

JUST DESERTS: NARRATIVE, PERSPECTIVE, CHOICE, AND BLAME

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Narrative has never been merely entertainment for me. It is, I believe, one of the principal ways in which we absorb knowledge.¹

I. INTRODUCTION

Narrative can be subversive. The framing of narrative, therefore, carries profoundly political implications. Put differently, the terms of narrative are prizes in a pitched conflict among groups attempting to describe their social reality, constitute their social identity, and vindicate their social existence. Understanding the stakes of narrative in this way underscores the vital importance of battered women's self-defense work² and explains much of the stubborn resistance to this work. For as

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1. Toni Morrison, *The Nobel Lecture in Literature*, 1993.

2. Following Professor Elizabeth Schneider, I use the phrase "women's self-defense work" to denote "legal work on issues of sex-bias in the law of self-defense and criminal defenses generally." Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 197 n.9 (1986). As Professor Schneider goes on to note: "The question of the admissibility of expert testimony on battered woman syndrome has been the primary legal issue which appellate courts have addressed

much as anything, criminal trials (which, like all trials, consist of highly ritualized and formalized storytelling) are battles over the terms of narrative.

Two of the fundamental elements of any narrative are context and perspective—how much of the story gets told and from whose point of view. Knowing the truth of the old legal adage that “he who frames the issue wins on the merits,” each party to a legal dispute seeks to frame the dispute’s context and perspective to his or her own advantage. The state in criminal cases typically seeks to frame context and perspective narrowly, so that the focus is limited to the isolated criminal incident, and the perspective from which the incident is viewed is limited to that of the dominant race, class, and gender. To this end, the state employs three methodological devices. First, it seeks a narrow time frame that excludes evidence about events leading up to the criminal incident.³ Second, it seeks to exclude evidence about the social, cultural, and economic conditions surrounding the incident.⁴ Third, it seeks to define the reasonable person standard—the standard that tells the fact finders whose perspective they should adopt in assessing the facts—so that the defendant’s personal history and attributes are rendered irrelevant.⁵

in the area of women’s self-defense work.” *Id.* at 200.

3. For example, in the landmark self-defense case of *State v. Wanrow*, the trial judge—administering a pro-prosecution jury instruction containing a narrow time restriction—directed the jury to evaluate the reasonableness of the defendant’s fear of the decedent only in light of circumstances occurring “at or immediately before the killing.” 559 P.2d 548, 555 (Wash. 1977). The Supreme Court of Washington held that the trial judge erred in limiting the time frame in this way, stating that “self-defense is to be evaluated in light of *all* the facts and circumstances known to the defendant, including those known substantially before the killing.” *Id.*

4. An example of a social condition that prosecutors would prefer fact finders not to hear about in self-defense cases involving battered women is the lack of adequate protection from courts and police for battered women. As Professors Schneider and Jordan note: “Women are forced to defend themselves against abuse because they do not receive adequate protection from the courts or from the police.” Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN’S RTS. L. REP. 149, 151 (1978). Economically, moreover, “many women are forced to remain with their husbands out of economic necessity.” *Id.* at 152.

5. In *Wanrow*, the defendant’s counsel challenged the lower court’s self-defense jury instruction on the ground that it did not fully include the woman’s perspective. The part of the instruction relating to perspective and privileging the male point of view read as follows:

However, when there is no reasonable ground for the person attacked to believe that *his* person is in imminent danger of death or great bodily harm, and it appears to *him* that only an ordinary battery is all that is intended, and all that *he* has reasonable grounds to fear from *his* assailant, *he* has a right to stand *his* ground and repel such threatened assault, yet *he* has no right to repel a threatened assault with naked hands, by the use of a deadly weapon in a deadly manner, unless *he* believes, and has reasonable grounds to believe, that *he* is in imminent danger of death or great bodily harm.

Conversely, defendants often want the fact finder to evaluate the criminal incident within a broad time frame; in view of its broader social, cultural, and economic realities; and from the perspective of someone like the defendant. Generally, traditional criminal law doctrine has sided with the state by dictating that courts narrowly frame context and adopt the dominant perspective. Nevertheless, despite stubborn resistance from traditional scholars and some courts, Professor Elizabeth Schneider and other pioneers in women's self-defense work have succeeded in helping defendants frame their narratives broadly enough to do justice to the fullness of their circumstances and experiences. After briefly reviewing the ways women's self-defense work challenges traditional legal efforts to strictly discipline defendants' narratives, I shall trace the roots of the conservative, complacency-inducing assumptions that perpetuate racial, sexual, and class domination.

II. FRAMING THE NARRATIVE BROADLY IN WOMEN'S SELF-DEFENSE WORK

Women's self-defense work challenges the restrictions on narrative inscribed in traditional criminal law doctrine in two crucial respects. First, women's self-defense work presses criminal law doctrine to depart from its dominant tendency to focus narrowly on the criminal incident.⁶ Specifically, women's self-defense work presses criminal law doctrine to broaden its time frame to take account of earlier events leading

559 P.2d at 558. Citing the threat to equal protection inherent in the failure to include a woman's perspective in the law of self-defense, the Supreme Court of Washington noted:

[This instruction] leaves the jury with the impression the objective standard to be applied is that applicable to an altercation between two men. The impression created—that a 5'4" woman with a cast on her leg and using a crutch must, under the law, somehow repel an assault by a 6'2" intoxicated man without employing weapons in her defense, unless the jury finds her determination of the degree of danger to be objectively reasonable—constitutes a separate and distinct misstatement of the law and, in the context of this case, violates the respondent's right to equal protection of the law. The respondent was entitled to have the jury consider her actions in the light of her own perceptions of the situation, including those perceptions which were the product of our nation's "long and unfortunate history of sex discrimination."

Id. (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)). As Professors Schneider and Jordan note about this decision by the Supreme Court of Washington in *Wanrow*: "This application of a woman's perspective to the law self-defense is a watershed in judicial recognition of women's right to self-defense." Schneider & Jordan, *supra* note 4, at 157.

