Psycho-Philosophical Issues Facing the *Mens Rea* Requirement for Legal Culpability

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When it comes to determining a criminal culpability during court proceedings, jus- tice systems have traditionally favored actions and consequences over intentions. Advances in the fields of psychology and psychiatry, however, are reasserting the importance of mental status in determining culpability, which has begun to challenge our current understanding of justice. This article explores how the mental states that fulfill the mens rea *requirement are particularly problematic given that they rely on psycho-philosophical assumptions concerning free will and moral cognition that are unstable at best. The article discusses how these findings may require change in the legal system and suggests future avenues of research.*

In 2006, a 51-year-old man was arrested by the Federal Bureau of Investigation for the possession of child pornography.[1] After medical evaluation, the man was found to have a rare neurological disorder known as Klüver-Bucy Syndrome (KBS), which explained his recent irritability, voracious appetite, and extreme changes in sexual preference. The man had not developed the disorder as a result of any action on his part, but as an unexpected side effect of a surgery meant to treat his epilepsy. In previous cases where people with KBS had committed

[1] Julie Devinsky, Oliver Sacks, and Orrin Devinsky, "Klüver-Bucy syndrome, hypersexuality, and the law," *Neurocase* 16, no. 2 (2010): 140-145.

pedophilic acts, those suffering from the disorder were not charged with any crimes but were instead given treatment. However, because this man seemed normal to untrained professionals, he was charged with and eventually pled guilty to possession of child pornography. During the sentencing trial, the prosecution fought for the longest possible sentence (20 years), because in their eyes, the defendant was simply a pedophile with an unrelated mental disorder. The defense argued that it was unjust to have even charged him in the first place, arguing that he was the victim of a mental disorder that caused him to behave irrationally. In the end, the judge gave him the minimum required sentence: 26 months in prison, 25 months of home confinement, and 5 years of supervision. Wanting to bring this quietly-conducted trial and its implications into the academic discourse, the man's psychiatric consultants wrote and published a case study that they concluded by reaffirming their professional conclusion: because the man's behavior was a result of a mental disorder, he should have received medical treatment, not criminal charges.

Obviously, this individual did harm by supporting an industry that exploits children in the worst possible way, and it would be more than reasonable to take some measures that would ensure that this behavior is curtailed. But given the man's mental status, can it be said that he was fully responsible for his actions? This question can be broadened to the whole population: if some uncontrollable force is causing a person to commit crimes, is that person truly culpable for their behaviors? A reasonable person would say the person is not truly culpable and should not be punished. However, the current justice system is using outdated psycho-philosophical assumptions concerning free will and moral cognition to punish individuals for psychological traits that they cannot control. It is time to begin focusing on the biological, social, and economic factors that actually contribute to criminal behavior.

Traditionally, psychological factors, being difficult to recognize and evaluate, were rarely considered in the courtroom, and instead criminal responsibility—also referred to as culpability—was determined based on the readily observable actions and consequences of a case. David Carson and Alan Felthous list the four pillars of culpability that serve as the criteria for determining responsibility in every court case:

1. The defendant must have committed some proscribed act (*actus reus*),
2. The defendant must have caused the proscribed consequences,
3. The defendant must have been in the proper state of mind (*mens rea*), and
4. The defendant must have an absence of circumstances which could constitute a legal defense to any crime charged.[2]

Determining whether a defendant fulfills the first two criteria is relatively easy; actions and consequences are often readily observable, and modern investigative measures are robust and well-developed. The fourth criterion rarely comes to play in trials and is also easy to determine: it concerns certain unique circumstances that legal precedent and law have already established as

[2] David C. Carson and Alan R. Felthous, "Mens Rea," *Behavioral Sciences & the Law* 21, no. 5 (2003): 559–62.

