I’ve done substantial cutting and pasting to reduce length yet provide a overall sense of the project. The paper is still too long for a workshop, but I think a reader can still get a good general sense of the project by reading “Part 1” (pages 1-21) and “Part 2” (pages 83-105).

Nigga Theory in the Substantive Criminal Law

Jody David Armour

I.  INTRODUCTION

“Part 1”

Distinguished Harvard Law Professor Randall Kennedy and comedy icon Chris Rock, although very different kinds of black social and cultural commentators (the scholar framing his viewpoint in the lofty language of the academy, the comedian, in the vernacular of the street), nevertheless share a common conclusion about how law-abiding blacks should regard black criminals—as “Bad Negroes” for Kennedy, as “Niggas” for Rock. “I love black people but I hate Niggas” Rock declares over uproarious laughter in a famous routine, defining “Niggas” as black criminals. And while the term “Nigga” has many different senses, some as full of sympathy and solidarity as others are of antipathy and disdain, clearly implicit in Rock’s application of the term to black criminals is moral condemnation of the unworthy and morally deficient. Capitalizing on the popularity of Rock’s satire, bumper stickers bearing his declaration of disdain cropped up on car bumpers like bitterly sardonic political slogans. Rock’s distinction between black people and Niggas exactly corresponds to the distinction Kennedy proposes between “good” and “bad” Negroes. Specifically, he exhorts law-abiding blacks to pursue a “politics of respectability” whereby they “distinguish sharply between ‘good’ and ‘bad’
Negroes.” “Bad Negroes,” for Kennedy, are black criminals, especially street criminals.  

“‘[G]ood,’ law-abiding Negro[es],” Kennedy urges, should “differentiate between ‘good’ and ‘bad’ Negroes” for the sake of safety and to promote respectability in the eyes of whites.

As to safety, he points to chilling proof of “black-on-black violence”: Black teenagers are nine times more likely to be murdered than white teens, and one out of twenty-one black men can expect to suffer criminal homicide. Because four-fifths of violent crimes are committed by persons of the same race as their victims, most blacks die at the hands of other blacks. “In terms of misery inflicted by direct criminal violence,” Kennedy concludes, blacks “suffer more from the criminal acts of their racial ‘brothers’ and ‘sisters’ than they do from the racist misconduct of white police officers.” In the words of another critic of Bad Negroes, “Racist white cops, however vicious, are ultimately minor irritants when compared to the viciousness of the black gangs and wanton violence.” Today’s scourge of the black community in criminal matters, from this perspective, is violent black criminals—“brothers” and “sisters” “who attack those most vulnerable without regard to racial identity.”

The upshot of this analysis is that “the principle injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws.” Not too many but too few blacks are wards of the state, in other words. Absent “underenforcement of the laws,” even more Bad Negroes would be arrested, convicted, and removed to jail cells and cell

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1 The kinds of black criminals Kennedy thinks should be viewed and treated as a Bad Negro are described sometimes as those involved in street crime, sometimes more narrowly as those involved in violent street crime, and still other times more broadly those involved in crime.

2 Kennedy, RCL at 26

3 Kennedy 17

4 Kennedy at 17

5 Kennedy at 20

6 Kennedy at 19

7 Kennedy at 19

8 Kennedy at 19
blocks. While some see racial injustice in the staggeringly high percentage of blacks behind bars, on probation, or on parole (56% of young black males in Baltimore, and one third of all black men in the state of California, for instance), from this perspective the real injustice of such high percentages is that they are not even higher. Terms like “brothers” and “sisters”—quintessential expressions of solidarity—no more apply to Bad Negroes than to racist police. Under this politics, “Every brother ain’t a ‘brother,’” with the distinction between mere “nominal brothers” (by shared pigmentation) and “real brothers” (by mutually recognized membership in a cohesive community) resting solely on criminal guilt or innocence.

Beyond safety, another reason to distinguish between Good and Bad Negroes, says Kennedy, is because black criminals “besmirch” the reputation of blacks as a collectivity in the eyes of whites. Because whites wield decisive decisionmaking power in a vast array of vital arenas, white social perceptions of blacks often dictate the fate of the black community. Black access to housing, schooling, employment and social welfare programs depends on their

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9 Removing black victimizers reduces black-on-black crime, victims—a net gain in social welfare for the black community.
10 Viewed in this light, distinguishing law-abiding Negroes from black gangs and criminals—today’s scourge of the black community in criminal justice matters—should be no more controversial than distinguishing law-abiding blacks from the historical scourge of racist white cops.
11 The substantive criminal law, in other words, tells us who deserves to be viewed as Bad Negroes and Niggas. It provides the moral and legal criteria for membership in both categories; it describes both the general moral limits on just blame and punishment (that is, the general moral limits on justly characterizing wrongdoers as Bad Negroes) and the particular moral judgments judges and jurors in a particular case must make to convict (that is, the particular moral judgments they must make to distinguish blameworthy and Bad from reasonable and Good Negroes). Accordingly, we will use only the rules and principles of the substantive criminal law itself (its own moral and legal criteria for blame and punishment) to evaluate the justness of describing blacks who commit crimes as Bad Negroes.
12 Kennedy at 13
13 Kennedy at 17
racial image in the eyes of whites. Kennedy accurately points out that many white
decisionmakers view especially poor blacks (as against middle-class, educated, Barack Obama
and Bill Cosby Negroes) as “undeserving,” “dangerous and unworthy.” This negative racial
reputation—magnified and reinforced by the misdeeds of black criminals—induces white
policymakers to undervalue the interests of all blacks. The rain of ill racial repute falls on
Good and Bad Negroes alike. To fare better in the vital arenas where white perceptions matter,
from this standpoint, Good Negroes must rehabilitate their racial reputation by distinguishing
and distancing themselves from black wrongdoers.

A final way Bad Negroes injure their Good opposites is by disproportionately
committing street crimes. In doing so, Bad Negroes establish and maintain a statistically
significant relationship between blackness and crime; they make it rational for actors—nonblack
and black alike—to consider another’s race in assessing his dangerousness. In the language of
evidence law, by disproportionately committing street crimes, black criminals make blackness
itself “relevant” to decisionmakers’ assessments of criminality by making the proposition that
someone did or will do a crime more likely to be true given someone’s blackness than it would
be without that evidence. Proponents of “rational racial profiling” plausibly maintain that race
is relevant to decisionmaking in just this way. Even Civil Rights Icon Rev. Jesse Jackson
famously practiced racial profiling in his reaction to ambiguous footsteps, experiencing relief
upon his realization that suspicious footsteps belonged to someone white rather than someone
black. The heightened anxiety Rev. Jackson would have felt had the suspicious footsteps

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14 Kennedy at 14
15 Kennedy at 14-15
16 May want to treat predictions differently than after-the-fact determinations.
17 “There is nothing more painful for me at this stage in my life than to walk down
the street and hear footsteps and start to think about robbery and then look around and see
belonged to somebody black can be attributed to Bad Negroes. Thanks to “them,” all Negroes are viewed with heightened suspicion; all must pay the Black Tax.

Many Good Negroes, says Kennedy, are keenly aware of the practice of racial profiling and other kinds of racial discrimination they suffer “because of the fears, resentments, and stereotypes generated in part by the misdeeds of black criminals.”18 These law-abiding blacks resent such racial discrimination “because it makes them pay for fears generated by criminals with whom they are lumped by dint of color.”19 This awareness and resentment leads many law-abiding blacks to combat being lumped with Bad Negroes by pursuing the key anti-lumping strategy of the politics of respectability, namely, “to distance as many blacks as far as possible from negative stereotypes used to justify racial discrimination against all Negroes.”20 To maximize the moral and legal distance between Good Negroes and negative stereotypes in criminal matters, racial justice advocates must not “canonize,” nor make excuses for, nor sometimes even represent as clients black wrongdoers, according to Kennedy.21 Thus, this politics adopts a double-barreled anti-lumping moral and legal response to black criminals: First, sharply distinguish morally between Bad and Good Negroes on the basis of criminal wrongdoing; then maximize the distance between the two by not celebrating, making excuses for, or in some cases even representing them. These two anti-lumping responses to black wrongdoers—Distinguish and Distance—make up what he calls the “morality of means”22 that legal advocates must observe in criminal matters to advance the interests of the black community.

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18 Kennedy 17
19 Kennedy, Foreword X-XI
20 Kennedy 17
21 Kennedy 21
22 Kennedy 20
Describing the Distinguish and Distance strategies as “moral means” implies that advocates for racial justice in criminal matters who fail to approach criminal wrongdoers in this way breach their most important ethical duty to the black community, namely, their ethical duty—as racial justice advocates—to help rather than hurt the black population. And, under this approach, it hurts blacks as a group for racial justice advocates to carry briefs for Bad Negroes. Not Racial Justice “By Any Means Necessary” but “By Respectable Means Only” is the maxim of conduct for ethical and responsible legal advocates from this standpoint. For convenience, let’s use the term “Good Negro” adjectively to refer to law-abiding blacks who observe the morality of means in seeking to advance black interests in criminal matters. Good Negroes, in this sense, wield whatever influence they have in criminal matters to sharply distinguish morally and legally between black wrongdoers and law-abiding blacks and to maximize the moral and legal differences between them in the eyes of whites. Thus, there can be Good Negro Presidents, Senators, Attorneys General, Judges, Jurors and Jurists. Good Negro Police Officers, District Attorneys, Parole Board Members and Probation Officers. Good Negro Scholars, Bloggers and Pundits. Even Good Negro Ordinary Citizens—a category encompassing ordinary African-Americans who, for instance, know better than to “singe the sensibilities”\(^\text{23}\) of whites through public displays of solidarity with black criminals like O.J. Simpson, whose murder acquittals, according to Kennedy, triggered “triumphalist celebrations”\(^\text{24}\) in droves blatantly Bad Negro Ordinary Citizens nationwide.\(^\text{25}\)

Finally, there can be Good Negro Legal Advocates—attorneys dedicated to morally and

\(^{23}\) Kennedy 21
\(^{24}\) Kennedy 21
\(^{25}\) Kennedy 21: The politics of respectability, for example, would have cautioned against the triumphalist celebrations that followed the acquittal of O.J. Simpson on the grounds, among others, that such displays would singe the sensibilities of many, particularly whites, who perceived the facts differently
ethically advancing the interests of African Americans in criminal matters. These Legal Advocates advance racial justice in criminal matters by sharply distinguishing and distancing. To this end, some Good Negro Legal Advocates flatly refuse to represent certain “types” of blacks—namely, Bad Negroes. And if they decide to represent some Bad Negro clients to promote the interests of blacks as a group, these ethical Legal Advocates, according to Kennedy, at least refuse to make excuses for black wrongdoers.26

Thurgood Marshall was a Good Negro Legal Advocate par excellance for Kennedy. Working on behalf of the National Association for the Advancement of Colored People, Kennedy notes, Marshall initially allowed the NAACP to represent only Good—“innocent”27—Negroes, refusing to represent a sixteen year old black boy sentenced to death for rape and attempted prison escape on grounds that “the youngster was ‘not the type of person to justify our intervention.’”28 Even when Marshall later “loosened his policy” and represented some defendants he believed to be guilty, Kennedy points out, his attentiveness to the group’s racial reputation and morality of means kept him from ever “tak[ing] the position that racism excuses thuggery when perpetrated by blacks.”29 For excuse claims (whether fully exculpatory like duress or merely mitigatory like provocation) seek to attribute criminal behavior to an actor’s circumstances rather than his character. The more jurors (or other decisionmakers) attribute criminal conduct to an actor’s circumstances, the less does his crime, in the words of the authors of the Model Penal Code, “serve to differentiate his character from theirs.”30

26 Disreputable Arguments concern arises in battered women cases, too, in debate over whether certain types of defenses reinforce stereotypes of passivity and irrationality and should be avoided in the interest of advancing the interests of women as a group.
27 Kennedy 20
28 Kennedy 20, 21.
29 Kennedy 21
30 Kadish and Schulhofer, Criminal Law and Its Processes 410 (7th Edition)
excuses, in other words, subvert efforts to sharply “differentiate between ‘good’ and ‘bad’ Negroes”\textsuperscript{31} on the basis of crime; they plug up one of the barrels—the sharply distinguish Good from Bad barrel—of Kennedy’s double-barreled morality of means. Successful excuses also plug up the distance barrel—they reduce the distance between black wrongdoers and Good Negroes—by inviting, enabling, and ultimately establishing sympathetic identification with the wrongdoers.\textsuperscript{32} In the words of a Model Penal Code Comment on the (partial) excuse of Extreme Emotional Disturbance, “In the end, the question is whether the actor’s loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen.”\textsuperscript{33} Thus, making or recognizing “excuses” for Bad Negroes (that is, attributing any of their criminal behavior to situational pressures related to racism) compromises the morality of means by reducing the distance and blurring the sharp distinction between Good and Bad Negroes in the eyes of whites.\textsuperscript{34} Because arguments that reduce and blur differences between Good and Bad Negroes—lumping arguments—besmirch the racial reputation of blacks, excuse claims (full and partial) for black criminals are the kinds of disreputable arguments eschewed by Good Negro Civil Rights Icons.\textsuperscript{35} Kennedy underscores this point by repetition: “Marshall sought to right miscarriages of justice, not excuse, much less canonize, criminals who happen to be black.”\textsuperscript{36}

Excusing Bad Negroes

In declaring that Marshall sought to right miscarriages of justice, not excuse black

\textsuperscript{31} Kennedy 17
\textsuperscript{32} Kennedy’s thesis really is an accusation against black criminals and hence disproportionately poor blacks.
\textsuperscript{33} Kadish and Schulfoher, Criminal Law and Its Processes 420 (7th Edition)
\textsuperscript{34} Key mitigation factor under MPC is we blame less if we cannot “differentiate” between defendant’s character and our own.
\textsuperscript{35} Arguments can function as political tools. Those seeking to advance the interests of blacks must consider the political function of arguments.
\textsuperscript{36} Kennedy at 21
criminals, Kennedy drives a moral wedge between justice and excuses in matters of criminal responsibility. He implies that we cannot right miscarriages of justice by excusing black wrongdoers—that we cannot excuse wrongdoers in the name of justice. He opposes excusing black wrongdoers primarily because excuses cost the black community more than they are worth. They are too costly not only for the reputational reasons just described, but also for reasons of safety and security—because excuses, by definition, reduce or eliminate the blame and punishment of wrongdoers, they keep drug addicts, dealers, gangbangers and killers, out of confinement and on the street, where they can claim more mostly black victims. Rejecting excuses increases incapacitation and incapacitation decreases crime. Rejecting excuses, in short, decreases crime. In the words of columnist Ben Wattenberg, “A thug in prison can’t shoot your sister.”37 And from a cost-benefit perspective, “prisons are a real bargain.”38 According to John J. DiIulio, Jr., “research shows it costs society at least twice as much to let a prisoner loose than to lock him up.”39 As proof that “prisons pay big dividends,” DiIulio cites Patrick Langan’s calculation that “tripling the prison population from 1975 to 1989 may have reduced ‘violent crime by 10 to 15 percent below what it would have been,’ thereby preventing many serious crimes.”40 Inasmuch as excuses reduce the number of convictions and length of sentences, they reduce the big dividends prisons pay.

Kennedy bolsters his rejection of excuses by pointing to poll data suggesting that the black community does not favor excusing wrongdoers either; just the opposite, most blacks surveyed believe that courts in their area do not treat criminals harshly enough and favor

37 Kadish and Schulhofer, 8th Ed. 102
38 Kadish, 8th Ed. 102
39 Kadish, 8th Ed. 102
40 Kadish, 8th Ed. 102
building more prisons so that longer sentences could be given.\textsuperscript{41} From this community perspective, moreover, he opposes even excusing or sympathetically identifying with “African-Americans who engage in relatively minor, nonviolent infractions”\textsuperscript{42} or nonviolent drug activity. In his words:

[Paul] Butler exudes keen sympathy for nonviolent drug offenders and similar criminals. By contrast, Butler is inattentive to the aspirations, frustrations, and fears of law-abiding people compelled by circumstances to live in close proximity to the criminals for whom he is willing to urge subversion of the legal system [through jury nullification]. Butler simply overlooks the sector of the black law-abiding population that desires \textit{more} rather than \textit{less} prosecution and punishment for \textit{all} types of criminals.\textsuperscript{43}

He applies this same general-welfare-of-the-black-community perspective to other racial justice issues. Thus, because cracks users and dealers are overwhelmingly black, laws that punish crack offenders much more harshly than powder cocaine offenders (who more often are white) may help more than hurt blacks as a group “by incarcerating for longer periods those who use and sell a drug that has had an especially devastating effect on African-American communities.”\textsuperscript{44}

Because urban curfews that disproportionately fall upon minority youngsters also help some black residents feel more secure, such disparities may help more than hurt the black community.\textsuperscript{45} Because crackdowns on gangs that disproportionately affect black members of gangs also reduce gang-related crime, the black population may be \textit{helped} more than \textit{hurt} by

\textsuperscript{41} Kennedy 306  
\textsuperscript{42} Kennedy, 304  
\textsuperscript{43} Kennedy, 305-06 (italics in original)  
\textsuperscript{44} Kennedy, 10 (italics in original)  
\textsuperscript{45} Kennedy, 10
such disparities. Because prosecutions of pregnant drug addicts that disproportionately burden pregnant black women also may deter conduct harmful to black unborn babies, black communities may be helped more than hurt by such disparities. Viewing laws like these as “social policy” propositions, Kennedy concludes that “it is often unclear whether social policy that is silent as to race and devoid of a covert racial purpose is harmful or helpful to blacks as a whole since, typically, such a policy will burden some blacks and benefit others.”

By this logic, therefore, “colorblind criminal laws”—laws silent on race and not enacted for the purpose of treating one racial group differently than another—whose effects disproportionately burden “blacks” can be good for the black community. For convenience, let’s call colorblind criminal laws that disproportionately burden blacks “racially burdensome.” By this logic, then, racially burdensome criminal laws can be good social policy for “blacks as group.” For the negative impact of a law on one subdivision of a social group can produce a positive impact on another. Thus, the interests of Good Negroes can be at war with those of Bad Negroes in criminal matters. When the interests of these two subdivisions collide, how does the politics of respectability settle the conflict—what moral and legal principle does it use to adjudicate conflicts of interest between different subdivisions of the black community? The principle is simply that laws are good if they serve the greatest aggregate interest of “blacks as a group”—the welfare principle. One great attraction of the welfare principle is that it does not play favorites—the principle does not require the interests of Bad Negroes to be discounted on account of their moral blameworthiness. Each person’s welfare figures in the rough calculations

46 Kennedy, 10
47 Kennedy, 10
48 Kennedy, 11
of costs and benefits that shape social policy—no one’s may be discounted.\textsuperscript{49} In the words of John Stuart Mill, “everybody is to count for one, nobody for more than one.”\textsuperscript{50} If an interest can be served, that creates a reason to do whatever would serve it.\textsuperscript{51} Interests can be ordered in terms of the degree of satisfaction or frustration serving them would produce.\textsuperscript{52} There is good reason, then, to promote satisfaction as much as possible. Thus, the welfare principle seems to provide a reasonable, \textit{neutral} moral and legal principle for adjudicating conflicts of interests between subdivisions of any social group—it says that when interests conflict, we should serve the greatest aggregate interest. The principle thus expresses benevolence in the sense of concern for all humans—an attractive moral attitude.\textsuperscript{53} And it provides clear, general guidance to policymakers seeking to advance the interests of blacks in criminal matters. Applied to racially burdensome criminal laws, the welfare principle provides moral and legal support for viewing such laws as good for “blacks as a group” inasmuch as the costs of such laws (blame and punishment) fall disproportionately on the smaller Bad Negro subdivision while their benefits (increased safety and respectability) accrue primarily to the larger subdivision of Good Negroes.\textsuperscript{54} The interests of Good Negroes, in other words, can be tantamount to those of “the black community” and “blacks as a group” in criminal matters. Racially burdensome laws can represent, in Kennedy’s words, a “net plus” for “African-Americans as a group”\textsuperscript{55}—that is, a

\textsuperscript{49}David Lyons, Ethics and the rule of law\textsuperscript{114} If an existing human interest can be served, that establishes a reason to do whatever would serve it.\textsuperscript{49}
\textsuperscript{51}Lyons, 117
\textsuperscript{52}Lyons, 117
\textsuperscript{53}Lyons, 114
\textsuperscript{54}Kennedy, 11, first full paragraph
\textsuperscript{55}Kennedy, 11. “This is one (often overlooked) reason why, in the absence of persuasive proof that a law was enacted for the purpose of treating one racial group differently than another (or some other clear constitutional violation), courts should
“net plus” for Good Negroes.

Thus, the politics of respectability is a moral and legal apparatus, a group of tools used together to accomplish a specific moral, legal, and political task. Its tools consist of a Bad Negro Detector, a moral and legal test to guide the Detector, a built in excuse deflector, a Distinguish and Distance function, and a moral framework used together to promote the good of blacks, defining good in terms of welfare. The most important tool in the entire apparatus is the Bad Negro Detector, for Bad Negroes must be clearly identified to be sharply distinguished—morally and legally—from respectable blacks.\footnote{56} The Detector detects morally deficient Negroes by a single legal test—criminal wrongdoing. Whenever it is pointed at blacks who commit criminal acts, the Detector detects morally blameworthy Negroes. And thanks to it’s built in excuse deflector, it detects morally blameworthy wrongdoers irrespective of excuses. Because Bad Negroes are morally blameworthy, they should be morally, legally, socially and politically separated from law-abiding blacks. Hence, Bad Negro Detection activates the double-barreled distinguish and distance function. The distinguish function runs a moral and legal us-them permit elected policymakers to determine what is in the best interests of their constituents.” Kennedy, 11. This suggests that any law racial burdensome to blacks but not explicitly discriminatory passes muster as long as its benefits outweigh its costs, even if we can show that factfinders apply these colorblind laws in (unconsciously) discriminatory ways, reaching different conclusions in like cases because of the operation of the defendant’s race on the unconscious attribution processes of the fact finder. It also makes it clear that, absent a “constitutional violation” (unconscious bias probably doesn’t work), policymakers looking at the general welfare should make these decisions. Kennedy makes a passing mention of a “rights” approach to these issues, but approaches rights from an interest balancing perspective, effectively treating rights as subject to the same logic as policies: “Courts must demand that official respect the rights of all persons, regardless of race. In deciding whether rights have been infringed, however, courts should be careful to avoid conflating the interests of a subdivision of blacks—black suspects, defendants, or convicts—with the interests of blacks as a whole.”\footnote{55} Neither does he indicate any way that “rights” would change the conclusions reached by a cost-benefit calculus.

\footnote{56} Being banished by distinction from the care and concern of the respectable black community
boundary between black criminals and non-criminals. This boundary is “sharp” not ambiguous, acute not gradual. The distance function then maximizes the moral and social distance in the eyes of whites between blacks on opposite sides of the boundary. Ethically, anytime blacks dedicated to advancing black interests can play a role in criminal justice matters, they should act in ways that reinforce sharp moral and legal distinctions between Good and Bad Negroes, maximize the moral, legal, and social distance between the two subdivisions, and maximize the number of black wrongdoers removed from the community. And its fundamental moral framework—its general guidance for adjudicating conflicts of interest between different subdivisions of the black community—is utilitarianism: the view that, as David Lyons puts it in Ethics and the Rule of Law, “when interests conflict…we should serve the greater aggregate interest, taking into account all the benefits and burdens that might result from the decisions that are available to us.”

