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Social theory and the significance of free will in our system of criminal justice

Rob Schwitters

Introduction

Free will is a key assumption of our system of criminal justice. This implies that a violation of a legally protected behavioral norm should not automatically lead to conviction and punishment: the offender must have the opportunity to maintain that there were excusing conditions explaining the violation of the norm. Free will refers to the idea that citizens must have the opportunity to plan their life within the framework of law.¹

However, the assumption of a free will is questioned by the rapidly growing empirical findings of neurological and brain sciences. These indicate that human behavior is driven by subconscious forces beyond free will. Brain and neuroscientists such as Lamme, Swaab and Wegner, draw far-reaching conclusions concerning free will (that it is an illusion.)² Many sharing the hard determinist conclusion that free will does not exist, maintain, along with for instance Lamme, that this will have serious implications for our system of criminal justice. However, others uphold the view that merely minor transformations are required. According to them, hard determinism can be incorporated in the system.³ Our prevailing practices of punishment can to a great extent be continued. We merely have to replace a retributivist rationale of punishment with a consequentialist (utilitarian) rationale.⁴ If punishment is seen as an instrument to induce actors to obey the law, the entire question of free will can be ignored.

The denial of free will has met a lot of resistance within the legal domain.⁵ The common denominator being that free will is a necessary postulate of our criminal justice system, and that its elimination would undermine the underpinning of punishment. In this text I aim to show how social theory might contribute to this debate. Social theorists tend to have a strong affinity with deterministic explanations. Marx, for instance, explained culture, political convictions etc. in terms of socio-economic relations. Durkheim's explorations of patterns of suicide are often referred to as an indication of how even the most individual decisions are in fact the product of social conditions such as the varying social cohesion among

1 Hart 2008, p. 29-54.

2 Dick Swaab, *We are our brains, from the womb to alzheimer's* (2014); idem, *Ons creatieve brein* (2016); Victor Lamme, *De vrije wil bestaat niet, Over wie er echt de baas is in het brein* (2012); Libet et al.. (1979); Wegner (2002).

3 For instance, Morse 2007.

4 Greene & Cohen 2004.

5 See, for instance, Buruma 2013; De Jong 2013.

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groups with different religious identities. The notorious studies of the social psychologists Milgram (test persons obeying the instructions of superiors to administer electric shocks to others) and Zimbardo (*The Stanford Prison experiments*) also indicate how strong the impact of situational factors is on the behavior of individuals. Normal people can turn into monsters when they are placed in evil circumstances.

However, what I want to show in this text is that social theory does not automatically side with the deterministic attacks on free will. The denial of free will is to a great extent based on a flawed interpretation of free will in which it is seen as a capacity of separate individuals. I will suggest that it is the sociological realization that free will is embedded in inter-subjective relations that helps to clarify which value is at stake when we deny free will.

Free will presumes social practices and social relations that facilitate moral and political discourse. As long as human actors have the capacity to evaluate these practices and contexts in moral and political terms, we cannot deny them a free will. My argumentation will build on the theories of Peter Strawson, Anthony Giddens and Jürgen Habermas. Although Strawson is a philosopher, his approach is based on unmistakably social theoretical assumptions because it is based on observations of human behavior. Giddens' approach is pre-eminently sociological. Habermas's social theory draws from both philosophy and sociology.

It is inevitable that I have to fall back on theorists who also have a philosophical background. The quick and unsound philosophical conclusions that Swaab and Lamme derive from their empirical findings indicate that philosophical insights cannot be ignored. I will therefore start with an examination of Wittgenstein's ideas concerning conceptual puzzles. He sees these puzzles as the consequence of an insufficient awareness of the fact that the meaning of concepts is tied to social contexts. This observation is highly relevant to the free will-determinism debate.

The key assumption of my text will be that free will and determinism are the outcomes of social practices and social contexts. In my exploration of this assumption, I will further follow the thoughts of Giddens and Habermas. In Habermas's theory, one finds a deep awareness that free will is related to basic structures of our societies. Like Giddens, I will emphasize that human actors reflexively incorporate scientific insights. I recognize this in Grace's suggestion that the criminal justice system should be grounded in a rationale of restorative justice. By including friends, family and teachers in the criminal procedure, determining factors are given a face and are flexibly integrated in a procedure of dispute settlement that leaves free will intact.

Hard determinism and punishment

Do human beings have a free will, or is human conduct determined by causal factors that operate beyond their conscious will-decisions? The empirical findings of

brain and neuroscientists seem to lead unequivocally to one conclusion: free will is an illusion. Scanning of the brain indicates that human actors' decisions are first taken at a subconscious level and are only afterwards experienced as a conscious decision.⁶

Not all physical scientists regard these empirical findings as undermining free will. The neuroscientist Gazzinga for instance, maintains that causal explanations can be reconciled with free will, presuming that they belong to different categories of thought.⁷ But there are several brain and neuroscientists who derive more radical conclusions from their empirical findings and defend the hard determinist position that free will is an illusion.⁸ In the Netherlands, for instance, Lamme and Swaab deny the existence of free will.⁹ Lamme even sees mental concepts as intentions, reasons and justifications merely as retrospective rationalizations of conduct, as made-up stories.¹⁰ These attacks on free will have a wide audience, and the free will/determinism debate is a prominent theme at numerous seminars and in numerous publications.¹¹

The observation regarding the relevance of subconscious forces evokes the ambition to explain human conduct fully in terms of forces situated in the brain. It is often built on the assumption that the more we can observe the causal forces determining human behavior, the less we will tend to presume that there is such a thing as free will.¹² We will find out that there is no uncaused causer, an entity outside the matrix of causal forces that ultimately determines human conduct. According to determinists, free will is based on the unsound presumption that if I were to change position with someone repeatedly committing violent acts, and have the same genes and upbringing, I would still have the capacity to resist forces inducing problematic behavior.¹³ It is this conviction that justifies our blaming and punishing of the offender.

