
Doctrines of Excuse: When Is One's Rule Violation Blameless?

That a person satisfies the culpability requirements of an offense (discussed in Chapter 4) typically will be enough to establish the blameworthiness for one's rule violation that makes criminal liability appropriate. Nonetheless, this presumption of blame may be rebutted by showing that, at the time of the offense, the perpetrator had a "disability" that excuses the person from responsibility for the offense. A person may be excused through any of the general disability excuse defenses—insanity, immaturity, involuntary intoxication, or duress.¹ An insane arsonist, for example, may have intended to burn the building (a culpability requirement of arson), yet the offender's insanity may render him or her blameless for the offense. While assumptions of sanity, maturity, sobriety, and absence of coercion normally are correct and applicable in most cases, in the unusual case a person may have a disability—insanity, immaturity, involuntary intoxication, or coercion—and its effects may be such that he or she cannot reasonably be expected to have avoided the criminal violation.

The class of excuses that we address in this chapter are called "disability excuses" because society's reduced expectations for the conduct of the person come from some sort of disability or abnormality of the person. We have seen hints of these reduced expectations in previous studies, notably the study on the individuation of standards for negligence (Chapter 4, Study 11) in which our respondents were willing to require lowered standards of care from individuals whose characteristics gave them various disadvantages. Another class of excuses, "mistake excuses," look not to a person's abnormality but, on the contrary, to the normalcy (or reasonableness) of that persons' mistake as to an aspect of the circumstances that, if the mistake holds true, would render the conduct noncriminal. (In Chapter 3, we discussed several examples of this kind of excuse relative to justification defenses. For example, we saw that a person who uses deadly force on an attacker whom he or she *mistakenly* believes threatens him or her with deadly injury is granted a defense by our respondents.) Future research might examine other mistake excuses, such as those given to the following: (1) a person who violates a law

when that law has not been made reasonably available to the public; (2) a person who violates a law because he or she reasonably relies on what proved to be an official misstatement of the law; and (3) a person who makes a mistake as to the criminality of his or her conduct after making a diligent effort to ascertain the law.²

We begin our examination of disability excuses with one of the most frequent points of contact between psychology and the law: the insanity defense.

STUDY 12: INSANITY

Previous psychological research has probed many questions about the insanity defense, but two seem particularly germane to our interests. The first question is dealt with in surveys focusing on people's estimates of the fairness and effectiveness of the insanity defense as an instrument of public policy. These surveys have proven quite useful in comparing attitudes toward the insanity defense across different segments of the general population. For instance, Pasewark and colleagues have used this approach to compare laypersons' and legislators' estimates of how frequently defendants enter an insanity plea (Pasewark and Pantle, 1979; Pasewark and Seidenzahl, 1980). They found that while legislators' estimates of the frequency of cases of the insanity plea were substantially more conservative (i.e., fewer) than those of lay community members, both groups vastly overestimated the frequency and the success rate of insanity pleas. This overestimating tendency has been confirmed in more recent studies; people generally assign a much greater role to the insanity defense than it truly plays in the workings of the criminal justice system (Hans, 1986; Steadman and Braff, 1983). This finding is interesting in the present study, in that it suggests that most respondents, concerned not to overapply the defense themselves, will be relatively reluctant to grant validity to mental illness as a reason for excusing offenders from criminal liability.

Surveys and experiments that attempt to discover lay definitions of insanity constitute the second approach that previous researchers have applied to the study of the insanity defense. These studies have focused on the implications of lay definitions of insanity for the decision-making processes of juries. One conclusion has been that instructing jurors in simulated trials to apply different legal-code tests of insanity makes remarkably little difference in the verdicts that jurors ultimately reach (Finkel, 1988; Finkel, Shaw, Bercaw, and Koch, 1985). This suggests that various individuals hold their own views of what constitutes insanity and that they do not modify these views in the direction of code formulations, even when instructed to do so during their participation in simulated trials. In other words, lay definitions of insanity appear strong enough to override the specifications of the legal code in determining the Not Guilty by Reason of Insanity (NGRI) verdict.

One study has tested lay understandings of legal definitions of insanity directly (Hans and Slater, 1984). This survey was conducted in the week following the announcement of an NGRI verdict in the case of John Hinckley, Jr., the man who attempted to assassinate President Ronald Reagan in 1982. During this week, Americans were exposed to unprecedented amounts of information and debate about the insanity defense. Consistent with previous research, Hans and Slater found that the majority of their respondents were still unable to accurately report the legal test for insanity that was being applied to Hinckley.³ A substantial proportion of respondents (23%) volunteered the definition: "Didn't know what he or she was doing" (Hans and Slater, p. 107).

From our point of view, the interesting question is: Do ordinary persons spontaneously use standards for judging mental illness that are in rough accord with those that the legal system suggests are relevant? This question is not answered by the research cited above. What distinctions, then, are made by standard legal codes? Within the legal system, mental disease or defect can affect a person's criminal liability either (1) by negating (i.e., making it impossible for the prosecution to prove) a culpable state of mind that is required by the definition of the offense charged or (2) by satisfying the conditions of a general insanity defense. The latter, the general insanity defense, operates without regard to the elements of the offense charged. If the conditions of the general insanity defense are met, the person escapes criminal liability, whatever the offense. Rather than focusing on the person's actual state of mind as to the offense elements, the general insanity defense focuses on the person's general capacity for normal mental and emotional functioning.⁴ In this study, we test the similarities and differences between community standards and the provisions of the general insanity defense.

The common law recognized an insanity defense under what is called the *McNaughten* test, which provides a defense if one was laboring under such a defect of reason due to mental disease that one did not know the nature or quality of the act one was doing or, if one did in fact know about the act, one did not know that what one was doing was wrong.⁵ The test focuses exclusively on the person's cognitive (as opposed to control) dysfunction and requires a very high, if not absolute, degree of loss of function. The person must "not know" either the nature of his conduct or that it is wrong. In contrast, the cognitive dysfunction prong of the Model Penal Code's more modern formulation (called the "ALI test" because the American Law Institute authored the Model Penal Code) sets a somewhat lower standard of dysfunction: It requires only that the person lack "substantial capacity" to "appreciate" the criminality or wrongfulness of his conduct [MPC § 4.01(1)]. The Code's language permits the defense upon less dysfunction; cognitive function only need be impaired, not absolutely lost.

Many jurisdictions adopting the *McNaughten* test have added an alternative ground of exculpation: Even if one knows the nature of what one is doing and that it is wrong, one nonetheless is excused if he or she has lost the power to avoid do-

ing the act in question to such a degree that one's free agency is at the time destroyed.⁶ This introduces the possibility of a defense based on a pure control dysfunction, with a person's cognitive functioning intact. Like McNaughten, however, this "irresistible impulse" test, as it is called, is stated as absolute in its demands. One must have no power to control one's conduct, and one's free agency must be "destroyed." Under the control prong of the Model Penal Code's ALI test, in contrast, one need only lack "substantial capacity" to conform one's conduct to the requirements of law [MPC § 4.01(1)]. Absence of control is not required for the Code's defense; substantial impairment of control is sufficient.

These distinctions—cognitive versus control, and complete loss versus substantial impairment of function—represent the major distinctions among the most common American formulations of the insanity defense. Some jurisdictions still use just the McNaughten test—requiring high cognitive dysfunction. Some adopt McNaughten and add the irresistible-impulse test as an alternative ground of defense—thus requiring either high cognitive or high control dysfunction. The Model Penal Code's ALI test has been adopted in many jurisdictions. It requires only substantial impairment of either cognitive or control functioning. Some jurisdictions, such as the federal system, have recently dropped the control-function prong of ALI and kept the cognitive-function prong. Rather than reverting to McNaughten entirely, they have retained the ALI test's substantial impairment approach.⁷ Public disillusionment and dissatisfaction have led a few jurisdictions to drop the insanity defense altogether.⁸

The following insanity study sought to determine whether our subjects would give a general defense because of a person's insanity, whether they recognize the validity of the cognitive versus control distinction that the doctrine uses, and which of the tests, if any, best reflects their views. In the core of the story we presented to the subjects, an individual (who is characterized with various details that suggest insanity) picks up an object that is nearby, such as a baseball bat, a mallet, or a rock, and hits another person with it, killing that other person. Because the writers of these cases wanted to make the mental dysfunction of the person vivid, they created scenarios that differed from one another in several ways. What we will need to look at carefully, therefore, are the respondents' perceptions of the kind and degree of mental dysfunction experienced in each case.

