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PROFESSOR SAMUEL H. PILLSBURY'S SCIENCE OF MIND: A TRIBUTE

*Deborah W. Denno**

Most criminal law doctrine reflects a philosophical, historical, and scientific perspective on the human mind. Few scholars have analyzed this interdisciplinary mix with as much nuance and insight as Samuel Pillsbury. Professor Pillsbury continuously thinks *outside* the box, yet he also rummages *inside* it, rearranging the spotlight so that we can see human behavior and the legal rules that guide it in a less academic, more real-world view.¹ By embracing a multidimensional science of mind, Professor Pillsbury moves us past the traditional doctrinal framework of criminal law, prompting workable proposals for changing the criminal justice system.²

Over the years, I have often relied on Professor Pillsbury's work in my scholarship and teaching. In this Essay, I focus on three examples where Professor Pillsbury's work helped me see doctrine more

* Arthur A. McGivney Professor of Law, Founding Director, Neuroscience and Law Center, Fordham University School of Law. I am most grateful to Megan Martucci and Erica Valencia-Graham for their helpful comments and contributions, and to reference librarian Kathleen Thompson for her excellent research. In addition, I thank the staff of the *Loyola of Los Angeles Law Review*, Willie Almack in particular, for their impeccable guidance throughout the editorial process.

1. See Samuel H. Pillsbury, *Why Psychopaths Are Responsible*, in HANDBOOK ON PSYCHOPATHY AND LAW 297, 297 (Kent A. Kiehl & W. Sinnott-Armstrong eds., 2013) (noting that “[t]he gap between the academic and the ‘real’ world is a staple of modern policy discourse” and finding that, even as an academic, Professor Pillsbury at times favors “the lay position”).

2. See generally SAMUEL H. PILLSBURY, *IMAGINING A GREATER JUSTICE: CRIMINAL VIOLENCE, PUNISHMENT AND RELATIONAL JUSTICE* (2019). Professor Pillsbury proposes that the harms that violence causes are not just to a person's body but to their very selves. *Id.* at 19. Building on this foundation, he tackles the ideas behind punishment, particularly the justifications for the punishment of “wrongful violence.” *Id.* at 103–04. Using specific examples to focus on the inequalities in the due process system, Professor Pillsbury stresses the need to enact sentencing with “moral regard.” *Id.* at 110–18. This principle involves encouraging criminal justice actors to engage on a more emotional level and to understand the harm that punishment causes. *Id.* at 117–18. Ultimately, Professor Pillsbury stresses the importance of having faith in justice and understanding the harms of wrongful violence and unjust punishments for criminal justice reform. *Id.* at 303–07.

expansively, most notably in the areas of mental states and punishment.³

As every student of criminal law learns, generally, each crime has two key components: the mens rea, which refers to the defendant's mental state at the time of the offense; and second, the actus reus, which refers to the defendant's voluntary act that causes the social harm. For example, if A intentionally picks up a gun and shoots B, A has performed a voluntary act (shooting B) that caused B's death (the social harm), and A did so intentionally (the mental state).

While the criminal law supposes that most human behavior is voluntary and that individuals are consciously aware of their acts, it also recognizes that individuals who act unconsciously, such as those experiencing a reflex response, are simply not acting. Under the criminal law's voluntary act requirement, unconscious individuals can be acquitted even if their behavior results in severe harm.⁴

In an article critiquing the artificial dichotomy of conscious versus unconscious thought processes in criminal law, I relied on Professor Pillsbury's highly influential work, *Crimes of Indifference*, to provide key support.⁵ In *Crimes of Indifference*, Professor Pillsbury dives into cognitive science and the philosophy of mind to discuss defendants' mental states, particularly in the context of the mens rea requirements for depraved-heart murder and unintentional manslaughter.⁶ Professor Pillsbury underscores what he calls the concept of "responsible choice." With it, he flips the criminal law's priorities in assigning culpability from defendants' levels of *awareness* of the risks of their behavior to their *indifference* to the value of human life.

The modern criminal law's requirement that a defendant has "actual awareness" of the risks of their behavior may, in Professor Pillsbury's words, "blind us to the more passive, but more common evils of callous indifference."⁷ Instead, by relying on cognitive science, Professor Pillsbury posits that criminal responsibility should depend

3. See Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269 (2002) [hereinafter Denno, *Crime and Consciousness*]; Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319 (1997) [hereinafter Denno, *Getting to Death*]; Deborah W. Denno, *Criminal Law in a Post-Freudian World*, 2005 U. ILL. L. REV. 601 [hereinafter Denno, *Post-Freudian World*].

