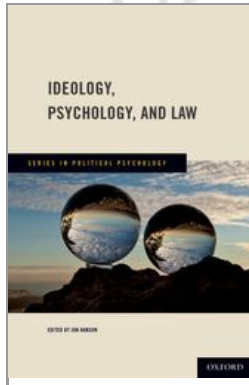


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Two Social Psychologists' Reflections on Situationism and the Criminal Justice System

Lee Ross

Donna Shestowsky

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[+] Abstract and Keywords

The criminal justice system relies on lay notions of culpability that are incompatible with contemporary social psychology, and arguably with reasonable standards of fairness and justice. A given wrongdoer's actions are viewed in that field less as the product of stable disposition or "character" and more that of situation factors and their cumulative consequences than either lay or legal conceptions acknowledge. Moreover, the legal distinctions made between relevant and irrelevant mitigating factors are ones that social psychologists would deem unconvincing and even incoherent. While recognizing the impediments to dramatic systemic change, and the important role that public approval plays in maintaining the criminal justice system, this chapter questions whether justice can truly be served when the law's theory of culpability is so fundamentally at odds with the lessons of social scientific research. It also considers the implications of a more

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enlightened view.

Keywords: character, situational factors, justice, social psychology, culpability, cumulative consequences, naïve realism

This chapter discusses the tension between lay views of accountability, free will, and mitigating circumstances—views reflected in our criminal justice system—and contemporary psychology's understanding of the dynamic relationship between the person and the situation in determining behavior.*¹ In so doing, it also addresses the tension between utilitarian concerns of social order and ethical concerns about the just imposition of punishment. We should be clear from the outset that we are not *advocating* for the significant shifts in legal practice and policy that follow from the analysis we offer. We recognize that the legal system cannot, and should not, diverge too far from the views of fairness and efficacy that underlie the “lay psychology” that pervades our society if it is to retain the trust and support of the public. Rather, we highlight how lay understandings about the determinants of behavior are at odds with the lessons of the behavioral social sciences, and we offer some suggestions regarding the need for education about the relative power of influences that are considered in discussions of mitigation and appropriate punishment for violations of the law. Those suggestions, we believe, strike a balance between political and pragmatic concerns and those lessons.

We first consider the tendency for laypeople to underestimate the impact of situational pressures and constraints and thus to make unwarranted dispositional or characterological attributions. This tendency, we then suggest, is exacerbated by *naïve realism*—the assumed veridicality and objectivity of one's own perceptions and judgments relative to those of one's peers. Our main contention is that the legal system's consideration of mitigating factors or “excuses” reflects lay conceptions of behavioral causation and dualistic notions of “free will” that are neither empirically nor logically defensible. The imposition of criminal punishment, we concede, may serve valid goals ranging from general and specific deterrence of antisocial behavior to satisfying the **(p.613)** need for catharsis and promoting the sense that justice has been served. But the current workings of the criminal justice system should trouble the conscience of anyone who thinks deeply about the determinants of human behavior. A logically coherent account of behavioral causation that incorporates the lessons of empirical research, we contend, would at the very least compel us to treat transgressors with more compassion than they typically receive.

I. Lay Dispositionism and Underappreciation of the Power of the Situation

As all students of social psychology know, when people are called upon to evaluate or predict the behavior of others, they tend to underestimate the impact of situational or environmental factors and to overestimate the impact of dispositional ones.² Cultural psychologists tell us that members of individualistic cultures such as those of the United States, Canada, Australia, New Zealand, and most of Western Europe are particularly likely to show such a dispositionist bias (see Gabler, Stern, & Miserandino, 1998; Markus & Kitayama, 1991). This lay dispositionism leads people to overestimate the degree of stability that will be found in a given individual's behavior over time and the degree of

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consistency that will be found across different situations. People are similarly prone to underestimate the extent to which changes in the particular circumstances or environment confronting that individual might significantly change his or her behavior.

One specific implication of lay dispositionism for judgments made within the legal system is clear: in attempting to understand, predict, and control proscribed behavior, people are apt to infer traits such as “criminality” and rely on overly broad and simplistic notions of good or bad “character” without properly appreciating the power of the situational pressures and constraints that shape behavior. The difficulty of getting jurors to accept claims of entrapment or of induced false confessions may reflect this shortcoming. That is, we know that jurors are disinclined to believe that “traps” set by police officers could induce otherwise honest people (like them) to commit criminal acts.³ They also fail to appreciate how honest people (like them) could be induced by psychological tactics such as promises of leniency (as opposed to physical torture) to confess to crimes they did not commit.⁴

Assessments regarding the role of situational pressures and constraints in producing particular misdeeds, however, apply to a wider range of criminal cases and potential defenses.⁵ For crimes requiring proof of criminal negligence, for example, the legal system commonly invokes the notion of a “reasonable” person—that is, it asks jurors or judges to consider the extent to which **(p.614)** a reasonable person would have been able to anticipate the consequences of his or her actions and, assuming that such consequences were anticipated, the extent to which a reasonable person would have felt *compelled* to act in a particular fashion under the circumstances in question.⁶

Moreover, if the actor is perceived to have lacked “choice” or freedom to act otherwise, the action is deemed to be justified and noncriminal, even if the consequences of the action were apparent at the time.⁷ The necessity defense illustrates this point. This defense allows an individual to concede the act constituting the crime but avoid penalty when either acting in the greater good or choosing the lesser of two evils.⁸ Actions that would likely be deemed justified include, for example, a prisoner escaping from a burning prison, or a driver disobeying traffic laws to hasten a severely injured individual's transport to the hospital (Martin, 2005).⁹

If, on the other hand, the actor is not perceived as lacking “choice” but, rather, as having acted deliberately and with some degree of freedom to have acted otherwise, situational factors become relevant, not in determining guilt versus innocence, but in weighing any “extenuating” or “mitigating” factors when deciding on the appropriate punishment. In making the latter determination, jurors and judges essentially assess the extent to which the behavior in question reflected the defendant's disposition or character as opposed to the pressures and constraints of the situation he or she was in when the offense was committed. To some extent the test is one of empathy—that is, an assessment of the likelihood that one might have responded similarly in the face of the relevant situational factors.

What the relevant research obliges us to recognize is that laypeople's intuitions about

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how they or other “reasonable” people would have acted in the face of various situational factors and constraints are likely to be erroneous. Attributions about the role of “bad character” versus “situational pressures and constraints” are apt to exaggerate the former and disregard the latter to an extent that is not warranted by the evidence of experimental social psychology. That relative lack of insight in considering the power of the situation is particularly likely in cases in which the external influences at play are not overt threats, traumas, deprivations or opportunities for enrichment but, rather, subtler matters of peer pressure or of situations inducing small initial transgressions that in turn lead, step by step, to increasingly serious ones. Research conducted in the situationist tradition implies that many, if not all, people (including those who sit in judgment of transgressors) could be led, by the right set of subtle and not so subtle situational pressures and constraints, to commit similar transgressions or more generally to do things that they would condemn others for doing and that they believe themselves incapable of doing under any conceivable circumstances.¹⁰ (p.615)

Social psychologists certainly do not claim that individual differences are nonexistent or unimportant in determining behavior. Nor do we claim that all actors will respond similarly to a given situation or set of incentives and disincentives. Indeed, one of our discipline's main intellectual contributions over the past half-century has involved uncovering the factors that produce variability and unpredictability in the way individuals respond to the situations and events they experience.

What laboratory and field studies *have* demonstrated about the impact of “the person versus the situation” can be stated succinctly: seemingly small and subtle manipulations of the social situation often have much larger effects on behavior than most lay observers would predict. Those effects, moreover, are likely to “swamp” the impact of previously observed or measured individual differences in personality, values, or temperament. Furthermore, the predictability and stability of behavior observable that we see in the everyday behavior of our peers, family members, and workmates may result less from the stability of “character” than from the stability and power of the social circumstances that direct and constrain behavior in particular settings or the circumstances in which we have made our observations. As a consequence, *changes* in roles, expectations, incentive structures, and other features of the actor's social environment, including those that simply reduce opportunities for wrongdoing, are likely to produce greater changes in behavior than most laypeople—including presumably most judges, jurors, and policymakers—would anticipate.¹¹

The relevance of research on the power of situation and the dispositionist bias in lay attributions regarding criminal behavior should be obvious to social psychologists and to most people familiar with the findings and insights of that field. Equally obvious is the potential value of altering influential features of the social environment that are conducive to criminal behavior, such as the prevailing subgroup norms, the salience of poor role models and the absence of good ones, and the ease of access to guns, alcohol, and drugs. Less obvious, as we shall elaborate below, are the implications of a situationist perspective for concerns of criminal justice or, more specifically, for decisions about the

just infliction of punishment. For now, let us simply note that to the extent that our legal institutions and practices reflect erroneous lay conceptions about the determinants of behavior, those institutions and practices are likely to be less effective, and arguably less fair, than they would be if they were guided by more accurate and insightful conceptions.¹² The appropriateness of educating and “de-biasing” lawmakers and policymakers about situational versus dispositional determinants of behavior is thus worthy of contemplation. And insofar as criminal statutes are created by legislators who are somewhat **(p.616)** directed by the prevailing attitudes of their constituents, the importance of educating and “de-biasing” those constituents is clear.

