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Prospects and Challenges of Domestication of International Laws in Nigeria:
Elizabeth Ama Oji and **M. V. C. Ozioko**

Appraisal Of The Nuclear Non-Proliferation Treaty (NPT), 1968: **A. Okoh Alubo** and **Morgan Piwuna**

Neuroscience and *Mens Rea* Jurisprudence: Implications of the Philosophical Problem of Free Will and Determinism: **By Ikenga K.E. Oraegbunam, and Julian N.K Chukwukelu**

The Independence of the Judiciary in Nigeria: A Myth or Reality?:
Roseline O. Ehiemua
Individual Criminal Responsibility Arising in Non-international
Armed Conflict: Past, Present and Future challenges: **Awhefeada, Ufuoma Veronica**

Grappling with the Age of Electronic Law Reporting in Nigeria; Evolution,
Challenges and Prospects: **Dewan, Dauda Umaru**

Human Rights as a Weapon of Success for Global Social Justice: **Eseni A. Udu**

Reproductive Rights and its Impact on the Health of Women in Nigeria:
Olusegun Olaitan Oluwaseyi

Making the companies & allied matters act 1990 in sync with modern needs:
Udoka Dennis Oguekwe and **Adaeze Udeze-Oguekwe**

The Imperative for a Reappraisal of Nigeria's Legislative Competences or Lists in the
Light of Practical Federalism: **Uwadineke C. Kalu**

Strike, an Instrument for Compelling Enforcement of Agreed Terms in Nigeria Industrial
Relation: a Right or a Privilege?: **Anushiem, Matthew Izuchukwu**

Human Rights of Prisoners in Nigeria: An Overview: **Umejiaku Nneka** and **Enemchukwu, Rose A**

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NEUROSCIENCE AND *MENS REA* JURISPRUDENCE: IMPLICATIONS OF THE PHILOSOPHICAL PROBLEM OF FREE WILL AND DETERMINISM*

Abstract

The determination of criminal responsibility of an accused person is clearly a demand before jurisprudence as philosophy of law. Accordingly, it is a joint task for both philosophy and law to the relevant extents. While philosophy with its comprehensive methodological prognosis searches for the possibility of man's inner facultative involvement, in this case, for the *mensrea*, law seeks the outward overt requirements expressive of yet inner consciousness in pursuit of the same *mensrea*. But this is by no means a conclusive *fait accomplis*. The perennial meta-ethical problem of free will and determinism presents a veritable challenge. Is man really free to perform premeditated acts, or is he condemned and determined willy-nilly to act the way he does? The emerging field of neuroscience seems to offer yet more complications.It claims, for instance, that a person's brain seems to commit to certain decisions before the person becomes aware of having made them.This is surely a counter-point to the idea of free will and hence disposes of *mensrea*.This study examines the implications of these philosophical reflections and scientific findings respectively and relates them to the question of criminal liability. This paper concludes to the effect that in the midst of challenges, the search for *mensrea* requirement for criminal liability determination is made to be intensified by the fruits of the considered extra-legal disciplines.

1. Introduction

The doctrine of *mensrea* is one of the fundamental and enduring principles in Anglo Saxon criminal jurisprudence. Put succinctly, the doctrine means that an act alone does not make a person guilty unless his mind is equally guilty.

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However, this cardinal doctrine is confronted by a myriad of controversies arising from its moral foundations and from the varied words used to denote it. Yet, one enduring question is whether, and in what sense human beings exercise control over their actions or decisions.The problem is not abated by the different mental states (intention, negligence, recklessness) which the term *men srea* refers to. Furthermore, currently, the findings of neuroscience appear poised to strike a deadly blow to this revered doctrine. Neuroscientists doubt the freedom of human actions. They argue that human actions have their origin in biological causes and not in independent human volitions. This development makes various authors to debate the question of whether neuroscience is relevant to, and does not counter criminal responsibility.[2]Again, since it is only the 'free' can form the *mensrea* for a crime, how does criminal law resolve the perennial tension between free will and determinism? Will the reflections of philosophy and the conclusions of the emerging field of neuroscience make irrelevant the doctrine of *mensrea*? Even if science may develop so as to demonstrate correlations of particular genes, or types of brain state, as claimed by neuroscience, could that ever necessarily and/or reasonably infer diminished or absent criminal culpability on the part of theindividual accused? This paper is set to enquire into these puzzles and draw a response.

