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The Psyche of Criminality: An Elaborative Examination of Mental State

UTKARSH PANDEY[1] AND SIYA DHIMAN[2]

ABSTRACT

State of mind is fundamental requisite for deciding culpability as well as quantum of punishment. Two similar acts can have different punishment even if the end result is same. A person can be imprisoned for life even if he could not commit the crime solely on the basis of requisite state of mind. A human conduct that is believed to be inimical to the social interests is labelled as a crime but the quantum punishment is decided by the mens rea i.e. culpable state of mind. Can we know the intention of the delinquent at the time of commission of crime? How to distinguish fake intention from projected one? We know already that truth cannot be 'found', and that it can only be reconstructed. In fact, Legal proceedings are not a simple recapitulation of a past occurrence. It is never possible simply to reconstruct the exact actions or utterances that gave rise to the case at hand. In such scenario, if there is misjudgement of intention, miscarriage of justice is bound to happen. This paper will discuss the method judges employ to judge the state of mind of accused while committing crime, are these methods full proof, and how to reduce the probability of misjudgement to advance the criminal justice.

Keywords: *Mens Rea; Criminal Psychology; Culpability.*

I. INTRODUCTION

Crimes were defined by Blackstone as "the breach and violation of public rights and duties which affect the whole community". A crime, therefore, is an act deemed by law to be harmful to society in general, even though its immediate victim is an individual.[3] Every civilized system of jurisprudence has adopted the basic principle that in any serious crime, with few exceptions, there are two essential components that are required to be established:

(a) Voluntary conduct (*actus reus*) and

(b) Intent (*mens rea*).

The fundamental principle of criminal liability is that there must be a wrongful act— *actus*

[1] Author is a Research Scholar at University Of Lucknow, India.
[2] Author is an Advocate at HC of Shimla, India.
[3] *P. S. R. Sadhanantham v Arunachalam, AIR 1980 SC 856* [LNIND 1980 SC 44] : (1980) 3 SCC 141 [LNIND 1980 SC 44] .

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reus,[4] combined with a wrongful intention—*mens rea*. This principle is embodied in the maxim, *actus non facit reum nisi mens sit rea*, meaning "an act does not make one guilty unless the mind is also legally blameworthy". A mere criminal intention not followed by a prohibited act cannot constitute a crime. Similarly, mere *actus reus* ceases to be a crime as it lacks *mens rea*. No act is per se criminal; it becomes criminal only when the actor does it with requisite guilty mind. No external conduct, howsoever serious in its consequences, is generally punished unless the prohibited consequence is produced by some wrongful intent, fault or *mens rea*.[5]

Except from some cases where the statute excludes the requirement of *mens rea* all other cases are punished on the basis of state of mind. However, as usual the crimes are committed in clandestine manner in most of the cases no one except accused and victim are present, out of these cases victim is always there before the court of law except in cases of murder or victim rendered unable to speak or express himself[6]. It is very difficult to chaff falsity from truth as both the contesting parties claims their version to be true. The judges are given a crucial task to find the truth. Can judges accurately determine whether the defendant acted with requisite 'guilty mind'? St. Thomas Aquinas was sceptical of such mind reading:

> *"Man, the framer of human law, is able to judge only of outward acts; because man seeth those things that appear, according to Kings; but God alone, the framer of the Divine law, is able to judge the inward movement of wills ...."* [7]

Given the cognitive demands modern criminal law demands from judges this statements reflect the truth. This paper will bring to light the misconception that judges always judge correctly, explanation of how judges use projection and prototyping methods for mind reading, there are chances of misjudgement which may be fatal to the either person, suggestion for improvement.[8]

(A) Expressions connoting *mens rea* under IPC

- **Dishonestly:** Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly".[9]

[4] The expression "*actus reus*" has apparently been coined by Prof Kenny in the first Edn of his Outlines of Criminal Law in 1902. See Jerome Hall, General Principles of Criminal Law, 2nd Edn Bobbs- Merrill, New York, 1960, p 222, fn 24.

[5] Mahadeo Prasad v State of West Bengal, AIR 1954 SC 724; R Balakrishna Pillai v State of Kerala, (2003) 9 SCC 700 [LNIND 2003 SC 259] : (2003) 2 SCR 436 [LNIND 2003 SC 259]; CK Jaff Sharief v State (through CBI), AIR 2013 SC 48 [LNIND 2012 SC 1352]: (2013) Cr LJ 341 (SC) : (2013) 1 SCC 205 [LNIND 2012 SC 1352]; Rupinder Singh Sandhu v State of Punjab, AIR 2018 SC 2395-9 : (2018) Cr LJ 2935 (SC). Exception to the rule is off of strict liability.

