

ARTICLES

DIFFERENT TORTS FOR DIFFERENT COHORTS: A CULTURAL PSYCHOLOGICAL CRITIQUE OF TORT LAW'S ACTUAL CAUSE AND FORESEEABILITY INQUIRIES

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INTRODUCTION

Current research on law and psychology, particularly in the area of behavioral decision theory, assumes that all people have a similar psychological make-up. It assumes that all defendants, jurors, judges and lawmakers are subject to the same predictive errors of thought, known as cognitive biases, and apply the same heuristics, or rules of thumb. To date, the effect of individual and group differences upon these cognitive processes has neither been discussed nor evaluated. This paper analyzes how psychological processes and biases vary across cultures, and reveals the way these differences result in uneven treatment and incentives in American tort law's actual causation and foreseeability inquiries.

A. PREVIOUS WORK IN LAW AND PSYCHOLOGY

An examination of scholarly work in law and psychology reveals that, despite the recent application of psychological knowledge to important substantive law issues, systematic cultural differences revealed by empirical psychological work are rarely applied to legal issues. The lack of cross-cultural analysis is not surprising. Prior to the past two decades, it was rare to find scholars applying basic psychological principles to critique fundamental principles of law, especially outside of the areas of eyewitness

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identification and jury selection and behavior. Recent work in law and psychology, on the other hand, has taken great strides in illustrating the importance of empirical contributions to the law. In this section, we briefly summarize how scholarship in law and psychology has developed over the past twenty years. In examining the development of the discipline, we highlight the key issues in law and psychology and reveal the existing debates between scholars with regard to such issues. In addition, we address many of the issues underlying these debates and illustrate how empirically verified cultural differences can be harnessed to improve the law.¹

An early and meaningful application of psychological principles to legal theory was conducted by Michael Saks and Robert Kidd, who illustrated how heuristics and cognitive biases (namely those revealed initially by Daniel Kahneman and Amos Tversky)² lead to evidentiary and procedural problems when applied to fact-finders.³ Since Saks and Kidd's groundbreaking work in 1980, scholars have frequently examined and evaluated specific areas of the law using heuristics and cognitive biases as tools. Proponents of behavior decision theory, who aim to produce an accurate description of judgment and choice while challenging law and economics' assumption that actors are rational, have often advocated such research.⁴

Some of these scholars have applied cognitive bias principles to illustrate, for example, how the hindsight bias⁵ reveals weaknesses in jurors' after-the-fact reasonableness judgments, and how overconfidence impacts actors' ability to evaluate potential consequences of risky

¹ In this paper, we focus on only the role of cultural psychology in American law. Certainly, the cultural differences we present would be relevant to other legal systems as well. Although we do not undertake that challenge in this article, we encourage others to examine the role of cultural psychology in other legal systems.

² See generally Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, 3 COGNITIVE PSYCHOL. 430 (1972); Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCHOL. REV. 237 (1973); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979). See also Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers*, 76 PSYCHOL. BULL. 105 (1971); Daniel Kahneman & Amos Tversky, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973); Daniel Kahneman & Amos Tversky, *Casual Schemata in Judgments Under Uncertainty: Heuristics and Biases*, 1 PROGRESS IN SOC. PSYCHOL. 49 (Martin Fishbein ed., 1980).

³ See generally Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW AND SOC'Y REV. 123 (1980).

⁴ See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1545 (1998). See also Jeffrey J. Rachlinski, *The 'New' Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739 (2000).

⁵ The "hindsight bias" occurs when people overestimate the extent to which they could have predicted a future event once they learn what actually happened. See generally Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION PERFORMANCE 288 (1975). See also Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1504 (1998).

behavior.⁶ Others have described and applied various other psychological principles to the law, including framing effects, anchoring, and availability and representativeness heuristics.⁷ Thus far, however, no scholars have made meaningful efforts to understand how empirical work in cultural psychology illustrates the weaknesses of substantive laws.⁸

The growing list of cognitive biases that scholars have applied to the law has drawn significant attention and criticism. The concerns of critics are numerous and thoughtful. Some law and economics scholars argue that the rational person standard is capable of incorporating psychological flaws.⁹ Others embrace the benefits of a psychological approach to the law.¹⁰ However, even those more open to the use of psychological principles in legal analysis have advocated the use of caution.¹¹ These scholars point out that if the full myriad of psychological shortcomings were introduced into the legal world, they could potentially become so prolific that any behavioral analysis would inevitably omit a contradictory phenomenon.¹² Other scholars make a more application-focused argument,

⁶ Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante, Determining Liability in Hindsight*, 19 LAW & HUM. BEHAV. 89, 90 (1995). As Kamin and Rachlinski describe, “[p]recautions that seem reasonable in foresight look inadequate in hindsight.” See also Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998).

⁷ “Framing effects” describes the principle whereby the way probabilities are phrased affects people’s perceptions and judgments of those probabilities. “Anchoring effects” describes how certain information presented prior to asking a question can affect perceivers’ responses by impacting the starting point (or “anchor”) of perceivers’ judgments. For example, Tversky and Kahnemann illustrated how the phrasing of questions about the length of the Mississippi River affects perceivers’ judgments of the river’s length. Perceivers consistently judged the river as longer when asked whether it was longer than 3,000 miles compared to when they were asked whether it was longer than 500 miles. The availability heuristic is a mental shortcut through which one estimates the likelihood of an event by the ease with which instances of that event come to mind. The representativeness heuristic is a mental shortcut through which people make judgments by the ease in which typical events in that category are vividly recalled (such as a plane crash compared to an auto crash). See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974) (initially reporting these biases). See also CASS SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2002). For a broad overview of the studies applying these biases (and others) to the law, see Langevoort, *supra* note 5.

⁸ An exception to this statement is recent work by the authors exploring empirically how culture impacts the psychological bases of contract formation. See Justin D. Levinson, Kaiping Peng & Lei Wang, *Let’s Make A Deal: Understanding the Cultural Psychological Basis of Contract Formation* (July 2003) (unpublished manuscript, on file with the University of California, Berkeley Department of Psychology).

⁹ These scholars argue that discussion of how psychological flaws highlight the weaknesses of our legal inquiries is superfluous. See Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998) (defining what we call cognitive biases as “cognitive quirks”) (commenting on Jolls et al., *supra* note 4).

¹⁰ These scholars have recognized the limits of the rationality assumption (known as “bounded rationality”) and have even encouraged continued empirical research applying psychology and the law. See Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1194 (1997). See also Jolls et al., *supra* note 4, at 1545.

¹¹ See Rachlinski, *supra* note 4, for a review of, and response to, these arguments, particularly those posed by Hillman, *infra* note 12.

¹² *Id.* See also Jolls et al., *supra* note 4, at 1524 (pointing out that the hindsight bias may be a countervailing weight to people’s overconfident tendency to underestimate the likelihood of being sanctioned). Hillman, who used evidence of cognitive biases to critically analyze courts’ eagerness to

pointing out the lack of available solutions consistent with existing legal reform procedures.¹³ Despite the debates about behavior decision theory, practically all who discuss psychology and law agree that there are certain benefits of measured research and encourage future study in the discipline.¹⁴

Our study in the discipline analyzes the ways in which cultural psychology can contribute to legal scholarship in law and psychology. We do this primarily by examining the way systematic cultural differences can create uneven psychological biases across groups. We expose these biases through our analysis of the tort law principles governing the administration of the actual causation and foreseeability tests. While the biases we present and explore are currently stable within culture, they are not applied consistently amongst the different groups subject to the law. In some predictable, identifiable cases, discreet subgroups receive disparate treatment, sometimes to their detriment. Given this uneven treatment, legal scholars should concern themselves not only with the gap between the legal principle and psychological principle, but also with the psychological gaps that may separate people treated similarly under the laws.

Our research illustrates how cultural differences affect the law in ways yet to be discussed by the majority of law and psychology scholars. In general, these scholars have spent a large chunk of their efforts analyzing jury decision-making processes and critiquing law and economics' rationality assumption. Unlike these scholars, we do not aim to discredit (or credit, for that matter) the fundamental rationality assumption of law and economics. Instead, we aim to demonstrate how cultural psychology allows us to examine the law in a new and critical way, particularly in cases where notions of psychology are already embedded into the substantive legal inquiry.¹⁵

In order to do this, we first examine various social psychological principles assuming that there are no cultural differences. We then apply cultural psychological research to these principles and note how the analysis ultimately changes. Our first illustration shows how the fundamental attribution error, or the tendency to focus on internal dispositions when making causal determinations, skews the decisions of jurors who are conducting tort law's actual cause inquiry. We evaluate the policy implications of this psychological principle, including the possibility that it over-deters actors from engaging in socially and economically

overtum liquidated damages provisions, has argued that reform is particularly difficult when judges and reformers themselves are subject to the same biases but cannot accurately recognize them. See R. A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 CORNELL L. REV. 717 (2000).

¹³ Rachlinski, *supra* note 6, at 602.

¹⁴ Jolls et al., *supra* note 4, at 1494 ("The goal of the behavioral approach is to go back and forth between data and theory to generate predictions that will generalize."). See also Sunstein, *supra* note 10; Rachlinski, *supra* note 4.

¹⁵ Of course, we cannot ignore the fact that behavioral decision theorists and law and economics scholars have waged the relevant debates in our area. Where discussions of behavioral incentives, for example, are relevant, we do not attempt to avoid these issues.

desirable behaviors. We also reveal cultural differences in attribution patterns, such as Asians' proven tendencies to focus more on external, situational factors, and discuss how such cultural differences alter our policy landscape.

Our next illustration shows how the psychological principle of culpable causation, people's tendency to attribute causes to morally blameworthy actors, places additional causal responsibility upon morally blameworthy actors in the actual causation inquiry. Empirical research indicates that the causal inquiry itself, and therefore any strict liability standard, is psychologically embedded with moral judgments. Differences in how causation is attributed often depend upon the culture of judges, juries, and defendants.

Finally, we discuss how individuals attempting to evaluate ex-post the foreseeability of harm resulting from a particular action rarely invoke the same psychological processes and principles that the actor used while in the situation.¹⁶ We note that this problem is exacerbated in cross-cultural settings, where members of certain cultures view the potential consequences of their actions quite differently. These differences are illustrated, for example, by an explanation of psychological research indicating that the illusion of control¹⁷ applies differently across cultural groups. We discuss how the existence of these psychological gaps, not only between different actors evaluating the same course of action, but also between those actors and the jurors later examining the situation, challenge the law's policy goals of deterrence and fairness, particularly in light of predictable cultural differences. We conclude by examining potential solutions to these inequities through traditional legal means, as well as through further empirical psychological research designed to test solution hypotheses.

