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Socializing the subject of criminal law? Criminal responsibility and the purposes of criminalization

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**SOCIALIZING THE SUBJECT
OF CRIMINAL LAW?
CRIMINAL RESPONSIBILITY AND THE
PURPOSES OF CRIMINALIZATION**

NICOLA LACEY*

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I. INTRODUCTION

Most accounts of criminal responsibility depend on the claim—in somewhat different guises—that the paradigm subject of criminal law is an individual with rational agency. In other words, she is a subject whose conscious acts, or whose actions expressing her constitutive psychology or settled traits, attitudes, or dispositions, in some sense express her rational self. Moreover, these standard accounts of what it is to be a subject of criminal law assume that these features of agency can be clearly

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distinguished from features of a subject's situation, environment, history, or circumstances. Circumstances of poverty or of wealth; our experiences of privilege or of disadvantages such as racism, violence, or sexual abuse; the quality of our parenting and education: all of these undoubtedly shape our lives in fundamental ways. But, while operating causally on us in various ways, these external factors do not, it is argued, define us as agents—as subjects of criminal law.

In this Article, I will argue that this distinction between environment and agency is in fact more problematic than it first appears. Cases in which environment or socialization fundamentally affects the judgment and reasoning of the individual subject pose, I shall argue, a real challenge to the basis for the practices of responsibility attribution on which legal judgment depends. Such cases also put in question the standard assumption that questions of responsibility can be analytically separated from questions of criminalization. The clue to meeting this challenge, I will argue, is to recognize that the criteria for criminal responsibility must be articulated with an understanding of the role and functions of criminal law.¹ And this in turn, I shall suggest, underlines an important distinction between the contours of responsibility in legal and in moral contexts. It also has significant implications for method in criminal law scholarship.

In what follows, I shall set out a standard model of what it is to be criminally responsible, encompassing the engagement of standard powers of self-control and understanding. I shall then go on to consider the ways in which external factors may affect the extent to which these volitional

1. In making this argument, I am of course revisiting a well-travelled terrain, but I seek to recast the issue by insisting that the question of criminal (as distinct from moral) responsibility cannot be separated from that of the rationale for criminalization, and hence cannot be resolved within the terms of the free will/determinism debate. For key contributions arguing for and against the proposition that environmental factors can or should undermine attributions of criminal responsibility, see MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* chs. 12 & 13 (1997); David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976); Richard Delgado, "Rotten Social Background": *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9 (1985); Michael S. Moore, *Causation and the Excuses*, 73 CALIF. L. REV. 1091 (1985); Stephen J. Morse, *Severe Environmental Deprivation (aka RSB): A Tragedy, Not a Defense*, 2 ALA. C.R. & C.L. L. REV. 147 (2011) [hereinafter Morse, *Severe Environmental Deprivation*]; Stephen J. Morse, *Deprivation and Desert*, in *FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW* 114 (William C. Heffernan & John Kleinig eds., 2000) [hereinafter Morse, *Deprivation and Desert*]; Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976); 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 (2011). For further discussion, see THOMAS ANDREW GREEN, *FREEDOM AND CRIMINAL RESPONSIBILITY IN AMERICAN LEGAL THOUGHT* 333–43, 356–414 (2014).

and cognitive conditions are met. In relation to the volitional condition of responsibility, I shall consider criminal law's difficulties with the defenses of duress of circumstances and of necessity as threatening to a model of individual responsibility which is functional to law's regulatory ambitions: to admit a defense which in effect allows the defendant to rely on her own interpretation of what is required may seem to run counter to the very rationale of criminal law. I shall then go on to consider external factors which shape the cognitive rather than the volitional conditions for responsibility. While probably the standard example here is that of ignorance of law,² I consider a broader set of cases in which "implicit bias" or "miscognition" potentially undermines the cognitive basis for criminal responsibility. These biases themselves proceed from deeply embedded aspects of experience or education, and they have the power to shape the subject's reasoning process in such a way as to call into question whether she genuinely enjoyed a fair opportunity to conform her conduct to the precepts of the criminal law. In each of these contexts, I conclude that external conditions indeed pose real challenges—challenges moreover which derive from our social practices of mutual interpretation—to the capacity of the concept of criminal responsibility to fulfill its standard role in legitimating and coordinating the imposition of criminalizing power. Further, they call into question the idea that there is a clear definitional line between the individual subject of criminal law and her social environment.

