

Chapter 10

The Implications of Free Will Skepticism for Establishing Criminal Liability

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1. Introduction

In recent years, a growing number of philosophers have argued that the traditional concepts of free will and moral responsibility should be rejected. If these concepts were abandoned, what would be the practical implications for the criminal justice system? In an influential article, Joshua Greene and Jonathan Cohen (2004) have argued that we should take this question seriously, because they predict that new evidence from neuroscience will increasingly undermine our notions of free will and responsibility in a way that is more vivid and accessible than abstract philosophical theorizing. This evidence will cause ordinary people to question the presuppositions upon which our legal system is currently based. In particular, they will question the retributivist justification for punishment, which claims that punishment is a deserved response to free actions for which criminals are morally responsible. Greene and Cohen believe that, although retributivism is unsustainable in view of the arguments for free will skepticism, the practice of punishing criminals can still be justified on consequentialist grounds. In addition, they note very briefly that consequentialism can justify the retention of various criminal defenses. However, in common with most writers on this topic, they do not give detailed consideration to the process of establishing criminal liability in a trial, but instead focus on the general justification for punishment.

This paper discusses the implications of rejecting the notions of free will and retribution for the process of establishing criminal liability in a trial. Currently, it is a general principle of UK and American law that before a person can be convicted of a crime the

prosecution must prove three things. Firstly, the accused must have performed the *actus reus*—the prohibited act. Secondly, (with the exception of strict liability offences) the prosecution must prove *mens rea*—a mental state such as intention or recklessness. Thirdly, the accused must lack a valid defense, such as self-defense. This paper argues that these prerequisites for criminal liability should be retained. It offers a rationale for these prerequisites, which appeals to considerations such as the value of liberty and moral communication, but which does not depend on the concepts of free will and retribution. This paper then focuses specifically on the defenses of self-defense, provocation, and mental disorder.

2. Key Terms

Before presenting my main arguments, I will define some key terms.

2.1 Retributivism

This paper will focus on an influential version of retributivism, which holds that punishing the guilty is intrinsically good.¹ According to this version of retributivism, the state is not merely entitled to punish the guilty. Rather, the state has a moral duty to punish offenders, purely because they deserve to suffer, even if punishing them serves no further purpose.² For the retributivist, the judgment that someone is *morally responsible* for committing a criminal offence means that the criminal action belongs to the offender in such a way that she deserves to be punished for it, irrespective of the consequences of imposing punishment. (In this paper, the term “retributive responsibility” will be used to refer to this kind of moral responsibility.)³

¹ For a defense of this view see Moore (1997). For criticisms of other versions of retributivism, see Mackie (1982), Honderich (1984).

² Reform and deterrence are examples of purposes punishment might serve, which form no part of the retributive theory of justice.

³ This definition of retributive responsibility is based on definitions given by Derk Pereboom (2006: 211-212; 2002: 479). Richard Double uses the term “retributive moral responsibility” in (2002: 516). The connection between retributivism and responsibility is also discussed by Ted Honderich. Honderich argues that retributive judgments depend on “holding people responsible in a certain way...a way that is inconsistent with determinism” (2002: 101-2; 139). See also H.L.A. Hart (1968) and Galen Strawson (2002). Strawson asks “Are [people] ever responsible for the their actions in such a way that they are, without any sort of qualification, morally deserving of ...punishment...for them?” (2002: 442). Honderich argues for an alternative, non-retributive conception of responsibility in *How Free Are You?* (2002: ch. 8-11). Pereboom also advocates a non-retributive conception of moral responsibility in (2006: 211-212).

The principle that the guilty should receive the punishment that they deserve is known as *positive retributivism*, since it is meant to provide a positive reason in favor of punishment. In contrast, the idea that those who are not guilty should be spared punishment (and that the guilty should receive no more punishment than they deserve) is known as *negative retributivism*. Those who endorse negative retributivism insist that this principle should constrain the state's power to punish. Unless otherwise indicated, the term "retributivism" will refer to theories that include both the positive and the negative retributive principle.

2.2 Free Will

I will use the term *free will* to refer to the ability to control one's actions in a way that could make one an appropriate candidate for judgments of retributive responsibility.