4. See Denno, *Crime and Consciousness*, *supra* note 3, at 275–86.

5. See *id.* at 272 (citing Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105 (1996)).

6. See Pillsbury, *supra* note 5.

7. *Id.* at 107.

primarily on three factors—“the nature of the risks involved, their obviousness, and the reasons for the defendant’s lack of perception or disregard of those risks.”⁸ Ultimately, Professor Pillsbury’s article leaves the reader with this final thought: “The modern human community requires more than avoiding deliberate aggression; it requires active concern, at least for the lives of other human beings.”⁹

A recent New York case illustrates Professor Pillsbury’s point: despite criminal law’s focus on the purposeful and intentional wrongdoer, “the most common cruelties are acts of indifference.”¹⁰ On March 10, 2022, Lauren Pazienza, age twenty-six, was caught on video walking down a New York City street when she suddenly shoved to the ground the woman directly ahead of her—a much-beloved eighty-seven-year-old Broadway singing coach.¹¹ According to the police, Pazienza’s attack was “unprovoked and senseless.”¹² There was no evidence that Pazienza knew her victim, Barbara Gustern, and had no discernable reason to push her.¹³ Pazienza kept walking after Ms. Gustern hit her head when she fell. Five days later, Ms. Gustern died of acute brain trauma.¹⁴

Meanwhile, the New York media continuously broadcast Pazienza’s photo and the video of her harming Ms. Gustern until Pazienza finally turned herself in.¹⁵ Pazienza was charged with first degree manslaughter and second degree assault.¹⁶ While Pazienza pled not

8. *Id.* at 106.

9. *Id.* at 218.

10. *Id.* at 217.

11. See Press Release, Alvin L. Bragg, Jr., Manhattan Dist. Att’y, Lauren Pazienza Indicted for Fatally Pushing 87-Year-Old Broadway Vocal Coach (May 10, 2022), <https://www.manhattanda.org/d-a-bragg-lauren-pazienza-indicted-for-fatally-pushing-87-year-old-broadway-vocal-coach/> [<https://perma.cc/AQ87-UAU6>]. According to the District Attorney’s press release, Lauren Pazienza crossed the street, shouted obscenities at Ms. Gustern and then shoved her to the ground, which resulted in head injuries. *Id.*

12. *Id.*

13. See Jonah E. Bromwich, *Woman Threw Tantrum Before Fatally Pushing Voice Coach, Prosecutors Say*, N.Y. TIMES (May 10, 2022), <https://www.nytimes.com/2022/05/10/nyregion/lauren-pazienza-vocal-coach-barbara-gustern-bail.html> [<https://perma.cc/L67Z-27S7>]. Pazienza had several glasses of wine before the incident and was upset after being told to leave a Chelsea park which was closing. *Id.*

14. Press Release, Alvin L. Bragg, Jr., *supra* note 11. Pazienza stayed in the area for approximately 20 minutes before leaving and returning to her home in Queens. *Id.*

15. Emily Crane, *Accused NYC Shover Lauren Pazienza May Have Opened Her Parents up to Charges, Expert Says*, N.Y. POST (Mar. 25, 2022, 2:31 PM), <https://nypost.com/2022/03/25/lauren-pazienza-may-have-opened-parents-up-to-charges-expert/> [<https://perma.cc/4D68-DZTA>]. Pazienza fled to her parents’ home and deleted social media accounts and turned herself in only after officers arrived. *Id.*

16. See Press Release, Alvin L. Bragg, Jr., *supra* note 11.

guilty to the charges, her bail was revoked on the basis that she might be a flight risk.¹⁷ Her attorneys planned to raise a psychiatric defense, and at the time of writing, Pazienza has rejected all plea deals.¹⁸ If convicted at trial, she will face up to twenty-five years in prison.¹⁹

In my spring and fall 2022 criminal law classes, I used Professor Pillsbury's concept of "responsible choice" as a helpful tool for analyzing the Pazienza case. Was Pazienza fully aware of the risks of her acts, or was she intentional in her killing? The circumstances suggest she was neither. Was she callously indifferent to her victim in the way Professor Pillsbury characterizes it? Absolutely, and the New York City community was outraged. The Pazienza case provides an opportunity to consider both Pazienza's level of mens rea and, independently, the human element of the impact of her actions devoid of motive or justifications.

This emphasis on the human element is echoed in much of Professor Pillsbury's scholarly work analyzing criminal law. In his book, *Imagining a Greater Justice: Criminal Violence, Punishment and Relational Justice*, Professor Pillsbury examines the perspectives of all the actors in the criminal justice system, arguing for the need to collaborate with all parties, especially the victims. This approach effectuates reforms that punish wrongdoing, help victims heal, and accentuate the realities of violence victims have experienced.²⁰

Similarly, in his article, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, Professor Pillsbury hones in on the human aspect of "emotion" within the criminal justice system, particularly emotions regarding sentencing for capital punishment.²¹ In my work on examining the constitutionality of execution methods, especially lethal injection, I relied on Professor Pillsbury's retribution

17. Marisa Sarnoff, *New York Judge Denies Bail for Woman Accused of Fatally Shoving Beloved Voice Coach*, 87, *to the Ground*, LAW & CRIME (May 10, 2022, 4:59 PM), <https://lawancrime.com/high-profile/new-york-judge-denies-bail-for-woman-accused-of-fatally-shoving-beloved-voice-coach-87-to-the-ground/> [<https://perma.cc/PQ3E-YU3S>]. Prosecutors argued that Pazienza's actions prior to her turning herself in, including evading apprehension, made her a serious flight risk. *Id.*

18. See Peggy Spellman Hoey, *Lawyers Raise Psychiatric Defense for LI Woman in Fatal Shove: Report*, PATCH (Oct. 12, 2022 12:18 PM), <https://patch.com/new-york/portjefferson/lawyers-raise-psychiatric-defense-li-woman-fatal-shove-report> [<https://perma.cc/CKW7-R7C2>]; see also *People ex rel. Aidala v. Rikers Island Corr. Facility*, No. 154311/2022 (N.Y. Sup Ct. May 18, 2022).