In the final part of the Article, I will move on to consider ways in which the resulting challenge to criminal law's legitimacy might be met. To many criminal law theorists, the issue is essentially one of moral philosophy: responsible agency being a moral category, the task of the criminal law theorist is simply to delineate the conditions of responsibility and to come to the best judgment possible about whether they have been met. By contrast, I shall argue that the normative question whether the conditions of criminal responsibility have been met cannot be answered in the abstract. Rather, our deliberations here must proceed in the light of the meaning and social functions of criminalization as a complex social practice, itself located within a broader set of understandings about the proper relationship between individual and state. This relationship—like the institutions through which it is realized and implemented and the interests which shape its development—changes over time. And this implies that the question of where we should draw the line around

2. For a robust subjectivist case for allowing such a defense, see Andrew Ashworth, *Ignorance of the Criminal Law, and Duties to Avoid It*, 74 MOD. L. REV. 1 (2011).

responsibility is itself historically contingent. This is not to say that, within modern western legal systems, there has been no core understanding of responsibility. But it is to insist that the question of where responsible agency for the purposes of criminal law begins and ends in difficult cases such as those already canvassed is a matter for social evaluation. It is, at root, a decision which depends on a judgment about the proper purposes of criminal law and about the broader obligations of the state, rather than a question which can be determined by an ahistorical metaphysics or, to be sure, by sciences such as psychology or neuroscience.³ In conclusion, I shall draw out the implications of this analysis for the methodology of criminal law theory and for how we should conceive the relationship between criminal law scholarship and historical and social scientific work on the criminal process more generally.

II. CONCEPTUALIZING THE RESPONSIBLE SUBJECT OF CRIMINAL LAW

So let us consider, first, the standard account of what it is to be a responsible subject of criminal law.

It is widely accepted in the criminal law theory of modern western societies that the legitimation of the state's imposition of criminalizing power in relation to individual human beings depends upon that power's being invoked in response to only the responsible acts of an agent with certain minimum capacities.⁴ These capacities consist in volitional and cognitive powers: a basic ability to exercise self-control or self-direction, a basic ability to understand the facts and circumstances bearing on action, and a basic ability to predict and assess the consequences following on from our conduct. Without basic capacities of these two kinds, we are arguably not even candidates to be subjects of criminal law: rather, we are outsiders to the special form of communication which constitutes the criminal law.⁵ But to have this baseline of capacity is not

3. This argument is developed at greater length in Nicola Lacey, *Responsibility Without Consciousness*, 36 OXFORD J. LEGAL STUD. 219 (2016) [hereinafter Lacey, *Responsibility Without Consciousness*], and see more generally NICOLA LACEY, IN SEARCH OF CRIMINAL RESPONSIBILITY: IDEAS, INTERESTS AND INSTITUTIONS (2016) [hereinafter LACEY, IN SEARCH OF CRIMINAL RESPONSIBILITY].

4. See H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1 (2d ed. 2008).

5. See R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW (2007) [hereinafter DUFF, ANSWERING FOR CRIME]; R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001) [hereinafter DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY]; R.A. DUFF, TRIALS AND PUNISHMENTS (1986).

in itself sufficient for an attribution of criminal responsibility. Rather, these cognitive and volitional capacities need to have been engaged in relevant ways at the time of the relevant conduct: we knew or were aware of the relevant circumstances surrounding our acts; we foresaw the likely consequences of our conduct; we would have been able, had we so chosen, to act otherwise. But while a wide range of facts, psychological and other, will bear upon the “existence” or not of these engaged capacities, that “existence” is not itself a straightforward matter of fact. Rather, as H.L.A. Hart influentially argued in his classic *Prolegomenon to the Principles of Punishment*,⁶ it is a matter of judgment whether, in the light of the relevant facts, the defendant can be said to have had a fair opportunity to conform her behavior to the law. In other words, the test of engaged capacity is a normative one which ultimately asks whether the individual should have had the relevant cognitive state of knowledge or awareness.

Almost needless to say—though we must note this before we move on—this basic principle, or perhaps its association with engaged capacities, is itself quite often modified or diluted in practice. First, criminal law can and does use different principles of attribution in relation to corporate entities,⁷ just as in the past it has applied different principles to individual human beings and indeed to animals.⁸ We might see the principles of corporate responsibility as extensions by analogy from the paradigm principles applied to individual human beings. But this, I suggest, would be a mistake. While we can certainly see the criteria of responsibility attribution as fulfilling broadly analogous legitimating and coordinating roles in relation to both individual and corporate criminal liability, we should see the criteria applied to corporations as relating directly to the functions of responsibility attribution in that context. In other words, we should see it as concerned with the legitimation of criminalizing power in the light of its various aims and functions specifically in relation to corporations—and not as pale adaptations of a human paradigm.⁹ It follows that systems of criminal law typically deploy more than one conception of responsibility at any one time.

