

Elucidating *Actus Reus* and *Mens Rea*: A Descriptive Psychology Perspective

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Abstract

The legal concepts *actus reus* and *mens rea* are foundational in determinations of culpability and guilt for criminal acts, thereby affecting many lives in our society. This paper begins with a brief overview of the concepts of *actus reus*, and *mens rea*, followed by presentation of several resources from Descriptive Psychology to elucidate these concepts and enhance our understanding. Resources include the concepts of Persons and Deliberate Action, a parametric analysis of Behavior, and forms of behavior description related to these parameters. The concepts *actus reus* and *mens rea* are elucidated using the forms of behavior description. The analysis demonstrates that to a large extent, the question “Was the person guilty?” translates to the question “*What* deliberate action was it?”

Volumes have been written about *actus reus* and *mens rea* because of the enormous significance that these concepts have for how we treat people accused of criminal acts. A great deal hinges for individuals, families, and communities on the shared understanding of human behavior reflected in these notions. This paper elucidates the concepts from the perspective of Descriptive Psychology.

Descriptive Psychology contrasts with theories that treat behavior as if it merely consisted of the *observable* aspect or *motoric* aspects of a behavior. It also contrasts with theories that view behavior as being deterministically controlled by historical antecedents, or that view man as fundamentally irrational.

Like Law, Descriptive Psychology is anchored on broader concepts of behavior that include motivational and cognitive parameters. Both make distinctions among personal characteristics of the individual engaged in the behavior, and include the circumstances as relevant and important in understanding the particular behavior that occurred. Both highlight the expectation that persons are generally assumed to be responsible for their actions, and that society has a crucial stake in accurate assessment of persons who may be unable to control their behavior and pose a danger to others and/or to themselves.

It is not an accident that Law pragmatically has found it important to make these distinctions. Unfortunately, in the general psychological literature, Law has not had much to draw on by way of resources to provide a systematic framework for understanding the behavior of persons as persons, as opposed to, e.g., as organisms, black boxes, etc. The general psychological literature reflects a range of misconceptions about the nature of behavior and in what sense a given behavior is chosen or in what sense a person is aware of what he is doing (i.e., is cognizant of what behavior he is engaged in).

In contrast, Descriptive Psychology is designed to provide systematic access to all the facts and possible facts about behavior, persons, the real world, and the relationships among them. It provides a conceptually sound framework for making and mapping out whatever useful and important distinctions need to be made, and it can facilitate this enterprise and enable us to make distinctions more clearly. (It is important to emphasize that Descriptive Psychology is a resource for such enterprises, not a solution.)

This paper provides an example of using Descriptive Psychology as a legal resource. It begins with a brief overview of the concepts of *actus reus*, and *mens rea* (cf., McKee, pp. 2-4, 8-9). Then the

concepts of Persons and Deliberate Action, as conceptualized in the Descriptive Psychology system, are introduced. A parametric analysis of behavior is presented, and forms of behavior description are discussed. The concepts of *actus reus* and *mens rea* are elucidated using the forms of behavior description rather than using terms such as “voluntarily” and “capable of” which have long and slippery philosophical histories.

Actus Reus and Mens Rea

According to Grisso (1988), “The law has long recognized two concepts on which responsibility for criminal actions depend: *actus reus*, requiring evidence that the accused person engaged in the alleged act; and *mens rea*, requiring a determination that the accused person manifested the requisite mental state to have intended committing the act or to have foreseen its consequences” (p. 4).

What constitutes an act is a matter of some discussion. *Actus reus*, the guilty act, is not simply the performance, e.g., thrusting a knife. Rather, to be construed as a “guilty act” the circumstances and consequences of the act must also be considered. Thrusting a knife does not constitute a criminal act. Thrusting a knife at someone (circumstances) resulting in the other’s injury (consequences) may be a criminal act.

Actus reus may also be an omission, a failure to act. Standing alone on a dock is not a criminal act. However, a healthy, unimpaired adult, standing alone on a dock watching a two year old child drown three feet away, may, under some circumstances (e.g., where there is a “duty to act”), be charged with criminal negligence. *Actus reus* is generally defined by overt, publicly observable variables: the act, the environmental context, and the result of the act.

Mens rea, the second component of a crime, comprises what some call the internal dimensions of the actor. *Mens rea*, the “guilty mind,” is the actor’s intent, the state of mind to do the *actus reus*, which the law prohibits. *Mens rea* is not directly observable, but is

“inferred” from the person’s acts (and omissions) and speech before, during and after *actus reus*.

Intent is distinguished from motive. Motive is what prompts a person to act (or fail to act), while intent refers simply to the actor’s state of mind at the time of the crime. For example, A and B each rob an abortion clinic of \$500. A uses the \$500 to buy drugs which he then ingests. B donates the \$500 to an anti-abortion advocacy group. Despite quite different motives, A and B’s *mens rea* are equivalent: an intent to deprive the owner of his money. (But see below.)

In addition to being used in a very narrow sense as the intent to commit a specific crime, *mens rea* has also evolved into a broader use as a state of mind of general culpability or liability, an awareness of right from wrong (Miller, 2003, p. 213). To acknowledge the complexity of the construct of *mens rea* and its applicability to human interactions, the American Law Institute identifies four distinct states of culpability: purposely, knowingly, recklessly, and negligently. According to Loewy (1975), a person acts “*purposely* when he consciously desires his conduct to cause a particular result; *knowingly* when he is aware his conduct is practically certain to cause a particular result; *recklessly* when he is aware of a risk that his conduct might cause a particular result; and *negligently* when he should be aware of a risk that his conduct might cause a particular result” (p. 117).

To illustrate these states of mind, suppose the *actus reus* is a person A shooting a gun. A would act purposely if he pointed at and then shot person B at a distance of 18 inches. A would act knowingly if he shot at (and hit) B “just to scare him” at a distance of 20 feet. A would act recklessly if he shot the gun aimlessly at a party injuring B. A would have acted negligently if, while cleaning his loaded gun, the weapon discharged and A’s roommate was injured.

A person is presumed to be legally responsible for his or her behavior if, at the time of the offense, the person was capable of voluntarily performing the act, *actus reus*, and capable of forming the intent to act, *mens rea* (cf., McKee, 1994). The concept of “capable of” is discussed later in this paper. It may be noted that for

some crimes (known as “specific intent crimes,” murder being the most commonly known, but rape, arson, and any attempt crime also fall into this category), *mens rea* requires both the intent to perform the act and the intent to achieve a specific result. In order to obtain a valid conviction, the prosecution is required to prove both *actus reus* and *mens rea* beyond a reasonable doubt.

A person may be excused from conviction and punishment if the defense successfully argues that either *actus reus* or *mens rea* was sufficiently impaired by a mental illness, mental defect, or other condition beyond the control of the defendant. A related defense of this type is infancy, i.e., the defendant was too young (generally under age 7) to be capable of forming *mens rea*, a criminal intent.

Generally in criminal law, disorders such as psychosis, manic-depressive illness, and mental retardation are considered to affect *mens rea*. For example, a person suffering from schizophrenia, paranoid type, may have a delusion that a neighbor is attempting to kill him and as a result assaults the neighbor without provocation. Expert testimony showing both that the assault was initiated by a persecutory delusion and that it negated his belief that he was acting wrongfully, would likely result in a verdict of “not guilty by reason of insanity.”

Some mental disorders, however, are considered to affect *actus reus*, the voluntariness of the person’s behavior. In certain cases, the legal defense of automatism may be argued. The incapacitating conditions may include sleepwalking disorder, epilepsy, anoxia, and certain dissociative disorders such as psychogenic fugue, depersonalization, and multiple personality (also called “dissociative identity”) disorder. For example, if an epileptic patient hits another during a seizure, expert testimony that the act was not under the defendant’s voluntary, conscious control would be the basis of the defense. That is, the defense would argue: it is not an *actus reus*. (It was not purposeful, so there can be no criminal act.)

