

*Inevitable Mens Rea & Legal Insanity  
In the Age of Neuroscience*

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“Genetics may yet threaten privacy, kill autonomy, make society homogeneous and gut the concept of human nature. But neuroscience could do all those things first.”

The Economist (2002)



[A]s more and more scientific facts come in, providing increasingly vivid illustrations of what the human mind is really like, more and more people will develop moral intuitions that are at odds with our current social practices. Neuroscience has a special role to play in this process for the following reason. As long as the mind remains a black box, there will always be a donkey on which to pin dualist and libertarian positions. What neuroscience does, and will continue to do at an accelerated pace, is elucidate the 'when,' 'where' and 'how' of the mechanical processes that cause behavior. It is one thing to deny that human behavior is purely mechanical when your opponent offers only a general philosophical argument. It is quite another to hold your ground when your opponent can make detailed predictions about how these mechanical processes work, complete with images of the brain structures involved and equations that describe their function. At some further point, people may grow up completely used to the idea that every decision is a thoroughly mechanical process, the outcome of which is completely determined by the results of prior mechanical processes. What will such people think as they sit in their jury boxes? Will jurors of the future wonder whether the defendant *could have done otherwise*? Whether he really *deserves* to be punished.? We submit that these questions, which seem so important today will lose their grip in an age when the mechanical nature of human decision-making is fully appreciated. The law will continue to punish misdeeds, as it must for practical reasons, but the idea of distinguishing the truly, deeply guilty from those who are merely victims of neuronal circumstances will, we submit, seem pointless.

J. Greene & J. Cohen (2006)



“...[W]e have...no decisive reason to doubt that very many commonsense belief/desire explanations are—literally—true. Which is just as well, because if commonsense intentional psychology really were to collapse, that would be, beyond comparison, the greatest intellectual catastrophe in the history of our species; if we’re that wrong about the mind, then that’s the wrongest we’ve ever been about anything. The collapse of the supernatural, for example, didn’t compare; theism never came close to being as intimately involved in our thought and our practice...as belief/desire explanation is. Nothing except, perhaps, our commonsense physics—our intuitive commitment to a world of observer-independent, middle-sized objects—comes as near our cognitive core as intentional explanation does. We’ll be in deep, deep trouble if we have to give it up...I’m dubious...that we *can* give it up; that our intellects are so constituted that doing without it (...really doing without it; not just loose philosophical talk), is a biologically viable option. But be of good cheer; everything is going to be all right.”

Jerry A. Fodor, Psychosemantics: The Problem of Meaning in the Philosophy of Mind (1987)



1. Introduction
2. The “Standard Picture” of Agency: CTA & Reason-responsiveness. Guidable Creatures. Why You’re Here
3. The Criteria for Responsibility: Act, Mental State & No Affirmative Defense. Assumes Agency.
4. The Two Challenges: Determinism & VNC
5. Determinism:Metaphysics: Spockian Solutions
  - Neuroscience not new and can’t answer
  - Compatibilism
  - Consistent with Agency



## 6. The Disappearing Person Radical(Non)Challenge: Are We Just “Victims of Neuronal Circumstances?”

a. Why Compatibilism Can't Save Agency

b. Indirect Scientific Evidence

1. Unaware of Causes

2. Automaticity (the “juggernaut”)

3. Deception About Agency

4. Localization of Brain Activity



## c. “Direct” Evidence for VNC

### 1. Libet & the Post-Libetians

## d. Reasons to Reject VNC

### 1. Problems with Libet Paradigm

a. Neuroarrogance

b. Confuses intending with wanting

c. No evidence that intentions play no role  
(even if intentions have a physical basis, they may play a causal role)

d. Predisposition



## e. Trivial Task

2. Commonsense (no convincing evidence from neuroscience or any other science that mental states are epiphenomenal)

3. Incorrect picture of brain/mind

4. Scientific Evidence for the Efficacy of Intentions

5. Evolution/Theory of Mind

6. Normatively Inert





## 7. Action

- a. An intentional bodily movement (or omission if the agent has a duty to act) performed in a reasonably integrated state of consciousness.
- b. Unless the harm the agent's body causes is the result of an action (or omission), we cannot attribute the harm to the agent and potentially hold him responsible for it. The harm is the product of mechanism rather than action.
- c. Assumes the CTA. Inevitable if we are agents.



## 8. Mens Rea

a. Justice Oliver Wendell Holmes: Even a dog knows the difference between being stumbled over and being kicked (?)

b. The royal (but imperfect) road to assessing the agent's attitudes towards the rights, interests and well-being of the victim

c. Responsibility is unthinkable without mens rea



## 9. Legal Insanity

a. “The fMRI can’t tell you why” —Phil Resnick

b. The Moral Basis of the Insanity Defense

1. Retributive; not Consequential

2. Lack of Contextual Rational Capacity

3. Moral Compass Intact

4. The Problem of “Internal” Compulsion/  
Lack of Control



## c. Unacceptable Alternatives

### 1. The Mens Rea Alternative

#### a. The *Delling* Case

### 2. Guilty But Mentally Ill



10. The Current Contribution of Neuroscience
  - a. Inferences from Imaging and Real Relevance
  - b. Action
  - c. Mens Rea
    - a. Identifying Mental Disorder
    - b. Identifying Psychosis and Psychotic States, e.g., delusions, hallucinations
    - c. Identifying Cognitive Criteria, e.g., knowing right from wrong; understanding/appreciating
    - d. Unraveling the Control Test Knot? Not yet.



# 11 . Conclusion: Inevitable Mens Rea & Legal Insanity

We Are Acting Agents, Not Pinocchios, and Our Brains Are Not Geppettos Pulling the Strings. Agency Is Secure—At Least For Now (and probably forever). As Jerry Fodor wisely counseled, “be of good cheer; everything is going to be all right.”

And, as long as we are agents, mental states will be crucial to responsibility ascription

For now, neuroscience can't help much, but we can hope...

