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Determinism and the Law

By Morris D. Forkosh*

Determinism is, simply stated, a doctrine that acts of the will, occurrences in nature, or social or psychological phenomena are determined by antecedent causes. Determinism, as a general philosophic concept, can be utilized to clarify legal concepts, point out alternatives and consequences to legal methods, and enable practitioners and others to comprehend particular applications of the law as well as theory. To illustrate technically and particularly, it might be asked, are there a certain number of essential elements in a pleading which, when proved, automatically and irresistibly mandate a verdict?21 Are these elements or their combinations absolutely static, or is there a degree of flexibility? Or is it that there are different conclusions of law dependent upon various combinations of changing facts?2 Can a defendant be permitted to justify his actions, cast doubt upon the plaintiff, or otherwise successfully counter his prosecution, i.e., does the proof of the essential elements, without more, suffice?23 To illustrate generally, are there anti-laws which can be characterized as rejections of determinism? Do these statutory efforts run counter to the inflexible “nature” of man? For example, consider the victimless conduct of prostitutes, pimps, gamblers, homosexuals, and so on—can their “crimes” be eradicated? Can such a fundamental change in man occur?24 Stare decisis does not mean

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1 E.g., failing to comply with a factory inspection statute establishes negligence as a matter of law. M. Forkosh, A TREATISE ON LABOR LAW 109 (2d ed. 1965).

2 See, e.g., M. Cohen, REASON AND NATURE 207 (1931). This author states that “it follows, therefore, that a system may be determined in its mechanical features and physically undetermined, without any breaks or discontinuity in our laws of nature,” and who earlier refers to “the principle of rational determinism.” Id. at 159.


4 See also text and notes 73-74, infra. The controversy during the 1960’s between the proponents and opponents of anti-discrimination laws is another illustration of this two-part approach to determinism, one argument being that such prejudices were inherent in man’s nature and could not be changed, the counter being that it was not this that the law struck at, but only its outward manifestations or conduct. See, with references therein, Forkosh, LABOR LAW, supra n.1, 83.
inflexibility, nor does necessity, as de Tocqueville put it, mean irresistibleness, but man’s search for stability has always exerted an attraction for rigidity and Draconian effectuation. Even the current generation’s actions may be viewed as a gesture against unyieldingness and inexorability—a plea for a degree of modification.

I

One approach to an understanding of determinism is to see man’s view of himself and his environment in terms of control, that is, of what is, and what is not, within his ability to command or, at least, sway. One school sees the entirety of time as pre-determined in all its ramifications, from Genesis to Doomsday, from within man to without man, so that there is nothing to be done except to live as so directed. This school would have us believe that there is not the slightest degree of choice, alternative, or responsibility, and so there can be no conscience, liability, or accountability. And, to raise one important question for law, what is, or can there be, truth? If whatever happens occurs causally because of past and existing conditions which, given as facts, prevent anything else from being able to happen, i.e., everything is ordained, then truth is not subject to the type of “trial” or

5 See, e.g., the historical approach of Johann Gottfried Herder (1744-1803) who, in his major work, Ideas of the Philosophy of the History of Humanity, written in 1784, felt that although God designed the world He does not interfere; that civilization and history are purely natural phenomena with events being strictly determined, continuity being unbroken, and that what occurs at any moment must have happened then and never at any other time. Thus there is no free will, an impotency in man’s ability or efforts to guide his destiny, and a rigid determinism which is not overcome by his view that each nation’s culture is different from all others and that a single uniform pattern of interpretation is not possible. See generally, A. Lovejoy, Essays in the History of Ideas 166-182 (1960); see also J. Bury, The Idea of Progress 240-241 (1932) [hereinafter cited as Bury, Progress].

6 See, e.g., the formulation of this concept in a more extended fashion in S. Hook, “Moral Freedom in a Determined World,” reprinted in his The Quest for Being 29 (1960).

7 For a discussion of truth, that is, of a “factual” or “objective” nature, so that a trial and a verdict may be had in a court of law, see, e.g., Forskoch, The Nature of Legal Evidence, 59 Calif. L. Rev. 1356 (1971) [hereinafter cited as Nature of Legal Evidence]; and see also J. S. Mill, Autobiography 158 (J. Cross ed. 1924). Of prime importance is W. James, Pragmatism, (R. Perry ed. 1955), containing not only the sixth lecture on “Pragmatism’s Conception of Truth,” but also four additional essays on its meaning.

For one existentialist’s view see, e.g., S. Kierkegaard, Philosophical Fragments (1938), with which contrast the intrinsic approach to philosophical propositions of R. Descartes, Discourse Part IV, Philosophical Writings (N. Smith ed. 1952) and the seventeenth century English materialists, e.g., Thomas Hobbes’ thoughts (to him it was “necessitation,” not determinism) as discussed by J. Laird, Hobbes (1934).
pro-and-con "proof" one finds in a court of law. As with conditions, so are our impulses also causally determined. Hence, no choice is available; there is no randomness, no meaninglessness, in the world.

Thus for the existing conditions there were pre-existing ones, and for those others, and so on indefinitely backward as well as forward into the future. Logically, this extreme position is not only a basis for Savigny's historical approach but, if followed, also would snuff out experimentation in, say, the natural sciences. The reason for this is that the natural sciences necessarily utilize a form of determinism. Basic to the sciences is the function of causal physical relationships, so that if all is foreordained then deliberate change or betterment as such is impossible. Anthropologically, Malinowski has utilized the word law in two senses, first, "the sense of a rule of intrinsic determinism of a process," and, second, "as a promulgated command of authority sanctioned by force . . ."10 with the first, in effect, emphasizing the deterministic concept. One school of behavioral psychologists, known as environmental behavioralism, hold to the view that the environmental stimuli, which include a person's genetic endowment,

8 This distinction between "impulses" and "conditions" may be argued from many points of view, e.g., epistemologically. The bifurcation, nevertheless, permits us to speak of "external" events without reference to a "subjective" mind, that is, we can retain a degree of flexibility in this discussion without being compelled to choose between crass materialism or pure solipsism or any other approach.

9 See, e.g., COHEN, REASON, supra note 2, at 374, where, in commenting upon jurisprudence, he refers to several authors and of Savigny writes: "Since the past completely determines the present, the idea that each generation can make its legal world for good or ill according to its power and insight is the essence of the unhistorical view." For another analysis, and definition, of determinism see, e.g., J. WALSH, FREE WILL 115, at 127 (1962).

