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Solipsism and Criminal Liability

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SOLIPSISM AND CRIMINAL LIABILITY

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A viable legal system and a free society can endure and progress only by continuing to debate fundamental principles. Thus, often it is useful to return to underlying precepts in order to refine and comprehend more fully the contemporary state of knowledge.

This article posits the case of the solipsist—one who denies the existence of all physical reality and maintains that his own ego alone exists—as a criminal defendant. Others, most notably Professor Lon L. Fuller, have expounded upon the manifold ways in which certain harsh necessities, *externally* impose upon common people, can test the rules of the criminal law. The postulate of the solipsist-as-defendant presents the inverse theme: the singular defendant is a psychologically extraordinary individual existing in a relatively mundane environment. It thus provides the opportunity for consideration of the ways in which *internal* forces of great intensity can shape the manners in which people behave and the way the legal enterprise functions.

Do I know, can I know, anything? Would not knowledge be an impossible inclusion of what lies outside? May not I rather renounce all beliefs? If only I could, what peace would descend into my perturbed conscience: The spectacle of other men's folly continually reawakens in me the suspicion that I too am surely fooled; and the character of the beliefs which force themselves upon me—the fantasticality of space and time, the grotesque mockery called religion, the sorry history and absurd passions of mankind—all invite me to disown them and to say to what I call the world, "Come now; how do you expect me to believe in you?"¹

I. INTRODUCTION

IN THE ABOVE QUOTED PASSAGE, Santayana states the metaphysical position of the solipsist, one who denies the existence of all physical reality and maintains that his own ego alone exists. Throughout the remainder of *Scepticism and Animal Faith*, Santayana criticizes the reasonableness of this position and the philosophical credentials of the scepticism which is its basis. But what if one actually adopted the solipsistic viewpoint, and on the basis of this belief committed a criminal act against the person or property of another? In this paper I will address the merits of several of the legal defenses arguably available

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In this article, the author, while recognizing that the feminine gender is equally appropriate, uses the masculine gender for personal pronouns. This convention is adopted for the purposes of style and consistency.

1. G. Santayana, *Scepticism and Animal Faith* (Dover ed., 1955), p. 21.

to such a criminal defendant by virtue of his solipsism.² I will discuss the availability to the solipsist of (1) the defense of legal insanity, (2) the mistake of fact and mistake of law defenses, and (3) the claim that solipsism is in effect a religion and that the solipsist's criminal act is an expression of that religion, thereby protected by the first amendment to the Constitution of the United States. The purpose of this inquiry is to test fundamental principles of the criminal law, the continual reexamination of which strengthens both its import and its relevance. Initially, however, it is important to clarify exactly what is meant by solipsism, and what a living, breathing solipsist would actually be like.

II. PHILOSOPHICAL ORIGIN OF SOLIPSISM AND ITS PSYCHOLOGICAL MEANING

Solipsism is an extreme form of a type of scepticism which has served many functions in the history of philosophy. I will briefly discuss the origin of the solipsist viewpoint from the perspective of scepticism as exemplified in the philosophy of Descartes.³ This discussion is intended to clarify the philosophical—predominantly methodological—meaning of solipsism, and to provide a foundation for a discussion of solipsism as a psychological phenomenon.

Scepticism in philosophy originated mainly in response to the perceived possibility of error. Clearly, man at times makes errors in his apprehension of the world. These may be sensory, as when one mistakes an hallucination or optical illusion for an actually existing object, or intellectual, as when one believes in witches or demon-possession. Scepticism takes account of these errors, and asks such questions as: When do we *not* make such errors? How can one know the difference between truth and error in any particular situation? Is there any way of being absolutely certain that we are not always in error in our beliefs about the world and ourselves?

Descartes attempted to solve these problems by engaging in "methodical doubt" to pursue scepticism to its logical extreme. That is, he resolved to doubt all beliefs in his mind which were even arguably subject to doubt. His intention was to isolate those beliefs (if any) which are absolutely indubitable, to identify what it is about these beliefs which makes them indubitable, and to use these beliefs as one uses axioms in geometry. Beliefs which are not themselves

2. For various other arguable legal defenses, see generally Robbins, "Jurisprudence 'Under-Mind': The Case of the Atheistic Solipsist," 28 *Buffalo L. Rev.* (1979), p. 143.