When we examine the subjects' perceptions of the degree and kind of insanity that was conveyed by the scenarios, we discover that their perceptions are somewhat different than we had expected them to be.⁹ The cases and the way our respondents perceived them are shown in Table 5.1.

The cases are numbered as they will appear in the next table, which is why the numbers run from 4 through 7 rather than beginning with 1. Columns *a* and *b* show the subjects' ratings of the degree to which the perpetrator suffers from a substantial or complete control dysfunction. Columns, *c*, *d*, and *e* report their perceptions of the degree of cognitive dysfunction. The questions on cognitive

TABLE 5.1 Respondents' Perceptions of Cognitive and Control Dysfunctions

	<i>Control Dysfunction</i>		<i>Cognitive Dysfunction</i>		
	(a)	(b)	(c)	(d)	(e)
<i>Suggested Scenario Label</i>	<i>Substantial</i>	<i>Complete</i>	<i>Substantial</i>	<i>Unaware of Nature of Conduct</i>	<i>Unaware of Wrongfulness</i>
4. High control, low cognitive	7.58	7.39	3.05	2.76	2.71
5. High control, low cognitive	7.29	6.61	2.95	2.50	2.74
6. Medium control, high cognitive	4.47	4.74	7.68	7.97	7.58
7. Low control, high cognitive	3.79	3.89	6.82	3.29	6.68

The questions asked whether the respondent 1="strongly disagreed," 5="was unsure," or 9="strongly agreed" that the actor had a substantial or complete control or cognitive dysfunction. The exact questions are shown in Table 5.4 and correspond to each of the five lettered columns of this table. The questions tabulated here are the common-language formulations.

dysfunction are more numerous because, as we noted about cognitive dysfunction, the legal doctrine distinguishes between cognitive dysfunction of two sorts: First, one may be unaware of the nature of one's conduct (unaware that the thing one is hitting is a person) and second, even if one is aware of the nature of the conduct, one may be unaware of the wrongfulness of the conduct (unaware that hitting another is wrongful). Therefore, we included questions about both of these sorts of cognitive dysfunction.

The results indicate that respondents are well able to distinguish cognitive from control dysfunction, a fact that lends some support for the use of this distinction by the doctrine. As can be seen from the scenarios in rows 4 and 6, we were generally successful in creating perceptions of high dysfunction, whether cognitive or control. Subjects perceived the case in row 5 as being a case of high control dysfunction; and perceived the case in row 6 as having a fairly high degree of cognitive dysfunction. Looking at these degree-of-dysfunction ratings, one is struck by the fact that we have two conditions in which the control dysfunction is judged to be high and the cognitive dysfunction moderately low (scenarios 4 and 5) and two conditions in which the cognitive dysfunction is judged high and the control dysfunction low or moderate (scenarios 6 and 7). Therefore, in our analyses of liability judgments, we will treat each member of each pair as to some extent a replication of the other member of the pair, although trying to remain sensitive to the differences between the pair. (These are the scenario descriptions of this study and are represented in the "suggested label" columns of Tables 5.1 and 5.2.)

TABLE 5.2 Liability as Related to Insanity

<i>Suggested Label</i>	(a) Liability ^a	(b) % No Liability (N)	(c) % Civil Commitment
Control Conditions:			
1. Murder	10.42	0	
2. Self-defense	0.11	79	
3. Mistaken identity	7.79	0	
Experimental Conditions:			
4. High control, low cognitive	1.89 (19%–8.29)	81	81
5. High control, low cognitive	3.00 (34%–9.25)	66	66
6. Medium control, high cognitive	0.64 (8%–5.67)	92	92
7. Low control, high cognitive	1.65 (16%–9.00)	84	84

Liability Scale: N=No criminal liability, 0=Liability but no punishment, 1=1 day, 2=2 weeks, 3=2 months, 4=6 months, 5=1 year, 6=3 years, 7=7 years, 8=15 years, 9=30 years, 10=life, and 11=death.

^aCivil commitment cases are included as 0 in calculating these means. The numbers in parentheses indicate the percentage of respondents who assigned criminal liability and, of those, the average liability they assigned.

Before we leave Table 5.1, one more result is worth interpreting. The two different aspects of cognitive dysfunction have a complex relation with each other. As we previously noted, one can be aware of the nature of one's conduct but unaware of the wrongfulness of the conduct. It looks like this is the way that our subjects treat this situation, as the doctrine suggests. Scenario 7 is perceived by them as being a case in which the person is aware of the nature of his conduct (column *d*) but unaware of the conduct's wrongfulness (column *e*). As column *c* shows, our respondents agree that this individual has a substantial degree of cognitive impairment. Note that if one is unaware of the nature of one's conduct that one will of course be unaware of its wrongfulness, but not the reverse. The two categories of awareness—of the nature of the conduct and of its wrongfulness—are serial in relation rather than alternative.

Next, we will examine Table 5.2. The liability results again are shown in columns *a* and *b*, and there is one additional feature in column *a* that we will explain in a moment. Before we examine the liability ratings for the mental illness cases, a note on the comparison cases is in order. The comparison (control) cases are scenarios 1, 2, and 3. The murder case (row 1) involves a person who, because he is angry at another, goes to that person's house and bludgeons him to death, a straightforward murder, and we notice (in column *a*) that it commands a sentence of somewhere between life imprisonment and the death penalty. The self-defense control case (row 2) shows the liability assigned to a convenience store

owner who defends himself from a knife-wielding robber by pulling a nightstick from under the counter and striking the robber, who is lunging at him with a knife. The robber is killed. This seems a straightforward case of self-defense to us and, judging by their slight liability assignment, to our respondents as well. The third control case (row 3) involves again a convenience store owner who chases a robber, loses him, and misidentifies another individual as that robber. The look-alike individual and the owner get into a fight, the owner uses the nightstick that he is carrying, injures the look-alike, and the individual eventually dies from the injuries. The liability assigned to this case is high. This indicates the respondents' views about the wrongfulness of a mistake as to what the store owner thinks is justified force. The subjects' response is notable because the mistake is in some sense similar to the sorts of mistakes that the mentally dysfunctional persons make in the experimental cases.

Notice that a new column, *c*, appears in this table, containing the percentage of subjects who assign civil commitment to the perpetrator. In the real world, the choice facing judges and juries in insanity cases is not simply criminal liability or no criminal liability. A special verdict of not guilty by reason of insanity is available where an insanity plea is made, and this disposition generally leads to civil commitment, not to immediate release into society. Because of this fact, we gave subjects the option to recommend this course of handling the mental illness cases and even to suggest a term of the civil commitment.¹⁰ We gave them this option as a way of assuring that those who are concerned about community safety more than anything else would feel that the civil commitment system would provide this assurance and that they need not impose criminal liability on someone who they thought might not deserve it in order to assure the community's safety. Notice that many of our subjects (66 percent or more) choose this civil commitment option (Table 5.2, column *c*). The ability to specify not just civil commitment but also a term of years thus makes the civil option equally effective at protecting the community as the criminal option. Thus, those who give the criminal option would be those who are doing so because they believe that the person really deserves the condemnation and punishment of criminal conviction.

The first result to notice from these various liability-judgment comparisons is the global one. Perpetrators who are judged to be suffering from a high degree of dysfunction, whether that dysfunction is of the cognitive or conduct-control sort, are normally not assigned criminal liability. In other words, our subjects do grant validity to a defense of insanity and sharply reduce the liability assigned to a person who commits a crime while mentally ill; in making this judgment, our subjects are in general accord with the way that the criminal codes treat such cases. Typically, more than 70 percent of our respondents assign no criminal liability to such cases.

