

PRACTICE ATTRIBUTIONAL CHARITY: COGNITIVE BIAS IN INTENTIONAL HOMICIDE LAW

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“The doers of evil present us with a . . . moral challenge[:] to see the good in those that do wrong. . . . A hard look at evil should humble us because what makes evil so frightening is not its strangeness, but its familiarity.”¹

I. INTRODUCTION.....	41
II. THE ARGUMENT.....	43
A. <i>The Protest</i>	44
B. <i>The Role of Cognitive Bias</i>	45
1. <i>Fundamental Attribution Error</i>	46
a. <i>What Fundamental Attribution Error Does Not Mean</i>	48
b. <i>What Do I Mean, Then?</i>	49
2. <i>The Protest Again</i>	55
III. THE PITCH.....	56
IV. RECOMMENDATIONS.....	58

I. INTRODUCTION

We are all much more creatures of circumstance than we like to admit, and that fact ought to make us humble. If our lives had been different, we could have been not just poorer, not just less well-educated, but actually criminal. Murderers, even.

Let me begin by putting you at ease. I am not going to argue that the influence of circumstances in general means we should not be held responsible for our actions. I am not going to argue for determinism, or even for relativism. This is just a plea, really, for empathy and for humility, but it is a plea for these qualities in abundance. Now comes the difficult part: I am asking for empathy and for humility even in the context of intentional killings.

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1. Samuel H. Pillsbury, *Evil and the Law of Murder*, 24 U.C. DAVIS L. REV. 437, 488 (1990).

If I succeed first in convincing you to extend your good graces to those lengths, then I would like to explore what that means for our criminal justice system in general, and for homicide law in particular. Ultimately, I would like to see if we can brainstorm some suggestions for societal changes that might actually reduce the number of intentional killings (and of other crimes as well). This is a work in progress, so I am sincerely looking for your ideas. Cynthia Lee suggested in her talk that changing cultural norms is a more effective method of achieving real change than simple legal reform, anyway, and I tend to agree with her.² So, please, brainstorm with me about what we can do—whether through law reform or through appealing to cultural norms.

In my next piece, I will be posing the following question. At first glance, it may seem to be one of those crazy, law professor hypotheticals that does not bear on the real world. Bear with me, if you would, though, because I am sincere in asking: What would be different if we truly embraced the idea that we might have been—more, that we may yet someday be—murderers?

If you cannot imagine yourself intentionally killing anyone, perhaps not even in state-sanctioned self-defense or on the military battlefield, much less killing someone unlawfully, then maybe you can imagine a killer who might have been, or may yet be, your family member or your friend. Imagine the next convicted murderer as anyone at all, as long as you consider that person to be part of your “in” group—someone you can identify with. Because if the circumstances in your life—in that person’s life—had been different, I think it really could have been. If circumstances change sufficiently, it may yet be.

“Now wait,” you might protest. “I’ll grant you that circumstances affect us all—no one seriously disputes that. But let’s not get carried away here.” And of course you are correct. I said I was not going to argue for determinism, and I meant it. I am a firm believer in personal responsibility, and I have explained my grounds for that belief elsewhere.³

So at this point, it is probably worth stating the obvious: some people overcome incredible hardship, and despite incredibly criminogenic circumstances, those people become wonderful, contributing members of society. In preparing for this talk, I thought immediately of three people who fit that description, just off the top of my head. In the interest of time, however, I will tell you briefly about only one of them.

When I was practicing in Boston, the local bar association assigned me to mentor a Boston University law student. We became friends, and she started to share more of her background with me. Not only was she the first person in her

2. Cynthia Lee, Charles Kennedy Poe Research Professor of Law, George Washington Univ. Sch. of Law, Panel 1 at the 2014, Texas Tech Criminal Law Symposium on Homicide (Apr. 4, 2014).

3. See, e.g., Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L.J. 197, 224 (2005) (“Although nature explains a certain amount of our behavior, and nurture explains a lot, as well, as long as we believe in free will, we must recognize the role of character and self-actualization.”).

family to go to college, much less the first to attend law school, she also spent almost every night of her childhood literally hiding in a basement closet while her brother, his gang friends, and their rival gang members shot at each other. She is now a well-paid lawyer at a large firm in Boston.⁴ And she is far from alone in her success story.⁵

So absolutely, we are more than our circumstances. Character counts. We can overcome. But overcoming is hard, and most of us, when called upon to fight against the tide, choose not to make waves.⁶ I am hoping, ultimately, that we can brainstorm together on two fronts. The first front is individual, training ourselves to fight harder against bad tides. The second front is structural, working harder to change those bad tides even before they begin to form.⁷

But both of those fronts are the topic of a future piece. Today, I would like to focus on convincing you of my premise: circumstances have a much greater influence on human behavior than we give them credit for. More specifically, even the most horrific murderer could just as easily have been one of us.

II. THE ARGUMENT

I know this is not an intuitively appealing premise, but I think it is an accurate one, so thank you for your patience in allowing me the opportunity to convince you. As I noted before, I readily agree that it is possible to overcome even horrific circumstances. However—and this is a serious “however”—I especially like the way Professor Abbe Smith responds to that very point. Professor Smith says, “Although victims do not always become perpetrators, a truism repeated by prosecutors at sentencing as if it were a profound revelation never before put into words, it is the rare serious perpetrator who was not also a victim.”⁸ Less artfully put: while it is possible to overcome horrific

4. Not that being a big-firm lawyer is everyone’s definition of “success,” but it is a very different place than where she began, and it strikes me as noteworthy that she made it from her point A to that point B.

5. See, e.g., James R. Silkenat, *Major Push for Diversity: ABA Scholarship and Other Programs Broaden Inclusion in All Areas of the Law*, A.B.A. J., Mar. 2014, at 8. “Eric Mackie . . . was expected by many to follow in his father’s footsteps and sell drugs for a living. . . . Graduating this year from law school, Eric says he hopes to use his JD to inspire more change in communities that others have deemed unchangeable.” *Id.*

6. If I may continue abusing a metaphor, see FRANK LOESSER, *Sit Down, You’re Rockin’ the Boat*, in *GUYS AND DOLLS* (1950).

7. I am actively soliciting your ideas on both of these fronts, the individual and the structural, so be thinking about it, if you would.