6. See, e.g., Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 643 (1981) (citing GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* (2d ed. 1961)) ("Ordinarily, we judge criminal liability at the moment the crime occurs. . . . The origin of a decision to act criminally is ordinarily of no concern.").

up to the criminal incident, such as the abuser's history of threats and physical abuse, the escalation in violence over time, and the woman's efforts to reduce her and her children's exposure to further violence. Moreover, women's self-defense work presses criminal law doctrine to consider the contextual obstacles to a woman leaving a battering relationship, such as economic necessity; the frequent inability of police, restraining orders, and even shelters to protect battered women; and the high incidence of separation assault in which efforts to leave trigger more severe or lethal reactions by abusers.⁷

Second, women's self-defense work stresses the importance of assessing the woman's decisions and actions from the perspective of someone in her position. That is, it urges that the defendant's conduct be judged against an individualized standard of reasonableness in which the fact finders ask themselves whether an ordinary person "in the shoes of the defendant" could have reacted as she did. The so-called "objective" test of reasonableness, which courts sometimes tell fact finders to employ in evaluating the defendant's reactions, directs the fact finders to assess the defendant's situation from the perspective of an average person drawn from the general population. The "objective" test, therefore, is a bed of Procrustes⁸ that directs fact finders to *ignore* the special attributes of the defendant—such as a post-traumatic stress disorder or an enhanced capacity to predict the behavior of her partner—which she developed from her history of abuse.⁹

7. See Schneider & Jordan, *supra* note 4, at 152 (noting that "[the] high and deadly incidence of wife-assault must be viewed with an understanding that many women are forced to remain with their husbands out of economic necessity or fear of retaliation. These problems are compounded by the shamefully few resources available to shelter battered women."); see also Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (analyzing the phenomenon of lethal separation assault and the social circumstances in which it arises).

8. In the classroom, I refer to the so-called "objective" approach to reasonableness as the problem of the Procrustean bed. In Greek mythology, Procrustes was a highwayman who waylaid unsuspecting travelers and dragged them to his lair, where he bound them to his bed. Although the abducted travelers came in many different sizes, Procrustes's bed came in only one. If a hapless traveler proved too short for his host's bed, Procrustes racked and stretched him into conformity; too long, Procrustes lopped off the offending extremities. In the end, the diversity of dimensions that the different travelers embodied was reduced to blank uniformity.

9. A battered woman who kills in a "nonconfrontational" situation (i.e., a situation in which the decedent did not pose an imminent threat of death or serious bodily injury to the defendant) may make two quite distinct claims of reasonableness. (Contrary to popular perceptions, only about 20% of the situations in which the defendant kills her abusive spouse can be characterized as "nonconfrontational"; in most cases the defendant was actually under attack by her abusive spouse when she resorted to deadly defensive force. Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 379

III. NARRATIVE, CONSENT, AND BLAME

Traditional legal scholars and conservative courts oppose defendants' efforts to broaden and individualize their narratives because they fear the potential impact of such considerations on our ability to treat the defendant's "choice" to violate the law as truly "free." For traditional scholars must posit "free choice" to get their justifications of criminal punishment off the ground. To punish a person, according to these theorists, we must first determine that he or she is blameworthy. In the words of Professor George Fletcher, a leading traditional scholar: "(1) punishing wrongful conduct is just only if punishment is measured by the desert of the offender, (2) the desert of an offender is gauged by his character—i.e., the kind of person he is, (3) and therefore, a judgment about character is essential to the just distribution of punishment."¹⁰ Normally, we can infer a blameworthy character from a decision by the actor to break the law. But the inference from bad act to bad character only holds if the defendant's decision or choice to break the law was free. If the defendant's choice was determined by external forces, that choice does not tell us what kind of person he or she is. Thus, "if a bank teller opens a safe and turns money over to a stranger, we can [normally] infer that he is dishonest. But if he does all this at gunpoint, we cannot infer anything one way or the other about his honesty."¹¹ And if we do not know what kind of person he is, we

(1991)). The first claim maintains that she should be *excused* for errors in judgment attributable to the psychological disorders induced by her plight. The second claim maintains that her conduct was rational, and hence *justified*, in view of the objective obstacles that she faced; that is, she was justified in killing her batterer in a nonconfrontational situation in the same way that a hostage would be justified in killing the armed guard who inadvertently drops off to sleep.

Professor Elizabeth Schneider points out that expert testimony on battered woman syndrome may address both of these claims. Expert testimony about "learned helplessness" and the psychological disorders induced by the abusive relationship taps an excuse theory of self-defense. In contrast, expert testimony about the objective obstacles to leaving—including "separation assault" (the often lethal escalation in violence that many women suffer when trying to leave a battering spouse) and the police's and courts' failure to protect women from ongoing abuse—suggests that the defendant's responses were rational and perhaps justified. See Schneider, *supra* note 2, at 202-03; see also Mahoney, *supra* note 7, at 80-82 (discussing how testimony on separation assault may sometimes support the excuse-based claim by explaining why the woman would stay in the battering relationship long enough to develop "learned helplessness"). Some feminists have cautiously criticized the learned helplessness element of battered woman syndrome for its tendency to promote stereotypes of women as passive, submissive, helpless, and irrational. *Id.* at 37-43; Schneider, *supra* note 2, at 207 & n.68; Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623 (1980).

10. GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* § 10.3 (1978).

11. *Id.*

cannot blame him. Before we can condemn, therefore, we must conclude that the defendant's choices were free.

Once we see how the dominant theory of blame and punishment hinges on free choice, we also see why context and perspective are so hotly contested in criminal trials. The more we ignore the events leading up to a choice, the more we disregard the social realities surrounding the choice, and the more we refuse to take account of particular attributes of the person making the choice, the more likely we are to judge the actor's choice free—and vice versa. An extraordinarily telling illustration of the relation between our evaluation of a person's choice or consent and the amount of information we have about the context of that "choice" comes from *O'Brien v. Cunard S.S. Co.*,¹² a century-old decision that appears in several torts casebooks in the chapter on the defense of consent to a claim for battery.

Ms. Mary O'Brien sued Cunard Steam-Ship Company for personal injury resulting from a smallpox vaccination she received from the ship's surgeon while emigrating from Ireland to the United States. One of Ms. O'Brien's claims against the surgeon and company was for battery, an intentional, unprivileged infliction of harmful or offensive contact. The defendants raised the defense of consent, which, if proven, would defeat her claim. Consent is legally established if Ms. O'Brien manifested consent; that is, if a reasonable person in the shoes of the surgeon would have believed that Ms. O'Brien was actually willing to be vaccinated. Both the trial and appellate courts in *O'Brien* weighed the circumstances of Ms. O'Brien's vaccination and ruled that it was so obvious that she had manifested consent that reasonable minds could not differ. Thus, the courts did not permit Ms. O'Brien to get her case to a jury of her peers (more than a few of whom would have been Irish); instead, they ruled that she consented to the vaccination as a matter of law.