3. See generally, R. Descartes, *Meditations on First Philosophy* (Bobbs-Merrill ed., 1960); R. Descartes, *Discourse on Method* (Bobbs-Merrill ed., 1956).

free from the possibility of doubt are to be made so by deducing them, if possible, from the axiomatic ones.

By engaging in this process, Descartes discovered that the existence of any object encountered through the senses (including his own body) is subject to doubt. It is possible, for example, that one is in fact sleeping and dreaming, and that all the objects which seem so real to him are as unreal as those that one seems to sense in dreams. Likewise, the existence of God may be doubted. But there is one thing that Descartes found could not be doubted—that by this process itself he was in the process of doubting. Doubting is a kind of thinking, and thinking a kind of existence: “I think, therefore I am.” This sentence, construed as a comprehensive statement of what one knows and believes about the entire universe, is an enunciation of solipsism. At this stage in his analysis, Descartes purported to know and believe exclusively in the existence of his own ego, which is nothing more than a disembodied mind.

Descartes then proceeded logically to “deduce” the existence of God, and through God, the existence of the physical world, thereby intending to validate and lend certainty to all those things in which he had actually always believed. He had resolved to doubt, then, only for the purpose of validation. But if these “deductions” are regarded as philosophically unsatisfactory (this is the prevalent view today), then a thinker following Descartes’ methodical doubt principle, and admitting the premise that only one’s own ego is beyond the possibility of doubt, will be unable to ever get beyond the initial solipsism of the “*cogito ergo sum*.”

Since the time of Descartes, numerous attempts have been made to refute solipsism; such refutations are still being written. Each serious “refutation” has been in due course itself refuted.⁴ Probably the best view is that solipsism is not refutable at all. “The existence of anything . . . is something radically incapable of proof.”⁵ As one scholar has noted, solipsism rejects in advance any form of empirical refutation, because it has already characterized all physical reality as mere appearance.⁶ And it is probably true that pure logic can never prove the *existence* of anything whatsoever. Similarly, it is equally impossible to prove that solipsism is true.

It must be noted that, in the history of philosophy, solipsism and scepticism in general have played a largely methodological, critical

4. See generally Szrednicki, “The Transcendental Impossibility of Solipsism,” 14 *Ratio* (1972), p. 131; Tlumak, “On a Defective Transcendental Refutation of Solipsism,” 18 *Ratio* (1976), p. 50.

5. G. Santayana, *supra* note 1, at 35.

6. See Oliver, “A Sober Look at Solipsism,” 4 *Am. Phil. Q.* (1970), pp. 30, 31.

role. It is not the case, for example, that Descartes ever in fact psychologically doubted the existence of his body. Rather, his precise objective was to validate that natural belief by testing it against the logical possibility of solipsism. Philosophers in general have been careful to distinguish this type of solipsism and scepticism—used as methodological, critical tools—from solipsism as actual, psychological doubt.

There has been very little analysis of psychological solipsism. Most commentators simply have considered it obvious that an actual, psychological solipsist would necessarily be severely mentally disturbed.⁷ It is easy to see how one might come to this conclusion. In order to exist in the world successfully, one must provide oneself with food and shelter and guard against innumerable dangers presented by life every day—dangers which threaten one's very physical existence. In short, one must act as though all these needs and dangers are quite real. But this is precisely what the solipsist denies. Thus he would seem to be singularly unsuited to normal life in the world. It should be clear, however, that today human beings in fact are capable of holding very odd metaphysical beliefs and still leading apparently very normal lives. It is simply that one must hold these beliefs in a very special way. Hence even the belief in solipsism may be consistent with everyday living in the world. The secret lies in holding this belief so as to insulate it from the necessary activities of life, to avoid any disruption of these activities. Put differently, to survive and endure in such a manner that this behavior is indistinguishable from that of the realist, the solipsist must behave circumspectly.

The first thing that such a solipsist would notice about his experience in the world and circumspectly take account of is that the world appears to him exactly as it would appear if solipsism were false. If, for example, he places his hand in a flame, this action would immediately be followed by the sensation of pain. We would normally say that the flame (x) caused the pain (y). Given the existence of (x) and its properties, (y) is exactly what one would expect to follow from this action. On the realist's supposition that (x) and its properties exist, one can explain exactly why (y) occurs, and predict that, all other things being equal, (y) must occur whenever the action involving (x) occurs.