8. Abbe Smith, *The “Monster” in All of Us: When Victims Become Perpetrators*, 38 SUFFOLK U. L. REV. 367, 369 (2005). Professor Smith continues, “As a career indigent criminal defense lawyer, I live in the world of victims-turned-perpetrators. I am often more surprised by my damaged clients who do *not* commit serious, violent crimes than by those who do.” *Id.* (footnote omitted).

circumstances, horrific circumstances do have a marked effect. More to the point, that effect is larger than we are comfortable admitting.⁹

The truth is, the world is not really divided into “us” and “them.” We are all us—and we are all them, too. Professor Smith wrote, “My purpose . . . is to challenge the belief that there is a great divide between people to whom terrible things are done and people who do terrible things. They are often the same people.”¹⁰ It is but a small step to see that “they” could just as easily be “us.”

A. *The Protest*

Okay, so now you are all thinking that I am crazy. You cannot imagine yourself, or anyone you know, ever killing anyone. Well, some of you could do it if you were attacked and you had to defend yourself, or maybe only if you came home to see your child being murdered—you could kill then. But some of you are probably thinking you could not kill even under those most extreme circumstances. There is no way, you are thinking, that you or anyone in your in-group would ever commit an intentional killing.

You make a fair point. We have pretty well-developed executive function, most of us.¹¹ We have had a lot of help along the way, and controlling ourselves is something lawyers as a breed are very good at. So, from your privileged, autonomous, self-directed, and utterly emotionally composed seats, you ask me, why should you buy the premise that the next defendant in an intentional-homicide trial, the next person convicted of purposefully killing another human being, could be you, your friend, your family member? The members of your in-group all have much more well-developed senses of self-control than that.

9. This discomfort with the notion that we are not fully in control of our destinies comes through in all human endeavors. Ellen J. Langer, *The Illusion of Control*, 32 J. PERSONALITY & SOC. PSYCHOL. 311, 323 (1975); see also Shelley E. Taylor & Jonathon D. Brown, *Illusion and Well-Being: A Social Psychological Perspective on Mental Health*, 103 PSYCHOL. BULL. 193, 196 (1988). Indeed, “[w]hen manipulations suggestive of skill, such as competition, choice, familiarity, and involvement, are introduced into chance situations, people behave as if the situations were determined by skill and, thus, were ones over which they could exert some control.” Taylor & Brown, *supra*. Which would you prefer, to be the beneficiary of 50/50 odds that happened to fall in your favor, or to consider yourself to be a master coin tosser? Strange as it seems, the studies demonstrate us ascribing ourselves that “skill.” See *id.*

10. Smith, *supra* note 8, at 393 (footnote omitted).

11. See David S. Black et al., *Component Processes of Executive Function—Mindfulness, Self-Control, and Working Memory—and Their Relationships with Mental and Behavioral Health*, 3 MINDFULNESS 179, 180 (2011) (citing Gordon D. Logan, *Executive Control of Thought and Action*, 60 (2–3) ACTA PSYCHOLOGICA 193, 193–210 (1985)); Yana Suchy, *Executive Functioning: Overview, Assessment, and Research Issues for Non-Neuropsychologists*, 37 ANNALS BEHAV. MED. 106, 106–16 (2009). Executive function encompasses a variety of thought processes and behaviors, including “attention, planning, decision making, self-regulation of emotions, initiation of goal-directed behaviors, and *behavioral inhibition* as well as other higher-order cognitive processes.” *Id.* (emphasis added).

B. The Role of Cognitive Bias

My answer is that we are all vulnerable, but we do not realize it because of fundamental attribution error and other related cognitive biases. Malcolm Gladwell has written numerous bestsellers,¹² among them the book *Outliers*.¹³ The book reminds us of our fondness for a good “self-made man” story.¹⁴ You know how it goes: the protagonist comes from humble beginnings, but through his native intelligence and perseverance, he pulls himself up by his bootstraps and becomes wildly successful.¹⁵ The truth, Gladwell points out, is that no one is self-made.¹⁶

Gladwell begins his book with the story of Canadian hockey players and what seemed like an odd coincidence: the vast majority of them were born in the first few months of the year.¹⁷ But when he began to think about it, it was not such a strange coincidence after all.¹⁸ These were the best players in the country, presumably, and Gladwell offers a hypothesis that is heretical to adherents of the self-made-man heuristic: it is not solely to these players’ credit that they are the best of the best.¹⁹

In addition to individual merit, which no doubt these players had plenty of, there is what seems like the completely insignificant administrative decision of how to group the children. Eligibility in Canada runs on the calendar year (technically, January 1 is the cutoff date), so children who turned ten on January 2 play with and against those whose birthdays fall throughout the calendar year, right up through those born on the following January 1.²⁰ This means the ten-year-old who has been ten for a day is playing against the ten-year-old who has been ten for a year. At that age, especially, there is a tremendous difference in size, coordination, and other basics that matter to sports.²¹ So it is no wonder that in that environment, the older kids are better players than the younger ones. And it is no wonder that the better players get chosen first, get more praise, and then more practice opportunities and more training. And if their families spend time doing things to make this happen and

12. *E.g.*, MALCOLM GLADWELL, *BLINK* (2005) [hereinafter *BLINK*]; MALCOLM GLADWELL, *THE TIPPING POINT 3* (Little, Brown & Co. 2000) (2002) [hereinafter *TIPPING POINT*].

13. MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS 3* (2008) [hereinafter *OUTLIERS*].

14. *See, e.g., id.* at 18 (“[W]e assume that it is [the individual’s] personal qualities that explain how that individual reached the top.”).

15. *Id.* (“[O]ur hero is born in modest circumstances and by virtue of his own grit and talent fights his way to greatness.”); *see also id.* at 268 (“We are so caught in the myths of the best and the brightest and the self-made that we think outliers spring naturally from the earth.”).

16. *Id.* at 19 (“[T]hese kinds of personal explanations of success don’t work. People don’t rise from nothing. We do owe something to parentage and patronage.”).

17. *Id.* at 20–23.

18. *See id.*

19. *Id.* at 24.

20. *Id.*

21. *Id.*

it snowballs, then it is similarly no wonder those players are now better than the younger ten-year-olds who never had all of those advantages.²²

Gladwell's observation about eligibility cutoff dates and birthdays has come under some fire.²³ Regardless of the completeness of his hypothesis's ability to explain success in the world of sports, however, I would urge you that his underlying point is a valid one. Institutional structures—even those that seem like completely insignificant administrative decisions like eligibility cutoff dates for a child's hockey team—shape us in ways we do not see.²⁴

1. *Fundamental Attribution Error*

What is fundamental attribution error? Fundamental attribution error is the human tendency to attribute outcomes to personal character, rather than to circumstances.²⁵

One illustration arises in the realm of unconscious sex-discrimination research. In a study exploring fundamental attribution bias, sex, and emotion, male and female participants were asked to explain various emotional expressions by both men and women.²⁶ The study found that “[d]espite being given situational information to explain the emotional behavior on every trial, both male and female participants were more likely to judge that women's emotional behavior was caused by their emotional nature, whereas men's

22. *Id.* at 30–31. And just imagine, “[i]f all the Czech and Canadian athletes born at the end of the year had a fair chance, then the Czech and the Canadian national teams suddenly would have twice as many athletes to choose from.” *Id.* at 33.