legitimate defenses to criminal charges. Examples include involuntary intoxication and the states of coercion and duress. Fulfillment of the third criterion, however, has traditionally been much more difficult to discern. Verifying this criterion requires an understanding of the defendant's psychological profile at the time a crime occurs, and throughout human history, a significant amount of suffering has come from our inability to truly understand one another's thoughts, emotions, motivations, and mental states. For example, if one were to have observed the man suffering from KBS while he was eating voraciously or raging against a driver who had cut him off, would one have been able to perceive the deeply afflicted nature of his mental wellbeing? To a casual observer, he would have seemed, if not normal, just highly choleric in nature. Only experienced professionals would have been able to properly recognize this combination of behaviors as symptoms of a rare neurological disorder, but even they might not be able to guess at his private criminal behavior. Because of these shortcomings in psychiatric knowledge and investigative capabilities, justice systems have historically leaned on the first, second, and fourth criteria when determining criminal responsibility, creating laws banning proscribed actions outright, regardless of intention, while only giving power to the third criterion when a defendant's *mens rea* is clearly in question, such as in cases of severely evident psychosis. This focus on weighing the moral value of one's actions solely on the actions themselves is also reflected in the deontological ethical systems that dominated Europe up until the nineteenth century, which ascribed almost supernatural moral traits to actions themselves in a manner that supersedes the significance of intentions, circumstances, and consequences in moral judgments.[3]

Only in the twentieth century have humans been able to properly investigate the psychological phenomena relevant to determining the fulfillment of the third criterion, and thus our understanding of the minds of those who commit crimes has deepened considerably. For instance, in 2017, Iris Vilares and colleagues used machine learning to find not only that there are distinct regions in the brain associated with knowledge and recklessness—two mental states that entail criminal culpability—but also that one's mental state could be reliably predicted based solely on neurological data fed to an algorithm.[4] While we are far from giving defendants fMRI tests to determine their criminal culpability, by better understanding the links between neurology and mental state, researchers hope to better evaluate the *mens rea* of those who commit crimes, and by doing so, properly assign blame to those who deserve it.

However, recent trends in the field of neurolaw (i.e., the application of neurological knowledge to the realm of jurisprudence) indicate that blame may not be so easily placed. If one is unable to understand the nature of their actions, they cannot be held fully culpable in the eyes of the law. As Vilares and her colleagues point out, this would include misunderstandings caused

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[3] For an example of a deontological ethical system that focuses almost entirely on the moral value of an action without regard for intention, see Immanuel Kant, *The Metaphysical Elements of Ethics,* trans. Thomas Kingsmill Abbott (Auckland: Floating Press, 2008).

[4] Iris Vilares et al., "Predicting the knowledge–recklessness distinction in the human brain," *Proceedings Of The National Academy Of Sciences Of The United States Of America* 114, no. 12 (2017): 3222-3227.

by one's neurochemistry, which are largely out of one's control.[5] If one were to have a malady in the regions of the brain discussed above, then that person would be unable to properly experience the mental states of knowledge and recklessness. These individuals, therefore, could not reasonably be said to have these *mentes reae*, and they could not reasonably be prosecuted on these grounds for determining culpability.

In fact, the above concern is already given consideration in the legal code through the requirement of competence and the Not Guilty by Reason of Insanity (NGRI) defense. One difficulty that has not yet been fully resolved, however, is where to draw the line between incompetency and insanity on one hand, and competency and sanity on the other. Without a clear definition, our legal system may inadvertently punish people with mental illnesses in a disproportionate and unjust manner for behaviors that they could not fully control. For example, evidence has shown that mental health problems resulting from military service in U.S. foreign conflicts—primarily, post-traumatic stress disorder, or PTSD—are appearing more frequently in criminal courts across the country.[6] Research has shown that PTSD is often associated with higher rates of anger and self-medication through alcohol abuse, which in turn are associated with violent behaviors that can result in legal troubles.[7] If a veteran's PTSD contributed to the perpetuation of a crime, is it reasonable to conclude that the individual was capable of making controlled, rational decisions at the time when the crime was perpetuated? And if we follow their violent behaviors back to their sources, could it be said that the U.S. government, by exposing our soldiers and military personnel to situations that can lead to the development of PTSD, is at least in part responsible for the perpetuation and negative effects of these behaviors? Clear definitions of competency and sanity are thus necessary in order to protect the government—and indeed, all of society—from legal culpability.