For the solipsist, however, the hand is not real, nor is the flame, nor is the pain. For this reason, he probably would not want to use

7. See, e.g., *ibid.* (stating that if psychological solipsism exists in the world at all, "it is in rare forms of schizophrenia and childhood autism").

such causal language in describing the fact that (y) follows (x). Typically, the language of causality implies that (x) has the power to affect (y), and that such a power seems to imply the physical existence of (x) and (y). Presumably, the solipsist would instead want to use the Humean analysis of causality in describing the relationship. On this account, one need only say that (x) always precedes (y) temporally, that (x) and (y) are always contiguous with one another, and that (x) and (y) are constantly conjoined in experience.⁸ This formulation does not necessarily imply the existence of (x) and (y), but only accepts the relations in which they always stand to one another, as appearances.

The point here is that if the solipsist merely notices that appearances occur just as if there were physical things, he will be able to make predictions about events in the world and direct his actions toward procuring desirable events and avoiding undesirable ones without assuming the existence of any physical things at all. In the preceding example, the pain (y) is one unpleasant thing the solipsist can avoid merely by avoiding (x). This viewpoint can be extrapolated to all necessary, everyday activities in the world: procuring food and shelter, stepping out of the way of oncoming vehicles, etc., and even to maintaining harmonious social relations. One would not normally strike out at the appearance that he labelled "another human being"; if he did, certain other appearances would follow that he might find to be unpleasant, like retaliation or imprisonment. Put differently, life in the world for the circumspect solipsist is just as manageable as it is for the realist. The former simply does not credit anything save his own ego with existence. What is required for diurnal existence is simply the realization that appearances are organized as if there were such a thing as physical reality.⁹

It might be countered that a circumspect solipsist is in fact not a legitimate solipsist—that his assertion of the non-existence of other people and things is merely verbal, while his actions demonstrate that he does not "really believe" the position he espouses. This objection must be treated on two levels. First, in the common usage of the term, one can argue that the circumspect solipsist truly does "believe" in the non-existence of physical reality. People are often said to "believe" in various metaphysical doctrines which are more or less perfectly insulated from their normal behavior. For example, we say

8. See, e.g., D. Hume, *A Treatise of Human Nature* (L.A. Selby-Bigge ed., 1973), pp. 155-72.

9. The solipsist, however, probably would be a poor scientist, for without the supposition of physical existence, he would be at a loss to explain why appearances are organized as they are.

that both the Christian ascetic and the more average Christian "believe" in Christianity, even though the latter's belief may only be evident on Christmas, or in the face of death, or even never at all. If the circumspect solipsist's views are in fact only observable when he espouses them at cocktail parties, we can still say in this loose sense that he "believes" in solipsism. Or he may never express his viewpoint and only think of it on those occasions when he faces human tragedy, as a way of finding solace. But clearly he can maintain, in good faith, that he is a solipsist.

On another level, however, the question becomes more complex. It might be argued that in fact a belief in existence is implied every time we act in the world. Husserl maintains that an assumption of existence is actually contained in our acts of awareness whenever the objects of those acts are physical things. Although he claims that this belief in existence can be suspended temporarily, or "bracketed," for certain analytical purposes, he also maintains that an actual belief in physical existence inheres in any activity in the world, and that the latter is impossible without the former.¹⁰ Santayana also maintains that the negation of solipsism inheres in all activity of man in the world—an "animal faith" in existence which can only be momentarily suspended for the purposes of theoretical speculation.¹¹ If these philosophers are correct, then one could argue that the circumspect solipsist does not "believe" in the position he espouses. But it is still possible for him to disagree with these philosophers, and to hold, in good faith, that he is a solipsist, for I necessarily deal in the remainder of this paper with a solipsist who has not behaved altogether circumspectly. As a result of his actions or expressions thereof, he is formally charged with the commission of a crime. Perhaps he felt that an appearance one usually labels "another human being" was behaving in a very annoying fashion, and decided that the pleasure of punching this appearance in the nose would be so great as to outweigh the possible consequences of formal or informal sanction. What can be said of the moral and legal qualities of this act? In what follows, I will discuss the legal defenses arguably available to this solipsist.

