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Inevitable Mens Rea

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INEVITABLE MENS REA

STEPHEN J. MORSE*

“Even a dog distinguishes between being stumbled over and being kicked.”¹

INTRODUCTION

The thesis of this essay is simple: As long as we maintain the current conception of ourselves as intentional and potentially rational creatures, as people and not simply as machines, the mens rea requirement in criminal law is both inevitable and desirable. I begin with the challenge to personhood, action and responsibility that recent work in psychology and neuroscience allegedly present. Then I turn to some dangerous distractions that are often confused with the questions of personhood, action and responsibility. The next section explains why the genuine challenge from neuroscience can be met. Finally, I turn to the positive case for mens rea. I do not argue for any particular categorization or hierarchy of mens rea terms.² Instead, I argue more generally that mens rea, which is understood to be the mental state element that is part of the definition of most criminal offenses,³ is crucial to culpability and central to our value as moral

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1. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (Dover Publications 1991) (1881).

2. See Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 464 (1992), for a new proposal and a critique of the present hierarchy. See also Kimberly Kessler Ferzan, *Don't Abandon the Model Penal Code Yet! Thinking Through Simons's Rethinking*, 6 BUFF. CRIM. L. REV. 185 (2002). See generally Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815 (1980).

3. An influential criminal law casebook refers to this usage of mens rea as “mens rea in a special sense,” in contrast to the usage of mens rea as a synonym for criminal culpability more generally, which is referred to as “mens rea in a general sense.” SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 203 (7th ed. 2001).

beings.

I. THE CHALLENGE TO PERSONHOOD, ACTION, AND RESPONSIBILITY

As I type the words of this paper, I have an experience that virtually every neurologically intact human being takes for granted: the subjective experience of first person agency, the experience of mental causation, that my bodily movements and thoughts are caused, roughly speaking, by my intentions.⁴ To the best of our knowledge, only human beings have a fully developed capacity to act for reasons. This description sounds like Cartesian dualism—the notion that we have an immaterial mind or soul that is somehow in causal relation with our physical body and that causes it to move as the mind directs. But I fully accept that we inhabit a thoroughly material universe in which all phenomena are caused by physical laws. In particular, human action and consciousness are produced by the brain, a material organ that works according to biophysical laws. At present, however, we do not have a clue about how the brain enables the mind, or about how action and consciousness are possible.⁵ Understanding how the brain enables the mind would revolutionize our understanding of biological processes and the nature of personhood,⁶ but such understanding may not be possible.⁷

Although action and consciousness are scientific and conceptual mysteries,⁸ they are at the heart of both common sense, “folk psychology,” and the conception of the person inherent in judgments about responsibility and culpability. The capacity for intentional movement and thoughts—the capacity for agency—is a central aspect of personhood and is integral to what it means to be a responsible person. We act because we intend. Responsibility judgments depend

4. I am not suggesting that all bodily movements and thoughts are so caused. Many bodily movements are simply mechanically caused, such as reflexes, and many thoughts simply spring to mind without any conscious intention to produce them. Some behavior, such as habitual gestures or verbal “tics,” does not seem intentional, but neither is it purely mechanically produced. One can intentionally bring such movements under conscious intentional control.

5. PAUL R. MCHUGH & PHILLIP R. SLAVNEY, *THE PERSPECTIVES OF PSYCHIATRY* 11-12 (2d ed. 1998).

6. *Id.* at 12.

7. See generally COLIN MCGINN, *THE MYSTERIOUS FLAME: CONSCIOUS MINDS IN A MATERIAL WORLD* (1999) (arguing that understanding consciousness is impossible for creatures with our limited intellectual capacities).

8. See generally ROBERT AUDI, *ACTION, INTENTION AND REASON* (1993) (describing the “basic philosophical divisions” in each of the four major problem areas in action theory).

on the mental states that produce and accompany our bodily movements. This is how we think about ourselves, and this is the concept of the person that morality and law both reflect. Law and morality as action-guiding normative systems of rules are useless, and perhaps incoherent, unless one accepts this view of personhood.

