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COGNITIVE FOUNDATIONS OF THE IMPULSE TO BLAME*

Lawrence M. Solan[†]

At a prominent New York law firm, the associates playfully refer to their telephone extensions as their “blame codes.” “Did you ever get in touch with the clerk about filing the TRO?” “No.” “Sounds like blame code 443 to me.” The intuitions of these semi-fictional characters are sound. Once something goes wrong, it is only natural to assign responsibility to someone for the ensuing unfortunate state of affairs. We do not necessarily *decide* to blame others, we just do it.

Psychological research suggests that moral judgment, at least initially, involves intuition based on experience rather than studied reason.¹ Responsibility and blame are preliminarily assigned quickly as a result of one’s perception of events matching mental models of blameworthiness. Later, more refined analysis is possible. “Dual process theories” in psychology suggest that many decisions are based first on rapid, intuitive evaluations of situations, with subsequent reasoning available only later.² The rapid judgment of

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¹ See Johathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001).

² For a collection of articles, see DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY (Shelly Chaiken & Yaacov Trope eds., 1999).

blameworthiness happens so quickly and so effortlessly that I call it here "the impulse to blame."

This Article examines some of the cognitive structures that trigger this impulse. It argues that the ease with which we blame arises in part from the fact that the impulse's triggers consist of cognitive elements that we use routinely and completely independent of moral judgment in everyday life. This impulse is a combination of cognitive and emotional responses to bad events. It is largely a by-product of other, morally-neutral aspects of our psychology—the attribution of cause, recognition of good and bad outcomes and the drive to theorize about what others have in mind when they speak or act. Thus, being a moral actor is "inexpensive" in the sense that to attribute blame requires very little other than the implementation of structures that serve other purposes.

The ease with which we blame has its consequences. First, to the extent that this impulse occurs just when our theory of morality says that indignation is appropriate, it means that people are designed to be moral actors. Correspondingly, to the extent that the impulse's triggers are at odds with notions of justice and fair play, a society must ensure that its legal order corrects for any such mismatches. And we do. For example, I describe research that puts causation (or at least contribution) at the center of the blame impulse. But we do not want to blame people for every harm they cause, and we want to distinguish among different causal situations. Doctrines of justification and excuse are examples of some solutions to the problem of overblaming. Similarly, some conduct is blameworthy even if no harm resulted. Responsibility for inchoate crimes, such as attempted criminal activity, is a solution to underblaming.³

Second, if we are aware of the impulse, consciously or subliminally, we may wish to undermine its application for a variety of reasons by not acknowledging triggering events as such. One can avoid blame by altering the evidentiary standards for finding that the triggering factors apply, by denying the facts themselves or by selecting alternative stories,

³ In fact, empirical research suggests that our system does not adequately punish some inchoate crimes according to people's everyday moral sense. PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995).

consistent with the facts but inconsistent with blaming one party instead of another.⁴

These "avoidance" techniques can be seen as second order effects of the blame impulse. They have serious ramifications in both everyday life and in the legal decision-making process. For example, the drive to create narratives consistent with the facts, but which do not trigger the blame impulse, is characteristic of the litigation process, as noted by many scholars.⁵ More generally, it is not uncommon for people to blame the victim under a variety of circumstances, such as when the person making judgment has more in common with the perpetrator, or when blaming the victim is more consistent with the judgment-maker's view of the world as just.⁶

Philosophers who write about responsibility and blame, such as Jeffrie Murphy and Jean Hampton,⁷ P.F. Strawson⁸ and R. Jay Wallace,⁹ discuss the relationship between blame and emotion, and recognize that emotions have a cognitive basis.¹⁰ This Article agrees with that position, and offers a broader cognitive foundation for blaming.

Part I describes the circumstances in which the impulse to blame is triggered in everyday life. Part II then examines some of the cognitive structures that underlie the blame impulse. Finally, Part III focuses on second order effects: What do we do to avoid blaming people whom we would rather not blame, and what do we do to increase the likelihood of blaming those whom we would like to blame? A brief conclusion explores some ramifications of the ease with which we blame in designing a system of justice.

⁴ For a discussion from a social psychological perspective, see Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCHOL. BULL. 556, 566-68 (2000) [hereinafter *Culpable Control*]; Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCHOL. 368 (1992).

⁵ See, e.g., ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000); BERNARD S. JACKSON, *MAKING SENSE IN LAW: LINGUISTIC, PSYCHOLOGICAL AND SEMIOTIC PERSPECTIVES* (1995).

⁶ There is substantial literature on this issue. For a recent contribution that summarizes some of the history, see Melvin J. Lerner & Julie H. Goldberg, *When Do Decent People Blame Victims?*, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY, *supra* note 2, at 627; SHARON LAMB, *THE TROUBLE WITH BLAME: VICTIMS, PERPETRATORS, & RESPONSIBILITY* (1996).

⁷ JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* (1988).

⁸ P.F. Strawson, *Freedom and Resentment*, in STUDIES IN THE PHILOSOPHY OF THOUGHT AND ACTION (P.F. Strawson ed., 1968).

⁹ R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* (1994).

¹⁰ See MURPHY & HAMPTON, *supra* note 7, at 5 n.7.

I. WHEN WE BLAME

Probably the best way to characterize the process by which we assign blame is with reference to cognitive schemata. Three decades ago, the psychologist Harold Kelley suggested that various causal schemata are at the center of attribution decisions.¹¹ He described causal schema as follows:

In general, a causal schema is a conception of the manner in which two or more causal factors interact in relation to a particular kind of effect. A schema is derived from experience in observing cause and effect relationships from experiments in which deliberate control has been exercised over causal factors, and from implicit and explicit teaching about the causal structure of the world. It enables a person to perform certain operations with limited information, and thereby to reach certain conclusions or inferences as to causation.¹²

Kelley presents a number of examples, such as our ability to understand from experience that some effects may result from a limited set of causes, each of which is sufficient, but none of which is individually necessary.¹³ When we experience the effect, we can infer that at least one of the causes is present as well.

Psychologists continue to associate attribution with causation, but the schemata have become more complex. Mark Alicke suggests that blame has three components: mental states, behaviors and consequences.¹⁴ The mental and behavior components of blame correspond to volitional and causal control. In the prototypical blame situation, someone with a culpable mental state behaves unacceptably, leading to a bad result. According to Alicke, the key factor in determining whether we assign blame to an individual, and if so how much blame, is the amount of control that the individual exercised over the situation, whether through bad acts or bad motives.¹⁵ This consideration is independent of causation, although experiments show that it contributes to people's judgments of causation. Alicke found that people are more likely both to find

¹¹ Harold H. Kelley, *Causal Schemata and the Attribution Process*, in *ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR* 151 (Edward E. Jones et al. eds., 1972). See KELLY G. SHAVER, *THE ATTRIBUTION OF BLAME* (1985) for considerable refinement of this perspective.

