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RETHINKING MENTAL STATES

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INTRODUCTION

Surprisingly little controversy attends the hierarchical ordering of states of mind in contemporary law. The narrowest and most "serious" mental state is intention or purpose, followed in order by knowledge, recklessness, and negligence. The least serious category is strict liability, denoting the absence of any culpable mental state. A more serious mental state might allow a greater penalty or liability, might affect the threshold of any liability or the causal extent of liability, or might diminish a culpable plaintiff's ability to recover from a culpable defendant. Further, the hierarchy applies in such diverse fields as tort law, criminal law, some patches of constitutional law, and other legal areas. Although difficulties arise with respect to the actual proof of mental states, their attribution to groups, and similar matters, most courts and commentators agree on these central concepts and their relative rankings.

This conventional hierarchy of mental states, however, is flawed. Properly understood, the principal mental state concepts do not reflect a single hierarchy of legal significance. Rather, they conceal two distinct mental state hierarchies, of desire and belief, as well as a third hierarchy, of conduct, which does not essentially involve mental states. Culpable desire-states include purpose, intention, and "reckless indifference" or "callousness." Culpable belief-states include knowledge and reckless "awareness" of a risk. Culpable conduct includes recklessness in the sense of gross negligence, as well as simple negligence. This Article attempts to elucidate these three hierarchies, and will canvass criminal, tort, and constitutional law doctrines for illustrations.

The following charts give a glimpse of things to come. These charts are highly simplified, as we shall see, but they might help the reader understand the scope and nature of my project.
Table 1. Prevailing Model of Mental State Hierarchy\(^1\)

<table>
<thead>
<tr>
<th>Most serious</th>
<th>Least serious</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purpose</td>
<td>Strict liability</td>
</tr>
<tr>
<td>Knowledge, belief</td>
<td></td>
</tr>
<tr>
<td>Recklessness (largely cognitive)</td>
<td></td>
</tr>
<tr>
<td>Negligence</td>
<td></td>
</tr>
</tbody>
</table>

Table 2. New Model of Mental State (and Conduct) Hierarchies

<table>
<thead>
<tr>
<th>1. States of Belief</th>
<th>2. States of Desire</th>
<th>3. Conduct (i.e., not a true mental state)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Knowledge, belief</td>
<td>Purpose, intention, desire</td>
<td>&quot;Recklessness&quot; (gross negligence)</td>
</tr>
<tr>
<td>&quot;Recklessness&quot; (cognitive)</td>
<td>Reckless indifference, callousness</td>
<td>Ordinary negligence</td>
</tr>
<tr>
<td>Negligent ignorance or negligent mistake</td>
<td></td>
<td>Slight negligence</td>
</tr>
<tr>
<td>Least serious</td>
<td>Strict liability (absence of any of the above states of belief)</td>
<td>Strict liability (absence of the above deficient conduct)</td>
</tr>
</tbody>
</table>

---

\(^1\) The prevailing hierarchy ranks "purpose" as the most serious mental state, "knowledge" as less serious, and so forth. The new model breaks the conventional hierarchy into three hierarchies: belief, desire, and conduct (which is not a mental state). Purpose or desire becomes the most serious mental state of the desire hierarchy, while reckless indifference is the least serious. The model also applies concepts of negligence and strict liability to each hierarchy. Thus, negligent ignorance and negligent mistake are mental states in which the actor lacks a belief that a reasonable person would have. Although such an actor does not actually possess a "positive" mental state, my use of the term "mental state" will refer to both "positive" and "negative" states.

A legally significant "negative" mental state means that the defendant is either culpable for not possessing a specified mental state (for example, a reasonable person's mental state) or is strictly liable even though not culpable. Thus, there are two senses of "strictly liable" behavior—liability without possessing a culpable state of belief and liability without having acted in a faulty or deficient manner. See discussion infra app. part B.4.
This Article is both positive and prescriptive. The reigning hierarchy is too simplistic to describe existing law accurately. The proposed model better describes both the general function of mental state concepts and also certain specific doctrines, such as “depraved indifference” murder and the “wilful blindness” doctrine. Unfortunately, however, the reigning hierarchy sometimes describes the positive law all too accurately. In some areas, such as the “intent” standard in equal protection law, application of the modern hierarchy is undesirable.

My principal aim is to produce analytical insights, not to prescribe specific changes in legal rules. For example, I am less concerned with redrafting the Model Penal Code definition of “recklessness” than with educating theorists, lawmakers, and law interpreters about the ambiguities in the concepts of recklessness, and about the relationship of those concepts to other mental state concepts such as intention, knowledge, and negligence. Although my analysis may suggest a need for redrafting, in the end I wish to open up new possibilities, to jar existing modes of thought, and to suggest directions for making mental state categories more expressive of underlying social norms.

The approach is conceptual, but not (heaven forbid) formalistic; it attempts to defend some useful general categories, while remaining attached to reality. It assumes that the substantive purposes of criminal, tort, or constitutional law largely explain which mental states the law does, or should, employ. But I also believe that the three broad hierarchies I describe here are sufficiently general to reveal analogies and similarities across fields of law, and are sufficiently specific to illustrate important relationships and possibilities within each field. My methodology also occasionally appeals to ordinary language and moral intuitions, not as fundamental or irrefutable justifications of the proposed hierarchy, but as informal examples of its meaning and of its connection with different normative theories.

Why, the reader may wonder, is it so important to rethink the conventional mental states hierarchy? Does it not work well enough? Consider a few suggestive examples of reasons for worry.

First. In many jurisdictions a tort defendant will be liable for punitive damages if he is “reckless” in some sense. Yet a defendant who knows that harm will result from his conduct will not necessarily be liable for punitive damages. This result is flatly inconsistent with the hierarchy’s ranking of “knowledge” as a more serious mental state than “recklessness.”

Second. Many modern legal standards devalue desire states relative to belief or cognitive states. For example, the influential Model Penal Code differentiates criminal recklessness from negligence in only one respect: recklessness requires conscious awareness of a substantial and unjustifiable risk, while negligence requires that the actor should have been aware of such a risk. Yet a traditional and defensible view sees recklessness as culpable indifference to risk. The terms “indifference,” “not-caring,” and “callous-

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2 See infra notes 46-50, 71-82 and accompanying text.
3 See infra notes 19-20 and accompanying text.
ness” all describe a culpable desire state—not a desire to harm, but an insufficiently strong aversion to harm, or a desire or willingness to create a risk of harm. The modern account of recklessness, emphasizing cognitive awareness of a risk, ignores or conceals the moral quality that “culpable indifference” expresses.  

Third. In equal protection law, discrimination by a government actor against a suspect class is subject to strict scrutiny only if the discrimination is purposeful. If the government actor knowingly harms such a group as an unfortunate byproduct of a significant government interest, she acts constitutionally. Thoughtful commentators have suggested, however, that the actor also should be liable if she shows insufficient concern or respect for the interests of minorities. Such indifference—a kind of recklessness—is thus plausibly considered more serious than acting in the face of knowledge that one will harm minorities. Once again, the conventional hierarchy—ranking knowledge higher than recklessness—is deficient.

Fourth. Legal standards sometimes require proof of a defendant’s intent or purpose. For example, accomplices are usually liable only for purposeful facilitation of a crime. Yet defendants rarely possess the mental state of purpose. Often, accomplices are willing to lend some aid but are quite indifferent to whether the crime is actually completed. If “intent” requirements are to remain meaningful, the law must allow proof of another type of desire-state—namely, some kind of reckless indifference.

Fifth. The traditional model does not explain the remarkable prominence that the mental state of recklessness has recently achieved. For example, in Tison v. Arizona, the Supreme Court surprised most observers by finding reckless indifference a sufficiently culpable state of mind to justify imposing the death penalty. Moreover, courts have seized upon “reckless disregard for the rights of others” or some similar formula as warranting punitive damages in a wide variety of tort cases. The “indifference” sense of recklessness—a “desire-state,” in my terminology—is usually at stake in these contexts. Only an analysis of the several distinct meanings of “recklessness,” and of the special relevance of desire-states to personal culpability, can adequately explain this important legal development.

Some preliminary caveats are in order. First, a model is only a model. Any attempt to organize mental state concepts into a single model will oversimplify. Decision-makers occasionally might employ useful mental state concepts that do not fit into the proposed model. I claim only that it includes the concepts that matter most in the law, and that it improves upon the existing hierarchy and concepts.

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4 See infra notes 66-68 and accompanying text.
5 See infra notes 189-202 and accompanying text.
6 See infra text accompanying note 63.
8 See infra text accompanying note 31 (citing the Restatement (Second) of Torts on reckless disregard for the safety of another).
Second, I am agnostic about the normative underpinnings of the fields of law that are the focus of this Article. My strategy will be to describe briefly some of the accepted normative perspectives, and then to show how the new model improves upon the old in expressing those norms. For convenience, the Article divides the normative approaches into three categories—culpability, utilitarianism, and rights.

Third, although evidentiary problems in the proof of mental states are real, I will not discuss them at length. A substantive approach, however, explains a good deal about how the law does—and should—employ mental state concepts.

Finally, I do not mean to overstate my complaint. The reigning hierarchy almost "works." That is, its concepts usually give satisfactory doctrinal expression to underlying retributive, utilitarian, or other normative approaches. It almost works even though it sometimes ignores or hides distinctions in the three hierarchies. It succeeds, however, only because its concepts are often an adequate combination of, or surrogate for, the concepts in the hierarchies of belief, desire, and conduct, and because special justifications and unexplained doctrinal exceptions conceal the inadequacies.

Part I begins with a brief description and critique of how the conventional mental state hierarchy is applied in criminal law and torts, the two areas of law containing the most refined definitions. Part II propounds the new model, redescribing the conventional concepts in terms of belief, desire, conduct, and reasonableness. The real test of the new model comes in Part III, which surveys different normative explanations for legal rules. The first section of Part III applies the model on the assumption that the relevant legal rules (mainly criminal law) are designed to express a retributive or blameworthiness perspective. The second section of Part III applies the model to utilitarian analysis, specifically to the economic analysis of tort and criminal law mental states. The third section of Part III applies the model to rights analysis, specifically to the treatment of intentional discrimination under the equal protection clause. Part IV reviews some of the pragmatic justifications for mental state concepts, including delimiting the scope of liability and easing evidentiary problems. A conceptual appendix follows the conclusion and expands upon some of the ideas presented in the body of this Article.

I. THE REIGNING HIERARCHY: AN EXPOSITION AND BRIEF CRITIQUE

This Part briefly describes and critiques the reigning hierarchies of mental states in criminal and tort law.

A. Criminal Law

Criminal law contains the most comprehensive and complex hierarchy of

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9 See discussion infra part IV.B (addressing problems of proof of mental states, the role of the judge and jury, and the precision with which the legislature should define mental states).
mental states in modern law. Less detailed versions of the generally accepted hierarchy exist in other areas of law. Although these versions may subtract elements of criminal law's hierarchy, they rarely add to it or alter its ordering.

"Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the most severely it ought to be punished." The view that criminal law mental states range along a single hierarchy is accepted quite widely. This section principally examines the Model Penal Code hierarchy, which has gained broad acceptance in the United States.

Two of the great innovations of the Model Penal Code are its reduction of the manifold criminal law "mental states" or culpability terms to four, and its adoption of "element analysis," under which different mental states might apply to different elements of a single offense. The Code creates four mental states or culpability terms: purpose, knowledge, recklessness, and negligence (with a default term, strict liability, if no mental state or culpability term applies). The possible objects of mental states are the actor's conduct, the attendant circumstances, and the result that he brings about (or seeks to bring about) by his conduct. The Code defines culpability terms slightly differently for the different elements:

10 *Tison*, 481 U.S. at 156.

11 I put this in quotation marks because, as the drafters of the Model Penal Code must have realized, negligence is not so much a state of mind as it is a quality of behavior that is significant in criminal law because it reflects a particular kind of culpability. See MODEL PENAL CODE § 2.02 cmt. 4 (1985) [hereinafter MODEL PENAL CODE]. In this essay I generally refer to "mental states," rather than "culpability," because the latter term also has specialized meaning—"blameworthiness" under a retributive theory. In context, it should be clear whether I am discussing a true mental state or a culpable (negligent) or non-culpable (strict liability) lack of a mental state.


13 An example of a "conduct" element is "breaking and entering" in burglary; an example of a "circumstance" element is "the dwelling-house of another" in burglary; an example of a "result" element is the death of another human being in homicide. For a more detailed explanation of these elements, see infra app. part A.3.

14 In the text, I summarize only the major features of the definitions. For other helpful summaries, see MODEL PENAL CODE § 2.02 commentary at 225-53; Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 818-21 (1980) (discussing the Model Penal Code's distinctions between the categories of purpose, knowledge, recklessness, and negligence).

The recent proposal for codification of British criminal law is similar to the Model Penal Code in its culpability requirements. See LAW COMMISSION NO. 143, CODIFICATION OF THE CRIMINAL LAW: A REPORT TO THE LAW COMMISSION 183-84 (Proposed Draft 1985) [hereinafter LAW COMMISSION REPORT]. There are significant differences, however, between the British approach and the Model Penal Code. First, the British
(1) A person acts with purpose (or with intention)\(^{15}\) if she has the "conscious object to . . . cause . . . a result,"\(^{16}\) or if she is aware, believes, or hopes that a circumstance exists.\(^{17}\)

(2) She has knowledge if she believes it is "practically certain" she will cause a result, or if she is aware of at least a high probability that a circumstance exists.\(^{18}\)

(3) She is reckless if she "consciously disregard[s] a substantial and unjustifiable risk that the material element exists or will result," and if so disregarding the risk is a gross deviation from what a law-abiding person would do.\(^{19}\)

(4) She is negligent if she is unaware but "should be aware of a substantial and unjustifiable risk." Negligence is otherwise virtually identical to recklessness.\(^{20}\)

(5) She is strictly liable simply if she is criminally liable in the absence of one of the above culpability states.\(^{21}\)

Recklessness is probably the most important culpability term under the Model Penal Code, for it is the culpability that the Code presumes when a criminal statute is silent.\(^{22}\) By contrast, the concept of purpose is surpris-

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\(^{15}\) MODEL PENAL CODE § 1.13(12). Although the Model Penal Code treats purpose and intent as one category, they are in fact subtly distinct. See infra note 272.

\(^{16}\) Id. § 2.02(2)(a)(i).

\(^{17}\) Id. § 2.02(2)(a)(ii).

\(^{18}\) Id. §§ 2.02(2)(b)(ii), (7). I later discuss a unique mental state that the Model Penal Code uses only in homicide—"extreme indifference to the value of human life." The Model Penal Code grades this mental state at the same level as purposeful or knowing homicides.

\(^{19}\) Id. § 2.02(2)(c). Recklessness is defined the same way for all material elements. In determining whether the actor has deviated to a gross degree, one must consider the nature and degree of the risk, the nature and purpose of the actor's conduct, and the circumstances known to the actor. Id.

\(^{20}\) Id. § 2.02(2)(d). The only other difference is that the criterion of gross deviation in behavior is the "reasonable" rather than "law-abiding" person—a difference that probably has no significance. See David M. Treiman, Recklessness and the Model Penal Code, 9 AM. J. CRIM. L. 281, 348-49 (1981). Like recklessness, negligence is defined in the same way for all material elements.

\(^{21}\) MODEL PENAL CODE § 2.05 (using the label "absolute liability").

\(^{22}\) Id. § 2.02(3). If, however, one considers the defense as well as the prima facie case, then the presumed minimum culpability is, practically speaking, negligence, since most criminal law defenses are defeated so long as the defendant was negligent. See Peter
ingly unimportant: although the Code distinguishes between purpose and knowledge in the definitional section, it only rarely distinguishes between them in the sections specifying requirements for individual offenses. For example, murder includes homicide that “is committed purposely or knowingly.”

B. Torts

Tort law conventionally encompasses three broad categories: intentional torts, negligence, and strict liability. Mental states are most explicitly relevant in the category of “intentional” torts. The Second Restatement of Torts defines intent quite broadly to encompass not only purpose, but also knowledge or belief. For example, in battery, “it is immaterial that the actor is not inspired by any personal hostility to the other, or a desire to injure him.”

Nevertheless, “intent” or “purpose” in the narrower sense of “motive” plays a limited role in tort law. For example, the tort of malicious prosecution requires that the defendant institute criminal proceedings against another “primarily for a purpose other than that of bringing the offender to justice.” “Spite fences” and other malicious interferences with another’s property rights are prima facie nuisances. Other examples include intentional interference with economic relations and abuse of qualified privilege in defamation.

After “intent” (which includes knowledge), the next most serious mental

Arenella, Character, Choice, and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments, Soc. Phil. & Pol'y, Spring 1990, at 59, 71. Of course, recklessness remains the de facto as well as the formal minimum insofar as the defendant has no colorable defensive claim.

23 The primary examples of where purpose is distinguished from knowledge are criminal conspiracy, Model Penal Code § 5.03; solicitation, id. § 5.02; attempts, id. § 5.01; and a few other crimes, such as burglary, id. § 221.1; and terroristic threats, id. § 211.3.

24 Id. § 210.1.

25 Intent encompasses not only the actor who “desires to cause consequences of his act,” but also one who “believes that the consequences are substantially certain to result from it.” Restatement (Second) of Torts § 8A (1965) [hereinafter Restatement (Second) of Torts]; see David J. Jung & David I. Levine, Whence Knowledge Intent? Whither Knowledge Intent?, 20 U.C. Davis L. Rev. 551 (1987) (reviewing history of Restatement’s definition of intent). These definitions are similar to the Model Penal Code definitions of purpose and knowledge.

26 Restatement (Second) of Torts § 13 cmt. c.

27 For a brief analysis of purpose and motive, see infra note 272 and accompanying text.

28 Restatement (Second) of Torts § 653 (1977); see also id. § 668.

29 See id. § 829 cmt. c, illus. 1 (1979).

state in the conventional tort hierarchy is recklessness. Tort recklessness, like criminal recklessness, requires a greater deviation from the standard of care of the reasonable person than negligence requires. And the test of recklessness is more subjective than the test of negligence. Yet tort recklessness, unlike Model Penal Code criminal recklessness, does not specifically require awareness of a risk. “Reason to know” suffices.

The tort of recklessness has not had a very important place in our law, perhaps because its doctrinal benefits as compared to negligence often are outweighed by the greater difficulty of proving it. But recent expansion of punitive damages liability, often based on an ill-defined “recklessness” standard, has begun to revive the concept.

Tort negligence and strict liability, two of the three principal areas of tort doctrine, do not contain prominent mental state requirements. Criminal law, by contrast, defines negligence and strict liability in terms of mental states, albeit in a negative sense: criminal negligence consists of a culpable lack of knowledge, while criminal strict liability consists of liability in the absence of any culpable mental state. A plaintiff will find torts of negligence and strict liability more difficult to prove than “intentional” torts for two reasons. First, the former torts allow defenses based on the plaintiff’s unreasonable conduct, and second, they effectively require plaintiff to

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31 See Restatement (Second) of Torts § 500:

The actor’s conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

For a discussion of problems with this definition, see infra note 70 and accompanying text.

32 The Restatement’s concept of “reason to know” is narrower than “reasonably should know”—it essentially requires that the facts be at your fingertips. See id. § 12.

33 The benefits might include greater amenability to punitive damages, id. § 501 cmt. b, greater scope of causation, id. § 501(2), and elimination of defenses based on plaintiff’s conduct, id. § 503. Prosser & Keeton, supra note 30, § 34; see also 3 Fowler Harper et al., The Law of Torts § 16.13, at 504 (2d ed. 1986).

34 See infra part II.C.

35 Of course, “reasonable foresight” is a component of duty and proximate cause in negligence. See Restatement (Second) of Torts § 435(1); Prosser & Keeton, supra note 30, § 43. Some categories of strict liability also have a “foreseeability” component. See George P. Fletcher, The Search for Synthesis in Tort Theory, 2 Law & Phil. 63, 74-80 (1983); see also Guido Calabresi & Alvin K. Klevorick, Four Tests for Liability in Torts, 14 J. Legal Stud. 585 (1985). And the “reasonable foresight” test of proximate cause applies to strict liability as well as negligence. See Prosser & Keeton, supra note 30, § 79; Harper et al., supra note 33, § 14.15, at 329-30.

36 See infra app. B.4.

37 They are therefore unlike intentional torts, which are defeated only by plaintiff’s consent. The extent to which a plaintiff’s unreasonable conduct affects recovery in a
prove lack of justification for defendant's conduct, because a defendant is not negligent unless he creates socially unjustifiable risks.38

C. Critique

1. Equating Knowledge With Purpose

The mental state hierarchies of modern criminal and tort law create some difficulties that reveal the need for a new model. The first problem is the equal treatment of knowledge and purpose in most criminal law and tort contexts. Does a knowing homicide really deserve to be treated as harshly as a purposeful one, that is, as a prima facie murder? Knowledge would seem to include a probabilistic or statistical “practical certainty” of death among a class of potential victims. In some cases, to be sure, such knowledge should suffice for the offense of murder. If a terrorist leaves a bomb in a crowded public place, knowing that some unidentified persons will die, he deserves to be liable for murder. In other cases, however, treating knowledge the same as purpose is problematic. Suppose a drug manufacturer markets a product with benefits that it reasonably believes exceed its risks, risks that include a statistical certainty of harm or even death to a small number of users. Should the manufacturer be prima facie liable for murder and exempt from liability only if the action fits within the extremely narrow defense of a reasonable choice of lesser evils?39

The same problem arises in tort law, which also fails to distinguish between purposeful and knowing creation of harm. Suppose a manufacturer distributes a drug that it knows will kill one out of one million users,40 but that is highly beneficial and unavoidably risky. Logically, this would seem

strict liability claim, however, is now quite unclear. Furthermore, comparative negligence and comparative fault have largely replaced contributory negligence, although they are not usually applied to intentional torts. See David C. Sobelsohn, Comparing Fault, 60 IND. L.J. 413, 441 (1985). In addition, assumption of risk, as a defense to torts of recklessness, negligence, and strict liability, is sometimes viewed as analogous to the doctrine of consent in intentional torts. See Kenneth W. Simons, Assumption of Risk and Consent in the Law of Torts, 67 B.U. L. REV. 213 (1987).

38 By contrast, an intentional tort plaintiff can establish a prima facie case by showing the “intentional” (purposeful or knowing) infliction of the relevant harm. The defendant must then fit himself within an available justification, such as self-defense or necessity.

Causation requirements for intentional torts might also be less stringent than for non-intentional torts. See RESTATMENT (SECOND) OF TORTS § 431 cmt. e. It is less clear that this is so in criminal law. The Model Penal Code draws no explicit distinction. MODEL PENAL CODE § 2.03 cmt. 2.

39 See discussion infra notes 105-08 and accompanying text.

40 “Once the probability of harm associated with a risky action can be gauged, an axiom of statistical theory holds that a sufficient number of repetitions of that action practically guarantees that the harm actually will occur.” Christopher H. Schroeder, Rights Against Risks, 86 COLUM. L. REV. 495, 500 (1986) (footnote omitted).
to be a battery,\textsuperscript{41} yet is it sensible to require the manufacturer to show the necessity of the product under the necessity doctrine in order to avoid such liability?\textsuperscript{42} Indeed, on this theory, a defendant would commit a prima facie battery whenever he knew that a safety device would prevent some harm but then decided (however reasonably) not to employ it.\textsuperscript{43}

2. The Narrow Distinction Between Recklessness and Knowledge

A second problem is this. Criminal law distinguishes recklessness from knowledge according to a single factor: whether the actor believed that the risk was merely “substantial” (recklessness) or instead “highly probable” (knowledge). Is this a sufficient distinction? Does it convincingly serve criminal law purposes? Once an actor perceives a “highly probable” risk of physical harm, she is prima facie liable for assault or murder. She must fit within a limited number of defenses in order to avoid conviction. But an actor who perceives only a “substantial” risk is not liable unless her conduct

\textsuperscript{41} This theory has some support. See Paul A. LeBel, Intent and Recklessness as Bases of Products Liability: One Step Back, Two Steps Forward, 32 ALA. L. REV. 31 (1980). LeBel argues for extending products liability to cases of intentional (as well as reckless) creation of risk, but he adds a utilitarian cost-benefit analysis that would provide a defense to the manufacturer in cases such as my example. \textit{Id.} at 48. The addition avoids difficulty only by ignoring the usual criteria for intentional tort liability.

I am unaware of any cases that accept this theory. One reported case seems to have rejected it. In Madden v. D.C. Transit System, Inc., 307 A.2d 756 (D.C. 1973) (per curiam), plaintiff claimed that the transit system was liable for battery because it was aware that its buses regularly discharged fumes and oily substances. The court curtly rejected the claim, finding a failure to allege “intent” on the part of the bus company. \textit{Id.} at 757. But the court did not address the “knowledge” type of intent described in § 8A of the Restatement (Second) of Torts.

\textsuperscript{42} Because the risk is so low, under negligence doctrine, the manufacturer would probably not have a duty to warn. Some courts might decline to classify the case as a battery because the “practical certainty” of harm to a class of potential victims is only probabilistic. This, however, makes little sense. A court would have no difficulty finding a defendant who set off an explosive in a public place liable for battery, even though the identity of the victim is similarly uncertain.

LeBel would use the doctrine of transferred intent to address the problem where the victim of a “probabilistic” battery is unspecified. LeBel, supra note 41, at 42-45. That doctrine, however, is dubious to begin with. See Kenneth W. Simons, Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay, 81 J. CRIM. L. & CRIMINOLOGY 447, 506 n.181 (1990).

\textsuperscript{43} LeBel classifies the famous Ford Pinto case, Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (1981), as a prima facie battery because the manufacturer had compared the costs of redesigning the fuel tank with the expected injury costs from no redesign, and thus “had knowledge that at least some deaths and injuries were substantially certain to result from the design.” Lebel, supra note 41, at 41. This reasoning is extraordinarily broad (although LeBel later qualifies it significantly). For further discussion, see infra text accompanying notes 77-81.
both is unjustifiable and is a "gross deviation" from social norms, considering all of the circumstances. Thus, the escaping criminal who drags a police officer hanging on the fender of her car, thereby causing his death, is liable for murder if she believed that death was "highly probable," but not if she believed it was "substantially" possible. Similarly, in the example of the manufacturer, if it believed that an injury or death was "highly probable," then it is prima facie liable for murder, but not if it believed the injury was merely "substantially" possible.

3. Punitive Damages

Finally, tort law's treatment of punitive damages is not consistent with the basic hierarchical ordering. Generally speaking, punitive damages are more readily available in intentional tort cases than in negligence and strict liability cases. They are also often available when the defendant has been "reckless." But if a doctor commits an "intentional" battery by mistakenly exceeding the scope of the patient's consent, punitive damages probably will not be allowed. Why not? If, under the conventional hierarchy, a knowing or intentional interference with a patient's bodily integrity is more serious than a reckless interference, why are punitive damages more easily available for the reckless act? Consider the Second Restatement's position: punitive damages are available only "for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Why does the Restatement depart from the ordinary definitions of intentional or reckless behavior?

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45 It is possible that the "extreme indifference" category of murder would apply in this case. See infra part II.D. But the need for this unusual mental state category illustrates the deficiency of the traditional hierarchy.
46 See Prosser & Keeton, supra note 30, § 2, at 9-10.
47 Punitive damages are often available for "reckless" conduct in at least one sense of that term—namely, "such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton." Prosser & Keeton, supra note 30, § 2, at 10 (footnote omitted); see also id. § 34, at 213.
48 See id. § 9, at 40-41.
49 Restatement (Second) of Torts § 908 (1979).
50 The Second Restatement seems to distinguish between recklessness as a ground for tort liability ("reckless disregard of the safety of another," which can be shown by an objective test, Restatement (Second) of Torts § 500), and as a ground for punitive damages ("outrageous" conduct that shows "reckless indifference to the rights of others," Restatement (Second) of Torts § 908). It views the latter as a narrower concept. See id. § 908 cmt. b ("Punitive damages are not awarded for mere inadvertence."). Indeed, the latter might reflect a "global" rather than "local" conception of recklessness. See infra note 89.
II. A NEW CONCEPTUAL MODEL

The proposed model helps to resolve some of the puzzles and to explain how mental states are relevant under several quite different normative approaches. This Part identifies the general (and somewhat abstract) elements of the model. Later Parts of the Article will demonstrate, in a more systematic and concrete way, how the model mediates between particular legal doctrines and three general normative approaches—retributive (Part III.A), utilitarian (Part III.B), and rights (Part III.C). Thus, the diverse examples in this Part were chosen to illuminate a multipurpose conceptual model, not to reveal a common normative vision. Readers who are anxious to see the point of this conceptual analysis might proceed directly to Part III, and then return to this Part as they find necessary. Further elaboration of the model can be found in the Appendix.

