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Steven Goldberg

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EVOLUTIONARY BIOLOGY MEETS DETERMINISM: LEARNING FROM PHILOSOPHY, FREUD, AND SPINOZA

*Steven Goldberg**

Through his writings, speeches, and work with the Society for Evolutionary Analysis in Law and the Gruter Institute for Law and Behavioral Research, Owen Jones has become the leading figure in the field of evolutionary analysis in law. He is a founder of the field and the most effective proponent of its importance. The Dunwoody Distinguished Lecture in Law adds yet another major contribution to Jones's imposing body of work.

Under the circumstances, it may seem ungenerous to point to a major area where Jones needs to do more if the implications and merits of linking behavioral biology and law are to become clear. But in the long run, Jones's work and the discipline he champions will benefit if he and others in the field turn their attention to the issues of determinism and free will that accompany any causal account of human behavior.

Jones has not ignored these matters. As we will see, he has made cautious and sensible comments on some limited aspects of the problem. Moreover, Jones is under no obligation to become a philosopher, and it is even sillier to suggest that he cannot write about the causes of human behavior without solving problems relating to free will that have resisted the work of countless scholars for thousands of years.¹ It would be helpful, however, if Jones and other supporters of evolutionary analysis in law gradually began to flesh out their views on determinism so that their movement can be located in a broader philosophical context.

In the most general terms, the problem that will confront Jones is that, on the one hand he wants evolutionary analysis to inform decisions about how society should reach the goals it deems morally appropriate, yet, on the other hand he may be committed to a world view in which morality vanishes because free will vanishes.² This is a familiar problem that has accompanied many efforts to introduce the scientific study of human behavior into law.³

* Professor of Law, Georgetown University Law Center. I would like to thank Louis Michael Seidman and Silas Wasserstrom for their help.

1. One recent analysis of free will begins by citing the work of the Roman philosopher Lucretius, who died in 55 B.C. SIMON BLACKBURN, *THINK: A COMPELLING INTRODUCTION TO PHILOSOPHY* 81 (1999).

2. *See id.* at 82-83.

3. *See, e.g.*, MICHAEL S. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 351-52 (1984) (some psychiatrists believe their discipline eliminates the idea of moral responsibility).

Jones would like to avoid this problem by sharply separating “ought” from “is.” He argues that his approach “supplies no normative value to behaviors or goals.”⁴ Although legal systems “tend to reflect biobehavioral predispositions [that] says precisely nothing about whether or not they should.”⁵ Instead, behavioral biology helps us achieve goals “that have already been set by independent processes of norm formation.”⁶ Knowing something about the biological basis of human behavior helps us choose effective legal strategies for achieving those goals.

In addition, Jones emphasizes that when evolutionary biology does shape the law, it does not do so in a mechanistic way. First of all, evolutionary analysis depends on probabilities, and thus, the most it can say is that some features of legal systems are highly likely, not inevitable.⁷ Behavioral dispositions in humans, Jones notes, “manifest themselves in condition-dependent, subtle, variable, responsive, algorithmic, complex ways.”⁸ Indeed, evolutionary processes helped create “extraordinary human capacities for rational analysis and decisionmaking,”⁹ capacities that apparently enable us at times to overcome or shape the behavioral tendencies favored by natural and sexual selection.

In short, Jones very much wants to avoid “imperialistic” claims for his chosen discipline.¹⁰ As he puts it, “[o]ne need not have a theory of everything in order to explain some things.”¹¹ And he is particularly concerned with one of the classic problems raised by overly ambitious scientific claims: the simplistic notion that because biology causes behavior, criminals should go free. Jones notes that such arguments lead to “allergic responses.”¹² In an earlier article, he specifically rejected the idea that “accused rapists should be allowed to raise biology in furtherance of exculpatory arguments, claiming that male evolved psychology absolves them from guilt.”¹³

Much of this is welcome. Any scholar who resists the notion that his theories explain everything deserves our thanks. And the leap from a theory of human behavior to a defense in a criminal trial is one that should

4. Owen D. Jones, *Proprioception, Non-law, and Biolegal History*, 53 FLA. L. REV. 831, 870-71 (2001) [hereinafter Jones, *Proprioception*].

