

# FORGETTING FREUD: THE COURTS' FEAR OF THE SUBCONSCIOUS IN DATE RAPE (AND OTHER) CASES

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## I. *Introduction*

Forensic linguistics - - the study of the inter-relationship between language and the law<sup>1</sup> - has come into its maturity in the last few years.<sup>2</sup> Progress has especially been made in understanding the ways in which language use reproduces gender inequalities, notably in sexual assault trials.<sup>3</sup> Yet, while academic study in this area has blossomed, this field of research has had little impact on the actual operation of date rape trials. This article in part seeks to explain why. That explanation - - that courts fear and misunderstand the subconscious mind - - it turns out, however, has broader significance for how courts understand much of the substantive criminal law and the law of evidence. This article thus uses judicial attitudes toward one category of social science evidence, forensic linguistics, as a case study for examining a far more pervasive problem of criminal justice.

After this Introduction, Part II offers a whirlwind tour of the role of language in date rape cases. There is little dispute among social scientists about two aspects of the connection

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<sup>1</sup> Here I use a broad definition of what it means to call something a “forensic” social science. *Cf.* G.H. GUDJONSSON & L.R.C. HOWARD, FORENSIC PSYCHOLOGY: A GUIDE TO PRACTICE 1 (1998) (comparing two definitions of “forensic” psychology, a broad one meaning “activity at any one of the many interfaces between psychology and law,” thus “touch[ing] on almost every aspect of psychology remotely connected with law,” and a narrow one meaning “that branch of applied psychology which is concerned with the collection, examination, and presentation of evidence for judicial purposes.”). The term “forensic linguistics” as used here thus includes using language and the law research to design or modify legal institutions *and* presenting expert evidence in the courtroom on matters of language that are relevant to resolving a particular legal dispute. Further exploration of terminological debates would do little to advance or clarify the central points that I seek to make here: that legal decisionmakers fundamentally misconceive the role of the subconscious in creating moral and criminal culpability.

<sup>2</sup> *See generally* JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS: LAW, LANGUAGE AND POWER (1998).

<sup>3</sup> *See, e.g., id.* at 15-38; DEBORAH CAMERON & DON KULICK, LANGUAGE AND SEXUALITY (2003); JANET COTTERILL, LANGUAGE AND POWER IN COURT: A LINGUISTIC ANALYSIS OF THE O.J. SIMPSON TRIAL (2003); GREGORY MATOESIAN, LAW AND THE LANGUAGE OF IDENTITY: DISCOURSE IN THE WILLIAM KENNEDY SMITH RAPE TRIAL (2001) [hereinafter MATOESIAN, LAW AND IDENTITY].

between language use and jury verdicts in such cases. First, women are generally perceived by jurors as using “women’s language” - - a language of hedged words, imprecise description, and subservient tones - - whether or not they in fact use that supposed language. Yet speakers of this language are generally perceived as less competent and credible than those speaking “men’s language.”<sup>4</sup> Second, jurors craft rape case narratives from the stories they hear in novels, movies, and television programs, stories that often add to the impression that the victim is either confused or lying. These two effects - - of gendered language use and gendered narratives - - work primarily at the subconscious level, jointly leading even the most “feminist” of jurors to disbelieve the victims of date rape.<sup>5</sup>

Numerous solutions to this problem of subconscious gendered linguistic bias have been proposed, including expert testimony and jury instructions on the subject, victim testimony uninterrupted by objections, and linguistic “intermediaries” to translate defense counsel questions into less dominating forms without destroying the sting of truly truth-probing cross-examination. Yet this largely undisputed science, and the various proposed solutions, have received nearly no attention from courts or legislatures. Why? Although this near-complete inattention may be unusual, it turns out that law-making, law-interpreting, and law-applying governmental actors tend to resist any legal insights that turn on understanding the subconscious mind and its implications for legal reasoning. Judges in particular show such resistance, with the important exception of cases in which the law expressly makes a conception of the subconscious as dangerous and diseased legally relevant. This is true, for example, of the insanity defense in criminal cases.<sup>6</sup>

The judicial reticence to wrestle with the subconscious, I argue, requires understanding the difference between everyday or “folk” conceptions of the subconscious and the scientific

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<sup>4</sup> See *infra* text accompanying notes 21 - 40.

<sup>5</sup> See *infra* text accompanying notes 41 - 55.

<sup>6</sup> See *infra* text accompanying notes 76 - 77.

conceptions. Part IIIA explores the folk understanding of the subconscious and its consequences for the substantive criminal law and the law of evidence. The primary elements of the folk subconscious, which also constitute the elements embraced by the law, are these: (1) the conscious and subconscious minds are distinct entities, the former being rational, the latter being diseased; (2) the interaction between the two is uni-directional, flowing from the subconscious to the conscious but not vice-versa, and with the conscious unaware of, and unable to resist, the influence of this flow; (3) the inaccessibility and inscrutability of the subconscious mind means that only experts can access it or influence it, yet even their interpretations of such a mysterious, ambiguous entity are highly suspect; and (4) even if we could access and understand it, those might be unwise tasks because what we would uncover would be both frightening and dangerous. Accordingly, the law should focus on what it can understand and trust: the relatively rational, clear thinking of the conscious mind.<sup>7</sup>

The consequences of the law's infusion with this flawed folk idea of the subconscious mind are unfortunate. Because the subconscious is seen as dangerous to our "true," conscious self, robbing it of its rational autonomy - - the free will that makes us responsible for what we do - - we are *not* fully responsible for crimes *caused* by our subconscious. Doctrines like the insanity defense, diminished capacity, and imperfect self-defense in part reflect this insight.<sup>8</sup>

Correspondingly, however, it makes no sense to permit the prosecution to prove subconscious mental states as part of its case-in-chief because this "lower" mind can only *help to relieve*, not impose, criminal responsibility. Even for the defense, arguments rooted in a vision of the subconscious as only partially diseased, such as the "abuse excuses," often do not fare well, particularly when they suggest that society, not merely the accused, bears some responsibility for the defendant's actions. Similarly, outside the extremes of the

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<sup>7</sup> See *infra* text accompanying notes 66 - 81.

<sup>8</sup> See *infra* text accompanying notes 66 - 81; ELLEN PODGOR, ET AL., CRIMINAL LAW AND PRACTICE 645-55 (2005).

insanity and cognate defenses, experts about the subconscious human mind, from therapists to experimental psychologists, are distrusted.<sup>9</sup>

Relatedly, judges generally privilege the conscious and the concrete. For example, judges deny challenges to jurors for cause when circumstances suggest that the jurors likely harbor a subconscious bias against the accused, so long as the potential jurors consciously conclude, and thus publicly declare, that they can be fair.<sup>10</sup> Judges likewise fear efforts to build subconscious empathy between jurors and defendants or witnesses, such as by “race-switching” instructions that ask parties to get in touch with their often unacknowledged racial biases by imagining the crime’s occurring with the races of the victim and the accused reversed. Judges also display conflicting attitudes toward the role of narrative, recognizing that lawyers must consciously craft good tales but resisting efforts to cure the subconscious effects of prevailing cultural narratives. Furthermore, judges place more faith in the conscious expressions of trial witness’s thoughts - - such as with eyewitness identifications - - than in experts’ analyses of subconscious processes, such as those rendering many eyewitness identifications suspect.<sup>11</sup>

Part IIIB contrasts the dominant folk vision of the subconscious with its scientific twin. Empirical data portrays the scientific subconscious as more a spectrum than a dichotomy. There are a range of mental states varying in the degree to which they approach, or are accessible to, conscious reasoning. Furthermore, the more subconscious layers of thoughts and feelings are better understood as stemming from multiple systems rather than a single

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<sup>9</sup> See *infra* text accompanying notes 76 - 86.

<sup>10</sup> See *infra* text accompanying notes 103 - 04.

<sup>11</sup> On the equivalent of “race-switching” as illustrated in Hollywood movies, see Andrew E. Taslitz, *The Jury and the Common Good: Synthesizing the Insights of Modern and Postmodern Legal Theories*, in FOR THE COMMON GOOD: A CRITICAL EXAMINATION OF LAW AND SOCIAL CONTROL 312, 330-32 (Robin Miller & Sandra Lee Browning ed.s 2004). See also CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 224-25, 248-49, 253, 255-59, 318 (2003). For a summary of the law and science on eyewitness misidentification, see ANDREW E. TASLITZ & MARGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE 788-809 (2<sup>nd</sup> ed. 2003).

“subconscious mind.” These multiple systems operate quickly, automatically, and short-sightedly, focusing on problems and dangers in the here-and-now.<sup>12</sup>

The conscious mind, by contrast, is a relatively more unitary entity, operating more slowly, and better able to plan for the future. Moreover, the conscious-subconscious relationship is bi-directional, each capable of influencing the other. Much conscious thought begins in the subconscious, though we are unaware of these roots, and though the conscious can often veto subconscious decisions before they become actions. Correspondingly, the ability of the conscious mind to plan means that we can be educated to make some subconscious operations - - primarily feelings and attitudes, as opposed to cognitions - - accessible to the conscious mind. Introspection can be a self-deluding means toward this goal, but paying close attention to how others perceive our behavior can often provide better clues to what our subconscious is doing.<sup>13</sup>

Perhaps even more importantly, our consciousness can alter our subconsciousness even when the former has no idea what the latter is doing. Notably, consciously collecting more information relevant to a decision can also educate the subconscious mind. Thus, if a man on a date decides to go slow, getting to know his female partner better over time, rather than acting on his initial belief that she is interested in intercourse, his subconscious is more likely to trigger “gut feelings” of discomfort where his belief may be in error; he is therefore less likely to press for sex when consent may be lacking.<sup>14</sup>

The subconscious also learns from our behavior, so if we behave as the man we want to be, such as acting like a man who truly cares about the wishes of his hoped-for sexual partner,

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<sup>12</sup> See *infra* text accompanying notes 124 - 38.

<sup>13</sup> See *infra* text accompanying notes 149 - 63.

<sup>14</sup> See *infra* text accompanying notes 176 - 90.

we become that man. The subconscious is more rigid in its ways than is the conscious, thus slower to change, but change it can and will.<sup>15</sup>

The bottom line is that conscious thoughts cannot be fully understood or divorced from subconscious ones, and the latter can be perfectly healthy and can be subject to the long-term control of the former. It therefore often makes little sense to see the subconscious as depriving us of free will or as being beyond the probings, responsibility assessments, and behavioral and character-changing incentives of the criminal law.<sup>16</sup>

Part IV explores the implications for the substantive and evidentiary criminal law of replacing the folk theory of the subconscious with the scientific one. One such implication is - - subject to a number of guarantees of reliability - - occasionally enhancing judicial receptivity to psychologists' "informed speculations" about the effect of a particular accused's subconscious mind on his conscious thoughts and behavior. Yet the case-specific proof problems concerning the subconscious mind's content that are exaggeratedly presupposed by the folk conception are nevertheless real. One way around this problem is to use knowledge of the subconscious mind to craft *objectiv*mental state elements as part of the substantive crime's definition.<sup>17</sup>

For example, much data suggests that many date rapists engage in self-deception about their victim's consent, consciously believing in it but subconsciously knowing otherwise. Yet they engage in cognitive strategies to block their conscious minds from learning the truth. A *mens rea* requirement that asks the jury to judge whether a non-self-deceiving male *would have been aware* of the woman's non-consent recognizes individual moral culpability for subconscious self-deceptive strategies but without judging whether *this particular offender*

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<sup>15</sup> See *infra* text accompanying notes 176 - 90.

<sup>16</sup> See *infra* text accompanying notes 176 - 90. On the purposes of the criminal law generally, see PODGOR, *supra* note 8, at 4-7.

<sup>17</sup> See *infra* text accompanying notes 194 - 99.

engaged in such self-deception. Although such a substantive criminal law strategy might mean punishing some small subset of men who in fact believed both consciously *and* subconsciously that the victim consented, Part IVA explains why this approach is nevertheless just, for it is most consistent with the presupposition of individual and societal deliberative capacities that is essential to the legitimacy of the criminal law in a democratic republic of free and equal citizens. Part IVA further defends the validity of this democratic vision in the face of the theory of “memes,” which posits that ideas are viruses that overtake our minds without our fully conscious choice, thus supposedly compromising our free will.<sup>18</sup>

Part IVB returns to the evidentiary implications of the scientific subconscious, first explaining why generalizations about on-average subconscious processes can have relevance in individual cases. Illustratively, if most people would give undue weight to a character trait’s power as a predictor of an accused’s actions at a particular time, it is a fair bet that at least some jurors will indeed suffer from this subconscious bias, arguably thereby justifying excluding character evidence at trial. Part IVB also examines the problem of contextualization versus de-contextualization, that is, that jurors sometimes bring pre-existing knowledge about context into the jury room when the law requires them to ignore it, or the jurors either lack or ignore knowledge of relevant context when the law demands that it be paid attention. Expert testimony and other evidentiary techniques may help to bring the contextualization/de-contextualization balance to the equilibrium that the law requires. Where that balance precisely should be is, of course, a normative question, and Part IVB offers some guidelines to illustrate the flavor of how these normative judgments can be made. Once again, Part IVB

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<sup>18</sup> See *infra* text accompanying notes 194 - 214.

finds helpful normative guidance in the theory of proper institutional design in a democratic republic.<sup>19</sup>

Part V recaps the primary conclusions of this article, offering both narrow and broad ruminations about how the scientific vision of the subconscious should alter both legal practice and the content of the substantive and evidentiary criminal law. Narrowly, Part V explains how better use can be made of forensic linguistics experts in date rape trials and in law reform. Broadly, Part V offers speculations concerning how the scientific subconscious might have wider application to criminal justice well beyond the specific problem of date rape, suggesting the need for further study and research in these areas. My hope is thus that this article will start a conversation about how to replace the ill-informed folk visions dominating the criminal law with the more realistic and normatively desirable scientific ones.<sup>20</sup>

## II. *A Whirlwind Tour of Forensic Linguistics in Date Rape Cases*

### A. *“Women’s Language”*

Those who study language and the law have revealed how the law-in-action can diverge from the law-as-ideal. Although law on the books expresses a commitment to gender equality, the ways in which language is used at trial and in other legal institutions can promote the very opposite result.<sup>21</sup> The strand of law and language research of most relevance to sexual assault trials, therefore, is one that explains the otherwise little-noticed mechanisms by which language usage affects social power. Two of the leaders in this field, Professors John

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<sup>19</sup> See *infra* text accompanying notes 215 - 57. On the justifications for the character evidence bar and its exceptions, see STEVEN FRIEDLAND, ET. AL., EVIDENCE LAW AND PRACTICE 90 - 98 (2d ed. 2004). For an analysis of the role of context in expert testimony, see generally Andrew E. Taslitz, *Abuse Excuses and the Logic and Politics of Expert Relevance*, 49 HASTINGS L.J. 1039 (1998).

<sup>20</sup> See *infra* text accompanying notes 259 - 72.

<sup>21</sup> See, e.g., ANDREW TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 1-11 (1999) [hereinafter TASLITZ, RAPE AND CULTURE].

M. Conley and William O' Barr, in a recent text summarizing the state of research in this area, explained:

The particular body of work that is our focus here introduces another important variable into the law-language equation: power. This research looks at the law's language in order to understand the law's power. Its premise is that power is not a distant abstraction but rather an everyday reality. For most people, the law's power manifests itself less in Supreme Court decisions and legislative pronouncements than in the details of legal practice, in the thousands of mini-dramas reenacted every day in lawyers' offices, police stations, and courthouses around the country. The dominant element in almost every one of these mini-dramas is language. To the extent that power is realized, exercised, abused, or challenged in such events, the means are primarily linguistic.<sup>22</sup>

In sexual assault trials, the means by which gendered power is exercised are primarily two-fold. First, perceived micro-linguistic differences in speaker style and access to the floor alter speaker credibility.<sup>23</sup> For example, researchers have posited the existence of a "women's language," a way of speaking that is on-average more characteristic of women than men.<sup>24</sup>

Such a language includes

Such stylistic features as hedge words (*kind of, sort of*), polite forms (*sir*), tag questions appended to declarative statements (*The meeting's at three, isn't it?*), exaggerated imprecision about quantities (*It was about a mile, but I'm not very good at distances*), and a rising, inquisitive intonation in normally declarative contexts (*six-thirty?*) in response to a question about when dinner will be ready)....<sup>25</sup>

What is most important here is this: whether or not a woman speaks "women's language," she will generally be perceived as doing so by jurors at a trial.<sup>26</sup> This is so because our stereotypes or "folk linguistic" beliefs about how women speak closely track the descriptions

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<sup>22</sup> CONLEY & O'BARR, *supra* note 2, at 2.