2. *Mens Rea*: Concept and Evolution

There seems to be no legal term that is so basic yet so complex, so elusive yet so patent, so requisite yet so often wrongly dispensed with, so ambiguous yet

[2]Researchers have found delays of about half a second before one is aware of what one does. With contemporary brain scanning technology, scientists in 2008 were able to predict with 60% accuracy whether subjects would press a button with their left or right hand up to 10 seconds before the subject became aware of having made that choice (C.S. Soon; M. Brass; H. Heinze; &J. Haynes, "Unconscious Determinants of Free Decisions in the Human Brain".*Nature Neuroscience*11 (5): (2008). 543–5). These and other findings have led some scientists, like Patrick Haggard, to reject some forms of "free will". To be clear, no single study would disprove all forms of free will. This is because the term "free will' can encapsulate different hypotheses, each of which must be considered in light of existing empirical evidence Such illusions show that humans do not have full access to various internal processes. The discovery that humans possess a determined will would have implications for legal responsibility.Neuroscientist and author "Sam Harris' believes that we are mistaken in believing the intuitive idea that intention initiates actions. In fact, Harris is even critical of the idea that free will is "intuitive": he says careful introspection can cast doubt on free will. Harris argues "Thoughts simply arise in the brain. What else could they do? The truth about us is even stranger than we may suppose: The illusion of free will is itself an illusion (cited in M. Velmans, 'Preconscious Free Will', *Journalof Consciousness Studies*10 (12): (2003). 42–61).

so venerable, as the Latin phrasethat haunts Anglo Saxon criminal law: *mensrea*[3]. Cooper CJ and Lukin J describe it as 'the very much debated, the very much misunderstood and the very much confused doctrine of *mensrea*'.[4] Perhaps, a glance at its etymology will be the best way to grasp its meaning. *Mensrea* is from two Latin words, '*mens – mentis*' (mental) and '*res-rei*' (thing). Therefore, *mensrea* literally means 'the mental thing'.[5] The exact origin of this phrase is not clear.[6] It is widely believed by legal historians that until the 12th century, the law's description of acts constituting crimes was largely untroubled by concepts regarding mental states of mind. The distinction between tort and crime was then at best, very fussy, at worst, nonexistent.[7]

As a common law concept, the term '*mensrea*' literally translates to 'guilty mind'. It can be defined as the internal element of any crime and is said to be the blameworthy, guilty or criminal state of mind of the accused at the time that the person caused the *actusreus* to occur[8]. This literal interpretation has been given judicial backing in the case of *Abeke v State* which defines *mensrea* as a guilty mind. Smith and Hogan provide a working definition: intention, knowledge or recklessness with respect to all elements of offence together with any ulterior intent which the definition of the crime requires[9].
The phrase 'elements of offence' is a reference to what those writers used to call 'all the consequences and circumstance of the accused's acts (or state of affairs) which constitute the *actusreus*. The term '*mensrea*' is only a word of convenience used to denote many states of mind. The various states of mind which can be found under *mensrea* include, amongst others, intention, recklessness, knowledge or negligence. There are others like malice, willfulness, malice afterthought, etc.

[3] SH Kadish observed that the term mensrea is rivaled only by the term jurisdiction for the varieties of senses in which it has been used and for the quantity of obfuscation it has created. SH Kadish, 'The Decline of Innocence', (1968), 26 *CLJ*, 273, 67.
[4] *Thomas v McEather*, (1920) St R Qd 166 p.175.
[5] JWC Turner, *Kenny's Outlines of Criminal Law*, (18th edn, Cambridge: Cambridge University Press, 1962) p. 14.
[6] IKE Onaegbunam& RO Onunkwo have given what I believe is a far deeper account of the history of this phrase. '*Mens Rea* Principle and Criminal Jurisprudence in Nigeria', (2011) 2 *Unizik J.I.L.J*, 251.
[7] The ridiculously rigid nature of the Common Law is best seen in the law of deodands. Under this law, a chattel was deemed to be a deodand and forfeited to the crown whenever a coroner's jury decided that it had caused the death of a human being. RF Hunnisett, *The Medieval Coroner*, (Cambridge: Cambridge University Press, 1961) p. 32.
[8] C Ryan and G Scanlan, *Criminal Law* (2nd edn, Liverpool, 1989) p.54
[9] J C Smith and Hogan, Criminal Law (8th edn, London: Buttherworth's& co Publisher ltd, 1996) p.75