5. *Id.*

6. *Id.*

7. *Id.* at 871-72. On the implications for law of the statistical nature of evolutionary analysis, see Steven Goldberg, *Statistics, Law, and Justice*, 39 JURIMETRICS J. 255 (1999).

8. Jones, *Proprioception*, *supra* note 4, at 838.

9. *Id.*

10. *Id.* at 871.

11. *Id.* at 871-72.

12. *Id.* at 837.

13. Owen D. Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 CAL. L. REV. 827, 910-11 (1999) [hereinafter Jones, *Biology of Rape*].

not be taken lightly.

But Jones's approach also leaves some very basic matters unclear. The fundamental problem arises in the context of norms, that is, the question of morality, of what we ought to do. As we have seen, Jones maintains that he is concerned with a "descriptive" study of evolutionary biology which "says precisely nothing" about norms, which are set by "independent processes."¹⁴ But the creation of norms is, in Jones's view, not entirely free of evolutionary influences. Indeed, "the normative content of legal systems will, all over the globe, tend to reflect the behavioral biology of species-typical emotions, even as the details of those legal systems will inevitably vary in many particulars."¹⁵ Jones believes, for example, that rape is wrong, and he also believes that our opposition to rape stems in large part from natural selection.¹⁶ Of course, evolution does not explain everything about norms; there is "ample room for cultural variation, random variation, and historical accident."¹⁷

But is that enough to rescue norms? The starting point for many discussions of morality is that for people to be held morally responsible they must have free will. To put it another way, if determinism is true, that is, if human choices are the result of antecedent causes, then morality is impossible.¹⁸ This problem is bigger than it may seem. You cannot rescue free will by noting that the causes of human behavior include unpredictable random factors, such as the quantum behavior of subatomic particles. If my actions are caused by chance, that is very different from saying that they are caused by free choice.¹⁹ Nor can free will be rescued by saying that human behavior is caused by multiple factors. Thus, the fact that Jones does not attribute all human behavior to evolutionary biology does not take determinism off the table. If my choices are caused by subatomic particles, the environment, the weather, my upbringing, and evolutionary biology, those choices, however impossible to predict or understand, are still not free, and it will be difficult to hold me morally accountable for them.²⁰ Finally, the existence of human reason does not rule out determinism. The factors I consider in making a rational choice, the weight I give to them, and my reasoning faculties themselves can all be the result of earlier

14. Jones, *Proprioception*, *supra* note 4, at 870.

15. *Id.* at 861-62.

16. *Id.* at 862-63; *see also* Jones, *Biology of Rape*, *supra* note 13, at 829-37.

17. Jones, *Proprioception*, *supra* note 4, at 862.

18. *See* Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1111-12 (1985) (discussing H. Hart).

19. BLACKBURN, *supra* note 1, at 84.

20. Indeed, this remains true even if we are ignorant of some of the many causes of human behavior, just so long as we believe that the behavior is, in fact, caused. Moore, *supra* note 18, at 1119.

causes.²¹

Jones does not at present take a clear position on whether all human behavior is the result of antecedent causes. That is neither surprising nor distressing; determinism is not the subject of his Article. But there is enough in Jones's work to raise the issue and to suggest where he might stand. I think it is a fair guess that Jones supports a rather thoroughly materialistic view of human behavior, and thus will have to do some work to explain how people can be held morally accountable. Consider Figure 13 in his Article, where humans are shown to be the product of physical, chemical, and biological processes.²² There are alternate accounts. For example, some religions view humans as being created by God, and given free will as part of that creation.²³ But neither God nor religion makes it into Figure 13; if they are included in the bracketed [others], then, like law, they are a creation of humans rather than the other way around.

