Introduction to this issue:

**Mens Rea**

Basically, criminal responsibility requires four conditions to be satisfied. The defendant must have committed the proscribed act. This is called the *actus reus* in common law systems. He or she must have committed the *actus reus* with (or in) the proscribed ‘‘state of mind.’’ This is known as the *mens rea* in common law systems. The action must have caused the prohibited consequences. Some writers treat *actus reus* and causation as just one requirement (e.g. Garner, 1999, p. 999). Finally, there must be an absence of circumstances that would constitute a legal defense to any crime charged. However it is not quite so simple. For example, it is possible to commit certain offences, usually relatively minor crimes, without *mens rea*. It is, for example, a crime to exceed the speed limit, or drive with excess alcohol in your blood, whether or not the individual intended to do so or was reckless or negligent. And *mens rea* is inadequately, or improperly, understood as a ‘‘state of mind.’’ Negligence, which describes a quality of behavior rather than—at least—a positive ‘‘state of mind,’’ is a category of *mens rea* in many jurisdictions (Ashworth, 2003). Recklessness, which can also just describe a more extreme quality of negligence, is also a category of *mens rea*, even when the nature of the problem behavior is that the defendant failed to think, rather than considering the implications of his or her conduct.

Behavioral scientists, when concerned about criminal responsibility, have tended to focus upon defenses related to mental disorder, in particular insanity and diminished responsibility (Briscoe et al., 1993, p. 41). Given their knowledge base, and often their clinical roles, this is not surprising. However some defenses can actually be understood as simply a denial of *mens rea*, and perhaps should be treated as such rather than as distinct defenses requiring the construction of a conceptual structure that invites controversy. For example, the nature and degree of a particular defendant’s mental disorder may have the effect that he or she did not, indeed could not, intend the act committed. In such a case he or she should not need a defense; he or she simply lacks *mens rea*.

However, this issue of *Behavioral Sciences and the Law* invites a broader interest in criminal responsibility, and of *mens rea* in particular. There is a wealth of issues upon which the insights and research of the behavioral sciences could prove both provocative and productive for lawyers, whether as theorists, law reformers, judges, or practitioners. It could have major implications for the theory of criminal responsibility, for its understanding, application, and practice.

For example, a paradigm of *mens rea* would be ‘‘intention.’’ If A intends to kill B, and does in fact cause B’s death, without there being any defense, A will be guilty of murder (although the exact charge may be described in different terms in different jurisdictions). The law presumes, as has almost everyone else, that ‘‘intention’’ involves a mental action that precedes the physical acts involved in committing the *actus reus*. However, the work of Libet (1985) (see also Wegner and Wheatley,
suggests that action precedes "thought," even if the time difference is very small. This has major implications for the theory of criminal responsibility. Can someone intend to hit another if he or she has acted before thinking? It requires, at least, a rethink of the nature of a voluntary act.

But what does "intention" actually mean? Some lawyers, implicitly assuming that dichotomous categorizations are both possible and appropriate, have suggested that a person intends, even when he or she does not seek the result caused, if he or she knows that the outcome is very likely (different words are used in different decisions) but is willing to continue acting.

"[I]f the jury are satisfied that at the material time the defendant recognised that death or serious harm would be virtually certain (barring some unforeseen intervention) to result from his voluntary act, then that is a fact from which they may find it easy to infer that he intended to kill or do serious bodily harm, even though he may not have had any desire to achieve that result." Lane, L.C.J., Nedrick (1986) 1 W.L.R. 1025 at 1028. (The House of Lords subsequently, in Woolin (1998) 3 W.L.R. 382, approved this decision but substituted "find" for "infer.")

Is this understanding of "intention" consistent with how ordinary users of the language understand the term? If not, does that matter? Is it appropriate to punish people for "intending" something even if those people would not consider it "intentional?" We have to intend in order to attempt to do something. However the broader definition of "intention," quoted above, is inconsistent with attempting. Try attempting to open a bottle (i.e., intend to open the bottle), when you only know that it is virtually certain to open, from your continuing conduct, even though you may not wish to open it. Even if we accept that neat, clear, consistent, definitions of mens rea are impossible, because responsibility is necessarily and essentially relative rather than categorical, might behavioral scientists help lawyers to create more appropriate and "user-friendly" understandings.

In particular might they bring some of their insights into the analysis and measurement of risk, into conceptions and categorizations of recklessness? A basic model, which could serve in many practical circumstances, would recognize that "risk" involves two basic continua, outcomes and likelihood. The defendant's criminal responsibility might be measured (a)(i) by the actual likelihood, or (a)(ii) his or her understanding of the likelihood, and (b)(i) the actual harm or (b)(ii) his or her understanding of the harm liable to occur. (Adopting the (i) categories would be consistent with an "objective" assessment, (ii) with a "subjective" assessment, in legal terms.) To the basic model might be added provision, which court decisions often ignore, for the defendant balancing positive (e.g., getting your sick child to hospital) and negative (e.g., causing deaths, injuries and property damage by your driving) outcomes. If we were to conceptualize "risk" and "recklessness" in this way it might (a) accord better with ordinary language users' understanding of the terms, (b) permit more rigorous analyses of the nature of particular defendants' criminal behavior, and (c) permit better comparisons between risky behaviors.