Lord Simmon in *DPP v Majeweski*[10] said that *mensrea* 'is the state of mind stigmatized as wrongful by the criminal law which when compounded with relevant prohibited conduct, constitute a particular offence. Kadish argues that '*mensrea*' refers only to the mental state which is required by the definitions of offence to accompany the act which produces or threatens the harm[11]. A critical look at these definitions will show that they stress *mensrea* as concerning criminality of the act and not its morality. In other words, there is no need for the accused to feel morally guilty or to know that what he was doing was morally blameworthy. Most, if not all these definitions have their criticisms. Jefferson has argued that starting from the first literal translation of the word *mensrea* into guilty mind, it is not correct to define *mensrea* in terms of state of mind. This is because *mensrea* cannot be used to denote just state of mind but also negligence which is not a state of mind but a failure to achieve a certain standard or act in a standard required of a prudent man acting in the same situation as the accused. Also the definition given by Smith and Hogan sees *mensrea* using only such words as intention, knowledge or recklessness. It does not mention the word 'negligence', and of course, that word cannot be excluded in determining what constitutes*mensrea*. Some of the words used in statute cannot fit into *mensrea* definition, words like permitting, maliciously and willfully[12].The most important thing to note is that whichever definition is used, it will not take us away drastically from the meaning of *mensrea* which is generally the internal element of the offence committed. It is also important to note that looking at the word in general may be erroneous as the meaning varies from crime to crime just as *actusreus* varies from crime to crime. Its meaning may only be correctly got in a given situation by looking at statutes and cases and treating each case according to its own merits. *Mensrea* is at heart analytical tool and not a prescriptive norm[13].

Be that as it may, with the growing influence of Canon Law, the purpose of the criminal law began to be perceived as the curbing of immorality. Terms with high moral content like 'malice' gradually found their way into law as the benchmark of culpability. But it will be stretching things too far to say that the idea of culpability giving rise to liability is unique to the common law. Blame and guilt are deeply human concepts and could be found in all human races.
Under the English Common Law, *mensrea* was used in two senses: the specific and the general senses. In the specific sense, it denotes the specific mental

[10] (1977) AC 443
[11] (1968) CLJ 273, 274
[12] M Jefferson, *Criminal Law* (4th edn, Great Britain: Financial Times Pitman Publishing, 1999) p.130
[13] Ibid, p.131

element required to commit a particular crime. In the general sense, it refers to the general principle of criminal responsibility which demands proof of a guilty mind against the accused. As illustrated by Oraegbunam and Onunkwo, 'while in the narrow sense, one can talk of the *mensrea* of, for instance, receiving stolen property, or of forgery, or of assault, the use of *mensrea* in the broad sense connotes, until the contrary is proved, the general presumption by the courts, of an accused's criminal intent when considering any offence'.[14]

However, at the early stages of common law, the application of the *mensrea* doctrine varied according to the proverbial Chancellor's foot. Judges most times were swayed by heinous nature of the charge. Occasional judicial attempts to draw out a generalized standard seemed akin to the apocryphal and hypothetical characterization of an elephant from descriptions produced by the groping of the blind. In each instance, vision was limited by reach. The result of this was chaotic state of law with regard to the mental elements of an offence. But if the concept of *mensrea* is so difficult to grasp and to be applied consistently by the court, why not do away with it entirely? In what follows immediately, this study will look at the arguments for the elimination of *mensrea* doctrine from Nigerian criminal jurisprudence.

3. The *Mens Rea* Debate and the Problem of Free Will and Determinism

Criminal law relies on the premise that people freely choose their actions and should be punished accordingly. This notion of free will which is evident in the doctrine of *mensrea* underpins the retributivist theory of punishment.[15] Though amenable to commonsense, the notion of free will has not been immune to attacks from determinist philosophers and more recently, from neuroscience. This problem is not merely academic. It crucially affects this discussion.[16] It would be a logical jump to discuss the issue of *mensrea* without first of all deciding whether man is free at all or whether he is merely a 'controlled puppet'. Therefore, this study looks briefly at how the criminal law reconciles the tension between free will and determinism.

Efforts to understand the relationship between freewill and determinism for purposes of figuring an actor's ethico-legal responsibility have preoccupied a diverse group of thinkers from Plato and St. Augustine to Martin Luther and

[14]Oraegbunam & Onunkwo, *art cit*, 249.

[15]Kant is regarded as the most influential writer on the retributivist theory of punishment. He believes that a sentence is matched to a 'criminal in proportion to his inner wickedness'. I Kant, *The Metaphysics of Morals*, Mary Gregor (trans), (Cambridge: Cambridge University Press, 1996), p. 106.

[16]Kenny had rhetorically asked, 'supposing then that determinism is true, how can we any longer uphold the notion of responsibility in our courts of law'? A Kenny, *Free Will and Responsibility* (London: Routledge&Kegan Paul Ltd, 1978), p. 12.

Hume. This all-encompassing problem traverses the gamut of many disciplines: theology, law, biology, philosophy, psychology, etc.[17] However, this study limits itself only as it concerns criminal responsibility.