[6] Reference to masculine is being used for person whether male or female unless specifically excluded.

[7] II ST. THOMAS AQUINAS, SUMMA THEOLOGICA, in 20 GREAT BOOKS OF THE WESTERN WORLD, second part, part 1, question 100, art. 9, at 261 (Robert Maynard Hutchins ed., founders ed. 1952).

[8] See Kevin Jon Heller, The Cognitive Psychology of *mens* Rea, 99 J. Crim. L. & Criminology 317 (2008-2009);

[9] Section 24, IPC.

- **Fraudulently:** A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.[10]
- **Voluntarily:** A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.[11]
- **Reason to believe:** A person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing but not otherwise.[12]

(B) The Herculean Task

Abovementioned mental states are differentiated with such "subtlety and precision," however, that it is an open question whether judges can accurately distinguish them.[13] Those are fine distinctions, to say the least. IPC can be described the as an "elaborate set of precise rules whose operability of depends on the judges willingness" and "to make artificial characterizations."[14] For example, Section 354 provides, *"Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty…"* Thus, Judge must determine both whether the defendant acted *knowingly or intendedly* (with regard to his conduct's to outrage her modesty). In the homicide cases the judges have to tell whether the case is of death by negligence (nobody knows whether the car hit the pedestrian intentionally or negligently), culpable homicide not amounting to murder, culpable homicide amounting to murder or murder. Finally, in most of the criminal cases judges have to deal with another mental state associated with the defences[15] to falsify the story projected by the prosecution and to negate the *mens rea* of the charged crime, including sudden and grave provocation, insanity or even 'it was a consensual sex' or 'withdrawal of consent was during the intercourse'[16].

Most scholars simply presume that judges can mind read accurately, and those that take mind-

[10] Section 25, IPC.
[11] Section 39, IPC.
[12] Section 26, IPC. This is not an exhaustive list, some other terms are used in IPC to connote intention, like Wrongful gain & wrongful loss (Sec 23, IPC), Knowledge or Intention (Sec 299, 300, IPC), Wantonly or Malignantly (Sec 153, IPC) Knowingly,
[13] Supra note 6, p. 3.
[14] Ibid, p.4; The author talked mostly about US's Model Penal Code (MPC), this paper will be referring to similar provision in IPC for proper understanding, if there is no similar provision in that case original MPC section will be referred.
[15] See Section 76-106 IPC.
[16] Rajasthan High Court in *Jarnail Singh v. State of Rajasthan, (1971) SCC OnLine Raj 76*, it was held that withdrawal of consent during the sexual act does not make the man guilty of rape. When a woman of full age gives her consent to a man for sexual intercourse prior to penetration, it is not rape, no matter how much force is subsequently used by him, no matter how much reluctance is developed by her subsequent to penetration.

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reading seriously have uniformly adopted "common sense functionalism"[17]

II. THE METHOD OF MIND READING

Most of the scholars presume that accurate mind reading is possible - a position that dates back at least to 1882, when Bowen famously dismissed Oliver Wendell Holmes's skepticism toward mind-reading by claiming that "the state of a man's mind is as much a fact as the state of his digestion."[18] Little has changed in the intervening century. In fact, as recently as 1987, Richard Singer could assert without argument that "it is certainly within the jury's ken to find that a typical self-defender did not intend a killing.[19]

The question is, why we presume that judges can make accurate mental-state determinations. The answer seems to be that legal scholars embrace, implicitly or explicitly, a common sense theory of mental-state attribution in which mind-reading seems neither particularly complicated nor particularly problematic.