I suspect Jones believes that our moral values are the product of causes, not of free choice. The causes extend beyond evolutionary biology, but they are causes nonetheless. This would hardly be a surprising belief for an individual in our society, particularly one so attracted to science. It is not as though positing a role for free will solves the problem of human choice. If humans have free will, how does that will make its views felt in the physical brain? Through what mysterious force does it cause chemicals to react and nerves to twitch? Dualism is largely in retreat among elites in our culture, in large part because it operates outside of the realm of modern science.²⁴

Indeed, from this point of view, one of the most remarkable items in Jones's piece is his passing reference to the view that the study of behavioral biology and law leaves "ample room for variation and for free will."²⁵ If by free will Jones really means something that is outside of the world of causation yet capable of influencing that world, then dualism has an important new recruit. Perhaps by using the term free will here, Jones means something different. He may just mean "not caused by evolutionary biology and difficult to predict," which leaves determinism in place.²⁶ Or

21. In fact, it is sometimes argued that only our ignorance of reasons creates the feeling of free will; if we acted based solely on reason in an effort to achieve our goals we would lack free will. EDWARD O. WILSON, *CONSILIENCE: THE UNITY OF KNOWLEDGE* 119 (1998).

22. Jones, *Proprioception*, *supra* note 4, at 870.

23. On the Catholic teaching that God has given humanity free will, see Robert W. Lannan, *Catholic Tradition, and the New Catholic Theology and Social Teaching on the Environment*, 39 *CATH. LAW.* 353, 373 (2000).

24. See BLACKBURN, *supra* note 1, at 88-90; see also Steven Goldberg, *Gene Patents and the Death of Dualism*, 5 *S. CAL. INTERDISC. L.J.* 25, 36-37 (1996).

25. Jones, *Proprioception*, *supra* note 4, at 867.

26. See Moore, *supra* note 18, at 1119. Moreover, it is difficult to assert that we are partly determined and partly free; to many this is like saying someone is "partly pregnant." *Id.* at 1116.

by “free will” he may mean the feeling or sensation of free will that all humans apparently have. We feel like we are using our reason and making free choices, even if the way our reason operates and the choices we make are completely the result of antecedent causes. This type of free will is also completely consistent with determinism. Indeed, some believe it may be the result of evolutionary forces. E. O. Wilson, for example, has written that we have “the illusion of free will. . . . And that is a fortunate circumstance. Confidence in free will is biologically adaptive. Without it the mind, imprisoned by fatalism, would slow and deteriorate.”²⁷

Jones may benefit from considering earlier efforts to analyze systematically the problem of free will. Legal scholars who specialize in the relationship between determinism and law have identified several typical reactions to the situation that confronts Jones.²⁸ Four of these well-known philosophical categories appear particularly relevant here.

The first possible reaction to a scientific, causal theory that seems to bear on legal issues is not to dispute determinism but rather to assert that the law, unlike science, simply assumes the freedom of the will. Thus, judges confronted with psychiatric explanations of human behavior sometimes assert that human autonomy is a “necessary postulate” of law.²⁹ Justice Cardozo provided a classic statement of this view in rejecting an argument that a taxing program was coercive:

[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems.³⁰

This approach, which Michael S. Moore has termed “reconciliation by fiat,”³¹ is popular with lawyers and judges who want to go about their

Finally, for some philosophers free will is even more elusive because it is inconsistent not only with determinism but with indeterminism. Peter van Inwagen, *Free Will Remains a Mystery*, in PHILOSOPHICAL PERSPECTIVES 14: ACTION AND FREEDOM 1, 10 (James E. Tomberlin ed., 2000) [hereinafter PHILOSOPHICAL PERSPECTIVES].