10 B. MALINOWSKI, FREEDOM AND CIVILIZATION 173 (1960 ed. 1944) [hereinafter cited as MALINOWSKI, FREEDOM]. The first sense refers to the physical, i.e., "through scientific research we construct an exact and empirical formula of a process which describes it, establishes its uniformity, and allows us to foresee and to predict the course of events within an isolated system. . . ." Id. at 175.

11 On genetic determinism (to coin this phrase) see, e.g., Professor Jensen's views that a child's I.Q. cannot be raised because of its high heritability, supported in its conclusion by H. EYSENCK, THE I.Q. ARGUMENT (1971). For the pros and cons in this area see book reviews entitled Unknowns in the IQ Equation by S. Scarr-Salapetak in 174 SCIENCE 1223 (1971). In Sacramento, California, a class suit was filed in the Superior Court by Christopher Sombrano, Efren Ruiz, and Sixto Torres, eighth and seventh graders, against the State Board of Education, seeking to stop school districts from placing I.Q. scores in their school records. Santa Monica Outlook, Dec. 18, 1971. The Coleman Report's finding, however, is that under certain conditions the education of black children is improved when they are moved from a segregated school situation into one where white children are found (ratios not here discussed), which means that they can be bettered. U.S. DEP'T. OF H.E.W., EQUALITY OF EDUCATIONAL OPPORTUNITY (1966). See also notes 18 and 44, infra.
cause him to behave as he does, there being no “mind” or “autonomous man.”

A second school utilizes the approach that to change man’s conduct we must first change his thinking and his emotions, i.e., conditioning behavioralism.

While such a rigid, inflexible, and crassly deterministic approach to phenomena and thought is somewhat understandable, this does not necessarily make it acceptable. It denigrates man, takes from him any independence or freedom, and in effect robotizes him and leaves him without a soul, without even the ability to make a moral judgment or to have a belief in a God. People are therefore bereft of emotion, love, faith, or any hope for the future; change is impossible, and man cannot freely progress. Neither can there be any ability to alter man’s conduct, so that the concept and application of social control is an

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12 Quaere: does not this ability to “change” through man’s efforts (see, e.g., note 73, infra) illustrate one analogical aspect of soft determinism in action? (On soft determinism see notes 20-25 infra and accompanying text).

Behavioralism is not to be confused with determinism, on which see text and notes 17, 73, and 78-79, infra. On the strictness of naturalistic principles vis-à-vis hard determinism see, e.g., Bury, Progress, supra note 5, at 170-171.

13 See, e.g., B. F. Skinner, Beyond Freedom and Dignity (1971), who rejects “free will” and “autonomy” as “prescientific” ideas and feels that as environmental stimuli condition and control, then change here will change conduct. Such behavior therapy utilizes different forms of rewards or benefits in this controlled conditioning process. Thus, even though this school denies a mind or autonomy in man generally, they must concede it in themselves, i.e., they choose direction, rewards, application, etc.—a form of soft determinism (on this see text keyed to notes 20-25, infra, and cf. text and note 18, infra). For a vigorous critique of Skinner, see book review by N. Chomsky, New York Review, Dec. 30, 1971, at 18, although compare N. Chomsky, Problems of Knowledge and Freedom (1971).

All of the preceding, in one form or another, and in some degree, may be found applied in the nation’s public schools and even into the colleges and universities. See notes 11, supra, and 44, infra.

14 In this writer’s opinion, hard determinism contains an internal flaw, that is, a contradiction. It must reduce everything to a quantified and crass materialism, rejecting anything subjective except as tied in strictly and rigidly with and to the former. Then why does this deterministic concept not include, or explain since it cannot reject, the uncertainty principles as applied in atomic physics, namely, there is a limit to atomic scale measurement because this measurement process itself alters or changes the situation? See also note 45, infra. Furthermore, the “black hole” concept promulgated thirty-three years ago by Oppenheimer and Snyder (“that a great assembly of matter, as in a large, burned out star, would collapse into something so dense that it would become invisible”), indicates, as the classic calculations, that it, the black hole, should shrink until the infinitely dense mass was confined into an infinitely small area, and time, also, “would behave in bizarre ways.” As quoted from W. Sullivan, New York Times, Dec. 29, 1971 at 18, col. 1.

15 Extremes and rigidities are not limited to determinism. Consider for example, the concepts of solipsism and Manichaeism.

16 See note 39 and text, infra.

17 On the idea of progress, and its necessary utilization of soft determinism, see, e.g., Bury, Progress, supra note 5, at 171, 240.
aberration—it is the death of law, and as a corollary the death of the nation. Man therefore must necessarily reject such a physical or similar form of harsh determinism which in this manner spills over into other areas of human conduct, thought, morals and ethics.

It is because of these and other flaws in the idea of hard determinism that the vast majority of philosophers and lawyers today reject not only such an unyielding approach and series of logical extensions or sorites but also, perhaps, the other extreme—the liberty of indifference. Instead, they accept and utilize a softer concept which embraces a degree of self-determination or indeterminism, of what may also be called operational free will in which man independently is a, if not the, source or cause of his own conduct in a significant degree. John Stuart Mill in the last century, and Jean-Paul Sartre and other existentialists in this century, propounded such a view, with the latter generally defending

