Probable Causation, Bonus Episode 9: Gregg Caruso

David [00:00:08] Hello and welcome to the Probable Causation show about law, economics and crime. I'm your host, David Eil and my guest today is Gregg Caruso. Gregg is a professor of philosophy at SUNY Corning, visiting fellow at the New College of Humanities in London and honorary professor of philosophy at Macquarie University. He's also a co-director of the Justice Without Retribution Network at the University of Aberdeen School of Law and the author of numerous scholarly articles and books, including his wonderful new book that is the topic of our discussion today titled "Rejecting Retributivism: Free Will, Punishment and Criminal Justice." Gregg, welcome.

Gregg [00:00:44] Yes, thank you for having me, David.

David [00:00:46] So first, let's start out with a little bit more about you. What brought you to the study of philosophy and criminal justice and then writing this book?

Gregg [00:00:54] Yeah, I mean, I guess like most things in life, it was a series of fortuitous events. I didn't actually set out to be a philosopher or to study philosophy. I originally wanted to be a jazz musician, and so I went to a college in New Jersey called William Paterson University, primarily because it had one of the best jazz programs in the nation and it was close to New York City where the kind of jazz scene was centered and so I thought that was the track I was on. And then I just started taking some philosophy courses along the way, fell in with some philosophers who were at the university at the time, and we started some reading groups and I just slowly started to get more interested in philosophy than jazz. And then pretty much at the end of my time at William Paterson, I sort of realized that I had enough credits for a philosophy degree just because a pure interest I had taken all these courses and so I ended up completing my degree in philosophy, and then I took a year off, not exactly sure what I was going to do, but I sat in on some graduate courses at the City University of New York Graduate Center and then realized that that was really what I wanted to do. And so I ended up applying there, getting in and pursuing my Ph.D. at CUNY.

David [00:02:05] So has your past in jazz influence your studied philosophy at all? I know jazz is kind of at least some genres of it are improvizational and you know not totally scripted.

Gregg [00:02:15] Yeah, I mean, I think the creative aspects of both philosophy and music are similar at least they exercise, the same parts of the brain. And so, yeah, it's hard to know in full how the study of jazz really affects my philosophy, but definitely I think it's made me sort of more creative thinker. And I think there's a lot of philosophers I know actually pretty competent musicians, so there's must be some kind of connection. I don't know fully what is it.

David [00:02:42] And does your interest in criminal justice arise concurrently with your interest in free will, or did you kind of come to free will first and then realized that this was a big issue in criminal justice?

Gregg [00:02:52] No, that's a great question. Yeah. The free will stuff, actually, and the criminal justice stuff came later. Originally, I was studying cognitive science and philosophy of mind under a philosopher named David Rosenthal, and I thought I was just going to continue down that path, write about theories of consciousness and philosophy of mind and recent developments in the behavioral, cognitive and neurosciences, but then

when it came time to write my dissertation, I started to take part in this reading group on free will. I had never actually taken a course on free will.

Gregg [00:03:22] There was no one really CUNY Graduate Center that was specializing in free well at the time. And the reading group really got me deep down the rabbit hole of the issues, and I saw how some of the stuff I was doing in philosophy of mind could be applied to questions that were arising in the literature on free will and so I ended up writing my dissertation on free will and consciousness and then that turned into my first book. Then I started to think more about the practical implications of my view and so people started asking me what my views on free will meant for morality and for creativity and for interpersonal relationships, and then eventually criminal justice.

Gregg [00:04:01] And so I started to explore the practical implications of my views, which we'll get into I'm a free will skeptic and I ended up getting really interested in these issues having to do with criminal justice. I attended a conference in Scotland on free will and retribution and ended up meeting a bunch of like minded philosophers who were interested in exploring what free will skepticism meant for criminal justice and that's what led to our foundation of the Justice Without Retribution Network, which I'm a co-founder and co-director of. And then I just started exploring how my view with cash out in the criminal justice arena and I got really interested in it and now it's a focus of my research agenda and then this new book was a work in progress for many years. So they're honing this alternative I've developed that's consistent with my views on free will.

David [00:04:51] And it's clear throughout the book that, you know, a great deal about American criminal law and English speaking countries do is that's something that I've picked up along the way, occasionally reading cases and, you know, maybe a large article here and there or did you have a kind of focused period of study on the laws?

Gregg [00:05:07] I picked it up as I went. I'm definitely an empirically minded philosopher. You know, I guess maybe that stems from my interest in cognitive science. And so as I got more interested in the issues of criminal justice, started looking at empirical literature on the social determinants of criminal behavior, started looking at a number of different things in the empirical literature having to do with rehabilitation of criminals, but then, you know, as the criminal law aspect came in, you know, I have to say I picked up a lot from my colleagues who work in criminal law. I spent a year writing this book in Scotland at the University of Aberdeen School of Law, and they housed me and put me up as I as I worked on this. And so there's a colleague I work with there, Elizabeth Shaw, who's in criminal law and so it was really fortunate I could bounce ideas off of her. And so I've essentially, you know, taught myself the issues as I've gone on and tried to grounded as much as possible in both the philosophical literature on jurisprudence, but also in empirical issues, that we could see what works and best practices from public health, ethics, neuroscience, social sciences and recent developments in the behavioral cognitive neurosciences.

David [00:06:19] Yeah, it's definitely a very interdisciplinary book, I would say. Let's start off with the free will part at the beginning so the first part of the book. It was really useful for me because as a warning for you and for listeners, I have zero background in philosophy really didn't come in with anything other than my own intuitions about free will, but this part of the book is, I mean, you say that it's just kind of recapitulating a lot of your prior work, but I think it's a really nice introduction to the various arguments that contribute to free will. What's the tie between free will and criminal justice? Why does this question have stakes for criminal justice?