Virtually everything for which we deserve to be praised, blamed, rewarded or punished is the product of mental causation and, in principle, responsive to reason. Machines may cause harm, but they cannot do wrong, and they cannot violate expectations about how we ought to live together. Only people can violate expectations of what they owe each other, and only people can do wrong. Machines do not deserve praise, blame, reward or punishment. Machines do not deserve concern and respect simply because they exist. These concepts apply only to potentially acting, intentional agents.

Suppose, however, that our conscious or potentially conscious intentions are not genuinely causal or seldom are so. To use the title of a recent book by an eminent psychologist, suppose that our “conscious will” is just an illusion.⁹ Ordinary notions of action and agency are allegedly under attack from psychology and neuroscience,¹⁰ a critique that some legal scholarship has begun to embrace.¹¹ If this is a correct, the potential normative implications are profound. Most centrally, if conscious will is an illusion, then concepts of responsibility and desert may be equally illusory or at least inapplicable in most cases of human activity. Perhaps no one really deserves anything and human beings are morally indistinguishable from machines. Although many people think that the implications of a thoroughly material worldview are profound,¹² I shall argue that one can fully and consistently accept a material,

9. DANIEL M. WEGNER, *THE ILLUSION OF CONSCIOUS WILL* (2002).

10. Denise Park introduces a group of papers concerned with scientific study of will and writes that the premise of all of them is:

There are mental activations of which we are unaware and environmental cues to which we are not consciously attending that have a profound effect on our behavior and that help explain the complex puzzle of human motivations and actions that are seemingly inexplicable, even to the individual performing the actions.

Denise C. Park, *Acts of Will?* 54 AM. PSYCHOLOGIST 461 (1999).

11. See, e.g., Deborah Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269-71 (2002).

12. See JANET RADCLIFFE RICHARDS, *HUMAN NATURE AFTER DARWIN: A PHILOSOPHICAL INTRODUCTION* 15-23 (2000). Richards argues that the thoroughly material view of people exemplified by Darwin's theory appears to challenge traditional notions of what is most distinctive about humans.

matter-first worldview and also accept traditional notions of personhood, action, responsibility and desert.

II. DANGEROUS DISTRACTIONS

This section suggests that neuroscience's challenge to personhood and responsibility is not the same as the doubts arising from determinism and causal accounts of behavior.

That determinism threatens responsibility is a truism, but it does so for a different reason than the argument from neuroscience. Although no one can ever know if determinism or something close to it is true, let us assume that it is. After all, the universe is massively regular and it would be strange indeed if the phenomena of the world were mostly or entirely random or indeterministic.¹³ The alleged incompatibility of the truth of determinism and responsibility is foundational. If human beings are fully subject to the causal laws of the universe, as a thoroughly material worldview holds, then responsibility is allegedly metaphysically impossible from the start. No matter what sorts of creatures people are, as long as they and their actions are entirely determined by the same events and laws that determine all the other phenomena of the universe, then real or ultimate responsibility is impossible. So, at least, many philosophers claim.¹⁴ On the other hand, there are plausible "compatibilist" responses that suggest that responsibility is consistent with determinism.¹⁵ There seems no resolution in sight, but no one in this debate about determinism and responsibility argues that people are not intentional creatures. This is perfectly consistent because determinism is not logically or conceptually inconsistent with the possibility of mental causation.

In contrast, the argument from neuroscience that I am considering

13. Galen Strawson calls this assumption the "realism constraint." Galen Strawson, *Consciousness, Free Will, and the Unimportance of Determinism*, 32 *INQUIRY* 3, 12 (1989). Moreover, if the world is indeterministic or random, this would hardly be a secure foundation for responsibility.

14. See, e.g., DERK PEREBOOM, *LIVING WITHOUT FREE WILL* (2001).

15. See, e.g., HILARY BOK, *FREEDOM AND RESPONSIBILITY* (1998); R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* (1994). I find R. Jay Wallace's account the most compelling and satisfying among recent compatibilist accounts.