Generally, there are two competing perspectives of human action: the determinist perspective and the free will perspective.[18] The determinists contend that individual action is to some degree caused by factors outside of an individual's control. These causal forces might range from divine intervention to interactions between social and biological factors. But, whatever they are, they compel human behaviour to some extent.[19] The thesis of the determinists is best summarized by Kelman thus: 'determinism pictures conducts in structuralist, backward-regarding, amoral terms, holding that conduct is simply a last event we focus on in chain of connected events so predetermined as to merit neither respect nor condemnation'.[20] However, it is important to note that determinism is not identical with fatalism.[21]

Contrary to the determinist, the proponents of free will hold that human behaviour is the result of individual choices made by autonomous actors.[22] They assume that individuals are unique actors who have an inherent ability to choose or 'choose not' when confronted with specific environmental stimuli.[23] It thus follows that individuals can be held personally responsible for their choices, and thus, should face the consequences for their decisions. These scholars believe that the reality of human effort, choice, regret, motivation and common sense vindicate their assumption.

[17]MA Etudaiye, 'Free Will. The Farcical Jurisprudence of Criminal Justice in Nigeria', (2009), vol 1, No.3, *Akungba Law Journal*, 97.

[18]The debate between free will and determinism is one that includes many intricacies and subclasses that are beyond the scope of this discussion. It is simplistic to argue that this area of rich and intricate human thought can be so crudely divided into two categories. Nevertheless, the philosophical camps of free will and determinism are generally accepted because they do highlight what is the line of division for most philosophers.

[19]M Jones, 'Overcoming the Myth of Free Will in Criminal Law: The True Impact of the Genetic Revolution', (2002), 234 *D.L.J*, 5, 1037.

[20] M Kelman, *A Guide to Legal Studies*, (Harvard: Harvard University Press, 1987), p. 86.

[21]Determinism here refers to the idea that the future is dependent upon the present such that, given the present, only one possible future exists. It should be contrasted with fatalism for which the future is guaranteed irrespective of the present.

[22]Traditionally, an actor has been said to have acted freely (according to his or her free will) if, with respect to a given act, he or she could have done otherwise.

[23]Fagothey speaks of free will as our ability to control ourselves, to be masters of ourselves, to do what we want to do, rather than have it forced on us. A Fagothey, *Right and Reason: Ethics in Theory and Practice*, (Missouri: C.V. Mosby Co, 1985), p. 16.

There is no gainsaying that the law views deterministic arguments and tendencies of science with grave caution. The integrity of criminal justice no doubt will suffer if determinism is allowed to run its full course in the court of law. As Berman observes, 'the lawyers in all countries will answer that if there is no reason, no choice, no will, then there can be no law'.[24]Cardozo J forecasts cataclysmic effects if the law abandons free will and accepts determinism.[25] Scholarly approaches to this problem therefore generally fall into two categories: Pragmatism and Compatibilism.

The pragmatist group of scholars contends that criminal law should not concern itself with the philosophic and psychological questions of free will and determinism. It believes that the justification for the assumption of free will is based on practical and social convenience. This assumption allows for the administration of justice and solves any tension that might exist between deterministic science and normative criminal justice theory. It allows criminal jurisprudence to be foundationally constructed around the notion of human decision making control and corresponding personalized responsibility. Not only does this allow courts to avoid the difficult task of deciphering the true root of all human behaviours, it also justifies another key component of criminal justice theory, namely, attributing blame to individuals.[26] Packer, a proponent of this view puts it this way:

> The idea of free will in relation to conduct is not, in the legal system, a statement of fact, but rather a value preference having very little to do with the metaphysics of determinism or free will . . . . Very simply, the law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were.[27]

[24]HJ Berman, *Law and Revolution: The Formation of Western Legal Tradition*. (Harvard: Harvard University Press, 1983), p. 29.

[25]He acknowledged that it is quite possible that a brain in some sense diseased may produce a fit of jealousy, anger, or revenge, but added that the law is, that that species of insanity is crime, and, as such, must be punished. This is necessary, he said, because any other legal doctrine must result in resolving society into its original elements, and compel every man to protect himself. *Steward Machine Co* v *Davis*, 3 (1937), 301 U.S. 548.

[26]This view has roots in America realism and utilitarian theory of Bentham. For instance, Oliver Wendell Holmes wrote 'if I were having philosophical talk with a man I was going to have hanged (or electrocuted) I should say, I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a solider dying for his country if you like. But the law must keep its promise'. M Howe (ed), *The Correspondence of Justice Holmes and Harold Laski*, (Harvard: Harvard University Press, 1953), p. 806.

[27] H Packer, *The Limits of the Criminal Sanction*, (California: Stanford University Press, 1968) p. 74.

However, there is another group of scholars who justifies human freedom and accepts some deterministic causes of behaviour. This view is what is known as compatibilism. Thecompatibilist theories are varied and variegated but their general argument is that human conducts are generally free except on very few occasions. They hold that free will is a perfectly natural, scientifically respectable phenomenon and part of the ordinary human condition. Yet, they accept that free will can be undermined by various kinds of psychological deficit like mental illness or infancy.