When my students first read the court's opinion in *O'Brien*, most wholeheartedly endorse the court's conclusions. Given the way the Supreme Judicial Court of Massachusetts frames Ms. O'Brien's story, it is easy to see why. According to the court, on the day Ms. O'Brien was vaccinated "about 200 women passengers were assembled below" deck. The surgeon lined them up, examined each for a mark, inoculated all those who had no marks, provided each a card, and let them go back on deck. Signs were posted around the ship stating that only vaccinated

12. 28 N.E. 266 (Mass. 1891).

persons could freely land, and that anyone aboard ship who failed to prove that they had been vaccinated (proof of vaccination could consist of a mark from a previous vaccination) must be vaccinated by the ship's surgeon or else face a fourteen-day quarantine on shore. In the court's view, no one "assembled below" objected, and everyone's conduct evinced a desire to take advantage of the surgeon's services. I quote the most crucial part of the court's version of the transaction:

By [her] testimony, . . . it appears that . . . when her turn came she showed him her arm; he looked at it, and said there was no mark, and that she should be vaccinated; that she told him she had been vaccinated before, and it left no mark; "that he then said nothing; that he should vaccinate her again;" that she held up her arm to be vaccinated; that no one touched her; that she did not tell him she did not want to be vaccinated; and that she took the ticket which he gave . . . and used it at quarantine.

Thus summarizing the record, the court held that all reasonable minds must agree that Ms. O'Brien freely chose to be vaccinated; that is, she consented.

For my students, the most compelling part of the court's story is where Ms. O'Brien "held up her arm to be vaccinated" when the surgeon, without touching her, said that he "should vaccinate her again." "What more compelling proof of consent to such a procedure can there be," my students query, "than for a person to hold up her arm without ever saying she does not want to be inoculated?" The court's finding of consent seems obvious to the point of banality once we adopt its narrative.

Before informing my students of key aspects of the narrative that the court left out, I correct a basic and commonplace flaw in the students' logic. "Just because one submits to the demands of another does not mean that the person consents to those demands, does it?" I query rhetorically. "If someone points a gun at you and says 'you should give me your wallet,' you would not say that your act of handing over your wallet—your choice to give him the wallet rather than risk a bullet—was a consensual act, a free choice, would you?" The students immediately comprehend that focusing too narrowly on a transaction without considering its context undermines clear thinking about consent and choice. To be sure, at the instant I hand over my wallet to the assailant, I am "actually willing" to part company with it—I may be choosing the lesser of available evils, but at the moment of transfer I am exercising choice. If we narrowly freeze-frame the transaction at the moment of transfer and crop out the rest of the context, my act

looks perfectly intentional, consensual, and freely willed. This interpretation of the transaction dissolves, however, as soon as we broaden the time frame and attend to more of the context.

I then draw on the trial record and attorneys' briefs in *O'Brien* to supply my students with the context that the court's opinion leaves out. From the trial record we learn that Mary O'Brien was a seventeen year-old Irish emigrant traveling with her father and younger brother to Boston in steerage, the cheapest possible accommodations on a passenger ship. Ms. O'Brien was poor, unsophisticated, and not very educated (she did not understand the meaning of the terms "quarantine" and "vaccinate" when she read them on the signs posted around the ship).

The steerage steward told the 200 Irish women steerage passengers who were on deck that they had to go below into steerage, without telling them why. (At another point, the male Irish steerage passengers were told to go down into steerage and were "hosed down before they knew what was to be done.") There was only one way out of the steerage area, a door at the top of a staircase. At the middle of the staircase was a landing occupied by the doctor and two steerage stewards. There was no other exit. The women were lined up in such a way that they could not leave until they had been examined. One of the steerage stewards stood in front of the door leading to the deck so that no one could leave without the surgeon's order.

Mary O'Brien, separated from her father for the first time, nervously avoided getting in line until all the other women had been examined by the doctor and passed through the door leading to the deck. She was left standing alone—this member of a despised "race"¹³—in a

13. Peter Quinn sums up the prejudices confronted by Irish immigrants like Ms. O'Brien as follows:

Today the sense of the Catholic Irish as wholly alien to white, Christian society seems, perhaps, difficult to credit. But in mid-19th-century America the inalterable otherness of the Irish was for many a given. . . . Although eugenics was still a generation away, the theory of Irish racial inferiority was already being discussed. In 1860, Charles Kingsley, English clergyman and professor of modern history at Cambridge University, described the peasants he saw during his travels in Ireland in Darwinian terms: "I am daunted by the human chimpanzees I saw along that hundred miles of horrible country . . . to see white chimpanzees is dreadful; if they were black, one would not feel it so much, but their skins, except where tanned by exposure, are as white as ours."

Three years later, in 1863, Charles Loring Brace, the founder of the Children's Aid Society and a prominent figure in the American social reform movement, published a book entitled *Races of the Old World*. Drawing on the claims of Anglo-Saxon racial superiority found in popular historical works such as Sharon Turner's *History of the Anglo-Saxon* and John Kemble's *The Saxon in England*, Brace located the cause of Irish mental deficiency in brain size, a measurement that

dim narrow passageway, surrounded by three insistent men clothed in authority. She told the doctor that she had been vaccinated before. He retorted that she “must” be vaccinated. (Although the court’s opinion states that the doctor said that she “should” be vaccinated, Ms. O’Brien testified that he said she “must” be vaccinated.) In such a situation, is it so obvious that Ms. O’Brien’s compliance with the surgeon’s command expressed her free will that reasonable minds cannot differ? If I am surrounded by three menacing figures in a dark alley and informed by one that I must (or even “should”) hand over my wallet, is it incontrovertably obvious that my compliance with the “request” expressed my free will?

My students find these additional narrative facts sobering and disquieting. Sobering because the additional facts indicate a threatening and coercive situation, marked by a menacing show of force and an absence of options for Ms. O’Brien. Disquieting because the additional facts reveal a picture very different from the one conjured in the court’s decontextualized opinion. My students learn early the power of narrative and the capacity of courts to achieve a desired outcome by manipulating the terms of narrative. The notion of law as a body of universal rules that determine the outcomes of disputes becomes problematic for them when they see that the framing of legal narrative determines these outcomes at least as much as the underlying substantive rules. Because few rules exist for how judges should frame narratives, this means there is a great deal of indeterminacy and room for bias at the heart of the legal process. *O’Brien* gives many of my students their first taste of the fruit of the tree of realist legal knowledge—a fruit that for some is bitter and disenchanting, but for others is ripe with the promise of deeper insight.