There are also metaphysical libertarian answers to the claim that responsibility is impossible. These typically posit that human beings, or at least normal adults, have some type of contra-causal freedom that permits them to act ungoverned by the causal laws of the universe. Despite the ingenuity of some of the libertarians, most experts in the field consider this view extravagantly implausible.

denies that we are intentional creatures, that mental causation is as omnipresent as we believe. Because mental causation is crucial to ascriptions of moral responsibility for action—indeed, mental causation is a necessary constituent of action—it would therefore deny that we are as responsible for as much of our activity as most people believe. It does not deny that responsibility would be impossible if a creature that was more intentional evolved. Of course, some people convinced by the neuroscientific challenge might also be incompatibilists, but there is no necessary relation.

A related persistent confusion is that once a non-mental causal explanation has been identified for action, the person must be excused for that action. In other words, the claim is that causation and responsibility are inconsistent, that causation per se is an excusing condition. Thus, if one can identify brain processes or structures as causes of action, then, allegedly, the person is not responsible for it. In a thoroughly material world, this claim is either identical to the incompatibilist position in the determinism debate and furnishes a foundational critique of all responsibility, or it is simply an error, but in neither case is the argument the same as the neuroscientific challenge I address.

In a thoroughly causal world, if causation were an excuse, no one would be responsible for anything, whether or not we are intentional creatures. But unless proponents of this argument are more successful than incompatibilists in the determinism debate and can furnish convincing reason why causation should excuse, they provide no reason to jettison responsibility practices. Finally, contrary to popular belief, the causation argument is erroneous as an explanation of present responsibility concepts and practices. I have termed this the “fundamental psycholegal error.”¹⁶ Causation, even by a biologically abnormal structure or process, is not a present excusing condition in western morality and law.

The neuroscientific argument presents a more specific, less metaphysical, challenge to responsibility if it implies that action does not exist or is rare. Just because an action is caused biologically, however, does not entail that it is not action. Actions, like all the other phenomena of the universe, have causes. In this respect, causal

16. Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1592 (1994). My critics complain that I repeat this argument in many things that I write. My response is that I will continue to do so as long as people continue to manifest the confusion, which they routinely do.

explanation at the level of brain structure or physiology is no different from psychological or sociological explanation. A cause is just a cause. Again, the neuroscientific worry is that genuine action is a rare event or perhaps does not exist at all.

III. THE RESPONSE TO THE NEUROSCIENTIFIC CHALLENGE

The philosophy of mind and action has long contained arguments for various forms of material reductionism and for eliminative materialism.¹⁷ Reductive accounts hold, simply, that mental states are as they seem to us, but that they are identical to brain states. Eliminative accounts hold that our beliefs about our mental states are radically false and, consequently, that no match up between brain states and mental states is possible. Both types of views are conceptual and existed long prior to the exciting recent discoveries in neuroscience and psychology that have so deepened our understanding of how the brain and nervous system are constructed and work. Needless to say, both are extremely controversial. Most philosophers of mind believe that complete reduction of mind to biophysical explanation is impossible.¹⁸ Until the conceptual revolution that allows us to solve the mind-body problem occurs, science cannot resolve the debate, although it can furnish support to conceptual arguments. At present and for the foreseeable future, no one can demonstrate irrefutably that we are "merely" ultra-complicated biophysical machines. We have no convincing conceptual reason from the philosophy of mind, even when it is completely informed about the most recent neuroscience, to abandon our view of ourselves as creatures with causally efficacious mental states.

Even if we cannot solve the mind-body problem and thus determine if reductive accounts are true, it is possible that we might make empirical discoveries indicating that some parts of our ordinary understanding about action and agency are incorrect. Much recent argument based on current neuroscience and psychology takes this position, arguing that mental causation does not exist as we think it

17. See PAUL M. CHURCHLAND, *MATTER AND CONSCIOUSNESS, A CONTEMPORARY INTRODUCTION TO THE PHILOSOPHY OF THE MIND* (rev. ed. 1988) 26-34, 43-49 (1988) (explaining the arguments for and against both positions).