The Nigerian Criminal Code appears to be more of a compatibilist bent. In the construction of crimes throughout the Code, words like, 'knowingly', 'fraudulently', 'intentionally', 'voluntarily', 'dishonestly', 'wilfully' are used to indicate the deep belief that the criminal actor can independently form the requisite *mensrea* for the crime. This belief is not merely a value preference. Furthermore, the Code accepts that the ability to exercise free will and hence *mensrea* could be restricted in certain circumstances. The defences of insanity, provocation, intoxication, compulsion could all be said to be circumstances where the free will of the defendant was hindered and so the *mensrea* for the crime could not be said to have been formed. As if this is not enough, section 24 provides a general defence for all circumstances where an act was independent of the exercise of the defendant's will or where the event was an accident. Therefore, it is submitted that although criminal law is wary of extending the boundaries of determinism, it is sweeping to say that the belief in free will is merely for practical purposes.

Having seen how the criminal law resolves the conflict of determinism and free will and thus providing a sure footing for this discussion, the next question is; granted that human beings can form the requisite *mensrea* for crime, should the *mensrea* requirement be necessary for conviction? If the prevention of harm to the society is the aim of criminal law, what is the jurisprudence of requiring proof of a particular intent? Put differently, why not make people strictly liable for every offence?

It seems only a few debates in the history of Jurisprudence have been as animated and brilliant as the debate between Barbara Wootton and Herbert Hart on the role of the *mensrea* principle in criminal adjudication. Wootton, a British Magistrate mounted an attack on the sacred doctrine of *mensrea* and the conception of responsibility embodied in it.[28] She begins by noting that it is impossible to keep a clear line between the wicked and the weak minded. 'The

[28]B Wootton, *Crime and the Criminal Law: Reflections of a Magistrate and Social Scientist*. (2nd edn, London: Stevens & Sons, 1981), p. 14.

step between he did not resist his impulse and he could not resist his impulse was one which was incapable of scientific proof'[29]. Since there is no objective science to distinguish between 'he did not' and 'he could not', the notion of *mensrea* (that is, responsibility in the sense of a man's ability to have done otherwise than as he did) is irrational.

Wootton uses the term 'responsibility' in a restricted sense to mean the person by whom a forbidden act was committed and not whether such a person could have prevented himself from acting otherwise than as he did. She opines that the primary job of the court is to determine the question of responsibility in its narrow sense and not to indulge in an unnecessary inexact speculation of whether the defendant could have acted otherwise.

Furthermore, Wootton contends that the necessity of *mensrea* is only justified because of the wrong assumption that the aim of the criminal law is retribution for past wickedness. Rather, she holds that the aim of the criminal law is the prevention of crimes. Punishment should be administered only as a deterrent to the defendant and to other persons in the society.[30] From this reasoning, it was inevitable that Wootton would view *mensrea* as relevant only after conviction as a guide to what measures should be taken to avoid a recurrence of the forbidden act and not as necessary condition of the defendant's liability to punitive measures.

Finally, since Wootton is suspicious of how we distinguish the insane (the 'could not') from the unscrupulous (the 'did not'), she recommends that the distinction between the penal and medical institution be blurred or obliterated altogether. Both categories of offenders will be simply held in 'places of safety' in which they will receive treatment.

The argument of Wootton is seductive but dangerous. This line of thinking would entail a radical revision of the penal system to mean that the mere proof of the commission of a forbidden act without any allusion to *mensrea* brings the defendant within the scope of punitive measures. Hart was among the first to point out the shortfalls in Wootton's arguments. It is to the views of this eminent scholar of Jurisprudence that we now turn.

Hart's misgivings could be summarized on four principal grounds.[31] Firstly, Hart argues that a system in which the proof of *mensrea* is no longer a necessary condition for conviction would increase occasions for official

[29] *Ibid* p. 47.
[30] Wootton rarely used the word punishment. She disliked it. She used words like treatment or rehabilitation. She was deeply concerned about the morality of punishment. No wonder, she described capital punishment an act of unsurpassable arrogance.
[31] HLA Hart, *Punishment and Responsibility*, (Oxford: Oxford University Press, 1968), p. 208.

interference with the lives of the citizens. He illustrates this with the crime of assault. Under this system, a mere touch, even a friendly handshake would be matters for investigation since technically, the *actusreus* of the crime has been committed. Individual freedom, no doubt, will be at the whims and caprice of the law enforcement. Certainly, no one who has witnessed the 'professional conduct' of the Nigerian Police would view this kind of expansion of police powers with equanimity.