III. SOLIPSISM AND CRIMINAL LIABILITY

THE INSANITY DEFENSE

The policy behind allowing insanity as a defense to criminal prosecution is usually said to be that the law should punish only those

10. E. Husserl, *Ideas* (Collier ed., W. Gibson transl. 1962), pp. 91-93.

11. See G. Santayana, *supra* note 1, at 39.

offenders who are morally blameworthy.¹² If the defendant is afflicted with a serious mental problem and his crime was a result of this disturbance, then he is deemed not to be morally blameworthy, and may not be punished. The most rigid legal test for insanity is the *M'Naghten* rule.¹³ It is submitted that the solipsist criminal defendant, under certain conditions, is legally insane under this strict test. It should be fair to assume that if he satisfies this test, he will satisfy the various other current insanity tests, which have been adopted in some jurisdictions largely because the *M'Naghten* rule was thought to be so strict as to be underinclusive.¹⁴ Since *M'Naghten* focuses on the criminal offender's knowledge of right and wrong, i.e., his moral position with respect to his acts, it is important to determine the moral position of the solipsist in this regard.

The critical fact to be considered in evaluating the solipsist's moral and legal position is that, for him, other people and their property are mere appearances. The effect of this fact may be seen by comparing the solipsist's action (battery on another person) to another type of "action." Suppose that while asleep one dreams of committing a battery, or that while awake he fantasizes about committing this act. The law, at least as we now know it, would be in no position to punish him. This is so because the object of his "action" in each case is non-existent. Properly speaking, there has been no "bad act" at all; he has merely entertained "bad thoughts," and these alone the law does not punish. Nor would we generally say that his dreams or fantasies as such are immoral, since they have no consequences in the world.¹⁵ But this is precisely the kind of "act" the solipsist *intends* to do when he commits a battery. His *intended* victim is an unreal, mere appearance, not another human being. This intention is morally and legally innocent, because the solipsist is in precisely the same position as one who merely dreams or fantasizes about committing a

12. See generally Packer, "Mens Rea and the Supreme Court," 1962 *Supreme Court Review*, pp. 107, 147-48 ("moral blameworthiness should be the indisputable condition precedent [to criminal sanctions]").

13. "[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

M'Naghten's Case, 8 Eng. Rep. 718, 722 (H.L. 1843).

14. See, e.g., Bazelon, "Morality of the Criminal Law," 49 *S. Cal. L. Rev.* (1976), p. 385.

15. The Biblical, Christian view is that "bad thoughts" and "bad acts" are morally equivalent, but this view is probably not shared by most Christians, and certainly has not been incorporated into the criminal law.

battery. There is no *mens rea*, or "evil mind," behind his act, and absent such a state of mind, "there can be no crime, large or small" ¹⁶ The solipsist thus enjoys a complete moral freedom (in the sense of a complete "freedom from morals") with respect to other human beings. He truly does not know the difference between right and wrong, because given his solipsistic factual assumptions, this distinction is wholly inapplicable to his actions.

Now, the solipsist is not *required* by solipsism to take advantage of this peculiar moral freedom, i.e., to act on it, but he is merely *permitted* to do so by this doctrine. Instead of acting on this moral freedom, a solipsist could behave with what I will call "moral circumspectiveness." I have noted that the world of appearances is organized exactly as if solipsism were false, or exactly as if there really were existing people and things. This would suggest to the reasonable mind that there is a significant risk that solipsism in fact *is* false, though it does not in any sense *prove* the falsity of this doctrine. The solipsist behaves with moral circumspectiveness by taking cognizance of this risk and acting accordingly. ¹⁷ Thus he will avoid committing a battery not merely because it might result in adverse consequences (i.e., negative sanction), but also because human appearances *might* in fact be flesh-and-blood people like himself. He thus behaves toward them with a view toward this risk and so avoids the acts which would be immoral and illegal if solipsism were to turn out to be false. Whether or not the solipsist is legally insane instead will probably turn on his ability to behave with moral circumspectiveness.

If, for some reason—such as a defect in the cognitive processes—the solipsist is unable to recognize the risk that solipsism may be false as well as the attendant moral risks, this defect, combined with the meaninglessness of moral laws for him, should render him legally insane under the *M'Naghten* standard. By hypothesis we are dealing with a mental defect, *to wit*: the inability to conceptualize the possible falsity of solipsism. And since the people or property injured by his criminal acts are unreal for the solipsist, he can have no basis for knowing that he is committing an act that is wrong.

