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THE CONFUSION OF CAUSES AND REASONS IN FORENSIC PSYCHOLOGY: DECONSTRUCTING MENS REA AND OTHER MENTAL EVENTS

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I. INTRODUCTION

The public perception that criminal conduct is increasingly excused on psychological grounds, notwithstanding a markedly small statistical success rate of diminished capacity defenses,[1] evinces misplaced frustration over a broader cultural reluctance or inability to assign moral blame.[2] Psychology is seen as feeding a kind of determinism that rationalizes evil behavior and precludes retributive punishment as a matter of scientific principle.[3] This perception is accurate to the degree that it reveals our legal system's fundamental confusion of purposes in judging and explaining criminal behavior. This confusion is engendered by the indeterminacy of language, which entangles the verificationist mode and purpose of science with the aspirational mode and purpose of metaphysics. The difference between the two linguistic forms roughly corresponds to Ludwig

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1. The term "diminished capacity" is employed broadly to refer to situations in which abnormal psychological components are used either to exonerate a defendant for not possessing the requisite mens rea of a criminal offense (the "mens rea" variant) or to diminish a defendant's responsibility for an admitted crime (the "partial responsibility" variant). *See* Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984). Diminished capacity is distinct from the insanity defense, which asserts an impairment of such severity that it precludes legal responsibility altogether. *See infra* notes 28-30 and accompanying text.

2. *See* ALAN M. DERSHOWITZ, THE ABUSE EXCUSE 41 (1994). Dershowitz suggests that the proliferation of "abuse" syndrome defenses "may be a symptom of a national abdication of personal responsibility." *Id.*

3. *See* JAMES Q. WILSON, MORAL JUDGMENT 1-21 (1997). Wilson describes the popular perception that the moral order is in crisis, particularly in light of highly publicized criminal trials, utilizing "dubious theories of social causation" to explain defendants' behavior and weaken "essential notions of personal responsibility." *Id.* at 2.

Wittgenstein's distinction between propositions expressive of logical necessity (what can be said) and ethical sensibilities expressive of transcendent value (what can only be shown).[4] The entangling of these forms in forensic psychology becomes manifest as a merger of *causes*, which explain actions in impersonal verificationist terms, and *reasons*, which infuse meanings to actions through something akin to literary interpretation. These entangled concepts are discussed in Part II of this paper.

Part III focuses on functional means of tracing attributions of responsibility to their proximate base in causes or reasons. First, Part III evaluates Meir Dan-Cohen's distinction between *object-responsibility*, which is impelled through a sense of direct empirical causality, and *subject-responsibility*, which is impelled through more complex identifications of a conscious self with particular objects or events bespeaking causal influence in varying gradations.[5] Second, Part III examines Daniel Dennett's distinction between an *intentional stance* taken toward another person, in which the other person is presumed to have essentially the same capacity for reason and beliefs that the observer has, and the *design stance*, in which the other person is viewed mechanistically, as a kind of machine.[6] Third, Part III observes Albert Jonsen's distinction between *patterns of appropriation*, composed of questions a defendant might ask to clarify his own behavior to himself, and *patterns of attribution*, composed of questions that a judge would ask in assigning blame and punishment.[7] In our interpretation, the impetus to punish another is driven essentially by an intense projection of something like subject-responsibility, which can be designated as *subject-guilt*.

Therefore, the justice of punishment is measured primarily by reasons as opposed to causes. Critical questions about a defendant's mental state at a particular moment in the forensic narrative, which seem like questions of fact to be verified in a

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4. *See infra* notes 22-24.

5. *See infra* notes 35-38.

6. *See* DANIEL DENNETT, BRAINSTORMS 336-43 (1980). Descartes employed a kind of radical design stance toward animals, viewing them as mindless mechanisms. *See* RENÉ DESCARTES, DISCOURSE ON METHOD, PART V 56-58 (Donald L. Cress trans., Hackett Publ'g Co. 1993) (1637). Ironically, viewing humans as machines allows a more humane approach to punishment because such persons are not as prone to be the targets of our own projection. *See infra* notes 54, 71.

7. *See infra* note 51.

scientific mode, are more properly seen as questions of value by which a "fact finder" infuses meaning into the narrative. This is accomplished by drawing the emotive boundaries of the selves who comprise the story.

The conclusion that a defendant is "guilty" in the sense of warranting retributive punishment is, then, radically dependent on the quality of the fact finder's own identity base, which provides the means by which she must compare, project, and define the identities of others, both defendants and victims. Scientific expert testimony can offer evidence only of causes, and causes become influential only as a fact finder translates them into an unscientific literature of reasons. Justice is a meaningful concept only because it is unscientific and belongs to the dimension which, in Wittgenstein's phrase, gives sense to the world by standing outside it.[8]

This is not to say that justice is a Platonic form, but merely to indicate that justice is such a foundational psychological concept that it is falsified even by characterizing it as an object of knowledge that can be expressed in propositional language. Partly for this reason, one may grasp the phenomenon of guilt through something close to Saint Augustine's concept of original sin.[9]

These insights lay the foundation for additional observations and comments in Part IV. First, because the question of a defendant's mental state is not properly characterized as a question of fact in the ordinary sense, one may question whether the determination should be made by persons ordinarily designated as fact finders. Second, because the influence of expert testimony is only marginally related to its capacity for verification, present concerns over the scientific integrity of expert testimony are overdrawn. Third, given the prior two assertions, the state of mind determination is best left to the judge who sentences the defendant. This requires some form of a bifurcation model whereby only clear-cut, empirically-driven causal questions are given to juries. Fourth, given the second and third assertions, a wider range of expert testimony should

8. *See infra* note 22.

9. *See* SAINT AUGUSTINE, THE ENCHIRIDION ON FAITH, HOPE AND LOVE 31-32 (Henry Paolucci ed., 1961).

be permissible, including theoretic modalities presently challenged as unscientific. Fifth, in light of all prior insights, ever greater attention must be given to the selection of judges. The criteria we presently employ should be acknowledged as radically incomplete.

Although the task of implementing these practical changes appears Herculean, it will not be so once the legal community acknowledges what is obvious to others: that the confusion of causes and reasons is slowly but dreadfully undermining not only public confidence in the law's capacity to attribute criminal responsibility, but also in the ability of each of us to think about morality and guilt, justice and mercy, and good and evil.

II. A TALE OF TWO LANGUAGES

Human thought is an interplay of two languages. One is scientific and provides meaning through definition. The other is literary and provides meaning through image and connotation. One seeks verification by testing assertions through elemental empirical reference or mathematical calculation. The other evokes aspiration by framing conduct against common sensibilities and intuitive apperceptions. One assumes a grammar of causes by compelling assent through measurement. The other assumes a grammar of reasons by giving sense to things through familiarity. One operates out of a design stance and accounts for human actions in terms of mechanics. The other employs an intentional stance and accounts for human actions in terms of feelings and passions. One presupposes determinism, while the other presumes a posture of free will. One ascribes responsibility as a matter of causation, while the other perceives responsibility as a matter of identity. One appears to negate guilt. The other appears to attribute guilt.

The intermingling of these languages has riddled the discourse of law and psychology with internal contradiction, seeming to set the disciplines at cross purposes both with themselves and with one another. In fact, this is a false conflict largely resolvable by a disentangling of linguistic forms. The residual dilemma, insoluble in speech, nevertheless, is clarified to the intellect opening the possibility for a different kind of

resolution within the human heart, where silence also can be a mode of discourse.[10]

The delimitations of logic confine language to varying degrees of imprecision. In order to eliminate all traces of ambiguity, language would need validation from something outside itself, some superior form of thought free of any form of signification. But without some form of signification, there can be no language, and without language, there can be no thought. Thus, to think of thought without language is to think of thought without thought, and we cannot think such a thought because then we would not be thinking. The realization that in some sense we just did think such a thought by asserting that we could not does not solve the problem, but illustrates it.[11]

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10. *Cf.* MARTIN HEIDEGGER, BEING AND TIME 208 (John Macquarrie & Edward Robinson trans., 1962). Heidegger writes:

> Keeping silent authentically is possible only in genuine discoursing. To be able to keep silent Dasein must have something to say—that is, it must have at its disposal an authentic and rich disclosedness of itself. In that case one's reticence [Verschwiegenheit] makes something manifest, and does away with "idle talk" ["Gerade"]. As a mode of discoursing, reticence Articulates [sic] the intelligibility of Dasein in so primordial a manner that it gives rise to a potentiality-for-hearing which is genuine, and to a Being-with-one-another which is transparent.

Id.

11. What at first glance appears to be a nonsensical word game is actually the classic impediment to establishing a foundation for mathematical logic. The significance of the paradox—technically, the inability adequately to account for a class of all members of classes who are not members of themselves—is evident by its halting effect on Bertrand Russell. Russell's work in mathematical logic was seriously undermined by his recognition of the problem. *See* RAY MONK, BERTRAND RUSSELL 142-43, 175-85 (1996).

Russell's illustration is probably the most well known: "The barber shaves all men in the village who do not shave themselves." *Id.* at 143. Assuming the barber is male, the barber is a member of a class (all men in the village), but not a member of that same class (because all men in the village by definition shave and by definition cannot shave themselves *and* be shaved by the barber). If someone other than the barber shaves him, the barber is not a man in the village; if he shaves himself, the barber is not the barber.

The same problem is manifest in the ancient liar's paradox attributed to Epimenides of Crete: "All Cretans are liars." Because Epimenides is a Cretan, the statement can be true only if it is a lie, and it can be a lie only if it is true. Russell's resolution was to imply a contextual removal of the problematic class member from the class asserted. Just as we assume that Epimenides impliedly exempts himself from the class of all Cretans, every function of mathematical logic assumes a level of abstraction impliedly removed from the operations of the function employed. Of course, the resolution is itself problematic in its contemplation of an infinite regression of levels of abstraction. As Russell came to adopt Wittgenstein's position that

When deconstructionists speak of the impossibility of reading[12] because there is nothing outside the text,[13] they emphasize this same conundrum: human language is inherently reflexive. Universal assertions cannot be validated because there is nothing to which the assertions appeal except the language which composes them,[14] and language cannot be validated without appealing to something which by definition cannot be thought.[15] So meanings of words cannot help but be interminably entangled with meanings of other words.[16] It is our fate to hack through the endless jungle of associated meanings which grow around us as fast as we can free ourselves.[17]

As a matter of utility, science has developed a language that is artificially circumscribed. In this language, definition is possible because the endless multi-directional tentacles of word and image association have been cut off at the point where mathe-

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logic was a function of language, he lost interest in the field. *See id.* at 295-300, 516-19, 533-35. For a commentary on the liar's paradox and Russell's solution, see HILARY LAWSON, REFLEXIVITY 15-22 (1985).

12. *See, e.g.*, Jacques Derrida, *Living On/Border Lines*, *in* HAROLD BLOOM ET AL., DECONSTRUCTION AND CRITICISM 75, 116 (1994). "The impossibility of reading should not be taken too lightly." *Id.* (attributing the quote to Paul deMan).

13. *See* JACQUES DERRIDA, OF GRAMMATOLOGY 158 (Gayatri Chakravorty Spivak trans., 1976). Derrida attempts to illumine the mistake of assuming some form of pure thought apart from signifiers, which leads to further mistakes of assuming distinctions between words and their meanings, between speech and writing, and between reading and interpreting. *See id.* For a narrative manifesting these insights in relation to formalist principles of literary criticism, see STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 1-17 (1980). For an analysis of formalist literary criticism incarnate in contemporary legal theory, see Jeffrey Malkan, *Literary Formalism, Legal Formalism*, 19 CARDOZO L. REV. 1393 (1998).

14. For an overview of major post-structuralist theories of textual meaning, see Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 377-96 (1982). For a lucid account of the indeterminacy of legal language, see Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148, 161-88 (1990).

15. *See* LAWSON, *supra* note 11 at 15-22; JONATHAN CULLER, ON DECONSTRUCTION 133-34 (1982).

16. *See* Jacques Derrida, *Speech and Phenomena*, *in* A DERRIDA READER 6-30 (Peggy Kamuf ed. & David B. Allison trans., Columbia Univ. Press 1991) (critiquing Edmund Husserl's assertion of a grammar of pure intention); CHRISTOPHER NORRIS, DECONSTRUCTION: THEORY AND PRACTICE 28-29 (1993) (interpreting Derrida's concept of writing as "endless displacement of meaning"). *See generally* CULLER, *supra* note 15, at 110-34.

17. Such deciphering is an impossible task for any individual. For an explanation of "interpretive circles," see FISH, *supra* note 13, at 167-73; John Henry Schlegel, *The Ten Thousand Dollar Question*, 41 STAN. L. REV. 435, 442-57 (1989) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986)).

matical calculation can verify empirically driven theoretical constructs.[18] We gain much by this linguistic severance. Antibiotics, refrigeration, microwave ovens, personal computers, Prozac, and every tangible benefit woven into contemporary human living is to one degree or another the proximate result of scientific method. This method is the proximate result of definitions whose precondition is the deliberate cutting off of the thought connections which comprise language. Yet, because our inherent thought program is cut apart, we lose much also.