In regard to defenses based on insanity, the statutes defining insanity vary widely from state to state and a thorough discussion of the defense is beyond the scope of this paper. Many insanity rules

exist: the M’Naghten test, the irresistible impulse test, the Durham rule, the ALI rule, and the *mens rea* test. The rules share three elements: (a) there must be a mental disease or disorder; (b) there must be legally-relevant impairments in functioning; and (c) there must be a clear and direct causal relationship between (a) and (b).

Persons and Deliberate Action

What do we mean by “persons”? In Descriptive Psychology, what we mean is given by the following definition: “A person is an individual whose history is, paradigmatically, a history of deliberate action.”

What is “Deliberate Action”?

Ossorio (1985) writes:

In deliberate action a person engages in a given behavior, B; further, he knows that he is doing B rather than other behaviors which he distinguishes and he has chosen B *as* B from among a set of distinguished behavioral alternatives as being the thing to do. In the vernacular, we might say, “He knows what he’s doing and is doing it on purpose.” Deliberate action does *not* imply deliberation or prior thought about what to do, and, in fact, almost all deliberate action is spontaneous, unrehearsed, and unreflective.

Deliberate action is archetypal for persons. If persons did not normally have the ability to distinguish what they were doing and to do it on purpose, we would not have the concept of person that we in fact do. The capability for deliberate action is not merely an expectation; it is a social and legal requirement. Few people would argue with the principle that a person

who either doesn't know what he is doing or can't control what he does is a danger to himself and others and needs some form of custody. (p. 154)

Several clarifications are useful. Ossorio (1985) points out that the definition of a Person, i.e., an individual whose history is, paradigmatically, a history of deliberate action, reflects several facts.

The first is that engaging in deliberate action is *conceptually* the essential characteristic of a person. The second is that persons do not literally spend their entire lives engaging in deliberate action. The third is that, since it is conceptually essential, some form of explanation is called for and is available for those cases and those times when a person is not enacting a deliberate action. (Most commonly, the explanation refers to a particular state such as being asleep, being unconscious, being delirious, and so on.) (p. 155)

Ossorio (1981) has also commented that:

The paradigm case of human behavior is not merely a deliberate action in which the distinction between Intentional Action B and some other intentional action M is involved. Rather, that case is found where the individual, A, *engages* in B *because* it is B, rather than M. It is in this sense that we regard human beings as having freedom, choice, and the correlative responsibility in regard to their behavior. (p. 18)

It is important to reiterate that Deliberate Action does not imply deliberation. Moreover, Deliberate Action is a special case of Intentional Action, which will be presented next.

A Parametric Analysis of Behavior

The parametric analysis of Behavior as Intentional Action and its articulation as a calculational system provides the systematic framework for the range of behavior descriptions available to us. This is a major resource and contribution of Descriptive Psychology to our

task. It helps us articulate distinctions and systematize patterns and connections which would otherwise be difficult to make or organize.

The concept of intentional action is articulated not by means of a definition, but rather by means of a parametric analysis:

$$\langle B \rangle = \langle IA \rangle = \langle I, W, K, KH, P, A, PC, S \rangle$$

The parameters of intentional action are the ways in which one particular behavior can be the same as or different from another behavior as such. In this formula,

- B Behavior (Instances of behavior are identified directly by locutions in ordinary language.)
- IA Intentional Action (The technical designation for Behavior under the present parametric analysis)
- I Identity (Refers to the identity of the individual whose behavior it is; values of this parameter are given by names or individuating description.)
- W Want = The “motivational” parameter (Values of this parameter are given by specifying states of affairs as being wanted.)

Ossorio (1972, p. 16) has noted that the motivational parameter is what conceptually defines the unit of behavior. When the state of affairs that is wanted becomes the state of affairs that is achieved, that behavior is ended. Notice that in situations with unintended consequences, the unit of behavior that the individual is engaged in as established by what he wanted, is probably different from that identified by a different Observer-Describer who is concerned with the (unintended) consequences.

- K Know = The cognitive parameter (Values of this parameter are given by specifying states of affairs as being distinguished or conceptualized.) (This includes distinguishing what is relevant to the behavior in the circumstances.)

Anything that is wanted (cf., the W parameter) will also show up under K, since for something to be wanted, it is also distinguished.

KH Know How = The competence parameter (Values of this parameter are given by specifying prior states of affairs as a relevant learning history.)

Ossorio (1972, p. 16) points out that “The function of the Know How parameter is precisely to exclude accidental happenings from the range of instances of intentional action.” Notice that, for any given behavior, if we could not specify that the behavior engaged in was one which the person knew how to do or had the relevant learning history to enable him to do, it would be incorrect to say that the person engaged in that deliberate action (i.e., in that behavior under a deliberate action description). Cf., “The two year old’s arm bumped the rook moving it over one square” versus “The two year old just put me in checkmate.” The latter could not be correct as a deliberate action, since the two year old does not have the requisite Know How, but could be correct under an achievement description.

P Performance = The process, or procedural parameter (Values are given by specifying a process, e.g., he pulled the trigger, or, he shot the arrow.)

A Achievement = The result, or outcome, parameter (Values are given by specifying events and states of affairs.)

When this is the only parameter specified (i.e., the values of all the other parameters are deleted), this form of behavior description is called an Achievement Description. The unspecified parameters are represented by Θ ’s in the formula below.

$$\langle B \rangle = \langle \Theta, \Theta, \Theta, \Theta, \Theta, A, \Theta, \Theta \rangle$$

Achievement Description

One of the functions of Achievement Descriptions (specifying this parameter exclusively) is to enable an observer to specify a given result as unintended.

PC Person Characteristics (Values are given by specifying personal characteristics of which the behavior is an expression.)

S Significance (Values are given by specifying behaviors or behavioral patterns engaged in by means of the behavior in question, i.e., “doing X by doing Y.”)

One of the standard heuristics used in Descriptive Psychology for explaining Significance (cf., Ossorio, 1986) is the guy standing by the farmhouse in the rolling English countryside who is saving the nation (S) by moving his arm up and down (P). Actually, he’s got his hand around a pump handle, so he’s pumping the pump. (Why is he doing that/what is he doing by doing that?) There’s water in the pump so he’s pumping water, and the pump is connected to the house, so he’s pumping water into the house. There are people in the house drinking the water, so he’s pumping the water to the people in the house. There is poison in the water, so he’s poisoning the people in the house. And the people in the house are conspiring to overthrow the government, so he’s really saving the nation.

Taking it from “top-down,” he’s saving the nation by poisoning the people in the farmhouse (who are plotting to overthrow the government), and he’s doing that by pumping (poisoned) water to them, and he’s doing that by pumping the pump, and he’s doing that by moving his arm up and down. Going from the top down, the more specific, concrete behaviors are ways of saving the country. They are ways of implementing what is wanted. From the bottom up, you get the significance of why he was doing what he was doing. All are correct descriptions of what it is he is doing in this example, and it reminds us that people are usually doing more than one thing at the same time (Ossorio, 1986).

Forms of Behavior Description

The use of the concept of Intentional Action as a calculational system (via deletion, substitution, and reduction operations) enables us to provide various forms of behavior description, including descriptions of behavior where we do not know/cannot specify/do not choose to specify the value of one or more parameters. The Achievement Description mentioned above is one example

of how this schema offers us a means of clarifying our discussion of behavior when many locutions in our ordinary language do not distinguish clearly what the speaker meant.

