

CHAPTER 7

SOCIAL PSYCHOLOGY AND THE LAW

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7.1 INTRODUCTION

VIRTUALLY every aspect of legal rules and procedures relies on assumptions about human psychology—about how individuals think, feel, and make decisions. Economics focuses on how people behave and interact as economic agents; psychology also focuses on human behavior and interaction, with specific attention to the influence of social and mental processes. Sometimes the law implicitly or explicitly incorporates findings from psychological science. For example, the law of negligence accounts for some of the limitations of human judgment in hindsight (Jolls, Chapter 4, this volume; Rachlinski, 1998). Because the hindsight bias is part of folk wisdom, legal rules have responded accordingly, such as in patent law where non-obviousness is determined by reference to secondary considerations like commercial success to “guard against slipping into the use of hindsight” (Rachlinski, 1998). But sometimes folk wisdom misunderstands human behavior and decision-making processes. Thus, for example, most people deem it unthinkable that an innocent person would confess to a crime she did not commit, in the absence of physical torture. And when folk wisdom misses the mark, it is more likely that judges, legislators, and other legal actors will fail to account for what psychological science might tell us about the human behavior in question. As one pioneer of the field of law and psychology observed over a century ago, “[Jurists] go on thinking that their legal instinct and their common sense supplies them with all that is needed” (Münsterberg, 1908). This chapter examines some of the implicit psychological assumptions about human behavior embedded in legal rules and practices. We narrow our focus specifically to social psychology, which we define as the scientific study of the ways in which individuals’ thoughts, feelings, and behaviors are influenced by the real, implied, or imagined presence of others (Allport, 1924).

Many of the law's assumptions about human behavior have been challenged by findings in psychological science broadly, including social psychology specifically. Traditionally, these challenges have focused on a fairly narrow range of legal processes involving courtroom evidence and decision-making. Thus, social psychologists have examined problems and processes such as pre-trial publicity, interrogations and confessions, juror and jury decision-making, and the like. In the related field of cognitive psychology, important contributions from research in memory regarding eyewitness testimony and eyewitness identification have led to greater scrutiny and occasionally expert testimony at trials (Ceci and Friedman, 2000; Loftus, 1979). In this chapter, we discuss findings from some of the traditional intersections of law and social psychology, many of which focus on courtroom processes and procedures. We also go further and step outside the courtroom, to explore ways in which more recent findings in social psychology inform debates about substantive legal issues such as punishment, discrimination, morality, *mens rea*, and remorse, as well as out-of-court processes such as negotiation and dispute resolution.

Due to space constraints, we omit discussion of legally relevant research in psychological science with substantial cognitive psychological underpinnings. These include issues of human memory (eyewitness testimony, eyewitness identification, lineups), children as witnesses, and comprehension of judicial instructions, among others. In addition, certain specific topics substantially informed by work in social psychology are covered by other chapters in this volume, and so we omit detailed discussion of them here. These include Bounded Rationality, Behavioral Economics, and the Law (Jolls, Chapter 4), Law and Experimental Economics (Holt and Sullivan, Chapter 5), Experimental Psychology and the Law (Wilkinson-Ryan, Chapter 6), Well-Being and Public Policy (Bronsteen, Buccafusco, and Masur, Chapter 18), Value-Driven Behavior and the Law (Tyler, Chapter 19), and Law and Social Norms (Carbonara, Chapter 22). It is worth noting that the extensiveness of this list reveals the far-reaching influence of social psychology in law generally and in law and economics in particular.

7.2 JUROR AND JURY DECISION-MAKING

Juries consist of groups of individuals (often twelve, sometimes fewer) who are brought together to make a decision about a legal dispute. To gain an understanding of how these decisions are made, researchers have examined a diverse array of topics, including jury nullification, juror understanding of legal instructions, the effect of pre-trial publicity, and so forth. Later we discuss the role of race in jury decision-making. In this section, we briefly examine some of the core issues in the social psychology of the individual judgments of jurors as well as the group decisions of juries. As studied by social psychologists and other behavioral scientists, the focus is descriptive, on how jurors and juries actually make decisions, rather than on the normative question of how they should make decisions.

7.2.1 Models of Juror Decision-Making

Prior to deliberating, each individual juror hears the evidence and arguments presented by lawyers, as well as the judge's instructions. According to the Story Model of Juror Decision-Making (Bennett, 1978; Pennington and Hastie, 1981) jurors make sense of the evidence at trial by organizing it in a narrative fashion. Instead of passively absorbing verbatim the enormous amount of complex, ambiguous information given in a trial, jurors actively process the information using the framework of their existing knowledge to fill in gaps and construct stories from the evidence. Jurors create a story narrative that explains the different pieces of reliable evidence, and then reach a decision by matching the best-fitting story to the verdict categories. In order to evaluate competing stories, jurors use several criteria. The most preferred story will account for the greatest amount of evidence, will be internally consistent and leave no gaps in the causal chain of events, and will be plausible in light of what the juror believes about the world (Pennington and Hastie, 1981). This model has been supported by "think aloud" observations of mock jurors (Pennington and Hastie, 1986), as well as experiments examining judgments in mock criminal and civil trials (Huntley and Costanzo, 2003; Pennington and Hastie, 1992).

More recent experimental research on coherence-based reasoning has established that the process of reaching a decision is often bi-directional (Holyoak and Simon, 1999). The decision task faced by jurors is cognitively complex because it requires consideration of information that is voluminous, contradictory, and ambiguous (D. Simon, 2004). To process the large amount of complex information presented in a trial, jurors reconstruct the information into simpler mental representations, upon which their cognitive system imposes coherence (D. Simon, 2004). At trial, the evidence and arguments lead jurors to construct a story or "mental model" informed by their background beliefs; the story together with the juror's background motivations, attitudes, and beliefs, then influences the assessed relevance, reliability, and weight of the evidence and arguments. Ambiguous and contradictory information is gradually transformed into a coherent story, and new information that supports the story is accepted while information supporting alternative stories is rejected or ignored (D. Simon, 2004). This bidirectional process gradually imposes coherence onto a complex set of initially disparate and incoherent items of evidence and arguments, permitting jurors to arrive at clear and confident conclusions (Holyoak and Simon, 1999; D. Simon, 2004).

These models have been supplemented by other insights about how information received at trial is interpreted in light of jurors' existing schemas and beliefs. For example, jurors bring with them into the courtroom commonsense notions of legal categories like insanity, self-defense, and intent, and those existing schemas influence how jurors evaluate evidence and make legal judgments (Finkel, 2005; Finkel and Groscup, 1997; Robinson and Darley, 1995). Even after receiving instructions about the definitions of crimes like burglary or robbery, jurors import their commonsense notions of these offenses into their decisions.

7.2.2 Models of Jury Decision-Making

The decision-making processes of individual jurors is only one element of jury decision-making, which takes place in the context of group deliberation. Models of jury (as opposed to juror) decision-making examine how individual preferences combine during the course of group deliberation to result in a verdict, or in the case of no verdict, a hung jury. Jury decision-making research traces its roots to the Chicago Jury Project, directed by Kalven and Zeisel beginning in the 1950s. In their landmark field study, they surveyed judges about the characteristics of the case, the actual jury verdict, and how the judge would have decided the case at a bench trial (Kalven and Zeisel, 1966). They found that a majority jury vote on the first ballot predicted the final verdict in over 90% of the cases, and they hypothesized that deliberation often focused on convincing the members of the minority to change their vote.