(A) The traditional explanation

The theory lies on three interrelated assumptions. The first is that there are fixed and unchanging causal relationships between external circumstances, internal mental states, and physical behaviour. As Jerome Hall illustrates it:

> *"The whole law of evidence is a studied effort to cope with this fundamental problem and its justification rests on the high probability of a "sufficiently" accurate representation of inner states by external conduct. This premise is accepted not only in law, but throughout every avenue of social life. It rests ultimately on the essential uniformity of human nature, and is so deeply ingrained in our daily experience that it is hardly possible even to conceive of social intercourse founded on its rejection.*[20]

The second assumptions, dependent on the first, is that Judges possess an intuitive theory of the specific casual relationships that exist between circumstances, mental states and behaviour. These are referred to as "common-sense generalisation about human nature" by HLA Hart[21]. It can be classified into two basic categories:

i) Circumstances tending to excite, stimulate, or bring the emotion in question into play; and

[17] Norman J Finkel, Commonsense Justice, 1995, pp. 61-2.
[18] See Jerome Hall, Interrelations of Criminal Law and Torts: I,43 COLUM. L. Rev. 753, 769 (1943)
[19] Richard Singer, The Resurgence of *mens* Rea: Il-Honest but Unreasonable Mistake of Fact in Self Defense, 28 B.C. L. REV. 459, 515 (1987)
[20] Supra Note 16
[21] HLA Hart, Punishment and Responsibility (1968), p. 33.

ii) Outward conduct expressing and resulting from the emotion in question.[22]

Hart's insistence "that men are capable of self-control when confronted with an open till but not when confronted with a wife in adultery"[23] and Oliver Wendell Holmes's belief that "detached reflection cannot be demanded in the presence of an uplifted knife"[24] are examples of common-sense generalizations in the first category. Rex v. Shaw's assertion that strangling someone to death with a rope indicates malice aforethought is an example of a common-sense generalization in the second category.[25] As the examples indicate, both categories of generalizations take a common "if x, then y" form, where x is the circumstances or behaviour and y is the mental state that can be inferred from them.[26]

The third assumption which naturally flows from the second is, Judges determine a defendant's mental state by applying their common-sense theory of the specific relationships that exist between circumstances, mental states, and behaviour to the evidence in the case.

Judge Posner offers a more specific example of this reasoning process-what he calls, somewhat idiosyncratically, a "behaviourist account of deliberation"[27] -when he discusses how judges infer premeditation from the evidence in a case:

> *"In deciding whether a crime is premeditated ... we examine the circumstances of the crime: Was it concealed? Had the criminal made arrangements for a getaway? Had he obtained the means of committing the crime in advance? Were those means suitable to the end (suitably lethal, in the case of a murder)? Did the criminal have much to gain from the crime? From these circumstances a model of a deliberating criminal could be constructed-an "objective" reconstruction of the criminal's motivational experience, created by attributing to him a certain type of rationality."*

Taken together, these three assumptions constitute what cognitive psychologists have described as a functionalist account of mind-reading. We can summarize that account as follows:

Our mind-reading capacity is implemented by an intuitive theory of mind, a body of knowledge or belief about the causal relations between mental states on the one hand and behaviour,

[22] JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 387, at 416 (1979).
[23] Supra Note 19. (Punishment and Responsibility).
[24] Brown v. United States, 256 U.S. 335, 343 (1921).
[25] (1834) 172 Eng. Rep. 1282 (N.P.); see also Luke Wilson, *Renaissance Tool Abuse and the Legal History of the Sudden*, in LITERATURE, POLITICS, AND LAW IN RENAISSANCE ENGLAND 121, 128-39 (Erica Sheen & Lorna Hutson eds., 2005) (noting that courts in the Renaissance era tended to infer lack of premeditation from "tool abuse"-killing with an object that was not designed to serve as a weapon).
[26] Alvin Goldman & Kelby Mason, Simulation, in HANDBOOK OF THE PHILOSOPHY OF SCIENCE: PHILOSOPHY OF PSYCHOLOGY AND COGNITIVE SCIENCE (2006) at 268.
[27] RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 175 (1990)

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environment and other mental states on the other.... In mind-reading, we use these generalizations and our data about the target's circumstances or behaviour to infer some of the target's mental states.[28]

There are two other aspects of functionalist theorising. First, it assumes that the judges acquire their "intuitive theory of mind" in a nearly scientific manner i.e. making generalisation based on the available evidence. The process is empirical and based on real-world observation of casual relationship between external circumstances and mental states and between mental states and physical behaviour.[29] Second, the mind-reading by judges does not involves any introspection on their part, they simply apply the common-sense generalisations to the given case; they do not ask how would they react in the given situation.[30]

III. PROBLEMS WITH THE TRADITIONAL EXPLANATION

Judges do not have a direct access to the defendant's mind but they do know the physical behaviour, the *actus reus* and have at least some sense of external circumstances which led to that behaviour. Hence, we can naturally assume judged would infer the 'missing' mental state by relying on intuitive theory of how circumstances, mental states and behaviour are casually related.