Currently, standards for determining sane mental states that entail criminal culpability do exist; distressingly, however, these standards are based on outdated information concerning human psychology. According to the Model Penal Code, which serves as an authority on legal practice in many American states, there are four mental states that can make one liable for a crime:

1. Purpose, the state of wanting or intending a proscribed action or result;
2. Knowledge, the state of understanding that a proscribed action or result will occur or is highly likely to occur but still performing the action, regardless of intent;
3. Recklessness, the state of performing an action while disregarding any known, substantial, and unjustifiable risk associated with performing that action; and

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[5] Vilares et al., "Predicting the knowledge-recklessness distinction," 3227.

[6] Ziv E. Cohen and Paul S. Appelbaum, "Experience and Opinions of Forensic Psychiatrists Regarding PTSD in Criminal Cases," *The Journal Of The American Academy Of Psychiatry And The Law* 44, no. 1 (2016): 41-52.

[7] Shannon M. Blakey et al., "Disentangling the Link between Posttraumatic Stress Disorder and Violent Behavior: Findings from a Nationally Representative Sample," *Journal of Consulting and Clinical Psychology* 86, no. 2 (2018): 169-178.

4. Negligence, the state of performing an action while being unaware of any substantial and unjustifiable risk which any reasonable, law-abiding person would be expected to be aware of.[8]

During a trial, the prosecution must prove that the defendant had one of these mental states while committing a proscribed action in order to fulfill the *mens rea* requirement of culpability.[9] While these standards of mental culpability may appear simple and straightforward, I would like to posit that they utilize two philosophical assumptions that have become increasingly untenable in recent years due to developments in the field of psychology. I will refer to them here as perfect free will and perfect conscience. The first assumption, perfect free will, assumes that all people—when unencumbered by external forces—are fully able to rationally choose between any options presented to them; this trait provides more strength to the first two *mentes reae*. The second assumption, perfect conscience, assumes that all normal human beings have an internal conscience that guides their actions when interacting with the world; this trait is especially relevant in the lower three mental states. In a way, combining these assumptions creates an archetypal citizen in the eyes of the justice system: one who makes totally free, unrestricted choices informed by a socially concordant conscience. I argue that, by assuming that all people in their natural, unencumbered state have perfect free will and that all of their actions are guided by their individual consciences, the justice system effectively implies that these citizens are fully responsible for their actions. Therefore, when one breaks a law, they are freely doing so in good conscience, and a harsh punishment becomes appropriate. As mentioned earlier, the insanity defense and the competency requirement already allow for some wiggle room within this framework: if, in the moment, one did not have control over their actions or was unable to determine right from wrong because of some psychological issue, they cannot be said to be truly guilty of their crime. Again, the issue becomes one of boundaries: when is one said to cross the line from "free to choose" and "unable to choose", or from "in good conscience" to "in impaired conscience"? The field of psychiatry is attempting to resolve these issues, and current trends may indicate that these lines are quite blurred, possibly even non-existent.

The notion of free will has long been scrutinized in the field of psychiatry, and a significant consensus within the field is that the popular understanding of free will and voluntary action, where a moral agent—sometimes characterized as supernatural—chooses from a range of present options using only universal moral dictates as a reference while excluding external factors such as personal history and relationships, does not match up with reality.[10] Rather, experts believe that free will is either, from a more cynical perspective, a non-existent illusion our brains concoct to rationalize the predetermined actions of ourselves and others, or, from a more forgiving perspective, a societal tool that attempts to explain the mechanisms by which our biology, learning history, social

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[8] American Law Institute, Model Penal Code, 1962.

[9] There are some exceptions to this rule: there exist certain distinct crimes that entail criminal responsibility but have no *mens rea* requirement (e.g. statutory rape, felony murder, etc.).

