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978-0-521-51376-0 - The Mind of the Criminal: The Role of Developmental Social Cognition in Criminal Defense Law

Reid Griffith Fontaine

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THE MIND OF THE CRIMINAL

In American criminal law, if a defendant demonstrates that they lack certain psychological capabilities, they may be excused of blame and punishment for wrongdoing. However, criminal defense law often fails to consider the developmental science of individual differences in ability and functioning that may inform jurisprudential issues of rational capacity and criminal responsibility. This book discusses the excusing nature of a range of both traditional and non-traditional criminal law defenses and questions the structure of these defenses based on scientific findings from social and developmental psychology. This book explores how research on individual differences in the development of social perception, judgment, and decision making explains why some youths and adults develop psychological tendencies that favor criminal behavior, and considers how developmental science can guide the understanding of criminal excuses and affirmative defense law.

Reid Griffith Fontaine is assistant professor at the Florida State University College of Law. Professor Fontaine has published numerous peer-reviewed scholarly and scientific articles on the development of social-cognitive processing and anti-social conduct, which have appeared in many of the top behavioral science journals, including *Aggressive Behavior*, *Child Development*, *Development and Psychopathology*, *Developmental Psychology*, *Journal of Abnormal Psychology*, and *Journal of Abnormal Child Psychology*. His scholarly writings on intersections of developmental and social-cognitive psychology and public policy, jurisprudence, and law have been published in leading refereed interdisciplinary journals, such as *New Criminal Law Review*; the *International Journal of Law and Psychiatry*; and *Psychology, Public Policy, and Law*. In addition, two symposia on his scholarly writings on affirmative defense law have been published in the *University of Michigan Journal of Law Reform* and the *American Criminal Law Review*. Professor Fontaine received a Fulbright Senior Scholar award for the 2009–2010 academic year, which funded his visiting appointment at the University of Rome.

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The Mind of the Criminal

THE ROLE OF DEVELOPMENTAL SOCIAL
COGNITION IN CRIMINAL DEFENSE LAW

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*For my grandmother, Memé, who, through her unwavering wisdom,
love, and dedication to her family, has brought immeasurable
richness to our lives – my own, as a result, has been transformed
in ways in which words could do little justice.*

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Preface

The influence of empirical science data on Anglo-American lawmaking and judicial decision making has grown considerably during the last fifty years.¹ Increasingly, scholars and legal professionals have emphasized the importance of the social and behavioral sciences in policy and lawmaking, as well as how criminal jurisprudence and law may be informed by scientific psychology.² Although relatively underappreciated, recent scholarship has pointed to the potential value in the drawing from social-cognitive psychology (i.e., the science of how social factors influence human information processing, and how, in turn, cognitive processing mediates relations between environmental factors and human interpersonal behavior), particularly when studied from a developmental perspective, to answer critical empirical questions that are central to criminal jurisprudence and law.³

¹ Harold I. Schwartz & Robert Boland, *Using Science to Influence the Supreme Court on the Right to Refuse Treatment: Amicus Curiae Briefs in Washington v. Harper*, 23 BULL. AM. ACAD. PSYCHIATRY & L. 135 (1995); see Mark A. Small, *Advancing Psychological Jurisprudence*, 11 BEHAV. SCI. & L. 3 (1993).

² Reid G. Fontaine, *Disentangling the Psychology and Law of Instrumental and Reactive Subtypes of Aggression*, 13 PSYCHOL. PUB. POL'Y & L. 143 (2007) [hereinafter Fontaine, *Disentangling*]; Reid G. Fontaine, *Social Information Processing, Subtypes of Violence, and a Progressive Construction of Culpability and Punishment in Juvenile Justice*, 31 INT'L J.L. & PSYCHIATRY 136 (2008) [hereinafter Fontaine, *Social Information*]; Robert F. Schopp & Marc W. Patry, *The Guilty Mind and Criminal Sentencing: Integrating Legal and Empirical Inquiry as Illustrated by Capital Sentencing*, 21 BEHAV. SCI. & L. 631 (2003); Small, *supra* note 1, at 3; Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249 (1996); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003).

