Consciousness & Culpability

Adam Candeub

Michigan State University College of Law, candeub@law.msu.edu

Follow this and additional works at: http://digitalcommons.law.msu.edu/facpubs

Part of the Criminal Law Commons, and the Other Law Commons

Recommended Citation

This Article is brought to you for free and open access by Digital Commons at Michigan State University College of Law. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Digital Commons at Michigan State University College of Law. For more information, please contact domannbr@law.msu.edu.
CONSCIOUSNESS & CULPABILITY

Adam Candeub*

INTRODUCTION

The law holds, from jury instructions to rules of evidence, that a defendant is criminally culpable if she “has” or “acts with” a culpable mental state. This position is not quite accurate. Merely “having” or “acting with” a culpable intention is a necessary, but not a sufficient, condition for culpability. Rather, culpability requires that an actor must have consciousness of her criminal intention. Consider those who commit crimes in their sleep, under hypnosis, or while experiencing other dissociate mental states. If one were to ask a murderous somnambulist, “What are you doing?” she could respond in a dream-like voice “I’m killing my daughter” or upon awaking could recall her murderous intention. Such an actor has a criminal intention, at least under most definitions of intentional states, but would not be convicted of murder.2

Although the law generally ignores the role of consciousness in mens rea, some case law recognizes the distinction between having a mental state and being conscious of it. Cases dealing with somnambulists, as well as

* J.D., University of Pennsylvania Law School; B.A., Yale College. The author is currently an attorney practicing law in Washington, D.C. I thank Professor Michael Moore for his insightful comments on this Article. I thank Professor Stephen Morse, not only for his insightful comments, but his great kindness and support over the years, as well. Thanks as well to H.W. Candeub for her patient editing, and Jay Atkinson, Doug Golbi, and James Miller for their useful reviews. Above all, thanks to Julie Taibor for her love, constancy, and stickers.

1. See, e.g., FED. R. EVID. 704(b) (“No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto.”); CALIFORNIA JURY INSTRUCTIONS: CRIMINAL § 2.02 (6th ed. 1996) (“The [specific intent] [or] [and] [mental state] with which an act is done may be shown by the circumstances surrounding the commission of the act . . . . unless the proved circumstances are not only . . . consistent with the theory that the defendant had the required [specific intent] [or] [and] [mental state] . . . .”); FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES (4th ed. 2002) (“In order to convict of First Degree Felony Murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill.”).

2. Law students are no doubt familiar with the famous English somnambulist who murdered her daughter. See Norval Morris, Somnambulistic Homicide: Ghosts, Spiders and North Koreans, 5 RES JUDICATAE 29 (1951) (discussing the unreported cases of The King v. Cogdon and Regina v. Carter, both involving somnambulistic homicide). The occurrence of somnambulistic crimes is not as freakish as it might first seem. Numerous American jurisdictions have had to deal with the issue. See Eunice A. Eichelberger, Annotation, Automatism or Unconsciousness as a Defense to Criminal Charge, 27 A.L.R.4TH 1067 (1984) (collecting cases in which somnambulism was put forth as a defense).
other unlikely defendants such as murderous hypnotics, somnambulistic assaulters, and hypoglycemic assaulters all recognize consciousness as a requirement for culpability and treat it as a separate element to be proven at trial. A lack of consciousness negates culpability, and whether one has consciousness is simply a fact that is either present or not—just as one can be said to possess a mental state or not. This Article argues that these freakish cases reveal a basic, if usually unrecognized, criterion of mens rea—that mens rea requires consciousness of culpable mental state and that consciousness is not necessarily coextensive with possessing a mental state.

If, however, mens rea is redescribed as consciousness of a mental state, as opposed to possession of such state, a problem emerges. Unlike having a particular mental state, such as purpose or knowledge, consciousness is not a fact with a yes or no answer. Rather, it is a continuum: innumerable desires, beliefs, and intentions sit on awareness’s gray edge. It is not clear when culpable consciousness emerges along this continuum—as is the case with mental states, such as purpose, belief, or desire. In other words, if consciousness is a continuum, and if consciousness is the sufficient and necessary condition for culpability, there must be a rule to determine when a defendant acts with culpable consciousness.

This Article proposes that whether an actor’s level of consciousness incurs culpability involves a moral judgment—a judgment that asks, given the circumstances, whether we can expect an actor to bring into her stream of consciousness her criminal intentions. This judgment is crucial for determining culpability because only an actor who can be expected to consciously respond to reason can be morally and legally culpable. This judgment (henceforth referred to as “culpable consciousness” or “consciousness-c”) demarcates the divide in consciousness’s spectrum between those intentions that are our own and for which we are culpable, and those that are not and for which we are not culpable. Consciousness-c, therefore, solves the problem of criminal hypnotics and somnambulists. Their actions may be intentional, but such actors cannot reasonably be expected to bring their criminal intentions into consciousness given the circumstances under which they act; therefore, they lack culpability.

3. The Model Penal Code states that a voluntary act does not exist in cases of crimes performed under hypnosis. See MODEL PENAL CODE § 2.01(2)(c) (1985) (providing that conduct under hypnosis is not a voluntary act). Numerous state statutes build on this rule. See, e.g., N.H. REV. STAT. ANN. § 626:2(II)(c) (1996); MONT. CODE ANN. § 45-2-101(32)(c) (1995); see generally Mary Christine Bonnema, Comment, Trance on Trial: An Exegesis of Hypnotism and Criminal Responsibility, 39 WAYNE L. REV. 1299 (1993) (discussing cases involving hypnotism as a defense). Whether actions performed under hypnosis are genuine actions is a question that has received important scholarly attention. See infra text accompanying notes 75-79.


Beyond the admittedly peculiar cases of somnambulistic murderers, consciousness-c clarifies one of the criminal law’s most intractable problems in mental state, the distinction between first- (premeditated) and second-degree murder. Traditionally, the distinction has turned on whether the actor “premeditated”; the intention to commit murder must pass through her stream of consciousness. As one hornbook describes the process:

It has been suggested that for premeditation the killer asks himself the question, “Shall I kill him?” The intent to kill aspect of the crime is found in the answer, “Yes, I shall.” The deliberation part of the crime requires a thought like, “Wait, what about the consequences? Well, I’ll do it anyway.”

The second-degree murderer, on the other hand, clearly had the intention to kill. For example, if someone were to ask her, “What are you doing right now?” she would answer, “Killing this guy.” However, she does not premeditate, neither speaking nor introspecting the phrase, “I’m killing this guy,” or words to that effect, before she commits her act.

Judges and commentators have attacked the degree murder system for close to a century, and the Model Penal Code has simply abandoned it. However, it remains the law in some form in most states. The survival of the first- and second-degree murder distinction attests to the strength of the moral intuition that actors are more culpable for acts committed with heightened states of consciousness.

Consciousness-c accommodates this intuition but breaks with the traditional first-degree murder formulation. Consciousness-c determines culpability not by premeditation, which is but one species of consciousness, but by the degree to which an actor can be expected to bring her intentions into her stream of consciousness and premeditate upon them. The ease with which actors can do so reflects their conscious responsiveness to reason, which is the hallmark of moral and legal responsibility. An actor is guilty of first-degree murder if she, under the circumstances, should have been able to or would have been expected to premeditate upon her act. This expands first-degree murder to those cases in which we would reasonably expect an actor to introspect but, because of some malignancy or eccentricity of character, failed to do so. This expansion is justified on the grounds that premeditated intentions and those that can be easily brought into the stream

---

8. Id. § 7.7(e), at 648.
10. See WALLACE, supra note 6, at 131. For similar analyses of responsibility in terms of reason-responsiveness, see STUART HAMPSHIRE, FREEDOM OF THE INDIVIDUAL (1975), and SUSAN WOLF, FREEDOM WITHIN REASON (1990).
of consciousness can play equally powerful roles in influencing behavior and exerting, what Wallace calls, "reflective self-control."\textsuperscript{11}

Consciousness-c saves the degree distinctions from the criticism that motivated the Model Penal Code to reject them:

Crudely put, the judgment is that the person who plans ahead is worse than the person who kills on sudden impulse. This generalization does not, however, survive analysis . . . . Prior reflection may reveal the uncertainties of a tortured conscience rather than exceptional depravity. The very fact of a long internal struggle may be evidence that the homicidal impulse was deeply aberrational and far more the product of extraordinary circumstances than a true reflection of the actor’s normal character.\textsuperscript{12}

Providing an illustration of a truly evil murder that would not qualify as first-degree is the famous hypothetical murderer, who walks by a child sitting on the edge of a bridge and, without thinking, pushes the child off.\textsuperscript{13} Under consciousness-c, such a murderer \textit{would} be culpable for first-degree murder because he \textit{should} have been able to bring his murderous intentions into his stream of consciousness.

By transforming the factual determination, "Did the defendant premeditate?" into a normative question, "Would it be reasonable under the circumstances to expect an actor to premeditate or excuse an actor from premeditating?" Consciousness-c also answers Benjamin Cardozo’s famous criticism that first-degree murder presents an evidentiary problem too fine for most jurors.\textsuperscript{14} The fineness resides in the ephemeral nature of introspection itself. Courts continue to create confusion in determining just how much premeditation is required for first-degree murder.\textsuperscript{15} Consciousness-c, on the other hand, only requires that the jury determine that (i) the act was intentional and (ii) it was performed under conditions in which one could expect the actor to call such intention into consciousness and, indeed, also to premeditate. Consciousness-c, therefore, completely avoids the evidentiary morass of whether the defendant premeditated “enough.”

\textsuperscript{11} WALLACE, \textit{supra} note 6, at 157.

\textsuperscript{12} MODEL PENAL CODE § 210.6 commentary 127-28 (1985).

\textsuperscript{13} 3 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 94 (1883).

\textsuperscript{14} See \textit{infra} note 144 and accompanying text.

Consciousness-c follows from the basic premise that moral or legal obligation only exists when individuals' actions "are susceptible to being influenced directly by reasons.\textsuperscript{16} Actors can be said to be directly influenced by intentions (or, more broadly speaking, "reasons") when those intentions can, with relative ease, be brought into the stream of consciousness. Actors are not directly influenced by culpable intentions that cannot be brought, or would be too difficult to bring, into their stream of consciousness. These actors—whether they be animals, young children, individuals acting quickly or under great stress, or those who, for whatever reason, cannot be expected to bring into consciousness the intentions under which they are acting—are less culpable, and in extreme cases like somnambulism, not culpable at all.