This result has special implications for the current controversy over whether the insanity defense should excuse only those cases of cognitive dysfunction or if

control-dysfunction cases also should be provided a defense. Recall that the federal system, as well as several states following its lead, recently has reverted to a cognitive-only test, denying any defense for a control dysfunction. Our respondents would disagree with this change. In scenario 4, which is perceived as showing high control and low cognitive dysfunction, 81 percent of the respondents impose no criminal liability, and in scenario 5, similarly perceived, 66 percent impose no liability. Scenario 7, perceived as the reverse (low control and high cognitive), has about the same number of respondents giving no criminal liability (84 percent). This suggests that *both* cognitive and control dysfunctions can support an insanity defense. This conclusion is supported as well by the results in scenario 6. Where *medium control* and high cognitive perpetrator characteristics are perceived, 92 percent of subjects give the defense, noticeably more than the 84 percent who give the defense in scenario 7 for *low control* and high cognitive traits. Control dysfunction can support a defense; the greater the perceived control dysfunction, the greater the likelihood of a defense. Of course, these respondents do judge that *civil* commitment is appropriate for the insane individual; they do not wish to release the perpetrator into the community. Indeed, were we to graphically illustrate the length of the period of confinement recommended by the respondents—without respect to whether it was civil or criminal confinement—we would see that the time period of incarceration recommended was reasonably constant across cases. Our respondents seem to be making a complex judgment here. As is reasonably well understood in legal circles, there are a number of reasons why one incarcerates a person: because the person is blameworthy and deserves the sentence is one; to incapacitate the person so that no further crimes will be committed is another. (The latter is how one might treat a man-eating tiger, were one to stray into the legal system. One would recognize that it is in the nature of tigers to eat men; so, one would not morally condemn the tiger for doing so. But exactly because it is in the nature of tigers to do so, one would lock the tiger up so that it would not have the opportunity to eat more men.) What our respondents wish to happen, given the alternatives presented to them, is to punish the nonsane perpetrator with a prison sentence and to incapacitate the insane perpetrator for a long period of time¹¹ in a place that, within our system, may look remarkably like a prison.

Return now to the criminal liabilities (Table 5.2, column *a*) assigned to the cases in which we depicted possibly insane persons bringing about death. The number not in parentheses is the normal liability assignment; that is, the average liability assigned by all respondents, treating those who assigned no liability, no liability or punishment, or civil commitment as assigning a criminal liability of zero.

The corresponding numbers in parentheses show the average criminal liability assigned by those who assigned criminal liability. (To make the reader's task easier, we have included two numbers. The first is the percentage of respondents who as-

signed criminal liability. The second is the average liability assigned by those persons. So, for instance, in case 4, we see that 19 percent of the respondents assigned criminal liability in that scenario, and their average liability score was 8.29.) This new "average liability" number is a different statistic than we have previously included in our tables, and it is informative in this context because it reveals that those subjects (a minority of respondents in each case) who do not exculpate the offender for reasons of insanity judge that quite high sentences are appropriate. Additionally, notice that this is true for all of the insanity cases (4 through 7). Even within this minority group, however, liability ratings varied: Slightly more respondents assign criminal liability to the two high-control-dysfunction cases than to the two high-cognitive-dysfunction cases, and the average liability that they assign is higher. Further research will need to be done to determine both the persistence and importance of these differences and the degree to which they will transcend the specifics of the scenarios that we created for each case.

Having examined the liability scores related to the insanity cases, we address one more issue in this study—the respondents' understandings of the legal code's wordings of the various formulations of the insanity defense. (See Tables 5.3 and 5.4, which together explain our subjects' perceptions in this regard.) For each scenario, we asked our respondents to estimate the degree to which the individual in the scenario fits the various formulations of the insanity defense, and we did this in two ways: First, we presented our subjects with our best commonsense translation of the legal code concept (Table 5.4, column *a*); and second, we also gave them the exact wording of the legal code formulation (Table 5.4, column *b*). For example (in insanity case 2), we asked the degree to which the respondents agreed with the statements that the perpetrator "did not realize that striking the [victim] with the baseball bat was wrong" and that the perpetrator "was laboring under such a defect of reason [due to mental disease] that he did not know that what he was doing was wrong."

Table 5.3 shows the average responses of our subjects to these questions and, more important, shows the correlations between the pairs of equivalent questions (that is, between the common and legal language formulations). The correlations (column *c*) are generally high, averaging 0.86 in scenario 4, 0.85 in scenario 5, dropping to 0.58 in scenario 6, and returning to 0.84 in scenario 7. We interpret these high correlations to mean that, in this context, the subjects saw the paired statements as having about the same meanings. This conclusion of the essential interchangeability of the two forms of the statements is supported by the general close agreement between the average scores on each of the two equivalent questions. (The comparison across rows between columns *a* and *b* shows this.¹²) This suggests that, on the one hand, it would not be wrong in the criminal justice system to use the ordinary language formulations of the questions that the jurors are instructed to decide in determining whether a specific individual meets the legal criteria for insanity. On the other hand, it also suggests that the people to whom

TABLE 5.3 Respondents' Perceptions of Cognitive and Control Dysfunction: Agreement with Common and Legal Language Formulations

Scenario	Dimension of Perceived Dysfunction	(a)	(b)	(c)
		Common Language Agreement	Legal Language Agreement	Correlation*
4. High control, low cognitive	1. Unaware of nature of conduct	2.76	3.42	0.79
	2. Unaware of wrongfulness	2.71	2.97	0.87
	3. Substantial impairment of appreciation of wrongfulness	3.05	3.29	0.86
	4. Complete loss of control	7.39	7.13	0.94
	5. Substantial impairment of control	7.58	7.47	0.86
5. High control, low cognitive	1. Unaware of nature of conduct	2.50	3.24	0.84
	2. Unaware of wrongfulness	2.74	3.08	0.90
	3. Substantial impairment of appreciation of wrongfulness	2.95	3.21	0.86
	4. Complete loss of control	6.61	6.42	0.83
	5. Substantial impairment of control	7.29	6.84	0.83
6. Medium control, high cognitive	1. Unaware of nature of conduct	7.97	7.71	0.48
	2. Unaware of wrongfulness	7.58	7.63	0.34
	3. Substantial impairment of appreciation of wrongfulness	7.68	7.50	0.57
	4. Complete loss of control	4.74	4.42	0.68
	5. Substantial impairment of control	4.47	4.61	0.85
7. Low control, high cognitive	1. Unaware of nature of conduct	3.29	4.16	0.77
	2. Unaware of wrongfulness	6.68	6.68	0.74
	3. Substantial impairment of appreciation of wrongfulness	6.82	7.16	0.89
	4. Complete loss of control	3.89	3.63	0.85
	5. Substantial impairment of control	3.79	4.26	0.95

Note: The exact wordings of these questions are shown in Table 5.4. Question 1 is tabulated in column *d* of Table 5.1, question 2 in column *e*, question 3 in column *c*, question 4 in column *b*, and question 5 in column *a*. Respondents were asked whether they 1="strongly disagreed," 5="were unsure," or 9="strongly agreed" with the common and legal language formulations that correspond with each of the five dimensions of perceived dysfunction for each of the four scenarios presented here.

*All of the correlations shown in column *c* are statistically significant ($p < .05$).

TABLE 5.4 Key to Table 5.3—Questions for Common and Legal Language Formulations

Dimension of Perceived Dysfunction	(a) Common Language Formulation	(b) Legal Language Formulation
1. Unaware of nature of conduct	Because of mental illness, the actor did not realize that he was striking the tenant with a baseball bat.	The actor was laboring under such a defect of reason due to mental disease that he did not know the nature or the quality of the act he was doing.
2. Unaware of wrongfulness	Because of mental illness, the actor did not realize that striking the tenant with a baseball bat was wrong.	The actor was laboring under such a defect of reason that he did not know that what he was doing was wrong.
3. Substantial impairment of appreciation of wrongfulness	Because of mental illness, the actor's ability to understand the wrongfulness of his conduct was substantially impaired.	As a result of mental disease or defect at the time of his conduct, the actor lacked substantial capacity to appreciate the criminality or the wrongfulness of his conduct.
4. Complete loss of control	Because of mental illness, the actor lacked any ability to stop himself from striking the tenant with the baseball bat.	Because of the duress of mental disease, the actor had so far lost the power to avoid doing the act in question, as that his free agency was at the time destroyed.
5. Substantial impairment of control	Because of mental illness, the actor's ability to stop himself from striking the tenant with the baseball bat was substantially impaired.	As a result of mental disease at the time of his conduct, the actor lacked substantial capacity to conform his conduct to the requirement of the law.

we gave these scenarios, and by extension, jurors, are able to understand and apply the somewhat ponderous legal wordings of the various formulations of insanity as well. This does not contradict the findings of other research (discussed at the beginning of this study) that showed that people were unable to reproduce the legal system definitions of insanity.