Gregg [00:06:54] Yeah, sure. So, you know, the problem of free will, I think, touches on every aspect of our lives. You know, some people view it as a kind of purely metaphysical question. Is the universe deterministic and deterministic? Can agents be free in a world that's governed by, you know, fixed, immutable laws of nature? But other people and I include myself in this category, view the problem of free will as intimately connected with a set of practices, in particular with attitudes, judgments and treatment. So I define free will as the control and action that's required for a very particular but pervasive notion of moral responsibility, which I call basic dessert moral responsibility. So for agents to be free in this sense, they would be truly deserving of praise and blame, punishment and reward. What's considered a sort of purely backward looking, not consequential sense. So the idea is essentially, since agents freely committed certain kinds of acts, they have the kind of control required for free will. They're morally responsible, and therefore we can justly be praise and blame, punish and rewarded. So you could see that if you define free will as a kind of control condition for this kind of basic dessert, more responsibility, It's intimately connected with our legal practices and the first chapter of the book tries to explain the relevance of free will to the criminal law and the criminal justice more broadly by showing how, you know, the criminal law presupposes a certain kind of responsibility. I quote in many cases, rulings by the Supreme Court in the United States that actually talk about the relevance of free will to the criminal law.

Gregg [00:08:30] But in particular, there's this kind of harsh justification for legal punishment that's historically and even presently quite pervasive called retributivism. And so the retributive justification for punishment maintains that absent any excusing conditions, forms of mental illness, you know, incompetence, ignorance, maybe wrongdoers morally deserve to be punished in proportion to their wrongdoing. And so the notion of retribution is essentially wrongdoers deserve something bad to happen, this kind of harsh treatment, just because they knowingly done wrong. And this that just because aspect that is appealing to this notion of basic dessert, it's the agents need to be given their just desserts where dessert here means the punishment they deserve, but to ground that kind of retributive punishment presupposes a notion of free will, a notion of more responsibility.

Gregg [00:09:25] That's been the center of this, you know, longstanding historical debate in philosophy and so it's interesting. There are people who have obviously drawn this connection, and there's a lot of work on free will in criminal law, but I notice that a lot of people who actually come at it from the law perspective or from the criminal justice perspective, sort of just assume agents have this kind of moral responsibility and just assume that the criminal law is well founded and that the retributive justification could be made sense of. And part of what I wanted to do in the book is explain the relevance of these debates in free will in philosophy and how they impact criminal law and criminal justice.

David [00:10:05] And I think many lawyers might respond by resorting to what you mentioned briefly earlier, that if somebody can't control their actions, then they're not responsible under the criminal law. They can't have the right to mens rea. They they can't have the guilty mind, but what you're proposing is much broader than that, right?

Gregg [00:10:21] Yeah. So I am attempting to essentially question the whole moral responsibility system or the system of dessert. The idea that agents truly deserve to be praised or blamed, punished and rewarded. So I don't want to fall into what my friend Bruce Waller calls excuse extensionalism that is extending various excuses that would

relieve individuals of their responsibility. I think that's a foolish kind of an approach to try to show that everyone is incompetent or failed to meet the conditions for legal responsibility or for lower responsibility. Instead, what I'm trying to do is question the whole system of moral responsibility. But again, only this very particular kind of responsibility, what I call basic dessert moral responsibility. I think other notions of responsibility can remain intact.

Gregg [00:11:12] So I'll just say what my view is on free will. I'm a I'm a free will skeptic and by that I mean it's the view that maintains that who we are and what we do is ultimately the result of factors beyond our control. And because of this, we're never more than responsible in this basic sense, in exactly the sense that's required for retributive punishment, the kind that's required to ground the notion of just desserts. So maybe one way to think about it is, you know, I'll give you an example it helps clarify, I think the notion of retributivism that I'm sort of dealing with. There's a German philosopher, Immanuel Kant, who was a retributivist, and he gives this example of an island society. And he says, imagine this society is going to dissolve its social contract and all of its members are going to exit and leave the island, but there's one remaining prisoner in jail. It's a murderer and he asks, is it just for the last person before they leave the island to execute this murderer? For Kant unfortunately, the only proportional punishment for murder was death.

Gregg [00:12:18] He believed in the death penalty and they believe that that was a proportionate punishment and he was a retributivist, not all retributivists buy into the death penalty. But the core philosophical question is, are we morally justified in punishing this individual, giving them their just desserts, whether that's death or some other form of punishment before we exit the island? Now, the key aspect of this example is that the justification would be purely backward looking, simply because this person had committed this wrongdoing. They need to be given a fitting and just punishment. It's not to protect individuals. There's no forward looking benefit here, i.e., it's not to deter future crime. There's no one left to deter. You're executing this person. It's not for future safety. There's no one left to be kept safe. It's not for the moral formation of the wrongdoer because now you're executing that.

Gregg [00:13:08] The retributive justification for punishment says, well, all of those potential forward looking benefits, they're surplus goods that may be punishment produces, but they don't form any part of what makes punishment just the punishment is justified simply on the grounds that the individual freely did it and that they're morally responsible and they need to be punished in accordance with the dessert of their wrongdoing. That is, they need to be given a form of punishment that fits the crime. And so if you reject the notion of free will, if you reject the notion of basic dessert moral responsibility, and you give up the idea that individuals are morally responsible in this basic sense, then that justification for punishment goes out the window because wrongdoers wouldn't be morally responsible in the required sense and that's simply because no one would be morally responsible in the required sense. It has a major implication for the criminal law, and then you would have to look for alternatives and other ways of trying to justify harsh treatment towards wrongdoers.

David [00:14:11] In some ways, I think you're extremely charitable towards the legal system and the criminal justice system in particular in thinking that it has this kind of orderly structure, logical structure of having justifications that underlie everything it does. One example that stands out to me as at least undermining a little bit that idea. So in the United States, there's a huge number of people who are incarcerated, not because they have been found guilty at trial or because they've pled guilty to a crime, but because they're detained before trial. So there as well any notion of guilt has to go out the window

under the Anglo-American system of presumption of innocence until proven guilty, the legal system still managed to incarcerate a lot -- there's hundreds of thousands of people in United States are detained in this way. And although the Supreme Court has said this is not punishment, as it has to be consistent, it still turns out that in a lot of cases, the condition and jails are worse than in prisons for people who have been found guilty. So I wonder if how big the stakes are in arguing over the underlying justifications or whether these are just kind of, you know, backfill this can mean in order to make some sense of what's happening.

