My students find these additional narrative facts sobering and disquieting. Sobering because the additional facts indicate a threatening and coercive situation, marked by a menacing show of force and an absence of options for Ms. O’Brien. Disquieting because the additional facts reveal a picture very different from the one conjured in the court’s decontextualized opinion. My students learn early the power of narrative and the capacity of courts to achieve a desired outcome by manipulating the terms of narrative. The notion of law as a body of universal rules that determine the outcomes of disputes dissolves when they see that the framing of legal narrative determines these outcomes at least as much as the underlying substantive rules. Because few rules exist for how judges should frame narratives, this means there is a great deal of indeterminacy and room for bias at the heart of the legal process. O’Brien gives many of my students their first taste of the fruit of the tree of realist legal knowledge—a fruit that for some is bitter and disenchanting, but for others is ripe with the promise of deeper insight.

The Fundamental Fault Line: Determinism versus Antideterminism

Thus, the battle over context and perspective really boils down to one over how we should think about choice. And the battle over alternative conceptions of choice, in turn, is really a clash of antideterminist versus determinist explanations of human behavior. By “antideterminism” I mean the principle that people freely choose their actions and thus are completely responsible for what they do. By “determinism” I mean the principle that human behavior can be understood as the product of prior causal events. For the determinist, we are all enmeshed in a web
of sometimes compelling, sometimes subtle, and often unconscious influences that renders talk of any kind of pristine free choice vacuous.

Much resistance to women’s self-defense work stems from worry over the subversive implications of openly acknowledging the deep connections among context, perspective, and choice. Acknowledging these connections weakens the purely antideterminist approach to criminal incidents by inviting a more searching investigation of the harsh circumstances that may have conditioned a defendant’s “decision” to violate a legal norm. But admitting that criminal acts may be determined (at least partially) by unjust environmental pressures undermines our ability self-righteously to demonize people who commit crimes, challenges the presumed link between blame and punishment, and compels us to reconsider the cruelty of the punishments we mete out. Is it any wonder, then, that mainstream commentators shrink from the proposal of even modest determinist doctrines in the criminal law?

For a revealing example of the unwarranted panic that determinist approaches to human behavior strikes in the heart of traditional criminal scholars, consider their reaction to a modest proposal by Richard Delgado, a prominent legal thinker, that the criminal law should recognize an excuse for persons whose crimes were induced by coercive persuasion, popularly known as brainwashing. Under Delgado’s proposal, the defense was to be limited to persons whose mental state had been forcibly altered by brutal external pressures applied by a powerful captor. Moreover, the defense could not be invoked by someone who voluntarily joined the group that allegedly brainwashed him or whose condition could otherwise be attributed to some “choice” on his part.
Despite the limited scope of Delgado’s proposal, Joshua Dressler, a noted mainstream legal thinker, warned that recognizing such an excuse threatened the collapse of the entire system of criminal blaming! According to Dressler, recognizing Delgado’s excuse would put us on a slippery slope, inevitably leading to recognition of a universal excuse based on the influence of external circumstances on an accused’s choice.12 Dressler ends his apocalyptic critique by chiding Delgado for ignoring the dire implications of his revolutionary suggestion.

My first thought upon reading Dressler’s exaggerated rebuke of Delgado’s modest proposal took the form of a paraphrase of a line from Shakespeare—the gentleman doth protest too much. In other words, such overreactions to severely limited deterministic proposals bespeak the sway of ideology. Of course, most positions on controversial topics are rooted in some political ideology. But mainstream legal thinkers vehemently deny this truism. They see themselves as objectively balancing competing considerations and reaching meticulously reasoned results.

My second response was a deepened sense of awe at the achievements of advocates for battered women, for these activists had to overcome this kind of shrill and obdurate opposition to determinist perspectives before they could get courts to admit evidence of “battered woman’s syndrome.”13 Finally, my third response was to canvass mentally the numerous determinist doctrines the law has recognized for many years without precipitating the collapse of the entire system of criminal blaming. For example, the commentary to Section 2.09 or the Model Penal Code explains the operation of duress doctrine with the following illustration:
(a) X is unwillingly driving a car along a narrow and precipitous mountain road, falling off sharply on both sides, under the command of Y, an armed escaping felon. The headlights pick out two persons, apparently and actually drunk, lying across the road in such a position as to make passage impossible without running them over. X is prevented from stopping by the threat of Y to shoot him dead if he declines to drive straight on. If X does go on and kills the drunks in order to save himself he will be excused [under duress doctrine] if the jury should find that “a person of reasonable firmness in his situation would have been unable to resist,” although he would not be justified under the lesser evil principle of [necessity doctrine].

X’s choice in this hypothetical situation to kill the people lying across the road rather than sacrifice himself is deemed to be determined. Whenever a court recognizes a defense of duress, it is acknowledging that a person cannot be condemned for choosing to break the law until more is known about the roots of his or her choice. And to assess the roots of that choice, the time frame must be broadened beyond the moment of the criminal incident itself and the choice evaluated in view of the situation in which the criminal incident occurred.

Provocation is another determinist doctrine that courts routinely recognize. For instance, a husband or wife (in practice, provocation excuses have been most successfully invoked by husbands) who discovers a spouse in the act of committing adultery and kills the spouse or paramour may seek to reduce his or her criminal liability from murder to voluntary manslaughter. At the moment of the killing, the defendant intends¹⁴ to kill the spouse, but courts hold that “in spite of the existence of this bad intent the circumstances may reduce the homicide to manslaughter.”¹⁵
Again, provocation doctrine directs fact finders to look behind the decision to kill to its causes, and to ask whether the circumstances leading up to it would excite the passion of a reasonable person. If they answer yes, then the killing is partially excused.

What drives these and other determinist doctrines is the insight that in certain cases decision makers cannot make the usual inference that a person is blameworthy from the fact that he chose to break the law. These excuses turn on the recognition that the defendant’s extraordinary circumstances drove a wedge between his contingent self—the self that came forward under the unjust pressures of the situation in which he found himself—and some underlying “true” self that could have manifested itself but for those unjust pressures. As Martin Wasik puts it, in cases of duress “the accused claims that there was no act by him.” By this logic, it is unfair unconditionally to condemn someone for the behavior of his contingent self, for the responses of this unduly influenced self do not tell us anything about the defendant’s “true” character. And we must ascertain an individual’s true character before we can hold him fully responsible for criminal acts.

This rationale neatly explains the determinist doctrines that the courts recognize; but what courts and commentators do not adequately explain is why these doctrines are so strictly limited. Generally, courts strictly cabin the duress defense by requiring that the defendant face immediate and specific threats, usually of death or severe bodily injury, and that the threats come from specific human agents who seek to compel the defendant to commit the particular crime for which he is charged. The Model Penal Code illustrates the strictness of these restrictions on the duress defense in the following variation on their earlier hypothetical situation: