

Friedrich Toepel (ed.)

Free Will in Criminal Law and Procedure

Proceedings of the 23rd and 24th IVR World Congress
Kraków 2007 and Beijing 2009



ARSP Beiheft Nr. 120

Archiv für Rechts- und Sozialphilosophie

Franz Steiner Verlag



Nomos

Free Will in Criminal Law and Procedure

ARSP BEIHEFT 120

Archiv für Rechts- und Sozialphilosophie

Archives for Philosophy of Law
and Social Philosophy

Archives de Philosophie du Droit
et de Philosophie Sociale

Archivo de Filosofía Jurídica y Social

Friedrich Toepel (ed.)

Free Will in Criminal Law and Procedure

Proceedings of the 23rd and 24th IVR World Congress
Kraków 2007 and Beijing 2009



Franz Steiner Verlag Stuttgart 2010



Nomos

Bibliografische Information der Deutschen Nationalbibliothek:
Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

ISBN 978-3-515-09320-0

Zugleich: 978-3-8329-5499-4

Jede Verwertung des Werkes außerhalb der Grenzen des Urheberrechtsgesetzes ist unzulässig und strafbar. Dies gilt insbesondere für Übersetzung, Nachdruck, Mikroverfilmung oder vergleichbare Verfahren sowie für die Speicherung in Datenverarbeitungsanlagen.
© 2010 Franz Steiner Verlag, Stuttgart
Gedruckt auf alterungsbeständigem Papier
Druck: Druckhaus Nomos, Sinzheim
Printed in Germany

CONTENT

I. Is Free Will an Incoherent Notion?

(Proceedings of the 23rd IVR World Congress Kraków 2007)

Friedrich Toepel, Bonn

Preface..... 9

Ronald Allen, Chicago

Introduction 11

David Hodgson, Sydney

In Defence of Voluntariness..... 15

John Montgomery, Strasbourg

The Freewill Issue in Theological Perspective 23

Friedrich Toepel, Bonn

Free Will and Infinite Regress..... 29

Allan McCay, Sydney

Bad Luck and Compatibilism; Smilansky's Concerns about the
„Shallowness of Compatibilism“ 39

Juan Pablo Mañalich, Santiago (Chile)

Determinism, Free Will and Criminal Responsibility 49

Ronald Allen, Chicago

Replies..... 63

II. The Connection between Punishment, Retribution and Free Will

(Proceedings of the 24th IVR World Congress Beijing 2009)

Friedrich Toepel, Bonn

Preface..... 71

Angus Menuge, Mequon (Wisconsin)

Does Neuroscience Undermine Retributive Justice? 73

John Montgomery, Strasbourg

Some Remarks on Punishment and Free Will in Legal Theory and Classical
Christian Theology..... 95

Friedrich Toepel, Bonn

Free Will and Alternative Possibilities..... 101

Mateusz Klinowski, Kraków

What can Logic of Action Tell Us About Responsibility and Free Will? 115

I. IS FREE WILL AN INCOHERENT NOTION?

(PROCEEDINGS OF THE 23RD IVR WORLD CONGRESS KRAKÓW 2007)

PREFACE

Perhaps as a result of my background in the Continental legal tradition, for a long time I avoided writing about free will and in this respect shared the attitude of many German legal scholars. In the discourse that I was most familiar with, there seemed to be two groups of opinions separated by an impenetrable wall, the practically thinking die-hards who always presuppose free will no matter how strong the evidence is against them and the allegedly more enlightened thinkers who reject free will on account of the psychological evidence or at least allow for the possibility that there is no free will. If members of the two groups meet, their discussion typically takes the following form: Those who call free will into doubt focus on statements of psychologists and results of brain-imaging studies which support their opinion, while their opponents question the reliability of the studies and point to the devastating practical effect of abandoning the presumption of free will. Such discussions are notorious for never leading to a conclusion.

Nevertheless, the idea to organize a workshop on free will emerged as I listened to Professor Ronald Allen's presentation of a paper at Northwestern University School of Law on the occasion of the 100th anniversary of the Northwestern Law Review.¹ Discussing the notion of free will in the context of Miranda rights, he presented an argument that free will is not only a concept to be avoided because of insufficient scientific evidence in favour of its support, but that we actually have no clear idea what we are talking about when using the term – that free will is an incoherent notion. Professor Allen is not alone with this opinion. Renowned philosophers like Galen Strawson² have developed a similar argument and his arguments have been favourably received by other philosophers including Saul Smilansky.³

Professor Allen's remarks completely altered my view of the free will problem because here at last was a question that could and should be answered, namely whether the term free will can be explicated in a coherent manner. Incoherent terms should not be tolerated in law, much less serve as an important criterion in making legal decisions because there is always the possibility that the public will one day discover this incoherence, and that will substantially undermine trust in the legal system. Further, the problem of incoherence is not much discussed by legal scholars. I am not aware of any Continental works on this topic and therefore I feel that here is a substantial amount of work to do in this area. At the same time, examining the coherence of the term would bring in much of the complicated debate related to the classical problem of whether it is reasonable to accept free will given the empirical evidence at our disposal. It would not be sufficient to prove that there is a coherent shallow notion of free will which would be totally irrelevant for the law. Rather, it is vital to examine whether a coherent notion can be found which is deep enough to meet the needs of the legal system. If this is not possible, we have to look for a substitute, which in turn could require structural alterations to the legal system.