2.3 Free Will Skepticism

Free will skeptics believe that people lack free will and are not retributively responsible for their actions. They believe this either because they think determinism is true and that it is incompatible with free will and retributive responsibility, or because they think that free will and retributive responsibility are incompatible with both determinism and with indeterminism.

2.4 Determinism

Many free will skeptics argue that the truth of determinism, would pose a serious challenge for free will and thus for retributive responsibility. Determinism, as it applies to human behavior, is the theory that the deliberations, choices and conduct of every individual are causally necessitated by factors that are ultimately beyond the individual's control.

Determinism does not imply that our psychological states, such as our intentions, desires and beliefs, make no difference to our actions. Rather, determinism implies that, if our actions are to be explained by reference to such psychological phenomena as mentioned above, then these phenomena were themselves produced by prior events that were causally sufficient for

the occurrence of those psychological phenomena and that those prior events were themselves produced in the same manner by even earlier events etc. in an unbroken chain of cause and effect that can be traced back to before the person was even born. Nor does determinism imply that people will fail to modify their behavior in response to good reasons for doing so. It merely implies that whether a person recognizes and responds to one particular reason for action rather than another at any given time is determined by prior events in the manner described above. This paper examines the implications of the view that determinism (or indeterminism) is incompatible with retributive responsibility. However, this paper assumes that determinism is compatible with *rationality* (see, e.g., Bradley 1966: 260; Dennett 1982: 161).

In this paper, the term *determinism* will be used to mean the theory that *human behavior* is determined. The proposition that *all* events are caused has been contested by physicists. On one theory, indeterminism exists at the quantum level of subatomic phenomena. Some theorists have claimed that quantum physics may lend support to the idea that human actions are undetermined (e.g., Swinburne 2004: 169-170). However, free will skeptics have argued that even if quantum events affect human behavior, it is unlikely that this could provide a satisfactory basis for retributive responsibility.

In this paper I will *not* discuss the arguments in favor of free will skepticism or the arguments against retributivism. Instead, I will focus on the practical implications for of rejecting the traditional concepts of free will and retributive moral responsibility.

3. The Actus Reus Requirement

Currently, before a sentence can be imposed on an offender, it must be proved beyond reasonable doubt that the accused performed the actus reus of an offence. If we abandoned retributivism we would still be justified in detaining dangerous offenders in order to protect society. However, it might be questioned whether there would be any non-retributive reason

for insisting that a person should only be detained after it had been proved that she had already committed a crime. In this section, I will consider three non-retributive reasons for the actus reus requirement—the value of liberty, the idea that predictions of dangerousness that do not appeal to past offending are not sufficiently individualized and the principle of fair warning.

3.1 Liberty

According to retributivists, only their theory can provide an adequate justification for having the actus reus requirement. This requirement follows from negative retributivism – the idea that we should not punish the innocent. If we abandoned retributivism, it might be feared that the state could imprison people based on a mere suspicion that they might commit a crime in the future, even if the person had never actually broken the law. However, punishing someone on this basis would involve placing too much emphasis on security at the expense of liberty. The actus reus requirement can be defended on non-retributive grounds—it upholds the value of liberty by protecting the individual against the power of the state. In order to safeguard liberty, the state should be required to prove the individual’s dangerousness to a high standard. Past behavior is one of the best guides to future behavior (see Callender 2010: ch.8). It is therefore appropriate that proof that the individual has actually engaged in dangerous conduct should be a necessary condition for interfering with liberty.

It might be objected that free will skeptics cannot rely on the value of liberty, because liberty is only valuable if individuals possess free will. However, free will skeptics have argued that the kind of “liberty” or “freedom” that is protected by human rights such as the right to “freedom of movement” is different from the sense of “freedom” that is at issue in the debate about free will and retribution. A person can get satisfaction from acting in accordance with her preferences and can be frustrated if she is prevented from doing so. This can be true regardless of the origin of these preferences, i.e. regardless of whether these preferences are

predetermined or due to chance. Free will skeptics can therefore still value liberty—in the sense of the freedom to act in accordance with one’s preferences.