Providing support for the situationist assertions that we have offered here has long been one of experimental social psychology's primary undertakings. We won't digress here to review the results of the situationist classics by Asch, or Milgram, or Latané and Darley, or Freedman and Fraser,¹³ or other investigators whose work enlivens our textbooks. But it is perhaps worth noting that most of these classic studies did not explicitly contrast actual effects of experimental manipulations or circumstances with expected effects. Nor, generally, did they pit situationist factors against measures of traits or dispositions that one might have expected to account for variability in participants' responses to the situation or manipulation in question. Rather, the investigators implicitly invited readers to consider their own expectations about how normal adults like themselves would respond to those circumstances or manipulations, and then presented findings that violated those expectations. The studies also invited us to infer (but did not provide data to show) that information about actors' personalities or past behavior may tell us less about who would be, say, altruistic versus punitive or cooperative versus competitive in a given situation, than would information about various psychologically relevant features of that situation.

Ethical concerns preclude most forms of experimental research on the cross-situational consistency of real “criminality.” That is, contemporary research regulations do not allow researchers to expose a cross-section of respondents to a range of potentially crime-provoking circumstances and observe the degree to which the individuals who resort to crime in one situation also resort to crime in other situations. But the classic studies on traits such as honesty¹⁴ suggest that “criminality” is unlikely to be a trait that manifests itself without regard to the specifics of attending circumstances. Moreover, insofar as certain individuals do show cross-situational consistency in criminal behavior, it is likely to be due at least as much to the constant or recurrent nature of the incentives and constraints in their environments as it is to their enduring personal dispositions.¹⁵ Indeed, what we term “good” or “bad” character may itself be a reflection of exposure to earlier situational forces and constraints over which the individual actor exercised little, if any, control.

II. Subjectivism, Naïve Realism, and Attributions of Objectivity Versus Bias

In considering the impact of the situation on behavior, it is important to note that people necessarily respond not to some objective reality but to the reality that they perceive. Indeed, much of contemporary psychology focuses on **(p.617)** the processes and biases that determine how objective stimuli are subjectively interpreted by the

individual, and also on the steps by which those interpretations lead first to emotions, motivations, and intentions to act, and ultimately to behavior itself. As such, legal scholars and others who attempt to understand behavior in various domains of legal concern—including lawyers who seek to influence jurors and judges—have a clear interest in making use of the relevant theoretical insights and empirical findings.

Cognitive and social psychologists have written extensively on the role that cognitive schemas or scripts play in organizing human perception, recall, and evaluation. More recent investigations have focused on the impact of nonconscious processes, including affective processes, and on the efficacy of subtle “priming” manipulations in influencing judgments and decision making.¹⁶ Our present discussion has a narrower focus—one that deals not with the factors that determine the way people make judgments but, rather, with the beliefs that individuals have about the accuracy and objectivity of their own particular constructions of reality. Such beliefs, we argue, are the source of the negative assessments people make about individuals whom they find to have construed that reality *differently*. The relevant epistemic stance, which we term *naïve realism*,¹⁷ can be summarized in first-person terms with the proposition that “I see actions and events as they *are in reality*—that my perceptions and reactions are a relatively unmediated reflection of the “real nature” of those actions and events.” One corollary of this proposition is that “I believe other people will, or at least should, *share* my perceptions and reactions.” Another corollary is that “to the extent that others' perceptions and reactions differ from my own, those perceptions and reactions are *unreasonable*—the product not of reality itself but that of some distorting influence on perception and judgment.”¹⁸ This account of naïve realism was originally formulated to describe the divergent attributions that people make about their own versus others' perceptions of social issues and events. But it applies equally well to the attributions people make about those who violate moral or legal norms and to the attributions they make about those who disagree with them about the fairness of particular sanctions.

The tenets of naïve realism have some important implications. One implication is that we tend to overestimate the proportion of other people who agree with us or would respond similarly to us in any given context (the ubiquitous “false consensus” effect; see Ross, Greene, & House, 1977). A second implication is that we tend to think that our own views on any social or political dimension fall at the appropriate point on that dimension—for example, that we are exactly as liberal as it is reasonable to be on the ideological dimension (**p.618**) and that those who are more liberal are naïve and unpragmatic while those who are less liberal are hard-hearted and greedy. Similar perceptions are apt to color our views about the legal system. In particular, we are likely to believe that those who favor less punishment than we do lack common sense and that those who favor harsher punishment lack compassion.¹⁹

III. Implications of a Situationist Perspective

Social psychology's lessons about the power of situational pressures and constraints, and about the importance of attending to the social actor's construal or “definition” of the situations that that actor faces, have important implications for crime-reduction policies.

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Liberals who are mindful of the situationist message would likely stress the need to address the classic environmental factors implicated in crime—for example, child abuse and neglect, lack of education and job opportunities, absence of appropriate role models, and malignant peer group influences. Conservatives who appreciate that same lesson would be more likely to stress the need to strengthen the influence of family, church, school, and community, and other institutions that might constrain potential transgressors. Behaviorists of all political persuasions would emphasize the importance of incentive structures and reinforcement contingencies that reward or punish and thus encourage or discourage particular behaviors. And while all of us would readily concede the difficulties of accomplishing the kind of structural changes in society that would remedy economic or social inequality of the sort that is associated with elevated crime rates, research in social psychology provides some evidence that relatively modest interventions can go a long way in addressing one of the most obvious risk factors for criminality—that is, academic failure and high drop-out rates.²⁰

But this encouraging research evidence does little to advance the immediate goals of the criminal justice system, one of which is ensuring public safety. In considering ways to accomplish that goal, the relative effectiveness of threats of incarceration versus other types of intervention constitutes an empirical question—one for which no simple answer is likely to be forthcoming. When apprehension and punishment are perceived as certain, crime is clearly often deterred. Whether the threat of harsh,²² as opposed to benign, conditions heightens the deterrent value of a prospective incarceration term is more debatable. However, the high recidivism rates we currently observe for parolees belie any notion that the present penal system is generally successful in producing positive change in prisoners' attitudes and values, in their capacities for self-restraint, or in the calculations they make about the potential risks versus benefits of future criminal behavior.²³ Moreover, high recidivism rates (**p.619**) suggest that the pressures and constraints of the environments to which parolees return, and the various burdens of stigmatization (including the difficulty of finding decently paid employment), may be more determinative of future behavior than any positive changes produced by incarceration.

Once we grant that we would change the situational factors that prompt crime if we could (or at least where such changes were cost-justified), we are obliged to look beyond the accountability of the transgressors and consider our own. To begin with, a reasonable society surely would place the burden of proof and ethical justification on those who would argue that *inhumane* prison conditions better achieve the goals of specific and general deterrence than do more humane ones.²⁴

If society's goal is to have a criminal justice system that is not only effective but also logically and ethically coherent, additional implications of a situationist perspective come to the fore. One such implication would surely be a more “forgiving” response to transgressors who have been subjected to unusually strong situational pressures, including pressures whose strength is unlikely to be appreciated by lay observers who have never faced those pressures. Another implication, we would argue, would be a greater willingness to mitigate punishment in cases where the situational forces that

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weighed on the transgressors were ones to which they did not choose to expose themselves or ones whose impact they could not have anticipated in advance. Dysfunctional family situations, negative community norms and role models, and lack of access to lawful means of acquiring money sufficient for one's basic needs (coupled with temptations of unlawful means) would clearly fall under that category.²⁵

Pragmatic concerns would also lead one to consider the likelihood that the situational factors that prompted the actor to commit the relevant "bad acts" would present themselves to that actor again in the future. Transgressors who happened to find themselves in the wrong place at the wrong time, or who otherwise faced unusual challenges, would thus seem to merit not only our empathy but also our leniency, since such actors would be relatively unlikely to commit future offenses regardless of whether or not they were subjected to punishment. Pragmatic concerns regarding the likelihood of recidivism thus can clash with concerns of evenhandedness and fairness. Individuals already advantaged in terms of their present and probable future life situations who succumb to the pressures and constraints of unusual circumstances would receive more lenient treatment than those already disadvantaged in terms of their past and likely future environments.