³ See, e.g., Fontaine, *Disentangling*, *supra* note 2; Fontaine, *Social Information*, *supra* note 2; Reid G. Fontaine, *The Wrongfulness of Wrongly Interpreting Wrongfulness: Provocation, Interpretational Bias, and Heat of Passion Homicide*, 12 NEW CRIM. L. REV. 69 (2009);

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The utility of social-cognitive developmental research (or, simply, developmental social cognition) in criminal jurisprudence and law does not lie in providing answers to questions of morality. For instance, science cannot answer the question of whether it is morally right or wrong to strike someone who has provoked you. However, science may generate important data that apply to empirical issues that are typically considered when the moral nature of an act, series of acts, or actor is judged. For example, science may be used to assess issues of perception and interpretation,⁴ judgment and decision making,⁵ emotional and psychophysiological arousal,⁶ rational capacity,⁷ intentionality and willfulness,⁸ instrumentality versus reactivity,⁹ motives and goals,¹⁰ and self-control.¹¹ These forms of functioning may bear considerable relevance for

Richard L. Wiener, Barbara A. Watts, & Dennis P. Stolle, *Psychological Jurisprudence and the Information Processing Paradigm*, 11 BEHAV. SCI. & L. 79 (1993).

⁴ E.g., Kenneth A. Dodge, Joseph M. Price, Jo-Anne Bachoroski, & Joseph P. Newman, *Hostile Attributional Biases in Severely Aggressive Adolescents*, 99 J. ABNORMAL PSYCHOL. 385 (1990); Jennifer E. Vitale, Joseph P. Newman, Ralph C. Serin, & Daniel M. Bolt, *Hostile Attributions in Incarcerated Adult Male Offenders: An Exploration of Diverse Pathways*, 31 AGGRESSIVE BEHAV. 99 (2005).

⁵ E.g., Kenneth A. Dodge & Joseph P. Newman, *Biased Decision-Making Processes in Aggressive Boys*, 90 J. ABNORMAL PSYCHOL. 375 (1981); Reid G. Fontaine, Virginia S. Burks, & Kenneth A. Dodge, *Response Decision Processes and Externalizing Behavior Problems in Adolescents*, 14 DEV. & PSYCHOPATHOLOGY 107 (2002); Reid G. Fontaine, Chongming Yang, Kenneth A. Dodge, John E. Bates, & Gregory S. Pettit, *Testing an Individual Systems Model of Response Evaluation and Decision (RED) and Antisocial Behavior Across Adolescence*, 79 CHILD DEV. 462, 462–63 (2008).

⁶ Craig R. Colder & Eric Stice, *Longitudinal Study of the Interactive Effects of Impulsivity and Anger on Adolescent Problem Behavior*, 27 J. YOUTH & ADOLESCENCE 255 (1998) (examining the effect of impulsivity on the relation between anger and problem behavior); Craig A. Smith & Richard S. Lazarus, *Appraisal Components, Core Relational Themes, and the Emotions*, 7 COGNITION & EMOTION 233 (1993); Jack V. Honk, Adriaan Tuiten, Edward D. Haan, Marcel V. Hout, & Henderickus Stam, *Attentional Biases for Angry Faces: Relationships to Trait Anger and Anxiety*, 15 COGNITION & EMOTION 279 (2001).

⁷ Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. LAW 289 (2003); see also Valerie F. Reyna & Susan E. Rivers, *Current Theories of Risk and Rational Decision Making*, 28 DEVELOPMENTAL REV. 1 (2008).

⁸ E.g., RATIONAL CHOICE AND CRIMINAL BEHAVIOR: RECENT RESEARCH AND FUTURE CHALLENGES (Alex R. Piquero & Stephen G. Tibbetts eds., 2002).