This Article's argument proceeds in the following manner. First, the law's current treatment of consciousness is discussed. Part I shows that the case law treats consciousness as a separate requirement for culpability, usually implicitly, but sometimes explicitly as in premeditated murder or somnambulistic murders, and that any legal theory which attempts to explain culpable mental states without consciousness is incomplete. Drawing on philosophical notions of personal identity and responsibility, in particular the work of R. Jay Wallace and Derek Parfit, this Article argues that this consciousness requirement is not arbitrary, but it proceeds from accepted theories about responsibility and personhood.

Second, given that consciousness—the true criterion for culpability—exists in a continuum, what line demarcates culpable consciousness? Seeking to provide a rigorous answer, Part II draws on Ned Block's distinctions concerning consciousness and advances culpability consciousness ("consciousness-c") as a moral judgment that asks, given the circumstances and human cognitive competence, is it reasonable for actors to access in consciousness their culpable mental states? Part II puts forward the standard legal-philosophical explanation of mental states as propositional attitudes, provides an explanation of how we are conscious of propositional attitudes, and describes how consciousness-c fits into such a framework.

Part III shows how consciousness-c creates a more coherent scheme for distinguishing degrees of murder. Finally, Part IV compares consciousness-c with another recently suggested clarification of the distinction between first- and second-degree murder. Dan Kahan and Martha Nussbaum argue that the law should make normative judgments not about actors' abilities to bring culpable intentions into consciousness—consciousness-c—but about actors' motivations and motivating emotions. Under this approach, juries would find, for instance, second-degree murder or voluntary manslaughter, rather than first-degree murder, if they approved of or sympathized with the motivations that prompted the defendant's actions. Consistent with these commentators' views, consciousness-c recognizes that the criminal law contains hitherto under-recognized moral judgments, but contends that these

\textsuperscript{16} WALLACE, supra note 6, at 131.
judgments are rightfully confined to whether actors can be expected to exert reflective control to follow a rule, in other words, consciousness-c.

I. THE CONSCIOUSNESS REQUIREMENT
AND ITS JUSTIFICATIONS

The law recognizes consciousness as essential for culpability, yet does so by implication, rarely acknowledging it as a separate requirement.¹⁷ For instance, the Model Penal Code holds an actor culpable if she "has" or "acts with" the intentional states of knowledge, belief, or purpose.¹⁸ Notice that explaining legal mental states in this manner does not require consciousness. One can "have" knowledge or purpose without such knowledge or purpose ever entering consciousness. For instance, I believe the proposition, "I ate granola for breakfast today," even though I never once spoke or held a sentence ascribing such proposition in my stream of consciousness. Nonetheless, I clearly have such a belief, and this belief is manifested in numerous ways other than presence of a sentence denoting it within my stream of consciousness. For instance, should someone ask me "What did you have for breakfast?" I would answer "Granola." Having a belief about what I ate for breakfast does not require that I, in fact, think or meditate "I ate granola for breakfast today."

Perhaps as a result of the failure to specify the role of consciousness, case law and legal theory have failed to put forward a consistent justification for the consciousness requirement.¹⁹ Instead, case law and commentary have produced scattered and inconsistent justifications. The following section (i) reviews how case law treats consciousness, showing how case law generally requires consciousness for culpability but lacks any consistent justification; (ii) reviews a notable scholarly treatment of the matter; and (iii) concludes with a proposal for a coherent rationale for why consciousness is necessary for culpability.

Briefly put, Part I concludes that consciousness is required for a culpable mental state because culpability requires choice. We hold people responsible for "bodily movements insofar as they manifest a choice that is made by the agent."²⁰ A true choice, in turn, requires that actors have intentions, beliefs, desires, or "reasons [they can] grasp and accept" that mediate that choice.²¹ Only by grasping these reasons can we act because of (or, in

¹⁷. A crime is traditionally held to have three elements: the mental, intentional part (mens rea); the act ("actus reus"); and causation. See LAFAVE & SCOTT, supra note 7, § 3.1, at 193-94.

¹⁸. LAFAVE & SCOTT, supra note 7, § 3.5, at 218-19. The Model Penal Code recognizes consciousness as an element of its act requirement, not its mental state requirement. Id. § 3.2(c), at 197-98; see also MODEL PENAL CODE § 2.01(2)(c) (1962).

¹⁹. See discussion infra at Part I.A.

²⁰. WALLACE, supra note 6, at 132; see also MICHAEL S. MOORE, ACT & CRIME 113 (1993) [hereinafter MOORE, ACT & CRIME] ("Acts are not plausibly identified with bodily movements simpliciter, but they should be identified with the complex event volitions-causing-movements.").

²¹. WALLACE, supra note 6, at 132.
the case of a criminal, in spite of) a moral or legal obligation. In turn, we can only grasp and accept conscious reasons. Therefore, only conscious moral reasons can directly influence behavior, and only conscious immoral or illegal reasons can render actors culpable.

A. Case Law: Justifying the Consciousness Requirement

Case law in numerous situations—somnambulism, extreme physical injury, extreme physical distress, blackouts, unconsciousness, hypoglycemic comas, or epileptic fits—has consistently required consciousness for culpability. The justifications that courts offer as to why consciousness serves to negate culpability are varied, and, as shown below, largely incorrect.

Numerous courts claim that because the unconscious actor cannot "know the nature and quality" of his act, or lacks knowledge of the deed, the unconscious actor lacks culpability. This justification does not withstand scrutiny. An actor under hypnosis can answer questions about his actions and give reasons for performing them. A somnambulist or an epileptic could conceivably do the same thing. Furthermore, a somnambulist could wake up and recall his action, thus having knowledge of his past somnambulistic acts almost identical to his knowledge of his past non-somnambulistic acts. It would seem that what these actors lack is not knowledge or comprehension but an ability to have such knowledge and comprehension with the right kind of consciousness.

Other courts say that because unconscious acts are performed in the absence of will, or without a voluntary will or act, there is no culpability. However, that observation begs the question of what constitutes a "voluntary will," for the existence of voluntary will or free will in a universe governed by natural laws is, of course, a controversial claim. If moral respon-
sibility required a will free from natural law, then arguably there would be no responsibility at all. Since the time of the Stoics, philosophers have reasoned that if human beings are part of the physical world, and the physical world is controlled by laws of cause and effect, free will has no place. Dennett, quoting Lucretius, puts the point nicely:

Again, if all movement is always interconnected, the new arising from the old in a determinate order—if the atoms never swerve so as to originate some new movement that will snap the bonds of fate, the everlasting sequence of cause and effect—what is the source of the free will possessed by living things throughout the earth? 32

Advocates of free will, like Immanuel Kant (to pick a famous one), argue that some human action—action that is motivated by reason—is immune from the interconnected movement of the natural laws that determine the behavior of matter. 33 Thus, Kant concluded that moral responsibility requires that one have “transcendental” freedom of the will, an absolute spontaneity that is immune to, or transcends, natural laws. 34

Regardless of how one comes out on the great debate concerning free will, there is no reason to believe that free will and consciousness are necessarily linked. If free will exists at all, why would it only exist in conscious mental activities but not in our unconscious mental activities? If the human will possesses a transcendental faculty to choose, totally free from physical causation—to use Kant’s image of a rational will 35—why should that capacity only exist in consciousness? It seems possible that a hypnotic or epileptic individual’s actions could be caused by the transcendental free will. Similarly, if we follow Freud and believe in the existence of unconscious desires and intentions, 36 there is no reason to believe that such desires and intentions could not be chosen independently from physical causation.

Still other courts state that unconscious individuals cannot form intentions. 37 This is not true. Since at least the time of Freud, it has been recognized that desires, beliefs, and intentions may be repressed into the uncon-

---

32. Id. at 1-2 (quoting Lucretius, The Nature of the Universe, II, lines 250-255 (Latham trans., 1951)).
34. Id. at 465-66.
35. Id. at 473-78.
37. See, e.g., People v. Saille, 820 P.2d 588, 599 (Cal. 1991) (“If you find that the defendant killed while unconscious as a result of voluntary intoxication and therefore did not form a specific intent to kill or did not harbor malice aforethought, his killing is involuntary manslaughter.”); Huffman v. State, 217 P. 1070, 1072 (Okla. Crim. App. 1923) (“When one takes the property of another, to make it larceny, a felonious intent must be shown, and while this may be inferred from the character of the taking, the defendant may show that he was unconscious of what he was doing at the time, or too drunk to form or have any felonious intent.”).
The process of psychoanalysis "brings to the surface"—brings to consciousness—those mental states that the Freudian analyst would argue exist and influence behavior. Moreover, it would appear that sleepwalking or hypnotic individuals have intentions. They act in goal-directed behaviors that seem, like any other behaviors, to be caused by beliefs, desires, and intentions. If a sleepwalker, hypnotic, or epileptic recalls acting upon an intention while unconscious, such an intention is indistinguishable from any other remembered intention. Finally, as discussed below, functionalism, the generally accepted theory of mind, conceives of beliefs, desires, and intentions as propositional attitudes encoded in the brain like lines in a computer. Like so much code in a CPU, beliefs, desires, and intentions in a brain can exist under functionalism without consciousness of such mental states.