A. Generally

Mental states of belief and mental states of desire are fundamentally different. Unfortunately, the modern hierarchy of mental states conceals this distinction and obscures its significance. I propose to resurrect belief-states and desire-states as independent hierarchies of mental states. I also suggest “conduct” as a third independent hierarchy of culpability or liability, a hierarchy that does not directly evaluate any mental states. One can directly compare the seriousness of different mental states only within a given hierarchy, not across categories.

States of belief, or cognitive states, range from a belief that something is relatively certain (for example, that a harmful result will occur), to a belief that something is substantially possible, to a belief that something will not occur. In the law of homicide, for example, an actor might correctly believe that he will cause death, and thus be liable for a “knowing” murder. Or an actor might simply believe that the risk of causing death is substantial, and thus be liable for reckless manslaughter (under the Model Penal Code’s largely cognitive definition of recklessness).

States of desire similarly range from a desire for something (for example, that a harm will occur), to lack of preference, to a desire for the opposite (that the harm not occur). The concepts of purpose and intention are also states of desire, but of a special sort: they are desires that the actor believes she has some power to effectuate. (The same cannot be said of wishes and

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51 Logically, before considering the basic elements of the model, one should consider some philosophical and conceptual issues that are even more fundamental. What is a mental state? Is it a descriptive or normative concept? What are its objects? For a discussion of these preliminary matters, see infra app. A.1-3.

52 See infra text accompanying notes 88-92 (suggesting that pre-modern accounts gave more prominence to states of desire).

53 See discussion infra app. B.1 (“The Concept of Belief”).
hopes.) Thus, an actor who "purposely" causes the death of another desires that death and believes she might bring that result about.\textsuperscript{54}

"Reckless indifference" is a crucial legal and moral concept that usually reflects an intermediate state of desire—less serious, for example, than a desire to cause harm or social evil, but more serious than a strong desire to avoid such harm. Although "reckless indifference" can have many meanings, I use it here as a term of art for any of the following: literal indifference about whether or not something occurs; a desire to create a risk; and "callousness," or caring less about a result or circumstance than one should. Although this mental state has been relatively neglected in some modern American legal standards, it expresses what many earlier criminal law standards required for manslaughter, what modern courts often mean when they require "recklessness" for punitive tort damages, and, in its most aggravated form, what criminal law standards still require for "depraved heart" or "extreme indifference" murder.\textsuperscript{55}

The hierarchies of belief and desire are independent. It is possible to rank the seriousness of mental states within each hierarchy, but not across hierarchies. Thus, a purpose to harm is a more serious or culpable mental state than reckless indifference to harm, because both are desire-states. But beliefs are not categorically more significant than desires, and desires are not categorically more significant than beliefs.

For example, a "knowing" homicide is not necessarily more culpable than a "recklessly indifferent" one. A knowing homicide might occur when a product manufacturer knows that death is a statistical certainty among a class of persons, yet the actor's purpose in exposing the class to risk might be socially justifiable in light of the product's benefits. If modern law were to apply its own concepts honestly, it would treat such a homicide as prima facie murder; but such treatment would misserve criminal law norms. Conversely, even modern criminal law treats as murderers defendants who cause death with a "depraved heart" or "extreme indifference to the value of human life"—the desire-state form of recklessness. Such a defendant lacks knowledge that death is likely, but his desire-state makes his conduct highly reprehensible. This remarkable exception to the usual hierarchy dramatically reveals the hierarchy's inadequacy.\textsuperscript{56}

I describe "conduct" as a third hierarchy, in part to emphasize that some supposed "mental state" terminology does not really refer to mental states (including beliefs or desires) at all. Negligence and strict liability in tort law, for example, do not involve mental states in any direct way. In criminal law, however, negligence and strict liability often are defined, albeit negatively, in terms of belief-states. Negligence refers to the culpable failure to form a

\textsuperscript{54} See discussion infra app. B.2 ("The Concept of Desire").

\textsuperscript{55} See discussion infra part II.D ("Reckless Indifference").

\textsuperscript{56} See discussion infra part II.B ("The Independence of Belief and Desire"); see also discussion infra app. B.3 ("Purpose, Belief, and the Doctrine of Double Effect") (providing a philosophical perspective).
belief, while strict liability refers to liability even in the absence of such a culpable failure.\textsuperscript{57}

The contemporary confusion over the meaning of the concept of recklessness best illustrates the need to distinguish between the three hierarchies. The Model Penal Code's formulation of recklessness emphasizes cognitive awareness of risk (belief-state), as well as gross negligence (conduct), but slightes the actor's attitude of reckless indifference (desire-state). By contrast, the concept of reckless indifference is the sense of recklessness that courts often employ as the standard for punitive damages in tort law.

Despite the conceptual independence of the hierarchies of belief, desire, and conduct, the law frequently combines these concepts. This practice is eminently sensible. For example, one might restrict manslaughter liability to defendants who are aware of a substantial risk of harm \textit{and} who are indifferent to causing harm. One should remember, however, that separate elements have been combined, and thus avoid taking the combination for granted or closing one's eyes to new permutations. In sum, the reigning hierarchy often works adequately, but only because it combines mental state concepts from the distinct categories in a reasonable way, not because the concepts of the reigning hierarchy are themselves optimal.

In the remaining sections of this Part, I spell out in more detail three important points:

1. Belief-state and desire-state hierarchies are independent hierarchies, while the single hierarchy of the reigning model is oversimplified.
2. Recklessness can have three very distinct meanings that courts and commentators easily confuse or conflate.
3. The reigning hierarchy often works adequately, but only because of a strategy of adaption and accommodation, not because the model is conceptually sound.

B. \textit{The Independence of Belief and Desire}

Under this proposed model, the hierarchies of belief and desire are independent. Thus, although belief-states and desire-states are ranked in approximate hierarchies, not every state of desire is more culpable or significant than every state of belief, nor is the converse true. It also would be a mistake to adopt a single hierarchy that cut across these categories. Yet the reigning hierarchies of tort and criminal law do just that. They treat purpose more seriously than knowledge, which they treat more seriously than recklessness (often interpreted as requiring belief in a substantial risk), which

\textsuperscript{57} In theory, an objective standard of reasonableness can be applied to any belief-state, any desire-state, or any conduct. A person might be unreasonable in forming a belief, in having a desire, or (apart from belief and desire) in acting. But it is unusual and somewhat problematic for the law to ask directly (and without more) what a reasonable person would desire. \textit{See} discussion \textit{infra} app. B.4 ("Negligence and Strict Liability: Mental State or Conduct?").
they treat more seriously than negligence (requiring no such actual belief). Indeed, the Model Penal Code explicitly orders the mental state categories in a hierarchy. Each "lower" mental state is a "lesser included" mental state of any "higher" mental state.⁵⁸

The problem with the conventional ordering is not simply aesthetic; rather, the ordering sometimes miserves the relevant underlying norms. Consider two contrasting scenarios from the law of criminal complicity. In the first scenario, a store owner overhears that a group of teenagers plans to use his spray paint to deface property, but nonetheless he sells them paint. He then contacts the police, though he believes the police probably will not be able to apprehend them. (This owner's facilitation, although "knowing," might not be criminal, for an accomplice usually must have a purpose to facilitate the crime.)⁶⁹

Now suppose a slight variation. Again, teenagers seek to buy spray paint, but this time the eavesdropping owner hears them discussing a very foolish criminal plan, and he is convinced that they will almost certainly be apprehended before they can commit the crime. The second owner agrees to sell the paint, but only at a considerable mark-up over the usual price. He does not contact the police. This second seller's greater selfishness and greater indifference about whether he facilitates a crime seem to make him more culpable than the first seller, even if the first seller is fairly certain that the paint will be used in a crime and the second is fairly certain that it will not.⁶⁰

⁵⁸ MODEL PENAL CODE § 2.02(5):
Substitutes for Negligence, Recklessness and Knowledge: When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

The proposed British criminal law codification has an analogous provision. See LAW COMMISSION REPORT, supra note 14, at 184, cl. 23.

The Restatement (Second) of Torts also assumes that "intent" is higher in an ordered hierarchy than "recklessness," which is higher than "negligence," which is higher (in some respects) than strict liability. See RESTATEMENT (SECOND) OF TORTS § 500 cmts. f, g; id. § 519 cmt. d (contrasting strict liability for abnormally dangerous activities with intentional torts and negligence).

⁵⁹ Criminal liability is typically reserved for accomplices who purposely assist principals in committing a crime—i.e., who desire that their conduct help the principal succeed. See MODEL PENAL CODE § 2.06 (accomplice liability); see also id. § 5.02 (criminal solicitation); id. § 5.03 (criminal conspiracy). It is not enough that the facilitator know that his conduct will help the primary offender. See generally Louis Westerfield, The Mens Rea Requirement of Accomplice Liability in American Criminal Law—Knowledge or Intent?, 51 MISs. L.J. 155 (1980); Grace E. Mueller, Note, The Mens Rea of Accomplice Liability, 61 S. CAL. L. REV. 2169 (1988).

⁶⁰ Even the second seller might not be liable under a strict interpretation of "purposeful" facilitation. I do not believe, however, that courts will be so strict. See infra note 63.
The upshot: an intermediate "desire" state, recklessness, can be more culpable than the highest "belief" state, knowledge.

Another telling example is the "purpose" inquiry in equal protection analysis. If, in creating a classification, a government official intends to disadvantage a suspect class, such as blacks, the classification is subject to strict scrutiny. If he simply knows that the law will have a disproportionate effect, it is not. Commentators have widely criticized this restriction of the suspect mental state to hostility or a desire to disadvantage. But some have proposed that a mental state of indifference to the interests of the suspect class, or of unequal concern and respect, also might serve as a suspect mental state. This intermediate "desire-state" of indifference, again, is more culpable or more legally significant than the "belief-state" of knowledge, notwithstanding the modern hierarchy.  

The equal protection example reveals two other points. First, there is a basic moral difference between intentionally bringing about a harm and knowingly bringing about a harm as an unfortunate side-effect of one's legitimate purposes. Greater blame attaches to those who intend harm than to those who merely foresee harm as a consequence of their actions; the philosophical doctrine of double effect attempts to clarify and explain this distinction. Second, "intention" and "purpose" are surprisingly narrow concepts. For example, consider an actor whom we might casually describe as intending to aid a crime. Often she will not be disappointed if the precise result (completion of the crime) does not occur. She therefore does not really "intend" the result. Thus, if she is thought to deserve legal liability, it is especially important to define a credible conception of reckless indifference that will apply to her. There are other serious problems with the concepts

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61 See discussion infra part III.C ("Rights Analysis: The Example of Intentional Discrimination").

62 See discussion infra app. B.3 ("Purpose, Belief and the Doctrine of Double Effect").

63 Legal standards that purport to require intention or purpose actually may require something more like reckless indifference, because the literal concepts of intention and purpose can be quite narrow. As one example, consider the case of Bernhard Goetz. In a previous analysis of his use of force against four alleged attackers, I suggested that:

I do not find it absolutely clear that Goetz literally "intended" to kill or wound the four, even though he deliberately aimed at their midsections. For it is not clear either that Goetz planned to kill or wound them, or that bringing about their death or injury was Goetz's motive in acting. Perhaps, in his anger, he simply wanted to do everything possible to get them out of his way; if they then miraculously survived without injury, he would not have been disappointed. Indeed, it might be a surprisingly rare case in which a jury can be sure that the defendant literally "desired," "planned," or "intended" to kill or harm another.

Kenneth W. Simons, Self-Defense, Mens Rea, and Bernhard Goetz, 89 Colum. L. Rev. 1179, 1195 (1989) (reviewing George P. Fletcher, A Crime of Self-Defense: Bernhard Goetz and the Law on Trial (1988)). Thus, if Goetz had a culpable mental state, it might well have been some form of callous indifference, rather than intention or purpose. See id. at 1195-97.

The other example involves the law of criminal facilitation. The Model Penal Code
of intent, as well, problems that the less stringent concept of reckless indifference might help to solve.\textsuperscript{64}

requires that the accomplice give aid "with the purpose of promoting or facilitating the commission of the offense." \textit{Model Penal Code} § 2.06(3)(a). The Code similarly requires purpose, not mere knowledge, in conspiracy. \textit{Id.} § 5.03(1). \textit{See generally} Sanford H. Kadish, \textit{Complicity, Cause, and Blame, in BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW} 153, 153-55 (1985); Westerfield, \textit{supra} note 59. For discussions of British law, see generally Ian Dennis, \textit{Intention and Complicity}, 1988 CRIM. L. REV. 649; G.R. Sullivan, \textit{Intent, Purpose, and Complicity}, 1988 CRIM. L. REV. 641; Glanville Williams, \textit{Complicity, Purpose and the Draft Code—I}, 1990 CRIM. L. REV. 4. This is one of the few instances in the Model Penal Code in which knowledge is insufficient culpability. If applied strictly, the "purpose" test should cover only accomplices who aid with the "conscious object" of promoting or facilitating the offense. But, so interpreted, the test would have surprisingly narrow application. Consider the supplier who sells goods or services to the principal on a single occasion at an inflated price, or who knows that the principal has no legitimate use for the service. Such a supplier will often not care whether the principal actually commits the crime; thus, he lacks true purpose. Yet many courts will probably view his assistance as purposeful. \textit{See} People v. Lauria, 59 Cal. Rptr. 628, 632-33 (1967); \textit{see also} Westerfield, \textit{supra} note 59, at 166-67 (noting that several courts have inferred the intent requirement for accomplice liability from circumstantial evidence). Why? Perhaps because they consider the supplier to be unusually blameworthy: he is willing to make an unusual profit and is indifferent as to whether he aids crime. \textit{See also} Kadish, \textit{supra}, at 153-59 (analyzing complications in applying the "intention" test).

\textsuperscript{64} Consider two such problems. First, \textit{individuating} intentions is a notoriously difficult enterprise. \textit{See} Michael Moore, \textit{Intentions and Mens Rea, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY} 245 (Ruth Gavison ed., 1987). For example, suppose I intend to broadcast enemy propaganda; I know that the propaganda will assist the enemy; do I therefore intend to assist the enemy? Since intention is supposed to mark a distinctively blameworthy mental state, and since the precise object of the intention is critical to blameworthiness, this conceptual difficulty becomes an important normative difficulty.

In \textit{R. v. Steane}, 1947 K.B. 997, a British court held that the defendant did not "intend to assist the enemy" because he broadcast in response to threats to his family. H.L.A. Hart notes that a strict intention requirement is problematic here: if the defendant had broadcast in order to get a pack of cigarettes, then, again, he should be acquitted for lack of "intention" to assist the enemy! H.L.A. \textit{Hart, Punishment and Responsibility} 125-26 (1968). Hart's solution to the problem is to expand intention to include knowledge, but an alternative solution is to expand intention to include reckless indifference—for which knowledge is, in many cases, a plausible surrogate.

Second, sometimes one intends to act in a certain way only as a regrettable means to a larger end that one intends in a fuller sense. Jones intends to stop his friend's terrible suffering, so he kills her. In an important sense he does not desire to kill her, because he wishes there were some other way to prevent her suffering. But he thinks there is not; he therefore believes it is necessary to cause her death. What does he "really" intend? What is the significance of the fact that he intended to kill only as a means? Is it not morally significant that he regrets having to kill, as compared to a cold-blooded killer who is indifferent so long as he receives his fee, or who even delights in causing pain? On the other hand, pursuing this line of argument might lead to a counterintuitive conclusion—
Of course, mental states in the belief hierarchy often provide very strong evidence of mental states in the desire hierarchy. One who knowingly causes harm to another often desires to cause harm, or is indifferent to causing harm. It is often sensible to combine mental state requirements, so that, for example, a person is liable for unintended murder only if he is aware of a substantial risk that he will cause death and he shows "extreme indifference to the value of human life." Nevertheless, the belief and desire hierarchies are independent in principle, even if they overlap in practice.

C. Recklessness: Belief, Desire, or Conduct?

The ambiguous concept of recklessness starkly reveals that the existing model of mental states is inadequate. The new model helps to untangle three different strands of this important concept. Briefly, recklessness can refer to any of the following, either singly or in combination: a state of belief (belief that one is creating a substantial risk); a state of desire (reckless indifference); or conduct (gross negligence). This section reviews the three conceptions of recklessness, and then applies them in the context of punitive tort damages.

Under the Model Penal Code, both a reckless actor and a negligent actor engage in highly deficient conduct, but the reckless actor also must subjectively believe that he is creating a substantial risk. In many cases, however, this differentiation of culpability or liability is unpersuasive because it fails to capture a second sense of recklessness: reckless indifference. Consider the simple example of a driver who runs a light and hits a pedestrian. Should he necessarily be subjected to greater liability if he considered that he might run over the pedestrian than if he did not? Mutt, who is aware of the risk, might try his best to avoid hitting the pedestrian. Jeff, who is unaware, might be equally culpable for choosing to run the light without addressing the risks at all. But only Mutt is "reckless" under the Code. The Code formulation thus sanitizes the concept of recklessness, cleansing it of the messier common law concepts of reckless indifference—such as callousness and the

that severe condemnation should be limited to those extraordinarily rare actors who intend harm for its own sake. (Criminal and tort law often look only at the immediate intention, not the "ultimate motive." But sometimes the more ultimate motive is considered relevant, for example when defendant claims self-defense, or when the death penalty is at issue.)

The concept of reckless indifference partially responds to these problems, which arise because of the need to distinguish non-culpable belief-states from culpable desire-states. Yet intention and purpose are not the only culpable desire-states. The problematic scope of intention and purpose is one reason, I believe, for the current revival of legal interest in the concept of reckless indifference.

65 Model Penal Code § 210.2(1)(b).
66 Id. § 2.02 cmt. 3.
desire to risk harm.\textsuperscript{67} Recklessness, however, need not be limited in this way to a cognitive state, nor to a cognitive state plus highly deficient conduct.\textsuperscript{68}

A third sense of recklessness is gross negligence: highly deficient conduct or a very serious departure from the standard of ordinary care. Indeed, the tort law in some jurisdictions employs the terms "reckless," "wilful," and "grossly negligent" interchangeably.\textsuperscript{69} Considered alone, this sense of recklessness does not essentially refer to the mental states of belief or desire. Indeed, a grossly negligent actor might care very much about avoiding harm to others, but simply possess grossly deficient skills.

Failing to differentiate among these three senses of recklessness can engender confusion. A vivid example is in the definition of "reckless" in the Restatement (Second) of Torts. It describes the concept in all three ways, sometimes emphasizing the gross deficiency of the conduct, sometimes the actor's subjective awareness of risk, and sometimes the actor's callousness.\textsuperscript{70}

\textsuperscript{67} Although the Model Penal Code requires that the actor's "disregard" of the risk constitute a gross deviation, that language does not clearly reflect the desire-state of indifference. See infra notes 118-19.

\textsuperscript{68} See, e.g., George P. Fletcher, Rethinking Criminal Law 445 (1978) (stressing that the distinction between intent and recklessness may be viewed in terms of the relative degree of risk that the result will occur, or in terms of the actor's attitude toward the risk). In their influential treatise, Wayne LaFave and Austin Scott describe recklessness only in terms of awareness of risk and highly unreasonable conduct. Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 235-37 (2d ed. 1986). Indeed, when confronted with the third (indifference) conception in a judicial opinion, they simply reduce it to awareness: "A requirement of 'indifference to consequences' would seem to be another way of requiring an awareness of the risk (i.e., a subjective standard)." Id. at 235; see also id. at 237 n.22. They fail to see that indifference is a subjective standard distinct from awareness.

\textsuperscript{69} Prosser & Keeton, supra note 30, at 34; see Edwin H. Byrd, III, Comment, Reflections on Willful, Wanton, Reckless and Gross Negligence, 48 La. L. Rev. 1383, 1383 (1988).

In criminal law, by contrast, the Model Penal Code restricts both recklessness and negligence to "gross deviations." Model Penal Code § 2.02(c), (d).

\textsuperscript{70} Restatement (Second) of Torts § 500 and accompanying comments. Thus, the text of § 500 emphasizes gross deficiency ("such risk is substantially greater than that which is necessary to make his conduct negligent") and subjective awareness ("knowing or having reason to know of facts"). The title ("reckless disregard of safety defined"), but not the text, of § 500 suggests reckless indifference. The comments are similarly confused and contradictory. According to comment a, there are two types of recklessness. In the first, the person "deliberately proceeds to act . . . in conscious disregard of, or indifference to, [the] risk." Id. § 500 cmt. a. In the second, the person is not aware of the high degree of risk, but should be. Id. This second "gross negligence" interpretation is broader than and, therefore, effectively replaces the first "subjective awareness"/"callous indifference" interpretation. Comment g underscores this "gross negligence" interpretation, while comments b, c, d, and f emphasize the two subjective interpretations. Finally, comment b suggests that subjective perception of certain facts is required, but this is a stronger requirement than the text, which merely requires "reason to know" of such facts.
Recent expansion of punitive tort damage awards for "reckless" behavior\textsuperscript{71} gives urgency to the task of clarifying the concept. The new model might help to resolve the problem. First, the "belief" interpretation of recklessness cannot be the most significant one in this context. For example, a product manufacturer might be consciously aware\textsuperscript{72} of a significant risk that its product will cause harm, but not all such adventent risk-creation could be deemed negligent, much less reckless, given the complexity of product designs and the sometimes necessary tradeoffs between one harm and another, or between harm and cost. Or consider the earlier example of a medical battery, where the doctor makes a negligent mistake in exceeding the scope of the patient's consent.\textsuperscript{73} Punitive damages will not be allowed, notwithstanding the doctor's intentional interference with the patient's bodily integrity, because the conduct is not sufficiently aggravated.\textsuperscript{74}

Punitive damages might plausibly rest upon "recklessness" in either of the other two senses—gross negligence or reckless indifference.\textsuperscript{75} But the choice is a real one, with real consequences. The gross negligence conception examines behavior and relies on an objective standard. The indifference conception examines a mental state and relies on the actor's subjective attitudes. For example, if the Learned Hand test is employed, gross negligence might demand an \textit{extreme} departure from the socially optimal tradeoff between costs and benefits.\textsuperscript{76} Indifference might instead demand proof that the


\textsuperscript{72} I cannot, in this essay, address the objection that a product manufacturer does not really "have" a mental state at all.

\textsuperscript{73} \textit{See} discussion \textit{supra} part I.B ("The Reigning Hierarchy: Torts").

\textsuperscript{74} Mark Grady takes a somewhat different view. He argues that punitive damages are in fact (and should be) awarded based on "deliberate" or "conscious" negligence, as opposed to "inadvertent" negligence. Mark Grady, \textit{Punitive Damages and Subjective States of Mind: A Positive Economic Theory}, 40 ALA. L. REV. 1197 (1989). Just what Grady means by these terms is unclear. Does he mean awareness that one is acting negligently, or instead awareness of the possibility of using a precaution, and the harm of not doing so? In the latter case, the defendant might honestly believe that he is acting non-negligently (for example, he might mistakenly believe that the precaution would not be very helpful).

In any event, Grady's category of "deliberate" negligence approximates, but is not identical to, the desire-state of reckless indifference. Someone could show reckless indifference without realizing that he is acting negligently (if, for example, he simply has no idea what negligence law requires in his circumstances). Moreover, although awareness of one's failure to take a precaution, or of its foreseeable effects, will ordinarily be a necessary condition of being indifferent, it is not a sufficient condition.

\textsuperscript{75} The Restatement seems to adopt the latter standard, for it requires that the defendant show "reckless indifference to the rights of others." \textit{RESTATEMENT (SECOND) OF TORTS} § 908.

\textsuperscript{76} \textit{See} Richard A. Posner, \textit{Economic Analysis of Law} 194-95 (3d ed. 1986);
defendant did not weigh safety costs at all in his decision, or that he knew that (or did not care whether) he was negligent.

Consider the much-discussed Ford Pinto case, in which a jury awarded substantial punitive damages for Ford Motor Company's failure to redesign its fuel tank to minimize a fire hazard. Many believe that Ford was reckless and deserved punitive damages mainly because it consciously weighed costs against benefits. I demur. If tort law wishes to encourage defendants to engage in socially reasonable weighing of costs and benefits, it hardly makes sense to penalize defendants who do so.

Of course, some other theory might justify punitive damages in the Ford case. The company's original design decision might have been grossly negligent, even if a post-sale correction would have been marginally inefficient. Also, Ford placed a low valuation on human life in its cost-benefit analysis of whether to correct the defect, a valuation that might reflect gross negligence, or even indifference to human safety. Still, if punitive damages are appropriate, they should not be assessed merely because Ford performed a cost-benefit analysis that balanced safety against cost.

As another example, consider whether a drunk driver who negligently injures a plaintiff should be liable for punitive as well as compensatory damages. One who drives drunk for the first time might honestly (if unreasonably) believe that he will still be able to drive fairly safely. One who is aware that his drunk driving is extremely risky, by contrast, is more likely to show indifference to the interests of others and is more deserving of liability for punitive damages. Even in this last situation, one might distinguish two var-

Grady, supra note 74, at 1218-20 (giving examples where gross negligence is inadvertent, and suggesting that courts should not, and do not, impose punitive damages for gross negligence alone); William M. Landes & Richard A. Posner, An Economic Theory of Intentional Torts, 1 Int'l. Rev. L. & Econ. 127, 134 (1981); Sobelsohn, supra note 37, at 419-22 (suggesting a mathematical model).


78 Indeed, LeBel would classify the case as a battery on the similar ground that Ford "knew" that its omission to redesign would cause death and injury. LeBel, supra note 41, at 41.

79 See discussion infra part III.B ("Utilitarian Analysis").

80 See Richard A. Posner, Tort Law: Cases and Economic Analysis 225-26 (1982) (discussing the Ford Pinto case and Learned Hand's test). See also Schwartz, supra note 77, at 1033 (reviewing the evidence in the Ford Pinto case and concluding that the Pinto was somewhat less safe than comparable cars, but not a "firetrap").

81 I am hesitant on this point because Ford apparently borrowed "value of life" figures from the federal government, perhaps showing good faith and reasonable conduct. Posner, supra note 80, at 226; Schwartz, supra note 77, at 1033. Nevertheless, Ford's valuation may be legitimately criticized. Did Ford realize that, on any reasonable interpretation, the figures were much too low? For a negative answer, see Schwartz, supra note 77, at 1026.
iations. In the first, the driver tries to impress his passengers with his risky maneuvers and tries to avoid thinking about the risks to safety. In the second, the driver concentrates on driving safely, but he lacks the skill because of his inebriation. The first driver might plausibly be considered more callous than the second, and therefore more deserving of punitive damages.\(^{82}\)

D. Reckless Indifference

The concept of reckless indifference has become increasingly important in modern law. This section further explores the concept and its difference from other concepts of recklessness.

Suppose an actor is accused of causing harm with "reckless indifference" to that result. We can usefully identify at least three relatively distinct senses of reckless indifference, three different ways in which recklessness can be a mental state of desire.

First, the actor might be *equivocal*: he neither intends the harm nor intends to avoid it; he simply does not care whether he causes harm.\(^{83}\) This is perhaps the most literal explication of "indifference," and if the actor is indifferent to a serious harm, then such equipoise can be an extremely blameworthy state of mind. Consider a person who does not care whether his action causes death. Such callousness is a serious vice precisely because hardening oneself to the pain of others reflects greatly deficient social concern, not commendable neutrality or detachment.\(^{84}\)

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\(^{82}\) The California Supreme Court found legally sufficient a claim for punitive damages based on the allegation that the defendant drunk driver "acted with a conscious disregard" for plaintiff's safety. Taylor v. Superior Court, 598 P.2d 854 (Cal. 1979). The court seemed to interpret the standard as requiring only that the driver who becomes drunk be aware that he would have to drive while in that condition. Chief Justice Bird, concurring, would require more—that the driver was "consciously indifferent to the fact that others would probably be harmed by his actions." *Id.* at 860. She believed that her test was satisfied, however, because the defendant had repeatedly driven when intoxicated and was aware of the possible consequences. While both opinions in *Taylor* refer to awareness, disregard, and indifference, neither distinguishes between them nor clarifies the underlying standard.