23. Some commentators point out that Gladwell's hypothesis does not always hold true. *See, e.g.,* Benjamin G. Gibbs et al., *The Rise of the Underdog? The Relative Age Effect Reversal Among Canadian-Born NHL Hockey Players: A Reply to Nolan and Howell*, 47 INT'L REV. FOR SOC. SPORT 644, 648 (2012) (“When hockey success is defined as the most elite levels of play, the relative age effect reverses.”); John M. Grohol, *The Relative Age Effect in Sports: It's Complicated*, PSYCHCENTRAL (Mar. 23, 2013), <http://psychcentral.com/blog/archives/2013/03/23/the-relative-age-effect-in-sports-its-complicated/> (“Among the most elite hockey players, the effect completely reverses—it's better to be born later in the year if you want to become one of the great hockey players.” (emphasis omitted)).

24. OUTLIERS, *supra* note 13, at 28 (explaining that “[t]he small initial advantage that the child born in the early part of the year has over the child born at the end of the year persists,” and that this advantage “locks children into patterns of achievement and underachievement, encouragement and discouragement, that stretch on and on for years”). Note also the popularity of “redshirting” one's children educationally by holding them back a grade in order to get an educational advantage over their peers. Sam Wang & Sandra Aamodt, *Delay Kindergarten at Your Child's Peril*, N.Y. TIMES (Sept. 24, 2011), <http://www.nytimes.com/2011/09/25/opinion/sunday/dont-delay-your-kindergartners-start.html?src=me&ref=general> (“This [F]all, one in 11 kindergarten-age children in the United States will not be going to class. Parents of these children often delay school entry in an attempt to give them a leg up on peers . . . [in a] practice[] called redshirting. . .”).

25. John Sabini et al., *The Really Fundamental Attribution Error in Social Psychological Research*, 12 PSYCHOL. INQUIRY 1, 1 (2001) (“The tendency to underestimate the degree to which behavior is externally caused has been called the Fundamental Attribution Error. . .”).

26. Lisa Feldman Barrett & Eliza Bliss-Moreau, *She's Emotional. He's Having a Bad Day: Attributional Explanations for Emotion Stereotypes*, 9 EMOTION 649, 651 (2009).

behavior was caused by a situation that warrants it.”²⁷ The title of the publication says it all: “*She’s Emotional. He’s Having a Bad Day.*”²⁸

Popular culture also shares a perception, real or imagined, that fundamental attribution bias in assessing our own behavior varies according to sex. The point is amusingly made by Sheryl Sandberg, COO of Facebook and author of *Lean In*, in her TED talk:²⁹

[M]en attribute their success to themselves, and women attribute it to other external factors. If you ask men why they did a good job, they’ll say, “I’m awesome.” [Here, Ms. Sandberg inserts a *sotto voce* “Obviously,” to knowing chuckles from the audience, before continuing.] If you ask women why they did a good job, what they’ll say is someone helped them, they got lucky, they worked really hard.³⁰

Of course both explanations are accurate. A certain amount of awesomeness is required for success, but so is a certain amount of help from others, a certain amount of luck, and—according to Gladwell—about ten thousand hours of practice,³¹ which people generally are unable to get without a whole lot of circumstances in their favor.³²

Many studies in many contexts demonstrate our insistence on attributing outcomes to character, even when the influence of the situation is beyond obvious. The classic illustration comes from a study involving subjects watching basketball players shoot free throws in either well-lit gyms or in darkened ones.³³ The study subjects insisted that the players in the well-lit

27. *Id.*

28. *Id.* at 649.

29. “TED is a nonprofit devoted to spreading ideas, usually in the form of short, powerful talks (18 minutes or less). TED began in 1984 as a conference where Technology, Entertainment and Design converged, [TED today shares ideas from a broad spectrum]—from science to business to global issues—in more than 100 languages.” *About: Our Organization*, TED, <https://www.ted.com/about/our-organization> (last visited Oct. 16, 2014).

30. Sheryl Sandberg, Chief Operating Officer, Facebook, Address at TEDWomen 2010: Why We Have Too Few Women Leaders, (Dec. 2010), http://www.ted.com/talks/sheryl_sandberg_why_we_have_too_few_women_leaders (filmed Dec. 2010, 6:31–6:54).

31. See OUTLIERS, *supra* note 13, at 40 (claiming studies show that 10,000 hours is the amount of time you need to devote to practicing anything (hockey, computer science, musicianship like the Beatles) in order to get really good).

32. See *id.* at 102–03 (discussing the family resources required to shuttle children to practices and meets and so on, as compared to families who lack the resources to invest as heavily in their children’s activities).

33. Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 PSYCHOL. BULL. 21, 22 (1995) (“Basketball players who are randomly assigned to shoot free throws in badly lighted gyms may, on average, be judged as less capable than players who are randomly assigned to shoot free throws on a well-lighted court.”); see also TIPPING POINT, *supra* note 12, at 160–61 (“In one experiment . . . a group of people are told to watch two sets of similarly talented basketball players, the first of whom are shooting baskets in a well-lighted gym and the second of whom are shooting baskets in a badly lighted gym (and obviously missing a lot of shots). Then they are asked to judge how good the players were. The players in the well-lighted gym were considered superior.”).

gyms were more accomplished, better athletes, despite their obvious situational advantage.³⁴

There are a number of related biases at work here, but in the interest of time, I would like to highlight just one: the “just world” phenomenon.³⁵ Deep down, we believe that good things happen to good people, and bad things happen to bad people. We believe this, essentially, because it is comforting and lets us sleep at night. If something bad happened to some people, we reason, those people must have deserved it. Those people did something to bring those bad things down on themselves. We, on the other hand, do not deserve it. We did not do whatever triggering act those other poor slobs did to bring catastrophe crashing down, and so we will be safe.