Legal and moral excuses for black wrongdoers illustrate how this apparatus applies to specific criminal justice issues. Because excuses presuppose criminal wrongdoing, black wrongdoers claiming an excuse have already triggered the Bad Negro Detector. An excuse is a claim by a wrongdoer that the Detector misidentified her because some circumstance either negates her moral blameworthiness or reduces it. But if excuses really matter in moral and legal appraisals of wrongdoers, then the findings of the Bad Negro Detector lose moral credibility, for the Detector deflects excuses and focuses solely on criminal wrongdoing. It is morally fitting that Good Negroes follow the example of Thurgood Marshall and refuse to make or entertain excuses for their opposites. So it is morally fitting that the Bad Negro Detector deflect excuses

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57 David Lyons, Ethics and the rule of law, 116 Excuses aren’t necessarily saying “treat me as a creature lacking agency and responsibility” but rather “treat me with some sense of sympathy, compassion, recognition of situated agency, some degree of human frailty, etc.” All the non-capacity excuses work this way, as you see once you go through all of them!
and detect morally deficient Negroes solely on the basis of criminal wrongdoing. Excuses seek to introduce shades of grey into a culpability inquiry that is black and white. In other words, the Bad Negro Detector takes a dichotomous approach to moral and legal agency in criminal matters: An agent is either morally blameworthy or she is not. And the difference is one of kind, not degree. It is this dichotomous conception of moral agency and the moral agent that helps justify the sharply distinguishing and distancing functions. Furthermore, excuses are bad for the black community from a cost-benefit perspective, for they entail two enormous social costs. First, because excuses blur moral and legal distinctions and reduce the moral and legal distance between Good and Bad Negroes, they thwart the distancing strategy and diminish the group’s racial reputation. Second, excuses reduce the safety of Good Negroes by reducing blame and punishment—and thus jail time—for wrongdoers; “prisons pay big dividends” for law-abiding blacks but excuses reduce those dividends by reducing the prison population. This may be true even of “relatively minor, nonviolent infractions”\textsuperscript{58} or nonviolent drug activity. Because the costs of excuses for Bad Negroes fall mainly on the larger Good Negro subdivision, while the benefit of less blame and punishment go to the smaller Bad Negro subgroup, excuses fail the utilitarian test—they cost the black community more than they are worth.\textsuperscript{59}

Every tool and function in this moral and legal apparatus—every premise, assumption, deduction, distinction, and conclusion—is morally and legally unjustified. Nevertheless, the apparatus is important and useful. It is important because many influential decisionmakers share its moral attitude toward criminals and its strategies for dealing with them. It is also important

\textsuperscript{58} Kennedy, 304
\textsuperscript{59} Applying the apparatus to racially burdensome laws produces the conclusion that Good Negroes should morally and legally endorse laws whose burdens fall unequally on blacks, as long as such blacks are Bad Negroes and punishing them represents a “net plus” for Good Negroes.
because it represents the most sophisticated and systematic defense of this moral and legal viewpoint to date. And it is useful because it provides a helpful foil for the development of a sounder alternative—by critiquing each of its many and fundamental deficiencies, I will frame a more coherent, defensible moral and legal model of racial justice in criminal matters. This more defensible model will provide the basis for what I will call the “politics of solidarity,” a politics rooted in sound principles of racial and criminal justice and diametrically opposed to the principles animating the politics of respectability.

Here is a thumbnail sketch of the discussion to follow. The politics of respectability rests on a legal and moral Good-Bad dichotomy that has no sound basis in law or morality. The main instrument of this politics—the Bad Negro Detector—cannot justly or reliably identify morally blameworthy blacks. The Detector’s defect lies in the legal criterion it uses to identify morally blameworthy blacks, namely, the test of criminal wrongdoing or, alternatively, the test of criminal conviction. Neither test reliably establishes the wrongdoer’s moral fault. Consider, first, the criminal wrongdoing criterion. This criterion does not establish criminal fault, for it fails to recognize that criminal wrongdoing alone is never enough to subject a wrongdoer to blame and punishment under the substantive criminal law (save exceptional cases of strict liability\textsuperscript{60}). The State must initially establish criminal intent, which it cannot do without disproving excuses; then it must disprove excuses again in affirmative defenses.\textsuperscript{61} 

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\textsuperscript{60}I will consider it strict liability not just when it concerns social welfare offenses but whenever the law does not require a showing of mens rea as to a material element of a crime. Thus, moral-wrong and lesser-crime approaches to mens rea—both rejected by the MPC and most common law courts in line with Cunningham and Faulknor—provide for criminal liability without a showing of mens rea as to each material element. These I include in the strict liability category. 

\textsuperscript{61}The Model Penal Code and better analyses require that State to prove beyond a reasonable doubt the presence of mens rea in the definitional sense and the absence of defenses like duress, insanity, and self-defense. Other jurisdictions take a less coherent approach and allow the state to shift the burden of proof to defendant on these latter defenses.
against excuses for criminals is good demagoguery, for excuses negate or mitigate personal moral responsibility for wrongdoing, and “personal responsibility” is a value-laden political mantra. But critical reflection shows that such railings are bad morality and bad law. Second, the criminal conviction criterion lacks reliability as a test of moral fault for various reasons.\textsuperscript{62}

One especially compelling reason to doubt its results comes from recent psychological studies in attribution theory suggesting that often criminals are made—not found—in the criminal adjudication process. Put differently, the Detector does not simply detect or “discover” Bad Negroes, it actively constructs them: Similarly situated black and white wrongdoers are “diagnosed” differently by factfinders and other legal decisionmakers. Hence, the Detector “detects” its own biased creation. These differential diagnoses of wrongdoing as a function of race result in racial differences in blame and punishment that are easily hidden from empirical examinations of racial biases in criminal justice. Comparing sentences meted out to whites and blacks convicted of the same crime (say, murder or manslaughter), for instance, would not reveal it. For this kind of bias typically gets swept under the rug of jury characterizations of the killing as criminal or not criminal; and, if criminal, murder or manslaughter; and, if murder, the most aggravated form or one less aggravated. The differences between these characterizations turn entirely on differences in the moral appraisals of wrongdoers by jurors, for the mens rea requirement directs jurors to morally appraise a wrongdoer before finding him guilty.\textsuperscript{63} Research

\textsuperscript{62} One, the beyond reasonable doubt standard yields many false convictions just by its ease of satisfaction. (Black robber hypo; estimate empirically). Two, difference in resources for poor disproportionately black defendants increases likelihood of false convictions. Three, criminal law finds guilt frequently without blameworthiness, in violation of the just culpability principle, but nevertheless morally innocent actors are by law guilty of serious crimes.

\textsuperscript{63} The substantive law does place some constraints of the moral appraisals of jurors by, for instance, not allowing them to legally acquit of murder a morally blameless son who euthanizes his pleading-to-die and terminally ill father. Every moral justification is not legally
suggests that black wrongdoers systematically suffer harsher moral appraisals than similarly situated white wrongdoers. To root out and expose where race-based attribution bias lives in the substantive criminal law and adjudication of just deserts, I will frame a model of mens rea at odds with, but more realistic than, the reigning mens rea paradigm. Surprisingly, perhaps, some commentators contend that jurors generally find mens rea without directly or indirectly morally appraising the wrongdoer, that jurors generally just look for an aware mental state, which makes mens rea look more like a factual judgment than a moral appraisal. These commentators labor under a mistaken conception of mens rea and the nature of the judgment it often calls for from the factfinder. A proper analysis of the form and function of basic mens rea definitions will show that this requirement routinely requires jurors to morally appraise the wrongdoer, enabling the harsher moral appraisals of blacks found in attribution studies. This and other reasons I will discuss cast serious doubt on the reliability of the Detector in identifying morally blameworthy blacks who deserve our moral contempt and political ostracism.

Absent a reliably just basis for morally condemning black wrongdoers and convicts, there is no just basis for categorically distinguishing and distancing them from Good Negroes. Even assuming, however, that criminal wrongdoing or conviction did provide justifiable grounds for morally distinguishing convicts and non-criminals, it does not justify making the distinction sharp or maximizing the distance. For standard mens rea doctrine does not deflect moral excuses, rather it requires constant and careful attention to excuses at every stage of the culpability determination, from offense definition to affirmative defenses. It recognizes that just

recognize as a justification, just as every moral excuse is not legally recognized as an excuse, but for the law to maintain moral credibility there must be substantial overlap between moral and legal justifications and excuses. In any event, while the mens rea requirement does not necessarily capture every consideration relevant to the moral appraisal of a wrongdoer, the moral considerations it does encompass inform the jury’s moral appraisal of the wrongdoer.
blame and punishment cannot be visited on a wrongdoer without taking her excuses seriously. And excuses blur moral distinctions and reduce moral distance between wrongdoers and the law-abiding. Accordingly, mens rea doctrine does not require that the jury convict only if it finds a sharp moral difference between the wrongdoer and others. Rather, criminal conviction is surprisingly consistent with slight moral differences between the convict and law-abiding agents. The moral and legal boundary between criminal innocence and guilt under ordinary mens rea analysis is ambiguous not sharp, gradual not acute. And even when an actor crosses the mens rea threshold into criminal fault, ordinary mens rea analysis does not treat the moral blameworthiness of all guilty wrongdoers the same. Rather, it grades the wrongdoers’ moral fault; it recognizes multiple levels of subjective culpability, levels sometimes separated by vague and incremental moral boundaries. In other words, ordinary mens rea analysis rejects a dichotomous approach to moral agents and agency; in this sense it rejects a dichotomous approach to personal responsibility. It recognizes “situated agency” and makes allowances for human frailty in the face of situational pressures. Its complex, nuanced conception of moral agents embarrasses the pinched, narrow conception of agents proposed by proponents of the politics of respectability. Mainstream commentators on mens rea and moral agency—Choice Theorists—endorse the same anemic conception of agents and dichotomous approach to personal responsibility. For Choice Theorists, just the fact that a wrongdoer chose his wrongful act justifies blame and punishment. This simplistic approach will not withstand critical scrutiny, however, leading us back to a fuller, richer and more defensible approach, but one that further subverts the moral and legal grounds for the morality of means and politics of respectability.

Finally, I will make a frontal assault on the guiding normative framework of the politics of respectability, namely, utilitarianism. There is no reason to regard benevolence as the most
basic moral attitude (attractive as it is) rather than a concern or passion for justice.\textsuperscript{64} Principles of justice, not welfare, must morally and legally determine whether we blame individual defendants and how we resolve conflicts of interests between criminals and non-criminals. It is critical to criminal law’s perceived legitimacy—its “moral credibility”\textsuperscript{65}—that it condemn actors only on the basis of deserts, not utility. Therefore, any morally credible distinction between Good and Bad Negroes must rest on a principle of justice. It is a principle of justice, not utility, that best explains the bedrock requirement that mens rea or moral blameworthiness must accompany a criminal act. But because of demonstrable but often unconscious bias, especially race-based attribution bias, most of the mens rea requirements that can be generated by the just punishment principles cannot provide an unbiased basis for determining a wrongdoer’s moral blameworthiness or just deserts. Moreover, in light of savage social inequalities, a theory of justice like that of John Rawls does not provide a morally persuasive basis for punishing even those wrongdoers who clearly acted with mens rea from the standpoint of an unbiased factfinder.\textsuperscript{66} There is a crisis of legitimacy that does and should continue to afflict the administration of criminal justice, a crisis that does and should destabilize the moral meaning of criminal conviction. Specifically, the legal order is “pervasively infected by a systematic racial bias that nullifies its legitimacy.”\textsuperscript{67} Criminals are social and legally constructed in the process of adjudicating blame and punishment; the specific tools (rules of decision) provided by the

\textsuperscript{64} Lyons, 114 In the words of Kant, “woe to him who creeps through the serpent-windings of utilitarianism” in search of a just basis for blame and punishment.


\textsuperscript{67} Kennedy, Race, Crime and Law 27.
substantive criminal law allows the racial stereotypes that saturate our cultural belief system and social existence to drive the construction of criminals in the adjudication of guilt. Once we clearly identify the specific legal and psychological mechanisms whose interaction drives racial bias in the legal and social construction of criminals, and once we recognize the priority of justice over welfare in matters of blame and punishment, we are left with no just or morally credible basis for the politics of respectability. A legal system—especially a criminal justice system—does not necessarily merit the respect that we give it by our obedience or by our acceptance of the validity of its findings. It must earn that respect, which in part for reasons discussed below it has not, making it difficult to morally or intellectually respect a politics that rests on its results.

[There is a critical class dimension I will raise in the intro also. That is, given that most criminals are from poverty-stricken backgrounds, and assuming people are not poor because they’re bad but bad because they’re poor, the politics of respectability may reflect class-based fault lines and even class bigotry. This is why I argue (tongue-only-partially-in-cheek) that there is a silver-lining in racial profiling].

END OF WORKSHOP “PART I”

“PART 2” BEGINS ON PAGE 95

The politics of respectability rejects “excuses” for two commonly advanced reasons—one of utility and one of desert. As to utility, proponents of respectability contend that legally and morally recognizing excuses does not serve the general welfare of blacks; as to deserts, they contend that excuses deny that blacks are capable of “moral choice” in the same way we deny
that infants, the insane, and animals are capable of moral choice. I begin by showing the inadequacy of thinking about blame and excuses from a social welfare standpoint; only a justice or rights-based approach to blame and punishment stands up to critical scrutiny. I also lay the groundwork for a non-instrumental approach to tort liability that, following Rogers, holds “rational” or intentional harm-doers strictly liable and “non-rational” harm-doers liable only if they did not act like a “reasonable person in the situation.” The goal here is to demonstrate that there are coherently alternatives to thinking about matters of life and death (like accidents and criminal convictions) in cost-benefit terms, alternatives rooted in respect for victims and harm-doers or victimizers.

The Disutility of Excuses

Judges sometimes talk about criminal guilt and innocence in utilitarian terms. But their utilitarian mode of reasoning cannot explain or justify the great added weight that the criminal law gives to the interests of criminal defendants in general and Bad defendants in particular. In the landmark case of In re Winship, for instance, the U.S. Supreme Court holds that defendants have a constitutional due process right not to suffer criminal conviction without proof of guilt beyond a reasonable doubt. The Court recognized that the beyond a reasonable doubt requirement reduces the risk of convicting innocent defendants (“false convictions”), but only at the cost of increasing the risk of acquitting guilty defendants (“false acquittals”). The more proof courts require for conviction, the harder it is for the State to prove its case and thus the easier it is for guilty wrongdoers to be falsely acquitted. But increasing the risk of false

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68 Excuses deny that blacks are “sufficiently human, moral, and responsible to be held accountable for their actions.” They argue that this is a racially demeaning perception of blacks—an insult. Black wrongdoers, they insist, have the same capacity for moral choice—the same moral agency—as white wrongdoers. Thus, a wrongdoer who chooses to do wrong should be morally and legally condemned without excuse.
acquittals is a high price to pay to prevent false convictions. For every false acquittal puts another culpable wrongdoer back on the street to commit more “murders, rapes, robberies, aggravated assaults”\(^\text{69}\) and other crimes, infamous and petty. The innocent victims of falsely acquitted defendants could be spared great misery and suffering by requiring less proof of guilt in criminal prosecutions, say, mere proof by a preponderance of the evidence—so if factfinders believe that it is more likely than not that the accused is guilty, they should convict. The beyond a reasonable doubt standard of proof protects the interests of innocent (and guilty) criminal defendants at the expense of innocent victims of crime; and the preponderance standard protects the interests of innocent victims at the expense of innocent (and guilty) defendants. For simplicity, I will focus only on the collision between the interests of “innocent” defendants and “innocent” victims. A defendant is innocent of a *crime* if she either did not engage in the prohibited conduct or had a morally and legally relevant excuse. Picking a standard of proof in criminal cases, therefore, requires courts to pick a principle to adjudicate a conflict of interests between innocent crime victims and innocent criminal defendants. On what basis should this conflict be settled—by what moral and legal principle?

In his concurring opinion in Winship, Justice Harlan argues that the proper principle for settling this conflict of interest between innocent defendants and victims is the principle of utility—the welfare principle. For Harlan, the standard of proof in criminal cases reflects a social trade off. In Harlan’s words, “[b]ecause the standard of proof affects the comparative frequency of [false convictions and false acquittals], the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.” In this rational world of utilitarian calculations, we should determine

\(^{69}\) John J. DiIulio, Jr., Prisons are a Bargain, By any Measure, New York Times, January 16, 1996, p. A17 (Kadish 102)
the standard of proof in criminal cases by weighing the disutility of false convictions (suffering by innocent criminal defendants) against the disutility of false acquittals (suffering by innocent crime victims of repeat offenders). For Harlan, the balance of societal gains and losses supports but one conclusion—there must be proof of guilt beyond a reasonable doubt. In his words:

In a criminal case...we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty...In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.

Harlan’s judgment that false convictions are “far worse” than false acquittals captures the core value determination underlying the beyond a reasonable doubt requirement. The same core value determination underlies Blackstone’s often-repeated claim that it is “better that ten guilty persons escape than that one innocent suffer.”\textsuperscript{70} Other judges and commentators have endorsed even higher ratios to vindicate the underlying value, such as one hundred to one and even more.\textsuperscript{71} Justice Harlan does not say what would be a morally and legally acceptable ratio of false acquittals to false convictions under the core value, but he agrees with Blackstone and others that false convictions are “much worse” than false acquittals.

Yet, a utilitarian cannot say that the law should protect an innocent defendant at the expense of an innocent victim, that the disutility suffered by a falsely convicted defendant outweighs the disutility suffered by the victim of a falsely acquitted wrongdoer. Nor can she say from a utilitarian perspective that one innocent man in prison suffers more than the innocent victims of a one falsely acquitted serial killer, let alone ten or a hundred or “even more” such killers. Further, the direct victims of falsely acquitted wrongdoers are not the only innocent

\textsuperscript{70} 4 William Blackstone, Commentaries on the Laws of England *352 (1765).
\textsuperscript{71} [Page 30, Kadish 8\textsuperscript{th} Ed., citing article by Alexander Volkh]
victims of a higher standard of proof in criminal prosecutions, for by making it harder to convict culpable wrongdoers, the law creates a procedural loophole that encourages potential wrongdoers in the general population to commit more crimes by making it look easier to avoid criminal liability. The bigger the perceived loophole, the more potential wrongdoers are going to be tempted to exploit it; the higher the standard of proof, the bigger the perceived loophole. Hence, a higher standard of proof arguably deters fewer potential—and certainly frees more actual—wrongdoers, thus jeopardizing more innocent victims. In the words of Arthur Goodhart,

[T]he future harm that the ten guilty men who have been acquitted may do, either by repeating their own offences or by encouraging others by showing how easy it is to avoid conviction, far exceeds any injury that the innocent man can suffer by his conviction. The question then becomes: Is it better that ten young persons should be tempted to become drug addicts than that one innocent man should be convicted of being in possession of unauthorized drugs?  

So the principle of utility cannot be the basis of the bedrock value determination—it cannot be the “core value”—that makes it “far worse” to punish innocent defendants than to promote the welfare of innocent victims. There must be some other moral and legal principle doing the work. This other principle would have to protect the interest of an innocent defendant even when doing so reduces overall welfare. Before discussing this other principle, consider the pockets of

72 Utilitarians may counter that a mere “more likely than not” requirement for criminal conviction also encourages potential wrongdoers in the general population to commit more crimes by leaving “people in doubt about whether innocent men are being condemned” and thus diluting “the moral force of the law.” Assuming the truth of this claim, it is still far from clear that the number of potential criminals encouraged by a higher “beyond a reasonable doubt” loophole does not exceed the number of potential criminals encouraged by the dilution in the law’s moral force inherent in a lower “more likely than not” requirement. Hence, this analysis will proceed on the assumption that such more indirect and general costs of higher and lower standards of proof offset each other and therefore focus our calculations on the direct harm of false convictions to innocent defendants of false convictions and the relatively direct harm to innocent victims of falsely acquitted culpable wrongdoers.
substantive criminal law where courts invoke overall welfare to justify punishing innocence.

Punishing Innocence in the Substantive Criminal Law

Utilitarian reasoning dominates the areas of the substantive criminal law where courts are most willing to punish the morally innocent. Unabashedly utilitarian judges talk openly about their willingness to sacrifice justice to promote welfare. Thus, in People v. Morrero, the court justifies a law punishing morally innocent defendants in mistake of law cases by quoting Justice Holmes:

It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the lawmaker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.

Holmes justifies convicting defendants who lack subjective culpability of “felonious homicide” on these same grounds, reasoning that holding them to an objective standard (even one that they may not have the capacity to meet) serves “the criminal law, which has for its immediate object and task to establish a general standard…in the interests of the safety of all”73 (rather than, say, “in the interest of justice for the accused”).74

Nowhere in the substantive criminal law does utilitarian reasoning dominate more openly than in the area of strict liability for so-called public welfare crimes; nowhere are courts more willing to be explicit about sacrificing justice for “achievement of some social betterment.”75

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74 There is no way to get from Kennedy’s utilitarian moral principle to commonly recognized and required legal and moral requirements.
75 United States v. Balint, 258 U.S. 250 (1922) (Kadish 249)
United States v. Balint, for instance, the Supreme Court construed a criminal statute that imposed up to five years in prison on a seller as not requiring proof that he knew or had any reason to know that anything about his behavior was wrong. The Court reasoned that when Congress enacted the statute, it “weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided.”

Likewise, in United States v. Dotterweich the Court concludes that “the interest of the larger good” can justify a regulatory law criminally condemning (the defendant could have been imprisoned for up to a year) “a person otherwise innocent.”

What makes punishing the morally innocent so tempting to many lawmakers and judges is that it maximizes deterrence by minimizing loopholes. Requiring the State to prove not only that the defendant committed a criminal act but also that he did so with subjective culpability provides an escape hatch from criminal condemnation for innocent wrongdoers, but only at the cost of creating a loophole for guilty wrongdoers. Just as a legal requirement of proof beyond a reasonable doubt (a high standard of proof) creates a procedural loophole that encourages potential wrongdoers by making it look easy to avoid conviction, a legal requirement of moral fault creates a tempting substantive loophole that encourages potential wrongdoers by making it look easy to evade “properly imposed criminal responsibility.” As the Morrero court put it in justifying a law that punishes without proof of subjective fault, a fault requirement creates “opportunities for wrongminded individuals to contrive in bad faith solely to get an exculpatory notion before the jury.” A good man’s escape hatch is a bad man’s loophole.