Gregg [00:15:23] Yeah, that's a great question. I mean, I think in general, the law is a hodgepodge of different justification. And so I think our current system appeals to a number of different justifications for imprisonment, incarceration, pretrial detention. Some of them are retributive, some of them are consequentialist, some of them are incapacitation justifications, which I think is what you're alluding to with pretrial detention.

Gregg [00:15:48] I mean, the justification, as you said, there is not punishment per se. The justification is that it's necessary to detain these people because they pose a significant risk of either flight or committing other violent crimes if released. So I would say a couple of things. I mean, I actually wrote this recent paper about pretrial detention. It was for a public forum, I think it was Arch Digital I published it in actually arguing that we need to severely reform the pretrial detention system and in particular, get rid of monetary pretrial detention, in part because there's really no good way to justify it on all the various accounts of punishment. You know, it's not retributive, as you point out, because the person hasn't been found guilty yet. So you're not punishing this person to give them their just desserts.

Gregg [00:16:35] It really doesn't seem to provide the forward looking benefits that proponents claim it does. So it couldn't be justified on utilitarian or consequentialist grounds. And the primary justification seems to be incapacitation, which is similar to the kind of justification I defend, but part of qhat I argue is that the vast majority of people who are held for pretrial don't pose the kind of significant risk to public safety to justify the widespread use of pretrial detention. And I also think the monetary aspects completely conflate issues of justice with issues of revenue. And that's a combination that's right for for all kinds of abuse and misuse. So, I mean, one of the things you find quite often with pretrial detention is that there's really no correlation between the amounts of cash bail we set for different types of individuals and the risks they pose. So sometimes you have someone who is a significant risk to society, let's say someone who's committed a series of or purported murders, they're an accused murderer, and the bail was set at $1,000,000, but they're wealthy so they could afford to get out.

Gregg [00:17:42] Well, that is odd, because if the person is a significant enough risk to society, no amount of money should warrant them being able to pay and afford to just, you know, go free. On the other hand, there are significant people who have committed low level crimes that really are no significant threat to public safety and the fines are set maybe at 10,000 or 20,000, but because of financial difficulties, they can't afford to pay and so they languish in jail sometimes for decades. You know, one really famous case is the Kalief Browder case who was held in Rikers Island. This was a teenager who was picked up on suspicion of stealing a backpack, fine was set at I think it was $5,000, but because he was poor, he couldn't afford it neither could his family. And so he languished in solitary confinement in Rikers Island for five years. And they reason they kept him in solitary confinement partly was because of his age. They thought the population of Rikers Island is a relatively dangerous population and he was a minor and he was held for five years

without being charged without a day in court and eventually charges were just dropped and he was released and upon release, he committed suicide. Well, that shows you something is drastically wrong with our system. This person has not been found guilty of a crime. They've been held in solitary confinement for five years and there's really no good justification for that, no good theory of criminal justice or punishment to really justify those kind of practices. So I agree with you that even all the theoretical accounts out there still fail to capture the kinds of abuses that are largely taking place. And so for those reasons and for philosophical reasons, I think we need drastic reform of the criminal justice system.

David [00:19:27] There is a kind of a strain of optimism that runs through the book that at least part of the impetus for reform can be a rethinking of justifications. In other words, even allowing that, you know, a lot of times the system is not going to be justifiable on any grounds or on the grounds that it purports to respect. Even so, by changing the way people think about, you know, guilt and punishment that can drive reform.

Gregg [00:19:54] I think it can. Yeah. And, you know, I mean, obviously people want our legal practices to be justified and so I think you are correct in the earlier question that there's a little bit of reverse engineering going on. I think a lot of times we start with this kind of reactive emotion or this retributive impulse and that emotional kind of reaction is largely driving the kinds of practices we adopt, but then we try to re-engineer sound justifications to make sense of it. I think people are concerned enough with the idea that our practices should be justified, that if you were to reveal to them flaws in the justification that people are more often than not willing to acknowledge that we need reform.

Gregg [00:20:37] Some people are just not aware of the situation. Some people obviously have never thought about the justifications for punishment. Some have and still are going to continue to try to justify our practices no matter what, but the more I've been out there and the more I've been talking with people both from academia and outside academia, and I think this is true now in America, there's growing acknowledgment that the criminal justice system is broken and that it needs to be formed. What I'm trying to bring to the conversation is a is a more holistic approach to the idea that, look, the kinds of reforms we need to implement need to go even deeper than even most reformists are willing to acknowledge.

Gregg [00:21:16] And so some people see the kind of arguments on presenting as quite radical, but I've been struck by how welcoming people have been to the idea and how people outside of academia, once exposed to the arguments, are willing to see that there seems to be a lot of foundation for the kinds of arguments I'm making.

David [00:21:34] Let's go back to the free will as you quickly. I think a lot of people, even if they've kind of accept some free will skeptic arguments, it's just counterintuitive that you don't have free will. People have a deep seeded intuition that they can control what they do, at least on some level. And so that gets access whenever there's a terrible crime happens and somebody is arrested for it. It's hard for people in that moment to think that this person, absent a finding of mental incapacity or something, this person didn't have the ability not to do whatever terrible thing that they did. And then there's a kind of another intuition that I think many people have, maybe not as many people as have the strong intuition about free will, but I think a lot of people do have a strong intuition about physicalism, which you describe as the idea that the world is ultimately physical and there is nothing over and above physical properties and events in the universe. I think one of your main approaches is to show the tension between this idea of free will and physicalism.