I have discussed this phenomenon previously in the context of our societal tendency to blame the rape victim for her victimization:

Like a tourist counting his money on the subway, the victim was “asking for it” by flaunting her body so openly. Those who think this way are not being intentionally cruel; they are protecting their emotional vulnerability. If the victim had done nothing wrong, nothing to bring it on herself, why then, it could happen to us. There is nothing we can do. Rather than feeling vulnerable, we prefer to imagine that the victim is to blame. If she brought it on herself by wearing such a short skirt, then there is something the rest of us can do: we can dress demurely. We right-dressing women will be safe.³⁶

a. What Fundamental Attribution Error Does Not Mean

As I disclaimed before, I am not saying that there is no such thing as free will. I am not saying there is no role for character, or choice, or ultimate responsibility. I am not even saying that fundamental attribution error and related biases are entirely bad things. Our insistence on essentializing our observations—blaming “the fight on the bully, the accident on the klutz, the divorce on the skirt-chaser, and so on”—as well as our relentless in- and out-grouping and related stereotyping, actually serve a highly evolutionary and

34. TIPPING POINT, *supra* note 12, at 160–61.

35. Claudia Dalbert, *Belief in a Just World*, in HANDBOOK OF INDIVIDUAL DIFFERENCES IN SOCIAL BEHAVIOR 288, 288 (Mark R. Leary & Rick H. Hoyle eds., 2009) (“The just world hypothesis states that people need to believe in a just world in which everyone gets what they deserve and deserves what they get.”); *see also* D. E. Benson & Christian Ritter, *Belief in a Just World, Job Loss, and Depression*, 23 SOC. FOCUS 49, 49 (1990) (“The belief that the world is a just place where ‘good’ people have desirable things happen to them and ‘bad’ people have undesirable things happen to them, has been called the ‘just world hypothesis’ or a ‘belief in a just world.’”).

36. Susan D. Rozelle, *Fear and Loathing in Insanity Law: Explaining the Otherwise Inexplicable Clark v. Arizona*, 58 CASE W. RES. L. REV. 19, 28 (2007); *see* Roland Bénabou & Jean Tirole, *Belief in a Just World and Redistributive Politics*, 121 Q. J. ECON. 699, 700 (2006) (discussing the “just world” bias and its usefulness by explaining that “maintaining somewhat rosy beliefs about the fact that everyone will ultimately get their ‘just deserts’ can be very valuable” to human willpower).

useful purpose.³⁷ If not for these sorts of cognitive shortcuts, we would have no way of managing the tremendous flood of inputs our senses receive to make sense of the world. We could not prioritize what to pay attention to and what can fade into the background of our consciousness, an absolutely essential skill for basic living, much less for accomplishing any kind of focused work. Infants do it, choosing to pay attention to voices speaking rather than to air conditioners or to insects humming.³⁸ In fact, the inability to screen out distractions and focus on what matters is a type of learning disability, which puts those who have not mastered this skill at a disadvantage.³⁹ The bestselling book, *The Power of Habit*, affirmatively instructs us to create habits, because doing things unconsciously makes it more likely those things will happen and frees up brain space for tackling other matters.⁴⁰

b. What Do I Mean, Then?

The point I hope you will accept here is a familiar one. I argue only that to meaningfully understand and credit fundamental attribution error is to accept that “there but for the grace of god go I.” The reminder is useful and merits attention even when taken to the apparent extreme I take it when I ask you to accept that it really could have been any one of us who killed someone—or, worse, that it may yet be.

Take, for example, one of us who really *is* one of us. He is not a law professor, but nevertheless, most of us would quickly and comfortably put this gentleman in our “in” group. Take James Fallon.

A neuroscientist at UC-Irvine, Professor Fallon is a marvelously fun person and someone I am pleased to claim as a professional acquaintance. He has a generous and expansive personality, and as a result, he might even allow that we were friends, although I have not spoken with him for years now. I did

37. Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1381, 1393 (2003).

38. Studies demonstrate newborns and infants can differentiate even more discriminatingly and are able to distinguish between speech and analogous non-speech sounds, as well as between sign language and analogous meaningless hand motions. Jenny R. Saffran et al., *The Infant's Auditory World: Hearing, Speech, and the Beginnings of Language*, in 2 HANDBOOK OF CHILD PSYCHOLOGY 58, 75 (Deanna A. Kuhn et al. eds., 6th ed. 2006) (“The infants preferred the speech over the complex nonspeech analogues, listening longer [and sucking faster] on the alternating [minutes in] which speech versus [complex] nonspeech was presented.” And “hearing infants show a preference for watching sign language over carefully matched nonlinguistic gestures.”). At less than one year, babies know the difference between their native language and a foreign one. Patricia K. Kuhl et al., *Infants Show a Facilitation Effect for Native Language Phonetic Perception Between 6 and 12 Months*, 9 DEV. SCI. F13, F19 (2006) (“[E]xposure to a specific language causes neural commitment to the properties of native-language phonetic units, and . . . this learning process plays a role in the decline of nonnative phonetic perception.”).

39. See M. Kay Runyan & Joseph F. Smith, Jr., *Identifying and Accommodating Learning Disabled Law School Students*, 41 J. LEGAL EDUC. 317, 341–43 (1991).

40. CHARLES DUHIGG, *THE POWER OF HABIT: WHY WE DO WHAT WE DO IN LIFE AND BUSINESS* 17–18 (2012).

appear on a panel with him once, addressing control and provocation. He laid the groundwork with the relevant brain science, and I nattered on about the legal theory.⁴¹ He is a very good speaker: smart, entertaining, and informative. You would like him.

He has also been in the news lately because of a twist worthy of a fiction novelist. One day Professor Fallon, an expert on psychopathy, moved from his psychopath scans to his Alzheimer's study pile. He had been using his own family members' brains as controls in that study, and when he got to the last scan, he grew concerned that something was wrong. That bottom scan in the pile was of a psychopath's brain. Perhaps there had been a mix-up? It would not be unheard-of for something to end up in the wrong pile on his desk. He asked his research assistant to break the double-blind code, and—drumroll, please—the scan was his. Nationally prominent neuroscientist, happily married with three loving children, Professor Fallon has the brain of a psychopath.⁴²

Now, before this revelation, Professor Fallon, who is a dedicated scientist, would have said that human beings are essentially poorly understood machines. While acknowledging the role of both nature and nurture, of course, Professor Fallon used to feel these two forces were far from equal in how they shaped us. Before being confronted with the reality of his own brainscape, he says he characterized human behavior as approximately 80% attributable to nature, the way we were born, our genes, and other hardwiring.⁴³ He called the remaining 20% attributable to nurture, the way we were raised, our environments, and so on.⁴⁴

But after the revelation? Professor Fallon says in his book that he has thought about this issue carefully, and for a long time, and concluded that the only thing that separates him from the killers on death row is his upbringing.⁴⁵ Those psychopathic killers, he said, had horrible, abusive childhoods.⁴⁶ Professor Fallon, in contrast, had a loving family, and their affection, in the context of what was a reliably supportive environment growing up, turned him into what he terms a “prosocial psychopath.”⁴⁷ Without the nurture he received, however, he is convinced he would have been just another

41. James Fallon & Susan D. Rozelle, Address at the Ninth Annual Association for the Study of Law, Culture, and the Humanities Conference (Mar. 17, 2006).