In gaining the capacity to speak of molecular structures, we lose the ability to speak of the meaning of life. In acquiring prowess over the neurophysiological human animal, we lose the ability to think seriously about the human soul. In speaking with ever greater precision about what *is*, we relegate to an entirely different and ever more tentative mode of speech any assertion about what *ought to be.*[19]

The circumscribed language of science is so revered in our culture that we tend to accept it as the truth of matters. We accept the language on its own terms. Since scientific language tells the truth, it deals with facts, or so we perceive. People cannot dispute scientific facts. People can only dispute matters of value, and so these disputed matters of value must be expressed in ostensibly inferior linguistic forms such as poetry, religion, and philosophy. Thus, the bifurcation of thought-speech[20] establishes scientific thought as the privileged founda-

18. *See* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 10, 129-213 (1979) (describing the phenomenon of constructing "privileged representations" to govern thought, thus allowing science and philosophy to speak with an apomictic quality).

19. *See* HANS KELSEN, PURE THEORY OF LAW 62-67 (1967), *reprinted in* COHEN AND COHEN'S READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 516, 521 (Philip Shuchman ed., 2d ed. 1979) (arguing that the intermingling of the questions of what law *is* and what law *ought* to be incorrectly presupposes an absolute moral order which, in practical application, "amounts to an uncritical justification of the national coercive order"); Moritz Schlick, *What is the Aim of Ethics? in* LOGICAL POSITIVISM 247, 256-63 (A.J. Ayer ed. & David Ryan trans., 1959) (asserting that a science of ethics can never establish what is "good" by stating what good *must* or *should* mean, but only by verifying in *fact* whether an established norm is followed). *See generally* C.L. Stevenson, *The Emotive Meaning of Ethical Terms, in* LOGICAL POSITIVISM, *supra*, at 264, 280-81 (characterizing as "a great confusion" any attempt to unite the dynamic use of "good," by which a speaker exerts influence, with a descriptive use, by which a speaker records or clarifies degrees of correspondence with a truth apprehended *a priori*).

20. The term "thoughtspeech" is my own. Just as our common sense perception

tion of true understanding to which other modes of thought are atavistic derivations, interstitial modes of metaphoric explanation awaiting translation into the truth of unambiguous scientific terms and relations.[21] But, there can be no translation. If literature were scientific, it would not be literature, and literature is necessary for human beings to make sense of their lives. Science cannot do this;[22] its language is too limited. Science

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bifurcates space and time, which Einstein established as a single dimension, the curvatures of which pose unified interactions, our common sense perception bifurcates thought and speech, envisioning the latter as an impure reflection of the former. *See* CULLER, *supra* note 15, at 92-94 (relating Derrida's concept of logocentricism to Cartesian dualism); DERRIDA, *supra* note 13, at 158; NORRIS, *supra* note 16, at 44-55 (analyzing the difference between voice and text). For an overview of special relativity theory, see MICHAEL WHITE & JOHN GRIBBIN, EINSTEIN: A LIFE IN SCIENCE 127-41 (1994). For an insightful account of jurisprudential concepts in terms of modern physics, specifically analogizing the psychological influences of language in "life space" and "value regions" to field curvatures in spacetime, see Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238 (1950), *reprinted in* THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 121, 134-35 (Lucy Kramer Cohen ed., 1960).

21. A scientific language that is both intersubjective (having common and fixed meanings for all users) and universal (capable of describing any state of affairs of whatever kind) was the goal of the Vienna Circle philosophers, and remains in some sense an ideal of linguistic philosophers even though they might doubt the possibility of accounting for subjective states. *See* VICTOR KRAFT, THE VIENNA CIRCLE 160-93 (Arthur Pap trans., 1953) (delineating the requisites of a universal language and focusing on the physicalism of Rudolph Carnap). The Logical Positivist ideal of a universal language notwithstanding subjective impasses seems analogous to Einstein's ideal of a unified theory of physics notwithstanding the obstacles posed by quantum theory. *See* WHITE & GRIBBEN, *supra* note 20, at 212-26. *See generally* A.J. Ayer, *Introduction* to LOGICAL POSITIVISM, *supra* note 19, at 3-28 (tracing the development of the Logical Positivist movement beginning with the Vienna Circle).

22. Wittgenstein was always aware of this, and he differed from other pioneers of Logical Positivism, notably Bertrand Russell, in the significance Wittgenstein attached to what could not be captured in language. *See* LUDWIG WITTGENSTEIN, TRACTATUS LOGICO PHILOSOPHICUS PROPOSITIONS 6.41, 6.522, 6.53 (B.F. McGuinness et al. eds. & D.F. Pears & B.F. McGuinness trans., Cornell Univ. Press 1971) [hereinafter TRACTATUS]. In Proposition 6.41, Wittgenstein states:

> The sense of the world must lie outside the world. . . .
>
> If there is any value that does have value, it must lie outside the whole sphere of what happens and is the case. For all that happens and is the case is accidental.
>
> What makes it non-accidental cannot lie *within* the world, since if it did it would itself be accidental.
>
> It must lie outside the world.

Id. at 6.41. For this reason, Wittgenstein states that it is impossible to have propositions of ethics. *See id.* at 6.42. "God," Wittgenstein asserts, "does not reveal himself *in* the world." *Id.* at 6.432. Yet Wittgenstein's subsequent comments on the *Tractatus* make it clear that he viewed his task of limiting what language could capture as having considerable ethical significance. *See* ALLAN JANIK & STEPHEN TOULMIN,

was not made for this purpose. The language of science remains, so to speak, a small cultivated garden within the infinite jungle of thoughtspeech. This insight is easily lost because scientific language itself misleads us into thinking that it is all that matters. Accordingly, we seek to employ it to explain everything, insofar as this is possible, and fill in the gaps with ordinary language. In doing this, we mix not only words, but also the different human needs for which the words have been created.

The language of science is directed to the need for *causes*.[23] The language of literature is directed to the need for *reasons*.[24]

WITTGENSTEIN'S VIENNA 188-91 (1973) (concluding that Wittgenstein's purpose was "as much ethical as logical"); *infra* note 55. Toward the end of the *Tractatus*, Wittgenstein observes that "[t]here are, indeed, things that cannot be put into words. They *make themselves manifest*. They are what is mystical." TRACTATUS, *supra*, at 6.522 (emphasis by the translators). In his Introduction to the *Tractatus*, Bertrand Russell expressed "a certain sense of intellectual discomfort" with Wittgenstein's "mystical, inexpressible region" of what can be shown and not said, and considered it a manifestation of the logical problem of generality. Bertrand Russell, *Introduction* to TRACTRATUS, *supra*, at xxi-xxii. Russell suspected the problem was illusory, but he could not resolve it. *See id.; see also* MONK, *supra* note 11. This difference of attitude among the destroyers of metaphysics regarding those subjects traditionally addressed by metaphysics is mirrored in modern literary criticism, and is perhaps the essential distinction to be made between the *old* New Critics in the mode of Eliot and Richards, and contemporary deconstructionists in the mode of deMan and Derrida. *See* NORRIS, *supra* note 16, at 13.

23. A cause, Wittgenstein explains, is a hypothesis founded in experiences of regular sequential conditions. *See* LUDWIG WITTGENSTEIN, THE BLUE AND BROWN BOOKS 15-16 (3d ed. 1964). Causes are distinguishable from reasons, which are accounts "showing a *way* which leads to this action." *Id.* at 15. "The difference between the grammars of 'reason' and 'cause'," he continues, "is quite similar to that between the grammars of 'motive' and 'cause'." *Id.* at 16. Because we use the word *why* to inquire about both causes and reasons, we are confused into thinking "that a motive is a cause of which we are immediately aware, a cause seen from the inside, or a cause experienced." *Id.* In the same way, the conception that thinking "consists in operating with signs" misleads us to conceive that "thinking is a mental activity," which in turn misleads us into envisioning a location for it. *Id.* at 16-17. A thought is misconceived as something like an event located in the head. *See infra* notes 45-50 and accompanying text.

24. The confusion of reasons for causes in psychoanalytic theory remains the fundamental mistake of many adherents and critics alike. *See infra* notes 93-97 and accompanying text. Although Wittgenstein admired Freud, sometimes characterizing himself as a disciple or follower of Freud, he was critical of Freud's assertions of psychoanalysis as a science. *See* LUDWIG WITTGENSTEIN, LECTURES AND CONVERSATIONS 41 (Cyril Barrett ed., 1967) (compiled from notes taken by Yorick Smythies, Rush Rhees, and James Taylor). "Freud is constantly claiming to be scientific," Wittgenstein remarked, "but what he gives is *speculation*—something prior even to the formation of a hypothesis." *Id.* at 44 (notes by Rush Rhees after a conversation

Causes explain the world in impersonal terms so that we are able to master *things*. So we speak of sub-atomic electrical charges, oxidation, biochemical deficiencies, neurotransmitters, statistical probabilities, behavior modification, photons, megabytes, salt corrosion, density, movement of the jet stream, mass times the speed of light squared, blood alcohol content, and the speed of the automobile in relation to the dimensions of the intersection as the light was turning from yellow to red. Reasons explain the world in personal terms so that we are able to live in emotive equilibrium with ourselves and one another. So we speak of envy, beauty, happiness, rights, obligations, faith, love, betrayal, tears that scald and start, things that glitter but are not gold, heroes, evil, and the "reckless son-of-a-bitch" drunk who ran the light, killed someone, and should be locked up forever. The need for the languages of science and literature is so much a part of us that we inevitably interweave the grammar of causes and reasons in our never-ceasing webs of discourse.[25]

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with Wittgenstein in 1942) (emphasis by Rhees). According to Wittgenstein, Freud's failure to make the basic distinction between causes and reasons had made for an "abominable mess" among psychoanalytic theorists. *See* JACQUES BOUVERESSE, WITTGENSTEIN READS FREUD 69 (Carol Cosman trans., 1995) (quoting G.E. Moore, *Wittgenstein's Lectures in 1930-33*, *in* PHILOSOPHICAL PAPERS 316 (1959)). Bouveresse comments:

> For event *A* to be considered the cause of event *B*, one would have to verify that in a sufficient number of cases events of the *A* variety are followed by events of the *B* variety. Of course, an event of the first type could still happen without being followed by an event of the second type. The relation of causation (*Verursachung*) is therefore hypothetical in a sense that the relation between a reason and the action it explains (*Begrundung*) is not. A reason is characterized by the capacity to be recognized as such by the person whose reason it is, and not on the basis of an inductive inference. Yet Freud either formulates causal hypotheses, and in this case he must try and verify them by methods different from his own; or he proposes and imposes reasons, and the acceptance of a reason has nothing to do with the acceptance of an explanatory hypothesis of the causal type, or for that matter with any hypothesis at all.

Id. at 69-70.

25. Daniel Dennett illustrates the interweaving through causal hybrids as assertions that employ intentional idioms in a grammatical structure by which they are "subject to the usual rules of evidence for causal assertions." DENNETT, *supra* note 6, at 235. Dennett writes:

> 1. His belief that the gun was loaded caused his heart attack.
> 2. His obsessive desire for revenge caused his ulcers.
> 3. The thought of his narrow escape from the rattler made him shudder.

The ability to impose a cause in the scientific mode is often useful in articulating a reason in the literary mode, but each mode entails its own peculiar criteria. Appealing to the principle of gravitational force is useful in understanding *how* a person who jumped from a bridge committed suicide. It is, however, of small use in understanding *why*. Yet the grammatical similarities of the questions and the usefulness of the methodology which yields the cause automatically graft the *why* into a causal dialect. Hence, the *why* of the suicide appears to be a question which is, at least in principle, subject to scientific verification. The true answer would not lie in the fact that the deceased's heart was broken, that he was betrayed by his best friend, that he could not suffer the searing anguish of a debilitating illness, or that he looked upon a sea of endless suffering and the darkness prevailed. Because these are all intentional explanations or reasons, we are comfortable acknowledging that no one of these is the *real* one. The mistake is to think that because none of these is *real,* a *real* answer or a scientific cause must still exist and can be found if the intentional factors are translated into a clinical etiology of chemical imbalances and misfiring neuronal impulses. To some persons, this type of explanation would seem the truth of the matter. The cause and the reason would appear as one and the same. But such persons could never have loved the deceased, looked into his eyes, laughed with him, shared his meals, or talked to him as a friend. To say that causes and reasons are the same is simply

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4. He threw himself to the floor because of his belief that the gun was loaded.

5. His obsessive desire for revenge led him to follow Jones all the way to Burma.

6. He refused to pick up the snake because at that moment he thought of his narrow escape from the rattler.

Id. at 235-36. The first three examples, as Dennett notes, invoke intentional explanations while not strictly attributing these as causes of the event. The next three examples provide the desires, beliefs, and thoughts as direct causes of the event. In either type of statement, the explanations influence the reader to understand the event "by making it reasonable in the light of certain beliefs, intentions, desires ascribed to the agent." *Id.* at 236. Bouveresse considers Dennett's examples and concludes that Wittgenstein's grammar of causes and reasons would not preclude a reason in the form of an intentional explanation from being a cause, but such a reason would invariably be more than a cause. *See* BOUVERESSE, *supra* note 24, at 74-77. A reason would always be a kind of interpretation, endowing an action with meaning. *See id.* at 78 (analogizing Wittgenstein's distinction between causes and reasons to Friedrich Waismann's distinction between causes and motives).

to speak of a context where reasons are not necessary because the emotive connection to the subject is marginal.