\(^{83}\) The concept of "no desire" is slightly different. See infra note 268. One might have positive but equally strong opposing desires, with the result that one is equivocally or in equipoise. Yet one might have no desires or attitudes, either positive or negative, about the matter at all.

\(^{84}\) "Callousness" suggests hardening oneself to the pain of others. Ordinarily it is a term of denigration. "Indifference" can apply to supererogatory matters, as well as to social goods and evils. I can be indifferent about which restaurant we go to. I would not then be callous—unless I knew that you strongly opposed the choice, but I did not care. In ordinary language, "indifference" tends to refer to equipoise, and "callousness" to blameworthy lack of concern for another's interests. I use "reckless indifference," however, as a term of art for socially deficient mental states less serious than positive desire or purpose.
An actor will not often be in such a state of perfect equipoise, however, and restricting the culpable desire-state of reckless indifference to this conception would be unwise. A defendant who exhibits only a slight preference that the victim not die should hardly escape censure.

Under a second conception of reckless indifference, the actor might desire to create a risk of harm to another. Suppose he plays a variant of Russian Roulette in which he places the gun at another's head. He might not desire to kill (or to die), but he does desire to risk death—otherwise the game would lose its attraction. It is appropriate to describe the actor as showing reckless indifference to the other's death.

The third conception of reckless indifference is the most broad and the most vague. The actor might be "callous" about the result, or "callously indifferent" to it. I use these phrases in a somewhat specialized sense—the sense of caring much less about the result than the actor should. The actor might not care at all about avoiding harm; he might care a little, but for the wrong reasons; or he might simply care much less than he should. A bank robber who creates a significant risk of death to a bank teller might prefer not to kill her, out of the purely selfish motive of avoiding greater governmental efforts to find and punish him. That motive for care, however, hardly excuses him. And the fact that he was willing to risk the teller's death reveals that he cares much less about avoiding her death than he should.

In legal practice, "callousness" (the third conception) is by far the most important conception of "reckless indifference." But the concept needs much clarification. This Article only sketches its contours, leaving a more detailed portrait to another day. Still, it may help to review some discussions of the concept in legal doctrine.

85 See Myles Brand, Intending and Acting 138 (1984) (analyzing indifference as equipoise). For criticisms of interpreting reckless indifference as equipoise, see Glanville L. Williams, The Mental Element in Crime 92-95 (1965) (objecting to the Model Penal Code's "extreme indifference" formulation for murder, but falsely assuming that the formulation must refer to equipoise); William J. Winslade, Recklessness, 30 Analysis 135 (1970) (arguing that recklessness differs from "indifference," by which the author seems to mean equipoise).

86 "Caring less than one should" is not a single desire-state. Rather, it expresses what philosopher Holly Smith has called "a reprehensible configuration of desires and aversions." Holly M. Smith, Culpable Ignorance, 92 Phil. Rev. 543, 556 (1983). "Thus, a concern for one's own welfare is not bad in itself, nor bad even if very powerful, so long as it is counterbalanced by sufficiently strong aversions to harming others." Id.; see also Holly M. Smith, Varieties of Moral Worth and Moral Credit, 101 Ethics 279 (1991) (analyzing conceptual models of praiseworthiness and blameworthiness).

87 Although the concepts of "reckless indifference" and "callousness" have received relatively little attention from philosophers, some useful accounts include: R.A. Duff, Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law (1990); Ronald D. Milo, Immorality (1984); Alan R. White, Grounds of Liability: An Introduction to the Philosophy of Law 105-11 (1985); Michael J. Zimmerman, An Essay on Moral Responsibility 45-46, 61-62,
Consider the traditional category of "depraved heart" murder, which treats certain homicides as murder although the perpetrator does not intend to kill or know that death will result. The Model Penal Code recognizes such "extreme indifference" murder, but somewhat apologetically, for

90-91 (1988); Elizabeth Beardsley, Blaming, 8 PHILOSOPHA 573 (1979); James B. Brady, Recklessness, Negligence, Indifference and Awareness, 43 MOD. L. REV. 381 (1980); R.B. Brandt, A Motivational Theory of Excuses in Criminal Law, in NOMOS XXVII: CRIMINAL JUSTICE 172-76 (J. Roland Pennock & John W. Chapman eds., 1985); Winslade, supra note 85. In passing, Kant notes that using another as a means includes the case of being indifferent to others. Immanuel Kant, The Metaphysical Principles of Virtue, in KANT'S ETHICAL PHILOSOPHY 54 (J.W. Ellington trans., 1983). Milo's book contains a thoughtful typology of immorality, according to whether the agent's moral defect is lack of moral concern (most reprehensible), bad preferences (less reprehensible), or lack of self-control (least reprehensible), and also according to whether the agent believes she is doing wrong.


89 See MODEL PENAL CODE § 210.2(1)(a) (murder includes homicide "committed recklessly under circumstances manifesting extreme indifference to the value of human life"); see also id. § 211.1(2)(a) (aggravated assault; same requirement). For a listing of
the category is one of the very few examples in which the Code departs from the four standard culpability terms. Moreover, common law courts sometimes defined criminal negligence or criminal recklessness (which would suffice for manslaughter) in terms of the defendant’s “callous” or “wanton” behavior.\textsuperscript{91} By contrast, the Model Penal Code’s basic definition of recklessness is a remarkably sanitized version, emphasizing cognitive awareness of risk, with at best a glimmer of recognition of the indifference concept.\textsuperscript{92}

This concept of reckless indifference has also received legal recognition outside the United States. Recently, some British cases and commentators have emphasized the “indifference” sense of recklessness in criminal law.\textsuperscript{93} German and Soviet law recognize a similar concept, the doctrine of \textit{dolus eventualis}. According to George Fletcher, these jurisdictions includ[e] \textit{dolus eventualis} within the contours of intending a particular

state cases adopting a similar mens rea requirement for unintended murder, see Michaels, \textit{supra} note 88, at 792 n.32.

The category of “depraved heart” murder reveals that some desire-states are quite unusual—they are not directed at objects in the typical way. For example, the Model Penal Code’s murder category, “recklessness manifesting extreme indifference to the value of human life,” requires an evaluative judgment that looks at the actor’s desires and values in a “global” sense. It asks not only whether the actor desired to cause, or even was indifferent to causing, another person’s death, but also whether those attitudes, as well as the actor’s other motives and attitudes, manifested a devaluation of human life. By contrast, conventional modern element analysis provides a “local” assessment of desires and their immediate objects.

Because the “extreme indifference” test does not merely look at the defendant’s mental state concerning a particular element, the test permits consideration of other aspects of defendant’s situation and character. Indeed, even a positive desire to cause another’s death need not manifest such extreme indifference. Consider a mercy-killing in which, at the victim’s request, one administers a deadly poison in order to end the victim’s terrible suffering. The mercy killer has not necessarily shown indifference to the value of human life, although she desired to and deliberately did kill the victim.

I cannot further explore the global/local distinction here, except to note the following. There are significant costs to using a global definition of mental states. Such a definition might be unduly vague, lacking the clarity and greater predictability of much of elements analysis. Global definitions, however, have advantages, too. Unlike local assessments characteristic of element analysis, global assessments permit a more complete evaluation of the legal significance of an actor’s mental states, an evaluation that is not narrowly structured into a prima facie case and defenses.

\textsuperscript{90} \textsc{Model Penal Code} § 210.2 cmt. 4.


\textsuperscript{92} See discussion \textit{infra} notes 117-19 and accompanying text.

\textsuperscript{93} The leading British cases are R. v. Caldwell, 1 All E.R. 961 (1981), and R. v. Lawrence, 1 All E.R. 974 (1981). For further discussion, see White, \textit{supra} note 87, at 108 n.42 (citing numerous English cases in support of interpreting recklessness as indifference). For representative British commentary, see generally sources cited \textit{supra} note 87.
result. *Dolus eventualis* is defined as a particular subjective posture toward the result. The tests . . . vary; the possibilities include everything from being "indifferent" to the result, to "being reconciled" with the result as a possible cost of attaining one's goal.  

As examples, Fletcher considers a prisoner who blows up a wall to escape, believing it unlikely that anyone will be killed, but indifferent or "reconciled" to harming someone. He also discusses a rapist who puts his hand over the victim's mouth with indifference to her fate.

In a variety of ways, then, legal doctrine exhibits the concept of reckless indifference, a concept that is best understood as a culpable or otherwise legally significant state of desire. But the modern hierarchy of mental states largely ignores the concept.

E. *Why the Reigning Hierarchy (Almost) Works*

The reigning hierarchy often works fairly well in translating underlying normative approaches, such as blameworthiness or utilitarianism, into doctrinal requirements. But if the hierarchy is theoretically flawed, as I claim, how is this success possible? I posit two basic explanations. First, the reigning hierarchy often combines theoretically distinct mental states in a sensible way. Second, that hierarchy sometimes distorts or ignores problems that otherwise would directly undermine it.

Mental state requirements are, of course, always combined with some conduct requirement. Punishment or liability for beliefs or desires alone would be inconsistent with our views of state power and individual responsibility. Moreover, a legal standard often combines mental states from the distinct hierarchies of belief and desire. This sensible practice helps to explain why many mental state definitions that confuse or conflate several concepts nevertheless often work well.

Recklessness is a good example. In order to find an actor reckless, the law

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94 Fletcher, supra note 68, at 445-46; see also Mihajlo Acimovic, *Conceptions of Culpability in Contemporary American Law*, 26 La. L. Rev. 28, 48 (1965) (describing a Romanist law test according to which the perpetrator acted intentionally if he could have said to himself: "It may be either so or different, it may happen either so or differently; anyhow I shall act."). But cf. Paul T. Smith, *Recklessness in Dolus Eventualis*, 96 S. Afr. L.J. 81 (1979) (criticizing South African law to the extent that it interprets *dolus eventualis* as indifference rather than foresight).

Fletcher also notes that *dolus eventualis* is considered an aspect of intention, not of recklessness. Fletcher, supra note 68, at 446. Indeed, "recklessness (or 'conscious negligence' as it is called in German and Soviet law) requires an affirmative aversion to the harmful side-effect." Id. This concept of recklessness seems similar to the Model Penal Code's, which requires conscious awareness of a substantial risk.

95 Fletcher, supra note 68, at 446.

96 Id. at 447.

might appropriately require any combination of the following: that his conduct was unreasonable; or that his attitude was indifferent, uncaring, or callous; and that he was aware of a significant risk of harm. Perhaps the indifference requirement mainly reflects the actor’s blameworthiness, while the belief in risk requirement mainly reflects his dangerousness or amenability to deterrence. The combination of requirements helps express or achieve a combination of social goals.88

The second reason why the reigning hierarchy is often adequate is that in most cases, it provides an adequate surrogate for the belief/desire/conduct scale. Matters of defense and justification often shore up weaknesses that might otherwise sink the ship. There are a few cases, however, that the reigning hierarchy simply cannot explain, cases in which the hierarchy must be distorted or ignored.99

A first example is the grading of homicide. Under the Model Penal Code, a person commits murder if he kills another human being purposely or knowingly,100 or with “extreme indifference to the value of human life.”101 The latter category exemplifies recklessness in the desire sense under the proposed model.102 The defendant commits the lesser crime of manslaughter if he causes death “recklessly,” in the largely cognitive and conduct senses of the Model Penal Code.103 Negligent homicide is classified as a felony of an even lesser degree.104

The proposed model places purposeful and reckless (“extreme indifference”)killings into one category, but knowing killings into another, because the latter crime need not be as culpable or serious. Despite this theoretical

88 On the other hand, it is unwise to employ a single definition of a mental state term such as “recklessness,” even if the definition combines elements. Such a definition will not work in every context. For example, the “conduct” aspect of recklessness under the Model Penal Code and the Restatement (Second) of Torts is rarely relevant when the legal standard prohibits recklessness as to a circumstance. If an actor needs to be reckless regarding the risk that the goods he has received are stolen, usually it suffices that he was aware of a substantial risk that they were stolen (the belief-state). It is unlikely to be relevant whether the risk was “unjustifiable” and its disregard a “gross deviation” from what a law-abiding person would perceive.

For simplicity, the Model Penal Code uses a single definition for culpability, such as recklessness. But the conduct and justification aspects of the definition seem designed to apply to the result element of crimes—for example, involuntary manslaughter, which requires that one “recklessly” cause a death. Model Penal Code § 210.3(1).

99 The later sections on blameworthiness and utilitarianism discuss some of the examples more fully. See infra parts III.A-B.

100 Model Penal Code § 210.2(1)(a).
101 Id. § 210.2(1)(b).
102 Extreme indifference murder also requires that defendant be “reckless” in the largely cognitive and conduct senses of the Model Penal Code; that is, it requires “manslaughter recklessness” plus “extreme indifference.” See id.
103 Id. § 210.3.
104 Id. § 210.4.
difference, the Model Penal Code position, assimilating purposeful and knowing killings, often makes sense. If an actor kills with the belief that she will bring about that result, does she not deserve as severe a punishment as one who desires that result? Indeed, often she does. For example, someone plants a bomb in the President's motorcade, desiring to kill him but having no object to kill others, yet she knows that she almost certainly will cause additional deaths. Someone blows up the wall of a prison to help an inmate escape, knowing that she is very likely to kill a guard, but not desiring to kill him.

In these examples, however, the actor does not simply know that she will cause harm; she also shows "extreme indifference" to human life. Here, the belief-state is a surrogate for the desire-state. But if a defendant's knowledge were not a surrogate either for purpose or for extreme or reckless indifference, then murder liability would be improper.

Courts seem to agree that knowledge justifies liability for murder only when it expresses serious culpability. They must distort current criminal law doctrine, however, to reach this result. Reconsider the "statistical" killings discussed earlier. If a manufacturer produces a drug for a life-threatening ailment, and the drug will certainly kill 2% of the users, the use of the drug may well be justifiable. The same may be true of a doctor's use of a surgical technique that will certainly kill 2% of the patients. Although neither of these cases will be classified as prima facie murder, in theory, they should be. The defendant has caused a death, knowing or being "practically certain" that he will do so, in the statistical sense (assuming a sufficiently large population). His defense would have to be necessity, but is it fair

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105 Elizabeth Beardsley asserts, without qualification, that "knowing" and "reckless" defendants under the Model Penal Code are morally indifferent, and that the difference between them is not their degree of moral indifference but the evidence of indifference. Beardsley, supra note 87, at 578. I disagree. The equivalence is not so unqualified, and indifference can indeed be a question of degree.

106 See Model Penal Code § 2.02(2)(b)(ii). If "knowledge" in a criminal statute requires that the actor select or identify the individual victim whom he expects to harm, then "statistical certainty" does not amount to knowledge. But this interpretation is implausible in light of criminal law norms. Consider the analogous problem with intention. "Transferred intent" is a gratuitous doctrine because it should suffice that the defendant intended to kill any human being. See Simons, supra note 42, at 506; see also Joshua Dressler, Understanding Criminal Law 108 (1987); Moore, supra note 64, at 267-68. Similarly, we might conclude that a defendant "knowingly" kills so long as he knows that he will cause the death of any human being. According to this view, one who leaves a bomb in a public place and expects it to kill someone "knowingly" kills. But see Model Penal Code § 2.03(2)(a) (providing a causation requirement that might achieve this result, but might also imply a requirement of an individuated victim).

107 We can put consent to one side. It is not a general defense in criminal law, and it is certainly not a defense to homicide. See Model Penal Code § 2.11 cmt. 1; Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 5.11(a) (1986). In tort law, it is not always practicable to obtain consent of all persons exposed to a risk. At
that the defendant be required to fit within this traditionally narrow doctrine.\textsuperscript{108}

Thus, the "knowing" element of murder is indeed an error, albeit a largely harmless one. Almost all cases now treated as murder would continue to be so treated if murder required only the aggravated desire-states: either a purpose to kill or recklessness evidencing extreme indifference to human life. The few cases that might no longer be treated as murder indeed deserve reclassification.

A second example of how the existing hierarchy almost works is the tort of battery. As noted above, battery now encompasses knowing as well as intentional contacts and inflictions of harm. If belief and desire are separate concepts, how can tort law blur them without causing serious problems? The answer, I believe, is that most intentional torts consist of an individual encounter between a defendant and a plaintiff; in that context, characterizing as a battery every knowing (and harmful or offensive) contact with another's person causes few problems. When the plaintiff has not consented to such conduct, usually there is little social justification for it.\textsuperscript{109}

Once again, however, statistical or probabilistic harm causes problems. Consider "probabilistic" batteries, in which the defendant "knows" that his product or activity will cause harm in a statistical sense, although he could

\textsuperscript{108} Indeed, it is quite possible that he will not be able to fit within the doctrine's very narrow contours. See 2 PAUL ROBINSON, CRIMINAL LAW DEFENSES 124 (1984).

By contrast, creating a statistical risk of death less than "practical certainty" would not leave the actor in such a predicament. This case would be analyzed as reckless manslaughter or negligent homicide. The Model Penal Code defines "recklessness" to include a "conduct" requirement—that is, that the risk be "unjustifiable." Thus, the actor would not be found reckless in the first instance, and would not need to fit within a defense. But is there really a significant difference between the two cases in terms of criminal law goals? Furthermore, manslaughter would be as problematic as murder in this respect if the law considered only the cognitive sense of recklessness—i.e., if the law considered only whether the defendant was aware that he was creating a substantial risk.

This problem is not just a peculiarity of the unfamiliar notion of "statistical certainty." Analogous examples can be given where the harmful result is "practically" but not "statistically" certain. For example, suppose a doctor administered an experimental drug that had a 98% chance of accelerating otherwise certain death by a few days, but a 2% chance of saving a life. Here, it is not statistically "certain" that the death would be accelerated (though if there were hundreds of such cases, it would be close to "certain" that someone would die). It would be "practically certain," however, that in this particular case the doctor would accelerate death.

\textsuperscript{109} Accordingly, there is usually no unfairness in requiring a defendant who satisfies the prima facie case, but who wishes to escape liability, to fit within a narrow defense. The concept of consent is broadly defined to include reasonably apparent consent, thus further protecting the defendant. RESTATEMENT (SECOND) OF TORTS § 892 cmt. c. Note, too, that assault is ordinarily limited to apprehension that a reasonable person would find offensive. Id. § 27.
not identify the victim ex ante. There, although the legal concepts of battery still apply, they make much less sense. In individual encounters, one can rarely imagine a social benefit in allowing unconsented and knowing contacts, and the actor can usually avoid the contact without significant cost. By contrast, in the market context of a product or activity that surely will cause harm as an inevitable byproduct of its benefits, allowing the activity is more likely to create a net social benefit.

Courts are not likely to apply battery doctrine in these "probabilistic" cases, but no firm doctrinal basis exists for resisting the logical implication of the "knowing" battery concept. The existing hierarchy seems to work here only because it refuses to acknowledge a troubling exception.110

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110 A final "exception that proves the rule" is tort law's treatment of nuisance. Under the Restatement (Second) of Torts, nuisances are divided into several categories. If the invasion of another's property interest is "unintentional," then the defendant is liable if the invasion is negligent, reckless, or abnormally dangerous (and thereby subject to strict liability). RESTATEMENT (SECOND) OF TORTS § 822. If the invasion is "intentional"—that is, if the defendant purposely or knowingly invades another's interests—then the defendant is liable only if the invasion is "unreasonable." Id. § 825. But the Restatement gives a most peculiar interpretation of "unreasonable." The intentional invasion can be unreasonable either because it is, in effect, negligent ("the gravity of the harm outweighs the utility of the actor's conduct"), or because it is properly subject to strict liability. Id. § 826(b).

In short, if you invade another's property interests unintentionally, you are liable if you are negligent or subject to strict liability. If you invade them intentionally, you are liable if you are negligent or subject to strict liability. It is difficult to see what the "intentional" nature of the invasion adds to the analysis. See, e.g., PROSSER & KEETON, supra note 30, at 624-26 (illustrating the confusion that these provisions generate). For an unusually lucid discussion of the Restatement provisions, see JAMES A. HENDERSON JR. & RICHARD N. PEARSON, THE TORTS PROCESS 919-23 (3d ed. 1988). Although intention could have had significance, the drafters were sloppy, to say the least, in failing to distinguish clearly between intentional and unintentionality. See RESTATEMENT (SECOND) OF TORTS § 822 cmt. k (suggesting that the "reasonableness" and "strict liability" judgments for "unintentional" and "intentional" invasions are at least "analogous").

Why is "intention" given only minimal significance? Perhaps because knowledge legally suffices for "intention," while desire-states or conduct are more relevant than knowledge to whether a defendant should be liable for nuisance. That is, most invasions worth suing about are knowing invasions, for a defendant who continues polluting or otherwise invading another's property interest, after the other has complained, knows that he is intruding. See id. § 825 cmt. d. But the knowing or unknowing character of the invasive conduct says little about its reasonableness, blameworthiness, or amenability to strict liability. Once again, a belief-state is, at best, of secondary importance. By contrast, a malicious desire to injure another—"intending" harm the old-fashioned way—might be a per se nuisance. Id. § 829(a). Of course, the nature and effects of the defendant's conduct, apart from his mental states, are presently the most important determinants of his liability for a nuisance.

Bob Bone has suggested to me another possible explanation for the preservation of the intentional/non-intentional distinction. The Restatement drafters may have wished to
III. **MENTAL STATES IN NORMATIVE CONTEXT**

It is time to address a more practical issue: What difference does the new model make? This Part explores three different normative contexts. Suppose the point of a legal rule is to express moral blame or retribution. Does the new model express that normative approach better than the traditional hierarchy does? The same question can be asked about the two other normative approaches, utilitarian analysis and rights analysis. Each is addressed in turn.

A. **Retributive Analysis**

Mental state categories commonly are used to express the blameworthiness of an actor. In tort and criminal law especially, an actor with a "higher" mental state is often considered more culpable or blameworthy. But, until recently, the concepts of culpability and blameworthiness have received surprisingly little theoretical attention. In criminal law, recent analysis of the nature of retributive theories of punishment has begun to remedy this lacuna. Still, few scholars have carefully applied these theories specifically to mental state distinctions. This section, therefore, will describe generally accepted intuitions about the relationship between particular mental states and blameworthiness. Note, however, that the analysis will change depending on how the underlying retributive theory is resolved.

The traditional model has difficulty explaining many of the doctrinal distinctions and intuitive moral judgments underlying a retributive theory of

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111 Culpability may also be important in other areas of law. See, e.g., David M. Phillips, *The Commercial Culpability Scale*, 92 Yale L.J. 228 (1982) (concluding that commercial law mental state categories reflect both blameworthiness and deterrence of loss-producing behavior).


punishment. To show that the new model is far more successful, this section examines its application to results, circumstances, and conduct.

1. Results

Under the new model, a higher mental state within each category is \textit{(ceteris paribus)} more culpable than a lower one. Intending to kill is more culpable than being indifferent to killing, which in turn is more culpable than lacking intention or indifference—all other things being equal.\textsuperscript{114} Believing that your actions \textit{will} certainly cause a death is more culpable than believing that they \textit{might} cause a death, which is more culpable than lacking such a belief. Gross negligence is more culpable than simple negligence.

Under the new model, moreover, these hierarchies are independent. One who knows that his conduct will cause injury may be less culpable than one who has a lesser awareness, but who does not care in the least (i.e., one who shows reckless indifference). For example, compare a product manufacturer who makes a reasonable cost-benefit decision not to adopt a safety precaution with a manufacturer who pays no attention at all to safety. The first manufacturer might possess knowledge of the risks but lack culpability, while the second might be culpably uninterested in the risks, and for that reason lack awareness of them.

Desire-states such as intention and indifference usually express culpability much more directly than belief-states do. The doctrine of double effect is a classic expression of this point.\textsuperscript{115} Furthermore, when belief \textit{is} blameworthy, it is usually because the belief is strong evidence of some blameworthy desire-state.\textsuperscript{116} For example, the Model Penal Code definition of recklessness is largely based on the actor’s beliefs and conduct. An actor satisfies the definition if he is aware of, and disregards, a substantial and unjustifiable risk.\textsuperscript{117} Conscious awareness of a risk, however, followed by taking the risk, often \textit{evidences} a culpable desire-state: that is, an intention to harm, a desire for risk, or reckless indifference. To that extent, the Model Penal Code formulation \textit{in effect} expresses the desire-state version of recklessness.\textsuperscript{118} A

\textsuperscript{114} See, e.g., Duff, \textit{Intention, Mens Rea and the Law Commission Report}, supra note 87, at 156 ("[I]t is in and by intending a result that a man relates himself most closely to it as an agent: for he is not just prepared to bring it about as a by-product of something else, but directs his will towards it."); \textit{see also} discussion \textit{infra} app. Part B.3 ("Purpose, Belief, and the Doctrine of Double Effect").

\textsuperscript{115} See \textit{infra} app. part B.3 ("Purpose, Belief, and the Doctrine of Double Effect").

\textsuperscript{116} See, e.g., Beardsley, \textit{supra} note 87.

\textsuperscript{117} \textit{MODEL PENAL CODE} § 2.02(2)(c).

\textsuperscript{118} The language "conscious disregard" could be so read. \textit{See} Treiman, \textit{supra} note 20, at 369-70 ("What makes the reckless actor culpable is his conscious disregard of the risk . . . The Model Penal Code definition . . . emphasizes this further . . . by indicating that it is the disregard of the risk that constitutes the gross deviation from the standard of a reasonable person."). Treiman, however, does not equate conscious disregard with indifference or desire for risk.
driver who runs a red light, aware of a serious risk to a pedestrian, is often recklessly indifferent to that pedestrian’s fate. Indeed, sometimes an actor’s awareness of a likely harm is strong evidence that he intended to kill or endanger.\footnote{199}{The justification and strength of the inference from “he knew that his action would cause this effect” to “he acted in order to produce this effect” depends on whether he can offer any alternative explanation of why he acted thus, which does not make death or injury part of his aim.}

Belief that one will create a risk or cause a harm cannot be equated with a culpable desire-state, however. Our driver could be aware of the harm yet care very much, as in the case where the pedestrian he sees is a friend.\footnote{120}{Of course, gross negligence, or knowing creation of risk, might sometimes justify criminal liability even when defendant “cares” or is not “indifferent.”}

Similarly, a parent who does not care at all whether her child’s health is at risk and who neglects the child might, precisely because of that indifference, lack awareness of a health risk to the child.\footnote{121}{This seems to be the import of Lord Diplock’s celebrated (and condemned) comment that one can be reckless for failing to give any thought to a risk. R. v. Caldwell, 1 All E.R. 961, 966 (1981) (noting that reckless “includes not only deciding to ignore a risk of harmful consequences resulting from one’s acts that one has recognized as existing, but also failing to give any thought to whether or not there is any such risk”), discussed in White, supra note 87, at 106-09; Williams, The Unresolved Problem of Recklessness, supra note 87; see also Duff, Recklessness, supra note 87, at 291-92. Duff broadly asserts:}

Therefore, the belief requirement is usually unobjectionable.

Treating knowing actors as more culpable than actors who are reckless in the cognitive sense of the Model Penal Code often can be explained as follows. Compare Arthur, who believes that harm is certain or likely, and Boris, who believes it is only a very slight risk. Boris might well have acted differently had he believed the harm was more likely, while Arthur has shown by his actions that he would proceed despite the greater risk. Thus,\footnote{122}{I take the example from Lord Diplock in R. v. Sheppard, 3 All E.R. 899, 906 (1980), noted in White, supra note 87, at 108-09. For another helpful reference, see Duff, Caldwell and Lawrence: The Retreat from Subjectivism, supra note 87, at 82-84.}
Boris's willingness to risk a very slight harm might be less culpable than Arthur's willingness to risk a very likely harm.\textsuperscript{123}

For similar reasons, the “negligent” actor who lacks awareness of the risks of his conduct, but who reasonably should be aware of them, is often less blameworthy than the aware actor who acts wrongfully. If the ignorant actor had been aware, at least he might have acted to avoid the risk. Also, the defect in perception, skill, or character that explains his lack of awareness often makes him less culpable than the aware actor.\textsuperscript{124}

The negligently unaware actor is often more blameworthy than the reasonably unaware actor, however, because he has failed to comply with a reasonable standard of care in paying attention or in acquiring knowledge. That failure has disabled him from preventing a harm. One who is reasonably unaware of a risk often cannot realistically be expected to avoid it.