Several existing models suggests that Projection and prototyping may be a default starting point for much of social inference.[31]

Projection: Krueger has shown that "when the responses of others are not known, people project their own as a first bet."[32]

Prototyping: Fiske & Neuberg have found that the perceivers attempt category-based impression formation before they use more attribute-oriented impression formation and if relatively category-oriented processes are successful, then the perceiver goes no further toward more attribute-oriented processes.[33]

Judges are likely to use projection and prototyping, instead of functionalist theorizing, to

[28] Goldman & Mason, Supra note 24, at 286-9.
[29] Rebecca Dresser, Culpability and Other Minds, 2 S. CAL. INTERDISC. L.J. 41, 48
[30] Goldman & Mason, Supra note 24, at 40.
[31] Daniel R. Ames, Everyday Solutions to the Problem of Other Minds, in OTHER MINDS: How HUMANS BRIDGE THE DIVIDE BETWEEN SELF AND OTHERS 158, 166 (Bertram F. Malle & Sara D. Hodges eds., 2005);
[32] Joachim I. Krueger, Return of the Ego-Self-Referent Information as a Filter for Social Prediction: Comment on Karniol (2003), 110 PSYCHOIL. REV. 585, 589 (2003)
[33] Susan T. Fiske & Steven L. Neuberg, A Continuum of Impression Formation, from Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation, 23 ADVANCES INEXPERIMENTAL SOC. PSYCHOL. 1, 2 (1990)

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determine a defendant's mental state.

(A) Projection

This model does not presume that Judges possess intuitive theory of mind. Instead it assumes that individuals are "information poor" but possess a "special skill, namely constructing, stimulated or imaginary mental states…in simulated processing. It can be of two types: First, *prospective projection*: the mind reader uses simulation to move forward from information about the target's situation-his physical environment and whatever is known about his psychological characteristics-to the target's mental state; Second, *retrospective projection*: using simulation to move backward from the target's physical behaviour-the criminal act itself-to the mental state that caused it.[34] The goal of projection is to determine what mental state the mind-reader would have had in the target's situation if he were the target. Accurate projection thus depends, on the mind-reader's ability to adopt the target's characteristics and to prevent his own characteristics from influencing the simulation process. Projection differs from functionalist theorising in the way that former involves introspection on the part of judge whereas the latter only requires experimentally acquired intuitive theory of mind.[35]

If judges use projection to mind-read, they have to rely on hybrid from of projection as there is two kind of information: (1) evidence concerning the defendant's situation, such as the circumstances in which he committed the crime and the mental state that he was in prior to finding himself in those circumstances (prospectively); and (2) a critical "observable piece" of the defendant's behaviour, namely, the *actus reus* of the crime (retrospectively). A juror tries to simulate all of the mental states offered by the prosecution and defences and chooses the state that best matches the *actus reus* of the crime.[36]

(B) Evidence of projection

a. General Research

Cognitive psychologist have long recognised that this is one of the most basic and stubborn mind-read mechanisms:

> *"When people predict the thoughts, feelings, or behaviours of others, they tend to assume that these others think, feel, and behave as they themselves do ... they project regardless of their level of cognitive busyness ...and regardless of information they have about other*

[34] Goldman Supra at 45.
[35] The Cognitive Psychology of *mens* Rea, at 14.
[36] Supra note 32.

individuals ..."[37]

Indeed, the tendency to assume that others "think, feel, and behave" as they do is so tenacious that it routinely leads individuals to mind-read *inaccurately*. For example, "people in one emotional situation.., project their current preferences and behaviours onto other people who are in different emotional situations"[38] -a phenomenon known as an "empathy gap".