¹² Kelley, *supra* note 11, at 152.

¹³ *Id.* at 154-55.

¹⁴ Alicke, *Culpable Control*, *supra* note 4, at 557; ROBINSON & DARLEY, *supra* note 3, at 188-89.

¹⁵ Alicke, *Culpable Control*, *supra* note 4.

causation and to assign liability when a person performs a bad act for a bad reason. In one experiment, for example, participants considered a person who got into a car accident rushing home with an anniversary gift for his parents to be less of a cause of the accident than a person rushing home to hide some illegal drugs, even when the rest of the facts were exactly the same.¹⁶

We will see below how affective considerations, such as bad motives and unsympathetic suspects, contribute to assigning blame. It is important to note, however, that no one rejects causal models as irrelevant. If I cause a car accident and leave the scene, one cannot sensibly claim that my neighbor should be blamed simply because my neighbor is not a likeable person and performs bad acts more often than I do. Yet, if the facts about the accident are in dispute, these negative feelings about my neighbor may color the investigation, and motivate the investigators to find fault in him rather than in me. If we know in advance that looking at an event in a particular way will lead us to assign blame, that knowledge may motivate us to perceive the event differently. These experiences are examples of “observer bias,” a commonplace phenomenon in the legal system.¹⁷

Moreover, when more than one causal scenario is available and consistent with some version of the facts, one has no choice but to select among them. As Dan Kahan observed, the fact that blaming involves more than the logic of causation is not just a matter of noise entering the system. It is an important aspect of how we assign moral judgment.¹⁸ While this Article continues to look at blame in terms of causal schemata, we return later to how people decide which model of an event to accept when the facts make more than one available.

What do these cognitive schemata look like? The linguist Anna Wierzbicka has written about “cognitive scenarios” associated with emotions, including negative ones

¹⁶ Alicke, *Culpable Causation*, *supra* note 4, at 370.

¹⁷ For discussion, see D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CAL. L. REV. 1 (2002).

¹⁸ Professor Kahan made this important observation forcefully during the Symposium. Dan Kahan, *The Aesthetics of Blame in Criminal Law*, Remarks at the Brooklyn Law School Center for the Study of Law, Language & Cognition Symposium, Responsibility & Blame: Psychological & Legal Perspectives (Oct. 18, 2002).

that we associate with blame.¹⁹ According to Wierzbicka, many emotional responses emanate from reactions to good and bad events. Among the emotions that stem from bad events are sadness, unhappiness, outrage, grief, anger and distress.²⁰ Others, such as anxiety, fear, panic and nervousness, involve concern about bad things happening in the future. Psychologists write similarly about assigning positive and negative valences to events.²¹

Interestingly, the elements of Wierzbicka's cognitive scenarios for emotional responses contain, by and large, the same elements that psychologists propose in describing the circumstances under which we blame. For example, Wierzbicka describes circumstances in which we might say that someone is angry. One such scenario is as a reaction to the harm caused by another. We say that someone is angry in the following situation:

Sometimes a person thinks: "Something bad happened because someone did (didn't do) something. I don't want things like this to happen. I want to do something because of this if I can." When this person thinks this, this person feels something bad.²²

That bad feeling, Wierzbicka maintains, is anger. The somewhat juvenile-sounding tone of the scenario is not accidental. The tone reflects the fact that the scenario uses primitives that are by and large universal in the expression of emotion in languages around the world. There are few such universals; those that do exist are very basic.²³ Were the scenarios that describe emotional responses not expressed in such basic terms, it would be difficult to account for their universality.

Negative emotional experiences generally, according to Wierzbicka, stem from scenarios that include, "something bad happened."²⁴ Sadness, for example, comes from a more passive

¹⁹ ANNA WIERZBICKA, *EMOTIONS ACROSS LANGUAGES AND CULTURES: DIVERSITY AND UNIVERSALS* (1999).

²⁰ *Id.* at 60-90.

²¹ See SHAVER, *supra* note 11, at 3.

²² *Id.* at 89.

²³ Judge Posner argues that the paucity of moral universals makes it unlikely that moral theory can inform legal theory in a meaningful way. While this Article does not take a position on that issue, Wierzbicka's work certainly supports Posner's factual statement about there not being a great number of moral universals. See Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998).

²⁴ WIERZBICKA, *supra* note 19, at 60.

reaction to bad outcomes.²⁵ Of course, emotions can combine. One can feel sad and helpless with respect to the negative result and simultaneously angry at its cause. In fact, this mixture of feelings is commonplace.

Each of these reactions comes first from a perception of something that happened in the world, and then from one's thoughts about the events. For reasons that Alicke explains, the perceptions of what happened need not be accurate.²⁶ We can attribute an event to someone because a causal schema is present, but we can be wrong about causation in this particular instance. In other words, we are all casual causal profilers in everyday life.

Philosophers writing about blame often associate it with emotions of resentment and indignation,²⁷ sometimes called "moral sentiments."²⁸ Wierzbicka describes indignation as a person thinking: "I know now: someone did something bad. I didn't think someone could do something like this. I don't want things like this to happen. I want to say what I think about this," and experiencing negative feelings as a result.²⁹ The reaction is a complicated one, involving an undesired outcome, bad conduct, surprise at the bad conduct and a negative emotional reaction as a result of experiencing these things.

I do not claim that Wierzbicka has captured all of the nuances of these emotional reactions, or that the relationship between blame and emotion can be reduced to a single emotion. Nonetheless, what triggers blame and what triggers such emotions as anger seem very similar. To capture the relationship between blame and negative emotional reaction to events, let us posit the following as a typical scenario that triggers blame:

Sometimes a person thinks: "Something bad happened because someone did (didn't do) something. (That person should have known better.) I don't want things like this to happen. When I think about the bad thing that happened, I also think about the fact that this person did something to make it happen."

Thus, blaming involves focusing on the wrongdoer when thinking about an undesirable outcome that the wrongdoer has

²⁵ *Id.* at 62.

²⁶ Alicke, *Culpable Control*, *supra* note 4, at 567.

²⁷ See Jean Hampton, *Forgiveness, Resentment and Hatred*, in FORGIVENESS AND MERCY, *supra* note 7, at 35, 56.

²⁸ See generally WALLACE, *supra* note 9.

