УДК 340.124
DOI: 10.17223/1998863X/48/18

A.B. Didikin[1]

FREE WILL, ACTION AND RESPONSIBILITY: PHILOSOPHICAL AND LEGAL ANALYSIS

The paper provides an analysis of the main approaches to the interpretation of volitional actions in analytical legal philosophy, in the context of legal responsibility and discussions about free will. The most famous examples of the possibility of applying the neuroscience arguments in legal philosophy, in particular when assessing the effect of a volitional act performed consciously on human behavior, are considered. The paper argues that the philosophical argumentation in Gilbert Ryle's logical behaviorism can be used as a rational approach to refute neuroscience data and interpret actions correctly, in terms of legal language.
Keywords: *analytical legal philosophy, free will, actions, responsibility, neuroscience, logical behaviorism, Gilbert Ryle.*

In legal philosophy, the question of the applicability of legal responsibility for an offense committed by a subject is of fundamental importance. On the one hand, a state's use of coercion is aimed to support the regime of legitimacy and encourage lawful actions. However, the justifiability and adequacy of the sanctions and punishments applicable to the subjects of the offenses remain the topic of philosophical and legal discussions. To what extent may discoveries in neuroscience affect a final conclusion supported by arguments? Is there a real need to re-evaluate the degree of "freedom" of an individual in making a rational moral and legally significant choice of behavior?

In the theory of legal responsibility, there are two traditional approaches to explaining the meaning of applying punishment to a person who has committed a crime or an offense. The first approach was called *consequentialism*, as its name suggests, the use of punishment for an offense results in the beneficial social consequences. When punishing the consequences, state intentions are aimed at preventing the illegal actions in the future and to facilitate the rehabilitation effect, which eliminates the consequences of the offense committed. The second approach, known as *retributivism*, is based on the need for adequate sanctions for the criminal act committed [1].

The offender deserves a punishment, and its application sends a clear signal to society that punishment is inevitable, and it is a basic principle of the legal system.

---

[1] (рус.) А. Б. Дидикин. Свобода воли, действие и ответственность: философский и правовой анализ.

Аннотация. В статье представлен анализ основных подходов к интерпретации волевых действий в аналитической философии права в контексте юридической ответственности и дискуссий о свободе воли. Рассмотрены наиболее известные примеры возможности применения нейронаучных аргументов в философии права, в особенности когда влияние эффекта волевого акта представлено сознательно в поведении человека. В статье приводятся аргументы в пользу того, что философская аргументация логического бихевиоризма Гилберта Райла может быть использована как рациональный подход для корректного изучения нейронаучных данных и интерпретируемых действий.

Ключевые слова: аналитическая философия права, свобода воли, действия, ответственность, нейронаука, логический бихевиоризм, Гилберт Райл.

What are the grounds for determination and application of responsibility measures to the offender? In general, it relates to free will, that is, a conscious decision of a person to perform actions contrary to legal norms, or prescribed norms. The offender deliberately poses challenges to the community, or he can express his unlawful position publicly, while responsibility measures restore the balance between rights and obligations. However, as noted by Michael Pardo and Dennis Patterson, many proponents of neuroscience continue to argue that neurobiological data on the activities of the human brain may show the different levels of the conjunction of rational and emotional cognitive processes in a particular person [2]. The decision made correlates with brain activity or type of brain activity, which means that it is possible to predetermine human actions, considering not only a free choice that is not affected by something from the outside. Additionally, the important concepts of the theory of legal responsibility, such as *mens rea*, mental adequacy, competence and voluntariness, can be re-evaluated when empirical neuroscience data is considered.