[10] Eric Racine, "A proposal for a scientifically-informed and instrumentalist account of free will and voluntary action," *Frontiers in Psychology* 8 (2017): 1-14, doi:10.3389/fpsyg.2017.00754.

environment, and physical stimuli are synthesized into expressed behaviors.[11] Regardless of one's feelings about these arguments, the present and popular view of free will still has some elements that need to be verified: for example, the existence of an independent agent or "soul" that perceives the world around us and controls our behavior. Theoretically, there would have to be some observable point of interaction where this independent agent would interact with the physical world to receive information and initiate physical actions, so this theory could hypothetically be tested by mapping out the entire human nervous system — through which, we obviously know, signals from the environment are received and processed, and signals to the body are sent — and by actively examining it for these points of interaction (the same could be done for other body systems, such as the cardiovascular and endocrine). Admittedly, the technology necessary for performing these examinations does not currently exist, but if technology reaches that degree of power and perceptiveness — which, hopefully, it will — we could use this procedure to test the soul hypothesis. If this hypothesis turns out to be true, then our current legal system could continue operating within its current parameters, and our current standards regarding *mens rea* requirements could be upheld, but again, more research is needed before a decision about free will is made, and we should take considerable care

If one were to suppose, however, that free will as it is commonly conceived is non-existent and that individuals are governed by neurochemical and neurophysiological factors, then one would be forced to conclude that the locus of culpability should shift away from the individual and toward the societal level. As mentioned earlier, in this view, our behaviors are shaped by our biologies, our histories, and our present environments. Thus, behaviors that constitute a crime are also just products of our biologies, our histories, and our environments. This brings up an important question: is it right or productive to punish someone in possession of a brain pathway that has made them behave illegally? This view would argue that it is neither right nor productive to do so when it is clear that societal factors are truly to blame. If this is the case, then our current criminal justice system would be required to address the larger factors at play in a criminal situation, rather than focusing on penalizing the individual products of these factors.

This neurolaw argument would also imply that because prisoners are in a way "suffering" from a neurophysiological construct that is maladaptive for society as a whole and over which they have little, if any, control, they should not be treated as the origin of others' suffering, but rather as a conduit through which biological and psychosocial factors had come together in a harmful manner. In this view, the ideal way of handling prisoners would be to treat these maladaptive traits much in the way a psychologist treats a client's problems: by exploring the roots of the client's behavior, correcting the client's dysfunctional thoughts and emotions, and by providing the client with psychological tools that they can use to prevent future problems. As this perspective on free

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[11] Ramon Cardinali de Fernandes and Alexandre Dittrich, "Expanding the Behavior-Analytic Meanings of 'Freedom': The Contributions of Israel Goldiamond," *Behavior & Social Issues* 27 (2019): 4–19, doi:10.5210/bsi.v.27i0.8248. In this article, de Fernandes and Dittrich examine popular formulations of 'freedom' within the field of psychology, including an interesting one by Israel Goldiamond.

will and crime also implicates societal factors like poverty and lack of education as agonists of crime, an effective justice system would need to address these problems. Ideally, the justice system would work to cause change in the structure of our present in order to eliminate these negative factors in the first place. In the short term though, a just justice system would at the very least provide prisoners with services and resources—such as free education or some form of reliable post-discharge income—that can mitigate the effects these negative societal factors can have on a prisoner's future behavior. In severe cases where effective treatment has not been developed or is projected to be unable to bring a prisoner's behavior to a societally adaptive level, the justice system would then be obligated to serve as a minimally-restrictive holding system, wherein a prisoner could be kept indefinitely or until better treatments are developed. In any case, the discussion of the nature of free will is not yet resolved, and we should be wary of assuming that the formulation of free will underlying our current legal system is the soundest one.[12]