Subsequent research set out to investigate more precisely the relationship between pre-deliberation preference and final verdict. Note that the timing of the first ballot is in the hands of the jury, and might or might not occur before any substantial deliberation has taken place. In fact, immediate votes prior to deliberation seem to occur in only a small minority of cases (Devine et al., 2004; Diamond and Casper, 1992; Diamond et al., 2003; Hastie, Penrod, and Pennington, 1983; Sandys and Dillehay, 1995). When the first ballot does occur, if each juror expresses their preference verbally, the early preferences can influence those voting subsequently (J. H. Davis et al., 1988). Jurors' certainty and confidence in their views can be weak before deliberations begin, such that some do not begin leaning strongly toward one side until after substantial deliberations have taken place (Hannaford-Agor et al., 2002). To understand the influence of the jury deliberation process, it is therefore important to measure pre-deliberation preferences of individual jurors prior to deliberation.

One early model of jury decision-making called Social Decision Schemes (SDS) (J. H. Davis, 1973) provided a framework for predicting the likelihood of a particular verdict given the initial pre-deliberation preferences of individual jurors, and a given decision rule (e.g. unanimity). Thus, in a legal case in which jurors deliberate under instructions to return a unanimous verdict, the initial preferences of each juror can be used to predict the likelihood of a guilty verdict returned by the jury as a whole. Follow-up work has shown a leniency effect in criminal cases, such that a pro-acquittal majority is more likely to win than a pro-conviction majority faction of equal size (Devine et al., 2004; Kerr and MacCoun, 2012; MacCoun and Kerr, 1988). This suggests that, all other things being equal, conviction and acquittal are not equally likely, which is consistent with the notion of reasonable doubt.

Other models of jury decision-making have examined the shifts in distribution of preferences over time during the deliberation process, and have shown the influence of structural features such as jury size (Kerr and MacCoun, 1985), unanimity requirements (Hastie et al., 1983), and polling (J. H. Davis et al., 1976). For example, under requirements of unanimity, larger juries tend to hang more often than smaller juries (Saks and

Marti, 1997), and juries required to decide unanimously hang more often than juries using a lesser decision rule, such as a two-thirds or three-fourths majority (J. H. Davis et al., 1975; J. H. Davis et al., 1976; Hastie et al., 1983). In some studies of civil cases, the mean damage award of smaller juries is larger than that of large juries (J. H. Davis et al., 1997; Horowitz and Bordens, 2002; Saks, 1997). Reducing jury size increases the variance of damage awards, thereby making them more unpredictable (Saks, 1997). Reducing jury size also decreases the average number of racial and ethnic minorities within the jury (Diamond et al., 2009), and reduces the accuracy of evidence recall as well as time spent deliberating (Saks and Marti, 1997). In criminal cases, the bottom line is that the jury's final verdict often reflects the initial majority preference (Kalven and Zeisel, 1966; Kerr and MacCoun, 2012).

In civil cases, juries are often called upon to make a money damage judgment in a dollar amount. Unlike the binary judgment of Guilty/Not Guilty, the civil damages judgment is continuous. Like binary judgments of Guilty/Not Guilty, money damage judgments also can be predicted fairly well by models that consider the initial pre-deliberation preferences of individual jurors. For example, the jury's damage award judgment might be predicted by the trimmed median judgment of individual jurors, where trimming involves discounting the largest outlier (J. H. Davis, 1996). The Social Judgment Scheme model proposed by Davis (1996) predicts a given jury's money damages award based on weighting each individual's preference on its distance from the preference of other individuals, with larger distance receiving less weight. This model has received empirical support (J. H. Davis et al., 1997; Hulbert et al., 1999). In civil cases, the process of jury deliberation can sometimes lead to monetary awards that are higher than the mean or median pre-deliberation individual juror judgment, especially when compensation is awarded for intentional wrongdoing (Diamond and Casper, 1992; Kaplan and Miller, 1987; Schkade, Sunstein, and Kahneman, 2000).

Of course, it is the rare case that makes it all the way through trial to a jury, and there are many decision points along that path made by a variety of legal actors. In the sections below, we focus on some of the social psychological factors that influence those decisions. Some of these factors are well documented, while others are the subject of more recent empirical investigations.

7.3 NEGOTIATION

The vast majority of legal disputes are never brought to trial; in 2002, 15.8% of cases in state courts were resolved by trial (Ostrom, Strickland, and Hannaford-Agor, 2004), while in federal courts, the number was only 1.8% (Galanter, 2004). Of federal criminal cases, only about 5% go to trial (Galanter, 2004). In the meantime, recourse to alternative dispute resolution (ADR) procedures is growing rapidly (Stipanowich, 2004). While some of the findings discussed in this chapter are most relevant when a case is brought to trial, negotiation is at its heart a classic social-psychological interaction.

Procedural justice—the subjective perception about the fairness of the process by which outcomes are arrived at, independent of the fairness or favorability of the outcomes (MacCoun, Lind, and Tyler, 1992)—is important for acceptance of negotiated agreements (Hollander-Blumoff and Tyler, 2008). Most people value being treated with dignity and respect, and being given the opportunity to voice their positions. As a result, in negotiation, people are generally more willing to accept and adhere to negotiated agreements and respect their legitimacy when these basic needs are met. Lawyers who treat one another fairly and respectfully during settlement negotiations are more likely to buy into the proposed settlement when it is reached, and might work harder to convince their clients to accept it (Hollander-Blumoff and Tyler, 2008).

Out-of-court settlements are achieved through negotiation, a process that has been studied extensively by social psychologists. Negotiators sometimes suffer from a bias blind spot, which refers to the tendency for people to view others as biased, while being unable to perceive their own biases, even when alerted to the potential for bias in their decisions (see Pronin, 2007 for review). The ability to reach a negotiated outcome depends in part on the extent to which participants perceive their opponents as biased, rather than the extent of disagreement or opposing interests. Participants who perceive their opponent as more biased act more competitively toward that opponent, and respond more aggressively (Kennedy and Pronin, 2008). In turn, their responses are then perceived as more biased. This back-and-forth misperception of bias leads to a “conflict spiral” in which both parties are more likely to engage in competitive rather than cooperative behavior, which continues to escalate the conflict.

Rapport is another interpersonal influence in negotiation, and it is an important determinant of the extent to which negotiators develop the trust necessary to reach mutually beneficial agreements (Nadler, 2004b). Interpersonal rapport has at least three components: mutual attention and involvement, positivity, and coordination. Frequently, negotiations involve mixed-motive conflicts in which negotiators are motivated to cooperate just enough to ensure settlement, but at the same time to compete with each other to claim the greatest possible bargaining surplus for themselves (Thompson and Nadler, 2002). To reach a collectively optimal settlement, parties must coordinate on cooperation (Schelling, 1980), meaning that one has to be willing to share information about one’s own preferences and priorities and refrain from issuing ultimatums and threats. The development of rapport can foster the kind of cooperative behavior necessary for achieving efficient negotiated settlements in mixed-motive conflicts (Nadler, 2004b).

With the advent of communication technology, negotiations increasingly take place between people without the opportunity for a face-to-face meeting. Negotiating with someone with whom we have no prior relationship, and using a communication medium that provides no visual access (e.g. email), makes it less likely that rapport will develop, leading to insufficient information exchange and increased risk of impasse instead of mutually beneficial agreement. Fortunately, these pitfalls can sometimes be overcome rather easily, such as with a short get-acquainted conversation before negotiating. In two studies examining transactional negotiations, some negotiators who

used email to negotiate were assigned to have a brief getting-to-know-you telephone conversation, whereas others did not have this opportunity. The seemingly inert act of schmoozing facilitated cooperation during negotiation, leading to the sharing of crucial information and, ultimately, lower likelihood of impasse (Morris et al., 2002; Nadler, 2004a).

