On the presumption of free will in criminal law and criminology

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Most criminological theories, and the modem criminal law, in particular presume that humans have what is called free will. According to this assumption, the subject of criminal law is in principle free to choose whether to offend or not. The assumption of free will is the basis for the criminal law notion of responsibility based on guilt. Nonetheless, in (legal) philosophy, the problem of free still needs to be resolved. The discussion is framed as a dispute between more or less homogeneous groups of proponents of determinism and free will. In this article, the ideas for and against free will are put forward, using the notions and examples developed by Schopenhauer, Nietzsche, Kant and Kelsen. On the other hand, psychoanalysis undermines the classical notion of the subject itself, which is nonetheless shared among the rest of mainstream schools of present day legal thought.

Despite its opposition to the Cartesian subject, psychoanalysis in a way defends the traditional humanistic position that refuses to reduce mind to matter. Modern naturalistic neuro-science, on the other hand, seems to explain that our subjective experience, for example of *sollen*, is a kind of illusion of reality that will soon be scientifically explained with no recourse to metaphysics. Will the Cartesian free subject of the 18th Century survive the persistent undermining from the sciences? And if the scientific naturalistic view of the subject does one day prevail, what will legitimate criminal law look like?

Key words: free will, hard determinism, guilt, Schopenhauer, Nietzsche, Kant, Kelsen, classical criminological school, normative attribution, psychoanalysis, naturalistic neuro-science

UDC: 234.9:343.9+343.2