An example involving someone who is clearly not responsible in the retributive sense can support the claim that the freedom to act in accordance with one’s preferences is still valuable regardless of whether we have “free will” in the sense required by retributivism. Somebody with severe learning disabilities might lack the free will necessary for retributive responsibility. However, such a person might still be able to enjoy liberty in the sense of being able to act in accordance with her preferences and being free from coercion by others. If this person had never actually engaged in dangerous conduct, it would be objectionable to interfere with her liberty on the basis of a mere suspicion that she could pose a danger to others.

The value of being able to act on one’s preferences without external coercion stems partly from the satisfaction that this produces. However, it is plausible that it is also intrinsically valuable. To support the claim that liberty could have this intrinsic value even if we lack “free will” in the retributive sense, let us return to the example of an individual who is not responsible in the retributive sense due to severe learning disabilities. Such an individual may nevertheless be able to carry out some self-directed, independent activities—activities that involve exercising liberty. Even if the person would be equally content to lead a more passive life, dependent on others and governed by others’ decisions (and even if it were guaranteed that others’ support could be relied on) it seems plausible that it would be worthwhile for the individual to adopt the life-style that involves more liberty.

3.2 Evidence of dangerousness should be individualized

Another non-retributive reason in favor of the *actus reus* requirement is the idea that predictions of dangerousness that do not rely on past offending behavior are not sufficiently individualized. If these predictions do not rely on the particular individual’s own behavior,

then they must rely more heavily on statistical generalizations.⁴ Locking people up on the basis of such generalizations seems intuitively objectionable.

It might be objected that this intuition about the importance of individualized evidence really stems from negative retributivism—the idea that we must not punish those who are not morally blameworthy. However, in response, it should be noted that imposing negative consequences on someone based on statistical generalizations is typically regarded as unfair, even in contexts where retributive responsibility is not relevant. For example, imagine that there were evidence that, on average, women had significantly lower spatial abilities than men. Spatial abilities are important for certain professions, e.g. being a pilot. It would be unfair to apply a blanket rule that women could not be pilots or to automatically give preference to male candidates. This is because each individual should have the opportunity to prove through his/her own performance whether that individual has the ability to do the job. This principle of fairness does not stem from retributivism. Assuming that spatial abilities are determined by one's genes and/or environment, people are not retributively praiseworthy or blameworthy for having or failing to have good spatial abilities. By analogy, therefore, it could be argued that fairness requires that each individual should be given the opportunity to prove through his/her own actions whether that individual is non-dangerous and this principle applies independently of retributivism.

3.3 Fair warning

A third non-retributive reason in favor of the actus reus requirement is that this requirement gives people advance notice of when they would be liable to interference by the criminal justice system. Individuals will know that they will be immune from such interference, unless they perform certain prohibited actions. Giving people fair warning will reduced people's

⁴ The idea that past behavior is a good predictor of future behavior also relies partly on a statistical generalization, but it is more individualized than other methods of predicting dangerousness that do not appeal to the particular individual's past behavior.

fear of the state and will increase people's ability to plan their lives. It will thus help to promote the general welfare.

4. The Mens Rea Requirement

Currently, the prosecution must prove *mens rea*—a mental state such as intention or recklessness (unless the crime is one of strict liability). According to negative retributivism, the mens rea requirement is based on the principle that a person should only be punished if she were morally blameworthy for committing a crime. If retributivism were abandoned, what reason would there be against simply detaining anyone who performs a prohibited act, regardless of the person's mental state? In this section, I will consider three non-retributive reasons for the *mens rea* requirement. Two of these reasons, liberty and fair warning were also advanced in support of the actus reus requirement (see above). The third reason is the value of moral education.

4.1 Liberty

H.L.A. Hart argued that the mens rea requirement should be preserved in order to safeguard individuals' liberty. More people would actually be detained if the mens rea requirement were abandoned. Hart writes: "if we are... to be liable if we [perform a prohibited act] by accident, by mistake... etc., the chances that we shall incur the sanctions are immeasurably increased." In order to avoid being subjected to sanctions, people might also refrain from engaging in various legitimate, valuable activities, if they believed there was a risk that they might *accidentally* breach a prohibition while engaging in these activities. Deterring people from engaging in these activities in the first place would also constitute an interference with liberty.