²⁹ *Id.* at 90.

caused. The scenario has all three elements of Alicke's control theory: state of mind, a causal connection and a bad outcome.³⁰

Blaming seems so close to negative emotions that it is tempting to call blaming itself an emotional response. The same things, more or less, that lead to anger and indignation trigger blame as well. We could then say that holding someone responsible is a societal response to an emotional reaction based on a causal schema. But we routinely blame situations for bad outcomes with little emotional commitment. Especially relevant is our propensity to blame inanimate forces. Consider the following sentence, taken from a recent newspaper article: "A cold front, not Hurricane Lili, was to blame for last night's storm system, officials said."³¹ It is easy enough to find or construct other examples. Moreover, some cultures tend to focus blame more on situations than on people, suggesting the salience of alternative cognitive scenarios in those cultures.³²

On the other hand, we sometimes experience anger without blame. Consider a parent who is angry at a child for leaving a bicycle outside unlocked, allowing it to be stolen. The parent feels anger toward the child for his carelessness, but does not care at all about the bicycle, perhaps because it was already in bad shape and too small for the child. In this situation, it would be strange to say that the parent blames the child for the loss of the bicycle, notwithstanding the parent's irritation.

As for the volitional component of blame, the more we can say that someone should have known better,³³ the more blameworthy that person is. Intentionally vicious acts, for example, are worse than negligent ones. Studies repeatedly show a relationship between the assignment of responsibility on the one hand, and the bad actor's state of mind on the other.³⁴ The cognitive scenario for blame captures this sense by including the sentence "that person should have known better"

³⁰ Alicke, *Culpable Control*, *supra* note 4, at 557.

³¹ Shannon Tangonan & Chris Quay, *Tornadoes are Reported During Storm*, COURIER-JOURNAL (Louisville, Ky.), Oct. 5, 2002, at 1B.

³² See, e.g., Tanya Menon et al., *Culture and the Construal of Agency: Attribution to Individual Versus Group Dispositions*, 76 J. PERSONALITY & SOC. PSYCHOL. 701 (1999).

³³ Bailey Kuklin, *You Should Have Known Better*, 48 U. KAN. L. REV 545, 546 (2000).

³⁴ See ROBINSON & DARLEY, *supra* note 3; Alicke, *Culpable Causation*, *supra* note 4, at 370; Alicke, *Culpable Control*, *supra* note 4, at 559-61.

in parenthesis to indicate both that it is not a necessary element and that it is itself graded.

A separate problem exists with respect to the causal element of the blame scenario. Just as there are progressively more culpable states of mind, there are progressively more direct causes. The law recognizes this in such concepts as proximate causation, and even "efficient proximate causation," a concept still used in determining the liability of insurers in some states.³⁵ I will defer dealing with this issue until we more closely examine different ways in which we express causation.

Finally, while I have argued for the distinction between blaming and emotion, I have said little about the relationship between the two. Several possible accounts are consistent with what I have said thus far. It is possible that the cognitive scenario that triggers blame also triggers emotional responses such as anger, resentment and sadness. At that point, the emotion and the impulse to blame reinforce each other. This version can be described in terms of a causal fork:³⁶ A single scenario triggers two responses—blame and anger/resentment. But it is also possible to describe the relationship as a causal chain: The cognitive scenario triggers the emotional reaction as Wierzbicka describes,³⁷ and the impulse to blame derives from the emotional response. After all, the characteristic of blame is associating causal attribution with the bad act. Anger and resentment are certainly good enough to provoke such focus. Conversely, it may be that recognizing blameworthy conduct as such helps to trigger an emotional response as well, as when we say, "how dare she!" In his contribution to this Symposium, Neal Feigenson describes a number of different ways in which emotion and attribution of responsibility can interact, and I agree with his position.³⁸

II. WHAT MAKES IT EASY TO BLAME?

Now let us examine more closely some interesting aspects of the cognitive scenario that triggers blame. As noted,

³⁵ See, e.g., *Tento Int'l, Inc. v. State Farm Fire & Casualty Co.*, 222 F.3d 660 (9th Cir. 2000).

³⁶ P.N. Johnson-Laird, *Causation, Mental Models, and the Law*, 65 BROOK. L. REV. 67, 93 (1999).

³⁷ See WIERZBICKA, *supra* note 19, at 87-90 (describing scenarios for anger and indignation).

³⁸ Neal R. Feigenson, *Emotions, Risk Perceptions and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959 (2003).

blaming seems to be triggered by a model whose prototypical instantiation has three elements: a bad state of affairs, causation and a culpable state of mind. Did evolution give us these cognitive structures for the sake of making us moral actors? We can never know. But we can look at some linguistic evidence that shows us using each of these constructs in everyday life without regard to moral content. In short, it appears that our strong impulse to attribute responsibility is built upon constructs that we need and use independently of moral judgment. Below I examine a few of them: our perception of events based on causal schemata; our distinguishing between good and bad outcomes; and our use of state of mind in the acquisition of concepts. The presence of the blame impulse's building blocks in everyday thought may, at least to some extent, explain some of the reasons it is so easily triggered.

A. *Event Structure*

This Section makes the following argument: We conceptualize the world in terms of events and we conceptualize events in terms of cause and result. We do all of this automatically and in circumstances having little or nothing to do with moral attribution, which means that use of these constructs in the attribution of responsibility comes with little cognitive cost.

1. Events as Units of Analysis in Everyday Life

For many years, linguists and philosophers of language have considered events to have ontological status in language the same way that objects do. Compare the following:

- (1) a. The bird flew into the nest.
- b. The yellow bird with the red beak flew into the nest.

These two sentences can be used to describe the same event in the world. The second sentence entails the first, and provides more information about the bird than does the first. Now consider the sentences in (2), taken from Ernest Lepore, a philosopher who writes about the relationship between language and logic:

- (2) a. "The dog bit the man in the park."

- b. "The dog bit the man in the park after midnight on Wednesday under his arm."³⁹

Just as (1)(b) entails (1)(a), (2)(b) entails (2)(a). But the difference between the sentences in (2) is not in the detail concerning an object, but rather in the detail concerning an event: The event of the dog biting the man. A theory of semantics should be able to account both for the entailments themselves and for the similarity between the entailments in (1) and (2). Creating a logic that performs operations on both objects and events accomplishes both tasks.⁴⁰

There are other reasons for believing that our language uses events as primitives. Consider (3), also taken from Lepore:⁴¹

- (3) John buttered his toast, and he did it after midnight.
Or consider (4):

- (4) It just happened again!