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76 United States v. Balint, 258 U.S. 250 (1922) (emphasis added)(Kadish 249)
77 Morrero p. 270 Kadish 8th Ed.
78 Morrero p. 269 in Kadish 8th Ed.
For instance, assume lawmakers in some jurisdiction conceive of moral innocence as not choosing to do wrong. These lawmakers conclude that choice presupposes awareness and so they are considering requiring proof of awareness of wrongdoing for all criminal convictions. For them, the requirement that an aware mental state accompany the wrongdoing is, in the words of Justice Jackson, “as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.” For these lawmakers, because the defendant lacks awareness of wrongdoing in cases of inadvertent negligence—that is, cases where the defendant honestly was not aware of creating unjustified risks, though a reasonable person would have been aware—he could not have chosen to do wrong and so is morally innocent. These lawmakers must now decide what rule to apply to a motorist who causes a death while speeding but who can honestly say he was absentmindedly unaware of wrongdoing at the time of the fatal accident. The speeding clearly constitutes wrongdoing but it was accompanied by moral innocence because the wrongdoer lacked awareness of wrongdoing. If these lawmakers see themselves only as policymakers whose sole job is to frame rules that serve the general welfare of the community, they must decide whether to establish a rule that criminally condemns this inadvertent (hence innocent) wrongdoer by weighing the cost of punishing her against the cost of protecting her innocence by requiring the state to prove guilty awareness of wrongdoing. Because requiring the state to prove that a wrongdoer acted with an aware mental state encourages loopholers, an awareness requirement reduces deterrence. Thus, the cost of requiring proof of awareness of wrongdoing can be measured by the number of potential wrongdoers who could be deterred by closing the loophole and getting rid of the awareness requirement altogether.\textsuperscript{79} For convenience, let’s call

\textsuperscript{79} The number of potential wrongdoers who may not be deterred because of the
potential wrongdoers who could be deterred by closing a legal loophole (such as an awareness of wrongdoing requirement) “potential deterrables.” Potential deterrables can inflict great harm on a community. Punishing an inadvertently negligent—hence innocent—driver potentially deters:

1. Those who drive with a reckless awareness of risks but believe they might be able to deploy “false and diversionary stratagems”¹ at trial to trick a jury into believing that they lacked such awareness at the time of the accident.
2. Those who know that they occasionally or routinely daydream while driving, and who would be motivated by news of criminal conviction notwithstanding lack of awareness to inhibit their absentminded tendencies while driving.
3. Those who generally keep a proper lookout while driving and now have added incentive to do so.
4. Those who participate in any dangerous activity that requires attention, from flying airplanes to filling prescriptions, and who would be motivated to pay attention by news of criminal conviction for the absentminded.

The list of potential deterrables who might be influenced by a single case of punishing an inadvertent thus innocent wrongdoer can be multiplied to include many others. In the end, the social cost of protecting morally innocent wrongdoers by requiring awareness of wrongdoing can be measured by the suffering inflicted on all the innocent victims of potential deterrables who were not actually deterred because of the “awareness” loophole. This cost can be high enough to compel the conclusion that legally protecting innocent defendants is just not cost-justified.

This high cost of potential deterrables may be a good utilitarian reason not only to punish wrongdoers whose lack of awareness was unreasonable, but even those wrongdoers whose lack of awareness was perfectly understandable, forgivable, and, in a word, reasonable. In other words, even requiring the minimum possible level of moral fault—negligence—for criminal conviction may not be cost-justified. Because negligence is the minimum moral and legal threshold, requiring mere negligence for criminal conviction provides a narrower loophole for legal loophole…by the number of potential wrongdoers who would be deterred by not requiring awareness for conviction

¹ People v. Marrero (pg 267 in Kadish casebook)
potential deterrables than recklessness and intent. Nevertheless, punishing drivers who speed, irrespective of subjective moral fault—even if, say, a throttle or cruise control sticks—potentially deters wrongminded individuals who lack a good explanation for speeding but who, goaded by the negligence loophole, believe they can invent a sympathetic story if risk ripens into injury.\textsuperscript{81}

However narrow, modest, or minimal the innocence escape hatch, its invitation to loopholers may figure centrally in cost-benefit calculations of its desirability. The more often the criminal law requires proof of any level of moral fault for criminal conviction, the more wrongminded and borderline potential deterrables will be tempted to treat every escape hatch as a loophole; the more incentive, in other words, presumptively bad and borderline men have to do wrong and plead a lack-of-subjective-moral-fault loophole in defense. So the more crimes require proof of subjective culpability for criminal conviction, the more the criminal law brims with substantive loopholes, temptations, and inducements to do wrong. In a word, requiring proof of subjective culpability in any area of the substantive criminal law might deter fewer potential—and free more actual—wrongdoers than eliminating the requirement and imposing strict criminal liability, and moreover the suffering potential deterrables and falsely acquitted wrongdoers inflict on innocent victims may outweigh the suffering of morally blameless convicts. Legally protecting the innocence of criminal defendants with a subjective fault requirement may cost more (in harm to innocent victims) than it’s worth (in benefit to innocent defendants).

The Cost and Benefits of Excuses

\textsuperscript{81} One key justification for strict liability for public welfare crimes is that it reduces wrongdoing in the sense of excessive risky \textit{conduct}. Specifically, the assumption underlying strict liability in the public welfare area is that the special stigmatizing effects of criminal conviction gives more incentive to actors than civil liability to avoid excessive risky conduct. Otherwise there would be no reason to prefer criminal conviction, which requires proof beyond a reasonable doubt, over civil liability, which requires only proof by a preponderance of the evidence.
Put differently, punishing individuals who commit criminal acts regardless of their moral fault renders excuses irrelevant, for the whole point of an excuse is to deny or negate subjective fault. So eliminating the subjective culpability loophole renders excuses irrelevant to determinations of criminal guilt. For instance, if criminal conviction requires proof not only of wrongdoing (as under strict liability) but also proof that the defendant “knew” he was doing wrong, an honest claim of “But I didn’t mean to” is a full excuse—so eliminating the “knowledge” of wrongdoing requirement eliminates the “But I didn’t mean to” excuse. And if the State requires proof of recklessness or negligence, a claim of “But my error was reasonable” fully excuses because it means the same as saying “my mistake was an understandable, forgivable expression of human frailty”—so eliminating the requirements of recklessness and negligence eliminates the “I’m only human” excuse.\(^82\)

Referring to offense definition elements like negligence, recklessness and knowledge as excuses may strike many as unconventional; conventionally, these three levels of culpability are viewed as requirements—preconditions—that must be met before there is a crime to excuse. Thus, for criminal homicide, it might seem that the prosecution must first prove that the defendant negligently, recklessly or intentionally killed the victim, for only then is there a criminal homicide to excuse. Hence, *in form* negligence, recklessness and intent seem like “inculpatory” elements; excuses, “exculpatory” elements. But form obscures function. Negligence, recklessness, and intent *function* as excuses; they are exculpatory elements in inculpatory clothing. Anytime someone engages in harmful and unjustified conduct, his wrongful act (wrongdoing) must be excused. Take a case of unintentional homicide. To prove criminal negligence, the prosecution must show not only that the defendant engaged in
unreasonable—unjustified, excessively risky—conduct (wrongdoing), but also that his mental and emotional shortcomings, his cognitive and volitional failings, were not those of a “reasonable person in the situation.” The Reasonable Person test does double duty as a test of the desirability of an act and as a test of the subjective fault of the actor. As a test of subjective fault, the reasonableness test shifts attention to the presence or absence of excuses, for excuses negate (or mitigate) subjective moral fault. State v. Everhart clearly illustrates this crucial distinction between ingredients of the negligence definition that require factfinders to morally appraise the act and those that require them to morally appraise the actor and her excuses. In Everhart, a young girl with an IQ of 72 gave birth in her own bedroom, wrapped the baby in a blanket from head to foot, and accidentally smothered him to death. To convict the girl of criminal negligence, the prosecution had to prove not only that wrapping the baby in that way under those circumstances was an unjustified (excessively risky) act—which it was—but also that “a reasonable person in her situation” would have avoided that act. Under this test of reasonableness, once factfinders morally appraise the act as unjustified from a social welfare perspective, they must appraise the actor’s subjective culpability by weighing her excuses for such wrongdoing. If the court viewed her IQ of 72 as a morally relevant excuse, it can make

83 Moral judgments about the conduct and moral judgments about (appraisals of) the actor; the moral judgment about the conduct may be a utilitarian one, while that about the appropriateness of punishing the author of the welfare-reducing act may have to be made on non-utilitarian grounds—unless Bentham or Hart were right—and this is precisely what I am driving at.

84 believing that the baby had been born dead
85 H.L.A. Hart Punishment and Responsibility 153-54 (1968) [Kadish 8th, 423-24]…that is, that an ordinary person with normal capacities and frailties would have acted differently.
86 Justifications focus on the desirability of the act; excuses, on the common humanity, human frailty and moral agency of the actor. Excuses, in a word, focus on the actor’s subjective culpability.
her low IQ part of her “situation” for purposes of the “reasonable person in her situation” test. The court in Everhart followed precisely this analysis, holding that because of the defendant’s low IQ and the accidental nature of the death, the prosecution failed to prove culpable negligence.

Someone driving a car in an emergency—to rush a relative to the hospital, for instance—provides a more general illustration of the excuse function that the reasonable person test routinely serves in negligence or recklessness analyses. This Distraught Driver might expose others to more risk than can be justified by the benefit of his speeding. If the injury to the relative was clearly not life-threatening, for instance, the cost (increase) in health and safety risks imposed on others by speeding may outweigh the benefit (decrease) in health and safety risks to the relative produced by speeding to get him there sooner. Or the driver might suffer some other failure of judgment or self-control (like failing to keep a proper lookout or taking longer to react to a suddenly appearing pedestrian), lapses that he would have avoided under less stressful circumstances. A factfinder might find that the driver’s act or conduct was excessively risky (“unjustified”) but nevertheless conclude that his error in judgment or reduced self-control was “excusable” and therefore reasonable. Because reasonable acts are always justified yet reasonable actors may be merely excused, a reasonable actor can commit an unreasonable act and remain reasonable throughout its commission. Reasonable responses need be neither rational nor right when the reasonable person test functions as an excuse inquiry and directs

87. The act can be unjustified without the actor being unreasonable; reasonable people in certain situations can—without subjective culpability—commit unjustified acts. Calling someone who creates unjustified risks reasonable is functionally equivalent to excusing her; calling her unreasonable is equivalent rejecting her excuse claim. Thus, the “reasonable person in her situation” ingredient in definitions of criminal negligence and recklessness functions as an excuse claim.

88. Kadish 425.

89. Not reasonable and therefore excusable!
factfinders to make allowances for the harm-doer’s ordinary failings. Thus our hypothetical Distraught Driver can claim to be excused and thus reasonable if an ordinary person confronted by a similar emergency could have made similar mistakes on the basis of similar cognitive and volitional failings.  

Even in torts, where some claim negligence only focuses on acts and their justifications, not actors and their excuses, the reasonable person test clearly directs jurors to excuse some excessive risk-takers. Only the excuse function, for instance, explains so-called emergency doctrine in civil negligence. Under the emergency doctrine, trial judges in effect instruct juries that they may excuse an actor for an unjustified act if he acted under the taxing cognitive and volitional pressure of an emergency. Specifically, under the doctrine, judges instruct juries to consider the emergency that confronted the defendant in determining his reasonableness. As Dan Dobbs points out, the only logical application of the emergency doctrine occurs when there is wrongdoing—when the act inflicted more evil that it prevented. If the defendant’s conduct would be reasonable even without considering the pressure of the emergency, then the emergency doctrine is irrelevant, for there is no wrongdoing to excuse. For instance, assume an emergency that confronts a defendant with a sudden and pressure-filled choice between causing death and causing property damage. If the defendant chooses the presumptive lesser of available evils—property damage—he is doing exactly what he would be expected to do even with hours for calm deliberation and decision. But then nothing about the choice being sudden and pressure-filled is doing any independent moral or legal work. In such a case, as Dobbs observes, “it is right to hold that he is not negligent and not liable, but wrong to suggest that the emergency

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90 One of my main contentions—there but for the Grace…
doctrine has anything to do with the decision.”

Clearly, then, the function of the emergency doctrine is to highlight for the factfinders that the “reasonable person in the situation” test excuses ordinary expressions of human frailty in the face of certain situational pressures. The cognitive and volitional deficiencies (expressions of human frailty) caused by the situational pressures excuse an unjustified act when the actor was “reasonably [i.e., an ordinary person would have been] so disturbed or excited [by the emergency] that the actor [could] not weigh alternative courses of action.” But, paradoxically, the most compelling evidence that the emergency doctrine provides for the existence of an excuse function at the heart of the reasonable person test in negligence is that courts increasingly reject the emergency doctrine itself. For the reason they increasingly reject giving a separate instruction on emergency circumstance is because they recognize that judges already always instruct the jury that the defendant is held to the standard of the reasonable person in the “situation” or under the “circumstances.” “Emergency, if one exists, is one of the circumstances, and lawyers are free to argue to the jury that the defendant behaved reasonably considering the emergency (or any other circumstance).” Courts increasingly reject a specific emergency instruction because they see that the general instruction on the reasonable person standard fully covers the emergency excuse and all other excuses arising from the circumstances. A separate

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91 Dan B. Dobbs The Law of Torts Hornbook Series 305-06.
92 Prosser and Keeton on Torts, 5th Ed. 196. Under such conditions, As Prosser and Keeton observe, “…the actor cannot reasonably be held to the same accuracy of judgment or conduct as one who has had full opportunity to reflect, even though it later appears that the actor made the wrong decision, one which no reasonable person could possibly have made after due deliberation.” Id. Another civil court found that a defendant acted reasonably because “he was suddenly confronted with unusual emergency which ‘took his reason prisoner.’” Id. In the words of one civil court, in an emergency, the actor’s choice “may be mistaken and yet prudent.” Id.
emergency instruction lacks neutrality because the “the effect is to emphasize one circumstance that favors the defendant.”

Any sound application of the general reasonable person test already makes allowances for all kinds of situational pressures, including those generated by emergencies, so a separate emergency instruction “highlights a single circumstance, the emergency, for special consideration” and thus “unduly emphasizes the defendant’s side of the case.” Accordingly, courts increasingly see emergency instructions as unnecessary and unfair.

The upshot of this analysis is that, in everyday operation, the general reasonableness standard functions as a legal vehicle for excuse claims in negligence, civil or criminal. In fact, the reasonableness test does double duty, functioning as a legal vehicle for two separate levels of excuse claims: The general first-level excuse claim, covering mistakes and accidents of ordinary people caused by emergencies and other external situational pressures, and the second-level excuse claim, covering mistakes and accidents of atypical people—like the young girl with an IQ of 72 in Everhart—caused by an idiosyncratic deficiency, one afflicting a limited subdivision of the population. The general first-level excuse—always implicit in a reasonable person test—claims that the wrongdoer, in the words of H.L.A Hart, has taken “those precautions which any reasonable man with normal capacities would in the circumstances have taken.” Applied to emergencies, for instance, the claim is that the psychological and emotional pressures created by

94 Dan B. Dobbs, The Law of Torts Hornbook Series 308. The same defendant-friendly redundancy infects the “unavoidable accident” (no negligence if the accident was unavoidable by the exercise of ordinary care) and “mere happening” (the mere happening of the accident or injury is not itself evidence of negligence) instructions—both “unduly emphasize the defendant’s side of the case in preference to the plaintiff’s.” Id.


97 Prosser and Keeton on Torts, 5th Ed. 197, fn 32 (doctrine merely emphasizes the “under the circumstances” portion of general standard of “reasonable under the circumstances”).

98 The first-level excuse claim is commonly called the “objective” test of reasonableness; the second-level, the “individualized” test.

the emergency could cause any ordinary person with normal capacities to suffer similar cognitive or volitional impairments. In contrast, the second-level excuse—the relevant moral basis for appraising the defendant in Everhart—claims that, again in Hart’s words, given the wrongdoer’s idiosyncratic “mental and physical capacities,” she “could not have taken those precautions.”

Applied to the case of the accidental baby killing by the girl with an IQ of 72, her excuse claim is that because of her cognitive deficiency she could not have taken “those precautions which any reasonable man with normal capacities would in the circumstances have taken.”

From the standpoint of subjective culpability, she can reason, why treat someone with less mental and psychological capacity differently than someone with less physical capacity? Just as a shorter or blind person cannot be faulted for failing to see or avoid danger that could only be seen by a taller or sighted person, someone with an IQ of 72 cannot be faulted for failing to appreciate danger that could only be appreciated by someone of normal intelligence. Her excuse claim is that because of her cognitive deficiency she, once more in Hart’s words, “could not have helped [her] failure” to act and think like someone without her disability.

As Hart observes, if the criminal law punishes those who could not help themselves by refusing to adjust the reasonable person test to the individual capacities of the wrongdoer, then it punishes the morally innocent, for in such a case “criminal responsibility will be made independent of any ‘subjective element.’”

Nevertheless, the law sometimes punishes the morally innocent in negligence (and

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recklessness) cases by refusing to adjust or individualize the test to accommodate atypical but real cognitive and volitional deficiencies. Put differently, the law frames the fault requirement in negligence in a way that selectively recognizes some morally relevant excuses (those that benefit the average person) but rejects other equally relevant excuses (those that benefit atypical persons or minorities). A negligence requirement that refuses to excuse morally blameless but atypical harm-doers—yet excuses blameless and typical ones—singles out atypical harm-doers for strict liability. The justification for singling out and punishing (or penalizing) morally innocent but atypical harm-doers in negligence is the usual one deployed by courts in support of strict liability for human fallibility—efficiency. This is as true of the reasonableness test in torts as in crimes. Yet despite these pockets of morally indefensible utilitarianism in the criminal law, cost-benefit thinking almost never morally justifies criminally blaming and punishing blameless harm-doers. Generally—and notwithstanding such pockets of presumably welfare maximizing strict liability—the substantive criminal law eschews cost-benefit thinking in matters of blame and punishment. Thus, efficiency proponents cannot explain why generally in the eyes of the substantive criminal law the moral innocence of harm-doers matters enough to courts to be protected even when the social cost of protection outweighs the social benefit. The “culpability principle” expressed in the mens rea requirement protects innocence, as we will see, even if that protection reduces overall social welfare. So cost-benefit thinking cannot explain why the substantive criminal law takes the moral innocence of wrongdoers seriously. In criminal matters, therefore, such thinking cannot be trusted to take social and racial justice seriously.

104 Cite evidence codes definition of relevance here.
105 Only in Canadian way: Regina v. City of Sault Ste. Marie and later Supreme Court of Canada case holding strict or absolute liability unconstitutional except “in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like.” Reference Re Section 94(2) of the Motor Vehicle Act, 23 C.C.C.3d 289 (1985).
Negligence is the minimum threshold of subjective fault or mens rea legally recognized. Civilly, negligence is dominant in tort thinking,\(^{106}\) and criminally, negligence routinely defines the difference between criminal guilt and innocence. Accordingly, the better we understand the reasonable person test—the primary test of negligence—and how it has been shaped by the tug of war between efficiency and justice, the better we understand the stakes of that conflict. To understand the reasonable person test or fault principle, we must trace it to its origins in the common law. This will require us to probe the origin and development of accident law for deeper insight into how the law determines which harm-doers to punish or penalize and which victims to protect and compensate. To be more specific, tracing the common law origin and development of the fault principle in civil negligence will shed light on its operation in criminal negligence in three ways. First and most practically, criminal courts surprisingly frequently interpret criminal statutes as imposing criminal liability for civil negligence.\(^{107}\) What mode of moral and legal reasoning seems to justify treating the “fault” required for blame and punishment as no greater than—indeed coextensive with—that required for mere civil liability. Second, even jurisdictions that purport to distinguish between civil and criminal negligence do so on the basis of tests so vague and amorphous—“gross,” “culpable,” “wicked,” “clear,” “complete,”\(^{108}\) even more illuminating, “that degree of negligence that is more than the negligence required to impose tort liability”\(^{109}\) —as to blur any distinction\(^{110}\) and invite judges and jurors to treat civil

\(^{106}\) Dobbs page 268 Hornbook

\(^{107}\) Properly understood, criminal negligence reunites moral and legal fault by requiring some degree of subjective fault for a finding of criminal fault.

\(^{108}\) Rex v. Bateman, 19 Crim. App. 8, 11-12 (1925); State v. Barnett 218 D.V. 415, 63 S.E. 2d 57, 58-59 (1951) [Kadish 8th 413-14]

\(^{109}\) Jerome Hall, General Principles of Criminal Law 124 (2d ed. 1960) [Kadish 8th 114]

\(^{110}\) Welansky is spot on here.
negligence as criminal negligence.\textsuperscript{111} Finally, the history of civil negligence vividly illustrates how willing utilitarian lawmakers are to sacrifice the interests of vulnerable victims to maximize welfare.\textsuperscript{112} In fact, according to standard legal history, the very reason American courts initially established a fault principle in torts was because protecting the interests of some harm-doers produced more social utility than protecting the interests of their vulnerable victims. Thus, looking at the reasonableness requirement from a cost-benefit perspective will show the moral limits of looking at matters of life and death from a cost-benefit perspective.

In personal injury cases, many respectable judges and scholars underwrite utilitarian thinking about the suffering of certain victims, viewing their unrelieved pain and death as justified if it produces marginally more satisfaction than frustration for the group as a whole. In criminal matters, as we have seen, many respectable judges and scholars view the suffering and death that the state deliberately inflicts on certain morally innocent harm-doers as justified if it produces marginally more overall satisfaction. Such thinking rests on mistaken moral and legal analyses. In tort cases, cost-benefit thinking cannot explain significant areas of personal injury law, such as defense of property limitations, liability for “reasonable batteries,” and the absence of any meaningful moral difference in many cases between accidents and batteries. And the

\textsuperscript{111}Further, courts and commentators in torts justify not protecting or relieving innocent accident victims on precisely the same utilitarian grounds they (and others) use to justify criminally punishing morally innocent wrongdoers. However, because criminal conviction—unlike tort liability—implies moral blameworthiness and moral condemnation,\textsuperscript{111} one cannot necessarily justify sacrificing morally innocent harm-doers in criminal cases on the same welfare grounds used to justify sacrificing innocent harm-doers in tort cases. Life and liberty and intentional sacrifice by state are not bases that distinguish interests spent for welfare in torts and same possibility in criminal cases.

\textsuperscript{112}and equality—both by not shifting the costs of accidents from innocent victims and by not treating equally innocent injurers the same. Eliminate excuses for everyone in tort (no general emergency doctrine, so would get us closer to respecting rights of victim from noninstrumental standpoint) or let all attributes in, (which I think means getting close to good faith best judgment test) so that innocence of some not seen or recognized as more worth protecting than the innocence of others (social welfare logic allows this).
pursuit of efficiency cannot coherently explain “that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law,’”—the “culpability principle.” This is the moral and legal principle expressed in the legal requirement of “mens rea” or “vicious will.” In Blackstone’s words, “an unwarrantable act [that is, wrongdoing] without a vicious will is no crime at all.”¹¹³ Utilitarian thinking cannot explain why the substantive criminal law generally protects the moral innocence of wrongdoers, why it generally requires proof of mens rea, even when doing so may reduce social welfare.¹¹⁴ And because excuses figure centrally in all levels of mens rea analysis, cost-benefit thinking cannot explain why the substantive criminal law takes excuses seriously.

The Fault Principle

Before the fault requirement in torts, harm-doers were strictly liable for direct injury to accident victims. Because the action of trespass was the remedy for all forcible and direct injuries,¹¹⁵ and because strict liability was imposed when the writ of Trespass could be used,¹¹⁶ directly injured accident victims were protected against having their health and safety interests sacrificed—without remedy—to promote the general welfare. Instead, losses from all such accidents were shifted to harm-doers, even if the harm-doers were “reasonable,” not “negligent,” and without “fault.” That is, even if it was cost-justified (“reasonable”) from a social welfare perspective for the harm-doer to sacrifice the health and safety of the accident victim without compensation, the directly injured victim recovered. Victims of accidents that cannot be prevented by reasonable care are called “unavoidable” victims. Thus, from a moral standpoint,

¹¹³ Kadish 8th 213.
¹¹⁴ I have omitted portions of this argument.
¹¹⁵ Prosser and Keeton on Torts 5th Ed. Hornbook Series Student Edition 29
¹¹⁶ Dobbs The Law of Torts Hornbook Series 259
the direct harm test can be viewed as settling the conflict of interests between “reasonable” harm-doers and their “unavoidable” victims in a way that protected the victim’s interest both at the expense of the harm-doer’s interest and at the expense of overall social welfare. When an interest resists cost-benefit calculations in this way, it is conventional to call it a “right.” Morally, then, the direct harm test could have been viewed as resting on a legal and moral right of directly injured accident victims to be compensated even when compensating them reduced overall welfare.