4.2 Fair Warning

Hart also argued that the mens rea requirement should be preserved, because individuals will be better able to predict when they will be subject to legal sanctions than they would be if

they could be detained simply because they had performed a prohibited action. If an individual cannot predict when she will be subjected to state sanctions, she will live in a permanent state of fear and it will be difficult for her to plan her activities.

4.3 Moral Communication

Convicting someone can be an important act of moral communication, even if the message being communicated is not a retributive one. It is a public declaration that the offender has committed a criminal offence. This also typically involves declaring that the offender committed a serious moral wrong, since the offence-definition typically specifies a serious moral wrong. Free will skeptics have argued at length that actions can be morally right or wrong, even if we are not morally responsible in the retributive sense.⁵ Declaring that the offender committed a serious moral wrong can serve forward-looking purposes. It allows society to express and reinforce their commitment to the values that have been breached, it helps the community to develop its understanding of those values and it can help criminals to reform, by bringing them to recognize the wrong that they have done. This third function of moral communication could only be fulfilled if the accused had *mens rea* at the time of the crime. If the *actus reus* were performed by accident then attempts to reform the offender would be unnecessary.

There is very widespread agreement about the appropriateness of *morally appraising* the conduct of offenders, even among those who argue that offenders are not *morally responsible* in the retributive sense. Pereboom, who is at the most skeptical extreme of the spectrum of views on free will, claims that the arguments against free will (while undermining retributivism) give us no reason to doubt our right to morally criticize wrongdoers' conduct. Free will skeptics accept the legitimacy of engaging the wrongdoer in dialogue about the moral quality of his actions and about his reasons for performing them;

⁵ This chapter will assume that they are correct, but there is not scope within this chapter to defend this claim.

evaluating what these actions reveal about his attitudes or character traits; and demanding that he engages in self-reflection and apologizes for his behavior. Pereboom writes:

The moral responsibility invoked here has been called the *moral answerability* or *the fittingness of providing a moral explanation* sense, and it is the variety of moral responsibility that is most thoroughly ingrained in our practice and least controversial... It may well characterize human interactions across cultures... The main thread of the historical free will debate does not pose determinism as a challenge to moral responsibility as answerability, and free will skeptics accept that we are morally responsible in this sense. (2013: 51)⁶

Free will skeptics would object to the practice of condemning or punishing offenders purely in order to make them experience psychological suffering. However, moral-appraisability serves forward-looking goals (such as helping the offender to develop more morally desirable character traits) that could be endorsed by free will skeptics. Some free will skeptics have doubted whether these goals are weighty enough to justify state coercion, on their own (Tadros 2011). Free will skeptics tend to justify the state coercion of offenders by referring to the need to protect society from dangerous individuals. Nevertheless, even if the reason *why* offenders should be subject to coercion is based on the need to protect society from dangerous offenders, free will skeptics can still consistently maintain that *the way in which* offenders are subject to state coercion should communicate a message about the offender's moral answerability. The mens rea requirement is necessary in order to ensure that this message is communicated accurately.

⁶ Pereboom recognizes that his conception of moral answerability cannot justify the "hard treatment" aspect of punishment, without relying on retributive ideas that he rejects. In line with his incapacitation theory, Pereboom proposes that non-dangerous criminals should be allowed to go free, but he does not say whether, in his view, they should be acquitted. Indeed he does not mention how we are to determine whether an individual is a "criminal"—through a trial or through some other procedure. It is submitted that in most cases the forward-looking benefits that can flow from morally appraising offenders at the conviction stage, justify convicting offenders who have committed serious moral wrongs, even if they are not dangerous. This conclusion seems to be consistent with Pereboom's overall position.

5. Defenses

The next part of this paper focuses specifically on the defenses of self-defense, provocation and mental disorder. It argues that these defenses could be retained even if we abandoned the traditional notions of free will and retribution. It also considers whether these defenses or their underlying rationale, would need to be revised. This paper focuses on the defenses of provocation, self-defense and mental disorder as they are defined in Scotland and England.