There are several reasons why the law should examine and embrace the role of cultural differences in the law. First, and most plainly, our society is multicultural. Within the United States, cultural identities are not uniform, and unique documentable differences persist and thrive in communities all around the country. Current research in cultural psychology, as we will explain, indicates that differences across cultures present predictable results. Second, the increasingly global nature of our economy renders an inward-looking legal philosophy outdated. Interdisciplinary schools of thought, such as law and economics, attempt to be global in application. Law and psychology should, too. Third, the field of cultural psychology, a new but scientifically bountiful discipline, now allows us to examine empirically how our law deals with a multicultural society. Knowledge of cultural psychological differences is growing all the time through new

¹⁶ See Rachlinski, *supra* note 6, at 571, for a brief discussion of the hindsight bias' impact on foreseeability. See also Donald J. Langevoort, *Ego, Human Behavior and Law*, 81 VA. L. REV. 853 (1995) (applying the illusion of control and ego forces to the law).

¹⁷ The illusion of control refers to people's expectancy of personal success, which is inappropriately higher than objective probability would warrant. See Ellen Langer, *The Illusion of Control*, 36 J. PERSONALITY SOC. PSYCHOL. 311 (1975).

research. Fourth, our law demands fairness. As it has developed, our law has sought not to discriminate, but instead to take into consideration the diversity of perspective of our society. Even the concept of the jury pool embraces that notion. With this perspective, we examine our laws in light of our increasing knowledge of the human mind.

B. THE LEGAL BACKDROP: TORT LAW'S CAUSATION AND FORESEEABILITY INQUIRIES

Before analyzing in detail how cultural psychology helps us critique the law, we must first outline the legal tests and policies of the laws we will examine. Assume the following: an injury occurs and the injured party seeks legal redress from an alleged negligent actor. To recover successfully in a negligence action, the plaintiff must prove, among other things, a "reasonably close" causal connection between the defendant's conduct and the injury.¹⁸ Establishing a causal connection is important because it limits responsibility to causes significant enough to justify imposing liability.¹⁹

The law breaks down the issue of causation into two inquiries.²⁰ Actual cause, also known as cause in fact, is typically the first inquiry. On its own, actual cause does not suffice to allow a judgment of liability. It has been described as a test of exclusion and is most frequently applied as a "but for" or *sine qua non* test (i.e., "defendant's negligence is a cause in fact of an injury where the injury would not have occurred *but for* defendant's negligent conduct").²¹ Generally, if the "but for" test is met, a cause in fact relation is found to exist.²² At that point, the inquiry proceeds to whether there is proximate cause, an inquiry driven by policy considerations such as whether the law should hold the defendant legally responsible for the harm caused by the defendant's negligence.²³

As a whole, both the "but for" test of actual causation and the proximate cause test have their limitations. For example, one main criticism of the "but for" test is that it is a hypothetical question.²⁴ It

¹⁸ PROSSER AND KEETON ON TORTS § § 30, 41 (W. Page Keeton ed., 1984).

¹⁹ *Id.* at § 41.

²⁰ See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973). The factual analysis of actual causation and the more policy-based proximate cause analysis are not always viewed as two sequential inquiries under the terminology we use. However, whether or not they are presented as two separate inquiries or as one complex inquiry, the inquiries we describe are dominant themes of tort law's causation inquiry.

²¹ FOWLER V. HARPER, ET AL., 4 THE LAW OF TORTS § 20.2 (2d ed. 1986). Legal scholars have long debated whether this formulation best effectuates tort law's policy goals. For our purposes, we focus on this "but for" test, the most widely used formulation.

²² There are certain exceptions to this generalization, including when multiple sufficient causes exist. For purposes of this article, we assume a "but for" analysis would apply to the hypotheticals presented, because our hypotheticals would likely fall under the "but for" test.

²³ "As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability." PROSSER AND KEETON ON TORTS, *supra* note 18, at § 41.

²⁴ See generally E. Wayne Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause in Fact*, 46 TEX. L. REV. 423 (1968).

requires a fact-finder to decide what would have happened if the defendant did not act negligently.²⁵ Psychologists call this type of hypothetical inquiry a “counterfactual” inquiry.²⁶

In an attempt to connect the notion of legal responsibility to causation, “the prevailing rule requires that the plaintiff’s injury be a foreseeable consequence that the defendant should reasonably have anticipated.”²⁷ It is not necessary that the defendant should reasonably foresee the exact method of harm, but rather she should have reasonably foreseen that her conduct would lead to the result.²⁸ The primary purpose of the foreseeability requirement, whether in the duty or proximate cause analysis, is to insure fairness.²⁹ The foreseeability test also has the secondary purpose of “deter[ing] negligent conduct proportionate to the risks that should be foreseen and, conversely, [not over-detering] socially useful conduct.”³⁰ As we will illustrate, these words were probably a bit hopeful.

The factual determination of actual cause is frequently left in the hands of the jury.³¹ If reasonable persons could differ as to the determination of whether the defendant’s action was a cause in fact, then the court presents the jury with the applicable legal standard. The court then asks for the jury to apply the legal standard to the facts as they find them to be.³² Similarly, the jury will likely be involved in a determination of foreseeability.³³ In each case, the burden of proof is typically on the plaintiff, who must

²⁵ See PROSSER AND KEETON ON TORTS, *supra* note 18, at § 41.

²⁶ Counterfactual inquiries are difficult to prove. Some psychological research has shown that perceivers use causal rules consistent with the counterfactual actual cause inquiry. See Thomas R. Shultz, et al., *Judgments of Causation, Responsibility, and Punishment in Cases of Harm-Doing*, 13 CANADIAN J. BEHAV. SCI. REV. 238 (1981). But see Barbara A. Spellman & Alexandra Kincannon, *The Relation Between Counterfactual (“But For”) and Causal Reasoning: Experimental Findings and Implications for Jurors’ Decisions*, 64 LAW & CONTEMP. PROBS. 241 (2001), for another view indicating that counterfactual judgments do not always match causal judgments. For a discussion of counterfactual inquiries in law and psychology, see Neal R. Feigenson, *Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61 (1995). See also our discussion of psychological findings, particularly in the Morris and Peng study, *infra*.

²⁷ JOHN L. DIAMOND, ET AL., UNDERSTANDING TORTS § 12.01 (2d ed. 2000). Note that the foreseeability analysis does not always occur during the proximate cause analysis. It is often seen as part of the duty analysis of the negligence inquiry. Such analysis is used when performing the duty portion of the negligence inquiry. See PROSSER AND KEETON ON TORTS, *supra* note 18, at § 42. In the duty analysis, the court asks whether the defendant owed a duty to conform to a standard of conduct in order to protect others against unreasonable risks. *Id.* at § 30.

²⁸ See DIAMOND ET AL., *supra* note 27, at § 12.03.

²⁹ “It would seem that the negligent person ought only to be made liable to the extent to which he ought to have foreseen those results.” HARPER ET AL., *supra* note 21, at § 12.04 (citing W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 450 (2d ed. 1937)). Pollack stated that the test for whether a defendant should be held liable for a harm caused by a negligent action is “such as the defendant could reasonably be expected to anticipate.” HARPER ET AL., *supra* note 21, at § 20.5 (citing Pollack, *Liability for Consequences*, 38 LAW Q. REV. 165 (1922)).

³⁰ DIAMOND ET AL., *supra* note 27, at § 12.04.

³¹ See PROSSER AND KEETON ON TORTS, *supra* note 18, at § 41. See also Thode, *supra* note 24, at 425.

³² See PROSSER AND KEETON ON TORTS, *supra* note 18, at § 45.

³³ See *id.*

persuade the jury that the facts meet a “more likely than not” standard.³⁴ This means that the plaintiff must prove that it is more likely than not that the resulting harm would not have occurred but for the defendant’s conduct, and that it is more likely than not that the harm caused by the defendant’s conduct was foreseeable.

C. SOCIAL AND CULTURAL PSYCHOLOGY GENERALLY

Social psychology has been described as the scientific study of interpersonal behavior and events.³⁵ For decades, social psychologists have studied human perceptions of cause and causal attributions. Attribution research aims to understand the psychological processes underlying people’s interpretations of the causes of others’ behaviors. Heider, the founder of attribution theory, argued that a person’s response to a social situation is largely a function of how the person subjectively organizes information from a situation through attributions. Heider’s most influential idea may have been the concept that attributions are guided by lay theories, or people’s intuitively constructive folk beliefs, such as the schema that criminal behavior reflects both situational forces (environmental factors that facilitate or constrain the person) and internal forces (the combination of personality and desires).³⁶

During the past twenty-five years, the field of cultural psychology has emerged, developed primarily by anthropologists³⁷ and psychologists.³⁸ This contemporary field of psychological research is concerned with both the psychological foundations of cultural communities and the cultural foundations of the mind. It examines the way in which culture and the psyche interact over the history of the group and over the life course of the individual. The word “cultural” in the phrase “cultural psychology” refers to the local or community-specific concepts of what is true, good, beautiful, and efficient that are socially inherited (made manifest in the language, laws,³⁹ and customary practices of the members of a certain group) and

³⁴ DIAMOND ET AL., *supra* note 27, at § 11.01. See also Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992).

³⁵ BERNARD SEIDENBERG & ALVIN SNADOWSKI, SOCIAL PSYCHOLOGY: AN INTRODUCTION (1976) (citing DAVID KRECH ET AL., INDIVIDUAL IN SOCIETY (1962)).

³⁶ FRITZ HEIDER, THE PSYCHOLOGY OF INTERPERSONAL RELATIONS (1958).

³⁷ See ROY D'ANDRADE, THE DEVELOPMENT OF COGNITIVE ANTHROPOLOGY 1, 8-10 (1995); CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 11 (1973); ROBERT I. LEVY, TAHITIANS: MIND AND EXPERIENCE IN THE SOCIETY ISLANDS (1973); RICHARD SHWEDER, THINKING THROUGH CULTURES: EXPEDITIONS IN CULTURAL PSYCHOLOGY 73 (1991).

³⁸ See JEROME BRUNER, ACTS OF MEANING 19-20 (1990); MICHAEL COLE, CULTURAL PSYCHOLOGY: A ONCE AND FUTURE DISCIPLINE (1996); Hazel Markus & Shinobu Kitayama, *Culture and the Self: Implications for Cognition, Emotion, and Motivation*, 98 PSYCHOL. REV. 224, 224-25 (1991); Joan Miller, *Culture and the Development of Everyday Social Explanation*, 46 J. PERSONALITY SOC. PSYCHOL., 961 (1984); Richard E. Nisbett, Kaiping Peng, Incheol Choi & Ara Norenzayan, *Culture and Systems of Thought: Holistic vs. Analytic Cognition*, 108 PSYCHOL. REV. 291, 293 (2001); Kaiping Peng, Daniel Ames & Eric Knowles, *Culture and Human Inference: Perspectives from Three Traditions*, in HANDBOOK OF CULTURE AND PSYCHOLOGY 243, 245 (D. Masumoto ed., 2001).