Gregg [00:22:42] Yeah, I mean, I'd be a bit cautious to this just because I think that that could only go so far. There are perfectly naturalistic accounts of free will that are out there that wouldn't be threatened by this, but yeah, I think you're right that intuitively, at least average everyday people tend to have what's considered a libertarian notion of free will and it's not to be confused with political libertarianism. This is a view in the free will literature. I think this idea actually came first before the political conception that agents have a certain kind of power that transcends the causal interactions of just the level of events. So agents can be causes, and agents are something that sort of stand above their physical and material makeup. So agents have the ability to be little uncause causes so that is they're the cause of their own actions themselves are not causally determined by any [00:23:36]the seeing [0.1s] events. They're not cause they're determined by brain chemistry. They're not causally determined by the laws of nature and so they little uncause causes.

Gregg [00:23:45] Well, you know that view is really hard to fit in our our best philosophical and scientific theories about the world. And so I think there are good reasons for rejecting that notion of libertarian free well. There are other notions of libertarian free will that are little harder to refute that claim to be completely naturalistic. These are sometimes called event causal libertarian accounts, and so they just posit some form of indeterminacy at the level of events. They don't bring in any kind of mysterious or sui generis kinds of causation, but I just think that those those kind of accounts suffer from a number of different objections in particular. You know, if you just introduce some indeterminacy or some randomness in the causal sequence, that's not really free will, either way, because agents, again, lack any kind of ultimate control over indeterminate events. So whether the universe is deterministic or indeterministic, I argue that agents would lack the control and action that's required for moral responsibility or for basic dessert responsibility. So I see the threat coming both from determinism or indeterminism.

Gregg [00:24:50] I'm technically neutral as to whether the universe is deterministic or indeterministic. I would argue that we lack free will either way. And you know, I have another argument that I don't want to get too off track here that is independent of issues having to do with the determinism or indeterminism it's simply the pervasiveness of luck that in a way luck swallows all. And luck is another component that's outside the control of agents. You know, and by luck here, you just have to think about, you know, basic aspects of one's life, like the lottery of life isn't always fair, we don't all have equal starting points. It's a matter of luck, who your parents are, whether you're born rich or poor, white or black, male or female. It's a matter of luck what your genetic predispositions are, whether you're born with a learning disability.

Gregg [00:25:36] And then there's luck throughout the course of one's life, there's the luck of, you know, who your first grade teacher was, whether you come across an encouraging coach or whether you go to, you know, first grade and meet your best friend for life. Those are all matters of luck whether you have an abusive parent or an encouraging parent, whether there's someone along the way that, you know, introduces you to a hobby or a sport or music or some kind of outlet that becomes your creative muse in life. These are all different aspects of luck that shape who we are and what we do. So when I say that I'm a freewill skeptic, you know, I said earlier how I define that as who we are and what we do is ultimately the the result, the fact that beyond our control, we can now see that that might include determinism because agents have no fundamental control over the laws of nature or events in the remote past.

Gregg [00:26:29] But yet, if determinism is true, you know, what we do is ultimately a result of the combination of the laws of nature and events in the remote past. So fundamentally, what we would do and who we are would be the result of factors we don't control. The same would be true if indeterminism is correct because agents don't have any fundamental control over indeterminate events. So those are be the result of factors beyond our control and matters of luck are ultimately beyond the control of agents. So if you acknowledge all the myriad kind of causes, all the myriad factors that shape individuals, that shape who we are, how we think and how we act, upon reflection, I think you could get people to realize that the myriad aspects of all of those causes, of all of those factors are stemming from features of the world that are beyond the ultimate control of us as individuals, as agents.

Gregg [00:27:20] That's not to say we don't have any control, and that's not to say that we don't have some forms of responsibility, like causal responsibility. You know, we could say that Hurricane Katrina was causally responsible for the destruction of New Orleans. Nothing wrong with saying that. That's just a factual claim about this event helped cause that event. So agents can, be cause of their response, they could also be responsible in the sense that we could attribute various aspects of the nature of the act and also of the psychology of the agent. In a certain way, we could say that, you know, we could attribute negligence to an agent, we could attribute diligence to an agent, even if those characteristics are not self-made, even if they're not ultimately responsible for shaping themselves into diligent agents or negligent agents.

Gregg [00:28:10] So I think there were numerous kinds of notions that we could preserve degrees of control, degrees of responsibility, but what I'm fundamentally challenging is the notion that who we are, what we do is within the control of the agent in a way that would make them morally responsible in this basic sense. And I argue that that can't be justified given our best philosophical and scientific accounts of the world.

David [00:28:35] Does this affect the way you lead your everyday life? This free will skepticism.

Gregg [00:28:40] Yeah, I think it does. I mean, clearly it's altered my beliefs about public policy and it's altered my views about criminal justice. And I think, you know, it's affected my life even more deeply than that. I think it does trickle down into your interpersonal relationships. I mean, you know, I think others have to testify to this more than I can for myself, whether I'm correct in this or not. But I think I tend to be less retributive in my interpersonal relationship. I tend to be less blaming, you know, like in terms of just take a parental situation, you know, when my daughter does something wrong or she gets in trouble at school, she doesn't tend to do, but let's just say she does something that breaks the rules, you know? Well, one way to react to that is moral blame or to feel a certain kind of resentment. Those kind of moral attitudes, I tend to say, are unjustified, but I do think that there are other reactive attitudes that we could replace them with. So, like disappointment instead of feeling moral anger, I can be disappointed in my daughter's choices. I can engage her in a certain kind of moral exchange where I ask her, why did you do that? I could ask her to reflect upon features of herself that might have been the cause for that action.