In this context, cases of "situation-specific" criminal behavior come to mind. A particularly provocative case is that of Patricia ("Patty") Hearst.²⁶ Kidnapped (p.620) and subjected to abuse by a politically motivated group, this young woman, who had previously enjoyed a life of great privilege, was induced to join her captors in serious crimes. Jurors would have found it difficult to overlook the fact that, notwithstanding her initial misfortune in being kidnapped, she later seemed to participate willingly in serious crimes rather than return to her family. It also would have been hard for them to deny that, but for an accident of fate in which she was undeniably a victim, her "character" would never have prompted her to become a bank robber. But it would have been equally hard for them to deny that other bank robbers are similarly victimized by life circumstances and that given the chance to lead a life as privileged as that of Patty Hearst, they would never have resorted to crime and would refrain quite readily from doing so in the future. More common cases of situational-specific criminal behavior than that of Patty Hearst, include ones involving violent acts by severely abused spouses, euthanasia by loved ones, or parental withholding of necessary medical treatment from ill children because of religious convictions.²⁷

Perhaps more difficult to grapple with than those examples are cases in which multiple and continuing childhood abuses constitute the first links in a causal chain that ends with adult transgressions. Particularly problematic are cases such as those of Cary Stayner or John Lee Malvo, for whom both the heinousness of their crimes and the power of the situational influences they had faced seem uncontested.²⁸ But less dramatic cases similarly involve misdeeds that likely would not have occurred in the absence of unfortunate early experiences, immediate peer pressure, or particular norms endemic to the perpetrators' occupations, subcultures, or social situations. Again, our point is not that the wrongdoers in these less exceptional cases were not free to act otherwise at the

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moment of their crime. Indeed, many actors in similar situations (and many who faced even more dysfunctional childhood environments) *did* act otherwise. Rather, it is that the determination of “just” treatment in such cases should be based on a fuller, more sophisticated appreciation of the power of the relevant situational forces.

Cases involving criminal acts committed in a time of war or intergroup conflict give rise to similarly difficult dilemmas. To what extent does a situationist perspective oblige one to opt for leniency in the case of perpetrators of genocide, especially those who (as is typically the case) lead unexceptional lives prior to finding themselves responding to exceptional situational pressures in exceptional times and who, when permitted to do so, resume normal, noncriminal lives afterwards? Contemporary examples, including the Rwanda genocide perpetrated by Hutus against Tutsis (Prunier, 1995) and other horrendous instances of murder and mayhem that have an obvious sociocultural **(p.621)** component, pose the same dilemma as the holocaust. The actions of the perpetrators shock the conscience and cry out for accountability.²⁹ Yet the evidence is often all too clear that the relevant misdeeds were prompted by exceptional circumstances of a sort that would have led, and in fact did lead, many, perhaps even most, members of their society to act similarly.

A final case in point—all too salient at this moment in history—is that of terrorists who have been subjected to a lifetime of hateful propaganda and social norms, and whose expressed misgivings, if any, were met with authoritative, disapproving pronouncements from trusted sources about the will of God. We may feel justified in punishing such individuals harshly because their deeds seem so inherently evil to us and because we believe that harsh punishment is necessary, not only to deter future would-be terrorists but also to satisfy the outrage of our community. But we cannot claim in good conscience that the terrorists' choices, which presumably were the product of some combination of heartfelt grievances, culturally prescribed understandings, religious or political indoctrination, and various compliance techniques skillfully employed by their handlers, were “freely” made.³⁰ We cannot claim that such choices were a simple reflection of bad character or evil dispositions any more than we could make such a claim about actors who committed their crimes at gunpoint or in the face of grievous threats to their families or other coercive influences.

The tension between the goal of general deterrence and that of giving appropriate weight to mitigating circumstances should now be clear. On one hand, the prospect of punishment represents yet another situational feature that may influence the behavior of potential transgressors. To the extent that the potential offender is rational and informed, we can reasonably assume that the more certain the prescribed punishment is, the greater its deterrent value will be (see Scodro, 2005). On the other hand, the failure to mitigate punishment in light of the power of the situational factors that prompted the actor's behavior seems to violate our lay notions of fairness. It is precisely this dilemma that prompts us to contrast the perspective of the social psychologist steeped in the situationist tradition with those of the legal scholar and the layperson.

In assessing culpability and making inferences about “bad character,” the social

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psychologist (particularly the social psychologist who has spent a lifetime considering the problems and findings of attribution theory) would be tempted to consider the degree to which *other* actors have proved willing and able to resist the situational pressures and constraints that the offender faced. The legal scholar or layperson, by contrast, would seek to distinguish between responses freely chosen by the individual actor and responses that occurred **(p.622)** without the actor's capacity to act otherwise, or without the conscious exercise of choice at all.³¹

A couple of examples may serve to clarify the relevant distinction.³² Most people would be willing to consider evidence of spousal abuse, or even the immediate fear of such abuse, in the case of a crime committed against the abuser. Most would also be willing to give weight to evidence of earlier parental abuse when evaluating the misdeeds of a teenage offender, despite the fact that only a small minority of abused spouses or abused children go on to commit such offenses (see Widom, 1989). We further suspect that neither laypeople nor legal scholars would treat evidence of a strong and malignant peer group influence as equally mitigating, even if they were presented with evidence that the percentage of individuals in the relevant neighborhood who succumbed to such environmental and peer group influences by committing some similarly serious offense was relatively high (see Meares & Kahan, 1998).

If those assumptions are correct, the criterion for deciding whether the perpetrator of a given act deserves leniency clearly is not based on a careful empirical assessment of the degree to which the misdeed reflected a statistically exceptional response to the relevant situational factors. Rather, the hypothetical examples we offered above suggest that leniency is prompted by feelings of sympathy or empathy for the perpetrator, rather than an objective assessment of the potency of the situational factor in question, or even of the actor's deliberateness and consciousness of choice (which is arguably greatest in the choice of a spouse, less in the choice of a neighborhood or peer group, and least in the choice of parents).

"Person-based" excuses pose similar challenges to any coherent theory of justice. While we are inclined to distinguish behavior reflective of the actor's character, temperament, inclination, or "dispositions" from behavior reflective of the actor's situation, it would be unreasonable for us to argue that people are somehow more responsible for the genetically and physiologically determined aspects of their dispositions or character than they are for whatever situational pressures and constraints they are unable to overcome, or even for the residues of prior experiences manifest in their present character. Attribution researchers study lay views about the relative potency of personal and situational determinants of behavior, but any conventional psychological analysis proceeds from the truism that behavior is necessarily a product of both the person *and* the situation, or, more precisely, the product of the *interaction* between person-based and situation-based characteristics. The use of the term "interaction" is instructive. It reflects the recognition that the same situation may have a different effect on people with differing inborn physiological characteristics or differing residual effects of similar prior experiences. **(p.623)**

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Conversely, different situations may produce similar behavior on the part of different individuals.

We will consider the implications of such an interactionist perspective for logically coherent assessments of culpability, for assignment of appropriate weight to various “excuses” or claims of mitigating circumstances, and for other issues of criminal justice in the concluding section of this chapter. Before proceeding to that discussion, however, we would like to distinguish between two options our society has for dealing with criminal transgressors. In a sense, we must decide whether (or at least when) to apply the norms that characteristically govern our dealings with strangers, as opposed to the norms that generally govern our dealings with family members or friends. The former set of norms entails treating people as we feel they *deserve* to be treated. In that case, the norm of evenhandedness is paramount and we place significant weight on the actor's ability to anticipate the consequences of his or her actions. The latter set of norms, by contrast, entails treating people in the manner that would best serve their individual *needs*. In that case, we are apt to take into consideration personal capacities and weaknesses, to deemphasize the foreseeability of consequences and give little thought to evenhandedness of treatment, and instead search for possible ways to achieve rehabilitation.³³

Of course, even the most nurturing of parents considers equity issues when buying birthday presents or assigning household chores. But if such parents learn that one of their children seems to be thriving in the public school environment and demands little attention, whereas another is disruptive, unmotivated, and unable to master the third-grade curriculum, those parents are apt to adopt child-specific remedies. In particular, they may transfer the latter child to a school that offers students more individual attention, hire private tutors, urge school officials to create reinforcement contingencies, and solicit support of trained personnel who will better serve their child. In so doing, they will not be dissuaded by complaints that they are treating their children unequally—that is, complaints that that they are rewarding their wayward child for his or her failings, and in a sense “punishing” their well-adapted child for his or her successes by keeping that child in the less-than-stellar regular school.

Adopting a similarly person-specific approach to dealing with criminal transgressors, however, is fraught with problems.³⁴ First, since the regimen likely to work best for one transgressor might not be the one likely to work best for another, we might often be obliged to treat different transgressors differently, and with unequal degrees of harshness, for similar misdeeds. Indeed, if all wrongdoers were subjected to whatever treatment were deemed most likely to make their behavior conform to the dictates of law and society, **(p.624)** the relative harshness of the punishment might prove to be uncorrelated, or even *negatively* correlated, with our intuitive assessments of how much sympathy, empathy, or leniency the transgressors deserve.

Most people surely would be willing—on both consequentialist and fairness grounds—to have people who are merely *potential* transgressors receive treatment that would be effective in preventing them from engaging in later criminal behavior, especially if the

costs of such treatment were modest. Furthermore, the fact that the treatment required to produce law-abiding behavior might be different for different individuals would raise few objections. The treatment might, for example, involve biochemical intervention for some, educational or psychiatric intervention for others, provision of good role models for others, and the harsh discipline of a boot camp for still others. By contrast, *after* a criminal offense has occurred, even when the offender is young, and even when the offender is at least somewhat a victim of his or her circumstances, the issue of fairness or “horizontal equity” (similar treatment for similar offenses) poses a difficult dilemma, one that we address in the next section of this chapter.