³⁹ It is with interesting circularity that, although at the same time we argue for cultural understanding in the law, culture itself in a sense comes from the law. A basic example is the role of the

serve to mark a distinction between different ways of life. The word “psychology” in the phrase “cultural psychology” refers broadly to mental functions – such as perceiving, categorizing, reasoning, remembering, feeling, choosing, valuing, and communicating. A “mental” function is a function that relates to the capacity of the human mind to grasp ideas, act based on reason or with a purpose in mind, to be conscious of alternatives, and to be aware of the content or meaning of one’s own experience. Thus, cultural psychology is the study of the way the human mind can be transformed, given shape and definition, and made functional in numerous ways that are not uniformly distributed across cultural communities.⁴⁰

While some of the most revealing cultural psychology studies have been focused on the differences between cultures globally, identifiable cultural differences also exist locally within the United States. There are, however, few empirical studies that have examined the psychological differences across cultural groups in the U.S. Many psychologists have reservations about these types of studies because they fear that the findings may be misused in an attempt to justify and perpetuate racism or ethnic discrimination.⁴¹ Still, there are some psychological studies that attempt to describe the core of ethnic and cultural differences within the U.S.

One such study, conducted by psychologist James Jones, suggests that African American psychology may reflect a continuing African influence.⁴² The study contends that African Americans exhibit psychological differences in the areas of time orientation, sense of rhythm, and improvisation; and they tend to prioritize oral expression and strong spirituality. A similar study, conducted by Marin and Marin, suggests that Hispanics have high levels of interdependence, conformity, and readiness to sacrifice for the welfare of in-group members.⁴³ Another study, conducted by Uba, contends that Asian Americans tend to emphasize harmony, relationship, obligation to the family, and the prioritization of group interests over individual interests.⁴⁴ Yet another study on Native Americans suggests that they tend to be more present-oriented, in harmony

court in society. Lay people all have a culture-specific knowledge of what a typical court is like: who is involved, what they wear, where they sit, and how the events proceed. This mental representation is based on a cultural institution – an actual court that operates outside of people’s cognitive world. People either witness this cultural institution personally, through a third-party representation (such as mass media), or otherwise (e.g., through stories). Therefore, the courts themselves in some way determine people’s knowledge of a typical court. As a result, people’s own court-behavior may re-enact, and thus help perpetuate, court in real life.

⁴⁰ See Schweder, *supra* note 37. KAIPING PENG, READINGS IN CULTURAL PSYCHOLOGY (2001).

⁴¹ We have similar concerns as to how the cultural differences we discuss are evaluated. If our current standards are culturally-biased, they should not be solved by creating separate rules for separate cultures, but by designing culturally-neutral techniques.

⁴² James Jones, *Racism in Black and White: A Bicultural Model of Reaction and Evolution*, in ELIMINATING RACISM: PROFILES IN CONTROVERSY 137 (P. Katz & D. Taylor eds., 1988).

⁴³ GERARDO MARIN & BARBARA MARIN, RESEARCH WITH HISPANIC POPULATIONS 11-17 (1991).

⁴⁴ LAURA UBA, ASIAN AMERICANS: PERSONALITY PATTERNS, IDENTITY, AND MENTAL HEALTH 15 (1994).

with nature, and focused on the welfare of the group.⁴⁵ The common theme that unites all of these studies is the contention that across the various ethnic communities, there are broad cultural differences in both the perception and valuation of individualism and collectivism.⁴⁶ Although research has shown that some of these differences may result from socio-economic differences rather than ethnic/cultural differences, it is almost certain that ethnic/cultural differences do play a significant role in creating these variations in understanding.⁴⁷

D. LINK TO PSYCHOLOGY SPECIFICALLY

The relevance of psychology to the law to date has typically focused on juries, eyewitnesses, and whether principles such as deterrence are effectuated by the law. We agree that psychology provides invaluable insights in these areas, and we do not hesitate to use psychological tools to critique these particular aspects of the law. We do not, however, believe that these are the only, or even most appropriate, areas of the law in which psychological tools may be used. In the case of the causation inquiry we critique, the law itself indicates psychology's relevance, and the historical and case law discussions of the notion of actual cause further illustrate such relevance.

The determination of whether a negligent action is the actual cause of harm has long been associated with the existence or non-existence of a causal relationship as lay people view it.⁴⁸ Roscoe Pound described it as a principle of "common sense."⁴⁹ Prosser and Keaton describe the causal relationship as "the projection of our habit . . . merely because we had observed these sequences on previous occasions."⁵⁰ The decision to rely upon human perception of cause rather than physical causation should

⁴⁵ Carolyn Attneave, *American Indians and Alaska Native Families: Emigrants in Their Own Homeland*, in *ETHNICITY AND FAMILY THERAPY* 55, 65-73 (M. McGoldrick et al. eds., 1982).

⁴⁶ See generally P. GREENFIELD & R. COCKING, *CROSS-CULTURAL ROOTS OF MINORITY CHILD DEVELOPMENT* (1994); Markus & Kitayama, *supra* note 38; Harry C. Triandis, *Cross-Cultural Studies of Individualism and Collectivism*, 37 *NEBRASKA SYMPOSIUM ON MOTIVATION: CROSS-CULTURAL PERSPECTIVES* 41 (John J. Berman ed., 1990).

⁴⁷ See generally HARRY C. TRIANDIS, *INDIVIDUALISM AND COLLECTIVISM* (1995).

⁴⁸ HARPER ET AL., *supra* note 21, at § 20.2 (referring to the cause in fact analysis as "not a metaphysical one but an ordinary, matter-of-fact inquiry into the existence of causal relation as lay people would view it"). See also PROSSER AND KEETON ON TORTS, *supra* note 18, at § 41 ("This question of 'fact' ordinarily is one upon which all the learning, literature and lore of the law are largely lost. It is a matter upon which lay opinion is quite as competent as that of the most experienced court.").

⁴⁹ Roscoe Pound, *The Theory of Judicial Decision*, 36 *HARV. L. REV.* 940, 952 (1923).

⁵⁰ PROSSER AND KEETON ON TORTS, *supra* note 18, at § 41. This assertion by Prosser and Keaton seems to be an attempt to introduce social psychology into an understanding of causal analysis, indicating that they believe previous experiences to be a predictor of causal relationships. Interestingly, cultural psychological research indicates that such an assertion may be culturally limited. Research shows that while Americans often rely on linear trends (provided by previous occasions) as a predictor of future events, Asians rely more upon notions of "changeability." See Li -Juan Ji et al., *Culture, Change, and Prediction*, 12 *PSYCHOL. SCI.* 450 (2001).

benefit from the scientific understanding of human perception provided by psychology.⁵¹

E. CHALLENGING TORT LAW'S ACTUAL CAUSE INQUIRY: CULTURAL PSYCHOLOGY APPLIED

Rick is speeding on a two-lane road. The road is wet, and a dense fog has settled upon it. Up the road, a bus has run out of gas and has attempted to pull over to the shoulder. The bus, however, is still slightly blocking the roadway. Rick's car hits the bus.

Facts like these are not uncommon in tort law, particularly in negligence actions. Based on the facts presented, there are three primary potential causes of the accident: (1) Rick's driving (the negligent action), (2) the road conditions, and (3) the bus partially blocking the roadway.⁵² Assuming that Rick is the defendant in a negligence action, the determination of cause in fact will go to a jury as long as reasonable persons can differ with respect to such a determination. The cause-in-fact question presented to the jury will require it to make the following counterfactual judgment: is it more likely than not that the harm would have occurred if Rick were not driving negligently?

Tort law leaves the inquiry with the jury and waits for a factual determination. Psychology does not stop there. Psychology requires one to examine and understand how the jury will evaluate the cause-in-fact determination, which includes understanding the jury's susceptibility to external facts that may have been admitted into evidence.⁵³ After all, a jury will typically have heard, and have been influenced by, more information than is presented in the hypothetical above. Why was Rick speeding? Was anyone on the bus when it was hit? How many people were hurt or killed? While this information is not relevant to the legal inquiry of actual cause,⁵⁴ it can be used to garner clues as to how jurors will make their cause-in-fact determination when it is viewed within the context of social and cultural psychology. In the next section, we begin this inquiry by examining how the psychological principle of attribution (and particularly the fundamental attribution error) allows one to predict differences in jury evaluation and critique legal standards of causation.

⁵¹ Similarly, the foreseeability analysis should benefit from an understanding of social psychology. The comments to Maryland's jury instructions point out the connection: "whether a reasonable person would or should know . . . by reflecting current societal standards." Maryland Civil Pattern Jury Instructions (citing *B.N. v. K.K.*, 538 A.2d 1175 (1988)). This reference to "current" societal standards indicates that the standard is designed to change along with a changing society.

⁵² Many other physical causes technically exist (for example, the traffic signal that slowed down Rick enough so that he happened to be driving down the street after, rather than before, the bus had already run out of gas). We focus on the causes most likely to be evaluated by a jury.

⁵³ By "external facts" we mean any facts that the law would deem not specifically relevant to a cause-in-fact determination.

⁵⁴ The information regarding the severity of harm could be relevant if such harm is the specific harm for which the court action seeks redress.

1. *Attribution Differences and the Fundamental Attribution Error*

One well-known pattern of psychological error is the tendency of observers to overestimate how much a person's behavior is determined by his or her internal stable dispositions. This tendency was first described by Ichheiser⁵⁵ and later formalized by Ross⁵⁶ as "the fundamental attribution error" ("FAE"). Ross illustrated the FAE by recreating a game show situation and investigating why observers typically believe that game show hosts are more intelligent than the contestants.⁵⁷ Ross randomly assigned subjects to be game show hosts, contestants, or observers.⁵⁸ Even though those who had been chosen to be observers were fully aware that the hosts and contestants were selected at random, when they evaluated the knowledge and intelligence of the contestants and hosts, they consistently rated the hosts as smarter and more knowledgeable than the contestants.⁵⁹ Such attributions were clearly mistakes, as the random nature of the group assignments assured that members of the different groups were equally intelligent and knowledgeable.⁶⁰ The observers made these mistakes because they ignored the contextual roles of the group assignments and instead made internal attributions relating to the hosts and contestants.⁶¹

Psychologists Jones and Harris further illustrated the nature of the FAE by presenting essays on Fidel Castro and asking subjects to make judgments about the authors' attitudes toward Castro and communism.⁶² The subjects were told that the authors were not able to choose their point of view; some authors were required to write a pro-Castro essay, while others were required to write an anti-Castro essay.⁶³ The subjects were then asked to read the essays and decide whether each author had a pro- or anti-Castro attitude.⁶⁴ Despite knowing that the authors had no choice in selecting their points of view, subjects rated the pro-Castro authors as having pro-Castro attitudes, and the anti-Castro authors as having anti-Castro attitudes.⁶⁵ Subjects made these internal judgments despite the fact that they knew there was no correspondence between the authors' writing and their attitudes toward Castro.⁶⁶ Once again, the subjects overlooked the contextual factors and gave internal attributions to explain the authors' writings.

⁵⁵ Gustav Ichheiser, *Misunderstandings in Human Relations*, 55 AM. J. SOC. 150 (1949).

⁵⁶ Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 174 (1977).

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² Edward E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 J. EXPERIMENTAL SOC. PSYCHOL. 1 (1967).