<sup>23</sup> See TASLITZ, RAPE AND CULTURE, *supra* note 21, at 69-80.

<sup>24</sup> See *id.* at 73-75.

<sup>25</sup> CONLEY & O' BARR, *supra* note 2, at 2.

<sup>26</sup> TASLITZ, RAPE AND CULTURE, *supra* note 21, at 74.

of women's language.<sup>27</sup> Stereotypes lead us to ignore contrary evidence while attending to confirming evidence. Furthermore, these biases are magnified by the "fundamental attribution error," our tendency to attribute behavior more to personality than context.<sup>28</sup> Consequently, when we see many women in low-status roles speaking politely, we attribute that behavior to women's essential nature rather than to their social role. The resulting linguistic stereotypes resist change, as they have in American culture for more than twenty years.<sup>29</sup>

One effect of perceiving women's language where it does not exist and of viewing it as typical female behavior is the self-fulfilling prophecy. Women learn that they will be ignored or disliked if they violate stereotypical norms, so they try not to deviate too much from those norms.<sup>30</sup>

Although other factors, such as race, age, and class, can reduce the effects of stereotypes, the effects are greatest where gender is most salient. But gender is most salient in initial encounters or where women are in the minority.<sup>31</sup> Our gendered cognitive biases lessen as we get to know individuals better. Interestingly, female crime victims at trials face precisely those initial encounters (between victim and jurors) in which women are often in the minority. Moreover, the very nature of the crime of rape suggests that gender will be salient.<sup>32</sup>

The effect of the real or imagined use of women's language can be devastating to a woman's credibility. Anyone using women's language is evaluated as more caring but less credible, competent, and intelligent.<sup>33</sup> These evaluations are magnified when women, rather than men, are the speakers. Furthermore, the indirectness characteristic of women's language

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<sup>27</sup> ELIZABETH ARIES, *MEN AND WOMEN IN INTERACTION: RECONSIDERING THE DIFFERENCES* (1996); DEBORAH CAMERON, *FEMINIST & LINGUISTIC THEORY* (1992); *LANGUAGE* (2d ed. 1993).

<sup>28</sup> ARIES, *supra* note 27 at 163-94.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 184-88.

<sup>31</sup> *Id.* at 186, 190-93, 203.

<sup>32</sup> See TASLITZ, *RAPE AND CULTURE*, *supra* note 21, at 79-80.

<sup>33</sup> See ARIES, *supra* note 27, at 178-84; DEBORAH TANNEN, *TALKING FROM 9 TO 5: HOW WOMEN'S AND MEN'S CONVERSATIONAL STYLE AFFECT WHO GETS HEARD, WHO GETS CREDIT, AND WHAT GETS DONE AT WORK* 70, 98, 117-20, 122, 177, 279-89 (1994). [hereinafter TANNEN, 9 to 5].

may be seen as insecurity, apology as weakness.<sup>34</sup> Additionally, women's language speakers' use of shorter, less aggressive responses in public settings command less attention. Similarly, their giving reasons for their suggestions and arguing from their personal experience rather than from abstract principle, two "feminine" strategies, are relatively unpersuasive to men.<sup>35</sup> These effects are much larger in laboratory settings than in studies involving naturally occurring speech, but even modest effects can be decisive in criminal cases.<sup>36</sup> There, defense victory requires only "reasonable doubt."<sup>37</sup>

Yet women face a double bind if they violate stereotypical speech norms.<sup>38</sup> Most men simply do not like aggressive women.<sup>39</sup> "There is a sense in which every woman is seen as a receptionist - - available to give information and help, perennially interruptible."<sup>40</sup> Women who violate stereotypes may seem unlikable or unworthy to many men. Furthermore, men resist receiving information from those, like women, whom men perceive as of lower status because being lecturer rather than listener is the superior (i.e., men's) role.<sup>41</sup>

In sum, women may be perceived as using women's language when they are not, a perception marking them as stupid, incompetent, and incredible. Yet too masculine a style means that they will be disliked or ignored. For women to be seen as credible, they must walk a fine line between opposed stereotypes.

### B. *Gendered Narratives*

The second way in which trial language affects social power is in the creation of narrative. Jurors reason toward a verdict by constructing a narrative of what happened in the

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<sup>34</sup> TANNEN, 9 to 5, *supra* note 33, at 91-2, 156-58.

<sup>35</sup> *See id.* at 91-2; TANNEN, YOU JUST DON'T UNDERSTAND: MEN AND WOMEN IN CONVERSATION 70, 98, 117-20, 122, 177, 278-80 (1990) [hereinafter TANNEN, DON'T UNDERSTAND]; ARIES, *supra* note 27, at 178-84.

<sup>36</sup> ARIES, *supra* note 27, at 178-84.

<sup>37</sup> *See* PODGOR, *supra* note 8, at 199, 211-18 (defining "reasonable doubt").

<sup>38</sup> ARIES, *supra* note 27, at 11.

<sup>39</sup> TANNEN, 9 to 5, *supra* note 33, at 117.

<sup>40</sup> ARIES, *supra* note 27, at 183-84.

<sup>41</sup> TANNEN, DON'T UNDERSTAND, *supra* note 35, at 63-64.

real world.<sup>42</sup> This narrative consists not only of deciding who physically did what to whom but with what mental state, how, and why.<sup>43</sup> The narrative includes an understanding of the character of each of the players and a moral assessment of their actions, beliefs, and intentions.<sup>44</sup> But these tales are not crafted out of whole cloth. Rather, jurors draw on themes learned from relevant tales in the broader society and on pre-existing understandings of what constitutes a “good,” coherent, sensible tale.<sup>45</sup> The themes learned from nursery stories, novels, television series, movies, and various news media about proper gendered behavior generally, and of the nature of rape specifically, thus play a central role in the tale that jurors in a sexual assault trial craft to make sense of the case before them.<sup>46</sup>

In creating rape stories, jurors are affected by governing ideologies - - a structural framework that governs their world. Ideology is often embodied in metaphors - - ways of understanding one aspect of the world in terms of another.<sup>47</sup> “Sex as achievement” is, for example, one metaphor by which many men structure their understanding of women.<sup>48</sup> Related metaphors are of sex as a hunt (“I’m going *out to get a piece of ass* tonight”), a game (“scoring” or “striking out”), war (getting “shot down” and “hitting on women”), triumph through inflicting sexual pleasure (“I *got her so hot* she could hardly stand it!”), a commodity (“why should a man rape if he *can get it for free?*”), and theft (“He’s robbing the cradle”).<sup>49</sup>

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<sup>42</sup> Andrew Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN’S STUD. 387, 434-39 (1996). [hereinafter, Taslitz, *Patriarchal Stories*].

<sup>43</sup> Andrew Taslitz, *A Feminist Approach to Social Science Evidence: Foundations*, 5 MICH. J. GENDER & L. 1, 156 (1998) [hereinafter Taslitz, *Feminist Approach*].

<sup>44</sup> See Andrew E. Taslitz, *Myself Alone: Individualizing Justice by Psychological Character Evidence*, 52 MD. L. REV. 1, 91-98 (1991). [hereinafter Taslitz, *Myself Alone*].

<sup>45</sup> Taslitz, *Patriarchal Stories*, *supra* note 42, at 434.

<sup>46</sup> *Id.* at 404-06.

<sup>47</sup> GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 5 (2d ed. 2003); HELEN HASTE, *THE SEXUAL METAPHOR: MEN, WOMEN, AND THE THINKING THAT MAKES THE DIFFERENCE* 37 (2003).

<sup>48</sup> HASTE, *supra* note 47, at 37; TIMOTHY BENEKE, *MEN ON RAPE: WHAT THEY HAVE TO SAY ABOUT SEXUAL VIOLENCE* (1982).

<sup>49</sup> BENEKE, *supra* note 48, at 12-14.

And women are animals (“chick,” “bitch,” “beaver”), objects (“a cute thing,” “*a little bit of that*”), and genitals (“she’s a cunt.”).<sup>50</sup>

If pleasure can be “inflicted,” then there is no harm, even from force, and thus no rape. Moreover, animals, objects, and commodities cannot grant or withhold consent, so a woman cannot generally object to force, and thus, again, no rape. Furthermore, these metaphors, which relate to sex as achievement and women as commodities, lead men to view sex as giving them status over women and in the eyes of other men, to view women as objects of hostility, animals to be hunted, or things to be bought; to seek control, which by definition is needed to possess a commodity; and to seek dominance as necessary to win a war, a hunt, or a game.<sup>51</sup> Some measure of physical or psychological violence is by definition part of sex under these controlling metaphors. The metaphors thus embody patriarchal ideology - - a set of lenses for viewing the world through the assumption of male dominance.<sup>52</sup> Metaphors can be triggered by things as subtle as the choice of words at trial (e.g., a “bar” seems a sleazy place for a woman to be, and a “club” invokes images of “clubbing” - - lascivious dancing in low-cut dresses with many men in a quest for fleeting, impersonal sexual satisfaction).<sup>53</sup> The ideology embodied in metaphors can act as “epistemological filters” affecting what evidence jurors receive, what weight and meaning they give to it.<sup>54</sup>

Likewise, the cultural themes at work in a rape case are not always obvious ones. Fairy tales like *The Little Mermaid* - - in which a mermaid becomes mute as the price for becoming human to win the man she loves, failing at first to compete with an even more beautiful woman, then finding success when she regains her song - - teach that women are most

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<sup>50</sup> *Id.* at 14.

<sup>51</sup> *Id.* at 15-16.

<sup>52</sup> Taslitz, *Patriarchal Stories*, *supra* note 42, at 404-10.

<sup>53</sup> See generally MATOESIAN, LAW AND IDENTITY, *supra* note 3.

<sup>54</sup> Taslitz, *Patriarchal Stories*, *supra* note 42, at 413-14; GREGORY MATOESIAN, REPRODUCING RAPE: DOMINATION THROUGH TALK IN THE COURTROOM 184 (Univ. of Chicago Press 1993) (coining term “epistemological filters”) [hereinafter MATOESIAN, REPRODUCING RAPE].

attractive when silent or because of the beauty of their voices rather than the content of their character or the expression of their deepest needs.<sup>55</sup> The evil character in the tale is the ugly Sea Witch, who, unlike the mermaid, aggressively expresses her needs and seeks to fulfill them. Aggressive women, who express their needs, especially about sexuality, become in jurors' minds hideous, unworthy "sea witches" at a rape trial, though jurors may be unaware of the connection they are making between the many cultural tales like *The Little Mermaid* and the alleged rape victim before them. Women, as well as men, fall prey to these sorts of cognitive processes. Indeed, even the most well-meaning, "feminist" jurors may find that they have a reasonable doubt about the specific rape case before them if the tale told fits cultural stories about "sluttish women," an observation supported by ample empirical evidence.<sup>56</sup>

C. *Judicial and Legislative Inaction: A Working Hypothesis*

These are but a few short illustrations of how perceived linguistic style, linguistic access opportunities, and narrative thinking can combine to bias rape trial jurors against a clear analysis of the evidence before them and against giving appropriate weight to the alleged female victim's version of reality. Far greater, sometimes book-length examinations of these phenomena have been done elsewhere.<sup>57</sup> There is ample reason to believe that the failure to address these linguistic means of gendered domination at rape trials helps to explain why prior rape law reforms, such as rape shield statutes (often prohibiting admitting evidence of a woman's prior sex life or sexual predisposition), cessation of the old requirement of corroboration of the woman's testimony, and modest re-definitions of the crime itself have done little to improve rape reporting and conviction rates or to re-shape sexist public

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<sup>55</sup> See THE LITTLE MERMAID (Disney 1990); Gwyneth Cravens, *Past Present*, THE NATION, May 11, 1992, at 638, 638-40 (comparing original Hans Christian Anderson tale with the Disney one).

<sup>56</sup> See Taslitz, *Patriarchal Stories*, *supra* note 42, at 394-440, 465-71.

<sup>57</sup> See e.g., MATOESIAN, REPRODUCING RAPE, *supra* note 54; MATOESIAN, LAW AND IDENTITY. *supra* note 3.

understandings of rape and of proper gendered behavior.<sup>58</sup> Numerous suggestions have been made for curing the linguistic infections that ail the justice system, including “intermediary” questioners to “translate” defense counsel’s questions into less misleading and oppressive forms at trial; permitting alleged victims wider leeway to give longer, fuller responses to lawyers’ questions; and calling empathic experts to educate jurors about why they resist giving fair consideration to rape victims’ tales - - explaining the cognitive processes at work, the power of cultural rape narratives, and why jurors disbelieve witnesses with “feminine” linguistic styles.<sup>59</sup> Yet none of these and other linguistic proposals have yet received serious consideration by legal decisionmakers.

There are a number of obvious explanations for this judicial and legislative reticence to change. One might be a growing cultural backlash against feminism generally.<sup>60</sup> Another might be perceived (though arguably surmountable) constitutional obstacles to some of the proposed changes.<sup>61</sup> Still another obstacle might be the experimental nature of many of those proposals combined with a fear of such techniques’ unknown psychological impact causing the conviction of increasing numbers of entirely innocent men.<sup>62</sup> All these are plausible explanations for the resistance to change. But in this article I want to explore a hitherto largely ignored contributing factor: the law’s general fear of poking around in the subconscious mind.<sup>63</sup>

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<sup>58</sup> See Taslitz, *Patriarchal Stories*, *supra* note 42, at 389-92 (summarizing reforms and evidence of their failure).

<sup>59</sup> TASLITZ, RAPE AND CULTURE, *supra* note 21, at 58-63; 115-33.

<sup>60</sup> See Taslitz, *Patriarchal Stories*, *supra* note 42, at 394-402 (discussing the trend to deny patriarchy’s existence or its impact on rape trials).

<sup>61</sup> See TASLITZ, RAPE AND CULTURE, *supra* note 21, at 117-51 (summarizing and rebutting such claims).

<sup>62</sup> WARREN FARRELL, *THE MYTH OF MALE POWER* (1993) (alleging that 60% of rape allegations are false).

<sup>63</sup> There is a complex and tedious debate about the meanings of the terms “subconscious” and “unconscious,” both between philosophers’ and natural scientists’ usages of these terms and among individual thinkers within these two groups. Again, I do not believe that clarity or precision require my recounting or taking sides in this debate. The “folk” notions of the mind that govern the law in operation at modern criminal trials (notions to be discussed shortly) treat anything less than fully conscious, self-aware mental states as usually irrelevant to legal culpability, the exceptions being unusual cases in which extreme disorders of the less-than-fully-conscious mind sicken the conscious mind, thus reducing or eliminating individual culpability. But science and philosophy both

The impact of linguistic styles and narrative reasoning processes on jury deliberations and verdicts takes place largely in the subconscious. Jurors are not aware that the reason that they disbelieve a rape victim may be their perception of the victim's perceived use of "women's language," her willingness to submit to "turn domination" by defense attorneys (leading to brief, deferential responses by alleged victims to counsel's questions at trial), and the resonance of defense arguments with cultural rape narratives. These processes largely take place in the witness's *subconscious*.<sup>64</sup> Yet the criminal justice system's willingness to explore the role of the subconscious is a limited one. Although many of Sigmund Freud's theories have now been discredited, his energetic preaching of the importance of a realm of thought outside of conscious awareness - - what he called the "unconscious" and I call the "subconscious" - - has much to commend it. At the same time, his vision of the subterranean mind as a dark, dank recess of horror and irrationality distorts the true role of the subconscious in moral decisionmaking. The courts too often forget those aspects of Freud's theories that make sense (the real existence of less-than-conscious thought) and remember those that do not (the subconscious as generally irrational).<sup>65</sup> Understanding this judicial confusion requires

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reveal a spectrum of interactive degrees of consciousness that belies any simple dichotomy between the conscious and other mental states and undermines the idea that portions of the spectrum below full consciousness should generally be irrelevant to the law. The conclusions that I reach remain the same, though perhaps with differing degrees of strength, wherever we are on the less-than-fully conscious portion of the spectrum and would be unaltered by a more fine-grained and time-consuming elaboration of terminology. Moreover, I chose the term "sub," rather than "un" conscious because some of the mental states to which I refer are, metaphorically speaking, "submerged" just below the surface of conscious thought and can, in theory, eventually be brought into conscious awareness; others can fairly readily be influenced by the conscious mind, even if these lightly submerged thoughts never do break through to the surface; and others are forever beyond conscious access and perhaps beyond full conscious control but nevertheless remain *below* consciousness and thus still "sub" conscious. The term "unconscious," so often preferred by many writers, seems too much to connote solely the last category and likely fosters popular images among lay people of what happens in the mind of someone who is "knocked out," in a coma, or, at best, asleep. See generally Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J. L. & GENDER 381 (2005) (summarizing the nature of these various less-than-conscious mental states, though using the "unconscious" moniker to label their connections) [hereinafter Taslitz, *Willfully Blinded*].