Another example of a projection-induced error is the curse of knowledge, where individuals permit their knowledge to interfere with their attempts to simulate others who are not only less knowledgeable, but whom they know are less knowledgeable, than they are. One study asked well-informed businessmen to predict how individuals they knew were less informed would forecast corporate earnings. The study was designed to reward the mind-readers for quarantining their own superior knowledge; nevertheless, "the predictors failed to discount their own knowledge completely, so their predictions partly reflected their proprietary knowledge."[39]

Such errors are troubling, because there is no reason to believe that judges are any less prone to them than ordinary mind-readers. It is reported that the high court has overturned as many as 90 % judgements of the trial court[40]. Given the circumstances it would not be out of place to assume that judges often mind-read wrongly. One advocate suggested, "Sometimes there are cases where the trial court does not consider several factual aspects or even legal aspects slip their mind. Therefore the accused succeed in the HC."[41]

b. Application

i. Consent

Research suggests in rape cases, judges who identify with the victim find it easier to put themselves in the victim's position than those who do not; and the easier it is for judges to put themselves in the victim's position, the more likely they are to understand -and agree with the victim's account of what happened-namely, that she did not consent. That explanation is consistent with the projection model, particularly its emphasis on perspective-taking and its assumption that identification is based on similarity between a juror and his mind-reading

[37] Russell W. Clement & Joachim Krueger, Social Categorization Moderates Social Projection, 38 J. EXPERIMENTAL SOC. PSYCHOL. 219, 219 (2002).
[38] Leaf Van Boven & George Loewenstein, Cross-Situational Projection, in THE SELF IN SOCIAL JUDGMENT 43, 49 (Mark D. Alicke et al. eds., 2005).
[39] Goldman at 165-6.
[40] Trial court orders are overturned by high court in 90% of cases: Lawyers https://timesofindia.indiatimes.com/india/Trial-court-orders-are-overturned-by-high-court-in-90-of-cases-Lawyers/articleshow/50156974.cms
[41] Ibid.

target.[42] Misjudgement in such case can be proved grave injustice to the real victim.

ii. Mistake

In a fictitious case, a teenager stood over the defendant, pointed a gun at his head, and demanded five dollars; the defendant then pulled a gun out of his jacket and killed the youth-a classic self-defence situation, and one that led mock judges to acquit 62.5% of the time.[43] Supreme Court quashed disciplinary action against judge and held that "to err is human and not one of us, who has held judicial office, can claim that we have never passed a wrong order".[44]

(C) Prototyping

The substantive criminal law is concerned with defining the elements of specific crimes. Regardless of how they are defined, the due process requires the prosecution to prove all the elements of crime 'beyond reasonable doubt'.[45] The failure to prove any element entitles acquittal to defendant.[46]

This approach assumes (1) that judges actually understand crimes as a bundles of "singly necessary and jointly sufficient" elements, and (2) judges will only convict when prosecution proves all elements beyond reasonable doubt. However, Empirical research contradicts both the assumptions. Judges mentally represent crimes as loosely-structured prototypes, not as bundles of essential elements[47] Research indicates that judges possess prototypes for a wide variety of crimes, including, inter alia, assault, burglary, kidnapping, murder, robbery, stalking, rape, manslaughter, euthanasia, and infanticide. These prototypes rarely correspond to the legal definition of a crime. The most common judge prototype for assault, for example, is simply a physical attack that injures the victim, a prototype that completely neglects the requirement that the victim reasonably fear bodily harm. If the characteristics of the defendant's crime match the features of the prototype closely enough, judges will convict even in the absence of one (or more) of the features." [48]

a. Procedure of prototyping

The key question is, what role mental-state determinations plays in prototyping. There are two

[42] Lynda Olsen-Fulero & Solomon M. Fulero, Commonsense Rape Judgments: An Empathy-Complexity Theory of Rape Juror Story Making, 3 PSYCHOL. PUB. POL'Y & L. 402, 409 (1997)
[43] Cognitive psychology of *mens* rea, at 20.
[44] Krishna Prasad Verma (D) thr. L.Rs. vs. State of Bihar and Ors., (2019) 10 SCC 640.
[45] Tika v State of UP, AIR 1974 SC 155
[46] Calcutta Corporation v Calcutta Wholesale Consumers, AIR 1970 Cal 120; Republic v. David Wang'ondu Githuru, 2018 SCC OnLine Ken 1, the Kerala HC reiterated that *"Suspicion, however strong, cannot provide basis for inferring guilt which must be proved by evidence beyond reasonable doubt."*
[47] Vicki L. Smith, When Prior Knowledge and Law Collide: Helping Jurors Use the Law, 17 LAW & HUM. BEHAV. 507, 509 (1993).
[48] Cognitive Psychology of *mens rea* at 23.