⁶³ *See id.*

⁶⁴ *See id.*

⁶⁵ *See id.*

⁶⁶ *See id.*

The FAE illuminates the complexities of relying upon a judge or jury to fulfill our law's request to use "common sense" when making judgments about causation. To illustrate how the FAE works in a tort law setting, consider the hypothetical presented above. The legal inquiry, as a counterfactual question, asks the jury to consider whether the bus would have been hit but for Rick's driving. The FAE reflects a tendency of people to overestimate the power of internal dispositions and underestimate the power of external or situational factors.⁶⁷ In our hypothetical case, the internal attributions are explanations focusing on Rick, such as his characteristics, personality, traits, and intelligence. The external attributions focus on situational contextual factors, such as the wet road, the fog, and the bus' positioning. Given the FAE, jury members will almost certainly overestimate Rick's causal connection to the crash.

Two of tort law's primary policy goals are fairness and deterrence.⁶⁸ The effects that the FAE has on the administration of the law may prevent the system from achieving these goals. Given that the FAE frequently causes jurors to make internal attributions in perceiving defendants as but-for causes, fewer cases are excluded from the legal process than a non-biased inquiry would warrant. Fewer exclusions affect not only courtroom proceedings, but also the way in which members of society evaluate the potential risks of their actions. Faced with a lesser chance of having a causal analysis work in their favor, actors (who presumably balance the risks and rewards of a proposed course of action) will recognize increased risk. Specifically, the risk is that a jury will erroneously deem the action a but-for cause, which will not only send the case further down the litigation trail (which carries increased transaction costs), but also increase the likelihood of a liability determination. The potential rewards of the contemplated action, therefore, will have to be correspondingly higher in order to justify the course of action. Certain desirable actions that lie between the optimal "point of action" (where an actor would choose to act, with no cognitive error) and the revised "point of action" (where an actor would choose to act, with the FAE) will be chilled. Furthermore, the law's fairness goals will not be effectuated⁶⁹ because an actor who truly did not cause a harm might still be held causally responsible for that harm. That actor will be left to hope that the proximate cause analysis works in his favor to correct the injustice.

a. *Cultural Differences in the Fundamental Attribution Error*

⁶⁷ See Lee D. Ross et al., *Social Roles, Social Control, and Biases in Social-Perception Processes*, 35 J. PERSONALITY SOC. PSYCHOL. 485 (1976). See Langevoort, *supra* note 5, at 1504, for a brief discussion of how the FAE might apply to legal scenarios.

⁶⁸ HARPER ET AL., *supra* note 21, at § 1:32, 1:37.

⁶⁹ Perhaps the notion of "fairness" in American law itself is characterized by the FAE because it is an individualistic notion of what is "fair" to an individual defendant or victim, not a notion of "fairness" to the society. We allow for the same bias in this paper by focusing on "fairness" to the individual, not to society. We focus mostly on fairness to the alleged tortfeasor. There are other concepts of fairness as well, including fairness to the victim. Legal scholars have debated fairness and other tort policy rationales for over a century. See HARPER ET AL., *supra* note 21.

Cross-cultural research on attribution has consistently found that Americans⁷⁰ are inclined to explain events by reference to properties of the object and that Asians are inclined to explain the same events with reference to interactions between the object and the field.⁷¹ In one study, Miller presented subjects with a fact pattern describing a “bar room brawl.” She then asked participants from India and the United States to identify the causes of the fights. She found that Americans were more likely to identify internal traits, such as a hot temper or bad personality, as the causes of the fights. Hindu Indians, on the other hand, were more likely to explain the fights as caused by the bar context, including the overall dangerousness of bars.⁷²

Similarly, Morris and Peng as well as Lee, Hallahan, and Herzog have shown that Americans explain murders and sporting events by invoking presumed dispositions of the individual, whereas Chinese explain the same events with reference to contextual factors.⁷³ In Morris and Peng’s study, the researchers presented subjects with stories of mass murderers and asked them to explain the causes of the murders. American subjects more frequently believed that the murders were caused by the perpetrator’s temperament, traits, and dispositions. Chinese were more likely to believe that bad interpersonal relations and bad environments caused the murders. A content analysis of media reports of the murders showed the same patterns of thought across cultures.⁷⁴

⁷⁰ Throughout this paper, we refer to “Americans” and “Asians” frequently. Most cultural psychological experiments on Americans to date have been conducted on middle class European Americans. Therefore, when we say “American” in the context of psychological research or predictions in this paper, we must limit ourselves to psychologically tested cultural notions of “American” culture (that are predominantly influenced by Euro-American values, beliefs, and behaviors). When we say “Asian,” we limit ourselves to psychologically tested cultural notions in various Asian cultures. Most of these tests have been conducted on East Asians, including Chinese, Japanese, and Koreans. It is true that cultural differences exist between and within such cultures. However, the scientific research we rely upon tends to indicate that collectivist East Asian cultures often share cultural psychological similarities in ways of thinking. See RICHARD E. NISBETT, *GEOGRAPHY OF THOUGHTS: HOW AMERICANS AND EAST ASIANS THINK DIFFERENTLY AND WHY* (2003) for a meaningful discussion of this point. We do not intend to suggest that all facets of American or Asian cultures are the same. However, the research we rely upon has been consistent in highlighting overall cultural similarities within such groups. We acknowledge that by using such terms, we are generalizing. We hope that, over time, continued cultural psychological research will continue to increase our knowledge of culture both generally and specifically.

⁷¹ Interestingly, new cross-cultural research indicates that causal attributions function differently when applied to a situation where a group and individuals within that group are both listed as potential causes. See Tanya Menon et al., *Culture and the Construal of Agency: Attribution to Individual Versus Group Dispositions*, 76 J. PERSONALITY SOC. PSYCHOL. 701 (1999). In such cases, Asians will be more likely than Americans to focus on collective-level actors and to causally attribute to group dispositions. Americans will be more likely to focus on individual actor’s dispositions.

⁷² See Miller, *supra* note 38.

⁷³ See Michael W. Morris & Kaiping Peng, *Culture and Cause: American and Chinese Attributions for Social and Physical Events*, 67 J. PERSONALITY SOC. PSYCHOL. 949 (1994); Fiona Lee et al., *Explaining Real Life Events: How Culture and Domain Shape Attributions*, 22 PERSONALITY AND SOC. PSYCHOL. BULL. 732 (1996).

⁷⁴ In this paper, we focus on empirical findings indicating cultural differences. However, understanding the psychological basis for these findings helps us understand the potential basis for the

In another study, Morris and Peng showed participants cartoon-displays of fish moving in relation to one another in various ways.⁷⁵ For example, participants saw a lone fish swimming away from a group of fish, and were then asked to explain the causes of the lone fish's behavior. Chinese participants were more likely to see the behavior of the lone fish as being caused by the group of fish (external factors), while American participants were more inclined to see the behavior as being caused by the lone fish's desires (internal factors).

These studies suggest that, in general, Easterners see more complexity and potential causal factors at work in the world than Westerners do. Partly as a consequence, Easterners find it easier to explain any given outcome and are more susceptible to hindsight bias.⁷⁶ When presented with apparent contradictions, Westerners resolve the situation by deciding which of the two propositions is correct, whereas Easterners are inclined to find some truth in both propositions. Westerners thus emphasize noncontradiction, whereas Easterners value the "Middle Way."⁷⁷

differences themselves. Recent evidence on cultural differences points to both individual and cultural differences in the underlying causal schemas or lay theories that guide attribution. Carol S. Dweck et al., *Implicit Theories: Individual Differences in the Likelihood and Meaning of Dispositional Inference*, 19 PERSONALITY AND SOC. PSYCHOL. BULL. 644 (1993); Joan Miller, *Culture and the Development of Everyday Social Explanation*, 46 J. PERSONALITY SOC. PSYCHOL. 961 (1984); Morris & Peng, *supra* note 73. For example, findings that the FAE is stronger in Western, individualistic societies than in collectivist societies, such as China, seem to reflect different lay theories about the autonomy of individuals relative to social groups. Nisbett, Peng, and their colleagues have proposed that contemporary Asian reasoning and perception is influenced by ancient Chinese holistic cognitions. Correspondingly, they argue that the ancient Greeks' more analytic approach influences the reasoning and perception of contemporary Western people. Li-Juan Ji et al., *Culture, Control, and Perception of Relationships in the Environment*, 78 J. PERSONALITY SOC. PSYCHOL. 943 (2000).

⁷⁵ See Morris & Peng, *supra* note 72; Ying Y. Hong et al., *Multicultural Minds: A Dynamic Constructivist Approach to Culture and Cognition*, 55 AM. PSYCHOLOGIST 709 (2000).

⁷⁶ See Incheol Choi & Richard E. Nisbett, *The Cultural Psychology of Surprise: Holistic Theories and Recognition of Contradiction*, 79 J. PERSONALITY SOC. PSYCHOL. 890 (2000). Existing legal discussions on the hindsight bias do not address these cultural differences.

⁷⁷ See Kaiping Peng & Richard E. Nisbett, *Culture Dialectics, and Reasoning*, 54 AM. PSYCHOL. 741 (1999). As we mentioned in note 26, *supra*, legal scholars have discussed psychological challenges of counterfactual inquiries. They have not, however, discussed the impact of culture on the inquiry. Are Asians, given their tolerance of contradiction, even able to apply a but-for inquiry? Studies testing how people apply these types of inquiries begin to reveal how culture is implicated throughout the process of determining actual causation. In a well-known series of studies, Alfred Bloom gave English and Chinese speakers controlled counterfactual stories and found that Chinese speakers were less adept at counterfactual reasoning than English speakers. A. BLOOM, *THE LINGUISTIC SHAPING OF THOUGHT* (1981). However, Au and Cheng have criticized Bloom's work, raising questions about the accuracy of the Chinese translations of the stories. Terry K. Au, *Chinese and English Counterfactuals: The Sapir-Whorf Hypothesis Revisited*, 15 COGNITION 162 (1983); P. W. Cheng, *Pictures of Ghosts: A Critique of Alfred Bloom's The Linguistic Shaping of Thought*, 87 AM. ANTHROPOLOGIST 922 (1985). Furthermore, there is little doubt that Chinese are capable of counterfactual reasoning in everyday life — the Chinese surely could think, "If I were only 5 minutes early, I would not have missed the train." The question then is whether or not the lack of a simple linguistic device to mark counterfactuals in Chinese language renders counterfactual reasoning less likely. See Earl Hunt & Franca Agnoli, *The Worfian Hypothesis: A Cognitive Psychology Perspective*, 98 PSYCHOL. REV. 377 (1991). Morris and Peng, *supra* note 73, have shown that in counterfactual thinking about mass murders, Americans were more likely to accept the effects of a counterfactual interpretation concerning individual dispositions (e.g., "if only he were

This recent knowledge of attributional differences across cultures allows us to predict how the cultural make-up of the jury will affect a determination of the cause in fact in our hypothetical. In general, Americans will overstate the causal link to internal dispositions (which, in this case, is Rick), and Asians will discount the link to internal dispositions, attributing the harm instead to contextual factors (such as the weather, the road conditions, and the position of the bus).

