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Short Review:

Lori B. Andrews, J.D., *Predicting and punishing antisocial Acts. How the Criminal Justice System Might Use Behavioral Genetics* [in:] R.A. Carson, M.A. Rothstein (ed.), *Behavioral Genetics – The Clash of Culture and Biology*, The Johns Hopkins University Press 1999, pp. 116-156.

ABSTRACT:

The paper analyzes the increased use of genetics in criminal justice system, especially in case of U.S. legal system. Author notices that new light can be shed on the idea of criminal responsibility, the concept of guilt and the whole processes of sentencing. There is a possibility that the development of behavioral genetics may in the near future change the theory and practice of criminal law, and even influence areas beyond legal system.

STRUCTURE OF THE PAPER

In the first part of the paper author analyzes various reasons for increased interest in investigating the possible connection between genetic mutation and antisocial acts. First reason - practical in its nature – states that we live in the era where politician are strongly concerned about crime and the ways in which society can deal with this phenomenon. The answer provided by behavioral genetics is to medicalize crime and suggestion that we should seek treatments. Second reason – is a kind of a sociological one – author states that scientists will devote more time and attention to conduct research concerning genetics and antisocial acts. The third reason is all about the belief in the explanatory power

of genetics; geneticists make claims that a human behavior will be explicable in scientific (molecular) terms; therefore, we will have a very appealing scientific model of behavior. Fourth reason, mentioned by the author, concerns a standard for admission of scientific evidence in courtrooms. We should not seek the truth (certainty) in science, there is no such thing (see remarks on falsification by K. R. Popper). Fifth reason is also practical in its nature; lawyers are obliged to use any kind of argument that can be of any use for their clients. A new kind of arguments provided by geneticists will ultimately become a very popular. Even when we will a kind of junk science here (i.e. using Huntington disease as a defense).

The next part of the paper is focused on the idea of criminal responsibility and philosophy of a criminal law. One can find here a set of general ideas about the fundamental concepts of legal system such as culpability, responsibility, voluntary and involuntary acts. They serve as point of departure in discussing the process of guilt admission, exculpation, mitigation etc. The main idea explicated there is the one that states that criminal law is a “choosing system”. Criminal law deals with criminal voluntary acts. If we did have an involuntary act, there we would not have a possibility to ascribe guilt. Bottom line here is a thesis that behavioral genetics may change our picture of human being as free choosing agent.

The third part of the paper is a very interested one, because one can find a very useful description of a set of cases involving genetic defenses. Author describes a history of genetic defenses since 19070s to nowadays (XXY, Huntington disease etc.) The history is a point of departure for presenting ways in which genetic defense can influence the criminal law. Author identifies three approaches to genetics and law. First one suggests that we can dispute guilt and mitigate punishment, because of use of behavioral genetic defense. Maybe we should treat criminal acts as an expression of a illness. Criminal should not be condemned, she should be cured. The second approach is more interesting and

maybe even counterintuitive. Genetic predisposition might be used to enhance punishment. Line of argumentation is as follow: a defendant cannot change his/her real nature (how can one change his/her genetic structure?), therefore society might lock the person up forever to protect itself or even use the death penalty. Evidence of genetic propensity can serve not as a defense but as a stigma. The third and last approach ignores the genetic status in sentencing, because it can be views as an irrelevant for the case.

The further parts of the paper are devoted to minor issues such as:

- (1) access to appropriate testing (genetic tests are very pricy therefore, only rich people will be able to use genetic defense),
- (2) system of identifying people with antisocial acts (how can legal institutions gather genetic information from society; what about our rights for privacy?),
- (3) what kind of social means should be used in order to dissuade people from anti social acts?,
- (4) how should we treat people with antisocial genes?

Author at the end of a paper proposes a thesis that use of behavioral genetic in the criminal justice system will can have implications beyond criminal system. It will provide a society with information about “worth” of people with certain genotypes.

COMMENATRY

The paper is well-written and very interesting one. Unquestionably, the strongest point of it is a presentation of the cases involving genetic defense. The weakest point of the paper is however a lack of an analysis of a structure of genetic arguments. The paper presents use of genetic evidence in criminal law, however at the same time it does not explain how the genetic defense is construed.

Genetic argument is not just a simple scientific fact. It is a philosophical interpretation of a kind of biological data, which states that person possesses some kind of genetic mutation and it can be linked (somehow) to a certain behavioral trait.

Genetic argument consists of scientific, philosophical and legal terms. It stresses that due to genetic mutation (scientific term) one cannot behave voluntarily (philosophical term), therefore the sentence should be mitigated (legal term). It is a methodologically complex enterprise. One should integrate knowledge from genetics, philosophy (legal philosophy as well) and law. Every project devoted to genetics and law should in the first place describe the relation between genes and behavior (casual link, correlation?). Then one should propose a way in which legal philosophy (philosophy of criminal law) can use genetic data and describe what implication can follow. Finally, at the end, one can try to assess whether changes in legal philosophy should influence practice of criminal justice system.

The paper is devoted to the practical problems with using genetic defense in courtrooms, the more vital and important ones are – as it seems - the philosophical and methodological issues which are not addressed in the paper.