Gregg [00:29:50] I could ask her to do other better ways. Are there things moving forward that you could do to work on that would help rectify that aspect of yourself so you make better choices? Those kind of interactions, I think, are consistent with the rejection of free will, because they're not grounded in what I call basic dessert. Instead, they're grounded in

forward looking considerations like forward looking reconciliation, forward looking safety and overlooking moral formation. I mean, part of my role as a parent is to help develop my daughter into a moral being. I think that you could preserve most of what we care about in those interpersonal relationships, but you could see through, I think, the harsher types of reactive attitudes that we tend to feel. That is, again, resentment, indignation, moral anger or retributive punishment.

Gregg [00:30:39] And I don't feel that we are worse off for giving those things up. In fact, I actually tend to think I'm an optimistic skeptic. That is, I'm optimistic about the implications of free will skepticism. I tend to think that by abandoning the belief in free will and a notion of just desserts, we could look more clearly at the causes and more deeply into the systems that shape individuals and that shape our behavior. And by doing so, that will allow us to adopt more humane and effective practices and policies.

David [00:31:08] Have you mostly given up praise as well as blame?

Gregg [00:31:11] Yeah so right. This is a good question. I mean, there are some free will skeptics like my friend Benjamin Vilhauer, who argues that there's sort of an asymmetry between praise and blame because blame causes more harm. The justification for it is higher than praise. So I think that's one mood that's open, but I tend to think they stand or fall together.

Gregg [00:31:31] So, yeah, I tend to think that if you're going to give up purely backward looking blame, you should give up purely backward looking praise. Again, that's not to say that we can't encourage behavior that we approve of. We can't, like with my daughter, you know, reinforce certain types of behavior. Albert Einstein was a freewill skeptic, and there's some great passages I tend to like to quote from a number of interviews he gave. And he repeatedly acknowledges that, you know, he's a freewill skeptic. He gives up the idea that agents are fundamentally free. He was a determinist, by the way. So he thought the universe was deterministic. And because of that, he thought agents were not free.

David [00:32:08] He was the one who had the God doesn't play dice quote, right?

Gregg [00:32:11] Yeah. He resisted the findings of quantum mechanics early on. Yeah and he said God doesn't play dice with the universe by that essentially meaning the laws of nature are deterministic. But because of that, he says very clearly in this interview that, you know, he doesn't think he deserves praise for having developed the theory of general relativity. He thinks, you know, free will is an illusion, as he believes, and that, you know, that far determinism is the right view phrase has to go and I don't think there's any real loss in that. I think people like to view themselves as praiseworthy, just like people like to blame other individuals when they do something wrong, but I think that there is a certain kind of benefit that comes with giving up these attitudes. It doesn't mean you have to give up the idea that Einstein was creative or that he was an original thinker. That only requires what I call a attributability responsibility.

Gregg [00:33:07] We could attribute various traits, things that we could attribute to him, certain types of character traits like being original, i.e. his thoughts are original in how they compare to other individuals at that time. We can attribute to him a certain kind of creativity, a certain kind of work ethic, a certain kind of perseverance, sticking with a problem until he came up with a solution. We could say all of that without thinking he fundamentally is praiseworthy in some ultimate sense, and he himself thought that. So I think that's a good model to kind of use.

David [00:33:42] So in the latter half of the book, you outline a proposal that is consistent with your view of free will and moral responsibility, and you call it the public health quarantine model. What are the essential features of that model?

Gregg [00:33:54] Yeah, So let me just quickly, so the book is broken down in really two halves. The first half lays out a number of different arguments against what I call retributive punishment. So I actually present six distinct arguments. We don't have to discuss them here. Only two of them really depend upon the issue of free will, but the other four arguments I give against retributivism a sort of independent of issues having to do with free will, but we could sort of set them aside. And then second half of the book is my attempt to develop an alternative, a non-retributive alternative to addressing criminal behavior, which I call the public health quarantine battle and not only do I actually view this as non-retributive, I also view it as non-punitive. I see this as actually an alternative to punishment, not a justification of punishment. So there are other ways to justify punishment and legal punishment in particular that are non-retributive, but I reject those for independent reasons.

Gregg [00:34:51] And so then I come up with this alternative approach and it's grounded in work that originally was done by Derk Pereboom. And so he was kind of one of the first to kind of give this quarantine analogy and then I placed that approach in a deeper framework. Public health ethics. So let me just sort of sketch it real quick as quickly as I can. There's the quarantine part and then there's the public health part. So the quarantine part is relatively straightforward. Let's say I get on a plane to come meet you in person, David and somewhere along the way I contract Ebola and I test positive at the airport. Well, I think we'd all agree that the state would be justified in quarantining the Ebola patient, and the justification for quarantine would not need to appeal to free will, wouldn't need to appeal to a basic dessert or just desserts or retribution or moral responsibility in any direct way. The primary justification for quarantining me would be the right of self-defense and prevention of harm to others, i.e. the justification for quarantining me, for limiting my liberty would be that it's necessary to protect public health to prevent a pandemic.

Gregg [00:35:57] And, you know, when I first sort of worked on this model and began to develop it, most people were unfamiliar with these kinds of justifications, but I think the COVID pandemic has changed all that. I think we all have now personal experience with at least self-quarantining or the idea that individuals could be quarantined, their liberty could be limited, and that there are justifications for that, that are not retributive, that are not punitive, that are not grounded in free will of responsibility. And so what I proposed is that we could adopt a incapacitation account that can justify incapacitating, seriously dangerous criminals, serial killers, child molesters on the grounds of the right of self-defense and the prevention of harm to others that's analogous to the justification of quarantine in the cases of communicable disease.

Gregg [00:36:45] So we could say, look, look, this individual, this serial killer, this child molester poses a significant enough risk to society moving forward that the right of self-defense and prevention of harm to others public safety justifies liberty, limiting restrictions. But here's the important part just like the quarantine analogy, we don't punish the Ebola patient, at least under no intuitive definition of punishment, i.e., punishment tends to involve a denunciatory or communicative component where we condemn both the individual and their actions. Punishment usually requires at least as philosophers to conceive of it intentionally imposing harm on an individual, or at least intentionally

imposing harsh treatment and that could be everything from pain, deprivation all the way up to the death penalty.