Returning to the case of Deliberate Action descriptions, these are used to represent behavior in which a person not merely distinguishes among behaviors but also chooses among them. That is, he acts on grounds (reasons) for doing one thing rather than another. The special case of Deliberate Action is represented via the Substitution operation as:

$$\langle B \rangle = \langle I, \langle B \rangle, \langle B \rangle, KH, P, A, PC, S \rangle$$

Deliberate Action Description

where the Behavior engaged in is also the behavior that was distinguished (K) and chosen (W) (hence the B also appears in the K and W parameters). The choice of behavior also reflects one's Person Characteristics (PCs).

Deliberate Action is the paradigm case of human behavior; however, for purposes of the Law, it appears that persons are viewed at a minimum under an Agency Description. In an Agency Description, the parameters of behavior specified are W, K, KH, P, and A.

$$\langle B \rangle = \langle \Theta, W, K, KH, P, A, \Theta, \Theta \rangle$$

Agency Description

An Agency Description of Behavior does not imply that these are the only parameters there are, but that these are the ones, at a minimum, that I'm talking about. An Agency Description enables us to talk about someone engaging purposely in instrumental behavior, i.e., wanting, distinguishing, having the competence, and engaging in a process to bring about some (desired) outcome. An Agency Description portrays the sense in which behavior is instrumental and the person is the agent of what he does. If we consider $\langle B \rangle$ as the criminal act, e.g., robbing the abortion clinic of \$500, what needs to be shown according to the law, is that $\langle B \rangle$ (as stated in

the indictment) *is* the person’s behavior, at least under an Agency Description.

This may approximate what is meant by a person’s behavior being “presumed to be voluntary and deliberate,” but without making other problematic assumptions of the nature of behavior in general. It appears that the way in which the Law means that our behavior is voluntary is that it is not involuntary, and persons choose to do X, making certain distinctions, and choosing behavior X from among a range of other possible behaviors.

Using the parametric analysis of behavior, we can see that what is left out of an Agency Description is the Identity, Person Characteristics, and Significance parameters; that is, who did it, what person characteristics the behavior is an expression of, and what the person’s motive was, i.e., what he or she was doing by doing that. Thus, the Agency Description is well-suited for giving descriptions that still make sense as being deliberate/purposeful, but without having to include certain aspects of the individual’s historical particulars of engaging in that behavior.

Actus Reus

As noted above, *actus reus*, the “guilty act,” does not consist of the specific performance alone, e.g., thrusting a knife. That is, *actus reus* is not merely the procedural aspect of behavior (the P alone) nor the act under a Performance description.

$$\langle B \rangle = \langle \Theta, \Theta, \Theta, \Theta, P, A, \Theta, \Theta \rangle$$

Performance Description

(The A is always included along with P in a Performance Description because the occurrence of any performance is also an accomplishment, just as whatever is included under the W parameter also shows up under K.)

To be construed as a “guilty act,” the circumstances and consequences of the act must also be considered. Thus, *actus reus* involves the parameters K, P, and A.

$$\begin{aligned} \langle B \rangle &= \langle I, W, K, KH, P, A, PC, S \rangle \\ \text{Actus reus:} &\quad K, \quad P, A \end{aligned}$$

Environmental factors are represented here by K, since, for them to be operative, they would have to be distinguished by the actor.) This is very close to an Activity Description of the behavior if the behavior is considered to be non-accidental.

$$\begin{aligned} \langle B \rangle &= \langle \Theta, \Theta, K, KH, P, A, \Theta, \Theta \rangle \\ &\quad \text{Activity Description} \end{aligned}$$

Actus reus appears to be noncommittal both with regard to whether the act was an expression of skill/ability (KH), and with regard to what is wanted or why (W). It merely addresses the activity engaged in (P), the outcome of P (A), and the presence of additional circumstances (K), which presumably the perpetrator also distinguishes. (It is interesting that specifying these same parameters, K, P, and A, also corresponds to a Stimulus-Response Description.)

The committing of a crime through failure to act may also be an instance of *actus reus*. The parameters help make this less mysterious. Rather than saying that non-action is an action, specifying the K parameter makes clear what distinctions the Actor is making in doing P, when societal standards obligate him to do Z under those circumstances, or not to have otherwise made the gross error of judgment/behavior that he did. To address crimes of omission, we return to an Agency Description of what behavior the person was engaged in, and the Law requires that there be a specified standard that his behavior was in violation of, which then caused injury to one or more members of the community. The failure to act cannot be attributable to some extenuating circumstance. (Note that the example above specifies a “healthy, unimpaired adult standing alone on a dock...” etc.)

Both the committing of an act and omitting to act insofar as these result in a crime have in common their parallel to the analysis of a successful degradation ceremony presented by Ossorio

(1971/1975/1978/2005, pp. 121-122, citing Garfinkel, 1956). A successful degradation ceremony involves six necessary conditions:

1. There is a community of individuals who share certain basic values such that adherence to those values is a condition for retaining good standing in the community, i.e., for being fully and simply “one of us.”
2. In principle, three members of the community are involved, i.e., a Perpetrator, a Denouncer, and (some number of) Witnesses [to the degradation ceremony in the sense of point 3, below] (e.g., the Defendant, the Prosecutor, and the Judge/Jury).
3. The Denouncer and the Witness act as members of the community and as representatives of the community. That is, their behavior reflects their good standing in the community, and they act in the interest of the community rather than out of merely personal interest.
4. The Denouncer describes the Perpetrator as having committed a certain Act.
5. The Denouncer redescribes the Act (if necessary) in such a way that its incompatibility with the community’s values follows logically.
6. The Denouncer presents (implicitly or explicitly) a successful case for judging that the Perpetrator’s engaging in the Act as redescribed is a genuine expression of his character and *is not to be explained away by reference to chance, accident, coincidence, atypical states, etc.* [italics, bracketed clarification, and example in 2 added].

In both cases, the community has a crucial stake in its members behaving according to some basic standards, and it requires that its members be able to make minimally competent judgments or risk sanctions and/or legal consequences. Under an Agency Description, the individual’s culpability can be established, provided there is a clear community standard which is grossly violated, whether by

commission or omission of an act, if such behavior directly causes harm to a community member.

Mens Rea

As noted previously, the commission of a crime is considered to have two components. How might Descriptive Psychology elucidate the second aspect, the concept of *mens rea*, the “guilty mind”?

Mens rea is the actor’s intent. Intent is given by the W parameter, and hence also appears in the K parameter, since one cannot want or try to do/get something if he or she cannot distinguish it.

$$\begin{aligned} \langle B \rangle &= \langle I, W, K, KH, P, A, PC, S \rangle \\ \text{Mens rea:} & \quad W, K \end{aligned}$$

Any underlying motive is given by the S parameter.

$$\begin{aligned} \langle B \rangle &= \langle I, W, K, KH, P, A, PC, S \rangle \\ \text{Motive:} & \quad S \end{aligned}$$

Recall that Significance, the motive, does not appear under an Agency Description of Behavior. Indeed, in the example of two people having quite different motives for taking the money from the abortion clinic, both A’s and B’s *mens rea* are equivalent. By virtue of the fact that the criminal act of robbing the abortion clinic is considered under an Agency Description, the “motive,” S, i.e., why they did what they did, can indeed be considered as something separate from the “criminal behavior.”

$$\begin{aligned} \langle B \rangle &= \langle \Theta, W, K, KH, P, A, \Theta, \Theta \rangle \\ \text{Mens rea I:} & \quad W, K \\ \text{Motive:} & \quad S \end{aligned}$$

(KH is taken for granted in that the action is considered to be non-accidental, albeit we do not have any good or systematic way of specifying the value of KH for any given behavior.)