Instead of ascribing labels such as "gross negligence" or "recklessness," our courts might analyze the nature and degree of the risk involved in the particular case. Criminal courts are not just responsible for deciding whether a defendant is, and if so how, guilty. They are also responsible for devising an appropriate sentence. Understanding the offending behavior is exceptionally important for devising an appropriate intervention. Current trials often miss opportunities to obtain
information that could be very useful to those charged with devising an appropriate corrections program and/or deciding whether and when parole should be granted. It would therefore be appropriate, for example, (a) to identify, and (b) to treat differently, the defendant who has difficulties in realistically assessing the likelihood of the consequences of his or her actions, or has problems in conceiving the seriousness of the outcomes of his or her behavior.

Another, albeit related, example of the potential for the behavioral sciences to contribute to our understanding and representation of *mens rea* concerns developments in cognitive skills training. Studies (Hollin, 2001) suggest that offenders, with and without a mental disorder, think about social activities, and solve social problems, in distinctively different ways. Studies have found (Friendship, Blud, Erikson, & Travers, 2002), and not found (Falshaw, Friendship, Travers, & Nupent, 2003), differences in reconviction rates for offenders who have been provided with "thinking skills" programs designed to tackle the perceived different patterns of problem solving. If these studies, perhaps after improvements in the programs devised (McGuire, 2001), do show that cognitive skills training can make a difference in terms of reconviction rates, then there are considerable implications for lawyers. It will be possible to devise more appropriate sentences. However, we will also be able to question who should be considered criminally responsible. Could and should these differences in thinking styles, and/or problem-solving styles, have been identified at an earlier stage, perhaps during early education? Could and should individually tailored programs have been devised and provided for those individuals? Could it provide a defense to criminal responsibility? It may not follow, from the fact that a defendant has a distinctly different means of analyzing problems, that he or she did not, nevertheless, still intend, willingly risk, know, or whatever the *mens rea* may be for the relevant crime, but greater understanding of why he or she behaved in that manner will allow more appropriate blaming and disposal decisions.

It is within this, it is submitted exciting, context that articles were invited on the theme of *mens rea*. Each of the articles, within this theme, develops fresh thinking on an aspect of this developing debate.

Terms designating the specific elements of a crime, such as "intention," "motive," and "forethought," may or may not be given legal definitions. Even after having been provided with a legal definition of each *mens rea* element, jurors may apply their own meaning, which may correspond more to common usage than the technical, legal meaning of the term. Based on findings from social and psychological research, Bertram Malle, Ph.D., and Sarah Nelson, Ph.D., (pp. 563 to 580) find remarkable consistency in the folk usage of such terms whereas the legal terms and definitions exist in potentially confusing diversity. These authors explain why the folk concepts of *mens rea* elements would result in greater clarity and consistency of application.

Is the criminal intention of a crime invariably either clearly and completely present or absent? Bernadette McSherry, B.A. (Hons), LL.B. (Hons), LL.M., D. Jur., Grad. Dip. Psych., (pp. 581 to 599) argues that intent is not always complete. A range of degrees of intention exist that correspond with different mental disorders. The law should recognize, she maintains, the spectrum of degrees of intent by providing a corresponding range of dispositional options.

Another quality of psychological intent and legal *mens rea* is consciousness. In demonstrating in court that a criminal act was voluntary, the fact-finders will either
assume or be persuaded of the actor’s consciousness at the time. Unconsciousness is a
complete defense without the typical encumbrances of a successful insanity defense
such as hospitalization. As Deborah Denno, J.D., Ph.D., (pp. 601 to 618) correctly
acknowledges, science reveals that consciousness, unlike a lightbulb, is not invariably
either fully lit or fully extinguished. More like a radio, the volume or intensity of
consciousness can be full force, “off”, or somewhere between. The various degrees of
consciousness and voluntary control result in a gradation of criminal intent, depend-
ing on the nature and extent of the psychological process affecting consciousness and
intent. To better accommodate the range of consciousness involved in criminal acts,
Professor Denno proposes a revised concept of voluntariness that consists of three
parts, including an intermediate category of semi-voluntary acts.

Much remains to be understood about how the brain, and the mind, exercises
control over behavior. Nonetheless, recent research has advanced the science
considerably in understanding the phenomena and correlates of self-control and
its opposite, lack of control or impulsivity. Ernest Barratt, Ph.D., and Alan R.
Felthous, M.D., (pp. 619 to 630) apply the literature as well as original research to
the task of distinguishing impulsive from premeditated acts, a distinction that, they
argue, is of critical importance in determining whether or not a specific criminal act
was voluntary. To be most fruitful, continuing research on behavioral control must
use a discipline neutral model that invites contributions from several of the cognitive
neurosciences.

Both a traditional special meaning and a contrasting narrow meaning of mens rea are
used in criminal law. Robert F. Schopp, J.D., Ph.D., and Marc Patry, Ph.D., (pp. 631
to 651) recommend an intermediate meaning. Integrating legal and empirical
observations, they propose an analytical approach to establish mental culpability in
criminal offenses, including capital offenses in the United States. Reflecting current
standards of decency, their analysis would be particularly applicable where culpability
pertains to criminal sentencing as well as the initial adjudication of guilty.

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