42. JAMES FALLON, *THE PSYCHOPATH INSIDE: A NEUROSCIENTIST'S PERSONAL JOURNEY INTO THE DARK SIDE OF THE BRAIN* 2–3 (2013).

43. *Id.* at 6.

44. *Id.*

45. *Id.* at 225.

46. *Id.* at 91.

47. *Id.* at 225.

one of the murdering defendants whose brains he so often undertakes, as an expert witness, to explain to a jury.⁴⁸

Nor is it just Professor Fallon.⁴⁹ We are all more shaped by nurture, the environment, and our circumstances than we like to believe. It is not usually one bad apple spoiling the bunch; usually, it is a bad barrel rotting the apples.

Consider the Stanford Prison Experiment. Normal subjects, who knowingly volunteered to take part in a university psychology study, nevertheless quickly and completely internalized their randomly assigned roles as prisoners or as guards—with “guards” employing psychological and physical abuse of “prisoners” that escalated within days to the point that the experiment had to be discontinued.⁵⁰

Compare the behaviors elicited through the Stanford Prison Experiment to the abuses at Abu Ghraib. In 2004, news broke that members of the U.S. military had been abusing prisoners held at the Abu Ghraib facility in Iraq.⁵¹ The Army conducted an internal investigation and concluded that ““numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees’ at Abu Ghraib; among these were incidents of kicking, punching, and other physical abuse, coerced masturbation and other sexual humiliation, forced nudity, and the use of unmuzzled dogs as weapons of intimidation.”⁵²

Sadly, there are commonalities among atrocities. It is telling that when Philip Zimbardo, the author of the Stanford Prison Experiment, saw photographs documenting those sadistic guards reveling in their power to

48. *Id.* at 91 (“The killers had been abused, and I had not. Despite my hard-line conviction that we are shaped by nature and not nurture, I began to think that upbringing might play a significant role in creating a criminal after all.”).

49. See, e.g., M. E. THOMAS, *CONFESSIONS OF A SOCIOPATH: A LIFE SPENT HIDING IN PLAIN SIGHT* 3–4 (2013) (discussing the pseudonymous author who is a self-professed sociopath, “accomplished attorney[,] and law professor”). M. E. Thomas appeared on the television show, *Dr. Phil*, wearing a blonde wig and discussing her book. *Dr. Phil: “I Abducted a Baby”/ Confessions of a Sociopath* (CBS television broadcast May 15, 2013); see also “*I Abducted a Baby*”/ *Confessions of a Sociopath*, DR. PHIL, <http://drphil.com/shows/show/2035/> (last visited Oct. 23, 2014) (containing a trailer promoting the show and highlights of the interview). Viewers quickly claimed to recognize her. See, e.g., Elie Mystal, *The Author of ‘Confessions of a Sociopath’ Might Be This Law Professor*, ABOVE L. (May 17, 2013, 2:08 PM), <http://abovethelaw.com/2013/05/sources-and-dr-phil-offer-insights-author-of-confessions-of-a-sociopath-who-might-be-this-law-professor/> (discussing the television appearance).

50. See generally PHILIP ZIMBARDO, *THE LUCIFER EFFECT* (2007) (detailing the experiment from the perspective of Zimbardo, the experiment’s creator).

51. See, e.g., James Risen, *The Struggle for Iraq: Treatment of Prisoners; G.I.’s Are Accused of Abusing Iraqi Captives*, N.Y. TIMES (Apr. 29, 2004), <http://www.nytimes.com/2004/04/29/world/struggle-for-iraq-treatment-prisoners-gi-s-are-accused-abusing-iraqi-captives.html> (detailing the Abu Ghraib news story).

52. Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085, 2092 n.21 (2005), DEP’T OF THE ARMY, AR. 15-6 Investigation of the 800th Military Police Brigade, at 16–17 (prepared by Major General Antonio M. Taguba, Investigating Officer) (May 27, 2004), available at <http://www.aclu.org/torturefoia/released/TR3.pdf>.

torture and humiliate the prisoners at Abu Ghraib, he said those photos could have come straight from that 1971 Stanford basement.⁵³

Allow me to increase the rhetoric: Nazi concentration camp doctor and “most wanted” war criminal, Aribert Heim, who was said to have spent his time “performing operations on prisoners without anesthesia; removing organs from healthy inmates, then leaving them to die on the operating table; injecting poison, including gasoline, into the hearts of others; and taking the skull of at least one victim as a souvenir,” escaped justice after the war, eventually settling in Egypt where he lived until 1992.⁵⁴ Using the name Tarek Hussein Farid, Heim “formed close bonds with his neighbors,” including one who “became emotional when talking about the man he knew as Uncle Tarek, whom he said gave him books and encouraged him to study. ‘He was like a father. He loved me and I loved him.’”⁵⁵

How could this beloved father figure have been the same person as the hated Nazi war criminal known for torturing prisoners? And yet he was. Interestingly, Heim’s son, Rudiger Heim, long denied his father’s guilt.⁵⁶ But “Rudiger Heim is not a Holocaust denier,” explained one of the two experts who penned Heim’s biography.⁵⁷

It’s the leap to blaming his own father for what he had done . . . that he doesn’t want to make. And I think that throughout Germany . . . it’s easier to accept collective responsibility than it is to accept individual responsibility . . . [It’s easier] to say we all did a bad thing [than to say] my father or my grandfather or my beloved aunt did it.⁵⁸

As I said before, it is not the individual people, not the metaphorical bad apple. It is the situation, the bad barrel. The horror of Abu Ghraib, of Nazi Germany, of any genocide in history, is that it could have been us. That is the chill that passes through us when we read about the Stanford college kids in that basement—it is the recognition of the potential for evil in ourselves. Of course we wish to distance ourselves from that. Fundamental attribution error is appealing.

53. ZIMBARDO, *supra* note 50, at 19–20 (“Some of the visual images from my experiment are practically interchangeable with those of the guards and prisoners in that remote prison in Iraq, the notorious Abu Ghraib.”).

54. Souad Mekhennet & Nicholas Kulish, *Uncovering Lost Path of the Most Wanted Nazi*, N.Y. TIMES (Feb. 5, 2009), <http://www.nytimes.com/2009/02/05/world/africa/05nazi.html?pagewanted=all>.

55. *Id.*

56. Interview by Robert Siegel with Nicholas Kulish, *For Concentration Camp Doctor, A Lifetime of Eluding Justice*, NPR (Apr. 25, 2014, 4:04 PM) [hereinafter *Eluding Justice*], available at <http://www.npr.org/2014/04/25/306877244/for-concentration-camp-doctor-a-lifetime-of-eluding-justice>.