Secondly, even if it is conceded to Wootton that the purpose of criminal law is prevention of crime and that punishment must serve as a deterrent to the defendant and to persons in like situations as the defendant, it is impossible to know this without asking whether the defendant could have done otherwise than as he did. If the defendant could not have done otherwise, then, no amount of punishment can deter him or other persons in like situations. What type of punishment could deter individuals from the performance of reflex actions? Therefore, this idea of preventive justice is morally suspect.
Thirdly, Wootton recommends that the distinction between penal and medical institutions be obscured since there is no objective criterion with which to distinguish the insane from the unscrupulous. She maintains that the current segregation of defendants into medical or penal institutions is absurd. But this contention is wrong on two grounds. Firstly, criminal punishment as it is applied is different from a finding of insanity and subsequent confinement in a medical institution. Criminal conviction is a public act which invites the odium if not hostility of the society on the criminal. This expression of odium is a powerful deterrent. It is therefore morally reprehensible to impose this measure on people who could not help doing what they did. On the other hand, if one accepts Wootton's recommendation to make penal and medical institutions indistinguishable, then, law will lose this important deterrent element in its authority. As Packer observes, 'the ends of the criminal sanction are disserved if the notion becomes widespread that being convicted of a crime is no worse than coming down with a bad cold'.[32]

Fourthly, Wootton believes that it is illogical to introduce any reference to *mensrea* into the definition of an offence. But there are some socially harmful activities which are now and should always be treated as criminal offences which can only be identified by reference to intention or some other mental element. These are occasions where the actus (act) is not inherently reus(guilty). For instance, without any allusion to *mensrea*, how can the Criminal Code define an attempt to commit an offence? What distinguishes an

[32] Packer, *op cit*, p. 261.

attempt from an innocuous activity is that it is a step taken with intention to effect some harmful result. Furthermore, without any reference to *mensrea*, it would be difficult to classify the gravity of different offences. Considering the offence of housebreaking / burglary, it is simply put, trespass with intent to commit felony in a dwelling house. Without the intent, it is merely trespass; a civil wrong.[33]

Fifthly, conventionally, *mensrea* is thought of as a fault requirement. But helping to establish culpability on the part of the defendant is only one of its roles and by no means, the most important. '*Mensrea* has important roles to play in articulating, and notifying, the limits of citizens' freedom. More specifically, one purpose discharged by *mensrea* is to secure fair warning to defendants, ensuring they have sufficient advance notice that, by their conduct, they risk violating the criminal law'.[34] Therefore, it plays a crucial communicative role. *Mensrea* is usually thought only as fault element because we conceive the criminal law in *ex post* terms, that is, where the defendant has already acted; and the task is to decide whether he satisfies the criteria of culpability. But this communicative role is shown more clearly if we conceive the criminal law from an *ex ante* perspective.

Finally, there is doubt whether the Wootton's contention that there is no objective means of distinguishing between the insane and the unscrupulous still carries weight given the advancements in the field of psychiatry. Wootton, no doubt, views the emerging science of psychiatry in her days with grave suspicion. She doubts if it were a science at all. This is because she observes that the definitions and concepts of mental disorder are unstable, elusive and far from being socially or ethically neutral. It would be interesting, she says, to know how often psychiatrists would diagnose diminished responsibility if they did not know that the subject was on trial for murder.[35] However, the field of psychiatry today has emerged from its mushy beginnings to become a vibrant science. Therefore, it is doubtful if Wootton would have still maintained her views of psychiatry today.

The journey so far has been long but very useful. We have seen how the criminal jurisprudence reconciles the perennial conflict between determinism and free will. We have also met resolutely the argument that *mensrea*, a sacred

[33]S. 411 (1) Criminal Code. Also, possession of dangerous weapon is an offence only because there is intent to break into a dwelling house by means of such possession. If there is no such intent, possession of dangerous weapon by unauthorized persons would still be an offence but of a different gravity. S. 417 (a) Criminal Code.
[34]W Chan & AP Simester, 'Four functions of Mens Rea', (2011), *CLJ*, 381, 2.
[35]Wootton, *op cit*, p. 18.

and venerable principle of criminal jurisprudence should be eliminated or, at least, be allowed to wither away. In what follows now, we shall delve completely into how the emerging field of neuroscience presents a challenge to near sacrosanct principle of *mensrea*.

4. *Mens Rea* and Neuroscience

Although the law claims that even the devil knoweth not the mind of man, the criminal law has had a long interest in the mind. As shown already, in most criminal trials the prosecution must prove the existence of a mental state – a guilty mind. As Greene and Cohen note, 'for centuries, many legal issues have turned on the question, "what was he thinking"?'[36] Neuroscience claims to have the resources to answer this question with unprecedented certainty.