Gregg [00:37:37] Well, that's not exactly what we're doing when we quarantining the Ebola patient. We're not intentionally seeking to punish them. You know, if I trip and knock over an elderly person, I've caused them harm. But by no intuitive notion of punishment have I punish them. Punishment usually requires more than just harm. It requires an intentional imposition of harm and so the Ebola patient is quarantined, but the moral obligation is to treat them and then release them. The minute they're no longer a threat. Secondly, you cannot justify demeaning them or dehumanizing them or holding them in inhumane conditions. Right. Their basic human rights are preserved. And so what I would argue is the same is true in the criminal justice arena. We are justified in incapacitating, seriously dangerous criminals on this justification that I've appealed to the basic right of self-defense or prevention of harm to others, but we're not justified in imposing other types of punitive treatment. That is, I think that when individuals are detained or incapacitated, they should preserve their basic human rights, including the right to vote.

Gregg [00:38:41] So I've argued, for example, that we should restore voting rights not only to people once they're released, but that individuals while detained, should preserve their basic right to vote. And I argue the other basic human rights should be preserved. I also have written a lot about the environment in which we incapacitate people. That is the physical spaces that we hold individuals in. And you mentioned this, I think in your been maybe one of your first questions about pretrial detention feels a lot like punishment. And that's because our institutions, our prisons are generally designed for punitive purposes. It used to be actually, this is interesting if you look at the history of punishment, go back to ancient Greece and very few people were ever imprisoned either individuals were expelled, kicked out of the state or executed. Really, prisons were places that individuals were held until the trial occurs and then punishment was imposed some form of punishment.

Gregg [00:39:35] Later in the history of prisons itself is that the prison became the punishment. It became the form of punishment, the meeting out of punishment in prisons that began to be designed for punitive purposes and that's what most of our current institutions are they're punitive institutions. And my argument is that we can't justify those types of punitive institutions if I'm right in my arguments, but yet we could justify incapacitation. So what part of what I argue is that the institutions in which we hold individuals have to be redesigned for the purposes of rehabilitation or reintegration, that the primary purpose of the criminal justice system should be to protect public safety, but also to reform wrongdoers and then release them the minute they're no longer a threat to society. Because just think of again, the quarantine analogy the minute that person is no longer a risk to public safety, the minute they no longer are say contagious, the state loses its justification for continuing to quarantine them and the same would hold true o my analogy with incapacitation.

Gregg [00:40:39] I owe you a story, right, of what to do with serial killers and child molesters or criminals if you're a freewill skeptic, what do you do? So I give you that with that part of the account, but what I really want to do and what I hope is the real novel aspect of the book is to shift the focus away from punishment to prevention in social justice and that's where the public health aspects come in. What I really propose in the book is to adopt a public health approach to violence and a public health approach to addressing criminal behavior in general. And the reason why public health frameworks are useful here

is that they've been designed over for many decades to deal with the same set of issues that arise in public health.

Gregg [00:41:20] And part of what I argue in the book, there's a whole chapter dedicated to trying to address what I call the causal determinants of criminal behavior and this is where my empirical nature comes in. I looked at thousands of different studies of the various causes of criminal behavior, and part of what I try to argue is that the social determinants of criminal behavior are essentially analogous to the social determinants of health. So when you look at poor health outcomes, just take something like type two diabetes or morbidity or infant mortality rates, what you'll often find is that the higher in certain communities and generally those poor health outcomes correlate with things like poverty, low socioeconomic status, exposure to abuse or domestic violence, or lack of stable housing or higher rates of mental illness, or lack of access to health care or education or poor environmental health, like higher rates of lead or other types of environmental harmful environmental determinants and poor nutrition.

Gregg [00:42:25] So if you look at something like infant mortality rates in India, what you'll find is that it correlates with a lot of different, what are called the social determinants of health, which immediately link up with issues of social justice because what you'll notice is that public health institutions, by their very nature, become de facto social justice institutions, because what you'll see quite often is, well, what's the cause of this poor health outcome? Infant mortality rates being extremely high? Well, you'll see well, the real driving cause of that is women's rights issues in India a lot of it has to do with low literacy among women or lack of access to birth control or the lack of reproductive control over their own bodies because of social norms. And so to address that poor health outcome, what you'll often find is that you have to fundamentally address the underlying social injustice, which is the cause for the poor health outcome.

Gregg [00:43:21] And so what public health institutions have been doing for decades is tracking poor health outcomes, identifying them, finding what the social determinants are, then prioritizing those that would have the biggest impact, adopting best policies and best practices for how to reconcile them and often what that involves is addressing underlying social injustices. So what I argue is that we should replace our reactive attitudes to crime, which rely primarily on resentment, moral blame and retribution. You know, if everything is a matter of individual responsibility, it's like if you have a hammer, everything looks like a nail. If everything is a matter of individual responsibility, the right response to crime is punitive, but if you begin to see that crime is often shaped more by systemic causes, then we would see that maybe, you know, both philosophically and in terms of efficacy the better approach, the more humane approach is to shift from a reactive approach to a preventative approach, one that focuses on the underlying social injustices. And this is where I spell out a number of particular policy proposals based on public health practices.

David [00:44:30] So I think a skeptic might say, well, that sounds really great, but, you know, we've been kind of on this root causes project for a while now. It's not new that people are talking about this certainly in the 60s and really using different language, going back much farther than that. Why should we expect it to work now?

Gregg [00:44:51] Yeah, though, it's a great question. You know, I think there's a couple of things to say here. One, I think in terms of my own approach, it goes deeper than most of these reform movements and that many of these previous reform movements retained at least some notion of justice desserts. Some notion of justified punishment, some notion of a free will or moral responsibility. I think that, you know, as I said earlier, once you

abandoned those, in my view, archaic notions, particularly the in my view, the very pernicious notion of just desserts. I mean, I think a lot of this, the harm that's done comes from preserving this idea of just desserts. You can begin to look more clearly at the causes and more deeply into the system to shape individuals, and that will lead to more humane, ineffective policies, but I get your skepticism.

