***Mens Rea* in Law and Morality**

The term *mens rea* has been in the news lately, mostly in relation to legal proceedings against those who allegedly conspired in various ways to interfere with the processes of a federal election. It denotes criminal intent as a necessary condition of criminal liability, in many cases explicitly and in most if not all other cases implicitly. Along with its companion *actus reus*, or criminal act, it constitutes the formula of criminal liability (alternately: culpability), i.e., that a crime was committed with criminal or at least non-innocent intent. This distinction, also relevant to philosophical moral reflection, creates a tension in law between public interest and individual fairness, in the sense that defining criminal liability partly in terms of *mens rea* poses an added burden on the prosecution leading to a lesser likelihood of conviction, whereas its explicit omission in some positive law statutes leads to a greater possibility of criminalizing the innocent. Although this tension might be lessened by philosophical attention to the matter, it will always remain true that our outward actions are more easily subject to empirical proof than our internal mental states. Still, understanding better through philosophical reflection what these mental states are might broaden our abilities of empirically detecting and exposing them.

The terms *rea* and *reus* are ultimately feminine and masculine adjectival forms respectively of the Latin term *res*, which means ‘thing’, ‘substance’, or matter, from which the English words ‘real’ and ‘reality’ are derived. Roman law typically used the term ‘*res*’ to refer to a cause brought before the court. This led in time to the alleged criminal act of a defendant to be referred to as the ‘*actus reus*’; this usage gradually shifted in meaning to denote ‘criminal act’, as it does now, with ‘*mens rea*’ fitting into the equation as ‘criminal intent’.

It makes sense intuitively to define crime by such a twofold distinction. We recognize clearly that it is wrong for the innocent to be convicted and punished, so that if it is possible for someone to commit a certain crime innocently, it should not be considered a violation of the law. On the other hand, we are equally confident that certain criminal acts either imply or come so close to implying *mens rea* that we see no reason to add the prosecutorial burden of proving it separately and explicitly. In still other cases, our concern to prevent crime may make us less concerned about fairness to the point where the state of mind of the offender no longer matters to us.

Thus, our notions of criminal liability in practice vary along a spectrum of formally strict liability, in which *mens rea* matters less or not at all, to substantively strict liability, in which *mens rea* matters greatly and to the highest degree.

And yes, there are degrees of *mens rea* relevant to the law. Those referred to explicitly are purposeful intent, knowing intent, reckless intent, and negligent intent:

*Purposeful intent* is acting with the intention of causing the proscribed harm. This does not require knowledge that the act is proscribed, nor do any of the following.

*Knowing intent* is acting with the knowledge that the proscribed harm will be caused or probably caused by the act, even in the absence of intent is not to harm.

*Reckless intent* is acting in blatant disregard of substantial and unjustified risk of harm, even in the absence of knowledge of likelihood of harm.

*Negligent intent* is acting to cause harm by omission of due concern, even in the absence of recklessness or knowledge of probability of harm.

It should be noted that whether negligent intent should be considered as a degree of *mens rea* is a topic of dispute among legal scholars, even though it is still widely incorporated in modern law.

Part of the reason for this may be the murkiness of what goes on in the mind of a person. Apart from recklessness, knowledge, and intent, what else can count as the kind of bad or dishonest intention which could denote criminality? We will return to this shortly.

Many written criminal statutes specify the particular level of *mens rea* that defines the crime along with a description of the *actus reus*. Other statutes don’t but arguably imply the minimal standard of an intention that precludes innocence, a point driven home by Supreme Court Judge Oliver Wendell Holmes, Jr.’s famous quip: “Even a dog knows the difference between being stumbled over and being kicked” [*Lochner v. New York*](https://en.wikipedia.org/wiki/Lochner_v._New_York), 198 U.S. 45 (1905). It is the lingering notion of an implicit *mens rea* requirement in law which perhaps more than anything else prompts further philosophical reflection.