⁹ E.g., Nicki R. Crick & Kenneth A. Dodge, *A Review and Reformulation of Social Information-Processing Mechanisms in Children's Social Adjustment*, 115 PSYCHOL. BULL. 74, 84, 92 (1994); Fontaine, *Disentangling*, *supra* note 2.

¹⁰ E.g., Annemaree Carroll, Stephen Houghton, John Hattie, & Kevin Durkin, *Reputation Enhancing Goals: Integrating Reputation Enhancement and Goal Setting Theory as an Explanation of Delinquent Involvement*, in 4 ADVANCES IN PSYCHOLOGY RESEARCH 101 (Frank Columbus ed., 2001); Ulrich Orth, Leo Montada & Andreas Maercker, *Feelings of Revenge, Retaliation Motive, and Posttraumatic Stress Reactions in Crime Victims*, 21 J. INTERPERSONAL VIOLENCE 229 (2006).

¹¹ E.g., Charles R. Tittle, David A. Ward, & Harold G. Grasmick, *Self-Control and Crime/Deviance: Cognitive vs. Behavioral Measures*, 19 J. QUANTITATIVE CRIMINOLOGY 333 (2003).

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the case of assessing the morality – or, in legal terms, criminal culpability – of an alleged act.

Consider the killer who has been accused of first-degree murder. Did she kill her victim for personal gain or because she believed she had been significantly provoked? If she believed she was provoked, was her assessment of the nature and severity of the situation valid? Did she become so emotionally aroused that she was not fully rational when she committed the killing? Was she in control of her actions? Answers to these questions may be needed before a determination of the degree of criminal culpability can be realized. Developmental and social-cognitive research may be used to inform these and numerous related issues and, in this way, challenge and potentially reform theory and practice in criminal law.

Some of these issues of mental capacity and functioning have been examined in research programs in developmental social cognition (e.g., is reactive violence associated with a tendency to interpret certain types of social stimuli as hostile and intentionally harmful?). Others, although equally empirical by their nature, have either not yet been scientifically examined or require far more scientific substantiation before sound recommendations can be made (e.g., to what degree does moral disengagement follow a predatory versus reactive developmental path?). As such, scientific data may be used to guide certain scholarly discussions whereas hypotheses must be drawn to ignite the necessary science to guide others.

Historically, questions of empirical science such as these and numerous others, although of direct relevance to legal decision making and, more specifically, determinations of criminal culpability, have been addressed by philosophy. There is a plethora of questions that are, by their nature, philosophical and, as such, should be handled by moral and legal philosophers. However, questions that are naturally empirical should be examined and answered by empirical science. Although this may sound obvious, the practice of informing empirical questions of self-control, affect, rationality, and like topics central to criminal law doctrine with actual empirical science is only relatively recent. Increasingly, research on social-cognitive development has much to say about issues and debates in criminal law and may be used so that empirical matters of criminal capacity and functioning correctly rely more on the empirical science of developmental psychology.

This volume recognizes developmental social cognition and criminal law as an emerging interdisciplinary area of study that combines empirical psychological science with criminal law theory (and criminal justice policy) and explores the intersection of these historically separate scholarly traditions in a way that reveals some noteworthy implications for criminal jurisprudence and law. In its treatment of different ways in which social-cognitive research

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may have implications for criminal excuses in criminal law theory, this volume identifies and distinguishes between empirical possibility and substantiation. In this volume, not only is the state of social-cognitive inquiry clarified with respect to different issues, but guidelines for future research are introduced and examined.

The first two chapters of this volume present the principles and structural bases of criminal law and developmental psychology, respectively, on which subsequent chapters rest. Chapter 1 clarifies the jurisprudential foundations of American criminal law and emphasizes the goal of retribution to its function. Chapter 2 reviews several major research programs in developmental and social psychology and highlights several of their key contributions. These introductory chapters are referred to repeatedly throughout the volume as necessary, in reference to specific intersections between developmental social cognition and affirmative defense law.