Still other courts speak of unconsciousness as a form of insanity. Again, this cannot be the answer. The famous, "M'Naghten test," which remains law in over one-half of United States jurisdictions, states that the actor must (i) have a defect of reason caused by "a disease of the mind" and (ii) this defect must cause the actor not to realize the nature and quality of the act, or that the act was wrong. Somnambulists may not have the same mental capacities as the awake, but they do not suffer from mental illness. Even assuming somnambulists, the hypoglycemic comatose, or hypnotics have some sort of "disease of the mind," they can tell the nature of their acts. They can answer questions about the nature of their actions, remember their intentions, and probably, per the M'Naghten test, could tell the difference between right and wrong. Indeed, it is claimed that hypnotics cannot act in a manner contrary to their moral beliefs, though they are highly suggestible in other ways. In short, people in trances or unconscious states do not necessarily lack the ability to tell right from wrong or to

38. See generally FREUD, supra note 36 (discussing Freud's theory of dream interpretation).
39. See generally DANIEL C. DENNETT, THE INTENTIONAL STANCE (1987) (arguing that intentionality is a property that emerges when looking at a cognitive system with a certain perspective).
40. See infra text accompanying note 60 for a fuller description.
41. The standard argument that functionalism "cannot handle" consciousness is the "absent qualia" argument—"given any functionally specified organizational structure, it is always possible (at least in principle) to construct realizations of that structure which we have every reason to believe possess no qualia." Robert Van Gulick, Understanding the Phenomenal Mind, in THE NATURE OF CONSCIOUSNESS: PHILOSOPHICAL DEBATES 435, 435 (Ned Block et al. eds., 1997). In other words, because functionalism envisions brain function as analogous to a computer, functionalism cannot explain why brains need consciousness, just as computers do not need consciousness to do what they do.
42. McGuire v. Commonwealth, 885 S.W.2d 931, 935 (Ky. 1994) ("The instruction given by the court exculpated the defendant if the jury believed he was 'temporarily insane at the time' or 'so intoxicated that he did not form the intention to commit the offense or offenses.'"); March v. State, 734 P.2d 231 (N.M. 1987) (citation omitted); State v. Wilson, 514 P.2d 603 (N.M. 1973); People v. Higgins, 159 N.E.2d 179 (N.Y. 1959); Bradley v. State, 277 S.W. 147, 149 (Tex. Crim. App. 1925); State v. Painter, 63 S.E.2d 86 (W. Va. 1950).
43. LAFAVE & SCOTT, supra note 7, § 4.2, at 438 (citing M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843)).
44. See MOORE, ACT & CRIME, supra note 20, at 248-62.
45. See id.
46. See id.
understand the nature of their actions. Whatever they are, they are not insane.

Finally, some courts speak of unconscious actors lacking "choice."\(^{47}\) As discussed in Part III infra, this Article argues that these courts are by and large correct.

**B. Legal Theory**

Theorists, as well as courts, find that consciousness is necessary for culpability. Several papers given at a *University of Pennsylvania Law Review* symposium on Michael Moore's *Act and Crime* demonstrate that any legal theory of culpability must explain how consciousness affects culpability.\(^{48}\)

In *Act and Crime,*\(^ {49}\) and later in *Placing Blame,*\(^ {50}\) Moore presents a magisterial philosophical analysis of criminal law, probably the most significant of his generation. As Moore of course realizes, one of the key problems lurking in any such analysis is the mind-body problem, a perennial problem in Western philosophy since Descartes.\(^ {51}\) Briefly put, this philosophical problem asks how the brain, which is physical, can be the cause and locus of thoughts, desires, beliefs, and other intentional states, which are clearly not physical.\(^ {52}\) If the laws of physics and chemistry determine how physical things cause other physical things to occur, how can we explain how physical things can cause thoughts—or even more puzzling, how can non-physical things, like beliefs and desires, cause things in the physical world?\(^ {53}\) Thoughts, desires, and beliefs are particularly puzzling, not simply because they are nonphysical, but because, as the philosophers would say, they are intentional—they have objects.\(^ {54}\) One can "imagine a sphinx, remember the dead, and hope for a cure to the common cold, none of which objects exist—at least in the ordinary way."\(^ {55}\) Similarly, criminal mental states have objects. A murderer can intend to poison Aunt Bea. Thus, "poison Aunt Bea" is the object of his intent. Such objects, at least until the crime is committed, also lack existence at least in the ordinary way.

---

47. People v. Roberts, 826 P.2d 274, 297 (Cal. 1992) (holding that an unconscious actor lacked volition when he stabbed prison guard to death); State v. LaFreniere, 621 N.E.2d 812, 818-19 (Ohio 1993) (holding that the trial court should have instructed the jury on blackout when the defendant testified that "everything just went out for a second" and that he could not remember anything for a few minutes, and noting that state law exempts from criminal liability involuntary acts "that are not otherwise a product of the actor's volition").


52. MOORE, PLACING BLAME at 420-44.

53. DENNETT, *ELBOW ROOM*, supra note 31, at 32-34.


The mind-body problem is a problem not just for philosophy, but for the criminal law, as well. The mental state terms of the criminal law have nonphysical objects. For instance, criminal actors must intend with a particular object—an as yet unperformed criminal act. Everyday juries distinguish among these nonphysical objects. For example, Mr. Y's purpose to murder Mr. X and Mr. Y's purpose to defend himself from Mr. X's attack are examples of two propositional attitudes distinguished from one another by their objects. Whether the jury determines the existence of one or the other of these propositional attitudes makes a big difference, particularly to Mr. Y. Nevertheless, the objects of mental states do not exist in any ordinary way. They are not physically identifiable entities. Courts, however, think that the facts that they find are largely about physical, scientifically understood reality.56

To solve this mind-body problem of legal mental state, Moore adopts functionalism, the mainstream, orthodox solution to the problem.57 While arguably one of the great achievements of twentieth century analytic philosophy, functionalism is not a walk in the park to explain, and this Article will give the reader only a metaphorical description and point to places where more capable authors have done a better job.58 The only point in the excursus is to show that whatever success functionalism has in explaining mental states, it has little success in explaining consciousness and, therefore, cannot succeed in explaining legal mental states.

To start with functionalism, consider the calculator in your pocket. How does it calculate 2+2? There is no little silicon man in your calculator who knows arithmetic. Rather, the calculator has programmed certain relationships among symbols, namely the symbols "2," "+," and "4" (or, to be a bit more precise, the binary code equivalents of these symbols). Even though the calculator has no idea what the number 2 is, it knows (or is so programmed that) whenever it receives the symbols "2," "+," and "2," it shows "4" on its screen. The calculator does not know anything about arithmetic, mathematical concepts, or meanings; it merely "knows" how to manipulate symbols or syntactic representations.

By analogy, the functionalist believes that intentions, beliefs, and desires can be equated to symbols or syntactic representations—symbols that

56. Rules concerning the admissibility of expert evidence best show the empirical outlook of United States courts in their factual determinations. As the Supreme Court has concluded, expert scientific evidence is only admissible if it is firmly based in empirical inquiry. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593 (1995) (citing CARL G. HEMPEL, PHILOSOPHY OF NATURAL SCIENCE 49 (1966) (stating that "a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested"). That the Court identifies empirical, verifiable knowledge as authority that "assist[s] the trier of fact," FED. R. EVID. 702, indicates that, at least in the Court's view, facts are claims about the physical world.

57. MOORE, ACT & CRIME, supra note 20 at 131; JOHN SEARLE, THE REDISCOVERY OF MIND 7 (1992) [hereinafter SEARLE, REDISCOVERY] (stating that functionalism is the "modern orthodoxy").

are functional neural structures in the brain. These symbols mirror the laws of human psychology just as a calculator mirrors the laws of arithmetic. Furthermore, these symbols are causally and computationally related to one another and to sensory inputs and behavioral outputs, just as a calculator relates input to output according to the laws of arithmetic. To adopt an incredibly crude metaphor, just as a "2," a "+," and a "2" makes the calculator display a "4" on the screen (its behavioral output), the functional neural structure for the belief, "Putting arsenic in this tea will kill Aunt Bea," and the functional neural structure for the desire, "I want to kill Aunt Bea," produces the action (or behavioral output) of pouring a vial of arsenic into a cup of tea.

Searle has a nice description of the process:

Suppose that John has the belief that \( p \), and that this is caused by his perception that \( p \); and, together with his desire that \( q \), the belief that \( p \) causes his action \( a \). Because we are defining beliefs in terms of their causal relations, we can eliminate the explicit use of the word "belief" in the previous sentence, and simply say that there is a something that stands in such-and-such causal relations.

Notice that functionalism essentially understands human minds as computers, and computers are not conscious. Most functionalist descriptions of mental state do not require or include a robust notion of consciousness. This disconnect between functionalist accounts of mind and consciousness creates challenges for legal scholars relying on functionalism. Moore, of course, has always realized that in order to provide a theory of mind usable by the law, a functionalist account must also include an account of consciousness. In Law and Psychiatry, he tackles, inter alia, the question of which Freudian functional states could feasibly render an actor legally responsible. Moore argues that only those states that are potentially conscious render an actor legally responsible. Yet the consciousness requirement must continually be grafted onto the functionalist account, and this move raises questions.

Consider Moore's description of human action in Act and Crime. According to Moore, every actus reus can be analyzed as basic acts that consist

59. It should be noted, as Hubert Dreyfus pointed out nearly a quarter of a century ago, that no one has the foggiest notion of what these neural structures might be, and they remain somewhat near science fiction. HUBERT DREYFUS, WHAT COMPUTERS STILL CAN'T DO 159-63 (1972).
60. REY, supra note 58, at 167-69.
61. SEARLE, REDISCOVERY, supra note 57, at 41.
63. Id. at 147-48.
64. MOORE, ACT & CRIME, supra note 20, at 131-132.
65. MOORE, LAW & PSYCHIATRY, supra note 62, at 268-72.
66. Id. at 341-43.
67. MOORE, ACT & CRIME, supra note 20, at 136.
of voluntary bodily movements. A volition causes each voluntary action, and a volition is the executory command for a basic physical action. Both Professor Bernard Williams and Professor Stephen Morse criticize Moore’s functionalist account of action in their articles, *The Actus Reus of Dr. Caligari* and *Culpability and Control*, respectively. Williams puts forth the example of Cesare, the zombie from Robert Wiene’s famous Weimar-era film, *The Cabinet of Dr. Caligari*. Dr. Caligari commands Cesare to kill the town clerk. Williams asks, “Suppose Caligari [Cesare’s evil master] had said ‘You agree to do it?’ and Cesare, in his somnambulistic state, had said ‘Yes, I agree to do it.’” Does this consist of an action? Is Cesare guilty of murder? Under Moore’s functionalist view, it is not clear who possesses the volition to kill or, to speak more colloquially, who performed the action. One could argue that Cesare does, for when he assents, he must have some mental attitude that expresses the proposition “stab the town clerk.” Yet, due to his state (that of being a zombie), one hesitates to throw poor Cesare in jail.