<sup>64</sup> See Taslitz, *Patriarchal Stories*, *supra* note 42, at 402-33 (on the cognitive processes involved).

<sup>65</sup> See FRANK TALLIS, *HIDDEN MINDS: A HISTORY OF THE UNCONSCIOUS* ix-xiii, 53-72. (2002)

examining the differences between “folk” and scientific concepts of the subconscious mind, to which I now turn.

### III. *Folk Versus Scientific Notions of the Subconscious Mind*

The substantive criminal law and the law of evidence in criminal cases reflect what might aptly be called “folk” or commonsense notions about the nature of the subconscious mind.<sup>66</sup> Modern “scientific” notions of the subconscious mind - - by which I mean any empirically-informed concept, whether used by philosophers or by laboratory experimenters - - differ from folk notions in important ways.

#### A. *The Lawyers’ Folk Subconscious*

##### 1. *Folk Subconsciousness and the Criminal Law*

To lawyers, the conscious and subconscious minds are sharply distinct entities. The existence of one does not depend on the existence of the other. Moreover, there are no shades of gray: thoughts and feelings are either conscious or not, with no middle group.<sup>67</sup> Furthermore, each entity is essentially unitary, that is, there is *one* conscious mind and *one* subconscious one, even if either or both might contain a small number of sub-minds, perhaps analogous to Freud’s tripartite notion of the mind as id (the passions), ego (the grownup and

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<sup>66</sup> Cf. DEBORAH CAMERON, *FEMINISM & LINGUISTIC THEORY* 44 (1992) (1985) (defining “folk linguistics”).

<sup>67</sup> In not one of the criminal cases that I tried, or assisted in, as a prosecutor was the state’s focus on anything other than the conscious thoughts of the accused. In a very small number of cases, primarily involving insanity claims, the defense inquired into the subconscious mind of the offender as a ground for exculpating the accused. Even in those cases, however, the question implicitly posed was whether subconscious processes rendered conscious free will absent. The two realms of the conscious and the subconscious were otherwise usually neither merged, interactive, nor subdivided. When trial judges did venture to opine about psychology, their comments either reflected pop concepts of Freudian psychology or other images of the “folk subconscious” described here and held among the lay population. Testimony about subconscious processes at work in the minds of those other than the accused – such as jurors and witnesses -- occasionally fared better, though resistance still ran high. Although resistance to this last category of testimony is increasingly weakening of late, primarily because of rising evidence of the subconscious’s role in the expanding number of innocent persons wrongly convicted, growing opposition to supposed “junk science” has retarded change. (See generally KENNETH FOSTER & PETER HUBER, *JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS* (MIT Press 1999).). Nothing that I have read or heard from academics or other prosecutors in my seventeen years of teaching criminal law and evidence law suggests any substantial change in this state of affairs. It is primarily the conscious mind *simpliciter* – standing on its own -- that is the focus of the criminal law, and rare legal expeditions into the subconscious view it as separate from, but preying upon, the otherwise healthy conscious mind, the subconscious more as cancer than as part of the self.

problem-solver), and superego (the conscience).<sup>68</sup> There is communication between the conscious and subconscious minds, but that communication is primarily uni-directional, that is, from the subconscious to the conscious mind, though we may not be aware that, or how, this is happening.

Novelist Paul Levinson, in *The Consciousness Plague*, uses a disease metaphor to capture this sense of the distinctness, the *otherness*, of the conscious and subconscious minds vis-à-vis each other.<sup>69</sup> In Levinson's novel, police investigation into mysterious cases of memory loss reveals that a bacteria-like organism has lived in our brains from the dawn of our species and may be responsible for our very consciousness. The memory loss arises when new antibiotics cross the blood-brain barrier, killing the microbes that enable us to act with awareness.

Levinson has one character, a "cognitive historian," explain:

All I'm saying is that there are lots of living and quasi-living things running around inside us - - in symbiotic, parasitic, and probably neutral relationships with us. And these relationships - - the symbiotic ones, especially - - may well truly make us what we are as human beings. And part of that, in view of the bacterial gift of gab, could conceivably be helping our brains work, enabling us to think, remember - - who knows?<sup>70</sup>

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<sup>68</sup> See TALLIS, *supra* note 65, at 53-72 (Freud's tripartite notion of the mind).

Freud in fact viewed the *id*, *ego*, and *superego*, as "not simply different parts of the mind, but powers - - each with a specific function." *Id.* at 61. The *id* operated "unconsciously," but, in Freud's terminology, both the *ego* and the *superego* had conscious, "preconscious," and unconscious regions. *Id.* Freud's unconscious is a mysterious and frightening place:

exempt from mutual contradiction. It is a place where love and hate can comfortably exist, side by side. Like a machine designed by Escher, its impossible gears are not thwarted by logical inconsistencies. They smoothly work around stark juxtapositions and polarities.

The unconscious is timeless. Events are not ordered chronologically in the unconscious, nor are they altered by the passage of time. The recollections of early childhood are as potent as the recollections of the previous day.

Finally, the unconscious is a "place" - - a location where external reality has been replaced by what Freud has called "psychical reality." It is a kind of psychoanalytic cyberspace. An inner landscape where virtually anything can happen. It has its own enigmatic truths. The psychological truths of fantasy and the dream world.

*Id.* at 68.

<sup>69</sup> PAUL LEVINSON, *THE CONSCIOUSNESS PLAGUE* (2003).

<sup>70</sup> *Id.* at 87.

Levinson's metaphor can be read as consistent with folk notions of the mind because it emphasizes that the conscious and subconscious minds are seen as so different as literally to be distinct forms of life (human, bacterial). On the other hand, Levinson's image can also be disturbing precisely because it unsettles some folk notions of mind. The plague may not literally *be* our conscious mind, but it can be seen as *mutually interacting with* our physical being to give birth to consciousness. Moreover, if it is true that an alien infection is what makes us conscious, then our "real," uninfected humanity lay in our subconsciousness. That our humanity *consists of* the primitive subconscious mind's *symbiotic relationship* with an alien plague can thus also undermine the sense of the true separateness of our higher (conscious) and lower (subconscious) selves. This simultaneous contrasting reading of separateness and fusion are what so disturb the novel's readers, as does the suspicion that the lower, animalistic mind is our essential self.<sup>71</sup>

If we fear that the subconscious may be who we really are, it is because the official folk wisdom of the law is just the opposite: that our conscious mind is our true self and the master of our ship.<sup>72</sup> It is our aware, conscious mind that gathers information and makes informed choices - - that is the seat of the autonomy that makes us human. The contents of the subconscious mind are, however, inaccessible to laypeople. Only experts - - therapists, social

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<sup>71</sup> Cf. V.S. RAMACHANDRAN & S. BLAKESLEE, PHANTOMS IN THE BRAIN: PROBING THE MYSTERIES OF THE HUMAN MIND 152 (1998) ("[Y]our conscious mind is simply a façade and...you are completely unaware of what really goes on in your brain.").

Some neuroscientists, like Ramachandran and Blakeslee, go so far as to see the conscious mind as largely a fiction. (See RAMACHANDRAN & BLAKESLEE, *supra*, at 152; cf. DANIEL WEGNER, THE ILLUSION OF CONSCIOUS WILL (2002) (arguing that conscious will is an illusion, but a necessary one that helps to serve as a guide to understanding ourselves and to developing a sense of responsibility and morality by helping us to appreciate and remember our authorship of the things our minds and bodies do). This approach is not helpful, however, for the practical purposes of the legal attribution of responsibility and is contradicted by the work of other cognitive theorists who conclude that the more versus the less conscious parts of our minds serve distinct adaptive functions (See *infra* sources cited in Part IV) - - distinct but neither bright-line nor dichotomous nor independent. (See *infra* Part IVA4).

<sup>72</sup> Cf. MODEL PENAL CODE § 2.02 (2005) (listing as the subjective mental states upon which criminal liability may be based only those involving *conscious* awareness).

workers, perhaps the clergy - - can, with time, hard work, and our cooperation, gain access to our animal self.<sup>73</sup> Our true selves thus remain ignorant of, and thus unable to control, our subconscious selves. On the other hand, our subconscious selves can influence our bodily actions and conscious selves without the latter's awareness.<sup>74</sup> In effect, the subconscious crew mutinies, taking command of the ship without the true captain's ever knowing that he has lost it.<sup>75</sup> As psychologist Timothy Wilson puts it, "A standard analogy is that consciousness is the President in the executive branch of the mind ...if he or she is ignorant of what is occurring out of sight (lacking in self-insight), then the agencies of the adaptive unconscious may start to make decisions that are contrary to the wishes of the President."<sup>76</sup>

Because conscious autonomy is the hallmark of a healthy personality, the folk vision is that the influence of the subconscious on the conscious mind is an unhealthy one, subverting the natural order of higher (the conscious) and lower (the subconscious) and of who should rightly be in charge. The subconscious can thus rob us of the ability to make autonomous choices - - the free will - - that makes us responsible for our actions.<sup>77</sup> Correspondingly, however, we are not responsible, or at least not fully so, for actions initiated or "caused by" our subconscious mind. In the criminal law, therefore, the subconscious is presumptively never the basis for full moral and legal responsibility but can compromise the conscious

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<sup>73</sup> Using Freud's theory as the quintessential example, Professor Daniel Robinson made the point thus:

The Archimedean point from which the clinician can discover what is otherwise buried in the recesses of the unconscious is reached by way of dream interpretation that, according to Freud, is nothing less than the *via reggia* to all that is repressed. What is found in the dream are symbols and codes, ambiguous and transitory enough to keep the dreamer sleeping, if fitfully, but revealing enough for the skilled interpreter to unearth those wishes which can find safe fulfillment only in the dream.

DANIEL ROBINSON, PRAISE AND BLAME: MORAL REALISM AND ITS APPLICATIONS (2002).

<sup>74</sup> *See id.* at 154 (in Freudian theory, "What has been repressed and is no longer available to consciousness continues to influence thought, but does so in ways beyond the cognitive powers of the thinker.").

<sup>75</sup> *See id.* at 154 ("The thoughts and actions arising from repressed material cannot be said to be acting on the basis of a rational deliberation of means and ends.").

<sup>76</sup> TIMOTHY D. WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS 46 (2002).

<sup>77</sup> *But cf.* ROBINSON, *supra* note 73, at 154-59 (rejecting this logic).

mind's full responsibility by infecting the latter. Thus the subconscious enters into discussions of criminal liability in the form of insanity defenses in which "mental diseases or defects" rob us of our ability to tell right from wrong, or prevent us from forming the most serious conscious mental states required to prove the most heinous crimes, or come in the form of syndromes portraying their sufferers as aberrants who cannot see the world through the eyes of the "normal."<sup>78</sup>

Ill mental health may, therefore, also often stem from "repression," moving unpleasant conscious thoughts into the subconscious zone.<sup>79</sup> Health consists of bringing that which has been submerged into the darkness out before the light. The therapist's task, through dream interpretation, reading Rorschach inkblots, close observation, and guided therapeutic questioning, is to relieve the ballast weighing down that which we will not face.<sup>80</sup> When the submerged knowledge surfaces, our autonomy returns, our health is restored.<sup>81</sup> Overcoming self-deception is thus a prerequisite for self-control, yet, until we achieve self-knowledge, we cannot be held responsible for its absence, for the task is too hard to bear alone.<sup>82</sup>

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<sup>78</sup> See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW (4th ed 2003) (insanity and diminished capacity); Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433 (1995) (syndromes).

<sup>79</sup> TALLIS, *supra* note 65, at 13-62.

<sup>80</sup> See Taslitz, *Myself Alone*, *supra* note 44, at 30-44 (summarizing therapeutic techniques).

<sup>81</sup> See TALLIS, *supra* note 65, at 63 ("[T]he psychoanalyst [must] win back parts of the mind that have succumbed to the unconscious").

<sup>82</sup> Andrew Taslitz, *Wilfully Blinded*, *supra* note 63, at 395-441 (on reality of self-deception and the debate over its moral implications). Professor Robinson, by contrast, questions whether self-deception is psychologically possible, ROBINSON, *supra* note 73, at 175, but, if it is, finds the situations where self-knowledge and control are ultimately beyond conscious influence to be quite rare and, even then, a debatable basis for freeing one's self from moral responsibility. See *id.* at 175-76. He finds no basis for dispute, however, where self-knowledge or control is possible, even if it requires much effort. See *id.* at 174-76. He explains:

All actions committed in ignorance are *not* involuntary, and ignorance itself is not always a passive state. Central to the mission of a moral life is an informed life, one of the moral obligations being that of knowing one's powers and potentials for bringing about morally weighty outcomes. One who has murdered his parents is not likely to earn sympathy as an orphan, and one who has stubbornly preserved ignorance - - preserved it as a possibly useful future excuse - - bears the same responsibility for the damage this ignorance leads to, and the responsibility for putting or keeping oneself in a state likely to have just these consequences.

## 2. *Folk Subconsciousness and the Law of Evidence*

### a. *Limited Relevance*

This notion of limited responsibility for the workings of our subconscious mind has implications for the law of criminal case evidence as well. Except in the extreme cases mentioned above - - insanity, diminished capacity, and sometimes syndromes arising from severe trauma - - many courts view evidence of the subconscious thoughts and feelings of the alleged criminal as of limited, if any, relevance. Certainly courts will not entertain evidence of subconscious thoughts to establish the mental state element of a crime, though they sometimes accept evidence offered by the defense of subconscious influence on the conscious mind as exculpating.<sup>83</sup>

Even in the rare latter cases, however, the defense evidence is widely derided as supporting “abuse excuses.”<sup>84</sup> Evidence concerning such excuses is especially feared because its relevance turns on arguing that cultural influences can affect individual thoughts and actions, making the blame for certain crimes a shared one between society and the offender.<sup>85</sup>

The way in which social forces affect individual behavior is significantly through subconscious processes; therefore, to permit evidence about such processes is to abandon the highly individualistic notion of moral blame that underlies our criminal law.<sup>86</sup> Contrary to what the critics of “abuse excuses” claim, however, to acknowledge shared responsibility is

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*Id.* at 174. Robinson goes on to explain that ignorance motivated by indifference, distraction, or self-interest rather than natural limitations is ultimately worthy of significant moral sanction because the harm that we do is reasonably foreseeable and therefore controllable were we more caring, focused, and other-directed, yet, in his view, instances of natural limitation will be few. *See id.* at 174-75. Robinson’s vision differs significantly from the general trial court drift toward viewing subconscious and biological forces as limiting autonomous human choice and thus moral and legal responsibility. *See generally* STEPHEN KERN, A CULTURAL HISTORY OF CAUSALITY: SCIENCE, MURDER NOVELS, AND SYSTEMS OF THOUGHTS 243-65 (2004) (tracing murder law’s evolution of the casual connection between subconscious mental aberrations or “illnesses” and criminal responsibility for murder)).

<sup>83</sup> *See* Taslitz, *Myself Alone*, *supra* note 44, at 10-14, 76-81, 95-102 (reciting examples).

<sup>84</sup> *See generally* ALAN DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY (2000).

<sup>85</sup> *See* Smith *supra* note 78; Taslitz, *Abuse Excuses*, *supra* note 19, at 1068.