6. See HART, *supra* note 4.

7. CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY (2d ed. 2001).

8. E.P. EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS (Faber & Faber Ltd. 1987) (1906); William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889 (1995).

9. Nicola Lacey, “Philosophical Foundations of the Common Law”: *Social Not Metaphysical*, in OXFORD ESSAYS IN JURISPRUDENCE 17 (Jeremy Horder ed., 2000).

Second, and yet more fundamentally, criminal law in many systems, including those of the United States and England and Wales, quite standardly invokes patterns of attribution which modify the requirements set by the conception of responsibility as founded in fair opportunity through engaged capacities. These supplementary patterns of attribution deploy a notion of responsibility founded merely in causal liability for prohibited outcomes, independent of any proof of capacity to avoid them, or even on occasion one founded in notions of bad or dangerous character or the presentation of a certain risk.¹⁰ I want to acknowledge the wide significance of these complementary patterns of responsibility attribution. Much of my Article will be devoted to considering whether external factors bearing on the conditions of human agency undermine the criteria for responsibility understood in Hart's sense—where the fair opportunity to conform one's conduct to the precepts of criminal law is essentially regarded as lying in the engagement of key volitional and cognitive capacities. But I shall return in the latter part of the lecture to consider how far the persistence and even resurgence of these complementary outcome, risk, or character-based patterns of attribution¹¹ lend weight to my argument that practices of responsibility attribution in criminal law can only be understood in relation to the overall functions of criminalization and obligations of the state.

III. EXTERNAL FACTORS AS UNDERMINING THE AUTONOMY OF THE SUBJECT OF CRIMINAL LAW SO AS TO CALL INTO QUESTION JUDGMENTS OF RESPONSIBILITY

So how *should* external factors which undermine the autonomy or understanding of a subject affect our judgments about their criminal responsibility? For the purposes of this section of my Article, I will concentrate on Hart's vision of criminal responsibility as founded in the presence of adequately engaged volitional and cognitive capacities of self-direction and understanding.¹² Note that, as soon as one moves beyond the idea of the potentially competent subject of criminal law—the person whose possession of baseline capacities does not exempt her from criminal liability in itself—to the question of whether those capacities were *adequately engaged* in a relevant piece of conduct, the question of

10. See LACEY, IN SEARCH OF CRIMINAL RESPONSIBILITY, *supra* note 3. See generally NICOLA LACEY, WOMEN, CRIME, AND CHARACTER: FROM MOLL FLANDERS TO TESS OF THE D'URBERVILLES (2008).

11. On this reemergence, see LACEY, IN SEARCH OF CRIMINAL RESPONSIBILITY, *supra* note 3, at ch. 5.

12. HART, *supra* note 4, at 13–14.

context immediately becomes relevant. For this question of adequate engagement brings in the question of external factors bearing on the potentially responsible agent's behavior, in a way which is belied by any reference to "the responsible subject of criminal law" as if this were something to be defined in terms of criteria independent of the context in which any particular putative offense is committed. The question, in effect, is not whether someone was a responsible subject but whether her capacities for responsible agency were *sufficiently fully and freely engaged in relation to the offense* to justify a finding of liability. In this part, I shall leave aside the enduring question of whether any human being can be said to have free will sufficient to say that she could genuinely have done otherwise than she did—a counterfactual which, as many commentators have observed, is impossible to test. Rather, I shall rely on a broadly Strawsonian view of responsibility attribution as a practice of mutual human interpretation, based on perfectly rational—but also largely revisable—grounds and proceeding on the unstated basis that people enjoy certain powers of self-direction.¹³ There can be real sense, in other words, in a practice of responsibility attribution based on a mutual assumption of self-direction and agency irrespective of the extent to which the conditions of free will hold. With that in mind, I shall move on to discuss some intuitively troubling cases for both volitional and cognitive conditions of responsibility attribution.

A. *Volitional Conditions*

Let us look first at the volitional condition. A well-established panoply of defenses in criminal law addresses various volitional defects, subject to greater or lesser controversy or difficulty about line drawing. A certain degree of intoxication clearly undermines the power of self-direction—and where this intoxication is involuntary, a cognitive defect is added to a volitional defect so as further to undermine the normal conditions of responsibility.¹⁴ Certain forms of mental incapacity—extreme fear, distress or stress, rage, disorientation—can reduce or, in the term used in English law, "diminish" the normal conditions of responsibility, making it harder for us to direct our conduct so as to conform to the criminal law's requirements.¹⁵ But these immediate, person- or context-specific, and rather vivid forms of volition-reducing