18. See, e.g., Strawson, *supra* note 13, at 3 (claiming that reductive physicalism about the mind is "moonshine"). See generally JOHN R. SEARLE, *THE REDISCOVERY OF THE MIND* (1992) (providing an extended argument for the irreducible reality of mind).

does. For ease of exposition, let us call this the “no action thesis” (NAT). But the logic of these arguments is often shaky. We have already seen that a brain correlate or cause of an action does not mean that it is not an action. If actions exist, they have causes.

The real question is whether scientific, empirical studies have shown that action is rare or non-existent, that conscious will is an illusion after all. Two kinds of evidence are often adduced: demonstrations that a very large part of our activity is undeniably caused by variables we are not in the slightest aware of and studies indicating that more activity than we think takes place when our consciousness is divided or diminished. Neither kind of evidence offers logical support to NAT, however. Just because a person may not be aware of the “real” causes for why she formed an intention does not entail that she did not form an intention and was a fully conscious agent when she did so. Even if human beings were *never* aware of the causes of their intentions to act and actions, it still would not mean that they were not acting intentionally and consciously.

Human consciousness can undeniably be divided or diminished by a wide variety of normal and abnormal causes.¹⁹ We have known this long before contemporary scientific discoveries of what causes such states and how they correlate with brain structure and processes. The law and morality agree that if an agent’s capacity for consciousness is non-culpably diminished, responsibility is likewise diminished. Some believe that it is diminished because bodily movements in the absence of consciousness are not actions.²⁰ Others believe that apparently goal-directed behavior that is responsive to the environment, such as sleepwalking, is action, but that it should be excused because diminished consciousness reduces the capacity for rationality.²¹ Let us assume that the former is correct, however, because it offers more direct moral and legal support to NAT. Let us also assume that studies have demonstrated that divided or diminished consciousness is more common than we think. To demonstrate that divided or partial consciousness is more common than it appears certainly extends the

19. See JEFFREY L. CUMMINGS & MICHAEL S. MEGA, *NEUROPSYCHIATRY AND BEHAVIORAL NEUROSCIENCE* 333-43 (2003) (describing of dissociative and related states and their causes and treatments).

20. See, e.g., MODEL PENAL CODE § 2.01 (2002); MICHAEL S. MOORE, *ACT AND CRIME* 49-52, 135-155, 257-58 (1993); Michael S. Moore, *More on Act and Crime*, 142 U. PA. L. REV. 1749, 1804-20 (1994).

21. See, e.g., Morse, *supra* note 16, at 1641-52. See also Bernard Williams, *The Actus Reus of Dr. Caligari*, 142 U. PA. L. REV. 1661 (1994).

range of cases in which people are not responsible or have diminished responsibility, but such studies do not demonstrate that most human bodily movements that appear intentional, that appear to be actions, do not occur when the person has reasonably integrated consciousness. One cannot generalize from deviant cases or cases in which a known abnormality is present.

What is needed to support NAT is thus a general demonstration that causal intentionality is an illusion *tout court*, but I believe that no such general demonstration has yet been produced by scientific study. The most interesting evidence has arisen from studies done by Benjamin Libet,²² which have generated an immense amount of comment.²³ In extreme brief, Libet's exceptionally creative and careful studies demonstrate that measurable electrical brain activity associated with intentional actions occurs about 550 milliseconds before the subject actually acts and for about 350-400 milliseconds *before* the subject is consciously aware of the intention to act. Let us assume, correctly I believe, the validity of the studies. I do not think they imply, however, that conscious intentionality does no causal work. They simply demonstrate that non-conscious brain events precede conscious experience, but this seems precisely what one would expect of the mind-brain. It does not mean that the intentionality played no causal role and Libet concedes that people can "veto" the act, which is another form of mental act that plays a causal role. Libet's work is fascinating, but it does not prove that persons are not conscious, intentional agents.