I will not defend this conception of free will, which I consider to be flawed. Free will is not a capacity in the brain of a separate individual. To deny the existence of such a free will does not mean that there is no place for an alternative conception of free will. This conception of free will ties it to the reciprocal relations between human beings: free will needs at least two parties!

6 E.g. Libet et al. 1979.

7 Gazzinga 2005.

8 Wegner 2002.

9 Swaab 2014; Lamme 2012.

10 Lamme 2012.

11 To mention some events and publications in the Netherlands: Seminar 11 March 2016 Haarlem, "*Bestaat de vrije wil*" with introductions by Daniel Dennett, Victor Lamme and Dick Swaab; 'Neurologie in Nederland, De betekenis van de neurowetenschappen voor ons recht' *NJB, Special Issue*, 88 45 (20 December 2013, "Vrije wil en verantwoordelijkheid", *Special Issue Justitiële Verkenningen*, 39 1 (2013).

12 Greene & Cohen 2004.

13 Harris 2012.

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Free will and our system of criminal justice

Free will is one of the key postulates of our system of criminal justice. It is a requirement of punishment that the offender could have helped doing what he did.¹⁴ This relevance of free will is embedded in principles such as legality, *nulla poena* and no punishment without fault. Citizens may only be punished when they could have acted otherwise. This implies that they have recourse to excusing conditions.

The excusing conditions embodied by the *mens rea* or the dimension of culpability (generally referred to as the subjective dimension) can be categorized as follows:

The first category refers to knowledge: an actor is not liable to punishment if at the time of violating the law he was not aware of, or was mistaken about the consequences of his actions, or was unaware of the facts. For instance, a customer in a toyshop picks up a gun, thinking it is a toy, and fires it. In fact it is a real gun, left there by a third person, someone playing a dirty trick. A lack of knowledge may be seen as an excusing factor in this case.

The second category of excusing conditions refers to the capacity to form or follow your own will. Did the accused have the capacity to determine his will, and did he have the opportunity to follow his will? Two subcategories of excuses can be distinguished: not being capable of complying with the law may be attributed to internal factors such as age or mental disorder. But it may also be the consequence of external factors such as coercion, provocation and duress.

If an individual breaks the law when none of the excusing conditions can be invoked, he is ordinarily presumed to have acted of his own free will (voluntarily). It is assumed that he could have helped doing what he did. According to Hart, excuses play an important role in criminal law because they enable citizens to plan their lives within the framework that the law offers. If they cannot be presumed to have had the opportunity to comply with the law, they should not be punished.

In deterministic accounts notions such as mental disorder and external constraints are dispensable notions, because all human conduct is seen as the inevitable outcome of causal forces. The assessment that human conduct is determined leads to the generalizing conclusion that free will is an illusion. However, Wittgenstein questions whether these generalizing applications of concepts are allowed.

A philosophical caveat (Wittgenstein)

Wittgenstein's later work is deeply affected by a sociological awareness that the meaning of concepts depends on their use in particular social contexts. It makes no sense to generalize concepts such as "self-interested conduct," "power," and

14 Hart 2008, p. 29-54.

“free will,” and to assess their meaning by referring to an essence which can be recognized in the application of the concept in all various circumstances. Wittgenstein maintains that the meaning of concepts is tied to contexts, and that they do not share an essence; their unity is based on family resemblances. This means that they are connected by a series of overlapping similarities, where no feature is shared by all.¹⁵

This absence of an essence applies in particular for complex concepts such as “free will” and “determinism,” which are used in a wide variety of contexts. In the criminal justice system, a rejection of free will may lead to mitigation or waiving of punishment. However, in deterministic accounts of historic transformations, the issue of responsibility and punishment is completely irrelevant. Then, the context is not moral dialogue but the detached perspective of a third person.

In the context of daily life, whether behavior can be attributed to free will or not generally depends on whether one is accountable for one’s behavior (*performative dimension*).¹⁶ This implies that the assessment of free will or determinism is not just a label, a neutral observation, but also the outcome of moral evaluations. It is a signal indicating how the actor should be dealt with, whether he or she should be punished or not. Individuals will receive fewer negative responses if they lose their job because of an economic recession as opposed to lack of discipline. This normative connotation of free will implies that the identification of actions and the discussion of them is never the same as identifying physical events. It always entails commitments and responsibilities; it always involves taking a position. In other words, determinism and free will do not merely refer to empirical descriptions of events, they also have a performative dimension.¹⁷

A common feature of the concept of free will generally is that actors could have acted otherwise.¹⁸ However, whether actors can be presumed to have that opportunity cannot be determined by generalizing an answer that goes beyond concrete situations and contexts. If you ask a friend to go to the cinema, and he responds with, “I won’t because I prefer to go to the theatre with my partner,” we see his behavior as the outcome of a free decision. However, if he says that he is not able to join you because he has to take care of his ill child, then we tend to see his behavior as influenced by external factors.¹⁹ His explanation is not merely an empirical observation, a label, but also a signal: “don’t blame me, there are factors beyond my will that affect me.”

15 Wittgenstein 2002. Moreover, following Wittgenstein, and inhibits the danger that others will define them. It to shape our societies. A denial of free

16 The concept “performative” (utterance) is employed in language philosophy. It refers to sentences that tend not to describe, but rather to change reality.

17 Pitkin 1973 p. 269-272. This distinction is also articulated by those who distinguish between a practical and a theoretical reason, see, for instance, Mackor 2010.

18 See, for instance, Hart 2008, p. 29-54.

19 Pitkin 1973, p. 270-271.

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Whether someone has the opportunity to act otherwise than he did depends on the interests at stake and the particular concerns. Therefore, the question of whether any action is ever really free does not fully make sense. It makes no sense to generalize about action and causation in the abstract, ignoring the multifarious meanings concepts as determinism and free will have in concrete contexts.²⁰ When we are trying to frame the determinism debate in abstract terms, we will always come up against paradoxes such as for instance indicated in the observation “it is your genes that determine whether you have a free will.” These puzzling contradictions are the consequence of the flawed ambition to generalize about determinism and free will in the abstract.