possible answers, first, judges simply make no attempt at all to mind-read because their prototype does not require the defendant to possess a particular mental state except some like murder. When a prototype does reference a particular mental state, the nature of prototyping suggests that judges will treat the mental state as just another feature of the prototype. This suggests that if judges conclude that the defendant is the kind of person who commits a particular crime, they will presume that he possessed the mental state associated with prototype,[49] young adult black males had the highest conviction rate[50]

Like crime prototypes, defence prototypes takes person centric and situation centric approach. If the women is battered, fragile, guilt-ridden, depressed; the judges is likely to take victim favourable view. Consent prototypes are primarily situational: the prototypical women who consents to sex flirted with the alleged accused, went to his apartment, engaged in consensual kissing. Some Judges view defendant as insane if he looks like 'wild beast' of if the crime is committed in bizarre fashion.[51]

Finally, how they acquire such prototypes? There are two basic method of acquisition: through experiences and from exposure to other sources such as media.[52]

IV. ERRORS OF PROJECTION AND PROTOTYPING

We have seen that, as a mind-reading technique, projection involves an attempt by the juror to imagine not how he would have felt in the defendant's situation, but how he would have felt in the defendant's situation if he were the defendant. For projection to be accurate, in other words, a juror must not only perceive himself to be similar to the defendant, he must also actually be similar to the defendant when he engages in the act of mind-reading. The perceptions and reactions he uses to simulate the defendant's situation must match the perception and reactions of the defendant in the actual situation.[53] Is there possibility of similarity between judges and defendant? We will examine two kinds of similarity.

(A) Natural similarity

A situation in which the juror and the defendant are psychologically similar simply by virtue of their shared sociological characteristics. In such a situation, a juror will be able to accurately

[49] The Cognitive psychology of *mens rea* at 25.
[50] Homicide trends in the United States, 1980-2008, United State Department of Justice (2010).
[51] Caton F. Roberts et al., Implicit Theories of Criminal Responsibility: Decision Making and the Insanity Defense, 11 LAW & HUM. BEHAV. 207, 222-23 (1987).
[52] Jeffrey W. Sherman, Development and Mental Representation of Stereotypes, 70 J. PERSONALITY & SOC. PSYCHOL. 1126, 1127 (1996) (noting that the information underlying prototypes "may be acquired from first hand personal experience with group members or through social learning from family, friends, and the media").
[53] The Cognitive Psychology of *mens rea* at 35.

mind-read the defendant simply by creating a simulation that accurately reproduces the external circumstances that led to the defendant's crime. In most cases, because judges and the defendant will be very sociologically different, they will be very psychologically different, as well. It has been seen that white judges are more likely to convict the black defendants than white defendant, female judges are more likely to convict than male judges in rape and incest cases but are generally lenient towards defendants in cases that don't involve sex. It does not mean that male judge often misread women. It simply means that there is no natural similarity between the judge and defendant.

Constructed similarity is still possible where the judge may be able to adjust his stimulation to eliminate the gap.

(B) Constructed similarity

It has two prerequisites. First, the judges must prevent his own idiosyncratic desires beliefs and knowledge from influencing his stimulation of the defendant's experience i.e. quarantining.[54] Second, the judges must adjust his stimulation routine to take into account the defendant's psychological differences. If he does not make the necessary adjustments, the simulation will once again reveal his mental state, not the defendant's. Inputs can be inaccurate in two ways, deficiency of inputs or excess of input.[55]

a. Excess of Inputs

If he does not make the necessary adjustments, the simulation will once again reveal his mental state, not the defendant's. Unfortunately, as noted earlier, mind-readers rarely acknowledge psychological difference; on the contrary, they assume that others "think, feel, and behave as they themselves do" even "when they are asked not to" and "regardless of information they have about other individuals." It has been found that both men and women are particularly likely to project their own sexual intent onto others when others' sexual intent is uncertain.[56] Because sexual arousal is a hot emotional state, cold judges may well underestimate the potential effect of the consensual kissing on her overall level of sexual arousal-which means that they will be more likely to conclude that although she consented to the kissing, she would not have consented to the intercourse.

The problem is that judges simply have no reliable method for determining how sociological differences translate into psychological differences, and thus have no reliable method for

[54] Goldman at 29.
[55] Goldman at 172.
[56] The Cognitive psychology of *mens rea* at 39.