\[\text{\textsuperscript{18}}\text{ See text and notes 12-13, supra, and 78-79, infra, and also MALINOWSKI, FREEDOM, supra note 10, at 175, where he writes: "Freedom in the naive sense of a free floating quality obviously becomes meaningless when applied to such a process controlled by cultural determinism." On this last type of determinism see his Chapter 6. See also the conflict between the "scientific management" concept of the Taylorism of the 1930's and man's freedom, in H. MULLER, FREEDOM IN THE MODERN WORLD 69-70 (New York: 1966), and see further pp. 185 et seq. on scientific determinism and irrationalism, and passim on economic and other aspects of determinism.}\\[\text{\textsuperscript{19}}\text{ The following illustration of this startling conclusion bears it out in several ways: The problem of population control (decrease) with the concomitant food control (increase), requiring man's experiments and evaluations. See, e.g., COMMITTEE ON RESOURCES AND MAN, NATIONAL ACADEMY OF SCIENCES, RESOURCES AND MAN (1969), and J. BLACK & M. KEEPER, FUTURE FOOD AND AGRICULTURAL POLICY (1948).}\\[\text{\textsuperscript{20}}\text{ Jonathan Edwards's approach (infra note 27) rejects the state and liberty of indifference (at 320 et seq.), especially (for us) as it "destroys the great difference of degrees of the guilt of different crimes, and takes away the heimousness of the most flagitious horrid inequities ..." (at 322). The more one (i.e., "the soul") "has of this disengagedness, in its acting, the more liberty. ... [Which eventually, in its extreme form of liberty, brings] a full and perfect freedom and liableness to act altogether at random, without the least connection with, or restraint on government by, any dictate of reason ... [and] as being inconsistent with the full and perfect sovereignty of the will over its own determinations ..." (at 272).}\\[\text{The conflict between such determinism and indifference is highlighted by Duncan-Jones, FREEDOM: AN ILLUSTRATIVE PUZZLE, PROCEEDINGS ARISTOTELIAN SOCIETY, N.S. (1938-39), where, at 108, he assumes a particular decision now made is, within a certain range, not determined, so that even though his life before is identical, he might now have made a different decision, and thus "I am therefore not responsible for having made this precise decision. And so on. A fortiori, unrestricted indifference is inconsistent with responsibility. We therefore have a simple constructive dilemma. If determinism is true, people are not responsible, and if the liberty of indifference is true, people are not responsible; but either determinism or the liberty of indifference is true; therefore people are not responsible." Obviously the present writer's approach rejects these excluding (Continued on next page)
freedom" but not chance. And so, too, are most of the scientists who engage in the exploration of mind or matter, soft, rather than hard, determinists, in that they believe they can somehow affect or influence, if not determine or control, their brain children. For them it is almost a cliché that "Neither mind nor culture is even thinkable without each other, but this does not mean that one is reducible to the other. In the final analysis, culture is a product, the synthesis of mind and action." The three most obvious and important current illustrations of this soft, rather than hard, approach are the willed, hopeful, and optimistic efforts by atomic scientists, environmentalists, and the United Nations.

II

This dualistic distinction between what philosophers term hard and soft determinism is found not only in life in general but also in legal theory and in legal practice, expressly or im-

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extremes so that no true disjunctive dilemma is presented, that is, Russell’s practical approach (infra note 28) must be utilized even though his resulting conclusion is rejected (infra note 30, because his "free will" in that context is really the extreme liberty of indifference).


The problem of responsibility then is not solved by an appeal to universal determinism. For that matter if determinism is really universal, then human beings cannot be said to escape from it. ... What I am saying then is that universal determinism does not eliminate human responsibility. ... If, for instance, we maintain that a human being is a partial cause of what he does, we do not, it will be observed, commit ourselves to the doctrine of free will in the most extended sense of that term. A human being can act with a clear vision of what he wants to accomplish, but in that vision must be included the limitations of his possibilities. ... 22 Although writing that man is "condemned" to be free, his idea of freedom in this aspect is somewhat restricted, even though subsequently utilizing it as a positive condition for man’s emergence. J. Sartre, Existentialism and Human Emotions (1957), and see also his Existentialism 12 (1947). The "responsibility" which existentialists advocate is deserving of extended treatment; for example, they feel that existence precedes essence, which means that man is meaninglessly existent but always free to choose and define his essential self through his conduct, so that he is therefore responsible for all he says and does.

23 Chance, as a philosophical concept, may be treated in several ways (see, e.g., notes 28-30 infra). "Such original or undervived individuality and diversity is precisely what Pierce means by chance; and from this point of view chance is prior to law. The doctrine of the primacy of chance naturally suggests the primacy of mind..." Cohen, Introduction to, C. Pierce, Chance, Love and Logic xi, xiii (1949).

24 R. Murphy, The Dialectics of Social Life 204 (1971).

25 The first seek to prevent, in the United States, the self-destructive and necessitous (hard determinism?) urge by the government in proceeding with tests, building of reactors with minimum safeguards, etc.; the second seeks to overcome the inherent consequences of "civilization’s" technology; and the third seeks to (Continued on next page)
pliedly. For example, the legalistic, but not necessarily the religious concept of free will, in a murder trial, finds the accused being held personally responsible for the consequences of his willed actions; or, in a breach of contract suit, a contractor, in one situation, is required to show fraud or duress before his assumed freely-exercised consent can be disproved. In both these illustrations the inability to have or to exercise any choice whatsoever would necessarily mean a verdict determined

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prevent international self-annihilation. All these, and other illustrations which come to the reader's mind, disclose a rejection of hard determinism; otherwise why make any effort against "inevitableness"?

27 For distinction between hard and soft determinism, see W. JAMES, ESSAYS ON FAITH AND MORALS 145-150 (1949). See also note 29 infra. See R. TAYLOR AND W. DRAY, 2 THE ENCYCLOPEDIA OF PHILOSOPHY 359, 373 for a discussion of ethical, logical, theological, physical and psychological determinism. See also, A. OLDENQUIST, CHOOSING, DECIDING AND DOING 96-104 ( ), and E. WILSON ED., FREEDOM OF CHOICE: A SYMPOSIUM (1970).

28 Freedom of the Will, as discussed by J. Edwards (P. Ramsey ed. 1957). This article denigrates human reason, seeks to destroy the almost inconceivably pernicious concept of self-determination, and still concludes that God's determination of human life doesn't 'at all excuse sin,' i.e., 'there cannot be anything coming to pass without a cause' and so he is 'opposing' the 'hypothesis' that there can be 'acts of the will coming to pass without a cause.' Id. 183. See also note 33 infra.

29 William James, admittedly a disciple of Pierce (supra note 23), sought to resolve the logical conflict between free will and determinism through a doctrine of chance, this latter being defined in a purely negative fashion, i.e., merely the negation of necessity. See his "The Dilemma of Determinism," in THE WILL TO BELIEVE, AND OTHER ESSAYS IN POPULAR PHILOSOPHY (1897), also repr. in A. CASTELL, ED., ESSAYS IN PRAGMATISM (1948) also given in note 26, supra.

30 See, e.g., Hall, From Legal Theory to Integrative Jurisprudence, 33 U. OF CIN. L. REV. 1, 3 (1964): "The basic ethical postulate of this theory is that only the voluntary commission of legally proscribed harms is within the scope of criminal liability; this implies the restriction of mens rea to intentionality and recklessness. . . ." See also note 71, infra, where the Durham court, at 574, stated: "The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called mens rea), commit acts which violate the law, shall be criminally responsible for those acts. . . ." Cf., however, RUSSELL'S conclusion (quoted in note 23, supra) that "Praise and blame, reward and punishment, and the whole apparatus of the criminal law, are rational on the deterministic hypothesis, but not on the hypothesis of free will." See, however, note 20, supra.