As our prediction indicates, cultural differences prevent the system from achieving its goal of fairness when the actual causation inquiry is applied. In the case of European American juries, the FAE will create a situation where fewer cases are excluded than an unflawed inquiry would warrant.⁷⁸ On the other hand, adding cultural diversity may change the inquiry and lead to an increased focus on situational causes. From a fairness perspective, the latter case is just as undesirable as the first. A causal determination should not depend so heavily upon the culture of the jury applying an inquiry, be it western or eastern, especially given that the inquiry's flaw becomes more apparent when examined in culturally variant situations. This is clearly illustrated by the effects that each scenario would have on the deterrence of undesirable behavior. Under Asian attribution patterns, actors would be under-deterred, as more cases will be excluded than a scientific inquiry would warrant.⁷⁹ Conversely, with American perceivers, over-deterrence would likely occur because actors will frequently be held responsible for harms that have not been caused by their actions, which will chill certain types of desirable behavior.

The disparity in deterrence effectiveness illustrated by the FAE has interesting policy implications. Tort theorists have long argued over how to evaluate various liability structures in light of the evidence of less than optimal actor comprehension and attention spans.⁸⁰ Howard A. Latin argued that "low attention" parties, parties whom he argued should be

not that mad") whereas Chinese were more sensitive to the situational counterfactual (e.g., "if only he were not in the U.S."). It seems that even if Chinese are less likely to engage in hypothetical or counterfactual reasoning than Westerners, the reasons may result more from cultural factors than differences in grammatical categories.

⁷⁸ It could be argued that if the psychological tendency to attribute cause overly to internal dispositions in Americans is systematic, then it still supports our goals of a common sense causal determination. It is, however, important to understand that the FAE is both a psychological error in reasoning and a culturally predictable tendency. Arguing that the FAE is really an American "common sense" understanding of cause is therefore conceding that our inquiry is psychologically flawed. In addition, the notion of common sense carries with it an inherent quality of simplicity. Such desired simplicity also fails to comport with the idea of psychologically complex phenomena. It is unlikely, therefore, that the notion of common sense was intended to include flaws such as the FAE.

⁷⁹ Though under-deterrence is likely to result from fewer exclusions (and over-deterrence through greater exclusions), the concept of deterrence is complex and can be manipulated in other ways. For example, increasing punishments or conducting a publicity campaign could each increase deterrence on their own.

⁸⁰ See Howard A. Latin, *Alternative Compensation Schemes and Tort Theory: Problem-Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677 (1985). But see Richard A. Posner, *Alternative Compensation Schemes and Tort Theory: Can Lawyers Solve the Problem of the Tort System?*, 73 CAL. L. REV. 747 (1985).

similarly situated actors compared on an objective basis, did not further social engineering goals.⁸¹ In the case of cultural differences among perceivers, we may have an analogous situation – where an objectively identifiable group processes incentive information differently.⁸²

b. *Severity of Harm*

The FAE has consequences that go beyond the error itself. Recent trends in social psychology reveal the manner in which the FAE interacts with other psychological phenomena and variables.⁸³ A particularly relevant interaction of variables for our purposes concerns the interaction of the FAE with varying severity of harm. Juries may consistently fail to apply unbiased notions of causation⁸⁴ when faced with varying severity of harm.⁸⁵ Returning once again to our hypothetical, assume two new alternative facts. First, assume that Rick's car hit a school bus packed with children, and that several children are severely injured. Alternatively, assume that the bus was an empty city bus. Psychological analysis suggests that in the severe harm condition, some people will search for a morally blameworthy stable causal attribution of the harm, even where other external causes may exist.

Scholars of cultural psychology have recently developed new theories that show how perceptions of the severity of harm interact with the FAE in a cross-cultural setting.⁸⁶ These studies allow us to predict increased attributions to actors by Asian perceivers in cases of severe harm. Given their focus on external information and societal impact of an action, Asians are more sensitive to severe harm situations and are more likely to have stronger reactions to cases of severe harm. Although this focus by Asians on severe harm situations translates into increased internal attributions, research shows that such focus will not have a corresponding effect of de-emphasizing contextual attributions (Asians will remain focused on the context as well). Americans, on the other hand, have exhibited mixed patterns of sensitivity to severity of harm.⁸⁷

⁸¹ Latin, *supra* note 80, at 698.

⁸² Posner, *supra* note 80, pointed out in his response to Latin's *Alternative Compensation Schemes*, *supra* note 80, that before arguing for shifting liability based upon psychological evidence, economic studies should be consulted (or presumably, if not yet in existence, conducted) as well. By no means do we think the cross-cultural research (psychological or economic) is done. In fact, it is just getting started.

⁸³ Phil Tetlock, *Accountability: A Social Check on the Fundamental Attribution Error*, 48 SOC. PSYCHOL. Q. 227 (1985).

⁸⁴ In addition to causal attributions, perceivers (particularly Asians) might also be more susceptible to increased severity of harm when determining foreseeability.

⁸⁵ See Norman J. Finkel & Jennifer Groscup, *When Mistakes Happen: Commonsense Rules of Culpability*, 3 PSYCHOL. PUB. POL'Y, AND L. 65 (1997).

⁸⁶ Kaiping Peng & Eric Knowles, *Culture, Education, and the Attribution of Physical Causality*, 29 PERSONALITY SOC. PSYCHOL. BULL. 1272 (2003).

⁸⁷ Psychology studies using between subjects designs (those designs that test variables by exposing subjects to only one condition) find that Americans are not sensitive to consequences in causal

Cultural psychologists have found that lay perceivers focus on the consequences of the action when deciding whom to blame and punish. Peng and Knowles have theorized that, while Americans are disposed to attend to an actor's internal intentions, East Asians have a more pragmatic, consequence-oriented folk theory of culpability.⁸⁸ In a study presenting various homicide cases, they found a statistically significant pattern in which East Asian judgments of causality and responsibility were influenced by consequences (fatal injuries versus superficial injuries), while American judgments of causality and responsibility were influenced more by intentionality (intentional versus accidental infliction).⁸⁹ Such a consequence-based distinction is not new to Chinese culture. In fact, notions of severity of harm permeate China's criminal code.⁹⁰ In our hypothetical case, this study means that Asian perceivers will be more likely to attribute causal responsibility to Rick when his car hits the school bus packed with children than when the car hits the empty city bus.⁹¹

The impact of Asians' increased likelihood of attributing cause in severe harm situations challenges tort law's policy rationale of fairness. The magnitude of the harm is certainly relevant to the issue of damages in a tort claim. The law, however, does not ask the jury to consider the magnitude of the harm when making a determination of the cause in fact. Rather, the law wants the jury to ignore such information at that stage of evaluation. Though fairness requires that causal linkage not correspond to external factors such as severity of harm, increased chances of a causal connection between an action and a severe harm may actually further deterrence. If tortfeasors for the most severe of harms are more frequently held liable (due to fewer causes excluded at the actual causation phase), certain potential tortfeasors may be less likely to act.⁹² Nonetheless, an economic analysis may not support the conclusion that this severity of

judgments. However, within subjects designs (those designs that test variables by exposing subjects to each condition separately) find that Americans causal judgments can be affected by severity of harm. See Peng & Knowles, *supra* note 86; Norman Finkel & Jennifer Groscup, *When Mistakes Happen: Commonsense Rules of Culpability*, 3 PSYCHOL. PUB. POL'Y & L. 65 (1997); PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995).

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See Randall P. Peerenboom, *Rights, Interests and the Interests in Rights in China*, 31 STANFORD J. INT'L. L. 359 (1995), for a discussion of how Chinese criminal law focuses much more heavily on severity of harm than does American law. Peerenboom points out that utilitarian concerns and the prevention of harm to society are just a few of many rationales for punishment in the U.S. In China, societal protection is the guiding principle of punishment, which is to be meted out based on the amount of harm to society.

⁹¹ The influence of severity of harm on Americans will be less systematic and predictable, and could be based on lawyers strategic ability to emulate a within subjects design.

⁹² In addition, we might assume that the most severe harms are the most frequently publicized. If this increased publicity were in fact true, it would also strengthen deterrence to hold someone responsible in these cases, even if it is not technically fair. Similarly, in criminal law, while deterrence policies might be effectuated, just deserts would not likely be furthered if causal determinations were altered by the presence of severe harm. Fairness would once again not be served if the psychological principles would also apply to a jury's interpretation of whether a harm should reasonably have been foreseen, an inquiry we discuss *infra*.

harm principle is good, even with deterrence in mind. Instead, it will likely indicate that potential actors facing a large harm and correspondingly large gain will have to increase their risk assessment above what would otherwise be considered reasonable.⁹³ Consequently, favorable economic behavior might be chilled in favor of a less risky approach.

2. *Culpable Causation*

Psychological research indicates that the perceived moral culpability of an actor also affects a layperson's causal determination.⁹⁴ Mark Alicke conducted studies, which demonstrate that people most frequently select the most morally blameworthy cause as the likeliest cause when multiple potential causes are present.⁹⁵ In Alicke's studies, when subjects were presented with a hypothetical fact pattern relating to a car accident, they cited the driver (the actor) as the primary cause of the accident more frequently when his reason for speeding was to hide a vial of cocaine than when it was to hide his parents' anniversary gift.⁹⁶ Perceivers also consistently selected the morally blameworthy actor as the primary cause of the accident despite the presence of other causal factors, such as an oil spill or tree branch blocking a traffic sign.⁹⁷ Alicke described this effect as culpable causation, which is defined as "the influence of the perceived blameworthiness of an action on judgments of its causal impact on a harmful outcome."⁹⁸ Alicke's study, even without cultural psychology's input (which we discuss, *infra*), reveals numerous potential biases in our legal inquiries.⁹⁹

Returning to our hypothetical, consider two versions of an additional fact not earlier presented. This additional fact is based upon the conditions in the Alicke study. First, assume that the reason Rick is speeding is that he is rushing home to hide the anniversary present he bought for his parents. Alternatively, assume that the reason Rick is speeding is that he is rushing home to hide the drugs he left sitting in plain view. Applying the principle of culpable causation to our hypothetical, Rick's socially undesirable motive will influence the jury's determination of the primary cause of the accident. While Alicke's study did not exactly approximate our cause in fact analysis by asking a counterfactual but-for question,¹⁰⁰ his study does

⁹³ Actors who perceive the possibility of severe harm, even where the risks are actually minimal, will also be deterred. However, due to the psychological invincibility factors we discuss *infra*, such a group will be fairly small.

⁹⁴ Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY SOC. PSYCHOL. 368 (1992).

⁹⁵ *See id.*

⁹⁶ *See id.* at 369.

⁹⁷ *See id.* at 370.