Applied to homicide, this analysis would improve upon the conventional hierarchy. The Model Penal Code distinguishes between the “knowing” homicide of murder and the “reckless” homicide of manslaughter. Under the Code, the only significant difference between the two is the degree or strength of the defendant’s belief. If he believes that death is “practically certain,” it is murder. If he believes that death is a “substantial risk,” it is manslaughter. But does this describe a consistent moral difference? If the attitudes and desires are the same, what difference should it make how likely the harm is? Sometimes, one will be just as indifferent to the result, or even just as desirous of it, whether one believes the result is certain, likely, or merely quite possible.

The knowing/reckless distinction might cruelly reflect a desire or culpability difference, however, and thus might serve as an adequate surrogate in practice. If one believes a bad result is certain yet fails to avoid it, that may be greater evidence of one’s indifference (or even one’s intention or desire to cause harm) than if one believes the result is only substantially likely. Moreover, in the particular context of homicide, the Model Penal Code version of “depraved heart” murder largely corrects any moral inconsistency.\textsuperscript{125} Mur-

\textsuperscript{123} See also Beardsley, supra note 87, at 577 (“It remains possible that R [who acted recklessly] hoped that the harm in question would not occur. Not so for K [who acted knowingly].”).

\textsuperscript{124} The intoxicated actor is the classic exception that proves the rationale for the rule. Self-induced intoxication that blots out awareness is considered just as culpable as awareness. See MODEL PENAL CODE § 2.08. Moreover, sometimes an intoxicated actor may be an exception to the other condition as well—we cannot easily assume that, had he been sober and therefore aware of the risks he was running, he would have acted to avoid them. One who gets drunk usually shows at least a general willingness to run risks.

\textsuperscript{125} Consider, for example, a variant of the game of Russian Roulette in which an actor agrees, at the victim’s request, to spin the cylinder of a gun once and to hand the gun to the victim, who takes the chance and shoots himself. The actor does not know that death will result—the chance is only one out of six. However, the actor's conduct manifests extreme recklessness—an indifference or insufficiently strong aversion to causing the other’s death, or an indifference to “the value of human life,” or even a desire to risk
der includes one who causes death recklessly, and not knowingly, but who also shows the culpable desire-state of "extreme indifference to the value of human life." The need for this corrective provision dramatically illustrates the deficiency of the conventional hierarchy.

Although the belief-states in current homicide law might reflect the desire-state hierarchy and thereby reflect a retributive purpose, they also might reflect the end of deterring dangerous actors. Indeed, belief-states may be especially well-suited to serve utilitarian norms, including deterrence. 126 For example, the Model Penal Code's reckless manslaughter definition might reflect the relative dangerousness of such an actor (i.e., less dangerous than a "knowing" killer, but more dangerous than a negligently unaware killer), as well as indirectly reflect the blameworthiness of those who choose to act in the face of the known risk. Indeed, the criminal law might not wish to rely on culpability alone, especially when it metes out the most severe punishments. Thus, as a prerequisite to murder liability, society might wish to require even a highly culpable actor to believe that he might cause death. 127

2. Circumstances

How do the existing and the proposed models deal with circumstances, as

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126 See infra part III.B ("Utilitarian Analysis").

127 The positive law, however, is unclear. Suppose Lopez shoots in the direction of her intended victim, but she knows that she is a very poor shot, and that the victim is even out of the range of a superb shot. Miraculously, she succeeds. Here, she desires to cause a death, but she does not believe either that death is "practically certain" to follow (knowledge), or even that death is a "substantial risk" (recklessness in the belief sense). Should her belief that she would not succeed preclude liability for manslaughter or murder?

When the actor's mental state is a "depraved heart" or "extreme indifference," American homicide law usually requires at least a reckless belief that death might result. See MODEL PENAL CODE § 210.2(1)(b); Michaels, supra note 88, at 789. When the required mental state is purpose, however, it is not clear whether the actor must believe that death will or might result. On its face, the Model Penal Code imposes no such requirement, for the actor need only have the desire or "conscious object" of causing the result. And LaFave and Scott describe this as one "traditional view" of the meaning of intent. LaFAVE & SCOTT, supra note 68, at 217; see also LAWS COMMISSION REPORT, supra note 14, at 183 (recommending to Parliament that a person acts "purposely" if "he wants [the element] to exist or occur"). Of course, it will be a rare case in which the actor has the desire to kill, successfully kills, but thinks he is likely to fail. (If he believes he is certain to fail, he lacks even "purpose," in the ordinary sense of that term.)

The doctrine of dolus eventualis in German and Soviet law, which is roughly analogous to the "extreme indifference" mental state, requires neither a significant probability of causing a harm, nor a subjective belief in such a probability. FLETCHER, supra note 68, at 448.
opposed to results? Here the proposed model continues to offer some advantages.

Consider another criminal law example: the crime of knowingly receiving stolen property. Under the new model, the culpable desire-states are of positive desire or indifference: one receives property hoping that it is stolen, or (roughly) not caring whether it is stolen. These attitudes might be more culpable, the model asserts, than believing that it is stolen (knowledge) or believing that there is a substantial risk that it is stolen (belief-recklessness).

Why might the desire-states be more culpable? If Jill hopes, and does not merely believe, that the goods are stolen, perhaps she hopes to be part of an ongoing stolen goods ring, or perhaps she simply finds immoral satisfaction in facilitating crime. In a second scenario, by contrast, if Jack merely believes the goods are stolen, but actually hopes that they are not, then he does not really want to facilitate crime. He simply wants to take advantage of a below-market price. Jill is arguably more blameworthy.

The traditional hierarchy often works adequately with respect to circumstances, even though it does not distinguish clearly between desire-states and belief-states. When a mental state pertains only to a circumstance, the conduct element might be as relevant to culpability as is the mental state. Although a desire for a circumstance may be marginally more culpable than a belief in the circumstance, the difference often pales in comparison with the significance of the conduct or of other mental state elements in the offense. "Receiving stolen property" is an example, for in the two different scenarios described above, the two defendants do not differ much in blameworthiness. By contrast, in result crimes such as homicide, the crime is defined entirely by the result and the accompanying mental state. Any type of conduct that brings about the result satisfies the actus reus. The mental state is virtually the sole determinant of the level of culpability.

Again, a culpable desire as to a circumstance might sensibly be combined with a belief-state or conduct requirement. If one receives goods hoping that they are stolen but certain that they are not, one might not be a fit subject for punishment. Absent a belief that they are stolen, one might not be sufficiently dangerous to merit punishment.

The reigning hierarchy expresses decreasing culpability along this spectrum: belief that an incriminating circumstance probably exists, reckless belief that it might exist, negligent unawareness of its existence, and strict liability. But a telling "exception" to this hierarchy tends to "prove" the new model. Under the "wilful blindness" doctrine, an actor is treated as having knowledge if he "has his suspicions aroused but then deliberately omits to make further inquiries, because he wishes to remain in ignorance."128 Suppose Fredsuspects that his friends are carrying illegal drugs

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128 GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 159 (2d ed. 1961); see also LaFAVE & SCOTT, supra note 68, at 219-20; ROLLIN PERKINS & RONALD BOYCE, CRIMINAL LAW 867-75 (3d ed. 1982); DRESSLER, supra note 106, at 106; Duff, Caldwell and Lawrence: The Retreat from Subjectivism, supra note 87, at 92-93; Ira Rob-
in his car, but decides not to make easy and obvious inquiries. In such circumstances, many courts would hold that Fred "knows" that drugs are present, because only culpable, wilful blindness prevents his actual knowledge.129 Under this doctrine, courts and commentators have debated about how strongly suspicious the actor must be, that is, how probable he must believe the incriminating fact to be.130 It is clear, however, that he must culpably avoid the truth. Shutting one's eyes and proceeding is considered to be just


The Model Penal Code provides that "knowledge" of a fact "is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." MODEL PENAL CODE § 202.7. This, however, is an awkward statement of the wilful blindness doctrine. First, by requiring subjective awareness of a high probability, it barely recognizes the doctrine, since there is often a thin distinction between believing something and believing that it is highly probable. Second, it liberalizes the doctrine by eliminating the usual requirement that the actor must have deliberately avoided knowledge in order to remain in ignorance. This change seems to confirm the Model Penal Code's discomfort with desire-states.

Finally, the "unless" clause is problematic. For example, how could one recognize the high probability that goods are stolen, yet believe that they are not? Examining this language, Michael Moore concludes that the Model Penal Code assumes inconsistent beliefs. MOORE, supra note 113, at 86. I doubt whether that was the drafters' intention. The comments suggest that the section mainly covers those who choose to remain in ignorance, not those who form a contrary belief. MODEL PENAL CODE § 248 (covering "the actor who is aware of the probable existence of a material fact but does not determine whether it exists or does not exist"). Hence, Moore may be incorrect in equating awareness of a high probability of the truth of P with P's actual belief. MOORE, supra note 113, at 440 n.118. The Model Penal Code's language is nevertheless amenable to Moore's interpretation.

LaFave and Scott suggest that this "unless" clause is designed to ensure that the defendant is not convicted under an objective test of knowledge. LAFAVE & SCOTT, supra note 68, at 219-20. But the clause is poorly drafted if this is the objective. For even without the clause, the defendant cannot be convicted under an "objective test," because he must actually be aware of a high probability of the existence of the fact.

129 See United States v. Jewell, 532 F.2d 697, 702 (9th Cir. 1976) (stating that "'knowingly' in criminal statutes is not limited to positive knowledge, but includes the state of mind of one who does not possess positive knowledge only because he consciously avoided it").

130 Consider then-Judge Kennedy's dissent in Jewell, which insisted on both elements:

[A] child given a gift-wrapped package by his mother while in Mexico may form a conscious purpose to take it home without learning what is inside; yet his state of mind is totally innocent unless he is aware of a high probability that the package contains a controlled substance.

Id. at 707.

In contrast, Perkins and Boyce argue that a much smaller possibility that the circumstance exists—50% or even less—will suffice if the actor also deliberately fails to discover the truth. PERKINS & BOYCE, supra note 128, at 871-75. But they also suggest that a defendant's conscious avoidance must be "for fear of learning that what he was thinking
as culpable as proceeding in the face of guilty knowledge. Notice that this rationale is consistent with the previous suggestion about why ignorance is often less culpable than awareness: the ignorant actor, if aware, might have acted to avoid the harm. In the case of the wilfully blind actor, that possibility seems more remote. Again, a desire-state plays an important role in expressing the actor's culpability.

3. Conduct

The judgment that a person is blameworthy almost always depends on his conduct, as well as his beliefs and desires. Mental states, by themselves, are only part of the story. The person who receives stolen goods, knowing that they are stolen, is blameworthy because of what he has chosen to do in light of his knowledge, not just because of his knowledge. How much does the retributive judgment depend on conduct? The answer varies for different legal prohibitions. At one extreme, where conduct matters very little, is the crime of conspiracy. At the other extreme, "strict liability" for certain kinds of defined behavior (such as possession of an illegal weapon) can express blameworthiness, even without explicit consideration of the actor's beliefs and desires.

Why not take the next logical step, and evaluate blameworthiness accord-
ing to conduct alone, ignoring mental states entirely? This behaviorist approach has its proponents, but I reject such a reduction. It really is relevant, if not always decisive, what a person believes or desires as well as what he does. Moreover, I reject the view that all “beliefs” and “desires” are unreal entities or perfectly translate into “conduct” descriptions.

B. Utilitarian Analysis

Utilitarian norms, including the law-and-economics variants now in vogue, offer an important potential justification for mental state distinctions. The following discussion concentrates on criminal law and on the mental state required as to a harmful result.

In many areas of law, utilitarian norms are a partial but not exclusive explanation for mental state distinctions. In criminal law, for example, a combination of deterrent and retributive policies best explains contemporary mental state distinctions. Indeed, it is not uncommon to find partially utilitarian justifications of legal standards of the following pattern—utilitarian in emphasizing the deterrent value of legal sanctions, but non-utilitarian in their justification of the content of what the law prohibits.

For example, although non-utilitarian reasons are a partial explanation for the bewildering variety of acts and results condemned by the criminal law, criminal law mental state distinctions might be partly designed to deter actors from bringing about results that have been antecedently condemned. One need not be a thoroughgoing utilitarian or adherent of law and economics to conclude that mental states sometimes serve a deterrent function effectively. The following, however, mainly examines utilitarian


\[138\] For a further discussion of this view, which is often but mistakenly attributed to Wittgenstein, see app. I.A (“Preliminary Matters: What Is a Mental State?”).


\[140\] The point should not, however, be overstated. The mental state distinctions within homicide, for example, reflect distinctions in the actor's culpability and associated social harm, as well as distinctions in amenability to deterrence. See infra text accompanying notes 164-65.

\[141\] Thus, in the analysis to follow, I do not mean to suggest that I find utilitarian or
rian explanations in isolation in order to determine their strengths and limitations.

The new model, with its largely distinct hierarchies of belief, desire, and conduct, helps to explain the value of utilitarian and economic analyses. The following discussion examines six significant conclusions of utilitarian and economic analyses:

(1) If an actor’s mental state reflects a greater likelihood of success in causing harm, a higher sanction is warranted in order to deter him;
(2) If an actor lacks a minimal awareness of the nature or likely results of his conduct, he cannot be deterred and should not be punished;
(3) If a mental state reflects a higher private benefit to the actor, a higher sanction is necessary to deter him;
(4) Some mental states, such as sadistic desires, reflect a private benefi
t that lacks social value;
(5) Criminalizing some mental states would create “steering clear” costs, inducing socially costly efforts to avoid liability; and
(6) Inflicting harm with an aggravated mental state sometimes thereby aggravates the harm to the victim.

The new model not only is consistent with these conclusions, but also explains them more persuasively than the traditional model does. Further, it suggests some useful utilitarian modifications of these propositions.142

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economic analysis the most promising explication or justification of criminal law. I agree with those critics who believe that responsibility, deserts, and guilt are essential concepts of criminal liability that cannot be reduced to economic analysis. See, e.g., Jules Coleman, Crime, Kickers, and Transaction Structures, in NOMOS XXVII: CRIMINAL LAW, supra note 87, at 313, 326; Stephen Schulhofer, Is There an Economic Theory of Crime?, in id. at 329, 335-36. Furthermore, the deterrent theory of criminal law has provoked familiar and powerful objections: it allows punishments disproportionate to an offender’s fault; it might even justify punishing the innocent; and it permits an offender to be “used” for the purpose of preventing others from committing crimes. See HART, supra note 64, at 76-82; Kent Greenawalt, Punishment, in 4 ENCYCLOPEDIA OF CRIME & JUSTICE, supra note 91, at 1336. Moreover, the deterrent theory might better explain why we have a system of punishment at all, than why current law has its particular set of excuses and mental state gradations. See HART, supra note 64, at 8-13. For the purposes of this essay, however, it is important to examine some ways in which a utilitarian theory might explain the criminal law’s mental state distinctions. I hope my model is general enough to support that explanation.

For a thoughtful account of how utilitarian theory might support criminal law ex ante rules of conduct, while retributive theory might support criminal law ex post principles of adjudication, see Paul Robinson, Rules of Conduct and Principles of Adjudication, 57 U. CHI. L. REV. 729 (1990).

142 Before discussing the six points, one more observation is in order. “Deterrence” is a familiar rationale for criminal and tort liability rules in general, and for some of their mental state distinctions in particular. In criminal law, see JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION chs. VII-XII (Wilt
The first three categories that follow largely concern effective deterrence
of behavior that is presumably worth deterring. The last three categories
concern whether, and to what extent, society should presume this.

1. The Mental State Reflects the Likelihood of Harm and Thus the
   Need for a Deterrent Sanction

At one end of the spectrum of mental states, the “higher” mental states
reflect the greater probability that the defendant will succeed in bringing
about a harm: The greater that probability, the more dangerous the defend-
ant, and the greater the need to deter him (and others with similar mischief
in mind). Thus, according to the most familiar utilitarian explanation of
mental state requirements in the law, as the likelihood of harm increases, so
too should the severity and certainty of punishment.\(^{143}\) This rationale helps
to explain why knowing and intentional killers are punished as murderers,
while those who are “reckless,” in the sense that they are aware only that
they are creating a substantial risk of death, are less dangerous and are pun-
ished only for manslaughter.\(^{144}\) This dangerousness/deterrence rationale,

\(^{143}\) I do not address here the debate over which mechanism of deterrence is more
effective—higher penalties or higher frequency of imposing penalties. Often I will speak
of “higher sanctions” as a shorthand for either mechanism.

\(^{144}\) See Posner, supra note 139, at 1222-23; Shavell, supra note 139, at 1248.
however, might not distinguish between intentional and knowing infliction of harms. In either case, the actor is highly dangerous and can readily prevent the expected harm.\textsuperscript{145} This section later examines whether other utilitarian rationales might explain the distinction.\textsuperscript{146}

Under the new model, the mental state most relevant to the deterrence question is belief—in particular, belief as to the probability of success. One who believes that he will succeed is more dangerous, \textit{ceteris paribus}, than one who only believes he might succeed, or one who believes he will not. But desire-states, too, can be relevant. An actor who not only believes he is likely to cause harm, but also desires or intends to cause harm, might be the most dangerous, for he has committed himself to a goal and does not simply expect to create a harm as a byproduct of some other goal.\textsuperscript{147} On the other hand, if the actor believes he is very unlikely to succeed, his desires are less indicative of his dangerousness. Still, his desire to create a socially disapproved consequence might be a significant indicator of future dangerousness, for he might be more likely to succeed on other, more propitious occasions.\textsuperscript{148} Thus desire, as a possible sign of future commitment to similar

\textsuperscript{145} Thus, R.A. Duff notes two different paradigms of knowledge and intention. The consequentialist view is that one has responsibility for bad effects if one could have controlled them. According to this view, it is not important to distinguish between knowledge and intention. The non-consequentialist view is that responsibility depends on the quality of will that our actions reveal. According to this view, intention bears more directly on responsibility than does knowledge. Duff, \textit{The Obscure Intentions}, supra note 87, at 780; see also Duff, supra note 14, at 99.

\textsuperscript{146} One common utilitarian rationale for treating intentional agents more harshly than agents who merely "knowingly" create harm is that many intentional actors plan ahead and are therefore more likely to escape any criminal sanction. See Posner, supra note 139, at 1221-23; Shavell, supra note 139, at 1248. Although this argument makes abstract sense, it is over-inclusive. Many intentional actors do not premeditate at all. An intent to kill or injure is often formed very quickly. Moreover, American jurisdictions have shown a recent movement away from imposing higher penalties for premeditated homicide. See \textsc{Model Penal Code} § 210.1 cmt. 2 (1980).

\textsuperscript{147} See Shavell, supra note 139, at 1248. Similarly, Landes and Posner believe that "[w]hen a person desires to inflict an injury, he is more likely to inflict it than when the injury occurs as a byproduct of other activity." Landes & Posner, supra note 76, at 129. This is a sensible judgment as long as the person desiring to injure is also willing to act on that desire, and as long as we keep constant the person's belief in success. A person who desires to inflict harm, but believes he is unlikely to succeed, might in fact be \textit{less} likely to succeed than a person who believes the harm is almost certain, albeit only as a byproduct of his activity. The authors, however, then unwisely collapse the distinction between belief and desire, asserting that, as a practical matter, if one does something that is very likely to cause harm, ordinarily he really intends it. \textit{Id}. In my view, intention and purpose are much narrower concepts than they suggest.

\textsuperscript{148} Not surprisingly, the Model Penal Code provision for lighter sentencing of those who commit "inherently unlikely" attempts has drawn utilitarian objections. \textsc{Model Penal Code} § 5.05(2) cmt. 3; Peter W. Low et al., \textsc{Criminal Law: Cases and Materials} 362 (2d ed. 1986).
ends, can reflect dangerousness to some extent, even when detached from a belief in success.\textsuperscript{149}

2. Threshold Mental State Requirements Reflect Minimal Amenability to Deterrence

At the other end of the spectrum of mental states, deterrence theory might disfavor strict liability and even negligence as bases of criminal liability. The argument runs that the defendant (and persons like her) might not be deter-rollable if she is unaware that she is creating a risk, unaware of a legally relevant circumstance, or unaware of any relevant legal prohibition.\textsuperscript{150} This argument, however, is overstated. Negligent defendants often can be encouraged to be more careful.\textsuperscript{151} Even "strictly liable" defendants often can be deterred if one is willing to impose a greater burden on the defendant to inquire about the circumstance or to avoid the harm.\textsuperscript{152} Also, if one broadens the time frame and examines the defendant's opportunity to do otherwise well before the time of the crime, many "strictly liable" defendants may be deterrollable.\textsuperscript{153} Moreover, punishing the undeterrable sometimes might deter others.\textsuperscript{154} Still, at some point, minimum standards of liability might indeed reflect an actor's minimum amenability to deterrence.\textsuperscript{155}

On this point, the new model adds little to the discussion. Minimal amenability to deterrence depends mainly on whether the actor had minimal knowledge, or could have had minimal knowledge, sufficient to avoid the criminal conduct. It also depends on whether the actor had the ability under the circumstances to act differently.\textsuperscript{156} At this threshold level, however, amenability to deterrence does not depend on the desires and intentions of the actor. The new model addresses the sometimes problematic relationship

\textsuperscript{149} Of course, even an actor who creates a social harm "knowingly" might do so as a byproduct of creating a greater social benefit. See Landes & Posner, supra note 76, at 129; Posner, supra note 139, at 1221. Thus, "dangerousness" alone—whether it expresses knowing or intentional behavior—is not determinative of net social disutility.

\textsuperscript{150} See 1 LAFAVE & SCOTT, supra note 107, § 1.5(4); Johannes Andenaes, Deterrence, in 2 ENCYCLOPEDIA OF CRIME & JUSTICE, supra note 91, at 591, 593-94.

\textsuperscript{151} See Model Penal Code § 2.02 cmt. 4, at 243; HART, supra note 64, at 132-35; HOLMES, supra note 142, at 53-55, 59.

\textsuperscript{152} See Kelman, supra note 136, at 1516. Such deterrence might come at a great social cost, however, since it might not be wise or fair to punish a defendant for noncompliance when compliance would be very costly.


\textsuperscript{154} See HART, supra note 64, at 132-35.

\textsuperscript{155} I cannot address here the complexities of this issue, which range from the justification for "ignorance of the law is no excuse" to the appropriate "voluntariness" requirements for all offenses, including those of strict liability.

\textsuperscript{156} Voluntary act requirements, the partial defense of provocation of "heat of passion," and perhaps the volitional test of the insanity defense inquire into this ability to act differently and can be partly justified by deterrent theory.
between belief-states and desire-states, but that relationship is not problematic here.

3. The Mental State Reflects a Private Benefit to the Wrongdoer and Thus the Need for a Higher Sanction

An actor who intends or desires to harm another sometimes obtains a private benefit, such as psychic satisfaction, that he does not obtain if he merely causes the harm without intending or desiring it. Compare a sadistic killer and a prisoner who escapes by blowing up a prison wall, thereby knowingly but reluctantly killing a guard. Given the greater private benefit, a greater sanction might be necessary to achieve the same level of deterrence.157 To the extent that criminals act instrumentally, their private incentives for acting obviously affect how easily they can be deterred.158

Desire-states are the mental states most likely to demonstrate a higher private benefit. A person who causes harm but merely believed that she would do so does not necessarily obtain private utility from causing the harm. The expected harm could be a mere undesired side-effect of the end she truly desires. Actors who act upon their desires and intentions, however, often thereby achieve private benefits, whether tangible or intangible. Shavell and Posner argue further that whenever an actor desires or intends a result, by definition the result increases the actor’s utility.159 Once again, the new model mirrors this utilitarian rationale better than the conventional hierarchy does.

Intermediate desire-states also might reflect increased private benefits, a

157 “A party will commit an act if, and only if, the expected sanction would be less than the expected private benefits.” Shavell, supra note 139, at 1235; see also Posner, supra note 139, at 1196-98 (discussing crimes of passion motivated by interdependent negative utility).

158 This is not to say that the private benefit should be considered a social benefit as well—a matter discussed infra text accompanying notes 160-65—but only that effective deterrence requires attention to such private incentives.

159 Shavell defines “desire” and “intent” as follows:

Let us say that a party “desires” a result if it would either directly or indirectly raise his utility. Let us also say that a party “intends” a result if he (a) desires the result and (b) acts in a way that he believes will raise the probability of the result. . . .

According to the definition, we would say that X intended that Y die if he desired Y’s death and shot at Y and killed him. If, however, X shot at Y but instead struck Z whose death he did not desire, we would not say that he intended that Z die. Also, we would not say that X intended that Y die if X played golf with Q, and Y happened to be killed in an automobile accident (since the round of golf did not increase the probability of Y’s death).

Shavell, supra note 139, at 1247 (footnote omitted).

Intentional action is the presupposition of much modern decision theory. “Many decision theorists assume that an ideally rational subject would fit the Bayesian model, in which an action type is selected on the basis of expected utility (desirability) and probability for success (beliefs about oneself and the environment).” Brand, supra note 85, at 130.
possibility that Shavell and Posner neglect. Consider an actor who intends or desires to risk harm to another—for example, by placing a gun to the other’s head in a game of Russian Roulette. Even if the actor does not desire to cause the harm, he may obtain some private benefit from the creation of the risk.

Finally, an intermediate desire-state might warrant a higher sanction even though it does not reflect an increased private benefit. Consider again the escaping convict who shows reckless indifference by willingly, though reluctantly, causing the death of a prison guard. Such an actor might not place positive value on the harm or risk, but he attaches less negative value than he should. Although he does not obtain a private benefit from the act, he has less aversion to the act than he should. As compared to the ordinary citizen, whose aversion to breaking the law or causing harm is strong, this actor merits a greater sanction, though perhaps not so great as the sanction for an actor who positively desires to create risk or harm.

4. Some Mental States Reflect a Private Benefit that Lacks Social Value

A controversial issue in the economic analysis of law is whether all private benefits can be considered social benefits for purposes of aggregating social utility. In criminal law, the question becomes whether the private benefits that an actor obtains from intentionally causing or risking a social harm should count as social benefits. Posner argues that they usually should, unless the actor (such as a sadist) actually derives her private benefits from the harm she causes to others, an exception Posner describes as “interdependent negative utilities.” Posner does not persuasively defend the exception within economic theory, however, and I doubt that it can be so defended. As Dorsey Ellis explains, only an independent, nonutilitarian normative theory can explain why these types of private benefits are either socially valueless or have negative social value.

\[160\] Landes and Posner, supra note 76, at 130, 139; Posner, supra note 139, at 1196-97. 
\[161\] See Posner, supra note 139, at 1197-1201. I think Posner’s position derives in part from his narrow view that utility must be measured by willing transactions in a consensual market. See Posner, supra note 76, at 11-15. His model will tautologically exclude the utility a party derives precisely from coercing another—i.e., from performing an act that the other is unwilling to permit. This exclusion, however, is difficult to defend on general utilitarian grounds.

\[162\] Dorsey D. Ellis, An Economic Theory of Intentional Torts: A Comment, 3 INT’L REV. L. & ECON. 45, 46-49 (1983). As Ellis notes, other economists are willing to exclude certain types of personal satisfaction from the utility calculation. Id. (citing Gordon Tullock, The Logic of the Law 243 (1971), and George J. Stigler, The Optimum Enforcement of Laws, 78 J. Pol. Econ. 526, 527 (1970), among others); see also Kenneth G. Dau-Schmidt, An Economic Analysis of the Criminal Law as a Preference-Shaping Policy, 1990 DUKE L.J. 1, 11-12 (discussing the relation of criminal benefits to social welfare function); Kleverick, supra note 139, at 293-94 (describing various writers’ views of the social loss function). To be sure, one might believe that an economic
Nevertheless, utilitarians might persist in their general approach, simply accepting a nonutilitarian exception in this small corner of the cost-benefit field. For example, as good utilitarians, they might conclude that murder is a more serious crime than negligent homicide, not because—or not only because—it involves an egregiously blameworthy attitude toward causing death, but because the psychic and emotional gains that murderers obtain or seek to obtain have a very great disutility. They would have to concede, however, that that last judgment of disutility is not conventionally utilitarian.