31 It may be argued that if any choice, in its ordinary meaning, is presented or permitted in adhering to hard determinism then automatically, and without (Continued on next page)
in advance, regardless of the so-called facts, and the rejection of
general rules of conduct or principles of law. These latter may
also be termed generalities, assumptions, fictions, or beliefs. That
is, they are not necessarily in accord with the facts and to that
extent are therefore fictitious. They may find their wellspring in
ethical principles, man’s love or humanism, and may change as
the needs of the times require, i.e., rules of law are not static or
rigidly determined.

This overall approach is also found in other disciplines: Adam
Smith’s use of the fictional self-centered (or economic) man in
the political economy who exercises freedom of choice, will, and
desire; Jeremy Bentham’s fictions in political (legal) theory and
Immanuel Kant’s in philosophy (his “heuristic fictions”); and
Hans Vaihinger’s Philosophy of “As If,” in which juristic fictions
are treated as but one aspect of this concept found in many fields.

When fictions or assumptions are so deliberately created and used
they disclose another aspect of soft determinism; for, if pre-
determinism is accepted then why bother with fictions when,
computer-like, all present and future conditions flow out of past
and pre-determined occurrences? It is extrapolation, not inter-
pretation, which applies.

Every student, practitioner, and jurist can give hundreds of
fictions in the law, e.g., that we are all legitimate and sane (until
proved otherwise). And, as has already been seen, one of the
most influential and widely used legalistic assumptions is that
there is freedom of the will, and therefore the individual’s con-

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more, there is a necessary collapse into soft determinism. In other words, and
by analogy to, for example, solipsism, a really hard or extreme determinist cannot
conceive of any other system, or of any degree of choice, or of the chaos within
the particles of matter wherein chance, not order, seemingly prevails. It is thus
not an either/or which is presented, for this per se rules out any hard determinism,
but, rather, the wearing of deterministic blinders which not only circumscribe
one’s mental vision but also preclude any other ray of light from entering. See also
text keyed to note 41, infra.

32 Tr. C. K. Ogden 8335 (1935).

33 A religious aspect may also be found here, that is, those who so believe
therefore need not fear the future. However, is there not an element of soft
determinism found when they also believe that if (a choice?) they conduct them-
selves properly here, then their future is assured in the hereafter? See also notes
27 and 34. Of course another aspect might result in fatalism, but, again, does not
such a believer then also ask of what avail are his present acts, and therefore
convince himself that his conduct can be his own (that is, as he pleases)?

34 The assumption here is that all known facts go into the computer; this, for
man’s invention, is obviously impossible (at least as of now), but is not God the
“Great Computer” in the sky?
sequent personal responsibility for his actions follows because of this ability to choose. Choice, discretion, novation are not limited to the law, but are reflected therein. For simple examples, the citizen may, if he desires, spit on the sidewalk, but he knows that he thereby violates the law and may be punished; or, an individual is subpoenaed to testify before a grand jury and if offered immunity, his choice is ordinarily between testimony and contempt; or, once convicted, the prisoner's chosen conduct may give him earlier parole, etc.

So also does society offer rewards and punishments to influence and bring about "correct" individual choices or group ones such as the federal offering of grants-in-aid to states, direct or indirect aid to housing projects, day care centers, by tax abatement or reduction or otherwise. The national weal is not only furthered but also protected by these choices, e.g., one could have opted for reserve training instead of remaining subject to the draft. In this sense such governmentally projected choices may be used to protect, support, and further the acceptance of institutions or of values and thereby prevent or diminish opposition and revolution. The point is that soft determinism is a practical and essential element in every nation's efforts to maintain itself and control (condition?) its citizenry, whether by civil or criminal laws, grants, rewards, or punishments.

III

This deterministic bifurcation is found throughout the warp and woof of every civilization, culture, and conflict, as exemplified in the positivistic explanation and logical extension of a (assumed and rigid) premise, which is contrasted with the sociological (changing) base from which the rules allegedly spring; natural law theory, in this respect, somewhat quaffs at both fountains. Practically, however, could there have been progress, technology, and increasing standards of living without a degree of causality, but also combined with choice, that is, a pluralistic society in a pluralistic universe? In one peripheral aspect, not

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35 Cf., however, the existentialist's view on choice as given in Sartre's works, e.g., note 22, supra.
36 See, e.g., note 28; see also note 4.
37 One social (business) psychologist distinguishes between the "minimum" and the "maximum" man in a behavioral, not deterministic, aspect of a business (Continued on next page)
too far-fetched, such bifurcation with its aleatory approach has sprung from and dialectically conduced to the general acceptance of scientism over universalism. Evolution\textsuperscript{38} and quantification also seemingly have replaced religion and intuition. "God is dead"\textsuperscript{39} is not a peculiarly modern existentialist expression\textsuperscript{40} but is found in the centuries preceding this, likewise the evolutionary conception of man can be seen long ago in the Renaissance, and even before then in classical Greece.

The difference between hard and soft determinism may also be highlighted by asking, can man truly influence his future? Put differently, is the Greek view of a buffeted individual at the mercy of the gods and their whims who is overcome by fate and incapable of doing aught to escape the future, the correct one? Or is man able to control his life and his conduct, even if only a trifle? If man's thought and course of conduct are completely, fully, and finally determined for him, whether by an external Being, or forces, or conditions, and he is without any power to will, alter, or even condition these influences, then hard determinism in its extreme and rigid form emerges and we have man

\textsuperscript{38} See, e.g., Weightman, "The Concept of the Avant-Garde," ENCOUNTER XXXIII (July, 1969) pp. 5, 8, speaking of "the latest of a long and extremely complicated process, which is, of course, the general change-over from the static or cyclical view of human existence to the evolutionary view. Evolutionism is, fundamentally, a scientific concept. . . ."

\textsuperscript{39} This is Nietzsche's nineteenth century expression, supra note 9. See S. KIERKEGAARD, PHILOSOPHICAL FRAGMENTS, supra note 7, at 31-35, who rejects the nineteenth century "proof" of God, and also J. SARTRE, EXISTENTIALISM, supra note 22.

Albert Einstein and Arnold Toynbee illustrate the devout believer, one the physical and the other the social scientist, who rejects the exclusivity of technology and materialism because either God doesn't play dice or because there is a "reality" behind the universe. In either case there is a rejection of discontinuity, an acceptance of unitary causality, and a belief in a continuum of some degree of rigidity. The only question then presented would be whether man could function independently, in the slightest degree, within this conceptual sphere. Both would answer yes, the first because of what he accomplished, if for no other reason, and the second because, quoting Plato's rendition of Socrates, the Old One speaks of his "individuality" else-else other individualities, and, further, because Toynbee remarks that "Man can deliberately combat his egocentricity, and perhaps he can partially overcome it." See, e.g., A. TOYNBEE, SURVIVING THE FUTURE (1971).