27. WILSON, *supra* note 21, at 119-20.

28. See, e.g., MOORE, *supra* note 3, at 350-65; Stephen J. Morse, *The Moral Metaphysics of Causation and Results*, 88 CAL. L. REV. 879, 882-89 (2000); Michael Corrado, *Addiction and Causation*, 37 SAN DIEGO L. REV. 913, 917-19 (2000); Rachel J. Littman, *Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will*, 60 ALB. L. REV. 1127, 1131-39 (1997).

29. MOORE, *supra* note 3, at 353 (citing Judge Levin).

30. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 589-90 (1937).

31. MOORE, *supra* note 3, at 353. Moore regards this as an unacceptable approach for a just

business without becoming bogged down in philosophical debate. I would be surprised if it were adequate in the long run for a scholar like Jones, who is vitally concerned with the causes of human behavior and the intersection of those causes with the law.

A second approach is to reject, on the merits, the notion that human choices are determined. This view is typically called libertarianism.³² Libertarians accept that humans may be predisposed to take certain actions by evolution, the environment, and other causes outside of their control, but they insist that, in the end, individuals can choose to follow or not follow these tendencies.³³ This freedom to choose, according to libertarians, is central to moral responsibility. Science, in their view, has not demonstrated that human choices are the result of antecedent causes alone. Libertarianism, whether it goes by that name or not, is popular with individuals who, for religious or other reasons, are convinced that human choices are outside the scientific model that seems to govern so much else in the world. Whether or not they are formally dualists, who believe that the soul is distinct from the body, they believe that human actions have a free and morally-laden quality. Libertarianism is undoubtedly widespread; it has even been suggested that it is the view that “philosophers hold when they are not at work.”³⁴ It may be a view that Jones will come to accept. But, as suggested earlier, that would be a somewhat surprising result. Evolutionary analysis in law seems consistent with a materialistic view of nature, including the idea that human brains and minds are entirely part of the natural world. In particular, modern advances in neural science make it unlikely that someone with Jones’s point of view would regard human choice as outside the realm of causal science.³⁵

The third possible reaction to the intersection of causation and law is often called hard determinism or incompatibilism. In this view, all human actions have a cause, and thus, no one is morally responsible for anything.³⁶ Some students of human behavior, including some psychiatrists, have supported this view, as have some philosophers.³⁷ For most people, however, it is an unpleasant and counterintuitive notion and one that seems to undercut our usual sense of the relevance of the law.

Finally, there is compatibilism, or as it is sometimes called, soft

legal system. *Id.*

32. Corrado, *supra* note 28, at 917; Littman, *supra* note 28, at 1138-39.

33. Littman, *supra* note 28, at 1138-39.

34. Corrado, *supra* note 28, at 918.

35. *Id.*

36. Morse, *supra* note 28, at 882; Littman, *supra* note 28, at 1137.

37. MOORE, *supra* note 3, at 352; see also Ted A. Warfield, *Causal Determinism and Human Freedom Are Incompatible: A New Argument for Incompatibilism*, in PHILOSOPHICAL PERSPECTIVES, *supra* note 26, at 167.

determinism.³⁸ Compatibilists believe that moral responsibility is consistent with the idea that human actions are caused. In other words, determinism and human responsibility can coexist.³⁹ Under one formulation of this view, human action is not uncaused, but when it is guided by reason it is fair to hold an individual responsible.⁴⁰ Moral and legal rules are meaningful because they provide an individual good reasons for taking action.⁴¹ Moral responsibility in this view does require that a human agent act intentionally rather than under compulsion from external forces that overcome his or her desires. But moral responsibility is compatible with the notion that an individual's desires are themselves the result of antecedent causes.⁴²

Compatibilism comes in many varieties, and it has many critics, including those who believe it is little more than a play on words.⁴³ On the other hand, no approach in this area is without opponents, and compatibilism appears to be the most widely supported view among moral philosophers today.⁴⁴

I believe that in the future, Jones and other practitioners of evolutionary analysis in law will gradually locate themselves somewhere along this spectrum of approaches to determinism and law. Hard determinism has an obvious appeal to those with a scientific bent, but it is hard to give up the language and attitudes associated with choice and morality. Yet simply positing free will, as Cardozo did, may not be satisfying either. My guess is that for most evolutionary analysts either libertarianism or some form of compatibilism will have the most appeal. The former allows evolutionary and other causal influences on human behavior, but it preserves freedom and morality by finding a sphere of human action that operates completely outside of the causal world. The latter, which combines causation and moral responsibility, may be particularly attractive for some.