Shavell is more willing than Posner to accept that "intent to do harm may be associated with the absence of social benefits, for . . . society often appears reluctant to value private benefits that are based on the enjoyment of harm." But this concession only underscores a principal problem with his economic approach: can we really define a "social harm," or specify its magnitude, independently of the mental state associated with the harm? A definition of criminal conduct should exclude certain "illegitimate" psychic gains of injurers from the efficiency calculus while also believing that such gains must be considered in determining the most effective way to deter the conduct. See Ellis, supra, at 50; Shavell, supra note 139, at 1235.

I have been assuming, as law and economics scholars generally do, that utilitarian theory adopts a subjective theory of value. But it is possible to wed utilitarian theory to an objective theory of value. See DAVID O. BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS 211-90 (1989) (discussing objective utilitarianism). Dismissing certain private benefits as socially valueless is quite consistent with such "objective utilitarianism."

Shavell, supra note 139, at 1248.

A similar problem arises in Robert Cooter's perceptive essay, Prices and Sanctions, 84 COLUM. L. REV. 1523 (1984), when he discusses the relevance of mental states to his distinction between prices and sanctions. Cooter defines a sanction as "a detriment imposed for doing what is forbidden," while a price is "money extracted for doing what is permitted. . . . Officials should create prices to compel decision-makers to take into account the external costs of their acts, whereas officials should impose sanctions to deter people from doing what is wrong." Id. Under this model, mental states are properly relevant only in imposing sanctions, not in exacting a price:

Since the purpose of a sanction is to deter people from wrongdoing, the sanction will be adjusted to achieve this goal. Deterring actors whose fault is intentional, deliberate or repeated requires a more severe sanction than deterring actors whose fault is unintentional, spontaneous, or committed for the first time. Therefore, sanctions increase with certain mental qualities of the act indicating more resistance to deterrence.

The efficient price depends upon the extent of external harm, not the actor's state of mind. If contrary to fact, prices varied with the actor's state of mind—making the price higher if the act were done intentionally—then people would be deterred from doing the very acts that are permitted. Since a typical purpose of prices is to internalize costs, and since the external cost of an act is unrelated to the actor's state of mind, a price should not increase just because the activity is intentional, willful, or repeated.

Id. at 1537 (footnote omitted). This analysis seems to link aggravated mental states only
murder is a more blameworthy crime than a negligent homicide; it is not simply a killing that is more difficult to deter, therefore requiring a higher sanction.\footnote{Shavell does not deny the significance of non-deterrent purposes of criminal law. Shavell, supra note 139, at 1232 n.1, 1259. Instead, he argues that deterrence helps explain much of criminal law, including its mental state distinctions. This instrumental explanation is quite incomplete, for it understates the extent to which certain states of mind, especially desire-states, display the culpability or blameworthiness of the actor.}

This awkward exception to utilitarian analysis, where the actor maliciously intends harm for personal benefit, is an example of a desire-state. But, as just noted, a personal benefit also could arise from a lesser desire-state—here, a malicious desire to risk harm to another—while a belief that one will harm another does not, without more, translate into a personal benefit.

5. Criminalizing Some Mental States Would Create “Steering Clear” Costs

Some mental state categories create what Posner has termed “steering clear” costs, which undermine criminal law’s deterrent impact by inducing socially costly efforts to avoid liability. Posner argues that nonintentional conduct generally should not be criminalized,\footnote{Posner, supra note 139, at 1225-26.} for such conduct cannot be avoided with certainty, but only made less probable. Criminalization therefore might induce people to avoid “a very broad zone of perfectly lawful activity” in order to steer clear of punishment. But Posner is willing to criminalize nonintentional conduct that is also “reckless,” which he defines in effect as gross negligence—that is, as a gross disparity between costs of precaution and benefits of not taking a precaution. Here, the large disparity between avoidance costs and risks creates less danger than in other nonintentional cases of erroneously imposing liability and incurring “steering clear” costs.\footnote{\textit{Id.}}

Although Posner’s analysis makes sense as applied to the “gross negligence” sense of recklessness,\footnote{This analysis, however, is not a very good description of current criminal law doctrine. For example, it ignores the Model Penal Code’s critical distinction between recklessness (belief in risk plus gross negligence) and criminal negligence (essentially, gross negligence). See \textit{Model Penal Code} § 2.02(2)(c), (d).} it also should be extended to the desire sense of recklessness.\footnote{Posner considers this sense of recklessness only in passing. Posner, supra note 139, at 1226 n.58.} A person who shoots into a crowd and injures someone, not caring whether she injures anyone, does not pose significant “steering clear” costs, because the bad result is not a byproduct of any legitimate
activity. Such an actor has sometimes also “invested resources,” in Posner’s sense, if she has planned to create the risk, just as the intentional actor “invests” when he plans to bring about the harm itself.\footnote{Most intentional and reckless (indifferent) wrongs, however, do not involve significant planning and “investment,” as I noted earlier. See supra note 146.} Thus, in many cases where the actor is reckless in the “indifference” sense, his underlying conduct is not “perfectly lawful.” Avoiding the costs of that conduct is therefore socially valuable, not socially wasteful.

6. Inflicting Harm with an Aggravated Mental State Sometimes Aggravates the Harm to the Victim

A harm inflicted with a serious mental state sometimes inherently inflicts a greater harm to the victim. A victim of fraud often feels worse than a victim who has been negligently or non-negligently misled.\footnote{See Morals and Legislation, supra note 142, at 265-80 (discussing the consequences of mischievous acts); Principles of the Penal Code, supra note 142, at 17-19 (explaining that little alarm is created when there is no “ill-intent”). As Bentham notes, “it is by the apparent state of [mind] that the alarm is governed. It is governed by the real only in as far as the apparent happens, as in most cases it may be expected to do, to quadrature with the real.” Morals and Legislation, supra note 142, at 276; see also P.F. Strawson, Freedom and Resentment, in Freedom and Resentment and Other Essays 1, 4-6 (1974). But see Cooter, supra note 164 (asserting that “the external cost of an act is unrelated to the actor’s state of mind”).} Emotional or psychic harm based on outrage at the offender’s motive or mental state is quite real.

The actor’s desires are more likely to aggravate the victim’s harm than are the actor’s beliefs. First consider desire-states. A victim often suffers more when the actor intends physical harm than when the actor inflicts the same harm accidentally. An actor’s reckless indifference, too, might aggravate a victim’s injury, at least compared to a case where the actor attempts to avoid the harm. Thus, if a pedestrian is injured by a youth recklessly drag racing, and “not giving a damn,” she will often feel more aggrieved than if she were injured by a terribly unskillful driver who clearly had tried to avoid the injury.

By contrast, the victim of a knowing injurer will usually not, for that reason alone, feel additional grief. Of course, the knowing injurer often either intends or is indifferent to harm. Someone who fires a gun into a crowd outrages as well as harms the victims because she shows how little she cares about their interests. But knowledge is not always correlated with desire or indifference. A dental patient does not feel outraged at the dentist who

\footnote{See Landes & Posner, supra note 76, at 130. Posner does note that “steering clear” costs sometimes do not exist, for example, in statutory rape or felony murder. Posner, supra note 139, at 1222. But he does not connect this point explicitly to his analysis of recklessness.}
knowingly inflicts necessary pain. Losers in the legislative process do not usually feel outraged or specially stigmatized if their interests are knowingly harmed as a necessary byproduct of the legislature's pursuit of some other, more general interest. They do feel stigmatized, however, if the legislature desires and intends to harm their interests.

Nevertheless, it is true that many people feel a surprising degree of outrage at knowing inflictions of harm, even when the actor does not desire the harm. Every year when I teach the calculus of interests in my torts class, many students are initially outraged by the fact that businesses deliberately weigh life and limb against the cost of preventing such injuries. Although some of their outrage is aimed at improper outcomes from such weighings, or at suspected indifference to safety, this does not fully explain the reaction. Perhaps their reaction derives from a feeling that people have been used as a means, or from their sense of the limits of utilitarian analysis. In the famous Trolley Problem, for example, if the trolley driver deliberately turns the trolley and causes the death of one person in order to save five, will the family of the one victim not feel a little worse than if the diversion had been accidental? Still, the family's extra emotional hurt follows mainly from the trolley driver's singling out or using the victim, not from the driver's knowledge that he will harm the victim. In any case, I believe that outrage directed solely at knowing inflictions of harm should dissipate upon reflection.

Finally, increases in the unreasonableness of an actor's conduct might increase the victim's resentment. A victim might feel worse after being injured by a grossly unskilled driver than by one who made a more common negligent mistake. But some of this difference might actually reflect a desire-state difference—the victim's perception that the grossly negligent driver cared less.

The relevance of mental states to the victim's harm should not be overstated. When the basic harm is very serious, it is doubtful that the additional insult significantly alters the utilitarian calculus. When there is very little

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This is the problem: You are driving a trolley and its brakes fail. You will run down five men unless you turn the trolley onto a spur. But if you turn the trolley, you will kill one man.

Notice that if you turn the trolley and cause the death of the one, you will commit a knowing, not an intentional, killing. You do not "need" the actual death of the single workman to serve your purposes; you merely foresee his death as certain.

175 If the chance of killing the five and the chance of killing the one were in each case one out of ten, I think the single victim or his family would feel less outraged. There would also be little outrage, I think, if the knowledge were more certain, but only statistical or random—i.e., if the victim could not be identified. Instead of a trolley, posit a mysterious device that will kill five people, randomly chosen; if you press a button, the device will kill one person, randomly chosen.
harm, however, as in minor physical assaults, or when there is no harm, as in criminal attempts, this factor can assume importance.

Remember also that a victim is sometimes resentful because she justifiably perceives that the offender has acted immorally or wrongly. This ostensibly utilitarian measurement of harm is then simply a backhanded way of expressing the blameworthiness of the offender's conduct. But we cannot always equate emotional harm with justified moral outrage. A victim may feel outraged even when the actor acts morally or rightly (consider an actor's reasonable mistake in self-defense that the victim does not realize is reasonable).\textsuperscript{176} On the other hand, a victim might not feel outraged even when the actor acts immorally. To be sure, utilitarians—especially rule-utilitarians—might consider "unjustified" or "wrongful" harm to have greater disutility. But this argument is often disingenuous. We should not pretend to be utilitarians if our real justification for devaluing certain mental states, or the harm that they cause, is based on nonconsequentialist morality.

Let me summarize and refocus some of the above arguments. Utilitarian and economic theories instruct us to examine the full context of the actor's creation of harm. Which mental states are most relevant, then, to the overall utility of the actor's conduct? Intentionally creating harm and intentionally creating risk are rarely justifiable, at least if one excludes the private, parasitic benefit of the actor.\textsuperscript{177} Knowingly creating harm and knowingly ("recklessly") creating a risk are often justifiable if the harm and the risk are byproducts of legitimate, productive activity. If they are not justified, however, they merit a relatively high sanction, because the actor might perceive that success is likely.

Reckless indifference might be translated into a socially inadequate valuation of the social costs of one's activities. But this utilitarian translation does not distinguish the attitude of indifference from negligent, or perhaps grossly negligent, conduct. A more discriminating utilitarian explanation of reckless indifference is possible: many cases of reckless indifference involve risks created as byproducts of impermissible activities (e.g., escaping from prison or joyriding). Regulating such risks does not endanger socially valuable

\textsuperscript{176} A related issue is whether the "stigma" felt by an excluded group is relevant to an equal protection violation. The general answer, I think, is yes, but only if the victims' resentment was justified, that is, only if the government had actually wronged them. See sources cited in Kenneth W. Simons, \textit{Equality as a Comparative Right}, 65 B.U. L. Rev. 387, 482 n.235 (1985). On the other hand, government might properly shoulder some responsibility for alleviating victims' feelings of mistreatment, even if those feelings are factually unjustified.

\textsuperscript{177} Ordinarily, if a social harm is justifiable, then it will not be desired as a means or an end, but instead will be the inevitable concomitant, or a further consequence, of a legitimate activity. Counterexamples exist, however. For example, in a medical experiment, it might be necessary and justifiable to cause a person a small amount of pain intentionally in order to discover something useful.
activities. As Posner might put it, there are no "steering clear" costs if the prohibited activity is socially valueless. Insofar as recklessness suggests insufficient aversion to harm, it might require a higher sanction.

Finally, under a utilitarian or economic approach, mental states might in general be less important than the actual social effects of the defendant's activity—less important, at least, in valuing the net social value of that activity taken alone. Mental states are likely to be relatively more important in determining the defendant's amenability to deterrence.

C. Rights Analysis: The Example of Intentional Discrimination

Mental states often are critical determinants of the scope and meaning of legal rights. The new model sheds more light than the reigning hierarchy on at least one vexing problem in contemporary constitutional law—the problem of intentional discrimination.

My discussion of rights analysis after blameworthiness and utilitarian approaches should not suggest that rights analysis is necessarily an entirely independent mode of analysis. Rights analysis might express utilitarian or retributive views, at least in part. More specifically, in constitutional rights discourse, blameworthiness and utilitarian arguments are sometimes relevant, though the precise analysis draws on the distinctive constitutional doctrine at issue, as well as on constitutional theory generally. Moreover,

178 For example, insofar as tort law gives plaintiffs a claim for compensation, we might view the claim either as a personal right against the defendant derived from corrective justice, or instead simply as an effective patrolling device to ensure that defendants' behavior maximizes social utility. See Posner, supra note 76, at 176-77. Many utilitarians, especially rule-utilitarians, would recognize rights. See, e.g., Brink, supra note 162, at 268-70; R.M. Hare, Moral Thinking: Its Levels, Methods and Point 151-56 (1981) (discussing linkage of obligations and rights, and the importance of rights); J.S. Mill, Utilitarianism 315-21 (Mary Warnock ed., Meridian Books, New American Library 1962); Jeremy Waldron, Introduction to Theories of Rights 17-18 (Jeremy Waldron ed., 1984). See generally Utility and Rights (R.G. Frey ed., 1984).

179 When the government is alleged to violate a constitutional right, an institutional actor is often responsible. One then faces the difficulties of analyzing the "mental state" of a group of legislators or administrators. For descriptions of the difficulties in ascertaining the mental states of legislatures, see Lawrence A. Alexander, Introduction: Motivation and Constitutionality, 15 San Diego L. Rev. 925, 938 (1978) (describing the process through which legislation must pass and the problems of attributing intent to individual actors during that process); Ronald Dworkin, The Forum of Principle, 56 N.Y.U. L. Rev. 469, 476 (1981) (describing the difficulty in attributing any mental state to constitutional delegates in voting for the broader clauses of the Constitution, such as the Equal Protection Clause). To simplify matters, I will assume that an individual government actor has made the decision at issue.

The Supreme Court itself sometimes analyzes group legislative decisions as if only a single actor had participated in the process. This method of analysis has well-recognized problems. See Edwards v. Aguillard, 482 U.S. 578, 610-40 (1987) (Scalia, J., dissenting) (describing the difficulties of ascribing purpose to the Louisiana legislature in the context
The constitutional mental state requirement is sometimes based on an approach other than blameworthiness or utilitarianism, such as fairness.\textsuperscript{180}

The following section focuses on the equal protection issue of intentional

of reviewing legislation mandating the teaching of creation science; Robert W. Bennett, \textit{Reflections on the Role of Motivation under the Equal Protection Clause}, 79 NW. U. L. REV. 1009, 1027-29 (1984) (stating that normative judgments about how groups ought to behavior unavoidably begin to affect the motivation determination, especially as one focuses on increasingly larger groups); Dworkin, \textit{supra}, at 498 (arguing that any justification for any particular view of the Framers' intent must be grounded not in history, but in political theory); Seth F. Kreimer, \textit{Allocational Sanctions: The Problem of Negative Rights in a Positive State}, 132 U. PA. L. REV. 1293, 1337 (1984) (claiming that, by inferring illicit purpose from government actions, a court must decide what is an ideal legislature, absent any illicit purpose, would do in similar circumstances, thereby injecting the court's values into the analysis); Seth F. Kreimer, \textit{Note, Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction}, 86 YALE L.J. 317, 322-27 (1976) (noting the theoretical and practical difficulties of securing evidence of a group's motivation).

Defenders of motive review include: \textit{John Hart Ely, Democracy and Distrust} 136-45 (1980); Paul Brest, Palmer \textit{v.} Thompson: \textit{An Approach to the Problem of Unconstitutional Legislative Motive}, 1971 SUP. CT. REV. 95, 98 (criticizing the Supreme Court for not reviewing the City of Jackson's motivation in closing city swimming pools, rather than desegregating them, as mandated by court order); Donald H. Regan, \textit{The Supreme Court and Protectionism: Making Sense of the Dormant Commerce Clause}, 84 Mich. L. REV. 1091, 1143-60 (1986) (praising the use of motive analysis in the review of dormant Commerce Clause cases). A full theory of mental states of institutions and groups falls beyond the scope of this Article.

\textsuperscript{180} Consider a recent Supreme Court discussion of the due process requirement of minimum contacts for personal jurisdiction. In Asahi Metal Industries \textit{v.} Superior Court, 480 U.S. 102 (1987), a plurality asks whether the defendant has "purposefully availed" himself of the judicial forum, in a rather strict sense of "purpose": the defendant must have "an intent or purpose to serve the market in the forum State." \textit{Id.} at 112 (plurality opinion of Justice O'Connor, joined by Justices Rehnquist, Powell, and Scalia). The defendant's mere expectation that the stream of commerce will sweep the product into the state is insufficient, according to the plurality.

This distinction is probably not best explained in terms of blameworthiness or utilitarian norms. It can, however, be explained in terms of fairness. One who seeks to and does obtain benefits from his commercial activity in a particular jurisdiction can be fairly asked to accept the burden of being amenable to suit there. What "fairness" demands in this context is certainly controversial—indeed, four other Justices believe that a defendant's knowledge that the stream of commerce will carry the product to a jurisdiction suffices. \textit{Id.} at 116-17 (Justice Brennan, with whom Justices Marshall and Blackmun join, concurring in part and in the judgment); \textit{see also id.} at 122 (Justice Stevens, with whom Justices White and Blackmun join, concurring in part and in the judgment) (doubting that an "unwaverin line" can be drawn between knowledge and purpose).

The new hierarchy helps explain such a fairness rationale. Desire-states seem most critical. For example, even the Justices who accept "knowledge" as sufficient would probably not confer jurisdiction on a manufacturer that "knew" that its product had been distributed in a market despite its efforts to keep the product out of the market. This
discrimination. Under the Equal Protection Clause, a court will subject legislation that discriminates against suspect groups, such as blacks, to strict scrutiny only if the discrimination is purposeful or intentional. Similarly, the court will subject legislation that discriminates against women to heightened or intermediate scrutiny only if the discrimination is intentional. In Personnel Administrator v. Feeney, the Court explained: "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Perhaps the most important reason for the Court's adoption of this test was its fear of what it viewed as the alternative—an "effects" test that would have pre-

suggests that some degree of desire to exploit the market—either a positive desire, or a willingness to accept the benefits—is critical to the fairness argument.

Mental state analysis is relevant to many constitutional doctrines other than intentional discrimination. Examples of problems interpreting "intent" include: selective prosecutions challenged under the First Amendment, Wayte v. United States, 470 U.S. 598, 610 (1985) (holding that the government's policy of prosecuting only those individuals who informed the government of their actions was not selective prosecution because plaintiff failed to prove the government's intent in undertaking such action was to curtail free speech rights); and "intention" to penalize exercise of a constitutional right, Maher v. Roe, 432 U.S. 444, 474 n.8 (1977) (rejecting the contention that refusal to fund abortions through Medicaid evidenced intent to deprive a woman of her constitutional right to an abortion); Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (holding that a statute that withheld welfare benefits from recent migrants to the defendant state violated the Constitution if the statute's purpose was to prohibit interstate travel).

Examples of problems interpreting "recklessness" or "indifference" include determining the meaning of: "cruel and unusual punishment" under the Eighth Amendment, Wilson v. Seiter, 111 S. Ct. 2321, 2326 (1991) (discussing the meaning of "deliberate indifference" to the needs of prisoners); "recklessness" as the minimum mental state required for a "deprivation" of due process, Daniels v. Williams, 474 U.S. 327, 332 (1986) (holding that more than mere negligence is required for a due process deprivation to occur); Davidson v. Cannon, 474 U.S. 344, 348 (1986) (stating that a due process violation does not occur simply because prison employees do not act with due care); and "reckless disregard for truth or falsity" as a minimum requirement for liability for defamatory public officials and figures, Harte-Hankes Communications v. Connaughton, 491 U.S. 657, 666-68 (1989); New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).


A similar rule applies to selective prosecutions challenged under the First Amendment. A policymaker is permitted to adopt a passive enforcement policy with respect to draft registration that he knows will result in disproportionate prosecution of vocal nonregistrants, but that policy is impermissible if adopted because of its impact on those protesters. Wayte, 470 U.S. at 607-10.

442 U.S. 256, 279 (1979) (citation and footnote omitted).
sumptively invalidated any government action having a disproportionate impact on a suspect group or on women.\textsuperscript{184}

Many have argued that an intention requirement unduly limits the concept of discrimination.\textsuperscript{185} Some criticize the test for focusing more on the mental state of the government actor or actors than on the effects of their actions.\textsuperscript{186} Suppose, however, one were to retain the current emphasis on mental states, but rethink which mental state triggers heightened scrutiny. What are the possibilities?

One could require strict scrutiny whenever the government actor knows that her actions will disproportionately disadvantage a suspect group. But that test would not be much narrower than a disproportionate effects test. Often the government will know that a policy will have such an effect; indeed, in this context, it is doubtful that knowledge is constitutionally more significant than negligent ignorance of such effects. Of course, many legitimate government decisions have a known disproportionate impact.\textsuperscript{187} Note that the Supreme Court in \textit{Feeney} specifically rejected the claim that awareness of consequences is sufficient "intent" to trigger higher scrutiny.\textsuperscript{188}

\begin{footnotesize}
\textsuperscript{184} See Bennett, supra note 179, at 1009-11 (outlining some of the difficulties a simple "effects" test might generate); Gayle Binion, \textit{Intent and Equal Protection: A Reconsideration}, 1983 \textit{SUP. CT. REV.} 397, 404-08 (expressing concern over alternatives to motivation analysis); Paul Brest, \textit{Reflections on Motive Review}, 15 \textit{SAN DIEGO L. REV.} 1141, 1144 (1978) (defending motive review on the ground that it permits the judiciary to avoid a more general cost-benefit analysis of legislation).

\textsuperscript{185} See, e.g., KENNETH L. KARST, \textit{BELONGING TO AMERICA} 151-59 (1989) (arguing that a discriminatory motive test is inappropriate because it places the burden of proof on the wrong side of the argument and because one can seldom trace the origin of discriminatory intent to a single piece of legislation); Bennett, supra note 179; Binion, supra note 184 (criticizing the Court's use of intent in constitutional cases); Alan David Freeman, \textit{Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine}, 62 \textit{MINN. L. REV.} 1049 (1978) (claiming that one problem with a discriminatory intent requirement is that racially-inflicted harm cannot be traced to a single perpetrator); David A. Strauss, \textit{Discriminatory Intent and the Taming of Brown}, 56 \textit{U. CHI. L. REV.} 935 (1989) (asserting that subordination, stigma, and second-class citizenship should be used as tools for analyzing alleged discrimination).

\textsuperscript{186} See, e.g., Binion, supra note 184, at 421-23; Freeman, supra note 185, at 1052-57 (criticizing the belief that an equal protection violation can be traced to a single perpetrator—i.e., the "perpetrator perspective" doctrine).

\textsuperscript{187} Therefore, "knowledge" is less probative of intent or of reckless indifference in this context than in the criminal and tort contexts where individuals inflict physical harm.

\textsuperscript{188} But see Pamela S. Karlan, \textit{Note, Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent}, 93 \textit{YALE L.J.} 111, 124-26 (1983). Karlan argues that "morally culpable intent" exists in a discrimination case whenever a plaintiff proves that the defendant acted knowingly, recklessly, or negligently. Karlan, however, fails to acknowledge that much legislation affects minorities disproportionately. Often minorities are disproportionately poor and city-dwellers, meaning that any legislative restrictions on assistance to the poor or to urban programs would disproportionately affect them. As a result, if the legislature enacts statutes knowing that they would disproportionately affect
The new model suggests that because the requisite equal protection mental state of purpose is a desire-state, another desire-state is the most likely candidate for expanding the standard of liability. Again, reckless indifference rears its handsome head. One might expand liability by asking not simply whether the government official intended to harm blacks or women, but also whether he was indifferent to the harm they would suffer.

Consider Paul Brest's suggestion that the racial antidiscrimination principle includes "the phenomenon of racially selective sympathy and indifference, which means the unconscious failure to extend to a minority group the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one's own group."\textsuperscript{189} Prior to \textit{Washington v. Davis},\textsuperscript{190} many lower federal courts had concluded that a similar, more expansive type of improper attitude toward the interests of blacks subjected government policies to higher scrutiny. In \textit{Hobson v. Hansen}, the District Court for the District of Columbia proclaimed in a much-quoted passage that "the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."\textsuperscript{191}

minorities, Karlan's proposed test would presumptively invalidate the statutes, even though they may assist urban residents or those in need of aid. Although Karlan would allow the government to justify its actions under a "balancing" test, the contours of this test are vague. See \textit{id.} at 129-31.

Bennett notes that a conscious motivation test fails to impose on government any duty to discover information about the negative consequences of its actions. Bennett, \textit{supra} note 179, at 1024-25. This is a valid criticism. One solution would be an indifference test. Under such a test, we might conclude that a government that cared as much about the interests of blacks as the interest of whites would often inquire into these negative effects. But I also believe that government actors often are aware of the racial impact of their actions.

\textsuperscript{189} Paul Brest, \textit{Foreward: In Defense of the Antidiscrimination Principle}, 90 Harv. L. Rev. 1, 7-8 (1976); see also id. at 14-15 (providing examples of racially selective indifference). Brest refers to selective indifference as an "unconscious" attitude, but I believe he only means that the indifference need not rise to the level of overt racial hostility to trigger constitutional protections. See infra note 194.

Bennett notes that "there are many cases where disadvantage may be imposed in ignorance of what is at stake for others, while decent respect for those others' interests, if known, would have called the action into question." Bennett, \textit{supra} note 179, at 1016. "Failure to empathize can result from ignorance of interests or indifference to them, as well as from conscious antipathy." \textit{Id.} at 1019. Bennett does not, however, endorse a mental state requirement broader than conscious intent.

Larry Simon recognizes that due to self-deception, an actor may not consciously seek a racist goal, yet an outsider might be able to see that race influenced the actor's decision. Larry G. Simon, \textit{Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination}, 15 San Diego L. Rev. 1041, 1061-62 (1978).

\textsuperscript{190} 426 U.S. 229 (1976).

The majority of the Court has never accepted reckless indifference as a culpable mental state sufficient to trigger strict scrutiny. Part of the reluctance may stem from the influence of the conventional hierarchy. If knowledge cannot trigger strict scrutiny, as the Court squarely held in Feeney, how could recklessness suffice? After all, recklessness falls below knowledge on the conventional hierarchy.

If the Court adopted a reckless indifference interpretation, it could inquire whether the government does not care at all about the interests of blacks and women, or whether it cares much less about their interests than it cares about the interests of whites and men. Some recent proposals that the Court recognize “unconscious” discrimination might, in effect, endorse this interpretation. The presence of such indifference could be ascertained through the use of a hypothetical test—for example, “whether the same deci-

175 (D.C. Cir. 1969) (en banc); see also Hawkins v. Town of Shaw, 461 F.2d 1171, 1173 (5th Cir. 1972) (quoting from Hobson); Norwalk CORE v. Norwalk Redeve. Auth., 395 F.2d 920, 931 (2d Cir. 1968). In these cases, “neglect” seems to refer to a culpable lack of concern, not merely to negligent ignorance, though the courts are not entirely clear. This lack of clarity might be one reason why the Supreme Court opted for a narrower “purpose” test in Washington v. Davis, 426 U.S. 229, 238-44 (1975).

The Court acknowledged that “indifference” can be a form of discrimination in Alexander v. Choate, 469 U.S. 287 (1985). Reviewing a claim under the Rehabilitation Act of 1973, the Court noted that Congress perceived discrimination against the handicapped “to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.” Id. at 295. The Court’s own formal test of discrimination, however, did not rely on a mental state of indifference or culpable neglect. Instead, the Court assumed, without deciding, that disparate impact was cognizable, but held that disparate impact did not exist because the handicapped did receive “meaningful” and “equal” access to the government benefits at issue. Id. at 309.