\textsuperscript{40} E.g., Heidegger, "Nietzches Wort 'gott ist tot,'" HOLZWEGE (1952). See especially J. SARTRE, EXISTENTIALISM, supra note 22, at 18: "Atheistic existentialism, which I represent . . . states that God does not exist. . . . Man is nothing else but what he makes of himself. Such is the first principle of existentialism. . . ." There is, of course, much contrary opinion, e.g., Alexander I. Solzhenitsyn, who writes that Russia's censors "demand that the word God be unfailingly written without a capital letter. To this indignity I cannot stoop. . . . [It] is the cheapest kind of atheistic pettiness. . . ." New York Times, June 18, 1971, at 5, col. 1.
bereft of free will, i.e., fatalism. In the history of thought, ideas, and law these complex views emerge in various shapes and forms, although the simple extremes of non-determinism and (hard) determinism are seldom, if ever, expressed or found in actual conduct; the in-between, or soft determinism, is what men ordinarily and normally go by, and their lives and laws reflect this.

By illustration, if one believes that the "impersonal" forces of the market really determine prices, or that the national economy is truly self-regulating, then his approach is to let them function without interference. This is Adam Smith's general *laissez-faire* principle. If, however, man feels he can influence the causes then his various efforts are understandable, e.g., nationally, the Sherman Antitrust Act, the Employment Act of 1946 and its Council of Economic Advisers, the 1971-72 price-wage freezes, Phases I and II, and internationally, the European Common Market, population and birth control, agricultural changes and efforts. Whether these laws and efforts are because even Pandora found hope, or man is part of God, or there is some free will in all human beings, is here immaterial—the fact is that man so believes. More importantly, man so acts and conducts himself and his interpersonal and other relations, and the law accepts and builds upon man's freedom to choose. And, further, without this practice, and despite any negative theory and the consequences flowing from these acts, the technological, economic, and scientific progress achieved over the past two centuries would have been impossible—even though these latter results now "condition" the law and its approach; now the law permits class and other environmental and consumer suits which would have been rejected yesteryear.

Thus, in fields of conduct as well as in theory the concept of soft determinism is also found. Every businessman, large or small,

\[\text{\footnotesize 41 For a comprehensive study of fatalism see Steven M. Cahn, FATE, LOGIC, AND TIME (1967). See also note 33, supra.}\]

\[\text{\footnotesize 42 In general, see S. Hook, DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE (1958).}\]

assumes the possibility, even probability, of his volitional impact upon the (slight or large segment of the) market; the consumer's "choice" is today defended and aided more than ever before individually, collectively, administratively, statutorily, and judicially; our environment is sought to be cleansed on the basis of chosen option and directed power; the physician has replaced the witch-doctor, and medicine's strides have refuted the implacability of past centuries' resignation; the psychotherapist necessarily utilizes the soft approach—otherwise patients are defrauded; the Newtonian solidity has been ousted by the Einsteinian and latter-day conclusions regarding chaos and indeterminism within particles; the medieval belief in a completed universe has been replaced by the modern one in which it is evolving in time; the local and national politician seeks to influence the voters, and on the international scene much is made of the concept applied between and among nations, and also where individuals within nations attempt to travel, improve themselves, etc.; and even in the classroom, as with that old time religion, every teacher assumes the perfectability of the students and their changeableness.

IV

Soft and hard determinism, as with soft and hard ice-cream, may sometimes be found together, and even in one man. This, perhaps, may throw light on the law's reluctance to consign hard determinism to the ash-heap, and also explain how and why "incompatible" or "inconsistent" laws are occasionally bed-fellows. The illustrations may be taken from economic, philosophical, and political institutions, as well as the law.

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46 See supra note 14. Discoveries may really be an illustration of hard determinism; for example, consider the periodic table of elements and its predictions before the actualities; Einstein, Bohr, and others predicted, over fifty years ago, the present day laser phenomenon. But, and regardless of these and other like demonstrations of sufficient cause-effect relationships, why a break-through at this particular moment? Why this person and not that one? Why in this country and not in another? Why do "teams" fail and yet the lone wolf succeed? There are too many unanswered whys (and see also note 24, supra).

48 But only questionably determined, within limits permitting of a disordered continuity, and thus making predictions possibly only on an iffy basis.
Marx, for example, claimed to have up-ended extremist Hegel\(^47\) and thereby to have made the latter's philosophical approach, dialectical methodology, susceptible to the former's views. The question is how to reconcile the use of language such as this in The Manifesto, "its [the bourgeoisie's] downfall and the victory of the proletariat are equally inevitable,"\(^48\) with that found elsewhere, "Men make their own history. . . ."\(^49\) Perhaps Marx was torn between his philosophical views and his practical desires, for if man felt that his action was not needed, as inevitably the future would emerge, then he might remain passive; but if he could influence the direction, or even hasten the pace, of the change, then, perhaps, he could accomplish something by action. Marx, in 1872, believed that there could be a constitutional and peaceful transition from capitalism to socialism, but this would require bourgeois acquiescence, \textit{i.e.}, man would actively cooperate willingly and freely to undercut himself and his institutions. In other words, the future, created by man, was a \textit{desideratum} which, in effect, might now be likened to a Machiavellian version of the carrot technique, that is, holding forth the inevitability of a future classless and Utopian society, but requiring the donkey to move himself toward it.

On the political-ideological front, and translated into current

\(^{47}\) Hegel's philosophy of history viewed man as the instrument of an objective idea (mind) whose legal approach used language which seemingly permitted man to exercise a degree of control. \textit{See, e.g.}, my Reflections Upon Hegel's Concept of Property, Contract, Punishment, and Constitutional Law, 18 VAND. L. REV. 183, 186, 191 (1964), [hereinafter cited as Reflections] and T. M. Knox, Hegel's Philosophy of Right 27-8, 30 (1942). Hegel insists upon man's "free will" in many passages, but either simultaneously or later qualifies the common acceptation and understanding of the term by rejecting its independence; his language rejects the particular (individual) free will and goes, dialectically, into the "will [which] is then universal. . . ." Knox, supra note 31. \textit{See also} N. Haines, Politics and Protest: Hegel and Social Criticism, 86 POL. SCI. QTLY. 406, 417 (1971).