IV. Psychological Versus Legal Reasoning: Fairness Considerations

Our legal system clearly does not treat individuals convicted of the same crime in a uniform fashion. In particular, it distinguishes between juvenile offenders, whose characters and abilities to calculate the implications of their actions are presumed to not yet be fully formed, and adults, whose maturity in those respects is assumed as a matter of law (see Scott, 2000; Vining, 2002). The law draws such distinctions even for cases in which the nature of the adult's misdeeds obviously belies such assumptions. When determining punishment for transgressors, our legal system also gives some weight to extenuating factors. In other words, even when an individual is judged to be guilty of a criminal offense, it distinguishes good “excuses” from poor ones (see Haney, 2002). The cogency of such distinctions, however, is another matter, as we now shall discuss in greater detail.

Evidence of a brain injury or of a biochemical imbalance, we submit, would be treated by the legal system as a relatively good excuse for an assault against person or property, largely because the condition in question was neither willed nor welcomed by the offender. This excuse would be especially good if the injury or imbalance occurred just prior to the assault, and if no similar offenses had occurred before the offender suffered the injury or imbalance in question. If a criminal had voluntarily ingested alcohol, amphetamines, or (p.625) other drugs just prior to committing a crime, the resulting intoxication would be treated as a less satisfactory excuse, although it still might win the offender some leniency because of the presumed diminishment of voluntary control over behavior or the cognitive impairment that may have made the transgressor unable to formulate the requisite mental state for the crime. A far better biochemical excuse, on the other hand, would be one involving the unanticipated (or “involuntary”) side effects of a potent drug prescribed by a physician to treat an ongoing illness or to alleviate a particular symptom, even if such effects were rare.³⁵

Various “situational” antecedents to an offense that a social psychologist might consider to be important proximate causes of that offense, by contrast, would be unlikely to win the offender any leniency. Consider the excuse that the offender's assault against a member of some group had been occasioned by a particularly effective incendiary speech against the group in question—perhaps even a speech to which the listener had been exposed by happenstance or force rather than choice. Or consider the excuse that a particular offender had been taunted by a peer who questioned his courage, or

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challenged by the respected leader of her activist group to prove the depth of her dedication to their shared cause.

We have no evidence to cite for the failure of “situational excuses” in the types of cases noted above. Indeed, if the relevant precipitants to action were introduced in a criminal trial, it might very well be by the *prosecution*, in an effort to explain the defendant's “motive.” Nevertheless, we trust that laypeople and experts alike would agree that appeals to the power of the *social* situation in such instances (as opposed to a history of abuse coupled with the presence or immediate threat of such abuse) would be futile,³⁶ and that neither statistical evidence nor expert testimony about the degree to which “similarly situated” individuals would have behaved similarly would result in leniency for the defendant. The only evidence that fact-finders would likely find exculpatory would be evidence showing that the defendant failed to form the requisite mental state for the crime or somehow lacked the ability to act otherwise.³⁷

Certainly, fact-finders do consider some excuses involving situational factors. “Crimes of passion” occasioned by the discovery of infidelity or other insults to honor, provided that they are committed in the “heat of the moment,” are generally treated with some leniency.³⁸ As noted above, excuses involving prior abuse by a parent or spouse carry similar weight, especially if the offender is young and the effects of that abuse are evident from the offender's lack of social adjustment. But consider the likely success of the excuse that an offender's parents were lax in discipline, overly indulgent, or poor role **(p.626)** models. We submit that the introduction of such “extenuating” factors would be dismissed as irrelevant and even treated with scorn.³⁹ Moreover, expert testimony that at least some children respond very badly to indulgent or laissez-faire parenting (see Kochanska, Forman, Aksan, & Dunbar, 2005) would do little to improve the defendant's prospects.

Other excuses that defendants have offered, with varying degrees of success, in seeking dismissal of charges or more lenient treatment include the effects of junk food, sleep deprivation, societal racism, hormonal disturbance, and a wide range of clinical abnormalities.⁴⁰ Critics of our legal system, including some legal scholars, have been quick to ridicule many of these excuses (see, e.g., Dershowitz, 1994; Morse, 1995), and to call for a reassertion of the principle of personal accountability.⁴¹ More sympathetic legal scholars have tried to explain and justify the basis for distinguishing between legitimate and illegitimate excuses. In particular, they seek to distinguish between cases in which the defendant was legally and morally accountable from cases in which lack of capacity or “free will” diminished or eliminated such accountability.⁴² To academically trained social psychologists, however, the distinctions made between good “excuses” and bad ones seem dubious—a product less of any coherent analysis or theory of personal agency than of the factors that inspire feelings of sympathy or empathy. Most importantly, claims about the role of “free will” rely on a dualist conception of mind and body (wherein will, as opposed to motive or attention, is not reducible to a physiological and/or cognitive process within the brain and body) that most psychologists would regard as little better than hand-waving.⁴³

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Let us try to make sense of, or at least describe in greater detail, some of the lay and legal notions in question. In general, it appears that where one can both specify the nature of the malignant causal agent or factor and show, or reasonably postulate, a direct link from that agent or factor to the transgressions in question, the excuse is typically deemed to be a good one—especially if the actor did not choose to expose himself to that factor. By contrast, if one cannot articulate the particular causal processes or at least the chain of events that led to a particular deed—even where the actor is similarly innocent of having chosen to expose himself to the initial links in that chain—the deed is attributed to free will and the individual is held accountable.

Consider our previous example of an abused child who later becomes an abuser himself. Most people may be quite willing to consider such prior abuse to be a factor that contributed to the crime and many would consider leniency on that basis. But, as noted earlier, if a second person who had never been abused, but had been consistently spoiled and never subjected to reasonable parental discipline, were to commit the same offense, pleas for (p.627) leniency would likely fall on deaf ears. At first, the distinction seems reasonable, or at least in accord with our sympathies. However, the more deeply we examine the causes of *any* specific action—that is, the more thoroughly we explore the interactions of situations and actors in making a given response likely or unlikely to occur—the more problematic the basis for that distinction becomes.

Research suggests that some children possess a genetic makeup that helps them cope with abuse without becoming abusers, while other children lack such genetically based “hardiness” (see Caspi et al., 2002). Scientists may soon discover the specific genes or the specific prenatal or early postnatal experiences that play a role in mediating vulnerability and hardiness in the face of various other types of potentially pathogenic environments. Should such a discovery prompt us to start punishing certain transgressors less harshly? Should the “spoiled rich kid” whose lawyer offers lack of parental discipline as an excuse for the white-collar crimes he has committed as an adult be treated with greater sympathy and shown more leniency because some scientist has succeeded in identifying the specific genetic factor that makes particular children vulnerable to lack of parental discipline? Suppose we have good statistical evidence from twin studies for the role of genetic factors in producing such vulnerability but scientists have not succeeded in isolating and identifying the specific genetic markers? Should our willingness to show leniency really depend on the progress of scientists in discovering specific genetic underpinnings?

Scientists are beginning to discover the genetic⁴⁴ or early experiential factors and their cognitive and physiological residues⁴⁵ that can be linked statistically to a host of other adolescent and adult pathologies and adjustment problems. Most of this work, however, does not conclusively identify the exact links between the relevant causal factors and the deviant or criminal acts with which they have been associated. Decades of research leave little doubt that these associations are apt to include complex interaction effects, in which much of the variability in outcomes will remain unexplained. That is, not all individuals possessing the genetic marker will manifest the problem and not all individuals manifesting

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the problem will show that particular marker.

In all likelihood, some term reflecting such unexplained variance or randomness (which in turn can be seen as the variability accounted for by as of yet unspecified factors and interactions between those factors) will still have to be included in any prediction equation. Should the complexity of the prediction equation or the size of the error terms for unexplained variance in that equation really determine our receptiveness to the relevant mitigation claim? Should the degree of specificity or complexity in the relevant prediction (p.628) equation really play a role in our decisions about the ethical justification for meting out harsh punishment to those who “freely” choose to do wrong in light of a genetic makeup and early parental environment that they obviously did not “freely” choose?

Let us suppose, for the sake of argument, that we do ultimately discover the exact genetic (or other physiological) basis for abnormal levels of aggression, emotional lability, poor impulse control, low social intelligence, poor decision-making ability, or other risk factors in temperament and capacity that are linked to criminal behavior. Suppose, in fact, we come to understand fully the biological and experiential basis for psychopathy, the diagnosis we now use to explain actions so inherently evil and free of concern for the victim that they defy our comprehension and capacity for empathy and fuel a sense of moral outrage that cries out for harsh punishment. In the face of such a discovery, would we, and *should* we, then treat the relevant offenders more leniently, with an emphasis on therapy—perhaps even gene-altering therapy—rather than on punishment? If so, from whom should we *withhold* such leniency? Should we punish those for whom our therapy proves ineffective, or those for whom it proves to be “too little and too late”? And how should we treat those possessing these “bad genes” in comparison to the victims of particular experiential misfortunes or in comparison to individuals for whom such biological and experiential factors happen to have interacted in a rare, unpredictable, but highly unfortunate manner?