If sociology has anything to contribute to the free will/determinism debate it is the acknowledgement that free will and determinism are concepts of which the meaning is bound to particular inter-subjective practices and to contexts. If we would see human conduct exclusively as determined by forces outside the will, then this would mean giving priority to determining practices.

Strawson: The reactive and the objective attitude

Characteristic for the later Wittgenstein is his awareness that the meaning of concepts is bound to their application in various contexts. The philosopher Peter Strawson deals with the determinism/free will issue in the same vein.²¹ In “Freedom and Resentment,” which is considered to be a landmark article, he rejects absolute generalizing assumptions concerning free will or determinism and asks himself what the purpose of the presupposition of free will in our daily inter-subjective encounters is.²²

Strawson denies the two main positions that have long dominated the free will/determinism debate, what he calls, the *pessimist position* and the *optimist position*.²³ The pessimist position is based on the incompatibility of determinism and free will (*incompatibilism*), and either embraces free will by rejecting determinism (*indeterminism/libertarianism*) or acknowledges determinism and considers free will to be an illusion. The optimists claim that determinism can be reconciled with free will (*compatibilism*). Strawson rejects the pessimist position, and argues against a specific version of the optimistic position.

His objection against the pessimistic assumption of incompatibility is that it is based on a flawed definition of free will. It is based on a definition of free will in terms of a metaphysical concept of contra-causal freedom. This definition does

20 Wittgenstein 2002, par. 96

21 Strawson 1974.

22 Strawson's theory is seen as a landmark article but also widely discussed, see e.g. McKenna & Russell, 2008. I am mainly paying attention to Strawson's theory as an illustration of an inter-subjective account of responsibility and free will; I will not go deeper into the discussions his theory provoked.

23 Strawson 1974, Sections I and II.

not allow an explanation of human conduct in terms of antecedent causal conditions. According to pessimists, a deterministic account of human conduct would imply that practices of expressing moral condemnation and approval, and of punishing and rewarding, have to be seen as unjustified. An analysis of conduct in which it is seen as the result of antecedent causes stretching back in time would not allow the assumption that someone could have acted differently.

The optimists claim that determinism can be reconciled with free will, and that deterministic accounts of conduct are not fundamentally in conflict with the presumption that people could have acted otherwise. Our practices of holding people responsible do not require the idea of an uncaused causer. Strawson argues in particular against the version of the optimistic position that considers practices of holding individuals responsible to be merely matters of regulation. Threats of punishment and blame are seen as means to encourage individuals to comply with the laws and norms of society, as causally determining factors that induce actors to behave in socially desirable ways.

As stated, Strawson rejects both positions. In a Wittgensteinian vein, he refrains from approaching the free will/determinism issue along abstract theoretical lines. But he asks what the purpose of the presupposition of free will in daily life is. What consequences would the elimination of free will have? We have to discern what actually goes on when we hold a person responsible.²⁴

Strawson observes that in daily life we attach great importance to another's attitudes and intentions towards us. It matters to us whether another's actions reflect attitudes towards us of goodwill, affection, or esteem, or one of contempt, indifference, or malevolence. When another wishes to injure us we feel resentment, as we feel gratitude when another aims to benefit us. Strawson states that an essential quality of being human would be lost if these (negative and positive) emotions and qualifications were lacking. He refers to these reactions with the concept "resentment." It concerns the emotions and moral evaluations that stem necessarily from our involvement as participants in a moral community. These reactions of participants, which he labels as the *reactive attitude*, have a prevalent place in daily life. Thus a reactive attitude underpins the attribution of adverse events to free will, and practices of holding actors responsible.²⁵

The significant place of the reactive attitude in daily life does not mean that there is no place for excuses. There may be considerations that modify or mollify our feelings of resentment, or remove them altogether.²⁶ Strawson distinguishes various kinds of excuses. Some of them leave the reactive attitude intact, others undermine it and imply an *objective attitude*. The first group of excuses does not invite us to see the agent as other than a fully responsible agent. These are the excuses referring to the fact that the actor simply did it by accident, because he

24 Strawson 1974, Section III.

25 Strawson 1974, Section III.

26 Strawson 1974, Section IV.

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did not mean to, or did not know. He was ignorant of the injury he was causing, or had lost his balance because, for instance, he was pushed. Although they induce us to see the harm as something for which he was not, or not fully responsible, they do not induce us to suspend our ordinary reactive attitudes towards him.

While the first category of excuses refers to *specific circumstances* that give reason not to hold the agent responsible, the second category refers to *specific features of the agent* that are seen as excusing factors. Strawson distinguishes between temporary disturbances (such as “he wasn’t himself,” “he has been under great strain recently,”) and permanent disturbances. The first subgroup invites us to view the agent himself in a different light from that in which we should normally see one who has acted as he has acted. These do not induce us to waive our ordinary reactive attitudes towards the agent.

The second and more important subgroup of cases includes cases in which the agent is seen as permanently psychologically disordered or morally undeveloped. The agent was himself; but he is mentally distorted or just a child. When we see someone in such a light, the reactive attitude is substituted for an objective attitude. We see the agent as an object for care, medical or psychological intervention, as something to be cured, handled or managed.²⁷

The objective attitude does not include the reactive feelings and attitudes that accompany our involvement and participation with others in inter-personal relationships. It may include love or pity, but it cannot include resentment, gratitude, forgiveness, anger, or the sort of love which two adults can sometimes be said to feel for each other. If your attitude towards someone is wholly objective, you may explain his behavior, but you cannot quarrel with him, and though you may talk to him, even negotiate with him, you cannot reason with him.²⁸

The objective attitude is not reserved for our dealings with children or those suffering from a mental disorder. According to Strawson, the objective attitude is available as a resource in other cases too. We may also see the behavior of normal adults as the subject of policy, management and treatment. This may be the consequence of intellectual curiosity, but may also – and this is not articulately referred to by Strawson but may be derived from his thoughts – be seen as an artifact of a developed welfare state in which it is very common to see adverse events as the consequence of shortcomings in regulation and intervention.