One further comment on this first of two uses of the concept of *mens rea*. Since something that is wanted (W) is also distinguished (K), this connection alleviates the need to necessarily determine

whether someone was “conscious” of breaking the law at the moment the event was occurring. Wanting X, seeing an opportunity to get it, and acting on this, is different from talking of consciousness or awareness of, or desiring to break the law to obtain X, etc. Seeing the opportunity to obtain something I want (K) gives me a reason to try to get it (Maxim 2). If I steal rather than purchase a chocolate bar, insofar as intent is concerned, it is sufficient to know that, at the time I took it, I wanted the chocolate, not that I desired at that moment to break the law, or to deprive the store owner of his merchandise. K includes my knowing that it’s against the law to steal and conceal a chocolate bar, but breaking the law doesn’t have to be either my intent or what I’m “conscious of.”

The contrast here is between “knowing” and “being conscious of.” For example, I “know” that Beijing is the capital of China, but I am seldom “conscious” of the fact. That I know it means that it is available for my behavior and that I can act on it. If there is behavior that requires that I know that Beijing is the capital of China, I can make use of that at any time. It is different from what I am conscious of; I couldn’t possibly be conscious of all the different things that I know. Nonetheless, what someone knows is still available to them, whether or not they are conscious of it. So long as I know that it is against the law to take a chocolate bar from the store without paying for it, I didn’t have to be conscious of/aware of breaking the law at that time. The normal test for whether someone knows that doing this is against the law is to ask them. One can also use a range of other clinical assessment skills to evaluate if the person charged is able to tell right from wrong, etc.

The second, broader notion of *mens rea* includes not merely the person’s intent (the W and K parameters), but also “a state of mind of general culpability or liability, an awareness of right from wrong.” This seems to incorporate the parameter of the actor’s Person Characteristics (PC), and corresponds to his behavior under a broader, Deliberate Action description. To establish the presence of a “guilty mind,” one needs to know what behavior the actor was engaging in. From the Actor’s perspective, what was he really doing?

 = <I, W, K, KH, P, A, PC, S>
Mens rea 2: I, W, K, KH, P, A, PC, S

Mens rea in the broader sense, corresponds to , according to the Observer’s description of the Actor’s behavior. It is more in this broader sense of *mens rea* that what is going on in my mind at the time of the crime may be relevant.

Concerning culpability, the Law has delineated four seemingly distinct states as being useful distinctions: acting purposely, knowingly, recklessly, and negligently. I would paraphrase this endeavor as, “In what sense am I responsible/liable for the consequences of my behavior, i.e., for having acted as I did?”

In the case of behaving purposely, what is purposeful is acting in a way to get something I want which happens to involve committing a crime, and that knowledge doesn’t deter me from doing it. It’s not that my object (“purpose”) is to commit a crime, but rather if I succeed in achieving A which is what I want, I will also be committing a crime, and that doesn’t make enough difference to me to alter my behavior.

In the cases of knowingly and recklessly, there are diminishing likelihoods that the doing of P causes an outcome A which is a crime. In the case of knowingly, doing P “almost certainly” causes A, and in the case of recklessly, there is a “substantial and unjustifiable risk” that P brings about A.

In all three of these cases: Purposely, Knowingly, and Recklessly, the perpetrator had the requisite knowledge (PC), but he didn’t act appropriately on it. There is knowledge, K, that doing P is against the law (in the case of “purposely”) and/or that there is substantial risk of harming someone, but the person does not value that sufficiently (PC) and engages in P anyway. Even though outcome A (breaking the law) may be unintended or incidental to my getting what I want, my values, attitude, etc. are such that these reasons don’t count enough, and that is a violation of a shared community standard which says that I should care, and act accordingly.

In the case of Negligence, it may be a matter of something I knew and should have cared enough to act on; or it may be something I

didn't know and should have (PC). In order to be fully and simply "one of us," you have to know these things, e.g., cleaning a gun is dangerous, and not be willing to place others at risk. This kind of knowledge and action is a societal requirement reflecting a shared community standard.

A Double Negative Formulation

Previously, it was noted that a person is presumed to be legally responsible for his or her behavior if, at the time of the offense, the person was capable of voluntarily performing the act, *actus reus*, and capable of forming the intent to act, *mens rea*. To obtain a valid conviction, the prosecution must prove both *actus reus* and *mens rea* beyond a reasonable doubt. What does it mean to say that, at the time of the offense, someone was capable of voluntarily performing the act and capable of forming the intent to act?

This can be treated as a double negative formulation, i.e., the person was *not incapable* of voluntarily performing the act (e.g., by virtue of being hypnotized), and the point is not to establish that the act was voluntary so much as that it was not involuntary. Per Ossorio (personal communication, August 29, 1994), the "... evidence that I was capable of voluntarily performing the act is the absence of evidence that I was incapable of doing it..." He added, "...if it looks like a straightforward Deliberate Action, the burden of proof should be on the claim that it isn't." This is consistent with the law, in that a person's "capability" to form intent is a question for the defense team to address in their affirmative defense of insanity.

Insofar as *actus reus* only involves parameters K and P, with result, A, the clause "capable of voluntarily performing the act" looks like an effort to incorporate the KH parameter in the law in order to identify K, P, and A as a non-accidental act of behavior, and to present the actor as an organism able to make choices (as opposed to the act representing the occurrence of a bodily movement with an associated outcome, or perhaps a mere stimulus-response sort of event produced by a decorticate organism).

Likewise, “capable of forming the intent to act” appears to be a way of *ruling out* that a person was *impaired/incapable* of making distinctions required under parameters W and K including the connection between P and A (cf., infancy defense, delusions, etc.). One must be able to understand that doing P brings about A.

Conclusion

In elucidating the concepts of *actus reus* and *mens rea*, we have used a variety of resources from Descriptive Psychology. Some of the ideas presented above can be summarized in the following schematic:

<B1> = <IA> =	< I, W, K, KH, P, A, PC, S >
Agency Description:	< Θ, W, K, KH, P, A, Θ, Θ >
<i>Actus reus</i> :	K, P, A
Motive:	S
<i>Mens rea</i> 1 (Intent):	W, K
<i>Mens rea</i> 2:	I, W, K, KH, P, A, PC, S

In other words, to a large extent, the question of “Was the person guilty?” translates to the question of “What deliberate action was it?”

The implications of this formulation for a defense are straightforward. The goal of the defense (team) is to establish parametric values which are *incompatible* with B1, e.g., the criminal act of robbing the abortion clinic. This includes any/all of the Agency Description parameters, including KH. (The flailing about of an epileptic, sleep walking, or acting on a hypnotic suggestion, are not the exercise of a skill.) Most importantly for psychologists, it *also* includes the values of PC, the Person Characteristic(s) of which the supposed criminal behavior is an expression. This of course includes “mental defects” or states of mind (cf., a fugue state, psychosis) that would support an insanity or diminished responsibility defense.

In other words, to undo the ascription of criminality, presented by the prosecution under an Agency Description, the defense is seeking exculpability via establishing values of any of the Deliberate Action parameters that would be incompatible with the defendant's having committed this act under a Deliberate Action description. (For example, "Yes, he took the money, but he believes he owns the clinic, the hospital, and the city, and that the money belongs to him.")