There may be no entirely satisfactory answer to such hypothetical questions, and we may never have to answer them. But in striking a balance among the goals of deterrence, retribution, remediation, and whatever other goals the criminal justice system is designed to serve, it seems neither logically defensible nor fair to make the balance depend so heavily on lay intuitions that we know from scores of research studies to be faulty and susceptible to biases. Policies and practices inevitably will depend on the amount of progress we have made in providing a more scientifically satisfactory understanding of criminal behavior and our success in educating legal theorists, legislators, and the body politic about that progress.

Beyond calling for a more accurate view of how dispositional and situational factors interact in producing behavior, we ultimately must address head-on the very concept of “free will.”⁴⁶ Philosophers, laypeople, and legal scholars alike are apt to sidestep the issue of free will and content themselves with asking whether the actor intended his or her action and intended, or perhaps acted without concerns for, its consequences. Cases in which the transgressor's actions clearly reflect a preternaturally strong (and presumably

biologically determined)⁴⁷ inclination raise a particularly vexing problem. (p.629)

What is a just response to someone who possesses and responds to such yearnings? What if one person's desire to use a particular drug, or even to molest a child in his care, is as strong at the moment it is acted upon as is the average person's need and desire for food when hungry, or for sleep when tired, or even for air when deprived of oxygen? We suspect that the wrongdoers in question would deny that they "willed" to have such needs or desires. They could also credibly claim that they wish that needs and desires incompatible with their misdeeds (needs and wishes that had held sway in other situations) had prevented those misdeeds in the specific situations in which they acted wrongly. Such a defense, we suspect, would fall on deaf ears.

Leaving aside such speculations about deliberate acts that reflect the relative strength of competing motives, we can ask about two other types of wrongful acts. What if the processes that lead a particular actor to commit a particular crime are essentially free of cool calculation of consequences, in particular, as free of such rational calculation of harm to others as the processes that might lead an ordinary driver to veer her car onto a crowded sidewalk to avoid a collision? And what if the motives that prompt the offender to commit his or her offense are as strong as the motives that lead a bank employee to accede to an armed thief's demand that she open the safe or tie up a fellow victim?

In the case of the driver who veers into a crowd or the bank employee who cooperates with a robber, the extenuating circumstance would in all likelihood preclude punishment. We submit that our leniency in both cases would reflect our ability to empathize. In both instances we know that we, and people who we love and respect, might act similarly if they faced the same set of circumstances. By contrast, few of us would empathize with the addict's cravings for drugs, and fewer still would be able to empathize with the cravings of molester. But should the fact that we do not share such cravings—and cannot even imagine sharing them—make us doubt their power, or dissuade us from favoring leniency once we acknowledge how powerful they are for the molester or addict? More specifically, should our ability or inability to realize that we might commit similar acts in the face of similarly strong cravings enter into the calculus when we weigh the appropriateness of punishment versus therapeutic treatment?

Imagine that through surgery, or by using some drug or behavior modification program, we could dramatically weaken the potential molester's desire to molest or strengthen his or her capacity to exercise self-restraint. Surely all of us would approve of such a treatment. Many of us would even be willing to forgo (or at least mitigate) punishment the relevant crime has already been committed provided that we could now achieve a lasting cure. If so, an obvious question arises: To what extent should our current *lack of* (p.630) such means of prevention or cure justify the withholding of sympathy and leniency?

Imagine again that scientists suddenly discover a prenatal or early postnatal intervention that would eliminate an identifiable risk factor for the development of psychopathy in the same way that we can now eliminate the risk of mental retardation and other

manifestations of PKU⁴⁸ through early identification and treatment of newborns. Should the failure of parents to provide that intervention constitute a mitigating factor when the adolescent commits a typically psychopathic crime? Should those who commit a similar psychopathic crime but were denied such prenatal treatment simply because the relevant discovery came too late for it to be administered be able to make a similar plea for leniency? Should the absence of such a treatment now, coupled with knowledge of what such a treatment might look like if we could solve particular technical problems, provide the basis for a claim now? Questions based on such counterfactuals are difficult, and it is not surprising that legal scholars and practitioners generally have not chosen to address them. But the “slippery slope” they present should be troubling to anyone who might be inclined to consider leniency in some but not all of the hypothetical cases with which we have burdened the reader.

Contemporary psychology cannot provide fully satisfying answers to the questions of when and why particular actors commit particular crimes. Nor can it provide reliable remedies to prevent crimes and reform criminals. In time, we may make progress on both fronts. But it is important not to lose sight of the truism that psychology would prompt us to bring to our analytic task. The explanation for *all* misdeeds (like the explanation for all behavior) can be stated, at least in the abstract, in terms that recognize the role of motives, needs or desires, and even intentions, without reference to “will.” We rarely, if ever, can specify *exactly* how and why a given situation or experience, along with the residue of various past experiences, has produced a particular response in a particular individual with a particular mind and body—both of which, of course, are themselves similarly the product of some combination of genetics, physiological processes, and experience. Nevertheless, we must presume that such an “interaction” between the factors in question has occurred. Deciding how to add the notion of personal responsibility or “willfulness” to any such account thus becomes more a matter of cultural convention (and a source of justification for the way we happen to treat particular classes of offenders) than the product of some coherent or logical analysis addressing the relative impact of behavioral determinants.

Psychologists are not alone in trying to sidestep the issue of accountability or free will in accounting for antisocial or criminal behavior. **(p.631)** Schopenhauer (1839/1960) observed more than a century and a half ago that man *do* what he wills, but that he cannot *will* what he wills. Nor, we would add, can man “will” how strongly and irresistibly he wills or desires it, or how strong and successful his will to *resist* that will or desire might prove to be.

Philosophers continue to debate Schopenhauer's famous challenge to the notion of free will, but any society or legal system that attempts to pursue justice in the treatment of transgressors cannot escape the fact that all behavior is caused by the structures of body and mind, by immediate experience, by the residue of ordinary and extraordinary past experience, and by the way these factors happen to interact in each individual case. The nature of this interaction remains beyond our limited ability to predict and control. But postulating a self that is somehow independent of genetic endowment, early

experience, or social context, a self that exercises “free will” in bending to, resisting, or altering the various situational pressures and constraints that determine behavior does little to improve our efforts. Such an exercise in dualism may quiet our misgivings in dispensing punishment, but it does little to improve the quality of the justice we dispense or to justify the vagaries and cruelties of our penal system.

There is room to dispute the conventional psychological account of the factors controlling human behavior that we have offered here. There is even more room to dispute our contentions about the epistemic status of free will. Indeed, the “compatibilists” in philosophy and other disciplines (see Bok, 1998; Fischer & Ravizza, 1999; Mele, 1995) have labored to come up with a definition of free will and behavioral accounts that are nondeterministic and may satisfy those who seek a coherent basis for assessing culpability and punishment. But the behavioral analysis offered by psychology at least obliges defenders of the contemporary criminal justice system to be more modest in their claims to be dispensing justice. Legal scholars, jurors, and judges—indeed all of us—recognize the limits of our ability to “will what we will.” But they, and we, are nevertheless all too willing to insist that *others* ought to be able to will what *they* will, or in any case, that *others* ought to face harsh consequences for not being able to do so.

V. Pragmatic Considerations Versus Considerations of Justice

While there may be no logically satisfying resolution to the problems of distinguishing good from bad excuses and justly deciding which offenders merit lenient treatment, there is no denying that punishment does serve obvious societal functions. Potential offenders respond not only to perceived contingencies (**p.632**) and likely consequences of punishment but also to the perceived societal norms and values communicated by our laws and sanctions. In light of that reality and of the problems of just treatment that we have discussed here, a reasonable stance would be to admit that our society employs criminal sanctions not to dispense justice per se but to control human behavior, especially behavior that we deem dangerous or offensive to our individual or collective well-being.

When we know how to end particular transgressions on the part of particular individuals through medical or psychiatric intervention, through counseling or education, or through other forms of rehabilitation, we should not hesitate to do so, any more than we should deny treatment to individuals whose antisocial behavior can be traced to purely medical maladies or traumas. When we do not know how to achieve such control through more benign treatment of offenders, we must take it upon ourselves to impose effective sanctions, to isolate the offenders from the people they could harm, or to otherwise limit their freedom in order to reduce the relevant risk.⁴⁹

What is more difficult to justify, of course, is retribution—that is, inflicting suffering because we feel that the offender *deserves* to suffer—rather than deterrence, social signaling, or other aspects of social control.⁵⁰ Wisdom and concern for fairness alike dictate that we treat offenders as humanely as is consistent with achieving the type and degree of control that our society deems necessary and appropriate. Indeed, one could reasonably argue that we should treat offenders as we would treat someone who suffers a currently untreatable communicable disease. That is, such individuals should be

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deprived of the normal comforts of liberty only to the extent that, and only as long as, it is necessary to do so to protect both ourselves, and *them*, from social harms that the members of our society collectively agree to be appropriate.⁵¹

A pair of related objections could be raised to the prescription implied above. First, it could reasonably be argued that the criminal justice system should reflect the sentiments and beliefs about both effectiveness and fairness that the people served by that system hold rather than the abstract conceptions of academic psychologists—even if those lay views happen to be logically and/or empirically misguided. It could further be argued that conformity to the citizenry's current views about why transgressors behave the way they do and the appropriate sanctions for misbehavior is necessary in order for the criminal justice system to achieve one of its other commonly cited functions—namely, providing society in general, and victims of crime in particular, the sense of just retribution that is required for them to forgo the “self-help” option of individual vengeance.