The second assumption giving power to the *mentes reae*, perfect conscience, is actually much less studied in psychiatric literature, yet it still plays a critical role in determining the criminal responsibility of a defendant. In a 2014 paper, George Vithoulkas and Dafin Fior Muresanu characterized conscience as a combination of abilities: one's ability to distinguish between right and wrong in a situation, one's ability to modify their behavior in the moment based on this distinction, and one's ability to evaluate the merit of their behaviors afterward.[13] From this definition, it is easy to see how conscience factors into the judgments we make of defendants. By the time they reach adulthood, all people are expected to have developed a healthy conscience, which would prevent them from engaging in immoral behavior in the first place. More specifically, it gives one the tools to prevent a combination of *actus reus* and *mens rea*: A healthy conscience would make one pause before performing an action they know or suspect will have negative consequences and advise them against performing the action, thereby avoiding situations in which they perform a proscribed action in the knowledge and recklessness mental states, and it would cause a person to put forethought into the potential risks of situations they may find themselves in, thereby avoiding a combination of *actus reus* and the negligence mental state. If someone is deficient in conscience, they will be more likely to perform proscribed acts while under the appropriate *mens rea* and thus garner punishment. The overall conclusion of this assumption then is that there is a theoretical "perfect conscience", one that is perfectly concordant with societal standards and that, if followed diligently, will cause one to behave in a perfectly moral pattern. The moral judgment that follows from this is that those who deviate from this ideal conscience will perform acts that are immoral, thus making them deserving of punishment.

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[12] For an overview of different perspectives on free will that are being researched today, see Patrick Grim, "Free Will in Context: A Contemporary Philosophical Perspective," *Behavioral Sciences and the Law* 25, no. 2 (2007): 183-201.

[13] George Vithoulkas and Dafin Fior Muresanu, "Conscience and Consciousness: a definition," *Journal of Medicine & Life* 7, no. 1 (2014): 104-108, http://www.medandlife.ro/index.php/issue/199-2014/200-issue-1/209-special-articles/443-conscience-and-consciousness-a-definition-pdf.

Aside from the ethical discussions surrounding what ideas a morally ideal conscience would hold, there are still some psychiatric considerations surrounding the issue of consciences, predominately, how a conscience arises. William Lyons of Trinity College Dublin explores some theories of conscience, along with his own, in a 2009 volume of the journal *Philosophy*.[14] Unlike prior theories, which classify conscience as either a divine gift or an inheritance from our parents, Lyons argues that conscience develops from a combination of social and cognitive factors: from a young age, we are presented with moral statements and principles to live by, and from adolescence onward, we undergo a continual process of evaluating and selecting between these moral truths. This process of sifting serves a biological purpose, as holding conflicting moral thoughts simultaneously can produce persistent levels of increased stress in an individual.

The question this view of conscience poses is similar to the one posed by the recent psychiatric arguments surrounding free will: if our consciences arise from the interaction of social and biological factors, can one be truly held responsible for any negative products of their conscience? My response is similar to my response to the free will question: if these factors are indeed the source of faulty consciences, then the factors are at fault, not the person whom these factors have negatively affected. We would then be morally obligated not to punish these individuals, but rather provide them with psychotherapy in order to help them develop healthier consciences, while also addressing societal and biological forces that give rise to unhealthy consciences. Again, at the very least, more research is needed in regards to the factors, which develop and affect consciences throughout our lives, and we should be wary not to conclude that our current conception of consciences voluntarily shaped by each individual is the ultimate one.[15]

Considering how two major assumptions lending credence to the *mens rea* requirement have been shown to be faulty from a psychiatric perspective, it is safe to say that, by introducing psychiatry into the discourse surrounding jurisprudence, determining criminal culpability becomes more difficult and nuanced. This poses a significant threat to the current construction of the justice system, which administers punishment to those deserving of it. If we truly want to take a punitive approach towards justice and assign blame where it is due, then the justice system should be waging all-out war against the factors which lead to crime, and not by merely incarcerating those who have been influenced by these factors, but by affecting actual societal change through meaningful welfare programs, rigorous education reform, and in-depth social science inquiries. At a minimum, the justice system should acknowledge the social factors, which have caused crimes to happen and seek to mitigate these influences among the prison population. While obviously change will not and, arguably, should not occur overnight, policymakers, judges, and other legal professionals should seriously consider how theory from the field of psychiatry can be integrated into their rulings, their sentencing, and the field of jurisprudence overall.

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[14] William Lyons, "Conscience - An Essay in Moral Psychology," *Philosophy* 84, no. 4 (2009): 477-494.

[15] Though few articles reference the idea of the conscience, a general discussion of moral development can be found here: Elliot Turiel, “Moral Development in the Early Years: When and How,” *Human Development* 61, no. 4-5 (2018): 297-308.