<sup>86</sup> *Cf.* Taslitz, *Abuse Excuses*, *supra* note 19 (critiquing criminal evidence law’s “atomistic rationalism,” an individualist approach blind to the socio-political implications of evidentiary doctrine).

not necessarily, or even usually to relieve the individual of *all* responsibility.<sup>87</sup> Still, this fear of the slippery slope toward the chaos of no individual responsibility for criminal activity whatsoever may contribute to the frequent - - though by no means universal - - judicial stance that evidence of subconscious thoughts should rarely be seen as of much, if any, relevance in a criminal case, even if offered to *relieve* the accused of responsibility.

b. *Fears of Unreliable Opinions*

The invisibility and apparent inscrutability of the subconscious mind also seem to lead judges and legislators to be especially wary of the ability of psychotherapists and especially social scientists to offer reliable opinions about the mental states of criminal defendants in particular cases. Congress, in reaction to the public furor over the acquittal of John Hinckley (the attempted murderer of former President Ronald Reagan) on grounds of legal insanity amended the Federal Rules of Evidence to prohibit expert opinions on the “ultimate issue” of an alleged offender’s mental state at the time of the crime.<sup>88</sup> Outside traditional mental state experts like those testifying in support of insanity defenses, many criminal courts have excluded from the jury’s hearing much psychological testimony because it is seen as insufficiently reliable to meet the admissibility standards of Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>89</sup> Some academics and jurists have waged a war on the use of even traditional expert psychological testimony in insanity cases, arguing that any social science not relying upon the experimental method, or on sound, traditional statistical methods, or on their analogues, is not sufficiently trustworthy to survive judicial scrutiny.<sup>90</sup>

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<sup>87</sup> Compare WILSON, *supra* note 76 (arguing abuse excuses undermine individual responsibility), with Smith, *supra* note 78 (arguing such excuses promote *shared* responsibilities).

<sup>88</sup> See FED. R. EVID. 704(b) advisory committee's notes; 21 AM. JUR. 2d CRIMINAL LAW § 52.

<sup>89</sup> SEE FED R. EVID. 702; Daubert, 113 S. CT. 2786 (1993).

<sup>90</sup> See David Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005 (1989); Smith, *supra* note 78, at 443-44 (describing the prevailing judicial attitude:

The courts and many commentators are especially fearful of the opinions of interpretive social scientists- - those who offer fine-grained descriptions of events and informed speculation about the subconscious meaning that they hold for the participants.<sup>91</sup> Clinical psychologists use interpretive methods to treat patients and therefore may face a similar judicial skepticism.<sup>92</sup> The courts' skepticism seems to stem from beliefs that interpretations are in the jury's realm and something that cannot be aided by so-called "experts" who are not even using the tried-and-true scientific methods of controlled experimentation and careful statistical analysis.<sup>93</sup>

There is an interesting judicial and academic blindness about the nature of "mental states" as defined by the law that may help to explain this judicial distrust of interpretive social science. The folk model of the mind embraced by the judiciary apparently privileges the conscious mind as the true, autonomous self because the conscious mind thinks primarily in words.<sup>94</sup> Words permit the gathering, storage, and recollection of data about the outside world; the description and analysis of the data; and a weighing of its strengths, weaknesses, and plausible meanings. Words enable anticipating and refuting arguments on various sides of

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"Allowing a social scientist to testify in a criminal case is worse than allowing a mental health professional to testify; in the judge's view, at least mental health professionals draw on their own experience with patients.")

I am obviously not arguing that courts never admit clinical psychological testimony or social science evidence. They sometimes do. My argument instead is that they are too often unduly skeptical about such evidence or mis-analyze its value to the jury based upon judicial confusion about the nature and normative significance of the conscious and subconscious minds and their inter-relationship.

<sup>91</sup> See Christopher Slobogin, *Psychiatric Evidence in Criminal Trials: To Junk or Not to Junk?*, 40 WM. & MARY L. REV. 1 (1998); Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH. J. GENDER & L. 1 (1998) [hereinafter Taslitz, *Feminist Approach*]. For a book-length defense of using interpretive social science in court to understand the minds of the participants, see CHRISTOPHER SLOBOGIN, *PROVING THE UNPROVABLE* (forthcoming Oxford University Press 2006) [hereinafter SLOBOGIN, *THE UNPROVABLE*].

<sup>92</sup> See Richard Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427 (1980).

<sup>93</sup> See Slobogin, *supra* note 91; Taslitz, *Myself Alone*, *supra* note 44, at 91-94.

<sup>94</sup> See Taslitz, *Feminist Approach*, *supra* note 91, at 1-15 (on evidence law's implicit understanding of conscious thought as "self-conversation"); THOMAS SZASZ, *THE MEANING OF MIND: LANGUAGE, MORALITY, AND NEUROSCIENCE* (1996) (defending conscious thought more generally as an internal conversation); SLOBOGIN, *THE UNPROVABLE*, *supra* note 91, at 121-24.

a question. In short, words enable “deliberation.”<sup>95</sup> Only the conscious mind deliberates in this linguistic sense; furthermore, because the conscious mind thinks in words, it is understandable in a way that the non-linguistic subconscious mind is not. Too much inference and interpretation is involved in mining the subconscious relative to the conscious mind, thus too much “guessing,” even by experts. Underlying this whole vision is the idea that there are “true” mental states “out there” to be discovered by juries rather than partly created by them.

There are several complications flowing from this linguistic notion of mind. One complication is that even if conscious thoughts are indeed silent words, internal conversations, they are no more directly accessible to observers’ minds than are subconscious thoughts. Both conscious and subconscious thoughts and feelings must usually be inferred from behavior, sometimes including the words spoken by the alleged offender - - but even these spoken words rarely directly reveal what their author is thinking.<sup>96</sup>

Second, words necessarily require interpretations, both by their speakers and by listeners. If a person’s heart is beating quickly and his hands are sweaty, he must make a judgment based on the context, his life experience, and his self-understanding whether his physiological reactions reflect fear or love, eager anticipation or foreboding. That judgment will involve some internal conversation, however brief, that he must again interpret.<sup>97</sup> Our recognition that people can be self-deluded, however, suggests that we believe that our own internal assessments can be wrong. But in what sense can the speaker’s silent reflection on his own mood and motives be wrong? The answer: if we, as observers, interpret his own internal conversations differently than he does, reflecting a different reality, he may be mistaken. This error will exist even if we believe that this later -expressed statement of what was his mental

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<sup>95</sup> See SZASZ, *supra* note 94 (noting value of internal conversations); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 29 (2001).

<sup>96</sup> See Taslitz, *Feminist Approach*, *supra* note 91, at 23-25.

<sup>97</sup> See *id.* at 23-25; Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 *WIS. WOMEN’S L.J.* 3, 9-13 (2000) [hereinafter Taslitz, *Two Concepts*].

state at the time of the crime was sincere, and even if we ignore the risks that his memory has faded or has become unwittingly biased in his favor with the passage of time - - risks that heighten the chances of his self-reports being flawed.<sup>98</sup> *Perhaps* tapping into another's subconscious thoughts is a more challenging task than mining his conscious ones, but either task requires interpretation. Interpretation – in the sense of meaning-creation - - is a different process from laboratory experimentation and cannot be avoided in the determination of “mental states” that is required by the criminal law. The currently prevalent hostility toward interpretive social science experts in the criminal courtroom, if based solely on a judicial distaste for “interpretation,” cannot be justified.<sup>99</sup>

c. *The Subconscious As Frightening*

The folk wisdom also assumes a conscious mind guided by a rigid concept of rationality as constrained by a certain set of logical rules.<sup>100</sup> Courts, juries, and lawyers openly recognize that humans are flawed and can often be irrational.<sup>101</sup> But the subconscious mind is viewed as far less capable of rationality, perhaps even actively capable only of *irrationality*, relative to the conscious mind.<sup>102</sup> This lack of rational capacity envisions the subconscious as itself frightening, dangerous, and beyond real comprehension, a “dybbuk” (in Jewish lore) or demon (in Christian lore) co-habiting with our soul.<sup>103</sup> This fear of the subconscious may further contribute to the judicial distrust of much social science evidence despite the logic of folk wisdom's own world view not dictating such an outcome.

d. *Witnesses, Jurors, and Aversion to Abstraction*

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<sup>98</sup> Taslitz, *Feminist Approach*, *supra* note 91, at 23-27 (mental state interpretation is a communal activity); Taslitz, *Willfully Blinded*, *supra* note 63.

<sup>99</sup> See Taslitz, *Feminist Approach*, *supra* note 91, at 65-69 (rebutting prevailing suspicion of interpretive social science).

<sup>100</sup> See KEITH E. STANOVICH, *THE ROBOT'S REBELLION: FINDING MEANING IN THE AGE OF DARWIN* 149-69 (Press 2004).

<sup>101</sup> Any well-known trial tactics book repeatedly makes this point, if not necessarily using the same language. (See, e.g., THOMAS MAUET, *FUNDAMENTAL TRIAL TECHNIQUES* (2d ed. 2000).

<sup>102</sup> See TALLIS, *supra* note 65, at 11-12, 68.

<sup>103</sup> See HOWARD SCHWARTZ, *TREE OF SOULS: THE MYTHOLOGY OF JUDAISM* 169, 228-30, 383 (2004).

(i) *Privileging the Conscious and the Concrete*

The folk concept of the mind affects evidence law in other ways having little to do directly with the state of mind of the criminal offender. Judges are apt to be equally reluctant to explore the subconscious minds of witnesses and jurors. For example, when I was a prosecutor, I repeatedly had the experience of a judge's turning to a potential juror who had just admitted to a series of club memberships, social activities, and political commitments suggesting that the juror might be biased against the state's case. The judge in each instance next asked the potential juror a single question: "But can you still be fair?" If the juror answered "yes," the judge rejected my request to strike the juror "for cause," that is, on the ground that his ability to be fair was suspect. That ruling in turn forced me to exercise my limited number of peremptory challenges (challenges for no stated reason), if I had any left. Jury selection is at best more art than science.<sup>104</sup> Nevertheless, the judge's question wrongly assumes that a juror can and does consciously understand the impact of his perhaps-subconscious biases on his ability to keep an open mind.

For similar reasons, courts are reluctant to permit expert testimony to educate the jurors ultimately empanelled about their likely biases and how to avoid them. A significant body of research reveals that jurors may embrace racial or gender biases of which they are unaware, and the laws of chance suggest that at least some such subconsciously-biased jurors are likely to sit on any individual jury.<sup>105</sup> The research also reveals that explaining the existence of these potential biases does little to combat them. However, further explaining to jurors the psychological processes by which these biases remain out of our awareness and resistant to change can reduce their influence.<sup>106</sup> Yet use of such jury-reasoning-process experts is not

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<sup>104</sup> See e.g., NEIL KRESSEL & DORIT KRESSEL, *STACK AND SWAY: THE NEW SCIENCE OF JURY CONSULTING* (2001).

<sup>105</sup> See e.g., TASLITZ, *RAPE AND CULTURE*, *supra* note 21, at 37-43, 58-63 (1999).

<sup>106</sup> See *id.* at 131-33.

widely accepted.<sup>107</sup> Moreover, some evidence proffered may have no relevance other than to disprove or free jurors from a likely pre-existing bias in their thinking. For example, an expert on gender biases held by jurors might be relevant only on the assumption that at least some jurors will be gripped by such bias in a way that interferes with their ability to render judgment fairly. But absent evidence of a particular juror's bias - - which would probably result in excusing that juror - - judges are reluctant to see displacing *presumed* bias as worth the time and trouble of calling an expert or even as logically relevant to the case.<sup>108</sup>

This last point reflects a trial judge bias toward the particular and concrete over the general.<sup>109</sup> Often this bias is essential to a fair trial.<sup>110</sup> But sometimes, as when the statistical likelihood of a biased person sitting on the jury is high, generalization is essential to justice. To take an extreme example, the generalization that a Ku Klux Klan member cannot be fair to an African-American litigant and thus should not serve on a jury sitting at the latter's trial is probably a very safe and wise bet. There is an interesting judicial doublethink involved. On the one hand, many courts fear concrete expert examination of a specific individual's subconscious mind as unduly "interpretive." On the other hand, they disfavor social science generalizations about the subconscious mind. Catch 22.

(ii) *Fear of Empathy*

Judges are also reluctant to build empathy between jurors and the accused. "Empathy" does not mean compassion for the accused's situation or approval of his actions. "Empathy" here just means understanding the situation of another whose experience may be very different from your own - - an understanding necessary to fair judgment.<sup>111</sup> One illustration is the

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<sup>107</sup> *See id.*

<sup>108</sup> This was certainly my experience as a prosecutor in Philadelphia. *Cf.* Taslitz, RAPE AND CULTURE, *supra* note 21, at 131-33 (noting, and arguing to overcome, judicial resistance to such experts in rape cases).

<sup>109</sup> *See* ROBERT P. BURNS, A THEORY OF THE TRIAL 125-31 (2001).

<sup>110</sup> *See id.* at 125-54.

<sup>111</sup> *See* Taslitz, *Abuse Excuses*, *supra* note 119, at 1054-56; Taslitz, *Feminist Approach*, *supra* note 43, at 47-49.

“race-switching instruction.” With this instruction, jurors sitting on a case in which an African-American father is charged with killing his teenage daughter’s white rapists might be asked to “switch” the races of the respective parties in the jurors’ own minds before sitting in judgment.<sup>112</sup> Although at least one court has used such an instruction, few others have followed that court’s empathy-building example.<sup>113</sup>

(iii) *Fictional Faith in Limiting Instructions*

Trial courts also often ignore research showing that “limiting instructions” have little impact on jurors.<sup>114</sup> Evidence might be admissible for one purpose but not another. Courts too readily assume that they can admit such evidence but successfully instruct jurors to use it only for the good purpose but not the bad one.<sup>115</sup> The reality is that, try as they might, jurors cannot really pull off this trick. They will probably subconsciously use the evidence for the prohibited purpose, though they may also do so consciously. There may sometimes be good reason to admit even objectionable evidence, but “curing” unfair prejudice by limiting instructions is not such a reason.<sup>116</sup>

(iv) *Approach-Avoidance About the Narrative Nature of Reality*

Similarly, trial judges and lawyers are well aware that jurors reason by crafting narratives rather than by deductive logic.<sup>117</sup> The narratives that make sense to us are learned in part from the culture in which we live. Trial lawyers craft their trial strategy to appeal to such narratives.<sup>118</sup> The judiciary nevertheless generally rejects efforts to relieve jurors from the

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<sup>112</sup> See LEE, *supra* note 11, at 224-25, 248-49, 253, 255-59, 318.

<sup>113</sup> See *id.* at 256-59.

<sup>114</sup> See FRIEDLAND, ET. AL., *supra* note 19, at 423 (defining limiting instructions); RANDOLPH JONAKAIT, THE AMERICAN JURY SYSTEM 202-05 (2003) (summarizing relevant social science).

<sup>115</sup> See JONAKAIT, *supra* note 114, at 202-05.

<sup>116</sup> Such instructions are not always pointless, for they give a tool to some jurors to bar others from mentioning the prohibited use during deliberations. That might alter the persuasiveness of certain internal arguments for or against a particular verdict. See MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 34-40 (1997).

<sup>117</sup> See Taslitz, *Feminist Approach*, *supra* note 43, at 34-57.

<sup>118</sup> See, e.g., SAM SCHRAGER, THE TRIAL LAWYER’S ART (1999).

grip of biased or inaccurate cultural tales, although some progress has recently been made on this front.<sup>119</sup>

(v) *Undue Faith in Uninformed Lay Judgment*

The judiciary is additionally too willing to place faith in the judgment of uninformed laypersons about matters on which folk wisdom assumes lay competency. Perhaps the most notorious example is eyewitness testimony.

Subconscious factors affect the accuracy of witness testimony. Thus much empirical data demonstrates that eyewitnesses making confident identifications of a wrongdoer may be mistaken because of influences thoroughly outside the witness's conscious awareness.<sup>120</sup> A witness might focus on an assailant's weapon more than his face, have trouble distinguishing among the facial features of persons of a different race from the witness's, or increase the certainty of his identification because an officer tells him that he "picked the right guy" in a lineup.<sup>121</sup> The witness is consciously aware of only one thing: he is certain that the accused did the crime. The exoneration of numerous convicted men based on later DNA evidence has shown just how wrong such witnesses can be.<sup>122</sup> Such exonerations have convinced some courts therefore to permit testimony on the general psychological and social forces that can lead to witness error.<sup>123</sup> But most continue to resist such a journey into the subconscious mind, declaring such testimony to cover matters well within the ordinary experience of lay people, thus not requiring expert guidance - - a position hard to defend if the subconscious of

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<sup>119</sup> See Smith, *supra* note 78; *Old Chief v. United States*, 519 U.S. 172 (1997) (recognizing importance of "evidentiary richness" in enhancing narrative); cf. Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747 (2001) (noting growing holes in the general judicial tendency to ignore subconscious and institutional discrimination and oppressive narratives).