Neuroscience is the study of the brain and the nervous system. It is a large field of study that has many branches like behavioural neuroscience, cognitive neuroscience, computational neuroscience, developmental neuroscience and so on. At the cognitive level, neuroscience seeks to explain the causes of human behaviour. Cognitive neuroscience addresses the questions of how psychological functions are produced by neural circuitry.[37] Armed with its sophisticated measurement techniques such as neuroimaging (e.g. fMRI, PET, SPECT), electrophysiology, and human genetic analysis, cognitive neuroscientists seek to address abstract questions such as how human cognition and emotion are mapped to specific neural substrates. The claim of the neuroscientists in a rather crude way is that human actions originate causally from the brain and that with more advancement in the field, it will be possible to predict the action of any defendant by some analysis of his brain. In other words, it holds that man's claim to free will and independent decision-making is illusory.

But does the emerging understanding of the mind nay, as the brain[38] have any implications for criminal jurisprudence? Opinions are as usual varied. Friedland believes that as criminal behaviour becomes more firmly rooted in the genetic makeup of the individual, it follows that an alteration of the underlying assumptions about what constitutes criminal responsibility will be necessary. Friedland's optimism in the prospects of neuroscience is unbounded. He posits that our way of life is destined to change because

[36]J Greene & J Cohen, 'For the Law, Neuroscience Changes Nothing and Everything', in S. Zeki (ed) *Law and Brain* (London: Royal Society Press, 2004), p. 15.
[37] Wikipedia.org/neuroscience/ accessed 27th July, 2014.
[38]The present neuroscientists are not the first to argue that the mind is simply the brain in action. The argument is found in the writings of Hume.

neuroscience will render all theories of punishment invalid.[39] Nygaard believes that the result of neuroscience will be a totally deterministic universe in which free will plays no role. He recommends that the society needs a new set of criminal laws to anticipate this dynamic changes.[40] However, this study does not share in this optimism. Nygaard agrees that neuroscience has some impacts on criminal law but it will hardly be revolutionising.

The Criminal law strictly does not make any claim that neuroscience would refute. Existing legal principles make virtually no assumptions about the neural bases of criminal behaviour, and as a result they can comfortably assimilate neuroscience without much in the way of conceptual upheaval. All neuroscience may offer are new details, new sources of evidence, but nothing for which the law is fundamentally unprepared. The law assumes that people have a general capacity for rational choice. That is, people have beliefs and desires and are capable of producing behaviour that serves their desires in the light of their beliefs. The law acknowledges that man's capacity for rational choice is far from perfect requiring only that the people it deems legally responsible have a general capacity for rational behaviour. The test is therefore a general capacity for rationality and not on whether the defendant had free will in the deep metaphysical sense.[41] Therefore, unless neuroscience can demonstrate that all our behaviours are thoroughly irrational or *arational*, the law's criterion of general minimal capacity for rationality stands firm. Secondly, the optimism that neuroscience would transform criminal liability stems from an underestimation of the human need for revenge. One of the key roles of the criminal justice system is to act as an outlet for the revenge-based motives of the individual victim in particular, and the greater society in general. This need cannot be satisfied merely by explaining to the victim that genes or neurons made the criminal to rape his mother.

Be that as it may, neuroscience still has a lot to offer the criminal law especially in the area of criminal liability. Neuroscience will provide new source of evidence in understanding criminal behaviour. It will lead to a reconsideration and expansion of the defences in the Code.[42] For instances, some studies have shown that the demand for a sudden uncontrollable rage as

[39] SI Friedland, 'The Criminal Law Implications of the Human Genome Project: Reimagining a Genetically Oriented Criminal Justice System', 86 *KY. L.J.* 303, 324–41.
[40] Quoted in O Jones, 'Behavioral Genetics and Crime, in Context', (2006), 225 *DLJ, 3,* 81-100.
[41] This demand for minimal rational capacity is codified in ss. 28 & 30. These sections show that what the criminal law is concerned with is not free will so to speak.
[42] The American Model Penal Code in this regard has codified Extreme Emotional Disturbance Defense (EEDD).

the defence of provocation stipulates is actually biased against women. In their view, the lashing out in a moment of temper is a male way of reacting and takes no account of the fact that women, partly because they lack physical strength, may react to gross provocation differently, yet lose self-control just as powerfully.[43] Finally, neuroscience will affect the way the criminal law is viewed not by insisting that criminal responsibility be abrogated, but by increasing the appreciation of the mechanism of human actions.