57. *Id.* See generally NICHOLAS KULISH & SOUAD MEKHENNET, *THE ETERNAL NAZI: FROM MAUTHAUSEN TO CAIRO, THE RELENTLESS PURSUIT OF SS DOCTOR ARIBERT HEIM* (2014) (discussing the time Dr. Heim spent hiding in Cairo in an effort to avoid capture).

58. *Eluding Justice*, *supra* note 56.

The situation is a powerful force, and yet we persist in failing properly to account for it. Proof that we are all in the same boat, that we are all capable of evil, comes in many forms. One of the best-known examples appears in the famous Milgram experiments.⁵⁹ There, subjects inflicted what they thought were increasingly painful, though they were assured, “not dangerous” shocks as part of what they were told was a study on negative reinforcement and memory.⁶⁰ Study participants, as with the Stanford Prison Experiment, were normal people.⁶¹ None enjoyed inflicting pain, and some manifested acute distress when the—feigned—sounds of excruciating pain came from the experimenter’s compatriot on the other side of the wall.⁶² For many, “the degree of tension reached extremes that are rarely seen in sociopsychological laboratory studies. Subjects were observed to sweat, tremble, stutter, bite their lips, groan, and dig their fingernails into their flesh. These were characteristic rather than exceptional responses to the experiment.”⁶³ And yet all it took to overcome their reluctance, it turns out, was for the person in the white lab coat to tell them they must.⁶⁴ “Prod 1: Please continue, *or* Please go on. Prod 2: The experiment requires that you continue. Prod 3: It is absolutely essential that you continue. Prod 4: You have no other choice, you *must* go on.”⁶⁵

The most fascinating aspect of this series of experiments, though, is a nuance I had never heard about until I began the research for this Article. It turns out that Milgram could manipulate how much shock subjects gave based on how close the experimenter stood to the subject, or on the prestige of the location of the so-called “study” being done.⁶⁶ In other words, subjects were willing to shock other subjects more when the “learning study” in which they believed themselves to be participating was at Yale.⁶⁷ They were less willing to administer that level of shock at Bridgeport.⁶⁸

By now, you may be tired of these examples, piling up the evidence in support of my hypothesis that we are all vulnerable to succumbing to our baser instincts under the influence of the “right” circumstances. I persist, nevertheless.

59. Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371, 371 (1963).

60. *See id.* at 372–74.

61. And, I would argue, as with the citizens of Nazi Germany who participated in or tolerated others’ participation in the tortures occurring there then.

62. *See* Milgram, *supra* note 59, at 375–76.

63. *Id.* at 375.

64. *See id.* at 376–77.

65. *Id.* at 374.

66. *See* Stephen Reicher & S. Alexander Haslam, *After Shock? Towards a Social Identity Explanation of the Milgram ‘Obedience’ Studies*, 50 BRITISH J. SOC. PSYCHOL. 163, 167 (2011).

67. *See id.*

68. *E.g., id.* (“When the experimenter is associated with a less prestigious institution . . . , he is less prototypical and so obedience falls to 48%.”).

We all know from the sad tale of Kitty Genovese that if there are too many onlookers no one helps.⁶⁹ Social science research tells us that six is the magic number—more than that, and everyone assumes that someone else will help.⁷⁰ This phenomenon is the reason CPR training teaches the person administering CPR to point to an individual and say, “You, call 911!” If instead the command were “Someone call 911!” odds are good that everyone would wait for someone else to do it, and it would not get done.⁷¹ Even the U.S. Supreme Court accepts this premise, explaining in the landmark right-to-counsel case, *Powell v. Alabama*, that appointing all members of the Alabama Bar is the equivalent of appointing no one.⁷²

Collectively, we are a selfish bunch. As one bystander to Kitty Genovese’s stabbing infamously explained, “I didn’t want to get involved.”⁷³

Even seminary students, presumably at least as inclined to help their fellow human beings as other populations, are affected by circumstances in ways we would never imagine. One study revealing this effect added an especially ironic twist.⁷⁴ Here is the set-up: theology students were divided into two groups, those hurrying to a lecture, and those who had more time.⁷⁵ All participants passed by an apparently distressed stranger, slumped over in the street.⁷⁶ Those who had the time generally stopped to help.⁷⁷ So far, so good. Tell them they were running late, though, and almost no one stopped to help.⁷⁸ Oh, and what was that ironic twist? The subject of the talk that some of them were running late to hear was the parable of the Good Samaritan.⁷⁹ Others were

69. Kitty Genovese was stabbed to death in New York while thirty-eight bystanders watched without calling the police or otherwise trying to help. Martin Gansberg, *Thirty-Eight Who Saw Murder Didn’t Call the Police*, N.Y. TIMES (Mar. 27, 1964), <http://www2.southeastern.edu/Academics/Faculty/sraig/gansberg.html>; see also Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About “Bad Samaritan” Laws*, 40 SANTA CLARA L. REV. 971, 972–73 (2000) (“Almost four decades ago, Kitty Genovese—a young Queens, New York woman—cried for help for more than half an hour outside an apartment building as her assailant attacked her, fled, and then returned to kill her. According to reports at the time, as many as thirty-eight persons heard her pleas from the safety of their residences, but did nothing to help her.” (footnotes omitted)).

70. See John M. Darley & Bibb Latané, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. PERSONALITY & SOC. PSYCHOL. 377, 380 (1968) (“Every one of the subjects in the two-person groups, but only 62% of the subjects in the six-person groups, ever reported the emergency.”).

71. See *Learn Hands-Only CPR*, AM. RED CROSS, <http://www.redcross.org/prepare/hands-only-cpr> (last visited Oct. 23, 2014) (including a video instructing the person administering CPR to “call or send someone to call 911” if the victim is unresponsive, while pointing to a specific bystander).

72. *Powell v. Alabama*, 287 U.S. 45, 56–57 (1932) (“[T]hey would not, thus collectively named, have been given that clear appreciation of responsibility or impressed with that individual sense of duty which should and naturally would accompany the appointment of a selected member of the bar, specifically named and assigned.”).

73. See Gansberg, *supra* note 69.

74. John M. Darley & C. Daniel Batson, “*From Jerusalem to Jericho*”: A Study of Situational and Dispositional Variables in Helping Behavior, 27 J. PERSONALITY & SOC. PSYCHOL. 100, 100 (1973).

75. *Id.* at 103–04.

76. *Id.* at 102.

77. See *id.* at 105.

78. *Id.* at 104–05.