<sup>120</sup> ABA, *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY: REPORT OF THE AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS* 30-32, 37 & n.51 (2006). [hereinafter *ACHIEVING JUSTICE*].

<sup>121</sup> See *id.* at 30-38.

<sup>122</sup> See *id.* at 26-30, 37 & n.51.

<sup>123</sup> See *id.* at 41-42.

even a perfectly mentally healthy, ordinary person can have a substantial impact on the conscious mind.<sup>124</sup>

The combination of these aspects of the judicial folk model of the subconscious may thus go a long way toward explaining the particular judicial resistance to learning from language and the law researchers in the emotionally strident and politically charged environment of the date rape trial. How would an alternative legal vision of the subconscious - - a scientifically informed one - - be different? It is to that question that I now turn.

### B. *The Scientific Subconscious*

Empirical data on the nature of the subconscious mind paints a picture both different from, and similar to, the folk image. Here, I stress the differences but touch upon the similarities.

#### 1. *The Conscious to Subconscious Mind Is More A Spectrum Than A Dichotomy*

One critical difference between the folk and the scientific subconscious is that the latter rejects a sharp dichotomy between the conscious and subconscious minds. As law professor Deborah W. Denno succinctly put it, “[M]odern neuroscientific research has revealed a fluid and dynamic relationship between conscious and unconscious processes....[H]uman behavior is not always conscious or voluntary in the ‘either/or’ way....Rather, consciousness manifests itself in degrees that represent varying levels of awareness.”<sup>125</sup> Various researchers and philosophers might use different labels and draw the lines in different places, but nearly all agree that there is a continuum from the “purely” subconscious to full awareness.<sup>126</sup>

Philosopher John Searle’s approach is illustrative. Searle identifies four stages below full conscious awareness. The “preconscious” consists of information that is not currently in our

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<sup>124</sup> See *id.* at 41-42.

<sup>125</sup> Deborah Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 272, 308-37 (2002).

<sup>126</sup> Andrew Taslitz, *Wilfully Blinded*, *supra* note 63, at 392-44.

consciousness but can readily be made so.<sup>127</sup> Thus, a historian at a cocktail party might be talking about the latest science fiction movie without once consciously thinking about Abraham Lincoln’s views on the morality of slavery. But, if asked about those views, the historian can readily talk about them, quickly bringing them into his conscious awareness.<sup>128</sup> Some mental structure grants him the capacity to produce this information in his conscious mind.

The “dynamic” or “repressed” unconscious instead consists of thoughts and feelings that can in principle be brought into the conscious mind and that affect your behavior and even your conscious thought, but you nevertheless remain totally unaware of these subconscious states and may insistently deny their existence.<sup>129</sup> Acting under hypnosis that implants a subconscious desire to obey a certain order or acting out of an unacknowledged hostility toward your brother are examples of the dynamic unconscious at work.<sup>130</sup>

The “deep unconscious” in Searle’s scheme consists of those mental processes that cannot even in principle be brought into consciousness. The rules for acquiring language are, for example, likely forever beyond our awareness.<sup>131</sup> Searle labels a fourth type of brain phenomena the “nonconscious,” brain operations of which we are unaware but that are more akin to the operation of bodily organs like the stomach than to thinking, such as commands to the lungs to breathe.<sup>132</sup>

One further significant subconscious mental phenomenon ignored by Searle consists of *motivated* cognitive biases.<sup>133</sup> A variety of biases operate at the subconscious level. These biases include the “vividness heuristic” - - attending more to vivid than pallid data; the

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<sup>127</sup> JOHN R. SEARLE, MIND: A BRIEF INTRODUCTION (2004).

<sup>128</sup> Cf. *id.* at 239 (using George Washington example).

<sup>129</sup> *Id.* at 240-41.

<sup>130</sup> See *id.* at 243.

<sup>131</sup> See *id.* at 241.

<sup>132</sup> *Id.* at 242.

<sup>133</sup> See Taslitz, *Wilfully Blinded*, *supra* note 63, at 417-23

“availability” heuristic - - relying most heavily in informing our beliefs on the most easily accessible information; and the “confirmation bias” - - searching more enthusiastically for data confirming rather than disconfirming our beliefs.<sup>134</sup> When these three heuristics are motivated by self-interest, they constitute self-deception.<sup>135</sup> Thus, if information furthers self-interest, it becomes both more vivid and more salient and is paid far more attention than information contrary to our needs.<sup>136</sup> Moreover, many, perhaps most or all, of our conscious interpretations of events, as will be explained shortly, begin in the subconscious. These biases may thus combine to contribute to a positive *misinterpretation* of events. This skewed subconscious understanding then enters our consciousness in order to justify our actions to ourselves.

Philosophy Professor Alfred R. Mele gives this highly relevant example:

Sid is very fond of Roz, a college classmate with whom he often studies. Wanting it to be true that Roz loves him, he may interpret her refusing to date him and her reminding him that she has a steady boyfriend as an effort on her part to “play hard to get” in order to encourage Sid to continue to pursue her and prove that his love for her approximates hers for him. As Sid interprets Roz’s behavior, not only does it fail to count against the hypothesis that she loves him; it is evidence *for* the truth of that hypothesis.<sup>137</sup>

It is a short step from this example to understanding how a man can consciously and sincerely believe that “no” means “yes” while subconsciously knowing otherwise.<sup>138</sup> Simply put, the rapist lies to himself because, if he did not, he might miss out on deeply, if unilaterally, desired sex.<sup>139</sup>

## 2. *The Subconscious Is Relatively Multiple, Automatic, Quick, and Short-Sighted*

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<sup>134</sup> See ALFRED MELE, SELF-DECEPTION UNMASKED 28-29 (2001).

<sup>135</sup> See *id.* at 28-30.

<sup>136</sup> See *id.* at 29-30.

<sup>137</sup> *Id.* at 26.

<sup>138</sup> See Taslitz, *Wilfully Blinded*, *supra* note 63, at 422-23.

<sup>139</sup> See *id.*

There is another sense in which the folk dichotomy between the conscious and subconscious minds contradicts the scientific conception. The scientific subconscious is not a single system but rather multiple systems working in parallel. These systems are automatic (fast, unintentional, uncontrollable in the short run, relatively effortless), rigid (resistant to change, especially in the short-run), and concerned with the here-and-now. They are “on-line pattern detectors,” quickly triggered by particular stimuli and especially sensitive to negative information.<sup>140</sup> These similarities, however, justify treating the different function-specific systems (or “modules”) that are beyond our awareness as constituting *the* “subconscious,” to be distinguished from *the* “conscious.” Thus there may be a “face recognition module,” an “emotion perception module,” a “kin-oriented motivation module,” and a “grammar acquisition module,” but all operate automatically, using rigid heuristics to make quick decisions.<sup>141</sup>

Such rigidity results in a cost in accuracy in exchange for the benefits of speed and simplicity.<sup>142</sup> For example, we may jump at the sight of a “snake,” an automatic subconscious reaction done to save our lives, but our conscious mind later realizes that the snake did not move and is in fact just a stick. The here-and-now obsession of the subconscious focuses on problems that need immediate attention by detecting patterns, alerting us to danger, and spurring goal-directed behavior.<sup>143</sup> Better that we jump in fear by mistake than that we recognize a real snake too late and get bitten.<sup>144</sup>

But this description is not inconsistent with some subconscious processes being complex, and some may be less in-the-here-and-now focused than others. Much mathematical problem-

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<sup>140</sup> WILSON, *supra* note 76, at 46-56, 90-91.

<sup>141</sup> See STANOVICH, *supra* note 100, at 43-44.

<sup>142</sup> See WILSON, *supra* note 76, at 46-56; STANOVICH, *supra* note 100, 43-44.

<sup>143</sup> WILSON, *supra* note 76, at 46-56; STANOVICH *supra* note 100, at 43-44.

<sup>144</sup> See also TALLIS, *supra* note 65, at 103 (“The old distinction between conscious and unconscious domains was subsequently reformulated [by cognitive researchers] in terms of *controlled and automatic processing*”) (emphasis in original)).

solving may be subconscious; the subconscious may react to speech even for persons undergoing surgery under anesthesia; and much creative thinking may have its origins in the subconscious.<sup>145</sup> “Hunches” may often stem initially from subconscious processes,<sup>146</sup> as do much of our choice of words in speaking and writing.<sup>147</sup> Emotions, such as disgust at certain of another’s bodily fluids, not merely thoughts, often have subconscious aspects or origins.<sup>148</sup> The subconscious can also filter what will reach consciousness and alter the content of experience before we become aware of it.<sup>149</sup> The distinction between conscious and subconscious thinking as one based partly on degrees of speed, automaticity, and far-sightedness, while useful, is once again relative and interactive.

### 3. *The Conscious Mind Is Relatively Unitary, Slow, Farsighted, and Language-Centric*

The conscious mind is also not strictly unitary,<sup>150</sup> reflecting the operation of different neural areas in the brain and of different levels of brain processing and function, including the sense of self, the sense of others, the “intention” to act (though such an intention has subconscious roots), the experience of emotions, and phenomenal qualities or “qualia,” such as the conscious experience of pain.<sup>151</sup> Nevertheless, there is a real sense in which conscious thought is viewed as more unitary than is subconscious thought, justifying “a language of executive or central control.”<sup>152</sup> Philosophers often scoff at this use of language suggesting a unitary conscious mind or a “central processor” as involving a “homunculus” or “little person in the head” because we still need to explain how the mind of that “little person” makes

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<sup>145</sup> BENJAMIN LIBET, MIND TIME: THE TEMPORAL FACTOR IN 94-99 (2004).

<sup>146</sup> *Id.* at 94.

<sup>147</sup> *Id.* at 108.

<sup>148</sup> STANOVICH *supra* note 100, at 41-42.

<sup>149</sup> *See* LIBET, *supra* note 145, at 115, 121.

<sup>150</sup> STANOVICH *supra* note 100, at 47.

<sup>151</sup> Denno, *supra* note 125, at 311.

<sup>152</sup> STANOVICH, *supra* note 100, at 47.

decisions and gives “us” orders.<sup>153</sup> As cognitive scientist Steven Pinker explains, however, language connoting a unitary conscious mind captures something important about its nature:

The society of mind is a wonderful metaphor, and I will use it with gusto when explaining the emotions. But the theory can be taken too far if it outlaws any [unitary, master] system in the brain charged with giving the reins or the floor to one of the agents at a time. The agents of the brain might very well be organized hierarchically into nested subroutines with a set of master decision rules, a computational demon or agent or good-kind-of-homunculus, sitting at the top of the chain of command. It would not be a ghost in the machine, just another set of if-then rules or a neural network that shunts control to the loudest, fastest or strongest agent one level down.<sup>154</sup>

The effectively “unitary” conscious mind engages in serial, one-at-a-time, rather than parallel, processing.<sup>155</sup> By focusing on one thing (or, at most, a few things) at a time, the conscious mind can devote all its energies to a single primary task.<sup>156</sup> The conscious mind is far slower than the subconscious, more sensitive to positive information, and more controlled (intentional, controllable, effortful), serving as an after-the-fact checker and balancer, for example, spotting that the “snake” really was just a stick and no longer merits fear.<sup>157</sup> The conscious mind also focuses much more heavily on the long view, engaging in planning, inference, abstraction, decisionmaking, and cognitive control.<sup>158</sup> Conscious thought is, in a sense, the mind’s software, thus sometimes called “mindware,” operating on top of the older subconscious hardware.<sup>159</sup>

This mindware program can plan and deliberate because of its unique responsiveness to language.<sup>160</sup> Language allows otherwise isolated subsystems and memory locations to communicate with one another. Language means that we can easily install new “mindware”

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<sup>153</sup> See *id.* at 46-47.

<sup>154</sup> STEVEN PINKER, *HOW THE MIND WORKS* 144 (1997); see also STANOVICH, *supra* note 100, at 47.

<sup>155</sup> See STANOVICH, *supra* note 100, at 36.

<sup>156</sup> LIBET, *supra* note 145, at 115-16.

<sup>157</sup> WILSON *supra* note 76, at 46-56.

<sup>158</sup> See *id.* at 46-56; STANOVICH, *supra* note 100, at 47.

<sup>159</sup> See STANOVICH, *supra* note 100, at 48.

<sup>160</sup> *Id.* at 48.

discovered by others and downloaded into our brain as words. Language also has strong motivational properties, leading us often to change our conscious priorities in response to linguistic input, conscious new priorities that may conflict with those of the subconscious.<sup>161</sup> Language also enables the conscious mind to effect its tendency toward building coherent narratives.<sup>162</sup> So strong is this need to maintain a coherent life's tale that the conscious seeks to explain action in a way that involves the conscious choice of behaviors when they were in fact largely triggered by the subconscious mind.<sup>163</sup> Language also enables hypothetical reasoning, reasoning involving representing "possible states of the world rather than actual states of affairs," playing a role in deduction, decisionmaking, scientific investigation, and the broader cultural acquisition of knowledge.<sup>164</sup>

#### 4. *The Conscious/Subconscious Mind Relationship Is Bi-Directional*

The relationship between the scientific conscious and subconscious is also bi-directional, in contrast to the *unidirectional* influence from the subconscious to the conscious mind that is posited by folk wisdom. This observation means that the conscious can, especially over time, gain a measure of control over the subconscious, though the latter necessarily continues to influence the former. Moreover, the subconscious influence on both observable behavior *and* conscious thought is part of the routine operation of a healthy mind and is not - - again in contrast to the folk model - - limited to those suffering from mental pathology.<sup>165</sup>

##### a. *The Power of the Subconscious and Its Short-Term Limits*

Empirical research demonstrates that bodily movements begin in the subconscious well before we are aware of the "desire" to move.<sup>166</sup> Neural activity begins subconsciously but

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<sup>161</sup> *See id.* at 49.

<sup>162</sup> *See id.*

<sup>163</sup> *See id.* at 49-50, 58-59.

<sup>164</sup> *Id.* at 50-51.

<sup>165</sup> LIBET, *supra* note 145, at 98-122.

<sup>166</sup> *Id.* at 101-08.

must persist for 500 milliseconds before it breaks through to consciousness.<sup>167</sup> Conscious thought thus in fact consists of *discontinuous separate events*.<sup>168</sup> Yet, perhaps because of our need for a coherent narrative, we report awareness of an event before such awareness was neurologically possible, referring our memory back in time to create a sense of continuity rather than choppiness in our mental life.<sup>169</sup> Movements that seem to us to be in our conscious control are therefore initiated by the subconscious.

Our sense of conscious control over our actions is, however, not entirely an illusion, for we become consciously aware of our impetus to act 150-200 milliseconds before the act itself.<sup>170</sup> This window of time has experimentally been shown to be subject to a conscious veto.<sup>171</sup> There is also much reason to believe that an action begun in the subconscious cannot move to completion without the *affirmative* permission of the conscious mind during this period.<sup>172</sup> Subconscious processes may, however, inform the choices consciously being made.<sup>173</sup> An “impulse” to insult our boss for treating us unfairly may thus, for example, be squelched upon more careful consideration of our self-interest by our conscious mind. Although our awareness of our conscious choice may itself begin in the subconscious, the conscious choice itself likely involves an operation independent of the subconscious mind.<sup>174</sup>

Although there is less supporting experimental evidence, it is likely that all, or most, other conscious mental events, not simply those involving bodily movements, begin subconsciously before any awareness appears.<sup>175</sup> Imagination, attitudes, and biases may therefore start at the

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<sup>167</sup> *Id.* at 112.

<sup>168</sup> *Id.* at 112-113.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 123-24; Denno, *supra* note 125.

<sup>171</sup> LIBET *supra* note 145, at 137-39; Denno, *supra* note 125, at 312.

<sup>172</sup> See LIBET, *supra* note 145, at 138-39, 141-42.

<sup>173</sup> *Id.* at 139.