III. SELF, SIN, AND STATE OF MIND

Perhaps no human task is so naturally prone to tangle the respective human needs for causes and reasons than the attempt to attribute responsibility. Responsibility appears to be a kind of reason insofar as it makes sense of a situation of conflict, and it appears to be a kind of cause insofar as it imposes a relation such that person *A* precedes event *X*. The causality attributed is not a cause in the strict sense, however, tangentially it might employ scientific induction. To say that person *A* precedes event *X* in a manner that makes him responsible for the event is to choose person *A* from a complex of precedent factors and endow person *A* with a peculiar significance apart from any scientific induction. For example, from a scientific stance, the internal bleeding was as much a cause of person *B*'s death as was the steel fragment that tore the artery, person *A* who failed to maneuver his car, the manufacturer who made *B*'s car without an air bag, or person *B* herself for being in the wrong place at the wrong time. If, however, we say that any of these is responsible for the death, we are left unsatisfied because the term "responsible" in this context, designating scientific causality, does not make sense of the situation in the same way as saying that person *A* is responsible. If we do conclude that a design defect or some other *non*human precedent factor was responsible, it is tantamount to saying that we identify emotively with person *A* to such a degree that it would make less sense, not more, to designate his role with a peculiar emphasis.[26]

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26. In the words of Felix Cohen, "[w]hat we actually do when we look for a legal cause is to pick out of this infinity of intersecting strands a useful point at which public pressure can be placed." Cohen, *supra* note 20, at 252; *cf.* Guido Calabresi, *Concerning Cause and the Law of Torts*, 43 U. CHI. L. REV. 69, 106 (1975-1976) (remarking that for legal purposes, the term *cause* is used "always to identify those pressure points that are most amenable to the social goals we wish to accomplish"). Although H.L.A. Hart and Tony Honoré do not dispute this "pragmatic" view of causality, they comment that it has "no plausibility as an account of what lawyers mean by causation," and that it could lead to "very strange results," for example, that an intentional tortfeasor would not be liable to compensate his victim if liability did not appear to provide an effective deterrent. H.L.A. HART & TONY HONORÉ, CAUSATION IN

So "responsibility" as the term is used in common discourse, can designate either a cause or a reason, but strictly speaking, a judgment of responsibility always entails both. Because of the loose terminology, we think of a reason being nothing more than a cause "seen from the inside."[27] This fundamental misperception lies at the root of subsequent confusion about the capacity of scientific testimony to establish whether the defendant "labored under melancholy distempers"[28] or "knew the nature and quality of his act."[29] In both examples, reasons are

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THE LAW 300-01 (2d ed. 1996). To read Calibresi's "pressure points" or Cohen's "useful public pressure" as referring to a more general sense of justice (i.e., encompassing more than economics) is unsound, they argue, because it imputes the ordinary use of the word *cause*, and this implies that causes are actions that themselves designate responsibility as opposed to human ascriptions that designate responsibility by characterizing an action as a cause. *See id.* at 301. In other words, the "ordinary" understanding of the word *cause* is logical insofar as *cause* is assigned a fixed meaning distinct from *responsibility*, but this distinction remains an artifice of the judge/speaker rather than an actual function of language and perception. See *supra* notes 23, 24, where characterizations of behavior bestow causation as much as causation bestows blame. *See also* Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 550-51 (1962) ("[I]t is defendant's *conduct* that inflicts the hurt, but it is the *law* that makes his conduct negligent. Negligence must be based on causal relation, but causal relation can never be based on negligence in the air.").

27. *See supra* note 23.

28. RALPH SLOVENKO, PSYCHIATRY AND CRIMINAL CULPABILITY 8 (1995) (quoting Sir Matthew Hale, ca. 1635, *quoted* in 1 N. WALKER, CRIME AND INSANITY IN ENGLAND 41 (1968)). This formulation is an attempt to refine in seventeenth-century medical terminology the earlier tests analogizing the accused's disposition to a "wild beast." *Id.* As one scholar comments,

> The analogy to the wild beast as a test has 3 important characteristics: first, beasts, as distinguished from human beings, were considered incapable of reason; second, the wild beast was thought to lack any control over its behavior; and third, the wild beast was seen as totally emotionally deranged—in a "frenzy" (a term frequently employed in early psychiatric literature). . . . The analogy is reflected in another phrase of the early law and psychiatry statutes: the "furiously insane."

Alan A. Stone, *Psychiatry and the Law*, *in* THE NEW HARVARD GUIDE TO PSYCHIATRY 797, 803 (Armand A. Nicholi, Jr., M.D. ed., 1988).

29. SLOVENKO, *supra* note 28, at 17-22 (explaining the origin and history of the *M'Naghten* rule). The test, originally formulated by Lord Chief Justice Nicholas Tindal in 1843 in response to criticism over the acquittal of the would-be assassin of the British Prime Minister, took the following form:

> [E]very man is presumed to be sane, and . . . to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know that he was doing what was wrong.

treated as causes; in other words, they are treated as facts to be measured or established. The same error engenders questions, such as whether the defendant's act was the result of an "irresistible impulse"[30] or the "product of a mental disease or defect."[31] It underlies the question of whether the accused

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M'Naghten's Case, 8 Eng. Rep. 722 (H.L. 1843).

30. *See* SLOVENKO, *supra* note 28, at 24-25. The irresistible and uncontrollable impulse test was formulated by Chief Justice Lemuel Shaw in *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 502 (1844). The following adaptation, preserving the classic form of the test, is from *Parsons v. State*:

> [D]id [the accused] know right from wrong, as applied to the particular act in question? . . . If he did have such knowledge, he may nevertheless not be legally responsible if the two following conditions concur: (1) If, by reason of the duress of such mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; (2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*.

Parsons v. State, 72 So. 854, 866-67 (Ala. 1887).

31. First enunciated by Judge David Bazelon in *Durham v. United States*, the *Durham* test, is as follows:

> [A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect. . . . We use "disease" in the sense of a condition which is considered capable or either improving or deteriorating. We use "defect" in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease.

Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954).

The District of Columbia Circuit modified the so-called *Durham* test. *See* McDonald v. United States, 312 F.2d 847, 850-51 (D.C. Cir. 1962) (holding that neither courts nor juries were bound to find a mental disease or defect, even if expert psychiatrics impose clinical categories indicating disease or defect). The court then overruled *Durham* in *United States v. Brawner*, 471 F.2d 969, 973 (D.C. Cir. 1972) (adopting the ALI rule as stated in the Model Penal Code). Initially, a proponent of the rule, Karl Menninger announced that the *Durham* decision was "more revolutionary" than *Brown v. Board of Education*. According to Slovenko, who cites personal correspondence, Menninger eventually became "embarrassed by his statement . . . and did not like to be reminded of it." SLOVENKO, *supra* note 28, at 23. Menninger's intellectual prowess and emotive sensitivity made him a brilliant psychoanalyst. These same qualities engendered a kind of anguish at the impossibility of distinguishing causes and reasons in a scientific sense—i.e., in merging the contradictory needs of both understanding evil and punishing it. *See* KARL MENNINGER, THE CRIME OF PUNISHMENT 190-218 (1966) (denouncing as primitive the Kantian sensibility that behavior is subject to transcendental categorical judgment). He later embraced the concept of "sin" as the most appropriate device for understanding the inherent conflicts of human thought and action. *See* KARL MENNINGER, WHATEVER BECAME OF SIN? (1973). One way of viewing this evolution is that Menninger's medical paradigm gradually attained the flexibility of a "language game" in Wittgenstein's sense, implicitly acknowl-

"lack[ed] substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law."[32] These questions appear to inquire about matters of fact that are scientifically verifiable;[33] the appearance results from the failure to acknowledge a difference in the kind of psychological needs that impel us to ask the questions.[34]

Because both *causes* and *reasons* attribute responsibility, the disentangling of grammar compels a distinction between different modes of responsibility. The scientific language of causes attributes *object-responsibility*,[35] addressing a context of verifi-

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edging the psychological need to appeal to a "meaning" or "sense" of life beyond linguistic formulation. *See infra* note 55.

32. ALI MODEL PENAL CODE § 4.01 (1962).

33. The ALI test has been justified on the ground that it circumvents the problem of false scientific categories by recognizing that mental illness affects an entire personality, not simply cognition (*M'Naghten*) or volition (irresistible impulse). The ALI test allows the jury to recognize that how "substantial" the impairment must be in order to exonerate a defendant is not strictly a matter of medical science, but is a matter of community standards that the jury can ascertain. *See* State v. Johnson, 399 A.2d 469, 477 (R.I. 1979). The resolution is illusory, however, to the degree expert testimony is extended from a strict insanity defense to one of diminished capacity, in other words, from a determination of whether a defendant possesses the minimum rationality to be treated as human to a determination of whether the defendant's acts *were* rational in light of determinable psychological facts, the effect of which precludes a mens rea. In the strict insanity defense, scientific categorizations are of doubtful consequence; whether the expert testimony is framed in terms of cognition, volition, product, or capacity, the bottom line determination of minimum rationality will remain holistic because juries do not think solely in the categories presented by experts. *See* Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61, 64 (1995). With respect to a determination of substantial capacity, it is doubtful that jurors preserve in any functional manner the distinction between the legal question of a defendant's responsibility and the medical question of his mental state. But even if this were so, the distinction seems academic by virtue of the fact that jurors actually faced with the task of imposing punishment invariably act inconsistently with the community standards to which they ascribe. *See* WILSON, *supra* note 3, at 90. For a survey of the various tests of criminal responsibility currently adopted in state courts, see Michelle Migdal Gee, Annotation, *Modern Status of Test of Criminal Responsibility—State Cases*, 9 A.L.R.4TH 526 (1981).

34. That is, the need to understand the world by imposing fixed meanings, and the need to experience a sense to life which is undermined by the fixed quality of meanings.

35. The distinction between *object-* and *subject-responsibility* is made by Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959 (1992). Rejecting the traditional account of responsibility in terms of a free will paradigm, Professor Dan-Cohen argues that it is more appropriate to employ a "constitutive paradigm" according to which the self continuously is defining its boundaries in

able events. The literary language of reasons attributes *subject-responsibility*, addressing a context of emotive identification. *Object-responsibility* ascribes a measurable causal relation between a person and a state of affairs. *Subject-responsibility* ascribes a nonmeasurable identity between a person and a state of affairs. For example, a person is object-responsible if she knocks over a vase at her friend's party. The measurable act of her elbow contacting the glass renders her the incontestable author of the event, regardless of the fact that she did not will it to happen.[36] The same person is subject-responsible if it is not she but her child who knocks over the vase.[37] Although the measurable act of begetting the child, or the act of bringing the child to the party, establishes a remote causal chain to the accident, it is not this basis on which responsibility is assumed. The parent will *feel* responsible because of her proximate emotive identification with the person of the child, whom the parent perceives as a part of herself. In a similar fashion, a person might identify with and feel responsible for her country, her alma mater, her church, or her city's N.B.A. franchise. Subject-responsibility is not a matter of *what* a person does but, rather, of *who* a person is.[38]

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spatio-temporal and social contexts. Within ordinary responsibility statements of the form "*A* is responsible for *X*," Dan-Cohen discerns a shift of meaning within propositions, reflecting two different, though closely related, senses of responsibility. *See id.* at 962. The self perceives actions in terms of its own scalaric boundaries, and so it may assume responsibility for an act as a part of a projected "responsibility base" or as an "object of responsibility," depending on whether the "responsibility" relates the act "to more central or more peripheral elements in the self's geography." *Id.* at 972.

36. *See id.* at 962.

37. *See id.* at 981-82.

38. Dan-Cohen offers a hypothetical in which *A* shoots a gun at *V* and *A'* shoots at *V'*. The bullet of *A* kills *V*. The bullet of *A'* is diverted by a sudden wind and *V'* is saved. *A* will be charged with murder and punished more severely than *A'*, although both appear to share an identical responsibility base—intentionally shooting at another. Our natural tendency is to distinguish the cases as a matter of causality, despite the fact that the broken link in the causal chain was totally fortuitous. The more compelling distinction lies not in events external to the respective shooters, but in their respective identities after the events:

> [I]magine V's widower blaming A for the widower's devastation and agony: "You are responsible for all this suffering." If A were foolhardy enough to inquire why, a natural answer would be, "Because you are the one responsible for my wife's death." The initial accusation is a matter of object-responsibility. The second statement, made in support of the accusation, is in terms of subject-responsibility; it identifies "the killing of V" as the relevant aspect of A, by virtue of which the widower's ensuing

Who a person is cannot be reduced to measurable criteria without contradiction because the identity sought is necessarily predicated on feeling, and feelings are not unitary as they constitute a self. The self is a complex of characteristics cast in human terms (e.g., beliefs, thoughts, motives), which make consciousness coherent to itself. An inquiry about another's self requires an *intentional stance*[39] that employs second-order speculation (beliefs *about* beliefs) to project a modular other necessarily cast in variations of one's own image. The resulting model can never be verified. Yet, without the sense provided by this *intentional* model, it is impossible to determine guilt in the criminal mode. An accused's state of mind cannot be at issue as a matter of temporal fact, but only as a complex of a defendant's characteristics manifested over time. Moreover, without an inquiry into an accused's state of mind, the basis of responsibility is limited to *what* the person has done. This sense of bare object-responsibility is adequate for some purposes, but not for criminal punishment, which requires mens rea, a guilty mind. Thus, the self of the person must be identified with the criminal act in an intense mode of subject-responsibili-

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misery can be rightfully placed at his doorstep.