In Chapter 3, I provide a discussion of the justification/excuse distinction in affirmative defense law. Whereas an objectively criminal act may be deemed *justified* when it is committed under conditions that provide the actor the right to perform it (such as in the case of one who defends herself with violence against a threatening attacker), it may, at best, only be *excused* when it is wrongful (i.e., not within one's rights to perform) and causes social harm. In such cases, the defendant may be excused of blame and punishment for her wrongful, harmful act if her capacity to act otherwise was compromised through no doing or allowance of her own (such as in the case of psychological dysfunction), or there is a basis on which to understand why she acted as she did (such as in the case of a reasonable mistake). In this chapter, rationality is identified as the key capacity on which social agents' personal responsibility and culpability for wrongdoing rest. I present the argument that criminal misconduct that results from nonculpable cognitive dysfunction may not serve as justification for blaming or punishing the defendant. Rather, a defendant should be excused of said (admittedly wrongful and harmful) conduct on this ground. Although there are legal conditions by which some criminal excuses function (e.g., insanity), I argue that affirmative defense law would be more consistently framed if it were to draw from scientific research in developmental social cognition.

Chapters 4 and 5 speak specifically to developmental conditions. In Chapter 4, the "developmental immaturity argument" is reviewed, by which it is asserted that, because juveniles have not developed psychologically and socially to the extent that adults have, they should not be held responsible to the same degree; as such, they should receive less severe punishments than adults who commit the same or like crimes. Maturity arguments on behalf of

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juvenile offenders (including those tried as adults) have drawn heavily from developmental science, although Chapter 4 points to areas of research in developmental social cognition, specifically, that have been neglected, and how more focused attention to this science may inform the moral debate about youth responsibility and juvenile justice policy.

Chapter 5 builds on this discussion of developmental immaturity and focuses on developmental *moral* cognition in the context of assigning blame and punishment to adult offenders who, for a variety of reasons, may not have developed the same capacities for moral understanding, reasoning, judgment, and decision making that other adults have. It is stressed that alternative developmental trajectories of moral cognitive deficits should be considered in legal determinations of wrongdoing. This perspective is considered in light of current debate about the role of psychopathy in determinations of criminal culpability, and is distinguished from, and places in question, the widely recognized defense of insanity.

Chapters 6 through 8 analyze defenses to reactive crime, with a focus on reactive homicide scenarios. In the behavioral sciences and, less formally, in the criminal law, recognition is given to a dichotomy of subtypes of violence and antisocial behavior. Whereas *instrumental* violence is carried out with a cool head for the purpose of personal gain (e.g., acquisition of money or power), *reactive* violence is enacted in response to an aversive stimulus, such as a provocation or a threat. Reactive violence (and crime) is typically more impulsive and emotional and is guided by one's interests of harming a provocateur or defending oneself or others against a threat.

Some scholars have drawn a parallel of the instrumental and reactive violence dichotomy in psychology and the murder-manslaughter distinction in criminal law. In fact, developmental social cognition has proven useful to understanding this area of homicide law and has received notable attention as of late.¹² Chapter 6 explores the defense of provocation/heat of passion, which functions to mitigate murder to manslaughter in the case of a defendant who is provoked and reacts by killing the provocateur in an emotionally disturbed and compromising state. This chapter pushes the debate to question how the defense may be reframed based on the considerable scientific evidence that reactive aggressive individuals typically have perceptual and judgment biases that hinder them from properly assessing social stimuli that are open or ambiguous as to their provocative content.

Chapter 7 builds from this discussion and considers the question: If research on judgment biases is relevant to possible law reform of the provocation/

¹² See, e.g., Fontaine, *Disentangling*, *supra* note 2.