<sup>174</sup> See *id.* at 139-47.

<sup>175</sup> *Id.* at 107-08.

subconscious level.<sup>176</sup> That does not mean that we are consciously aware of all our biases and attitudes or their sources. We are not. But when we attain conscious behavioral expression of these attitudes, there are likely subconscious roots. The subconscious can therefore often affect our behavior without our awareness, while our consciousness creates an explanation at odds with the real motivation for our action. This is one kind of self-deception.<sup>177</sup> Our conscious explanations of our behavior may thus often be unconnected to the real causes, and this is as true of jurors voting to acquit a rapist (subconscious sexist biases perhaps being at work) as it is of an academic criticizing a junior colleague's work as inferior, when subconsciously he may simply fear the competition.

b. *The Power of the Conscious Mind To Explore and Alter the Subconscious In the Long Run*

Yet this observation does not make our conscious mind the slave of our subconscious, nor mean that the subconscious is forever beyond our control. As noted earlier, the conscious mind is better at long-range planning and deliberation, including about whether to engage in certain acts, even if the subconscious ultimately initiates those acts. Such deliberation will be inadequate, however, if it is based on incomplete information, such as about the subconscious workings of our mind, or false information, such as our confabulated explanations of our behavior.<sup>178</sup> Precisely because the subconscious is outside our awareness, gaining complete and accurate information about its operation to guide conscious judgment may be hard.

Yet it is not impossible. Feelings and attitudes - - as opposed to cognitions - - are the sorts of subconscious phenomena that can most readily be made available to consciousness.<sup>179</sup> In particular, close attention to how others respond to your behavior is often a better guide to

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<sup>176</sup> *Id.* at 107.

<sup>177</sup> See Taslitz, *Wilfully Blinded*, *supra* note 63, at 415-21.

<sup>178</sup> See WILSON, *supra* note 76, at 171-72, 203-16, 221 (discussing these concepts generally); Taslitz, *Two Concepts*, *supra* note 97, at 45-65 (considering the moral status of these cognitive processes in the date rape context).

<sup>179</sup> See WILSON *supra* note 76, at 133-34.

your real emotions than is your own self-deceiving introspection.<sup>180</sup> Because this is so, attention to how others would likely perceive your own behavior can be a helpful guide to what is really going on in your head. Consequently, if a man feels subconscious discomfort about a sexual situation, by choosing to give credence to a woman's "no"s and to her struggles, he can get in touch with the sources of his discomfort.<sup>181</sup> An accused rapist who consciously believes that his victim consented may lie to the police about certain details of the encounter because he understands that those details will not "look good" to others. But this means that he was capable of asking himself at the time of the alleged crime what others would have thought about his actions. Had he done so, he could have helped to identify his own (subconscious) suspicions, using them to avoid the harm of non-consensual sex.<sup>182</sup>

The conscious mind can also choose to increase the information available to the subconscious mind, altering its "triggers." A well-informed subconscious, according to influential researchers, is likely to make better decisions than an ill-informed one.<sup>183</sup> How can we achieve this goal in the case of rape? A man can choose to go slow, spending more time with a woman, getting to know her better. He can directly ask her questions about her thoughts, feelings, and desires, especially when he intends to engage in any sort of physical intimacy. This need not squelch spontaneity, but it will involve a negotiation, a give and take. If a woman says "no," a man can ask again later - - but gently and carefully, lest she perceive him as unwilling to take no for an answer - - or he can wait until she takes the initiative rather than his plunging forward as if the word "no" had no meaning.<sup>184</sup> A subconscious more

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<sup>180</sup> See *id.* at 107-10.

<sup>181</sup> See *id.* at 20-23.

<sup>182</sup> See *id.* at 20-23.

<sup>183</sup> See *id.* at 171-72.

<sup>184</sup> See STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 263-64 (1998) (explaining how a man's repeated inquiries and repeated pressure in the face of protests can lead a woman to believe that the man will never really do what she asks and that it is better to relent to get the unhappy experience over with as quickly as possible).

informed about a woman's desires will be less likely to delude itself and more able to convey the truth to the conscious mind, for example, by generating "gut feelings" of discomfort.<sup>185</sup>

The subconscious mind also monitors, and learns from, our own behavior.<sup>186</sup> If you behave courageously, your subconscious eventually infers that you are indeed courageous. Your behavior provides new data for the subconscious, and any behavior repeated often enough to become habitual will also become part of the subconscious.<sup>187</sup> Correspondingly, therefore, if you behave like a man who is sincerely interested in the well-being of his partner, rather than in only his own narrow self-interest - - even if his current feelings are otherwise - - you will become that more sexually attentive man. Given the risk of harm - - namely rape - - from a mistake, society has an interest in encouraging such sensitivity.<sup>188</sup>

Research also suggests that studying subconscious processes and biases *and* why we are reluctant to recognize their operation and give up their influence on us can indeed sometimes reduce that influence in individual cases where such influence becomes an obstacle to promoting desired individual or societal goals.<sup>189</sup> Education of certain types can therefore at least occasionally both reduce the dissonance between our conscious and subconscious motivations and increase our conscious control over our subconscious minds. Additionally, awareness of what triggers certain subconscious processes can enable us to manipulate stimuli to avoid undesirable triggers. Thus a police officer's tendency to convey subconscious "minimal cues" to a witness about whom to select as the perpetrator of a crime from a lineup can be avoided by "double-blind" methods in which neither the officer administering the

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<sup>185</sup> Cf. WILSON, *supra* note 76, at 171-72 (noting that rather than marrying the first person you meet, you should "spend a lot of time with someone and get to know him or her very well, and [if you ] still have a very positive gut feeling, that is a good sign.").

<sup>186</sup> See WILSON, *supra* note 76, at 203-16, 221.

<sup>187</sup> See *id.* at 11, 37, 203-16, 221.

<sup>188</sup> See Taslitz, *Two Concepts*, *supra* note 97, at 53-54.

<sup>189</sup> See TASLITZ, RAPE AND CULTURE, *supra* note 21, at 131-33.

lineup nor the witness know who is the suspect.<sup>190</sup> This same principle of designing an institutional environment that suppresses some subconscious triggers while activating others can be applied in the courtroom to a wide range of evidence other than eyewitness identifications.<sup>191</sup>

#### 5. *Recap and Taking Stock*

*To summarize:* The conscious and subconscious minds are on a continuum and routinely interact in ways that make it hard sharply to separate one from the other. This interaction is bi-directional so that, while the subconscious can influence conscious thought and behavior, the reverse is true as well, especially in the long run. Moreover, these bi-directional influences are as characteristic of the healthy as the unhealthy mind. Furthermore, the subconscious is not necessarily irrational, but serves different functions than does the conscious mind, while the latter is not necessarily always “rational” in the sense of being the best guide to achieving individual and societal goals. Moreover, some subconscious thoughts can be made accessible to the conscious mind, while other subconscious thoughts can be consciously altered even without such access. Additionally, institutional environments can give us a measure of control over our subconscious’s influence on our conscious thoughts and behavior, even in the short run.

A proper understanding of these observations about the scientific subconscious may have implications for the substantive criminal law *and* for the law of evidence that are different from those suggested by folk conceptions. It is those implications to which this article now turns.

#### IV. *Implications*

##### A. *The Substantive Criminal Law of Rape*

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<sup>190</sup> See ABA, *ACHIEVING JUSTICE*, *supra* note 120, at 26 -29.

<sup>191</sup> See TASLITZ, *RAPE AND CULTURE*, *supra* note 21, at 105-20 (illustrating via institutional changes at rape trials).

## 1. *The Robot's Rebellion*

Because our conscious thoughts and seemingly consciously-chosen actions are generally at least partly rooted in subconscious processes beyond our full awareness, any effort entirely to divorce moral and criminal responsibility from our subconscious thoughts is fictional, an artificial distinction ignorant of the teachings of cognitive science.<sup>192</sup> Conscious choice is not so easily and cleanly divorced from subconscious “thoughts” and “feelings.” Of course, if, as the folk model posits, subconscious influence means subconscious subjugation of a conscious mind ignorant of its master’s control, then recognizing a broader connection between the two levels of mind would mean that we have limited, if any, responsibility for our conscious thoughts and actions. True “deliberate” choice would be an illusion.

But cognitive science’s teachings counsel the very opposite conclusion. Professor Keith F. Stanovich, holder of the Canada Cognitive Research Chair at the University of Toronto, describes this state of affairs as the “Robot’s Rebellion.”<sup>193</sup> Stanovich concedes that we often behave like robots, mechanically controlled by our genes and our subconscious minds (what he calls “TASS.”). But we robots are capable of at least limited “rebellion” against our masters because of the deliberate power of our conscious or “analytic” mind. Our

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<sup>192</sup> *But cf.* Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUST., Spring 1998, at 329 (noting subconscious *causation* of conscious thought and action *does not necessarily* equate with moral responsibility). Morse has mounted a now well-known assault on any use by the criminal law of the subconscious in individual cases unless it renders the conscious mind irrational or incapable of real choice or is, at most, relevant to mitigation rather than complete exculpation. *See* Stephen J. Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 VA. L. REV. 971, 1027-43 (1982); Stephen J. Morse, *Crazy Reasons*, 10 J. CONTEMP. LEGAL ISSUES 189 (1999); Stephen J. Morse, *Rationality and Responsibility*, 74 S. Cal. L. Rev. 251 (2000); Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J. L. & PUB. POL’Y 51 (2003). I see no reason to address Morse’s arguments, however, in any detail here. First, one of my proposed solutions is to use our knowledge of general subconscious processes to draft objective culpability standards, thus avoiding inquiring into the accused’s subjective mental state in any individual case. Second, I outline reasons why, as a matter of cognitive science, we can trust expert guidance to aid us in the task of understanding an individual’s subconscious, at least under certain circumstances, *if* the law does rely upon subjective rather than objective culpability rules. Third, I implicitly respond to Morse’s arguments in my entire approach while others have already more expressly critiqued his position, so little is to be gained by re-walking ground already well-trod.

<sup>193</sup> *See* STANOVICH, *supra* note 100, at 10-11, 20, 26-28, 77-78, 84.

conscious mind can often become aware of subconscious biases, can make normative choices about their value, and can devise strategies to reduce the effects of those biases deemed undesirable (more on this in the next section of this article).<sup>194</sup> Furthermore, although not mentioned by Stanovich, the immediately preceding section of this article summarized other helpful tactics for altering even subconscious thoughts and processes forever beyond our conscious awareness, such as repeatedly pushing ourselves to learn more about others with whom we interact before leaping into decisions about how we will treat them, and behaving routinely like the person we want to be. Repeatedly kind acts teach our subconscious to be less selfish. If other-directedness is something we value, this new subconscious can be the source of future morally appropriate, rather than condemnable, behaviors. In the long-term, the subconscious can be as much a force for good as for evil, and neither it nor the conscious mind are beyond the ability of informed, deliberative choice. The subconscious is relevant to moral and criminal responsibility but not solely in an exculpatory fashion. The robot can, and often should, learn to re-program itself.

## 2. *Proof Problems and Their Solution*

Yet there are complications. I have argued above that the claimed easier access to conscious than subconscious thoughts may be overstated because both inquiries involve interpretive judgments. To say that something is “interpretive” does not mean that anything goes. Some interpretations are based on more evidence, clearer data, and more persuasive reasoning than others.<sup>195</sup> Nevertheless, it is harder to judge the quality of some interpretive decisions than others. In particular, interpreting the subconscious mind’s content at a single moment in time is even more difficult than doing so for the conscious mind precisely because even the actor being judged - - here, the criminal suspect - - is unaware of much that is

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<sup>194</sup> See *id.* at 34-80, 184-85.

<sup>195</sup> See Taslitz, *Feminist Approach*, *supra* note 43, at 65-68; see generally Taslitz, *Myself Alone*, *supra* note 44.

happening in his subconscious. Proof problems may preclude making confident judgments about the contents of the subconscious mind beyond what is revealed via conscious thought and action.

But the law can get around this proof problem by choosing an “objective” mental state - - a sort of negligence standard - - to define the crime of rape. Yet the crafting of this standard can take into account much of what we know about the subconscious workings of the male mind, illustratively the common mechanisms by which men deceive themselves about women’s sexual desires. The law should discourage men from being self-deceivers.<sup>196</sup> More than this, it should *encourage* men to make reasonable communicative efforts to determine a woman’s desires. Such a standard would not be one of strict liability. A man who made reasonable efforts to find out whether a woman had consented would not be criminally responsible if he nevertheless turned out to be wrong. “Reasonable” communicative efforts, however, would be judged as those made by a non-self-deceiving male under the circumstances.<sup>197</sup>

There are practical ways to make this sort of standard real at trial - - as I and others have discussed at length elsewhere.<sup>198</sup> The narrow points to be made here, however, are these: (1) that, if we believe that most male date rapists are also self-deceivers, it is legitimate to craft a legal standard that takes into account the problem of subconscious and semi-conscious self-deception as a source of criminal liability; (2) that, if we further believe that self-deceivers are more morally reprehensible than other sorts of negligent actors - - perhaps because self-deceivers have some level of actual awareness of their wrong, are a type of hypocrite, are inauthentic persons, and lie to themselves and to others- - then we are justified

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<sup>196</sup> See Taslitz, *Wilfully Blinded*, *supra* note 63, at 439-40.

<sup>197</sup> See *id.* at 439-40.

<sup>198</sup> See Taslitz, *Two Concepts*, *supra* note 97, at 70-72; Lois Pineau, *Date Rape: A Feminist Analysis*, in *DATE RAPE: FEMINISM, PHILOSOPHY, AND THE LAW* 1-26 (Leslie Francis, ed., 1996).

in imposing harsher penalties on them than is ordinarily true for crimes of negligence; and (3) that, because the “reasonable” communicative efforts test is an objective one, it avoids the proof problem of determining an individual actor’s subconscious mental state on a particular occasion.<sup>199</sup> Continuing an unfair practice *in the face of factually refuting evidence is in itself blameworthy*, a grievous moral wrong.<sup>200</sup> Doing so to serve one’s self-interest is worse still.<sup>201</sup>

### 3. *The Subconscious and Democratic Deliberation*

My suggested standard of course reflects a number of contestable normative judgments. More importantly, however, is that my approach presupposes that both individuals and collectivities are capable of reasoned deliberation about such judgments *and* capable of acting upon them. It rejects the folk vision of the subconscious as compromising deliberative capacities. Such presuppositions of individual and societal deliberative capacities are essential to the legitimacy of a democratic republic of free and equal citizens. As Professor Klaus Günther of Frankfurt University explains:

[D]emocracy presupposes responsible citizens: citizens who attribute responsibility to one another as participants in public deliberation. If public deliberation is the most important feature of democratic legislation, then each citizen has to be conceived of as a person who is able to deliberate on the validity of legal norms. This requires the ability to give and accept reasons, as well as the ability to control his or her will according to the reasons he or she accepts.<sup>202</sup>

Professor Günther continues:

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<sup>199</sup> See Taslitz, *Wilfully Blinded*, *supra* note 63, at 423- 46.

<sup>200</sup> ROBINSON, *supra* note 73, at 158.

<sup>201</sup> For a more detailed justification for this objective test of criminal responsibility for rape than I can offer here, *see generally* Taslitz, *Two Concepts*, *supra* note 97. I am not backing away from my assertions earlier in this article that sufficiently reliable interpretive access to a particular individual’s subconscious processes is sometimes possible and, therefore, helpful for the purposes of a criminal trial. *See supra* text accompanying notes 179 - 82; *see generally* Taslitz, *Myself Alone*, *supra* note 44. Rather, I am arguing only that even if we concede that that task involves tougher proof problems than does gaining access to the conscious mind, the power of law to generalize can be used to circumvent the proof problem.

<sup>202</sup> Klaus Günther, *Voluntary Action and Criminal Responsibility*, in *VOLUNTARY ACTION: BRAINS, MINDS, AND SOCIALITY* 263, 276 (2003).