> . . . Instead of saying "You are [subject-]responsible for my wife's death, and that is why you are [object-]responsible for my misery," the widower could have simply retorted: "You are my wife's killer!" My point here is that this statement can be taken quite literally as an attribution of a certain identity or characteristic to A—that of being a killer. This linguistic form is not at all surprising. Being a killer is in fact a recognizable social role, and as such it is a candidate for participation in the self's constitution. Because one's victim must actually die for one to "be a killer," the fortuity of whether this happens becomes a piece of *constitutive* luck.
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> . . . .
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> . . . Both the view that V's death or survival is an external fortuity that should have no bearing on our assessment or treatment of A and the opposite intuition that the victim's actual fate heavily influences our attitude toward A make a strong claim on our allegiance. This ambivalence, however, is not just a matter of confusion or indecision. The conflict respects the corresponding viability of the two pictures of the subject of responsibility that these intuitions reflectively assume. Seen in one context and at the particular moment, V's death can be perceived as an external event that A brought about; in a different context and time, that same event is seen as part of A's biography, an ineluctable fact within A's boundaries that constitutes his identity as a murderer.

Id. at 982-85.

39. *See* DENNETT, *supra* note 6, at 236-39.

ty, which we might designate as *subject-guilt*.[40] The guilty state of mind becomes the pivotal issue. But is it a fact?

Even in principle, state of mind hardly seems like a verifiable event. It is not like a Kodak moment theoretically captured on some kind of mental film. It is more like a complex rush of simultaneous perceptions in competition, with state of mind being a term of art imposed retrospectively to make order out of the chaos.[41] And it is only chaos (in *intentional* terms) that in principle can be verified by scientific instruments as a biological fact of the brain. Thus, when state of mind is framed as a question of fact appropriate to a *design stance*,[42] employing the mechanics of scientific engineering, the language combines causes and reasons so that a second-order speculation about an accused's character, based on data ascertained over a life span, can appear as a first-order verification of the accused's position in a causal chain based on data purportedly measuring a temporal event in the brain. What begins as a kind of "category mistake,"[43] ends as an empty question.

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40. The term is my own. It signifies a kind of resolution to the ambivalence described by Dan-Cohen. *See supra* note 38. Fortuitous elements will always bear a causal claim to lessen our identification of the actor with the event or consequence of his act, even when we establish identification. The attribution of a particular kind of subjectivity, a "guilty mind," overcomes residual hesitation.

41. *See* DANIEL C. DENNETT, CONSCIOUSNESS EXPLAINED 253-54 (1991). Against the notion of a unitary consciousness in the mode of Descartes' *cogito ergo sum*, Dennett accounts for biological aspects through metaphors of Multiple Drafts and parallel pandemoniums. Analogizing human cognition to artificial intelligence, Dennett presents the self as the brain's user illusion of itself:

> There is no single, definitive "stream of consciousness," because there is no central Headquarters, no Cartesian Theater where "it all comes together" for the perusal of a Central Meaner. Instead of such a single stream (however wide), there are multiple channels in which specialist circuits try, in parallel pandemoniums, to do their various things, creating Multiple Drafts as they go. Most of these fragmentary drafts of "narrative" play short-lived roles in the modulation of current activity but some get promoted to further functional roles, in swift succession, by the activity of a virtual machine in the brain. The seriality of this machine . . . is not a "hard-wired" design feature, but rather the upshot of a succession of coalitions of these specialists.

Id.

42. *See* DENNETT, *supra* note 6, at 236-37.

43. GILBERT RYLE, THE CONCEPT OF MIND 15-16 (1949). Gilbert Ryle coined this term to designate inappropriate linkings of disparate concepts because of grammatical similarities in the way we speak about them. Thus, when we say "Mr. Clinton is a politician," and "Mr. Magoo is a cartoon," a Martian would be led to believe that

An empty question appears to present an issue that can be resolved empirically if one seeks hard enough for a determinative fact even though one might puzzle over what the elusive fact looks like.[44] Are the Baltimore Ravens a continuation of the Cleveland Browns or a new team with a number of players who were once Cleveland Browns? However one answers this question, one can appeal to facts in support of the answer, but there is no hidden fact or complex of facts that will resolve the matter. The essence of the question is metaphysical and presents an appeal to an intuitive sense of what comprises being a team. If the definition of team were narrowed to the point where it would admit empirical verification (for example, the presence of a particular number of players or a certain style of uniform), we would think that the concern of the inquirer was not being addressed. The answer can only be given as a matter of individual perception in light of the psychological angle from which the team is viewed. The enhanced propriety of one angle over another, i.e., the matter of the inquirer's concern, appears to be a question of value or taste. There is no true or right way of looking at the phenomenon, no invisible physical or organic structure that can tell us whether there is one team or two. So, it is with the state of mind. Just as there is no mental thought film,[45] there is no unitary true self to be photographed.[46]

So, when we ask about a defendant's state of mind or capacity to form the requisite criminal intent, we are not asking about an empirical predicate inherent in a measurable object, the defendant's mind. Rather, we are asking about the comparative propriety of angles from which to view the defendant's actions as his identity, drawing the defendant's emotional

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"politicians" and "cartoons" are not different in kind, but similar predicates of similar subjects. If one asserts that they are similar in kind, the joke works only because we recognize the category mistake. Ryle's famous examples included mistaking Oxford University with its constituent buildings and residential colleges, and confusing consciousness as an entity not identifiable with the rest of the body. A version of the former mistake was made by a ninth grade teacher of mine, who, reflecting on his experiences in England during the Second World War, told the class that "Oxford" was merely the name of a town that contained numerous colleges. The latter mistake is illustrated by Descartes' *cogito ergo sum*. The phrase "ghost in the machine" originated with Ryle's attempt to discredit the mistake. *See id.*

44. *See* DANIEL C. DENNETT, THE INTENTIONAL STANCE 40-41 (1993).

45. *See* DENNETT, *supra* note 41, at 297-320.

46. *See id.* at 227-52.

boundaries in a way that makes sense to us. In other words, while we frame the question as whether a specific mental state was present, the question is framed more accurately as whether we can make sense of the defendant's behavior in a particular way.[47] We are asking if he or she possesses the minimum level of rationality appropriate to an intentional stance and then employing the stance to tell ourselves what kind of person we are dealing with.[48] This is not a question of biological capacity at a particular moment so much as one of observed characteris-

47. *See* Kevin L. Keeler, Comment, *Direct Evidence of State of Mind: A Philosophical Analysis of How Facts in Evidence Support Conclusions Regarding Mental State*, 1985 WIS. L. REV. 435, 454 (1985) (delineating Wittgenstein's view that "intention" refers not to any single feeling or thought, but to a history of thoughts, feelings, memories, prior acts, beliefs, and circumstances which make an act or feeling intelligible by relating it to a socially recognized pattern of conduct). A corollary of this insight is that a fact finder does not *indirectly* determine intent by looking at a person's conduct and "guessing what was going on in the actor's mind," but rather *directly* by "find[ing] amidst the various antecedents and circumstances of the act that familiar pattern of conduct within which the act makes sense and by which it can be explained." *Id.* at 455. This is to say that intent, as we impose the label upon ourselves and others, is a reason retrospectively synthesized from Dennett's multiple streams of consciousness, rather than a cause spontaneously emanating from a Central Meaner. *See* DENNETT, *supra* note 41. In other words, a particular intent does not exist in the moment one seeks to explain; it exists as a shorthand designation of various elements subsequently employed to explain the moment.

48. For a survey of Dennett's and others' theories and speculation on their effect on criminal accountability, see Andrew E. Lelling, Comment, *Eliminative Materialism, Neuroscience and the Criminal Law*, 141 U. PA. L. REV. 1471 (1993). Lelling appears critical of Dennett for not following his own theories to their logical conclusion—i.e., the elimination of folk psychology from the criminal law. *See id.* at 1527. Dennett establishes the invalidity of our everyday understanding of consciousness by means of his multiple drafts model, yet he maintains the fictions of an intentional system of beliefs, desires, intentions, and others allowing for a change of stances when the actor's behavior appears so irrational that it cannot be explained via an intentional stance. *See* DENNETT, *supra* note 41, at 101-38. Dennett employs a design stance to understand actions operating within a non-rational system (a stance more appropriate to behaviorists or psychodynamic analysts), and a physical stance to understand actions as consequences of drugs or other neuro-chemical reactions (a stance more appropriate to biological psychiatry). *See id.* In either event, Lelling, citing Michael Moore, cannot, in principle, accept what Dennett concedes as a necessary fiction. *See* Lelling, *supra*, at 1528-30. The problem with Lelling's hard scientific line, which he acknowledges contains gaps that presently must be filled with intentional bridges, *see id.* at 1534-35, is that it does not allow the language of reason its own integrity. He appears to presume that causes and reasons are one and the same, or that reasons are necessarily inferior speculations that fill the gaps between causes. *See id.* at 1560-61 (endorsing Rebecca Dresser's hypothetical murder trial, employing a *mentalometer* to retrieve data from the defendant's brain in order to scientifically determine the nature of her culpability); *see also* Rebecca Dresser, *Culpability and Other Minds*, 2 S. CAL. INTERDISCIPLINARY L.J. 44, 70-71 (1993).

tics in a larger temporal context—i.e., how much of ourselves we proximately identify in the defendant whom we perceive from multiple aspects. Like the question about the Ravens and the Browns, the question about the defendant's state of mind appears to inquire about an empirical fact but more accurately sets the condition of a value judgment. If *state of mind* or *person* were defined narrowly enough to admit empirical verification, we would be asking a question about biological functions. Although this question could be answered, we would not be compelled to ask it in the first place because biological functions are only marginally useful in establishing *reasons*.[49] We need *reasons* to attribute *subject-guilt* and punish a person. *Causes* are not enough.[50]

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49. *Cf.* Oliver R. Goodenough, *Biology, Behavior, and Criminal Law: Seeking a Responsible Approach to an Inevitable Interchange*, 22 VT. L. REV. 263 (1997); Maureen P. Coffey, Note, *The Genetic Defense: Excuse or Explanation*, 35 WM. & MARY L. REV. 353 (1993); Deborah W. Denno, Comment, *Human Biology and Criminal Responsibility: Free Will or Free Rule?* 137 U. PA. L. REV. 615 (1988).

50. A similar paradigm can be applied to civil litigation, where *reasons* are required for the imposition of liability, notwithstanding rhetorical formulations which cast reasons as causes. The concept of proximate cause in tort law is inherently value-driven in the sense that it stops an otherwise infinite causal regression at a place locating responsibility in the comparatively less sympathetic actor. *See supra* note 26. There is data suggesting that a jury might well predicate responsibility on a remote and fortuitous act if the story is told in the right way. *Cf.* Feigenson, *supra* note 33, at 117-18. For example, but for the plaintiff getting out of bed in the morning, he would not have been at the intersection where the defendant ran the light. *See id.*

To illustrate the simulation heuristic by which jurors construct alternate scenarios to identify the deviant event that caused an accident, Professor Feigenson cites an experiment in which subjects read two different accounts of a victim killed on his way home from work by a drunken teenager running a red light. *See id.* at 117-19. In one version, the victim left the office at an unusual time, but took his usual route. In the other version, the victim took an unusual route but left at the ordinary time. When asked to imagine how the victim's family would complete the thought, "If only _____, [the accident would not have happened]," the answers most often corresponded to the incident that had been identified as unusual in the story, the *time* for those reading the first version and the *route* for those reading the second. Neither group tended to identify any of the teenager's acts as the "if only' factor." *See id.*

The recent debate over the liability of manufacturers of silicone breast implants illustrates the primacy of reasons in attributions of civil liability. The primary conflict is not, as it is usually cast, the presence or absence of "scientific" evidence establishing causal harm. *See, e.g.*, Heidi Li Feldman, *Science and Uncertainty in Mass Exposure Litigation*, 74 TEX. L. REV. 1, 18-19 (1995). Rather, the controversy is better understood as a clash of *identities*, with both litigation factions unable to draw their emotional boundaries to encompass the harm and engender subject-responsibility.

To the woman afflicted with illness, the implantation clearly stands out as the deviant event in the simulation heuristic of a healthy life. To the degree that breast implants are themselves a product of perverse cultural pressures, they can only be

The philosopher Albert Jonsen has analyzed the problem of moral attribution, and he has distinguished a pattern of attribution that essentially corresponds to our identifications of Wittgenstein's causes, Dan-Cohen's object-responsibility, and Dennett's design stance.[51] Jonsen places in opposition to the pattern of attribution in moral decision-making a pattern of appropriation that essentially corresponds to our identifications of Wittgensteins reasons, Dan-Cohen's subject-responsibility, and Dennett's intentional stance.[52] One of Jonsen's conclusions elucidates the basic dilemma of separating the two realms, and why the two languages are inseparable if we are to overcome our paralysis between disdain and empathy for the one to whom we attribute subject-guilt:

> In the pattern of attribution, the judge's question about the propriety of praise and blame takes him into the issues of intention, motivation, deliberation, and character. In the pattern of appropriation, the agent's question about the development of self-possession takes him into the issues of consideration, conscientiousness and commitment. *But it is clear that the question and notions of attribution rest in some manner on the question and notions of appropriation.* While the judge's question looks principally for external evidence of moral causality and need not strike so deeply into the interior of moral agency, the moral agent must exist for the judge's question to have ultimate meaning. Praising and blaming must somehow reflect and contribute to the existence of truly moral persons. *Thus, while it is possible to separate out the considerations which are more suited to answer the judge's question from those more suited to the agent's, both questions finally meet.*[53]

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experienced by the woman as *external* to her, an invasion to which she consented as a consequence of fraud. To the manufacturer, a simulation heuristic yields no deviant event. Any perceived harm must then be owned by the consumer, who chose to incorporate the implants as *part* of herself. The masculine quality of the appeal to scientific causality, *see infra* notes 108-09, no doubt aggravates the impossibility of empathic understanding on both sides. For an insightful overview of breast implant litigation, including an account of media-driven attitudes and causal perceptions, see Julie M. Spanbauer, *Breast Implants as Beauty Ritual: Woman's Sceptre and Prison*, 9 YALE J.L. & FEMINISM 157, 163-71 (1997).