Note in conclusion that paradigmatic cases of defenses, including insanity, provide examples of impairment in the W, K, and KH parameters:

Defense based on *actus reus*:

 automatism (KH)

 (the act was not purposeful)

Insanity based on *mens rea*:

 cognitive prong: M'Naghten (K)

Insanity based on *mens rea*:

 volitional prong: Irresistible Impulse (W)

Finally, it may be noted that there are many other resources that Descriptive Psychology offers to our understanding of behavior, including criminal behavior. These include its elaboration of the Person Characteristics parameter of behavior; the PC-C model representing the relationship of Person Characteristics, Circumstances, and Behavior; and the Judgment Diagram, representing the connection of relevant circumstances to Reasons (including the hedonic, prudential, ethical, and esthetic perspectives) and the relative weightings reflected in a decision/judgment made by a given person, reflecting his PCs. These, however, are beyond the scope of this paper.

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Author's Note

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Contributions of Descriptive Psychology to Strategies of Negotiation: The Case of Religion and Government

F. Richard Singer and H. Paul Zeiger

Abstract

Many troublesome debates about religion and government spring from the differences among people who have different views regarding when the laws of the land can trump the tenets of their religion. The protocols of the debating society, the scientific discussion, or the court of law are not particularly helpful in such situations because those protocols are aimed at picking a winner among competing candidates. Their contexts include a presumption of win-lose, zero-sum. What is needed in the situations under consideration, in contrast, are ways to agree on actions to be taken that do the least violence to the beliefs and practices of the participants. Methods derived from conceptual analyses inspired by Descriptive Psychology show promise for use in such situations.

Introduction

What practical value could possibly come from yet another paper about religion and government, especially one that attends not to facts, but to concepts? We intend indeed to generate practical value based on the following observations:

- Persons of differing religious persuasions are constrained by those persuasions in their attempts to participate together in the functioning of a city, region, or nation. Witness the

conflicts between Christians and the non-Christian inhabitants of the Roman Empire during the first three centuries of the present era; the Jews in Spain in the late Middle Ages, and throughout Europe generally; the religious wars of the 16th and 17th century; the abolition of Buddhism in India; and the Hindu-Muslim conflicts during the time of the Mogul invasions and later.

- When significant constraints emerge, joint participation in the functioning of the government has to be negotiated among participants whose concepts, principles and practices differ.
- The protocols of the debating society, the scientific discussion, or the court of law are not particularly helpful in such situations because those protocols are aimed at picking a winner among competing candidates. Their contexts include a presumption of win-lose, zero-sum. What is needed in the situations under consideration, in contrast, are ways to agree on actions to be taken that do the least violence to the beliefs and practices of the participants.
- Nevertheless, skills in the conduct of such negotiations can be exercised, and can bring improved success in the joint participation by persons of different religious persuasions in the successful functioning of a city, region or nation.

We shall first illustrate the process of negotiation by presenting a dialog among participants of contrasting positions. Then we shall examine the conceptual resources employed, and consider ways in which those resources can be well used.

Consider the following imaginary roundtable discussion, of a sort one might hear on the radio.

Introducing our roundtable participants

Believer: Fundamentalist Christian housewife with teenage children (*Intelligent, earnest and thoughtful, devoted to her children, looks to the Bible for ultimate truth*)

Teacher: High school science teacher (*Steeped in modern science but somewhat limited by its paradigm, eager to share it with his students, an enthusiastic and engaging teacher*)

Theologian: Liberal protestant theologian (*Has studied a range of theologies and philosophies, has an implicit understanding of Descriptive Psychology without having studied it explicitly*)

Politician: Political centrist (*Good-hearted pragmatist, specializes in finding a wedge of consensus leading to beneficial action*)

Moderator: Radio announcer (*Devoted to fair treatment of each participant, to a discussion that listeners enjoy, and to an informative commentary on what is going on*)

Their Discussion

Moderator: Welcome to today's roundtable discussion on the subject of religion and government. To get things rolling, what should be taught in High School science classes about evolution, the origins of living things, and the geological history of the earth?

Believer: I just don't want my tax dollars spent teaching my children beliefs contrary to those of my religious community.

Teacher: My students come from many religious communities. If we remove from the curriculum everything that contradicts any of them, there may nothing left in the curriculum.

Politician: Is there an issue of the rights of minorities here? Could we teach the stories of creation according to several of our main communities?

Believer: In my neighborhood, my beliefs are those of the majority!

Teacher: But truth is not something determined by majority vote. There are scientific methods and standards that have been refined over thousands of years with the purpose of looking squarely at the available data, drawing valid conclusions, and avoiding error. People who have worked with these methods and standards all their professional lives are in pretty good agreement about the history of the earth. That has to count for something. And the majority of the American public agrees with them. Furthermore, high school students need to know those methods and standards for their future roles in the workplace.

Theologian: Once the methods and standards of science are in place, what is true and what is false follows as a matter of sound empirical work. But the methods and standards themselves are not determined empirically. They are created by people, negotiated by people, and judged by people on the basis of the success or failure of the empiricism that they ground. And even today, they are a work in progress.

Teacher: I'll grant that scientific method is still a work in process, but are you going so far as to say that some future version of accepted scientific method might assign some sort of truth to religious creationism?

Theologian: That would be a very long stretch, but I will say this: today's scientific method is quite deficient in its concept of "person", and this deficiency shows up any time you try to take a scientific approach to, say, theology or psychology. For example, there are productive traditions of psychotherapy (cognitive behavior therapy springs to mind), with substantial bodies of empirical fact behind them, and those bodies of fact all rest on commonsense notions of person very different from the "scientific" notion of person as dynamical system made up of organs and changing via interacting chemical pathways. The better scientific notion of person would include both the dynamical system and the commonsense notions in a coherent logical framework, and that logical framework would support better theology as well as better psychology.

Believer: Aha! It is just as I thought. Evolution *is* just a *theory*, and might be eclipsed at any time by a better one.

Teacher: Careful! The better one would have to preserve all the successes of the current science, including lots of very practical stuff in, for example, geology, which rests on a history of the earth, and genetics, which rests on the histories of species.

Politician: We are heading down a road familiar to me. When people with different conceptual frameworks get to arguing about what is true, they are sure to go nowhere. In politics, such a deadlock can sometimes be avoided by shifting the subject from what is true to what is useful. For example, the scientific account of the origin of the universe and of life was constructed in order to explain a body of observations of the *physical* world. The creation stories of religions have a different purpose: to point to the fundamental characteristics of human beings, and lay the foundation for their moral development.

Teacher: I'll take a shot at that. I *have* to teach present-day science to any student who might go into geology or genetics or any field where that science is used to obtain practical results. I am committed to that by law and by custom. But the teaching of morals is not included in my job description, and if a student wants to reason from the scientific account of the origin of the universe and of life when she is doing geology and from her religion's creation story when making moral judgments, I have no objection.

Believer: Does that mean you are willing to give class time to my religion's stories?

Teacher: No, I'll leave that to your Sunday Schools, where the expertise lies. Wait—now that I think about it there is something else I can do. I can teach more about both the power and limitations of scientific methodology, and especially the relationship between empirically established fact and the models or theories used to account for them.

Theologian: If the question comes up in class, you might point out that present-day science has shown tremendous explanatory power regarding the practical aspects of the physical world, but much

less power in the world of persons and behavior. On the other hand, the stories from all the world's religions focus very heavily on what it means to be a person, what relationships and achievements are open to persons, what choices of actions are advisable or inadvisable, and what constitutes a good life.

Believer: It seems to me that you are trying to position science as useful in one domain of life (dealing with the physical universe) and religion as useful in another domain of life (dealing with people) and never the twain shall meet. Are you really saying that there is no overlap at all between science and religion?

Moderator: That is certainly a good approximation to what I am hearing, and I think that it is a good guideline for what happens in a high school science class. But I think the twain do meet now and then, especially in our next question: Under what circumstances should abortions be permitted?