On the other hand, the solipsist may be able to conceptualize the risk that his world view may be false, but simply fail to act accordingly. Thus he punches his victim with knowledge that he *may* be injuring a real person and thereby committing an immoral and illegal

16. J. Bishop, *Criminal Law* (9th ed. 1930), § 287.

17. Perhaps this statement assumes too much by viewing the solipsist's mind as a reasonable one. If so, then the case for insanity is even stronger.

act. An analogy may be drawn between this defendant and the voluntarily intoxicated offender. In both cases the actor in some sense does not know right from wrong. The solipsist does not know this because morality is meaningless in his world view, though he voluntarily (by hypothesis) ignores the possibility that his world view is mistaken. The intoxicated offender is so muddled that he does not recognize the immoral quality of his act. In this latter case, generally the law has found that he is criminally responsible for his acts, owing mainly to the fact that the offender has voluntarily placed himself in this muddled condition by becoming intoxicated. The predominant view is that the law should excuse from culpability only those whose lack of moral capacity is somehow thrust upon them, and not those whose condition is voluntarily chosen. Thus, when the solipsist performs his criminal act in the face of the known risk that solipsism may be false, he is not unlike the voluntarily intoxicated offender and should be legally responsible for his act. In fact, the case for liability on the solipsist's part may indeed be even stronger, for the risk he chooses to take is more obvious and the possible consequences more readily apparent than the risk one knowingly takes when one drinks alcohol or takes drugs.

The foregoing discussion of the availability of the insanity defense to the solipsist who is incapable of behaving with moral circumspectiveness holds true even if one assumes a non-retributive theory of justice like that proposed by H.L.A. Hart, for whom the aim of the criminal justice system should be general deterrence, not retribution.¹⁸ Therefore, he insists, we should not inquire into the moral blameworthiness of the actor, but rather into the voluntariness of the act.¹⁹ But even on this theory, the solipsist who is *unable* to behave with moral circumspectiveness does not commit a punishable act. He voluntarily strikes at a mere appearance, not at a real human being. He strikes a real human being in fact only because he is incorrect in assuming this object is a mere appearance. Given what he knows, however, the striking of the real human being is not voluntary, because it is completely unintended. Therefore, the insanity defense would successfully resolve the case in his favor.²⁰

18. See, e.g., H.L.A. Hart, "Prolegomena to the Principles of Punishment," 60 *Proceedings of the Aristotelian Society* (1959), p. 165.

19. H.L.A. Hart, "Legal Responsibility and Excuses," *Determinism and Freedom in the Age of Modern Science* (S. Hood ed., 1965), p. 90.

20. A separate, but related, question is how—or why—the solipsist would argue his case, communicate with his attorney, etc. This issue will be addressed in a future article.

The remainder of this article considers the defenses that might appear to be available to the solipsist who is capable of acting with moral circumspectiveness, but chooses not to do so.

MISTAKE OF FACT AND MISTAKE OF LAW DEFENSES

Jerome Hall has noted that, under the common law, mistake of fact "is a defense if, because of the mistake, *mens rea* is lacking."²¹ According to our usual way of thinking, the solipsist has made a mistake of fact when he assumes that physical things do not exist. Moreover, as noted previously, this mistake negates the element of *mens rea*: the act which he commits (e.g., battery on a real, existing person) is not the act he intends to commit (striking a mere appearance). However, the common law requires more than an honest mistake of fact to excuse the criminal offender from liability. The court in *State v. Henderson*,²² for example, stated the general rule when it said that "[r]easonable ignorance is a defense . . . but unreasonable ignorance is not."²³

This reasonableness requirement arguably makes the mistake of fact defense unavailable to the solipsist. In the first place, he has no very good reason to believe in solipsism. The solipsist can claim only that solipsism cannot be disproven, and the fact that a view cannot be disproven is scant reasonable basis for claiming that it is true.²⁴ Secondly, there are good reasons for thinking that solipsism is false. For example, the solipsist can exist and function normally in the world only if he assumes that appearances are organized as if solipsism were false.²⁵ And the realist, who does assume the falsity of solipsism, is able to explain events in the world, while the solipsist is only able to predict them. The explanatory power of realism, the lack of explanatory power of solipsism, and the necessity of acting as a realist would act even as the defendant espouses solipsism, do not of course prove that solipsism is false. These factors nonetheless would seem to make the solipsist's mistake of fact an unreasonable one.²⁶ The common law holds that "the defendant was bound to act as a reasonably cautious and prudent person would,"²⁷ and the solipsist probably cannot

21. Hall, "Ignorance and Mistake in Criminal Law," 33 *Indiana L.J.* (1957), pp. 1, 5.

22. 296 So.2d 805 (La. 1974).