Whereas the legal treatment of *mens rea*  is strapped by the need to have empirically applicable standards, philosophical reflection allows us to treat it from the inside out. Understanding *mens rea* in this manner may lead us to improved ways of detecting *mens rea* even from the outside, possibly even in a manner useful to law.

It is generally recognized by ethicists that choosing and acting wrongly does not of itself imply bad or blameworthy intentions. For there are two possible ways of choosing wrongly: either culpably by bad intentions, or non-culpably by innocent lack of knowledge in spite of all diligent effort. Bad intentions, we venture further, are based in absence of dedication to or purposeful ignorance of the truth, whatever it may be, while good or innocent intentions are based on dogged dedication to the truth, whatever it may be. Truth-orientation is, after all, the defining purpose of rationality, the virtue of which is good or innocent conscience, and the failure of which is bad, blameworthy, or culpable conscience. Bad conscience is motivated by convenience rather than truth, and thus accepts the truth only when it happens to coincide with convenience.

Thus, bad conscience - the basis of guilt, blame, culpability, liability, etc. - is self-deception based on abandonment of our rational truth-oriented mandate of truth-orientation, such that we reflectively deny evidence that would favor conclusions sensed as inconvenient, with the result of accepting as true what we don’t and can’t genuinely believe to be true. For genuine belief is conviction based on due truth-oriented deliberation of evidence, whereas a self-deceived conclusion is an acceptance preselected in advance with cherry-picked evidence to prop it up.

We all constantly face temptations to attend to our convenience i.e., to be convenience-oriented, rather than to the truth, i.e., to be truth-oriented. Virtue consists in our resisting such temptations by giving primacy to truth over convenience. It is not that the two are diametrically opposed; typically, and especially in longer runs, our convenience dovetails with truth. But sometimes, especially in shorter runs, truth at least appears to contradict convenience, and this is where our virtue is tested.

It is, of course, not the case that all bad intentions are criminal. We generally don’t countenance the possibility of purely mental crimes, lacking any elements of speech, action, or omitted action or even omitted speech. Sins of thought, as bad and as harmful as they may be, are not crimes, although they may lead to crimes. But in any case in which an *actus reus* is alleged, the determination of the presence or absence of an explicit or implicit *mens rea* related to it, considered key to criminal liability, may be determined by looking for its outward signs.

The outward signs of self-deception are defensiveness and a persistent denial of the obligation of answerability. The defensiveness consists in lack of tolerance for criticism from without as well as the absence of signs of inward criticism. The denial of answerability is the refusal to recognize our obligation to be accountable to others in order to reaffirm and reward the trust invested in us.

These are signs visible to us in our encounters with one another on the basis of which we routinely judge moral character. Perhaps not all of them will be able to count as evidence admissible in court of *mens rea* or the absence of it, but it can allow us at least to determine our targets. Denial of answerability and defensiveness should be shunned by all in the courtroom on both sides as incompatible with innocent intent. For both are inimical to the discovery of truth, the ultimate enemy of the guilty. A mindset inimical to truth can never be innocent. Those engaging in such practices in the courtroom and other legal situations should be reminded that such behavior is morally if not legally indicting and cannot contribute to any productive argument in their defense.

Whereas it may be true that mental states are not publicly observable in the straightforward empirical sense, neither are they opaque. Good and bad conscience make their notice to us in the behaviors of their possessors in many subtle ways. We are giving the guilty undeserved privacy by allowing them to play their evasive games without being challenged, without having it pointed out to them that they are tipping their hand to their own guilt by behaving in such a manner. The guilty only benefit from such dark privacy, while the innocent have no need for it.

Note: Although the views in this paper are my own, I drew substantially from the following sources for informational background:

1. Finbarr McAuley, “Mens Rea: A Legal-Philosophical View”, in Irish Jurist, volume 12, No. 1 \*Summer, 1982), pp. 84-104
2. James Edwards, “Theories of Criminal Law”, in the Stanford Encyclopedia of Philosophy, 2018. [www.plato.stanford.edu/entries/criminal-law](http://www.plato.stanford.edu/entries/criminal-law)