Gregg [00:45:36] One thing I would argue, though, is that we have tried these kind of reform movements in the past, but I don't think we've ever gone all in and I don't think we've gone far enough so that, you know, one very famous historical case, which actually has greatly contributed to the current problem, is if you look at what happened in the arena of mental health. So there was a lot of abuses happening in mental health institutions in the past. And, you know, if you go back and you look at medical ethics and the history of mental health institutions, you'll find a lot of these institutions, a lot of people are familiar with the Tuskegee experiments, but they may not be as familiar with the abuses that were happening in other institutions.

Gregg [00:46:18] And so what ultimately the reform movement came about and said, look, you know, these places that housed individuals with Down syndrome and with learning disabilities and with different types of mental illness are abusing these individuals we have to reform the system and what they adopted was going to be a two pronged approach. The first prong was going to be to close down these abusive institutions and then the second prong was to be invest in alternatives and alternative types of mental health prevention and mental health counseling and different types of mental health treatments. And like many things that happened in previous reform movements, what we did was the first stage and we never got to the second stage. They closed down the mental health institutions because of the abuse, but they never stuck with the investments in the alternatives. And this is largely because of everyday common sense problems that individual states are limited in terms of their state budgets and so once they closed down the institutions, they didn't have money to invest in the reforms.

Gregg [00:47:22] And what happened because of that is our prisons became de facto mental health institutions which they are not designed for. And when you look at the mass incarceration problem, what you'll often see I mean, there are many, many, many causes of them of the mass incarceration. Some of it are are systemic racism and economic inequality and another has to do with the fact that over 60% of the people in our current prisons and jails in the United States suffer from a diagnosable mental illness. It's higher among women and it's higher among juveniles, but that's a problem. And that's it stems from actually an earlier reform movement that closed down all of the abuse of institutions but didn't invest properly in alternatives. And because of that, these individuals have ended up in our current prison system where in my model, they would be better suited with alternatives to incarceration.

Gregg [00:48:14] You know, most of these individuals would be better handled through mental health services. Underlying addiction causes a great deal of lower level petty crime that results in mass incarceration. I would argue that we should decriminalize the war on drugs. We could, you know, decriminalize recreational marijuana, things like that, which would stop the flow of individuals being sent to prisons, but also invest in underlying issues of addiction. Drug treatment would be a better solution than incarceration for most of these people. So I think that, you know, I definitely even mentioned this in the book my approach only is going to work if we invest, if we stick with it, and also if you adopt a holistic approach. I think unfortunately we deal with reforms in silos. We say, well, okay, the criminal justice system on its own has to adopt certain reforms, but we don't link up the

reforms with issues having to do with, say, social services. Why fix social services, linking up individuals with different types of social services like housing, with mental health institutions and services and counseling with drug treatment is the only way that this is going to work. You have to adopt a holistic approach and you have to fund those institutions fully for these alternatives to work for me.

David [00:49:38] And those institutions would be integrated into the criminal justice system. I mean, it seems like I think a lot of people today would say that all sounds really good, but I want to keep those reform efforts and those projects to fund social programs separate from the criminal justice system. And I'm going to keep the criminal justice system to deal with people who, you know, fall through the cracks, are still having issues and I want that system still to litigate cases on an individual basis and assign punishment and wrongdoing, etc.. But it sounds like he wants to integrate all of these systems together and make criminal justice really a part of this this preventative program.

Gregg [00:50:21] Yeah, I mean, I think you can't successfully deal with criminal justice reform without simultaneously addressing issues of social justice and so I think that those two arenas are much closer together than people typically think. I also yes, I think that there has to be a holistic approach on a number of different fronts. And you could in the book I mentioned a few, but I'll just say a couple of things in terms of other programs that have proven effective and that have worked. I mean, one good example is what they did in Scotland, in Scotland at one point, and I don't remember the year, but there was the World Health Organization looked at violent crime and it considered Glasgow at one point the murder capital of Europe. People don't tend to think of Scotland as or Glasgow as the murder capital of Europe, but it was at one point and in particular there was a lot of knifings and stabbings and slashing that were associated with youth carrying knives. And then when they got into conflicts, they would end up resulting in in some kind of a stabbing incident or facial slashing.

Gregg [00:51:22] And so what they did is they adopted a public health approach, and it began as a pilot program in one precinct. Then it gets rolled out across Scotland to the effect now that Scotland is one of the safest places in Europe and part of the success of the public health, they actually call it a violence reduction unit, I think is the official approach what they did is they looked at some of the causes of crime and again, this is going to be local. There's going to be different causes in different places and different determinants will be more prevalent in certain places than others. And so one of the things they found in Scotland was that a lot of this crime was driven primarily by three factors: toxic masculinity, Scottish attitudes about men and how to resolve conflicts and kind of form of toxic masculinity, alcohol consumption and unemployment rates were really high. And so they they adopted a kind of multi-pronged approach to addressing those key things and it involved a whole systemic approach, a holistic approach, they had PSA campaigns, commercials that addressed knife violence, they had programs that went into schools that talked to children when they were young and formidable, to talk to them about the downside of violence, but they also did it across the board.

Gregg [00:52:42] So here is a good example hospitals, when individuals came in in the emergency room, they immediately intervened, even at that point and they often found that people who were victims of knifings and stabbings were part of a system of violence they were often perpetrators as well because individuals were both victims and perpetrators quite often if you're parts of gangs, if you're on the streets, if you know individuals are carrying knives. And so they treated them, obviously, in the E.R., but they also intervened and looked for certain aspects of what was going on in their lives.