The deliberative concept of a person that informs the notion of a citizen now finds its mirror image in the *legal person* as the addressee of norms. Citizens who treat one another as responsible authors of their legal norms also have to treat one another as being responsible for obeying their norms. It would not make sense to claim to be a responsible participant in public deliberation, but to plead ignorance when it comes to obeying the law in a concrete situation.<sup>203</sup>

This democratic concept of the deliberative self is inconsistent with some exculpatory arguments made on behalf of rape defendants, drawing on the alleged lessons of forensic linguistics. Men are sometimes portrayed as literally incapable of understanding “women’s language,” lacking the capacity to “get” all but the clearest, loudest, and most aggressive female protests.<sup>204</sup> Misunderstandings are worsened by the admission of many women that “no” does not always mean “no.”<sup>205</sup> When the men make a mistake, they are not at fault. Similar claims are made regarding misunderstandings about “body language.” Even worse, however, is that women are often portrayed as *more cognitively capable* than men, thus able to be aware of men’s incapacities and thus morally responsible for the consequences of not clearing up any misunderstanding.<sup>206</sup>

This line of argument degrades the image of men as equal citizens with mature deliberative capacities. In a democratic republic, respect for men requires treating them as if they are as capable of understanding and deliberating about sexual choices as are women. Moreover, such deliberation crosses the line from being about a private matter to becoming a public matter when the risk of non-consensual sexual intercourse - - of rape - - is involved, for crimes by definition involve an injury to the “public” good.<sup>207</sup> This degradation of men also

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<sup>203</sup> *Id.* at 276.

<sup>204</sup> See TASLITZ, RAPE AND CULTURE, *supra* note 21, at 67-69; *see generally* SCHULHOFER, *supra* note 184, at 260-67; Taslitz, *Two Concepts*, *supra* note 97, at 27-31.

<sup>205</sup> See SCHULHOFER, *supra* note 84, at 260-67; WAYNE G. FARRELL, THE MYTH OF MALE POWER 322-25 (1993); Taslitz, *Patriarchal Stories*, *supra* note 42, at 400.

<sup>206</sup> Taslitz, *Two Concepts*, *supra* note 97, at 14-16.

<sup>207</sup> See Andrew E. Taslitz, *the Inadequacies of Civil Society: Law’s Complementary Role in Regulating Harmful Speech*, 1 MD. INTERDISCIPLINARY J. ON RACE, RELIGION, GENDER, & CLASS 305, 318-19, 342-55 (2001).

believes the teachings of science. Men are fully capable of understanding women's language and behavior if they commit themselves to doing so.<sup>208</sup> Indeed, the degree to which an individual speaks "women's" language or otherwise adopts a more deferential speaking style is likely affected as much by situational factors, such as relative perceived social status and power imbalances, as by anything else.<sup>209</sup> Thus men may show features of "women's" language in many situations, revealing that men already know how to speak and understand a variety of linguistic styles, even if many of them often more easily engage in one style than another.<sup>210</sup>

#### 4. "Memes" and Male Responsibility

The theory of "memes" might be interpreted as still supporting compromised visions of male moral culpability. The "meme" concept is that ideas spread like viruses, looking for "hosts" within which to set up residence, even when the memes may threaten the hosts' physical or mental health.<sup>211</sup> The memes are interested more in their own spread and survival than that of the host's, and the host may prove receptive to them for a variety of reasons other than the host's self-interest.<sup>212</sup> Memes seem to suggest that we are slaves to ideas rather than their authors. In the current context of this article, men may thus be seen as "slaves" to patriarchy, thus not fully responsible for their coercive sexual behavior. This understanding of memes contradicts the democratic presupposition of real deliberative individual capacity. Memes acquired early in life, before any of us have full reflective capacities, arguably pose a

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<sup>208</sup> Taslitz, *Two Concepts*, *supra* note 97, at 47-48, 54-55; TASLITZ, RAPE AND CULTURE, *supra* note 21, at 67-80.

<sup>209</sup> TASLITZ, RAPE AND CULTURE, *supra* note 21, at 67-73.

<sup>210</sup> *See id.* at 67-69, 79-80.

<sup>211</sup> *See generally* SUSAN BLACKMORE, THE MEME MACHINE (1999); STANOVICH *supra* note 100, at 173-76.

<sup>212</sup> BLACKMORE *supra* note 210; STANOVICH *supra* note 100, at 173-80.

particular danger, having long “avoided consciously selective tests of their usefulness.”<sup>213</sup>

Philosopher Robert Nozick utters a similar caution:

Mostly we tend - - I do too - - to live on automatic pilot, following through the views of ourselves and the aims we acquired early with only minor adjustments. No doubt there is some benefit - - a gain in ambition or efficiency - - in somewhat unthinkingly pursuing early aims in their relatively unmodified form, but there is a loss too, when we are directed through life by the not fully mature picture of the world we formed in adolescence or young adulthood.... This situation is (to say the least) unseemly - - would you design an intelligent species so continuously shaped by its childhood, one whose emotions had no half-life and where statutes of limitations could be invoked only with great difficulty?<sup>214</sup>

Nozick’s caution is not one, however, about the human incapacity to resist early-acquired memes but rather about the human reluctance - - perhaps because of simple laziness - - to do so. Professor Stanovich explains that all memes are, in the long run, subject to just as much deliberation and change as is much of our subconscious, for memes take residence in the conscious or subconscious minds or both.<sup>215</sup> Furthermore, notes Stanovich, the growing knowledge of how memes gain their grip on us and that information’s ready accessibility to those who care to look makes it even easier to resist their hold.<sup>216</sup>

A few final caveats. I am not in this brief space trying to defend “free will” as an empirical reality. The criminal justice system assumes that such free will exists and is unlikely to dispose of that assumption any time soon.<sup>217</sup> *If* free will exists, I argue, then the mere existence of the subconscious mind should not be understood as impairing that freedom in the long run. The subconscious, to the contrary, must be seen as an essential part of the self, awareness of its operation and appeal to its mechanisms as being essential both to making informed, autonomous choices and to crafting institutions that promote such choices.

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<sup>213</sup> See STANOVICH *supra* note 100, at 193.

<sup>214</sup> ROBERT NOZICK, *THE EXAMINED LIFE* 11 (1989).

<sup>215</sup> STANOVICH, *supra* note 100, at 192-293.

<sup>216</sup> *Id.* at 192-205.

<sup>217</sup> See CHRISTOPHER SLOBOGIN, *MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY* 9-10 (2006).

Additionally, attributing responsibility based upon the assumption of an informed, autonomous choosing capacity - - that is, of free will - - is essential to fostering the values and institutional processes essential to a democratic society of free and equal citizens. The folk conception of the subconscious is thus both empirically wrong and inconsistent with the best vision of the nature of the “person” in a free society. The folk conception thus has pernicious effects on the criminal justice system, including rape trials, effects compounded by the courts’ resistance to more empirically accurate and normatively desirable understandings of the conscious and subconscious minds that underlie many of the teachings of forensic linguistics.

## B. *Evidentiary Implications*

### 1. *The Power of General Principles*

If gauging an individual’s subconscious mental state at a particular point in time is more art than science, the same cannot be said about the useful generalizations revealed by a vast array of empirically-grounded research about the subconscious mind. For example, such research identifies a “fundamental attribution error” made by most human beings. This error is the tendency of observers to attribute an individual’s behavior more to character than to situation.<sup>218</sup> Moreover, because of the “devil’s horn” and “halo effects,” evidence of a bad or good character trait may be understood as marking an entire person’s personality as bad or good.<sup>219</sup> Furthermore, most observers are willing to make quick judgments about another’s personality based on very little evidence.<sup>220</sup> Accordingly, someone learning of another’s violent act may be quickly likely to conclude that he is generally a violent person, therefore likely to commit other violent acts, when there might have been some unusual situational factor that prompted an otherwise peaceful man to turn to a single instance of violence.<sup>221</sup>

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<sup>218</sup> Taslitz, *Myself Alone*, *supra* note 44, at 110-13.

<sup>219</sup> *See id.* at 110-13.

<sup>220</sup> *See id.* at 110-13.

<sup>221</sup> *See id.* at 110-13.

These cognitive tendencies suggest that there is great wisdom in the American rule generally excluding from trials evidence of a person's character trait offered to prove that he committed the particular criminal act or civil wrong now alleged.<sup>222</sup>

In other instances, however, research about the nature of the subconscious mind may counsel not exclusion, but rather *inclusion*, of evidence. Specifically, it can be helpful to educate jurors about psychological principles of which they would otherwise likely be unaware. Knowing, for example, that stress can make an eyewitness identification of a criminal assailant less trustworthy rather than "focusing the witness's mind" or that certain common non-violent interrogation techniques can prompt the innocent to confess - - conclusions contrary to prevailing cultural beliefs - - can aid a jury in deciding whether it is persuaded beyond a reasonable doubt that a criminal defendant committed the alleged crime.<sup>223</sup> Research suggests that such testimony can significantly improve the quality of juror decisionmaking.<sup>224</sup> The power of the law to use social science to generalize can therefore aid in crafting evidence rules - - like the character and expert evidence rules just discussed - - in much the same way as generalization aided the substantive criminal law.

## 2. *Context*

Recognizing that jurors, unaided, will generally not be aware of their own subconscious biases further counsels judicial receptivity to jury education about social science. The common judicial assumptions that a juror who says he can be fair can indeed be fair or that indicators of a juror's potential bias will be obvious or within the juror's conscious awareness are just wrong. "Scientific" jury selection techniques, on the other hand, have not

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<sup>222</sup> See FRIEDLAND, ET. AL., *supra* note 19, at 90-98.

<sup>223</sup> ABA, ACHIEVING JUSTICE, *supra* note 120, at 30-32 (eyewitnesses); THE CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED 75-84 (2006)..

<sup>224</sup> See ABA, ACHIEVING JUSTICE, *supra* note 120, at 41-42 (eyewitness experts); *cf.* WELSH WHITE, MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON 196-215 (2001) (supporting usefulness of social science expertise concerning the voluntariness and accuracy of confessions).

generally been proven to be of much value either.<sup>225</sup> The consequence is that it is fair to assume that in most cases at least some members of a jury will suffer subconscious biases that so skew their judgment that they cannot be fair and impartial factfinders. Correcting misconceptions about human behavior through expert testimony can sometimes help. Deeply engrained biases may require more aggressive expert solutions, that is, experts whose main function is to explain to jurors what biases they are likely to hold, why, and why they are resistant to escaping the resulting pernicious effects despite their best intentions, as I explained earlier in this article.

The problem here is one of the human “tendency to contextualize a problem with as much prior knowledge as is easily accessible, even when the problem is formal....”<sup>226</sup> The law, by contrast, often requires “radical decontextualization...put[ting] a premium on detaching prior belief and world knowledge from the process of evidence evaluation.”<sup>227</sup> Jurors are repeatedly told to decide only based upon the evidence before them at trial, yet they frequently fill in gaps needed to create a coherent tale with supposed evidence never offered.<sup>228</sup> Their impetus is to craft tales matching those familiar to them from their own life experience.<sup>229</sup> Likewise, they follow rules about what sorts of stories “make sense” that they absorb from their local cultures.<sup>230</sup>

Jurors’ resistance to the radical decontextualization of the law is often desirable. It is one of the ways that jurors can serve as a check on abusive, unjust, or excessively bureaucratic exercises of government power.<sup>231</sup> To take one obvious example, the law of self-defense

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<sup>225</sup> See generally KRESSEL & KRESSEL, *supra* note 104.

<sup>226</sup> STANOVICH, *supra* note 100, at 113.

<sup>227</sup> *Id.* at 122.

<sup>228</sup> See *id.* at 122-23.

<sup>229</sup> See TASLITZ, RAPE AND CULTURE, *supra* note 21, at 17-18.

<sup>230</sup> See *id.* at 17-43 (illustrating in rape cases and summarizing social science); Taslitz, *Myself Alone*, *supra* note 44, at 94-98 (factors affecting how jurors determine what stories make sense).

<sup>231</sup> See TASLITZ, RAPE AND CULTURE, *supra* note 21, at 145-48.

generally permits the use of “deadly force” only if the defender actually and reasonably believes that he or she is in *imminent* danger of death or serious bodily injury from an attacker.<sup>232</sup> A purely formalistic view of the law - - a view long embraced by American courts - - would make this judgment based on a narrow time frame (the moment of the attack), treating all participants as fictionally the same, their individual life stories being irrelevant to the formal legal question whether the suspects acted in self-defense.<sup>233</sup> Likewise, the social forces that might explain the defender’s actions and give them meaning would be ignored. In such a world, a wife suffering a decade’s worth of physical and psychological abuse at her husband’s hands, who killed him while he was napping, would be denied an acquittal on grounds of self-defense.<sup>234</sup> A jury seeing signs of such abuse and recognizing that the woman might in fact be aware of behaviors by her husband that her experience taught her meant he would mount a particularly vicious attack when heawaken ed - - which might happen at any second - - might instead conclude that the wife *did* reasonably fear imminent serious bodily injury if she did nothing.<sup>235</sup> Such re-contextualization would, at least in the view of many feminist thinkers, achieve real justice.<sup>236</sup>

One problem, of course, is that if the trial judge bars all evidence suggestive of a history of spousal abuse, re-contextualization along these lines might never even occur to the jurors. Perhaps equally worrisome, even were evidence of abuse admitted, jurors might lack knowledge of the social and psychological dynamics of spousal abuse or, worse, harbor

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<sup>232</sup> PODGOR, et. al., *supra* note 8, at 549-53, 558-59. .

<sup>233</sup> See Taslitz, *Feminist Approach*, *supra* note 43, at 69-73; Andrew E. Taslitz, *What Feminism Has to Offer Evidence Law*, 28 S.W. U. L. Rev. 171, 200 (1999).

<sup>234</sup> See David Faigman and Amy Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 61 (1997).

<sup>235</sup> See Taslitz, *Abuse Excuses*, *supra* note 19, at 1062 (“Other battering theorists see the battered woman as hyperrational, as having an understanding of danger that the rest of us cannot comprehend”).

<sup>236</sup> See *id.* at 1062 (“For...[some] theorists, we must understand the entire system of patriarchal oppression of women through violence in order to appreciate the danger that this woman was in.”).

affirmative misconceptions of those dynamics.<sup>237</sup> Active efforts to read cold legal rules in as contextual a fashion as their text permits and to enliven trials with the relevant personal and social background arising from real human relationships can thus help to combat an arid legal system separated too far from social complexities.<sup>238</sup> Social science experts, such as those on the fate of battered women, can help to combat unsubstantiated stereotyping and help in jurors' bringing coherent meaning to seemingly chaotic and conflicting evidence.<sup>239</sup>

Yet other times the better choice is de-contextualization, and, for this task too, experts may be needed to achieve that goal. Even the most enlightened jurors, who are firmly ideologically opposed to racial or gender discrimination, may be unaware that their own subconscious processes are promoting precisely the unequal treatment that they so abhor. This may be true in the face of their absolute insistence to the contrary. Law professor Jody Armour summarizes the research findings on this subject:

If cues of group membership such as race serve to prime trait categories such as hostility, people will systematically view behaviors by members of certain racial groups (e.g., Blacks) as more menacing than the *same* behaviors by members of other racial groups (e.g., Whites). Thus Whites will interpret the same ambiguous shove as hostile or violent when an actor is Black, and as "playing around" or "dramatizing" when the actor is White. Category accessibility best explains this differential perception of violence as a function of the protagonist's race: the presence of the Black actor primed the stereotype that associates Blacks with violence; the violent-behavior category was more accessible when interpreting behavioral information about Blacks than Whites. These findings have been replicated in studies of school children. Both Black and White children rated ambiguously aggressive behaviors (e.g., bumping in the hallway) of Black actors as being more mean or threatening than that of White actors.<sup>240</sup>

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<sup>237</sup> DONALD A. DOWNS, MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY, AND THE LAW 110-11, 136-37 (1996).

<sup>238</sup> See *id.* at 103-10; Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199, 1199-1268 (1998); Taslitz, *What Feminism*, *supra* note 233, at 193-203 (analyzing importance and processes of contextualized factfinding):

<sup>239</sup> DOWNS, *supra* note 237, at 103-18, 136-37; Taslitz, *What Feminism*, *supra* note 233, at 196-203.

<sup>240</sup> JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 132-33 (1997).