Professor Morse presents the question more broadly. He asks whether dissociate states such as “highway hypnosis,” sleepwalking, depersonalization, or intense rage should “be understood as negations of a voluntary act or as affirmative defenses that excuse?” He observes that “[t]here is no reason to believe that unconscious agents might not recapture their general intentions if exposed to various forms of psychological methods.” Thus, such “unconscious acts” are arguably acts under Moore’s functionalist account.

Moore responds that sleepwalkers lack true, full-blooded volitions but have “volition-like states [that] execute certain of our background states of desire, belief, and general intention.” He hypothesizes, therefore, that sleepwalkers and their ilk do not perform actions “because they . . . [lack] appropriate intentions or volitions.” This is arguably a metaphysical extravagance. While philosophers, computer scientists, and psychologists can debate the matter, no one is close to proving the existence of any functional structures, like volitions, in the brain—let alone their poor relations, Moore’s “volition-like” states. It seems somewhat ill-advised to expect juries to find such entities, for which no proof exists, and even worse, which

68. Id. at 131.
69. Id. at 142.
71. Williams, supra note 70, at 1670.
72. Id.
73. Id. at 1671.
74. Id. at 1670.
75. Id.
76. Morse, supra note 70, at 1641.
77. Id. at 1651.
79. MOORE, PLACING BLAME, supra note 49, at 300.
have no equivalent in the everyday psychology that juries and lay-people reply upon to understand behavior.

In the alternative, deviating from orthodox functionalist doctrine, Moore distinguishes those intentions we have from those we do not by an appeal to consciousness. "Some substantial amount of one's desires and intentions must be accessible to an actor before he can be said to resolve the conflict between them with a volition."80 There are mental states that are just like volitions, but not "of the whole person," and therefore, do not make the whole person liable. Only conscious states make the "whole person" liable.

As Moore realizes, a functionalist account of legal mental state alone is insufficient. He, along with the vast majority of courts, agrees that consciousness is required. Therefore, even the most sophisticated functional analyses of legal mental state require consciousness.

C. Why Consciousness?

Case law and legal scholarship conclude that consciousness is the essential mental component of culpability. This Part argues that we are culpable only for beliefs, desires, and intentions of which we are conscious for two reasons: personal identity and moral choice.

John Locke says, "Consciousness makes personal identity."81 As Locke explains, "consciousness . . . unites existences and actions, very remote in time into the same person, as well as it does the existences and actions of the immediately preceding moment: so that whatever has the consciousness of present and past actions, is the same person to whom they both belong."82 Because consciousness determines those intentions that belong to a person, it also defines those intentions for which an actor is culpable.

Yet consciousness cannot be the sole determinant of which desires, beliefs, and intentions belong to an actor. Though accepting the centrality of consciousness in personal identity, Derek Parfit points out that people forget most of the actions they perform, as well as the beliefs, desires, and intentions prompting such actions.83 Parfit asks whether you remember putting on your shirt this morning; presuming that you do not, he concludes that remembering actions or intentions in consciousness cannot be the sole determinant of which actions and beliefs belong to you, though he admits that we would be "reluctant" to punish an actor for a crime she does not remember committing.84

Putting aside the question of whether amnesiacs are responsible for crimes they cannot remember committing,85 Parfit is clearly correct in hold-

80. Id. at 307.
82. Id. at 473.
84. Id. at 82.
85. Locke flatly says that actors cannot be criminally responsible for the crimes they forget. LOCKE,
ing that we are certainly not conscious—certainly not over time—of all those beliefs, desires, and intentions that we would call our own and for which we would bear responsibility. Indeed, very few of our desires, beliefs, and intentions are ever present in the stream of consciousness, particularly at the time they are performed. If this is the case, then why do courts and legal theorists—as well as our own moral intuitions—recoil at holding sleepwalkers culpable? After all, if we do not require consciousness of all those beliefs, desires, and intentions to be responsible, consciousness should not matter.

The reason why consciousness matters rests in the intersection of our notions of moral responsibility and personhood. Agents are morally responsible to the degree to which their behavior responds to reasons that they can grasp and understand. Moral actors act or refrain from acting because of a moral or legal requirement. Actors who cannot respond to reasons because they cannot grasp and understand them, like children or hypnotics, cannot be culpable. Because the ability to grasp and understand the reasons under which we act generally requires consciousness, consciousness emerges as the mental requirement of moral and legal responsibility.

To expand upon this argument, consider this account of why people are responsible. Since Kant, at least, people have struggled to account for moral responsibility in a world determined by natural laws. After all, if my behavior—say to kill my tennis opponent who happens to be beating me—is determined by natural laws, just as a rock’s behavior accelerating to the ground is determined by Newtonian physics, why should I be responsible? No one would hold the rock responsible if it were to hit someone in the head and kill him. Similarly, because laws of nature have determined the murder of my tennis opponent, I had no control and thus, no responsibility.

One answer would be that human beings have souls or some sort of nonphysical “mind stuff” that is somehow exempt from the laws of nature and somehow permits individuals to make choices independently from the mechanist laws of nature. Thus, souls freely choose and can be held accountable for those free choices. Without taking sides on the metaphysical question of free will, this Article only suggests that if souls determine human action, then consciousness would be the paramount criterion for moral responsibility. As Descartes realized, the soul, or some other “mind stuff,” only exists as it is thought. Therefore, mental states only exist if they are thought. My belief that “I like ice cream” exists only as I think, “I like ice

supra note 80, at 475. Parfit rejects this argument on the ground that we lack a specific memory of most acts we perform; but, even he concedes that it would be unfair to hold actors responsible for actions that they completely forget. The relationship between responsibility and identity over time is explored in Adam Candeub, Cognition and Excuse (Sept. 15, 2002) (unpublished manuscript, on file with author).

86. Descartes pointedly says, “no thought can exist in us of which we are not conscious at the very moment it exists in us.” David M. Rosenthal, A Theory of Consciousness, in THE NATURE OF CONSCIOUSNESS: PHILOSOPHICAL DEBATES 729, 747 n.2 (Ned Block et al. eds., 1997).
cream.” Arguably, under a Cartesian or dualist system, only premeditated murder would be intentional murder. 87

Given the preference of United States courts to ground factual determinations in scientific, empirical knowledge, 88 we will not speculate about souls or Cartesian res cogitans. It seems more helpful—or at least more persuasive to a larger number of academics—to describe responsibility in more material terms. Drawing on a long tradition of moral philosophy in this century that attempts to reconcile the mechanistic universe with moral responsibility, R. Jay Wallace proposes that actors are responsible, not when they exercise some power of the soul, but rather when they possess the “psychological competence” to grasp and respond to moral reasons. 89 Therefore, the rock falling to the ground and hitting a poor bystander is not morally responsible because it has no ability to change its course if one were to shout, “O little rock, O little rock, don’t hit that poor man’s head! Don’t you realize it would violate the categorical imperative?” However, a person throwing such a rock would conceivably have the power to change his action by exercising moral reasoning. By dint of that ability and his ability to consciously grasp the meaning of his actions, he would be morally responsible.

Wallace expands his discussion to include the following conditions for moral responsibility: actors are morally responsible when they have “(1) the power to grasp and apply moral reasons, and (2) the power to control or regulate [their] behavior by the light of such reasons.” 90 Notice how consciousness plays a role in both of these conditions. Unconscious actors do not grasp and apply their own reasons. Consider Raymond in the movie The Manchurian Candidate. 91 Raymond had been trained to enter into a hypnotic trance upon hearing the cue, “Raymond, shall we play some solitaire.” 92 While in that state, he was highly suggestible and performed all sorts of horrible acts under the direction of his sinister mother, played by Angela Lansbury. 93 Raymond certainly “responded to reasons.” He did things, like conspire to assassinate a presidential candidate, because he was part of his mother’s Communist plot to seize power. 94 However, her reasons were not his. One would not say that he was culpable for performing these evil actions because he lacked consciousness of the reasons. For his reasons

87. In modern times, John Searle, one of the most prominent defenders of anti-reductionism, relies on consciousness as a condition for an actor to possess a mental state. SEARLE, REDISCOVERY, supra note 57, at 84 (“In one way or another, all . . . mental notions such as intentionality, subjectivity, mental causation, intelligence, can only be fully understood as mental by way of their relationship to consciousness.”).


89. WALLACE, supra note 6, at 156-58.

90. Id. at 157.


92. Id.

93. Id.

94. Id.
to be applied, he would have to consciously grasp the meaning of his actions.

Therefore, expanding Wallace’s conditions for moral responsibility, it appears that consciousness is essential because it has the unique power of being a focus of all of our beliefs and desires. It is, as Bernard Baars calls it, a “universal workspace” in which desires and beliefs, particularly the actor’s moral desires and beliefs, can interact and affect action.95 Or, as Wallace states, “[w]hat is distinctive about hypnotism is that the desire on which the agent acts becomes effective in a way that disables the agent’s powers of reflective self-control . . . [they are] disengaged at the moment when the hypnotic suggestion becomes effective.”96 Without consciousness, Raymond lost the ability to regulate his behavior in light of his own beliefs and desires. When he acted by reason of others’ beliefs and desires, he could not be culpable for such acts.

II. CONSCIOUSNESS—C: AN EXPLICATION

So far the discussion has shown that (1) consciousness is necessary for criminal culpability and (2) this consciousness requirement is not some fluke in the law but proceeds from basic moral considerations. Unspecified is (3) what the actor must be conscious of to be criminally (and morally) culpable and what type of consciousness is required. Consider the difficulties these questions pose. A somnambulist murders her daughter. Though clearly asleep when committing the murder, she remembers, upon waking, the action and her premeditation prior to the act. Does she not possess culpable consciousness upon remembering the action? Or, consider the actor in a hypoglycemic or drug-induced trance. He knows that he is in such a trance and knows that it “slows” his mental processes; however, if he really concentrates, he can grasp and understand what he is doing. Does such an actor possess intentions for which he can be held culpable? Further, of what must the actor be conscious? On a less fantastic level, consider the second-degree murderer. She murders on impulse, coolly doing her business without premeditation. She is conscious of her intentions but they are not in her stream of consciousness. Why is she less culpable than the premeditating murderer?