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heat-of-passion defense, does it also have something important to say about other defenses of reactive crime? In particular, this chapter addresses how research on developmental social cognition may inform (1) cases of self-defense and defense of others that are based on mistaken threats and (2) the defense of duress. Traditionally, reactive killings in self-defense and defense of others have been treated as cases of *justifiable* homicide, even when the defendant was *reasonably* mistaken about the threat at hand. In this chapter, I discuss the value of developmental social cognition – in particular, the well-established finding that certain developmental conditions promote interpretational biases and deficits in some individuals – in considering cases of nonreasonable mistakes about threatening stimuli that result from nonculpable cognitive dysfunction.

In addition, Chapter 7 addresses a number of decision-making problems that may contribute to one's behavioral decisions and enactments in coercive or duress-promoting scenarios. Does research on developmental social cognition tell us something important about how meaningful the “reasonable firmness” requirement of the duress defense is to overwhelmingly threatening, coercive conditions? I explore this question, pointing to the critical role played by anxiety in such situations, and how social-cognitive mechanisms of anxiety may help scholars understand why some individuals are more likely to submit to a coercer's demands than are others.

In Chapter 8, I address perhaps the trickiest, most convoluted, and most controversial affirmative defense to “reactive” homicide – *battered-woman defense* (or, perhaps more appropriately, *battered-person defense*) – which, despite it having gained some acceptance in recent years, remains unrecognized in most jurisdictions. Here, I have “reactive” in quotes because some killings by chronically abused individuals are planned and committed in between battering incidents. In this chapter, I distinguish between killings by battered persons that should be deemed justifiable (such as in the case where there exists a constant “state of imminence”) and those that may only be excusable, at least in part because of the pervasive impairing psychological effects that often result from being repeatedly victimized in an escalating pattern of physical and emotional abuse. It is argued that an excuse-based defense to this latter category of killings by battered persons may be better understood in light of substantial developmental research on the processing effects of recurrent abuse and trauma. While historically proponents of battered-woman defense have discussed research on posttraumatic stress disorder, research on the development of abuse and social cognition has far more to offer.

Finally, some concluding thoughts are offered in Chapter 9. The importance of examining structural, functional, and phenomenological differences

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in instrumental and reactive violence subtypes in contexts that are specifically applicable to ongoing inquiry and debate in criminal law and jurisprudence is emphasized. Future directions for research are offered with an eye toward further intersection of social-cognitive research and criminal law and criminal justice policy.

I am grateful to numerous friends and colleagues who helped make this volume possible via their challenging discourse and critical commentary, as well as general support. Although not an exhaustive list by any means, I thank Professors Steve Asher, Marcia Baron, Vera Bergelson, Gian Vittorio Caprara, Dante Cicchetti, Michael Corrado, Phil Costanzo, Joe Hoffman, Kyron Huigens, Heidi Hurd, Len Kaplan, Leo Katz, John Lochman, Dan Markel, Michael Moore, Ron Roesch, Bruce Sales, Jim Sherman, Manuel Utset, and Bruce Winick. I am further grateful to Dean Don Weidner and the entire faculty at the Florida State University College of Law for their continued support of this project. Special thanks are in order for the following scholars who offered detailed commentary on sections and/or complete drafts of this manuscript as the project developed: Professors Gabriel “Jack” Chin, Ken Dodge, Joshua Dressler, Mark Fondacaro, Wayne Logan, Marc Miller, Stephen Morse, Chris Slobogin, Neil Vidmar, Bob Weisberg, and David Wexler. Also quite deserving of recognition are my three Florida State Law research assistants: Patrick Flemming – who took on a highly valued leadership role – Dominique Elden, and Michael Titus. Furthermore, I extend my sincere appreciation to my esteemed editor at Cambridge University Press, John Berger, who was nothing but patient and supportive from beginning to end. Finally, I am endlessly grateful to my family for their tremendous love and support. In particular, my wife, Andrea Julian Fontaine, a brilliant lawyer in her own right, quite selflessly edited significant portions of this volume, all while juggling her own work, creative projects, and, last but so very far from least, our newborn baby girl, Avery.

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