IV. THE FUNDAMENTAL FAULT LINE: INTENTIONALISM VERSUS DETERMINISM

Thus, the battle over context and perspective really boils down to a battle over how we should think about choice. And the battle over alternative conceptions of choice, in turn, is really a battle over intention-

served for Victorian ethnologists as an iron indication of intelligence: “The Negro skull, though less than the European, is within one inch as large as the Persian and the Armenian. . . . The difference between the average English and Irish skull is nine cubic inches, and only four between the average African and Irish.”

Peter A. Quinn, *Closets Full of Bones: Racism and Anti-Immigration*, AMERICA, Feb. 18, 1995, at 10.

alist versus determinist explanations of human behavior. By intentionalism I mean the principle that people freely choose their actions and thus are completely responsible for what they do. By determinism I mean the principle that human behavior can be understood as the product of prior causal events. For the determinist, the human animal is enmeshed in a web of sometimes compelling, sometimes subtle, and often unconscious influences that renders talk of any kind of pristine free choice vacuous.

Much of the resistance to women's self-defense work stems from worry over the subversive implications of openly acknowledging the deep connections among context, perspective, and choice. Acknowledging the connections among context, perspective, and choice weakens the purely intentionalist approach to criminal incidents by inviting a more searching investigation of the harsh circumstances that may have conditioned a defendant's "decision" to violate a legal norm. But admitting that criminal acts may be determined (at least partially) by unjust environmental pressures undermines our ability to self-righteously demonize people who commit crimes, challenges the presumed link between blame and punishment, and compels us to reconsider the cruelty of the punishments we mete out. Is it any wonder, then, that mainstream commentators panic at the proposal of even modest determinist doctrines in the criminal law?

A revealing example of the exaggerated panic determinist discourse strikes in the heart of traditional criminal scholars can be found in their reaction to Professor Richard Delgado's modest proposal that the criminal law should recognize an excuse for persons whose crimes were induced by coercive persuasion, popularly known as brainwashing.¹⁴ Under Delgado's proposal, the defense was to be limited to persons whose mental state had been forcibly altered by brutal external pressures applied by a powerful captor.¹⁵ Moreover, the defense could not be invoked by someone who voluntarily joined the group that allegedly brainwashed him or whose condition could otherwise be attributed to some "choice" on his part.¹⁶

Despite the limited scope of Delgado's proposal, Professor Joshua Dressler's warned that recognizing such an excuse threatened the collapse of the entire system of criminal blaming! According to Dressler,

14. Richard Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Defendant*, 63 MINN. L. REV. 1, 11 (1978).

15. *Id.* at 19-22.

16. *Id.* at 20-21.

recognizing Delgado's excuse would put us on a slippery slope, inevitably leading to the recognition of a universal excuse based on the influence of external circumstances on an accused's choice.¹⁷ Dressler ends his apocalyptic critique by chiding Delgado for ignoring the dire implications of his revolutionary suggestion.¹⁸

My first thought upon reading Dressler's exaggerated rebuke of Delgado's modest proposal took the form of a paraphrase of a line from Shakespeare—the gentleman doth protest too much. In other words, such overreactions to very limited determinist proposals bespeak the sway of ideology. I shall identify some such concerns later.

My second response was a deepened sense of awe at the achievements of advocates for battered women, for these advocates had to overcome this kind of obdurate opposition to determinist perspectives before they could get courts to admit evidence of "battered woman's syndrome."¹⁹ Finally, my third response was to canvass mentally the numerous determinist doctrines the law has recognized for many years without precipitating the collapse of the entire system of criminal blaming. For example, the commentary to section 2.09 of the Model Penal Code explains the operation of duress doctrine with the following illustration by Professors Kadish and Paulsen:

(a) X is unwillingly driving a car along a narrow and precipitous mountain road, falling off sharply on both sides, under the command of Y, an armed escaping felon. The headlights pick out two persons, apparently and actually drunk, lying across the road in such a position as to make passage impossible without running them over. X is prevented from stopping by the threat of Y to shoot him dead if he declines to drive straight on. If X does go on and kills the drunks in order to save himself he will be excused [under duress doctrine] if the jury should find that "a person of reasonable firmness in his situation would have been unable to resist," although he would not be justified under the lesser evil principle of [necessity doctrine].²⁰

X's choice in this hypothetical to kill the people lying across the road rather than sacrifice himself is deemed to be determined. Whenever a court recognizes a defense of duress, it is acknowledging that a person cannot be condemned for choosing to break the law until more is known about the roots of his or her choice. And to assess the roots of

17. Joshua Dressler, *Professor Delgado's "Brainwashing" Defense: Courting a Determinist Legal System*, 63 MINN. L. REV. 335, 342-43 (1979).

18. *Id.* at 360.

19. At least insofar as the evidence supported an *excuse* rather than *justification* approach to the defendant's claim of self-defense. See *supra* note 9.

20. MODEL PENAL CODE § 2.09 cmt. 3 (1985).

his or her choice, the time frame must be broadened beyond the moment of the criminal incident itself and the choice evaluated in view of the context in which the criminal incident occurred.

Provocation is another determinist doctrine courts routinely recognize. For instance, a husband or wife who discovers a spouse in the act of committing adultery and kills the spouse or paramour may seek to reduce his or her criminal liability from murder to voluntary manslaughter. At the moment of the killing, the defendant intends²¹ to kill the spouse, but courts hold that "in spite of the existence of this bad intent the circumstances may reduce the homicide to manslaughter."²² Again, provocation doctrine directs fact finders to look behind the decision to kill to its causes,²³ and to ask whether the circumstances leading up to it would excite the passion of a reasonable person. If they answer yes, then the killing is partially excused.

What drives these and other determinist doctrines is the insight that in certain cases decision makers cannot make the usual inference that a person is blameworthy from the fact that he chose to break the law.²⁴ These excuses turn on the recognition that the defendant's extraordinary circumstances drove a wedge between his contingent self—the self that came forward under the unjust pressures of the situation in which he found himself—and some underlying "true" self that could have manifested itself but for those unjust pressures.²⁵ As Martin

21. LaFave & Scott note that "there is a minority view, expressed in an occasional case and in a few manslaughter statutes, to the effect that the passion must be so great as to destroy the intent to kill, in order to accomplish the reduction of the homicide to voluntary manslaughter." LAFAVE & SCOTT, CRIMINAL LAW 572-73 (1972).

22. *Id.* at 572.