193 The “relative indifference” or “relative concern” interpretation also underlies Eric Schnapper’s thoughtful argument that courts should not simply prohibit discriminatory “ends,” but should also require the least discriminatory “means.” Eric Schnapper, Two Categories of Discriminatory Intent, 17 HARV. C.R.-C.L. L. REV. 31, 32 (1982). “In many cases, these racial decisions will be based not on an affirmative desire to harm blacks, but on a greater willingness to see a given burden borne by blacks than by whites . . . .” Id. at 40. For a theoretical account of the comparative interpretation of equality, see Simons, supra note 176.

194 See Schnapper, supra note 193, at 40 n.39 (explaining how a broader concept of intent might perform effectively the same role as the concept of “unconscious” racism). Charles Lawrence’s suggestion that courts examine unconscious racism might be unnecessary if intent were more broadly construed. See Charles R. Lawrence III, The Id. the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987). Lawrence claims that unconscious racism is a necessary concept because decisions about racial matters are often neither self-consciously racist nor random. Id. at 322. Further, he claims that a governmental decision-maker might not even consider the costs to certain groups with whom she does not identify. Id. at 347. Thus, Lawrence
sion would have been made if its racial impact had been reversed, i.e., if the disparate impact had been on whites rather than on blacks."  

Consider again the Feeney case. The state of Massachusetts had established an absolute veterans preference for its civil service system. This preference worked to the relative advantage of men: only 0.8% of adult women in Massachusetts were veterans, compared to forty-seven percent of adult men. The Supreme Court upheld the law because there was insufficient evidence that the legislature had acted with the purpose of treating women worse than men. Under the proposed model, however, the Court could have expanded its focus by inquiring whether the legislature would have enacted such an enormous preference for war veterans if it cared as much about the interests of women as about the interests of men. Or, to employ a hypothetical test, would the predominantly male legislature have given the same preference if most veterans were women? These tests of reckless indifference might have yielded a negative answer.

concludes, courts must utilize the concept of "unconscious" racism. Id. at 348-49. But if "purpose" includes reckless indifference, that conclusion might be unnecessary.

Still, a focus on unconscious racism is an independently valuable approach. Lawrence points out that recognizing unconscious racism might preclude individual blame for discriminatory practices and reduce resistance to remedies. Id. at 325-26.

193 Schnapper, supra note 193, at 51. In a recent article, David Strauss systematically and lucidly analyzes and critiques this "reversing the groups" test. Strauss, supra note 185. Strauss argues that this test provides the best interpretation of discriminatory intent or purpose, id. at 958-59, though he never explains how the test explicates "intent" or "purpose" at all, in any ordinary sense of those terms. Rather, the test explicates discrimination or lack of impartiality. To say that "the decision maker has—in some way, on some level—taken race into account," id. at 957, is not the same as saying that the decision-maker has intentionally or purposely discriminated against blacks. (I am also not fully persuaded by his criticisms of the test itself, but that issue is beyond the scope of this Article.)


197 The state placed any veteran with a passing grade ahead of all nonveterans, regardless of the relative examination scores. Id. at 259.

198 Id. at 286 n.3 (Marshall, J., dissenting).

199 As the Court explained:

Although few women benefit from the preference, the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and all nonveterans—male as well as female—are placed at a disadvantage. Too many men are affected by [the statute] to permit the inference that the statute is but a pretext for preferring men over women.

Id. at 275; see also id. at 279-80 ("[T]he law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women.").

200 Implementing this "hypothetical nonindifferent legislature" test will pose formidable practical difficulties. But the practical difficulties in implementing the current "purpose" test are themselves not trivial. Under the purpose test, one must imagine what a legislature, not acting for an illicit purpose, would have done in the same situation. See Kreimer, Allocational Sanctions, supra note 179, at 1337-38. This "hypothetical legisla-
The premises behind a desire-state interpretation of discrimination might be as follows. The government must treat all persons with equal concern and respect. The government must treat all persons with equal concern and respect, or else it devalues some persons by harming them deliberately, or by valuing their interests much less than the interests of others. It also creates stigmatic and emotional harm when it devalues citizens in these ways.

"Intentional" discrimination could be expanded to include reckless indifference in other areas of constitutional law, too. For example, under the dormant Commerce Clause, indifference to (i.e., lesser valuation or consideration of) the interests of out-of-staters might be just as constitutionally offensive as intentional discrimination against them. Or, under the First Amendment, "selective prosecution" could include prosecutions reflecting indifference to the free speech interests of citizens, as well as prosecutions undertaken in order to suppress or penalize those interests. In a selective prosecution case, however, the problems of defining indifference would loom much larger, because there is no obvious comparative test. Perhaps one would have to ask more broadly whether the government showed lesser concern for free speech interests than it "should" have—a question, unfortunately, that does little to sharpen the First Amendment analysis.

IV. MENTAL STATES IN PRACTICE

This Section reviews several practical and institutional features of the use of mental state categories, features that are not directly related to the underlying normative policies that the mental state categories serve. Although these features are hardly unimportant, I conclude that the normative purposes of legal rules generally provide the most compelling explanation for the law's choice of particular mental state categories (or of any mental state category at all).

ture" test differs from an entirely independent, and much more troublesome, test of what "a hypothetical innocent legislature might" have done, as Donald Regan convincingly explains. Regan, supra note 179, at 1154-57.

For a different view of Feeney, see Strauss, supra note 185, at 1000-03.

201 For a brief analysis of Ronald Dworkin's elaborations on this thesis, see Simons, supra note 176, at 229 n.80. The "equal concern and respect" principle, however, is disturbingly vague. See H.L.A. Hart, Between Utility and Rights, 79 COLUM. L. REV. 828, 844-46 (1979). For example, Binion argues that the government might also violate the equal worth principle by simple neglect, or by improper conduct: "The intentions of government are of no more indicative of a human devaluing than are its policies and their impact." Binion, supra note 184, at 422.

202 Recall the sixth utilitarian argument: inflicting harm with an aggravated mental state may aggravate the harm to the victim. See supra part III.B.6.

203 This expansion of the constitutionally offensive "attitude" might obviate some difficulties in determining whether a protectionist "purpose" was intended as a "means" or as an "end." See Regan, supra note 179, at 1138-39 (distinguishing between short-term and long-term purposes in the context of the dormant Commerce Clause). Indeed, I am not certain that a "mediate" protectionist "purpose" is a coherent concept.
A. Delimiting the Scope of Liability

Sometimes a legal standard employs a particular mental state in order to limit the scope of liability, and not because that mental state is intrinsically significant. Consider the liability of accountants for the tort of misrepresentation. Even in this liberal, post-privity age, the majority rule states that accountants are liable to all those who foreseeably rely upon fraudulent misstatements, but not to all those who foreseeably rely upon negligent misstatements.\(^{204}\) One might justify the distinction by pointing to the greater culpability of those who make fraudulent misstatements, or to their greater amenability to deterrence through tort sanctions. However, the New York court in Ultramares Corp. v. Touche justified the distinction by voicing the need to limit the scope of liability.\(^ {205}\) If the liability standard were broadened from fraud to negligence, the number of potential tort plaintiffs would dramatically increase.

In general, ascending the conventional hierarchy—stepping from negligence to recklessness to knowledge to purpose—progressively limits the scope of liability. One can less often prove the existence of a “higher” mental state—either because it is in fact more rare, or because it is more difficult to prove, or both.

It is usually also assumed that the “higher” state will be more rare because any set of facts satisfying the “higher” state will also satisfy any lower one, but not vice versa. On this view, a knowing fraud is necessarily also reckless and negligent.\(^ {206}\) But this assumption proves false. Even under the existing hierarchy, one can be “purposeful” without being “knowing.”\(^ {207}\) And under my proposed model, the “higher” state will satisfy the lower state only if each is a belief or if each is a desire.\(^ {208}\) Nevertheless, “higher” states in the conventional hierarchy are usually in fact more rare than “lower” states.

This liability-limiting rationale helps to justify choosing a “higher” mental state. Consider again the equal protection question whether strict scrutiny should attach to all legislative classifications that disproportionately burden a suspect class, such as a racial minority. When the Supreme Court gave a

\(^{204}\) See Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y. 1931); Prosser & Keeton, supra note 30, at 742-45.

\(^{205}\) 174 N.E. at 447 (“The extension [of liability urged by the plaintiff] will so expand the field of liability for the negligent speech as to make it nearly, if not quite, coterminous with that of liability for fraud.”).

\(^{206}\) See Model Penal Code § 2.02(5) (stating that knowledge satisfies legal requirements of both recklessness and negligence).

\(^{207}\) A purposeful actor need only believe that she might succeed, while a knowing actor must be much more certain of success. Also, under the Model Penal Code, a purposeful or knowing actor might have a defense of necessity, while a reckless or negligent actor is, by definition, acting in an unjustified manner. See Model Penal Code § 2.02(2)(a) (defining “purposely”); id. § 2.02(2)(b) (defining “knowingly”); id. § 3.04(1) (setting out the defense of necessity).

\(^{208}\) See supra part II.B (“The Independence of Belief and Desire”).
negative answer in *Washington v. Davis*\textsuperscript{209} and in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*\textsuperscript{210} it expressed concern that "effect" analysis would create a much greater scope of liability than would "intent" analysis.\textsuperscript{211} One might conclude that the Court required the more rare mental state of "purpose" over the more common mental state of "knowledge" in order to restrict the scope of liability, and not necessarily because the nature of the mental states themselves warranted the difference.

The scope-of-liability rationale has some descriptive value, and is sometimes normatively justifiable. There are good reasons to limit the scope of liability, and "heightening" the mental state required might be an effective way to serve that goal. Of course, other effective means may serve these goals, such as narrowing the objective conduct, circumstance, or result elements of the legal standard, or making proof procedurally more difficult. For example, to limit liability for negligent misrepresentations that injure foreseeable (non-privity) plaintiffs, one might either require a more substantial showing of damage or increase the plaintiffs' burden of persuasion.

But decision-makers often employ a narrow mental state rather than some other method of limiting the scope of liability for reasons other than the greater effectiveness of the mental state method. Often the mental state chosen has independent significance. Undoubtedly, the Supreme Court has chosen "purpose" as the mental state requirement for equal protection strict scrutiny not just to delimit the number of such cases, but also because the Court believes there is a moral and constitutional difference between deliberately harming blacks, on the one hand, and knowingly but regretfully harming blacks as a side effect of another legitimate policy, on the other.

Try this thought experiment. Suppose that accountants as a class faced approximately the same expected liability either with the existing rule, requiring remote but foreseeable plaintiffs to prove knowing fraud (a belief-state), or with a new rule, requiring such plaintiffs to prove both grossly negligent procedures (conduct) and a callous attitude toward truth (a desire-state). How would one choose between rules? Would we be indifferent? I believe we would care, which suggests that mental states often do not function simply to limit liability.

A final potential difficulty with the limited liability rationale is this: it is not always possible to distinguish sharply between the intrinsic significance of the mental state and the policy reasons underlying the need to restrict the scope of liability. Suppose the sole reason for restricting the scope of accountants' liability was the unfairness of imposing significant liability on accountants who have acted merely negligently. Obviously, the only sensible method of restricting liability in such cases would be to require a mental

\textsuperscript{209} 426 U.S. 229 (1976).

\textsuperscript{210} 429 U.S. 252 (1977).

\textsuperscript{211} *Washington v. Davis*, 426 U.S. at 248 (stating that an effects test "would raise serious questions about . . . a whole range of tax, welfare, public service, regulatory, and licensing statutes").
state (or type of conduct) "higher" than negligence. But when either a mental state limitation or an objective limitation effectively furthers the purposes for restricting liability, this limited liability rationale becomes meaningful and distinct. If we restrict accountants' liability in order to keep down the cost of accountants' services, or if we restrict strict judicial scrutiny in order to limit the absolute number of instances of judicial intervention in legislative decisions, then a "higher" mental state requirement does further the non-intrinsic rationale.

The First Amendment limitations on recovery for defamatory falsehoods provide examples of states of mind serving this limited liability rationale. Under New York Times v. Sullivan, public figures and public officials must prove "actual malice" to recover for defamation. Actual malice includes knowledge of falsity or reckless disregard for whether the published matter is false. Why does the First Amendment permit recovery even to this degree? One explanation offered by the Court is that a false statement of fact has no First Amendment value. If that were the only concern, however, then the Court should have no objection to a strict liability test, allowing recovery for any defamatory falsehood without regard to fault, for such a test would directly burden only unprotected speech. That the Court permits recovery only upon proof of reckless disregard or negligence (depending on the class of plaintiff) shows that the Court's greater concerns are to provide breathing room to the press and to avoid press self-censorship.

Any doctrinal requirement that narrows the class of plaintiffs who can recover serves the "breathing-room" rationale. A mental state limitation is such a requirement; and the reckless disregard standard, because it is more

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214 Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. They . . . are . . . of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' Gertz, 418 U.S. at 340 (citations omitted). Even more bluntly, the Court asserted that "there is no constitutional value in false statement of fact." Id.

215 See Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 686 (1989) (applying "actual malice" test); Gertz, 418 U.S. at 340-42 (holding that, for private individuals, the state may allow recovery based on any standard other than strict liability); Sullivan, 376 U.S. at 279-80 (requiring a public figure to show "actual malice" to recover for a defamatory false statement); see also Hustler Magazine v. Falwell, 485 U.S. 46, 49 (1988) ("[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.") (quoting Bose Corp. v. Consumers Union, 466 U.S. 485, 503-04 (1984))).
stringent than the negligence standard, gives the press more room when criticizing public figures and officials than when criticizing private individuals. Of course, the Court has adopted some doctrinal devices to limit recoveries against the press.\footnote{216}

Why has the Court relied so much on a mental state requirement to limit damage awards? The Court might have relied more heavily on some other limiting device—for example, it might have required plaintiffs to prove defamation, falsehood, and actual damages beyond a reasonable doubt in cases of public figures and public officials. Perhaps First Amendment values and the mental state requirements are connected after all. When members of the press are reckless as to the truth, perhaps they have forfeited First Amendment protection by showing disrespect for the defamed victim, or by failing to investigate fully in the face of awareness of a high risk that the statement is false.

B. Practical and Institutional Issues

In any particular legal context, practical and institutional issues affect the choice of a mental state requirement. For example, the law might treat a knowing creation of physical harm as a tortious or criminal battery, even though the knowledge requirement is sometimes inapt.\footnote{217} Here a belief-state is more economical than a desire-state (such as extreme indifference) because a belief-state is much easier to prove. But where expressing the moral difference is more important, such as in depraved heart murder, the law accepts the proof problems and employs the vaguer concept (here, the desire-state of extreme indifference to the value of human life).\footnote{218}

Apart from problems of proof loom other important practical and institutional issues. How large a role should the judge and the jury respectively play in deciding whether the individual possesses the relevant mental state? Should the legislature attempt to define the mental state with great precision, or should it leave the matter to courts and, case-by-case, to juries?

Moreover, simplifying the hierarchy holds much value. If courts and other legal decision-makers can use the same concepts of intent, knowledge, recklessness, and negligence across legal contexts, and if they can borrow ordinary language concepts rather than create entirely new legal terms of

\footnote{216} Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2704-05 (1990) (generally reviewing safeguards); \textit{Hepps}, 475 U.S. at 768-69 (private-figure plaintiff must prove falsity of statements); \textit{Boose Corp.}, 466 U.S. at 499 (appellate court must closely examine trial record to ensure that judgment does not intrude on free expression); Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (applying the \textit{Sullivan} standard that a public-figure plaintiff must prove falsity of statements).

\footnote{217} Recall the earlier example of justifiable harms that are "knowingly" created in the statistical sense—e.g., a product manufacturer's distribution of a reasonably safe but slightly risky drug. \textit{See supra} notes 40-43 and accompanying text.

\footnote{218} The concept of reckless indifference poses especially great problems of vagueness and proof.
art, they might achieve better results than if they try to exploit the sometimes subtle differences between concepts in different contexts. If they are less confused about the concepts, then they might apply the concepts with more predictability, and might give clearer signals to primary actors governed by the standards.

So what is left of my thesis? Is much of the mental states landscape not an artificial pruning of natural concepts to serve these aesthetic and pragmatic goals? Yes and no. Yes, some of the existing landscape has been deliberately pruned for these effects. But no, much of the pruning has been crude and random. The concepts often have not been thought through with a great degree of care. Too often, a court simply transplants the hierarchy from criminal and tort law to a new category without analyzing whether the concepts remain useful in the new category (not to mention whether they were really the best concepts in their original domain). Further, although the pruning might at first create an imposed order, in time the natural order might reappear. Apparently clear concepts have a way of spawning new shoots in the form of exceptions that express the underlying moral and utilitarian roots. The apparently clear concepts of purpose and belief become more complex and subtle as they are worked out in context.

I do not address these practical and institutional issues comprehensively. This Article has tried to further understanding of ideal mental state concepts, the concepts that might apply if we did not have to worry much about practical and institutional issues. Yes, we do have to worry about these things. But it is difficult enough to disentangle the underlying roots of these concepts. I leave the final pruning to others.

CONCLUSION

Human desires, beliefs, and motivations are maddeningly complex. A full understanding of why a person acts, of what her act signifies, of what she thought she was accomplishing, might require a sophisticated appreciation of psychology, sociology, moral philosophy, and economics. The law has a more modest aim: What mental state categories are most important in assessing the legal significance of a person’s decisions and actions?

I have not suggested a simple approach to these issues, because they are not simple. I also have not offered a clear resolution of many of them, because I am still unsure. In particular, the concepts of recklessness, reck-
less indifference, and intention deserve much more careful and considered analysis.

Some forms of economic analysis seek a relatively uniform account of distinct social fields, and therefore also seek a relatively uniform account of the significance of different mental states. But I do not believe that the effort succeeds. Unfortunately or (as I believe) fortunately, life is too unruly.

Nor do I think that skeptics about economic analysis should formulate an alternative uniform analysis. Consider one attractive candidate for a more uniform analysis—the concept of "respect for persons." Perhaps the most serious desire-states, of purpose and intention, reflect the greatest disrespect for another's interests, at least when they are directed at social harms. Perhaps intermediate desire-states such as indifference show less disrespect, and belief-states are more loosely correlated with disrespect. Though attractive, this approach is too crude to reflect the distinctive goals and functions of different fields of law. The denial of equal concern and respect that might underlie intentional discrimination is only one plausible equal protection conception. Moreover, it is hardly the same concept as the denial of respect for persons that the criminal law proscribes (e.g., in the law of murder).

If we want mental state categories to express normative aspirations, we must open our eyes fully to the particular context, and we must be ready to paint subtle colorations in such concepts as purpose, desire, reckless indifference, and belief. The concepts will retain important relationships to each other. Thus, belief-states and desire-states will remain distinct families, with closer relationships within each family than between them. Reckless indifference will remain a "lesser" form of desire, for example. But the social harm or normative prohibition that it reflects, and of which it is a "lesser" form, will vary.

Why bother with families of concepts at all? Why not employ unique mental state concepts for each unique legal or social policy? Putting aside practical problems of guiding decision-makers, I reject such an idiosyncratic approach, because I believe that the families of mental state categories I describe are basic categories of human agency and responsibility. We understand a person very differently when we variously discover what she has done, or what she believes, or what she desires, or what her beliefs or desires have prompted her to do.

\[222\] Cf. Sendor, supra note 113; Benjamin Sendor, *Mistakes of Fact: A Study in the Structure of Criminal Conduct*, 25 *Wake Forest L. Rev.* 707 (1990). Sendor tries to rationalize the criminal law doctrines of insanity, mental states, voluntariness, and excuses, with the single notion of "disrespect for persons." *Id.* at 726-36. Although his thesis is imaginative, the concept of "disrespect" is simply too elastic and vague to illuminate that range of doctrines within criminal law. It is even more clearly insufficient to illuminate doctrines across fields of law.
APPENDIX

This Appendix offers some conceptual and doctrinal elaborations upon arguments addressed in the body of the Article. Part A concerns "Preliminary Matters," that is, matters preliminary to any conceptualization of mental states. Part B concerns several issues only briefly addressed in the essay.

A. Preliminary Matters

This section of the Appendix addresses three important preliminary issues. What is a mental state? Is it a descriptive or normative concept? What are its objects?

1. What Is a Mental State?

The first set of issues is fundamental. What is a mental state? When a person "has" a belief or desire, does an event occur? A process? Where? When, and for how long? How do mental states differ from physical states? Or do they differ? Although philosophers and others have written extensively about these topics, here I set forth my position and mention some philosophical support, without offering anything close to a full justification.

The expression "mental state" can mislead. In order for a person to have the "mental state" of belief, or desire, or intention, his mind need not be in a "state" in the same sense that a physical element is in a gaseous or liquid state. Although "the state of a man's mind is as much a fact as the state of his digestion," the first is a "state" only in a loose sense. A mental state need not describe a vivid psychic experience. No mental "event" or "inner process" need be occurring. A person need not actually be think-

223 For some modern accounts, see G.E.M. Anscombe, INTENTION (2d ed. 1957); Brand, supra note 85; Donald Davidson, ESAYS ON ACTIONS AND EVENTS (1980); Alvin Goldman, A THEORY OF HUMAN ACTION (1970); Stuart Hampshire, THOUGHT AND ACTION (1960); Anthony Kenny, WILL, FREEDOM & POWER (1976); Anthony Kenny, ACTION, EMOTION & WILL (1963); Gilbert Ryle, THE CONCEPT OF MIND (1949); John Searle, INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND (1983); Richard Taylor, ACTION AND PURPOSE (1966); Ludwig Wittgenstein, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 3d ed. 1958).

224 Edgington v. Fitzmaurice, 29 Ch. D. 459 (1885).

225 Ryle, supra note 223, at 15-16, 88, 91, 113; see id. at 109 ("[D]islike,' 'want' and 'desire' do not denote pangs, itchings or gnawings.").

226 Wittgenstein's famous claim is: "An 'inner process' stands in need of outward criteria." Wittgenstein, supra note 223, ¶ 580. Consider his discussion of intention:

"For a moment I meant to . . . ." That is, I had a particular feeling, an inner experience; and I remember it. . . .

[S]uppose that . . . I did remember a single sensation; how have I the right to say that it is what I call the "intention"? It might be that (for example) a particular tickle accompanied every one of my intentions.

Id. ¶ 645; see id. ¶ 308; id. ¶ 316 ("In order to get clear about the meaning of the word 'think' we watch ourselves while we think; what we observe will be what the word means!

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ing or be self-conscious when she is expecting, believing, desiring, or intending something.\textsuperscript{227} Moreover, one should avoid the fallacy of predicating mental states on some mysterious entity—"the mind."\textsuperscript{228} People, not minds, have beliefs, desires, and intentions.

The expression "mental state" broadly refers to a family of concepts that includes choice, voluntariness, consciousness, belief, desire, motive, purpose, and intention.\textsuperscript{229} Although "mental qualities," or even "subjective qualities," might be a more appropriate expression,\textsuperscript{230} I use "mental states" because the expression is so well-entrenched, and because it does not have to be misleading.

Second, I reject a purely external explanation or criterion of mental states.

But [the concept of pain is not used like that."]; \textit{id.} ¶ 321; \textit{see also} DUFF, \textit{supra} note 14, at 97 ("[T]he philosophical assumption is that of Epistemological Dualism. It is dualist in that it separates mind from body . . . ").

\textsuperscript{227} See WITTGENSTEIN, \textit{supra} note 223, ¶ 574 ("The concepts of believing, expecting, hoping are less distantly related to one another than they are to the concept of thinking."); \textit{id.} ¶ 575 ("When I sat down in this chair, of course I believed it would bear me. I had no thought of its possibly collapsing."); \textit{id.} ¶ 576 ("I watch a slow match burning, in high excitement follow the progress of the burning and its approach to the explosive. Perhaps I don't think anything at all or have a multitude of disconnected thoughts. This is certainly a case of expecting."); \textit{id.} ¶ 577 ("We say 'I am expecting him,' when we believe that he will come, though his coming does not \textit{occupy our thoughts.}"); \textit{see also} William Alston, \textit{Motives and Motivation}, in \textit{5 Encyclopedia of Philosophy} 399, 402-03, 407 (Paul Edwards ed., 1967).

\textsuperscript{228} See RYLE, \textit{supra} note 223, at 15-16 (criticizing the "dogma of the Ghost in the Machine"); WITTGENSTEIN, \textit{supra} note 223, ¶ 573:

To have an opinion is a state—a state of what? Of the soul? Of the mind? Well, of what object does one say that it has an opinion? Of Mr. N.N. for example. And that is the correct answer.

One should not expect to be enlightened by the answer to that question. Others go deeper: What, in particular cases, do we regard as criteria for someone's being of such-and-such an opinion?

\textsuperscript{229} Although this is a vague definition, it is adequate for present purposes. I am more concerned with rejecting skeptical criticisms about the nature of mental states than establishing an unambiguous general positive definition.

\textsuperscript{230} WITTGENSTEIN tends to equate the expressions "mental state" with conscious thought, and therefore to criticize "mental states" and "states of mind" as unduly narrow understandings of mentalistic concepts.

When someone says "I hope he'll come"—is this a \textit{report} about his state of mind, or a \textit{manifestation} of his hope?—I can, for example, say it to myself. And surely I am not giving myself a report. It may be a sigh; but it need not. If I tell someone "I can't keep my mind on my work today; I keep on thinking of his coming"—\textit{this} will be called a description of my state of mind.

WITTGENSTEIN, \textit{supra} note 223, ¶ 585; \textit{see also} \textit{id.} ¶ 575:

When I sat down on this chair, of course I believed it would bear me. I had no thought of its possibly collapsing.

But: 'In spite of everything that he did, I held fast to the belief . . . .' Here there is thought, and perhaps a constant struggle to renew an attitude.

\textit{See id.} ¶ 577 ("I am expecting him" could mean either, "I should be surprised if he didn't
That is, I disagree that mental states are only artificial constructs, ultimately reducible or describable as something else, such as the actor’s behavior or the observer’s interpretive stance. To be sure, in determining what a person believes or desires or intends, it makes sense to examine what she does, and what others think about her mental state. But her mental state is not identical to the likely evidence of it. If she is to be punished, in part, for subjective attitudes, it would simply be wrong to punish for what others think her attitudes are.

One popular variation on this “observer’s stance,” external view claims to be based on the work of the philosopher Ludwig Wittgenstein, insofar as it emphasizes the social context and the social use of abstract concepts.

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come,” or “I am eagerly awaiting him”; the second is a state of mind, but the first is not.; see also id. ¶¶ 427, 586, 661, 662 (providing further examples).

I accept Wittgenstein’s criticism, but I do not believe that the expression “mental states” need be viewed so narrowly.

231 For such an explanation, see Posner, supra note 137, at 866-71 (endorsing a behavioral approach to replace mental state concepts).

232 I think Wittgenstein would agree. See GARTH HALLETT, A COMPANION TO WITTGENSTEIN’S PHILOSOPHICAL INVESTIGATIONS 43-44 (1977) (“Wittgenstein was neither a behaviorist nor an introspectionist.”). For a powerful and more detailed critique of the hermeneutic and behavioral forms of skeptical antirealism about minds, see Michael Moore, The Moral and Metaphysical Sources of the Criminal Law, in NOMOS XXVII: CRIMINAL JUSTICE, supra note 87, at 30-40.

233 It is more difficult to refute the “behavioral” approach to mental states, in part because that approach is so ambiguous. In one trivial sense, all evidence of other “minds”—physical movements, words, facial expressions, and the like—is behavioral or external, so a “behavioral” approach is a logical necessity. Once the “behavioral” approach is made nontrivial, however, it is an inappropriate translation of mental states. To be sure, if the law were concerned only with deterring persons from causing harm to others, and if it were not independently concerned with their awareness of or desire to create those risks, then mental states might indeed become less important than they now are. See Posner, supra note 137, at 866-71; see also Moore, supra note 232, at 35 (distinguishing methodological from logical behaviorism, as Posner does not). But such a reduction in the law’s concern would not simply translate mental state concepts; it would ignore them. For a different, retributive analysis of mental states, see supra part III.A.