NAT provides no guidance about what we should do next and is potentially incoherent. Let us suppose that you were convinced by the mechanistic view of persons that you were not an intentional, rational agent after all. (Of course, the notion of being "convinced" would be an illusion, too. Being convinced means that you were persuaded by evidence or argument, but a mechanism is not persuaded by anything. It is simply neurophysically transformed.) What should you do now? You know that it's an illusion to think that your deliberation and intention has any causal efficacy in the world. (Again, what does it mean according to the purely mechanistic view to "know" something? But enough.) You also know, however, that you experience sensations

22. Benjamin Libet, *Do We Have Free Will*, 6 J. CONSCIOUSNESS STUDIES 47, 47-57 (1999) (summarizing the findings and speculating about their implications).

23. WEGNER, *supra* note 9, at 54-55 (characterizing the recounting of Libet's results as a "cottage industry" and noting the large and contentious body of commentary).

such as pleasure and pain and that you care about what happens to you and to the world. You cannot just sit quietly and wait for your neurotransmitters to fire. You will of course deliberate and act. Even if pure mechanism is true—about which, once again, we will never be certain until we solve the mind-body problem, including the problem of consciousness—human beings will find it almost impossible not to treat themselves as rational, intentional agents unless there are major changes in the way our brain works. Moreover, if you use the truth of pure mechanism as a premise in deciding what to do, this premise will entail no particular moral or political conclusions. It will provide no guide to how one should live, including how one should respond to the truth of NAT.

Finally, the argument from common sense in favor of the justified belief that we are conscious, intentional creatures is overwhelming. Consider, for example, the nature of law itself. Once again, law is a system of rules that at the least is meant to guide or influence behavior and thus to operate as a potential cause of behavior. As John Searle writes,

Once we have the possibility of explaining particular forms of human behavior as following rules, we have a very rich explanatory apparatus that differs dramatically from the explanatory apparatus of the natural sciences. When we say we are following rules, we are accepting the notion of mental causation and the attendant notions of rationality and existence of norms. . . . The content of the rule does not just describe what is happening, but plays a part in *making it happen*.²⁴

But legal and moral rules are not simply mechanistic causes that produce “reflex” compliance. They operate within the domain of practical reason. Agents are meant to and can only use these rules as potential *reasons for action* as they deliberate about what they should do. Moral and legal rules are thus action guiding primarily because they provide an agent with good moral or prudential reasons for forbearance or action. Unless people were capable of understanding and then using legal rules as premises in deliberation, law would be powerless to affect human behavior.²⁵ People use legal rules as

24. John R Searle, *End of the Revolution*, N.Y. REV. OF BOOKS, Feb. 28, 2002, at 33, 35.

25. See Scott J. Shapiro, *Law, Morality and the Guidance of Conduct*, 6 LEGAL THEORY 127, 131 (2000). This view assumes that law is sufficiently knowable to guide conduct, but a contrary assumption is largely incoherent. As Shapiro writes:

Legal skepticism is an absurd doctrine. It is absurd because the law cannot be the

premises in the practical syllogisms that guide much human action. No “instinct” governs how fast a person drives on the open highway. But among the various explanatory variables, the posted speed limit and the belief in the probability of paying the consequences for exceeding it surely play a large role in the driver’s choice of speed. I am not suggesting that human behavior cannot be modified by means other than influencing deliberation or that human beings always deliberate before they act. Of course it can and of course they don’t. But law operates through practical reason, even when we most habitually follow the legal rules. Law can directly and indirectly affect the world we inhabit only by its influence on practical reason.