5. Evaluation

The basic task before the authors of this paper has to do with whether or not humans possess free will, the result of which will have far reaching implications for the time-honoured*mensrea* requirement for conviction and criminal liability. If accused truly possesses free will, then he consciously controlshis decisions and actions. This is a plus for *mensrea* requirement. If not, then accused person's sense of control is an illusion, which conclusion is antithesis to *mensrea*. The philosophical problem of free will and determinism is no doubt a recondite articulation of this dilemma. Does the accused have two or more alternative acts, where it is possible to him to choose either? *Mensrea* presupposes the fact that more than one action is a real possibility for the accused. It means that more than one action is within the accused person's power. Such accused person has a real choice between alternatives. Hence, *mensrea* application must first establish the fact that the accused person can perform an act, has real possibility to so do, and could have done otherwise. Thus, free will and hence *mensrea* is defended as a necessary presupposition of criminal responsibility, and holds the accused as possessing power to do something other than what he did. For those in the deterministic camp, every event is uniquely determined to happen just as it does happen by the causes operating on it. This means that every such event is of some kind, say A, such that there is a universally true generalization according to which events of another kind, say B, are invariably followed by 'A''s. This makes it possible to predict an 'A' if we know that 'B' has occurred. This state of affair has no room for *mensrea*.

Scientifically, however, the subjective experience of decision ownership for the determinists is nevertheless not unimportant. It is predicated on neural dynamics that are empirically knowable, traceable and in time predictable. The will is seen as a modification of the brain, by which it is disposed to action, or prepared to give play to organs. Consequently, when the accused acts, he acts necessarily, and his action is the result of the impulse he receives either from the motive, from the object, or from the idea which has modified his brain, or

[43] C Elliott & F Quinn, *Criminal Law,* (3rd edn, Tottenham: Pearson Education, 2000), p.66.

disposed his will. When the accused person does not act according to this impulse, it is because there comes some new cause (*actusnovusinterveniens*), some new motive, some new idea, which modifies his brain in a different manner, gives him a new impulse, determines his will in another way, by which the action of the former impulse is suspended. One piece of evidence supporting this position has come from neuroscience research showing that brain activity underlying a given decision occurs before a person consciously apprehends the decision. In other words, thought patterns leading to conscious awareness of what one is going to do are already in motion before one knows he will do it. This conviction is surely be the science equivalent of the philosophical theory of determinism. Yet, *a fortiori*, without conscious knowledge of why one is choosing as one is choosing, one cannot claim to be exercising "free" will.

Be that as it may, those supporting a purer view of free will argue that whether or not neuroscience can trace brain activity underlying decisions, making the decision still resides within the domain of an individual's mind. In this view, parsing unconscious and conscious awareness is less important than the ultimate outcome – a decision, and subsequent action, emerging from a single mind. Free will supporters argue that if free will is drained of its power by scientific determinism, then one is moving down a dangerous path where people cannot be held accountable for their decisions, since those decisions are triggered by neural activity occurring outside of conscious awareness. Imagine how this might play out in a courtroom in which neuroscience evidence is marshaled to defend a murderer on grounds that he could not *know* why he acted as he did.

Neuroscientific evidence about the links between brain dysfunction and criminal behaviour seems unlikely to change the views on the demands of justice or to touch the justifications for invoking a penal justice system: retribution, deterrence, incapacitation, and rehabilitation. Instead, one may see major changes in how crimes are investigated, in how trials are conducted, in how sentencing decisions are reached, and in what kinds of sentences are imposed. For instance, fruits of neuroscience research such as lie detection and other forms of "mind-reading" may be used to investigate crimes. Trials may be affected both by the introduction of such mind-reading evidence and by neuroscientific evidence of bias, on the part of parties, witnesses, jurors, and even judges. Issues of psychopathy, frontal lobe damage, and other asserted "causes" of criminal behaviour may be used, not to reduce responsibility, but as predictive factors to increase sentences. And neuroscience, defined broadly, may provide one with new options in sentencing that hold out the promise of effective rehabilitation through treatment. A criminal legal 'wish list' of questions which the courts might hope neuroscience could help them towards

answering might include :whether an accused 'intended' to do what he did, or determining the degree to which his urges are 'resistible'; or otherwise assisting in determining his level of responsibility; or assisting in determining memory , or whether an accused is lying.

However that may be, neuroscience or even psychiatry may be able to describe abnormalities of mental functioning, in their own terms, but that is not to answer questions about legal responsibility. 'Scientific explanation' is just that, and legal attribution of responsibility is also just that. To attempt to go from 'science in being' to 'law in the abstract', involves a journey for which there is no map, and which may not even 'exist', as a journey. Law asks questions which science cannot answer; whilst science answers questions that the law largely does not pose'. What is at issue is whether the model of a given science that is being offered to the courts can 'map onto', or not, the legal questions to which that science is to be applied. In relation to some questions, it may; but not directly in relation to some other questions. There will always be need of 'translation' from science into law. Addressing legal or even moral responsibility may properly 'utilise' scientific data but then require entry into an entirely different 'thought domain' or epistemological enclave.