Both of these sentences contain the pronoun *it*. But *it* does not refer to an object in either of these sentences. Rather, it refers to an event. In (3), the event is buttering toast. In (4), we don't know what the event is. It refers to a concept of an event that the speaker has in mind and presumably the hearer can understand through context. In fact, you can utter (4) even if no one has said anything else and it would still be appropriate in the right circumstances. This does not mean that *it* in (4) is not a pronoun or, for that matter, that *it* is not the subject of the sentence. It is both. But it does mean that we can use pronouns to refer to events that we have in mind, something we can do only if we actually have events in mind. As the linguist Ray Jackendoff explains, examples like these provide linguistic evidence that we conceptualize in terms of events and that this conceptualization makes its way into some rather technical aspects of linguistic knowledge.⁴²

³⁹ ERNEST LEPORE, MEANING AND ARGUMENT 286-87 (2000). See Donald Davidson, *The Logical Form of Action Sentences*, in THE LOGIC OF DECISION AND ACTION 81 (1967).

⁴⁰ For a detailed exposition of the role of events in formal semantics, see TERENCE PARSONS, EVENTS IN THE SEMANTICS OF ENGLISH: A STUDY IN SUBATOMIC SEMANTICS (1990).

⁴¹ LEPORE, *supra* note 39, at 288.

⁴² For other arguments concerning the role of pro-forms in semantic interpretation, see RAY JACKENDOFF, FOUNDATIONS OF LANGUAGE: BRAIN, MEANING, GRAMMAR, EVOLUTION 315-18 (2002).

2. Causation in the Structure of Events

The ontological status of events in language is relevant to this discussion because we often characterize events in terms of cause and result. Psychologists have studied how people structure events. An interesting set of studies by Jeffrey Zacks, Barbara Tversky and their colleagues suggests that events are structured around their object.⁴³ For example, people understand making a bed as an event that ends when the bed is made. To the extent that the entire purpose of the event is to effectuate the result, their findings mean that people structure events around causation and result. The fact that event perception is purposeful is akin to Alicke's notion that blame is based on control.⁴⁴ If we look at events in everyday life according to their object, then it should not be surprising that we look at events that way in assigning blame. That's just the way we look at events.

3. Causation in Everyday Speech

In everyday speech, we typically do not use the word *cause* to express causation. Rather, causation is such a basic part of our conceptualization that is part of the meaning of many verbs that we use routinely. Consider the following classic examples from the linguistic literature, which John Darley and I discuss in an article on causation and legal liability:⁴⁵

- (5) a. Bill broke the vase.
- b. The vase broke.

We understand these sentences as related to one another. (5)(a) means something like (6):

- (6) Bill CAUSED the vase to break.

Other examples include: "Bill baked a cake" (the cake baked), "Bill burned the toast" (the toast burned) and "Bill opened the door" (the door opened).⁴⁶

⁴³ Jeffrey M. Zacks & Barbara Tversky, *Event Structure in Perception and Conception*, 127 PSYCHOL. BULL. 3 (2001); Jeffrey M. Zacks et al., *Perceiving, Remembering, and Communicating Structure in Events*, 130 J. EXPERIMENTAL PSYCHOL. 29 (2001).

⁴⁴ Alicke, *Culpable Control*, *supra* note 4.

⁴⁵ Lawrence M. Solan & John M. Darley, *Causation, Contribution, and Legal Liability: An Empirical Study*, 64 LAW & CONTEMP. PROBS. 265 (2001).

⁴⁶ For detailed discussion of these alternations, see BETH LEVIN & MALKA RAPPAPORT HOVAV, UNACCUSATIVITY AT THE SYNTAX-LEXICAL SEMANTICS INTERFACE

Now consider the following sentences, discussed in a recent article on certain sentences called resultatives:

(7) "Ms. Bates, are you mad to let your niece sing herself hoarse in this manner?"

(8) "Leslie scrubbed her knees sore."⁴⁷

To "sing oneself hoarse" means to sing until the singing causes one to become hoarse. Again, causation is built into the meaning of the expression, without reference to it as a separate linguistic item.

Of course, we can express causation separately. We can use the word "cause" itself or, in English, we can use the verb "make" to indicate causation:

(9) Look what you made me do.

The verb "make" is called the "periphrastic" causation marker in English.⁴⁸ It is often used to express causation in situations that cannot use a causative verb. Consider (10):

(10) Mr. Mathis made the unruly student leave the room. We can't say, "Mr. Mathis left the unruly student" to mean that he caused the student to leave. Note, in contrast, that when it is possible to express causation by using a causative verb, using the verb "make" instead of the causative verb implies indirect causation:

(11) Mr. Mathis made the unruly student stand by the window.

Here, we really could have said that he "stood" the student by the window. The use of the periphrastic marker suggests that no physical contact was involved.

An even more indirect means of expressing causation when a causal verb is available is to use the verb "cause," as (12) illustrates:

(12) Mr. Mathis caused the unruly student to stand by the window.

Here we really don't know what Mr. Mathis did, but the implication is that it was indirect and perhaps unusual.

For the most part, we call all of this causation. Yet, consider the following sentence:

(13) The colonel let the soldiers sleep outside in the field.

79-133 (1995).

⁴⁷ Malka Rappaport Hovav & Beth Levin, *An Event Structure Account of English Resultatives*, 77 *LANGUAGE* 766, 767, 780 (2001).

⁴⁸ For discussion of this concept, see LEVIN & HOVAV, *supra* note 46, at 293 n.3.

Is this causation? If by “let” we mean “made,” then perhaps it is. If “let” means “allowed” then we would probably not consider it to be a matter of causation. The question becomes important if one of the soldiers becomes ill from having been exposed to the elements all night. Should we blame the colonel? It depends on whether we believe that the colonel was a cause of the bad results.

In fact, people frequently do not distinguish between enablement and causation, although logicians do. Darley and I presented subjects with a story about a car owner who left his key in the ignition, later to learn that it was stolen by a teenager who got into an accident.⁴⁹ Subjects were divided over whether the key-leaver could be said to have caused the accident, or whether he was only an enabler. Of those who found him to be only an enabler, about half thought he should be held liable for tort damages, while just about everyone who thought he was a cause thought he should be held liable.⁵⁰ Thus, many look at enablement as a matter of indirect causation. In fact, some languages have separate words for direct and indirect causation, with enablement being part of the latter class of verbs.⁵¹

4. Causation and Cognitive Scenarios for Blame

It appears, then, that causation is not a unitary concept. Causal schemata vary with the directness of the cause. Yet, we can blame for any level of directness. Part III of this Article looks at public opinion polls from the United States and Muslim countries on the question of who was responsible for the destruction of the World Trade Center in 2001. Consider the following possibilities, some of which reflect public opinion in different parts of the world:

- (14) a. Arab terrorists destroyed the World Trade Center.
- b. The United States made terrorists destroy the World Trade Center.
- c. The United States caused terrorists to destroy the World Trade Center.
- d. The United States created circumstances that legitimized terrorists in some quarters and

⁴⁹ See Solan & Darley, *supra* note 45.