To answer these questions, we must first have some understanding of mental state and consciousness. With these understandings, we can more clearly define what type of consciousness is required for culpability—culpability consciousness. The following Part includes a somewhat technical discussion, and those not interested in philosophy of mind or cognitive science could probably skim it.

96. WALLACE, supra note 6, at 175.
A. Mental States as Propositional Attitudes

LaFave and Scott state that mens rea is simply “the mental aspect[]” of a crime. Mental states need no further analysis because we all know what they are. Like Justice Potter Stewart and pornography, we know it when we see it. Cognitive scientists and philosophers have a (slightly condescending) name for this approach: “folk psychology,” which is defined as “our everyday conceptual scheme for accounting for our own and others’ actions in terms of beliefs, desires, emotion, and motives . . . that employ . . . references to contentful and causally efficacious psychological states.”

In other words, legal mental states simply employ the everyday terms we use to describe human behavior. Consider the Model Penal Code’s three mental state terms: purpose, knowledge, and recklessness. We all know what it means for someone to have a purpose or to know something. We may not know, as a biological fact, what must be in someone’s brain so that she can be said to “believe the Peace of Westphalia occurred in 1648,” but we all know, as a basic matter of human convention, what it means when we say “Susan believes that the Peace of Westphalia occurred in 1648.” Considering the success of folk psychology, most legal academics see no reason to abandon it. Indeed, if one were to do so, one would end up with an unrecognizable criminal law system, devoid of mental state categories.

Yet, the consciousness requirement throws a monkey wrench in the standard folk psychological explanation because it is far from clear how consciousness relates to folk psychology’s categories. Consider the Model Penal Code’s definition of murder: “criminal homicide constitutes murder when . . . it is committed purposely or knowingly.” While this makes sense in terms of folk psychological states of purpose and knowledge, what does it mean in terms of consciousness? An initial answer might be that if consciousness is required for culpability, then a culpable actor must have a purpose flow through his stream of consciousness. The exact sentence, “I intend to murder X,” must run through the actor’s head.

It seems unlikely that culpable consciousness requires that one must, in fact, form sentences, either spoken or introspected in one’s stream of consciousness, that pick out criminal intentions; one suspects that very few, if any, murderers have such a sentence in their heads as they commit their crimes. Indeed, the sentences that run through murderers’ heads as they kill may bear little or no resemblance to the sentence “I intend to murder X.”

97. LaFave & Scott, supra note 7, at 214.
100. MODEL PENAL CODE § 2.02 (1962).
102. For an examination of a criminal law without intention, see Andrew E. Lelling, Comment, Eliminative Materialism, Neuroscience & the Criminal Law, 141 U. PA. L. REV. 1471 (1993).
Remember Floria Tosca who said “Questo è il bacio di Tosca!” (translation: “This is Tosca’s kiss!”) as she stabbed away.\footnote{Puccini’s opera, \textit{Tosca}, tells the tale of the beautiful singer, Floria Tosca. \textit{See Milton Cross, Complete Stories of the Great Operas} 581-586 (1952). The evil head of the Roman secret police, Baron Scarpia, has imprisoned her lover, Mario Cavaradossi, for his liberal political agitation. Scarpia promises Tosca that if she will give herself to him, he will release Mario. Tosca agrees, but as Scarpia lecherously approaches to take his part of his bargain, Tosca picks up a conveniently placed carving knife and mortally wounds Scarpia as she cries “Questo è il bacio di Tosca!”} Certainly she intended to murder Scarpia, yet the sentence “This is Tosca’s kiss!” bears little syntactic similarity to the sentence “I knowingly stab Scarpia!”

Obviously, having a mental state like purpose or knowledge means more than saying or thinking sentences. But what? The dominant trend in philosophy of mind and cognitive science is to view mental states as “propositional attitudes”—relationships between attitudes like knowledge, desire, and purpose and propositions like “Henry VIII was a king of England,” “a tuna sandwich on rye,” and “kill Scarpia,” respectively.\footnote{REY, \textit{supra} note 58, at 19; Jerry Fodor, \textit{Fodor’s Guide to Mental Representation, in The Future of Folk Psychology} 22, 23 (John D. Greenwood ed., 1993) (“The contemporary discussion about mental representation is intimately and intricately involved with the question of Realism about propositional attitudes.”).} The advantage of propositional attitudes, and certainly a reason why functionalism relies upon them, is that they provide a solution to the mind-body problem because they have a foot in both the physical and nonphysical world. On one hand, they are attitudes that clearly have physical expressions. “Desiring” can be easily defined as a cluster of behaviors. If one desires to kill Scarpia, one will engage in certain behaviors. One might grab at the nearest available carving knife, thrust the knife into Scarpia’s belly, and say things like “This is Tosca’s kiss!” On the other hand, “killing Scarpia” is a proposition until it is, in fact, performed. It is a concept, like a number, that has no physical reality. Conceiving of mental states as propositional attitudes relates physical things to abstract things—behaviors and tendencies to propositions.

Propositional attitudes do not connect having a particular mental state to the existence of a particular sentence in the mind. Sentences, whether spoken, written, or introspected, are related to propositions because they “point out,” or are “used to ascribe” propositions.\footnote{“Propositions are not to be confused with facts . . . [facts] are the state of affairs which true propositions somehow signify, name, or describe.” A.C. Grayling, \textit{Introduction to Philosophical Logic} 17 (1997); Mark Richard, \textit{Propositional Attitudes: An Essay on Thoughts and How We Ascribe Them} 102-03 (1990) (“[W]hen I say, ‘So and so believes that Twain is dead’, and thereby say something true, the t-clause helps pick out the associated [mental or psychological] state. It does this by naming something that is, or characterizes, the cognitive content of the state . . . my sentence is true provided that so and so is in the state thus picked out . . .”).} There are an infinite number of sentences that can point to a proposition. When a jury finds that Tosca knowingly killed Scarpia, it determines that Tosca’s brain bore a particular attitude (purpose) to the proposition picked out by the sentence “Kill Scarpia with the carving knife.”
B. Consciousness & Propositional Attitudes

We began by asking what mental states are and answered that they are propositional attitudes. If consciousness of mental state is required for culpability, how can we be conscious of our propositional attitudes? Ned Block's distinction between consciousness-a ("access consciousness") and consciousness-p ("phenomenological consciousness") points to an answer. Consciousness-a is fairly straightforward. If you have consciousness-a of X, you have "access" to X and can report upon X. Thus, consciousness-a allows for rational control of action and speech, and permits us to represent our beliefs and desires and act upon them. There is nothing too mysterious about consciousness-a. Computers are conceivably conscious-a of the various sentences in their memory chips. Any entity that could retrieve data or images arguably has consciousness-a of such data or images.

Consciousness-p, on the other hand, cannot be defined "in any remotely noncircular way." It is the mysterious aspect of consciousness. It is the experience of how tasting a glass of wine, reflecting upon a painting, or talking to oneself "feels to oneself." As Block states, "[t]he totality of the experiential properties of a state are 'what it is like' to have it . . . [W]e have P-consciousness states when we see, hear, smell, taste, and have pains. P-conscious properties include the experiential properties of . . . thoughts,

107. Ned Block, On a Confusion about a Function of Consciousness, in THE NATURE OF CONSCIOUSNESS: PHILOSOPHICAL DEBATES 375, 385-86 (Ned Block et al. eds., 1997). Block's terminology has proven quite influential. It is not completely novel with him. Many have recognized that one can be conscious of a propositional attitude in two ways: thinking a sentence that expresses such attitude and being able to produce such an intention. As Anscombe might say, "intentional actions include those to whose description the question 'why?' applies." Included in these are movements not considered by the agent, though he can say what they are if he does consider them. G.E.M. ANSCOMBE, INTENTION 91 (1963); see also DENNERT, CONTENT, supra note 55, at 153 (1969).

108. Block, supra note 107, at 385-86.

109. While the distinction between consciousness-a and consciousness-p has wide support among philosophers and cognitive scientists, not all agree. For instance, Dennett claims that "the varieties of consciousness [Block] thinks he sees falling under P-consciousness and A-consciousness can all be accommodated under the two rough quantitative headings of richness of content and degree of influence." Daniel C. Dennett, The Path Not Taken, in THE NATURE OF CONSCIOUSNESS: PHILOSOPHICAL DEBATES 417, 417 (Ned Block et al. eds., 1997). For those who would follow Dennett, the Article's use of consciousness-a and consciousness-p can simply be recast as consciousness that is either more rich or less rich.

110. Block, supra note 106, at 380.

111. Thomas Nagel famously described consciousness-p when he asked whether human beings can ever know "what it is like to be a bat." Thomas Nagel, What Is It Like to Be a Bat?, in THE NATURE OF CONSCIOUSNESS: PHILOSOPHICAL DEBATES 519 (Ned Block et al. eds., 1997).

As he points out, we cannot imagine what it is like to be a bat and to echolocate (bats' radar-like capacity by which they orient themselves through sensing the pattern of bounced sound waves) because "imagining additions to [one's] present experience, or . . . imaging segments gradually subtracted from it, or by imagining some combination of additions, subtractions, and modifications" are simply "inadequate to the task." Id. Being a bat involves a mode of representation that is inconceivable to human beings. We can have no idea how representing the world through echolocation "feels." For a more exhaustive analysis of the philosophical implications of Nagel's subjective reality, see THOMAS NAGEL, THE VIEW FROM NOWHERE (1986).
wants, and emotions.\textsuperscript{112} Another way to describe consciousness-p is as the "global workspace," a focus through which all of an actor's desires and beliefs can interact.\textsuperscript{113} Baars describes consciousness-p as a theater in which a variety of "expert systems" converge, the place in which retrieved images, retrieved memories, and words interact, and conscious problem solving and practical reasoning occur.\textsuperscript{114}

Human beings can access and report on their propositional attitudes and, therefore, can be said to be conscious-a of them. It is also possible for human beings to have consciousness-p of propositional attitudes. This occurs when they appear in our stream of consciousness, when we introspect or verbalize them, or "think in words."\textsuperscript{115} Which does the criminal law require? What type of consciousness renders an actor culpable?

On one hand, it would seem that the law only requires consciousness-a. This is because we almost always have access to our beliefs, desires, and intentions and are therefore culpable for them. More importantly, if consciousness-p were required, then actors would only be culpable for those few actions that are ever performed in consciousness-p. People do not go around saying to themselves or others, "Now I will take a step," or "Now I will pull a trigger," or even "Questo la bacio di Tosca!"