13. P.F. Strawson, *Freedom and Resentment*, 48 PROC. BRIT. ACAD. 187 (1962).

14. ANDREW ASHWORTH & JEREMY HORDER, PRINCIPLES OF CRIMINAL LAW ch. 6 (7th ed. 2013).

15. ALAN NORRIE, CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW chs. 9 & 11 (3d ed. 2014).

external factors are supplemented by a far broader range of long-term, diffuse, and quotidian external influences which undoubtedly shape our capacities for self-direction and the extent to which we have a real opportunity to cultivate them through the course of our lives. Consider the nature of a person's education and socialization. There can be no doubt that certain forms of upbringing and schooling are specifically oriented to encouraging and fostering the power of individual self-direction via a process of rational deliberation, while others are designed to inculcate a more conventional conformity. Indeed, much of what we now recognize as education is geared to this sort of process. Most people are born, certainly, with some underlying potential to develop a capacity for self-direction, but the extent to which we ultimately enjoy it depends largely on the practices and norms which parents, educational institutions, and peers inculcate and communicate. And for those brought up in highly disorganized contexts, the opportunities to cultivate these powers may well be systematically lower. A certain conception of self-direction, in other words, is a culturally specific phenomenon, and moreover one which has to be achieved within the context of certain kinds of social institutions.

Social sciences such as psychology, sociology, and anthropology have much to say about these questions of socialization and its impact on our capacities and self-conception.¹⁶ Much the same is true of another broad set of external factors which undoubtedly shape our volitional capacities to conform our behavior to criminal law: to wit, the material circumstances in which we find ourselves. Though there are of course exceptional individuals, no fair-minded reader of an urban ethnography such as Alice Goffman's *On the Run*¹⁷ or Sudhir Venkatesh's *Gang Leader for a Day*,¹⁸ or of a novel such as Ralph Ellison's *Invisible Man*,¹⁹ could conclude that those born into communities marked by multiple

16. The classic work drawing an explicit link between the capacity for self-control and crime is MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, *A GENERAL THEORY OF CRIME* (1990). Since its publication, debate has flourished in journals such as *Criminal Justice and Behavior* and the *Journal of Research in Crime and Delinquency* not only about the link between levels of self-control and crime but also about the relevant contributions of, broadly speaking, biology and social factors to human capacities. Suffice it to say that much of this literature provides compelling evidence of the shaping power of parenting practices and other environmental factors. See, e.g., Travis C. Pratt, Michael G. Turner & Alex R. Piquero, *Parental Socialization and Community Context: A Longitudinal Analysis of the Structural Sources of Low Self-Control*, 41 J. RES. CRIME & DELINQ. 219 (2004).

17. ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* (2014).

18. SUDHIR VENKATESH, *GANG LEADER FOR A DAY: A ROGUE SOCIOLOGIST TAKES TO THE STREETS* (2008).

19. RALPH ELLISON, *INVISIBLE MAN* (1952).

disadvantages produced by industrial decline, racism, poor housing, and high levels of surrounding violence have anything approaching the same opportunity to conform their conduct to the requirements of criminal law as those born into privileged communities and comfortable material conditions. Indeed, many of the legal, as well as the de facto, disqualifications and knock-on effects of criminal conviction may make it exceptionally difficult to avoid further criminal offending, by closing off access to legitimate employment, housing, or basic life-qualifications such as a driving license.²⁰ This is not to claim that, for example, violent crime committed in massively disadvantaged circumstances is justified or is in any way less serious a concern than it is in less constraining circumstances. But it is to claim that the normative question of how we should respond, legally, to this sort of behavior cannot be resolved by a simple appeal to a conceptual definition of “responsibility.” For once we concede that responsibility itself is an issue of fair opportunity to conform, the question of how we evaluate that fairness is immediately in issue. And this, as I shall argue—and as the late Victorian English judges who struggled with the notion of “moral insanity,” as well as judges who struggled with definitions of the insanity defense in American criminal law in the second half of the twentieth century,²¹ understood quite well—brings us face to face with questions about the social functions of criminal law.

Modern judges have certainly found these broader circumstances troubling. Just as their nineteenth-century ancestors feared that the notion of moral insanity would undermine integrity of criminal law’s prohibitions,²² so our judges worry that a defense of necessity in effect allows the defendant to substitute her own judgment about right and wrong for that of the criminal law.²³ Hence their inclination—like their general resistance to justificatory defenses—is to distance this threat by confining the defense within an excusatory framework of “duress of circumstances.”²⁴ This attempt to insulate the judgment of guilt from

20. See GOFFMAN, *supra* note 17; see also AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL* (2014); cf. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016) (the consequences of involuntary homelessness).