A non-utilitarian or rights-based perspective need not ignore social welfare, for “one of the duties nonutilitarian philosophers enumerate is the duty of beneficence (the duty to maximize happiness), which in effect incorporates all of utilitarianism by reference.” A nonutilitarian, however, recognizes that there can be conflicts between the results of cost-benefit analysis and nonutility-based considerations like “respect for people” or justice or equality. Indeed, “depending on the moral importance we attach to the right or duty involved, cost-benefit questions may, within wide ranges, become irrelevant to the outcome of the moral judgment.” Professor William Rodgers, for instance, argues that tort liability rules should reflect “respect for people.” “This perception of fairness,” he continues, “requires distribution of praise and blame, and the legal consequences of both, in accordance with what people deserve…” From this perspective:

117 I KEEP WATCHING WHAT I DO, TO SEE WHAT I REALLY BELIEVE.
The ultimate goal of tort law…is not to settle for a stand-off in a search for cost minimization of accident and accident avoidance….The goal is zero injury, however unattainable that aim may be; that goal follows from the natural duty people have “not to harm or injure others,” and the natural right people have not to be harmed or injured. Rogers sees this rights-based approach as requiring that harm-doers who make conscious choices about risk creation and prevention be held strictly liable for harm caused by those choices, even if the choices maximize social welfare in the sense that the benefits of the choices are greater than their costs.

Common law courts could have deliberately chosen a rights-based approach like Roger’s to the interest of unavoidable accident victims either by reinforcing strict liability for directly injured accident victims or by extending strict liability to cover even indirectly injured victims of harm-doers (limited, perhaps, to harm-doers who “make conscious choices about risk creation and prevention”). Instead, American courts chose to adjust the conflict of interests between reasonable harm-doers and their unavoidable victims in a way that sacrificed the interests of victims. In the landmark case of Brown v. Kendall, for instance, the accident victim was directly injured by a harm-doer engaged in separating two fighting dogs. Chief Justice Shaw held that the harm-doer was not strictly liable for the directly injured victim; the victim could only recover if he proved that the harm-doer was at “fault.” This new fault requirement shifted the cost of certain accidents from harm-doers to victims. What moral reason justifies judicial establishment of a legal principle that serves the interests of certain harm-doers at the expense of certain victims.

One non-moral reason for striking the balance between the opposing interests in a way

that helps certain harm-doers and hurts certain victims could be the pure self-interest (coupled with political power) of the harm-doer (or of harm-doers as a class). This is a non-moral reason because pure self-interest cannot provide a neutral principle for shifting the costs of certain accidents from harm-doers (under the direct harm test) to victims (under the negligence test). If self-interest alone justified decisions and actions, we would be left with the normative theory called “ethical egoism.” Egoism tells us that we have reason to serve our own welfare but no reason to serve the welfare of others, unless serving others happens to serve our own welfare most effectively. Absent that happy coincidence, an agent “owes it to herself” not to compromise her own welfare for others’ sake.\footnote{Lyons, Ethics and the rule of law 111.} But because egoism provides no real basis for other-regarding values (contrary to claims by English philosopher Thomas Hobbes and others who contend that moral principles can be based on an egoistic ethic applied with an enlightened understanding of human interactions), egoism gives no guidance for adjudicating conflicts of interest from a neutral standpoint. A neutral principle requires actors and legal decisionmakers to transcend the limits of egoism and sometimes compromise their own welfare for others’ sake. The welfare principle clearly meets this neutrality test, for under utilitarian calculations “everybody is to count for one, nobody for more than one.”\footnote{Lyons, Ethics and the rule of law 114} The legal principle of negligence is commonly viewed as expressing the welfare principle on two different levels.

First, at the wholesale level of the establishment and maintenance of a general approach to the relationship between harm-doers and victims, according to a popular history of tort, the negligence regime is a creature of utilitarian thinking about the interests of accident victims. That is, the very reason common law courts initially decided to shift the costs of certain accidents from harm-doers to victims—the very reason they rejected the victim-friendly direct
harm test in favor of the more harm-doer friendly fault requirement—was because as a general matter the social benefits of promoting the harm-doers’ interests outweighed the social costs of sacrificing their victims’ interests in compensation. As Professor Peck points out, “[t]he negligence standard provided a legal environment in which rail transportation could grow and prosper. It served other branches of industry and commerce as well…”\textsuperscript{125} He concludes:

…Society as a whole stood to benefit from the workings of an industrial economy, and as a general proposition it could not afford to burden itself with compensating those individuals who were so unfortunate as to be injured accidentally by an instrument of progress.\textsuperscript{126}

From this perspective, the negligence principle represents a massive judicial subsidy to private industry at the expense of unavoidable victims in the name of social welfare. This approach views sacrificing the interests of certain victims of progress without relief as socially justified or “desirable”\textsuperscript{127} if doing so will produce (or probably produce) maximum utility; in a word, it privileges harm-doers to invade those interests as much as necessary to maximize the aggregate interest.\textsuperscript{128} The point of a negligence requirement, under this approach, is to maximize actual or expectable utility by producing pro-social conduct at the least cost.\textsuperscript{129} On this view, everything hinges on efficiency. A rule that protects the interests of unavoidable victims is


\textsuperscript{127} In the words of J.S. Mill: “The utilitarian doctrine is that happiness is desirable, and the only thing, desirable, as an end; all other things being desirable as means to that end.” Because “happiness is the sole end of human action, and the promotion of it the test by which to judge of all human conduct,”\textsuperscript{127} general welfare is also “the test” of legal institutions, so that a legal system is desirable if it will produce (or probably produce) maximal happiness.

\textsuperscript{128} Brandt, Morality, Utilitarianism and Rights 197

\textsuperscript{129} Brandt, Morality, Utilitarianism and Rights 203
rejected if the marginal social benefits of relieving their suffering weigh less than the social benefits of making her eat her own losses; a rule that protects those of harm-doers is embraced if efficient.

Second, at the retail level of rule application to the facts of given cases, the fault requirement directs harm-doers, jurors and other triers of fact to think like a utilitarian. In the landmark negligence case of U.S. Carroll Towing, a barge owner in a crowded harbor where other barges were being constantly “drilled” in and out was accused of negligence for not having someone in charge of the barge (the bargee) aboard during the working hours of daylight when the barge got into difficulties and sank. Had the barge owner spent more on safety—say, hired more bargees—the accident would have been prevented. Learned Hand found the barge owner negligent, concluding that “it was a fair requirement that [the owner of the barge], should have a bargee aboard (unless he had some excuse for his absence), during the working hours of daylight.”\(^\text{130}\) The first question such a case raises is “from whose perspective does the reasonable person look at the situation in deciding what level of bargees is enough or, more generally, what particular precautions should be taken?” From the egoistic standpoint of the barge owner, the only interests that matter are his own and those of persons he is contractually bound to protect—he wants to hire just enough bargees to protect those interests without spending an extra dime for the sake of other interests in the harbor. From the egoistic standpoint of others in the harbor, the barge owner might as well spend all he has on bargees (and other safety measures)—he bears the cost and they (the others in the harbor) reap the benefit. The purpose of the reasonable person test is to settle the conflict between the interests of barge

\(^{130}\) United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).
owners and others in the harbor from a neutral standpoint. Accordingly, Hand adopts a societal or “trans-harbor” perspective. More precisely, Hand formulates and applies a negligence test that weighs the costs of accident preventing precautions or “fixes” (“B”) against the social benefits of preventing those accidents (“PL”). His “B<PL” test of negligence balances (in the language of the Restatement (Second) of Torts) “the social value” of the interest of the barge owner in not having to hire more bargees against “the social value” of the interests of others in the harbor. 

Hands “cost-benefit analysis” of negligence helped spawn a law and economics movement in legal studies that equates the general fault principle—as a decision rule designed to guide the judgment of the jury—with the welfare principle, either in the sense of welfare maximization or “economic efficiency.”

Under this approach, the reasonable person who the defendant must act and think like is not a naked abstraction but an embodied moral agent endowed with two defining traits of moral character—prudence and benevolence. Both traits are captured in the common characterization of the negligence requirement as the Reasonably Prudent Person test. “A person acts prudently when she serves her own best interests; she acts

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131 Actually, the BPL test just sorts out avoidable and unavoidable accidents and this alone is the actor and jury directive (could be the distinction between civil and criminal negligence); another rule—a common law substantive rule—requires a victim not to be compensated if her injury was unavoidable…the jury not required to directly review this point, although it may influence their decision about whether it was cost-justified to do it that way.

132 Or, alternatively, the social interest of the bargee in maintaining some freedom of movement.

133 David Lyons, Ethics and the rule of law 112: “Those who hold that “interpersonal comparisons of utility” are impossible, but who believe that something like utilitarianism is a sound normative theory, substitute some notion of “economic efficiency” (so called because of its role in economic theory) for the requirement that welfare be maximized. The resulting theories are similar to utilitarianism in many ways, and for our purposes the differences can be ignored.”
imprudently otherwise.”¹³⁵ Prudence focuses solely on the “agent’s own good or welfare”¹³⁶ and so—like egoism—provides no neutral guidance on how to think and act when the agent’s own self-interest collides with the interests of others. Accordingly, “prudence is not usually regarded as a moral standard.”¹³⁷ The real normative work in the Reasonably Prudent Person formulation is being done by the reasonableness ingredient. Because “benevolence” is defined as concern for all human beings, the reasonableness requirement provides a vehicle for the legal expression of this basic moral attitude. The reasonableness ingredient establishes the moral relevance of other-regarding values, for it requires the harm-doer to show concern for and to promote the interests of others. In a word, the reasonable person acts and thinks like a prudent person who owned all of the interests in the harbor. Just as a prudent person will often be unable to serve all of her interests, wants, and needs, but must sacrifice some that are less important in order to serve others that are more important, a reasonable person often cannot serve everyone’s welfare to the same degree. Just as prudence counsels an individual to serve her own best interests in the long run, reasonableness requires that the harm-doer act in a way that promotes general welfare, to the maximum degree, in the long run. When the interests of a given individual collide, prudence says that individual should serve her own greater aggregate interest. When the interests of different individuals collide, the fault requirement says that, “we should serve the greater aggregate interest, taking into account all the benefits and burdens that might result from the decisions that are available to us.”¹³⁸

Thus, when the interests of different individuals conflict, Hand’s B<PL test tells harm-

¹³⁵ David Lyons, Ethics and the rule of law 111
¹³⁶ David Lyons, Ethics and the rule of law 111
¹³⁷ David Lyons, Ethics and the rule of law 111
¹³⁸ David Lyons, Ethics and the rule of law 112. This comparison between reasonableness and prudence is based on Lyon’s comparison between utilitarianism and prudence. Id.
doers and jurors to judge negligent conduct first by ordering each interest in the harbor according to the degree of satisfaction or frustration serving it would produce. No priority or special consideration attaches to an interest because it is a human life interest as against one in property or convenience, for instance. If sacrificing a given life interest without compensation—if shifting a given loss to a victim—produces less marginal frustration to victims than marginal satisfaction to harm-doers and others in the harbor, the victims’ losses are not worth preventing or compensating. More precisely, the B<PL test of reasonableness tells harm-doers that they are at liberty to efficiently spend the lives of foreseeable victims without liability. Granted, under this test they must spend lives of their victims with benevolence in the sense of showing concern for and promoting everyone’s interest—“if an existing interest can be served, that creates a reason to do whatever would promote the interest.” But in the end the cost-benefit approach to the fault requirement privileges harm-doers to spend lives for welfare. As Professor Guido Calabresi, a leading efficiency proponent, elegantly puts it in The Cost of Accidents:

Our society is not committed to preserving life at any cost. In its broadest sense, the rather unpleasant notion that we are willing to destroy lives should be obvious. Wars are fought. The University of Mississippi is integrated at the risk of losing lives. But what is more pertinent to the study of accident law, though perhaps equally obvious, is that lives are spent not only when the quid pro quo is some great moral principle, but also when it is a matter of convenience. Ventures are undertaken that, statistically at least, are certain to cost lives. Thus we build a tunnel under Mont Blanc because it is essential to the Common Market and cuts down the traveling time from Rome to Paris, though we know that about one man per kilometer of tunnel will die. We take planes and cars rather than safer, slower means of travel. And perhaps most telling, we use relatively safe

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139 Prevention is the Evil Deity question; compensation can be viewed as a different question, not one of whether the costs are many accidents are worth incurring as a general matter, but how those costs are distributed.
140 Lyon, Ethics and the rule of law 117 [Prosser, 28: The shadow of the past still lies rather heavily on the law of torts.]
equipment rather than the safest imaginable because—and it is not a bad reason—the safest costs too much.\footnote{The Cost of Accidents 17-18 (1970) (emphasis added). Professor Calabresi continues: “It should be apparent that while some of these accident-causing activities also result in diminution of accidents—the Mont Blanc tunnel may well save more lives by diminishing traffic fatalities than it took to build it—this explanation does not come close to justifying most accident-causing activities. Railroad grade crossings are used because they are cheap, not because they save more lives than they take.”}

Calabresi’s passage gestures at the brass-knuckles value beneath the beguiling benevolence of utilitarian thinking about accident victims—the willingness to privilege harm-doers to \textit{deliberately} spend human lives for welfare. The wealth-maximization privilege for unintentional harm-doers in negligence cases logically extends to \textit{intentional} harm-doers, permitting them to deliberately take the physical well-being of victims without compensation.\footnote{Put differently, someone who adopts cost-benefit thinking toward unintended victims logically commits herself to cost-benefit thinking about intended victims, resulting in even intended victims being treated just like accident victims who must to eat their own losses if their unrelieved suffering promotes overall satisfaction to the maximum degree possible.}

Thus, by privileging many “accidental” or “unintentional” harm-doers in the name of welfare, we are actually privileging harm-doers to deliberately inflict injury if the intended victims are not worth \textit{compensating} from a cost-benefit perspective. (This utilitarian willingness of tort law to privilege harm-doers who \textit{deliberately} spend lives for welfare in tort cases mirrors the substantive criminal law’s utility-driven brass-knuckles willingness to deliberately punish innocent defendants in cases of strict liability). I contend from a victims’ rights perspective that when victims are deliberately injured to maximize welfare, they should be compensated even if not compensating them is more efficient—in short, intentional or “rational” harm-doers should be held strictly liable in tort. I propose nothing new in this, for the law of battery already requires intentionally injured victims to be compensated even if the harm-doer behaved reasonably. My further contention is that from a victim’s rights perspective, there is no \textit{logical}
reason not to characterize and treat many “accident” victims as “intended victims” for purposes of compensation. In the interest of softening the impact of brass-knuckles utility on the safety interests of victims, I propose a return to strict liability for “unintentional” but “rational” harm-doers whose “accidents” are unavoidable and cost-justified. This discussion will highlight the stakes in debates about moral and legal frames of reference and show why a non-utilitarian approach may better protect certain vital interests than a utilitarian one.

But some proponents of a cost-benefit approach to negligence seek to deny the brass-knuckles logic of utilitarianism by denying that it also privileges intentional harm-doers to spend lives to promote welfare. They contend that because the negligence requirement only privileges harm-doers who accidently injure victims, the utilitarian logic that supports the reasonableness privilege for unintentional harm-doers does not necessarily extend to (or support a reasonableness privilege for) intentional harm-doers. The reasons they give to avoid the brass-knuckles implications of cost-benefit thinking—though unsound—are nevertheless illuminating, for these same unsound arguments are commonly deployed to deny the indeterminacy of law and thus to mask where racial bias lives in the substantive criminal law. Exploding or “ballistic” coke bottles cases clearly illustrate that so-called unintentional harm-doers are often intentional harm-doers in disguise. Thus, by privileging many “accidental” or “unintentional” harm-doers in the name of welfare, we are actually privileging harm-doers to deliberately inflict injury if the intended victims are not worth compensating from a cost-benefit perspective.

In Escola v. Coca Cola Bottling Co.,143 the victim, a waitress in a restaurant, was injured when a bottle of Coca Cola exploded in her hand because of a manufacturing defect—either excessive internal pressure of gas or a defect in the glass of the bottle (or some combination of

143 Res Ipsa (near strict liability) case involving “rational actor”—helps make my point.
both). Assume that if the producer, Coke, takes no precautions, its activity will cause ten accidents—ten exploding bottles will injure victims—per million bottles (units of activity).

Assume further that as Coke invests in precautions or “quality control,” it reduces losses. Specifically, for every added precaution it takes—from visually inspecting bottles for cracks to subjecting sample bottles to a pressure test to subjecting samples to a thermal shock test, for instance—it reduces accidents by one per million bottles. But as every added precaution becomes more exotic (from visual inspection to pressure test to thermal shock test), it becomes more expensive, so that each added precaution is more expensive than the previous one. Thus, assume it is relatively cheap to hire visual inspectors and thereby reduce accidents from ten to nine per million bottles; more expensive (but still “cost-effective”) to use pressure tests that reduce the rate from nine to eight per million; and still more expensive (but still “cost-justified”) to use thermal shock tests that reduce the rate from eight to seven per million. Altogether, then, once the producer has invested resources in bottle inspectors, pressure tests and thermal shock tests, it has reduced the defect rate from ten to seven per million bottles. Finally, assume that the marginal social cost (“B”) of reducing the accident rate from seven to six per million—the marginal social cost of the next more exotic precaution (say, an x-ray test or a much larger sample size)—exceeds the marginal social benefit (“PL”) of preventing injury to one additional victim per million bottles. Accordingly, it is not cost-justified from a social utility standpoint to prevent injury to the seventh victim, much less to victims six through one. Victims seven through one are victims of “unavoidable” accidents in the sense that they are injured by those “residual” risks—residual exploding bottles—that remain after producers have invested adequately in quality control.\textsuperscript{144}
The upshot of this analysis is that this producer, in the words of James Henderson, “is like an actor who shoots into a crowd.”

The producer, like the shooter, does not know who will be injured; but as surely as the shooter knows that someone will be shot, the producer knows that someone will be injured. Both the shooter and the producer can also estimate the number of victims. The shooter loads his gun with a certain number of bullets, and the producer accepts a certain defect rate [here, seven exploding bottles] when setting the level of quality control for its products. Having set a defect rate, the producer can predict the number of accidents, and thus, the number of accident victims. Choosing to limit quality control means accepting a certain number of accidents; so in a sense, the eventual victims of this choice are harmed deliberately. Of course, the shooter is presumably not privileged, and thus commits a battery when he shoots into the crowd. In contrast, the producer is here assumed to have made the economically reasonable decision in choosing to limit quality control. Consequently, the producer can be said to be privileged in the sense that it will not be found liable under a system of negligence even though its conduct caused harm to others. However, there is precedent for holding an actor liable to others for harm deliberately inflicted even when the actor is privileged to act. [Such precedent reflects a rights-based approach.] The best that can be said for the manufacturer is that it has behaved in an economically rational manner; but that does not alter the fact that its deliberate decision has condemned users and consumers to suffer harm.\textsuperscript{145}

What makes the producer and shooter “intentional” harm-doers under this analysis is the universally recognized doctrine of “constructive intent”—a constructive interpretation of “intent” that broadens its definition. A harm-doer paradigmatically intends the consequence of an act or course of conduct when she desires the consequence to follow; but even if she does not desire the consequence, under the doctrine of constructive intent, she still intends the consequence if she knows with substantial certainty that the consequence will follow and

\textsuperscript{145} James A. Henderson, Jr., Coping with the Time Dimension in Products Liability 69 Cal. L. Rev. 919, 931-939 (1981) [Torts Process 7\textsuperscript{th} 476].
nevertheless acts with that knowledge. Common usage of the term “intent,” however, does not apply it this broadly—our ordinary language practices recognize a distinction between knowledge and “intent.” For instance, if Tiger Woods struck a golf ball\textsuperscript{146} four hundred yards from the shore of a lake toward a four inch floating cup in its middle, he could hit hundreds of thousands or millions of balls at the hole without a single hole in one. He would know with substantial (or virtual) certainty that each ball he strikes will land not in the cup but in the lake. Nevertheless, assuming he tried to make the shot each time he teed off, it seems odd to characterize him as intending to hit the ball in the water. He could persuasively say that the only consequence he intends—the only one he desires—is a hole in one. Thus, courts could have interpreted the intent requirement as limited to only consequences the harm-doer desires. “No one can intend an undesired consequence,”\textsuperscript{147} logically they could have held. The problem with this natural but narrow interpretation of intent, however, is that it does not cover cases of “double effect”\textsuperscript{148}—cases where a harm-doer’s act is certain to cause two or more consequences, only one of which the harm-doer desires to occur. Suppose, for instance, the harm-doer poisons the punch served by the cafeteria at a summer camp. His desire or purpose is to poison camper A, whom he knows will drink the punch. However, he also knows that others—campers B through Z—will drink the same punch and be poisoned at the same time. He truly regrets poisoning these other campers—their injuries are for him undesired consequences—but he poisons the punch anyway because the benefit (to him) of bringing about the desired consequence outweighs

\textsuperscript{146} Our I threw a basketball the length of a football field.

\textsuperscript{147} See Phillippa Foot, The Problem of Abortion and the Doctrine of Double Effect, 5 OXFORD REV. (1967) (explaining the double effect doctrine and criticizing its application to the abortion question). Contending that an actor cannot intend an undesired consequence.

\textsuperscript{148} Henderson and Twerski Vandy at 1140; See also Phillippa Foot, The Problem of Abortion and the Doctrine of Double Effect, 5 OXFORD REV. (1967) (explaining the double effect doctrine and criticizing its application to the abortion question).
(his) regret about the undesired consequences. Courts would not hesitate to treat such an actor as an intentional harm-doer with respect to campers B through Z by sensibly applying the doctrine of constructive intent and thus adding to desire another “mental state” that meets the intent requirement: Knowledge. Constructive—knowledge-based—intent makes sense as a “constructive interpretation” of intent if there is good reason to treat the person poisoning the punch as just as responsible for poisoning her undesired but virtually certain victims, B through Z, as she is for poisoning her desired victim, A. If there is no convincing moral or policy reason to treat the different states of mind differently, and good reason to treat them the same, there is no convincing reason to refer to them by different names. In matters of legal terminology, to paraphrase William James, a verbal difference that makes no normative difference is no difference. We could very well want to morally and legally treat our hypothetical Tiger Woods as having an intentional state of mind with respect to the ball hitting the water if, for instance, an Evil Water Deity has decreed that hitting a ball into the water will cause catastrophic casualties. Calling Tiger’s drive from the tee a case of intentional harm-doing would signal that someone who in this circumstance hits a ball with substantial certainty that it will go in the water and

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149. For him, more benefit came from poisoning A than discomfort and guilt in sacrificing B through Z.
150. Acts and consequences (conduct and consequences)—how are they connected becomes the central question. They can be connected though intent (an actor intends the consequences of an act when he desires that consequence to follow or if she is aware that the consequence is certain to follow (the “act”) and goes ahead and acts with that awareness), recklessness, negligence or only in a factual causation sense. Different degrees or conceptions of personal responsibility accompany each different way that acts and consequences can be connected to some mental or other inner state of the harm-doer, unless you think of negligence as only focused on the act (justification) and not the inner state of the actor (excuse)—excuse gets us to non-rational decisionmakers. When, in what ways and on what grounds are we “responsible” for the consequences of our acts? Further, when and on what grounds are victims who suffer the consequences of acts protected or entitled to recover for their injury and specifically to recover from the actor for their injury?
151. That is, any formal, technical or conceptual difference.
cause catastrophe is just as responsible—irrespective of regret—for the undesired catastrophe (and for compensating its victims) as someone who hit the ball with the purpose or desire that it go in the water and cause catastrophe. The survivors of the victims certainly will see precious little meaningful moral difference between the Tiger who strikes the ball with purpose as to their loved ones suffering and the Tiger who strikes it with knowledge and regret as to their suffering.¹⁵²

Shifting from viewing harm-doers as injuring victims accidentally to injuring them deliberately shifts the legal and moral frame of reference from welfare to rights. For instance, the utilitarian take on negligence stands in stark contrast to the non-utilitarian mode of reasoning courts adopt in defense of property cases, where the life interests of victims are protected against intentional invasion, even if protecting “intended victims” is socially inefficient. Thus, in Katko v. Briney, the court held that a property owner could not intentionally use or apply deadly force—specifically a “spring gun”—to prevent trespass against property other than a dwelling. Quoting Prosser on Torts, the court reasoned that because “...the law has always placed a higher value upon human safety than upon mere rights in property, it is the accepted rule that there is no privilege to use any force calculated to cause death or serious bodily injury to repel the threat to land or chattel[.]” Utilitarians struggle to explain why tort law has rules that categorically prioritize human safety over property in battery cases rather than rules that maximize welfare and that allow harm-doers and jurors to make wealth-maximizing social trade-offs between life and property on a case by case basis. Accordingly, leading proponents of a social welfare approach to tort law, like Professor (now Judge) Posner, criticize the traditional rule in Katko v. Briney for

¹⁵² Extending the range of application of a term like “intent” to cover cases that are morally equivalent—constructive interpretations of words and concepts—is common in legal reasoning. Most legal disputes are battles over the range of application of terms in the legal lexicon.
not allowing a life to be deliberately taken when that is the least costly alternative from an overall social welfare perspective: “[N]either blanket permission nor blanket prohibition of spring guns and other methods of using deadly force to protect property interests is likely to be the rule of liability that minimizes the relevant costs.”