There is a perfectly plausible evolutionary story about why human beings need rules such as those law provides. We have evolved to be self-conscious creatures that act for reasons. Practical reason is inescapable for creatures like ourselves who inevitably care about the ends they pursue and about what reason they have to act in one way rather than another.²⁶ Because we are social creatures whose interactions are not governed primarily by innate repertoires, it is inevitable that rules will be necessary to help order our interactions in any minimally complex social group.²⁷ Human beings have developed extraordinary diverse ways of living together, but the ubiquitous feature of all societies is that they are governed by rules addressed to beings capable of following those rules. The most basic view of human nature is that we are consciously intentional creatures that are capable of a great deal of rationality. The new neuroscience does not yet pose a threat to this fundamental conception and all that follows from it, including the concept of responsibility and related concepts, such as *mens rea*. At the very least, we remain entitled to presume that conscious intentions are causal and to place the burden of persuasion at a very high level on proponents of NAT. The case is not close to meeting the burden.²⁸

sort of thing that is unknowable. If a system of norms were unknowable, then that system would not be a legal system. One important reason why the law must be knowable is that its function is to guide conduct.

Id. I do not assume that legal rules are always clear and thus capable of precise action guidance. If most rules in a legal system were not sufficiently clear most of the time, however, the system could not function.

26. See BOK, *supra* note 15, at 75-91, 129-31, 146-151 (1998).

27. LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES & THE DILEMMAS OF LAW* 11-25 (2001) (explaining why rules are necessary in a complex society and contrasting their account with H.L.A. Hart’s theory).

28. *Accord* SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* 86-90 (1998). As Jerry Fodor writes:

IV. INEVITABLE MENS REA

This section argues that responsibility practices flow naturally from the criminal law's traditional view of the person and that mens rea is an essential component of responsibility practices. Moreover, the requirement of mens rea contributes to the meaning and value of our lives as moral beings. A complete defense of these assertions of course requires book length treatment and more, but in this brief essay I can sketch the argument.

For the law and morality, then, a person is a practical reasoner. The legal view of the person is not that all people always reason and behave consistently rationally according to some pre-ordained, normative notion of rationality. It is simply that people are creatures who are capable of acting for and consistently with their reasons for action and who are generally capable of minimal rationality according to mostly conventional, socially-constructed standards of rationality.

The rules of morality and criminal law essentially reflect our expectations of what we owe each other. In criminal law, we mostly owe duties of non-maleficence, but we sometimes also owe duties of beneficence. According to dominant theories of just punishment, it is unjust to blame and punish anyone who does not deserve to be punished. Desert is thus at least a necessary condition of just punishment. Desert in criminal law is in turn based on a retrospective evaluation of the agent's behavior. If the criminal law operates by guiding the conscious actions of persons capable of understanding the rules and rationally applying them, it would be unfair and thus unjustified to punish and to inflict pain intentionally on those who did not act intentionally or who were incapable of the minimum degree of rationality required for normatively acceptable cooperative interaction. People who lack the capacity for rational guidance are not morally responsible and should not be held criminally culpable. They do not deserve to be punished.

Criminal culpability does not depend solely on the presence of an

[I]f commonsense intentional psychology were really to collapse, that would be, beyond comparison, the greatest intellectual catastrophe in the history of our species; if we're that wrong about the mind, then that's the wrongest we've ever been about anything. The collapse of the supernatural, for example, doesn't compare . . . Nothing except, perhaps, our commonsense physics . . . comes as near our cognitive core as intentional explanation does. We'll be in deep, deep trouble if we have to give it up . . . But be of good cheer; everything is going to be all right.

JERRY FODOR, *PSYCHOSEMANTICS: THE PROBLEM OF MEANING IN THE PHILOSOPHY OF MIND*, at xii (1987). The entire book is a defense of commonsense intentional explanation.