Study 12: Summary

Recall our discussion of the treatment that would be given to each case by various formulations of the current law. Let us for the moment assume that the typical

judgments in every insanity scenario are of “not guilty,” as in fact they are. If this is assumed, interestingly, both the formulation of insanity contained in the Model Penal Code and the formulation under the McNaughten–irresistible–impulse test accurately fit the pattern of our respondents’ judgments, and the formulations of the McNaughten rule and the recently passed federal statute do not match the respondents’ judgments. Specifically, the last two formulations do not grant a defense when the person is laboring under a control dysfunction, even though our respondents do see control dysfunction as establishing a defense of insanity. Thus, the two formulations that grant validity to the insanity defense based on either a cognitive or a control dysfunction are the ones that best match the judgments of our respondents. Further, the subjects were able to distinguish cognitive from control dysfunctions, lending some support for the use of this distinction by the doctrine. As the history of the doctrine might predict, cognitive dysfunctions appear to provide persuasive excuses to more of the subjects than do control dysfunctions.

Further examination of the data suggests, rather tentatively, one more conclusion. Examine again the degree of our subjects’ agreement with the substantial impairment dysfunction statement for scenarios 6 and 7 (column *c* of Table 5.1). Although the subjects are in strong agreement with those dysfunction statements, they are by no means in total agreement with them. We would suggest that this supports the Model Penal Code’s formulation of the cognitive dysfunction rule, which requires only that the person lack “substantial capacity” to appreciate the criminal wrongfulness of his conduct. This accesses the defense when cognitive functioning is impaired—rather than totally lost—a judgment with which our respondents seem to be in accord. In further research, we will test whether a cognitive dysfunction that respondents judge as establishing a lack of substantial capacity to appreciate the criminal wrongfulness of one’s conduct is sufficient to cause those respondents to grant the insanity defense.

Further research also will be necessary to provide more support to the conclusions we have drawn from this study. Since our respondents perceive all of the cases as containing a high level of either control or cognitive dysfunction, further testing is necessary to determine what degree of each dysfunction is required before support for the insanity defense appears. It would also be useful to determine whether respondents use the defense in an essentially dichotomous way, granting it standing as a complete defense after it rises above a certain level, or if they would continuously scale their liability judgments to the degree of dysfunction that they detect. The former is the process that most closely matches those contained in all of the legal formulations.

There is a great deal of controversy about the insanity defense in our society. As we noted, many individuals feel, probably inaccurately, that the defense is used too often and has the effect of “letting off” many blameworthy persons. Given this is so, it is worth noting that a strong majority of our subjects still excused a

person who bludgeoned his victim to death if they judged that perpetrator as being genuinely dysfunctional because of mental illness. It may be that much of the controversy about the insanity defense is generated in circumstances in which the average reader of the publicity about a case sees the perpetrator as having only a modest degree of dysfunction—not enough to trigger the defense—whereas the jurors see the same degree of dysfunction as sufficient to trigger the defense. Still, we should also note that those minorities of the respondents who did find criminal liability appropriate assigned quite lengthy sentences.

STUDY 13: IMMATURITY AND INVOLUNTARY INTOXICATION

As our discussion of the previous study on insanity has suggested, when one commits an offense under the influence of some significant dysfunction of one’s capacity to control one’s conduct or to understand the nature of one’s conduct, the criminal law frequently recognizes an excuse that provides a defense. In addition to mental illness, the law excuses for dysfunctions that arise from either involuntary intoxication or immaturity (or, as we shall see in the next study, from durs).

Current legal codes typically use a person’s chronological age (although there is considerable debate over the exact age that divides maturity from immaturity) as conclusive evidence that the person is too immature to understand or control the harmful and criminal nature of his or her conduct [MPC § 4.10; Robinson, 1984, § 175]. Our study sought to test the subjects’ willingness to excuse persons because of their immaturity, as evidenced by their chronological age. A “control” harm was described, and then the same harm was described as having been committed by an individual of various ages. No other information accessing an excuse was given, so if respondents gave lesser sentences to the younger offender, they did so solely because of the differential inferences they drew from the offender’s age.

The defense of involuntary intoxication in legal theory works through mechanisms similar to those used for the defenses of insanity and immaturity, as described in the previous study concerning insanity. In Chapter 4, we discussed the legal theory relating to *voluntary* intoxication. If a person voluntarily becomes intoxicated, that person’s intoxication has a limited effect in mitigating his or her liability. In those cases in which a person’s intoxication is involuntary, however, liability may be eliminated or mitigated in two ways, parallel to those seen for mental illness. First, the resulting dysfunction from involuntary intoxication may provide a defense if it negates a culpable state of mind required by the offense definition. Second, the condition may excuse the violator if it satisfies the conditions of the general involuntary intoxication defense, notwithstanding that the elements of the offense are satisfied. Those conditions typically are analogous to the conditions required by a jurisdiction’s particular formulation of the insanity defense [MPC § 2.08(4); Robinson, 1984, § 176]. As with insanity, the most com-

mon defense formulations use the McNaughten test, the McNaughten–irresistible-impulse test, or the ALI test. The differences among these tests arise from the distinctions between cognitive and control dysfunction and between loss versus impairment of function, as described in the previous study.

In this study, we attempt to see the degree to which our respondents agreed with the immaturity and involuntary intoxication defenses recognized by the legal doctrine, as well as the degree to which these two defenses are based on similar underlying mechanisms of exculpation. To examine community views on the general involuntary intoxication defense and its effect on a person's liability, subjects were given five homicide scenarios intended to present a person who suffers from the following dysfunctions, respectively: high control only, high cognitive only, low control only, low cognitive only, and low cognitive plus low control. To examine community views on the doctrine's immaturity defenses, three scenarios presented cases in which the person engages in similar conduct under similar circumstances (but without being under the influence of any intoxication). In these cases, it is the person's age that is varied, from 10 to 14 to 18 years of age.¹³ Finally, there was a control comparison case to establish the penalty these respondents would give to the perpetrator of a similar homicide who suffered from no dysfunction.

In the control case and the three age-related cases, the core scenario is this: Two brothers have a history of antagonism. After an argument, one waits until the other is asleep and then kills him by dousing him with kerosene and setting him on fire. In the involuntary intoxication scenarios, the respondents were told that the cause of the involuntary intoxication is an unexpected interaction between two medications that the person is taking: one to control long-term pain and the other described as an over-the-counter drug for treatment of a cold. (By describing it as an over-the-counter medication, we attempted to create the perception that people would regard it as generally safe and unlikely to enter into side-effect interactions with other medications.) The prescribing physician had not mentioned the possibility of drug interaction side effects, and the person had not thought to ask about them. The core of these stories had the involuntarily intoxicated person killing his brother by suddenly dousing him with kerosene and setting him on fire. We manipulated the kind and degree of the resulting dysfunction both by a description of the person's resulting mental experiences and the later testimony of a physician about what dysfunction the particular drug interaction would cause. Thus, we attempted to create perceptions that the involuntary intoxication experienced by the person brought about high or low cognitive or control dysfunctions. Our respondents' liability judgments regarding these scenarios are in Table 5.5.

Look first at the five scenarios (2 through 6) that involve involuntary intoxication. We consider these cases first because they are more closely analogous to the insanity cases of the previous study. For these cases, the civil commitment of the

TABLE 5.5 Liability as Related to Immaturity and Involuntary Intoxication

Scenarios	(a)	(b)	(c)	(d)
	Liability ^a	% No Liability (N)	% No Liability or No Punishment (N+0)	% Civil Commitment
Control:				
1. Murder	10.42	0	0	
Involuntary intoxication:				
2. High control	5.00	7	44	
3. High cognitive	3.84	23	52	
4. Low control	6.19	0	26	
5. Low cognitive	6.83	0	20	
6. Low control and cognitive	6.93	7	20	
Immaturity:				
7. 10-year-old	4.84 (53%–8.94)	47	47	47
8. 14-year-old	6.66 (77%–8.77)	23	23	23
9. 18-year-old	8.70 (90%–9.26)	7	10	7

Liability Scale: N=No criminal liability, 0=Liability but no punishment, 1=1 day, 2=2 weeks, 3=2 months, 4=6 months, 5=1 year, 6=3 years, 7=7 years, 8=15 years, 9=30 years, 10=life, and 11=death.

