

## Who Will Save 'Ought' Now? Compatibilism, retributivism and criminal responsibility

Frej Klem Thomsen

Ph.D, Associate Professor in Department of Philosophy & Science Studies at Roskilde University, Denmark

Traditionally, lack of responsibility has been held to either excuse or alleviate culpability. Thus, most jurisdictions recognize some version of the insanity-defence, just as most criminal codes require that the prosecution proves not merely that the accused was causally responsible for a certain harm, but that she had *mens rea*. Neuroscience threatens to undermine the distinction between agents who are and agents who are not responsible for their own actions by demonstrating the causal relations between brain structure and functioning, functioning and thinking, and thinking and behaviour. (Vincent, 2010; Gazzaniga and Steven, 2004; although cf. Morse, 2010; Morse, 2004)

The debate about the justification of legal punishment has been dominated since the 1970's by retributivism, which holds that contrary to consequentialism, inflicting suffering cannot be justified by preventing greater amounts of suffering in the future; it can be justified only when and if it is the deserved response to the wrong-doing the criminal has committed. (Ashworth, 2005; Von Hirsch and Ashworth, 2005; Duff and Green, 2011; Berman, 2008) Given that classical retributivism relies on libertarian conceptions of criminal responsibility to explain how and why a person can deserve to suffer, developments in neuroscience might therefore be taken to lead to both compatibilism and consequentialism. (Greene and Cohen, 2004; Singer, 2005) I argue, however, that since standard versions of consequentialism also rely on a notion of 'ought implies can', it too is threatened by the challenges to agency posed by neuroscientific insights.

The most promising response is compatibilism, since compatibilists hold that the possibility of free will is not necessary for the existence of moral responsibility, because our best understanding of what it means to be morally responsible does not rely on the agent being counterfactually capable of preventing an action, but only on being actually the cause of it in a relevant sense. (Frankfurt, 1969; Fischer, 2010; 2007; McKenna, 2009; Mele, 2011; Fischer, 2011; Hume, 2007 [1748])

However, even if retributivists adopt a compatibilist conception of criminal responsibility, doing so would undoubtedly require altering certain features of standard versions of retributivism. (Dresser, 2008; Tonry, 2011) I argue in conclusion that the most plausible candidates of compatibilist accounts require such drastic changes to retributivism as to render it either unrecognizable or implausible, while consequentialism emerges essentially unscathed.

Ashworth, A. (2005). Sentencing and Criminal Justice. Cambridge, Cambridge University Press.

Berman, M. N. (2008). "Punishment and Justification." Ethics **118**: 258-290.

Dresser, R. (2008). "Neuroscience's Uncertain Threat to Criminal Law." The Hastings Center Report **38**(6): 9-10.

Duff, A. and S. P. Green (2011). Philosophical Foundations of Criminal Law. Oxford, Oxford University Press.

Fischer, J. M. (2007). Compatibilism. Four Views on Free Will. Oxford, Blackwell Publishers: 44-84.

Fischer, J. M. (2010). "The Frankfurt Cases: The Moral of the Stories." Philosophical Review **119**(3): 315-336.

- Fischer, J. M. (2011). Indeterminism and Control: An Approach to the Problem of Luck. Law and Neuroscience. M. Freeman. Oxford, Oxford University Press: 42-59.
- Frankfurt, H. (1969). "Alternate Possibilities and Moral Responsibility." The Journal of Philosophy **66**(23): 829-839.
- Gazzaniga, M. S. and M. S. Steven (2004). Free Will in the Twenty-First Century - A Discussion of Neuroscience and the Law. Neuroscience and the Law. B. Garland. New York, Dana Press.
- Greene, J. and J. Cohen (2004). "For the Law, Neuroscience Changes Nothing and Everything." Philosophical Transactions of the Royal Society of London **359**: 1775-1785.
- Hume, D. (2007 1748). An Enquiry Concerning Human Understanding. Oxford, Oxford University Press.
- McKenna, M. (2009). "Compatibilism." Stanford Encyclopedia of Philosophy.
- Mele, A. R. (2011). "Surrounding Free Will: A Response to Baumeister, Crescioni, and Alquist." Neuroethics **4**: 25-29.
- Morse, S. J. (2004). New Neuroscience, Old Problems. Neuroscience and the Law. B. Garland. New York, Dana Press.
- Morse, S. J. (2010). Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note. Neuroethics - An Introduction with Readings. M. J. Farah. Cambridge, MA, The MIT Press.
- Singer, P. (2005). "Ethics and Intuitions." The Journal of Ethics **9**: 331-352.
- Tonry, M., Ed. (2011). Retributivism Has a Past: Has it a Future? Oxford, Oxford University Press.
- Vincent, N. (2010). "On the Relevance of Neuroscience to Criminal Responsibility." Criminal Law and Philosophy **4**: 77-98.
- Von Hirsch, A. and A. Ashworth (2005). Proportionate Sentencing. Oxford, Oxford University Press.