He continues:

[W]hat is needed is a standard of reasonableness that permits the courts to weigh such considerations as the value of the property at stake, its location (which bears not only on the difficulty of protecting it by other means but also on the likelihood of innocent trespass), what kind of warning was given, the deadliness of the device (there is no reason to recognize a privilege to kill when adequate protection can be assured by a device that only wounds), the character of the conflicting activities, the trespasser’s care or negligence, and the cost of avoiding interference by other means (including storing the property elsewhere)….

The point of tort liability, for Posner and other proponents of efficiency, is to maximize total wealth in society by deterring only “wasteful” injuries and accidents. An intentionally harmful battery is not “wrong” (in the sense of violating the victim’s “rights”) but only “wasteful,” and is only wasteful if either 1) the harm suffered by the victim exceeds the benefit enjoyed by the injurer or 2) (in cases where the satisfaction of the intentional injurer outweighs the frustration of the intended victim) the transaction costs of determining that the injurer’s satisfaction outweighed the victim’s frustration are higher than they would have been if the injurer had simply secured the victim’s consent ahead of time (say, through a bribe). In Posner’s words:

[T]orts [like] simple battery…involve a coerced transfer of wealth to the defendant in a setting of low transaction costs. Such conduct is inefficient because it

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153 Posner, Killing or Wounding to Protect a Property Interest, 14 J. Law & Econ. 201, 214, 225 (1971) (emphasis added). [The Torts Process 5th Ed. 86] …Id. The utilitarian logic of efficiency is relentless.

154 Posner, Killing or Wounding to Protect a Property Interest, 14 J. Law & Econ. 201, 214, 225 (1971) (emphasis added). [The Torts Process 5th Ed. 86]

155 Problem with rape cases, slavery, etc.
violates the principle that when market transaction costs are low, people should be required to use the market if they can and to desist from the conduct if they can’t.\textsuperscript{156} Despite these protestations by proponents of efficiency, tort law continues to recognize “a blanket prohibition” against intentional bodily injury to protect property even though such a blanket rule, by Posner’s own admission, is not “likely to be the rule of liability that minimizes the relevant costs.”\textsuperscript{157} The welfare principle cannot explain this particular intentional tort doctrine. Nor can it explain the more general refusal of tort law to fully privilege deliberate but welfare-maximizing boundary crossings and takings. That is, efficiency cannot explain the law’s general refusal to privilege reasonable but intentional crossings and takings.\textsuperscript{158} For instance, victims sometimes sue harm-doers for both negligence and battery; in such cases, a harm-doer can prove his behavior toward the victim was reasonable (socially cost-justified) but still be found liable for trespass to person or battery. In the words of Henderson and Twerski, “some intentional torts properly involve what amounts to strict liability for the intended consequences of reasonable, well-meaning conduct.”\textsuperscript{159} Thus, “when A touches B for the beneficial purpose of setting a fracture in B’s arm while administering unconsented-to first aid…prima facie, A has committed a battery.”\textsuperscript{160} Likewise, public officials or medical personnel may secretly (but for the common good) vaccinate non-consenting individuals to prevent a dangerous epidemic, yet

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\item[157] Posner, Killing or Wounding to Protect a Property Interest, 14 J. Law & Econ. 201, 214, 225 (1971) (emphasis added). [The Torts Process 5th Ed. 86]
\item[158] If I suddenly discover a stranger in my backyard, I will not look favorably on the following explanation: “The reason I am traversing your backyard is because this is the most efficient path to where I’m going.” Because the stranger intentionally crossed a boundary, efficiency and reasonableness claims lose legal traction.
\end{enumerate}
these benevolent and reasonable Good Samaritans may be subject to strict liability in battery.\textsuperscript{161} Well-meaning and reasonable actors are neither privileged to thrust beneficial contacts on individuals without their informed consent nor more generally to intentionally cause harmful or offensive contacts to non-consenting individuals in the name of social welfare. This is true, in part, because the law of battery, unlike the law of negligence, gives special weight and protection to the interests (i.e., rights) of victims—in the words of Henderson, Pearson, and Siliciano, “battery involves, as negligence does not, assaults upon the dignity and respect owing the individual human being.”\textsuperscript{162} The distinction in informed consent doctrine between cases sounding in battery and those sounding in negligence bears this out.

Where a doctor performs a medical treatment without authorization or consent, she commits a battery. In contrast, where she obtains consent but breaches a duty to adequately explain to the patient the risk of side effects of a treatment, she is only subject to liability under negligence. Under a battery “theory,” as Henderson et al. point out, “the only issue of fact is whether the defendant adequately explained the nature of the operation; but under negligence, the doctor may be able to avoid liability by proving that the failure to explain was reasonable.”\textsuperscript{163} Still more to the point, under a reasonableness theory, “the defendant can also avoid liability by proving that even if the collateral risks of the treatment had been fully explained, the plaintiff would have consented—that is, that the failure to inform did not cause the harm.”\textsuperscript{164} Thus, in Mitchell v. Kayem, the defendant surgeon in a fault-based informed consent case obtained a summary judgment because the plaintiff testified that she would have consented to the cancer surgery performed by the defendant even if the surgeon had apprised her of all the risks that

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\item \textsuperscript{161} Henderson and Pearson, The Torts Process, 3\textsuperscript{rd} Ed. 76-77. Facts similar to
\item \textsuperscript{162} Teacher’s Manual, THE TORTS PROCESS, 6\textsuperscript{th} Ed. 23
\item \textsuperscript{163} Henderson et al. 7\textsuperscript{th}, The Torts Process
\item \textsuperscript{164} Henderson et al. 7\textsuperscript{th}, The Torts Process
\end{itemize}
attend the procedure. But under battery, “whether or not the plaintiff would have consented is irrelevant.”

Battery shifts the relevant moral and conceptual framework from utility to respect. To see this, assume the car of my colleague but not close friend, Professor Economicus, suddenly develops a flat tire in the faculty parking lot, putting him in jeopardy of missing an important appointment. He returns to the faculty lounge and takes my car keys while I am in class without asking my permission. If he had asked me, in the spirit of colleagueship I would have cheerfully given them to him. He makes his appointment and returns the keys before I finish teaching. Under the cost-benefit understanding of the reasonable person test, if his failure to ask did not make me worse off than if he had asked, it caused no harm. Nevertheless, my colleague’s deliberate boundary crossing did not show respect for my personal autonomy, personal dignity, or individual rights. It may not be cost-justified to protect these interests against reasonable but intentional invasions. Nevertheless, a battery theory protects these special dignitary interests against these cost-benefit calculations. Once an injury is characterized as a battery rather than an accident, the harm-doer cannot justify intentionally crossing my personal boundaries on the same grounds as under a reasonableness theory. Battery law prioritizes respect for the individual (respect for her personal autonomy and her “right of bodily integrity”) over efficiency, for generally it compensates intended victims of even reasonable

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165 Henderson et al. 7th, The Torts Process 57 (emphasis added).
166 Under negligence there must be but for causation, but under trespass even if plaintiff would have consented if asked, there is still a tort if defendant failed to ask permission first—See bottom 56-57 of Henderson, Pierson, Kysar, Siliciano, The Torts Process 7th Ed.
167 According to the Reporters’ Note to the Restatement (Third) of Torts: Liability for Physical Harm, Section 4 (Proposed Final Draft No. 1, 2005), “even actions by others that are not ultimately detrimental, such as a physician successfully removing a wart from a non-consenting patient, can be violations of the right to bodily integrity and are thus tortious.” Henderson, Pierson, Kysar, Siliciano, The Torts Process 7th Ed. 29-30.
168 In Self-Defense a reasonable mistake completely excuses an intentional invasion. But there we are talking about excuses; here the focus in wealth maximization and justification. I get
and welfare-maximizing harm-doers.

This rights-based approach of intentional torts may be most clearly illustrated in *Vincent v. Lake Erie transportation Co.*,\(^{169}\) where the court held that even though the harm-doer acted reasonably in deliberately re-attaching his boat to the victim’s dock during a surprisingly severe storm, the harm-doer must still compensate the victim for damage to his dock. The deliberateness of the harm-doer’s conduct rendered its reasonableness from a cost-benefit standpoint irrelevant. In the words of *Vincent*, those in charge of the boat “deliberately” “held her in such a position that the damage to the dock resulted, and having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owner to the extent of the injury inflicted.”\(^{170}\) Both the particular act of re-attaching this ship to this dock and the general rule completely privileging shipsowners who (in a pinch) re-attach to docks may produce more benefits to shipsowners than burdens to dockowners. Nevertheless, under Vincent’s analysis, by intentionally causing an injury, the harm-doer loses the cost-benefit privilege of reasonableness—he must compensate even victims who are not worth protecting or compensating from a cost-benefit perspective.

*Vincent’s* non-utilitarian mode of analysis informs the analogies it draws between reasonable ship-owners, starving men, and individuals acting out of public necessity. “Theologians,” the court reasons, “hold that a starving man may, without moral guilt, take what is necessary to sustain life,” yet he must “pay the value of the property so taken when he [becomes] able to do so.”\(^{171}\) A rule rooted in respect for the rights of deliberately injured

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\(^{171}\) *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 222 (Minn. 1910). Even assuming that it can be shown to increase overall welfare to allow starving individuals to
property-owners requires these owners to be compensated even if it would increase overall welfare to privilege starving persons who find their own salvation in the appropriation of other’s material well-being. Alternatively, if starving men lack moral guilt because their deprivation has reduced their will-power and self-control, respect for intentionally injured owners requires desperate but intentional harm-doers to compensate them even if the harm-doers were “reasonable” in the excused or lacking subjective fault sense. Further, reasons Vincent, “public necessity, in times of war or peace, may require the taking of private property for public purposes; but under our system of jurisprudence compensation must be made.” An intentionally harmful act justified by public necessity is one that is socially cost-justified, and a rule completely privileging such acts may maximize overall welfare. Nevertheless, courts view victims of intentional harm-doing as having a “right” to compensation in the sense that they must be compensated even if the social benefits of the intentionally harmful act outweighs its social costs and even if the general rule shifting losses from intended victims to intentional but reasonable harm-doers reduces overall welfare.

Characterizing reasonable, wealth-maximizing producers as intentional harm-doers who deliberately shoot into a crowd, therefore, activates a different moral and legal frame of reference for courts than characterizing these same harm-doers as unintentional actors who accidentally injure separate and discrete individuals. Characterizing the state of mind accompanying a harm-

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\footnote{Vincent v. Lake Erie Transp. Co., 124 N.W. 221, 222 (Minn. 1910). Of course, what constitutes a “taking” can be controversial—how much zoning, etc. But once a “takings” is identified, showing it was done deliberately may trigger non-utilitarian, trespass, intentional boundary crossing thinking.}

\footnote{Utilitarian thinking not really favorable to victims interest, only crime victims interest, not accident victims interest, as the negligence discussion shows.}
\end{footnotesize}
doer’s conduct as “intent” (or the injury caused by the conduct as an “intended consequence”) triggers a rights-based moral and legal principle rooted in respect for the individual rather than social utility—a principle that holds harm-doers strictly liable and compensates victims even when doing so reduces overall welfare; characterizing the state of mind accompanying the same conduct as unintentional (or the same injury from the same conduct as an “unintended consequence”) arguably triggers a utility-based moral and legal principle—one that holds only unreasonable harm-doers liable and thus denies compensation to victims not worth protecting from a cost-benefit perspective. Accordingly, proponents of efficiency vigorously resist characterizing the state of mind of an actor who knows her conduct will cause a particular consequence—specifically, an unavoidable injury—as “intent.” The kind of argument efficiency proponents deploy to fend off rights-friendly characterizations of unavoidable victims as “intended” (and characterizations of harm-doers states of mind regarding such victims as “intent”) is specious—it has the ring of truth but actually misleads. What gives the specious argument of efficiency proponents its ring of truth is a hidden interpretive mechanism that invisibly determines how decisionmakers apply a legal rule. Because this hidden mechanism runs through all law and legal reasoning, it routinely enables—provides the discretionary basis for—prejudice and stereotypes consciously and unconsciously to determine the moral and legal judgments of judges and jurors. Thus this hidden interpretive mechanism invisibly subverts the law’s claim to provide neutral rules that are applied impartially to reach unbiased results. Exposing the speciousness of utility-friendly characterizations of unavoidable injuries may make it possible to view these unavoidable accident victims morally and legally just like paradigmatic

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174 And to support utility-friendly characterizations of them as “unintended.”
175 What appear to be factual judgments (like the defendant’s state of mind, say, “was there intent?”) turn out to be value-laden interpretive judgments.
battery victims—as entitled to relief even if the general rule granting them such relief (by imposing strict liability on the reasonable harm-doers) reduces overall welfare. ¹⁷⁶

Professors James Henderson (a strong efficiency proponent) and Aaron Twerski, Reporters on the *Restatement (Third) of Torts: Products Liability*, seek to avoid characterizing the state of mind of producers of who know their bottles will explode as intent by distinguishing between “the proximate consequences of discrete acts, on the one hand, and the inevitable consequences of general courses of conduct, on the other.” ¹⁷⁷ They contend that the concept of “intended consequences” should not be applied to a course of repetitious conduct—such as batting in the lineup on a major league baseball club throughout a long season—undertaken by an actor, because over the course of such conduct “some types of unhappy consequences are, sooner or later, virtually certain to occur.” ¹⁷⁸

For a batter in the major leagues, hitting foul balls into the stands, thereby

¹⁷⁶ Does the *general rule* affording recovery for reasonable (only in act-utilitarian sense—reasonable to park in driveway on particular occasion but not generally or in long run to allow such case by case decisionmaking) but intentional harms promote welfare and maximize utility overall? Or does such a “general rule” not generally maximize welfare (cannot be justified on either an act or rule-utilitarian basis) but is still legally recognized anyway? Only if the latter are we talking rights. Further, even the general rule that there is liability for reasonable and unintentional harms—strict liability for unintentional harms—could be justified on utility (not only fairness) grounds in products cases per Henderson’s argument on pgs 474-475. Different, however, to say “you are reasonable at act level but strictly liable anyway at rule level because strict liability maximizes utility” than to say “you are reasonable at act level but strictly liable anyway because you ‘intended’ to cause the injury, even if generally speaking (at rule level) liability for intentional injuries (even reasonable ones) does not maximize utility”—this the rule and approach to intentional torts that Posner objects to on precisely the grounds that it does not always promote welfare to hold a cost-justified actor (say someone who kills to protect property) liable just because he committed an intentional harms to further his property interest!]


striking patrons, is certain to occur from time to time across many thousands of swings of a bat. Yet in connection with any given swing, not only does the batter not desire to hit a foul ball when he swings the bat, he does not believe that such a consequence is certain—or even very likely—to follow. The player understands at the outset of the baseball season that foul balls will inevitably occur; but the “act” referred to in the phrase “one intends the consequence of an act” is the discrete act of swinging a bat at a pitched ball, not the deliberate undertaking of the course of conduct involved in batting regularly in a major-league lineup. Properly conceptualized, intent focuses on discrete acts, not general courses of conduct.

This elegant distinction between “proximate consequences of discrete acts” and “inevitable consequences of general courses of conduct” only seems convincing because of interpretive sleight of hand: Henderson and Twerski put the rabbit in the hat—that is, predetermine the conclusion that no “intent” accompanies the harm-doing—by narrowly characterizing the relevant facts; then they pull the “no intent” conclusion back out of the hat as if were produced simply by applying a neutral rule (constructive intent) to objective, unfiltered, unmediated “facts.” In truth, their “facts,” like many legally relevant “facts,” are not passively found or discovered but rather actively interpreted and constructed. Another name for this creative dimension of the fact-finding process is “interpretive construction.” Interpretive construction consists in consciously or unconsciously characterizing legally relevant “facts” either broadly or narrowly. Judges constructively interpret rules and interpretively construct facts. Through interpretive construction a judge or juror can expand or contract her interpretation of the “facts” as if she were playing an accordion. Accordion-like interpretive constructions of facts can invisibly determine legal outcomes, regardless of the substantive rule, standard, test or criterion. Yet, no rule, standard, test, or criterion guides these interpretive constructions; judges and jurors are at liberty to expand or contract their interpretive accordions
without constraint. Bias, conscious and unconscious, flourishes in such untrammeled discretion. Thus, interpretive construction enables biases to invisibly determine how judges and jurors apply moral and legal standards to any case. It sets the stage for interpretive prestidigitation.

Take proximate cause, for instance. The leading substantive test of proximate cause (the substantive legal criterion) is “foreseeability”—a negligent harm-doer who injures victims must only compensate “foreseeable victims” of “foreseeable harms.” Whether an injury was foreseeable is a question of fact for the factfinder. But the foreseeability test does not do any real work in many cases; interpretive construction of the legally relevant facts, not the substantive rule, often determines whether judges and jurors find that the injury was foreseeable and hence that there was proximate cause. Thus, in Hines v. Morrow, the defendant negligently permitted a railroad crossing to become full of pot holes. A car became mired in the mud at the crossing. The plaintiff, who had one wooden leg, went to the crossing to lend a hand in removing the car. A truck was brought up, and the plaintiff went between the car and the truck to tie a rope to each. When the truck started to back up, the plaintiff attempted to step out from between the two vehicles, but found that he could not because his wooden leg had sunk into a mud hole. A coil from the tow rope caught the plaintiff’s good leg, causing it such serious injury that it had to be amputated below the knee. On appeal, the defendant argued that the condition of the crossing was not the proximate cause of the plaintiff’s injury, that that particular injury was not foreseeable.

A finding of proximate cause in this case hangs as much on the factfinders interpretive construction of the facts—on how they play their interpretive accordion—as on the foreseeability test. As Professor Morris has pointed out, had the court focused on the details of the events, the defendant might have prevailed in his claim that the injury lacked foreseeability. Instead, the
court adopted a broader interpretive focus in line with the plaintiff’s description of the facts:

The case, stated in the briefest form, is simply this: [Plaintiff] was on the highway, using it in a lawful manner, and slipped into this hole, created by [defendant’s] negligence, and was injured in undertaking to extricate himself…. [To the defendant’s argument that it] could not reasonably have been foreseen that slipping into this hole would have caused the [plaintiff] to have become entangled in a rope, and the moving truck, with such dire results…[the] answer is plain: The exact consequences do not have to be foreseen.

Because interpretive construction often operates silently and invisibly, it can lead to the kind of interpretive sleight of hand that makes Henderson’s and Twerski’s foul ball analogy so intuitively appealing. An equally plausible counter-analogy could be a shooter who fires not a single shot from a single action rifle into a crowd, but one who, armed with an AK-47 with an extended ammunition clip, takes aim at a crowd. Imagine that the extended ammunition clip contains a hundred randomly loaded rounds, ninety-nine of which are blanks and only one of which is “live.” Assume the shooter does not desire to hit anyone in the crowd (she desires some other end), but given the crowd’s extreme density, she knows with substantial certainty that if she squeezes the trigger one hundred times, the inevitable live round will hit somebody. If we characterize the facts narrowly, we can disjoin and disaggregate each shot from its predecessor and successor and treat each squeeze of the trigger as a separate and independent “act.” Under this narrow characterization of the facts, the shooter’s behavior is understood to be not a unified course of conduct but rather a concatenation of discrete acts. By hypothesis, no discrete act carries with it more than a one percent chance of causing the undesired consequence. So, narrowly characterizing the behavior as separate acts rather than unified conduct makes it is easy to conclude that no “intent” or “knowledge with substantial certainty” accompanied the inevitable live round. Narrowly describing the facts makes it impossible to prove that the harm-
doer was aware that the consequence was certain to follow. The awareness requirement does no
real work; the work is being done by the narrow characterization and the reasons for that choice. 
A narrow construction destroys the logical possibility of finding an intentional harm. But a 
narrow characterization in this case seems pinched and morally obtuse. As with the poison 
punch case, if there is no reason to treat the shooter who is aware that the consequence is certain 
to occur at some point in a cascading concatenation of discrete “acts” differently than the shooter 
who knows the consequence is certain to follow from a single squeeze of the trigger, there is no 
reason to prefer the narrow “acts” over the broad “conduct” characterization.\textsuperscript{179} It seems fair to 
view the spirit of the undertaking as animating each discrete act. The dubious claim that there 
should be less moral and legal accountability for squeezes in rapid succession than for a single 
squeeze, even if accepted, cannot guide us in how to deal with the shooter if his AK-47 is an 
automatic weapon, so that a single squeeze triggers shots in automatic, continuous, and rapid 
succession. And the notion that harm-doers should be treated as less responsible for shots 
discrete and separate in space or time than for shots closely bunched together does not hold up 
either: Even if the shooter connects the AK-47 to an automatic timer and walks away, so that it 
only fires one round from the clip each day or week, there is no reason to treat her as less 
deliberately causing the undesired consequence on the fateful eighth day or week than on the 
fateful eighth second or minute. Great temporal distance between the shots (the “discrete acts”) 
need not diminish the harm-doer’s awareness that the consequence is substantially certain to 
follow, so even weeks of separation between shots need not lessen the deliberateness of the 
injury under the doctrine of constructive intent.\textsuperscript{180} 

\textsuperscript{179} Or to treat the inevitable victim of a concatenation of shots as less entitled to 
relief than the equally sure victim of a single shot. 
\textsuperscript{180} Hershey Bars and Milky Ways. By expanding the interpretive accordion to
Clearly, then, the characterization of the behavior narrowly as a series of acts or broadly as a course of conduct does not depend on the harm-doer’s awareness that the injury is certain to follow. Rather, the harm-doer’s state of awareness depends on the factual characterization. The awareness test itself is pure window dressing. Apply this test to discrete acts and it cannot be met,\textsuperscript{181} apply it to conduct and it cannot be avoided.\textsuperscript{182} The real moral and legal work here in not being done by the harm-doer’s state of awareness or “aware mental state,” but by whatever drives the factfinder’s choice of a narrow or broad characterization.\textsuperscript{183} For instance, what drives Henderson’s and Twerski’s narrow characterization of the “facts” as a series of separate acts is their desire to provide an efficiency loophole or privilege for intentional harm-doers—those with knowledge-based intent—by denying and concealing that they are intentional harm-doers committing intentional injuries. It expresses a value judgment\textsuperscript{184} in substance—it entirely turns on one—while in form assuming the guise of a neutral and logical description of the facts. The broad conduct characterization, on the other hand, provides greater protection for the interests of unavoidable “accident” by triggering a different moral and legal principle, one rooted in the law of deliberate takings and that reflects respect for the individual. Someone motivated by the principle of respect for the victim could broadly view each shot as unified with its predecessor and successor in a naturally unified course of conduct and thus apply the constructive intent test to the conduct rather than to the discrete acts that make up the conduct. There is no logical or encompass conduct, it seems natural to view the shooter as an intentional tortfeasor when the “live” round finally kills or seriously injures a passerby. Inasmuch as the reason for distinguishing between intentional and unintentional harm-doing is to recognize greater responsibility for intentional harm-doers and greater protection for intended victims.\textsuperscript{181} The harm-doer cannot be found aware that the consequence is certain to follow.\textsuperscript{182} She cannot be found unaware.\textsuperscript{183} meaning of terms like “intent” and “act” (those meanings are contestable and malleable) or on a \textsuperscript{184} favorable to the interests of harm-doers and the group as a whole
conceptual barrier to equating knowledge of the inevitable with knowledge of the particular for purposes of the intent requirement. Under this broad victim-friendly characterization, the legal issue is whether the shooter knew with substantial certainty that her conduct (not each discrete act) would cause death or serious bodily harm. Like a narrow characterization, a broad one may also express a value judgment (favorable to the interests of individual victims) while masquerading as a logical description of the facts. The reasons for the broad or narrow description of the facts, not the “facts” themselves, are determining the outcome of the case. These outcome determinative reasons for different descriptions can center on welfare or respect for the individual. So one’s stand on these most basic values can covertly determine outcomes by driving the process of factual characterization.