7.4 RACE AND DISCRIMINATION IN LEGAL DECISION-MAKING

7.4.1 Basic Issues

Policymakers and scholars are rightly concerned about the presence of bias in the legal system, and have paid special attention to issues of racial bias. Race can influence legally relevant decisions in many situations, from policing decisions to final sentencing judgments. At the same time, law often refuses to define the concept of race, leading to confusion and inconsistency (Peery, 2011). It is worth noting that many findings of racially motivated legal decision-making are generally uncorrelated with measures of explicit racial bias—“the kinds of bias that people knowingly—sometimes openly—embrace” (Rachlinski et al., 2009). Implicit bias (Greenwald and Krieger, 2006; Kang et al., 2012) is a more insidious issue than explicit bias. Attitudes and stereotypes are implicit when they are not consciously accessible through introspection (Kang et al., 2012). Both laypersons and judges hold implicit racial biases, and sometimes these biases can influence their judgment (Rachlinski et al., 2009).

Implicit bias has been measured in a variety of ways (Jost, Federico, and Napier, 2009), and one commonly used measure is the Implicit Association Test (IAT), which assesses the strength of a person’s association between two concepts using response times; in a classic version, Black and White faces are paired with positively valenced and negatively valenced words. Results suggest a pervasive implicit favoritism for one’s own groups and socially dominant groups (Lane, Kang, and Banaji, 2007). Numerous studies suggest that IAT performance is a better predictor of behavior in socially sensitive situations than explicit racism measures (see Greenwald et al., 2009 for a meta-analysis; but see Oswald et al., 2013 for a dissenting view). For example, in one experiment, people with more negative implicit attitudes toward Blacks were more likely to sit further away from a Black lab partner and less likely to anticipate befriending a Black peer (Lane et al., 2007). In other studies, people with higher implicit bias judged ambiguous actions by a Black person more negatively (Rudman and Lee, 2002), and were quicker to detect hostility on Black faces, but not White faces (Hugenberg and Bodenhausen, 2003). More recently, a Guilty/Not Guilty IAT has been developed, and implicit associations between Black and guilty have been shown to predict evaluation of evidence, though not judgments of guilt (Levinson, Cai, and Young, 2010).

7.4.2 Race and Criminal Justice

There are well-documented racial disparities in the enforcement of the criminal law (Sidanius and Pratto, 2001; Tyler and Huo, 2002; Walker, Spohn, and DeLone, 2011), and ongoing social psychological research with actual police officers has been fruitful (Goff and Kahn, 2012). In one study, police officers rated Black faces higher on criminality than White faces, and also rated stereotypically Black faces as more criminal than less stereotypically Black faces. Additionally, officers were more likely to misidentify a more stereotypically Black face as the target suspect when primed with words associated with crime (Eberhardt et al., 2004). For both police officers and laypeople, race also influences decisions about whether to “shoot” a suspect in videogame-like lab studies. Both Black and White participants were quicker to shoot armed Black targets than armed White targets, and made more shooting errors when faced with unarmed Black targets or armed White targets (Correll et al., 2002; Kahn and Davies, 2011; Payne, 2006). However, some research has suggested that police officers may make fewer shooter errors than laypeople, unless they have had significant negative interactions with Black citizens (Correll et al., 2007; Plant and Peruche, 2005).

Racially motivated policing is not limited to the treatment of adult suspects. In one study, researchers asked police officers to view photos of children along with a description of the type of crime the child was suspected of (Goff et al., 2014). Police officers perceived Black (but not White) teenage felony suspects to be an average of 4.5 years older than they actually were. This racial disparity was not correlated with traditional measures of explicit or implicit measures of racial prejudice. Rather, implicit anti-Black dehumanization (as measured by how readily individual officers associate Black names with animals in the ape family) predicted the extent to which they overestimated the age of Black teenage suspects and how culpable they perceived those Black suspects to be. Most striking, implicit dehumanization measures in the laboratory predicted the likelihood that police officers had used force on actual Black suspects in the real world (Goff et al., 2014).

The potential for racial bias continues once a suspect has been charged and brought to trial. Reacting to racially biased trial practices, the Supreme Court ruled in *Batson v. Kentucky* (1986) that attorneys cannot use peremptory challenges to exclude jurors from criminal juries based solely on their race, and lowered the burden of proof necessary to show discrimination. This holding was later extended to civil juries in *Edmonson v. Leesville Concrete Company* (1991). However, many attorneys try to skirt this prohibition and select jurors based on their assumptions that Black jurors are less likely to find defendants, especially Black defendants, guilty (Bonazzoli, 1998; Kerr et al., 1995). In fact, behavioral and neuroimaging research provide some support for these intuitions, suggesting that we may be more able to empathize or take the perspective of individuals who are similar to ourselves (Cialdini et al., 1997; M. H. Davis et al., 1996; N. Eisenberg and Mussen, 1989; J. P. Mitchell, Macrae, and Banaji, 2006; but see Batson et al., 2005 for

an alternate behavioral mechanism). However, there is evidence that in some situations, people may want to distance themselves from ingroup members who have committed bad acts, that is, the “black sheep” effect (J. Marques et al., 1998; J. M. Marques, Yzerbyt, and Leyens, 1988).

Research regarding race and juror behavior suggests that in fact, both of these mechanisms are at work. Two early studies of actual criminal trials found that Black jurors were less likely to convict than White jurors (Broeder, 1959; R. J. Simon, 1967). Mock jury studies by Ugwuegbu (1979) showed that both Black and White participants were more lenient toward defendants who were the same race as themselves. On the other hand, middle-class Black jurors have been found to react more punitively toward Black defendants, especially those charged with violent crimes (Nietzel and Dillehay, 1986). Perhaps the most convincing evidence that both of these effects are in play comes from Chadee (1996). He varied mock jury composition and found an interaction between jury–defendant similarity and strength of evidence. White-majority juries were more likely to convict and impose harsh punishment on a Black defendant than Black-majority juries when the evidence was relatively weak, while Black-majority juries were harsher on Black defendants than White-majority juries when evidence was strong (see Kerr et al., 1995 for additional support for both processes working together). The varied findings across studies suggest to some commentators that race and other demographic variables are only modest predictors of verdict (Fulero and Penrod, 1990; T. L. Mitchell et al., 2005). Given the interactive relationship among the racial composition of a jury, the strength of the evidence, and the defendant’s race (as well as potential other variables), attorneys’ attempts to circumvent Batson may lead to a result opposite to the one intended.

Regardless of jury composition, the race of the defendant and the victim sometimes influence sentencing, including the likelihood of imposing the death penalty. Baldus, Pulaski, and Woodworth (1983) found that defendants were significantly more likely to receive the death penalty when the victim was White (24%) than when the victim was Black (6%). Additionally, a victim’s low socio-economic status reduced the defendant’s likelihood of receiving a death sentence (Baldus et al., 1998). There is also evidence for the influence of defendant race, such that Black defendants were more likely to receive the death penalty than white defendants (Baldus et al., 1998). Eberhardt et al. (2006) displayed to experiment participants the photographs of defendants from death-eligible cases that advanced to the death penalty phase. Controlling for aggravating and mitigating factors, severity of killing, defendant and victim SES (socioeconomic status), and defendant attractiveness, the researchers found that when the victim was White, Black defendants with stereotypically Black faces were more than twice as likely to receive death sentences than those with less stereotypically Black faces. By contrast, when both the victim and the defendant were Black, stereotypicality of the defendant’s appearance did not predict the likelihood of a death sentence. (See Blair, Judd, and Chapleau, 2004 for similar findings regarding Afrocentric features and sentence length.)