Our own answer to such claims can be anticipated from the content of the arguments and observations we have offered here. While the workings of the **(p.633)** criminal justice system should respect the views that members of society have about responsibility and justice, we should do what we can to educate legislators, legal scholars, and laypeople about the lessons provided by the hard data of empirical psychology. More specifically, treatment of offenders should not continue to be guided by illusions about cross-situational consistency in behavior, erroneous notions about the impact of dispositions versus situations in guiding behavior, or failures to think through the logic of “person / situation” interactions. Nor should they be guided by comforting but not deeply considered notions of free will any more than they should be guided by once common but now abandoned notions about witchcraft, demonic possession, or unbalanced “humors.”

It is worth noting that the science and practice of medicine take advantage of new discoveries about the failings of mind and body without waiting to educate the lay public, much less waiting for such education to take full effect, before it adjusts its modes of treatment. Arguably, legal theory and practice should do more to take similar advantage of advancing behavioral science knowledge; although, two caveats are in order. First, the legal system, far more than the medical system, derives its legitimacy from public assent. Second, given the modest effectiveness of most of our available “treatments” for the personal and social ills that prompt criminal behavior, our exhortations and recommendations should be offered with a commensurate degree of modesty.

Society has been obliged to treat punishment as a way both to exercise social control and to satisfy our collective sense that those punished deserve their fate and that justice has been done, in part because we lack the means and the knowledge required to pursue better options. That we cannot achieve those legitimate ends without imposing suffering and loss of liberty on individuals who are in a real sense themselves victims of bad fortune—in the bodies and minds they inherited and in the situations that altered those minds and bodies in producing their misdeeds—should be a source of humility and

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regret. Self-righteous insistence that the wrongdoers must fully “pay” for their transgressions and not be “coddled” is warranted neither by the dictates of fairness nor by deeper analysis of the determinants of human behavior.

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Notes:

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(1.) This discussion is an expansion of ideas that appeared earlier in Ross and Shestowsky (2003).

(2.) For thorough discussions of the relevant research, see Ross (1977); and Nisbett and Ross (1980).

(3.) See Wrightsmann, Nietzel, and Fortune (2002) for a review of the relevant empirical research.

(4.) See Kassin and Kiechel (1996) and Kassin and Sukel (1997) for summaries of empirical research on mock juror decision-making. However, it should be noted that Kassin and Kiechel (1996) found that when mock jurors were presented with confessions that were induced by a threat of punishment, they were inclined to discount them.

(5.) The extent to which the layperson acknowledges the importance of situational pressures in creating criminal behavior over or in tandem with dispositional considerations is addressed in studies of jury decision-making. Mitigating factors that jurors consider in the determination of capital punishment, for example, include youth, mental retardation, and whether the defendant had a lack of choice or control over the proximate circumstances leading to the crime (Garvey, 1998). The extent to which our legal system acknowledges the role that situational pressures play in the causation of criminal behavior is likewise illustrated by how courts allow for specific jury instructions in certain kinds of cases (Dressler, 2006). In some cases where the battered woman syndrome defense is used, for example, courts tend to account for the fact that women do not commit homicide as frequently as men do, and also that when they do kill, the victim is often an abusive husband or partner. Dressler observes that there are three typical homicide patterns in battered woman cases, and that the allowance of jury instructions pertaining to self-defense varies according to perceived immediacy to defend against the abuse. In the first pattern, the confrontational homicide, the woman kills her partner while in the midst of being battered (pp. 258–59). Courts have generally allowed jury instructions for self-defense in this category of cases (p. 260). In the second type of battered woman case, the woman kills the abuser during a temporary but significant cessation in the abuse cycle (p. 259). The majority of courts do not allow jury instructions pertaining to self-defense in such cases (p. 260). In the third type of case, “hired-killer”

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cases in which the woman hired or otherwise persuaded a third party to commit the homicide, the courts have unanimously disallowed jury instructions regarding self-defense (pp. 259–60). Monahan and Walker (1985) and Morse (1995, 1998) discuss analogous background factors that may also be considered in determining the appropriateness of jury instructions regarding self-defense, such as the battered child syndrome and the rape trauma syndrome. For a discussion of the extent to which courts have also allowed cultural background to be considered as a mitigating factor in the determination of culpability, see Renteln (2004). For an examination of jurors' difficulties in understanding and applying the relevant instructions, see Haney (1998).

(6.) The Model Penal Code provides in pertinent part: “A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation” (§2.02(2)(d)); “a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense” (§2.02(1)).

(7.) The duress and necessity defenses are examples of this phenomenon. The Model Penal Code provides for the former by stating that “[i]t is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist” (§2.09(1)); the Code addresses the latter by stating that “[c]onduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and a legislative purpose to exclude the justification claimed does not otherwise plainly appear” (§3.02(1)(a)-(c)). However, scholars such as Meares and Kahan (1998) note that the rational actor standard embedded in criminal law—evident in the framing of defenses such as duress and necessity—ignore the role and influence of social norms within a community. For example, the reasonable person standard would not take into consideration the extent to which delinquency may actually be status-enhancing for gang members. Meares and Kahan (1998) argue that this kind of oversight of social norms and group dynamics may then cause traditional crime deterrence strategies such as severe penalties to backfire.

(8.) Martin (2005, p. 1527) notes that the necessity defense, “like other justification defenses, allows a defendant to evade responsibility for otherwise criminal actions notwithstanding proof of the elements of the offense.”

(9.) As some legal scholars have noted, this justification principle is interpreted to pertain only to extraordinary factual circumstances (see Robinson, 1982). For example, in

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California, between 1990 and May 2009, out of 19 appellate cases, only one case found sufficient evidence for a defense on these grounds—the appellate court in *In re Eichorn*, 69 Cal.App.4th 382 (Cal. Ct. App. 1998) granted a petition for writ of habeas corpus challenging the homeless petitioner's conviction, finding that the petitioner had presented sufficient evidence to present a defense of necessity to the jury, for the misdemeanor offense of violating a city ordinance which banned sleeping in designated public areas. In contrast, *People v. Trippet* (1997), 56 Cal.App.4th 1532 (Cal. Ct. App. 1997) held that the common law medical necessity defense was properly excluded as the defendant had adequate legal alternatives to transporting and possessing marijuana. And *People v. Garziano* (1991) held that those who commit crimes while demonstrating at medical clinics that provide abortions cannot escape criminal responsibility by invoking the necessity defense.

(10.) In that regard, longitudinal studies of holocaust perpetrators, soldiers guilty of wartime atrocities, and urban rioters are instructive. Most notably, studies of concentration camp guards in World War II suggest that the individuals in question typically led unexceptional lives before and after their wartime misdeeds (Steiner, 2000). Indeed, but for Hitler's improbable rise to power and Eichmann's parallel rise in the Schutzstaffel (SS), one can well imagine that Eichmann would have lived out his life as a faceless bureaucrat or mid-level corporate manager rather than as the monstrous perpetrator of the crimes against humanity for which he was punished.

(11.) Field observations by the County of Santa Cruz Probation Department in Santa Cruz, California, suggest that even relatively small interventions that might be described as situational, such as providing juveniles a ride home from events when their parents are unable to do so, can reduce the need for juvenile detention (Mariscal, 2003).

(12.) See Haney (1998) for a discussion of contrasting individualist and situationist orientations to the law.

(13.) For example, Asch's conformity studies illustrate the long-standing interest among social psychologists seeking to determine how, and to what extent, social forces influence behavior. In particular, Asch explored whether an individual would give responses conflicting with objective reality, such as misrepresenting the length of lines on paper when the majority of persons they were interacting with did so (see Asch, 1951, 1955, 1956). Darley and Latané's work (1968) suggests that situational forces also mediate less trivial responses, such as the likelihood of an individual reporting an emergency he or she witnesses, for example—overhearing an epileptic seizure or observing smoke in a room. When in the presence of others, or when holding the belief that others are also aware of the event, participants were less likely to report the emergency. Similarly, Milgram's famous study on obedience demonstrates that the presence and instructions of an authority figure can be enough to encourage individuals to continue with actions that they believe are causing considerable pain to another (Milgram, 1963). Freedman and Fraser (1966) illustrate a similar psychological process at work when a person (who has no objective authority status) makes a substantial request that the participant concedes to simply because he or she previously agreed to a rather trivial but related request.