^aCivil commitment cases are included as 0 in calculating these means. The numbers in parentheses indicate the percentage of respondents who assigned criminal liability and, of those, the average liability they assigned.

perpetrator was not an option that made sense within the judicial system and, therefore, was not given to our respondents as an option. First, and obviously, the sentences are greatly reduced from the control case of murder (as is revealed in column *a*). Second, both cognitive and control dysfunction appear to support a defense. This is similar to the conclusion of the insanity study. Third, statistical analysis reveals that the high and low dysfunction cases differ reliably: The high dysfunction scenarios (2 and 3) receive lower criminal liabilities ($p < .05$) than the low dysfunction scenarios (4, 5, and 6). The type of dysfunction—cognitive versus control—is not found to produce reliable differences. The interpretation that arises from this, then, is that people do assess cases of involuntary intoxication in terms of the degree of dysfunction that such cases bring about, and those perceptions of the dysfunctions cause respondents to reduce the liability they assign to the perpetrator.

Before taking this conclusion at face value, we need to look at the respondents' actual ratings of the degree of dysfunction brought about by the different scenarios (shown in Table 5.6). As column *b* indicates, the respondents certainly see the person in all of these scenarios as being intoxicated by the drug. They see him

TABLE 5.6 Subjects' Perceptions of Immaturity and Involuntary Intoxication Cases

Scenarios	(a) Age	(b) "Intoxicated"	(c) "Involuntary Intoxication"	(d) "Unaware of Actions"	(e) "Unaware of Wrongfulness"	(f) "Understanding Impaired"	(g) "Not Able to Stop"	(h) "Ability to Stop Impaired"
Involuntary intoxication:								
2. High control	7.19	7.19	6.13	3.77	3.87	4.90	6.03	6.42
3. High cognitive	7.90	7.90	6.52	7.00	7.10	7.13	6.74	7.10
4. Low control	6.90	6.90	6.03	3.71	3.55	5.13	4.74	5.58
5. Low cognitive	8.26	8.26	8.45	6.39	7.10	8.00	6.84	7.39
6. Low control and cognitive	6.42	6.42	5.97	4.06	4.32	5.48	4.58	8.19
Immaturity:								
7. 10-year-old	10.19	—	—	2.58	2.90	3.61	2.58	3.35
8. 14-year-old	14.13	—	—	1.74	1.90	2.42	2.00	2.19
9. 18-year-old	17.87	—	—	1.39	1.32	1.39	1.42	1.48

Key to column heads:

All statements were responded to on a scale where: 1="strongly disagree," 5="unsure," and 9="strongly agree."

(b) The actor was drug intoxicated at the time he performed the offense.

(c) The actor, if drug intoxicated, was not responsible for being drug intoxicated.

(d) Because of drug intoxication, the actor did not realize that he was committing the offense.

(e) Because of drug intoxication, the actor did not realize that committing the offense was wrong.

(f) Because of drug intoxication, the actor's ability to understand the wrongfulness of his conduct was substantially impaired.

(g) Because of drug intoxication, the actor lacked any ability to stop himself from committing the offense.

(h) Because of drug intoxication, the actor's ability to stop himself from committing the offense was substantially impaired.

as comparatively less intoxicated in scenario 6, and since that involves low degrees of dysfunction, that is appropriate. Moreover, as column *c* indicates, our subjects agree—somewhat grudgingly—that the offender is not responsible for being drug intoxicated in all of these scenarios.

Next, let us look at the individual scenarios and see what conclusions we can draw from them. The information in columns *d* through *h* tells us how these cases are perceived in terms of cognitive and control dysfunctions, with columns *d* through *f* relating to cognitive dysfunction and *g* and *h* relating to control dysfunction.

In the high control dysfunction case (row 2), respondents agree that the individual is tending toward being unable to stop (column *g*) and is also impaired in his ability to stop (column *h*). They also see the individual as being moderately cognitively aware; that is, they tend to disagree that he is unaware of his actions (column *d*), that he is unaware of the wrongfulness of those actions (column *e*), and that his ability to understand the wrongfulness of his actions is substantially impaired (column *f*). In this condition, it is reasonable to say that the respondents perceive that the individual has a modest degree of cognitive impairment and a higher degree of control dysfunction; in other words, that scenario is not inaccurately described as a "high control, low cognitive dysfunction" case. Persons perceived to have that level and kind of dysfunction by our subjects get a considerable reduction in sentence; certainly as compared to the control case of murder but also as compared to the low dysfunction cases. However, the liability rating of 5 (1 year in jail) is some distance from the sentence of no liability that many of the legal codes would give to an individual who has that dysfunction. Still, our respondents grant some considerable degree of validity to a defense based on a control dysfunction, which suggests that the legal codes that include a control prong in their formulations accurately represent community standards.

Look next at scenario 3, in which we attempted to create perceptions of a high cognitive dysfunction (an unawareness of the meaning or the wrongfulness of the harmful actions) and a low degree of control dysfunction. The respondents' ratings of the two statements on unawareness and the third on whether the individual is impaired in his ability to understand the wrongfulness of his actions all are high; clearly the case is perceived by our respondents, as intended, as one of high cognitive dysfunction. But the high ratings on the questions about whether the individual is able to stop the wrongful act indicate that the respondents see this case as one of high control dysfunction as well as one of high cognitive dysfunction. This means that, in this study, we were even less successful in creating a clear case of high cognitive dysfunction coupled with low control dysfunction than we were in the insanity study discussed previously. (Recall that it was demonstrated in that study that subjects do considerably reduce sentences for individuals who have high cognitive and moderate control dysfunctions.) Notice here that this individual receives a low liability rating of 3.84 (about 5.5 months in prison), which

is the lowest sentence given in this study's various cases of involuntary intoxication. This makes sense, since the respondents see this individual as impaired on both of the prongs of the defense.

The fact that the present case of high cognitive dysfunction was also read by our respondents as having a high control dysfunction may tell us something interesting about their "theories of mental dysfunction." Intuitively, a person who is thinking so oddly as to be unaware of the wrongfulness of killing somebody may be seen by the respondents as not able to stop the action because he or she sees no moral need to stop it. To put it another way, one who is unaware of one's own actions and their wrongfulness has a cognitive dysfunction that may be seen by the respondents as also creating a control dysfunction. A similar pattern showed up in our insanity cases, in which the individual who is seen as highly cognitively dysfunctional is also seen as having a substantial although not complete control dysfunction (Table 5.1, case 6). Again, future research will need to examine the generality of this inferential pattern of individuals; it may not always occur. For instance, it might be an inference based on the particular disability or the substance that brought about the voluntary intoxication in this case. Still, the fact that it also occurred, although to a more moderate degree, in the insanity case suggests that this inference pattern might be general.

In the three involuntary intoxication cases in which we intended to communicate various kinds of low dysfunction levels (Table 5.6, rows 4 to 6), we notice that the respondents in fact perceive those cases as involving moderate levels of dysfunction of a rather generalized sort. Specifically, the descriptions of scenarios 4 and 6 caused the respondents to perceive a moderate degree of both control and cognitive dysfunction (columns *d* through *h*). Intuitively in keeping with this, they do reduce the sentences given to those individuals as compared to the control case of murder (Table 5.5, case 1—sentence of 10.42, above life imprisonment) or the case in which an 18-year-old, nonintoxicated individual committed the same act (case 9, liability of 8.70, or more than 25 years in prison). But the sentences are by no means minor ones, ranging around five years in prison, and relatively few respondents (20 to 26 percent) assign no liability or no punishment in these cases.

We should mark one anomaly that we cannot currently explain. In the "low cognitive" impairment scenario (5), the respondents perceive that individual as having a considerable degree of both control and cognitive impairment—yet gave that individual a relatively high sentence. Further research will be needed to clarify this finding. It is possible that the subjects saw something in the specifics of our description that led to this odd result.

Still, with some tentativeness, we can derive one conclusion relevant to code drafters. Our respondents seem to analyze involuntary intoxication cases as analogous to those of mental illness; the subjects use the same concepts of control and cognitive dysfunction that they employ for analyzing mental illness. This sup-

ports the common practice of providing analogous conditions of exculpation in the general involuntary intoxication and insanity defenses.