23. In discussing the provocation doctrine as it existed at common law, the Model Penal Code commentaries state that "[p]rovocation is thus properly regarded as a recognition by the law that inquiry into the reasons for the actor's formulation of an intent to kill will sometimes reveal factors that should have significance in grading." MODEL PENAL CODE § 210.3 cmt. 5(a).

24. "The distinguishing feature of excusing conditions is that they preclude an inference from the act to the actor's character." FLETCHER, *supra* note 10, § 10.3.1, "[a]t most, therefore, provocation affects the quality of the actor's state of mind as an indication of moral blameworthiness. . . . [Provocation doctrine] is a concession to human weakness and perhaps to non-determinability, a recognition of the fact that one who kills in response to certain provoking events should be regarded as demonstrating a significantly different character deficiency than one who kills in their absence." MODEL PENAL CODE § 210.3 cmt. 5(a).

25. Mark Kelman, *Reasonable Evidence of Reasonableness*, 17 CRITICAL INQUIRY 798, 802 (1991). Professor Kelman articulates the rationale underlying excuse claims in self-defense cases as follows:

There is an implicit wedge between our contingent character—the character we have developed living the actual life we have lived—and some hypothesized "true" character that ought to be the basis for moral and legal judgment. So long as the juror believes that he

Wasik puts it, in cases of duress, "the accused claims that there was no act by *him*."²⁶ By this logic, it is unfair unconditionally to condemn someone for the behavior of his contingent self, for the responses of this unduly influenced self do not tell us anything about the defendant's "true" character.²⁷ And we must ascertain an individual's true character before we can hold him fully responsible for criminal acts.

This rationale neatly explains the determinist doctrines that the courts recognize; but what courts and commentators do not adequately explain is why these doctrines are so strictly limited. Generally, courts strictly cabin the duress defense by requiring that the defendant face immediate and specific threats, usually of death or severe bodily injury,²⁸ and that the threats come from specific human agents who seek to compel the defendant to commit the particular crime for which he is charged.²⁹ Professors Kadish and Paulsen illustrate the strictness of these restrictions on the duress defense in the following variation on their earlier hypothetical:

(b) The same situation as above except that X is prevented from stopping by suddenly inoperative brakes. His alternatives are either to run down the drunks or to run off the road and down the mountainside. If X chooses the first alternative to save his own life and kills the drunks he will not be excused under [duress doctrine] even if a jury should find that a person of reasonable fortitude would have been unable to do otherwise.³⁰

From the standpoint of the defendant's blameworthiness (the sine qua

too would have [made the same mistakes] the defendant did if exposed to the same external forces, he cannot judge her harshly, for nothing of the defendant's "true" character, the character freed from the influence of unjust pressures, has been revealed.

Id.

26. Martin Wasik, *Duress and Criminal Responsibility*, 1977 CRIM. L. REV. 453, 453; see also *State v. Woods*, 357 N.E.2d 1059, 1066 (Ohio 1976) ("The essential characteristic of coercion . . . is that force, threat of force, strong persuasion or domination by another, necessitous circumstances, or some combination of those, has overcome the mind or volition of the defendant so that he acted other than he ordinarily would have acted in the absence of those influences."), *vacated in part*, 438 U.S. 910 (1978), and *overruled on other grounds by State v. Downs*, 364 N.E.2d 1140 (1977), *vacated in part*, 438 U.S. 909 (1978).

27. See *infra* note 41 and accompanying text (discussing Professor George Fletcher's contention that the distinguishing feature of excusing conditions is that they preclude an inference from the act to the actor's "true character").

28. See, e.g., *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952); *Nall v. Commonwealth*, 271 S.W. 1059 (Ky. 1925).

29. See, e.g., *People v. Richards*, 269 Cal. App. 2d 768 (Cal. Ct. App. 1969) (defendant cannot invoke defense of duress when parties threatening prisoner's life did not ask him to escape).

30. MODEL PENAL CODE § 2.09 cmt. 3.

non of just punishment for the retributionist), it is impossible to distinguish between these two hypotheticals. In both cases the defendant faces equally severe and immediate external pressures compelling him to commit the same crime. His decision to run over the people lying across the road tells us no more about his "true" character in the second hypothetical than in the first. And the following distinction between the two cases offered in the commentary to the Model Penal Code is embarrassingly strained: "In the former situation, the basic interests of the law may be satisfied by prosecution of the agent of unlawful force; in the latter circumstance, if the actor is excused, no one is subject to the law's application."³¹

V. INTENTIONALISTS AND DETERMINISTS SQUARE OFF ON "DISADVANTAGED SOCIAL BACKGROUND"

Why does the excuse of duress cause mainstream scholars to grasp at such threadbare distinctions to keep it rigidly restricted? The reason—openly confessed by mainstream academics³²—is because determinist doctrines like duress severely threaten the coherence and cogency of the intentionalist assumptions of ordinary criminal law discourse. Once we admit that decisions to break the law are sometimes blameless because those decisions are determined by preceding factors, and once we acknowledge that in some cases we must inquire into the roots of bad intentions and choices to evaluate blameworthiness, we naturally begin to wonder why we do not inquire into the roots of decisions to break the law in *all* criminal cases. Why not always broaden the time frame and consider the impact of background circumstances on a defendant's capacity to choose? For example, why not weigh the impact of a disadvantaged social background on a defendant's criminal behavior in all cases in which the defendant comes from such a background?

Judge David Bazelon proposed just such a defense, first in a separate court opinion in 1972³³ and then in a law review article in 1976.³⁴

31. *Id.*

32. See *supra* notes 17-18 and accompanying text; see also FLETCHER, *supra* note 10, § 10.3.1 ("It goes without saying that a person's life experience may shape his character. Yet if we excuse on the ground of prolonged social deprivation, the theory of excuses would begin to absorb the entire criminal law. . . . Now it may be the case that all human conduct is compelled by circumstances; but if it is, we should have to abandon the whole process of blame and punishment . . .").

33. *United States v. Brawner*, 471 F.2d 969, 1032 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part).