7.4.3 Employment Discrimination

It is important to note that implicit biases are not necessarily racial, and their impact is not limited to criminal cases. For instance, disparate treatment jurisprudence treats stereotypes as consciously held beliefs, suggesting that an honest employer explaining a discriminatory decision would include the biased motive among its reasons for the decision. However, discriminatory employment decisions are often driven by implicit biases (Rooth, 2010; Rudman and Glick, 2001). The unconscious nature of these biases renders them invisible to the biased employer, allowing it to honestly maintain that a discriminatory hiring decision was based entirely on legitimate factors, thereby shielding the employer from liability. Evidence from the field and the laboratory supports the notion that implicit biases influence organizational decisions. For example, in one study job applicants with African-American names were less likely than those with white names to receive job interviews (Bertrand, Mullainathan, and Shafir, 2004). Successful women working in traditionally male domains (e.g. aircraft company executive) were penalized relative to men in the same position (Heilman et al., 2004). Physicians' degree of implicit bias was associated with different treatment recommendations for Black patients (Green et al., 2007). In light of the well-documented existence of implicit bias, scholars have advocated for a more "behavioral realist" approach to disparate treatment law (Kobick, 2010; Krieger and Fiske, 2006; Pedersen, 2010), but the question of exactly how findings regarding implicit bias should be incorporated into the legal system is still the subject of vigorous debate (Jolls, 2007; Tetlock, Mitchell, and Anastasopoulos, 2013).

7.5 INTERROGATIONS AND FALSE CONFESSIONS

7.5.1 Police Interrogations and Lie Detection

Historically, the interrogation process was relatively unregulated, leaving law enforcement free to use physical techniques to extract confessions. In the United States, physical force is no longer permitted in interrogations—the law requires confessions to be given voluntarily. Today, about half of all interrogations produce incriminating statements (Kassin et al., 2007; Schulhofer, 1987; Thomas, 1996). Given that confessing to a crime is "an exceedingly self-defeating proposition, regardless of one's actual guilt" (D. Simon, 2012), social psychologists have been interested in investigating why so many suspects choose to confess. More importantly, why do suspects confess to crimes they did not commit?

In most cases, the answer lies in the psychological pressures brought to bear in modern interrogation procedures. Interrogations in cases of serious crime tend to be intense and extremely confrontational. Judicial or other governmental regulation of the process

is minimal, because of the absence in most instances of a complete video record of the entire process. In one experiment, 36% of guilty suspects and 81% of innocent suspects agreed to waive their right to remain silent and talk to police (Kassin and Norwick, 2004). Of those who agreed to waive their right to remain silent, most guilty suspects did so to avoid looking suspicious. Most innocent suspects did so because they felt they had nothing to hide.

Although police often begin an interrogation with the belief that the suspect is guilty, they are unlikely to be able to accurately assess the suspect's innocence or guilt through the interrogation process. A large body of literature reporting tests of people's ability to detect deception has demonstrated that people on average perform no better than chance, and with few exceptions trained officers perform at the same level as laypersons, albeit with high levels of confidence (Bond and DePaulo, 2006; Kassin, 2008; Kassin, Meissner, and Norwick, 2005; Meissner and Kassin, 2002; D. Simon, 2012; Vrij, Edward, and Bull, 2001). Because police investigators have trouble distinguishing between true and false confessions, they have little reason to stop an interrogation until the confession is obtained. Generally, once people form an impression, they are motivated to verify it rather than disconfirm it (Rosenthal and Jacobson, 1968; Snyder and Swann, 1978), and the tendency to try to confirm guilt holds true in the interrogation room—when interrogators already believe that a suspect is guilty, they are more likely to use aggressive tactics like the presentation of false evidence and promises of leniency (Kassin, Goldstein, and Savitsky, 2003).

7.5.2 Interrogation and Confession

Having already decided that the suspect in custody is guilty, police investigators conduct interrogations not to discern the truth, but rather to elicit incriminating statements (Kassin et al., 2010). The techniques they use to elicit these statements are designed to induce stress, in order to overcome the resistance of the suspect. The physical surroundings of the interrogation are an important feature of their potential for effectively extracting an admission of guilt. Often police will interrogate a suspect in a small windowless room in the police station or other law enforcement facility, and the suspect will be isolated from his social support network of family and friends. This increases the suspect's anxiety and desire to escape (Kassin, 2008). A major source of pressure on the suspect is the interrogators' confrontation with the accusation of guilt and blocking of attempts to deny guilt. Interrogators are trained to invade the suspect's physical space, positioning their bodies and their faces close enough to cause anxiety and discomfort. Direct, hostile confrontation with another person or persons feels quite uncomfortable and disquieting even when it lasts only for a minute or even a few seconds. The ongoing confrontation of interrogation, by contrast, typically lasts for hours, and sometimes even days. Innocent people who have falsely confessed often later report that they did so simply to put an end to the stress of the seemingly never-ending confrontation. These people almost always convince themselves

that the truth will come to light after they are able to escape their tormentors in the interrogation room.

In order to convince the suspect that confessing is more advantageous than holding out, interrogators use techniques called minimization and maximization. Minimization entails convincing the suspect that the police and/or prosecutors are prepared to believe that the offense was not as serious as the accusation suggests, often because of mitigating circumstances such as self-defense, intoxication, or duress. Other face-saving justifications often suggested to suspects include the notion that their actions were peer-pressured, spontaneous, or accidental (Kassin et al., 2010). In the infamous Central Park jogger case in which five teenage boys gave false confessions in a case of a brutal assault and rape, every boy gave an account that minimized his own involvement and emphasized the more central role of his peers (Kassin et al., 2010). Implicit in the minimization theme is a promise of leniency, or even that the suspect's actions do not constitute a crime at all. In one experiment, participants were twice as likely to confess when the minimization technique was used; innocent participants were three times as likely to confess with the minimization technique (Russano et al., 2005); other experiments have demonstrated that the minimization technique increases the risk of false confessions (Klaver, Lee, and Rose, 2008). In the Central Park jogger case, each of the five boys who falsely confessed said afterward that he believed he would be going home after agreeing to the statement suggested by police (Kassin et al., 2010).

Another technique that interrogators use is maximization. Here, the implication is that because the evidence of guilt is so strong, the suspect will be convicted regardless of whether he confesses; but cooperating with investigators is the only way to avoid the harshest punishment, for example the death penalty. Interrogators in the United States (but not in most of Europe) are lawfully permitted to manufacture false evidence to convince the suspect of the strength of the evidence against him. Interrogators sometimes pretend to have the suspects' fingerprints or blood, they fabricate polygraph results and statements of co-defendants, and the like. Interrogators sometimes lie to suspects about the health or well-being of their loved ones to induce a confession. One teenaged suspect falsely confessed to killing his parents after police falsely told him that his hair was found in his mother's hands and that his father briefly awakened from a coma and identified his son as the killer (Kassin et al., 2010). In other cases police prompt suspects to provide incriminating details so that doctors can save their loved ones; for example, falsely telling the suspect that his girlfriend is still alive and that she can only be saved if he tells them which drugs he injected her with (Drizin, 2014).

Many documented false confessions consist of rich, detailed, and accurate accounts of the crime. Case studies of wrongfully convicted people show that these details were unknown to the suspect, but were disclosed to them by interrogators. In the absence of a recording of the entire interrogation, juries are persuaded by interrogators' false claim that the defendant volunteered information that only the true perpetrator could have known. The problem of police contamination is endemic in false confessions—it is present in the vast majority of DNA exonerations involving false confessions containing non-public information about the crime (Garrett, 2010).

Laboratory experiments are often a useful method for social psychologists interested in understanding the psychological mechanisms underlying a behavioral phenomenon. But false confessions pose a special challenge for experimental work, because the pressures brought to bear in the real-life interrogation room cannot be replicated in the laboratory. Participants in psychology experiments do not face the high-stakes consequences faced by actual criminal suspects. And the hours-long intense confrontation that police officers conduct cannot be utilized with volunteers in the social psychology laboratory. Moreover, members of certain populations such as adolescents, the mentally ill, and the mentally disabled are at higher risk for false confession; yet these individuals are rarely studied in the laboratory (Kassin et al., 2010). Despite these challenges, experimental investigation regarding specific aspects of the interrogation process is instructive. And it is reassuring that the existing experimental results are consistent with findings produced by other methods, as well as case studies of individual exonerees (Simon, 2012, p. 137).