It strikes us that some general comments may be in order on the exact circumstances that we created for the core scenario of the involuntary intoxication cases. Recall that the individual is taking a long-term drug for the control of pain, has not been warned by the physician as to the possibility of side effects, and takes an over-the-counter cold remedy that, in interaction with the pain medication, triggers the mental dysfunction. This case seems fairly far toward the involuntary end of a voluntary continuum that we will now suggest. Briefly, that continuum represents what a sensible person should know about what might happen to his or her mental state as a consequence of certain actions. Our actor, it seems to us, is relatively justified in not realizing in advance that the particular drug combination would produce mental dysfunction. He is, in other words, in a state of high dysfunction for involuntary reasons. Our previous study on voluntary intoxication showed what happens when the intoxication is more voluntary.

What can we conclude from our respondents' judgments of liabilities and associated perceptions of the immaturity cases? (Refer again to Table 5.6, scenarios 7, 8, and 9, which vary the control, or murder, case only as to the age of the person.) Notice, first, the "age" column (*a*) of the table; clearly the readers notice and can accurately report the age of the different persons in the scenarios. Also, columns *d* through *h* list respondents' perceptions as to the degree of awareness that the person has about the consequences and the wrongfulness of his actions. In general, these results tend to suggest that the youngest person is seen as comparatively less aware of the wrongfulness and likely consequences of his actions. He is less aware—but by no means unaware—all of the ratings stay well on the "aware" side of the scale midpoints.

Next, notice the civil commitment factor (column *d* of Table 5.5). For the cases involving underage perpetrators, we asked whether the respondents would recommend some alternative, nonprison form of dealing with the offender, as is sometimes available in the juvenile criminal justice system. Notice that some of our respondents do indeed recommend this form of treatment for the underage offender; the younger the offender, the higher the percentage of those recommending civil rather than criminal commitment. For the 10-year-old person, almost half of the respondents recommend this form of treatment.

Next notice the liability ratings assigned to the differently aged persons (Table 5.5, column *a*). Again, as in the previous study, the first number is the average liability assigned by all respondents, factoring in zero (0) for those who selected the civil rather than the criminal commitment option; the parenthesized numbers report the percentage of respondents imposing criminal liability and, of those, the average sentence they would impose. Relatively severe sentences are given, and age makes little difference in this. This surprises us, and we would like to see if this result holds up in future research. However, tentatively, we will interpret it: The

younger the perpetrator, the higher the percentage of respondents that would recommend that person to receive treatment that is alternate to criminal incarceration; however, for the majority of respondents who see criminal sentences as appropriate, youth does not decrease the duration of the sentence. Two possible interpretations strike us: The majority sees *criminal* incarceration as an appropriate vehicle for reform of the young individual, and they think that a long time in prison will accomplish this; or they see him as being just as incorrigible as an older offender would be, and they want to lock him away for a good long time. We suspect the latter.

As we mentioned in the introduction to this study, the treatment of juvenile offenders within the legal system is a topic of current discussion and controversy. Although our subjects are willing to assign some degree of cognitive and control impairment to 10- and 14-year-old youngsters, it may be that stronger inferences about impairment, or the lack of it, would be made from a consideration of the facts and circumstances of other particular acts of wrongdoing than those we have devised for this study. There may be instances in which a 10-year-old is judged both perfectly capable of being aware of the wrongfulness of a specific action and quite able to maintain the self-control necessary to avoid committing it. There also may be some instances in which an 18-year-old is seen to act without this awareness. If so, then some examination of these issues within the context of a trial might be the preferred procedure for judging the validity of the application of this defense.

Study 13: Summary

Our involuntary intoxication scenarios involved an interaction between a prescribed and an over-the-counter drug; one would want to have cases about other forms of involuntary intoxication before coming to any firm conclusions. That said, involuntary intoxication does seem to be judged by our respondents according to principles similar to those used for the general defense of insanity. However, our respondents are noticeably less willing to treat involuntary intoxication as a complete defense; it mitigates liabilities, but the liabilities assigned are still reasonably high. Further research is needed to determine whether this is the case in all instances of involuntary intoxication or if this was specific only to the cases we created.

The younger the offender, the higher the percentage of our respondents who recommend that the offender be treated in some alternative to the normal criminal justice system. However, for any of a number of reasons that we have discussed, those who would require that the offender be retained in the criminal justice system are willing to give that person, despite the age factor, sentences of more than twenty years. Much depends, we suspect, on the degree of rationality that the respondents attribute to the offenders, and that may not correlate well with the age of the offender. Much remains to be explored in further research on

this topic, and we notice that the criminal justice system is in a somewhat unsettled state with regard to the treatment of youthful offenders as well.

STUDY 14: DURESS AND ENTRAPMENT DEFENSES

In legal codes, another defense, duress, exculpates a person whose conduct otherwise would create liability. In duress, unlike in the insanity, immaturity, and involuntary intoxication defenses, the focus is not directly on the dysfunction caused but on the external pressures on the individual that might create reasons why he or she engaged in the otherwise punishable conduct. These pressures normally arise from the improper actions of other people and create such a force that even a reasonably resolute person, subject to those pressures, might succumb to them and violate a law. The bank manager who lets the burglars into the bank vault after hours because the burglars have kidnapped his family (and he believes that they will harm his family if he does not let them in) is an example of an individual who acts under coercion. The external pressure may cause coercion that, in turn, one might guess, causes an impairment of control analogous to the impairments excused under insanity or immaturity defenses. Statutes typically require that the force exceed a given level and reach a level of sufficient coerciveness to render the person blameless, before a defense is available. Frequently the definition of that level involves the familiar legal fiction of the "reasonable person." Under the Model Penal Code, for example, the force must be such "that a person of reasonable firmness in [the actor's] situation would have been unable to resist" (MPC § 2.09).

The case of the "entrapped individual" is sometimes thought to share a similar philosophical grounding; an individual who would not otherwise have committed the criminal act is led by abnormal circumstances into doing so. The possibility of entrapment arises when an agent of the government somehow lures or entices an individual into committing a crime. At the highest level of generalization, the entrapment doctrine gives a person a defense if a government agent *induces* or *persuades* that person to commit the offense. But as intuition would lead one to expect, entrapment statutes typically have additional limitations and restrictions that are taken into account. The defense is limited to instances of improper entrapment by a police officer, typically undercover; the same inducement by a private individual is not grounds for a defense. The inducement or persuasion of entrapment is not as compelling as the coercion typical of duress and does not seem to so clearly exculpate the acting individual.

The entrapment defense is almost unique to the United States, and there is a great deal of variety among different U.S. jurisdictions in defining it. The debated differences center around defining it in an appropriately limited way. Two general approaches are common. What may be called the "subjective formulation" of entrapment requires both that the person be induced to commit the offense by the

police agent and that the person is not otherwise predisposed to commit the offense. Thus, under the subjective formulation, a career drug dealer cannot get an entrapment defense—even if the transaction was induced or encouraged by a government agent—because the dealer’s previous transactions demonstrate predisposition.

Note that, somewhat counterintuitively, the subjective formulation of the entrapment defense does not have a specific requirement for the amount of pressure or enticement that was brought to bear on the person. As long as the person is not predisposed to commit the offense, any amount of pressure or inducement that successfully causes the person to commit the offense will provide a defense. The subjective approach focuses on both the police and the accused and requires two conditions for the defense to be successful—improper police conduct (conduct that would have caused a person not otherwise predisposed to do so to commit the offense) and no predisposition on the part of the defendant.

One senses that some competing policy considerations may be trading off within this formulation. On the one hand, one does not want the police to go around inducing criminal acts among citizens not otherwise predisposed to commit these acts. On the other hand, one recognizes that having undercover police officers purchase drugs or otherwise induce illegal transactions is sometimes necessary for catching career criminals. Letting off career criminals is too high a price to pay for deterring police entrapment practices, hence the exclusion (from the subjective formulation of the entrapment defense) of persons “predisposed to commit the offense.”

A second common approach of entrapment defenses is what may be called the “objective formulation.” Under this approach, the focus excludes whether the defendant was predisposed to commit the offense and focuses exclusively on the propriety of the government agent’s conduct. Of course, the subjective approach also focuses on one aspect of the police officer’s conduct—Is the conduct such that it would cause a person not predisposed to commit the offense to do so? The difference, however, is that the objective approach does not ask, in addition, whether the defendant was in fact predisposed.