Judge Bazelon's proposal grew out of his assessment that a number of defendants suffered the same kinds of cognitive and volitional defects that constitute excuses in cases where mental illness is found, but that they could not meet some of the technical requirements of the definition of legal insanity. Upon further reflection, Judge Bazelon realized that the mental impairments afflicting these defendants were the product of social, economic, and cultural deprivations or of racial discrimination, rather than of a clinically defined mental illness. Accordingly, he proposed a jury instruction that would permit acquittal where the crime was caused by the defendant's disadvantaged background. Specifically, he would instruct the jury to acquit if it found that, at the time of the offense, the defendant's "mental or emotional processes or behavior controls were impaired to such an extent that he cannot justly be held responsible for his act."³⁵ Although Judge Bazelon did not expect that his new instruction would generate a flood of new acquittals,³⁶ he hoped the instruction would force jurors to confront the causes of criminal behavior and thus compel the community to own up to its responsibility for the crime and for the plight of the accused. In Judge Bazelon's words, "It is simply unjust to place people in dehumanizing social conditions, to do nothing about those conditions, and then to command those who suffer, 'Behave—or else!'"³⁷

Given the panicked reaction to Professor Delgado's carefully circumscribed brainwashing excuse,³⁸ it is not hard to imagine the thundering chorus of scholarly condemnation—still reverberating today—that greeted Judge Bazelon's disadvantaged social background excuse. The question, however, that none of Judge Bazelon's critics coherently answer is why (from a noninstrumental or just deserts perspective) courts can recognize the restricted determinism of duress or provocation but not the fuller determinism of the disadvantaged social background excuse. As far as what a person's choice does or does not reveal about that person's "true" character, what difference does it make whether his choice to do wrong is rooted in an immediate threat

34. David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976); cf. Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 LAW & INEQ. J. 9 (1985) (going beyond his earlier limited proposal of a "brainwashing" excuse to articulate a theory supporting a disadvantaged background excuse).

35. Bazelon, *supra* note 34, at 395-96 (quoting *Browner*, 471 F. 2d at 1032).

36. *Id.* at 398.

37. Bazelon, *supra* note 34, at 401-02.

38. See *supra* notes 17-18 and accompanying text.

from an armed assailant (restricted determinism) or a brutally abusive childhood (fuller determinism)? In pondering this question, we must fully contemplate the desperate plight of battered children: "Victims of child abuse are likely to be kids from poor and often profoundly twisted families. They live in nightmare worlds of filth and hunger and violence and extreme pain. Often their stories are case studies in unrelieved torment, sickening to hear about, sordid beyond belief.")³⁹

VI. GEORGE FLETCHER'S GLOSS

Professor George Fletcher, a leading exponent of the just deserts school of criminal punishment, offers as sophisticated an account as can be found of why the law should not recognize a disadvantaged social background excuse.⁴⁰ He makes several different arguments against a social deprivation excuse. He begins his first argument with the now familiar point that legitimate excuses arise from atypical circumstances that make it impossible for us to infer anything about the defendant's "true character" from his wrongful act.⁴¹ Then he says that "whether a particular wrongful act is attributable either to the actor's character or to the circumstances that overwhelmed his capacity for choice" is a question that can be answered in an either/or way.⁴² He contends that the problem with excuses based on social deprivation is that these excuses "interweave" these two distinct ways of accounting for wrongful behavior.⁴³

Merely asserting that wrongful acts can always be attributed either to a person's "true character" or to his circumstances (that is, to his "contingent character") does nothing to advance Fletcher's claim that we should ignore background conditions of deprivation in determining whether a wrongful act reveals someone's "true character." Could any of us presume to know the "true character" of a child who suffers unrelenting rape or torture throughout his childhood? Then

39. Bob Herbert, *See-No-Evil Mayors*, N.Y. TIMES, Jan. 8, 1996, at A11.

40. See FLETCHER, *supra* note 10, § 10.3.

41. *Id.* ("The distinguishing feature of excusing conditions is that they preclude an inference from the act to the actor's character. . . . Typically, if a bank teller opens a safe and turns money over to a stranger, we can infer that he is dishonest. But if he does all this at gunpoint, we cannot infer anything one way or the other about his honesty. . . . The same breakdown in the reasoning from conduct to character occurs in cases of insanity, for it is implicit in the medical conception of insanity that the actor's *true character* is distorted by his mental illness.) (emphasis added).

42. *Id.*

43. *Id.*

how can any of us presume to know that the wrongful acts of a former battered child reveals his "true character"?

And it is no answer to say that because not every former battered child commits similar wrongful acts, the wrongful acts of this particular battered child reveal his truly blameworthy character. For not every spouse who discovers adultery in progress kills the adulterous mate. (In fact, the law presumes that the ordinary person would never be provoked to take another life under any circumstances, which is why provocation is not a complete defense.)⁴⁴ Nevertheless, we view the decision to kill under such circumstances as significantly determined and thus partially excused because we think such circumstances make the ordinary person *more likely* to kill.⁴⁵ Hence, a defendant who appeals to excusing conditions in his defense does not have to prove that most people who were exposed to those same conditions would have committed a similar act. All the defendant has to show is that because of those excusing conditions, the wrongful act does not reveal his "true character."

Fletcher also tries to distinguish the restricted determinism reflected in traditional duress doctrine from the fuller determinism of a disadvantaged social background by asserting that someone like the former battered child was still free to chose the particulars of the crime he ultimately committed.⁴⁶ According to this argument, traditional sources of duress, such as the bank robbers in our earlier hypotheticals,⁴⁷ induce a person to commit a particular crime, such as turning

44. Provocation is said to be "adequate" if it would cause a reasonable person to lose his self-control. *Of course, a reasonable person does not kill even when provoked*, but events may so move a person to violence that a homicidal reaction, albeit unreasonable in some sense, merits neither the extreme condemnation nor the extreme sanctions of a conviction of murder. The underlying judgment is thus that some instances of intentional homicide may be as much attributable to the extraordinary nature of the situation as to the moral depravity of the actor.

MODEL PENAL CODE § 210.3 cmt. 5(a) (emphasis added).

45. See FLETCHER, *supra* note 10, § 4.2.1; Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1281-82 (1937) ("While it is true, it is also beside the point, that most men do not kill on even the gravest provocation; the point is that the more strongly they would be moved to kill . . . the less does [the actor's] succumbing serve to differentiate his character from theirs.").

46. FLETCHER, *supra* note 10, § 10.3.1 ("The circumstances surrounding the deed can yield an excuse only so far as they distort the actor's capacity for choice in a limited situation. The moral circumstances of an actor's life may account for some of his dispositions, but explaining a life of crime *cannot excuse particular acts* unless we wish to give up the entire institution of blame and punishment.") (emphasis added).