⁵⁰ *Id.* at 289-90.

⁵¹ *Id.* at 295-96 (discussing the expression of causation in Dutch).

provided them with motivation to destroy the World Trade Center.

- e. The United States destroyed the World Trade Center.

The consensus in the United States is that (a) is true. Those who blame the United States, in whole or in part, for the World Trade Center disaster typically would subscribe to (d), although some in Muslim countries subscribe to (e), as opinion polls discussed below show.⁵² But I believe most everyone would agree that (a) and (e) are far more blameworthy scenarios than is (d). The use of the causative verb “destroy” instead of either words of enablement or a periphrastic causal verb (“make” or “cause”) implies direct involvement, which we consider more culpable. It appears, then, that we do distinguish between direct and indirect cause in assigning blame. This has been demonstrated experimentally. Darley and I found that participants considered the teenager who stole the car subject to more liability than the person who left the key in the ignition.⁵³ Yet, we remain uncomfortable equating (a) and (d) even if only by putting them at different places on the same continuum. If acknowledging (d) is psychologically tantamount to admitting (e), we have good reason to avoid thinking about (d) altogether. As Part III demonstrates, this sort of denial process is commonplace.

B. *Good and Bad Outcomes*

Returning to Wierzbicka’s analysis of emotion words, different cultures have different concepts with which they categorize emotions. Sometimes the differences are subtle; sometimes they are huge. In fact, there are very few universals when it comes to emotions. Among the universals that do exist are expressions of anger, feeling good and feeling bad, and recognizing that good and bad things happen.⁵⁴

Joshua Knobe has recently performed a simple but elegant experiment that shows one way that good and bad outcomes are part of our everyday thinking.⁵⁵ He presented each subject with one of two stories. The first read:

⁵² See *infra* note 76.

⁵³ Solan & Darley, *supra* note 45 at 293.

⁵⁴ WIERZBICKA, *supra* note 19, at 276-89.

⁵⁵ Joshua Knobe, *Intentional Action and Side-Effects in Ordinary Language*, ANALYSIS (forthcoming 2003).

The vice-president of a company went to the chairman of the board and said, "We are thinking of starting a new program. It will help us increase profits, but it will also harm the environment."

The chairman of the board answered, "I don't care at all about harming the environment. I just want to make as much profit as I can. Let's start the new program."

They started the new program. Sure enough, the environment was harmed.⁵⁶

Subjects were asked how much blame the chairman deserved for the harm to the environment, and whether they thought the chairman intentionally harmed the environment.⁵⁷ Eighty-two percent of the subjects said the chairman intentionally hurt the environment, and subjects thought he should receive a great deal of blame.⁵⁸

The second story was identical to the first, but instead of explaining that the process harms the environment, the vice-president explained that the process *helps* the environment.⁵⁹ The chairman answered, "I don't care at all about helping the environment. I just want to make as much profit as I can. Let's start the new program."⁶⁰ The result was just the opposite. Seventy-seven percent said that the chairman did not intentionally help the environment, and gave him little credit for having done so.⁶¹

Knobe's study shows that people react differentially to good and bad outcomes. The point here is simpler: In order to make the judgments they did, subjects must have, without prompting, distinguished between good and bad outcomes. That we do so routinely is part of what makes possible the impulse to blame without complex intellectual analysis.

C. *States of Mind*

In assigning blame, people care about the actor's state of mind. In fact, tort law is organized around such distinctions. Putting aside strict liability, we typically do not hold people responsible for innocent acts that lead to bad outcomes. We do,

⁵⁶ *Id.* (manuscript at 3).

⁵⁷ *Id.*

⁵⁸ *Id.* (manuscript at 4).

⁵⁹ *Id.*

⁶⁰ Knobe, *supra* note 55 (manuscript at 4).

⁶¹ *Id.* (manuscript at 4).

however, hold them responsible for being negligent ("you should have known better") and we permit punitive damages for people who are reckless or who knowingly cause harm. Criminal law makes similar distinctions, but draws its lines elsewhere.

Experimentally, Darley and I found a bootstrapping effect with respect to state of mind. Returning to the key-leaver, we varied his state of mind from innocent to negligent (leaving the keys because he was late to a meeting) to knowing (wanting his car stolen for the insurance money).⁶² We found that not only did subjects assign more liability the worse the state of mind, but that intentionally bad actors were perceived to have contributed more to the accident causally.⁶³ Alicke reached similar conclusions in his studies of causation.⁶⁴

One interesting aspect of state of mind is how it comes to be that we even consider what others are thinking. Strawson, in his essay *Freedom and Resentment*, calls the fact that we do so a "commonplace," which forms the basis for much of his discussion:

The central commonplace that I want to insist on is the very great importance that we attach to the attitudes and intentions towards us of other human beings, and the great extent to which our personal feelings and reactions depend upon, or involve, our beliefs about these attitudes and intentions.⁶⁵

If taking into account the thoughts of others were limited to the work of a careful moral thinker after considerable analysis of the blameworthiness of others, it would be surprising to find people using such information so reflexively. The harder it is to consider the thoughts of others, the more work it takes to attribute fault, and the less impulsive blaming should be.

In fact, people use state of mind information for reasons that have little to do with moral judgment. Developmental psychologists put it at the center of how children learn concepts. A mother who points out an elephant at the zoo to her toddler is really pointing out a large area containing all kinds of things. The child immediately grasps that the mother is talking about the elephant because she grasps that the

⁶² Solan & Darley, *supra* note 45, at 283-85.

⁶³ See generally Solan & Darley, *supra* note 45.

⁶⁴ Alicke, *Culpable Causation*, *supra* note 4.

⁶⁵ Strawson, *supra* note 8, at 75.

mother's goal is most likely bringing the large animal to the child's attention. Thus, children learn what elephants are by seeing them (perhaps in pictures) and by understanding the state of mind of the person telling them about elephants.

Psychologists call this phenomenon the "theory of mind"⁶⁶ approach to concept acquisition, or the "theory theory"⁶⁷ approach. There is now extensive research on how and when children develop a theory of the minds of others. At this point, it is hard to deny that they do. The observation is an important one with legal ramifications beyond the scope of this Article. For example, it means that those who argue that the law should be less concerned with actors' states of mind are proposing a change less realistic than they may realize.⁶⁸ For present purposes, though, we need only recognize that attributing a culpable state of mind uses cognitive skills that we employ daily for purposes other than moral judgment, and that we do so easily and routinely.