7.5.3 The Effect of Confession Evidence on Judges and Juries

Because it is difficult to understand why someone would confess to a crime they did not commit, confession evidence has an extremely powerful persuasive effect on juries. When evaluating the behavior of another person, people generally tend to place insufficient weight on external duress, and instead attribute the behavior to the personality characteristics of the actor (Gilbert and Malone, 1995; E. E. Jones, 1990; L. Ross, 1977). In experiments, confession evidence is perceived as more persuasive than eyewitness identification and negative character information (Kassin and Neumann, 1997). When mock jurors learn that a confession was coerced, they report discounting it, yet they are still influenced by it even though they know they should not be (Kassin and Wrightsman, 1980; Kassin and Sukel, 1997). Unfortunately, jury deliberation does not cure the difficulty that individuals have with understanding why an innocent person might confess, and these effects are observed with deliberating mock juries as well as with jurors (Kassin and Wrightsman, 1980). Estimates of conviction rates in cases involving false confessions are 73% to 81% (Drizin and Leo, 2004; Leo and Ofshe, 1998). Confessions are more persuasive with judges and juries when they contain a detailed account of the crime. Indeed, what appears to the jury as the defendant's vivid description of the crime, the motive, and sometimes even expressions of remorse, are sometimes the product of a police script, rehearsed during hours of unrecorded interrogation (Kassin et al., 2010).

In light of the problem of interrogation-induced false confessions, many leaders in law enforcement, the judiciary, the practicing bar, and scholars recommend mandatory videotaping of custodial interrogations in their entirety, in order to deter coercive interrogation tactics, to provide an objective record of the process, and to enable judges and juries to make more accurate assessments of the voluntariness and truthfulness of the

confession (Kassin et al., 2010). In some U.S. jurisdictions, videotaping of confessions is indeed now required in some circumstances (Kassin et al., 2010).

Common sense dictates that the video camera should be focused on the suspect during the interrogation so that observers can evaluate his demeanor and behavior, and the suspect-focused camera angle tends to be the default (Lassiter et al., 2002). But there is a problem with this default: when people watch a videotaped confession, their judgments of voluntariness are influenced by the camera's perspective. This is because of the general tendency to attribute unwarranted causality to stimuli that are more conspicuous—called “illusory causation.” Objects that stand out in our visual field are more likely than objects outside the visual field to be judged the causal origin of an event even when there is no basis for this inference (Lassiter et al., 2002). This illusion holds not only for physical objects but also complex social interactions. For example, a third person observing a casual conversation between two speakers perceives the causal influence of each speaker according to her physical vantage point—she perceives as more influential the speaker whom she happens to be facing during the conversation (Taylor and Fiske, 1975).

In the interrogation context, a large body of research using simulated videotaped confessions demonstrates that the common practice of focusing the camera on the suspect makes the confession seem more voluntary and the suspect seem more guilty, compared to focusing the camera elsewhere (e.g. equally on the suspect and the interrogator) (Lassiter and Irvine, 1986; Lassiter et al., 2001). When the suspect is facing the camera, and only the back (or none) of the interrogator is visible, the visual prominence of the suspect leads observers to conclude that the incriminating statements the suspect makes are voluntary, rather than a result of the pressure being brought to bear by the interrogator and the more general features of the context that were discussed earlier (Lassiter, 2010b). Because camera perspective bias occurs at a perceptual level, the effect is robust across people of differing expertise, sense of accountability, reasoning ability, and demographic background, and it does not diminish with group deliberation (Lassiter, 2010b). Despite their considerable knowledge and expertise, judges, like jurors, are susceptible to the influence of camera perspective (Lassiter et al., 2007). This poses a special problem because judges are tasked with determining whether a confession was voluntarily given before the jury is permitted to view the videotape. Positioning the camera so that the profiles of the suspect and the interrogator are both visible results in judgments of voluntariness that are more similar to those based on audio recordings or written transcripts (Lassiter et al., 2002). By focusing the camera equally on the suspect and the interrogator, the advantages of video recording can be maintained without introducing bias (Lassiter, 2010a).

7.6 MORALITY, BLAME, AND PUNISHMENT

Morality helps to regulate behavior to ensure that community welfare and social relations are preserved (Rai and Fiske, 2011). Law serves a similar function, including the

enforcement of moral codes. Within the legal system, participants make judgments that are infused, either explicitly or implicitly, with morality. Moral psychology is a burgeoning subfield within social psychology, and recent findings inform a wide range of legal processes. In this section we discuss a selection of social psychological findings regarding morality and blame, and their implications for law.

7.6.1 Apologies and Remorse

Confessions introduced in a criminal trial greatly increase the probability of conviction. But what about admissions of wrongdoing in other contexts, such as at criminal sentencing, or by a tortfeasor in settlement negotiations? As a general matter, when a wrongdoer expresses remorse, this expression can influence perceptions of the wrongdoer's moral character, and his propensity to engage in wrongful behavior in the future (Etienne and Robbennolt, 2007; Gold and Weiner, 2000; Takaku, 2001). An apology is designed to convince others that the wrongful act does not represent what I am "really like" as a person (Schlenker, 1980). An expression of remorse by a romantic partner leads to the belief that the wrong will not be repeated, which in turn leads to empathy and forgiveness (J. R. Davis and Gold, 2011). When a victim perceives a transgression as having been unintentional, an apology is an effective way of prompting forgiveness; however, victims are slower to forgive intentional transgressions even after an apology. In fact, in some cases of intentional wrongdoing, an apology can actually hinder forgiveness (Struthers et al., 2008).

Several theorists have explored the possible characteristics of a full and effective apology. Some common elements include an admission of wrongdoing and/or an acknowledgment of the rule that was violated, expression of responsibility, expression of regret or remorse, a promise to forbear, and an offer to repair (Dhami, 2012; O'Hara and Yarn, 2002). Empirically, taking responsibility for one's actions, offering to repair damage, and promising to forebear in the future have been shown to be essential elements (Scher and Darley, 1997). Apologies that contain none of these characteristics lead to increased blame and punishment. A wrongdoer whose apology omits an expression of responsibility is perceived to be more likely to cause harm in the future (Robbennolt, 2003).

In some circumstances, a wrongdoer who issues an apology is viewed more favorably, serving to reduce the inference of negative moral character (Gold and Weiner, 2000; Ohbuchi, Kameda, and Agarie, 1989). As a result of an apology, people perceive the wrongdoer as less likely to offend in the future (Etienne and Robbennolt, 2007; Gold and Weiner, 2000). In another study, judges who evaluated a hypothetical about a defendant who threatened a fellow judge imposed a lower sentence when the defendant apologized at the sentencing hearing, compared to when he did not (Rachlinski, Guthrie, and Wistrich, 2013). Judges who evaluated a hypothetical robbery case imposed a lower sentence when the defendant apologized (Rachlinski et al., 2013). These effects were small but reliable.

In litigation, defendants often avoid apologizing for fear that the act could be taken as evidence of responsibility later in court. As a result, defense counsel and insurers often advise their clients against apologizing. To promote settlement, state legislatures have adopted reforms to provide protections for defendants who apologize, specifically making apologies inadmissible in court to prove the defendant's responsibility. There is now at least some evidence from medical malpractice cases that these laws themselves promote settlement (Ho and Liu, 2011). In addition, there is experimental evidence that a defendant who apologizes to the plaintiff can increase the likelihood of out-of-court settlement by making the plaintiff more amenable to coming to the negotiation table, and by lowering the dollar amount that the plaintiff would be willing to accept in settlement (Robbennolt, 2006).