23. *Ibid.*, p. 807 (original emphasis). See generally W. Clark and W. Marshall, *A Treatise on the Law of Crimes* (7th ed. 1967), pp. 334-36.

24. In any event, his unwillingness to reject solipsism might be a factor in deciding the issue of his sanity. See *supra* note 17 and accompanying text.

25. See note 7 *supra*.

26. See note 17 *supra*.

27. E.g., *State v. Towne*, 180 Iowa 339, 160 N.W. 10 (1916).

successfully claim that his mistake was the mistake of such a reasonable man.²⁸

Another alternative that may occasionally excuse a defendant from criminal liability is the mistake of law defense. But this is the exception rather than the rule, which is that ignorance of the law excuses no one. An exception applies when the law that is violated specifically requires its *knowing* violation for liability to be incurred. For example, the defendant in *United States v. Squires*²⁹ claimed that his illegal act—the making of a false statement in acquiring a firearm from a licensed dealer—should be excused by virtue of his mistake of law: he did not know that he was within the class of persons affected by a specific provision of the firearm law, and that this law had criminal penalties only for those who knowingly violated it.³⁰

Similarly, the solipsist could claim, if charged with a violation of such a law, that he understood the law to apply only to real objects or events covered by it, and not also to mere appearances. Again, however, the requirement of the reasonableness of the mistake cannot be met here, for the same reasons discussed above. As the court stated in *Squires*, “it is recognized that one may not deliberately close his eyes to what otherwise would have been obvious to him.”³¹ And the solipsist arguably intentionally chooses not to see the rather obvious fact of the possibility of the falsity of solipsism.

THE RELIGION FREEDOM DEFENSES

Two issues will be discussed with reference to the religious freedom defense: (1) whether solipsism could be regarded as a religion, and (2) whether the solipsist could successfully defend against criminal prosecution on the ground that such prosecution is an unconstitutional interference with his exercise of (solipsist) religious freedom.

Initially, it should be observed that solipsism probably could be called a religion if one wished to so characterize it. Like a religion, it has moral implications for its adherents—namely, the complete freedom from moral rules with respect to all mere appearances. Moreover, its acceptance is based on faith, since there can be no evidence which could prove its truth (or falsity). Further, one would

28. The circularity of this argument is perhaps unavoidable. See notes 7 and 17 *supra*.

29. 440 F.2d 859 (2d Cir. 1971).

30. *Ibid.*, p. 864. See G. Williams, *Criminal Law: The General Part* (2d ed. 1961), p. 160.

31. *Ibid.*, citing *Greenway v. Maryland*, 8 Md. App. 194, 259 A.2d 89, 91-92 (1969). See G. Williams, *supra* note 30, at 159.

probably choose to believe in it as an emotional response to an awareness of the uncertainty and absurdity of existence and human tragedy, as suggested by the Santayana quotation with which this paper began.

At any rate, courts are extremely hesitant to decide what is and what is not a religion, as such questions seem to involve them in the precise activity that the Free Exercise and Establishment Clauses of the first amendment counsel them to avoid.³² Therefore, there is relatively little case law on the question of the definition of religion. In one such case, *Theriault v. Silber*,³³ it was held that a prison inmate's alleged religion—the "Church of the New Song"—was not a true religion for first amendment purposes. The court pierced the religious veil and determined that the purpose of the alleged religion was the disruption of prison discipline; it therefore concluded that the prison authorities were not impermissibly violating the prisoner's first amendment rights by restricting his "religious" activities.³⁴ Similarly, a court faced with a solipsist defendant might suspect that his solipsism was an after-the-fact excuse for his crime, and might doubt that it is even a religion, since there are no other adherents.³⁵ However, the court, for the reasons which follow, probably could avoid entirely the decision whether solipsism is a religion for first amendment purposes.

32. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof"

U.S. Const., amend. I.

33. 391 F. Supp. 578 (W.D. Tex. 1975).