A career drug dealer may get an entrapment defense under the objective formulation if the government agent’s conduct is “improper.” What conduct is “improper”? Under the Model Penal Code (which uses such an objective formulation), for example, a government agent acts improperly and may generate an entrapment defense for an offender if the agent induces an offender to commit an offense by: “(a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (b) employing methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it” [MPC § 2.13(1)(a) and (b)].

Note that the objective formulation seems somewhat more inconsistent with people’s intuition. The first clause of the statute requires only that the false representation be *designed* to induce a belief that the conduct was not prohibited. The second clause requires only that the methods create a risk of inducing *a person not ready to commit the offense* to commit the offense. Thus, the statute does not require that the actual *offender* be brought to the belief that the action is legal or that the offender actually be persuaded or induced to commit the offense. That is, the defendant need not actually be *induced* by the agent; the person need only have committed the offense in response to certain actions on the part of the agent. For instance, a government agent may tell a habitual drug dealer that it is not illegal to sell a certain sort of drug. The dealer may know full well that it is illegal and yet escape liability for the act of selling the drug under the objective formulation of the defense because of the agent’s knowingly false representation.

It may be apparent by now that the entrapment defense is not, strictly speaking, an excuse that *exculpates* the accused. It permits the person to escape from liability but does so for a variety of reasons relating to fairness and deterring governmental overreaching rather than the defendant’s lack of blameworthiness. This is true of the subjective formulation as well as the objective formulation. No minimum coerciveness of the inducement is required. Nor is the defense available if the person succumbs to inducement from a private citizen—even under circumstances where the same inducement from a government agent would evoke a defense.

This study tested cases involving both duress and entrapment. First, we sought to determine whether the subjects would recognize a duress defense for coerced conduct and, if so, how much coercion would be required to evoke the defense. Second, and considerably more tentatively, we explored the related questions of entrapment. We sought to determine whether our subjects would recognize a defense under the various conditions of entrapment suggested by different formulations of the defense. That is, we sought to determine whether the subjects would see entrapping conditions as exculpating the person or, alternatively, whether they might reduce the person’s liability because they saw mitigating if not exculpating conditions. We sought to examine as well whether the respondents’ views correspond better with one or the other of the two formulations of the entrapment defense.

In this study, we gave subjects both duress scenarios with varying levels of coercion and entrapment scenarios with and without predisposition of the offender, with and without improper inducement by a government agent, as well as variations substituting a private citizen for the agent. The core story involved an individual who agrees to transport eight ounces of cocaine for another individual. We asked the respondents to tell us the degree to which they saw the person as being personally disposed to commit the crime that he commits, to rate the amount of

coercion they saw exercised on the person, to judge whether a person of reasonable firmness would be coerced or induced to commit the same offense, and to indicate the degree of impropriety of the inducements that are held out to the person in committing the crime, as well as to assess the punishment that the person deserves, if any. Table 5.7 contains the respondents' judgments.

As to the duress defense, notice first that in the control scenario (row 1), in which the person commits the crime of transporting cocaine with no degree of duress or inducement, the liability our subjects imposed is 5.52, corresponding to a sentence of approximately 2 years. For contrast, take the most extreme duress case, that of high coercion (row 2) next. In this case an individual with no prior record transports the cocaine for an individual who threatens to kill his family if he does not do so. This high-coercion duress scenario gave liability results that are much lower than the control case, suggesting that the respondents see a considerable mitigation in this case; the average liability they assigned (column *a*, 2.29) is a sentence of 3.8 weeks. Notice also that 50 percent of the subjects assign no punishment to the offender.

As the degree of coercion decreases (the low-coercion case of row 3), the subjects assign a liability that is between that of the high-coercion and the control cases (3.65, corresponding to 4.4 months in jail). An examination of the distribution of the results provides no evidence of bimodality, which would have supported a "threshold" notion of coercion. It appears that here, as in other cases we have examined, the respondents are making continuous judgments of liability for cases in which the legal system imposes a threshold concept by requiring a fixed minimum coercion for a complete defense. Our respondents see degrees of coercion; the legal system sees either coercion or no coercion.

Examine next the ratings on the perceptions of the coercion cases (columns *d* through *h*). In the case of high coercion, respondents are in agreement that the coercion is indeed high (column *d*, 8.21 on a scale in which 9 = extreme coercion), and they are in agreement with the statement that it is sufficient coercion to cause any reasonable individual to succumb to it and commit the offense (column *e*). (But notice that the extent of the agreement is not strong, 6.31—where 5 = unsure and 7 = agree. Respondents mention such options as reporting the threat-making individual to the police.) Our case of low coercion, which involves a person smuggling cocaine because he would lose his job as a truck driver otherwise, is assessed by our subjects as a moderate to high coercion case (column *d*, 6.29—where 9 = extreme coercion), and they are generally unsure whether it is enough coercion to get a reasonable person to commit the offense (column *e*, 4.88, or quite near the "unsure" response). This suggests, in future research, cases of very low coercion be included to test the lower limits of the respondents' perceptions. There may be cases in which subjects recognize that some degree of pressure has been exerted yet do not grant the defense of coercion. However, note that in one sense the pattern of results takes us in the opposite direction—to con-

TABLE 5.7 Liability and Subjects' Perceptions as Related to Duress and Entrapment

Scenarios	(a) Liability	(b) % No Liability (N)	(c) % No Liability or No Punishment (N+0)	(d) Amount of Coercion	(e) "Reasonable Person Coerced"	(f) "Predisposition" Inducement	(g) "Improper Inducement"	(h) "Reasonable Person Induced"
1. Control— no duress or inducement	5.52 ^a	0	3	—	—	5.58	—	—
Duress scenarios:								
2. High coercion	2.29 ^c	9	50	8.21	6.31	2.32	8.09	6.32
3. Low coercion	3.65 ^b	3	24	6.29	4.88	3.68	7.53	4.82
Entrapment scenarios:								
4. No prior record—agent	2.44 ^c	21	50	7.62	6.06	2.79	8.18	5.91
5. Prior record— agent	6.24 ^a	6	9	3.65	4.38	6.91	6.03	4.50
6. No prior record—buddy	3.50 ^b	3	26	7.12	5.41	2.65	7.62	5.18

Liability Scale: N=No criminal liability, 0=Liability but no punishment, 1=1 day, 2=2 weeks, 3=2 months, 4=6 months, 5=1 year, 6=3 years, 7=7 years, 8=15 years, 9=30 years, 10=lifetime, and 11=death.

Key to column heads:

Statements (e) through (h) were responded to on a scale where: 1="strongly disagree," 5="unsure," and 9="strongly agree."

(d) How much coercion (i.e., pressure or force) did the actor feel, from the accomplice, to commit the offense?

(1=no coercion; 9=extreme coercion).

(e) The amount of coercion (i.e., pressure or force) from the accomplice on the actor would have been enough to cause a reasonable person in the actor's situation to commit the offense.

(f) The actor is generally inclined to commit an offense like this even if no one encouraged him to do so.

(g) The accomplice used methods of persuasion or inducement on the actor, to get him to commit the offense, that were improper.

(h) The accomplice used methods of persuasion or inducement on the actor, to get him to commit the offense, that would have caused a reasonable person to commit the offense.

Note: Superscript letters indicate significance at the $p < .05$ level by a Newman-Keuls test. Matching superscripts indicate means that are not statistically significantly different from each other. Means are compared within columns only.

sider what degree of coercion is necessary to completely exculpate the defendant. Even our actor who experiences high coercion receives no punishment from *only 50 percent* of the subjects. This puzzles us, because the facts described in this scenario appear to be highly coercive—the respondents see them as highly coercive—and yet the offender does not receive complete exculpation.

Still, the degree of coercion that our subjects perceive as operating on the person makes a difference in the liabilities that our respondents assign. There is a second line of evidence that coercion makes a difference to our respondents. Look within the low-coercion condition (scenario 3); specifically, at the perceptions of whether a reasonable person would have been coerced into committing the crime (column *e*). The extent to which the average subject judges that the degree of coercion would cause a reasonably firm individual to succumb to the pressure and the degree of liability assigned to the offender correlate strongly. ($\text{Beta} = -0.48$, $F(1,32) = 9.62$, $p = .004$, with the negative sign indicating that the lesser the degree of coercion that the respondent sees exerted on the person to commit the criminal act, the longer the sentence he or she imposes on the offender for committing the act.)