III. AVOIDING AND DEFLECTING BLAME: SECOND ORDER EFFECTS OF THE BLAME IMPULSE

This Part uses two examples to develop a point made at the beginning of this Article: While blaming may be impulsive once we have the cognitive scenario that triggers it, we often have considerable latitude in how we conceptualize the world and can accept or reject alternative scenarios of the same event.

Psychologists have demonstrated convincingly that people routinely evaluate evidence of causal theories in a self-serving manner in order to avoid reaching unwanted conclusions. In an ingenious study, Ziva Kunda had both male and female subjects read a newspaper story about the effects of caffeine on women's health.⁶⁹ The article "associated caffeine with fibrocystic disease, reportedly associated with often

⁶⁶ See, e.g., PAUL BLOOM, HOW CHILDREN LEARN THE MEANINGS OF WORDS (2000); Jill G. de Villiers & Peter A. de Villiers, *Linguistic Determinism and the Understanding of False Beliefs*, in CHILDREN'S REASONING AND THE MIND (P. Mitchell & K. Riggs eds., 2000).

⁶⁷ ALISON GOPNIK & ANDREW N. MELTZOFF, WORDS, THOUGHTS, AND THEORIES (1997).

⁶⁸ See, e.g., Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992).

⁶⁹ Ziva Kunda, *Motivated Inference: Self-Serving Generation and Evaluation of Causal Theories*, 53 J. PERSONALITY & SOC. PSYCH. 636 (1987).

painful lumps in the breast that could go unnoticed in the early stages but that grew progressively worse with age. The disease was said to be serious because it was associated in its advanced stages with breast cancer."⁷⁰ The article further stated that caffeine caused the disease by increasing the level of a substance called cAMP.⁷¹

After completing the article, subjects answered questions about what they remembered and how convincing they found the arguments. They were subsequently questioned about their consumption of caffeine.⁷² The study revealed that women who were heavy caffeine users found the arguments less convincing than women who were light caffeine users, but caffeine intake played no role in how convincing men found the arguments.⁷³ In other words, the greater the stake one has in the outcome, the less one will consider evidence likely to trigger causal attributions that one would like to avoid.

Now let us turn to how people interpret facts to trigger or avoid blame scenarios. The prototypical situation, in which it is easiest to blame, involves a bad person doing a bad thing for a bad reason.⁷⁴ Nowhere is this more evident than in the various reactions to the World Trade Center disaster, which is addressed below in Section A. Section B then discusses more legally relevant examples: cases of police brutality discussed by Susan Bandes in this Symposium⁷⁵ and elsewhere, and experimental evidence on jurors' use of evidence.

A. *The World Trade Center Tragedy: Blaming and Refusing to Blame*

In the year following the destruction of the World Trade Center, polls showed that many Muslims did not believe that the hijackers were Arab men. According to one Gallup poll taken in six Muslim countries, only 18% of those polled

⁷⁰ *Id.* at 642.

⁷¹ *Id.*

⁷² *Id.* at 642-44.

⁷³ *Id.* at 643.

⁷⁴ See Haidt, *supra* note 1 for a discussion that focuses on the blend of rational and affective considerations in assigning blame. Here, I look at some of the affective considerations in terms of avoiding or encouraging schemata that trigger blame.

⁷⁵ Susan Bandes, *Not Enough Blame to Go Around: Reflections on Requiring Purposeful Government Conduct*, 68 BROOK. L. REV. 1195 (2003) [hereinafter *Not Enough Blame*]; Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275 (1999) [hereinafter *Patterns of Injustice*].

believed that Arabs carried out the attacks, while 61% said that Arabs were not responsible.⁷⁶ Assuming these respondents to be entirely wrong in their assessment of what happened, their response reflects a complicated moral position.

Why would intelligent people from the Muslim countries deny facts that seem so well-proven to the rest of us? While those involved in the deed and their close supporters may wish to stave off punishment, ordinary people most likely had other motives. The story probably goes something like this: "I am a Muslim and know my people. I can't imagine anyone I know perpetrating such a violent act, which I denounce along with most of the rest of the world. I would never do so, the people I know would never do so, and none of us would ever support such a thing. It must be someone else." In Iran, a more recent poll found two-thirds responding that the attacks on New York and Washington were unjustified,⁷⁷ yet an earlier poll showed only 15% believing that Arabs carried out the attack.⁷⁸

This story has two sides. The first is revulsion and condemnation of a reprehensible deed—a moral position. The second part of the story is avoiding the truth. These two parts of the story are related. The most plausible reason for denying the obvious, even at the cost of losing one's credibility, is recognition of the blameworthiness of the acts being denied. Nonetheless, in addition to being bad strategy, since everyone else is able to see what happened, denial here is immoral. This immorality has two aspects. First, taking responsibility for our actions is a good in itself. The more this happens, the more we are likely to exercise control over our worst impulses. Second, a person who turns his back on the truth turns his back on finding a cure for the evil he denies. If acknowledging responsibility leads to less societal support of those who foment violence and hate, then failing to do so can lead to further violence and hate. A moral actor would want to reduce this violence—not allow it to escalate on his watch.

Now let us move closer to home, where a similar dilemma characterized the discourse for months after the

⁷⁶ *In Poll, Islamic World Says Arabs not Involved in 9/11*, U.S.A. TODAY, Feb. 27, 2002, at 1A. The countries were: Indonesia, Iran, Kuwait, Lebanon, Pakistan and Turkey. Saudi Arabia, Jordan and Morocco did not permit this question to be asked.

⁷⁷ Richard Burkholder, *Iranian Reactions to September 11*, Gallup Tuesday Briefing, July 30, 2002, available at <http://www.gallup.com/poll/tb/gover/Publi/200207-30b.asp> (last visited Oct. 11, 2002).

⁷⁸ Richard Benedetto, *Differences in Perceptions Fuel Mistrust*, USA TODAY, Mar. 5, 2002, at 11A.

tragedy, and still does to a surprising extent. A poll taken one year after the attacks by the *Globe and Mail* of Toronto found that 84% of Canadians believed that the United States was wholly or partly responsible for the 9/11 disaster, while only 14% believed that the United States was not to blame at all.⁷⁹ Canadians blame American foreign policy in the Middle East and around the world, according to the report.⁸⁰ Polls show similar sentiments in Europe, although fewer Europeans blame Americans than do Canadians.⁸¹ How do these attitudes compare with those of Americans? I could find no polls during that period asking these questions, perhaps because pollsters assume the responses would so obviously be an overwhelming rejection of any culpability on the part of the United States. We do know that 90% of those polled shortly after the attacks supported military action against those responsible.⁸²

What is especially telling is that there has been little national debate on the matter. For months it was taboo to raise the issue at all. We dismiss reports like those from Canada, Europe or the Middle East with no serious substantive discussion of their merits. It is not difficult to find discussions of American foreign policy with respect to Iraq (the war there is ongoing as this volume goes to press), but finding reports with respect to the destruction of the World Trade Center is difficult.