⁹⁸ *Id.*

⁹⁹ The differences in causal attributions that Alicke found are not due to juries intentionally meeting out justice. The results show unintentional psychological phenomena, tested in a non-jury setting. Subjects were asked only to respond to the causal inquiries and had no incentive to attribute cause to one or the other.

¹⁰⁰ *See id.* Alicke asked subjects which of multiple causes was the "primary" cause. As tort law's cause in fact inquiry does not require the jury to choose only one cause in fact, the study is too narrow when applied to tort law. There remains the possibility that the principle of culpable causation only

clearly show that laypersons' causal attributions are influenced by the perceived moral culpability of the defendant. When presented with multiple potential causes and an actor with socially undesirable motives, people's causal attributions are altered. Further analysis of this principle that more specifically tracks the legal inquiry should be conducted.¹⁰¹

How do Alicke's psychological findings fit within our legal framework? Applying the principle of culpable causation to the actual causation test, we see that culpable causation does not comport with the policies behind the legal inquiry. While morality has long been associated with negligence liability,¹⁰² the question of actual causation is examined as a separate inquiry in the liability equation. Morality discussion is generally limited to the notions of "fault" in the duty analysis of the negligence tort. The law asks that a citizen act reasonably and take reasonable precautions.¹⁰³ Strict liability systems, on the other hand, strip out notions of fault, and typically focus only on whether the harm was committed. Some scholars, led by Professor Epstein, have argued for a "corrective justice" model of liability, a causation-based strict liability system where an injury victim supposedly has a claim when he can show that another has caused him injury.¹⁰⁴ The principle of culpable causation shows that Epstein's model, or any strict liability model for that matter, may not really be strict liability. Moral judgments are inextricably linked to causal

affects a person's causal attributions related to primary cause and does not apply to "but for" cause. Such a result, while possible, is unlikely. Alicke's study was designed specifically to test laypersons' notions of causal attribution. While the study does not mirror the legal inquiry, it does prove that a person makes causal attributions differently, depending upon an actor's socially desirable or undesirable motives.

¹⁰¹ See *id.* Alicke's study used a dependent variable of an actor with a socially desirable motive or socially undesirable motive. From a legal perspective, an important follow-up would be to examine and confirm that culpable causation is visible when comparing actors with socially desirable and undesirable motives to actors with neutral motives. These results would provide us with a greater understanding of exactly when the culpable causation principle will apply to juries making a determination of cause in fact.

¹⁰² FOWLER V. HARPER ET AL., THE LAW OF TORTS § 13.2 (2d ed. 1986). "The liability for negligence, whether you style it such or treat it as in other systems as a species of culpa, is no doubt based upon a general public sentiment of moral wrong-doing for which the offender must pay." *Id.* (quoting *Donoghue v. Stevenson*, [1932] All ER Rep 1; [1932] AC 562, 580; House of Lords).

¹⁰³ Alicke's research is therefore similarly troubling in criminal law's causation analysis. While moral blameworthiness is relevant to a criminal law culpability determination, it is nonetheless a separate inquiry from the principle of actual cause. Further, Alicke's research indicates that the line between elements of a criminal or tort law case, while distinguishable on a policy basis, may be impossible to separate in the eyes of a jury. Consider the distinction between a murder and an attempted murder case, the main difference being whether the defendant's morally blameworthy behavior actually killed the victim. If it is proven that a separate actual cause killed the victim and the "but for" test is not met (e.g., someone else killed the victim a split second earlier), the morally blameworthy actor should only be guilty of attempted murder. Alicke's study indicates that a judge or jury's determination of actual cause in such a case may be susceptible to the principles of culpable causation. See our discussion of Knowles and Peng, *infra*.

¹⁰⁴ HARPER ET AL., *supra* note 21, at 135. Epstein's definition of cause is different from the more prevalent standards we describe. However, it would still likely be subject to the culpable causation principle, as such principle focuses on probabilistic causal attributions. Of course, as we have discussed, the principle's application to various legal tests should be empirically verified.

determinations, and even a causation-based liability model will tend to impose liability more frequently on morally blameworthy actors.

Other examples of the principle of culpable causation at work (even without the influence of culture) frequently appear in the arena of toxic torts. Imagine a pollution scenario, where a class has brought an action against an alleged toxic tortfeasor or a prescription drug producer. In such cases, causation often becomes the most contentious issue. “But for” the defendant’s negligent action, would the plaintiff have suffered the harm? Alicke’s study indicates that a jury’s causation analysis would likely be different depending upon whether the defendant is a morally blameworthy polluter (consider an asbestos maker or a breast implant manufacturer) compared to a morally sound polluter (consider a non-profit drug company seeking to find a cure for AIDS). While this result does not comport with tort law’s fairness goals, it could certainly act to deter toxic tortfeasors.

So how does all this mesh with tort law’s policy goals? Achieving fairness, in particular, is made difficult, if not impossible, by the existence of the culpable causation principle. The purpose of the actual causation test is to exclude cases where the action in question does not have a sufficient causal linkage to a harm. Such an inquiry, by its nature, should be devoid of moral judgment. Yet despite these fairness concerns, the culpable causation principle may serve deterrence concerns. Culpable causation may result in increased deterrence from negligence¹⁰⁵ by the morally blameworthy. Two assumptions underlie such increased deterrence: (1) that there is knowledge and publication of the culpable causation principle and its effects on lay person’s causal attributions in legal proceedings; and (2) that the actor can identify his behavior as morally culpable.

As chances of causal linkage and liability increase because of the culpable causation principle, the incentive for morally blameworthy actors to take preventative action will also increase. Morally blameworthy actors will therefore be more likely to either take additional steps to protect others from harm, or take fewer steps to subject others to harm. This result is not very troubling because there is less economic activity to encourage in this case than there usually is in other cases of economic analysis.¹⁰⁶ The downside is that drug-runners and polluters will be more careful.¹⁰⁷ When

¹⁰⁵ Deterring causation is really just deterring a negligent action from causing harm.

¹⁰⁶ However, in some business contexts, it is possible that some beneficial economic activity will be chilled in the unlikely event that the actors incorrectly perceive their own actions as morally blameworthy (or where it really is morally blameworthy, but at the same time is economically beneficial). However, as discussed by Langevoort, other psychological factors, such as ego, may limit a party from identifying its own behavior as morally culpable. Langevoort, *supra* note 16.

¹⁰⁷ Another interesting study would be to examine whether culpable causation principles impact an actor’s own causal attribution towards the harm. Would a defendant whose negligent actions arguably caused a harm be more likely to see a causal linkage if he viewed himself as morally culpable? In such a case, we might see a higher settlement rate in cases where defendants believe themselves to be morally culpable. Jones and Nisbett’s study indicates, at least, that the fundamental attribution error (see *infra*) would not apply to the actor in that observers link personal dispositions to behavior more than actors do. Edward E. Jones & Richard E. Nisbett, *The Actor and the Observer: Divergent*

these costs and benefits are analyzed, it appears that the current system is an effective deterrence tool with a relatively small amount of drawbacks. Before concluding this, however, one must first consider the underlying assumptions, particularly the assumption that actors can identify themselves as morally blameworthy. We will return to this notion shortly and discuss cultural differences as well.

a. Cultural Differences in Culpable Causation

Cultural psychology adds another twist to the analysis of culpable causation in the actual cause standard. Though research in the area is very new and studies should be conducted to verify our hypothesis, we predict that people from collectivist cultures, such as Asians, are less susceptible (but still somewhat affected) than people from individualistic cultures, such as Americans, to the principles of culpable causation in applying the actual causation inquiry. We base our predictions on the following conflicting facts. Asians, as we described in our discussion of the FAE, are more likely to attribute harms to situational factors than to individual actors.¹⁰⁸ In addition, Asians generally do not make chronic trait judgments, such as those fueled by notions of “evil.”¹⁰⁹ They will therefore be less likely to attribute stable internal dispositions to a particular actor across situations, resulting in fewer internal attributions of culpability.

On the other hand, collectivists such as Asians have a stronger installation of social norms, so they will be more sensitive to the socially undesirable motivations of the actor.¹¹⁰ To illustrate this point, Haidt and others presented subjects with fact patterns describing harmless immoral behaviors, such as lying to dying parents, or siblings “french kissing” each other. Despite the fact that both cultures were equally emotionally disturbed by the examples, people from collectivist cultures described the behaviors as more morally blameworthy than people from individualistic cultures did. Based on these results, Haidt argued that collectivist cultures have “communal moral codes,” whereby behaviors that impact communities will be judged as more blameworthy.

A strong sense of collectivist values will cause Asians to focus more on the immoral behavior of the actor where collectivities are involved, such as when drug dealing is present. Americans perceive drug dealers as bad because they have bad personal attributes, which will lead them to engage

Perceptions of the Causes of Behavior, in *ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR* (E. E. Jones et al. eds., 1972).

¹⁰⁸ Ara Norenzayan et al., *Cultural Similarities and Differences in Social Inference: Evidence from Behavioral Predictions and Lay Theories of Behavior*, 28 *PERSONALITY AND SOC. PSYCHOL. BULL.* 109 (2002); Morris & Peng, *supra* note 73.

¹⁰⁹ Norenzayan et al., *supra* note 108.

¹¹⁰ John Doris & Kaiping Peng, *Moral Intuitions in Cross-Cultural Contexts* (2003) (unpublished manuscript, on file with the University of California, Santa Cruz Department of Philosophy; Jonathan Haidt et al., *Affect, Culture, and Morality, or Is It Wrong to Eat Your Dog?*, 65 *J. PERSONALITY SOC. PSYCHOL.* 613 (1993)).

in negative activities at any time. This type of attribution is caused by Americans' strong dispositional focus. Asians, on the other hand, will first focus on the social harm of the drug dealing, and for that reason will then focus more on the actor's disposition, resulting in increased causal connections.

Interestingly, not all types of morally blameworthy actors will trigger increased causal attributions by Asian perceivers. Individuals who abuse their spouses, for example, generally do not trigger an increase in causal attribution. While spousal abuse is morally unacceptable both in American and Asian cultures, the harm is perceived as being a harm to the family unit rather than the community at large. Because of this, Asians are not likely to display culpable causation. They will generally do so only when the actor in question is a morally blameworthy individual who will also harm the community, such as a sex predator or a drug dealer.

We will now discuss further policy implications of the culpable causation principle. We know that certain morally culpable actors will be less likely to have their cases excluded by the but-for test, and will therefore have a greater chance of ultimately being held liable. But what effect does the culpable causation principle have on behavior? Will morally culpable people be over-deterred by culpable causation? Would an economic analysis reveal that morally culpable actors will increase precautions to counteract this increase in the chance of liability in the same way that they would to counteract an increase in transaction costs? Perhaps not. Even if morally blameworthy actors become aware of the effects of the culpable causation principle, psychological research shows that individuals often have an illusion of invincibility, which prevents morally blameworthy people from identifying themselves as such.¹¹¹ Because they do not perceive themselves in this way, they do not believe that they will have to face the same consequences as others who fit into such a category. Morally blameworthy people will not be over-deterred and will not increase precautions because they will not see themselves as morally blameworthy in the first place.