Strawson emphasizes that in daily life both attitudes play a role and that actors are permanently switching between these attitudes. The question he raises is what the possible truth of the thesis of determinism would imply for these attitudes. He asserts that if deterministic causal explanations would be incorporated in daily life this would amount to the predominance of the objective attitude. Strawson’s assessment of this mediates between that which should be *impossible*,

27 Strawson 1974, Section IV.

28 Strawson 1974, Section IV and V.

or *undesirable*.²⁹ He seems to suggest that it would be impossible to see actions merely in an objective light, since reactive attitudes are so firmly engrained in our psychological dispositions. At the same time he seems to argue that an exclusively objective attitude is undesirable because it would imply that people no longer address each other as complete moral subjects who show gratitude and resentment, and who are able to give reasons and justifications for their behavior. If such a society was possible, it would lack an essential human quality, because people are merely addressing each other as objects that have to be regulated, managed and trained.³⁰

By grounding free will in inter-subjective moral relations, Strawson rejects two of the positions discussed above. On the one hand he rejects the position of those who tend to incorporate individual responsibility in a deterministic utilitarian perspective (an *optimist position*). It is the position of those who suggest that it is rational to hold individuals responsible and punish them, as long as we can expect the deterrent effects of punishment. Within this utilitarian framework, punishing is a training device to get individuals to where those punishing them want them to be. Within this perspective, reasons and justifications are less relevant. The individuals to be punished are merely seen as objects subject to policy, medical intervention, imprisonments or fines. Whether they have a free will is less relevant. The meaning of free will is reduced to being controllable by punishment. To realize socially desirable effects is a matter of choosing the most effective interventions.

Although Strawson advocates a deeper account of free will to counter this utilitarian-deterministic position, he also rejects the (classic) interpretation of free will of the pessimistic incompatibilists. Strawson objects to an interpretation of free will in which it is defined in terms of an uncaused causer. He rejects this interpretation as being metaphysical and obscure.³¹

Strawson's evaluation of the relation between free will and determinism is based on observations of human behavior. To that extent, his approach has an undeniable sociological character. Moreover, he situates free will in inter-subjective relations and does not consider it to be an entity planted in the head of separate individuals. It is bound to how actors address one another in normative terms. Incorporation of determinism in daily behavior would imply the predominance of the objective stance and – presuming that that is possible – fundamentally transform and dehumanize our social relations and institutions.

With his explorations and the distinction between the objective and the reactive attitude, Strawson touches upon an issue that has a central place in recent social theory: the relation between structure or system on the one hand, and human agency on the other hand. I will focus particularly on the theories of the English

29 Strawson's assessment that an exclusively objective attitude would be either impossible or undesirable is widely discussed, see e.g. Russell 1992; Strawson 1986.

30 Strawson 1974, Section V.

31 Strawson 1974, Section VI.

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sociologist Anthony Giddens and the German social theorist Jürgen Habermas. They relate this duality to more far-reaching social conditions than Strawson does.

Causal explanations and reflexivity (Giddens)

It is a fundamental controversy in the history of social theory: which factor should be emphasized, structure or human agency? And how can these factors be related to each other? In functionalist and structuralist social theory, a deterministic account of human conduct prevails. In hermeneutic and inter-actionist theory the focus is on human agency.³² It is rewarding to turn to the thoughts of the English sociologist Giddens, who directly addresses the relation between both strands of theory, and tries to overcome the contrasts.

Towards the end of the 1970s, Anthony Giddens was acknowledged as a major figure in sociology. His work is distinguished by its comprehensive critical appropriation and reconstruction of the main concepts and perspectives of classic theorists. By the early 1980s, he developed a distinctive theoretical approach, *structuration theory*, in which he sought to combine functionalism/structuralism and theories based on human agency.³³ He recognizes an exclusive attention for society in structuralist and functionalist theories in which individual conduct is seen as determined by culture, socialization and social structures. In inter-actionist (hermeneutic) accounts the emphasis is on individuals as agents, as the producers of social relations, institutions and social structures. These contrasts are in line with Strawson's distinction between two attitudes underpinning human relations. Structuralist/functionalist approaches are based on objective attitudes in which individual conduct is seen as the outcome of forces beyond the will. Inter-actionist/hermeneutic approaches focus on meanings, intentions and justifications, which can be recognized in Strawson's reactive attitude.

Giddens rejects the sharp division and aims to integrate insights from both traditions. What he appreciates in structuralist/functionalist accounts is the insight that society cannot be seen as the direct product of human strivings and intentions. To a large extent, society is the outcome of the unintended consequences of human conduct.³⁴ At the same time, he acknowledges the inter-actionist insight that society, or social structure cannot be seen as an autonomous entity, but that it is the product of our talk, our practices and doings. He rejects a reified concept of society or social structure, which so often prevails in functionalist/structuralist approaches.

Social structure is not something that exists externally; it should not be seen as a determining factor which merely constrains human conduct. Structure, in the

32 Giddens 1979, p. 49-53.

33 Giddens, op. cit. 1979, also Giddens 1976 and 1984.

34 Giddens 1979, p. 59.

shape of rules, also *enables* human action and communication.³⁵ Actions, intentions and motivations always presuppose rules or structures. However, these rules do not merely enable action and communication, but they also transmit structure into individual action. These rules might be rules that are taken for granted, informal rules or formal rules, but can also be advanced science-based insights. They may be embedded in complex social systems (e.g. our system of social insurances) but also in custom and tradition.