In capital murder cases, jurors report afterwards that remorse is one of the most important considerations in imposing the death penalty (T. Eisenberg, Garvey, and Wells, 1998). Sitting bankruptcy judges evaluating detailed hypothetical scenarios perceived debtors who apologized as more likely to be careful in the future and thus were more likely to approve a repayment plan, compared to when no apology was offered (Robbennolt and Lawless, 2013). Yet in some settings, judges are unaffected by apologies. Sitting judges who evaluated hypothetical tort cases provided settlement recommendations that were unaffected by whether or not the defendant apologized to the plaintiff (Rachlinski et al., 2013). Further, motorists who apologize to a police officer issuing a traffic ticket might incur a lower fine (Day and Ross, 2011), but motorists who apologize to an administrative law judge in court might find themselves incurring a higher fine (Rachlinski et al., 2013). It might be that judges are less affected by apologies than the victims themselves because they are repeat players who hear many apologies, and because as a third party they do not feel the need to reciprocate in the same way a victim would (Rachlinski et al., 2013).

7.6.2 Moral Character and Punishment

Expressions of remorse influence our evaluations of the wrongdoer in part because we continually, if unconsciously, evaluate the type of person the wrongdoer is, to try to interpret the social meaning of the wrong. In everyday social interaction, we engage in snap judgments of moral character for purposes of self-preservation: we need to know whom we can trust and whom we cannot. Misreading character can mean being cheated or worse, and so people are both motivated and skilled at sizing up the moral character of other people.

Sometimes, however, the heuristics we use to size people up—for example, physical attractiveness—are either unreliable or normatively undesirable, or both. In experiments on the influence of physical attractiveness in the context of criminal trials, defendant physical attractiveness exerts a small effect on both judgments of guilt and punishment (Mazzella and Feingold, 1994). These effects are inconsistent, however, and can vary with other factors such as strength of the evidence (Beckham, Spray, and

Pietz, 2007; Erian et al., 1998). Outside of the trial context, there is some evidence that physically attractive defendants receive lower bail than less attractive ones (Downs and Lyons, 1991). Victim attractiveness can influence judgments as well; observers consider the death of a physically attractive woman to be more unjust and deserving of more punishment than the death of a less attractive woman (Callan, Powell, and Ellard, 2007).

Just as physical appearance can influence judgments of blameworthiness, so can perceptions of general virtuousness. In the absence of compelling evidence to prove guilt, juries sometimes use the fact of the defendant's prior criminal record as a reason to convict (T. Eisenberg and Hans, 2009). This is especially true when the prior crimes are similar to the current accusation (Greene and Dodge, 1995; Lloyd-Bostock, 2000; Wissler and Saks, 1985).

The influence of prior crimes is just a special case of the general impulse to size up individuals in terms of their goodness or badness. When perceiving persons, we immediately decide whether their intentions toward us are good, and how competent they are to carry out their intentions (Fiske, Cuddy, and Glick, 2007). We also use that information to make decisions about how blameworthy an actor is. Inferences about character drive judgments of responsibility, blame, and even causation (Alicke, 1992, 2000; Alicke and Yurak, 1995; Nadler, 2012; Nadler and McDonnell, 2012). Thus, a speeding driver who crashes into another car is seen as more responsible and causal when the reason for his speeding was to get home quickly to hide drugs from his parents, rather than to hide an anniversary present from his parents (Alicke, 1992). Similarly, the owner of oxygen tanks is judged more responsible and causal in the wake of an accidental explosion when the person storing them is using them to cheat at football, rather than to care for his sick child (Nadler and McDonnell, 2012). Bad motives are one source of inferring bad character, but they are not necessary. Even mildly negative personality traits spur inferences about character that influence blame judgments. For example, a woman who carelessly fails to supervise her unruly dogs is blamed more for an ensuing death if she is asocial and has an unhealthy lifestyle, compared to if she is highly social and has a healthy lifestyle (Nadler and McDonnell, 2012). Similarly, a ski resort worker who accidentally crashes into and kills another skier is seen as more responsible for the death if he is an unreliable worker who leads a slothful lifestyle, compared to if he is a reliable worker and leads an active lifestyle (Nadler, 2012).

The moral character of victims can also influence blame judgments. Harm to innocent victims induces more blame than harm to dangerous criminals, or victims perceived as tainted in other ways. Thus, for example, a person who shoots a stranger in his house is blamed more when the victim turns out to be his daughter's boyfriend than when the victim is a burglar, even when holding constant the shooter's perceptions of danger (Alicke, Davis, and Pezzo, 1994). A woman's allegedly questionable moral character (e.g. drinking, drug use, premarital sex, respectability) disadvantages her throughout the justice process and leads to more victim blaming as well as lighter punishment (Burt and Albin, 1981; C. Jones and Aronson, 1973). If they question a woman's moral character, prosecutors are less likely to file charges in the first place (Spohn et al., 2001). Additionally, convictions are less likely and sentences are shorter when a woman's sexual

history is mentioned, even if she is relatively inexperienced (L'Armand and Pepitone, 1982). Another set of studies examined *civil* sexual assault cases, both naturalistically and experimentally, and found victim moral character to be influential there as well (Shen, 2011).

7.6.3 Punishment, Mental State, and Moral Reasoning

Two prevalent normative theories of punishment in the legal literature are retribution (or “just deserts”) and utilitarianism (specific or general deterrence, as well as incapacitation and rehabilitation) (Hart, 2008; Ten, 1987). While much philosophical ink has been spilled debating these opposing views, only recently have researchers systematically investigated the psychological influence of deterrence and retribution motives on people’s punishment judgments. The results indicate an interesting division: in the abstract, people explicitly endorse utilitarian goals (e.g. successful deterrence leading to crime reduction), but when presented with a specific scenario, they consistently choose to impose retributive punishments (Carlsmith, 2008). This evidence suggests that people are intuitive retributivists, making judgments based on intuitions about just deserts, though these intuitive judgments can sometimes be overridden by more reasoned considerations (see Carlsmith and Darley, 2008 for a review). At the same time, the reasoning process itself may be oriented toward retribution: when an array of different information is made available, participants are more likely to choose to obtain information about moral severity and other retributive factors, rather than information relevant to utilitarian aims (Carlsmith, 2006; Carlsmith, Darley, and Robinson, 2002). Indeed, certain consequentialist moral decisions, despite being socially approved, give rise to the inference that the agent making or carrying out the decision is of inferior moral character (Uhlmann, Zhu, and Tannenbaum, 2013). For example, deciding to sacrifice one life to save multiple lives can lead to negative character inferences about the agent, even though the decision is regarded as morally correct (Uhlmann et al., 2013).

Restorative justice goals are also intuitively appealing in some cases. In contrast with retribution, restorative justice aims to repair the harm that was caused through processes in which the offender, victim, and perhaps community members determine an appropriate reparative sanction (Bazemore, 1998; Braithwaite, 2002). This justice goal is compatible with retribution; when given a choice, even for severe crimes, most participants choose a consequence with both retributive and restorative components over consequences that fulfill only one of those goals (Gromet and Darley, 2006). Because people have an intuitive desire to punish, retribution is their default response to wrongdoing. However, participants are significantly more likely to think to incorporate restorative goals when their attention is drawn to the effects of the harm on the victim or the community (Gromet and Darley, 2009).

Another potential punishment motive is to restore the social standing of the victim. Expressive theories of punishment posit that punishment communicates rules and social norms (Duff, 2011; Durkheim, 2014), and sends a message to victims, offenders,

and third parties alike, which announces and corrects the wrong that was committed. Thus, criminal punishment involving identifiable victims can function as a device that communicates how valued and respected the victim is (Hampton, 1988; 1994). Punishment can serve to reset the status quo by expressing that the victim is valuable enough to justify the spending of resources to detect, prosecute, and punish the offender who has harmed her (Bilz, 2014). Bilz (2014) has shown experimentally that both victims and third parties perceive punishment as raising the victim's social standing, and failure to punish as lowering it.