Presumably, there are some actors who do identify their own moral culpability, or at least recognize that others view them as morally culpable. Culpable causation will probably make these few self-identified morally culpable people to be more cautious. The reverse, however, could also be true. Though this idea has not been psychologically tested, it is likely that the reverse of culpable causation may come into play in certain situations involving morally good actors. When this reverse phenomenon is at work, perceivers will be more likely to attribute causes to external factors when making a causal determination relating to a morally good actor. As a result, juries will exclude more cases for morally good people during the "but-for" stage of causal determination. These people will be held causally responsible less frequently than a non-biased inquiry would warrant, and

¹¹¹ Markus & Kitayama, *supra* note 38 (showing that more than 90% of Americans believe that they are morally better than the average person).

under-deterrence of morally good people would occur. Furthermore, this under-deterrence would apply not exclusively to the morally good, but also to those who mistakenly perceive themselves as morally good. This skewed self perception ultimately means that, based on the Markus and Kitayama study we describe *infra*, the under-deterrence effect will reach an alarmingly large portion of the population.

Thus far, we have explained how the culpable causation principle, if known, will under-deter a large portion of the population (those who perceive themselves as morally good) and will over-deter a small portion of the population (those who either perceive themselves as morally blameworthy or recognize that others will perceive them as such). We have also alluded to the fact that people often do not identify themselves as morally blameworthy. This fact indicates that a very small number of morally blameworthy people (essentially only those who identify themselves as such) will be deterred by the culpable causation principle. There are, however, cultural differences at work here also.

In order to display these differences, Markus and Kitayama compared notions of morality and self-identification between Americans and Japanese.¹¹² They found that Americans, in contrast to Japanese, have a stronger sense of a “better than average complex,” particularly in the moral domains.¹¹³ When American students were asked, “What proportion of students in your community has higher moral principles than you do?” Americans usually believed that less than 10% of people on average had higher moral principles. Japanese people, on the other hand, estimated (correctly) that about 50% of people have higher moral principles. The findings of this study lead one to conclude that morally blameworthy Asians will be deterred more significantly by the culpable causation principle than morally blameworthy Americans because they are less likely to mistakenly perceive themselves as being morally good, and therefore less likely to experience the aforementioned under-deterrence effect.¹¹⁴

b. *Stereotypes and the Ultimate Attribution Error in Culpable Causation*

Unfortunately, the culpable causation principle often brings cultural, ethnic, and racial stereotypes into the mix. These stereotypes can play a role in laypersons’ identification of who is morally blameworthy, which is a key determination in understanding who is harmed by the culpable causation principle. When perceivers attempt to attribute cause in situations where the actor is a member of another cultural group, or “out-

¹¹² *See id.*

¹¹³ *Id.*

¹¹⁴ We are assuming here that one’s identification of oneself as having high or low moral principles is parallel in effect to the question of whether one considers oneself morally blameworthy. These questions are almost identical and would likely yield the same results.

group,” the ultimate attribution error may apply.¹¹⁵ According to the ultimate attribution error, perceivers grant members of their own group the benefit of the doubt when making attributions (e.g., she donated because she has a good heart). Yet when they explain the acts performed by members of out-groups, perceivers often assume the worst, using stereotypes to help them make attributions (e.g., he donated to gain favor). Likewise, positive behavior by out-group members is more often dismissed. It may be seen as a “special case,” as due to luck or some special advantage, as demanded by the situation, or as attributable to extra effort. This ultimate attribution error, however, is not universal. Some disadvantaged groups or cultures that stress modesty or dialectical thinking (such as the Chinese) tend to exhibit less of this group-serving bias.¹¹⁶

Psychologists believe that perceived moral differences of out-group members are the major reason for stereotypes. Such perceived differences are wide ranging, but they often focus on such things as whether members of a certain group are lazy, take drugs, or carry out other morally questionable behaviors. Out-group members, therefore, are often perceived as having moral deficiencies. As a result, culpable causation is even more of a concern in situations where out-group members are involved because out-group members are more likely to be perceived as morally blameworthy, and are therefore more likely to be held causally responsible.

Let us apply the ultimate attribution error and culpable causation to the fact pattern involving Rick, assuming for the moment that Rick is a member of an out-group stereotyped as “reckless” and “dangerous.” The ultimate attribution error will cause members of other societal groups to view Rick as morally culpable because they have stereotyped members of Rick’s out-group as reckless and dangerous. Once the perceivers have deemed Rick morally culpable, they will then be more likely to attribute cause to Rick according to the culpable causation principle. To summarize: because of the ultimate attribution error, jurors will consider Rick morally deficient due to stereotypes of Rick’s culture. This judgment of moral deficiency will lead to increased (and unwarranted) causal attributions through its interaction with the culpable causation principle.

3. *The Foreseeability Question: The Illusion of Control*

Thus far, we have focused mostly on the psychological processes of jury members attributing causal connections between an actor and a harm. Yet in order to examine whether psychology validates or challenges tort law principles of fairness and deterrence, particularly in the area of foreseeability, we must also look at the potential tortfeasor’s psychological processes. In some cases, we find a disconnect between the psychological

¹¹⁵ Thomas F. Pettigrew, *The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice*, 5 PERSONALITY SOC. PSYCHOL. BULL. 461 (1979).

¹¹⁶ Miles Hewstone & C. Ward, *Ethnocentrism and Causal Attribution in Southeast Asia*, 48 J. PERSONALITY SOC. PSYCHOL. 614 (1985); G. J. O. Fletcher & C. Ward, *Attribution Theory and Process: A Cross-Cultural Perspective*, in THE CROSS-CULTURAL CHALLENGE TO SOCIAL PSYCHOLOGY 240 (M. Bond ed., 1988).

processes of the actor and the after-the-fact psychological analysis of the jury members. In other words, we find that the jury cannot actually understand the state of mind of the actor, nor can the actor correctly estimate the likelihood of causing harm or being held liable.¹¹⁷

a. *Actor-Perceiver Differences*

Asking whether an actor could reasonably be expected to foresee harm resulting from his action is a difficult psychological inquiry. Can an actor ever really match the “reasonable” actor standard to which a jury will hold her after the fact? The psychological principle of illusion of control and the related research on predictability suggest that an actor will see a situation much differently than lay attributors will when they are considering it after the fact.¹¹⁸

Ellen Langer defined the principle of illusion of control as the psychological tendency of an individual to expect a level of personal success that is inappropriately higher than objective probability would warrant.¹¹⁹ Langer first observed this phenomenon in subjects during random games of chance, and she partially explained it by referencing people’s misunderstanding of the laws of probability. Subsequently, she found that the illusion of control extended beyond situations where actors were interpreting random events. Langer found that even in situations where actors interpret their own (non-random) actions, they are more likely to believe that these actions will cause favorable outcomes than objective analysis would warrant. These beliefs typically come from an early success, which generally leads to an illusory belief in control.

Langer clearly demonstrated the illusion of control principle in an experiment involving a lottery. In this experiment, participants in two groups each paid \$1 to buy a lottery ticket. Participants in one group were allowed to choose their own lottery numbers. Participants in the other group were required to buy tickets with randomly chosen numbers. On the morning of the lottery, participants were asked to sell their tickets. Participants who chose their own numbers asked for an average of \$8.67 for a \$1 lottery ticket. Participants with no control over their numbers asked for \$1.96 per ticket. These results suggest that people who had control of their lottery numbers unrealistically overestimated the chances that they held the winning ticket and consequently discounted their chances of losing.¹²⁰

Applying the illusion of control to the scenario involving Rick leads to some interesting observations about his state of mind. According to the

¹¹⁷ See Langevoort, *supra* note 16, at 866 (discussing how the ego can blind an actor’s risk evaluation).

¹¹⁸ *Id.* at 869. Langevoort highlighted how excessive optimism and the illusion of control, which he described as functions of the ego, can adversely impact the law’s deterrent goals.

¹¹⁹ Langer, *supra* note 17.

¹²⁰ *See id.*

illusion of control principle, Rick will believe that he can overcome the circumstances he is presented with and avoid suffering negative consequences. Though the dangers are present, he is not concerned about them because he is unaware of them. By virtue of his driving, Rick satisfies the element of control required to create the illusion of control. The illusion of control principle holds that once Rick takes control of the car, he will become oblivious to the dangers posed by road conditions and weather.

Such an illustration portrays how it might not effectuate our legal policies of fairness to state that the car accident was foreseeable. The actor, based on reliable psychological analysis, did not foresee the harm.¹²¹ Yet a jury might determine that a person could reasonably be expected to foresee the harm. The jury will not experience an illusion of control when formulating a factual determination of what a reasonable actor should have foreseen. Does that mean that the actor was unreasonable because he was subject to systematic and predictable psychological processes? Does it justify liability? Such a jury determination might be correct based on the psychological processes of the after the fact perceivers, but it is psychologically incorrect to say that a reasonable actor should have foreseen the harm. A fairness perspective, then, is not supported by the gap between the illusion of control and foreseeability.¹²²

The legal relevance of tort law's foreseeability requirement and the illusion of control principle allow us to add another critique to the effectiveness of deterrence in negligence law. While the illusion of control principle does not single-handedly prevent deterrence, it does often create situations where actors are more likely to discount the possibility that harm will result from their actions. Therefore, public awareness of legal liability does not always deter undesirable behavior. In some situations, it does not make any difference in a reasonable actor's decision making process, and in other cases, it may successfully deter overly risky conduct (as might be the case with Asian actors, discussed *infra*).¹²³ Furthermore, the illusion of control principle suggests that while a third party may think that an actor should have reasonably foreseen that a harm result from her behavior, it may be unreasonable for the law itself to impose liability upon that actor

¹²¹ Note that the term "foreseeable" is not exactly the same as "predictable," which has been the domain of most of the psychological studies. As Langevoort has correctly pointed out, we should verify that predictability does indeed coincide with foreseeability. See Langevoort, *supra* note 16.

¹²² In addition to fairness, other policy considerations are of course relevant here, too. After a careful policy analysis, scholars and lawmakers might agree that excusing liability based on the illusion of control would cause more problems than it solves. We do not mean to suggest that, due to the illusion of control, all potential tortfeasors who cannot see the potential consequences of their actions should be excused from liability. Instead, we only seek to take an additional step towards understanding why psychological principles do not support stated policy objectives. We discuss combating the illusion of control, *infra* page 225.