\(^{48}\) Marxist Library, Vol. III (1980), notes by D. Ryazanoff, supra note 42. \textit{See also} notes 170-73, a note on "The Class War and the Historical Process." Marx, of course, was a child of 19th century Darwinism and the determinism of the natural science approach and views of that period.

\(^{49}\) The quote continues "but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly found, given and transmitted from the past." The Eighteenth Brumaire of Louis Bonaparte, A HANDBOOK OF MARXISM 115 (1935); \textit{see also} Marx's third thesis in his THESSES ON FEUERBACH, at 229: "The materialist doctrine that men are products of circumstances and upbringing and that therefore, changed men are products of other circumstances, forgets that circumstances are changed precisely by men and that the educator must himself be educated. . . ." This soft determinism is illustrated by the continuing revolutionary activity of the U.S.S.R. outside its borders and even if it desires co-existence, by the efforts of its leaders to sway others diplomatically and militarily to communism.
events, Russia and China (and all nations, including the United States) affirmatively “plan” their countries’ attitudes and relations vis-à-vis the others (regardless of any planning in the economic, social, and other spheres). Peking enters the United Nations because it, as well as that body, believes the other can be influenced, if not led. Mao’s China accuses Brezhnev’s Russia of having stratified the classes (and the class struggle) so that theoretical, as well as practical, accommodation with the West is occurring. Russia has adopted the philosophical position that communism can “live” with capitalism, whereas Mao, insists upon the true deterministic position and therefore refuses to compromise. On the lower level of personal and governmental relationships, so long as within Russia and China, as well as in other nations whether they are totalitarian or democratic, individuals and groups refuse to accept, seek to change, or at least continue to hope, then hard determinism anywhere cannot succeed.

On the international level there has been a continuing and

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51 The key here is Marx’s view that human nature must be transformed, that is, the feudal society could not have been overthrown without there first having occurred a change from a feudal mentality to a bourgeois one; the stresses then resulted in the overthrow of the former. So, now, the bourgeois nature must be changed to a socialist one, and it is the revolutionary intellectuals who actively educate the proletariat so as to bring about a revolutionary consciousness and so to change the world. Thus “The Great Leap Forward” exhorted the masses to engage in numerous and local activities, even within their own back yards, because in this fashion they would at least hasten (themselves change and so determine) the changing future; is this not also the basic approach in the U.S.S.R.’s various five-year plans, the latest being the projected 1971-75 one which directs practically every detail of the economic life of the nation? The Cultural Revolution, which began in 1966, sought to purge the complacent and bureaucratic who had begun aping the Russians (and yet a new Constitution, party council, and re-vamped governmental structure is slowly re-building). See generally, Sweezy, The Transition to Socialism, 23 Monthly Rev. 1-16 (1971); see also infra note 52.
52 The proposition that Mao refuses to compromise is based on his statements and theoretical propositions, together with his actions to date. See also Rumania’s President Nicolae Ceausescu’s analogous crackdown on permissiveness in July, 1971, on his return from Peking, and his warning “of dangerous Western influences creeping into Rumanian cultural life....” N.Y. Times, Sept. 15, 1971, p. 10, col. 4. So that if Mao is truly a soft determinist in seeking to lead and change human nature, then his “concessions,” such as the meeting with President Nixon, opening the doors to Western visitors engaging in trade with the West, and seeking a seat on the Security Council of the United Nations, are all tactics, a facade, and really not sincere or meaningful for these tactics must either accept the others as they are (the negation of international revolutionary communism) or else now seek to infiltrate and change these others through these contracts (vide the conduct of the Russians and Chinese throughout the world).
increasing rejection of determinism that has culminated in this century in what may be termed nationalistic anarchy, which has resulted in the splitting up of older nations and their possessions into many newly-formed nations. Throughout this area of international law the concepts of self-determination and cooperative determination, with an outright rejection of compelled determination, have become accepted as the norms for the multi-nation decision-making process found in the United Nations and regional groupings. All of which means, at the very least, that hard determinism does not enter this international picture in any degree or shape. It is a variety of soft determinism which is used in the practical affairs of nations, as with individuals, so that "influences" are brought to bear as in the physical-military in Vietnam, the economic-psychological in the Middle East, the religious-political in the Pakistani-Indian conflict, the political-economic-military in Europe. Separately, the concern of all nations with international pollution and ecological imbalance illustrates how planned international cooperation for deliberate control and manipulation of natural and man-made causes to achieve desired results necessarily partakes of the concept of soft determinism, and so do other international efforts to control aspects of war, commerce and trade, population, disease, food, and all things entering and affecting the sought-after "good" life. 

Legal determinism may thus also be thought of as simultaneously hard or soft, in different degrees and ways, in several areas, but all for different reasons. The positivistic approach, as exemplified by Kelsen, sets up a pure theory of empirical law which is to be divorced from transcendental justice, any moral or political aspects, the behavior of individuals which "is determined by laws of nature according to the principle of causality," any form of natural law, etc.; it is anti-ideological and its orientation is like that of analytical jurisprudence, although it tries to carry

53 E.g., the two-week meeting in Stockholm in June, 1972 of the United Nations Conference on the Human Environment; see also this writer's Administrative Conduct, supra note 43.

54 Here the behavior of individuals is deterministic, but is it hard or soft? If present behavior is completely and finally determined by the past, then an external legislative or judicial "control" seems to be unnecessary, perhaps even objectionable. In utilizing such group effort and following the statutes out positively (logically), is not Kelsen therefore disclosing himself as a soft determinist? See also note 57, infra.
on such method "more consistently than Austin and his followers;" it is a "monistic theory" which abolishes the duality of law and State; and thus, in these and other respects, the pure theory seeks to legitimatize positive law. This positive law is unyielding and may be analogized to, although it is not, hard determinism, theoretically allowing no change in its logically enunciated corollaries, and requiring application in all its features—although the validity of the basic norm, "which establishes the supreme, law-creating authority" and gives the positive norms validity, is itself "unproved and must remain so within the sphere of positive law itself." This concession, in effect, softens the seemingly ingrained hardness by permitting the basic norm a degree of flexibility (carried on into the downward sweep) even though a cross-sectional slice, frozen at that moment, appears hard and inflexible.