These punishment goals are generally discussed in the context of criminal law, because criminal offenses classically require the intersection of a culpable mind (*mens rea*) and a culpable act (*actus reus*). In the American criminal justice system, the culpable mind has arguably been even more dominant than the culpable act in determining criminality, as those with guilty minds but incomplete wrongful acts may be charged with criminal attempt or conspiracy, while a civil suit in tort was seen as the appropriate remedy for a harm caused without intent (Darley and Pittman, 2003; Keeton and Dobbs, 1984). Both retributivist and utilitarian goals depend, to some extent, on the *mens rea* requirement. Only those who, as a matter of personal choice, violate societal prohibitions should be subject to the government's retributive arm—the system of criminal justice. Additionally, those who do not act intentionally might not be deterred through threat of punishment (Levenson, 1992). Given its centrality to judgments of guilt, it is important to understand how people assess *mens rea*, and whether these assessments align with the law.

Both criminal and civil law distinguish various culpable states of mind, for example negligence, recklessness, knowledge, and intent (see Model Penal Code §2.02; Restatement (Second) of Torts § 8A). These codifications assume that jurors and judges perceive culpable mental states in a way that allows them to reliably classify them into these categories, which may seem a tall order when one considers that not even courts are always consistent in drawing distinctions between culpable states of mind (Simons, 1992). In everyday life, people constantly make inferences about other people's mental states, and the extent to which these assessments are aligned with the MPC (Model Penal Code) categories is an important empirical question. Within the context of the justice system (and perhaps in all social perception; see Malle and Holbrook, 2012), intentionality is the fundamental mental state. The literally vital role of assessing intentions ("is that person friend or foe?") leads to the primacy of these judgments (Fiske, Cuddy, and Glick, 2007). Because negative intentions are relatively common and are perhaps more important to note, we are quick to infer intentionality, so that when a negative outcome occurs, we are more likely to believe that an intentional agent was present (Morewedge, 2009; Rosset, 2008), and we perceive harmful side effects of an action as more intentional than helpful side effects (Knobe, 2003).

Research on lay perceptions of legally culpable states of mind has yielded mixed results. Severance, Goodman, and Loftus (1992) found that participants were quite poor at distinguishing mental states, and could only reliably separate intentional and negligent harms. By contrast, Robinson and Darley (1995) found that intuitions about

liability and punishment generally tracked Model Penal Code state of mind categories. In a cross-cultural study, assessments of state of mind differed strongly across harm vignettes (a potential issue in itself); nevertheless, in three out of four scenarios, people's inferences did not comport well with MPC categories (Levinson, 2005). Interestingly, in this study, Chinese participants systematically inferred greater state of mind culpability than American participants. Other research has suggested that collectivist cultures, including the Chinese, give more weight to situational factors than dispositional factors when explaining behavior (e.g., Morris and Peng, 1994); however, these studies do not specifically assess perceptions of culpability or responsibility.

More recently, a set of studies by Shen and colleagues suggests that people blame and punish in line with the MPC categories of blameless, negligent, and purposeful, but that they are poor at distinguishing knowing and reckless states of mind (Shen et al., 2011). They point out one real-world consequence of this difficulty: being found guilty of a reckless killing versus a knowing killing can be the difference between a two-year and a forty-eight-year sentence. In a set of follow-up experiments, these researchers found that modifying the language in the MPC definitions can improve the ability to correctly categorize recklessness (Ginther et al., 2014). These improvements in recognizing recklessness did not, however, correspond with differentiation in punishment between knowing and reckless crimes, suggesting that ordinary citizens do not perceive a clear moral distinction presupposed by the MPC.

Assessments of intentionality are also influenced by motivation (Mueller, Solan, and Darley, 2012; Ditto, Pizarro, and Tannenbaum, 2009). For example, when told that a more serious penalty depends on whether the employer intentionally harmed an employee, mock jurors are willing to perceive a minimally culpable state of mind (i.e. negligent), or a minimal perception of risk (3%), as an intentional harm (Mueller, Solan and Darley, 2012). At the same time, when asked to categorize the employer's state of mind on a five-point scale based on MPC categories, 88% of these participants accurately identified negligent behavior, and 96% accurately identified reckless behavior. These results indicate that even in situations where people are able to categorize mental states accurately, these nuanced distinctions may be overridden by their attributions of moral culpability and desire to punish a wrongdoer.

Some researchers have suggested that neuroscientific techniques will be the future of assessing mental states (Meixner, 2012; Meixner and Rosenfeld, 2014; Eggen and Laury, 2012; Farah, 2005). However, there is general agreement that the state of the art does not yet meet evidentiary standards for this purpose (Meixner, 2012; Brown and Murphy, 2010). The neuroscience underlying credibility assessment and other mental state tools has not yet reached the standards that Daubert requires for admissibility. Realistic field tests have not yet been undertaken. And while there have been advances in fMRI techniques that allow for general assessment of current mental states while in the scanner (e.g. decoding what stimulus a person was viewing or imagining) (see Haynes and Rees, 2006 for review), methods are far from being able to accurately pinpoint past mental states (Brown and Murphy, 2010; Jones et al., 2009). It is also important to keep in mind that bad reasoning is more likely to be overlooked when neuroscience data—even

irrelevant information—is also presented (Weisberg et al., 2008), and that many reports about the capabilities of neuroscience often gloss over critical nuances (Satel and Lilienfeld, 2013). Fortunately, the viewing of brain images by jurors deciding criminal liability does not in itself appear to have biasing effects—the influence of brain images, if any, tracks the influence of conventional neuroscience expert testimony (Roskies, Schweitzer, and Saks, 2013).

7.6.4 Motivation and Moral Reasoning

When decision-makers have a preference regarding the outcome, they sometimes engage in biased processing of information to make it more likely that their desired outcome is attained (Kunda, 1990). Motivated cognition permits individuals to reach outcomes they desire while allowing them to maintain the illusion that they are acting objectively (Ditto, Pizarro, and Tannenbaum, 2009; Kunda, 1990; Pyszczynski and Greenberg, 1987). Earlier, we discussed evidence that people engage in motivated mind reading when assessing mental states (Mueller, Solan, and Darley, 2012), but this is one instantiation of a much broader phenomenon. It is likely that jurors' cognitive processes are influenced by their motivations across a wide variety of judgments. For instance, Sood and Darley (2012) found that people's desire to punish behavior they view as morally offensive (e.g. going to the supermarket in the nude) changes their perceptions of the harmfulness of that behavior, but only when a finding of harm is required for liability. As a general matter, most people perceive that someone going to the supermarket in the nude is not harmful, though they still find it objectionable. However, when they are told that the harm principle requires that an action must be harmful to be criminalized, participants rate that behavior as more harmful. Thus, people reach the outcome they desire by perceiving the underlying behavior in a way that supports the outcome. The researchers provide further support for a motivational account, rather than a more extensive objective mental search, by showing that participants are more likely to report harm in a situation where they disagree with the nude shopper's ideological viewpoint, compared to when they agree (see also Nadler, 2014; Kahan et al., 2012; Sood, 2013).

Motivated reasoning can also operate when people assess the magnitude of harm, sometimes even emerging in rapid subjective assessments. For example, participants in a laboratory experiment were told that their partner could choose for them to receive an electric shock, or to hear a set of tones (Grey and Wegner, 2008). In the intentional condition, the participant received a shock and was told that was the option their partner chose; in the unintentional condition, the participant received a shock and was told that their partner chose the other option of hearing the tones, but the opposite task was assigned unbeknownst to their partner. Participants who received intentional shocks experienced them as significantly more painful than those who received unintentional shocks. The extent to which harm is intended therefore seems to influence the perceived meaning of that harm, which in turn influenced the experience of pain itself.