79. *Id.* at 102.

late for a talk on an unrelated topic, but as it turned out, the subject matter of the talk did not affect the subjects' willingness to stop and help the stranger one way or the other.⁸⁰ This study casts us all in a pretty dim light: if seminary students are unwilling to be late to a lecture—a small price to pay to aid a fellow traveler who is suffering—how willing is the average soul, burdened by work and family and other concerns more pressing?⁸¹

2. *The Protest Again*

Fine, you may be willing to agree: we are none of us angels. We are all creatures of circumstance, and we could all stand to do better. But it is a far cry from the simple failure to render aid to a stranger because we are hurrying about our business to committing intentional murder. Surely, you are all thinking, intentionally killing someone is a line I, “we,” would never cross! Do not be so sure.

I once wrote a book chapter on hypnosis, which addressed the debate about whether it was possible to hypnotize people to do something they found morally repugnant. The consensus, it turns out, is that it is possible, but only if the context makes the hypnotized subjects feel as though the requested action is appropriate. In other words, if hypnotized subjects are simply instructed to kill, they generally balk. Hypnotize them to believe that the target is attacking them, however, or that the target is an enemy soldier, and suddenly, they comply.⁸²

Certainly, it is easier to imagine oneself as plausibly induced to act in mistaken self-defense—a much more morally attractive scenario—than to imagine that one could be induced to act as a simple murderer. The argument that we are all vulnerable to committing mistaken self-defense is comparatively

80. *Id.* at 105.

81. Of course, U.S. jurisdictions as a rule impose no duty to rescue. See Damien Schiff, *Samaritans: Good, Bad and Ugly: A Comparative Law Analysis*, 11 ROGER WILLIAMS U. L. REV. 77, 79 (2005) (“Today, with the exception of five states, no American jurisdiction recognizes a general duty to rescue in either criminal or private law. In contrast, almost every civil law jurisdiction in Europe, as well as in Latin America, recognizes various types of duties to rescue and related tort actions.” (footnote omitted)). Those jurisdictions that do impose such a duty generally couch it in terms that ensure the good Samaritan need not endanger himself, or interfere with any important duty owed to others. See, e.g., VT. STAT. ANN. tit. 12, § 519 (West 2013) (“A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.”); WETBOEK VAN STRAFRECHT [SR] art. 450 (Neth.) (Dutch Penal Code) (“A person who witnesses the immediate mortal danger of another person and who fails to render or procure such aid and assistance as he is capable of rendering or procuring where there is no reasonable expectation of danger to himself or others is liable to a term of detention of not more than three months or a fine of the second category, where the death of the person in distress ensues.”).

82. See Susan D. Rozelle, *The Type of Possession Is Nine-Tenths of the Law: Criminal Responsibility for Acts Performed Under the Influence of Hypnosis or Bewitchment*, in LAW AND MAGIC 249, 261 (Christine A. Corcos ed., 2010) (citing a study showing, for example, that while a hypnotized subject refused to attack a superior officer, he did so when he believed himself to be defending against the enemy in wartime).

easy to swallow. What then prevents that same mechanism—putting someone in a situation conducive to the behavior—from working equally well when the situation is even more strongly conducive? What if we had been born into the kinds of circumstances we know exist for too many of our fellow citizens? Entrenched poverty; the expectation of a life of crime that will end dead on the street or dead behind bars; living every day on the premise that there is nothing left to lose, and maybe never was anything to lose in the first place, are all strongly criminogenic circumstances that affect “them.”⁸³ What if those circumstances had been ours? What if we had the brains of a psychopath, and then grew up in those circumstances? What if we had authority over helpless prisoners?⁸⁴ What if we had been born into a society that countenanced genocide? What if it really could have been us?

III. THE PITCH

If you buy my plea for greater empathy and humility, then here is what I think follows: the Rawlsian veil of ignorance makes sense for criminal law, too.⁸⁵ This brings me to the thrust of my argument, and what I hope you take away from this Article, ruminate on, and share your insights with me about for future work:

If we accept that one of us could have been, and may yet be, the criminal defendant, even one who committed intentional homicide, I posit that we will stop thinking about punishment in such starkly retributive terms and start thinking more deeply about the proper role of utilitarianism. This is what Philip Zimbardo called the appeal to a “public health” model of criminal

83. See, e.g., Paul H. Robinson, *Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and “Rotten Social Background”*, 2 ALA. C.R. & C.L. L. REV. 53, 54–55 (2011) (analogizing the “rotten social background” (RSB) or “Urban Survival Syndrome” defense, which generally is not legally recognized, to coercive indoctrination, which generally is); see also Richard Delgado, “Rotten Social Background”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9, 79 (1985) (arguing “for a new RSB defense on social scientific, medical, and jurisprudential grounds”). But see Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1384–85 (1989) (arguing against Delgado’s proposed RSB defense because of “the belief that . . . people who possess normal, adult human reasoning skills are morally accountable for their intentional acts. . . . [T]o excuse the RSB defendant would not cause us to slip on a slope, but rather to fall off a moral cliff.”).

84. See generally, e.g., DAVE EGGERS, ZEITOUN (2009). In the aftermath of Hurricane Katrina, reports surfaced about law enforcement perpetrating abuses similar to those observed in the Stanford Prison Experiment and at Abu Ghraib during their efforts to restore order to a city in crisis. *Id.*

85. John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 235–36 (1985) (explaining that to be fair, a social contract can only be entered into by people bargaining on equal footing, meaning free from the “advantages which inevitably arise . . . as the result of cumulative social, historical, and natural tendencies”).

justice.⁸⁶ Instead of laying blame, we might begin to focus on what we need to do to ensure terrible criminal acts happen less often.⁸⁷

What do I mean by a public health model of criminal justice? The analogy might go something like this: Blame bad drivers all you like; to cut down on fatalities, use seatbelts.

We recognize that people behind the wheels of cars do not always exercise good judgment. We recognize that even when they do, things can go wrong. And while we still hold people responsible for their poor choices, we simultaneously take action to reduce the number of deaths that result.⁸⁸ Using the seatbelt example we acted both systematically, in passing a law requiring seatbelt use, and also at the level of the individual, in changing people's personal attitudes towards seatbelt use.⁸⁹

While initially the public response to mandatory seatbelts, mandatory vaccines, and other public health initiatives is to object to the violation of individual autonomy, over time, we see advertisements like the one I remember for a Boeri brand ski helmet. In the first panel, it showed a dandelion sprouting all white and fluffy. In the next panel, poof, bare stalk. The last panel is a happy, fluffy dandelion again, this time wearing a helmet. The tagline, as I remember it, "It's just your head."⁹⁰

86. ZIMBARDO, *supra* note 50, at x–xi. Zimbardo advocates for a public health approach, while still emphasizing, as I do, that “attempting to understand the situational and systemic contributions to any individual’s behavior does not excuse the person or absolve him or her from responsibility in engaging in immoral, illegal, or evil deeds.” *Id.* at xi.