21. In particular for a discussion in relation to *Durham v. United States*, 214 F.2d 862 (1954), see GREEN, *supra* note 1, at 219–29.

22. See LUCIA ZEDNER, *WOMEN, CRIME, AND CUSTODY IN VICTORIAN ENGLAND* (1991).

23. See NORRIE, *supra* note 15, at 201–18; CELIA WELLS & OLIVER QUICK, LACEY, WELLS AND QUICK: *RECONSTRUCTING CRIMINAL LAW TEXT AND MATERIALS* 416–47 (4th ed. 2010).

24. WELLS & QUICK, *supra* note 23, at 416–47.

social context utilizes a distinction between justified acts and (exceptional) circumstances which excuse or mitigate the responsibility of actors. In doing so, it construes the presence of shaping circumstances as “exceptional” and hence deploys the very assertion of the “normally” responsible subject’s autonomy from the social and from the context of external circumstances which I am questioning in this Article. If the effect of external circumstances on substantially affecting opportunities to conform conduct to criminal law is “normal” rather than “exceptional,” the task of deciding where to draw the line around responsible subjecthood becomes considerably more complex, not only suggesting that individuals whose special difficulty in meeting legal standards itself derives from past injustice are being treated doubly unfairly but also raising questions about the adequacy of the general understanding of agency assumed by criminal law.²⁵

B. Cognitive Conditions

Let me now turn to the cognitive conditions of responsibility. In part because of the continuing fascination of the problem of free will, moral philosophers have been less preoccupied by the cognitive conditions than by the volitional conditions of responsibility.²⁶ But criminal law theorists have long recognized the importance of questions about how far various forms of ignorance, mistake, or inattention should be regarded as undermining the conditions of responsibility.²⁷ At first blush, one might simply assume that responsibility is ruled out wherever the agent is unconscious or unaware of directly relevant circumstances or consequences impinging on her actions. And, of course, neuroscientific and psychological evidence has now given us a much more precise

25. See generally Delgado, *supra* note 1. Delgado’s article has since stimulated a lively and often contentious debate among both lawyers and philosophers. See, e.g., Morse, *Severe Environmental Deprivation*, *supra* note 1; Morse, *Deprivation and Desert*, *supra* note 1; Robinson, *supra* note 1.

26. For an honorable exception, see R.A. DUFF, INTENTION, AGENCY AND CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW 159–67 (1990). The relationship between consciousness and agency is also discussed in NEIL LEVY, CONSCIOUSNESS AND MORAL RESPONSIBILITY (2014); MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW (1993); MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP (1984); JOSEPH RAZ, FROM NORMATIVITY TO RESPONSIBILITY pt. 3 (2011); GEORGE SHER, WHO KNEW? RESPONSIBILITY WITHOUT AWARENESS (2009); Michael S. Moore, *Responsibility and the Unconscious*, 53 S. CAL. L. REV. 1563, 1564–76 (1980).

27. For a philosophical analysis of this issue, see MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING (2007); Angela M. Smith, *Control, Responsibility and Moral Assessment*, 138 PHIL. STUD. 367 (2008); Angela Smith, *Responsibility for Attitudes: Activity and Passivity in Mental Life*, 115 ETHICS 236 (2005).

appreciation of what degree of knowledge, awareness, or consciousness is present under specific circumstances. Yet here again, the idea that the relevant lines can be drawn by attending to either a pre-formed concept of the responsible subject or the psychological or neurological facts of the matter proves to be illusory.²⁸ For example, while both English and American law often hold that an honest mistake, which means that the defendant lacked the *mens rea* required for the offense, precludes liability, they yet more often hold that mistakes invoked to underpin defenses—mistaken self-defense, for example—must be based on reasonable grounds if they are to be regarded as undermining a fair opportunity to conform one’s behavior to the law.²⁹ And here again, we find ourselves confronted with the question of how the law should try to assess the impact of background conditions on a subject’s fair opportunity to engage her capacities of cognition. Indeed, in extreme cases, it may even raise questions about the very existence of those capacities.