Thus, a judge or factfinder guided by the principle of respect for the individual might naturally adopt a broad interpretive construction of the shooter’s behavior in a wrongful death action if she concluded that there was no good reason for a narrow one, in other words, that it did not promote respect for the rights of either the victim or the harm-doer to set her interpretive focus on the separate shots rather than on the conduct. In such a case she would combine knowledge-based intent (the conduct was accompanied by the constructive intent to hit somebody in the crowd) with the doctrine of transferred intent (the constructive intent to hit somebody transfers to the particular victim who is hit). Again, the choice of a narrow or broad characterization of the facts determines whether the harm-doer had the required mental state and whether the victim was intended, and the choice of characterizations often turn on a value judgment about the deserts of the harm-doer or about whose interests should prevail when there are competing interests. This discretion-filled and value-laden process of interpretive construction can also occur unconsciously. Whether it occurs consciously or unconsciously, it
undermines the claim that tort or criminal laws—and the findings of fact on which they turn—are a body of rules that provide little room for racial and social biases to routinely determine the outcome of cases. These malleable legal standards, like the foreseeability test, may merely provide conclusory labels—window dressing—for decisions based on other criteria or considerations, some of which may be infected with social bias. It is these other factors, then, that must be confronted as the real basis of the judgment or verdict, not the malleable labels.

The claim that legal tests and formulations often merely provide window dressing for decisions reached, consciously or unconsciously, on other discretionary, value-laden (and hence potentially bias-ridden) grounds is not new but still denied and disputed. Occasionally courts will admit to consciously manipulating their characterization of a question of fact to promote the social interests of harm-doers over the social interests of victims. For instance, in cases of strict liability for ultra-hazardous activities, a case can turn on whether a victim’s injury falls within “the risk that makes the activity ultra-hazardous?” This is the legal test of proximate cause in such cases; it operates like the foreseeability test of proximate cause. But this “risk that makes the activity ultra-hazardous” test is just as malleable as we saw the foreseeability test to be. Thus, broadly characterizing the ultra-hazardous risk vindicates the social interests of victims (broadening the risk makes it easier for the victim’s injury to fall within its scope), and narrowly characterizing it vindicates the social interest of the harm-doer (narrowing the risk makes it harder for the victim’s injury to fall within its scope). A case pitting a mink rancher against a logger in the state of Washington provides a clear example of how the judge’s or jury’s characterization of the relevant risk can conceal value judgments about competing interests or deserts. The dispute arose in the state of Washington, where politically and economically
logging matters more than mink ranching. In Foster v. Preston Mill Co., vibrations from a logger’s blasting operations caused mother mink owned by the victim to kill their kittens. During the whelping season, which lasts several weeks, female mink are very excitable. After the mink rancher informed the logger of the effect of its blasting upon the mink, the logger reduced the strength of the dynamite charges but continued to blast throughout the remainder of the whelping season. The victim sought recovery only for damages it suffered after it notified the logger that its blasting was causing loss of mink kittens. The court held that although blasting is an ultra-hazardous activity and thus triggers strict liability, injury to mink kittens from blasting vibrations is not the kind of risk that makes blasting an ultra-hazardous activity. Thus the test—does the victim’s injury fall within the scope of the risk that makes the activity ultrahazardous—turns decisively on how the legal decision-maker determines the scope of the ultra-hazardous risk. Yet the test gives no guidance to judges and jurors on how to determine the scope of that risk. The appellate court in Foster ultimately admits that it decides the scope of the ultra-hazardous risk by balancing “the conflicting interests” of loggers and mink ranchers. Because the interests of loggers outweigh those of mink ranchers, the court concludes that the risk of causing mink to kill their kittens “is not the kind of risk which makes the activity of blasting ultrahazardous.” Just like the foreseeability test, this “result within the risk” test is a malleable label that enables legal decision-makers to express value judgments about deserts or competing interests. Thus, if loggers strolled into mink ranching country and began blasting, and

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186 After the logger was notified, in essence he became a rational, intentional harm-doer like the intentional harm-doer in Vincent who reasonably but deliberately caused injury to the dock owner to save his own ship.
187 The court hints at guidance from “common experience,” but most people have little experience with ultra-hazardous risks.
the concussion, vibration and jarring from the blasting caused the mink to engage in typical but
disastrous mink behavior, the legal decision-maker would likely say that the risk of causing mink
to kill their kittens is the kind of risk which makes the activity of blasting ultrahazardous. Cost-
benefit (negligence) thinking can invisibly dictate the outcome of a strict liability claim by
driving how the judge or jury characterizes the risk that makes an activity subject to strict
liability in the first place. Honestly and steadfastly acknowledging that the mink rancher loses
because his industry is not as socially and economically important to the state as the logging
industry would keep attention focused where it should be—on the utilitarian value-judgment
about competing social interests. But the Foster court does not remain steadfast in its honesty.
Instead, it gives an additional reason for not finding injury to mink part of the risk of blasting:
“It is the exceedingly nervous disposition of mink, rather than the normal risks inherent in
blasting operations, which therefore must, as a matter of sound policy, bear the responsibility for
the loss here sustained.” The victim’s injury is attributed to his own “abnormally sensitive
character,” his dispositional deficiency, his eggshell skull. Again, the victim’s character is
“abnormally sensitive” and her skull is an eggshell only because her interests are outweighed by
competing social interests, not because of anything inherent in her disposition. Like
“foreseeability” and “ultra-hazardous risk,” terms like “abnormally sensitive character,”
“dispositional deficiency” and “eggshell skull” often function as conclusory labels that judges
attach to victims and their activities after concluding on cost-benefit grounds in Foster, for
instance, that the victims’ interests are not worth protecting “as a matter of sound policy.”
Characterizing the victim as having a dispositional deficiency that bars recovery unjustifiably

189 Section 524 Restatement (Second) of Torts bars the application of strict liability to
harms that “would not have resulted but for the abnormally sensitive character of the plaintiff’s
activity.” [Torts Process 7th 448]
blames and scapegoats the victim, clouds analysis, and conceals the utilitarian value judgment underlying the characterization. Because the legal decisionmaker can readily manipulate the characterizations on which the test turns to suit her value judgments, these value judgments determine whether the factfinder finds “foreseeability,” a “result within the risk,” or an “abnormally sensitive character.” Thanks to interpretive construction, the decisionmaker’s value judgment about competing interests or the deserts of the parties drive the interpretation and application of the legal test or standard.

Opportunities for discretion-laden value judgments to invisibly dictate findings of fact abound equally in the substantive criminal law. In People v. Acosta, for instance, Acosta, a car thief, led a 48-mile chase along numerous surface streets and freeways throughout Orange County. During the chase, Acosta ran stop signs and red lights and drove on the wrong side of streets, causing oncoming traffic to scatter or swerve to avoid colliding with him. Police helicopters from Costa Mesa and Newport Beach assisted in the chase by tracking him. The pilot of the Costa Mesa helicopter carelessly collided with the Newport Beach helicopter, causing both to crash, and killing three occupants in the Costa Mesa helicopter. Acosta was convicted on three counts of second degree murder, defined as proximately causing death with malice. On appeal Acosta contended that there was insufficient evidence his conduct was the proximate cause of the deaths and insufficient evidence that as he fled he consciously disregarded the risk to helicopter pilots and occupants. To determine whether there was sufficient evidence of proximate cause, the court adopts the familiar “foreseeability” test\textsuperscript{190} but admits that foreseeability is a malleable and indeterminate criterion that legal decisionmakers can manipulate to suit their utilitarian or non-utilitarian values:

\textsuperscript{190} People v. Acosta, Court of Appeal of California, 4\textsuperscript{th} Appellate District, 284 Cal. Rptr. 117 (1991) [Kadish 7\textsuperscript{th} 519]
The term [proximate cause] is, in a sense, artificial, serving matters of policy surrounding tort and criminal law, and based partly on expediency and partly on concerns of fairness and justice. Because such concerns are sometimes more a matter of “common sense” than pure logic, the line of demarcation is flexible, and attempts to lay down uniform tests which apply evenly in all situations have failed. 191

After this blunt admission that the difference between guilt and innocence turns on a flexible “common sense” standard that does not apply evenly to similarly situated defendants and does not have to be based on logic, the court plays its interpretive accordion one way on the foreseeability requirement and then plays it the opposite way on the awareness requirement. As to foreseeability, rather than narrowly characterizing the facts as involving the occupants of a helicopter who are killed because of the negligence of their own pilot (hardly foreseeable), the court characterized the facts in the broadest, most victim-friendly terms possible: “Given the emotional dynamics of any police pursuit, there is an ‘appreciable probability’ that one of the pursuers, in the heat of the chase, may act negligently or recklessly to catch the quarry.” 192 Such a general description of the facts can yield but one result—the deaths were foreseeable. The dissent, relying on the landmark tort case of Palsgraf (and playing Cardozo to the majority’s Andrews), rejects the majority’s broad characterization in favor of what it views as a narrower but more realistic and accurate characterization of the facts relevant to the foreseeability test: “The occupants of these helicopters were surely not ‘within the range of apprehension’ of a fleeing criminal on the ground.” 193

Yet, on the other issue in the case, whether there was sufficient evidence of malice, the majority found insufficient evidence of malice because there was not enough evidence to show that Acosta consciously disregarded the risk to the helicopter pilots: “In the absence of more evidence, no reasonable juror could find a conscious disregard for a risk which is barely

191 People v. Acosta, Court of Appeal of California, 4th Appellate District, 284 Cal. Rptr. 117 (1991) [Kadish 7th 519]. The court reinforces this point about the malleability and indeterminacy of the foreseeability test of proximate cause by agreeing with Prosser and Keeton, [Torts] 300 [(5th ed. 1984)] that “it is virtually impossible to express a logical verbal formula which will produce uniform results.” Id. [Kadish 7th 519].

192 People v. Acosta, Court of Appeal of California, 4th Appellate District, 284 Cal. Rptr. 117 (1991) [Kadish 7th 520]

193 People v. Acosta, Court of Appeal of California, 4th Appellate District, 284 Cal. Rptr. 117 (1991) [Kadish 7th 520]
objectively cognizable.” Although Acosta’s conduct proximately caused the three deaths, he did not have murderous mens rea, the court holds, and so was not guilty of murder. The reason he lacked murderous mens rea, says the court, is because he lacked awareness of risk to helicopter pilots and so could not have consciously disregarded that risk. If the court had remained consistent in characterizing the risks of the car chase at a high level of generality—as about “pursuers” “in the heat of the chase”—it would be difficult to argue that Acosta lacked awareness of (or did not consciously disregard) that risk, just as it would be difficult to argue that Acosta lacked awareness of risk to another driver on a surface street if Acosta had collided with and killed him. The court needs to narrow its factual description of the relevant risk to avoid finding that Acosta acted with awareness and conscious disregard. In going from describing the victims as “pursuers” to “helicopter pilots,” the court goes from describing the risk as an “appreciable probability” to a risk that is “barely objectively cognizable.”

The stakes of these interpretive flip flops are high. For the majority, because the risk is big enough for proximate cause but not big enough to have been consciously disregarded by the fleeing criminal, Acosta can still be convicted of manslaughter or criminal negligence, just not murder; under the dissent’s approach, because harm to helicopter pilots is too remarkable and unusual to be foreseeable to a fleeing car thief, there is no criminal liability at all. Proximate cause is a liability issue while awareness may be a grading one. This may have been why the majority stressed that “common sense” more than logic determines how a factfinder (judge or juror) applies the foreseeability test. “Common sense” may counsel against any characterization of the facts that will result in no criminal liability for a clearly dangerous and blameworthy wrongdoer; “common sense” may counsel against any judgment about proximate cause that will exculpate a dangerous and blameworthy criminal. So the court probably stretched its interpretive accordion and characterized the facts broadly enough to insure that their factual judgments about foreseeability and proximate cause reflected their “common sense” value judgment about the deserts of the clearly culpable wrongdoer.194

This is the key lesson of Acosta: findings of fact about causation and states of awareness (as well as many other questions of fact) in criminal matters are often thinly veiled value

194 Then it balked at going so far down this road as to find Acosta guilty of murder for the freakish occurrence, so it went against the jury’s finding of conscious disregard and malice and finds insufficient evidence that he was aware of that freakish risk.
judgments about a defendant’s deserts. First, as to causation, Professor Meir Dan-Cohen’s following observations confirm the lessons of Acosta about the hidden discretion and hidden space for bias to operate in this core test of criminal guilt.

[T]o the extent that causation plays a role in serving the retributive goal of punishment,…the concept of causation is inextricably bound up, in ordinary usage, with the entire complex of blaming. [T]he statement that A caused B’s death may, in ordinary speech, be as much a conclusory statement, based on the prior tacit judgment that A deserves to be punished for B’s death, as it is an independent statement of fact which leads to that conclusion. Put differently, in ordinary usage the concepts of causation and blame or deserts often reverse the idealized roles usually assigned to them in moral and legal theory. [O]ne would expect the conclusion that A should be punished for B’s death to be based, in part, on the judgment that A caused B’s death. In fact, the conclusion that A deserves to be punished may be directly and intuitively generated by the retributive urge, preceding and merely rationalized by the finding of a sufficient causal relationship between A’s acts and B’s death.195

Value judgments about the harm-doer’s deserts, his mens rea, drive factfinders’ judgments about elements of the actus reus. But this reverses the roles usually assigned to actus reus and mens rea elements in moral and legal analysis. Analytically, subjective culpability or mens rea inquiries are supposed to come only after it has been established that the defendant caused the prohibited result or committed the prohibited act196—inasmuch as the mens rea requirement functions as an excuse claim, until it is established that the defendant caused the death, there is no wrongful act to excuse. So the judgments of judges and jurors about the defendant’s subjective culpability should not enter into their causation judgments about his conduct; mens rea centers on the actor and his personal responsibility, causation on the act. To consider the actor’s personal responsibility as part of the act analysis would double-count the

196 The prohibited act in recklessness is not a result but a creation of excessive risks. Generally, a culpable state of mind without prohibited conduct is not criminal. If my broken speedometer makes me believe that I am exceeding the speed limit when in reality I am not, I cannot be found guilty of speeding for my intention to speed unaccompanied by an actual speeding.
desert or subjective culpability factor. In evidence terms, the harm-doer’s blameworthiness is not relevant to the causation issue. Indeed, idealized factfinders should not even view him as being subjectively culpable before they have first methodically and systematically gone through the elements of the actus reus—especially cause and death—and determined that his conduct was the proximate cause of the prohibited result. The minds of these idealized factfinders should neatly compartmentalize elements in the order they are spelled out in the rules of decision; they should follow the logical and legally prescribed progression of issues in processing questions of fact. This is part of what it means to say that cases are decided on the basis of rules of law rather than, say, hunches or unconstrained gut reactions.

But between the idealized and actual factfinder falls the shadow of ordinary human psychology. As Meir Dan-Cohen points out, factfinders may often begin with an unmediated, unregulated retributive urge rooted in the judgment that the harm-doer is a blameworthy individual who deserves punishment. Or they may gradually reach that conclusion as the dueling narratives of the State and the accused unfold at trial. However they reach their value judgment about the defendant’s deserts, this judgment can drive their interpretation and application of every other legal requirement. In the minds of factfinders, legal elements are not separate tubs sitting on independent bottoms. Rather, their relationship more resembles a constellation, with judgments about some elements exerting a gravitational pull on judgments about others, an orbit-defining pull that often operates covertly and irrespective of instructions from the judge. If the offense definition and defense elements of a crime are gravitationally ordered like a solar system, factfinder judgments about a defendant’s deserts often play the role of the sun. A colleague recalls the watchword of a District Attorney’s office as being, “Charge him with anything, prove he’s a Son of a Bitch.” Recognition that juror judgments about a defendant’s deserts operate as the gravitational equivalent of the sun in criminal cases lends credence to this suggestion. Even in tort cases, successful plaintiffs’ products liability attorneys sometimes describe their winning trial strategy as first convincing the civil jury that the corporate defendant is “wicked and evil” and then talking about actual causation and other factual issues.

Let’s turn next to the awareness requirement: this mens rea test, no less than the causation requirement, is malleable and dependant on the factfinders value judgments about the
Yet many mainstream commentators deny this. For them, determining whether the harm-doer acted with an aware mental state requires the factfinder to make an empirical judgment about an empirical event—a mental event—that took place in time and space, much in the same sense that a scientist might make an empirical judgment about the weather or the defendant’s blood pressure. In practical operation, nevertheless, the concepts of awareness and blame or deserts often reverse the idealized roles usually assigned to them in moral and legal theory. Looked at from the “common sense view of justice that blame and punishment are inappropriate and unfair in the absence of choice,” one would expect the conclusion that A should be punished for B’s death to be based, in part, on the factfinder’s judgment that A was at least subjectively aware of creating an unjustified risk of causing B’s death—for there can be no choice without awareness. In fact, the conclusion of factfinders that A deserves to be punished may be “directly and intuitively generated by” value judgments or retributive urges rooted in conscious and unconscious psychological processes, “preceding and merely rationalized by” the finding of an aware mental state. If factfinders can play the interpretive accordion on the awareness requirement to suit their retributive urges and value judgments, a finding about awareness may often be a value judgment about deserts in the guise of an empirical judgment about an empirical event—albeit a mental one—that took place in time and space. In People v. Hall, for instance, the harm-doer, while skiing, flew off of a knoll and collided with the victim who was crossing the slope below. Hall, the harm-doer, “for some time over a considerable distance” travelled too fast for conditions in an out of control fashion—“back on his skis, with his ski tips in the air and his arms out to his sides to maintain balance”—even though he was a “trained ski racer who had been coached about skiing in control and skiing safely.”

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197 This truth especially undermines the claims to objectivity of rules and findings about mens rea, as many commentators define all—or at least most—forms of mens rea as “aware mental states.”
198 “The vicious will was the mens rea; essentially it refers to the blameworthiness entailed in choosing to commit a criminal wrong. The requirement of mens rea reflects the common sense view of justice that blame and punishment are inappropriate and unfair in the absence of choice.” Kadish, Schulhofer, Steiker, Criminal Law and its Processes 8th 213.
199 Supreme Court of Colorado, 999 P.2d 207 (2000) [Kadish 8th 415]
200 Supreme Court of Colorado, 999 P.2d 207 (2000) [Kadish 8th 417]
201 Supreme Court of Colorado, 999 P.2d 207 (2000) [Kadish 8th 417]
the moguls on the slope rather than skiing in control and managing the bumps.” Hall admitted that he first saw the victim “when he was airborne and that he was unable to stop when he saw people below him just before the collision.” The People charged Hall with reckless manslaughter (“recklessly causing the death of another person”), requiring the prosecution to prove that Hall “consciously disregarded”—was aware of—a substantial and unjustifiable risk that, in the courts words, “by skiing exceptionally fast and out of control [over a prolonged period] he might collide with and kill another person on the slope.” These facts initially seem to support a slam-dunk finding of awareness if this requirement actually turns on an empirical judgment about an empirical fact—surely an experienced skier speeding down a popular slope out of control “for some time over a considerable distance” is aware of the possibility of a fatal collision with someone. Yet in a later trial, the jury rejected the charge of reckless manslaughter and convicted only of the lesser offense of negligent homicide. Colorado statutes follow the Model Penal Code’s definitions of manslaughter and negligent homicide, so “the crucial factor distinguishing these levels of culpability is awareness.” In other words, they jury had to conclude that Hall met the elements that negligence and recklessness have in common—namely, substantial and unjustified risk-taking that grossly deviates from the kind of risk-taking that a reasonable person in the situation would undertake—but that he lacked awareness of doing so. Despite abundant proof that Hall was aware of the danger, the jury found only negligence, one can only suppose because to them a manslaughter conviction simply seemed too severe; on their intuitive grading scale, he only deserved to be blamed and punished for negligence. That is not to say that they consciously disregarded their duty to apply the law to the facts. This analysis assumes that most factfinders do not practice jury nullification in most

202 Supreme Court of Colorado, 999 P.2d 207 (2000) [Kadish 8th 416]
203 Supreme Court of Colorado, 999 P.2d 207 (2000) [Kadish 8th 416]
204 The Court equates conscious disregard of a risk with awareness of that risk: “[W]e next ask whether a reasonably prudent person could have entertained the belief that Hall consciously disregarded that risk...Hall’s knowledge and training could give rise to the reasonable inference that he was aware of the possibility that by skiing so fast and out of control he might collide with and kill another skier unless he regained control and slowed down...” Supreme Court of Colorado, 999 P.2d 207 (2000) [Kadish 8th 417].
205 “[N]ot the type of momentary lapse of control or inherent danger associated with skiing...” Supreme Court of Colorado, 999 P.2d 207 (2000) [Kadish 8th 417]
206 Supreme Court of Colorado, 999 P.2d 207 (2000) [Kadish 8th 417]
cases. Rather, they may have sincerely concluded that Hall lacked awareness at the time of the fatal collision. Nevertheless, their conclusion that Hall deserves to be blamed and punished for something less than manslaughter may have been “directly and intuitively generated by” urges and values rooted in conscious and unconscious psychological processes, “preceding and merely rationalized by” their finding of no aware mental state.