Thus, while Giddens regards individual action and communication as governed by rules, he does not suggest that individuals are merely reproducing these rules. Giddens gives two major explanations for the fact that individual action cannot be identified with structure. First, structure cannot completely encompass action because structures are built on abstract rules that have no social-temporal location.³⁶ Action is always situated in concrete time and space, in *practices* that allow individual actors to have discretion in the interpretation and application of these rules. In other words, abstract rules are never mechanically applied in action, but actualized, specified and modified in concrete contexts. Secondly, actors who apply rules are knowledgeable actors who have a reflexive orientation towards these rules. Awareness and knowledge of the rules enable actors to change these rules.³⁷ The actors' ability to utilize structural rules is always mediated by forms of praxis that may entail considerable degrees of discursive penetration into that structural logic. They are not passive objects submitted to structure and society, but the production of society and structures is the outcome of the skilled performance of actively engaged subjects. The rules embedded in structure enable communication and coordinated action but at the same time every member of a society has to be seen as a practical social theorist who is able to take a reflexive stance towards acknowledged structural and social determining factors.

What we can conclude from Giddens' structuration theory on the free will/determinism debate is that we should avoid contrasting external causal factors that mechanically shape human behavior with a free will as an uncaused causer (not determined by structures.) To be able to make choices to express a will, actors draw from structures. At the same time they do not just reproduce these structures, rather they actively incorporate these structures into their practices. In these practices, it is a necessary presumption of action that the agent could have acted otherwise.³⁸ Abstract causal explanations are never able to take all the relevant factors in concrete situations fully into account. One of the reasons for this is that actors may take notice of these causal explanations, and reflexively incorporate these causal explanations into their orientations. Knowledge of causal explanatory accounts may induce actors to alter their behavior. Giddens refers, for instance, to the impact of empirical evidence about how many marriages end up in a divorce. Knowledge of this empirical evidence will have an impact on what

35 Giddens 1979, p. 70-74.

36 Giddens 1979, p. 55-65.

37 Giddens 1976, p. 15-16, 114-116; 1979, p. 5.

38 Giddens 1976, p. 56.

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people expect from a marriage and by consequence affect how they want to shape their love relationships.³⁹

Reflexivity is not only relevant on an individual level, but also within the domain of collective concerns. Causal explanations may also be incorporated in models of regulation or government and other organizational policy. Insight into the causes of social problems or the malfunctioning of organizations will give rise to interventions in the framework of causal relations.⁴⁰ For instance, the growth of the welfare state is based on the intervention in determining factors. In other words, the laws governing human behavior observed by the social sciences cannot be seen as universal explanatory devices, but are mutable, because actors and organizations determine their intentions and line of action on the basis of monitored and reported conduct.

The endeavor of structuration as a critical theory is to expand actors' discursive-based grip on unacknowledged conditions and the unintended consequences of their action. It is the task of the social theorist to raise awareness of these unacknowledged factors, an insight that may be used in the reflexive self-regulation of an actor's conduct.⁴¹ Social theory has an emancipatory task and addresses the motivations and justifications of complete moral subjects.

A denial of free will would have the same consequences that Giddens attributes to the predominance of structuralist/functionalist accounts. In these accounts, reasons and justifications are ignored because these focus on what are seen as the real drives of human behavior: subconscious forces beyond their will. Giddens regards these accounts, not only as a flawed social theory, he also articulates their problematic political implications. These structuralist/functionalist accounts imply a derogation of lay actors. They are just seen as cultural or structural dopes who have no relevant knowledge of their surroundings. This might lead to policies and political programs in which their views are disregarded. Competence is then outsourced to experts and people in positions of power.⁴²

These critical evaluations of structuralist/functionalist social theory can also be turned against hard determinism. There is a strong tendency among brain and neuroscientists to deny the relevance of conscious considerations for individual action. Lamme, for instance, considers intentions and justifications as ex-post rationalizations, as *made-up* stories.⁴³ Lamme asserts that our conduct is the product of subconscious drives situated in the brain and not of intentions and justifications. This implies that the conclusions actors arrive at on the basis of reflexivity will not be seen as a relevant input on behavior. It would be in line with Giddens' approach, to focus on the political implications of this perspective.

39 Giddens 1991, p. 14.

40 Giddens 1979, p. 243-245

41 Livesay 1985.

42 Giddens 1979, p. 71-75.

43 Lamme 2012, p. 197-213.

If actors are presumed not to be able to control their own conduct, control will be shifted to experts and those in positions of power.

A categorical denial of free will is not only politically precarious in that, by down-playing the relevance of individuals' reasons and justification, the door is opened for arbitrary interventions, but it would also imply that we have to deny that the intervening agencies (experts, politicians) have valid reasons and justifications for their interventions. If the standard of social desirability can no longer be grounded on rational reasons and justifications, only irrational drives (observed in scans) will count.

Communicative and systemic rationale (Jürgen Habermas)

In the course of my exploration, I have substituted a rather narrow and precise definition of free will for a broader definition of free will. I initially presented a concept of free will as it functions in the context of criminal law in particular. Following Herbert Hart, I defined free will in terms of allowing excuses to guarantee that only those who could have acted differently will be punished. This rationale enables individuals to plan their life within the framework of law. It may be seen as the *control* dimension of free will: if people know when and how the law will react to their behavior, they are able to control their behavior. This dimension of free will guarantees negative freedom: citizens are granted a domain of freedom where they are free to follow their own values and interests within a framework of well-defined rights and duties. A wider interpretation of free will can be derived from Giddens' theory: free will also concerns the opportunity citizens have to be engaged with the design of social institutions and policies. Their norms, values and political preferences have to underpin the legitimacy of institutions and political decisions (the *value* dimension of free will). Both the control dimension and this value dimension are at stake when we see conduct exclusively as the product of subconscious drives.

It is obvious: the legitimacy of governmental interventions is not always contested. Think of those interventions, enabled by increasing insight into the (physical) causes of serious sexual offences or extremely violent conduct. And interventions will generally be less contested when they are intended to empower people and make them better able to resist, or less inclined to continue, a criminal career. For instance, knowledge of the relation between employment and criminality may induce the government to opt for a more active job-creating policy. However, even this interventionist policy may be opposed by neoliberals who believe in the problem-solving capacity of the free market.