Although there is some ambiguity on the point, Armour argues that, for many people, this racial-hostility trigger happens automatically, outside conscious awareness, even for subjects who have sincerely renounced racial prejudice.<sup>241</sup> Such automatic processes “operate independently of conscious decisions to break with old patterns of response and adopt new ones.”<sup>242</sup> Therefore, explains Armour, “attitudes and beliefs can change without a corresponding change in established habits, resulting in a conflict between currently endorsed responses and old habitual habits.”<sup>243</sup> The Black stereotype can be particularly resistant to change because it takes root when we are children, too young to resist its lure. Moreover, the mass media and everyday social interactions reinforce the stereotype.<sup>244</sup>

To say that such stereotypes are resistant to change does not mean that the resistance cannot be overcome. Sometimes resistance is *not* futile. In particular, strategies designed to prod fact finders consciously to monitor their responses to avoid unconscious stereotyping can succeed.<sup>245</sup> Research again suggests that experts can be helpful in this area, particularly experts who educate jurors not just about their preconceptions but why they hold on to them:

[Social] myths continue to operate subconsciously. Discrimination is a habit that is hard to break. But if subjects who view a prejudiced belief as wrong are told how it may nevertheless affect their judgments, they are better able to monitor and thereby reduce the belief’s impact. Making unconscious biases conscious biases does seem to help jurors to evaluate victim testimony more fairly.<sup>246</sup>

### 3. *Normative Choices*

Note that many of these evidentiary choices, like the substantive criminal law choices, turn on explicitly normative judgments. Whether to “recontextualize” a self-defense claim

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<sup>241</sup> *Id.* at 133.

<sup>242</sup> *Id.* at 135.

<sup>243</sup> *Id.* at 135.

<sup>244</sup> *Id.* at 135-38.

<sup>245</sup> *Id.* at 146.

<sup>246</sup> TASLITZ, RAPE AND CULTURE, *supra* note 21, at 133.

with an understanding of the nature of spousal abuse or to “decontextualize” race from an assault trial turns both on empirical and value-based judgments. Illustratively, the false but widespread belief that black males are more dangerous than white males such that the race of victim and offender should be relevant in a rape trial can in theory be empirically tested.<sup>247</sup> Yet even if it were shown to be true that black males were on average more violent than white males, not all generalizations are morally equivalent. To permit a jury to decide that because many black males are violent, *this* black male must have been violent *in this case* to violate principles of individualized justice fundamental to the modern Anglo-American legal system as well as the to constitutional mandate of equal protection.<sup>248</sup>

The self-defense judgment becomes normative in another way too: the reasonableness of the defender’s beliefs, as noted earlier, matters separate and apart from their honesty and accuracy. A plausible, albeit today morally offensive, argument might be made that a white “victim” was justified in believing that she faced an imminent assault partly because the black race of her apparent attacker merited fear of violence.<sup>249</sup> Accordingly, she struck first. Even if her apparent assailant was in fact no danger at all, the argument would be that cultural mores and life experience entitled the white defender to her mistake.<sup>250</sup>

Certainly, many all-white jurors in the 1950s South might have found such an argument perfectly sensible.<sup>251</sup> Although such overt appeals to the reasonableness of perceptions of racial danger may be the exception rather than the rule, they may still covertly influence modern verdicts based on subconscious value judgments.<sup>252</sup> Better to bring those

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<sup>247</sup> See *id.* at 49-53 (discussing myths about black male sexuality, especially in the Mike Tyson case).

<sup>248</sup> See Taslitz, *Two Concepts*, *supra* note 97, at 35-41 (analyzing subconscious forces at work in, and theoretical grounds for the injustice of, convicting black male suspects of rape based upon their supposed sexual character); ARMOUR, *supra* note 240, at 69-80 (making equal protection argument).

<sup>249</sup> See ARMOUR, *supra* note 240, at 19, 36, 62.

<sup>250</sup> *Id.* at 19, 36, 62.

<sup>251</sup> See LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 166-67 (1998).

<sup>252</sup> See, e.g., Taslitz, *Two Concepts*, *supra* note 97, at 35-41.

judgments into the open and to confront some jurors with their unwitting hypocrisy - - their conscious embrace of equal justice but subconscious and behavioral embrace of its opposite. More importantly, in areas other than race, there is today less social agreement about what is right, yet jurors are often charged with making “reasonableness” judgments, judgments that are fundamentally normative, in these areas.<sup>253</sup> Because evidence law, like the substantive criminal law, thus inevitably involves the exercise of value judgments, democratic principles come into play.

#### 4. *Democracy and Institutional Design*

These principles can play out in institutional design. Thus the size and composition of juries can alter verdict outcomes and certainly alter the range of arguments made and views exchanged in the courtroom.<sup>254</sup> The jury is fundamentally a political institution. It enables ordinary persons to restrain and monitor government power and gives the people a voice in shaping the meaning of legal justice as it is applied in individual cases.<sup>255</sup> If careful, well-informed deliberation is the hallmark aspiration of democratic institutions, then juries too must be fully informed, considering diverse perspectives, and hearing from many salient social groups.<sup>256</sup> It is for reasons like these that the high Court has banned racial discrimination in jury selection, and the American Bar Association has sought to reverse the trend towards smaller and non-unanimous juries.<sup>257</sup> Empirical research, of course, is partly responsible for the ABA’s understanding that jury size alters outcomes, but a particular understanding of

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<sup>253</sup> See generally LEE, *supra* note 11; CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN (2000); MAYO MORAN, RETHINKING THE REASONABLE PERSON (2003).

<sup>254</sup> Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: the Sluggish Life of Political Factfinding*, 94 GEO. L. J. 1589, 606-07, 1609, 1611-12 (2006) [hereinafter Taslitz, *Temporal Adversarialism*].

<sup>255</sup> See JAMES P. LEVINE, JURIES AND POLITICS 20 (1992) (arguing jury is an inherently political institution); Taslitz, *Temporal Adversarialism*, *supra* note 254, at 1606-10 (discussing jury’s “checking function”).

<sup>256</sup> TASLITZ, RAPE AND CULTURE, *supra* note 21, at 134-51.

<sup>257</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986); Taslitz, *Temporal Adversarialism*, *supra* note 254, at 1611; AMERICAN BAR ASSOCIATION, ABA PRINCIPLES FOR JURIES AND JURY TRIALS 5-6 (2005).

political morality led that prestigious association to bemoan that finding and seek to reverse its effects.<sup>258</sup>

Forensic linguistics offers the same evidentiary benefits in both institutional design and expert evidence as does all valid social science. Awareness of the ways in which adversarial procedures can predispose jurors – drawing on both skewed cultural narratives and a negative reaction to perceived “women’s language” and speaking styles - - can and should spark discussion about constitutional ways to moderate the adversary system’s worst features in rape cases. Forensic linguistic experts can improve the quality of jury decisionmaking by testifying about the ways that perceived ways of speaking can skew credibility judgments without the jurors’ awareness and why they might find it hard to overcome such biases. By making jurors aware of the role of situational factors, including gender and power disparities in affecting credibility judgments, juries can be encouraged to confront the importance of those disparities as an unavoidable feature of any fair and open deliberative process about whether there was a “rape,” a process involving such overtly normative judgments as whether the woman “consented” and whether the man’s belief in consent was “reasonable.”<sup>259</sup> Awareness of these relevant social processes can also contribute, when combined with knowledge in other fields, to crafting evidence rules that might ameliorate or aggravate power disparities, such as by permitting one form of character evidence - - prior acts of sexual violence - - against an accused while prohibiting another form of character evidence - - prior consensual sex acts by the victim.<sup>260</sup> More informed legislative debate, judicial evidentiary craftsmanship, and jury deliberation simultaneously can improve the accuracy of jury judgments on simple facts like

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<sup>258</sup> Compare Taslitz, *Temporal Adversarialism*, *supra* note 254, at 1610-14 (temporal political morality of jury reform) with ABA jury.

<sup>259</sup> See TASLITZ, *RAPE AND CULTURE*, *supra* note 21, at 131-52; Taslitz, *Patriarchal Stories*, *supra* note 42, at 404-33.

<sup>260</sup> See Taslitz, *Patriarchal Stories*, *supra* note 42, at 494-97.

who hit whom and the democratic pedigree of judgments on normative facts like whether the man acted reasonably.<sup>261</sup>

## V. Conclusion

Courts' resistance to the evidentiary lessons of forensic linguistics for date rape cases has served in this article as a jumping off point for discussing a broader phenomenon: the court's misunderstanding of the scientific subconscious in substantive and evidentiary criminal law more generally. The courts have embraced a folk idea of the subconscious as diseased, mysterious, and inscrutable, either depriving the conscious mind of free will (where the disease gets out of hand) or, more commonly, being irrelevant to criminal liability, which turns on the control of the rational, independent, conscious mind. The inscrutability of the subconscious also makes it resistant to exploration, even by experts, though courts will permit such inquiries in the narrow, extreme circumstances in which the diseased subconscious has thoroughly infected and overtaken the conscious mind, such as in cases of legal insanity.<sup>262</sup>

The scientific subconscious paints a very different picture in which the conscious and subconscious minds are part of a continuum rather than a dichotomy and in which each portion of the continuum reciprocally influences other portions. Thus the conscious and subconscious minds are not truly separable. Moreover, there are ways to gain access to aspects of the subconscious in reasonably reliable ways, but, even where neither the individual nor experts can do so, each person still has significant control over the content of his subconscious mind. Such control can be attained by consciously collecting additional information and consciously altering behavior. What we know and how we act change who we are, even at the subconscious level. We are, therefore, generally responsible for the workings

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<sup>261</sup> See generally Taslitz, *Temporal Adversarialism*, *supra* note 254; Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO L., POL'Y, & ETHICS (forthcoming 2006)[hereinafter *Democratic Deliberation*].

<sup>262</sup> See *supra* text accompanying notes 88 - 99.

of our entire mind, both that on the surface and the happenings below. These lessons extend not only to criminal wrongdoers but to the witnesses who would condemn them and the jurors who would judge them, for our observations, memories, and judgment all turn on a combination of conscious and subconscious processes.<sup>263</sup> Accordingly, the law must not hide the subconscious, fear it, or flee it. Rather, the law must cautiously take it into account in designing substantive rules of criminal liability and fair procedures, without being blind to the difficulties attendant to doing so.

Several corollaries follow from this vision of a criminal justice system infused with the vision of the scientific subconscious.

First, the courts should in some instances be more receptive to expert testimony about the workings of the subconscious mind and its influence on conscious thought and behavior. This article is not the place to offer a detailed evidentiary guide for such testimony, a task that I and others have undertaken elsewhere.<sup>264</sup> What this article does do, however, is to suggest that there is good reason - - reason rooted in a scientific understanding of the subconscious mind - - for the courts to be open-minded about such evidentiary schema. This is not a plea for open-ended admissibility of such testimony. Like all expert testimony, careful judicial scrutiny is required.<sup>265</sup> Sometimes testimony concerning general psychological principles may suffice. For example, jurors are unlikely to appreciate the circumstances under which eyewitness identifications can be unreliable or confessions untrustworthy. Ample experimental and field data are available concerning the subconscious processes relevant to these inquiries, including data demonstrating the ability of juries properly to weight such

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<sup>263</sup> See *supra* Parts IIIB.

<sup>264</sup> See Taslitz, *Myself Alone*, *supra* note 44.

<sup>265</sup> See SLOBOGIN, *THE UNPROVABLE*, *supra* note 91, at 45 - 108 (analyzing the various evidentiary hurdles to expert admissibility).

information in deciding an individual case.<sup>266</sup> Ordinary expert evidentiary principles should favor admissibility of much expert testimony in these areas, and there is no reason for courts to display unusual skepticism,<sup>267</sup>

Other times, clinical testimony might be offered about an individual offender's character or state of mind, testimony that may examine his subconscious reasoning. Because accessing the content of the subconscious mind is an even more difficult interpretive task than is revealing conscious thought, courts may fear particular dangers of charlatanism. Yet, though a more difficult interpretive task, examining the subconscious is still an interpretive task that is not substantially different in quality from that involved in exploring the conscious mind, a job that we assign to laypersons (jurors) every day.<sup>268</sup> Experts can focus attention on evidence of relevant aspects of reality that laypersons might otherwise miss.<sup>269</sup> For that focus to be useful, however, it must result from thorough investigation pursuant to well-tested procedures. Professor Christopher Slobogin, an internationally renowned expert on evidence law and psychology, has proposed a four factor test of materiality, probative value, helpfulness, and prejudicial impact, offering a book-length defense of this approach in a forthcoming work.<sup>270</sup> Slobogin would permit experts passing this test to engage in "informed speculation" about an offenders' character or mental state to open up jurors' minds to plausible interpretations of offender conduct that would otherwise escape their notice.<sup>271</sup> This article suggests that Slobogin's carefully reasoned evidentiary framework should receive a warm reception upon his book's publication.

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<sup>266</sup> See ACHIEVING JUSTICE, *supra* note 120, at 23-45.

<sup>267</sup> See *id.*

<sup>268</sup> See *supra* text accompanying notes 94 - 99.

<sup>269</sup> See e.g., Taslitz, *Myself Alone*, *supra* note 44, at 94 - 97 (recounting the example of "Ms. B," an excessively gullible individual who believed another's lies, inadvertently leading Ms. B. astray).

<sup>270</sup> See SLOBOGIN, THE UNPROVABLE, *supra* note 91.

<sup>271</sup> See *id.* at 108-57 (making the case for "informed speculation").

Second, even for those who remain skeptical of the sorts of inquiries Slobogin endorses, knowledge of subconscious processes can aid in crafting objective standards of substantive criminal liability. There is an odd seeming paradox at work here: greater subjectification of mental state inquiries - - ones that account for an offender's *entire* mind, not merely its conscious portion - - can provide increased support for more *objective* standards. My main illustration here has been counseling a "reasonable belief in consent" standard in date rape cases where reasonableness is judged by the standard of the non-self-deceiving male.<sup>272</sup> Self-deception necessarily involves partially to fully subconscious processes, processes likely common to most date rapists and subject to moral sanction. Knowledge of these processes and their normative implications allows jurors to subject those who behave as if those processes are at work to community condemnation.<sup>273</sup> A similar analytical approach to other crimes might lead to a re-thinking of subjective culpability standards, replacing them with more objective ones that in the broad run of cases better reflect the moral impetus behind the increasing subjectification of the criminal law.<sup>274</sup>

Third, understanding the scientific subconscious supports a vision of the human mind more in tune with democratic theory. Recognizing the existence and moral significance of the subconscious mind as an essential and healthy part of every human being, one subject to molding in light of deliberative individual and group choice, holds the whole person responsible for his actions and related thoughts and emotions. To encourage more informed individual choice for potential defenders and more realistic, educated group deliberation by jurors of the totality of the human soul is to embrace the insights of modern democratic theory with a vengeance.<sup>275</sup> This broad democratic vision can lead to legal rules supportive of

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<sup>272</sup> See *supra* text accompanying notes 196 - 200.

<sup>273</sup> See Taslitz, *Willfully Blinded*, *supra* note 63, at 423-34, 439-41.

<sup>274</sup> See SLOBOGIN, *UNPROVABLE*, *supra* note 91, at 14-19.

<sup>275</sup> See *supra* text accompanying notes 202-210, 254-61.

enhanced individual responsibility and improved political deliberation by the organs of the criminal justice system.

The democratic features of the model of the scientific subconscious should likewise impose special obligations on the relevant experts to inform the lay public and legal authorities, particularly the judiciary, about the nature and relevance of subconscious thought and this insight's value for criminal justice reform. Returning to the example of forensic linguists, experts in those areas must work to advance public and judicial education.

Such education requires language researchers to move beyond the comfortable confines of academic journals and university presses. They must become public intellectuals. That means learning to replace the too often dry, abstruse style of academic writing with a more engaging writing style. It means popularizing linguistic concepts in op-eds, trade paperbacks, and newspaper stories. It means appearing on National Public Radio and even Oprah. It means lecturing at judicial conferences and bar associations. And it means working with lawyers to aid in crafting evidentiary motions and strategies and in lobbying legislatures. Similar movements to aid battered spouses and to reduce the number of innocent persons convicted have been undertaken with significant success by joint lawyer-social scientist teams in those areas.<sup>276</sup> Language researchers should mount similar efforts. My call, therefore, is not for researchers to sacrifice their role as scientists in the name of advocacy, but rather to abandon the elitism of the ivory tower to become educators of the broader public and thus particularly helpful contributors to the health of American democracy.

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<sup>276</sup> See generally ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING (2002); Taslitz, *supra* note 261 (concerning innocence).