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distinguishing between plausible and implausible adjustments.[57]

(C) errors of prototyping

First, the features of prototypes rarely correspond to the legal definitions of particular crimes and defences. Second, the fuzzy nature of prototyping is inconsistent with the formal requirements of jury decision-making. Third, prototypes tilt toward the extraordinary and unusual, reducing the likelihood that they will match actual cases. Fourth, prototypes vary significantly between judges, undermining consistent decision-making. And fifth, prototyping in general causes judges to process evidence in biased ways, leading to inaccurate fact finding.[58]

V. DEBIASING PROJECTION AND PROTOTYPING

It is clear we cannot prevent judges from projecting and prototyping. Judges project "even when they are asked not to, “regardless of information they have about other individuals,”. In fact, asking judges not to prototype will almost certainly backfire, making the prototypes even more salient and-worse increasing the likelihood that the judges will falsely remember prototype consistent evidence.[59] The best we can hope for improve the accuracy of projecting and prototyping.

(A) debiasing projection

First, empathy gaps can be reduced by asking individuals in a cold emotional state to imagine how they would think and feel in a hot emotional state before they predict how they would react in a hot state because it suggests that asking judges to imagine themselves in hot emotional states prior to mind-reading may encourage them to take the defendant’s hot emotional state into account when they simulate his experience of the crime.

Second, often a mind-reader’s failure to consider the possibility that the target knows less than he does, affects the outcome of the case. Research indicates that the curse can be minimized by having the mind-reader recall a situation in which he was less knowledgeable than he is now before he determines how much the target knows. This may sensitize the mind-reader that the he may know more than the target, leading him to mind-read more accurately.

Finally, individuals project less egocentrically if they are provided financial incentives to accurately mind-read. So, individual who have incentive to adjust accurately are more likely to exert the necessary effort than individuals who do not have incentives. We obviously cannot pay judges to protect accurately, but it may be worthwhile to remind them that inaccurate mind-

[57] Goldman at 178.
[58] The Cognitive psychology of mens rea at 46.
[59] The Cognitive psychology of mens rea at 60.

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reading will lead to a wrongful conviction or a false acquittal, both very costly outcomes.

(B) Debiasing Prototyping

First, although traditional jury instructions have no effect on the content of juror prototypes, a supplemental instruction that "attacks judges misconceptions about the target crime on a feature-by-feature basis, giving them specific information about how to revise the features contained in their naive representations," leads judges to prototype far more accurately.[60]

Second, individuals can be asked to imagine someone who does not fit their stereotype. Studies have shown that a "consider the opposite" imagination task significantly reduces an individual's stereotype expectancies when he later mind-reads a specific target.

Third, individuals can be asked to take the target's perspective prior to mind-reading. Research indicates that such perspective taking "increases the expression of positive evaluations of the target, reduces the expression of stereotypic content, and prevents the hyper accessibility of the stereotype construct.[61]

VI. CONCLUSION

Actus non facit reum nisi mens sit rea-"the act does not make a person guilty unless the mind is also guilty." Such a simple maxim, yet one so difficult to apply. Aquinas did not believe that ordinary mortals could determine whether an individual possessed a guilty mind; to him, "God alone, the framer of the divine law, is able to judge the inward movement of wills ....."

Legal scholars, by contrast, have always dismissed Aquinas's skepticism, insisting-even taking as an article of faith that judges can, in fact, determine the *mens rea* of those whom the criminal law seeks to punish.

This Article has attempted to take that debate, not to resolve it. The traditional explanation of mind-reading is clearly inadequate: judges mind-read through projection and prototyping, not through functionalist theorizing. But that does not mean that Aquinas is correct and judges are incapable of accurate mind-reading. Accurate mind-reading is sometimes possible: namely, when a juror uses projection to determine the mental state of a defendant who is very similar to himself or applies a legally precise prototype to determine the mental state of a defendant who is very different.[62] Applying the abovementioned suggestions may help the judge in deciding

[60] Heller, supra note 277, at 281-82.
[61] Adam D. Galinsky & Gordon B. Moskowitz, Perspective-Taking: Decreasing Stereotype Expression, Stereotype Accessibility, and In-Group Favoritism, 78 J. PERSONALITY & SOC. PSYCHOL. 708, 720 (2000).
[62] Daniel R. Ames & Sheena S. Iyengar, Appraising the Unusual: Framing Effects and Moderators of Uniqueness-Seeking and Social Projection, 41 J. EXPERIMENTAL SOC. PSYCHOL. 271, 280 (2005)

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the cases with utmost impartiality. Above all, internal biases are to be cured by relying on merits and merits of the case only.

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