Let me be more specific. There have been statistical studies made of a mysterious dip in the teenage crime rate 16 to 19 years after *Roe v. Wade*. After carefully eliminating other possible causes, there remains statistical support for the hypothesis that the dip was caused by babies not being born who would otherwise have grown up in poverty (with young single mothers ill-equipped to socialize them) and become contributors to the crime rate when in their teens. I do not propose that we debate the truth or falsity of this very controversial hypothesis, but instead consider: *if* it were well supported, should it be admissible as evidence in the abortion debate?

Believer: Certainly not. Abortion is murder, regardless of any real or imagined downstream benefits.

Teacher: But *some* cases of murder itself *are* justified by downstream benefits—by arguments that the available alternatives are even worse. I'm thinking of killing in self-defense or in a war.

Believer: You can't be serious. In those cases you are facing an already murderous enemy, not a helpless child.

Theologian: The controversial hypothesis reminds us that the child will not be helpless, and may be dangerous, 17 years later.

Nevertheless, even the hypothesis does not justify abortion, because we do not kill people who have committed no crime yet, even if it can be shown there is a high probability they will murder somebody in the future.

Believer: All this is irrelevant. Abortion is a crime. The Bible says so.

Theologian: The passing of laws forbidding all the actions prohibited by any of the scriptures of the world's great religions might not leave us much in the way of personal freedom.

Teacher: What about the rights of, say, a rape victim, not to be forced into 9 months of pregnancy, and perhaps 18 years of childcare, against her will?

Politician: I'm hearing three threads to this discussion. The first is theological: What does God decree? That is decisive for the religious person, but not for a democracy embracing a variety of contrasting religions. The second thread has to do with value judgments regarding when killing is justified by some higher good. The third, and most important, thread is linked to the second: How many of the rights of a full-fledged person are acquired by a person between conception and birth? There is plenty of precedent for assigning (or withdrawing) rights and responsibilities to an individual over the course of a lifetime; consider graduations, elections, marriages, sentencing to and releases from prison.

Theologian: You might get good agreement that the right not to be poisoned by drugs or alcohol in the mother's bloodstream is acquired at conception. On the other hand, some contend that ascribing anything called "rights" to something with virtually none of the capacities of a typical person makes no sense, and that arguments against abortion ought to be made on grounds other than rights—for example, that violence against something that is expected to become, in due time, a person, is wrong but not murder. The really tough questions come when rules like this one conflict with the welfare of the mother.

Politician: Or of society, if the controversial hypothesis that began this discussion is to be believed. There is a question of

investment, by family and society, in the individual. The loss of even a full-term newborn is much less of a tragedy than the loss of a 21 year old. Value judgments like this involving societal investment come up in medical ethics cases, when a doctor gets to save only one of two individuals.

Believer: My theological position is that the person at conception acquires the right to life, and that it trumps any rights of the mother to convenience, self-fulfillment, or even life, and that it also trumps any societal interests like resource allocation or public safety.

Politician: You could hardly find a more spectacular conflict of the rights to life, liberty, and the pursuit of happiness than that between a woman and her undesired, newly-conceived fetus, especially when the pregnancy threatens her own life and her family's well-being.

Theologian: (Tentative) I'm beginning to think that the real stickiness of the moral issues here has its roots in the differences between the potential and the actual. Both the paradigm cases we are arguing from, the right of an individual to life and the right to kill in, say, self-defense, involve actual persons with actual histories, capacities, and communities. But in the abortion case, everything is potential: both the future of the fetus and the downstream effects on the mother and her community. I believe that our moral philosophers need better tools for dealing with potentials.

Politician: That's certainly important in the long run. Shorter term, I see some hope for some working agreements along the following lines: Abortions are undesirable and efforts to reduce their incidence are to be applauded. The unborn have certain rights. They may lack the full protection of the law accorded an adult in good standing, but on the other hand, they may—in the light of their helplessness—deserve additional protections not accorded even to adults.

Teacher: I can see some possibilities for agreements along these lines that I could support.

Moderator: Nobody expected much consensus from such a diverse group on so controversial a question, but we have sharpened the picture of the practical issues to be confronted. Future decisions of our society's courts and legislative bodies will have to evolve a body of law and custom around two questions: (a) What legal protections should accrue to the person at what stages, from conception on? And (b) when conflicts arise between these protections and the legal protections of others (also involving potential situations), how are these conflicts to be resolved? I expect that the latter question will be addressed case by case.

Moderator: For our last question, consider the issue of whether the law should permit the public display of religious symbols like nativity displays in parks at Christmas or displays of the Ten Commandments in courtrooms.

Believer: The prohibition of such displays is one of the silliest things I have ever heard of. If I can put up a Manger Scene in my yard, and my Jewish neighbor can put up a Menorah in his, why can't the city put up either, or both, in a park?

Teacher: The relevant text from the first amendment says: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." I believe the question with which the courts have struggled is whether such displays constitute endorsement of a specific religion by the Government.

Believer: Even if they did, I do not see any laws being made, but putting that aside, why couldn't the city avoid even the appearance of endorsing a specific religion by putting up different symbols, from different religions, in their respective seasons?

Politician: My understanding is that doing so might entail a commitment to putting up more symbols than the majority of taxpayers were willing to pay for. We have to bear in mind the rights of minorities. It is all very well to say we are celebrating festivals created by religions X and Y, but what about the followers of religion Z, who feel that their religion is being denigrated by omission.

Theologian: If a government wanted to sail close to the wind on this one, I could see establishing a policy of roughly the form: "If

you can satisfy certain conditions, we will put up symbols of your religion in a certain number of its seasons.”

Teacher: What conditions?

Politician: Well, they would have to address budget concerns; religious groups with a small tax base might have to chip in for their displays. Esthetic considerations would have to be covered, presumably by some judgment process neutral to everything but esthetics. And things would have to be easy enough that minorities would not feel frozen out by weight of bureaucracy.

Believer: All that does not sound so easy.

Theologian: The general principle I see us groping toward is that of fairness, of celebrating the festivals of various religions, with perhaps more visibility to the religions that are more heavily represented in the citizen population, but with respect for all religions, and a willingness to celebrate any one’s religion, within the boundaries set by a few commonsense rules.

Politician: As future negotiators approach these issues, and especially as they contemplate what the “boundaries set by a few commonsense rules” might be, I would urge all sides to be very respectful of the following issue: Persons acting on behalf of their religious communities are nevertheless bound by the laws of the land. That fact constitutes a kind of relinquishment of some sovereignty by the religions. In return, the religions are relieved of the burdens of providing public safety, common infrastructure, and many other functions of the government. From the other side, by encroaching as little as possible on the principles and practices of its religions, the government is relieved of the burden of providing ways for individuals to meet their spiritual needs and aspirations. Although there will always be some overlap of responsibilities, the division of concerns between religions and the government constitutes a kind of “social contract” that, if well-negotiated, can serve both sides.

Moderator: I look forward to seeing such enlightened negotiations.

Commentary

In order to gain a deeper understanding of the interactions of our five participants, we draw upon several concepts from Descriptive Psychology: Justification Ladder (Shideler, 1988 pp. 81-83), Community (Putman, 1981, Ossorio, 2006 pp. 181-187), Significance (Ossorio, 2006 pp. 187-191), and Status (Ossorio, 2006 pp. 268-274).