Consider in this light the negotiations between Congress and President Bush over the creation of a commission to investigate possible intelligence failures prior to 9/11 and to suggest possible improvements in the gathering and analysis of intelligence information. From the beginning, this was a controversial proposal. Opponents, including Vice President Cheney, protested playing a "blame game" when we should be focusing our attention on fighting terrorism.⁸³ The

⁷⁹ Theresa Ebdon, *Most Canadians Say U.S. Shares Blame for Sept. 11*, *Globe Says*, BLOOMBERG NEWS, Sept. 7, 2002.

⁸⁰ *Id.*

⁸¹ Poll: *Majority of Europeans Say U.S. Policy to Blame for 9/11*, U.S.A. TODAY, Sept. 4, 2002, available at http://www.usatoday.com/news/sept11/2002-09-04-poll-europeans_x.htm (last visited Feb. 10, 2003). The poll shows that 63% of the French, who were polled, blame the United States in part, 51% of Italians doing so, with percentages in between the two in Great Britain, Germany, Holland and Poland.

⁸² Frank Newport, *Retaliation*, Gallup Web page on American sentiment, Oct. 3, 2001 (on file with author).

⁸³ Richard S. Dunham, *Five Questions Bush Must Answer*, BUS. WK., May 20, 2002, at http://www.businessweek.com/bwdaily/dnflash/may2002/nf20020520_3078.htm (last visited Apr. 1, 2003). One such question: "Why did Vice-President Richard

administration then supported the formation of a commission, but did not agree to the terms under which such a body could operate, frustrating members of Congress in both parties, and families of 9/11 victims who consider the investigation important.⁸⁴ Eventually the matter was resolved, and a National Commission on Terrorist Attacks Upon the United States was established by Title VI of the Intelligence Authorization Act for Fiscal Year 2003.⁸⁵ But when the President named Henry Kissinger as its head, the fighting began again. Kissinger eventually resigned over his refusal to comply with ethics rules governing the disclosure of potential conflicts of interest.⁸⁶

I suggest that the same psychology that caused those polled in Muslim countries to deny Muslim involvement in the 9/11 attack has caused us to refuse to examine seriously anything other than retaliation against the perpetrators. I further suggest that the American response too has both its moral and immoral elements. On the one hand, focusing on anything other than the horror of the 9/11 attacks feels like a dilution of our moral outrage at an unspeakable act of mass murder. It also smacks of blaming the victim, a dynamic well-studied.⁸⁷ Better not to ask the question if the answer can lead to misdirecting blame for the criminal acts of others.

But to the extent that we fail to examine American foreign policy dispassionately, to inquire whether it legitimately provokes a level of anger that is likely to engender terrorism and other violent responses, our denial is likely to lead to more violence. This is not to preordain the result of such an inquiry. We may decide that American foreign policy is, on

Cheney ask congressional leaders not to investigate the events leading up to September 11?" *Id.*

⁸⁴ Michelle Mittelstadt, *Outside Inquiry into 9-11 is Stalled; Victims' Families Lobbying Vigorously for Bipartisan Commission*, DALLAS MORNING NEWS, Oct. 22, 2002, at 1A.

⁸⁵ Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383, 2408-13 (2002).

⁸⁶ See David Firestone, *Kissinger Pulls Out as Chief Of Inquiry Into 9/11 Attacks*, N.Y. TIMES, Dec. 14, 2002, at A1. Subsequently, former New Jersey Governor Thomas H. Kean was appointed to chair the commission, which was soon to run out of funding before getting off the ground. An apparent compromise on that issue was reached in March 2003, as this volume goes to press. Dan Eggen, *9/11 Panel to Receive More Money; Negotiations Cut Commission's Request by \$2 Million*, WASH. POST, Mar. 29, 2003, at A4.

⁸⁷ See *supra* note 6. Of course, whether one considers this phenomenon blaming the victim depends upon the extent to which one identifies a country with its political leaders, a question beyond the scope of this Article.

balance, good policy regardless of the consequences. But we cannot justify refusing to ask the questions, even if our refusal is morally motivated in its own right. When we evaluate serious crises in which we are not so closely involved, either historically or contemporaneously, it would never dawn on us to exclude serious inquiry into the broader circumstances surrounding the crisis, and to exclude analysis of those circumstances in our overall evaluation of the situation. It is not taboo for us today to ask about the circumstances in Germany between the two world wars that allowed Hitler to take power, or to look at the circumstances that led to the French or Russian Revolution, to take some obvious examples.

I do not mean to argue that foreign and American responses to 9/11 are morally equivalent. But on a psychological level, the two situations are quite similar. What is behind the popular reactions in both the Middle East and the United States is a second order effect of the impulse to blame.

B. *Evidentiary Maneuvers in Legal Contexts*

It should be no surprise that a similar dynamic recurs in legal contexts. Theorists have convincingly argued that legal fights are often battles between competing narratives.⁸⁸ To the extent that blame is involved, which is generally the case in legal battles, the parties attempt to portray the facts of the case in a manner that is consistent with blaming only the other party.

Experiments show how jurors selectively use evidence to support outcomes they think are just. Kristin Sommer, Irwin Horowitz and Martin Bourgeois⁸⁹ presented jury-eligible participants with a tape recording of a mock products liability case in which the defendant was at fault, although it unsuccessfully tried to warn the plaintiff of the danger, and the plaintiff was also negligent to some extent.⁹⁰ They presented different groups with various jury instructions which, if adhered to, would lead to different outcomes: One set of subjects was instructed on strict liability, which would guarantee full recovery to the plaintiff, another on comparative

⁸⁸ See *supra* note 5.

⁸⁹ Kristin L. Sommer et al., *When Juries Fail to Comply With the Law: Biased Evidence Processing in Individual and Group Decision Making*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 309 (2001).

⁹⁰ *Id.* at 312.

negligence, which would result in weighing the relative fault of the parties in issuing an award, and a third on contributory negligence, under which the plaintiff's negligence bars recovery completely.⁹¹ In a pre-test of the experimental materials, a separate group of participants judged the strict and contributory liability conditions less fair than the comparative negligence condition.⁹² In the study relevant to this discussion, participants were divided into six-person juries, which deliberated after the trial.⁹³ The deliberations were taped.