On the other hand, the problem of dissociate or highly traumatic states suggests that consciousness-p is required for culpability. As discussed in the Introduction, the unconscious or somnambulistic murderer could conceivably answer questions about what he or she was doing (and therefore have consciousness-a), yet most jurisdictions would hold such an actor innocent.\textsuperscript{116} Similarly, even individuals under extreme emotional or physical distress generally can report on what they are doing. For instance, in the famous case of People v. Newton,\textsuperscript{117} Huey Newton, the renowned political activist, claimed that after being shot in the abdomen by a policeman, he "unconsciously" responded in kind.\textsuperscript{118} If someone were present at the inci-

\textsuperscript{112} Block, supra note 107, at 380.
\textsuperscript{114} Id. at 189.
\textsuperscript{115} Eric Lonnand provides a useful taxonomy of consciousness-p, specifying a "quartet" of types of consciousness-p.

For many conscious states, there is clearly something it's like for us to have them:

(i) conscious perceptual representations, such as tastings and visual experiences,
(ii) conscious bodily sensations, such as pains, tickles and itches,
(iii) conscious imaginings, such as those of one's own actions or perceptions and
(iv) conscious streams (or trains) of thought, as in thinking 'in words' or 'in images.'

Eric Lonnand, Nonphenomenal Consciousness, 30 NoEs 242-261 (1996). Lonnand concludes that we are not conscious-p of propositional attitudes, which we possess but are not present in streams of thought. Legal mental state is concerned with the fourth category.

\textsuperscript{117} 87 Cal. Rptr. 394 (Cal. App. 1970).
\textsuperscript{118} Newton, 87 Cal. Rptr. at 403.
dent and asked the incapacitated Newton, "What are you doing?" he may have responded, "I'm shooting the policeman." It is clear then that criminal actors can have consciousness-a, but not be criminally liable.119

There seems to be an impasse. If consciousness-p cannot possibly form the basis for criminal liability, why should it matter when actors like Huey Newton cannot bring their intentions into a complete consciousness-p? The answer to this conundrum lies in the realization that we can only be held culpable for those intentions that we can reasonably be expected to access given the circumstances. Under most circumstances, we can access the intentions that concern our actions. Consciousness-a implies consciousness-c. Just as, under Wallace's argument, actors have moral responsibility if they have the ability to exert "reflective self-control," under consciousness-c, actors have responsibility if they have the ability to bring culpable intentions into consciousness-p. There are, however, times when human beings simply cannot be expected to have a complete inventory of their mind's content. Under sufficiently traumatic situations, the law excuses an actor from consciously comprehending her actions in consciousness-p.120

By requiring relatively easy access in consciousness-p for culpability, consciousness-c reflects the strong notion that consciousness-p is the hallmark of personal identity. An actor is "present" when he can consider an action in consciousness-p. Actors who lack culpability because of a lack of consciousness, like hypnotics or somnambulists, have consciousness-a. If asked, they could provide reasons or justifications for their actions. However, even if they were to respond in a dream-like voice, "I intend to murder X," they would not be culpable because their consciousness-p was compromised. Their spoken or introspected intention would not have been "heard" by their true consciousness because their consciousness-p was impaired.

There does not appear to be a further justification for making consciousness-p a requirement for personal identity. It is almost a matter of definition; as Locke said, consciousness is required for personhood.121 While not expressing a view on the matter, it seems at least possible that treating consciousness-p as the hallmark of personhood is a culturally determined position. Other types of consciousness could define personhood, and some have argued that in the ancient past individuals did understand consciousness and personhood in radically different ways.122

We can now define what it means to have consciousness-c of a particular intention. Consider the somnambulist who, upon waking, recalls his intention that accompanied his act to murder his wife. Such an actor, though he arguably "had" the intention to murder, could not have reasonably

119. See id. at 405-06.
120. See WALLACE, supra note 6, § 6.2.
121. LOCKE, supra note 81, at 466-67.
brought the intention to consciousness-p; we do not expect sleeping people to be fully aware of their actions. Because the somnambulist does not have that ability, he could not be said to have grasped that criminal intention. To use Wallace’s terms, he lacked part of his reflective self-control that could directly influence his actions.\footnote{123 See \textit{Wallace}, supra note 6, § 6.2.} Like Wallace’s requirement for general culpability, namely that actors must have the ability to deliberate about and be influenced by reasons, consciousness-c requires that, in order for an actor to be said to act with a particular criminal intention, he must have the ability to deliberate about and be influenced by such criminal intention.\footnote{124 Id.} He need not deliberate about such intention, but he must have the ability to do so.

Consciousness-c clarifies the various “freakish” cases involving somnambulists and comatose individuals that have challenged courts and commentators to justify why defendants in these cases lack culpability. Somnambulists and comatose individuals cannot be reasonably expected to bring criminal intentions into their standard consciousness-p. Similarly, one need not make claims about whether the unconscious actor can comprehend the nature and quality of his act,\footnote{125 See \textit{Carter v. State}, 376 P.2d 351, 358 (Okla. Crim. App. 1962).} lacks knowledge of the deed,\footnote{126 See \textit{People v. Higgins}, 159 N.E.2d 179, 184 (N.Y. 1959).} or can form an intention.\footnote{127 See supra text accompanying notes 33-35.} Regardless of whether the actor knew the nature of his act or could recall it, all would agree that at the time the act was performed, his knowledge about the act could not influence his actions in a way that would permit reflective self-control.\footnote{128 See \textit{Wallace}, supra note 6, § 6.2.}

Consciousness-p, therefore, agrees with the courts that speak about unconsciousness as depriving an actor of the power of choice. A choice for which actors bear responsibility requires (i) the powers of reflective control (the ability to be directly influenced by reason) and (ii) the power to conduct such reflection in the actor’s normal consciousness-p. Unconscious actors cannot choose because it is not clear whether one can reflect in the unconscious. Further, even if you allowed some sort of dynamic unconsciousness, such reflection would not “belong” to actors under accepted notions of personhood if it were not accessible in their normal consciousness-p.

Finally, consciousness-c contains a normative content. When we speak of the ability to bring reason or intention into consciousness, the ability is always relative to the circumstances. Under most circumstances, although we do not think to ourselves, “Now I will take a step, now another, now I will shoot my tennis opponent,” we have the ability to bring those intentions into consciousness-p. Thus, as stated above, consciousness-a is generally equivalent to consciousness-p. Under other conditions, it is more difficult to equate the two.
Some intentions or reasons are easy to access—they exist on the tips of our tongues. Others require a moment of reflection—the husband who pulls back his hand as he is about to hit his wife and then cries, "My God, what am I doing?" Still others may require waking from a trance or psychoanalysis to access. The question of what actors could potentially access has different answers under different conditions. We expect actors under some conditions to have greater cognitive awareness than under other conditions. In everyday life, we would expect that actors should be able to access the intentions for their actions. When actors are in trances, we would not expect them to have such access. When actors have a known history of sleepwalking and attempting murder while doing so, we might expect them to gain consciousness of their murderous intentions through some sort of watcher or alarm clock.

This normative judgment—how much cognitive awareness we expect under a given condition or circumstance—yields more interesting results in crimes that involve gradations of consciousness, like first- and second-degree murder. These two classifications of murder will be discussed in the next Part.

III. FIRST- AND SECOND-DEGREE MURDER

Over the last few centuries, courts have developed more gradations of mental state for homicide than for any other crime. There is first-degree murder, which is intentional but requires "premeditation," and second-degree murder, which is also intentional but does not require "premeditation." Then there is voluntary manslaughter, which is "the intentional killing of a human being in the sudden heat of passion resulting from a sufficient legal provocation," though some courts claim that the heat of passion destroys the intention. There is also involuntary manslaughter, or negligent homicide, which is not an intentional crime at all. These mental state gradations have spawned a prodigious heritage of legal confusion.

Perhaps most difficult of all has been the distinction between first- and second-degree murder. The distinction has its roots in the statutory reform of common law murder, a reform that began in the eighteenth century with The Pennsylvania Act of 1794. This statute provided that "all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any kind of wilful [sic], deliberate and premeditated killing . . . shall be deemed

131. LAFAYE & SCOTT, supra note 7, § 7.10 at 254 ("The passion must be so great as to destroy the intent to kill, in order to accomplish the reduction of the homicide to voluntary manslaughter.").
132. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, § 31.10[D], at 544 (3d ed. 2001) ("A criminally negligent homicide—[is] involuntary manslaughter at common law . . . .").
133. See Pauley, supra note 9, at 161 ("Courts have had considerable difficulty with the premeditation formula for first degree murder—difficulty in defining the term, in sticking to one definition of it, and in applying that definition clearly and consistently.").
134. 1794 Pa. Laws ch. 257.
murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree." The Pennsylvania codification became a model for most states. The majority of states continue to have degrees. Under the standard formulation, first-degree murder requires "willful, deliberate, and premeditated" action, while second-degree murder only requires intentional action. Cases that explicate first-degree murder usually interpret premeditation as actual reflection. First-degree murder requires "coolness, calm reflection."

The problem that has plagued the distinction between first- and second-degree murder is practical. How much premeditation is required? If premeditation can occur a second before—or even simultaneous with—the act, then first-degree murder collapses into second-degree murder. The only difference between the two crimes becomes a tiny blip in the stream of consciousness. A thought can hover in consciousness—a and can be highly determinative of action, yet never enter consciousness—p. Why should liability be different in these two cases?

As a result of this problem, sometimes courts eliminate the requirement for deliberation in consciousness—p, as in State v. Schrader, which concluded that "what is really meant by the language 'willful, deliberate and premeditated' . . . is that the killing be intentional." On the other extreme, in People v. Anderson the California Supreme Court read premeditation to mean not only premeditated thought but careful planning as well.

This problem has led most commentators to reject the distinction. Notably, Benjamin Cardozo recognized this confusion early in the twentieth century. "To deliberate and premeditate within the meaning of the statute, one does not have to plan the murder days or hours or even minutes in advance . . . The law does not say that any particular length of time must intervene between the volition and the act."