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For a more comprehensive review of the situationist tradition in social psychology, see Ross, Lepper, and Ward (2010).

(14.) Mischel's (1968) classic early discussion of this issue (see also reviews by Nisbett & Ross, 1980; Ross & Nisbett, 1991) included a summary of the work by Hartshorne and May (1928), showing that the correlation between honesty in one type of situation (such as an opportunity to steal money) and honesty in another type of situation (such as an opportunity to cheat on a test) was modest at best. Mischel and colleagues subsequently added to our understanding of consistency and stability in manifestations of person dispositions by exploring more "idiographic" (person-specific and situation-specific) patterns or "signatures" of behavior (see, e.g., Mischel, 2004; Mischel, Shoda, & Mendoza-Denton, 2002; Mischel & Shoda, 1995; Mischel, Shoda, & Smith, 2003). But even that later work suggests that "criminality" on the part of any given individual is likely to reflect considerable situational dependence. In everyday contexts, there is, of course, a complex interaction or "confounding" between the person and situation (Ross & Nisbett, 1991, pp.19–20). That is, to some extent, people choose the situations to which they then are obliged to respond, and to some extent other people impose inducements and constraints as a function of what they perceive to be the nature of the person with whom they are dealing. It is this confounding, which, of course, is an important source of the consistency of behavior that we do observe outside the laboratory, that the early investigators of behavioral consistency discussed by Mischel (1968) sought to eliminate when they examined how a sample of respondents would respond to an identical set of stimulus circumstances.

(15.) One must be cautious in underestimating the importance of situational factors and attributing violent behavior solely or primarily to person-based variables, as this may result in the fundamental attribution error (see Ross, 1977; Ross & Nisbett, 1991).

(16.) A thorough review of this literature from a critical realism perspective is found in Chen and Hanson (2004). In particular, their discussion of the linkage between schemas and the affect tied to or triggered by these schemas is instructive.

(17.) The most comprehensive account of naïve realism is provided in Ross and Ward (1996); see also Pronin, Gilovich, and Ross (2004). The relevant ideas are also discussed in a seminal paper by Ichheiser (1949).

(18.) Evidence of the tendency to see others in general as more biased than oneself is presented in Pronin, Lin, and Ross (2002). Evidence that perceived bias in others is a function of perceived discrepancy between one's own views and others' views is presented in Pronin, Gilovich, and Ross (2004). It is interesting to note that people are aware that their particular views and priorities may be shaped by experiences arising from their particular class, racial, ethnic, or gender identity, but they feel that in their own case such factors are a source of enlightenment, whereas other people's particular experiences and identity are a source of what is at best "understandable" bias (see Ehrlinger, Gilovich, & Ross, 2005).

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(19.) A third implication of naïve realism is a tendency for people to think that they will be more successful in persuading individuals on the “other side” than vice versa, and by the same token that disinterested third parties will agree with them more than with those presenting the opposing viewpoint. The latter misperception, of course, has implications for settlement negotiation (insofar as litigants may forgo settlement opportunities because they overestimate the likelihood that a judge or jury will see things as they do) and for litigants' expectations about, and responses to, outcomes ultimately produced in the courtroom.

(20.) See Nisbett (2009) for a discussion of the academic gains promoted by introducing messages that explicitly assure disadvantaged minority group children that the difficulties they are facing in a new education setting are ones that all students initially experience, that they are welcome and “belong,” and that their teachers have both high expectations for them, and confidence that they will meet such expectations.

(22.) Whether capital punishment has a deterrent effect is similarly a hotly debated issue. Shepherd (2005) argues that the ambiguity over whether capital punishment deters crime results from a clash of methods between disciplines, which he claims can be reconciled. Shepherd notes that empirical studies by economists consistently show that capital punishment has a deterrent effect, whereas research by legal scholars and sociologists has arrived at the opposite conclusion. The former used large data sets compiled from all 50 states, while the latter focused their analysis on one state or a small group of states. In reconciling these methods, Shepherd asserts that both conclusions are correct. Capital punishment does deter—but only in a small number of states that execute relatively more prisoners. When data from states with a large number of executions and a high deterrence rate are averaged with those from states with a small number of executions, the result is that the high deterrence rate from the states with many executions overwhelms the lack of deterrence and even increased brutalization in states with fewer executions. Of particular significance is Shepherd's finding that although capital punishment effectively deters crime in some states, it is also associated with an increased murder rate in almost twice as many other states.

(23.) One study supporting this conclusion examined 962 felony offenders in Essex County, New Jersey (Gottfredson, 1999). In this research, the question of whether punishment increased or decreased criminal behavior was addressed by comparing judicial perceptions of the likelihood of recidivism, characteristics of the convicted, type of sentence, and time actually served. Gottfredson noted that other than the effect of incapacitation itself, confinement did not alter the likelihood of future criminality. In addition, where the offender was confined made little difference. The length of sentence that was issued did not impact future behavior, and time actually served had only a slight effect on the likelihood of future crimes. Doob and Webster (2003) examine the relationship between sentencing severity and levels of crime, finding that variations in sentencing are unlikely to deter crime.

(24.) The analogy that comes to mind is that of dealing with the carrier of a life-threatening communicable disease. The justification for quarantine is clear enough, but there would

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be no justification for making the conditions of that quarantine any more aversive to the individual than is necessary to protect the public. Bersoff (2002, p. 573), who argues that while it may be appropriate to separate criminals from society, finding that such segregation is justifiable is distinguishable from believing that criminals deserve "hateful retribution," and that the law's resistance to creating more humane institutions and using more empirically validated interventions to deal with criminals illustrates how unreceptive the law is to science and reality. A lack of appropriate resources can also backfire and lead to the breakdown of the prison system. In *Coleman v. Schwarzenegger* (2009), for example, the court tentatively held that the overcrowding in California's prisons is the primary cause of the state's failure to provide constitutionally adequate medical and mental health care to California inmates; the court also noted that in light of California's economic crisis and the low probability of increased funds to address this issue, as well as the failure of previous remedial measures, a "prisoner release order" was necessary.

(25.) The situationist perspective regarding culpability is somewhat aligned with that of philosophers who express skepticism about moral responsibility on the grounds that moral assessments and the weight given to such assessments are themselves products of situational influences of which the actor may or may not be aware. Rosen (2004) discusses this skeptical stance and notes its particular legitimacy in the case of assessments of moral culpability that are made about the actions of others.

(26.) Notwithstanding the fact that Patty Hearst came, for a time, to hold beliefs and adopt goals upon which she "freely" acted in committing at least some of her transgressions, the social situation into which she was temporarily thrust, rather than "bad character" in the usual sense of the term, clearly was the cause of her transgressions. Most observers would agree that she merits the public sympathy, and the governmental pardon, that she eventually received. Few would be surprised to learn that she committed no additional criminal offenses in the years following her imprisonment. This saga gives rise, however, to a provocative question. Why should young felons who, by accidents of birth and circumstance rather than choice, were exposed to the influence of potent antisocial norms, adopted antisocial beliefs and values, enjoyed ready access to weapons, and succumbed when given opportunities to transgress, merit our sympathy and leniency less than Patty Hearst? Given the same privileged circumstances that she enjoyed both before and after her foray into criminal behavior, few young men or women become bank robbers or accomplices to homicide. Indeed, criminal actions would seem to be a less likely consequence of the unusual situation to which Ms. Hearst was exposed than of the more mundanely toxic childhood experiences and social environments that faced many of the people who languish in our prisons.

(27.) Mather (1988) reviews spousal abuse self-defense cases (such as the battered woman's defense), and Lamparello (2001) discusses cases in which parents refused medical treatment for their children to comply with religious strictures.

(28.) Cary Stayner, tried in California in 2001 for multiple murders, had been subjected to the kinds of sexual and physical abuse that have often been linked to later criminal

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behavior, and was also the brother of a young man who had suffered several years of sexual abuse at the hands of his kidnapper before being rescued (Zamora, 1999). Malvo was a teenager who committed a string of murders in Washington, D.C., Maryland, and Virginia under the strong influence, if not total control, of an older mentor later known as “the DC Sniper.”

(29.) In such cases, it is also appropriate to discuss functions of punishment other than deterrence or “just retribution”—in particular, the need for catharsis on the part of the families and kinsmen of victims. We will return to a discussion of such subjective, psychic needs and considerations later in this chapter.

(30.) Atran (2003) argues that automatically attributing psychopathology to suicide terrorists can be viewed as a reflection of the “fundamental attribution error” (Ross, 1977).

(31.) This is similar to the notion expressed by philosophers such as Kant, that luck should not determine the culpability of an individual (see Nagel, 1979). To Nagel, moral luck refers to the phenomenon in which an individual continues to be the subject of moral assessment, whether positive or negative, even when significant aspects of the circumstances at hand are not within the individual's control.

(32.) Of course, one can acknowledge the likelihood that one would respond similarly in similar circumstances and expect to be punished (and perhaps even regard such punishment as just and appropriate). Such an acknowledgment would reflect the idea that “moral luck” can play a significant and justifiable role in determining punishment.