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55 S. SHUMAN, LEGAL POSITIVISM 12-13 (1963). Shuman examines the differences between analytical jurisprudence and legal positivism on the basis of his own interpretations and distinctions, thus feeling that "Austin would not be considered a legal positivist even though he thought of himself as one...[The critical idea here is that legal positivism is not to be confused with the philosophical term 'positivism']. Analytical jurisprudence is "a way...a method of doing jurisprudence...[and] is not an explanation about what the law is. On the contrary, legal positivism is precisely just such an explanation." Logical, not legal, positivism, was initiated, as a philosophical approach, by the Vienna Circle of the 1920's, e.g., A. AYER, LANGUAGE, TRUTH, AND LOGIC (1936); R. CARNAP, THE LOGICAL SYNTAX OF LANGUAGE (1937).


57 See text keyed to note 54, supra, where the behavior of individuals is determined according to causality, that is, in the physical world causality is found. Law, however, is not physical but, as it is ordinarily conceived and utilized normative, i.e., man conditions it, and so law is an illustration of soft determinism (at the least).

58 "Creation of law is always application of law...." KELSEN, supra note 56, at 133.

59 Id. at 395, see also 401 et seq., and 1-3. Prof. Patterson says this basic norm is anchored "in the sky." E. PATTERSON, JURISPRUDENCE 87 (1953).

60 Prof. Kelsen writes,

Again, a judicial decision may contradict the law. The contradiction is eliminated if the law is found to mean that the judge ought to decide according to the law, but that he can also make a valid judgment contrary to the law, if this judgment has acquired the force of law, that is, whenever the legal order makes it impossible to nullify or change the judge's decision (res judicata). This principle that the judicial decision is valid once it has legal force, even if it is not in accordance with the law, is generally recognized and accepted in all positive legal orders. All positive legal orders limit the possibility of voiding or changing a judicial decision because it violates the law. Generally it appears more important that a legal controversy be closed, once it is decided by a judgment, than (Continued on next page)
Such a soft-hard aspect may also be found in the question, whether inductively reasoned general laws can ever become rigidly applied, i.e., in this latter application a form of hard determinism whereas the formulation is necessarily one of soft? Or, put differently, does any rational explanation, or the entry of reason as a factor in drawing conclusions, entail indeterminism?\(^6\) Reason and law are coin-faces, at least insofar as the common law countries are concerned, for, in this writer’s view, eighteenth-century rationalism was preceded by the thirteenth and fourteenth-century elaborations of rules made common for all by reasoned determinations on particular fact situations.\(^6\)

Whether it is an artificial or other species of reason is not material; a degree of rationality, alternatives, and choices is implicit in the concept and also the use of the term. Coincidentally, there is the concomitant of thinking, will, and intellect—which may be compressed into a form of choice, or of the freedom to reject as well as to accept. Induction by its very definition and use makes for tentativeness, as its generalities necessarily remain subject to change as the factual basis is altered or broadened. Law in the United States, whether statutory or judicial, is always tentative, always utilizes reason, and always remains subject to change, i.e. even in its application it is always soft.\(^6\)

V

Throughout the law, as applied in practice and as taught, there appears primarily and basically the concept of soft determinism.\(^6\)

Hard determinism is an aberration as well as an exception. Law


\(^{62}\) See, e.g., this writer’s views as expressed in Nature of Legal Evidence, supra note 7; Forkosch, The Doctrine of Criminal Conspiracy and Its Modern Application to Labor, 40 Texas L. Rev. 305, 473 (1962); Forkosch, What is Legal History? in Essays in Legal History of Felix Frankfurter 2-22 (M. Forkosch ed. 1968).

\(^{63}\) The classical illustration would be the Noble Experiment of the Prohibition Era, and the Eighteenth and Twenty-First Amendment to the Federal Constitution. See also, for an illustration of an excellent form of judicial legislation, Texas & Pacific R.R. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907), as followed and discussed in United States v. Western Pacific R.R., 352 U.S. 59 (1956).

\(^{64}\) See, e.g., my Reflections, supra note 47, at 192-4, discussing property and contract, and at 194-7, discussing crime and punishment.
cannot ordinarily and generally accept or utilize rigidities of this or any type. Without indulging in semantics and definitions, a trial involves a search for "the truth" with the nature of legal evidence being stultified and limited by historic and current values which (continually) change in time; for a contract ordinarily to eventuate there must be the freely exercised wills of the respective parties; agencies and partnerships ordinarily are created voluntarily by the participants; corporations do not usually sprout, undesired and spontaneously, without human beings who so choose to create; the very language of the marriage ceremony incorporates the concept, as does the law which thereafter grants divorces; real property is transferred as a rule when the grantor so wills it; a delict usually finds the wrongdoer exercising his volition somewhere along the proximate and causal line—if there could be volition so pleaded then the driver of an automobile could well argue his complete innocence from willed blame or fault, and no-fault accidents would result in no-restitution consequences, and then would be an acceptance of predicted highway deaths without attempting to reduce them or eliminate causes; and even the continual revamping and experimentation in law school curricula discloses a belief in change and the ability to become better, to advance beyond through a willed change.

Crime and punishment are illustrations which may begin either with man's violation of God's admonition in the Garden of Eden, or man's evolution from the slime and the later ape. Regardless, crime today involves the criminal's "implicit will, an embodiment of his freedom, his right," as Hegel phrased it.

65 There are, of course, exceptions to every general statement or rule, as Cardozo's famous statement in Meinhard v. Salmon, 248 N.Y. 458, 464, 164 N.E. 545, 546 (1928):

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. . . .


67 See, e.g., notes 47 and 64, supra.

68 Would a rule of law permitting this consequence violate the Due Process Clauses of the Fifth and Fourteenth Amendments? See, for some indication, M. Fornosch, CONSTITUTIONAL LAW § 422 (2d ed. 1969).

69 Reflections, supra note 47, at 195.
so that each violator is held accountable for his chosen conduct.\textsuperscript{70} This view remains even though the right-wrong M’Naghten test was judicially somewhat and tentatively modified for the District of Columbia by the Durham test in 1954, viz. that “an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.”\textsuperscript{71} The late Clarence Darrow successfully expounded his own version of hard determinism, in the famous Leopold-Loeb trial.\textsuperscript{72} As to punishment, modern penology assumes rehabilitation to be possible, i.e., that a prisoner can himself voluntarily choose, control, condition, and correct and so our society offers rewards (parole, etc.) to those who choose correctly (as society desires [dictates] them to choose?).\textsuperscript{73} The Katzenbach Commission’s approach to the prevention of crime is also an illustration of behavioral soft determinism, that is, to eliminate “social conditions closely associated with crime . . .