---

135. MODEL PENAL CODE § 210.6 cmt. 4(b) at 123 (1980) (citing 1794 Pa. Laws ch. 257, §§ 1, 2).
136. Pauley, supra note 9, at 146.
137. Id. at 146; see also DRESSLER, supra note 132, § 31.03[B][1], at 508.
138. People v. Thomas, 156 P.2d 7, 18 (Cal. 1945); Russ, supra note 15, at 963 ("Despite the criticism of legal commentators, many courts continue to speak in terms of malice "aforethought," "premeditation," "deliberation," and the like, in defining first-degree murder."). For criticism of recent efforts at reform, see Hobson, supra note 15, at 517.
139. Thomas, 156 P.2d at 7, 18 (stating that premeditation requires "substantially more reflection than may be involved in the mere formation of a specific intent to kill"); Baker v. State, 632 A.2d 783, 794 (Md. 1993) ("Premeditated means that the defendant thought about the killing and that there was time . . . to form the intent to kill"); State v. Guthrie, 461 S.E.2d 163, 182 (W. Va. 1995) (first-degree murder is "a ruthless, cold-blooded, calculating killing. Any other intentional killing, by its spontaneous and nonreflective nature, is second degree murder.").
140. Pauley, supra note 9, at 154 (setting forth the Schrader/Anderson dichotomy).
141. 302 S.E.2d 70 (W. Va. 1982).
142. Schrader, 302 S.E.2d at 75.
143. 447 P.2d 942 (Cal. 1968).
144. Anderson, 447 P.2d at 949.
145. Cardozo has stated:

I think the distinction [between first- and second-degree murder] is much too vague to be continued in our law . . . The presence of a sudden impulse is said to mark the dividing line,
nett might argue, so stretches verifiability that it cannot be treated as a real empirical fact. 146 Compare the actor who correctly remembered premeditating murder with the actor who remembered premeditating a murder that did not occur. How could the law distinguish the two? Similarly, would it be fair to convict a defendant of first-degree murder who did premeditate, but honestly fails to remember, the premeditation?

Beyond questioning the evidentiary basis for the distinction, legal commentators have questioned its moral justifications for more than a century. Representing mainstream legal thought, the Model Penal Code’s drafters argued that “judicial inconsistency and obscurity are largely symptomatic of the lack of an intelligible policy underlying the” degree classification. 147 The drafters rejected dividing murder into degrees because the generalization “that the person who plans ahead is worse than the person who kills on sudden impulse” is not sound. 148 While it is the case that some killers who reflect beforehand are in fact more blameworthy than some who kill impulsively, it is also the case that some who kill impulsively are, in fact, more blameworthy than some reflective killers. 149

Consciousness-c questions these conclusions. Clearly, if consciousness is required for culpability, and if consciousness is a continuum, then greater consciousness entails greater culpability. The justification for this argument, as discussed supra, rests firmly upon our notions of choice and personhood. 150 Premeditation is perhaps the classic example of consciousness in which “all of you” is present. It involves the presentation of one’s beliefs, desires, and intentions in consciousness-p that, as discussed supra, are the hallmark of personal identity, providing the focus where presumably all of one’s beliefs, desires, and intentions can interact. 151 Not surprisingly, first-degree murder carries the greatest punishment. 152

The current degree murder formulation assumes that only premeditated murder involves the most heightened type of consciousness in which all of one’s beliefs, desires, and intentions can come into play and influence behavior. Consciousness-c questions this assumption. Consciousness implicates culpability because only in consciousness can it be said that reflective self-control occurs. Consciousness-c points out that intentions that are easily brought into consciousness-p can exert the same degree of influence and “reflective control” over behavior as those actually in consciousness-p. Provided it is reasonable to expect an actor to call his culpable intention into

---

147. MODEL PENAL CODE § 210.6 cmt. at 126 (1980).
148. Id. § 210.6 cmt. at 127.
149. See id. § 210.6 cmt. at 127-28.
150. See discussion supra at Part II.B.
151. See discussion supra at Part II.B.
152. MODEL PENAL CODE § 210.6 (1980).
consciousness-p, there is culpability. Actual presentation in consciousness is simply not necessary. Premeditated intentions, therefore, are morally equivalent to those intentions that reasonably could be brought into consciousness.

Consciousness-c would greatly expand first-degree murder. It would no longer include only premeditated murder, but also murder in which we would expect an actor to premeditate. This expansion easily answers the Model Penal Code's rejection of the murder degree distinctions. The Code reasons that because the person who plans ahead is not necessarily worse than the person who kills on sudden impulse, premeditation should not be an issue in murder. Consciousness-c responds that premeditation itself does not make an actor more blameworthy. But the reasonable expectation to premeditate—to bring to consciousness-p and think about it—indeed makes an actor more culpable. The Code could only refute consciousness-c by arguing that consciousness is irrelevant to culpability, which it explicitly does not do. To the contrary, the Code recognizes that consciousness is essential to culpability.\footnote{153}{The Model Penal Code finds that unconscious acts cannot render the actor morally culpable, but its reasoning is unsound. The Code claims that unconscious acts are not "voluntary acts." \textit{MODEL PENAL CODE} § 2.01(2)(b) (1985).}

Consider the example of the cold-blooded murderer who simply walks by a child sitting on a bridge and pushes the child off the bridge without thinking or deliberating, forwarded by a famous foe of the premeditation doctrine.\footnote{154}{\textit{3 J. Stephen, History of the Criminal Law of England} 94 (1883).} Under consciousness-c, an actor who reasonably could be expected to deliberate upon his intention—such as the childusher—would be just as culpable as if he had premeditated. Consciousness-c, therefore, preserves the obvious notion that increased consciousness increases culpability—a point that the Model Penal Code's drafters unconvincingly try to refute. Consciousness-c accommodates the Code's drafters' correct observation that premeditation itself does not necessarily make an intentional killing any worse than another intentional killing.

Consciousness-c, of course, resolves the evidentiary and conceptual distinction between first- and second-degree murder that Judge Cardozo found to be "a mystifying cloud of words . . . [that] is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it."\footnote{155}{\textit{Id.}} Cardozo understood the distinction as "merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy."\footnote{156}{\textit{Id.}} Under consciousness-c, actions that result from a sudden or vehemence passion would be analyzed by the degree to which such passion would alter our expectations that an actor could reasonably bring an intention into consciousness-p.
This normative content of consciousness-c is, as Cardozo might say, an exercise of mercy, for it realizes that under some circumstances, as in the case of sleepwalkers, it is very difficult to bring an action into consciousness-p. Under those circumstances, one’s capacity for reflective control is highly compromised; we would have no expectation that human beings would deliberate about their actions. Without such an expectation, actors cannot be faulted for failing to do so.

Consider this example:

Two men have a heated argument while drinking. A knife happens to be on the table. One man picks up the knife and stabs the other. Under the traditional model, the defendant could argue that only voluntary manslaughter was involved, particularly if there was no physical battery or other similar provocation. However, if only a verbal altercation occurred, which is not adequate provocation under the laws of most states, the prosecution would probably seek a higher penalty.157 Similarly, if the state followed the Model Penal Code-type distinctions, the defendant could claim “extreme emotional distress,” but again, that would be difficult given that the argument was only verbal.158

Because voluntary manslaughter would not be available, the defendant would likely be charged with either first- or second-degree murder. The question would be whether the defendant was guilty of first- or second-degree murder, a question that turns on whether, during the time preceding the attack, culpable thoughts passed through the defendant’s stream of consciousness. The jury would have to peer through Cardozo’s “cloud of words” to determine what premeditation means, and then determine whether the defendant premeditated—a difficult and intractable question which, more often than not, would simply be guess work.159

On the other hand, consciousness-c simply asks the jury, given that the action was intentional (the defendant had consciousness-a of his murderous intention), we would expect him, under the circumstances, to exhibit a higher level of reflective control. The jury could consider all factors reasonably related to our expectations. These factors might include the length of time during which the actor could deliberate, the nature of the fight—whether it was provocative enough to render cognition or reflection, more

157. Commonwealth v. Masello, 702 N.E.2d 1153, 1155 (1998) (stating that even a heated argument does not “constitute adequate provocation” warranting a voluntary manslaughter instruction); see also LaFave & Scott, supra note 7, § 7.10 at 657.

158. See State v. Crisantos (Arriagas), 508 A.2d 167 (N.J. 1986) (holding that absence of any evidence in the record of “passion” or extreme emotional disturbance coupled with very slight evidence of provocation, consisting of verbal abuse and an attempt to strike the defendant, warranted denial of a passion or provocation jury charge).

difficult though not enough, to warrant a complete manslaughter-provocation defense—the extent of drinking, or whether the defendant had a history of drinking or violence and should have known its effects.

IV. NORMATIVE JUDGMENTS: CONSCIOUSNESS & MOTIVATION

Numerous scholars have asserted recently that the law, particularly the law of murder, contains unrecognized moral judgments. Kahan and Nussbaum have argued that the law contains judgments about actors' motivations. They criticize various doctrines in the criminal law because the "prevailing explanations of these doctrines are inadequate precisely because they overlook the influence of the evaluative conception." Kahan and Nussbaum argue that we judge people largely by their motivations, not simply by whether they follow a rule. This general insight is uncontroversial. Actors whose motives are considered "good" or "noble" receive more lenient treatment than those with baser motives. Many, for instance, consider the physician mercy-killer morally superior to the hit man, though both commit murders that are equally premeditated. During sentencing, judges often consider motivation. Kahan and Nussbaum argue that the law's hidden judgments concerning motivating emotions should be made more explicit, even reflected, in legislation or sentencing practices. They claim that this explicit recognition will make the doctrine of premeditated murder clearer. While a complete refutation of their position requires a defense of act-based criminal law, a task well beyond this Article's scope, the following briefly discusses differences between consciousness-c and Kahan and Nussbaum's proposal, and suggests that consciousness-c may offer a more coherent reform.