34. "[T]his court recognizes . . . the difficulty in establishing satisfactory and precise standards by which to judge the bona fides of petitioner's alleged religion. Whatever the difficulties are, they do not, by their existence, obviate the necessity of deciding the issue nor do they provide an impenetrable obstacle to denials of First Amendment protection to so-called religions which tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity"

Ibid., pp. 580-81, quoting *Theriault v. Carlson*, 495 F.2d 390, 395 (5th Cir. 1974). The court continued:

"The Church of the New Song appears not to be a religion, but rather . . . a masquerade designed to obtain First Amendment protection for acts which otherwise would be unlawful and/or reasonably disallowed by the various prison authorities but for the attempts which have been and are being made to classify them as 'religious' and, therefore, presumably protected by the First Amendment."

391 F. Supp. at 582.

35. Compare Robbins, *supra* note 2, at 153:

"In essence . . . the solipsist becomes like God, and his belief, a religion. He believes that all things owe their existence to him."

The leading case on freedom of religion as a defense to criminal prosecution is *Reynolds v. United States*.³⁶ In that case, the United States Supreme Court held that a Mormon, whose religious beliefs sanctioned and even encouraged polygamy, could be prosecuted for bigamy, without violation of the first amendment. It was reasoned that the law in question regulated actions, rather than beliefs. To permit a religious defense to a prosecution for illegal acts

would make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.³⁷

This rationale is even more compelling in the case of the solipsist, whose "religion" sanctions the violation of any and every criminal and civil law, rather than only one law in particular. For this reason the solipsist would have little hope of prevailing on his claim of free exercise of religion.

IV. CONCLUSION, AND A CAVEAT

In this paper I have attempted to define some aspects of the legal position of the solipsist criminal defendant.³⁸ In order to do this it was first necessary to defend the view that there could be an actual, psychological solipsist who is capable of performing acts in the world and, therefore, capable of running afoul of the criminal law. I attempted to do this by suggesting the circumspect solipsist as a model. The circumspect solipsist behaves in effect as if solipsism were false. He is able to give an account of why he does this by reference to the Humean account of causality, which can be read as construing causal connections between events as constant conjunctions of mere appearances. In this way, the world, though non-existent, remains a habitable place for the solipsist.

However, the same circumspectiveness which allows him to function routinely in the world as a solipsist makes him morally and legally responsible for his criminal acts. This is so because this circumspectiveness suggests the possibility that solipsism is false, and suggests to the reasonable mind that even if one wishes to think of other people as mere appearances, one had better behave as if they truly existed, just in case this may be so. In the face of the risk of solipsism's falsity, if one chooses to ignore this risk and commit crim-

36. 98 U.S. 145 (1978).

37. *Ibid.*, p. 167.

38. See note 2 *supra*.

inal acts, he does so at his legal peril. The law probably will not allow that he has made a reasonable mistake in making this choice, nor will it exculpate him on the ground of religion freedom. Only if the solipsist is not capable of recognizing the risk involved will the law arguably allow that he is legally insane. And even in that case there will be severe and perhaps insurmountable problems of proof, if this illness is manifested only by the commission of criminal acts.³⁹

Finally, a caveat to this paper is in order. In creating a solipsist who can function in the world and therefore commit criminal acts, I have described what Santayana would call a "romantic solipsist," i.e., one who believes in the past existence of his own ego and the reliability of its memory of that past. Thus he is able to note that (x) is always followed by (y), and that this relationship may be counted on to continue. He thereby is able to know what actions produce particular effects in the world. But this is a naive form of solipsism, one that is not logically rigorous. If one can doubt his present perceptions that (x) and (y) exist, then he can just as easily doubt the correctness of his memory which tells him that (x) and (y) always occur together and in a certain order. A solipsist who recognizes this is a "solipsist of the present moment," in Santayana's terminology.⁴⁰ For such a person, all that *is* is that which currently appears to him, and he may not reach back into his memory to use what he thinks were similar past occurrences to predict what will happen in the present. Lacking any rational bases for a response to phenomena occurring presently in his world, this solipsist would be unlikely to engage in criminal behavior, or any outward behavior at all; catatonia seems to be the probable response to this viewpoint if sincerely held.

39. "In addition, there are also those borderline cases in which the mental illness, though severe, shows very few gross manifestations, and it is relatively rare that a judge or jury will recognize such an offender as ill and allow him to escape punishment."

Satten, "The Concept of Responsibility and Its Relationship to the Legal Problem of Criminal Responsibility," 4 *Kansas L. Rev.* (1956), pp. 361, 365.

40. See G. Santayana, *supra* note 1, at 33-41.