In this case, many variations of philosophical and legal discussions are possible. On the one hand, a conceptual framework for the theory of legal responsibility can remain unchanged, even when the principle of free will is questioned in the light of neuroscience. Here, it is possible to argue that people's common perceptions of justice and retribution can act as the basis for expanding or narrowing sanctions and punishments for offenses. On the other hand, the achievements in neuroscience can significantly change the way we view reasons for committed actions, or justify a legal assessment of a person's intention to commit a wrongful act, and, therefore, the adequacy of responsibility measures applied. Overall, the question about legal responsibility often correlates with the moral, social and emotional assessment of the legal choice made.

Nevertheless, what is the purpose of legal responsibility? How can the punishment system be justified? As noted above, the most common answer to the question of the nature of responsibility is determined through application of the arguments in consequentialism that refer to prevention of the consequences of harm caused by the offense, and at the same time, which are aimed to deter others from actions and eliminate the risk of their committing an offense. Possibly, the global objective is to prevent a massive violation of existing laws. Within the framework of this concept, punishment as a responsibility measure is not an ultimate goal itself but a means of achieving the common good in the form of a reduction of the dynamics of various types of offenses. While the state and society bear obvious costs of the application of punishments.

Retributivism is based primarily on the moral arguments that justify the restoration of justice and emphasize the importance of the principle of the inevitability of punishment. For a retributivist argument, the wrongful actions of a person are the most important of all, and not the harm done or the social negative consequences caused. If a perpetrator deserves a punishment, then the punishment itself acquires intrinsic value and becomes an element of the mechanism of legal regulation, along with other general legal principles, such as the principle of "state responsibility to respect its international obligations". In retributivism, the argument focuses not on the status of the perpetrator but on the level of the punishment that is proportional to the infraction. However, in practice, the strategy of argumentation can depend equally on arguments of consequentialism and retributivism, yet

in the first case, the utilitarian side of the question dominates the deontological one, and in the second case *vice versa*.

It should be noted that the question of the connection between the psychological processes, brain activity, and legal decisions is very complex and ambiguous. Understanding of how and why a particular sanction is applied for an offense does not necessarily entail the justification and necessity of the sanction itself. Primarily, the transition of empirical information about this into conceptual conclusions is important. For example, a notion that people massively consider particular types of punishments for specific offenses to be fair can act as an empirical evidence; however, in order to verify the conclusion, a hypothetical or ideal construct of applying legal responsibility is needed. Along with this, empirical data can also disprove a theory; for example, when it demonstrates that the decisions taken on responsibility are defective or incorrect, or are perceived as unfair. Therefore, there is no direct transition from a neuroscientific argument to a theoretical one because the processes of brain activity do not directly lead to conceptually valid conclusions. As J. Green notes, the interaction between the cognitive and emotional aspects of brain activity drives the decision-making process, depending on the greater or lesser activity of the areas of the human brain [3. P. 40–41]. He suggests that neurobiology and its data are more likely to support the arguments of consequentialism rather than retributivism, in particular, the arguments about the punishment justification by future beneficial effects on society. Considering that people's perception of criminal punishment is primarily emotional, and is associated with anger or proportional to it, then the question arises: what are the normative conclusions drawn from all of these above? The question is relevant because if the majority of the citizens consider the punishment for a particular person to be fair, this does not legitimate the application of the punishment automatically. To implement the punishment, it is necessary to establish and assess the fact of the commission of an offense using the legal means, and only as a consequence of this should a punishment be chosen. The use of more emotional arguments makes implementation of the punishment less legitimate.

And what would happen if the justification of punishment were based on the deontological arguments that were produced by the emotions and psychological processes of the human brain? In fact, this would cause deontology as a theory of moral rationalization to be affected by empirical information. There would be no independent moral evaluation, and random emotions would determine the nature of choices. Therefore, it can be argued that neuroscience's attempts to challenge legal philosophy rely on some conceptual errors.

Firstly, this happens when retributivism as an emotional view on the nature of punishment is mixed with deontology (similarly, as with the attempts to excessively apply moral rationalization to the legal norms in natural law theory).