Another way to approach this problem is to look not at current

38. MOORE, *supra* note 3, at 360-65.

39. *Id.*

40. Morse, *supra* note 28, at 886. Morse identifies several other conditions necessary for a compatibilist to hold an individual responsible, such as compliance with or breach of a moral obligation. *Id.*

41. *Id.*

42. Littman, *supra* note 28, at 1134-35.

43. On various approaches to soft determinism (compatibilism), see *id.* at 1135 n.32. For a criticism of compatibilism, see Warfield, *supra* note 37, at 167. In an earlier article, Jones cites an article by Deborah Denno, which appears skeptical of compatibilism, although Jones does not discuss this aspect of the Denno article. See Jones, *Biology of Rape*, *supra* note 13, at 911 n.288; see also Deborah W. Denno, *Human Biology and Criminal Responsibility: Free Will or Free Ride?*, 137 U. PA. L. REV. 615, 663 (1988) ("Moore's [compatibilism] appears to be more of a variation on the theme of degree determinism than any 'new' theory of behavior.").

44. Morse, *supra* note 28, at 886; Warfield, *supra* note 37, at 168.

philosophical categories but at historical experience. When we consider thinkers such as Freud and Spinoza, who strongly supported causal theories of human behavior, we find an unwillingness to completely abandon ideas of choice, freedom, and morality. Whatever philosophical camp they might now be put in, the experience of Freud and Spinoza suggests that even the strongest proponents of the relevance of scientific determinism to human action seek to participate in debate over what is best for individuals and for human society.

Freud's work and its relation to law is similar in some ways to evolutionary biology and law. Although we sometimes think of Freudian psychology in terms divorced from underlying human biology, that is at best an incomplete picture.⁴⁵ When Freud was a young man in the 1870's he became an adherent of Darwinian ideas. As he wrote in his autobiography, "the theories of Darwin, which were then of topical interest, strongly attracted me, for they held out hopes of an extraordinary advance in our understanding of the world"⁴⁶ In his first year of medical school he took a course on "General Biology and Darwinism."⁴⁷ After graduation, he did laboratory science for a time, beginning with research on the spinal cords of fish and concluding with neurological studies on brain paralysis in children.⁴⁸ Most importantly, Freud believed that the unconscious, which in his view influenced so much of human behavior, was something that we carry as an inheritance from the animal world.⁴⁹ Thus, it is not surprising that Ernest Jones's biography of Freud refers to him as the "Darwin of the mind."⁵⁰

Today, many believe that Freud's ideas are misguided and unscientific.⁵¹ But those ideas continue to have adherents, and in their heyday, proponents of Freudian theory envisioned it playing a role quite similar to the role Jones sees for evolutionary analysis. A 1967 legal casebook, *Psychoanalysis, Psychiatry, and Law*, centered on psychoanalytic theory because psychoanalysis "endeavors to construct a systematic theory of human behavior" and because "each man as an

45. On the long-standing tension between "biological" and "psychological" views of Freud's work, see FRANK J. SULLOWAY, *FREUD, BIOLOGIST OF THE MIND: BEYOND THE PSYCHOANALYTIC LEGEND* 13 (1983). Although Sulloway emphasizes the biological underpinnings of Freud's work, he does not deny the importance of psychology in that work. *Id.* at XV (preface to the paperback edition).

46. *Id.* at 13.

