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ScienceDirect

Cognitive Systems Research 34–35 (2015) 54–70

Cognitive Systems RESEARCH

www.elsevier.com/locate/cogsys

Will retributivism die and will neuroscience kill it? ☆

Action editor: Vasant G. Honavar

Iskra Fileva [a,*], Jonathan Tresan [b]

[a] Department of Philosophy, University of Colorado, Boulder UCB 232, Boulder, CO 80309, United States
[b] Department of Philosophy, University of Rochester, 532 Lattimore Hall, Rochester, NY 14627-0078, United States

Received 8 October 2014; received in revised form 29 May 2015
Available online 1 August 2015

Abstract

In a widely read essay, "For the Law, Neuroscience Changes Nothing and Everything," Joshua Greene and Jonathan Cohen argue that the advance of neuroscience will eventually result in the widespread rejection of free will, and with it – of retributivism. They go on to propose that consequentialist reforms are in order, and they predict such reforms will take place. We agree that retributivism should be rejected, and we too are optimistic that rejected it will be. But we don't think that such a development will have much to do with neuroscience – it won't, because neuroscience is unlikely to show that we have no free will. We have two main aims in this paper. The first is to rebut various aspects of the case against free will. The second is to examine the case for consequentialist reforms. We take Greene and Cohen's essay as a hobbyhorse, but our criticisms are applicable to neurodeterministic anti-free-willism in general.

We first suggest that Greene and Cohen take proponents of free will to be committed to an untenable homuncular account of agency. But proponents of free will can dispense with such a commitment. In fact, we argue, it is Greene and Cohen who work with an overly simple account of free will. We sketch a more nuanced conception. We then turn to the proposal for consequentialist reforms. We argue that retributivism will fall out of favor not as a consequence of neuroscience-driven rejection of free will, but rather, as a result of a familiar feature of moral progress – the expanding circle of concern. In short, retributivism can and must die, but neuroscience will not kill it – humanity will.

Keywords: Free will; Neurodeterminism; Legal responsibility; Retributivism; Brain overclaim syndrome; Josh Greene; Jonathan Cohen

"Man is condemned to be free: condemned, because he did not create himself, yet nonetheless free, because once cast into the world, he is responsible for everything he does."

[Jean-Paul Sartre, *Existentialism Is a Humanism*]

1. Introduction

There is a joke about social workers that goes something like this: "Two social workers are walking down the street. They hear moaning and cries for help coming from the nearby alley and go to see what is going on. A man with a face covered in blood, obviously beaten up badly, is lying on the ground. One of the social workers turns to the other one and says, 'The person who did this really needs help.'" Though this anecdote is, undoubtedly, a caricature of social worker attitudes toward victims and perpetrators, it can nonetheless be said to arise from a not uncommon sentiment – the fear that "experts" on human behavior tend to carry the task of explaining a criminal act by an

☆ We would like to thank Leslie Marsh and Philip Robbins for their patience and professionalism, and two anonymous referees for comments on an earlier draft.
* Corresponding author.
E-mail address: iskra.fileva@colorado.edu (I. Fileva).

http://dx.doi.org/10.1016/j.cogsys.2015.07.005
1389-0417/

appeal to causal factors independent of the will so far as to effectively deny the role of free will and portray all perpetrators as victims of their psychological make-up and circumstances.[1]

That this type of fear is not uncommon can be gleaned from the fact that politicians use it in an attempt to win votes. In 1968, George Wallace, running for president as an independent party candidate, declared:

> If a criminal knocks you over the head on your way home from work, he will be out of jail before you're out of the hospital (...) But some psychologist will say, well, he's not to blame, society is to blame. His father didn't take him to see the Pittsburgh Pirates when he was a little boy.
>
> [Beckett, 1997, p. 34]

In his detailed account of punitive practices in the US, Joseph Margulies writes:

> By the end of the decade [the 1980s], the Republican and Democratic positions on crime were nearly indistinguishable. The Democratic platform of 1988 abandoned the now heretical suggestion that crime could be caused by social conditions and pledged an aggressive role for the federal government in controlling lawlessness.
>
> [Margulies, 2013, p. 97]

Historically, on the part of the wider public, denials of free will have been met with reactions ranging from fear to ridicule.