51. *See* ALBERT R. JONSEN, RESPONSIBILITY IN MODERN RELIGIOUS ETHICS 37-60 (1968).

52. *See id.* at 60-70.

53. *Id.* at 71 (emphasis added).

Questions framed in such terms as a defendant's intent, mens rea, premeditation, or capacity to distinguish right from wrong are directed not so much to an objective pattern of verifiable attributes as to a subjective pattern of appropriating a person's very humanity. The judgment of a pattern of a defendant's humanity can be made only by reflection of the judge's own pattern of events. Thus, if we look upon a contextual scene and fail to see in the accused a resemblance to ourselves that is sufficient to compel us to adopt an intentional stance, the one we judge is not really a person, and the responsibility we attribute is of the object mode. We perceive the accused as something like a machine whose workings have been appropriated by sickness, or we see an animal living according to animal instinct.

A machine or an animal can be object-responsible in the sense of setting in motion a causal chain. We blame machines and animals for bad consequences, but the emotive quality of disdain is different in kind from what we feel toward another like ourselves.[54] In this sense, it is easier to attribute blame; ironically, it is more difficult to inflict punishment. For example, a small child, a sleepwalker, a computer, or a cat can be guilty only as a matter of fact. A conscious adult, however, stands guilty as a matter of identity. She is not only a link in a causal chain, but she is the *reason* for the causal relation. She is the subject of responsibility as well as an object of it. Thus, it is a more complex matter to attribute blame, but easier to inflict punishment once the culpable identity is established.

This culpable identity, with or without God, is the manifestation of something like sin; its resolution within the human text is as impossible as the validation of language.[55] Both the judge

54. *Cf.* Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 381-82 (1954) ("Why," asks the Socratic interlocutor, "doesn't the court say . . . that it is establishing property rights on grounds of ethics or policy?" The subject responds, "I think courts generally try to make noises like slot-machines and to give the impression that they are not legislating. People don't swear at slot-machines the way they do at other human beings.").

55. *See generally* PHILIP R. SHIELDS, LOGIC AND SIN IN THE WRITINGS OF LUDWIG WITTGENSTEIN (1993). Shields points out how Wittgenstein's distinction between what can be said and what can only be shown poses a limitation that is transcendental in a Kantian sense, manifesting both a logical and ethical demand. *See id.* at 11-30. The

and the defendant are guilty in this sense of original sin.[56] The concept of sin "with or without God" is not nonsensical, for the term expresses a fundamental tension between aspiration and delimitation within the human personality. Delineating a generic religious form, William James ascribed a certain uniform deliverance in which religions will appear to meet, consisting of an uneasiness or the "sense that there is *something wrong about us* as we naturally stand" and its solution as a "sense that *we are saved from the wrongness* by making proper connection with the higher powers."[57] The absence of salvation through higher powers, however, does not preclude or alleviate a sense of wrongness.[58] Acknowledging Kierkegaard's notion that despair is not a fact but a state of being identifiable with original sin, Camus, analyzing suicide, asserts that "the absurd is sin without God."[59] Just as chaos is itself a peculiar form of order,[60] on the experiential plane of consciousness ultimate

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inescapable tendency of human intelligence to overstep the limitation is analogous to St. Augustine's concept of original sin. *See id.* at 64; *see also infra* note 56.

56. Saint Augustine (354-430 C.E.) gave the concept of original sin its first articulate expression though antecedent versions exist in the writings of Saint Irenaeus (ca.130-ca.200 C.E.). Taking as the scriptural basis Saint Paul's Letter to the Romans, "[A]s by the offence of one [Adam] judgment came upon all men to condemnation . . . so by the righteousness of one [Christ] the free gift came upon all men unto justification of life." *Romans* 5:18 (King James). Augustine characterized the human race as a mass of damnation. *See* AUGUSTINE, *supra* note 9, at 30-31. The freedom characteristic of the human race is real in the sense that each person can choose to sin, but none can choose not to sin. *See id.* at ch. 30. In other words, humans have a genuine freedom to choose between alternatives, and every alternative is sinful with some alternatives being more sinful than others. *See* 2 JUSTO L. GONZALEZ, A HISTORY OF CHRISTIAN THOUGHT 42-44 (1971); JAROSLAV PELIKAN, THE EMERGENCE OF THE CATHOLIC TRADITION 100-600, at 298-301 (1971). For a cogent overview of original sin, including the antecedent doctrines and modifications subsequent to Augustine, as well as a bibliography, see THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH 1195-97 (F.L. Cross & E.A. Livingstone eds., 3d ed. 1997). *See generally infra* note 70.

57. WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 393-94 (1961). This passage is quoted by SHIELDS, *supra* note 55, at 5-6, as expressive of Wittgenstein's moral sensibility.

58. The impossibility of validating language from the outside posed very similar concerns for both James and Wittgenstein. *See* LAWSON, *supra* note 11, at 22 (comparing the linguistic limitations imposed by both philosophers); *cf.* JAMES, *supra* note 57, at 356 (asserting the inability of philosophical language to capture dimensions of personal experience).

59. ALBERT CAMUS, *The Myth of Sisyphus*, *in* THE MYTH OF SISYPHUS AND OTHER ESSAYS 1, 40 (Justin O'Brien trans., 1955).

60. This perception, long an inspiration to metaphysicians, *see, e.g.*, PAUL G. KUNTZ, COSMOS AND CHAOS: WEISS'S SYSTEMATIC CATEGORIZATION OF THE UNIVERSE 117, 118-19 (Lewis Edwin Hahn ed., 1995), has now become an inspiration to physi-

despair is a peculiar form of religion. The sense of inherent and incorrigible wrongness is the endemic bond of believers and disbelievers.

Sin is, in this sense, a fact of life, though even the designation "fact" is misleading for it implies something capable of verification on purely empirical grounds. Refuting skepticism, G. E. Moore asserted certain fundamental propositions that could not be doubted.[61] I know, for example, that I have a body, that I am a human being, and that the world existed long before my birth.[62] Yet Wittgenstein declared the misleading character of asserting knowledge with regard to any of these things:

> If someone said to me that he doubted whether he had a body I should take him to be a half-wit. But I shouldn't know what it would mean to try to convince him that he had one. And if I had said something, and that had removed his doubt, I should not know how or why.[63]

Certain matters are so basic that we cannot "know" them because knowing assumes a means of verification and a reason to doubt,[64] neither of which sensibly can be predicated on these matters. What at first blush appears to be empirical knowledge is something more foundational, something without which we cannot live or think at all.[65] To deny it is not to be wrong, but to be crazy and perhaps sinful.[66] For example, to learn of the

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cists under the rubric of chaos theory. *See generally* JAMES GLEICK, CHAOS (1987).

61. *See* RAY MONK, LUDWIG WITTGENSTEIN 556-57 (1990) (giving accounts of Moore's propositions and Wittgenstein's responses).

62. *See id.*

63. SHIELDS, *supra* note 55, at 17 (citing WITTGENSTEIN, ON CERTAINTY 257 (G.E.M. Anscombe & 5 G.H. vonWright eds., & Denis Paul & G.E.M. Anscombe trans., 1969)).

64. *See id.*

65. *See id.* at 18.

66. *Cf.* MENNINGER, WHATEVER BECAME OF SIN?, *supra* note 31, at 46. Dr. Menninger explains that in the wake of numerous psychological theories accounting for behavior previously regarded as sinful, some persons came to see the concept as trite. *See id.* Nevertheless,

> [S]in became for believers and nonbelievers alike a far more dignified concept . . . The latter, those of serious and intelligent make-up, are just as concerned as believers with the errors of mankind, and its present increasingly dismal situation. They may talk in terms of immorality and ethics and of antisocial behavior instead of sin, because it absolves them

Nazi Holocaust is to know something. To deny that it happened is *wrong* because it is a matter the veracity of which is affirmed by empirical data. To affirm that the Holocaust took place and yet deny that it is properly the subject of outrage is *not wrong*, it is *crazy*. One who holds that belief cannot be accommodated within human conversation any more than one who denies her own existence. Such people undermine the grammar of human sensibility in a radical way, precluding empathic identification and rational communication. In other words, try as we might, we cannot adopt an intentional stance toward these people.

The same experiential grammar impels qualitative judgments of craziness regarding the extent to which the person's act is not only crazy but *sinful*. We instinctively pity the person who denies her own existence and instinctively abhor the person who denies the outrageousness of the Nazis. This is not a matter of moral knowledge. It is simply who we are. In both cases, an intentional stance is possible in some measure because reasons can be posited to explain why each person is incapable of full personhood. Beyond this, however, reasons appear to fail, and causes are beside the point. It is scientific causal nonsense to say that we both pity and abhor the schizophrenic mother who drowns her baby because she, unlike the Nazi, whom we simply abhor, does not choose qualitatively her state of mind. The concept of choice implies a consciousness that is not biologically determined. The concentration camp commandant pos-

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> from acknowledging a God to be sinning against. This is a distinction without a difference in my opinion. It is just as presumptuous to "know" God as to deny His existence. . . .
>
> I believe there is "sin" which is expressed in ways which cannot be subsumed under verbal artifacts such as "crime," "disease," "delinquency," "deviancy." There *is* immorality; there *is* unethical behavior; there *is* wrongdoing. And I hope to show there is usefulness in retaining the concept, and indeed the word, SIN, which now shows some signs of returning to public acceptance. I would like to help this trend along.

Id.

The statement that it is as presumptuous to deny God's existence as to know it, the reference to the usefulness of the concept of sin, and that there is a linguistic dimension of the problem, are reminiscent of William James. *See id.* at 146. The implication that sin has an essential connection to the human inability to speak of things that are simply manifest is reminiscent of Wittgenstein's notion that sin is essentially connected to the limits of language. *See* SHIELDS, *supra* note 55, at 11-12, 17.

sesses no peculiar immunity from genetic, neurochemical, and behavioral influences. Does it then make sense to hospitalize the mother and hang the commandant? If the schizophrenic kills in madness she is, nevertheless, subject-responsible, for even her fragmented identity must incorporate the role of killer, but she is not subject-guilty.[67]

The attribution of craziness and pity to the schizophrenic allows us to separate the sin from the sinner. In some sense she was not herself, not human, when she committed evil. Thus, her subject-responsibility engenders a subject-guilt less intensive than in the other case. The attribution of craziness and abhorrence to the war criminal engenders a powerful sense of subject-guilt precluding separating the sin and the sinner.[68] Although this qualitative gradation of subject-guilt cannot be verified or measured scientifically, it does make sense, and qualitative distinctions retain sense along a vast continuum of craziness in various manifestations.[69]

After accounting for the biological-environmental-causal mechanisms of schizophrenia, we cannot enter the form of life which is her delusional self. Indeed, this is why we designate it as delusional. After accounting for the biological-environmental-causal mechanisms of Nazism, we still have some access to the criminal consciousness, for it is our own seen manifest from a varied angle. The distinction might be characterized as a matter of retaining an intentional stance toward the Nazi, while adopting a purer design stance toward the schizophrenic, or it might be characterized as adopting qualitatively different versions of intentional or design stances toward both.[70] The char-

67. *See supra* notes 40-43 and accompanying text.

68. *See supra* note 40 and accompanying text.

69. The partial responsibility variant of diminished capacity is, thus, a more useful fiction than the mens rea variant in that the former allows a more encompassing concept of mind. It is only by a severe circumscription of *mens* that one can characterize the schizophrenic who drowns her child and the professional hit man as possessing the same mens rea. *See, e.g.*, Morse, *supra* note 1, at 30. Both acted with volition. But the volition is qualitatively different if it is viewed from multiple aspects. In addition, the meaning of volition is itself susceptible to different aspects. *See infra* notes 99, 101 and accompanying text (regarding the meaning of "punishment").

70. From a Freudian angle, because we can identify with the Nazi criminal in a way that we cannot identify with the schizophrenic mother, the Nazi is subject to a greater degree of our own projected self hatred, and this compels punishment. *See* SIGMUND FREUD, BEYOND THE PLEASURE PRINCIPLE 33 (James Strachey trans., 1961);

acterization of the distinction, however, does not matter.[71] What does matter is the realization that the distinction is *not* validly predicated on different degrees of freedom or different mental processes at any precise moment. These questions are as empty of verification as the question whether the Baltimore

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SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 68-69 (James Strachey trans., 1961). However paradoxical it may seem, we simultaneously cannot believe that a human person could behave as a concentration camp torturer while, at the same time, we know unconsciously at least, that each of us is a torturer in his own heart. While this fact can be consciously denied, it cannot escape manifestation in unconscious dynamics such as projection. Freud writes,

> [A] particular way is adopted of dealing with any internal excitations which produce too great an increase of unpleasure: there is a tendency to treat them as though they were acting, not from the inside, but from the outside, so that it may be possible to bring the shield against stimuli into operation as a means of defense against them. This is the origin of *projection* . . . .