47. See *supra* notes 20 and 30 and accompanying texts.

over the bank's money to a stranger or running over unconscious people in the road. But a person's "nightmare world of filth and hunger and violence and extreme pain"⁴⁸ does not induce him to perpetrate the particular crimes he ultimately engages in. Thus, the wrongful act of the former battered child—because its particulars are chosen "freely"—is more blameworthy than the wrongful act of the victims of the bank robbers.

But the freedom to choose the particulars of a wrongful act does not necessarily make the actor more blameworthy. If the bank robber orders the teller to steal a getaway car on pain of dire consequences for the teller's infant daughter, the teller is not more blameworthy for succumbing to the robber's demands merely because he can "freely" choose the kind of car to steal and from whom to steal it. Nor is the driver more blameworthy for driving over two unconscious persons if the robber with the gun to his head lets him choose which of three precipitous mountain roads to take, all three of which contain two unconscious bodies. Similarly, a person under extraordinary pressures to commit crimes is not necessarily more blameworthy because he or she has some choice as to which crimes to commit and in what manner.

Perhaps recognizing the irremediable slipperiness of the distinctions between character and circumstances, and between choosing and not choosing the particulars of a crime, Fletcher resorts to popular assumptions, hoary conventions, and unabashed complacency for support. Because his argument here epitomizes the smugly conservative rhetoric that marks mainstream reactions to the disadvantaged social background excuse, I quote it in full:

The arguments against excusing too many wrongdoers are both moral and institutional. The moral or philosophical argument is addressed to the problem of determinism and responsibility in the standard cases of wrongdoing. *It is difficult to resolve this issue except by noting that we all blame and criticize others, and in turn subject ourselves to blame and criticism, on the assumption of responsibility for our conduct.* In order to defend the criminal law against the determinist critique, we need not introduce freighted terms like "freedom of the will." Nor need we "posit" freedom as though we were developing a geometric system on the basis of axioms. *The point is simply that the criminal law should express the way we live. Our culture is built on the assumption that, absent valid claims of excuse, we are accountable for what we do.* If that cultural presupposition should someday prove to be empirically false, there will be far more radical changes in our way of life than those expressed in the criminal law.⁴⁹

48. Herbert, *supra* note 39.

49. FLETCHER, *supra* note 10, § 10.3.

Fletcher's argument contains numerous deep flaws. First, his primary jurisprudential premise that the criminal law—or any other branch of the law, for that matter—should merely reflect popular assumptions and “express the way we live” is wrong. Popular assumptions sometimes reflect nothing more than ingrained stereotypes,⁵⁰ and the way we *actually* live may contradict our aspirations for the way we *ought to* live. To vindicate important values such as racial and sexual equality, courts frequently make decisions that challenge prevailing stereotypes⁵¹ and disrupt “the way we live.”⁵² In the words of Professors Lon Fuller and Melvin Eisenberg, “[t]he law has always to weigh against the advantages of conforming to the laymen's assumptions, the advantages of reshaping and clarifying those assumptions.”⁵³ If popular assumptions about personal responsibility contradict important moral norms (such as it is unfair to punish someone for a wrongful act unless it reveals his “true character”), it is within the province of the courts to focus the community's attention on the contradiction by recognizing an excuse that forces jurors, sitting as representatives of the community, to confront this contradiction in reaching their verdict.

Furthermore, Fletcher's point that “[o]ur culture is built on the

50. Expert testimony on battered women, for example, is designed to disabuse jurors of common but mistaken assumptions about battered women and battering relationships. As Elizabeth Schneider explains:

A battered woman who kills her batterer has to overcome special myths and misconceptions about battered women . . .

. . . Expert testimony can give the judge and jury information concerning the common experiences and characteristics of battered women in order to refute widely held myths and misconceptions concerning battered women that would interfere with judge or juror ability to evaluate the woman's action fairly. . . . Introduction of expert testimony is important because a battered woman who explains a homicide as a reasonable and necessary response to abuse in the home, threatens deeply held stereotypes of appropriately submissive female conduct and of patriarchal authority.

Schneider, *supra* note 2, at 201-02 (citations omitted); see also *People v. Torres*, 488 N.Y.S.2d 358, 362 (Sup. Ct. 1985) (“[S]pecialized knowledge would properly assist the jury in understanding the unique pressures which are part and parcel of the life of a battered woman, and, in this manner, enable the jury to disregard their prior conclusions as being common myths rather than informed knowledge.”). For a general discussion of the role of stereotypes in legal actions and the strategies courts should employ to minimize their impact, see Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995).

51. Expert testimony on battered women, for example, is designed to disabuse jurors of common but mistaken assumptions about battered women and battering relationships. See *supra* note 50.

52. See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954); *Roe v. Wade*, 410 U.S. 113 (1973).

53. LON L. FULLER & MELVIN A. EISENBERG, *BASIC CONTRACT LAW* 702 (5th ed. 1990).

assumption that, absent valid claims of excuse, we are accountable for what we do" is tautological. The argument merely states that "our culture holds actors accountable unless they are excused." But such a statement begs the fundamental question: What constitutes a valid claim of excuse, and does social deprivation qualify? If "our culture" is also built on the moral norm that only the blameworthy are justly punished (as Fletcher elsewhere says that it is),⁵⁴ then social deprivation might qualify as one of "our culture's" "valid claims of excuse."

Finally, his argument that "[i]t is difficult to resolve [the problem of determinism and responsibility] except by noting that we all blame and criticize others, and in turn subject ourselves to blame and criticism, on the assumption of responsibility for our conduct," ends up, in the words of Professor Mark Kelman, "as nothing more than the proud assertion of complacency."⁵⁵ As Kelman points out, "[i]t asserts no more than that 'our culture' (*whose* culture?) holds certain people accountable because that's what we have always done."⁵⁶ Disadvantaged and socially marginalized groups have especially good reason to regard such arguments with suspicion, for "what we have always done" has produced and continues to perpetuate their desperate plight.

VII. IDEOLOGICAL AGENDAS: ON DEMONS AND SCAPEGOATS

In the end, one must wonder what it is about determinist perspectives that compels otherwise able mainstream commentators like Fletcher to lapse into empty tautologies and proudly complacent assertions in seeking to refute them. I argue that the zealous advocacy of intentionalist perspectives, along with the inconsistent but vociferous denunciations of determinist ones, serves and reflects a host of ideological agendas. For purposes of this article I shall focus upon only two.