To see why this might be the case, let us take a very topical issue: that of the so-called cultural defense. In essence, the claim in some cultural defense cases relies on the proposition that the defendant apprehended the world differently because of his or her specific background.³⁰ So, just as someone who has been a long-term victim of domestic violence may interpret other people’s behavior in that light, potentially making it more likely that she will engage in acts of mistaken self-defense, so someone socialized in a homophobic culture to believe that homosexuals are sexually predatory, or in a racist culture which holds that certain ethnic groups are more prone to violence, may be more likely to misinterpret non-aggressive behavior as aggressive and to retaliate on the basis of this misapprehension. Though not often thought about within the framework of cultural defense, the same can be said of the very standard defense in rape cases consisting in a claim of honest belief in the victim’s consent—mistakes about consent being clearly more likely among those brought up to believe that women are prone to dissimulate or to lie about their preferences because of conventions about female modesty, stereotypes about their unreliability, or otherwise.³¹ While some such defenses are doubtless disingenuous, it seems quite clear that socialization within a

28. See Lacey, *Responsibility Without Consciousness*, *supra* note 3.

29. See ASHWORTH & HORDER, *supra* note 14, at 215–18.

30. Nicola Lacey, *Community, Culture, and Criminalization*, in *CRIME, PUNISHMENT AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTONY DUFF* 292 (Rowan Cruft, Matthew H. Kramer & Mark R. Reiff eds., 2011), *reprinted in modified form in CRIMINAL LAW & CULTURAL DIVERSITY* (Will Kymlicka, Claes Lernestedt & Matt Matravers eds., 2014).

31. See *id.*

certain set of norms or expectations changes the way in which we apprehend the world and, in particular, interpret each other's behavior. Moreover, even small changes in perception can have radical and grave implications. But pure miscognition, while being a relevant fact and one step towards an analysis of responsibility, cannot in itself answer the question of whether someone should be held responsible in criminal law.

The relevance of miscognition to the problem of criminal responsibility is underlined by a phenomenon on which research in cognitive psychology and the philosophy of mind is shedding ever greater light: that of the implicit biases, attendant on our experience and socialization, which are now known to shape our apprehension of the world and, often, our consequent behavior on a very standard basis.³² Various forms of implicit bias are now used as a partial basis for the attribution of liability in civil law, notably in indirect or disparate impact discrimination cases.³³ And in our moral and political lives, there is a lively debate about whether unexamined, implicit biases based on assumptions about sex, gender, sexuality, race, or religion should be regarded as on an ethical par with discriminatory behavior based on conscious prejudice. And implicit bias is at the root of many of the cases which I have just compared to situations of potential cultural defense. The psychological research can leave us in no doubt of the fact that socialization into certain pervasive implicit biases—notably on the basis of sex, sexuality, and race—is likely fundamentally to shape subjects' interpretation of other people's behavior. This consequently affects both people's propensity (as police officers, prosecutors, judges, or jurors) to label behavior as criminal and, as potential defendants, the likelihood of their misreading behavior in a way which encourages them to engage in potentially criminal conduct.³⁴ But, once again, this fact does not in itself conclude the core matter, which is whether the fairness of the defendant's opportunity to conform her behavior to the criminal law has been

32. Nilanjana Dasgupta, *Implicit Attitudes and Beliefs Adapt to Situations: A Decade of Research on the Malleability of Implicit Prejudice, Stereotypes, and the Self-Concept*, 47 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 233 (2013); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 *J. PERSONALITY & SOC. PSYCHOL.* 5 (1989).

33. An example is under the United Kingdom Equality Act 2010, c. 2, § 19.

34. For a variety of studies illustrating the power of implicit bias in different contexts, see Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 *AM. ECON. REV.* 715 (2000); Daniel Kelly & Erica Roedder, *Racial Cognition and the Ethics of Implicit Bias*, 3 *PHIL. COMPASS* 522 (2008); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 *ANN. REV. L. & SOC. SCI.* 427 (2007); see also LEVY, *supra* note 26, at chs. 5 & 6.

compromised to the extent that criminalization cannot be justified. And the answer to this question turns both on the overall rationale for criminalization and on two further issues. First, there is an empirical question about how far subjects are capable of articulating, confronting, and revising their implicit biases when prompted to do so by third parties or even by introspection—a question on which there is much debate.³⁵ Second, there is a normative question about whether the state, in whose name an attribution of criminal responsibility and criminal judgment is made, has carried out its own obligations. These arguably include a duty to create an environment inimical to the development of prejudices on the grounds of factors such as race, class, sex, or religion and to counter such prejudices, through the education system, the law, and elsewhere, where they nonetheless arise.

To sum up my argument so far: in terms of the fulfillment of both the volitional and the cognitive criteria for criminal responsibility, a wide range of diffuse social, external factors bears directly and indirectly on the opportunity which defendants have had to conform their behavior to the standards set by criminal law. It would be simply irrational to claim that these causal factors are irrelevant to the assessment of their responsibility. And, as work in the cognitive sciences proceeds apace, more and more of it is becoming available. But, on the other hand, it is equally clear that, however rich this information, it does not determine the question of responsibility: that of whether a particular defendant's conduct fell so far short of what we could reasonably have expected of her in a certain context that she can be said to have had a fair opportunity to conform, and that the imposition of criminal liability is accordingly justified. So how should the facts bearing on the causal background to our actions and the judgments about our degree of responsibility for those actions be combined?