\textsuperscript{70} This is highlighted by Darrow’s famous plea (\textit{infra} note 72) urging the impact of conditions, background, etc., upon the minds and wills of confessed murderers so as (successfully) to avoid the death penalty; today, of course, the defense has become more sophisticated, as shown in note 71, \textit{infra}.

\textsuperscript{71} Durham v. United States, 214 F.2d 862, 874-5 (D.C. Cir. 1954), \textit{see also} notes 2 and 14, \textit{supra}; Daniel M’Naghten’s Case, 4 St.Tr.N.S. 847, 8 Eng. Rep. 718 (1843), which enunciated the analogy to the “wild beast” concept of criminal responsibility; \textit{see also} Smith v. United States, 36 F.2d 548 (D.C. Cir. 1929), i.e., the irresistible impulse test. The Durham rule was severely criticized, e.g., S. Rubin, \textit{Psychiatry and the Criminal Law} (1963), and is not followed. \textit{See further, Boas, Responsibility, supra note 21, at 511}:

The criminal, moreover, is by his very nature a logical surd. His existence can be observed but not deduced. That is the logical puzzle. Then too he is called upon to behave in a manner in which his nature may prevent him from behaving. That is the psychological puzzle. And finally he is asked to accept as a standard of living norms which he jettisons at the moment of committing his crime. And that is the ethical puzzle. . . .

The history of the Durham rule is not discussed further save to call attention to H.R. Rep. No. 563, 87th Cong., 1st Sess. (1961), in which a majority of the Committee on the District of Columbia recommended amending the law referring, \textit{inter alia}, to the “system of values which were [sic] grounded upon the basic proposition that a person who possesses a free will is responsible for the misuse of such free will.”

\textsuperscript{72} In his closing argument to the judge he included this comment:

I do not know what it was that made these boys do this mad act, but I do know . . . that any one of an infinite number of causes reaching back to the beginning might be working out . . . because someone in the past has sinned against them.

\textbf{Famous American Jury Speeches} 992, 1015 (F. Hicks ed. 1925); \textit{see also} note 70, \textit{supra}.

\textsuperscript{78} \textit{See also} text and notes 4-5, \textit{supra}. Here behavior modification is essentially involved, regardless of character change, i.e., man’s nature. In general see R. Goldfarb & L. Singer, \textit{After Conviction: A New Review of the American Correction System} (1972), who also feel that change in man is possible where correction and proper techniques are scientifically utilized and applied, i.e., the ability exists to alter the whole man (the making of “artificial” people?).
and reducing the situations in which crimes are most likely to be committed.\textsuperscript{74}

The law's approach to probability, chance, and illogic may also be seen when condensed into the microcosm of society we call the petit jury. Here, we say, is the conscience of the people to be expressed, and the positivistic will of the state may be frustrated, not only criminally but also civilly, that is, the jury is not a mass phenomenon. Thus we have departed, if not completely, from the days when a judge could affirmatively order a jury to decide in a decreed manner and hold them in durance until so done,\textsuperscript{75} so that each jury (and juror) is different, cannot be computerized, and may express its own independent views as occasion warrants.\textsuperscript{76} In other words, the presentation of facts numbered one through a thousand does not necessarily and never can result in a known verdict, albeit time and again there will be conformity.\textsuperscript{77}

Behavioralism is not determinism as here discussed, but it may illustrate how and to what a production economy may necessarily be geared, so that such a nation's laws may partake of this dominant tendency. \textit{Au contraire}, where a consumer-oriented philosophy is utilizing them, as with a bit of the current approach, the backlash may express itself in the use of law and legal actions to change the production atmosphere.\textsuperscript{78} Although insurance in all fields may be oriented to mass statistics and the laws of probability, so that even predictions of holiday deaths on the highways are dishearteningly accurate, and although elections advertising budgets, and other forms of gauging and anticipating the mass public's behavior may be estimated accurately,
still, in the end, the individual and his differences, rather than his likenesses, is what counts in the law.\textsuperscript{79} At least for the common law countries and those code nations in the Western stream of culture, it is the individual for whom the law is promulgated and for and to whom it is applied, not the contrary. The element of indeterminateness, of probability rather than rigidity, figures in every court proceeding, jury or nonjury, trial or appellate. The quantitative extent to which this probability can be hazarded in and throughout the law's application requires that hard determinism be necessarily rejected.

The great internal upheavals of the 1960's in all countries, whether student or worker led, whether by coups or consents, generally were directed at institutions which had become jelled and frozen. Rousseau's agonized plea on behalf of the common man\textsuperscript{80} was reflected two hundred years later in all these continued efforts, and the struggle for change never ceases. In all this the law necessarily enters, at some point, if only to contain the use of extreme force.\textsuperscript{81} And in all of this, including the law, there is necessarily an illustration of the use and application of soft determinism.\textsuperscript{82} Without a rejection of hard determinism there could never be the generalist, only the specialist, and it might be argued, no culture, art, or civilization as the West and the East have produced these past two thousand years, nor could a pluralistic society be conceived or exist. Even the age-old yearning of man for absolutes has long been discarded and it is the concept of the indeterminate amalgam which has been accepted and is used.\textsuperscript{83}


\textsuperscript{80} "Man is born free; and everywhere he is in chains . . ." J. J. Rousseau, \textit{The Social Contract} 5 (1913).

\textsuperscript{81} The entry of the law does not necessarily mean that all force or violence is "bad" or even illegal, on which see, e.g., M. Forkosch, \textit{Is Violence an "American Nightmare"?}, 4 Georgia L. Rev. 439 (1970).

\textsuperscript{82} See, e.g., J. Revel, \textit{Without Marx or Jesus} (1971), postulating political freedom as the first need, with economic freedom following, and advocating numerous methods (e.g., sit-ins, boycotts) to effect changes in the status quo, i.e., institutions, and suggesting that it is in the United States that, as his subtitle puts it, "The New American Revolution Has Begun."

\textsuperscript{83} This does not automatically and without more rule out faith, belief, and
There is thus an integral portion in the practitioner's and the law school student's little green bags which must be comprised of this deterministic concept and explicitly brought to their attention. When and how this is to be done is not here discussed; that it be done is indicated.

(Footnote continued from preceding page)

religion, especially for the pragmatist, on which see, e.g., notes 26-29, 39-40, supra and also The Political Philosophy of Arnold Brecht 148-60 (M. Forkosch ed. 1954). Further, is not the acceptance of soft determinism itself an illustration of some kind of belief or faith in man, i.e., humanism?