Perhaps all this is about to change. In "For the Law, Neuroscience Changes Nothing and Everything," Joshua Greene and Jonathan Cohen reckon that the two questions in our title must be answered in the affirmative. Neuroscience, they contend, will put an end to retributivism in legal adjudication by showing that the notion of just deserts, which forms the cornerstone of the retributivist doctrine, is based on empirically untenable ideas of free will (Greene & Cohen, 2004, pp. 1775–17785).

The proposal is radical. Greene and Cohen are not just anti-retributivist. Their anti-retributivism follows a deeper rejection of free will. The claim is not that a special group of defendants – adolescents, patients with brain damage, people with behavioral addictions, etc. – may lack the freedom necessary for legal responsibility. Nor is it that all of us may lack it on a particular occasion, when we do something absent-mindedly, say, or in the heat of passion. Rather, the idea is that *no one ever* chooses freely what to do.

Yet, the proposal is not new. The view defended by Greene and Cohen is but the latest permutation of a significant though never culturally dominant strand of thought according to which concepts such as freedom and responsibility have no role to play in a scientific worldview and ought to be eliminated from, *inter alia*, legal practices.[2] The twist is that a new kid on the block, neuroscience, is now enlisted in the fight against free will.

This, however, is not a minor addition, according to the two authors. Neuroscience, they claim, will at last enable anti-free willist, anti-retributivist views to achieve supremacy in practice. Popular doubts about free will, they tell us, have thus far been relegated to the back bench in the theater of ideas, because the mind has remained a black box. This has allowed believers in free will to use it as a "donkey on which to pin dualist and libertarian intuitions." (Greene & Cohen, 2004, p. 1781). Neuroscience will finally turn the black box into a "transparent bottleneck." (Greene & Cohen, 2004). The metaphor is a reference to the way in which all the different causal influences – genes, physical condition, social factors, and so on – impact behavior: all of these forces must, ultimately, pass through the brain's "bottleneck" and emerge as features of brain states on the other end. Very soon, Greene and Cohen suppose, we'll have an up-close view of the activity in the "bottle" in the form of pictures from high-resolution scanners. And not even the staunchest free will defender will be able to stand her ground when that happens. For, they say, it is one thing to resist a general philosophical argument against free will, and quite another to keep supporting the thesis that free will exists in the face of "images of the face of brain structures involved [in human action] and equations that describe their function." (Greene & Cohen, 2004).

It would be difficult to deny that neuroscience has breathed new life into old ideas. Neurodeterminism, as some have called the view advocated by Greene and Cohen,[3] has gained significant traction in recent years. Greene and Cohen join a big chorus of authors, with expertise ranging from neuroscience to social psychology, who have recently argued that free will as we know it is some sort of illusion: Sapolsky (2004, pp. 1787–1796),[4] Eagleman (2012), Wegner (2002), Gazzaniga (2011), Ramachandran (2012), to mention a few. The debate among scholars has long spilled over into the popular media. Thus, some time ago, *The Economist* began an editorial on neuroscience and free will thusly: "Genetics may yet threaten privacy, kill autonomy, make society homogeneous and gut the concept of human nature. But

[1] Incidentally, Michele Moody-Adams raises an objection along these lines against Susan Wolf's view on which criminals tend to be victims of either bad upbringing or bad societal influences and may not have received "resources and reasons on which to base self-correction." See Wolf (1987, pp. 46–62, 58); also, Moody-Adams (1991, pp. 111–131, 121). Moody-Adams responds by saying: "Indeed, if we call a slave owner or Nazi a victim, then what are we to call the slave or the concentration-camp inmate?" (p. 121).

[2] See, for instance, Skinner (1971) and Menninger (1968).

[3] See, e.g., Baertschi and Mauron (2011, pp. 151–160).

[4] Sapolsky expresses the hope that we will one day live in "a world of criminal justice in which there is no blame [but] only prior causes" (p. 1794).