The way one justifies a behavior may go through several “rungs” of justification. The first rung, simply proceeding according to ordinary moment-to-moment appraisals, has failed the participants in each case because disagreements have arisen at all. The next rung, appealing to custom, also fails them. The main reason is that the participants come from different communities having different customs. The customs of a fundamentalist community conflict with the customs of a scientific community over the teaching of evolution. In all three cases, the participants resort to the third justification rung, namely principle. To come up with joint behavior justified at this level would be to: (a) find one or more principles for behavior relevant to the case that all participants and their communities could agree on, and (b) create a particular behavior that satisfies that principle in dealing with the case at hand. For this, there is some hope. There are candidate principles characteristic of American democracy that the participants and the communities that they represent agree upon: individual freedom, protection of the rights of minorities, universal suffrage and universal opportunity (and with them universal education), and freedom of religion. But these principles gain their universality in part by being stated at a rather high level of significance, and the participants are called upon to bring them down in significance by asking: “How?”

In the first case (the teaching of evolution), the Politician achieves a modicum of success in this endeavor. He proposes a course of action that respects both the rights of a minority and the needs of a democratic government for a population educated in the insights of modern science. And the Teacher is beginning to see that a major goal in teaching science is to teach about both the power

and limitations of scientific methodology including the relationship between empirically established fact and the models or theories used to account for them.

The third case (public display of religious symbols) ends similarly, albeit with a lower level of agreement. There the participants agree on the principles of individual freedom, especially of religion, respect for the rights of minorities, and the necessity to avoid the government's legislating in favor of any one religion. They further agree on a level or two of "How", and outline how further details might be negotiated

The second case (abortion) embodies all the difficulties from cases one and three and adds an additional difficulty of its own: failure to agree even on the relevant principle(s) because of differences over the status assigned to the unborn, i.e. the package of eligibilities and expectations that is attached to that position of the individual in society. There is agreement on the overall principle of avoiding violence to the individual. But differences arise in situations where violence (and there may be some further difference about what constitutes violence) to somebody is unavoidable, but can be shifted to land on one person or another. Then the statuses of the individuals who might be victims of violence come into play—especially the status of the unborn. There is precedent for according different statuses to different persons based on age, education, accomplishment, or many other characteristics. Children, for example, have been singled out for special rights to protection by international human rights agreements. But the unborn are different. In the scenario above, the politician summarizes what little common ground has been reached.

Why is it so hard?

Central to the conflicts under discussion are the overlapping communities associated with religions (the participants in each religion) and governments (the citizens of each government). Each member of a religious community is also under the jurisdiction

of a government. Consider the parameters that characterize a community:

(members, statuses, concepts, locutions, social practices,
choice principles, world)

Below is a brief account of these parameters. For more see (Putman, 1981) or (Shideler, 1988) or *Concept Dictionary-Encyclopedia* in the Descriptive Psychology section of conceptualstudy.org.

Members. To be a member of a community normally is to identify oneself as a member and to be recognizable as such by other members of that community. The distinction between members and non-members will also normally be recognizable to non-members. Furthermore, this distinction is behaviorally significant, i.e. members will be treated in some manners differently than outsiders. Membership may be awarded by a formal ceremony, such as an initiation in which an individual becomes a member of sorority. It may be recognized with specific criteria but without ceremony, such as being a member of the community of Chicago residents. Both recognition and criteria may casual, as when an individual is merely recognized as belonging to the community of football fans.

Statuses. Having a status is to have a certain set of relationships. For any P each of P's statuses refer to P's place or position in some world in the broadest possible senses imaginable. An eligibility for P is being able to play a certain role. Statuses determine P's eligibilities, i.e. P's potential for behavior. They may be explicitly recognized, such as starting point guard for the Boston Celtics. The may be more casual, such a person you can rely upon in a crunch. The status of full-fledged person with all the rights and privileges thereof, as contrasted with the status of person who is not yet full-fledged, enters into the abortion discussion above.

Concepts. To engage in deliberate action a person must be able to make conceptual distinctions. The concepts of a community are those that are essential for meaningful participation in its practices, and especially in its core practices. Non-members may also

recognize these concepts, but when they do they may not understand them in the same way that members do. For instance, the community of boy scouts uses the concept of an Eagle Scout, and furthermore this concept is understood in terms of its merit badge requirements. An outsider may also be able to use this concept, but many will use it more vaguely and few outsiders to the scouting community will know the requirements.

As noted above the concept of person is central at several points in the discussion. Particularly important to the discussion of science teaching is the concept of explanation. The scientific community's notion of explanation places great weight on logical simplicity, while a religious community's notion of explanation may put less weight there but more on harmony with scripture. See (Ossorio, 2006 p. 69) for the Descriptive Psychology concept of a person and (Singer 2007) for the relation of this to the person concept of some religious communities.

Locutions. The locutions of a community may include the language spoken, such as English or French. More important, they include the ways in which it is spoken and the concepts and conceptual distinctions this indicates. This involves the use of jargon and terminology and expressions that are intertwined with the social practices of the community. Particularly important to discussions among participants from different communities are locutions that carry an extra payload of value judgment in addition to their literal meaning. One need only recall political discussions mentioning “liberal”, or “right to life”.

Social Practices. A community is especially distinguished by the things members do as members of the community and the way in which they do these things. These are the social practices of the community, and the point of being a member is to be eligible to engage in these practices. There are optional social practices, in the sense that a member can be in good standing without engaging in the practice. There are also core social practices, i.e., those that a member must engage in to be considered a member of the community. For instance, planting wheat might be an optional social practice in a

farming community. However planting *some* crop would be a core social practice, since no person who *never* planted a crop would be considered a farmer. The differing ways in which different communities conduct similar practices can impact cross-community cooperation. For example academic communities often value forms of spirited debate that might be considered insulting by other communities.

Choice Principles. The actions of members as they engage in its social practices are guided by choice principles. Choice principles include any of the ways a community accepts the justification of the behavior of its members. For instance, a member may appeal to custom or principles. Choice principles are often expressed in the form of value statements, norms, policies, slogans, etc. They are often illustrated in stories or myths. Choices Principles are where the differences among communities may lead to the most conflicts. The scientist's principle of Occam's Razor, the fundamentalist's principle of scriptural infallibility, the politician's principle that getting reelected trumps other considerations, and the economic conservative's principle that free market efficiencies trump other goals, are all important to their owners, and instantly available to conflict with other, contrasting principles. Consensus in favor of a course of action is typically only possible when it is seen as neutral or positive with respect to the choice principles of all participants.

Worlds. In describing what we do and think about we use elements that we think of as {objects, processes, events, states of affairs}. A world for a person P is a large interrelated set of such elements that P is willing to act on. For instance, P might have world W of cycling. That P's bicycle tire has a nail would be a state of affairs in W. P's tire and tire gauge are objects in W. Having the tire go flat is an event in W. Repairing a flat tire is a process in W. P will have a multitude of such worlds, cycling, music, family, some profession, etc.

From the parameters of communities, it is easy to read off a number of possible conflicts between the two communities under discussion:

- The government will require general education of its citizens, which may contain material contrary to the worlds of one or more religions
- Communities have statuses together with rules for their assignment and change. These may conflict, as when one community assigns the status of full personhood to the fertilized egg, and the other denies this status.
- The communities may have choice principles that drive decisions in opposite directions. For example, a government will typically place a high value on promoting peace among its various sub-communities, while for a religion peace may have a lower value due to the desire to suppress competing religions.
- Two communities may have different connotations associated with different locutions, making a clean discussion difficult or impossible, especially when those connotations have status implications. One need only contemplate political buzzwords: pro-life, pro-choice, right to work, right to die, liberal, conservative, etc. Some of these locutions thinly veil status assignments that conflict with each other.
- The communities may have practices that conflict with each other. Differing practices concerning land use offer examples: land ownership is central to capitalist economics, while it plays a more subdued role in many indigenous societies. Religions that proselytize heavily may collide with government or housing division restrictions on solicitation.
- The sovereignty of the government may collide with ultimate significance that belongs to one's religion. Consider Mahatma Gandhi, for whom the independence of India from Britain carried a spiritual, i.e. preeminent, significance, while for Britain, the preservation of the empire was preeminent.
- Communities may even differ in the concepts and their corresponding locutions available for discourse on important subjects. For example, translators of Eastern religious texts

struggle to come up with adequate English renderings in context of the words “Dharma” and “Karma”.