234 Authors who specifically invoke Wittgenstein for such a view include: Marjorie Weinzeig, Discriminatory Impact and Intent Under the Equal Protection Clause: The Supreme Court and the Mind-Body Problem, 1 LAW & INEQ. J. 277, 294-300 (1983) (arguing that by looking for purpose or intent in Equal Protection cases, the Supreme Court has become mired in an ancient philosophical debate between mental and physical phenomena); Comment, Direct Evidence of State of Mind: A Philosophical Analysis of How Facts in Evidence Support Conclusions Regarding Mental State, 1985 WIS. L. REV. 435, 449-53 (interpreting Wittgenstein’s writing to mean that words do not have definite and precise boundaries as reference theory assumes); Peter Linn, Note, Wittgenstein, Language, and Legal Theorizing: Toward a Non-Reductive Account of Law, 47 U. TORONTO FAC. L. REV. 939, 941-42 (1989) (interpreting Wittgenstein as viewing language not as a medium for representation, but as a social tool for communication).
Mental state concepts lack general meaning, on this view, for they simply exemplify norms from a narrow social and cultural context. Whatever the value of this variation, Wittgenstein never suggested any such thing. Although he insisted on placing language concepts within the broader social context\(^{235}\) in order to see their point,\(^{236}\) he also believed that language practices are comprehensible and substantially uniform among speakers. He did not intend to show that social practices render the concepts indeterminate, or meaningful only to a small class of observers, but only that social prac-

\(^{235}\) Wittgenstein believed that intentions and similar concepts cannot be fully understood simply by investigating the momentary state of a person's mind. He gives this example:

What is a *deep* feeling? Could someone have a feeling of ardent love or hope for the space of one second—*no matter* what preceded or followed this second?—What is happening now has significance—in these surroundings. The surroundings give it its importance. And the word "hope" refers to a phenomenon of human life. (A smiling mouth *smiles* only in a human face.)

*Wittgenstein, supra* note 223, ¶ 583; *see id.* ¶ 581 ("An expectation is imbedded in a situation, from which it arises. The expectation of an explosion may, for example, arise from a situation in which an explosion *is to be expected.*") And again:

If I say "I meant *him,*" very likely a picture comes to my mind, perhaps of how I looked at him, etc.; but the picture is only like an illustration to a story. From it alone it would mostly be impossible to conclude anything at all; only when one knows the story does one know the significance of the picture.*

*Id.* ¶ 663; *see also id.* ¶ 337 ("An intention is embedded in its situation, in human customs and institutions. If the technique of the game of chess did not exist, I could not intend to play a game of chess."); *id.* ¶¶ 578, 635, 636.

With respect to intentions, especially, it may not be necessary to find a tangible, "inner," "psychological" experience. In Wittgenstein's words: "What is the natural expression of an intention?—Look at a cat when it stalks a bird; or a beast when it wants to escape." *Id.* ¶ 647. Similarly, Alan White cautions against viewing intention as "an extra inner psychological item which may or may not result in action." *White, supra* note 87, at 68; *see id.* at 69-71.

\(^{236}\) What is the purpose of telling someone that a time ago I had such-and-such a wish?—Look on the language-game as the *primary* thing. And look on the feelings, etc., as you look on a way of regarding the language-game, as interpretation.

It might be asked: how did human beings ever come to make the verbal utterances which we call reports of past wishes or past intentions?

*Wittgenstein, supra* note 223, ¶ 656.

Consider philosopher John Searle's inventive example of a Pleistocene man living thousands of years ago who happened to say aloud, "I want to run for the Presidency of the United States." His mental state could not really be a desire to run for President: "[T]o put it bluntly, the circumstances are not appropriate." And if Jimmy Carter has such a desire, it is because we assume that he holds a number of additional, appropriate mental states:

In order that his desire be a desire to run for the Presidency he must have a whole lot of beliefs such as: the belief that the United States is a republic, that it has a presidential system of government, that it has periodic elections, . . . and so on indefinitely.

*Searle, supra* note 223, at 20.
tices infuse the concepts with more complexity and subtlety than some previous philosophical analysis had suggested.\textsuperscript{237}

Mental state concepts are sometimes used in a broader sense than merely describing a person's subjective beliefs, desires, purposes, or attitudes. For example, "intention" or "purpose" might refer to the social meaning of an act,\textsuperscript{238} to its actual effect, or to the function it actually serves.\textsuperscript{239} "Intention" might also be a term of art for certain objective manifestations or expressions, such as in contract law.\textsuperscript{240} When attributing a mental state to an institution, rather than to an individual, the law often uses a looser or more metaphorical concept of mental state.\textsuperscript{241} This Article discusses "mental states" in the stricter sense.

\textsuperscript{237} See Hallett, supra note 232, at 30-32 (discussing the arguments—especially the Reference Fallacy, and the views of G.E. Moore and Bertrand Russell—against which Wittgenstein was reacting); see also Thomas Nagel, The View from Nowhere 22 (1986) (arguing that Wittgenstein should not be understood "as saying that behavior and so forth is what there really is and mental processes are linguistic fictions"); White, supra note 87, at 71-72 (rejecting the view that intention is "simply . . . the name either of some extra external element or of some external characteristic of our behaviour"); Brian Langille, Revolution Without Foundation: The Grammar of Scepticism and Law, 33 McGill L.J. 451, 486-94 (1988) (opposing vehemently the view that Wittgenstein believed language to be indeterminate); Dennis Patterson, Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine, 137 U. Pa. L. Rev. 335, 355-73 (1988) (although Wittgenstein emphasizes social context, he does not view concepts and rules as radically indeterminate).

\textsuperscript{238} See, e.g., Lynch v. Donnelly, 465 U.S. 668, 690 (O'Connor, J., concurring) ("The meaning of a statement to its audience depends both on the intention of the speaker and on the 'objective' meaning of the statement in the community."); Edwin Baker, Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection, 131 U. Pa. L. Rev. 933, 972-84 (1983) (arguing that in Equal Protection cases, the Supreme Court looks to more than the mental state of legislators to determine "purpose" or "motive"); Lawrence, supra note 194 (challenging the discriminatory purpose requirement of Washington v. Davis because such purpose can exist irrespective of the decisionmaker's conscious motives); Sendor, supra note 113, at 1418-19 (arguing, rather fancifully, that criminal mens rea elements "are the jury's hermeneutic tools for interpreting the relevant meaning or attitude of the raw 'text' of the defendant's conduct"); Sendor, Mistakes of Fact: A Study in the Structure of Criminal Conduct, supra note 222.

\textsuperscript{239} See Moore, supra note 113, at 26-32.

\textsuperscript{240} See Restatement (Second) of Contracts § 2 cmt. a (1981) (adopting an external or objective standard for interpreting contracts); John Calamari & Joseph Perillo, Contracts § 2-2 (3d ed. 1987) (stating that "for at least a century the objective theory of contracts has been dominant").

\textsuperscript{241} Legal liability can attach to a corporation that was "reckless" about the risk of injury from its products, or to a legislative body that "intended" to disadvantage blacks. Whether and how the analysis of individual mental states applies to such institutions is a difficult issue, which I do not explore here.
2. Mental States: Descriptive or Normative Concepts?

Are mental states descriptive or normative concepts? When we say that someone believes something, or that he desires or intends to do something, are we describing him in a nonevaluative way, or are we necessarily judging or evaluating him?\textsuperscript{242}

It is possible to give a purely descriptive account of some mental state concepts.\textsuperscript{243} To say that a person believes or desires something ordinarily carries no intrinsic evaluative freight. But legal standards obviously use descriptive mental state concepts for evaluative purposes because the consequence of applying the concept is some legal benefit or detriment. Thus, it is not surprising that the law sometimes expands simpler, descriptive concepts into legal terms of art that are themselves partially evaluative, and are not simply put to evaluative uses. Consider the observation that "Judy receives stolen goods knowing that they are stolen." Such knowledge is a fairly straightforward descriptive concept, which has both nonevaluative and evaluative uses. But legal "knowledge" has grown to encompass the evaluative concept of "wilful blindness," to encompass cases where defendants deliberately and culpably avoid cognitive awareness of the incriminating circumstance.\textsuperscript{244} A jury applying the simpler concept of knowledge need only understand a descriptive concept. A jury applying the concept of wilful blindness must make a value judgment.

Moreover, other mental state concepts are largely or entirely evaluative. "Reckless indifference," for example, is most usefully defined in evaluative terms. The concept of negligence is also evaluative in that it requires a factfinder to make a moral or normative judgment about the social reasonableness of the defendant's conduct.\textsuperscript{245}

Whether a mental state concept is descriptive or evaluative, and the extent to which it is one or the other, is important in the administration of legal standards. If a legal standard employs an intrinsically evaluative mental state concept, it gives the factfinder a much greater role in establishing the

\textsuperscript{242} For an excellent discussion of this problem, see FLETCHER, supra note 68, at 396-401.

\textsuperscript{243} Michael Moore apparently believes that all mental state concepts are purely descriptive, though they also have evaluative uses. See Moore, supra note 232, at 27 ("[T]o use a moral term such as 'person' or 'intention' is often both to describe . . . and to prescribe."). I demur, for reasons stated below. Perhaps Moore does not entirely disagree, however, for he declines to characterize negligence as a mental state. See MOORE, supra note 113, at 81-82. He might similarly decline to characterize "reckless indifference" as a mental state.

\textsuperscript{244} For further discussion, see supra text accompanying notes 128-33.

\textsuperscript{245} For one summary of criminal theorists' views on the descriptive/evaluative issue, see Sendor, supra note 113, at 1415-17. Sendor's summary reveals that some theorists have used the categories "descriptive" and "evaluative" (or "normative") differently from how I use them in the text. For example, Oliver Wendell Holmes essentially equates descriptive with subjective and evaluative with objective. Id. at 1415-16.
relevant legal norm.\textsuperscript{246} For example, the Model Penal Code attempts to employ descriptive legal concepts where possible, and thereby attempts to minimize the role of the judge and jury vis-a-vis the legislature in establishing norms of criminal liability.\textsuperscript{247}

3. Element Analysis: Mental States and Their Objects

When one intends, desires, or believes something, \textit{what} is it that he intends, desires, or believes? Troublesome philosophical questions arise here. What is the metaphysical and ontological status of such objects?\textsuperscript{248} How are intentions, desires, and beliefs individuated from each other?\textsuperscript{249} Although I will sidestep these difficulties, which are relatively unimportant to my project, I will identify some broad categories of mental state objects that are most useful in legal analysis.

The Model Penal Code's innovative approach, element analysis, helps in that it allows a distinct mental state to apply to any of the elements of a criminal offense. It divides the possible objects of a mental state into three categories—conduct, circumstances, and results—and it provides slightly different mental state definitions for each category. Largely following the Code, this Article assumes two categories of "objects" of mental states—"results," which are physical circumstances that the actor changes or has the power to change, and "circumstances," which are all other physical conditions, apart from the actor's own conduct.\textsuperscript{250} For example, intentional

\textsuperscript{246} Of course, even a partly evaluative concept may have a descriptive component—namely, determining whether the actor complied with the normative standard. One explanation for the "reasonable person" formulation of the negligence standard is just this point. We want the jury to crystallize the normative standard by defining what a reasonable person would do; we then want the jury to decide whether, in fact, this defendant complied with that standard.

\textsuperscript{247} See Edgar, supra note 137, at 1036-38, 1040 (outlining and critiquing this aspect of the Model Penal Code's approach to mens rea); Robinson & Grall, supra note 12, at 704 (arguing that element analysis has the practical advantage of allowing the legislature a greater role in defining the requirement of criminal liability).

\textsuperscript{248} Some thoughtful discussions include Moore, supra note 113, at 23; Searle, supra note 223, at 1-36; Ryle, supra note 223, at 8.

\textsuperscript{249} See, e.g., Moore, supra note 64.

\textsuperscript{250} There are some difficulties with the Model Penal Code's approach. Paul Robinson and Jane Grall have proposed a thoughtful revision of the Code definitions of "result" and "circumstances." Robinson & Grall, supra note 12, at 724 (defining result as a circumstance changed by the actor). My definitions in the text are very similar to theirs, but I add "or has the power to change" to their criterion of a result so that the criterion will apply to inchoate conduct, such as attempts. For a more extended, critical account of the distinction between result and circumstance, see R.A. Duff, The Circumstances of an Attempt, 50 CAMBRIDGE L.J. 104 (1991) ("[A] state of affairs is a circumstantial aspect of an action if there is some description of the action relative to which it counts ... as a circumstance of the action as thus described.").

Differentiating "result," "circumstance," and "conduct" is sometimes important under
crimes and torts typically sanction an actor who intentionally brings about

the Model Penal Code, because culpability terms are defined differently for each generic object category. In theory, however, it would be possible to specify the requisite culpability term for each particular object, thereby obviating the difficulty of differentiating "result," "circumstance," and "conduct." Instead of "purposely enters a house," the legislature could specify "voluntarily engages in conduct, which conduct constitutes the entering of a house, and knowing [or being reckless] that he is entering and that the location entered is a house."

How should we analyze an actor's mental state towards his own conduct or actions? Does it make sense, as the Model Penal Code suggests, to apply the same element analysis here? Thus, if the crime of burglary requires that the actor "break and enter" into a house, is it intelligible to ask whether the actor's purpose or conscious object was that his conduct be "of that nature?" See Model Penal Code § 2.02(2)(a)(i). To ask whether the actor knew that his conduct was of that nature? Whether he was reckless or negligent as to the point?

One approach is to ask whether the actor's conduct was intentional. But what does that mean? If the actor intentionally breaks and enters into a house, does that mean simply that he voluntarily breaks and enters? Or is there something more to intentional conduct? Must he, for example, be conscious of breaking and entering? Must he perform the more basic, subsidiary actions for the purpose, or with the desire or plan, of breaking and entering?

Philosophers analyze this set of issues in widely varying ways. It is common to distinguish between acting intentionally, acting with an accompanying intention, and having an intention for the future. See Anscombe, supra note 223, at 1 (providing an example of the distinction); Hart, supra note 65, at 117. For example, I might intentionally raise my hand, with the accompanying intention of getting your attention, and with the future intention of telling you something important. But which of these concepts is the more central, and how they relate to one another, is much disputed. For a helpful introduction, see Michael Bratman, Intention, Plans, and Practical Reason 5-9 (1987); see also id. at 123 (one might intentionally do something without intending to do it); Alfred Mele, Intention, Belief, and Intentional Action, 26 Am. Phil. Q. 19, 19 (1989).

My own conclusion is tentative. First, the highly uncertain scope of the concept of acting intentionally argues against its legal use. Second, I largely accept the analysis of Robinson and Grall, who consider "conduct" an inapposite object of mental states, and would instead simply ask whether the conduct was voluntary. Robinson & Grall, supra note 12, at 722. That is, they reject applying element analysis to basic bodily movements. I agree. If you voluntarily broke into another's home, there seems little point to asking whether you purposely, knowingly, or recklessly performed that action.

I also agree, however, with Robinson and Grall that it is much more sensible for the law to evaluate a person's mental states as to certain aspects of her conduct. For example, did she know, believe, or desire that it was another's home she was breaking into? It makes sense to describe the aspects, characteristics, and nature of the conduct as circumstance or result elements.

Voluntariness is itself a kind of subjective state of the agent. But it is not the sort of mental state that I discuss in this paper. Roughly speaking, voluntariness refers to a person's capacity to control her own conduct. For some discussions, see Hart, supra note 65, at 95-99; Moore, supra note 113, at 68-75; Dan-Cohen, supra note 97, at 17-19 (arguing that involuntariness is often associated with the actus reus rather than with
certain harmful results, such as emotional harm, physical harm or death. And the crime of receiving stolen property, knowing that it is stolen, is a clear example of a mental state directed at a circumstance. Decision-makers should consider which mental state to require for each element or object in a legal standard; they should not assume that a single mental state is adequate for all elements. Different mental states, and different degrees of belief or desire, might be advisable with respect to different elements or objects. Thus, in the last example, if the crime of receiving stolen property is graded according to the value of the property, then a jurisdiction might make a defendant liable for the most serious grade so long as he was “reckless” about the value, even though he could be liable for the substantive crime only if he “knew” that the property was stolen.251

These categories, and element analysis in general, are applied most carefully in the field of criminal law, yet not carefully enough even there. Other legal fields should specify more carefully the required object of each required mental state. In tort law, for example, the Restatement Second is clear enough that either purpose or knowledge suffices to establish the “intent” for battery, but it blurs the requisite object of the intent. An actor is liable for intentionally inflicting a harmful or offensive contact. But does this mean that she must intend harm or offense, or only that she must intend a contact that turns out to be offensive?252 In discrimination law, one important con-

251 See Model Penal Code § 223.1(2) (grading of theft offenses). Under the Model Penal Code, if the mental state is not otherwise clarified, it is ordinarily presumed to be recklessness. See id. § 2.02(3) cmt. 5. Such drafting conventions are a practical necessity.

252 Although the Restatement itself is unclear on the point, battery is now understood to require not an actual “intent” to cause harm or offense, but merely an “intent” to cause a physical contact. Of course, the contact itself must be harmful or offensive, but the defendant need not intend that it have such a quality. See Restatement (Second) of Torts §§ 13, 16 (discussing battery and the intent necessary for battery); see also Prosser & Keeton, supra note 30, at 39; Osborne M. Reynolds, Jr., Torts: Is “I Didn’t Mean Any Harm” Relevant?, 37 Okla. L. Rev. 717 (1984) (advocating a standard of intent that does not require a desire to harm).

Similarly, it is not clear whether trespass should be classified as an intentional or strict liability tort. Element analysis would again help. Insofar as trespass requires an intention to enter onto a piece of property, the tort is “intentional.” Restatement (Second) of Torts § 158 (describing liability for intentional intrusions on land). But insofar as a mistake, even a reasonable mistake, that one owns that property is irrelevant to liability, the tort is one of strict liability. Id. § 164 cmt. a. Thus, under a more careful element analysis, a trespass defendant must have the “mental state” of intention (or voluntariness) with respect to the conduct element, entering a piece of property, but he is strictly liable with respect to the circumstances element, the ownership status of that property.

The required “intention” with respect to one’s own conduct might be better described as a requirement that the conduct be voluntary, see supra note 250, since the principal
ceptual problem is the Supreme Court's failure to specify carefully what the discriminatory actor must intend. 253

The philosopher John Searle has provided a complementary philosophical analysis of the objects of mental states. He persuasively argues that desire and belief are crucial components of all mental states that are "directed" at an object and that are "satisfiable." 254 Legal mental states that apply to circumstance and result elements are "directed" in this sense, and thus can be partially explicated by my model of desire or belief. Undirected mental states also exist, Searle explains, and complex mental states may have both directed and undirected elements. Thus, "fear of X" implies a desire that not-X, and perhaps a belief that X is possible, but that hardly exhausts the content of "fear." 255 Although some mental states in legal standards are undirected, 256 they are not of much importance, and therefore are not discussed in this Article. 257

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See Searle, supra note 223, at 1:

[S]ome, not all, mental states and events have Intentionality [i.e., they are directed]. Beliefs, fears, hopes, and desires are Intentional; but there are forms of nervousness, elation, and undirected anxiety that are not Intentional. . . . If I tell you I have a belief or a desire, it always makes sense for you to ask, "What is it exactly you believe?" or "What is it that you desire"; and it won't do for me to say, "Oh I just have a belief and a desire without believing anything or desiring anything". My beliefs and desires must always be about something. But my nervousness and undirected anxiety need not in that way be about anything.

As this passage indicates, Searle's term "Intentional" has a broader meaning than intentional or purposeful.

Any directed mental state has "conditions of satisfaction," Searle asserts. "My belief will be satisfied if and only if things are as I believe them to be, my desires will be satisfied if and only if they are fulfilled, my intentions will be satisfied if and only if they are carried out." Id. at 10. Searle is less certain how to explain cases such as doubting that p or wondering whether p. Id. at 10 n.4. Reckless indifference, similarly, is not satisfiable in any straightforward sense, and an alternative account is necessary. See Kenneth W. Simons, Purpose, Intention, and Active Desires (1992) (unpublished draft, on file with author).

255 Searle, supra, note 223, at 31.

256 The Model Penal Code itself, in its definitions of many crimes and defenses, adds an undirected (or partially undirected) mental element as part of the requisite mental state of either the defendant or a victim. See, e.g., MODEL PENAL CODE § 211.1(1)(c) ("fear" in the definition of assault); id. § 211.3 ("terror" in the definition of terroristic threats); id. § 250.4 ("insults, taunts, or challenges" in the definition of harassment).

257 Element analysis has an important limitation, however. Some mental states, which I call "global" rather than "local," are not directed at a simple object. Instead, they require a more comprehensive evaluation of the actor's beliefs, desires, and conduct. See supra note 89.
B. Substantive Matters

This section of the Appendix concerns four topics addressed much more briefly in the body of the Article. First, it explores some of the complexities of the concept of belief. How, for example, do ignorance and agnosticism affect culpability for lack of belief? Second, it examines some complexities of the concept of desire. For example, are purpose and intention simply desire-states, or are they something more? Third, it explores the distinction between purpose and belief in light of the philosophical doctrine of double effect. Fourth, it investigates the concepts of negligence and strict liability in the contexts of belief, desire, and conduct.

1. The Concept of Belief

Cognitive states, or states of belief, can range from certainty that a proposition is true to certainty that it is not. Some of the more familiar concepts can be represented as follows. In the table, P is a factual proposition that can refer to a circumstance or to a result. Accordingly, a belief that P is either the belief that a circumstance exists (e.g., that the goods are stolen) or the belief that a result will follow (e.g., that the actor will cause the death of another). In order of decreasing certainty of belief, we have:

Table A. States of Belief

1. Belief that P.
2. Belief that P is "practically" or "substantially certain." 258
3. Equivocal: belief that P and not-P are equally probable.
4. Belief that there is a "substantial risk" that P (one sense of "recklessness"). 261
5. Belief that not-P.

258 P might also be a legal or moral proposition—e.g., that the law prohibits receipt of stolen goods; that the goods in question are, under the facts, legally "stolen"; or that receiving stolen goods violates a moral norm. In this Article, I examine beliefs and desires about factual, not legal, matters. Application of the model to legal matters would raise some distinct problems. For a partial discussion, see Simons, supra note 42. I recognize, of course, that a full account of when an agent is morally or legally responsible for her actions might well inquire whether she believes she is, or desires to be, violating the moral or legal norm. See, e.g., Jean Hampton, The Nature of Immorality, Soc. Phil. & Pol'y, Autumn 1989, at 7 (providing a "defiance" account of moral responsibility). Such issues, as well as the relation of cognitive and conative states to the insanity defense, to the lesser responsibility of children, and to excuses generally, are beyond the scope of this Article.

259 Model Penal Code § 2.02(2)(b) (defining "knowing" as to result).

260 Restatement (Second) of Torts § 8A (generally defining "intent").

261 Model Penal Code § 2.02(2)(c) (defining "recklessness" in part as requiring conscious disregard of a substantial risk that an element exists or will result). Of course, the Code's definition of recklessness requires more than cognitive awareness. See supra text accompanying notes 66-67. And even insofar as the definition is cognitive, "substan-
The table illustrates the basic hierarchical ranking—the higher in the hierarchy, the more serious the mental state. Thus, if one can be liable only for manslaughter if one causes death with a reckless (4) or greater belief that one will do so, then mental states (1) through (3) should also suffice, while mental state (5) will not. Of course, the law sometimes employs additional mental states intermediate between those noted above.\textsuperscript{262}

This simple ranking, however, needs several qualifications. First, one might lack a particular belief not only by having a lower belief, but also through agnosticism or ignorance. The latter are not, strictly speaking, states of belief, but rather the absence of such states. For example, an actor might escape manslaughter liability in each of these circumstances: she mistakenly believes that death is extraordinarily unlikely (close to (5), above); she considers the possibility that she will cause a death, but forms no belief about this (agnostic); or she never considers the possibility (ignorant).\textsuperscript{263}

Although ignorance and agnosticism are not positive states of belief, I sometimes loosely describe them as “belief-states.” This characterization underscores that they can negate legal requirements of belief, and that they also can form an independent ground of liability, if the actor is culpable or

\textsuperscript{262} For belief-states intermediate between (2) and (3), see, e.g., \textsc{Model Penal Code} § 2.02(7) (defining “knowledge” as to a particular fact as belief in a “high probability”); \textsc{Restatement (Second) of Torts} § 500 cmt. f (recklessness requires only a belief in “strong probability” that harm will result, while intent requires belief that harm is substantially certain).

\textsuperscript{263} More broadly, ignorance about P could include any instance of lack of knowledge that P, i.e., it could include the case of an actor who positively believes that P is not the case. For example, if I positively believe it is not raining when it is, I am “ignorant” in this sense about the actual state of the weather. But this sense is quite broad; it is equivalent to mistake, from which ignorance is usually distinguished. \textit{See} \textsc{Moore, supra} note 113, at 85-86; \textsc{Simons, supra} note 42, at 462-63.

Identifying these different senses of belief is critical to understanding when a defendant is considered to have a reckless belief. For example, some object that reckless belief is too narrow a concept because a defendant’s mere ignorance will negate it. Glanville Williams has responded that a person should be deemed reckless if he “does not believe that there is no . . . risk.” Glanville Williams, \textit{The Unresolved Problem of Recklessness, supra} note 87 (emphasis omitted). This proposal considerably broadens “recklessness” to encompass all mental states other than state (5) in Table A.
negligent for lacking a belief.\footnote{264} In the end, their legal relevance may depend on what is culpable about \textit{positive} belief-states.

Second, "belief" is ambiguous. Beliefs (1) and (5) might describe final judgments, not estimates of probabilities. If so, the hierarchical ordering might fail. Thus, at the end of the day, one might believe that P is the case (1), even though one does not quite believe that P is practically certain (2).\footnote{265} Or one might finally believe that P is not the case (5), even though one acknowledges that there is more than a substantial risk that P (4). Thus, (1) fits securely in the hierarchy only if it means "belief that P is certain," and (5) fits securely only if it means "belief that the risk of P is zero."\footnote{266} Legal requirements of belief or knowledge must be defined carefully if they are to fit in a hierarchical ordering, as modern standards often require.

Third, the mental state here should be described as belief, not as knowledge. When a legal standard requires knowledge, not simply belief, then the standard imposes an additional non-men's rea requirement, namely, that the proposition believed is true. This is simply an explication of the concept of knowledge. For example, to be guilty of the crime of knowingly receiving stolen property, one must believe that the property is stolen, and the property must indeed be stolen. But the mental state is essentially the same whether or not the property is actually stolen.\footnote{267}

\footnote{264} \textit{See infra} app. B.4 ("Negligence and Strict Liability: Mental State or Conduct?"). \footnote{265} \textit{See Bratman, supra} note 250, at 36-37 (distinguishing "flat-out belief" from degree of confidence or subjective probability). Indeed, I might even believe P while acknowledging that P is not very likely. ("I somehow convinced myself that I was going to win the lottery, though I admit I also knew it was pretty unlikely.") This is not to deny that it might in some sense be irrational to hold both beliefs.

One could further distinguish between a person's probability estimate and her degree of confidence in that estimate. If asked the probability that building a bridge will cause a death, the chief engineer might answer 0.75. But if asked how confident she was about that probability estimate, the engineer might confess serious doubts, in light of the limited and anecdotal basis for her judgment. Presumably a rational person—such as an insurance company—would consider both the estimate and the confidence interval before making a bet based on these probabilities. \textit{See Neil B. Cohen, Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge, 60 N.Y.U. L. REV. 385, 398-99 (1985) (discussing the relations between probability assessments and confidence intervals).}

For further discussion along these lines, see \textit{Robbins, supra} note 128. I disagree with much of Robbins's analysis, however, and I very much doubt the existence of the philosophical "consensus" that Robbins describes. \textit{Id.} at 219-20.

\footnote{266} Similarly, the "equivocal" belief that P and not-P are equally probable (3) could express either a belief that each has a probability of 50%, or simply an inability to say, based on the evidence, which is more probable. (I thank David Dolinko for pointing this out.)

\footnote{267} I qualify this statement only because of the philosophical uncertainty about the relation between knowledge and belief. If you know, are aware, or realize that P, then it must be the case that: (a) you believe that P; and (b) P is true; and (c) your belief that P is related to the truth of P in some appropriate way. Unfortunately, the content of (c) is
2. The Concept of Desire

States of desire comprise a hierarchy independent from states of belief. Although their analysis is somewhat parallel, the hierarchy of desires is more complex in several ways.