Secondly, retributivism cannot be absolutized as a theory about the nature of punishment as the debate on legal policy has still not ended, and it should rely on the pluralism of opinions. There are no necessary and sufficient conditions to determine a punishment for offenses in retributivism. Thus, neuroscience discoveries do not give grounds to deny the existing concepts of the legal procedures, including the idea of the penalty to be selected by the court. Human brain activity does not produce exact criteria for choosing the appropriate or fair punishment, and even

the emphasis on the existence of specific emotions evoked by this can hardly be considered as a successful way of argumentation.

When analyzing the influence of neuroscience on legal philosophy, the question arises whether it is possible to reconsider the perception of the offenders' actions. Can it be that the neural activity of the brain is programmed, and the individuals are not free in realizing their desires and aspirations? In this case, the problem of the existence of free will is escalated noticeably, and this philosophical question can be a challenge for jurisprudence.

Freedom of will, in general, is being contrasted with determinism, that is the idea that the current state of the world depends on the laws of physics and the states that the world had in the past [4. P. 327–330]. In the case of absolute determinism, there can be no free will as an ability to act differently, when all states and processes are predetermined. *Compatibilism* implies the possibility of combining determinism with human moral responsibility. While *incompatibilism* views such a combination as incompatible, and, therefore, hard determinism is postulated. At the same time, libertarianism recognizes such incompatibility but denies determinism and supports free will [5. P. 12–15].

The discourses and even the context of viewing the problem of free will are sometimes mixed in philosophical discussions. Thus, for example, the expressions "may" and "whether it has the right" can mean several different interrelated aspects: natural forces (for example, the ability of water to freeze), or when physical conditions may be sufficient to fulfill the desires by the subject of actions and the ability to perform the actions (for example, the desire to swim when there is water around). The freedom to do otherwise determines what is called free will.

However, the relationship between determinism and free will can be interpreted differently. Determinism is consistent with the idea that people have abilities and capacities to act in accordance with their mental state, and that mental state affects behavior. As the mental state is not repeatable, people may act differently and be responsible for their actions. Neuroscience cannot reliably answer the question of whether a conscious mental state always precedes behavior. Therefore, the moral choice or the choice of the mode of behavior is made regardless of which version of determinism is recognized as a valid one. Obviously, the legal doctrine should be based on compatibilism, which implies that a person is free to act and behave differently regardless of the laws of nature because, without a moral penalty, it will be impossible to justify punishment.

How convincing are neuroscience arguments when justifying legal decisions? There are a number of objections to this statement when the legal nature of the penalties for offenses is considered. Clearly, when implementing penalties, determining their size and the procedure for imposing them, there is no need to strictly follow the empirical arguments about mass support, or expression of public opinion about punishments. This is a purely legal procedural matter, within a framework of which problems of the legitimacy of the legal system and the fairness of a particular court decision are considered. Additionally, neuroscience data do not give any exact arguments about moral guilt and fair punishment for people's actions. Basically, neuroscience provides only new information, which does not lead straight to the epistemological solution of the problem. Similarly, as with the solution of the problem of free will, it is possible to define the rules for empirical actions to be legally assessed and become the basis of responsibility application.

However, when investigating the influence of neuroscience on law, another more important question arises: what is the relationship between mental states, causality and human actions in a legal context?

In terms of legal mechanisms, the concept of legal responsibility in legal philosophy is associated with a large number of formal conditions, in which professional argumentation is required to identify a causal relationship between empirically observable actions and their legal qualifications, as well as consideration of general legal principles.

It is especially noticeable in criminal law, as imposing responsibility for committed crimes is a formalized process, in which an assessment of the facts and events of the committed act allows authorities to determine the place of actions and the nature of criminal actions, considering the moral and ethical context of the offender's behavior, as well as the offender's attitude to what they have done. In this regard, there is an important argument in legal positivism that the convergence of moral and legal statements in criminal law affects the determination of specific measures of legal responsibility.