IV. RESOLVING THE ISSUE

The first step towards resolving this apparent dilemma consists, I would argue, in recognizing that the constitution of the responsible subject takes place within different domains of social action, and that

35. For an elegant account of the issues and a persuasive elaboration of the reasons to think that subjects can, at least under certain circumstances, revise their implicit biases—and hence of the reasons to think that implicit bias can be compatible with responsibility—see Jules Holroyd, *Implicit Bias, Awareness and Imperfect Cognitions*, 33 CONSCIOUSNESS & COGNITION 511 (2015). For further discussion of the revisability—or non-revisability—of deep-seated biases, see TIMOTHY D. WILSON, *STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS* (2002).

these domains—legal, moral, political, professional, or other—fulfill distinctive social functions and are imbued with distinctive values and ideals. We can, certainly, identify a broad notion of responsible agency which is being invoked across normative and practical fields such as morality, criminal and civil law, professional codes of conduct, and so on. But we should not assume that the responsible subject will take just the same form within each of them.³⁶ Rather, each of these fields constructs requirements for responsible agency distinctive to its own protocols and to what it requires from a notion of responsibility by way of the legitimation of its deployment of power and the coordination of the knowledge and information relevant to its judgments. And these requirements, I argue, are shaped by the distinctive social functions of these different domains. Hence the aims and rationale of criminalization are fundamental to the way in which criminal law understands and, conceptually, constructs its subjects. And this encompasses not only a society's view of what criminal law is for but also its view of the proper relationship between the individual and the state and of whether the state has done as much as it reasonably can to counteract environmental factors which, by fostering implicit biases or entrenching social disadvantages, produce a radically unequal distribution of opportunities to conform to criminal law.

The contemporary notion of the subject of criminal law as a psychological agent is, after all, itself a distinctively modern creation, its history intimately linked with the emergence of modern projects of governance committed to both ambitious programs of social regulation and broadly liberal notions of government.³⁷ This combination at once posed a distinctively challenging legitimation problem for criminal law, with the direct implication being the idea that the state's criminalizing power should be invoked only in response to responsible conduct in a robust psychological sense. Conversely, however, the regulatory ambitions of the modern state implied that the costs of proving that form of responsibility might be regarded as prohibitively high, in terms of

36. Nor, indeed, can we assume that all of these fields consistently invoke a notion of responsible subjecthood, or that they have always done so, but for the purposes of this Article, I mainly leave aside this historical question. It is taken up in detail in my *Women, Crime, and Character* and *In Search of Criminal Responsibility*. See LACEY, IN SEARCH OF CRIMINAL RESPONSIBILITY, *supra* note 3; LACEY, *supra* note 10; see also CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY (1989); CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES (2004); DROR WAHRMAN, THE MAKING OF THE MODERN SELF: IDENTITY AND CULTURE IN EIGHTEENTH-CENTURY ENGLAND (2004).

37. See LINDSAY FARMER, MAKING THE MODERN CRIMINAL LAW: CRIMINALIZATION AND CIVIL ORDER ch. 6 (2016).

either process costs or a sacrifice in efficacy. This broadly explains why even systems such as the American and British ones, quite firmly attached to individualist liberal ideals, have long tempered (particularly in the area of so-called regulatory crime) their criminal law's construction of the responsible subject whose knowledge, awareness, and capacity for self-control underpinned her liability with a thinner conception of responsibility as based on the causation of proscribed outcomes.³⁸ Particularly where a harmful outcome eventuates from the pursuit of a hazardous activity from which the defendant derives some benefit—driving a car, running a business—the criminal law's regulatory purposes indicate that a higher standard of conduct be set. This thinner sense of outcome or risk-based responsibility has been brought into some measure of conformity with the precept that subjects should have a fair opportunity to conform their conduct to the criminal law by the application of due diligence defenses providing that defendants who have taken all reasonable measure to avoid causing the relevant harm should escape liability. But these defenses are not invariant, and even the most liberal of systems on occasion imposes more absolute or strict forms of responsibility. How can this be understood, and how can it be justified?