87. See, e.g., Michael L. Rich, *Should We Make Crime Impossible?*, 36 HARV. J.L. & PUB. POL’Y 795, 796 (2013) (discussing “government mandates that aim to make certain classes of criminal conduct effectively impossible”); see also Tim Murphy, *Did This City Bring down Its Murder Rate by Paying People Not to Kill?*, MOTHER JONES (July–Aug., 2014), <http://m.motherjones.com/politics/2014/06/richmond-california-murder-rate-gun-death> (“The analogy here is infectious disease.” (quoting Barry Krisberg)).

88. Reckless and negligent vehicular homicide are well-ensconced features of the criminal law. See, e.g., FLA. STAT. ANN. § 316.192(1)(a) (West 2014) (“Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.”); NEV. REV. STAT. § 484B.657(1) (2013) (“A person who, while driving or in actual physical control of any vehicle, proximately causes the death of another person through an act or omission that constitutes simple negligence is guilty of vehicular manslaughter and shall be punished for a misdemeanor.”).

89. The seatbelt fight is all but won. Primary seatbelt laws (meaning occupants can be ticketed for the lack of a seatbelt alone) are in effect in thirty-two states; secondary seatbelt laws (meaning occupants must be stopped for another violation first) are in effect in seventeen states; and only one state (that renegade New Hampshire) still has no adult seatbelt laws. The compliance rate for seatbelt use was 87% as of 2013. *Seat Belt Use in 2013—Overall Results*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN. (Jan. 2014), <http://www-nrd.nhtsa.dot.gov/Pubs/811875.pdf>. A similar transition is taking place with helmet laws for motorcyclists. See, e.g., Thomas Frank, *Efforts to Pass New Helmet Laws Intensify*, U.S.A. TODAY (Apr. 4, 2007, 10:17 AM), http://usatoday30.usatoday.com/news/nation/2007-04-03-motorcycle-helmet-laws_N.htm (discussing growing concern about the number of people killed in motorcycle crashes and the existence of helmet laws in only twenty-seven jurisdictions).

90. Try as I might, I have been unable to find this advertisement archived anywhere, so I may be misremembering some details. I am confident, however, that I am remembering the thrust of the advertisement correctly.

IV. RECOMMENDATIONS

I think, once I have thought about it some more, that I am going to recommend we take this same public health approach to the criminal justice system, and not just to the traffic/regulatory end of it. If we were to construct a criminal justice system from behind the Rawlsian veil of ignorance, accepting that we ourselves, our loved ones, might someday not only be accused of committing horrible crimes (a premise our system is explicitly built on, with our insistence that the government carry the burden of proof beyond a reasonable doubt and similar safeguards⁹¹), but also might actually be guilty of committing horrible crimes—what changes would we make?

As with the public health example, we need to look both (1) systemically, at the institutional level, to change the rules, the circumstances, and the structures that invisibly shape human behavior; and (2) at the level of the individual, to strengthen individual ability to resist the bad tides.

At the institutional or structural level, I need to begin by saying that I very much credit Aya Gruber's concern about practical considerations.⁹² I also absolutely agree with her that sentences are too harsh across the board—even for murder.⁹³ Our table at dinner last night was commenting that twenty years is a long time. Frankly, one year is a long time. We may very well want to reconsider how frequently we incarcerate which criminals, and for how long.⁹⁴

The dear departed Professor Andrew Taslitz suggested psychological character evidence to individualize justice and treat defendants as people.⁹⁵ Professor Donald Dripps suggested some procedural reforms aimed

91. *In re Winship*, 397 U.S. 358, 364 (1970) (“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

92. Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 U. COLO. L. REV. 129, 135 (2014) (“If provocation critics focused more globally on non-capital murder sentencing and its negative effects on individuals and society, they might also hesitate before prescribing ratchet-up, carceral solutions to provocation’s disparities.”).

93. *Id.* at 178; see also Jonathan Simon, *How Should We Punish Murder?*, 94 MARQ. L. REV. 1241, 1311 (2011) (“The overall penalty structure in the U.S. is simply too high, and we should be unembarrassed to assert that reforming the law of murder is about reducing it.”).

94. There has been a groundswell of interest in the phenomenon of mass incarceration in the last two decades. See, e.g., John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL’Y REV. 377, 378 (2013); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1165 (1998) (“As coercive as the enforcement of order on the streets can be, it pales in comparison to the destructive impact of the mass incarceration of young African-American men that has been the centerpiece of American criminal-law enforcement since the 1980’s.”). In fact, two conservative prosecutors recently wrote a nationally-circulated editorial advocating for an alternative to our current system of mass incarceration. Ken Cuccinelli & Deborah Daniels, *Less Incarceration Could Lead to Less Crime*, WASH. POST (June 19, 2014), http://www.washingtonpost.com/opinions/less-incarceration-could-lead-to-less-crime/2014/06/19/03f0e296-ef0e-11e3-bf76-447a5df6411f_story.html.

95. Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 120 (1993) (discussing the “need for individualized justice in criminal cases”)

at recognizing that defendants with situational claims have the hardest battle, and that therefore judges should incline against allowing evidence that permits attributional explanations.⁹⁶ An article in *Mother Jones* magazine described Richmond, California's Office of Neighborhood Safety, which identifies a small number of individuals most likely to kill or be killed⁹⁷ and offers them a chance to become "fellows" in the program, earning a few hundred dollars a month as they turn their lives around.⁹⁸

I anticipate entertaining all of these ideas and more. So, what else? I would love to hear from you.

If we truly embraced empathy and humility, accepting that "our" difference from "them" is more properly attributed to fortuity than to our inherent awesomeness—that it really could be us, our friends, our family members, who killed someone—what would we do differently?

I'm taking notes.

and the use of "psychological character evidence . . . as a way to move judges and juries back toward an individualized assessment of the particular defendant before them").

96. Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1421 (2003) ("Perhaps all that can be said from the standpoint of the interests of justice is that the trial judge should recognize the psychological dynamic at work, and, in borderline rulings on evidence and directed verdicts, incline against the party inviting the jury to blame the person rather than the situation.").

97. Again, these are often the same people. See *supra* text accompanying note 8 (quote by Abbe Smith).

98. Murphy, *supra* note 87. Stipends are available for half of the eighteen-month-long program, with funds provided by private donors. *Id.* One of these donors is Kaiser Permanente, whose spokesperson is quoted as saying the health insurer supports the ONS initiative because reducing violence in the community cuts associated health-care costs. *Id.*