FREUD, BEYOND THE PLEASURE PRINCIPLE, *supra*, at 33. Within the human psyche there is much unpleasure to project:

> [M]en are not gentle creatures who want to be loved . . . they are, on the contrary, creatures among whose instinctual endowments is to be reckoned a powerful share of aggressiveness. As a result, their neighbour is for them not only a potential helper or sexual object, but also someone who tempts them to satisfy their aggressiveness on him, to exploit his capacity for work without compensation, to use him sexually without his consent, to seize his possessions, to humiliate him, to cause him pain, to torture and kill him. . . . In circumstances that are favourable to it, when the mental counter-forces which ordinarily inhibit it are out of action, [aggressiveness] . . . manifests itself spontaneously and reveals man as a savage beast to whom consideration towards his own kind is something alien.

FREUD, CIVILIZATION AND ITS DISCONTENTS, *supra*, at 68-69. We stand ready to grant mercy to the schizophrenic because we do not really know what it is like to be schizophrenic. We stand ready to condemn the Nazi because we do know what it is like to be him. For cogent explanations of projection, repression, reaction formations, and other unconscious dynamics, see David S. Caudill, *Freud and Critical Legal Studies: Contours of a Radical Socio-Legal Psychoanalysis*, 66 IND. L.J. 651, 657-60 (1991). For a discussion of instinctive human aggression in tension with the ideals of community, including the concept of original patricide upon which Freud predicated a version of original sin and the subsequent institutionalization of guilt and renunciation via the rule of law, see Robin West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817, 822-38 (1986).

71. Note again the paradox of dehumanization. The attribution of *subject-guilt* presupposes the dominance of an intentional stance by which we personally identify with the evil manifest in the accused. A design stance, while dehumanizing the accused, makes personal identification difficult. We do not punish machines with the ferocity we impose on humans. *See supra* notes 6, 54. This is not to say that ferocity cannot be an appropriate response to certain criminals. It is to say that a just person will strive to discern the degree to which our own self-hatred is a motive to punish.

Ravens comprise the same or a different team than the Cleveland Browns. It is not a matter of causation, but a matter of looking at the world in a certain way.[72] The way we look at things is a matter something like Jonsen's patterns of appropriation or Wittgenstein's forms of life.[73]

If the questions toward which most of forensic psychology are directed are scientifically empty, another question arises: is there a legitimate function of expert psychiatric testimony in criminal cases? Of course there is, but the proffered information is viewed better not in the mode of causes and patterns of attribution, but in the mode of reasons and patterns of appropriation. Determining the *degree* rather than the existence of subject-guilt is the goal. If this determination is not to be empty, it must not entail the illusion that freedom, will, volition, or state of mind are scientific facts to be discovered but, rather, they are terms of approval or disdain to be ascribed in just measure. The measure of justice is not scientific, but this does not render it meaningless or dysfunctionally subjective. Justice is not a concept, a scheme, or a theory. Justice is a sensibility manifest in acts performed by individual men and women. We do not know that justice is done any more than we know that we have bodies, ancestors, or feelings. Justice is a part of us which we can neither verify nor doubt. Its content is given by that which stands fast around it. Its manifestation carries the impression of running up against the limits of what language can express and connecting with a higher power that renders expression unnecessary. It is not scientific. It simply is.

IV. INSIGHT AND IMMODEST PROPOSALS

If the operative question is not properly characterized as one of fact, but rather of value, expert testimony is not properly di-

72. *Cf.* Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 55 (1984) ("What protects us against Nazism is not the belief that reason can prove that it is wrong. What protects us is outrage.").

73. *See supra* notes 21-23, 51-53 and accompanying texts; *see also* SHIELDS, *supra* note 55, at 16-19 (explaining Wittgenstein's idea that language does not "mirror" reality, but that all human language becomes meaningful by "what stands fast around it," i.e., by other words and by a "form of life" of the speaker that gives his own self definition).

rected to the designated finder of fact. For this reason, mens rea, or any variation of a specific intent or state of mind, should not be characterized as an element of a crime, but rather as a marker of the *quality* of criminal responsibility already conceded.[74] The elements of the crime (the facts to be found) should concern only the attribution of object-responsibility by causal relations. This is ordinarily an uncomplicated matter, resting upon the presence or absence of empirically verifiable evidence. In contrast, reconstructing the defendant's mental state is ordinarily a complex matter, involving perceptions of the defendant's defining forms of life and the context of her personal experiences and beliefs as best we can imagine them by empathic reference. The operative facts of this determination are not found in the manner of objects and causal relations so much as they are drawn in light of the experiences and beliefs—the forms of life—of the observer. It is, then, a kind of moral judgment with far-reaching implications. Therefore, we should use greater care in assigning the task of reconstructing the defendant's mental state than in assigning the finding of facts.

Bifurcation of trials into two stages, one determining factual guilt and the other determining mental capacity, has been advocated before,[75] and it has authoritatively been declared a

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74. Diminished capacity, thus, assumes the partial responsibility criticized by Professor Morse. *See* Morse, *supra* note 1, at 28-36.

75. Karl Menninger took this position in MENNINGER, THE CRIME OF PUNISHMENT, *supra* note 31, at 138-42, praising Sheldon Glueck for having taken the same position as early as 1936. *See* SHELDON GLUECK, LAW AND PSYCHIATRY: COLD WAR OR ENTENTE CORDIALE? 145 (1962). In an imaginary conversation between a trial judge and a psychiatrist, Menninger's psychiatrist concludes as follows:

> In my opinion, what you should do, what all courts should do, what society should do, is to *exclude all psychiatrists from the courtroom!* . . . After you have tried the case, let us doctors and our assistants examine him and confer together outside the courtroom and render a report to you, which will express our view of the offender—his potentialities, his liabilities, and possible remedies.

MENNINGER, *supra*, at 138. Menninger did not envision widespread disagreement among examining psychiatrists. Nevertheless, the modern proliferation of abuse excuses and other questionable theories only makes it more sensible to remove the diagnostic muddle from the jury's realm of fact. Menninger agreed that psychiatrists should not raise the ultimate legal issues of sanity and responsibility, but should "say in simple English why we think this man has acted in this way so different from the rest of us," and what might be done to change him. *Id.* "You [the judge] will then decide if we have been persuasive, and make possible by order what you think is the

failure.[76] The reason for its failure is nothing more than a slightly disguised incarnation of the same category mistake that bifurcation attempts to rectify, the mistake of conceiving of state of mind as an empirical judgment that *indicates* responsibility *by discovering* it rather than as a moral judgment that *creates* responsibility *by attributing* it. Courts have invalidated bifurcation models on the constitutional ground that expert psychological testimony cannot be excluded from a trial determining guilt if the testimony is relevant to the question of mens rea.[77] According to the American Bar Association commentary on Criminal Justice Mental Health Standards, this reasoning tends to undermine the purpose of bifurcation by needlessly presenting the same evidence at two separate phases.[78] This is true. The premise, however, that mens rea is an essential element of a crime fails to account for any possible distinction between object- and subject-responsibility, design- and intentional-stances, patterns of attribution and patterns of appropriation, or causes and reasons. We might thus say of bifurcated trials what Chesterton said of Christianity, that it is not an ideal that has been tried and found wanting, but rather one that has been found difficult and left untried.[79]

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most promising recommendation." *Id.* In other words, the psychiatrist will offer reasons for the defendant's behavior, and the judge will make the moral determination of the defendant's subject-responsibility. This does not mean that judges would be unaccountable for their actions; if the judges are themselves just persons, they will not fear accountability, and they will take care to explain their decisions.

76. *See* Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. TOL. L. REV. 505, 518-30 (1995) (criticizing bifurcation and severance in criminal cases as "burdensome and expensive remedies" that often can be accomplished by stipulations); Verla Seetin Neslund, Comment, *The Bifurcated Trial: Is it Used More than it is Useful?*, 31 EMORY L.J. 441 (1982) (concluding that bifurcation is necessary only in a few criminal insanity cases, and the proper solution is to vest discretion in trial courts); *infra* notes 77-78.

77. *See, e.g.*, State v. Shaw, 471 P.2d 715 (Ariz. 1970); State ex rel. Boyd v. Green, 355 So.2d 789 (Fla. 1978); Sanchez v. State, 567 P.2d 270 (Wyo. 1977). For cogent discussions of these cases, see Neslund, *supra* note 76, at 475-82. A host of other courts have held that due process does not require bifurcation. *See* Debra T. Landis, Annotation, *Necessity or Propriety of Bifurcated Criminal Trial on Issue of Insanity Defense*, 1 A.L.R.4TH 884, 891-94 (1980).

78. *See* RALPH REISNER & CHRISTOPHER SLOBOGIN, LAW AND THE MENTAL HEALTH SYSTEM 559 (2d ed. 1990) (quoting CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-6.7 commentary at 341 (1987)).

79. *See* GILBERT K. CHESTERTON, WHAT'S WRONG WITH THE WORLD 48 (1910).

If it is presently impossible for courts and legislatures to eradicate the concept of mens rea as an element of an offense, the concept, nevertheless, can be circumscribed in a manner that reduces the confusion of causes and reasons. Professor Wilson has proposed this as a remedy to the complex associations jurors face when they are instructed to find or not find such mental facts as malice and premeditation:[80]

> Apart from well-recognized justifications (such as self-defense or law enforcement) and excuses (such as necessity or insanity), all homicides [should] be clearly subject to simple tests: Was it intended? If intended, was the killer unreasonably provoked? If not intended, was the killing the result of actions that a reasonable person would know were risky?[81]

A preferable way of stating the criteria for questions properly submitted to a jury would be to indicate whether the issue submitted is capable of verification by direct reference to physical data. A defendant might be permitted to testify directly about her own feelings, her fear, hate, anxiety, but nothing more, and no second order testimony, including that of experts, would be allowed. If it is evident from first-order testimony that a defendant is crazy, she could fit within the traditional exception of insanity assuming the defense is preserved along with the concept of mens rea, and the judge would be limited in sentencing options at the second stage. It should be noted that these are limitations that a good judge would impose in the more enlightened bifurcation model because any preliminary finding of factual guilt (object responsibility) would empower the judge to consider a very broad range of evidence going to the value judgment regarding state of mind (subject responsibility). A cryptically crazy defendant will be found out at the second stage, if not at the first.

Even if the concept of mens rea is narrowed in the manner suggested, the concept still poses a comparatively high risk of confusing jurors. It would be far better to overcome the atavistic rhetorical habit of miscasting states of mind as facts and to

80. *See* WILSON, *supra* note 3, at 102-03.
81. *Id.* at 103.

abandon the mens rea fiction altogether. Volition should remain a prerequisite for punishment. If, however, lack of volition is not obvious from the bare facts, it is not properly characterized as a factual question[82] and should be left to the judge. This procedure entails a public abandonment of additional fictions enmeshed in accepted legal rhetoric: that judges simply *follow* the law in most instances, and *make* the law with judgments having moral or political significance only in the few instances where legislatures and higher courts have not spoken. Although this autonomic view of the judiciary has been thoroughly debunked by law professors in the past century, it remains a common trope of politicians who criticize judges for making instead of applying the law. Such criticism fuels an overdrawn fear that elitist judges will ride roughshod over the values cherished by good common folk.[83] This is nonsense and should be acknowledged as such.[84]

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82. Volition is no more a mental event than any other taxonomical element comprising specific or general intents. The point is that some complexes in the multiple drafts of consciousness can be reconstructed in a manner that readily achieves consensus. To say that volition can be obvious from the bare facts is simply to say that volition, though always a conversational question of morality, can sometimes generate so little conversation (moral or scientific) that it appears not to be a question at all. In such cases, nothing is gained by unnatural attenuations of idle chatter. Simply call it a determined fact and get on with it.

83. Although the trope is employed mainly by political conservatives against activist liberal judges, this is not invariably the case. Recall the liberal allocutions in the wake of President Reagan's nomination of Judge Bork to the United States Supreme Court. *See generally* Ted Gest, *Special Interest Groups Deploy Their Troops in the Fight Over Robert Bork*, U.S. NEWS & WORLD REP., Aug. 24, 1987, at 24. For a conservative condemnation of the trope, see Bruce Fein, *Put Away Sword of Damocles*, 84 A.B.A. J. 112 (Mar. 1998). The author, a former associate deputy Attorney General in the Reagan administration, acknowledges that life tenure might tempt a judge to an impeachable offense of intentionally subordinating the Constitution to personal values, but argues that anticipatory confirmation purges are an inappropriate safeguard and a serious threat to "the sparkling brilliance of judicial independence." *Id.* Mr. Fein noted that Chief Justice Rehnquist, no fan of judicial activism, has praised "an independent judiciary with the authority to finally interpret a written constitution . . . [as] one of the crown jewels of our system of government today" and criticized conservative senators for stalling confirmation votes. *Id.*

84. Additional corrective measures proposed by Professor Wilson include enhanced legislative oversight of court decisions with significant precedential effect. *See* WILSON, *supra* note 3, at 104. These proposals run contrary to a fundamental premise of separation of powers: legislative representatives, precisely because they have a greater stake in the popular will, are insensitive to rights and equitable claims of minorities. As courts protect these claims, they are necessarily unpopular, and judicial insulation is a positive thing. The balance of power between the comparatively democratic legislature and the comparatively elitist judiciary is a delicate one, but legislative bodies

Ironically, if traditional concepts of individual moral responsibility and retributive punishment are to be preserved, it will require a judiciary that is more elite, not less so.[85] Judges are empowered to make awesome and dreadful moral choices, not because society wills it, but because no one else can make the choices effectively. Honestly acknowledging this fact cannot make the situation worse. Acknowledgment will make us think seriously about the criteria we employ for choosing judges. The critical prerequisites are not intellectual acumen coupled with expertise in some imagined science of law, but rather habitual possession of classic virtues such as courage, justice, wisdom, and temperance.[86] We can benefit from the Aristotelian insight that, in the final analysis, we can come to no better definition of a just act than to say it is an act done by a just person,[87]

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in America already have the edge in directing the course of criminal law as the public wills. *See id.* at 83 (comparing the English and American systems, concluding, in part, that statistical differences are explained by the susceptibility of American prosecutors and courts to "[t]he collective force of strong popular feelings").

