

## Summaries

*Justitiële verkenningen* (Judicial explorations) is published eight times a year by the Research and Documentation Centre of the Dutch Ministry of Security and Justice in cooperation with Boom Lemma uitgevers. Each issue focuses on a central theme related to judicial policy. The section Summaries contains abstracts of the internationally most relevant articles of each issue. The central theme of this issue (no. 1, 2013) is *Free will and criminal responsibility*.

### **Free will and criminal responsibility. Going round physicalism, connectionism and embodied cognition**

*F. de Jong*

In this article, the author defends two propositions related to the concepts of free will and criminal responsibility. Free will is defined as the capability of distancing oneself from one's immediate surroundings and reflect on impulses. The first proposition is that it is a mistake to suppose – as do many neuroscientists adhering to objectivist theories on the human mind – that the concept of free will refers to a postulated natural phenomenon, the existence of which could, in principle, be established or falsified. Instead, the concept of free will constitutes a *practice*; it is a human artefact that is part and parcel of the differing means by which mankind structures intersubjective life. The second proposition is that the criminal law legitimately presupposes that persons normally act out of free will and that they, consequently, are morally responsible and accountable for the wrongful actions they perform. The author claims that his arguments for both propositions are supported by insights from the neuroscientific fields of connectionism and embodied cognition.

### **What kind of free will does criminal law need?**

*D. Roef*

Various leading neuroscientists argue that free will does not exist and that therefore any traditional notion of criminal responsibility is based upon an illusion. This article attempts to make clear that the 'free will', which is now empirically denied, is conceptually not the one we use and need in criminal law. The neuroscientific argument depends on the assumption that undetermined causal control is necessary to

responsibility. It supposes that someone has no free will when his conscious will is not the ultimate cause of his behaviour. However, the legal practice of criminal responsibility is not rooted in such a metaphysically free will, but on an alternative, more realistic understanding of control, i.e. the capacity sense of control. Criminal law bases responsibility on certain mental capacities people have, for instance the capacity to act for reasons, according to socially constructed standards. The so-called illusion of free will forms therefore not a serious threat to the foundations of our criminal responsibility system.

### **Psychiatrist and criminal responsibility**

*G. Meynen*

Currently, there is a vivid debate in the Netherlands about the possible non-existence of free will and its implications for criminal law, in particular for the concept of 'criminal responsibility'. Especially forensic psychiatrists who advise the court on a defendant's legal insanity feel uneasiness because of this discussion on free will. In this contribution the author suggests to reconsider the current practice in the Netherlands in which psychiatrists explicitly advise the court on legal insanity and to consider the option to leave the judgment on legal insanity entirely to the judge. Meanwhile, of course, psychiatrists will have to inform the judge about the defendant's mental condition at the time of the crime and its influence on the defendant's behaviour. If needed, in order to optimize communication between the medical domain (psychiatrist) and the legal domain (judge), a legal insanity standard could be developed and introduced.

### **Legal responsibility and neuroscience**

*N. Vincent*

This paper argues that to the extent that legal responsibility hinges on mental capacities – capacities which are implemented in (brain) mechanisms – scientists working in the fields of behavioural genetics and neuroscience can assist courts to adjudicate responsibility in several ways. First, by studying what mechanisms paradigmatically fully responsible agents possess and how those mechanisms operate. Second, by developing techniques to more individually, accurately and less subjectively inspect people's mechanisms to gauge their true mental capacities. Third, by studying how youth, advanced age, and mental disorders affect these mechanisms. And fourth, by developing

interventions to create, restore and enhance the function of these mechanisms in order to create, restore and enhance people's responsibility-relevant mental capacities.

### **Data and interpretations in cognitive neuroscience**

*W.F.G. Haselager, F. Leoné and D.A.G. van Toor*

Research in cognitive neuroscience may have significant implications for law. In order to assess such implications properly, a basic knowledge of the complexities involved in the acquisition and interpretation of brain data could be helpful. In this paper the authors will discuss some of the issues involved in two basic techniques of cognitive neuroscience: single cell recordings and functional Magnetic Resonance Imaging. The authors aim to improve the reader's understanding of the kind of assumptions and inferences that help to bridge the gap between data and interpretation.

### **Active responsibility in criminal justice. Towards a broader conception of 'doing justice'**

*B.A.M. van Stokkom*

Criminal justice is oriented at retrospective responsibility: examining whether the defendant is guilty and imposing a punishment that fits the crime. In this article it is argued that prospective responsibility needs more attention: taking responsibility. We have to remind the offender of his obligations: pay his debt, repair the harm done, work to change his behaviour and enhancing his situation. We should also take account of the interests and needs of the persons concerned. It is also argued that stimulating active responsibility should take place within the logics of 'doing justice'. Criminal justice cannot respond to the imperatives of care, well-being and problem-solving.

### **Free will and responsibility in penal execution**

*M.M. Boone*

Responsibility of the prisoner for his own rehabilitation is a central element of 'Modernising Imprisonment', the masterplan that aims to reform the execution of the prison sentence in the Netherlands. The Secretary of Justice strives for an individual approach based on the points of departure of the Life Course Approach in criminology. This method is designed in different ways. A central element is that rehabilitation will only be offered in the near future to prisoners that show

responsibility for their rehabilitation. Based on this starting point, a far-reaching system of advancing and degrading is introduced. Prisoners can deserve freedoms by showing responsible behaviour, but loose them again in case of irresponsible or unmotivated conduct. Three objections against this aspect of Modernising Imprisonment are discussed. First, the rehabilitation principle itself does not allow for such a far-reaching exclusion of categories of prisoners. Second, the high demands put on prisoners are not realistic given the characteristics of the prison population. Third, the assumption that a strict system of advancing and degrading will increase the effectiveness of sentencing is not well founded and cannot be derived from research.

**Criminal law and Enlightenment. On the character of a truly enlightened criminal law system**

*J.A.A.C. Claessen*

This article examines the influence of the Enlightenment on the development of our criminal law system, using a legal theory perspective. On the basis of the dialectical character of this movement and the enlightened view on mankind, it is postulated that a true enlightened criminal law system is one in which there is both room for retribution, free will and responsibility as well as for prevention, causal determinism and risk. Furthermore, it is put forth that the daily practice of the criminal law has by now moved too far into the direction of prevention, causal determinism and risk, due to the 'scientification' and the simultaneous demoralisation of criminal law. As a result of these developments, it is out of the question to talk of a balanced and, consequently, of a truly enlightened criminal law system. Within the framework of the 'scientification' of the criminal law system, additional attention is devoted to the recent topic of neuroscience.