47. *Id.* at 13-14.

48. HANS KÜNG, *FREUD AND THE PROBLEM OF GOD* 16 (Edward Quinn trans., 1990).

49. SULLOWAY, *supra* note 45, at 4.

50. *Id.*

51. See, e.g., David S. Caudill, *The Anatomy in Property Law: "It's Not About Sex," Or Is It?*, 20 CARDOZO L. REV. 1695, 1700-01 (1999) (reviewing JEANNE LORRAINE SCHROEDER, *THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY, AND THE FEMININE* (1988)).

individual dealing with his reality . . . is, after all, the subject of both psychoanalysis and law.”⁵² One of the major legal areas where psychoanalytic theory is used today is family law, an area where Jones envisions a role for evolutionary analysis.⁵³

For our purposes, it is of no moment whether evolutionary analysis in law will one day have more or less influence than psychoanalysis and law, or whether it should. What we can say with confidence, however, is that, just like the Freudians, Jones and his supporters will have to grapple with the difficult relationship of determinism to law. In the end, Freud, like most others who follow in Darwin’s footsteps, took a scientific, determinist view of human action. As Marcia Cavell puts it, “Freud thought that science demanded causal determinism; and because of his materialist convictions, he thought causal connections were incompatible with choice.”⁵⁴ But Cavell goes on to point out that Freud’s behavior as a psychotherapist was, in fact, designed to help patients uncover and understand their infantile wishes and perhaps overcome those wishes by carrying out other desires.⁵⁵ Similarly, Michael S. Moore notes that Freud used non-intentional, deterministic language when he theorized about his work, but used an intentional vocabulary when he talked to his patients.⁵⁶ To Moore, a compatibilist, this can be understood so long as we realize that determinism is consistent with individual responsibility.⁵⁷ Moore concludes that Freud’s “insights about the unconscious do not . . . generally require one to alter the legal view of persons as autonomous and rational beings who may justly be held responsible”⁵⁸

A similar picture emerges when we move back in time before Darwin to the work of the seventeenth-century philosopher Baruch Spinoza. Spinoza’s work remains influential.⁵⁹ His identification of God with Nature, and his belief that Nature operates by rational, deterministic laws make his thinking relevant to modern science.⁶⁰ In 1929, Albert Einstein, having received a cable asking, “Do you believe in God,” replied: “I

52. JAY KATZ ET AL., *PSYCHOANALYSIS, PSYCHIATRY AND LAW* 3 (1967).

53. Jones has applied evolutionary analysis to family law in Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C.L. REV. 1117 (1997). Psychoanalysis forms the central framework for JOSEPH GOLDSTEIN et al., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973), the first in a series of important family law books. See Elizabeth Stauderman, *Tribute: Biography of Joseph Goldstein*, 19 YALE L. & POL’Y REV. 1, 1 (2000).

54. MARCIA CAVELL, *THE PSYCHOANALYTIC MIND: FROM FREUD TO PHILOSOPHY* 82 (1993).

55. *Id.*

56. MOORE, *supra* note 3, at 382.

57. *Id.* at 360-61.

58. *Id.* at 383.

59. Spinoza has been the subject of two recent full-scale biographies. See STEVEN NADLER, *SPINOZA: A LIFE* (1999); MARGARET GULLAN-WHUR, *WITHIN REASON: A LIFE OF SPINOZA* (1998).