85. The judicial model can also be characterized as more feminine, incorporating more in the way of empathic flexibility as opposed to the masculine tendency toward uniform rules. *See infra* note 106 and accompanying text.

86. The point has been made eloquently by Anthony D'Amato:

> Perhaps the most important nonacademic consequence of Pragmatic Indeterminacy is the issue of how we select judges. . . . Although media commentators tell us to appoint judges who are learned in the law, who did well in law school, and who have the ability to craft sophisticated, persuasive opinions, the media is as usual a couple of decades behind. For the ability of a judge to state the law in a sophisticated way has . . . practically nothing to do with what we should really be concerned about—fairness and justice. The more we require our judges to be verbally skilled practitioners of the legal art, the less we can expect them to have found room in their lives for actual empathic experiences, for the wisdom that comes from contemplating the human condition, and for the maturity of judgment that comes from reflecting upon what to do in thousands of daily interactions with other people in diverse contexts. What we need on the bench are qualities of compassion, fairness, mercy, good judgment, experience of many walks of life, sensitivity, humanism, and empathy. Since judges cannot be constrained by law-words, they should be the kind of people who feel constrained by justice.

D'Amato, *supra* note 14, at 187-88 (footnotes omitted).

87. *See* ARISTOTLE, NICHOMACHEAN ETHICS 311-13 (G.P. Goold ed., H. Rackham trans., Harvard Univ. Press 2d ed., 1934) (representing section 1137a, lines 5 to 30 in the original work). Aristotle compares the practice of justice to the practice of medicine. Contrary to our unreflective perception, it is not the physician's *act* that heals the patient, but the *physician* who lives in a manner according with his knowledge of medicine; so also an *act* manifests justice only because of the basic attitude or habits of the person. *See id.* at 313 (representing section 1137a, line 24 in the

and from the Platonic realization that the people who really care about justice are never those who speak as representatives for the mob.[88] It is the philosophers, the strong poets who create the metaphors by which we define ourselves, who are properly to be sought as judges.[89] The justice they do, like the truth or facts they discern, is a way of making sense of the world by making conversation. Justice is not an observation of facts that the law measures against a scientific archetype of the human mind.

The alternative to this mode of radical honesty is the continued atrophy of any common standard of moral responsibility, the increasing sense that criminal guilt or innocence is subject to empirical-scientific verification according to standards that only scientists truly comprehend, inherent confusion over why such judgments are not simply left to scientists, and anxiety that individual lives will be robbed of dignity if we actually subscribe to the logic we profess. Insofar as guilt determinations are moral decisions, they cannot be entrusted to scientists as a matter of expertise. Insofar as moral decisions must be infused with literary-interpretive understandings of scientific data, they cannot be entrusted to whomever shows up for jury duty. It is more realistic to raise our expectations of judges than of juries.

Delineating the impossibility of a privileged language of nature or God, which scientists discover to facilitate a true understanding of the universe, Richard Rorty relates a story of William James, who told of hiking through the Appalachians and being overcome with revulsion on encountering a muddy clearing with jagged stumps of trees, a shabby log cabin and a pigpen.[90] But when a farmer emerged and expressed pride in his cultivation of the surrounding coves, James realized that he had fallen into "a certain blindness in human beings."[91] When

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original work).

88. *See* Plato, *The Apology, in* PLATO COMPLETE WORKS 26 (John M. Cooper ed., & G.M.A. Grube trans., 1984). Socrates notes that the popular support of his accusers, founded in jealously and slander, has been fatal to many innocent men and will continue to be so. *See id.*

89. *Cf.* Plato, *The Republic, in* PLATO COMPLETE WORKS, *supra* note 88, at 1044-46 (delineating the good soul that is the essential prerequisite of the good judge).

90. *See* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 38 (1989).

91. *Id.*

James looked at the scene, he saw only ugliness and believed there could be no other story. But to the people who had chopped the trees and set the logs, the clearing "was . . . a symbol redolent with moral memories and sang a very paean of duty, struggle and success."[92] Rorty tells the story to make a point about Freud:

> I take Freud to have spelled out James's point in more detail, helping us overcome particularly intractable cases of blindness by letting us see the "peculiar ideality" of events which exemplify, for example, sexual perversion, extreme cruelty, ludicrous obsession, and manic delusion. He let us see each of these as the private poem of the pervert, the sadist, or the lunatic: each as richly textured and "redolent of moral memories" as our own life. He lets us see what moral philosophy describes as extreme, inhuman, and unnatural, as continuous with our own activity. But, and this is the crucial point, he does not do so in the traditional philosophical, reductionist way. He does not tell us that art is *really* sublimation or philosophical system-building *merely* paranoia, or religion *merely* a confused memory of the fierce father. He is not saying that human life is *merely* a continuous rechanneling of libidinal energy. He is not interested in invoking a reality-appearance distinction, in saying that anything is "merely" or "really" something quite different. He just wants to give us one more redescription of things to be filed alongside all others, one more vocabulary, one more set of metaphors which he thinks have a chance of being used and thereby literalized.[93]

This pragmatic angle on Freud marks a liberation for forensic psychology.[94] If there is no Truth which psychology merely reflects[95] any more than there is Truth from which law is de-

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92. *Id.* (quoting William James, *On a Certain Blindness in Human Beings*, *in* TALKS TO TEACHERS ON PSYCHOLOGY 134 (Frederick Burkhardt & Fredson Bowers eds., 1983)).

93. *Id.* at 38-39.

94. According to Wittgenstein, Freud did not often see himself from this pragmatic angle—hence, the confusion of causes and reasons. *See* WITTGENSTEIN, *supra* note 24, at 41-52.

95. The argument that psychoanalysis is unscientific insofar as its hypotheses are clinically unverifiable and its methods self-validating has contributed greatly to the decline of psychoanalysis as a dominant force, particularly in American psychology. For a comprehensive survey of conflicting theories of the character of psychoanalysis, including accounts reflected in popular culture and divergent positions within the

duced, the myth of responsibility as a fact to be found is finally put to rest. It reveals as illusory the question of whether particular expert testimony is sufficiently scientific to be admitted into evidence.[96] Expert testimony should not be presented to jurors if indeed it is facts they are charged with finding. There should be no undue fear that the sentencing judge will be illegitimately influenced by incredible theories,[97] provided that she acknowledges that she is not considering expert testimony in order to discover whether the accused *truly* deserves retribution, but in order to construct a story by which a community can make sense of the crime and punishment. Making sense of a defendant's actions by attempting to understand his view of matters does not preclude retributive punishment any more than empathically understanding the victims in their agony mandates it. These are but parts of a story. They interplay with other parts, spoken and unspoken, and are made intelligi-

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psychoanalytic community, see NATHAN G. HALE, JR., THE RISE AND CRISIS OF PSYCHOANALYSIS IN THE UNITED STATES 345-79 (1995).

96. *See* WILSON, *supra* note 3, at 10-21 (criticizing "syndrome science"); John E.B. Myers, *Expert Testimony Describing Psychological Syndromes*, 24 PAC. L.J. 1449, 1459-64 (1993) (questioning the validity of expert testimony regarding "syndromes" not established in contemporary medicine). Both authors comment on the debate surrounding the continuing validity of the test articulated in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), which requires expert testimony be deduced from "a well-recognized scientific principle or discovery . . . sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* The confusion over what is or is not scientific is largely circumvented if the judge is the only person to whom such testimony is presented, provided that the judge possesses sufficient intelligence to understand the assertions and presuppositions of competing expert testimony. *See supra* note 86 and accompanying text. A judge of sufficient intelligence would not consider scientific evidence admitted in cases criticized by Professor Wilson: the testimony of an expert in the Rodney King trial, with a frame-by-frame analysis of the video of four police officers delivering fifty-six blows, that King's actions depicted evidence in each frame which *might* have indicated to the officers that he was displaying hostile action. *See* WILSON, *supra* note 3, at 15. Consider also the expert testimony in the first trial of Erik and Lyle Menendez that research on snails could explain how the brothers' brains could have been rewired as a result of alleged parental abuse. *See id.* at 17. Judges who are now reluctant to exclude such evidence, erring on the side of caution, or to throw out questionable verdicts would be freer if they could accept all evidence which only they could interpret, and if they were accountable to the legal community as to why they accepted some theories over others.

97. Professor Morse seems to fear psychoanalysis as such a theory. *See* Stephen J. Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 VA. L. REV. 971, 983-1043 (1982). Professor Dershowitz's glossary of syndromes proves there are unreliable experts willing to testify to any marginally plausible theory that might lead to acquittal. *See* DERSHOWITZ, supra note 2, at 321-41.

ble by the storyteller who speaks in the genre of law and, however inauspiciously, convinces her audience that hers is at least the *kind* of story they want to hear.[98]

Professor Morse correctly asserts that psychodynamic explanations in the Freudian mode are not "scientifically validated causal accounts for behavior," but rather "a literary-interpretive account of the *meaning* of behavior."[99] Morse, however, misses the point when he subsequently concludes that "psychodynamic explanations are not relevant to the ascription of criminal responsibility and the apportionment of punishment."[100] The point that Morse misses is that we *cannot* ascribe criminal responsibility and apportion punishment without accounting for the meaning of behavior; ascribing responsibility and apportioning punishment are nothing more or less than ways of making behavior mean something, the very *means of meaning*.[101] Believing otherwise merely enhances an oblivion to our own emotional boundaries at work, allowing us to believe that we choose to inflict punishment because we have no choice, that it is all a matter of finding a mental event as it *really* existed instead of creating the "event" as a picture to make sense of the person we are asked to judge. We thus give our own emotive identities, reflected in the defendant, the status of universal truth. But we need not persist in the illusion that guilt is no more than a determination of *object-responsibility* and that a defendant's mens rea is—at least in principle—objectively determinable by scientific method.[102] Professor Morse has observed

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98. *See generally* Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. CHI. L. REV. 1477 (1995) (presenting aspects of artistic literary sensibility as essential to the judicial function).

99. Morse, *supra* note 97, at 975; *cf.* HALE, *supra* note 95, at 374-75 (summarizing the "hermeneutic bent" of psychoanalytic theory deriving from philosophers in the mode of Wilhelm Dilthey, Jurgen Habermas, and Paul Ricouer, according to whom the interpretive constructions between patient and therapist "lay somewhere between traditional science and hermeneutics").

100. Morse, *supra* note 97, at 1043.

101. To the logical positivists in the Vienna Circle mode, the meaning of a word was its verification—a fixed quality. To Wittgenstein, a word attained meaning only in relation to what "stands fast around it," by unfixed contexts of word use and forms of life of word users. These differing attitudes toward language are at the basis of the various debates at issue here, with legal formalists reflecting a scientific mode of fixed meanings and deconstructionists reflecting a more philosophic mode of contexts and forms of life. *See supra* note 22.

102. In justifying the use of expert psychological testimony to negate the mens rea

what Wittgenstein perceived: Freudian analysis yields reasons, not causes.[103] But a judicial morality story, like any other,

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requisite to criminal responsibility, Professor Morse correctly observes that determining criminal mens rea is no different than determining other common legal issues, such as a testator's soundness of mind or a party's understanding of the nature of a contract:

> In all cases, the court must reconstruct a past mental state largely on the basis of inferences from the defendant's utterances and actions at the relevant time. This process is often difficult because we can never be sure *what is (or was) in the mind of another. Even the person in question may have faulty recollection*, for various reasons, about his past mental processes.

Morse, *supra* note 1, at 10-11 (emphasis added). "State of mind" is not, by this account, a fiction employed to make sense of one's place in a memory narrative of multiple drafts, but a real event. This is impossible without Dennett's characterization of a "Cartesian Theater," where a Central Meaner once viewed different editions of a film and designated an official version against which the recollected copy can be compared. *See* DENNETT, *supra* note 41, at 253-54.

103. Professor Morse in effect acknowledges this distinction, following Professor Michael Moore's analysis of responsibility language and unconscious motivation. *See, e.g.*, Michael S. Moore, *Responsibility and the Unconscious*, 53 S. CAL. L. REV. 1563, 1626-32 (1980). As Morse explains,

> Michael Moore has argued persuasively that unconscious motivation almost never vitiates responsibility for actors who otherwise meet the criteria for criminal guilt. A demonstration that behavior has causes does not per se undermine responsibility, because causation is not equivalent to, or proof of, a legal excuse. . . . Responsibility language and concepts refer to persons acting for reasons; causation language and concepts refer to things happening because of antecedent events. The criteria for legal responsibility are simply that the actor is rational in the sense that he or she acts for reasons that fit a practical syllogism, and that the actor meets the particular legal requirements of liability. Thus, a reasonably rational defendant who performs the actus reus with the requisite mens rea is responsible for the crime. The language of the prima facie case in criminal law is one of actors acting for reasons—causation is usually irrelevant. It is possible to redefine all behavior, including the formation of mens rea, as events or effects. As such, all have sufficient antecedent causes—physiological, sociological, psychodynamic, and so on. With such a redefinition, however, one is no longer talking the language of persons, reasons, choices, and responsibility. Instead, one is talking about persons and their behavior as objects and events. The two realms of discourse should not be confused, because if causation is equated with excuse, it leads to the reductionist conclusion that no one is responsible—presumably, all behavior has causes.