There are abhorrent illustrations in history in which governing powers denied the relevance of incentives and justifications of those subjected to interventions, as in the days of Stalin's totalitarian regime in the Soviet Union. Those showing their reservations concerning the communist ideology and the totalitarian practices of the regime were incarcerated in psychiatric institutions.

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It is rewarding to pay attention to Habermas's theory, because he offers the analytic framework for exploring the public dimension (the value dimension) of free will. In his article entitled "The language game of responsible agency and the issue of free will," he directly addresses the free will issue.⁴⁴ It may be seen as an attempt to fortify free will against the attacks of the brain and neurosciences. The relation between free will and public issues can be derived from the ideas Habermas presented in his earlier books *A Theory of Communicative Action* and *Between Facts and Norms*.⁴⁵

Habermas is a German social theorist of global stature. He is the leading exponent of critical theory. The work of Horkheimer and Adorno looms large in his intellectual development and can be recognized in his critical stance toward an instrumental rationality. He draws from philosophical as well as sociological insights, and also employs concepts derived from philosophy of language, political philosophy and developmental psychology.

Habermas's theory reflects a sociological sensitivity to circumstances fostering and circumstances inhibiting free will. He regards free will as an opportunity created by a modernization process that has to be realized. Like Strawson, Habermas maintains that a complete account of human conduct requires both acknowledgement of the objective stance of the outsider and the reactive stance of the participant. What Strawson's and Habermas's accounts of free will share is that they situate free will in inter-subjective normative relations. Free will is not seen as a capacity of a separate individual; it is embedded in the realm where individuals address one another, as participants, in normative terms.

Habermas refers to the objective stance under the heading "systemic," "instrumental" or "strategic action" and the reactive stance under the heading "communicative action." Habermas's concept of "communicative action" emphasizes the impact of emotions less than Strawson's "reactive stance." However, both concepts refer to processes of blaming, excusing and justification based on a language game of participants who address one another not in terms of an instrumental rationale, but in terms of good reasons.

In the communicative rationale of the participant, reasons and justifications are the building blocks of human interaction and inter-subjective relations. It concerns a coordination of action through language that assumes actors to be orientated towards reaching understanding. In strategic action, actors do not strive for mutual understanding; instead they try to realize individual aims. Communicative action is more demanding because it is merely successful insofar as cooperation is based on a consensus between the actors about the reasonableness of their aims.⁴⁶

44 Habermas 2007, p. 13-50.

45 Habermas 1997, 1987a and 1987b.

46 Habermas 1997, p. 18-21.

Free will is a presupposition of the language game of communicative action or responsible agency.⁴⁷ It is a language game in which actors approach one another as participants. Actors are operating then within a realm of obligating reasons. Even when we follow norms that are taken for granted or stick to social routines, we are acting within the realm of reasons and justifications, and implicitly assuming free will. This is something we realize as soon as we encounter a problem in our social interactions: then we are ready to give reasons and justifications, or apologize, for our actions. For instance, generally people routinely comply with the social rule which prescribes we should keep some distance from others in the public domain. The moment someone breaks this rule one becomes aware of it, and inclined to blame the one violating the rule, postulating that he could have acted otherwise. The other may accept the accusation, but also counter it by excusing or justifying his behavior ("I couldn't help it, someone was pushing me," or "I had to prevent my child from falling down the stairs.")

What Habermas calls *the lifeworld*, forms the context of communicative acts. The life-world is the realm in which communicative action unfolds; it is the background of tradition and language, the framework of shared and taken for granted understandings, values and norms that makes communicative action possible.⁴⁸ The lifeworld is a domain of shared, unproblematic beliefs. The moment these beliefs are challenged, they convert from a resource into a topic of discussion, at which point it no longer functions as a lifeworld background. However, the topic is evaluated in the light of prevailing background knowledge. The moment the issue is settled and becomes an obvious assumption of conduct it may again function as background knowledge. The lifeworld reproduces itself only through ongoing – language-based – communicative actions.

An implicit assumption in Habermas's ideas seems to be that free will depends on the extent to which communicative action is incorporated in our societies. He observes a somewhat unbalanced process of modernization in which an instrumental rationality is becoming too prominent and is crowding out normative orientations. Habermas considers the growing intervention of instrumental rationality in our daily lives to be a consequence of the development of corporate capitalism, the welfare state and mass consumption. These trends submit widening areas of life to a generalizing logic of strategic considerations, efficiency and control.⁴⁹

According to Habermas, the integration of society, and also the development of individual identities, is ultimately dependent on the communicative rationale, or normative inter-subjective orientations. Although the integration can to some extent be based on strategic forms of action (e.g. success in the market), societies are stable in the long run only if the social order is perceived as legitimate and in

47 Habermas 2007, p. 15-17.

48 Habermas 1997, p. 21-41 and 1987, Chapter IV.

49 Habermas 1987b, p. 229-295; 1997, p. 420.

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accordance with what is true, right and good. It requires grounding in consensual norms.

In pre-modern societies, it was the regulatory force of a received morality that guaranteed coordination and integration. But in modern societies, the normative integration, and the legitimacy of legal order, has to be accomplished by the active exchange of arguments, by communicative action that relies on the compelling force of the better argument.⁵⁰ Modern conditions require more advanced modes of normative orientation to cope with complex interdependencies.

The productivity and welfare of our society may be attributed to the high level of system complexity of the economic and political-administrative domain.⁵¹ This growing complexity is accompanied by the differentiation of strategic (instrumental) orientations and normative orientations. Whereas in pre-modern societies, all conduct is normative and symbolically structured (rooted in tradition), modern complex societies have domains governed by non-linguistic media such as money (economic domain) and power (state or administration). Strategic considerations are predominant within these domains. What counts in these “systems” is effectiveness and success. Coordination is not based on shared understandings or agreement; instead it takes place behind the actor’s back (e.g. the rationality of the market).⁵²

In Habermas’s analysis of current social conditions, which he sees as characterized by complex systemic relations and pluralism, consensus has to be actively accomplished. Understandings that used to be shared and taken for granted are doubted and contested.⁵³ Coordination of action and reproduction of the life-world depend on a more active reason-giving process. Only those norms that meet with the approval of those potentially affected are considered to be valid, insofar as they participate in rational discourses. He sees it as the task of social institutions and the law to facilitate these rational discourses.⁵⁴

The institutionalization of discursive processes is urgent, since the systemic rationalities embedded in the market and bureaucracies have a tendency to crowd out these consensual forms of integration (“colonization of the lifeworld”).⁵⁵ Communicative rationality tends to be undermined by instrumental imperatives. All norms become vulnerable to being assimilated to the strategic rationality of social subsystems of finance and administrative power. However, these rationalities cannot themselves supply an alternative source of the legitimacy of social and legal orders, or be an alternative device for social integration.