First, it is easier to rationalize the cruelty of our current punishment practices if we self-righteously condemn the men and women we either lock up or kill. To self-righteously condemn, however, we must first convince ourselves that we can divine the "true character" of the accused. If we humbly admit that we lack the omniscience to divine a person's "true character," especially when that person has lived through oppressive or brutally dehumanizing circumstances, we could give a more human face to criminals ("there but for the grace of God go I")

54. FLETCHER, *supra* note 10, § 10.3.1.

55. Kelman, *supra* note 6, at 647.

56. *Id.*

rather than demonizing them. Although we could still incarcerate individuals who harm others for the sake of deterrence or rehabilitation, we could no longer applaud hanging, shooting, electrocuting, or lethally injecting other human beings in the name of justice.

A second reason many shrink at determinist perspectives is that such perspectives shift the focus in a case from the individual actor to the harsh circumstances in which she found herself and to the fact that her crime may be (at least partly) attributable to those circumstances. Many start to squirm when responsibility for a problem is traced to social, economic, and political circumstances, because this implies that responsibility may ultimately rest with those of us who help maintain those circumstances. Many of us would rather scapegoat the victims of untoward circumstances than share any responsibility for their victimization and its consequences. An instructive example of this scapegoating tendency comes from a borrowed exercise I go through with my students.

Following Judge Guido Calabresi⁵⁷ (formerly dean at Yale Law School), I ask my students at a certain point in the course to imagine that each of them is the most powerful decision maker in a large community and that I am an Evil Deity. As the Evil Deity, I propose to them the following Faustian exchange: They can choose anything they want (I care not how hedonistic or idealistic, so long as it does not save lives), and in return I get to randomly execute one thousand of their most robust citizens in gruesome ways. When I ask how many of my students accept my offer, I generally get no takers and a measure of indignation that I could even make such an indecent proposal. Then I ask them to distinguish between the boon I just hypothetically offered and the automobile, which every year takes over forty thousand lives,⁵⁸ usually in gruesome, excruciating ways (not to mention the many thousands more who survive though disfigured, maimed, or incapacitated partly or wholly).

Students strive mightily to come up with distinctions, none of which really hold up under scrutiny, but one of which is directly relevant to choice and scapegoating. "In the hypothetical," they argue, "the powerful decision maker is responsible for the deaths rather than the victims because the decision maker alone cuts the deal with the devil and chooses the boon for everyone. But with cars the victims

57. GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW* 1-19 (1985).

58. Lisa Teachey, *Good News for Houston Drivers*, *Hous. Chron.*, Nov. 19, 1995, at A33.

choose the boon for themselves; the decision to get behind the wheel is a voluntary one. When people freely choose to run certain risks, they have to live with the consequences of their choices. If they are killed or injured, they have assumed those risks."

Accepting for the sake of discussion my students' assumption that free choice entails full responsibility, the problem is that choice can be so limited by circumstances as to be more illusory than real. We as a society cannot escape responsibility for maintaining circumstances that allow for only illusory choice. For example, social and economic existence in this society is now predominately organized around motor vehicles. Shopping, employment opportunities, and other core community activities are located in places that most people cannot reach without using some kind of motor vehicle. How real is a choice between gainful employment on the one hand, and not using motorized transportation on the other. Theoretically, a person could forswear all contemporary social and economic institutions, bid adieu to friends and family, and revert to a preindustrial existence herding sheep. However, we must stretch the meaning of "meaningful choice" beyond recognition to say that such options are consistent with free choice.

Moreover, we as a society are responsible for the limited range of options available to people who do not want to accept the boon of motor vehicles. Through our elected representatives (including zoning boards) and consumer behavior we make collective decisions about the construction and expansion of highways, the location of business districts, and the placement of shopping malls. How fair is it to create collectively a situation in which an individual's choice is so limited as to border on illusory and then point to that illusory "choice" as grounds for imposing full responsibility on the individual? To do so is to indulge in scapegoating.

Ugly scapegoating also infects popular perceptions of battered women. Hearing that a woman repeatedly "chose" to return to or stay in a battering relationship, some (perhaps many) conclude that she masochistically invited further beatings, or at least "assumed the risk" of them. In either case, she—and not her circumstances—is held fully responsible for her "choice" not to leave. And she alone is held responsible for the fatal consequences of her "choice." To consider the possibility that her choice was severely constrained or illusory requires us to factor her circumstances into our assignment of responsibility, which may ultimately mean accepting some responsibility *ourselves* for what happened to her and the person she killed. For example, assume that

(as often happens in these cases) the battered woman kept going back because of economic necessity, or out of fear for her safety and the safety of her children: Who is responsible for the discrimination against women in the workplace (especially mothers who cannot afford decent day care on depressed wages) that breeds such economic necessity? Who is responsible for the failure of courts and police to protect battered women who want to leave—a failure that results in thousands of stalkings and deadly separation assaults each year? Perhaps we as a society bear responsibility. But owning up to our collective responsibility for the plight of battered women deprives us of the moral purchase to self-righteously condemn them for their so-called choices.

VIII. CONCLUSION

My objective in this article has been to trace the deep connections between the struggle against domination inherent in the work of Professor Schneider and other pioneers of womens' self-defense work and the struggle against domination by advocates for other socially marginalized groups, especially impoverished minorities. I have argued that the common philosophical soil in which both these struggles against domination are rooted is the age-old tension between intentionalist and determinist perspectives on human behavior. My contention has been that the intentionalist perspective best serves the interests of the dominant group and thus this perspective is the one that traditional scholars have tenaciously defended, even while endorsing self-serving exceptions to intentionalism (e.g., duress and provocation) that redound to the benefit of the dominant group.⁵⁹ I have sought to point out the hopeless incoherence of purely intentionalist perspectives on criminal liability and to suggest just a couple ideological concerns that motivate the dogged denial of determinist perspectives by spokespersons for the dominant group. In the end, I hope that I have conveyed a sense of the profoundly political stakes of the framing of courtroom narratives and

59. The judges and legislators who administer the justice system do not stand behind a Rawlsian veil of ignorance that masks information about their own background when deciding which excuses to recognize. They already know that they do not have to worry about the emotional and psychological effects of a desperately impoverished and brutal social background, because the vast majority of them already have reached adulthood without having to face "nightmare worlds of filth and hunger and violence and extreme pain." In contrast, they are as likely as anyone to surprise a cheating spouse *in flagrante delicto* or encounter the various other short-run immediate pressures of the kind that constitute duress and provocation. Thus, it is in their interest to defend the excuses that may benefit them while dismissing excuses that involve pressures they are beyond the reach of.

the tremendous achievement of women's self-defense work in opening up those narratives in ways that reveal the domination that often subverts meaningful choice.