intentional bodily movement that risks or causes harm (the act requirement) and on a general rational capacity (which is always presumed, but can be challenged with affirmative defenses such as legal insanity), although these essentially mental phenomena are necessary components of responsibility. Purely accidental, non-negligent harmdoing, for example, may be the product of intentional movements performed by an entirely rational agent, but the criminal law would not blame or punish such harmdoing because the agent has done no wrong, has violated no reasonable expectation of taking care. These two components alone cannot explain wrongdoing. In addition to intentional action and a general capacity for rationality, criminal culpability also requires that other mental states, *mens rea*, must explicitly or implicitly be present because such states are what give meaning to the bodily movement.²⁹ And notice that, *pace* Justice Holmes, only people create meaning and care about meaning and that these are further mental phenomena that are motivated and motivating. The mental states that accompany intentional bodily movements *prima facie* indicate whether the agent really did violate an expectation by intentionally moving his or her body and they thus *prima facie* indicate the agent's attitude towards the rights and welfare of others. Indeed, this understanding of the role of *mens rea* has led some to propose a radical restructuring of *mens rea* in terms of indifference.³⁰ They are only *prima facie* indications, however, because an affirmative defense of justification may defeat the inference of wrongdoing itself and an excuse may defeat the inference of responsibility for wrongdoing. Mental states are thus vital because full understanding of action itself and an action's moral significance depends upon the meaning of the action. Mental states signal both that what the agent has done is wrong and how wrong it is.

Which mental states provide what signals is of course a moral and legal normative question that is open to interpretation and revision in light of our best moral and legal theories about culpability, but the

29. Offenses of strict or absolute liability permit punishment in the absence of culpability. Although many such offenses exist, it is famously the case that their presence in the criminal law arouses intense opposition from scholars on precisely the grounds, *inter alia*, that it is unfair to blame and punish people who have done no wrong because they do not deserve such treatment.

30. See, e.g., Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931 (2000). But see Joshua Dressler, *Does One Mens Rea Fit All?: Thoughts on Alexander's Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 955 (2000).

importance of mental states is inevitable for creatures such as ourselves. Because we must live interdependently and are always at risk of harm by others, evaluating and responding to the potential harmdoing of others is unavoidable. Machines programmed only to protect themselves in the interest of survival would respond only to probabilities of danger. If the harms caused by being stumbled over and being kicked were equally probable, there would be no reason that the program should distinguish between the two (or even wait for the harm to approach realization before responding). As long as we continue to treat each other as persons and to value moral life, however, and do not simply treat each other as potentially dangerous machines, the harmdoer's attitude towards the victim, expressed by mental states, will be crucial to our emotional, moral and practical response. For the reasons already given at present, it appears virtually impossible for us uniformly and permanently not to treat ourselves and each other as persons.

Personhood, morality and responsibility are human constructs that give meaning and value to our lives. They are what we care about. I have argued that the mental element in action is constitutive of and inseparable from all these concepts, and thus contributes to their richness. The emphasis on the mental in our lives, including mens rea in criminal law, is part of what makes us distinctively human beings with moral capacities. These capacities in turn endow us with dignity and make us worthy of concern and respect just because we are people. If we were to learn and fully to internalize the truth that mental states really do play no causal role in our lives, we would lose much that enriches us. Critics of concepts such as free action and conscious will recognize this and seem content to recommend that we live comfortably with the illusion that we possess these qualities.³¹ But accepting the truth of a matter because it seems fundamental to our practices and the nature of our lives is both intellectually and morally problematic.³² Moreover, if we really internalize a truth, it is not clear that we can maintain an illusion entirely inconsistent with that truth, no matter how pleasant the illusion may be. It is therefore fortunate that there is no convincing reason for us to abandon our present view of personhood, action and responsibility. We can live comfortably with the meaning and dignity that these conceptions and

31. See e.g., SAUL SMILANSKY, *FREE WILL AND ILLUSION* 145-191, 234-255 (2000); WEGNER, *supra* note 9, at 317-42.

32. See BOK, *supra* note 15, at 25-29.

the practices that flow from them confer on our lives.

CONCLUSION

Scientific discoveries about the brain and behavior seem persistently to threaten ordinary conceptions about the nature of human life, including our view that genuine agency is possible. We fear that we may simply be mechanisms. Extraordinary and fascinating advances in neuroscience and psychology are the latest contributors to this malaise, but it is an ancient anxiety. At present, however, these discoveries have not unmasked agency, demonstrating that it is illusory. We are agents. As long as we are justified in believing this—and human life without this justifiable belief would not be life as we know it—mental states will continue inevitably to play a central role in our evaluation of ourselves and others.