As a starting point, Kahan and Nussbaum claim that the distinction between first- and second-degree murder is "one of the great fictions of the law." They claim that the distinction is fictitious because "[m]any jurisdictions do not require any evidence of advance planning or thought to establish [premeditation]." In many jurisdictions, premeditation can occur in an instant because "no time is too short . . . for a wicked man to frame in

---

160. See, e.g., id.
161. Id.
162. Id. at 301.
163. Id. at 359.
164. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 (Hate Crime Motivation or Vulnerable Victim) (Nov. 2000).
166. Id. at 371-72.
167. See id. at 324.
168. Id.
his mind his scheme of murder. . .”169 Following Cardozo, they find the distinction simply too fine to be meaningful.170

That claim is tendentious. Just because premeditation can exist in a moment—the sentence that picks out the propositional attitude that reflects a criminal intention can enter consciousness-p in a moment—does not mean that distinctions that rely upon this phenomenon are fictitious. They may present fine evidentiary issues, as Cardozo argues, or are perhaps unverifiable to the point of meaninglessness, as Dennett might argue. But they are not fictitious.

In comparison, consciousness-c agrees that there are unrecognized moral distinctions between first- and second-degree murder but does not believe the distinction is fictional. The distinction is real and reflects the judgment that those with increased consciousness are more culpable. Consciousness-c argues that premeditation is simply an underinclusive category for crimes committed in “heightened consciousness” and first- and second-degree murder should be reformed to better reflect this distinction. The difficulty that the distinction has created stems from, as Cardozo recognizes, its evidentiary challenges—who can tell when an actor premeditates?171 Naturally, this difficulty has led to confusion. As discussed above, however, consciousness-c, an explicit moral judgment, eliminates this confusion.

Let us grant, arguendo, that the distinction is indeed fictional. To Kahan and Nussbaum the distinction’s fiction is not a criticism, but a strength. They assert, “the fictional conception of premeditation is in fact perfectly coherent under the evaluative view.”172 Under their evaluative view, premeditated murder can be defended on the grounds that it is a “passionless” killing, which is more morally repugnant than a murder committed “when not motivated by a strong emotional valuation.”173 This, however, is an overbroad generalization. Premeditated murder includes more than the cold, calculating murderer. Those who murder under strong emotion—not the type of emotion that would warrant prosecution for voluntary manslaughter—can be prosecuted for premeditated murder.174 Therefore, under the traditional formulation, premeditated murder need not be cool and calculated. Rather, “heated” premeditation, falling short of legally sufficient provocation, constitutes first-degree murder.175

Fundamentally, consciousness-c suggests that the moral justification for treating premeditation as a more evil crime is not, as Kahan and Nussbaum would argue, the moral judgment that passionless killing is worse than emo-

169. Id.
171. Id. at 325-26.
172. Id. at 325.
173. Id.
174. Under common law, voluntary manslaughter was limited to a few situations, such as battery, mutual combat, assault, illegal arrest, and adultery. LAFAVE & SCOTT, supra note 7, § 7.10 at 655-57.
175. Id. at 653-57.
tionally motivated killing. Rather, premeditation rests on the considera-
tion that those who have a greater consciousness of their actions are more
culpable. Premeditation places the maxim of one’s action squarely in con-
sciousness. Actors whose moral reasoning does not kick in under such cir-
cumstances are more culpable than those who never premeditate, and
thereby fail to present squarely their action’s maxim to their powers of ra-
tional, moral control. Consciousness-c only modifies the traditional applica-
tion of this insight by pointing out that heightened consciousness is not nec-
essarily coextensive with premeditation.

Kahan and Nussbaum further argue that premeditation, as a fiction, in-
cludes those who do not truly premeditate and functions “as a placeholder
for the sum total of the decisionmaker’s moral intuitions, which can then be
freely brought to bear on the facts of each particular case.” They invite
legislatures and courts to punish more harshly those “types of murders . . .
[with] especially heinous emotional motivation” as first-degree murder.

While a complete refutation of their position requires a defense of the
act-based, as opposed to character-based, criminal law—something well
beyond this Article’s scope as mentioned, supra—it would be appropriate to
voice a few tentative concerns with the Kahan-Nussbaum proposal. First, in
the broadest terms, the difference between consciousness-c and the Kahan-
Nussbaum proposal is primarily one of time frame and control mechanism.
Kahan and Nussbaum fault actors for those character flaws that cause their
criminal conduct. Actors should be punished not just for intending to do
particular prohibited things, but also for their broader aims, goals, and de-
sires. Kahan and Nussbaum would have juries look to the murderers’ deeper
motivations, holding an actor liable for character flaws with deep childhood
roots. They want actors held responsible for these flaws, and they want ac-
tors to be required to control their behavior by modifying and ameliorating
these flaws. Consciousness-c, on the other hand, faults actors for their in-
tended acts, holding them responsible for failing to use their powers of ra-
tional control to refrain from certain acts that fall within reasonable expec-
tations of human cognitive capacity. It does not look to an actor’s past life
or future goals but simply asks to what degree was it possible for an actor to
be conscious of the maxim of some prohibited act in a given situation.

The narrower focus of consciousness-c is more fair and consistent with
the view of human beings as free actors. People often have great trouble
controlling their motivations and desires. Many of the vices associated with
criminality, like anger, alcoholism, and drug use, are notoriously difficult to
control or modify. Indeed, we do not choose our motivations and desires

176. See Kahan & Nussbaum, supra note 159, at 323-27.
177. Id. at 326.
178. Id. at 327.
179. See id. at 326.
180. An action can be considered simply a willed bodily movement. Moore, Act & Crime, supra
note 20, at 126.
181. See Martin E.P. Seligman, What You Can Change . . . And What You Can’t 130-31,
in the sense that we can choose to perform a particular action. While we can choose an action (i.e., a simple, voluntary bodily motion), we cannot choose the reason why we perform that action. On the other hand, actors, even unfortunate characters prone to violence or drug use, certainly have the ability through rational self-control to refrain from the basic prohibitions found in the criminal law. Most alcoholics with violent tendencies do not commit crimes—not because they lack impulses to do so but because they are sufficiently receptive to reasons not to do so. Punishing the failure of rational control therefore seems much fairer, considering most people have the ability to control their behavior in accordance with reason.

Second, while consciousness-c aims to reduce evidentiary difficulties, the Kahan-Nussbaum approach appears to aggravate such problems. Their approach would replace the confusing distinction between first- and second-degree murder with the confusion caused by turning jurors into courtroom psychoanalysts, attempting to divine a defendant's motivations. Consider a hypothetical, which, appealing to the liberal standards of law school hypotheticals, hopefully will not unduly strain the reader's credulity: The same two men that appeared in Part IV, Mr. X and Mr. Y, are arguing and drinking. During the course of the argument, Mr. X, who moonlights as a hit man, informs Mr. Y, the other man, that Mr. X is having an affair with Mrs. Y and that Mrs. Y, after helping him perform a hit, has decided to leave Mr. Y and begin a full-time hit-person career as Mr. X's associate. Mr. X leaves, and Mr. Y then murders his wife.

Under the Kahan-Nussbaum proposal, the fact-finder would have to ascertain Mr. Y's motivation—anger (arguably sexist and misogynistic) that his wife had committed adultery and was leaving him, general orneriness, drunkenness, or righteous indignation against premeditated murderers. This seems quite an order compared to consciousness-c's modest requirement: under the conditions, would we expect Mr. Y to have a consciousness capable of reflective control.

Finally, Kahan and Nussbaum claim that their proposal corrects the first-degree, second-degree distinction's "obscure evaluation." Yet, as the above hypothetical suggests, determining the comparative moral worth of various conceivable goals motivating the defendant seems equally, if not more, obscure. Kahan and Nussbaum want courts to engage in a "two-step[]" process whereby they ascertain "emotional motivations" and then evaluate the actor's responsibility for his character. They argue that juries determine not only what motivations inspire an action, but the myriad motivations' comparative moral worth (or repulsiveness). Additionally, they argue that juries should determine the actor's responsibility in being the type of person who has such motivations. Kahan and Nussbaum realize that

220-21 (1993) ("I'm not sure [anger can be changed] ... the problem [of alcoholism and drug abuse] is certainly not incurable, but the outlook is not rosy.").

182. See Kahan & Nussbaum, supra note 159, at 325-27.
183. Id. at 367.
their position is open to the objection that it creates an awkwardly complex decisional structure, but dismiss the objection as "obtuse," arguing that moral decisions are complex.\textsuperscript{184}

In its simplicity, consciousness-c differs from the Kahan-Nussbaum approach. It does not ask courts to determine the moral worth of each defendant's character. Rather, it assumes that the criminal law only prohibits acts of such egregiousness that they are blameworthy if committed by virtually any actor under any motivation. Under consciousness-c murder is virtually always evil, save in those extreme situations that arguably prove the rule.\textsuperscript{185} Consciousness-c's moral judgment is quite confined, asking courts only whether the circumstances warrant a lower expectation of the defendant's reflective control to follow a rule.

\section*{CONCLUSION}

This Article has (1) argued that consciousness, not having or acting with a particular mental state, is the correct condition for culpability; (2) defended consciousness as culpability's \textit{sine qua non} because it—and not mere possession of mental state—is required for personal identity and responsibility; (3) defined the level of consciousness that is required for culpability—consciousness-c; and (4) showed how consciousness-c provides a clearer understanding of first-degree murder. The application of consciousness-c is not limited to elucidating the degrees of murder. It can be used in various other problems in the law, like voluntary manslaughter and corporate criminality.\textsuperscript{186}

\textsuperscript{184} Id.

\textsuperscript{185} The famous case of \textit{Regina v. Dudley & Stephens} stands as an exception that proves the rule. Regina v. Dudley & Stephens, 14 Q.B.D. 273 (1884), \textit{reprinted in part in Stephen H. Kadish & Stephen S. Schulhofer, Criminal Law and Its Processes} 114 (5th ed. 1989). In that case, several castaways in an open boat, including Dudley and Stephens, agreed after solemn deliberation that their survival required killing a sick, delirious companion, who was clearly near death anyway, and consuming his body. Dudley and Stephens arguably committed a mercy killing for the best reasons—saving other lives. A difficult case, and perhaps a situation for mercy—though arguably not, as the reviewing court upheld their convictions. The case shows, at least, the extremes to which we must go to find a situation in which worthy motivations could render murder in consciousness-c morally acceptable.

\textsuperscript{186} Adam Candeub, \textit{Corporate Consciousness and Corporate Culpability} (Sept. 15, 2002) (unpublished manuscript, on file with author).