Where do the opportunities for progress lie?

The first priority is realistically to take into account what is changeable. The values of the parameters of a community as a rule change slowly, and those the community considers essential are extremely stable. Do not expect to change someone’s core choice principles, although even this can occasionally happen. Some community parameters, however, do change over time. Cigarette smoking at basketball games is no longer an acceptable social practice. Moreover community parameters expand to take account of new circumstances. Although a person’s established locutions and concepts are extremely stable, new locutions and new concepts emerge, e.g. “global warming” and “carbon credits”.

The second priority is to recognize that even with little or no change to any of a community’s parameters, positive results can be achieved. Typically, these positive results comprise one or more courses of action that do not do violence to any of the important parameters of any of the communities at the table. To the extent that two different communities are interdependent, agreed-upon courses of action may be essential to the wellbeing of both communities. To make headway calls for three stages of coming together by the participants:

Coming together on concepts and locutions

All that this stage implies is to develop enough common language and concepts even to talk about the subjects under discussion. No agreement on facts or actions is implied. But the objectives *do* include avoiding using the same word for different concepts, and avoiding locutions that carry (a) implied status assignments to which some participants object, or (b) presumptions of fact, or (c) controversial value connotations, especially those that will inflame

one or more participants. Political discussions, especially the kind that appear in newspaper columns and on television talk shows are almost always rife with inflammatory language (“Liberal”, “Right-Wing Extremist”, “Illegal Immigrant”). All this is not so easy. It takes a specific (teachable) ability to listen to someone who has a different world than you do, and to develop a rough private model of that world—a world you may have to work within or around in the course of discussion. The same ability is called upon when a resident of the US spends time in the far north of Canada or in southern India. Those environments feature physical and social environments that contrast with the traveler’s own, and his well-being depends on understanding them well enough to mesh with them. Courses on “deep listening” address parts of this need (See Nichols, 2009 and Zeiger, 2001).

Coming together on facts, and portions of worlds

With some common language and concepts in hand, the next objective is to gain some agreement on *facts* about states of affairs or events or other relevant claims, thus delineating an overlap of agreement between the worlds of the various communities. In the existing Descriptive Psychology literature, this process is called negotiation (a specialization of the common use of the word) (Shideler, 1988, pp. 80-85). The process has four stages: taking positions; criticizing and defending positions; adjusting positions; and drawing conclusions. These stages are repeated until there is no more adjusting of positions. Typically, the conclusions at that point consist of a body of agreed-upon fact (shared world), and some other bodies of fact upon which the participants agree to disagree. The larger the shared world, the better the prospects for success at the next stage.

Coming together on courses of action

With whatever common concepts, locutions, and portions of the real world the participants have been able to achieve, they move on to the next objective: *one or more courses of action that do not do violence to any of the important parameter values of any of the communities at the table*. The commonly used word for this process is “bargaining” (Shideler, 1988, pp. 83-85). The process is familiar through its similarity to bargaining in the market place: “I am willing to agree to this if you are willing to agree to that” (Bergner, 1981). Note that the achievement of any such agreement is doomed in the absence of at least *some* success at the first two steps. The essence of cooperation at this stage is the creative synthesis of actions that make sense in a number of different worlds (the worlds of the participating communities) at once (but of course not the *same* sense in all those worlds).

How did our discussion participants do on these three stages?

They did pretty well on stage 1. They started out speaking the same language, came from very similar communities with American culture, and treated each other with respect. They avoided loaded terminology, and clarified the use of terms when necessary.

Their biggest accomplishment in stage 2 was the delineation of the different choice principles of different communities: belief in the authority of scripture versus belief based on the truth-testing of current scientific practice; assigning preeminence to the survival of the unborn versus assigning preeminence to a utilitarian principle that includes additional individuals. This clarified some of the main things that had to be worked around in stage 3.

The format of the roundtable discussion did not encourage a stage 3, since the participants were not charged with the duty of coming up with action items. Nevertheless, at the end of the discussion of each of the three questions, the Moderator pointed out directions in which bargaining might proceed. However the goal of this paper is

not to resolve these issues or to give methods the will guarantee their resolution. The purpose is to provide conceptual tools that might help divergent communities to make some progress on problematic divisive issues. These are tools are for use by persons having the desire to resolve issues in what is not taken to be a zero-sum game. As with any tools, results depend upon the skill with which they are used.

What has this chapter offered?

This chapter has mostly offered reminders. Reminders that persons coming from different religious persuasions to join in the effective functioning of a government face challenges in communication and cooperation more subtle than those faced by, for, example, most industrial work groups or nonprofit volunteer teams. These latter groups are normally focused on a narrow set of goals and are like to have substantial agreement on many of them. Moreover the context in which they interact is more likely to provide them with a large shared world for the purposes at hand. The challenges can be met more effectively via more realistic courses of action: listening in order to grasp the other's world, refraining from trying to change that which is unlikely to change, and focusing on action that is both a step forward and acceptable to all, even if it is not what anyone came in wanting. Although all of the techniques suggested here are in use (usually intuitively) every day by experts (Bergner 1981), there is widespread ignorance about how to conduct such negotiations successfully. We hope that the analyses presented here will contribute to the wider spread of this much-needed expertise.

Although we have written the examples in the context of American society because it was the first to achieve a clear separation of religion and government, the issues are relevant to any society in which these institutions are at least distinguishable. In a recent issue of *The New York Review of Books*, Buruma (2009, May 14) reviews two books, *Beyond Terror and Martyrdom* by Gilles

Kepel and *La Peur des barbares: Au-delà du choc des civilisations* [*Fear of the Barbarians: Beyond the Clash of Civilizations*] by Tzvetan Todorov that takes the issues that we have raised into the relations between Muslims in Western societies and between Islam and the West. Kepel critiques the grand visions of relationships between Islam and the West that have been presented with such havoc in the media. He sees these “narratives” as entirely misleading basis for relations between the two communities. “Narrative” is a kind of large-scale dramaturgical model that underlies the world of the extremist, and it is similar to the notion of world or worldviews in Descriptive Psychology. Todorov observes that a government can demand of newcomers respect for its laws and “rules of the game” but not that they love the government. Only totalitarian societies do that. The reviewer and both writers suggest, as we have above, that government specific choice principles must be handled delicately in order to preserve the balance between rights of the minority and the neutrality of the government with respect to religion. Todorov also observes that law trumps custom in the justification for actions. Buruma is acute in his perception of the distinction between attacking beliefs vs. attacking individuals (as in the case of Salman Rushdie). In Descriptive Psychology, this is the distinction between disagreement and degradation. The three writers also make some specific proposals regarding what compromises make sense to them. This puts them in the position of negotiating and bargaining just like the participants in our roundtable.

In this paper, we have deliberately refrained from taking a position on which principles, practices, and status assignments ought to be the particular concern of the government, and especially in what choices the government gets to trump its participating communities. Different forms of government can lead to different forms of, and different results of, the process outlined here. And, in a context in which legislative and judicial precedents matter, different results of the process can even lead to somewhat different forms of government. For all forms of government though, with the possible exception of an autocracy, competence in the methods we

have put forward here is a prerequisite for success, especially for those in authority, but also (at least in the case of a democracy) for the population at large.

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