The separation of the normative and descriptive essences is based on a comparison of the common state of affairs and the specific situation that causes negative consequences. If a building is destroyed by fire, the presence of combustible material will be an obvious condition without which a fire would not have occurred. However, to give legal characteristics of an incident, it is required to analyze reasons for actions that possibly caused the incident [6. P. 215]. Therefore, discussions about the impact of neuroscience discoveries on law demonstrate the advantages of behavioral concepts that analyze the causes of human actions and actions themselves.

Nevertheless, when applying the arguments of behaviorism in law, some explanations are required because of many philosophical and psychological rationales of behaviorism used. Philosopher and psychologist A. Fedorov notes that B.F. Skinner's radical behaviorism "denies that our thoughts are of an ideal (immaterial) nature. In other words, proponents of radical behaviorism suggest that everything that exists, including the so-called psychic reality, has physical properties" [7. P. 23]. Obviously, this version of behaviorism, known as physicalism in the philosophy of consciousness, is of little use in the field of legal connections and relations. The attempts to explain the idea of personal events in radical behaviorism do not contribute much either as legal interpretation does not consider all psychical and mental events. Repentance on the part of an offender itself, as a mental act, does not relieve them of responsibility, and can only serve as a basis for a change in procedural legal relationships. At the same time, active repentance, assistance to the investigation, consent to participate in the investigative experiment, or other legally significant actions in human behavior are of greater importance than a search for something that is completely predetermined in human behavior.

Moreover, that is where neuroscientific conclusions will completely dominate any other conceptual discussions in legal philosophy. If a psychical (or mental) essence does not exist as an independent reality, legal phenomena will also "dissolve" in physical reality. Thus, a possible alternative to neuroscience argumentation can be the concept of *logical behaviorism* that was justified by the British philosopher Gilbert Ryle [8]. The influence of his ideas on the analytical legal

philosophy, including H. Hart's legal neopositivism, is obvious, but in this case it requires further investigation.

What are the potential benefits of focusing on the arguments of logical behaviorism in philosophical and legal reasoning? The central thesis of Ryle, which remain a basis for many discussions, is not to look for specific metaphysical aspects of consciousness to prove its immaterial nature [9]. Instead, mental states can be understood from the observation of human behaviors [10]. People act the way they think. From the view of psychology and neuroscience, this conclusion seems unreasonable, but, in jurisprudence, it is of fundamental importance. When an investigator examines the scene of an incident, a notary certifies the authenticity of the documents, or a judge puts the arguments together to make a legitimate court decision, they do not need the whole range of causalities existing in universe, or verification that a person's behavior is completely predetermined, and they are not free as they cannot control mental processes in mind.

The general objectives of legal argumentation are resolution of conflicts, elimination of harm caused with the use of legal means, and formulation of the rules of conduct governing (but not physically determining) actions of individuals. That is why linguistic phenomena that construct a legal reality and the context of the usage of legal terms that creates grounds for the enablement of legally significant behavior can be viewed not in terms of neuroscience but rather in terms of logical behaviorism. Further philosophical and legal studies shall demonstrate how complete this conceptual scheme is.

Reference

1. Berman, M. (2010) Two Types of Retributivism. *The Philosophical Foundations of the Criminal Law*. 3. [Online] Available from: http://ssrn.com/ abstract = 1592546.

2. Pardo, M. & Patterson, D. (2011) Neuroscientific Challenges to Retributivism. In: Nadelhoffer, T. (ed.) *The Future of Punishment*. Oxford University Press. [Online] Available from: http://ssrn.com/abstract=1783823.

3. Greene, J. (2008) The Secret Joke of Kant's Soul. In: Sinnott-Armstrong, W. (ed.) *Moral Psychology*. Vol. 3. Cambridge, MA: MIT Press. pp. 35–80.