Gregg [00:53:18] And they found that quite often they were struggling with being able to pay their rent or unemployment, unstable housing, and they hooked them up with social services and addressed the issues. And so at every interaction with the system in emergency rooms and schools, through commercials, through financial state planning, in terms of unemployment programs, work training programs, they were able to cut violence and violent behavior in half within five years.

Gregg [00:53:50] Another program I point to as an example of holistic approaches was a pilot program that was done in the Bronx where the district attorney adopted what was called, I think it's called the Whole Person Defense approach. And so when individuals came into the criminal justice system, instead of bringing them in and entering them to the traditional criminal justice system, they offered them the alternatives to go into this pilot program, which treated individuals holistically. So it looked at, again, other aspects of their lives. You know, maybe one of the causes for the behavior that got them arrested, the criminal behavior, was a lack of transportation that allowed them to get to work or, again, often housing issues, unstable housing or unemployment and what they did is they treated them holistically. They worked with a number of different social service organizations to address those underlying problems, get them transportation, get them stable housing. And often, again, crime is a byproduct of circumstances more than, you know, individuals, more than personal responsibility. And so when they address the underlying causes, the criminal behavior went away.

Gregg [00:55:02] And these programs have been extremely successful in avoiding individuals entering the prison systems, but also have shown extreme efficacy in terms of recidivism, repeat crime. So I think that from the beginning and I mean the beginning, I think that when the police show up on the scene, there needs to be an assessment even at that stage, if we could avoid bringing individuals into the criminal justice system that's the best approach. And so there have been pilot programs in different cities that have, for example, trained police, instead of bringing them to the precinct and booking them and then entering them into the criminal justice system where they may get caught up with the cash bail system and be held and all of that. If you could identify on the scene that this seems to be stemming from an underlying mental health issue, individuals are directly brought to a social service that could address those mental health needs.

Gregg [00:55:58] Another program I've seen is where they if the police think this is a nonviolent incident and could be better dealt with by alternative means is they bring the disputing parties to what they call a conflict resolution center and the people at the center are trained in terms of a number of different counseling techniques and look at underlying aspects of what was driving the conflict. And this in many ways has been quite effective in avoiding bringing people into the criminal justice system without negatively affecting public safety. So I think that holistic approach really can work, but it has to be invested in and people have to actually implement that.

David [00:56:38] One last question before I let you go, Gregg. I think to a lot of our listeners, are social scientists doing empirical research, and I'm sure they're very grateful to you for your work and how it helps them think about their work. How can they give back to you? What are some questions that you think social science could answer that would be helpful to you in your work?

Gregg [00:56:57] Oh, yeah, that's great. You know, I think there's a empirical rounds that can really benefit from additional investigation. I mean, one of them and, you know, this is

actually perhaps the least developed part of my approach is assessment of risk and recidivism.

Gregg [00:57:12] So I think that we need to figure out tools and methods and ways of addressing and assessing risks, what kind of risk an individual poses, what kinds of ways of assessing potential for recidivism in a way that doesn't fall guilty to racist bias of cultural biases because a lot of the methods they're finding, for example, even with A.I., when judges use artificial intelligence to aid in their assessments of individuals that the programs themselves are bias, that they make use of certain statistical analyzes that are biased against poor people or African-Americans who have at least historically been drawn into the criminal justice system at higher rates and so the big data approach is showing higher risks associated with those aspects. We need to make sure that we're adopting assessment methods that are individualized, that are not biased. And I think there's a lot of work that could be done there.

Gregg [00:58:15] I think, you know, further empirical work on the social determinants of crime would be really beneficial and so, again, that's a big part of my model. We need to get a better understanding of what's driving criminal behavior, a better way of identifying those social determinants and then finding out the best ways to intervene. And so I think a lot more empirical work could be done there. Empirical work on best practices for interventions can be really helpful depending on what your expertise are. We need people working on what works most effectively with people with psychopathy, like people who suffer from psychopathy, have been shown to be one of the hardest nuts to crack in terms of rehabilitative methods that work for them. And so also, how do you intervene when you have individuals that begin to show signs of well for children they don't actually use the psychopathy scale because they usually only use that for adults, but there are anti-social skills that are used that show early signs of psychopathic behaviors and tendencies.

Gregg [00:59:19] Well, you don't want to stigmatize these children. You don't want to identify them in a way that's going to make the situation worse, but you also want to have methods that successfully identify a higher risk and then have ways to intervene that are effective. I think more work to be done there, and I think, you know, more work to be done in terms of environmental design, nudge theory, figuring out how to effectively design public spaces and infrastructure in a way that can reduce criminal behavior and there are really good examples of this like, you know, we know that when the temperatures go up on hot days in Chicago, crime rates go up. Sometimes simple things like expanding air conditioning centers around the city can reduce crime.

Gregg [01:00:02] One example from South America in a community that higher rates of gang violence realize that one of the problems was isolation, and they used a transportation rail system that linked up other communities where jobs were located figuring out how to design public spaces and institutions in ways that disincentivize violence and also I mentioned earlier how to design institutions for the purposes of rehabilitation or reintegration. There's all kinds of areas where social sciences and people who work in these areas can begin to work on more effective and humane approaches to address the problem and all of its various levels.

David [01:00:41] The book is "Rejecting Retributivism: Free Will, Punishment, and Criminal Justice," whether you're a philosopher, policymaker, concerned citizen, this book is for you. Gregg, thanks so much.

Gregg [01:00:51] Thank you for having me.

David [01:00:57] You can find links to all the research we discussed on the show on our website probablecausation.com You can also subscribe to the show there or wherever you get your podcasts to make sure you don't miss a single episode. Big thanks to Emergent Ventures for supporting this show and thanks also to our Patreon subscribers. This show's listener supported. So if you enjoy the podcast, please consider contributing via Patreon. You can find a link on our website. Our sound engineer is Jon Keur with production assistance from Hailey Greishaber. Our music is by Werner and our logo was designed by Carrie Throckmorton. Thanks for listening and I'll talk to you soon.