5.1 Provocation

Provocation is a partial defense to murder. In Scotland, the defense of provocation has the following requirements.⁷ Firstly, there must be a recognized form of provocation – either provocation by assault or provocation by infidelity. Secondly, the accused must have a loss of self-control. Thirdly, for provocation by assault the violence used by the accused must not have been grossly disproportionate to the provocation. For provocation by infidelity an ordinary person must have been liable to react in the same way.

In England, the defense of “loss of control” is roughly equivalent to the provocation defense in Scotland. It has the following requirements.⁸ Firstly, there must have been a loss of self-control. Secondly, that loss of self-control must have had a qualifying trigger, which includes either a) circumstances of an extremely grave character, which caused the defendant to have a justifiable sense of being seriously wronged, or b) fear of serious violence from the victim. Thirdly, the accused must have satisfied the ordinary person test—a person of same age and sex with normal self-restraint and tolerance might have reacted that way in those circumstances.

According to the currently accepted rationale for the provocation defense, the person who kills in response to provocation is partially *excused*, but in order for the defense to

⁷ *Drury v HMA* 2001 S.L.T. 1013

⁸ Coroners and Justice Act 2009, s54

succeed the anger that motivated the killing must have been *justified*. If free will skepticism is correct then is anger in response to someone's provocative behavior ever truly justified? Anger in the sense of "retributive outrage" could not be justified. However, other similar emotional states could be. If, for instance, a person is physically attacked, it is appropriate for the person to feel very upset (and to experience a different kind of negative emotion than the person might feel if she were hurt by a non-moral being e.g. an animal). In addition, it would be appropriate to feel a sense of repulsion at the moral "defect" that led to the attacker's action, even if that defect was not something for which the attacker was retributively responsible. It is also appropriate to feel a strong sense of disapproval that a moral wrong has been committed. (I have assumed that the concepts of moral *right* and *wrong* are compatible with determinism, even though the concept of moral responsibility construed in the retributive sense is not.) The provocation defense should require that the above types of emotion are justified, but not that retributive anger is justified.

This approach might have the additional advantage of reducing the risk that the provocation defense is seen as blaming the victim. Retributive anger is only appropriate if the victim is blameworthy. So saying that the provoked person's anger is justified implies that the victim deserved blame. However, the negative emotions that are justifiable on the free will skeptic's view do not imply that the victim was retributively blameworthy.

A non-retributive provocation defense would not entail that offenders should be excused merely because their offence was due to the effect of intense emotions, because it would still be necessary that the circumstances warranted a strong emotional reaction of the kind described above.

5.2 Self-Defense

Self-defense is a complete defense. It has three requirements in Scotland. There must have been an imminent danger to life or limb, no reasonable opportunity to retreat and the

accused's reaction must be proportionate.⁹ In England, self-defense has the following requirements.¹⁰ The defendant must have believed the victim posed an unjustified threat to the defendant himself or another or property. The use of force must be necessary. The degree of force must be reasonable (proportionality). The defendant must have acted in order to prevent the victim's attack.

Self-defense theorists are divided over whether it is ever permissible for an attacked person to harm/kill an "innocent aggressor." An aggressor may be considered innocent if, for instance, he was psychotic, and therefore not morally responsible at the time of the attack. Many theorists maintain that the self-defense justification should cover both innocent and responsible offenders alike. However, a few argue that harming/ killing an innocent aggressor is never justified, although it may sometimes be excusable. A third, "compromise" view holds that harming/killing an innocent aggressor is only justified under much more restrictive circumstances than when the aggressor is morally responsible.

Self-defense theorists who consider the "innocence" or "culpability" of the aggressor to be morally relevant, often appeal to the following considerations. They may argue that innocent aggressors had the *bad luck*, to be subject to circumstances *outwith their control* which *caused* them to attack. They may argue that we should therefore have particular *compassion* for innocent aggressors, which should be reflected in the legal definition of self-defense. In contrast, the culpable aggressor *chose* to initiate the attack. It may be argued that it is therefore justifiable to use harmful or lethal force against the culpable aggressor, because his moral guilt entails that his interests are now less valuable than the interests of the attacked person, or because the culpable aggressor "forfeited" his right to life/bodily integrity as a result of his immoral actions.