50 Habermas 1987b, p.229-295; 1997, p. 22.

51 Habermas 1987b, p. 229-295.

52 Habermas 1997, p. 39.

53 Habermas 1997, p. 25-26.

54 Habermas 1997, p. 107.

55 Habermas 1997, p. 406-409; 1987b, Ch. VIII.2.

Although the differentiation and expansion of domains with a systemic rationale may undermine communicative action, these tendencies enable the growth of welfare. To counter the erosion of communicative action, this process of a growing systemic complexity requires a post-conventional mode of normative integration, a mode of social integration relying on discursive processes in which only the best argument counts. In Habermas's perspective this boils down to the proper place of instrumental and strategic orientations and the right balance between these orientations and communicative orientations.

Public and private autonomy (Habermas)

Habermas maintains that law, rights and the constitution have to facilitate the communicative relations in complex societies in conditions in which normative consensus can no longer be taken for granted but has to be actively accomplished. Law helps to ease the burden of social integration that depends on communication and moral discourse. Law deals with contingency and pluralism, not only by giving the enforcement of behavioral norms in the hands of legal authorities, but also by granting individuals a sphere of individual freedom, of free choice that leaves open the motives for conforming to legal norms (calculation, moral consent etc.). In this way it reduces the burden of issues that require general discursive consensus. The principle of *private autonomy* guarantees all citizens equal individual liberties. It embodies a negative concept of freedom in which citizens are assumed to pursue their own interests within a framework of universal rights to equal individual liberties. Every person has the right to do as he or she pleases within the limits of general laws. Here we meet a generally acknowledged feature of free will: being free of the coercion of moral obligations, or the pressure from other people.

However, Habermas asserts that this private autonomy is not sufficient to guarantee the autonomy of citizens. It has to be supplemented by *public autonomy* in the sense that citizens have to see themselves as the authors of law.⁵⁶ They have to regard the legal order as a legitimate order. A procedure of democratic legislation has to confront participants with the normative pursuit of reaching understanding about the rules for their living together.⁵⁷ The legitimacy of the law is not exclusively based on legality; the quality of the law also has to be evaluated in terms of its communicative rationality.

Private autonomy and public autonomy complement each other. Contingency and pluralism make the definition and interpretation of numerous behavioral norms dependent on the practices of legal authorities. The outsourcing of the definition, interpretation and enforcement of norms is compensated by the creation of a private domain where citizens can follow their preferences and values, and moreover

⁵⁶ Habermas 1997, p. 118-122 and 408-409.

⁵⁷ Habermas 1997, p. 84.

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the development of a public domain in which the definition of (legal) norms has to be based on the universal discursive assent of citizens.

Although legal norms have to have communicative discursive underpinning, Habermas is realistic enough to observe that in complex societies such as ours you cannot expect all legislation to rely on the voluntary assent of all citizens. This would be too ambitious given the range of relevant arguments and knowledge that plays a role in processes of legislation and the prevalent pluralism in current societies. The bulk of political decision-making includes, for instance, pragmatic issues in which empirical knowledge is relevant. Moreover, the principle of certainty reduces the options for the selections of norms. Further, time pressure sets limits on open discussion in which only the better argument counts. Within the actual process of legislation majority rule, compromises, bargaining and the majority rule play an important role. Therefore, Habermas reformulates the idea that normative decisions have to be able to win the assent of all citizens. When it concerns legislation, legislated rules only have to be indirectly legitimized by the universal assent of those affected, since this assent merely applies to the democratic character of the procedure.⁵⁸ A law is legitimate when, besides protecting private autonomy, it can win the assent of members of the legal community, because it is the product of a formal decision-making body based on deliberation and discourse. Apparently this concept of democratic legitimation brings Habermas very close to accepting the prevailing institutions as sufficient guarantees of his discursive rationale.

Although it has to be admitted that there is a lot of institutional realism in his perspective, his concept of public autonomy still has critical evaluative potential: public autonomy is only guaranteed if there is a fruitful interplay between the deliberation and decision-making in governmental institutions and informal discussions among ordinary citizens. He regards it as the role of citizens and mass media to create well-considered public opinions. It is the role of legislative bodies to be receptive to the information, arguments and suggestions developed in the discursively structured public domain. Habermas's account is still critical to the extent that discursive processes may be frustrated by the colonization of the life-world, which is the consequence of the over-prominent position of systemic rationales, of group interests and mass media.⁵⁹

What I consider to be an important line of thought that can be derived from Habermas's account is the awareness that interventions in causally determining relations that steer human conduct behind their back ultimately need normative or political evaluation. Free will is a necessary condition for these evaluations: it entails the presumption that we are able to choose among alternatives on the basis of reasons and justifications. If we reject free will we outsource these evaluations, and the decisions concerning social desirability and legitimacy to experts and those having powerful positions. Although he defines a concept of free will

58 Habermas 1997, p. 110.

59 Habermas 1997, p. 360.

that requires citizens to be free from external moral and political pressure (*private autonomy*), he also articulates the public dimension of free will (*public autonomy*): the idea that actors have to be able to see themselves as the authors of the societies they live in. Here free will is directly relevant for assessing what is socially desirable, and for which cause we control human behavior in systemic contexts. These are issues that are completely downplayed by hard determinists.