1 Ronald J. Allen, *Miranda's Hollow Core*, *Northwestern University Law Review* 100 (1) (2006), 71–85

2 Galen Strawson, *Freedom and Belief*, 1998, 58

3 Saul Smilansky, *Free Will and Illusion*, 2000, 65–67

Thus the same options have to be taken into consideration as when discussing the classical problem of whether free will should be accepted given the empirical evidence at our disposal. We can accept the possibility of a classical libertarian variant of free will, we can reject such a notion as unattainable because of its incoherence and rest content with a more shallow notion which is compatible with determinism (compatibilism), or we can reject free will altogether and accept a hard determinist view. A fruitless empirical discussion in this way could be turned into a fruitful conceptual discussion.

After I had talked over the matter with Professor Allen, he encouraged me to organize a workshop on the conceptual problem of free will at the IVR World Congress in Kraków in 2007. I felt it would be good to let a historian participate in the discussion because he could enlighten us on how free will was used at crucial points in history, but I wondered where I could find the right person. When I visited Professor John Warwick Montgomery in Strasbourg, it occurred to me that what was actually needed for such a debate was a theologian rather than a historian because the free will problem received its most intense discussion during the Period of the Reformation. Professor Montgomery is not only a professor of law but also a well-known theologian – a rare combination. I need only add that after I had talked to him about the incoherence question and he, independently from Professor Allen, suggested that we should have a workshop on the topic, I proceeded to put my plan into practice.

We were fortunate to be joined by Justice David Hodgson from the Supreme Court of New South Wales who in a book⁴ and numerous distinctive articles (among them a contribution to the *Oxford Handbook of Free Will*)⁵ has become a prominent contributor to the free will debate by developing a libertarian view of free will which he also defends in the present volume. We further received two interesting contributions by representatives of the younger generation, Allan McCay from Sydney University who is writing his Ph.D. thesis on the subject and Juan Pablo Mañalich from the University of Santiago de Chile who is staying at Bonn University as a Humboldt grantee at the moment. McCay explored a crucial point made by Saul Smilansky, luck's undermining effect on moral responsibility which becomes relevant when considering the views of those who see free will as compatible with determinism. Mañalich undertook to show that a compatibilist background is sufficient as a basis of modern criminal responsibility.

My impression is that the diversity of standpoints among the participants of our workshop ensured lively presentations of the problem so that no important aspect of the conceptual discussion has been left out.

Bonn, August 2008

Friedrich Toepel

4 David Hodgson, *The Mind Matters*, 1991

5 David Hodgson, 'Quantum Physics, Consciousness and Free Will', in *The Oxford Handbook of Free Will*, ed. R. Kane, 2002, 85–110

RONALD J. ALLEN, CHICAGO¹

INTRODUCTION

It is both a great honor and a deep pleasure to be introducing this symposium on free will and the criminal law. My papers on the intersection of free will and certain aspects of American criminal procedure seem to have been the rough grain of sand that helped precipitate the pearls that are to follow, and it is a great honor indeed to have the members of such a distinguished and insightful panel be motivated at least in some small way by them. It is also a very deep pleasure because it allows me to express my thanks to and admiration for Friedrich Toepel, who organized this event. I and my colleagues were blessed with his presence at Northwestern as a Fulbright scholar. It was conversations during that time about my and his work that led in part to his organizing this symposium. The enthusiasm and energy represented by this effort gives one a small flavor of the enormously positive influence that he is on those around him. We cherished his time at Northwestern and very much look forward to welcoming him back, hopefully in the not-too-distance future.

It is my task here briefly to lay on the problem that brought the commentators together, and in a phrase that problem is free will. Although my work may have been the occasion for the papers that follow, in one sense that is ironic. Free will is normally thought of as philosophical problem, which of course it is, but it also has enormous, if oft-neglected, practical consequences. The articles below are largely philosophical in their approach, but I am not even an amateur philosopher. I am a scientist interested in understanding legal phenomena, and thus I am more interested in the practical consequences of the concept or entity than I am in the rich philosophical discourse it has generated. I mention this point because I was writing about free will only in passing. The object of my inquiry was instead the famous American case of *Miranda v. Arizona*.²

Miranda is not only a famous American case; it is also one of the most controversial cases ever decided by the United States Supreme Court, ranking with such cases as *Dred Scott v. Sandford*,³ *Plessy v. Ferguson*,⁴ and *Roe v. Wade*.⁵ Indeed, it is not much of an overstatement to say that a substantial portion of Presidential politics in the U.S. over the last thirty years has been driven by the effort of one part of the political spectrum to overrule and another to preserve *Miranda* and *Roe v. Wade*. That is also, however, not what interests me particularly. What interests me, and what I set out to explain, is why the case has largely been failure. When *Miranda* was first decided, there was a sense of crisis in American law enforcement because of the fear that the case augured the end of confessions, and confessions, like it or not, are a critically important component in efficient and effective law enforcement. A surprising thing happened on the way to the Forum, however, which was – not very

1 John Henry Wigmore Professor, Northwestern University School of Law.

2 384 U.S. 486 (1966)

3 60 U.S. 393 (1856)

4 163 U.S. 537 (1896)

5 410 U.S. 113 (1973)