We next look at the psychologically more complicated situation of entrapment to see if we can discern a pattern in the respondents' judgments. In scenario 4, the driver, who has no prior record of an offense, is approached by an undercover government agent who was previously acquainted with him in the Navy. The driver is put under pressure by the agent to transport drugs. Scenario 5 is the same, except the respondents were told that the person has had prior convictions for transporting drugs.¹⁴ The liabilities assigned to the two cases are significantly different; the liability assigned to the person with the prior record is as high as (indeed, higher than) the liability assigned to the individual who commits the act with no inducement (control—case 1). Compare this result with that suggested by the objective formulation, which relies solely on the propriety of the conduct of the government agent. Quite clearly, the objective formulation does not accord well with our subjects' intuitions. For the objective formulation, the past convictions are irrelevant; what is critical is that the government agent approached the person and, in some sense, "lured" him into the behavior. Yet for our respondents, prior convictions are critical; the individual with a prior record is assigned a mean sentence of about four years, exceeding that assigned to the perpetrator in the control case; in contrast, the individual with no prior record is assigned a sentence that is sharply lower (between four and five weeks in prison).

The reason for this difference is probably found in the respondents' perceptions of the degree to which the criminal act resulted from the predispositions of the person. (Refer to column *f* in which subjects were asked whether they agree that "the [individual] is generally inclined to commit an offense like this even if no one encouraged him to do so.") When the person has a prior history of similar offenses, the respondents interpret the person's current criminal action as springing from his predispositions (they agree with the statement that the action is due

to the person's general inclinations), and they tend to think that the coercion would not have worked with a reasonable person (column *e*); they judge the criminality of the person accordingly. In contrast, when the person is a first-time offender (case 4), the coercive force of the inducements provided by the agent is seen as much more potent, and the assigned liability is accordingly reduced. These results are psychologically interesting: The discovery of prior convictions has caused our respondents to see that entrapment scenario quite differently from the others.

This is not to say that there is no concern that government agents are involved in the inducement process or are acting improperly. In cases identical in every other respect, a slightly greater mitigation of liability is given in the case of inducement by a government agent¹⁵ (case 4) than by a friend of the person (case 6), and the percentage of respondents who assign no punishment in the former case (column *c*) is much higher. However, an examination of the various other ratings of the two cases suggests that this may not be due to the fact that the inducer is a government agent; instead it may be because, knowing that the inducements came from a government agent who can be expected to be more skilled at the "inducement game," the amount of the coercion contained in the inducement is judged by the subjects as being slightly higher, the degree to which a reasonably firm person would succumb to the inducement is rated slightly higher, and so on.

Whatever the source of this slight difference in the liabilities assigned in these two nearly identical cases, the finding tends to undermine the validity of the entrapment defense generally—both the objective and the subjective formulations. The defense is available only for inducement by a police agent, yet the subjects see the definition of police versus nonpolice source of the inducement as not a major determinant of liability.

Much about the objective formulation is untested in this study and awaits further research. For example, such research might create cases in which the government agent entrapped but was not perceived as having coerced the person or in which the government agent violated one of the objective formulation's specific prohibitions, such as telling the person that the action was not illegal.

The subjective formulation of entrapment is this: A person, who is not predisposed to commit the offense, is induced (not coerced, as in the duress defense) to commit the offense by a police officer with methods that would have induced a reasonable person to also commit the offense. On initial examination of our data, the subjective formulation of the entrapment defense corresponds better to the subjects' view than the objective formulation. Of our three entrapment cases, scenario 4 draws on average the lowest liability assignment from our subjects—2.44 (4.9 weeks)—and the person is perceived as not predisposed to commit the crime (column *f*). Further, subjects tend to agree that a reasonable person in the same situation would have been induced to commit the crime (column *h*). Scenario 5, in which the person, who has a prior record, is seen as predisposed and the inducement tends to be seen as not sufficient to cause a reasonable person to com-

mit the crime, draws a sentence higher than our no-inducement control case (scenario 1)! Further analysis confirms that the degree of perceived inducement matters. Within entrapment scenario 4, we examined the correlation between the agent providing an inducement and the degree of liability our subjects assigned to the induced individual [$\text{Beta} = -0.49$, $F(1,32) = 9.62$, $p = .004$].

Note that even the subjective formulation of entrapment does not find support among the subjects *as a defense*. The individual with no prior record who is lured by the government agent into committing the crime gets a liability rating of 2.44 (about 5 weeks in jail). This assignment of some liability on the part of our respondents suggests that they do not believe that a complete defense should be available in entrapment cases (as provided for in current doctrine) but believe that only a mitigation is appropriate. Moreover, recall also that the subjective formulation, like the objective formulation, stresses the importance of the inducer being a police agent; however, our subjects give only minor weight to that distinction.

We are tempted to ask whether, in terms of community standards, there should be an entrapment defense at all. One of the questions that awaits further research is whether one might explain the entrapment mitigations found in this study as reflecting the subjects' assessment of the degree of duress-like coercion that existed in the entrapment cases. Some of our results suggest that the subjects may recognize entrapment as a defense only to the extent that it would give a defense or mitigation under a duress defense (albeit a duress defense altered to take account of degree of coercion and to give mitigations for coercion that does not exculpate). If this were so, then, if one were to reform the criminal-law doctrine to conform to the subjects' views, one would expand the duress defense to provide a mitigation (but not a complete defense) in cases of high to moderate coercion. Having done that, one might then abolish the entrapment defense as unnecessary.

Study 14: Summary

This study confirms the fact that people do mitigate and exculpate for coercion. If duress is perceived, liability is lowered. An individual who is under quite high duress to commit a crime receives a significant reduction in liability but does not, as we might have expected, receive complete exoneration. The frequent use of the "liability but no punishment" option suggests that our respondents want to make it clear that they are not condoning the conduct, but such disapproval of the conduct does not diminish their willingness to exculpate the person. Recall that unlike insanity, which has a special verdict that signals the reason for the acquittal, a duress acquittal under the current system leaves the message about the conduct ambiguous. Thus, one would expect more resort to this particular verdict of, essentially, "rule violation but no punishment," under cases of duress than in insanity cases. The use of this option by our respondents shows no ambivalence about exculpating the person, we suggest, but rather ambivalence about apparently approving the conduct.

With respect to entrapment, we found that both of the standard formulations, which emphasize the importance of the inducement coming from a police agent as well as the particular conduct of the police agent, do not have much effect on the liability judgments of our subjects. Instead, our subjects give a mitigation in those cases in which they believe the person is strongly coerced and in which they believe a reasonably firm person would also be induced to commit the crime. Thus, if the community's view was to be followed, the entrapment defense would disappear as a separate defense and be subsumed under the duress defense.

CHAPTER SUMMARY

The issues that we have addressed in this chapter are perhaps broader in scope than in other chapters, and much about these doctrines of excuse remains to be explored. Still, some conclusions seem reasonably well established. The disability caused by mental incapacity is recognized by our respondents as a valid reason to exculpate a person. Formulations of mental incapacity that recognize both a control and cognitive deficit are the preferred ones; the respondents seem to judge that dysfunction of either type is a valid trigger for exculpation. The greater the dysfunction, the greater the likelihood of a defense. In addition, respondents seem satisfied with a substantial rather than a complete dysfunction as establishing exculpation.

Involuntary intoxication is analyzed in legal codes on principles similar to the ones used for the analysis of mental illness, and this seems appropriate to our subjects. Their responses show a similar pattern of liability for involuntary intoxication as for insanity: They recognize both cognitive and control dysfunctions as an excuse and the greater the dysfunction, the greater the likelihood of exculpation.

Duress scenarios, our data reveal, are recognized as providing at least a mitigation of liability for offenses, and the degree of mitigation is a function of the degree of coercion that the respondents see in the particular situation. Whether duress can provide a complete excuse—in the community's view—awaits further research. Code formulations of the entrapment defense require that it be given only when a *police agent* supplies the inducement that leads the person to commit the crime, and our respondents did not see the importance of this requirement. Instead, they seemed to judge these cases using considerations similar to the ones they used in the duress cases, leading us to consider the possibility that the entrapment defense might properly disappear as a separate defense and be subsumed under the duress defense.

We suggest that our respondents often deal with their complex judgments about many of these excuse cases by giving a response that signals that they do wish to disapprove of the conduct, but they do not wish to do more than symbolically punish the person.