Conclusion

What can social theory contribute to the free will/determinism debate? Is it not the core of sociological enterprise to articulate the impact of social conditions on human conduct and does that not drive sociology in the direction of deterministic accounts? In this text I have indicated that it is the sociological attention for the inter-subjective underpinning of free will that provides the framework for avoiding an exclusive deterministic position. Moreover, according to Wittgenstein and Strawson, it is meaningless to frame the free will-determinism debate in abstract generalizing terms, and better to explore how these concepts are used in concrete contexts of interaction. This opens a large domain for sociological studies: in which contexts are actors appealing to free will or to deterministic explanations in their accounts of conduct?⁶⁰

A sociological focus on contexts does not inevitably have to lead to objectivist accounts of human conduct, in which the free will is absent. When I follow Giddens in his acknowledgement of reflexivity, this determinism can be avoided. Findings of empirical studies, in which conduct is explained as the product of forces outside the will, may induce actors to change their behavior and create new accounts of responsibility. For instance, once scientists have observed that the violent behavior of someone has to be attributed to defects in the brain, this actor – after being informed about this relation – may be blamed for not taking medication to stop his violent habits. When statistics indicate that there is a relationship between the frequency of fires and the presence of fire alarms, house owners may be (legally) obliged to install these devices. Observations of causal or statistically relevant relationships will induce actors to change their behavior, or induce governing powers to intervene. These observations contribute to a shift in the matrix of attributing responsibility, not to the irrelevance of responsibility and free will.

I have turned to Habermas to indicate that free will is a necessary building block of the normative and political evaluation of the regulation of our societies. Objective accounts of our behavior may be incorporated in instrumental interventions of governments and experts, but the question remains of which social aim it is that they are trying to realize. In Habermas's terms, the answer requires a com-

60 An illustration is the study of Atkinson who observed that there is a strong tendency in reports on suicide to explain the act in terms of illness rather than free will. That can be attributed to the sensitivity of the feelings of the nearest and dearest (Atkinson 1978, p. 110-156); Steven Yearly (1985) refers to this study.

municative rationale. The prevalence of a communicative rationale is dependent on how firmly public autonomy is established in our societies, i.e. the extent to which actors are able to see themselves as the authors of their social relations and regulations. The capacity to evaluate their social relations is based on a moral and political discourse in which free will is a necessary postulate.

What are the consequences for our system of criminal justice? Determinism does not have to undermine penal practices. Although it is obvious that determinists will question retributivist justifications of punishment, many of them suggest that determinism can be incorporated in a utilitarian account that focuses on the effects of punishment.⁶¹ However, according to Strawson, it is questionable whether what might be a good device for training animals is a good device for dealing with human actors.⁶² Although he did not directly explore the consequences of his ideas for our criminal justice system, I follow his line of thinking when I assert that in criminal procedures a fundamental value is ignored when suspects are merely addressed from an objectifying perspective.

A basic principle of our system of criminal justice is that it offers the accused (and his lawyer) the possibility to excuse his behavior, to justify it, or to present an alternative version of what really happened. This means that the criminal law system has to take intentions and justifications into account. By explaining undesirable behavior or rule-violating behavior merely in terms of how sensitive the actors are to various control techniques (punishment, psychological, social or medical intervention) you make them objects of control, you silence them. There is no room for excuses, justifications, or a debate about what really happened.

The history of the articulation of legal norms and procedural requirements concerning euthanasia in the Netherlands may offer an illustrative example of the values that are at stake when problematic conduct is addressed solely from an objective perspective. In the Netherlands, norms and procedural requirements concerning decisions about terminating life were to a great extent articulated in criminal procedures in which brave doctors were justifying their practices.⁶³ Because their justifications found support, the norm concerning life-terminating practices changed. What if the practices of doctors had simply been seen as the problematic behavior of actors who are driven by factors beyond their free will?

Obviously, those figuring in criminal procedures are seldom well-educated citizens (such as doctors) with respectable motives. But even when motives are seemingly less respectable, consider those committing financial fraud, or tax fraud, or illegally receiving social benefits, their excuses and justifications should be taken into account. This might induce the legal authorities to acknowledge that there may be specific mitigating or justifying circumstances. Moreover, this may be an insight that may be a ground to improve the regulations.

61 Greene & Cohen 2004; Lamme 2012.

62 Strawson 1974.

63 Griffiths, Bood & Weyers 1998, p. 43-86.

The contribution of sociology to the free will debate will always be characterized by an emphasis on the impact of social context. Following Giddens and Habermas, I have suggested that this does not imply a rejection of the free will. Insight into causal relations encourages interventions. And these interventions have ultimately to be incorporated and legitimized in a framework of intentions and justifications of individual actors. When the free will/determinism debate is addressed along these lines, the absolute contrast between determining factors, on the one hand, and free will, on the other hand, dissolves and the abstract generalizing rationales embodied in these concepts disperse among a network of various interconnections.

Illustrative is a suggestion of Grace concerning our system of criminal justice. She is both convinced of Strawson's attention for the significance of the reactive attitude and at the same time impressed by empirical evidence concerning the enormous impact of social conditions (upbringing, friends, quality of the school) on criminal behavior. She takes both insights into account in her proposal for a criminal procedure based on restorative justice. This entails the idea of engaging the family, friends and teachers of the offender and the victim in the criminal procedure. Those (friends, teachers) who could presumably bridge the animosity between the offender and victim may facilitate the communication between the parties directly involved. But the basis of her argument is that, by involving parents, friends and teachers in the procedure and by giving them a voice, those aspects that are generally seen as determining factors (social conditions) are given a face and can be addressed in terms of justifications and responsibilities, and ultimately induce an improvement, not only in the individual offender's inclinations, but also of the social context. This indicates that in actual practices determinism and free will are not abstract rationales that cannot be reconciled, but context-related accounts of human behavior in which responsibility is attributed. Issues of determinism and free will deeply concern how we want to live, and how we want to shape our societies. A denial of free will robs us of the vocabulary and rationale to determine the criteria.

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