¹²³ Such a conclusion, however, is more likely in the realm of negligence tort law than in criminal law. In criminal law, it is more typical to find a *mens rea* (or state of mind) requirement of intent, knowledge, or recklessness. Each of these mental states presupposes an understanding of the potential consequence of one's action. Negligence, on the other hand, does not. Instead, it is couched in terms of what the actor "should have" reasonably known.

who, by virtue of the illusion of control, cannot really be expected to realize the potential impact of her actions.

b. *Cultural Differences and the Illusion of Control*

The illusion of control is another culture-specific phenomenon. A growing body of recent research suggests that Asians have realistic and field-dependent understandings of situations, even when given control. Contrastingly, Americans have a sense of invincibility and display an “unrealistic optimism.”¹²⁴ Ji, Peng, and Nisbett illustrated this with an experiment involving American and Chinese research subjects. As part of the experiment, the researchers had subjects view photos of two people on a computer screen. The subjects were asked to press one of two buttons, then judge whether they had control over which of the people subsequently appeared on the screen. The subjects were not told that the choice of photo was random and therefore unrelated to their selections. When questioned about the relationship between their selections and the photos that appeared, Americans developed an unrealistic belief regarding the outcome. They consistently overestimated their control over the situation. Chinese showed much more realistic estimations of the situation and did not believe that they had control over the outcome.

In a similar experiment, Heine and Lehman asked American and Japanese subjects to estimate the likelihood that positive unlikely events (such as winning the lottery or earning a big salary immediately after graduating school) would happen to them in the near future. Americans generally overestimated the probability of having those events happen to them, while the Japanese participants were much more conservative in their estimates.¹²⁵ When Heine and Lehman asked the subjects the probability that likely negative events would happen to them (such as traffic accidents, contracting AIDS after unprotected sex, or getting divorced), Americans grossly underestimated the probabilities that it would happen to them. In general, Americans had a stronger belief in their ability to control their own destinies. This type of optimism can affect both their evaluation of risk and their calculation of event probability.

Consequently, because they are less likely to display overconfidence during situations of control, Asians are more likely to foresee the potential harms of their negligence. This ability to foresee will allow them to evaluate the potential consequences of their actions and also means that an after-the-fact foreseeability analysis (not affected by the illusion of control) will be more consistent with an Asian actor’s conception of foreseeability. In addition, it means that Asian actors can be expected to be deterred under American-style negligence laws, while Americans’ overconfidence and

¹²⁴ Li-Juan Ji et al., *Culture, Control, and Perception of Relationships in the Environment*, 78 J. PERSONALITY SOC. PSYCHOL. 943 (2000).

¹²⁵ S. J. Heine & D. Lehman, *Cultural Variation in Unrealistic Optimism: Does the West Feel More Invulnerable Than the East?*, 68 J. PERSONALITY SOC. PSYCHOL. 595 (1995).

inability to efficiently evaluate risks in control situations will probably lead to under-deterrence. Potential liability for causing harm generally does not figure into the psychological profile of an American in a situation of control.

F. SOLVING THE PROBLEMS PRESENTED

We believe that the two greatest weaknesses of law and psychology scholarship have been its overlooking of systematic differences across cultures and its difficulty in proposing workable solutions. Thus far, we have described how understanding cultural differences is integral to the merging of law and psychology. Of course, before proposing sweeping solutions, caution is in order. Empirical research brought us here, and it will eventually lead us to solutions. Before proceeding swiftly with systematic changes, legal scholars and social scientists must first use empirical research, as in the cases of our examples and in others, to confirm the pervasive effects of these psychological principles in the law. Our discussion and linkage of psychology to the law is built upon empirical data, but much of it has not been specifically applied to American law's legal inquiries. That application should be the first step.

G. NEUTRALIZING PSYCHOLOGICAL ERRORS

The psychological errors we have presented create uneven incentives in the law and result in disparate treatment of people from different cultures. Neutralizing these errors will not only allow the law to operate in a manner that is consistent with psychological processes, but also allow it to neutralize the uneven distribution across cultures that the errors create. Of the traditional legal methods available to combat biases or problems in the courtroom process, one of the most basic is the jury instruction. Some of the harsh effects of psychological errors have been shown to be neutralized by revealing the existence of the errors before disseminating the susceptible information. These types of errors are often combatable in the courtroom situation, where a simple instruction could work to counter the bias. Unfortunately, however, not all cognitive biases are easily reversed.¹²⁶ This difficulty in reversing biases is not surprising, given the nature of the biases themselves, which are uncovered and repeatedly proven by reliable psychological results. An understanding of these principles, however, has led, and will continue to lead, psychologists toward additional methods of neutralizing or taming the negative impacts of biases.

A growing set of studies has shown that some allegedly stable cognitive illusions, such as the FAE, can be made to disappear by various means. Two types of research suggest that the FAE can be neutralized. One line of studies has shown that taking another person's perspective can

¹²⁶ As scholars have discussed, this is the case with the hindsight bias. See Kamin & Rachlinski, *supra* note 6, at 89. See also Rachlinski, *supra* note 6, at 586.

neutralize the FAE.¹²⁷ In a study conducted by Storms, two subjects were asked to engage in discussions with one another. In one condition, immediately after interacting, subjects were asked to make judgments relating to the way the other subject behaved (including their own role in the interaction). In this condition, subjects' judgments overly attributed the other party's behavior to internal dispositions (displaying the FAE). In a second condition, subjects were shown a video of themselves engaging in the discussions prior to being asked to make judgments of the other subject. In this condition, after seeing the video, subjects were asked to make judgments of their counterpart's behavior. Storms found that subjects in this condition were less likely to attribute the other's behavior to internal dispositions and were more likely to balance both dispositional and situational factors.¹²⁸

An entirely different type of study indicates that having perceivers begin an evaluation by focusing on how a situation could have been avoided will cause them to focus on context, which subsequently neutralizes the FAE.¹²⁹ In a study by Daniel Ames, subjects were presented with a fact pattern in which a driver ran a red light and collided with another car. Subjects were told that many accidents had occurred at this same traffic light in the past. When asked who caused the accident and why, subjects initially displayed the FAE, attributing the accident to the driver's internal dispositions. However, when they were instructed to think about how these types of incidents could be avoided, and then subsequently asked who caused the accident and why, subjects balanced both internal and situational factors in their attributions. The FAE was effectively neutralized.

Though the former studies do pose some logistical challenges for implementation in the legal setting (e.g., the demonstrated need for props such as videos to implicate the desired perspective change), the latter technique could be applied by judges prior to the moment when jurors are required to make a but-for causal determination. Asking jurors to begin their inquiry by focusing on how a problem could have been avoided will cause them to focus on external dispositions rather than internal attributions because external variables seem easier to change. Judges could ask juries to consider how future occurrences like these can be avoided. Once jurors have thought about these situations, they will be more prepared for the second causation inquiry. The FAE would then be neutralized.

¹²⁷ Richard W. Robins et al., *The Actor-Observer Effect Revisited: Effects of Individual Differences and Repeated Social Interactions on Actor and Observer Attributions*, 71 J. PERSONALITY SOC. PSYCHOL. 375 (1996); Michael D. Storms, *Videotape and the Attribution Process: Reversing Actors' and Observers' Points of View*, 27 J. PERSONALITY SOC. PSYCHOL. 165 (1973).

¹²⁸ These results also extended to observer subjects who viewed the conversations and made judgments about one subject's behavior. After seeing a videotape focused on the other subject, observer subjects were more likely to consider situational factors in making behavior judgments.

¹²⁹ Daniel Ames, *Audience Effect* (2003) (unpublished manuscript, on file with the University of California, Berkeley Department of Psychology).

Although both culpable causation and the FAE are automatically processed, culpable causation is more affected and moralistic. It is therefore harder to control and perhaps even generated on an unconscious level. As a result, counteracting culpable causation will probably prove more difficult. There have been no studies analyzing how the culpable causation principle may be combated. Given this, empirical research should be conducted. In the meantime, other practical solutions are possible. Sensitivity to the culpable causation principle will require that motives and facts surrounding moral culpability not be allowed into evidence prior to a determination of actual causation.¹³⁰ Such evidentiary controls are some of the oldest and most well established judicial tools for remedying inequity.

In this paper, we have focused on how the illusion of control influences everyday actors and their evaluations of whether to undertake certain actions. The concept of neutralization that we have discussed is inherently short term. For purposes of the FAE and culpable causation, short term solutions may be perfect. Countering the effects of the errors is most important at a particular point in time – jury deliberation. The solution for the illusion of control must focus not on a temporary neutralization, but on a systematic change where the illusion is completely eliminated in everyday life.¹³¹ Therefore, a broader solution rooted in social and cultural change must be found.

But is such a cultural change possible? Ideally, the illusion of control, as well other psychological errors such as the FAE and culpable causation, would be eliminated altogether. Such a change is not impossible, but it must occur through cultural learning and evolution. Cultural psychology has laid the foundation for this broad societal change by demonstrating that patterns of thinking, errors, and biases are not innate, stable, or deterministic, and by showing that they can be learned, constructed, and changed. The very existence of cultural differences themselves further support this point by illustrating that biases are culture specific and can be changed through culture. The fact that some cultures do not show the same biases as those in the United States suggests that certain aspects of such cultures provide the means to eliminate those biases. Diversity, then, allows us to select the most adaptive means to achieve bias-free treatment for cultures under the law.

¹³⁰ Similarly, evidence regarding severity of harm could be restricted in order to counteract its negative effects on causal judgments. However, keeping evidence regarding severity of harm out of testimony until after the causation question is answered will be difficult since the causal question links the negligent action to the harm. See Jolls et al., *supra* note 4, for a discussion of restricting evidence to counteract the hindsight bias.

¹³¹ As we apply it to the foreseeability inquiry, the illusion of control likely cannot be neutralized. However, when witnessed in a controlled setting (such as in random games of chance and lottery type scenarios), recent evidence has shown that the illusion of control might be successfully neutralized. For instance, Koehler, Gibbs, and Hogarth reported that the illusion of control is reduced when the single-event format is replaced by a frequency format, that is, when participants judge a series of events rather than a single event. Jonathan J. Koehler, B. J. Gibbs & R. M. Hogarth, *Shattering the Illusion of Control: Multi-Shot Versus Single-Shot Gambler*, 7 J. BEHAV. DECISION MAKING 183 (1994).

FINAL THOUGHTS: MOVING TOWARD A SOLUTION

As the law attempts to further understand people, and as theorists continue to evaluate how people make choices in personal and business behaviors, scholars must challenge themselves to reflect on the law's substantive and procedural standards. If the law seems to apply unequally to two or more distinct groups of people, the law should be improved. In this paper, our primary purposes have been to illustrate the cultural dimension of psychology and the law and to demonstrate how legal inquiries can be improved in light of these cultural differences. Our discussion is only the first step in the journey towards finding a solution that both considers cultural psychology's empirical findings and effectuates our legal ideals.¹³² In some cases, solutions are readily available and easy to implement. In others, solutions require significant change and will be extremely difficult to implement. In almost all cases, however, empirical application of these psychological principles will help lead the way toward a less biased legal system by formulating and testing legal standards that are more successful in avoiding known psychological flaws and are culture-neutral. Empirical research took the first step in revealing the law's shortcomings. Similarly, it will lead the way towards finding a bias-free system of legal inquiries.

¹³² Other scholars have begun this journey as well. Jolls et al., *supra* note 4, at 1527, for example, have suggested manipulating the information given to jurors and/or altering the evidentiary standard in order to counteract the hindsight bias effect on negligence.