⁹ HMA v Doherty 1954 J.C. 1

¹⁰ Northern Ireland's Reference (No.1 of 1975)

This type of account has a distinctively retributive flavor.¹¹ Its judgment about the culpable aggressor is strongly reminiscent of P.F. Strawson's description of the attitude of retributive indignation—an attitude which entails a “partial withdrawal of goodwill” towards the wrongdoer and which entails a “modification...of the general demand that another should, if possible, be spared suffering” (1962: 187). The free will skeptic could not endorse this type of reasoning, but would insist that *all* aggressors are ultimately victims of bad luck, even if the aggressor's behavior flowed from his ‘choice’ to do wrong. For that choice was either completely determined by factors wholly outwith the aggressor's control, or else it was due to a random occurrence for which the aggressor was not responsible.

Would a free will skeptic's theory of self-defense treat all aggressors equally, regardless of whether their attack was the product of psychosis or a rational choice? Not necessarily. A free will skeptic might distinguish between these different types of aggressor *if* there were non-retributive (e.g. consequentialist) reasons for doing so. However, this distinction must not be based on the idea that one type of aggressor is merely unlucky and so worthy of special legal protection, whereas another type is undeserving of compassion and legal protection, purely because of the nature of his act of aggression.

If all aggressors are unlucky, does this mean that killing/harming an aggressor in self-defense is only ever excusable and never justified? Free will skepticism does not necessarily entail this conclusion either. Many self-defense theorists argue that self-defense can be a justification regardless of whether the aggressor's behavior was the result of circumstances outwith his control. This position accords with widespread intuitions. “Common sense” seems to tell us that (all other things being equal) people are entitled to defend themselves against an attack which poses an immediate threat of significant physical harm or death,

¹¹It is, however, not *exactly* the same as the retributive justification for punishment. Even theorists who place a lot of weight on the aggressor's “guilt” still accept that the use of self-defensive force against an aggressor is justified in order to *prevent* harm to the attacked person, not in order to *punish* the aggressor for his attack.

regardless of whether the attacker made himself into the kind of person who would attack people, or was just unlucky to have turned out that way. It seems absurd to suggest that, when faced with an aggressor who is in some sense “innocent,”¹² attacked people have a “duty of martyrdom” and should meekly submit to the attack, rather than harm the aggressor (Kaufman 2010).

However, the free will skeptic’s arguments should make us reconsider what precisely is meant by saying that self-defense is a *justification* of defense. On a “modest” interpretation, saying that it is justified to use force to defend oneself, means that it is morally and legally *permissible* to use force; that, all things considered, the use of force is acceptable. Theorists who adopt this interpretation often emphasize that harming/killing someone is always regrettable, but that in extreme circumstances it can be the least bad option. In contrast, Boaz Sangero argues that self-defense should be portrayed as a “real and strong” justification. He writes “...private defense should not be viewed as evil, and not even as the lesser evil, but as the ‘best possible good.’ It concerns a desirable action...” (Sangero 2008: 17). Having characterized self-defense in this way, Sangero then argues that it should be reserved for the killing/harming of “guilty” aggressors, and that it shows a “lack of compassion” to allow self-defense to cover the killing/harming of “innocent” aggressors, such as a children, or psychotic individuals. Now, it does indeed seem somewhat heartless to characterize harming/killing child-aggressors or psychotic-aggressors as positively “desirable,” or to appear to welcome their injury/death by calling it the “best possible good.” Nevertheless, it can still be appropriate to say that harming/killing such aggressors is “justified” in the more modest sense described above. The modest account of justification in terms of an all-things-considered judgment of permissibility better captures the moral complexity of this kind of situation than Sangero’s description of a justified action as

¹² Because, e.g., he lacked either libertarian or compatibilist free will.

something which is unequivocally “desirable.” Given the considerations advanced by the free will skeptic, it seems inappropriate to label the killing/injury of *any* aggressor as justified in Sangero’s sense of the word. All aggressors are victims of bad luck and are entitled to compassion. Maintaining that harming/killing another in self-defense is only justified as “the lesser of two evils” acknowledges that every life is valuable and that causing death or injury is always a terrible thing (even when justified).