60. GULLAN-WHUR, *supra* note 59, at 119-20.

believe in Spinoza's God who reveals Himself in the orderly harmony of what exists, not in a God who concerns Himself with fates and actions of human beings."⁶¹

To Einstein, the statistical nature of the quantum theory, which he rejected, was inconsistent with Spinoza's philosophy. Other scientists disagreed; indeed, in 1937 Einstein and Niels Bohr argued about whether Spinoza would have accepted quantum physics.⁶²

Spinoza extended his belief in scientific determinism to human behavior. Rejecting Descartes's dualism, Spinoza argued that human beings, including their minds, were entirely part of the natural order.⁶³ He wrote, "I shall discuss human actions and appetites just as if the inquiry concerned lines, planes, or bodies."⁶⁴ And as with other parts of nature, the key to understanding human behavior was to understand antecedent causes: "There is in the mind no absolute, i.e. no free, will, but the mind is determined to will this or that by a cause, which is again determined by another, and that again by another, and so on to infinity."⁶⁵

This view of human behavior makes Spinoza's philosophy relevant to legal issues in much the same way that Freudian theory and evolutionary biology are relevant. For example, Margaret Gullan-Whur, in a recent biography of Spinoza, says that his "theory of the interrelatedness within nature of all natural phenomena, physical and mental" makes his work relevant to a variety of issues including the "rights of parents and children . . . [and] the anthropological foundations and legitimate social benefits of marriage"⁶⁶

Moreover, Spinoza confronted the same issue that we have seen with psychoanalysis and evolutionary biology: if human behavior results from antecedent causes, how can we talk about human responsibility?⁶⁷ Spinoza, after all, did not limit himself to a belief in deterministic natural laws. He also offered his views on the proper way for people to live their lives. He valued the exercise of reason in personal life, and he offered ideas about the proper form of political organization, including early arguments in favor of democracy.⁶⁸

61. *Einstein Believes in "Spinoza's God,"* N.Y. TIMES, Apr. 25, 1929, at 60.

62. Niels Bohr, *Discussion With Einstein on Epistemological Problems in Atomic Physics*, in ALBERT EINSTEIN: PHILOSOPHER-SCIENTIST 201, 236-37 (Paul Arthur Schilpp ed., 1959).

63. STUART HAMPSHIRE, SPINOZA 61-62, 121 (1973 ed.).

64. SPINOZA, ETHICS 164 (G.H.R. Parkinson ed., trans., 2000); *see also* NADLER, *supra* note 59, at 238.

65. SPINOZA, *supra* note 64, at 155.

66. GULLAN-WHUR, *supra* note 59, at 314-15.

67. HAMPSHIRE, *supra* note 63, at 149-50.

68. I discuss some of Spinoza's moral and political views in Steven Goldberg, *Antonin Scalia, Baruch Spinoza, and the Relationship Between Church and State*, 23 CARDOZO L. REV. (forthcoming 2001).

Scholars have long addressed the relationship between determinism and freedom in Spinoza's writings. Most have agreed with Stuart Hampshire that Spinoza developed an "account of freedom of mind which he considered compatible with the thesis of determinism."⁶⁹ As Jon Wetlesen puts it, Spinoza believed that a person is determined, yet free in so far as his striving is determined from within himself.⁷⁰ However modern philosophers might categorize his views on these matters, it is clear that Spinoza talked about causation while also talking about situations where people could be held responsible for their thoughts and actions.⁷¹

In sum, the application of evolutionary analysis to law that Jones envisions need not pose insurmountable philosophical problems. Jones wants to employ an essentially naturalistic view of human behavior without rejecting the idea that we can talk sensibly about human responsibility and morality. Some modern philosophical approaches, particularly compatibilism, support this possibility, as do some views of the work of determinists such as Freud and Spinoza. The point is not that Jones must immediately choose a school of philosophy or commit himself to a particular form of words to be used when issues of free will and determinism arise. It is rather that Jones should work with an awareness of these matters, and should gradually evolve a workable approach to the inevitable tensions that arise when law intersects with deterministic science.

69. Stuart Hampshire, *Spinoza's Theory of Human Freedom*, 55 THE MONIST 554, 554 (1971).

70. JON WETLESEN, THE SAGE AND THE WAY: SPINOZA'S ETHICS OF FREEDOM 2 (1979).

71. S. PAUL KASHAP, SPINOZA AND MORAL FREEDOM 133 (1987).