The awareness requirement in recklessness is certainly malleable and discretion-laden enough to function this way and provides fertile ground for interpretive construction. The Model Penal Code requires for recklessness that the person “consciously disregards a substantial and unjustifiable risk.” Under this test, the first interpretive feat for the judge and factfinder is to determine exactly what the harm-doer be aware of: (1) most broadly, that there is a risk\(^\text{208}\) (which the jury finds to be substantial and unjustifiable)? (2) more narrowly, that there is a substantial risk (which the jury finds to be unjustifiable)? (3) most narrowly, that there is a substantial and unjustifiable risk? Grammatically, it seems to require the narrowest construction—conscious awareness of all three.\(^\text{209}\) But taking subjective awareness this seriously is hard to defend.

Under this approach, a factfinder must acquit on the charge of reckless manslaughter despite concluding that Hall skied in a manner that created an outrageously high risk of killing someone, if she also concludes that Hall himself did not believe that he was creating extra risk, or substantial extra risk, because of his honest but inflated sense of his own skills—his oversized ego completely exculpates him. Focusing solely on the harm-doer’s state of awareness forces the factfinder to morally and legally ignore the reason why he lacks the required awareness—his culpable over-confidence. By the same logic, under this approach, even if she concludes that he was aware that the increased danger was substantial, she still must acquit him if she concludes that he lacked awareness of wrongdoing because he personally “figured that taking risks was part of the good life and hence justifiable”\(^\text{210}\)—his idiosyncratic or egoistic moral values exculpate.

\(^{208}\) Because we all recognize risk in most activities we do, this test departs most from any connection to subjective culpability and maximizes discretion in jury.

\(^{209}\) Kadish, Schulhofer, Steiker, Criminal Law and its Processes 8\textsuperscript{th} 228.

\(^{210}\) Kadish, Schulhofer, Steiker, Criminal Law and its Processes 8\textsuperscript{th} 418. A harm-doer who believes his risky behavior is cost-justified has no subjective awareness of wrongdoing, however idiosyncratic his beliefs. Lacking subjective awareness of wrongdoing means he could not have made a culpable choice, the sine qua non of just punishment for mainstream commentators. But in the area of values and value judgments, the Model Penal Code balks at following the logic of the choice approach to
In practice factfinders are unlikely to morally ignore why a harm-doer lacks awareness—his motivations—and can easily manipulate the awareness test to give legal effect to their moral evaluation of those reasons and motivations.\footnote{211}

The awareness requirement in recklessness is malleable and indeterminate in still other ways. Deaths from distracted drivers who text, dial, talk and tune are tragically common. Many of these drivers do not see themselves as more skillful than anyone else, so they are aware—on some level—of taking added risks. But do they have the requisite level awareness for reckless manslaughter (or perhaps even depraved heart murder)? For instance, a two-year-old child named Morgan Pena was killed by a driver who was attempting to dial a number on his cell phone. The driver surely was aware that failing to keep a proper lookout increases risks to pedestrians like Morgan and that a proper lookout is impossible while his eyes and attention are on his key pad. Nevertheless, the driver “apparently failed to appreciate the full extent of the danger his conduct created.”\footnote{212} The driver was cited for careless driving and running a stop sign, “but he was not charged with a more serious offense because the police determined that he was not reckless.”\footnote{213}

Professor Kimberly Ferzan refers to this level of culpability as “opaque recklessness”—“awareness of some risk but failure to appreciate how substantial it

\footnote{211} See Glanville Williams, The Unresolved Problem of Recklessness, 8 Legal Stud. 74, 77 (1988):

\[T\]ake Shimmen’s case [84 Cr.App.R.7 (1986)]. The defendant, who held a green belt and yellow belt in the Korean art of self-defence, was demonstrating his skill to his friends. To do this, he made as if to strike a plate-glass window with his foot; however, his kick broke the window. A Divisional Court held that he was guilty of criminal damage by recklessness, since he “was aware of the kind of risk which would attend his act if he did not take adequate precautions,” even though he believed he had taken enough precautions to eliminate or minimize risk…On subjective principles the court was wrong in saying that a person who believes he has taken enough precautions to eliminate risk is to be held guilty of recklessness merely because he perceived a risk before taking the precautions.

\footnote{212} Kadish 8th 229
\footnote{213} Kadish 8th 229.
was.”

Amorphous, indeterminate, “in between” states of awareness like opaque recklessness—states of awareness that may accompany the majority of unintentional homicides and other crimes—leave it to the unguided discretion of the factfinder whether to find the harm-doer responsible for recklessness or negligence. Because the minimum level of culpability for many crimes, and the recommended minimum under the MPC for most crimes, is recklessness, discretion-laden value judgments about whether to characterize a case of opaque recklessness as involving awareness (hence recklessness) or lack of awareness (hence negligence) often determines the difference between criminal guilt and innocence. That is, desert-driven value judgments by factfinders about how to characterize a common state of awareness that by hypothesis falls between and fits neither negligence nor recklessness often determines whether a harm-doer is a criminal or non-criminal. Similarly situated harm-doers with respect to their level of awareness, all acting with opaque recklessness, may be differently characterized, some as guilty, others innocent, on grounds having nothing to do with awareness and everything to do with the factfinders’ differential perceptions of the deserts or character of similarly situated harm-doers.’ The factfinders are constructing rather than finding criminals. Criminals are not just found on the basis of findings of fact, through the factfinders’ value judgments they are also founded in the sense poured into a mold and cast according to the factfinders’ conscious and unconscious stereotypes and prejudice.

Beginning of “Part II” for Workshop Readers

Causation and awareness are not the only elements of guilt and grading that look like factual judgments but are really discretion-laden and potentially bias-ridden deserts judgments in disguise. Premeditation—actual reflection by the harm-doer on his intent to kill—seems to require a simple factual judgment from the juror, namely, whether the harm-doer actually reflected on his murderous intent. Yet many courts hold that some premeditation is required while simultaneously holding that “no time is too short” for the requisite premeditation to

214 Kadish 8th 229.
215 Kadish 8th 229.
In Young v. State, for instance, an argument erupted over a card game, escalating into a scuffle during which the defendant shot two men in the chest with .22 caliber gun. Upholding the defendant’s conviction on two counts of premeditated (first-degree) murder, the court reasoned that “[n]o appreciable space of time between the formation of the intention to kill and the act of killing” was required and that “[p]remeditation and deliberation may be formed while the killer is ‘pressing the trigger that fired the fatal shot.’” It is a transparent fiction to maintain that premeditation can occur in the fractions of a second it takes to squeeze a trigger; saying that it can occur instantaneously essentially collapses the distinction between intentional and premeditated acts. A mental process that can be fully realized in a small fraction of a second can be called meditation and reflection only in a Pickwickian sense. The Arizona Supreme Court reached this same conclusion in a case where the Arizona legislature tried to define premeditation as an intention that “precedes the killing by any length of time to permit reflection” with the further clarification that “[p]roof of actual reflection is not required.” The Court reasoned that eliminating proof of actual reflection eliminates the difference between intentional killings that are first-degree murders and those that are second-degree. Because real legal consequences ride on the formal distinction between premeditated (first-degree) and merely intentional (second-degree) murders, the way the Arizona legislature tried to define premeditation, concluded the Court, was unconstitutional because arbitrary and capricious, in violation of due process. To salvage its constitutionality the court interpreted the statute to require proof of actual reflection.

Be that as it may, in the many jurisdictions where “[n]o appreciable space of time between the formation of the intention to kill and the act of killing” is required, the rule simply gives the jury the unfettered discretion to make a mens rea grading judgment about the defendant based on their assessment of his deserts: If they think he does not deserve maximum condemnation and punishment, they can conclude that less than a second between the formation of the intention and its execution is not enough time for actual reflection on the intention to kill, but if they think he does deserve the maximum, then—in keeping with the “oft repeated

216 Kadish 8th 385.
220 There two basic mens rea judgment, liability judgments and grading judgments.
statement…that ‘no time is too short for a wicked man to frame in his mind the scheme of murder’)—they can conclude that he did adequately meditate the intent in the instant it took to squeeze the trigger.\footnote{Commonwealth v. Carroll Supreme Court of Pennsylvania 412 Pa. 525, 194 A.2d 911 (1963). [Kadish 8\textsuperscript{th} 383]. Defendant contended that the logic of this claim implied that, “conversely, a long time is necessary to find premeditation in a ‘good man.’” Id.}

For instance, in People v. Zackowitz, the defendant’s wife broke into tears after being insulted by one of four men at work repairing an automobile on a city street. The enraged defendant, Zackowitz, warned the men that “if they did not get out of there in five minutes, he would come back and bump them all off.”\footnote{People v. Zackowitz 254 N.Y. 192, 172 N.E. 466 (1930). [Kadish 8\textsuperscript{th} 20]} Once back at their apartment, his wife disclosed the content of the insult—one of the men had propositioned her as a prostitute. With rekindled rage Zackowitz returned to the scene of the insult with a pistol in his pocket. After words and blows—defendant kicked Coppola in the stomach, Coppola went for defendant with a wrench—there was a single fatal shot. On the key question of the Zackowitz’s state of mind at the moment of the killing, the question was not whether he intended to kill but whether that intent was formulated before the shot (before “he went forth from his apartment”),\footnote{People v. Zackowitz 254 N.Y. 192, 172 N.E. 466 (1930). [Kadish 8\textsuperscript{th} 20] “if he went forth from his apartment with a preconceived design to kill”} making the crime first-degree murder, or whether the intent to kill was first formulated during the fight, making it murder in the second-degree. As proof of premeditation the prosecution pointed to three pistols and a teargas gun Zackowitz kept in a radio box in his apartment. The prosecution did not claim that Zackowitz brought the pistols or teargas gun with him to the encounter. The only relevance of the weapons was to prove “that here was a man of vicious and dangerous propensities, who because of those propensities was more likely to kill with deliberate and premeditated design than a man of irreproachable life and amiable manners.”\footnote{People v. Zackowitz 254 N.Y. 192, 172 N.E. 466 (1930). [Kadish 8\textsuperscript{th} 21]}

\footnote{Formally, it is possible to go further than “no time is too short” for the necessary premeditation to occur approach in Carroll by holding, as Pennsylvania decisions after Carroll have, that “the requirement of premeditation and deliberation is met whenever there is a conscious purpose to bring about death…We can find no reason where there is a conscious intent to bring about death to differentiate between the degree of culpability on the basis of the elaborateness of the design to kill.” Commonwealth v. O’Searo, 352 A2d 30, 37-38 (1976).} In his appellate brief the District Attorney defended the admissibility of the evidence on precisely this ground, stating that “the possession of the weapons characterized the defendant as ‘a desperate type of
criminal,’ a ‘person criminally inclined.’”

In Cardozo’s words, “[a]lmost at the opening of the trial the People began the endeavor to load the defendant down with the burden of an evil character.” He was put before the jury as “a man of murderous heart, or criminal disposition…” The jury found that Zackowitz acted with premeditation and sentenced him to death.

Cardozo, writing for the majority, ultimately reverses the judgment of conviction but first admits that evidence designed to show “bad character” or criminal propensity is relevant in the Rules of Evidence sense of “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Quarrelsome defendants, he admits, are “more likely to start a quarrel than one of milder type” and “a man of dangerous mode of life more likely than a shy recluse.” He assumes that evidence of bad character or criminal propensity tends to show that the defendant was more likely to have acted “in conformity therewith.” He assumes a statistically significant relationship between character traits and actions in conformity therewith. McCormick agrees, stating that evidence designed to show the defendant had “bad character” and thus was more likely to be guilty of the crime “is not irrelevant.”

It is rational to consider character in assessing blameworthiness for the same reason it is rational to consider race in assessing the likelihood that someone has or will engage in criminal activity. Defenders of racial profiling contend that racial identity itself indicates propensity at least in the statistical sense that

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228 People v. Zackowitz 254 N.Y. 192, 172 N.E. 466 (1930). [Kadish 8th 22]
229 Federal Rules of Evidence Rule 401: “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 402: All relevant evidence is admissible, except as otherwise provided…Evidence which is not relevant is not admissible.
231 Federal Rules of Evidence Rule 404(b): Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident…
232 C. McCormick, Evidence Section 190, at 447 (2d ed. 1972). Bad Character the 800 lb. gorilla in the middle of criminal trials of blacks. “but in the setting of jury trial the danger of prejudice outweighs the probative value.”
blacks pose a statistically greater risk of crime than non-blacks. In surveys most Americans agree with the statement that “Blacks are prone to violence.” Both evidence of the “bad character” and “evidence”—the self-evident evidence—of the harm-doer’s racial identity (and its associated propensities) can be viewed as increasing the likelihood of actions in conformity therewith. Bad character evidence and “rational” racial profiling practices rest on the same statistical logic. Cardozo attacks the logic as inadequate to justify allowing even relevant evidence of “murderous propensity” to get to the factfinder. “Character is never an issue in a criminal prosecution unless the defendant chooses to make it one,” he declares.\textsuperscript{233} The underlying reason for keeping relevant evidence of the defendant’s character and propensities away from the factfinder, he says, “is one, not of logic, but of policy,”\textsuperscript{234} specifically the “policy” of protecting the innocent by preserving the rationality and accuracy of the fact-finding process.\textsuperscript{235} Recast in the language of the Federal Rules of Evidence, Cardozo views otherwise relevant evidence of the defendant’s bad character as inadmissible because its prejudicial effects \textit{categorically}\textsuperscript{236} outweigh its probative value:

\begin{quote}
The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to [such evidence] and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.\textsuperscript{237}
\end{quote}

Cardozo worried that if the jury believed that generally speaking the accused has “an evil character” or is a “man of murderous disposition,”\textsuperscript{238} they would too readily conclude that he premeditated his intent on the occasion of the murder, or that even if he did not premeditate his

\textsuperscript{233} People v. Zackowitz 254 N.Y. 192, 172 N.E. 466 (1930). [Kadish 8th 21]
\textsuperscript{234} People v. Zackowitz 254 N.Y. 192, 172 N.E. 466 (1930). [Kadish 8th 21]
\textsuperscript{235} People v. Zackowitz 254 N.Y. 192, 172 N.E. 466 (1930). [Kadish 8th 21]
\textsuperscript{236} Generally speaking it may be true that evidence of other crimes, wrongs, acts or dispositions is more prejudicial than probative in one of the senses Cardozo identifies. But this cannot be claimed categorically. There can be cases where the danger of prejudice is arguably insufficient to justify exclusion. So in addition to the “intrinsic” reasons for excluding character evidence (the ones that center on the rationality and accuracy of the factfinding process), there may be weighty “extrinsic” reasons for restricting the admissibility of character or other-crimes evidence.
\textsuperscript{237} There may be cases where the danger of prejudice is arguably not enough to justify the exclusion. Then we would have to invoke more basic principles and assumptions about criminal responsibility and just punishment.
\textsuperscript{238} People v. Zackowitz 254 N.Y. 192, 172 N.E. 466 (1930). [Kadish 8th 21]
intent on that particular occasion, he still deserves to be blamed and punished “consistent with guilt in its highest grade.” Again, recast in the language of the Federal Rules of Evidence, the prejudicial effect of character evidence arises because the jury is likely to give the evidence too much weight (overestimate its probative value) or because the evidence will arouse undue hostility toward one of the parties. Prejudice, used here as a term of art, includes but means more than mere conscious bias, the kind that tempts jurors to disregard an instruction from the judge on what elements the prosecution must prove for conviction. This amounts to jury nullification, the indefensible kind. The kind of prejudice contemplated by the Rules of Evidence can also arise from the impact of certain evidence on mental processes that occur without the factfinders’ conscious awareness or control. For instance, prejudice arising from the impact of character and deserts evidence on the factfinders’ cognitive unconscious may determine how they interpretively construct the “facts” or otherwise manipulate malleable and discretion-laden legal tests. The very reason for the extensive foregoing analytic work on the nature of legal directives given to and used by factfinders is to identify where character- and stereotype-driven judgments can invisibly and unconsciously determine legal (and moral) judgments and outcomes. It should come as no surprise that when the substantive criminal law, through jury instructions, requires the jury to perform an intellectual feat that runs counter to the jury’s moral intuitions, gut reactions and other inclinations, the jury may unwittingly follow its inclinations rather than the blackletter laid down in the jury instructions. Thus, as Justice Jackson admonishes, “The naïve assumption that prejudicial effects can be overcome by instructions to the jury…all practicing lawyers know to be unmitigated fiction.” And in the words of another court:

[O]ne cannot unring a bell; after the thrust of the saber it is difficult to say forget the wound; and finally, if you throw a skunk into the jury box, you can’t instruct the jury not to smell it.

Empirical research corroborates these concerns: Studies find that jurors exposed to a defendant’s record of prior convictions for similar offenses significantly increases the likelihood of

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239 Kadish 8th 19.
conviction and that cautionary instructions eliminate little or none of the prejudicial effects that flow from such evidence. Similarly, studies found that exposure to a legally inadmissible confession significantly increased the chance of a guilty verdict despite weak other evidence and that instructions to the jury to ignore the confession had no measurable effect on the probability of conviction. Again, the jury may strive to “approach their task responsibly and to sort out discrete issues given to them under proper instructions,” but courts and codes generally recognize that certain kinds of evidence, like bad character and criminal propensity evidence, is likely to have an improper impact on the legal outcomes. Specifically, the jury gives such evidence “excessive weight,” which implies that such evidence causes jurors to convict more often than they would if they were not improperly influenced in a way detrimental to the accused. Bad character and criminal propensity evidence, in the words of Justice Harlan in Winship, increases the risk of “factual errors that result in convicting the innocent.” Jurors may not think they are giving certain evidence “too much weight,” may strive not to do so, and may even be prompted to resist the temptation or human tendency to do so by instructions from the judge. Evidence is nevertheless excluded as prejudicial when it is likely to subvert the rationality and accuracy of the fact-finding process despite jury instructions and despite dutiful factfinders. Thus, according to McCormick, character evidence “is not irrelevant, but in the setting of jury trial the danger of prejudice outweighs the probative value.” And when the Judicial Conference of the United States, the policy-making body of the federal judiciary, was chaired by Chief Justice Rehnquist, the Conference decried new rules permitting evidence of bad character and criminal propensity in prosecutions for child molestation and sexual assault, pointing out that the new rules posed a “danger of convicting criminal defendant for past, as

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245 In Re Winship 397 U.S. 356 (1970) [Kadish 8th 30]
246 C. McCormick, Evidence Section 190, at 447 (2d. ed. 1972). See also Michelson v. United States, 335 U.S. 469, 475-476 (1948): “The inquiry is not rejected because character is irrelevant; on the contrary, on the contrary it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.”
opposed to charged, behavior or for being a bad person.” As the Judicial Conference noted, its conclusion that evidence of bad character and criminal propensity distorts the rationality, accuracy and fairness of the fact-finding process reflects a “highly unusual unanimity” of the judges, lawyers, and academics who make up its advisory committees.

This near unanimous recognition of the rationality-subverting effect of evidence of character carries negative implications for blacks on trial. In cases involving black defendants, their pigmentation (and performance) is proof of their bad character and criminal propensity. Stereotypes—both as statistical generalizations and as features of the cognitive unconscious—often relate to character traits, such as “blacks are hostile or prone to violence.” The propensities (or proclivities) associated with blacks are established as stereotypes early in the memories of factfinders, in early childhood, and can function as conscious beliefs (especially when supported by statistics) or unconscious sets of associations; so in a real sense, in the courtroom (as well as on the street), a black actor wears evidence of his “bad character” and criminal propensity on his face. Accordingly, the prejudicial effects of evidence of bad character and criminal propensity pointed out by the Federal Rules of Evidence, McCormick, Rehnquist, the Judicial Conference and many others, may routinely influence the adjudication of black blame and punishment. When we put together our understanding of the gravitational pull exerted by value judgments about defendants’ character and deserts on the factfinders’ judgments about every other element of a charged offense, with our understanding of the role of stereotypes about black dispositional deficiencies in the perceptions and judgments of jurors and other social decisionmakers, we see much room within the rules and standards themselves for bias to thrive in adjudications of criminal guilt. The seemingly factual judgment about whether

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247 56 Crim. L. Rptr. 2139-2140 (Feb. 15, 1995). [Kadish 8th 26]
248 56 Crim. L. Rptr. 2139-2140 (Feb. 15, 1995). [Kadish 8th 26]
249 See authors like Ariela Gross who probe the performance dimensions of racial identity.
the defendant actually reflected on his intent, for instance, may often be—or merely reflect\textsuperscript{253}—a moral appraisal of the killer’s character and deserts, with a finding of premeditation merely serving as a conclusory label for the determination that “he was a man of murderous heart, of criminal disposition.”\textsuperscript{254}

Often the substantive criminal law directs jurors to make explicitly character-based assessments of the defendant’s deserts, character, and subjective culpability in assessing mens rea. Thus, an unintentional killing can constitute not only manslaughter (if the jury concludes that it resulted from criminal negligence or recklessness) but also murder (if it concludes that it resulted from criminal negligence or recklessness plus some “additional” degree of wickedness or subjective culpability). All the epithets describing the “additional” mens rea requirement invite the factfinder to directly evaluate the defendant’s character, especially when traits of character are viewed as “the kinds of dispositions that wants and aversions are,”\textsuperscript{255} that is, when character traits are viewed as desires, desire-states, cares, concerns, values and aversions. Collectively and for convenience this constellation of wants and aversions can be referred to as the “heart” of the accused. To be succinct, the legal tests jurors use to distinguish between murder and manslaughter all center on the condition of the defendant’s heart. Thus, the verbal formulas given to the jury to guide its identification of the added element of subjective culpability it must find for murder include: “the dictate of a wicked, depraved and malignant heart,” “an abandoned and malignant heart,” “a depraved heart regardless of human life,” and “that hardness of heart or that malignancy of attitude qualifying as ‘depraved indifference.’”\textsuperscript{256} Because factfinders can diagnose a harm-doer’s depraved heart even from inadvertent or

\begin{footnotes}
\item[253] Interpretive construction may mediate the relationship between the factfinder’s moral judgment of the harm-doer and the formal legal requirements that must be met by a factfinder (who seeks to follow jury instructions) to back up that moral judgment with criminal blame and punishment. Interpretive construction can consciously or unconsciously message the legal materials to align the factfinder’s moral judgment of the accused with the formal legal requirements.
\item[254] People v. Zackowitz 254 N.Y. 192, 172 N.E. 466 (1930). [Kadish 8\textsuperscript{th} 22] As a propensity argument the evidence goes to the increased likelihood that a bad person will premeditate the intent; as a character argument the evident goes to that he deserves punishment whether or not he premeditated!
\item[255] Richard B. Brandt Traits of character: A conceptual analysis 270.
\item[256] People v. Roe, 74 N.Y.2d 20, 542 N.E.2d 610 (1989) (description of the test in the dissenting opinion).
\end{footnotes}
negligent risk creation, the harm-doer need not even be aware of running excessive risks to be convicted of murder. The malice for murder need not include an aware mental state: Different factfinders could convict the same inadvertent killer of negligent homicide, manslaughter, or murder solely on the basis of different diagnoses of the condition of his heart at the time of the excessively risky conduct. The depraved heart approach of the common law and statutes based upon it makes the distinction between murder and manslaughter turn on “the degree of the jury’s moral abhorrence” to the killing and killer. Such a test “remits the issue to varying and highly subjective judgment calls of the judge or jury.” Does the Model Penal Code fare any better in providing decision rules that avoid remitting the issue of the harm-doer’s moral blameworthiness to “varying and highly subjective judgment calls of the judge or jury?” The leaner, modern mens rea language of the Model Penal Code, with its precise delineation of levels of culpability, has been hailed as a vast improvement over the vague and value-laden traditional definitions of mens rea as requiring proof that the harm-doer acted “willfully,” “maliciously,” “corruptly,” and “wantonly.” These traditional mens rea formulas were criticized as conveying “more atmosphere or emotion than concrete meaning.” To distinguish between manslaughter and unintentional murder, instead of proof of a depraved heart, the MPC requires proof of recklessness “in circumstances manifesting extreme indifference to the value of human life.” But this test of unintentional murder requires a judgment call just as subjective as depraved heart.

