U.S. v. Currens, 290 F.2d 751, 773 (3d Cir. 1961)
3. Morse S: The non-problem of free will in forensic psychiatry and psychology. Behav Sci Law 25:203–20, 2007
4. Aristotle: Nichomachean Ethics (translated by Peters H). New York: Barnes & Noble, 2004, pp 39–64
5. Pelagius, in The New Encyclopædia Britannica, Micropædia (vol 9, ed 15). Chicago: Encyclopædia Britannica, Inc., 1986, p 245

6. Ide HA: Pelagianism, in The Cambridge Dictionary of Philosophy (ed 2). Edited by Audi R. Cambridge, UK: Cambridge University Press, 1999, p 654
7. Celtic Church, in The New Encyclopædia Britannica, Micropædia (vol 3, ed 15). Chicago: Encyclopædia Britannica, Inc., 1986, p 16
8. Ellis PB: The Celts: A History. New York: Carroll and Graf, 2004, pp 159–78
9. O'Donnell JJ: Augustine: A New Biography. New York: Harper Collins, 2005, pp 261–86
10. Marias J: History of Philosophy (translated by Appelbaum S, Stowbridge CC). New York: Dover Publications, 1967, pp 113–21
11. Cary P: A brief history of the concept of free will: issues that are and are not germane to legal reasoning. Behav Sci Law 25:165–81, 172–3, 176, 2007
12. Zilbourg G: A History of Medical Psychology. New York: WW Norton & Co., 1969, p 156
13. Szasz TS: The Myth of Mental Illness: Foundations of a Theory of Personal Conduct. New York: Dell Publishing Co., 1961
14. Humanism, in The New Encyclopædia Britannica, Micropædia (vol 6, ed 15). Chicago: Encyclopædia Britannica, Inc., 1986, pp 137–8
15. Kolenda K: Humanism, in The Cambridge Dictionary of Philosophy (ed 2). Edited by Audi R. Cambridge, UK: Cambridge University Press, 1999, pp 396–7
16. Tamas R: The Passion of the Western Mind: Understanding the Ideas That Have Shaped Our World View. New York: Ballantine Books, 1991
17. Aquinas, Saint Thomas: Aquinas' Shorter Summa: St. Thomas Aquinas ' Own Concise Version of his Summa Theologica (translated by Vollert C). Manchester, NH: Sophia Institute Press, 2002, pp 1272–3
18. Walker N: Crime and Insanity in England. Edinburgh: Edinburgh University Press, 1969
19. Ellis PB: The Celts: A History (revised ed). New York: Carroll & Graf, 2004
20. Jacobs FG: Criminal Responsibility. London: Weidenfeld and Nicolson, 1971
21. de Bracton H: Angliae Legibuse et Conseutubinibus 2. Edited by Twiss T. London: Longman and Co., 1879. (Cited by Bromberg W. The Uses of Psychiatry in the Law: A Clinical View of Forensic Psychiatry. Westport, CT: Quorum Books, 1979, p 5)
22. Hale M: Please of the Crown. Cited by Corbet DE, Hale, Sir Matthew, in The New Encyclopædia Britannica, Micropædia (vol. 5, ed 15). Chicago: Encyclopædia Britannica, 1986, pp 630–1
23. Blackstone W: Commentaries on the Law of England (vol 4), 1765–1769. With notes by John L. Wendell. New York: Harper and Brothers Publisher, Franklin Square, 1854
24. Lowry R: The Evolution of Psychological Theory: 1650 to the Present. Chicago: Aldine Publishing Company, 1971
25. Demasio A: Decartes' Error: Emotion, Reason, and the Human Brain. New York: Putnam, 1994
26. De Spinoza B: Ethics (translated by Curley E). London: Penguin Books Ltd., 1996
27. Lavine TZ: From Socrates to Sartre: The Philosophical Quest. New York: Bantam Books, 1984, pp 193–8
28. Ameriks K: Kant, Immanuel, in The Cambridge Dictionary of Philosophy (ed 2). Edited by Audi R. Cambridge, UK: Cambridge University Press: 1999, pp 460–6
29. Vaihinger H: Kommentar zu Kants Kritik der Reinen Vernunft [Commentary to Kant's Critique of Pure Reason] (vol 1, ed 2). Stuttgart, Germany: Scienta Verlag Aalen, 1970
30. Kant I. Metaphysical Elements of Justice. Indianapolis, IN: Bobbs-Merrill, 1965, p 102
31. Higgins KM: Schopenhauer A, in The Cambridge Dictionary of Philosophy (ed 2). Edited by Audi R. Cambridge, UK: Cambridge University Press, 1999, p 820
32. Schopenhauer A: Prize Essay on the Freedom of the Will. Edited by Zolles G. Cambridge, UK: Cambridge University Press, 1999, p 28
33. Kapitan T: Free Will Problem, in The Cambridge Dictionary of Philosophy (ed 2). Edited by Audi R. Cambridge, UK: Cambridge University Press, 1999, p 326–8
34. Gomes G: What should we retain from a plain person's concept of free will? J Conscious Stud 12:40–3, 2005
35. Morse SJ: Culpability and control. Univ Penn Law Rev 142: 1587–660, 1994
36. Bandura A: Toward a Psychology of Human Agency. Perspectives on Psychol Sci 1:164–80, 2006
37. De Martino B, Kumaran D, Seymour B, *et al*: Frames, biases, and rational decision-making in the human brain. Science 313: 684–7, 2006
38. Libet B, Gleason EA, Wright EW, *et al*: Time of conscious intention to act in relation to onset of cerebral activity (readiness potential): the unconscious initiation of a freely voluntary act. Brain 106:623–42, 1983
39. Pessiglione M, Schmidt L, Dragarski B, *et al*: How the brain translates money into force: a neuroimaging study of subliminal motivation. Science 316:904–6, 2007
40. Janzarik W: Grundlagen der Einsicht und das Verhaltnis von Einsicht und Steuerung. Nervenarzt 62:423–7, 1991
41. v. Oefele K, Sass H: Die forensische-psychiatrische Beurteilung von freier Willensbestimmung und Geschaftsfahigkeit. Versicherungsmedizin 46:167–71, 1994