The results are striking. In reaching a verdict, some juries followed the judge's instructions (compliant juries), others did not (noncompliant juries).⁹⁴ For our purposes, what is most important is what the juries discussed during the deliberations. Sommer et al. summarize their findings:

[N]oncompliant juries in the contributory negligence condition discussed the most proplaintiff evidence and noncompliant juries in the strict liability condition discussed the least proplaintiff evidence, whereas compliant juries (including those who nullified the law by altering damage awards) and those operating under the fair rule of comparative negligence discussed equal proportions of proplaintiff information.⁹⁵

Although I have not discussed all aspects of the results of this study, the basic message is clear: People tend to maximize the evidence that supports reaching conclusions they believe to be fair, and to minimize the evidence that supports conclusions that they believe not to be fair.

Sometimes the system itself facilitates the avoidance of blame when the system perceives that it has a stake in the outcome. Consider Susan Bandes's description of the hurdles faced by an individual attempting to hold the government responsible for police brutality in the context of a longstanding pattern of torture in Chicago:

Complaints are discouraged, confessions are not videotaped, record keeping is lax or nonexistent, records are sealed or expunged, patterns are not tracked, and police files are deemed undiscoverable. If a history of past incidents does exist and, despite these hurdles, becomes known to the brutality victim, he faces additional hurdles introducing evidence of the brutality in court, including restrictive

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 314.

⁹⁴ Sommer et al., *supra* note 89, at 316.

⁹⁵ *Id.*

evidentiary rulings, protective orders, judicial toleration of police perjury or of "the blue wall of silence," assumptions about credibility that favor police officers, the absolute immunity of testifying officers, substantive constitutional doctrines insulating failures to act or demanding an exceptionally high level of proof of wrongdoing, restrictive municipal liability standards coupled with a lack of receptivity to evidence of systemic wrongdoing, and standing doctrines that make injunctive relief nearly impossible to obtain.⁹⁶

Quite obviously, these hurdles are calculated to make it especially difficult for the legal system to draw the conclusion that police brutality is a systemic problem. This absolves the government that runs the department from the responsibility to see that it stops.⁹⁷

My point here is not that we should suddenly be shocked that the system of justice is not always just. Rather, my point is that the ease with which we blame plays such a huge, albeit tacit role in our lives, including our legal system, that the lengths to which we are willing to go to avoid blame are virtually limitless. It is easy enough to compare the legal maneuvering that Bandes describes with the intellectual activity that leads to such radically different accounts of the World Trade Center attacks from one culture to another.⁹⁸

CONCLUSION

This Article has explored a notion of blame that results not from conscious reasoning, but rather from reacting to cognitive scenarios that trigger it. Much of the Article focused on what those scenarios may be, and where they come from. All of the elements of the blame impulse—state of mind, bad events and causation—function routinely in other psychological processes. In fact, all are so basic that we could not function well without them. This means that the impulse to assign responsibility and blame, while moral, may consist primarily of

⁹⁶ Bandes, *Patterns of Injustice*, *supra* note 75, at 1279-80.

⁹⁷ The legal difficulty of attributing blame to a governmental entity, rather than an individual, is the issue that Bandes raises in her contribution to this issue. See Bandes, *Not Enough Blame*, *supra* note 75. There is also a psychological literature that discusses cultural differences in assigning blame to individuals versus entities. See Menon et al., *supra* note 32.

⁹⁸ In a dramatic announcement, outgoing Governor Ryan of Illinois pardoned four prisoners on death row in January 2003, who had alleged that they confessed under torture to the crimes of which they were convicted. Other prisoners on death row had their sentences commuted. Jodi Wilgoren, *4 Death Row Inmates are Pardoned*, N.Y. TIMES, Jan. 11, 2003, at A13.

a secondary use of other cognitive tools, just as language uses parts of the mouth and nose that serve other primary functions, such as breathing and eating. If this is true, then it also would not be surprising that the impulse to blame underdetermines our larger system of moral judgment, which includes such things as inchoate crimes, justification and excuse. I conclude with a few words about this larger picture.

Assuming this perspective on responsibility and blame to be even partly right, it produces both first order and second order incongruities. The first order incongruities involve adjustments that a legal order will need to make to compensate for overblaming and underblaming. This is a matter of legal doctrine.

The blame impulse suggests that it is no accident that the legal system is conventionally organized as it is: basic crimes, inchoate crimes, justification and excuse. Inchoate crimes fall outside the blame paradigm since they typically require no bad outcome, and justified and excused conduct fall inside the blame paradigm. To the extent that the blame paradigm is the organizing principle, it would suggest that the conventional taxonomy is not only firmly rooted in a historically contingent but entrenched system, it is also the default position in the way we conceptualize responsibility and blame.

Second, it might be interesting to examine these doctrines to determine whether they have a different status in everyday judgments of responsibility and blame. Some work has been conducted in this regard. Robinson and Darley performed a set of studies to determine the attitudes of people concerning responsibility and blame, and to compare those attitudes with the legal treatment of various situations.⁹⁹ Among their findings was that attempted crimes are viewed to be almost as blameworthy as successful ones when the person attempting the crime is in dangerous proximity to the scene.¹⁰⁰ People do not necessarily think that the bad marksman is any less culpable than the good marksman. But the law makes an enormous distinction, most vividly in jurisdictions that have capital punishment. In contrast, the law often treats attempts that are remote, but still sufficient to result in legal liability more harshly than everyday morality would call for.

⁹⁹ ROBINSON & DARLEY, *supra* note 3.

¹⁰⁰ *Id.* at 20.

Robinson and Darley also looked at how people react to certain legally acceptable excuses, focusing on cases of diminished capacity.¹⁰¹ Briefly, their subjects typically believed that people who were legally insane for various reasons should not be punished, but rather should be civilly committed.¹⁰² However, there was far less sympathy for people who committed crimes because they were involuntarily intoxicated.¹⁰³ It would be very useful for research to focus more on how people react to defendants who enter the judicial system with a wide variety of problems that make them more susceptible to conducting their lives outside of socially acceptable norms.

In today's world, however, it is perhaps the second order consequences that are the more interesting. Awareness of the impulse to blame leads to strategies to avoid acknowledging the cognitive scenarios that trigger the impulse. This effort to avoid continues to make the world far more dangerous and the system of justice somewhat less just.

¹⁰¹ *Id.* at 127.

¹⁰² *Id.* at 132.

¹⁰³ *Id.* at 141.