19. See Hoey, *supra* note 18.

20. See generally PILLSBURY, *supra* note 2.

21. See generally Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989).

analysis.²² Professor Pillsbury outlines each individual's responsibility for their own emotions and formulates a "moral-emotive theory of retribution" that "constitutes an emotional dynamic for determining just punishment."²³ The approach encourages sentencers to "attempt to empathize with the offender,"²⁴ a viewpoint I think is essential when states recommend how they think death row inmates should die. As Professor Pillsbury concludes, "[w]hen we reach the limits of law, when we enter those areas where rules lose their power to direct us toward just results, recognition of and struggle with emotional influence becomes necessary."²⁵

Professor Pillsbury's understanding of the human aspects of criminal law is further evidenced by his formulation of criminal liability, particularly in his fascinating book chapter, "Why Psychopaths Are Responsible."²⁶ In examining the treatment of psychopaths in the criminal justice arena, Professor Pillsbury recognizes the divergence between the public's perception (based on distorted stereotypes) and academics' views when determining criminal responsibility.²⁷ While he sides with public attitudes more than many academics, he also holds marked standards about punishment. As Professor Pillsbury states, "[c]riminal liability currently, and I believe properly, depends on the social/moral meaning of the interaction between perpetrator and victim, a meaning that does not depend on the perpetrator's ability to appreciate wrong."²⁸

This ability to bridge the gap between intellectual discourse centered on the rationality and responsibility of criminal justice actors, and the public's concept of moral wrong and the value of others, is a resonating theme in Professor Pillsbury's work.²⁹ For example, in his article, *Evil and the Law of Murder*, Professor Pillsbury focuses on homicide to argue that legal definitions fail to accurately express the qualities we all tacitly agree are part of bad human behavior.³⁰ He proposes alternate legal descriptions that more adequately encompass

22. See Denno, *Getting to Death*, *supra* note 3, at 393 (citing Pillsbury, *supra* note 21, at 656).

23. See Pillsbury, *supra* note 21, at 657.

24. *Id.* at 658.

25. *Id.* at 710.

26. See Pillsbury, *supra* note 1.

27. *Id.* at 298.

28. *Id.*

29. *Id.* at 297.

30. Samuel H. Pillsbury, *Evil and the Law of Murder*, 24 U.C. DAVIS L. REV. 437, 479-87 (1990).

both the “human evil” that such legal definitions describe and the intuitions shared by society.³¹

There are not enough pages to describe how much Professor Pillsbury’s work has permeated the standard criminal law casebooks and literature professors use around the country. For example, the casebook *Criminal Law and Its Processes*,³² which I use in my first-year criminal law course, has long relied on Professor Pillsbury’s seminal articles to explain the intricacies of the law. Some of these topics include discussions about the placement and impact of objective and subjective standards of awareness,³³ premeditation,³⁴ provocation,³⁵ criminal negligence,³⁶ and the consideration of environmental background when determining individual culpability.³⁷

Professor Pillsbury’s body of work has been vastly influential in my own scholarship and teaching, the work of others, and in approaches to improving the criminal justice system. His conception of legal doctrine draws on scientific understanding and human appreciation of right and wrong, proposing integrated reforms and legal definitions to the criminal justice system. Without question, Professor Pillsbury’s contributions will continue to impact the discourse on legal tenants within criminal law for years to come.

31. *Id.*

32. See SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* (11th ed. 2022).

33. See *id.* at 520 (quoting a passage from Pillsbury, *supra* note 5, at 106, 150–51, to contribute to the discussion on the objective standard and the support of punishment in the absence of subjective awareness).

34. See *id.* at 479–80 (citing SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* 104–05 (1998), to help address a question on determining punishment based on evidence of premeditation).

35. See *id.* at 491–92 (citing PILLSBURY, *supra* note 34, at 104–05 (1998), as contributing further discussion on provocation as a partial justification versus partial excuse); *id.* at 487 (quoting Samuel H. Pillsbury, *Misunderstanding Provocation*, 43 U. MICH. J.L. REFORM 143, 145–46 (2009), on provocation as a partial excuse). The quote from *Misunderstanding Provocation* is used to clarify that a finding of provocation is not meant to suggest that the conduct was morally acceptable, but rather that it was understandable based on the actor’s state of mind. *Id.*

36. See *id.* at 518 (citing PILLSBURY, *supra* note 34, at 181–84, as providing additional analysis in *State v. Williams*, 484 P.2d 1167 (Wash. Ct. App. 1971), on determining criminal negligence based on standards of objective and individual perception).

37. See *id.* at 1008 (citing Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719 (1992), as providing further analysis on the consideration of environmental background when determining individual culpability).