In attempting to resolve these questions, I think that some insight can be derived from the so-called “mixed” theories of punishment.³⁹ These theories acknowledge that, in the context of the practical business of criminalization, important values of fairness and justice have to be interpreted in the light of the equally important goals of the criminal process in underpinning the integrity of the norms of the criminal law. It may be that, as H.L.A. Hart famously put it, offenses of strict liability—like other institutional mechanisms such as the modification of burdens or standards of proof—are imposed with a sense that an important principle—the principle of fairness—is being modified or, in Hart's terms, “sacrificed.”⁴⁰ Such a tradeoff would probably be handled in a very different way in a purely moral context. But the criminal law is a practical activity, with its conception—or, more accurately, its conceptions—of responsibility being inevitably shaped by its practical goals⁴¹: while for certain very serious offenses an analogy with purely moral communication may be apposite, contrary to what some influential

38. See LACEY, IN SEARCH OF CRIMINAL RESPONSIBILITY, *supra* note 3, at ch. 2.

39. See NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 46–56 (1988).

40. HART, *supra* note 3, at 20.

41. LACEY, IN SEARCH OF CRIMINAL RESPONSIBILITY, *supra* note 3.

commentators (like Antony Duff) have argued,⁴² this cannot be assumed to be the case for vast swaths of the territory of criminal law.

But this does not, it should be emphasized, imply that there are no normative limits on how, and on the conditions under which, subjects can and should be held accountable to the criminal courts. What it does imply is that these limits are ones which must speak to the practical concerns of law itself and to the background obligations of the state. Most criminal law theorists, after all, accept that they are in the business of providing the best possible account of the justification of criminalization as it currently exists as a social practice. And this justification, far from existing, prefabricated, in some metaphysical moral universe, is a matter of social judgment and interpretation. And here, as both Duff⁴³ and Braithwaite and Pettit⁴⁴—authors of the most sophisticated mixed theories of punishment—rightly argue, while the overall meaning and function of the criminal process may sanction certain compromises, its need, in a liberal polity, to establish itself as a legitimate exercise of state power means that there are constraints *internal to the functions of the criminal process* on how criminalizing power may be exercised.

Hence the question of whether failures of education, socialization, or other external factors undermine the basis of a subject's fair opportunity to conform his behavior to criminal law, and hence an attribution of criminal responsibility, depends not only upon an assessment of the capacities of particular individuals but also upon a fundamentally political interpretation of the relationship between individual and state and of the functions of the criminal process. It depends, at root, on whether we see the functions of criminal law primarily in terms of desert, blame, and stigmatization; or whether we believe that criminal law and its surrounding processes should aspire to foster positive goals such as integration, reform, and even forgiveness—aspirations which surely depend on a realistic as well as a respectful attempt to understand the background to offending behavior. When we see changes in the balance of responsibility attribution—with recent moves in both the American and English systems towards an expansion of some of the attenuated forms of character- or outcome-based liability—this tells us something important, and perhaps something worrying, about the changing

42. DUFF, ANSWERING FOR CRIME, *supra* note 5; DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY, *supra* note 5.

43. *E.g.*, DUFF, ANSWERING FOR CRIME, *supra* note 5; DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY, *supra* note 5.

44. JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1990).

functions of criminal law in our societies. For it seems to betoken a turn to a vision of criminal law as based on stigmatization, blame, and cost-reduction, as well as a weakening of the internal constraints set by the demands of legitimation where civil libertarian sentiments are robust. Where we draw the line around responsible subjecthood—what we regard as a fair opportunity to conform—is, of course, open to moral and political criticism. But that critique must be based on an explicit defense of certain moral and political values, rather than an appeal to an asocial concept of the responsible subject.

V. IMPLICATIONS FOR CRIMINAL LAW THEORY

To sum up: I have argued that our conception of criminal responsibility—of what it is and of why it matters—is and must be shaped by what criminal responsibility is for: by its own functions of legitimating criminalizing power and of coordinating the facts and evaluations on which such criminalization is founded. Criminal responsibility, in short, is a product of not merely ideas but of ideas whose realization depends on institutional structures which in turn shape them, and by vectors of power and interest which shape both ideas and institutions. This implies that criminal law theory should not confine its attention to the resources of philosophy. Certainly, both moral and political philosophy, as well as the philosophy of mind, can sharpen our appreciation of how ideas of agency and responsibility have been understood, and these ideas most certainly find some expression in systems of criminal law. But to understand how and why they do so, we need to turn our attention to both history, which illuminates the development of ideas over time, and the social sciences, which shed light on the role of criminal law and criminalization in the broader project of governance and in the production of social order. And this in turn implies that our analysis of criminal responsibility must be located firmly within an account of the rationale for the social practice of criminalization within a broadly liberal polity. The subject of criminal law is, inevitably, socialized; so, therefore, must be our criminal law scholarship.