5.3. *Mental Disorder*

The forward-looking approach to dealing with criminal behavior which is outlined in this paper provides a method for determining the scope of mental disorder defenses. The state should aim (among other things) to communicate to offenders that that they have committed a serious wrong, to make clear the reasons why the behavior was wrong and to enter into dialogue with the offender with the aim of reforming him. This suggests that offenders who are incapable of engaging in genuine dialogue or undergoing reform, should not be held responsible. Other theories of punishment often leave the question of the scope of mental disorder defenses largely down to intuition. E.g. some people have the intuition that an offender *deserves* punishment just as long as he *knew* that his behavior was wrong in the sense of being aware what the legal or moral rules are, without any depth of understanding. Others have the intuition that a person is only retributively blameworthy if he knew the difference between right and wrong in a deeper sense. A forward-looking communication theory can help to settle this dispute, by interpreting “knowledge” in terms of the ability to undergo moral dialogue. This is not an advantage that is *unique* to a hard-incompatibilist communication theory. Duff’s retributive communication theory, for instance, also has this advantage (Duff 2001). Nevertheless it is still a merit of the approach advanced in this paper.

6. Conclusion

Even if the notions of free will and retributive responsibility were abandoned then the mens rea and actus reus requirements and various defenses could be still be retained. However, some of these legal rules, as well as the rationale behind them, would need to be revised.

References

Bradley, M. C. (1966). A note on Mr. MacIntyre's *Determinism*. In B. Berofsky, ed., *Free Will and Determinism*. New York: Harper and Row.

Callender, J. (2010). *Free Will and Responsibility: A Guide for Practitioners*. New York: Oxford University Press.

Dennett, D. (1982). Mechanism and responsibility. In G. Watson, ed., *Free Will: Oxford Readings in Philosophy*. New York: Oxford University Press.

Double, R. (2002). Metaethics, metaphilosophy and free will subjectivism. In R. Kane, ed., *The Oxford Handbook of Free Will*. New York: Oxford University Press.

Duff, R. A. (2001). *Punishment, Communication and Community*. New York: Oxford University Press.

Greene, J., and J. Cohen. (2004). For the law, neuroscience changes nothing and everything. *Philosophical Transactions of the Royal Society*, 359: 1775–1785.

Hart, H. L. A. (1968). *Punishment and Responsibility*. Oxford: Clarendon Press.

Honderich, T. (1984). *Punishment: The Supposed Justifications*. Pluto Press.

Honderich, T. (2002). *How Free Are You? The Determinism Problem*, 2nd ed. Oxford: Oxford University Press.

Kaufman, W. (2010). Self-defense, innocent aggressors and the duty of martyrdom. *Pacific Philosophical Quarterly*, 91(1): 78-96.

Mackie, J. L. (1982). Morality and the retributive emotions. *Criminal Justice Ethics*, 1(1): 3-10.

Moore, M. (1997). *Placing Blame: A Theory of Criminal Law*. New York: Oxford University Press.

Pereboom, D. (2002). Living without free will: The case for hard incompatibilism. In R. Kane, ed., *The Oxford Handbook of Free Will*. New York: Oxford University Press.

Pereboom, D. (2006). Reasons-responsiveness, alternative possibilities, and manipulation arguments against compatibilism: Reflections on John Martin Fischer's *My Way*. *Philosophical Books*, 47(3): 198-212.

Pereboom, D. (2013). Free will skepticism and criminal punishment. In T. Nadelhoffer, ed., *The Future of Punishment*, pp. 49-78. New York: Oxford University Press.

Sangero, B. (2008). In defense of *Self-Defence in Criminal Law*; and on *Killing in Self-Defence* A reply to Fiona Leverick. *Criminal Law Bulletin*, 44(6): 1-34.

Strawson, G. (2002). The bounds of freedom. In R. Kane, ed., *The Oxford Handbook of Free Will*. New York: Oxford University Press.

Strawson, P. F. (1962). Freedom and resentment. *Proceedings of the British Academy*, 48: 1-25.

Swinburne, R. (2004). *The Existence of God*, 2nd ed. Oxford: Clarendon Press.

Tadros, V. (2011). *The Ends of Harm: The Moral Foundations of the Criminal Law*. New York: Oxford University Press.