Intentional harms can also influence jurors' evaluation of damages. In one set of experiments, people quickly viewed a series of damage amounts resulting from a river drying up (e.g. "crops destroyed: \$759.87") and later were asked to estimate the sum total of damages (Ames and Fiske, 2013). When the damage was caused intentionally (a man upstream diverted the river) participants inflated their estimate, whereas those who were told that the harm was unintentional were quite accurate in their assessment. This effect persisted even when the victims did not know that they had been harmed, when the harm-doer was caught and punished, and when participants were financially incentivized to accurately estimate the amount of damages. This harm inflation effect was mediated by blame motivation: the extent that participants wanted to blame, morally condemn, and punish the offender predicted their overestimation of the harm done. This suggests that any characteristic of the harm-doer that inspires greater blame motivation can cause overestimation of harm (Pizarro et al., 2006).

7.7 SUBSTANTIVE LAW: PROPERTY AND CONTRACT

Up until this point, we have examined how social psychology illuminates legal processes (jury, judge, police, and employer decision-making, negotiation, and interrogation), as well as the basic building blocks for the legal system (morality, blame, and punishment). But social psychology also can contribute a great deal to the understanding of legal rules and how they operate in the social world. In this section we focus on the social psychology of two fundamental building blocks of Anglo-American law—property and contract.

7.7.1 Property Law

In many cultures, people perceive the ability to own property as an extremely important value. For example, 70% of Americans agree with the statement that "The right to private property is sacred" (Nadler, Diamond, and Patton, 2008). Owning property feels good psychologically; accordingly, owners of property are more reluctant to give up what they already have than non-owners are to try to acquire identical property (Kahneman, Knetsch, and Thaler, 1990). This is known as the endowment effect and is discussed in Chapter 5 of this volume. One prominent theory about why the idea of property is sometimes perceived as sacred is that some types of property enable us to develop a sense of self (Radin, 1982). According to this theory, certain objects like wedding rings, heirlooms, and houses feel like part of ourselves, and sometimes feel irreplaceable.

Homes are one example of property that can be tightly bound with personhood, and, interestingly, certain legal doctrines arguably reflect this idea. For example, the United

States Supreme Court has held that although warrantless arrests in public are in some circumstances permissible, warrantless arrests in the home are not (*Payton v. New York*, 1980). Similarly, searches of the home can generally only be conducted with a search warrant, even though searches of other types of property can often be conducted without a search warrant (*Kyllo v. US*, 2001). The castle doctrine, which derives from English common law principles that are several hundreds of years old, holds that a person who is attacked in his home need not retreat and is permitted to use deadly force if necessary to defend himself (*New York v. Tomlins*, 1914). Some courts have held certain conduct to be permissible in the home even though that conduct is otherwise prohibited (e.g. possession of guns, marijuana, and obscene materials) (Barros, 2006).

As appealing as the personhood theory of property is, empirical research on it and virtually any other psychological aspect of property is sparse (Blumenthal, 2009). Studies focusing on the home confirm the notion that the home is an important source of security, privacy, and freedom (Barros, 2009). It might be that people are less attached to the physical structure of their home than to the personal effects in it and the social networks around it (Barros, 2009), but these ideas have not yet been empirically examined.

One important legal context dealing with the psychological connection to the home is the doctrine of eminent domain, which permits the government to forcibly take property in exchange for monetary compensation. The idea that the government is empowered to take homes seemed to be understood by most people at some level, but many people assume that these takings could only be for when they were necessary to accomplish an important government purpose, such as building a highway or a school (Nadler, Diamond, and Patton, 2007). Much of the public was shocked and dismayed, then, when the U.S. Supreme Court ruled in *Kelo v. City of New London* (2005) that a local government was permitted to designate a neighborhood for economic redevelopment and take the homes within it so long as it provided monetary compensation to the homeowners. The case generated a considerable amount of attention in the press, and the reaction was overwhelmingly critical, regardless of political ideology, current homeownership status, and the like (Nadler, Diamond, and Patton, 2007). Experimental studies of government takings demonstrate that although the law of eminent domain does not recognize distinctions among property owners beyond those reflected in the fair market value of the property, public sensibilities include more (Nadler and Diamond, 2008). For example, taking land from owners who had owned the land for a long time was seen as more problematic than taking from more short-term owners. This was especially true if the purpose of the taking was seen as less socially justified (building a shopping mall vs. building a children's hospital) (Nadler and Diamond, 2008).

Outside of the context of homes, there are some circumstances in which people are reluctant to assign a monetary value to property, especially when that property has symbolic value. For example, people resist the idea of trading their wedding ring for an identical one, even in exchange for monetary compensation (Medin et al., 1999). Attitudes toward the fungibility of symbolic property appear to depend on the reasons given. In one study, researchers examined attitudes toward President Bill Clinton's invitation to important donors to stay in the Lincoln Bedroom in the White House. One possible

rationale is sending a message to future donors that they will be guaranteed an invitation; another is that these particular donors were good friends, who back you up in a big way when times are rough, and the invitation is simply a way of returning the favor and building trust. Anti-Clinton partisans were largely unaffected by the rationale for the invitations. Pro-Clinton partisans' reactions depended on the rationale: specifically, they were less likely to feel outraged when a friendship rationale was invoked than when a market rationale was invoked (McGraw and Tetlock, 2005). In general, relational framing of property can dramatically alter perceptions of its fungibility.

7.7.2 Contract Law

Economic theory assumes that people are motivated by rational wealth maximization and nothing else. Thus, law and economics scholars argue that promisors are indifferent between performance and breach, and that if a promisor can make any extra money from breaching a contract, she will do so. As a descriptive matter, these assumptions are sometimes undermined by non-monetary values like reciprocity, fairness, and promise keeping. Parties to contracts behave in accordance with shared community norms, which shape what they think the law of contracts entails (Wilkinson-Ryan, 2012). People tend to assume that the applicable legal rule is the one that matches their intuitions. For example, about one-third of Americans believe that there is a legal duty to assist someone in distress; this percentage is constant regardless of whether the applicable law in the state imposes this duty or not (Darley, Carlsmith, and Robinson 2001). With regard to contracts, people tend to believe that all terms are legally enforceable (even though not all types of clauses are) (Stolle and Slain, 1997), and that specific performance and punitive damages are common remedies (they generally are not) (Wilkinson-Ryan, 2010).

Parties to contracts imbue those contracts with morality, even when the law governing the contract does not reflect that morality. Most people think of a contract as a kind of promise, and that breaking a contract is a moral violation deserving of punishment over and above the damages associated with the breach (Wilkinson-Ryan and Baron, 2009). The promise-keeping framework that governs most people's perceptions of contract obligations sometimes leads to a hesitance to breach even in cases of efficient breach (Wilkinson-Ryan, 2010). Indeed, the non-breaching party often feels "suckered" by breach, and the anger and embarrassment felt leads to inflated damages assessments (Wilkinson-Ryan and Hoffman, 2010). Norms of fairness govern the behaviors of contracting parties. People are more willing to breach a contract when they perceive the other party to have behaved badly—such as walking away from an underwater mortgage after it came to light that the bank harmed communities with subprime loans (Wilkinson-Ryan, 2011). Selling a contract weakens its moral force: parties are less likely to perform in the face of economic incentives to default when the contract is assigned (Wilkinson-Ryan, 2012). Taken together, these findings do not mean that legal rules need to change to reflect intuitions; but they do shed light on when and why parties behave in ways that the law does not always predict.

Legal instinct and common sense supply only part of what is needed for understanding how law operates in the world. Economic theory supplies another crucial layer of understanding. But psychological science, and in particular the scientific study of the thinking and behavior of people in the social world, rather than the thinking and behavior of “rational” or “ideal” actors, can help us create more effective laws and procedures for enforcing those laws. The scientific study of social thinking, social influence, and social relations has brought into relief the many ways in which legal processes and rules must operate within the social world. Traditionally, research in law and psychology focused on a relatively narrow domain of topics, and the work engaged to a very limited extent with the substance of legal doctrine. In the last few decades, enormous strides have been made in the use of psychological science to examine a much broader array of legal questions.

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