(33.) For a detailed description of these alternative formulations, see Lakoff (1996) who argues that differences between political conservatives and liberals in the United States are rooted in competing models or metaphors of family life, whereby conservatives embrace the model of a strict father who gives children what they earn by obeying rules and liberals embrace the model of a nurturing parent who gives children what they need.

(34.) In a sense, the Sentencing Reform Act (SRA) represents a rejection of a highly person-specific approach by setting limits on the discretion in sentencing formerly enjoyed by judges in federal criminal cases. For a discussion of the history and rationale of the SRA, see Driessen & Durham (2002).

(35.) This “unanticipated side-effects” excuse is in fact being discussed in relation to whether an antimalarial drug might have been the cause of a small number of military personnel killing their wives after returning from their Special Operations service in Afghanistan (Lutz & Elliston, 2002). For a useful discussion contrasting the legal implications of voluntary and involuntary intoxication, see Dressler (2006, pp. 345–361).

(36.) See note 5, *supra*. In illustrating this contrast, consider that justification is an affirmative defense for criminal charges under the Model Penal Code art. 3. In general, conduct (such as conduct ostensibly done in the name of “self defense”) is justified when

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the actor believes that it is necessary to act in such a way to avoid harm or evil from occurring to oneself or to others if the harm or evil sought to be avoided is greater than that of the offense charged (see §3.02(1)(a)). The use of force is generally justifiable when the individual acting reasonably believes it to be immediately necessary to protect himself against the unlawful use of force by another (see §3.04(1)). Where an individual assaults a member of a group after witnessing an effective and incendiary speech against that group, a social psychologist may view the incendiary speech to be an important proximate cause of the assault, but it is unlikely to meet the reasonable person standard for “immediately necessary” to protect oneself against unlawful use of force by another. Therefore, the force used in this circumstance will not be justified. Similarly, the individual who responds with force when faced with a taunt by a peer or challenge about the depth of their commitment will also probably fail the “immediately necessary” requirement. Renteln (2004) provides a probing analysis of the difficulties in determining to what extent fact-finders should consider a defendant's cultural background when applying the reasonable person standard and assessing culpability generally.

(37.) See Malle (1997) on “folk” or “lay” theories of action. His distinction between “explanations” and “reasons” for behavior nicely captures the difference between scientific and lay conceptions of behavioral causation.

(38.) When a homicide is committed intentionally, but also as the result of “adequate provocation,” such an offense may be mitigated from a charge of murder to that of manslaughter (Dressler, 2006, p. 571). In contemporary legal practice, juries typically decide what constitutes adequate provocation, although they are generally advised to apply a reasonable person standard when making that assessment (Dressler, 2006, p. 573).

(39.) For example, the low regard in which the legal system holds the rotten social background defense (RSBD) is instructive. The RSBD proposes that because the social conditions in which one was raised can negatively influence an individual's later actions, factors such as growing up in poverty and being subjected to neglect or mistreatment should excuse an actor from criminal liability, see Kaye (2005, p. 1173). Judge David Bazelon first wrote about the RSBD in his dissenting opinion in *United States v. Alexander* (1973). Though Bazelon's opinion sparked scholarly debate, the argument itself was never turned into a valid legal defense. The RSBD fails as a valid defense for several reasons. Legal scholars have argued that because research has not articulated any direct relationship between a particular social condition and a particular criminal act with sufficient clarity, defendants should not be able to use it as a defense (Kaye, 2005, p. 1173). Also, the RSBD undermines the retributive theory of punishment: if social background factors cause a person to commit a crime, retributive justifications for punishing that person disappear because the crime would have been caused by factors beyond the person's control (see Kirchmeier, 2004, p. 684). At its extreme, the RSBD would eliminate a person's responsibility for his or her actions because one's upbringing always influences the choices a person makes (see Forde-Mazrui, 2004, p. 730).

(40.) See Kagan (2007), noting that within the field of psychology over the last century

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there has been an increased emphasis on the ways in which biology shapes human behavior. Examining a number of psychological studies in this vein, Kagan critiques the methods employed in these to date and also cautions against ignoring the complexity between genes and environment.

(41.) For example, *Massachusetts Mutual Life Insurance Co. v. Woodal* (2003) discusses legal lore and the misunderstanding of the public and media of the use of excuses, and commenting on the famous case of Dan White, charged with murdering San Francisco Mayor George Moscone, and Harvey Milk, the first openly gay man to be elected to public office in California.

At trial, White's lawyer argued that he was suffering from "diminished capacity," a controversial defense then permissible in California courts. White supposedly was suffering from depression and thus incapable of premeditated murder. As evidence of this, psychiatrist Martin Blinder testified that the formerly health-conscious White had recently become a junk food junkie. Blinder commented that too much sugar can affect the chemical balance in the brain and worsen depression, but didn't blame the crime on bad diet. Rather, he offered junk food use as proof of White's mental state—in other words, Twinkie consumption was an effect rather than the cause of White's problems. But the media and public immediately—and misleadingly—dubbed the defense's argument the "Twinkie defense" (fn. 7).

While White's defense team did argue successfully for a ruling of diminished capacity, resulting in a verdict of voluntary manslaughter rather than murder, the diminished capacity doctrine was abolished in California by ballot initiative in 1982 following the negative publicity surrounding the case.

(42.) Arenella (1992) contrasts the conditions for moral blame set forth by moral philosophers with those entrenched in criminal law. Arenella (1996) argues that the law espouses a minimalist view of what it takes to be a morally accountable agent in order to ensure that all but the most severely disabled offenders are held accountable for their crimes.

(43.) Possible reconciliations of determinism and free will is of continuing interest to philosophers and other scholars considering the problem of moral responsibility for one's actions and the consequences of such actions (see Watson, 1988; also discussions of "compatibilism" by Bok, 1998; Fischer & Ravizza, 1999; Mele, 1995). However, the concepts of free will (as opposed to motivation or intention) and determinism are normally not topics of concern in mainstream psychology.

(44.) LaFave and Scott (1986) provide evidence that "XYY" males are more likely than others to engage in antisocial or criminal conduct leading to institutional confinement (although skeptics have suggested that the genetic factor in question is simply correlated with low intelligence, and perhaps increased likelihood of apprehension). Stoff and Cairnes (1996) review studies on correlations between aggressive behavior and various other factors including family and genetic epidemiology, neurotransmitter and temporal lobe

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deficiencies, serotonin levels, and autonomic reactivity. Raine (1997, p. 50), however, emphasizes that genetic factors speak merely to a predisposition for crime:

Twin and adoption studies not only demonstrate that a substantial amount of variance in criminal behavior can be attributed to genetic factors; they also demonstrate that environmental factors are equally important. For example, while a heritability estimate of .50 indicates that 50% of the variance in criminal behavior is due to genetic influences, it also indicates that 50% of the variance can be attributed to nongenetic (environmental factors).

(45.) Masters (1997), for example, argues that early exposure to lead (notably, the lead found in paints) seems to be one of the strongest predictors of both violent crimes and property crimes.

(46.) Wilson (1997) and Haney (2002) provide further discussion of this issue.

(47.) The relevant analysis actually applies regardless of whether those “preternaturally strong” needs, desires, or inclinations have their origin in genetics and physiology or in early experiences. In neither case does the individual choose to have (as opposed to choose to act on) the feelings in question.

(48.) Phenylketonuria or PKU is a genetic disorder characterized by an inability of the body to utilize an amino acid called phenylalanine which is essential for the building of body proteins. The condition, caused by the absence of the enzyme phenylalanine hydroxylase, can be detected with a few drops of blood taken shortly after birth, and can readily be treated by providing the required enzyme. The example of a potentially catastrophic genetically determined predisposition that can be completely remedied by a purely external or situational intervention provides an obvious model for those who seek ways of forestalling the effects of other genetically or physiologically based dispositions, including perhaps criminal behavioral dispositions.

(49.) Such a prescription, while humane in its intent, should not be taken as support for the unconstitutional holding of people who have not enjoyed “due process” and the other rights normally afforded those accused of a crime.

(50.) Darley and Pittman (2003) discuss the psychological basis for, and strength of, the impulse to compensate the victim and to punish the offender. Regarding deterrence and the death penalty Radelet and Borg (2000) argue that those who support capital punishment have lessened the extent to which they can and do rely on deterrence as justification for its continued use.

(51.) This discussion owes an obvious debt to the seminal discussion in John Rawls's (1971) *Theory of Justice*. Applying Rawls's ideas would prompt the suggestion that punishments imposed on particular offenders for particular offenses should be those we would choose to impose from behind a “veil of ignorance” regarding our status—that is, not knowing whether we would prove to be an offender, a victim of an offense, or a mere

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bystander (just as we would apply the same test in deciding how to treat the frail, the handicapped, or the indigent). As our earlier discussion of naïve realism suggests, however, our capacity for such objectivity is limited, and we might do well to make some allowance for that limitation. But it surely would be difficult to justify doing less than applying such a test.



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