4. Inwagen, P. van (2008) How to Think About The Problem of Free Will. *Ethics*. 12. pp. 327–350. DOI: 10.1007/s10892-008-9038-7

5. Vasiliev, V.V. (2017) *V zashchitu klassicheskogo kompatibilizma. Esse o svobode voli* [In Defense of Classical Compatibilism. An essay on free will]. Moscow: URSS.

6. Ogleznev, V.V. (2015) Several remarks to reasons for action. *Vestnik Tomskogo gosudarstvennogo universiteta. Filosofiya. Sotsiologiya. Politologiya – Tomsk State University Journal of Philosophy, Sociology and Political Science.* 2(30). pp. 214–220. (In Russian). DOI 10.17223/1998863/30/23

7. Fedorov, A.A. (2007) Radikalniy bikheviorizm i psikhicheskaya realnost [Radical behaviorism and psychological reality]. *Vestnik Novosibirskogo gosudarstvennogo universiteta. Psikhologiya.* 1(2). pp. 23–30. (In Russian).

8. Ryle, G. (1999) *The Concept of Mind*. Moscow: Dom intellektualnoy knigi.

9. McGeer, V. (2018) Intelligent Capacities. *Proceedings of the Aristotelian Society*. CXVIII. pp. 1–29.

10. Stout, R. (2003) Ryle's Behaviourism. *Revue Internationale de Philosophie*. 57(223). pp. 37–49.

Anton B. Didikin, Higher School of Economics (Moscow, Russian Federation); Institute of State and Law of the Russian Academy of Sciences (Moscow, Russian Federation).

E-mail: abdidikin@bk.ru

Vestnik Tomskogo gosudarstvennogo universiteta. Filosofiya. Sotsiologiya. Politologiya – Tomsk State University Journal of Philosophy, Sociology and Political Science. 2019. 48. pp. 186–192.

DOI: 10.17223/1998863X/48/18

FREE WILL, ACTION AND RESPONSIBILITY: PHILOSOPHICAL AND LEGAL ANALYSIS

Keywords: analytical legal philosophy, free will, actions, responsibility, neuroscience, logical behaviorism, Gilbert Ryle.

In legal philosophy, the question of the applicability of legal responsibility for an offense committed by a subject is of fundamental importance. On the one hand, a state's use of coercion is aimed to support the regime of legitimacy and encourage lawful actions. However, the justifiability and adequacy of the sanctions and punishments applicable to the subjects of the offenses remain the topic of philosophical and legal discussions. To what extent do discoveries in neuroscience may affect a final conclusion supported by arguments? Is it a real need to re-evaluate the degree of "freedom" of an individual in making a rational moral and legally significant choice of behavior? The main question for discussion is grounds for determination and application of responsibility measures to the offender. In general, it relates to free will, that is a conscious decision of a person to perform actions contrary to legal norms, or prescribed norms. The offender deliberately poses challenges to the community, or he can express his unlawful position publicly, while responsibility measures restore the balance between rights and obligations. The decision made correlates with brain activity or type of brain activity, which means that it is possible to predetermine human actions, considering not only a free choice that is not affected by something from the outside. Additionally, the important concepts of the theory of legal responsibility, such as mens rea, mental adequacy, competence and voluntariness, can be re-evaluated when empirical neuroscience data is considered. The central thesis of logical behaviorism of Gilbert Ryle, which remains a basis for many discussions, is not to look for specific metaphysical aspects of consciousness to prove its immaterial nature. Instead, mental states can be understood from the observation of human behaviors. People act the way they think. From the view of psychology and neuroscience, this conclusion seems unreasonable, but, in jurisprudence, it is of fundamental importance. The general objectives of legal argumentation are resolution of conflicts, elimination of harm caused with the use of legal means, and formulation of the rules of conduct governing (but not physically determining) actions of individuals. That is why linguistic phenomena that construct a legal reality and the context of the usage of legal terms that creates grounds for the enablement of legally significant behavior can be viewed not in terms of neuroscience but rather in terms of logical behaviorism.