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257 The Model Penal Code appears to oppose murder liability for inadvertent risk creation: “The Model Penal Code provision makes clear that inadvertent risk creation, however extravagant and unjustified, cannot be punished as murder…At least it seems clear that negligent homicide should not be assimilated to the most serious forms of criminal homicide catalogued under the offense of murder.” Comment (Model Penal Code and Commentaries, Comment to Section 210.2 at 27-28 (1981)). Nevertheless, the MPC provides in Section 2.08(2) that recklessness need not be shown if the defendant lacked awareness of the risk because he was voluntarily intoxicated. But this approach contradicts the Code’s own claim that “inadvertent risk creation” or “negligent homicide”—“however extravagant and unjustified”—“cannot be punished as murder.” This approach treats negligence in drinking before driving sufficient mens rea for murder where, for instance, the defendant honestly but stupidly believes that he can safely drive drunk and has a substantial personal history of doing so without incident. See United States v. Fleming, US Court of Appeals, 4th Circuit, 739 F.2d 945 (1984); State v. Dufield, 131 N.H. 35, 549 A.2d 1205 (1988). The illusion of a bright descriptive line (awareness) between at least murder and manslaughter if not between criminal and civil liability cannot be nursed under these approaches.

258 Kadish 8th 429.

259 Kadish 8th 429.

260 Kadish 8th 217.
The jury’s moral abhorrence is still the touchstone of murder. The leaner, more modern, less vituperative language of the Model Penal Code can lull the unwary into a false impression that modern approaches to mens rea require the factfinder to make fewer direct moral judgments of the harm-doer. The unacknowledged truth is that there is as much room for “subjective judgment calls” in the modern terminologies and approaches to mens rea as there was in the traditional formulations—it’s the same old value-laden and discretionary wine in shiny new terminological bottles. At many levels of narrow, definitional mens rea analysis—negligence, recklessness, depraved heart malice, extreme indifference—the rule of decision that goes to the jury not only invites but requires it to make a “subjective judgment call” about the harm-doer’s deserts and character. Other ostensibly factual mens rea elements—premeditation and awareness—remain tightly tethered to such subjective judgment calls through both interpretive construction and the open-ended malleability of the substantive legal tests. And according to a Model Penal Code Comment, even the most factual or “descriptive” mens rea tests—knowledge and purpose—are morally rooted in the same depravities of heart or extreme indifference that make some unintentional killings murder.261 Where there is ambiguity in the interpretation or application of even knowledge and purpose, there is room for judgments about the harm-doer’s character and deserts to determine whether factfinders find him guilty.

Although Cardozo’s warning about the dangers of character evidence are forceful and accurate, his claim that “character is never an issue in a criminal prosecution unless the defendant chooses to make it one” is misleading, for measuring the harm-doer’s subjective culpability or mens rea routinely requires factfinders to make character judgments about harm-doers. The universally accepted principle (subject to certain “exceptions”) is that evidence offered “to prove the character of a person in order to show action in conformity therewith”262 is

261 Model Penal Code and Commentaries, Comment to Section 210.2 at 21-22 (1981): “In a prosecution for murder, however, the Code calls for the further judgment whether the actor’s conscious disregard of the risk, under the circumstances, manifests extreme indifference to the value of human life. The significance of purpose or knowledge as a standard of culpability is that, cases of provocation or other mitigation apart, purposeful or knowing homicide demonstrates precisely such indifference to the value of human life.”

262 Federal Rules of Evidence Rule 404(b): other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, [identity], or absence of mistake or accident…
inadmissible. The prosecution cannot prove that the accused had a bad character or criminal propensity to prove he was more likely to have committed the charged criminal act with the required level of subjective culpability. In a word, for mens rea purposes, bad character must be inferred from a wrongful act, not a wrongful act from bad character. Nor can subjective culpability requirements—such as premeditation or awareness—be directly inferred from other crimes, wrongs, or other evidence of bad character and criminal propensity. But the jury can properly infer from an unexcused criminal act that the harm-doer has bad character. In Rethinking Criminal Law, George Fletcher points out that “an inference from the wrongful act to the actor’s character is essential to a retributive theory of punishment.” Stated more fully:

1. Punishing wrongful conduct is just only if punishment is measured by the desert of the offender, (2) the desert of an offender is gauged by his character—i.e., the kind of person he is, (3) and therefore, a judgment about character is essential to the just distribution of punishment.

This passage concisely captures the relationship between character, desert, excuses, and mens rea in a criminal prosecution. In the substantive criminal law, the mens rea requirement measures the deserts or blameworthiness of the harm-doer, for it presupposes a wrongful act—in keeping with the long-honored maxim “no one is punishable solely for his thoughts” and focuses solely on whether and how much to punish, that is, on liability and grading. Mens rea keeps deserts and subjective culpability tethered to punishment—in its liability function it generally treats morally innocent harm-doers as deserving no punishment (actus non facit reum, 

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263 George Fletcher Rethinking Criminal Law 800.
264 George Fletcher Rethinking Criminal Law 800.
265 Although Fletcher probably intended this passage to be taken as prescriptive of how deserts and character should relate, I contend that there it also descriptively captures the moral decisionmaking process of factfinders and that it provides a useful descriptive account of the kinds of judgments required by substantive mens rea in both its narrow and broad sense. Further, Fletcher curiously remains attached to a choice account of moral responsibility by mixing choice and character approaches: “If we accept this legalistic limitation on the inquiry, then the question becomes whether a particular wrongful act is attributable either to the actor’s character or to the circumstances that overwhelmed his capacity for choice.” Rethinking Criminal Law 801 (emphasis added).
266 Generally in the sense of causing a forbidden result, creating excessive risks, or engaging in proscribed behavior under forbidden circumstances.
267 Cognitionis poenam nemo patitur—hence the voluntary act requirement. Model Penal Code Section 2.01(1).
*nisi mens sit rea* or “an unwarrantable act without a vicious will is no crime at all”\(^{268}\), and in its grading function it generally treats, for instance, culpable but unintentional harm-doers as deserving less punishment than culpable but intentional ones (someone who kills with the mens rea for manslaughter deserves and receives less punishment than someone who kills with the mens rea for murder). Because the desert of an offender is measured by his character, the mens rea requirement often calls on jurors to measure and judge the character of the harm-doer in determining his blameworthiness; it often requires them to make character-based moral judgments about harm-doers. Excuses negate mens rea, so excuses “preclude an inference from the [wrongful] act to the actor’s character.”\(^{269}\) Put differently, a harm-doer makes out an excuse and defeats a finding of mens rea inasmuch as the jury attributes her wrongful act to her circumstances rather than her character; this character-based approach to mens rea includes the kind of mens rea that figures centrally in the offense definition of many crimes, namely, negligence and recklessness. So attribution judgments by factfinders guide their moral and legal judgments about whether a harm-doer crosses the threshold from non-criminal mistakes and accidents to criminal negligence, recklessness, or murder and whether someone who has crossed into the criminal realm *deserves* to be blamed and punished more or less.

“Part 2A: Workshop Continued…”

Character Theory as an approach to mens rea and the moral judgments of ordinary factfinders maps onto a body of social psychological research called attribution theory with precision, neatness, and simplicity. Fritz Heider, known as “the father of attribution theory,” focused his research on what he called “naive” or “commonsense” psychology, the kind employed by ordinary people, including jurors and court officials. For Heider, people were like amateur scientists, trying to understand other people’s behavior by piecing together information to explain its causes. Put differently, this research describes how ordinary people (“social

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\(^{268}\) Blackstone’s translation.

\(^{269}\) George Fletcher Rethinking Criminal Law 799.
perceivers”) answer the “why” questions that arise when they interpret another’s conduct. According to attribution theory, when trying to decide why people behave as they do, social perceivers make either an internal (dispositional) attribution or an external (situational) attribution. (Attributions are the explanations social perceivers come up with.) An internal attribution is the inference that a person is behaving a certain way because of something about him or her, such as the person’s attitudes, character, or personality. An external attribution is the inference that a person is behaving a certain way because of something about the situation he or she is in. Research indicates that individuals whose acts are viewed as stemming from external factors are generally held less responsible than those whose acts are viewed as stemming from internal factors.

Most noteworthy and pregnant with implications from a racial justice standpoint are studies showing differences in social perceivers’ attributions about the causes of wrongful behavior by white versus minority wrongdoers. In a classic experiment, Birt Duncan showed white subjects a videotape depicting one person (either black or white) ambiguously shoving another (either black or white). Subjects who characterized the shove as “violent” more frequently attributed it to personal, dispositional causes when the harm-doer was black, but to situational causes when the harm-doer was white. A recent study of juvenile offenders finds pronounced difference in court officials’ attributions about the causes of crime by black versus white youths: Court officials are significantly more likely to perceive blacks’ crimes as caused

\footnote{Attribution theory also probes how ordinary people explain or diagnose their own behavior, but that research is not relevant to this analysis.}

\footnote{Rotter, Julian B. 1966. “Generalized Expectancies for Internal versus External Control of Reinforcement.” \textit{Psychological Monographs} 80:1-26. A well-documented finding of this research is that when people explain the behavior of others, they systematically tend to overlook the impact of situations and overestimate the role of personal factors. Because this bias is so pervasive, and often so misleading, it is called the fundamental attribution error.}
by internal factors and crimes committed by whites as caused by external ones. In the words of the researchers, “[b]eing black significantly reduces the likelihood of negative *external* attributions by probation officers and significantly increases the likelihood of negative *internal* attributions, even after adjusting for severity of the presenting offense and the youth’s prior involvement in criminal behavior.” In addition, researchers found that to the extent that court officials attribute black crimes to internal causes and white crimes to external causes, they are “more likely to view minorities as culpable and prone to committing future crimes.” Thus, differential attributions about the causes of crime by blacks and whites contributes directly to differential evaluations of subjective culpability and dangerousness.

In criminal prosecutions, the behavior that social perceivers must interpret is the actus reus or prohibited act. Once factfinders determine beyond a reasonable doubt that a defendant has engaged in prohibited conduct, they generally must determine whether that conduct was accompanied by mens rea or subjective culpability. If the mens rea requirement enables factfinders to attribute wrongful conduct to either the defendant’s character or her situation, it may be where race-based attribution bias lives in the substantive criminal law. But the

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273 Id. at 563-564
274 Id. at 557
275 Such findings support the anecdotal observation of a California public defender who noted, “If a white person can put together a halfway plausible excuse, people will bend over backward to accommodate that person. It’s a feeling ‘You’ve got a nice person screwing up,’ as opposed to the feeling that ‘this minority person is on track and eventually they’re going to end up in state prison.’ It’s an unfortunate racial stereotype that pervades the system. It’s all an unconscious thing.” Christopher H. Schmitt, “Plea bargaining favors whites as blacks, Hispanics pay price,” San Jose Mercury News, December 8, 1991.
276 Jurors foremost, but also other decisionmakers who determine the treatment of wrongdoers, such as prosecutors, judges, legislators, voters, police officers.
prevailing model of mens rea does not recognize this possibility. Under the prevailing model, mens rea may refer to the level of culpability required by the definition of the offense to accompany the prohibited act (special mens rea) or to “excuses,” such as duress, which absolve the actor of responsibility even though all the definitional elements were met (general mens rea). This prevailing model contains two confusions that make it an obstacle to a clear understanding of the role of attribution bias in the substantive law. First, it mistakenly equates definitional or special mens rea with aware mental states; second, it wrongly assumes that excuses do not figure in definitional mens rea. Once these confusions are dispelled below it will become clear that very often the mens rea requirement provides the doctrinal vehicle for factfinders to make diagnoses, to pose and answer the “why” questions that arise after they determine that a defendant has engaged in prohibited conduct, for it enables them to make either an internal (dispositional) or external (situational) attribution. (I use “mens rea” here to mean any test of subjective culpability that affects either liability or grading judgments.) Very often, if factfinders attribute the prohibited conduct to the defendant’s character, they find mens rea; if, instead, they attribute it to her situation, they do not find mens rea. Yet, demonstrable race-based differences in attributions about the causes of crimes imply that in assessing mens rea, factfinders more readily find the requirement met for blacks than for similarly situated whites, for they will more readily attribute a black defendant’s commission of the actus reus to his character than they will for a similarly situated white.

One arresting implication of this analysis is that criminals—including even murderers—are often socially constructed by factfinders in the adjudication process. 277 For instance, assume a

277Such findings would also reveal why some studies might fail to recognize the existence or full magnitude of such discrimination, for such studies only compare blacks found guilty of, say, murder with whites found guilty of the same crime. But lost in such
black and a white actor, each of whom intentionally kills another person under similar circumstances and claims provocation. In a common law jurisdiction, the mens rea for murder is malice—unlawful killings committed with malice are murder and those without are manslaughter. Malice means (among other things) an unprovoked intention to kill; thus, an adequate provocation negates malice. Accordingly, if factfinders in such a jurisdiction find that the defendant intentionally killed in the heat of passion, triggered by an adequate provocation, they will find manslaughter, but if they do not find an adequate provocation, they will find malice and hence murder. Under one common approach, the provocation, to be adequate, must be such as might cause a *reasonable or ordinary person in the same situation* to “lose self-control and act on impulse and without reflection.”

It is here that the factfinders make attributions. As Model Penal Code reporters Jerome Michael and Herbert Wechsler observed:

> Provocation...must be estimated by the probability that [the provocative] circumstances would affect *most men* in like fashion...Other things being equal, the greater the provocation, measured in that way, the more ground there is for attributing the intensity of the actor’s passions and his lack of self-control on the homicidal occasion to the extraordinary character of the *situation* in which he was placed rather than to any extraordinary deficiency in his own character.

A comparison would be that blacks who intentionally kill are more likely to be found to have the mens rea for murder than whites who do the same.

United States v. Roston, 986 F.2d 1287, 1294 (9th Cir. 1993). This does not mean reasonable people kill whenever adequately provoked. “[A] reasonable person does not kill even when provoked...” Model Penal Code Section 210.3 cmt. 5(a), at 56 (1980). As Roston further explains, “[t]his standard does not imply that reasonable people kill, but rather focuses on the degree of passion sufficient to reduce the actor’s ability to control his actions.” Roston at 1294. Jerome Michael & Herbert Wechsler, A Rationale of the Law of Homicide, 37 Colum. L. Rev. 1261, 1281-1282 (1937)(emphases added). They continue: “While it is true, it is also beside the point, that most men do not kill on even the gravest provocation; the point is that the more strongly they would be moved to kill by circumstances of the sort which provoked the actor
In determining whether the accused’s intentionally homicidal act constitutes murder or manslaughter, in other words, the factfinders must decide whether to attribute that act to external, situational factors or to internal, dispositional ones. Inasmuch as they attribute such an act to his situation, they will find the necessary provocation to negate malice and hence convict him of manslaughter; inasmuch as they attribute it to his character to his, in the words of one court, “wickedness of heart or cruelty or recklessness of disposition,”280 (that is, to his character) they will not find provocation and hence will convict him of an unlawful killing with malice–murder. Because of race-based attributional bias, however, factfinders will more readily attribute an intentional homicide committed by a black actor to his “wickedness of heart or cruelty of disposition” than a similar one committed by a white actor. Thus, they will often find a black actor guilty of murder when a similarly situated white actor would only be convicted of manslaughter. Hence, murders and murderers are not merely found in the adjudication process, they are socially constructed through the biased decisionmaking processes of jurors.

The Wechsler and Michael analysis of provocation not only recognizes the centrality of the situation versus character distinction in assessments of subjective culpability, but it also points out the kind of information that internal versus external attributions are based upon,
namely, information about how most people would respond to the provocative stimulus:

“Provocation...must be estimated by the probability that [the provocative] circumstances would affect *most men* in like fashion.” The reasonable person test—recall that to negate malice, the provocation must be viewed by the jury as the kind that might cause a reasonable or ordinary person in the same situation to lose self-control—makes information about the reactions of most people to the same provocative stimulus legally relevant. As the court puts it in *Maher v. People*, “In determining whether the provocation is sufficient or reasonable, ordinary human nature, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard.” In the words of Mark Kelman, implicit in the reasonable or ordinary person test is the notion that “blame is reserved for the statistically deviant”—typical beliefs and reactions generally qualify as reasonable ones. Hence, the Reasonable Person or Ordinary Person test directs factfinders to consider information about typical reactions in assessing the actor’s subjective culpability. Once again, attribution research finds that social perceivers rely on just such data in forming an attribution; they consider how typical an actor’s reactions are in deciding whether to attribute them to external or internal factors.

Under Harold Kelly’s Covariation Theory, one kind of information that people rely on when forming an attribution is consensus information. Consensus information is information about the extent to which other people behave the same way toward the same stimulus as the

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282 For Kelly there are three types of information that people consider when forming an attribution: consensus, distinctiveness, and consistency. Consensus information concerns how different persons react to the same stimulus. Distinctiveness information concerns how the same person reacts to different stimuli. Consistency information concerns the extent to which the behavior between one actor and one stimulus is the same across time and circumstances. Distinctiveness and consistency information generally will not be available to factfinders in that they would involve admitting into evidence historical facts about the defendant and evidence of prior bad acts, and such evidence is generally (but not always) inadmissible.
actor does. If most others also respond to stimulus in the same way as the actor, then social perceivers will see his behavior as high in consensus and will tend to attribute it to the stimulus or situation. Conversely, if most people do not respond to the stimulus in the same way as the actor, then social perceivers will see his behavior as low in consensus and thus more diagnostic of what kind of person he is—that is, they will tend to make an internal attribution. 283 Thus, the reasonable or ordinary person test, by calling on factfinders to consider consensus information in assessing defendants culpability, provides one of the key doctrinal mechanisms for the formation and application of attributions in the adjudication of just deserts.

Moreover, the Model Penal Code makes it clear that the point of the word “situation” in phrases like “reasonable person in the actor’s situation” is to furnish factfinders with a discretion-filled doctrinal vehicle for excusing those reactions of an actor that do not reveal dispositional defects (such reactions can be attributed to the “situation”) and blaming the actor for those reactions that do reveal such defects. The Code makes the test for heat of passion whether the defendant acted “under the influence of extreme emotional disturbance for which there is reasonable explanation or excuse;” and then directs that the determination of the reasonableness of the explanation or excuse shall be made “from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.” 284 In clarifying this formulation, the Comments state:

The word “situation” is designedly ambiguous. On the one hand, it is clear that personal handicaps and some external circumstances must be taken into account.

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283 An alternative theory of the kind of information people take into account when making attributions, Edward Jones’s and Keith Davis’s Correspondence Inference Theory, still finds that social perceivers believe that a person’s actions tell us more about him when they depart from the norm than when they are typical or otherwise expected under the circumstances. Social Psychology, Brehm and Kassin, 108; See also Social Psychology, The Heart and the Mind 176-177.

284 Section 210.3(italics added).
Thus, blindness, shock from traumatic injury, and extreme grief are all easily read into the term “situation.”...On the other hand, it is equally plain that idiosyncratic moral values are not part of the actor’s situation. An assassin who kills a political leader because he believes it is right to do so cannot ask that he be judged by the standard of a reasonable extremist...In between these two extremes, however, there are matters neither as clearly distinct from individual blameworthiness as blindness or handicap nor as integral a part of moral depravity as a belief in the rightness of killing. Perhaps the classic illustration is the unusual sensitivity to the epithet “bastard” of a person born illegitimate. An exceptionally punctilious sense of personal honor or an abnormally fearful temperament may also serve to differentiate an individual actor from the hypothetical reasonable man, yet none of these factors is wholly irrelevant to the ultimate issue of culpability. The Model Code endorses a formulation that affords sufficient flexibility to differentiate in particular cases between those special aspects of the actor’s situation that should be deemed material for purpose of grading and those that should be ignored. There thus will be room for interpretation of the word “situation,” and that is precisely the flexibility desired...In the end, the question is whether the actor’s loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen. Section 210.3 faces this issue squarely and leaves the ultimate judgment to the ordinary citizen in the function of a juror assigned to resolve the specific case.285

285Model Penal Code and Commentaries, Comment to Section 210.3, at 62-63 (1980). It is worth noting the Code’s recognition of a link between attributions and sympathy. To the extent that we attribute an actor’s misbehavior to her situation, we are more disposed to sympathize with her: “There but for the grace of God go I” suggests a recognition that, because of ordinary human frailty, in the same situation, I, the person passing judgment, might commit the same act. But to the extent we attribute her misbehavior to her character, we may withhold sympathy, for we may think that we could not possibly commit the same act in the same situation. We see the act not as an expression of ordinary human frailty but rather as an expression of her own extraordinary weakness or depravity. Put differently, to the extent that we sympathize with wrongdoers, it may be possible to feel some sense of solidarity with them despite their plight; but without sympathy we can more readily view them as inalterably different, alien, other. Attribution processes (especially attributional stereotypes) may strongly affect how we
Thus, the Code recognizes the “situation” directive as a non-descriptive, flexible standard that draws on the common sense decisionmaking processes of ordinary social perceivers to determine whether to attribute the actor’s reactions to his situation and thus partially exculpate or to attribute them to his “moral depravity,” “exceptionally punctilious sense of personal honor,” “abnormally fearful temperament,” or other dispositional deficiency and thus fully blame. The “reasonable person in the actor’s situation” approach to mens rea, therefore, combines two discretion-laden standards that help factfinders form and make attributions—“reasonable person” (directs factfinders to consider consensus information) and “situation” (directs factfinders to weigh situational factors in deciding whether to attribute conduct to external or internal causes). For convenience and conciseness, I will often use “reasonable person” as a shorthand for “reasonable person in the actor’s situation,” but the shorthand should be understood as including both attribution-enabling ingredients. In other settings—e.g., negligence, recklessness, putative self-defense, duress—we will see the “reasonable person in the actor’s situation” formula (i.e., the “reasonable person” test) do precisely the same attributional work it does with respect to heat of passion, with one exception, namely, in these other settings, if the factfinders attribute the actor’s actions and reactions to his situation, it results in full rather than partial exculpation.

As I shall show below, the reasonable person test constitutes a core element of many crimes. Hence, it figures pivotally in a wide range of legal directives by which factfinders judge the existence and degree of actors’ subjective culpability, which is to say that it figures pivotally in jurors’ liability and grading judgments. Accordingly, we shall see that in the same way that race-based attribution bias drives the social construction of murder and murderers in provocation define “us” and “them”—whether we opt for a politics of solidarity or a politics of distinction—in relation to criminals.
cases, it drives the social construction of criminals and criminality in general, from felonies to misdemeanors, from the bottom of the culpability hierarchy to the top.\textsuperscript{286}

\textsuperscript{286} This same analysis also reveals how efforts to empirically investigate the existence and scope of racial discrimination in the criminal justice system by comparing sentences meted out to blacks versus whites convicted of the same crimes may either completely miss or grossly underestimate such bias. For to the degree that race-based attribution bias infects jury findings about mens rea, much racial discrimination cannot be captured by ostensibly neutral statistics about racial disparities in sentencing patterns. Thus, even if the sentences meted out to blacks and whites convicted of, say, murder or manslaughter were the same, it would not prove that white and black defendants are treated equally in the adjudication process. Rather, the real discrimination may very well have been swept under the rug of jury findings about the presence or absence of the mens rea–malice–for murder.