Morse, *supra* note 97, at 1028-29 (footnotes omitted). Both Professors Moore and Morse would minimize this confusion by precluding expert testimony regarding the ultimate issue of criminal responsibility. But this solution gives rise to a qualitatively more subtle confusion. Allowing any scientific experts to testify implies that there is a scientific truth to be discovered. Moreover, the sweeping exclusion of psychodynamic and other unscientific theories, if the rule encompasses sentencing hearings, undermines the moral insight that is the proximate benefit of psychology and the sense of

deals in reasons or it deals in nothing. And whatever else might be said of psychoanalysis, it explains otherwise chaotic and painful phenomena in human terms. If it is literary rather than scientific, it is all the more useful for that reason.

The problem of "abuse excuses," tangled webs of emotional narrative confusing jurors as to what constitutes science and what science must establish to create reasonable doubt as to one or more elements of a crime, is very real.[104] But it has largely been taken for granted that any solution must take the form of minimizing the literary-interpretive devices that give meaning to our lives by forcing as many decidedly nonrational processes (like ascribing a state of mind) into as few scientific categories as possible.[105] If the rules no longer work, the theo-

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justice which has impelled courts and legislatures to employ psychology, however imprudently. Any judgment entailing retributive punishment *cannot* be scientific because retribution can only be justified by an implicit appeal to phenomena inexpressible in scientific language, whether these phenomena are imagined as above and beyond thoughtspeech, as one might envision God, or as so integral a part of thoughtspeech that they cannot be signified, as one cannot prove *logically* that one has a body. *See supra* note 62 and accompanying text. In other words, Professor Morse replicates G. E. Moore's mistake of "knowing" with scientific certainty that he has an arm that raises, and Russell's mistake of "knowing" there is no rhinoceros in the room. To characterize these phenomena even as verifiable is to falsify them in a radical way. Similarly, to characterize an accused's state of mind as an event that really happened, implying that there is a *scientifically correct version*, is to miscast an *interpretation* as an objective truth. This was Freud's mistake, as characterized by Wittgenstein:

> If you are led by psycho-analysis to say that really you thought so and so or that really your motive was so and so, this is not a matter of discovery, but of persuasion. In a different way you could have been persuaded of something different. Of course, if psycho-analysis cures your stammer, it cures it, and that is an achievement. One thinks of certain results of psycho-analysis as a discovery Freud made, as apart from something persuaded to you [sic] by a psycho-analyst, and I wish to say that this is not the case.

WITTGENSTEIN, *supra* note 24, at 27.

104. *See supra* notes 2-3 and accompanying text. The problem is not in the statistical success rate of these defenses but in the resulting confusion of jurors and the erosion of public confidence in the legal system. The very fact that Professor Dershowitz is able to catalogue more than 50 of these diminished capacity variants bespeaks a culture in search of a moral center of gravity. *See* DERSHOWITZ, *supra* note 2, at 321-41. For intelligent, sensitive, yet unsentimental narrative, insights on the modern incapacity to think clearly about moral judgments, see DAVID GELERNTER, DRAWING LIFE: SURVIVING THE UNABOMBER (1997).

105. *See* WILSON, *supra* note 3, at 7-21 (distinguishing between social science and hard science, arguing that the former is "not science at all" and so should not pass the *Frye* test); Stephen J. Morse, *Crazy Behavior, Morals, and Science: An Analysis of*

ry goes, they must be made ever more rule-like, allowing less room for idiosyncratic, emotive-interpretive influence, reducing everything to just the facts, however unfact-like the phenomena may be. An alternate solution that has not been given due consideration is that we should change the way we think about such basic concepts as responsibility, guilt, and mind. The reductionistic approach, which views justice primarily as an aspiration of logical transcendence and universality[106] and, thus, imposes rigid categories, has dominated our legal culture from a time to which "the memory of man runneth not to the contrary."[107] Perhaps it is to the memory of woman that we should thus appeal, where justice is seen more in a light of emotive connection and particularity,[108] opening a way for

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Mental Health Law, 51 S. CAL. L. REV. 527, 600-26 (1978) (arguing that mental health experts' testimony should be confined to what they observe and to provide hard data in the comparatively few cases in which it is available, always precluding speculation regarding unconscious motivation); Moore, *supra* note 103, at 1564-67, 1674-75 (explicating a fundamental inconsistency in psychoanalytic theory, which would both *increase* attributions of responsibility through identifying unconscious motivation and *decrease* attributions on the ground the motives were not conscious, Moore concludes that both factions are wrong and that "there is nothing unscientific or irrational about a moral system that attributes responsibility of the most serious sort only to behavior involving conscious knowledge"). *But cf.* Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 496-522 (1980) (asserting that the focus of reform should center on the process of gathering data and that clinical diagnostic discrepancies, or "evaluator distortion," can be significantly reduced by (1) increasing the sensitivity of the clinician to her own distorting prejudices, much in the manner of psychoanalysts, whose training requires them to undergo analysis themselves to better understand countertransference; (2) interjecting additional observers into interview assessments via videotape or two-way mirrors; (3) providing feedback against which the interviewer can assess his own style and prejudices; and (4) exchanging clinical information between the defense and prosecution once the defendant decides on a clinically-based defense).

106. *See* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 6-9 (1988). The masculine perspective engendering classical liberal theory is based on a perceived inherent separateness of human beings who are protected from annihilation only by transcending their natural inclinations through moral principles bespeaking equality, rights, and duties. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE 151-74 (1982).

107. Idaho *ex rel.* Hamen v. Fox, 594 P.2d 1093, 1101 (1979). The phrase is taken from the outmoded English common law of custom, a means by which the public could acquire rights over private property. To some, the words generally connote the ossificatory aspect of precendential reasoning.

108. *See* West, *supra* note 106, at 13-19. Just as men perceive an inherent separateness of persons, women experience a fundamental material connectedness to life by virtue of their capacity to create children; thus, intimacy, not autonomy, is the ground of social relations, and so morality is cast in terms of responsibility to others

complex complements of intuitive and empathic apprehensions.[109] The way of masculine reductionism brings the beauty of order. The beauty of justice, however, remains ever in conflict with order's pretensions. Justice, it would seem, speaks mainly in reasons, the culturally weaker language. Small wonder her voice is so difficult to hear.

V. SUMMARY AND CONCLUSION

The human desire for a determinate system of law, fueled essentially by fear of chaos, has the seductive effect of making law appear as a kind of science. This effect produces an illusory identification of law, which aspires to make life mean something by ordering human conduct, and science, which aspires to verify phenomena for the practical purpose of mastering the universe to use it. Thus, our linguistic structures attempt to resolve very different modes of thought with symbols that are different in kind, but the differences are comprehended only by

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instead of principles of autonomous rights. *See id.*

109. Professor Gilligan examines the developmental process by which adolescents of both genders become cognizant of the tension between the conflicting claims of autonomy and intimacy, concluding, in part,

> [I]n the transition from adolescence to adulthood, the dilemma itself is the same for both sexes, a conflict between integrity and care. But approached from different perspectives, this dilemma generates the recognition of opposite truths. These different perspectives are reflected in two different moral ideologies, since separation is justified by an ethic of rights while attachment is supported by an ethic of care.
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> The morality of rights is predicated on equality and centered on the understanding of fairness, while the ethic of responsibility relies on the concept of equity, the recognition of differences in need. While the ethic of rights is a manifestation of equal respect, balancing the claims of other and self, the ethic of responsibility rests on an understanding that gives rise to compassion and care. . . .
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> . . . .
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> Thus, starting from very different points, from the different ideologies of justice and care, the men and women in the study come, in the course of becoming adult, to a greater understanding of both points of view . . . . Recognizing the dual contexts of justice and care, they realize that judgment depends on the way the problem is framed.

GILLIGAN, *supra* note 106, at 164-65, 167. The exclusion of *reasons* from the discourse of criminal responsibility, thus, can be viewed as an inadequate and one-sided remedy to the confusion of juries. Judging behavior apart from its meaning, however appealing in its simplicity, bespeaks a kind of cultural inability to integrate conflicting moral claims into a fully human frame.

close reading. One manifestation of this confusion is the inability to distinguish a discourse of causes, concerned with verifiable phenomena, from a discourse of reasons, concerned with the meaning of human lives. Because attributions of responsibility invariably involve both modes of language, the confusion is aggravated. So we are led to believe, via grammatical similarities, that causes and reasons are only different aspects of identical phenomena.

State of mind, then, is perceived as an event scientifically measurable within a temporal frame, a kind of picture capturable on thought film. State of mind, however, is more accurately described as a conclusory label applied retrospectively to make sense of multiple streams of consciousness. Although state of mind must employ certain empirical references, it is essentially a judgment of value that our language confuses us into envisioning as a scientific fact discernible through scientific expertise. Much of the linguistic confusion can be untangled by understanding various distinctions, such as Wittgenstein's *causes* and *reasons*,[110] Dan-Cohen's *object-responsibility* and *subject-responsibility*,[111] Dennett's *design stance* and *intentional stance*,[112] and Jonsen's *pattern of attribution* and *pattern of appropriation*.[113]

Even when these distinctions are applied, however, there remains an overlap, a point of incorrigible entanglement where scientifically measurable causality is a precondition of moral judgments and where moral presuppositions determine, at least unconsciously, the factors perceived as causal. A useful concept to understand this inevitable entanglement is Saint Augustine's formulation of original sin, which necessarily implies that any human moral judgment is ambiguous. Thus, any judicial decision is always a matter of choosing a lesser evil, and in this sense no decision is ever good.[114] This notion of sin also is useful in setting an epistemic ground of morality, corresponding in large measure to Wittgenstein's distinction between what can be said and what can only be shown: we know what is

110. *See supra* note 24 and accompanying text.
111. *See supra* notes 35-38 and accompanying text.
112. *See supra* notes 25, 39-50 and accompanying text.
113. *See supra* notes 53 and accompanying text.
114. *See supra* notes 54, 56.

foundationally good not as a matter of logic, but as a matter of being human. If a person has no grasp of the foundations, the person is not fully human and is crazy. The consequences of the craziness, encompassing more, but not less, than the consequences of a person's actions, determine whether the person's craziness is to be pitied or abhorred. The operative means of measurement also is foundational, and so it too is a matter of what it means to be objectively human, the objectivity being uncapturable by language. The unspeakable foundation merely points to something exceeding spacetime and thoughtspeech, something that cannot even be thought in the ordinary sense.

There are several practical corollaries to these insights. First, because a defendant's state of mind, whether for purposes of establishing insanity or negating the mens rea of a criminal offense, is not properly characterized as a fact, the issue should not be presented to a jury. Second, because there invariably remains an area of overlap between fact and value, state of mind is necessarily an important consideration and cannot be left out of the criminal justice system except at the expense of silently omitting the predicate "justice." Third, given the prior corollaries, the best means of accomplishing justice is by means of a bifurcated trial, with juries determining only matters more appropriately designated as factual and sentencing judges considering the refinements of responsibility attribution. In the established legal taxonomy, this would amount to the partial responsibility variant of the doctrine of diminished capacity.[115] Fourth, the debate over what qualifies as scientific testimony should be minimized once we acknowledge that state of mind is not a scientifically verifiable fact. For example, questions such as whether psychodynamic models are appropriately employed lose importance and the question of which psychological theories are credible is a matter left to the judge. Fifth, we need to modify our criteria for choosing judges, caring far less about law school class rank and far more about the person's education and experience before and after law school. We should value intelligence, truly liberal education, experiences which would build empathy, habitual manifestations of the cardinal virtues of courage, justice, wisdom, temperance, and the theological

115. *See supra* note 1.

virtues of faith, hope, and love. Because judges expressly charged with greater responsibility will need enhanced rhetorical skills to explain their decisions, we should seek people who are genuinely articulate, but in a manner that will clarify confusions of language, not promote them by talking a good game about a science of law that does not exist. Above all, political connections should be presumed a disqualifying factor, with the burden on the judicial candidate to rebut the presumption. Those who are good at pandering to mobs, or good at pandering to others who are good at pandering to mobs, generally represent a personality type to whom considerations of justice are secondary. Like Plato's philosopher-kings, the people we must seek will not particularly want the jobs.[116]

Finally, we must not be deterred from reform by the apparent strength of the established order. The sheer numbers of persons who hold vested interests in the present system seem overwhelming, and changing any essential characteristics will be difficult. But America is also ripe for change. This is evidenced by the numbers who believe the present order is in crisis. As Professor Wilson has noted, the statistics matter less than public perceptions.[117] If so many believe there is a crisis not only in the criminal justice system, but in the moral sensibilities of the whole country, there is in fact a crisis. People are very confused about what morality is, how to measure it in themselves and others, and how to talk about it in a way that is accessible to the public at large. Continuing on our present course will have the same effect as, for example, the outmoded medical practice of bleeding a patient to treat anemia. This need not be so. As I hope to have demonstrated, there are ways of clarifying present linguistic confusions about good and evil. We ignore them at our peril.

116. *See supra* note 89 and accompanying text.
117. *See supra* note 3.