Conative states, or states of desire, range from a desire for a result (or hope that a circumstance exists), to indifference, to a desire that the result not occur. In the following schematic table, if \( P \) refers to a circumstance, then the desire that \( P \) is the desire that the circumstance exists. For example, a pickpocket might hope that the victim’s pocket is full. If \( P \) refers to a result, then the desire that \( P \) is the desire that a result will follow. For example, an actor might desire that his shooting of a gun will result in another’s death.

Table B. States of Desire

1. Desire that \( P \).
2. Equivocal: No preference whether \( P \) or not-\( P \).
3. Desire that not-\( P \).

Like the states of belief in Table A, these states of desire should be ranked in a direct hierarchy. Suppose a legal standard imposes liability on an actor who “recklessly” caused harm in the following sense—she did not care whether she caused or did not cause the harm (2). Then she will also be liable if she desired that result (1), a “higher” concept within the same hierarchy, but not if she desired to avoid the harm (3).

... uncertain. Perhaps your belief must be grounded or justified in some way; but philosophers do not agree about how. See Edmund Gettier, Is Justified True Belief Knowledge?, 23 ANALYSIS 121 (1963) (answering “no” to his own question); see generally Anthony Quinton, Knowledge and Belief, 4 ENCYCLOPEDIA PHIL. 345 (Paul Edwards ed., 1967) (describing philosophical disagreement on this point).

The problem is of doubtful practical importance to the law. Only rarely will (a) and (b) be true while your knowledge is in doubt. Here is such a rare example. Jones gives Cohen a green wallet. Cohen asserts: “I know that this green wallet is stolen, because I just saw Jones steal it from Smith.” Cohen might correctly believe that the green wallet is stolen, yet not know that it is stolen. For example, suppose that the wallet that Jones just stole from Smith is actually a red wallet, which is now concealed in Jones’ pocket, while Jones stole the green wallet on some prior occasion. If Cohen has no other basis for believing that Jones stole the green wallet, then Cohen does not “know” that it is stolen, for his (true) belief that it is stolen is not connected to the true state of affairs in the “right” way.

Note some rough analogies between belief-state and desire-state concepts. Desire-state (2), equivocal desire, is analogous to (3), equivocal belief, in Table A, supra text accompanying notes 259-61. Varying intensities of desire are analogous to varying intensities of confidence in beliefs. Moreover, the desire-state of lacking any desire as to \( P \) or not-\( P \) is analogous to agnostic belief, discussed above, supra text accompanying note 263.

I do not believe that any desire-state is directly analogous to the “belief-state” of igno-
But this table is incomplete. Most importantly, it does not fully express the complex and multiple conceptions of "reckless indifference." I use that term as a term of art for any of the following three concepts:

(1) Equivocal lack of preference whether P or not-P (see state (2), Table B).
(2) A desire to create a serious risk of P.
(3) "Callousness" about P, in the sense of caring less about P than one should.

The body of this Article analyzes these concepts at greater length, but two general points are crucial here. First, reckless indifference expresses a culpable desire or a culpable lack of appropriate desire. Such recklessness is important, but not reducible to a cognitive state or to grossly deficient conduct. Second, reckless indifference should ordinarily be placed in an intermediate location within the desire hierarchy—a position lower than positive desire or purpose to harm, but higher than desire to avoid harm.

Another major complexity in the "desire" hierarchy is that legal requirements of purpose, intention, or motive include, but cannot be reduced to, states of desire. If Jones shoots at Smith for the purpose of killing him, then Jones not only must desire to cause Smith's death, but also must believe that shooting might fulfill that desire. By contrast, "hope" and "wish" are

rance. Alan White's concept of "serenity" or "freedom from care" is a candidate. See WHITE, supra note 87, at 93-94. But that concept seems similar to what I call lacking any desire, while White's concept of "not caring" or "indifference" seems similar to what I have called "equivocal/no preference" (3).

White terms the latter concept recklessness, and claims that it has many possible meanings, including "to care not," 'to be indifferent to,' 'to disregard,' and 'to fail to give due weight or consideration to.' Id. at 105. I agree, but I find these differences more significant than White acknowledges. See supra part II.D ("Reckless Indifference").

See supra part II.D.

269 See supra part II.D.

270 For further discussion, see supra part II.C.

271 I qualify this assertion because the second and third senses of reckless indifference are not, strictly speaking, within the hierarchy. For example, an actor might be recklessly indifferent in desiring to risk harm, or in not caring as much as she should about whether she causes harm, yet she might at the same time desire not to cause harm. See Brady, supra note 87, at 387-88. And since these senses are not within the hierarchy, one cannot, without further analysis, directly rank them in seriousness.

272 On one standard account, a person acts for a purpose if he has a motivating reason for his action—roughly, he desires something, he believes that a particular action might achieve that end, and he takes that action because of his desire and belief, where "because" is understood causally. See R.A. DUFF, supra note 87, at 66-73; MOORE, supra note 113, at 9-18. Intention can mean purpose, but it can also mean a nonpur- purpose plan of future action. For example, Doris might break into a house with the intention of stealing something inside, but she might not have broken in for that purpose. (Her purpose, instead, was to impress her friends.) See WHITE, supra note 87, at 73-74.
pure desire-states. In those few situations where the law requires "hope," the actor need not believe that it is possible to effectuate his desire. 273

Although purpose and intention are not merely desire-states, I include them within this hierarchy for the sake of simplicity, and because they are more like simple desires (conceptually and normatively) than they are like beliefs. A more elaborate model could more explicitly differentiate them. 274

3. Purpose, Belief, and the Doctrine of Double Effect

The concept of purpose or intention deserves more careful analysis. This section explores the distinction between purpose and belief in light of the philosophical doctrine of double effect. By "purpose," I mean a causally effective desire that is the actor's actual reason for acting. By "intention," I mean either such a purpose or a plan of future action. 275

The doctrine of double effect (DDE) is a theological and deontological doctrine under which an actor must have a stronger justification for intending to bring about a bad effect than for bringing the effect about foreseeably or knowingly. 276 In the words of philosopher Thomas Nagel:

Motive sometimes refers to a more remote purpose—e.g., her purpose in pulling the trigger was to kill him, and her motive was to obtain revenge.

This account is incomplete and controversial. For example, some believe that purpose should not be analyzed in causal terms. See, e.g., George M. Wilson, The Intentionality of Human Action 168-204 (2d ed. 1989).

273 See Brand, supra note 85, at 142; see also Simons, supra note 42, at 507-08.

274 For example, the causal belief/desire analysis of purpose might need modification in order to explain "intention-as-plan." I might intend to go to the dentist out of duty, without strictly "desiring" to do so. See Brand, supra note 85, at 121-23; White, supra note 87, at 77; see also C.T. Sistare, Responsibility and Criminal Liability 96-104 (1989) (helpfully surveying five senses of desire relevant to intentional action). The concept of purpose, however, is much more important to the law than the concept of "intention-as-plan," so these conceptual differences can usually be ignored. See Simons, supra note 254.

275 See supra note 272.

276 Not all who endorse the principle will agree with this precise formulation. Many, for example, treat the doctrine as establishing an absolute duty not to bring about bad effects intentionally. See Kent Greenawalt, Natural Law and Political Choice: The General Justification Defense—Criteria for Political Action and the Duty to Obey the Law, 36 Cath. U. L. Rev. 1, 6-13 (1986) (discussing Catholic absolute moral norms and practical standards of conduct).

For some discussions of the DDE and its rationale, see Bratman, supra note 250, at 139-64; Alan Donagan, The Theory of Morality 157-64 (1977); Charles Fried, Right and Wrong 23 (1978); Hart, supra note 64, at 122-25; Shelly Kagan, The Limits of Morality 128-82 (1989); J.L. Mackie, Ethics: Inventing Right and Wrong 160-68 (1977); Nagel, supra note 237, at 179-88; Jonathan Bennett, Morality and Consequences, in II Tanner Lectures on Human Values 47, 95-116 (Sterling M. McMurrin ed., 1981); Joseph Boyle, Toward Understanding the Principle of Double Effect, 90 Ethics 527 (1980); Nancy Davis, The Doctrine of Double Effect: Problems of Interpretation, 65 Pac. Phil. Q. 107 (1984); Anthony Duff, Intention, Responsibility and
The principle says that to violate deontological constraints one must maltreat someone else intentionally. The maltreatment must be something that one does or chooses, either as an end or as a means, rather than something one's actions merely cause or fail to prevent but that one doesn't aim at.

It is also possible to foresee that one's actions will cause or fail to prevent a harm that one does not intend to bring about or permit. In that case it does not come under a deontological constraint, though it may still be objectionable for neutral reasons.\textsuperscript{277}

Consider a classic example of the distinction:

In the Case of the Strategic Bomber (SB), a pilot bombs an enemy factory in order to destroy its productive capacity. But in doing this he foresees that he will kill innocent civilians who live nearby. Many of us see this kind of military action as easier to justify than that in the Case of the Terror Bomber (TB), who deliberately kills innocent civilians in order to demoralize the enemy.\textsuperscript{278}

The DDE demonstrates the deep significance of the purposebelief distinction in a theory of nonconsequentialist ethics. Although different authors justify the doctrine differently,\textsuperscript{278} for my purposes it is enough that the doctrine supports a distinction in blameworthiness between belief-states


\textsuperscript{277} NAGEL, \textit{supra} note 237, at 179.

\textsuperscript{278} Quinn, \textit{supra} note 276, at 336. Responsibility attaches most clearly to whomever orders the bombing, not to the bomber who simply implements the order. To simplify the discussion in the text, however, I will assume (unrealistically) that the bomber is also the decision-maker.

\textsuperscript{279} Id. at 350 (invoking a Kantian perspective: "Each person is to be treated, so far as possible, as existing only for purposes that he can share. . . People have a strong prima facie right not to be sacrificed in strategic roles over which they have no say."); see NAGEL, \textit{supra} note 237, at 182 (arguing that "to aim at evil, even as a means, is to have one's action guided by evil. . . But the essence of evil is that it should repel us."); Grisez, \textit{supra} note 276, at 76 (adopting a perspective similar to Quinn's). John Finnis grounds
and desire-states. The Terror Bomber’s desire or purpose to kill is more blameworthy, or violates a more stringent moral constraint, than the Strategic Bomber’s knowing but possibly regretful killing. 280

The DDE also shows the importance, and vexing difficulty, of identifying “purpose” and distinguishing it from “foresight” or belief. On close analysis, the actor often appears not to have strictly intended the harmful result:

The terror bomber does not . . . need the civilians actually to be dead. He only needs them to be as good as dead and to seem dead until the war ends. If by some miracle they “came back to life” after the war was over, he would not object. 281

Although this particular example might seem fanciful, the conceptual point is valid. So, if the DDE is to be defended, one must either propose a more reasonable definition of purpose or intention, or find some other solution.

Although some have attempted the former, 282 I believe that the desire-state of callous indifference might help preserve the truth underlying the DDE. 283 Perhaps the terror bomber does not desire or intend the deaths, yet he is recklessly indifferent to whether they occur. His attitude significantly differs, one might suppose, from the strategic bomber, who regrets having to

the doctrine in free choice and respect for human life. Finnis, Intention, supra note 276, at 61-64; Finnis, Abortion, supra note 276, at 105-06.

280 Strictly speaking, purpose and belief are not directly comparable in terms of blameworthiness. Belief can, however, coincide with a less blameworthy desire-state, such as regret.

281 Quinn, supra note 276, at 337 (quoting Bennett, supra note 276, at 111). For other analyses showing the problematic scope of intention, see Hart, supra note 64, at 123-24 (discussing the distinction between direct and indirect intention); Finnis, Abortion, supra note 276, at 105 (illustrating the problem of distinguishing intention and causal effect where they are part of one natural causal process); Foot, Abortion, supra note 276, at 21 (examining the DDE as used by Catholics to support their views on abortion); Moore, supra note 64 (distinguishing between direct and oblique intentions).

282 E.g., Fried, supra note 276, at 22-23 (defining intention by distinguishing between act and omission and between positive and negative duties); Dworkin, supra note 276, at 343-46 (distinguishing indirect from direct intention using an objective and subjective version of the distinction); Finnis, Abortion, supra note 276, at 105; Grisez, supra note 276, at 78, 89-90 (asserting that with an “agent’s intention, a multiplicity of non-subordinated intentions always determines a multiplicity of acts, regardless of the unity of performance”); Quinn, supra note 276, at 343-44 (asserting that agency in which the harm is direct and indirect will eliminate the problem of showing a genuine difference in intention structures).

283 I am not aware of any philosophical defense of this sort, though some philosophers have noted the mental state of indifference in passing. See, e.g., Fried, supra note 276, at 21, 41-42 (arguing that the norms of right and wrong prescribe intentionally bringing about the forbidden result, and that if the result occurs inadvertently, it may be callous and may be condemned); Finnis, Intention, supra note 276, at 63 (arguing that an absolute moral norm might prohibit “wanton” acceptance of a known but unintended side-effect).
cause civilian casualties. If, on the other hand, the strategic bomber chose one enemy factory over another knowing that many more civilians were in the vicinity of his target, and knowing that his target was no more strategically important to destroy than the alternative, then we would properly accuse him, too, of reckless indifference.

In short, the DDE demonstrates the value of distinguishing between purpose and belief. At the same time, the concept of reckless indifference helps to address one of the DDE's chief difficulties—namely, the inevitable tendency to define intention so narrowly that the concept largely vanishes. Reckless indifference, as well as intention, is more likely to express a serious deficiency of will or of moral constraints than is a mere belief that one will cause harm.

4. Negligence and Strict Liability: Mental State or Conduct?

I contrast a hierarchy of "conduct" to the mental state hierarchies of belief and desire for a simple reason. Some supposed "mental state" terminology might not refer to beliefs, desires, or other mental states at all. Culpability terms such as negligence are equivocal. They might refer to a mental state, but they also might refer only, or mainly, to the actor's conduct. For example, one can be negligently mistaken in one's beliefs, but one can also be negligent in one's conduct. Negligent conduct does not presuppose a negligent mental state (an unreasonable belief or desire). The reigning hierarchy, unfortunately, does not always make this clear.

One can ask of any belief, desire, or species of conduct, "Is it reasonable?" In law, the question assumes a specialized meaning: "Would a reasonable person so believe, or so desire, or so act?" I will use the terminology of "unreasonable" or "negligent" beliefs, desires, and conduct in this sense.

The concept of unreasonableness or negligence applies somewhat differently in the three contexts, and it applies explicitly only to beliefs and conduct. Therefore, I discuss, in order, unreasonable beliefs, unreasonable desires, unreasonable conduct, the concept of unreasonableness, justification and excuse, and strict liability.

a. Unreasonable Beliefs

Concerning any belief-state in Table A, one might conclude that a reasonable person would have held the belief, even if the individual actor did not, or that a reasonable person would not have held the belief, even if the actor did. A person might be considered blameworthy or dangerous for lacking a belief (say, that a harm will result, or that acquired property is stolen) that

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284 "Negligent" might seem a more apt adjective for unreasonable conduct than for unreasonable belief, and certainly for unreasonable desire. But modern criminal law does employ the concept of "negligent belief." See supra text accompanying note 20.

285 In some situations, such as self-defense, the law requires both an actual and a reasonable belief. See LAFAVE & SCOTT, supra note 68, § 5.7.
a reasonable person would have. But he might be considered less blameworthy or dangerous than if he had acted in the face of an actual belief. Thus, in the belief hierarchy, "did believe" is often ranked above "did not believe but reasonably should have believed." 286

b. Unreasonable Desires

Legal standards infrequently require a direct evaluation of what a reasonable person would desire—at least, not as part of the prima facie case. 287 They do not impose any general negligence constraint on the content of actors’ desires, though such a constraint is theoretically possible. In a sense, of course, all legal standards implicitly do precisely this. One who intentionally kills another without justification or excuse is prompted by an unreasonable desire—indeed, among the most unreasonable. But the current system does not employ negligence or reasonableness concepts explicitly. For example, although the law provides that a person who uses force in self-defense must “reasonably believe” that the force is necessary, it does not provide (without more) that he must “reasonably desire” to protect himself. 288

286 For a “blameworthiness” justification of this ranking, see supra part III.A. This relative judgment is not a necessary one, however. Indeed, in criminal law, one who deliberately avoids acquiring knowledge of an incriminating fact is equally liable as one who has that knowledge. See supra text accompanying notes 128-33.

287 A conclusion that the defendant had an unreasonable desire also functions quite differently from a conclusion that the defendant had an unreasonable belief. Suppose Smith drives badly and causes an injury, but he did not believe that his driving would have that result. We might nevertheless blame him if we conclude that a reasonable person in Smith’s shoes would believe that his driving would cause injury. Now suppose that Jones drives badly and causes an injury, but she did not desire to cause that result. What is the analogous conclusion about a reasonable person? That a reasonable person would desire to cause that result? Hardly. Although Smith is at fault for not perceiving harm, Jones is hardly at fault for not desiring to cause harm.

The disanalogy might be explained as follows. One reason why Smith’s lack of belief exculpates is because, if he had been aware, he might have acted to avoid harm. But the analogous argument about Jones is obviously unsound: “Jones’s lack of desire exculpates because, if she had had the desire, she would have avoided the harm.”

For further discussion of this problem, see Simons, supra note 42, at 513-15.

288 Why the difference? In the first place, desires are more closely tied to legal norms and sanctions; it is therefore important to specify the inappropriate desire or motive and the corresponding sanction, rather than employ an undifferentiated prohibition against harboring or acting upon “unreasonable” desires. Also, the unreasonableness of one’s beliefs is a narrower and more tractable inquiry than the highly evaluative inquiry into the unreasonableness of one’s desires.

But I should not overstate the point. Certain excuses, for example, do require a fairly direct inquiry into the reasonableness of the actor’s desires. Under the Model Penal Code, “heat of passion” manslaughter is the proper charge if an intentional homicide is “committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.” Model Penal Code § 210.3(1)(b). To paraphrase, an ordinary or reasonable person might at least be tempted to kill under these
Directly evaluating the reasonableness of desires might make more sense if one evaluated the complex of an actor's desires and attitudes, and not simply an isolated desire. One could even define the general concept of negligence in this way—as not caring enough about the interests of another, or caring less than the reasonable person would. A person might also be negligent for choosing to act without sufficient desire to discover the potential harmful consequences. These are not the usual contemporary definitions of negligence, however. They are closer to a definition of reckless indifference as "insufficient care," which was briefly described above.

\[c. \text{ Unreasonable Conduct}\]

Negligent conduct is not the same as negligent belief or (to the extent that this is coherent) negligent desire. Although deciding whether conduct is negligent may involve some inquiry into the reasonableness of beliefs or circumstances. \textit{Id.} cmt. 5(a). And duress requires that a person of "ordinary firmness" would be unable to resist the coercive pressure. \textit{Id.} § 2.09(1); see Joshua Dressler, \textit{Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits}, 62 S. CAL. L. REV. 1331, 1367 (1989) (asserting that duress "ought to exculpate anyone who is a victim of a threat that a person of reasonable moral strength could not fairly be expected to resist").

Consider also the nominally "cognitive" question whether a person using defensive force "reasonably believes" that an attack is imminent and that she must use force on the present occasion. \textit{See Model Penal Code} §§ 3.04(1), 3.09(2). It seems more realistic to describe the required "beliefs" here as referring, at least indirectly, to "desires," because the context in which a person uses defensive force is usually an emotional, violent confrontation. When we require that her "beliefs" be "reasonable," we might be concerned not simply, or even principally, that she assess the facts correctly, but rather that she respond in a socially appropriate manner to understandable fear. Again, the cognitive test of belief is attractively simple but inadequate. A more honest test might directly ask whether the actor showed an ordinary or reasonable degree of self-control in the situation, considering the pressures of the confrontation, the options available, and so forth. In part, this is a question of the strength and nature of the actor's desire to avoid harm to herself and her willingness or desire to inflict harm on another. For example, we might expect the actor to have only the normal desire to avoid harm to herself, not an extraordinary paranoia; and only a normal desire not to inflict harm unnecessarily, not an extraordinary pacifism or altruism.

289 Thus, there has been occasional support for the view that negligence is refuted when the actor uses his best efforts to avoid harm. This view presupposes that negligence itself requires some lack of consideration of the interests of others. For a discussion of this view, see 3 \textit{Harper et al.}, supra note 33, at 381-89 (discussing the conduct theory of negligence, which excludes evidence of the actor's state of mind, and the state of mind theory of negligence, which accepts such evidence); Henry H. Edgerton, \textit{Negligence, Inadvertence, and Indifference: The Relation of Mental States to Negligence}, 39 HARV. L. REV. 849, 849-52, 860-62 (1926). Under the modern view, however, the actor's good attitude or best effort is irrelevant; and this is one sense in which negligence is judged by an "objective" test.

290 \textit{See supra} part II.D.
desires, it need not do so directly. Negligence need not refer to a positive state of mind, or even to the unreasonable absence of some state of mind. One does not have to be unreasonably unaware of some relevant circumstance in order to act negligently. The Model Penal Code might be mistaken, therefore, in asserting that one is negligent if he "should be aware" of, yet fails to perceive, a substantial and unjustifiable risk. Similarly, the "reasonable foresight" test of negligence in tort law is too closely tied to what a reasonable person would believe or consider in planning his or her action.

In short, the unreasonable taking of the risk might be critical, not the unreasonable failure to perceive it. One who is fully aware of all the relevant risks and circumstances can act negligently if he makes an unjustifiable decision. Conversely, one who reasonably lacks conscious awareness of a particular risk can act negligently in taking the risk. Of course, even under the "conduct" interpretation, a minimum condition of negligence liability ordinarily requires the defendant to have reasonably foreseen at least some general category of risk that she posed. Still, the "conduct" interpretation

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291 See, e.g., Moore, supra note 113, at 81-82.
292 See, e.g., Hart, supra note 64, at 145-49 (distinguishing negligence from inadvertence). But see Rollin M. Perkin, A Rationale of Mens Rea, 52 Harv. L. Rev. 905, 913-15 (1939) (asserting that "negligence implies something done or not done with some sort of blameworthy state of mind").
293 Model Penal Code § 2.02(2)(d); see Moore, supra note 113, at 82.
294 On the other hand, consider how the commentaries to the Model Penal Code justify negligence liability against the claim that the negligent are not really blameworthy: "Moral defect can properly be imputed to instances where the defendant acts out of insensitivity to the interests of other people, and not merely out of an intellectual failure to grasp them." Model Penal Code § 2.02 cmt. 4. If this is the justification, then it is odd that the Model Penal Code mainly defines negligence as an unreasonable failure to perceive or be aware. The text of the Model Penal Code certainly has a rationalist gloss that is narrower than this justification.
295 Note that the recent proposed codification of British criminal law draws the distinction that the Model Penal Code blurs. The proposal distinguishes between the "heedless" defendant, who "gives no thought to whether there is a risk . . . although the risk would be obvious to any reasonable person," and the "negligent" defendant, whose act is "a very serious deviation from the standard of care . . . of a reasonable person." Law Commission Report, supra note 14, §§ 8.23, 8.24. Thus, heedlessness means unreasonable failure to perceive a risk, while "negligence" means grossly unreasonable conduct.
296 Suppose the actor drives during a terrible snowstorm and runs over a person who is obscured by the snow. Even a reasonable person would not have been able to see the victim under the circumstances. The actor's negligence consists in driving under these circumstances, not in failing to see the person. Of course, it is also true that the actor should have foreseen risk in a more general way.
295 Foreseeability of even general categories of risk might not always be required. In extreme emergencies, little or no "foresight" can honestly be expected, yet a person's conduct can still be judged for its reasonableness. See, e.g., Cordas v. Peerless Transp., 27 N.Y.S.2d 198 (N.Y. City Ct., N.Y. County 1941).
focuses on what a reasonable person would do, not on what he would consider or believe.\footnote{Note the ambiguity of negligence terms such as "thoughtless" and "careless." They might simply refer to deficient or unreasonable conduct. But they could also mean: (a) unaware (lacking belief), when one should be aware; or (b) inconsiderate (lacking desire not to harm, or indifferent to consequences). I have discussed these other senses of negligence above.}

d. "Unreasonable": The Concept

Reasonableness can be a question of degree. One might evaluate whether the actor's deviation from what a reasonable person would do was slight, substantial, or gross. This is indeed one conventional way of distinguishing ordinary from gross negligence in tort law,\footnote{RESTATEMENT (SECOND) OF TORTS §§ 283, 500 (defining the standard of conduct as the reasonable man standard and defining reckless disregard of safety).} and ordinary tort negligence from modern criminal negligence.\footnote{Thus, the Model Penal Code definition of criminal negligence requires a "gross deviation" from the standard of reasonable care. MODEL PENAL CODE § 2.02(2)(d). But at common law, criminal negligence did not necessarily require such a "gross" deviation, nor a greater deviation than in tort law. See LAFAVE & SCOTT, supra note 107, § 3.7(a).} Thus, one could create a separate hierarchy of reasonableness. Some mistaken beliefs are simply negligent, while others are grossly negligent. The same is true of unreasonable desires and unreasonable conduct.

Reasonableness is an extremely flexible normative concept. There is no reason to think that it must be a uniform concept across all fields of law, that it must refer only to rationality,\footnote{By contrast, Moore suggests that the reasonable person is "a preeminent practical reasoner, finding the morally and legally correct major premises (in terms of costs and benefits) for his practical syllogisms, and forming the accurate means/ends beliefs (in terms of probabilities) for his minor premises." MOORE, supra note 113, at 83.} or that it must be distinct from what most persons in some relevant community do. For example, although criminal law employs the concept of reasonableness in both justification and excuse, the concept's meaning in the two contexts might differ.\footnote{At the very least, we look at different aspects of the "reasonable person" when we ask whether a reasonable person would believe that force was immediately necessary, MODEL PENAL CODE §§ 3.04(1), 3.09(2) (self-defense); whether a reasonable person would be firm enough to resist a threat, id. § 2.09(1) (duress); or whether a reasonable person could explain why he was provoked or was "under the influence of extreme ... emotional disturbance." Id. § 210.3(1)(b) (provocation). For further speculation along this line, see Simons, supra note 63, at 1190-91 (discussing the possibility that "reasonableness" changes its meaning depending on the underlying theory of self-defense).} "Reasonableness" might be conceived differently as applied to beliefs, desires, and conduct.\footnote{See FLETCHER, supra note 68, at 490-91 (asserting that only offenses in the pattern of harmful consequences are committed negligently); Simons, supra note 37, at 252-53 n.129 (illustrating that the negligence concept is flexible enough to accommodate different types of reasonableness judgments).}
There is much controversy about the relevant community by which to judge the “reasonable person.” Finally, it is clearer in tort than in criminal law that the reasonable person is not the average member of the community.

e. Justification and Excuse

Some supposed “mental state” definitions betray their actual status as culpable conduct standards by explicitly incorporating justifications or excuses. A striking example is the Model Penal Code hierarchy. Purpose and knowledge are given a pure mental state analysis. Recklessness, however, is quite different. It requires not just that the actor be consciously aware of a substantial risk (a mental state), but also that the risk be “unjustifiable,” such that, “considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.” The Code similarly defines negligence as a failure to perceive a risk that is “unjustifiable,” and judges it by essentially the same standard.

Including these elaborate built-in justifications within “mental state” or “culpability” standards is awkward and misleading. These non-mental-state aspects of the recklessness and negligence standards are really conduct or actus reus requirements. The best explanation for the hybrid recklessness and negligence standards is probably functional. The standards are sometimes meant to serve as the most important part of a legal norm, and not just

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302 For example, is “the reasonable woman” a sensible standard? In the criminal law of self-defense, some courts have answered in the affirmative. See, e.g., State v. Wanrow, 559 P.2d 548 (Wash. 1977) (holding that using the objective standard of self-defense was erroneous and violated a woman’s right to equal protection).

305 RESTATEMENT (SECOND) OF TORTS § 295A cmt. c (asserting that customs of the community are factors to take into account, but are not controlling); PROSSER & KEETON, supra note 30, § 33 (asserting that evidence of usual and customary conduct of others under similar circumstances is normally relevant and admissible). I found no discussion in major criminal law treatises of the point that average care might not be reasonable care. This might be because criminal negligence often requires a substantial or gross, and not merely a simple, deviation from the standard of reasonable care. Thus, perhaps one who conforms to customary or average care can never be considered criminally negligent.

Note the recent Supreme Court decision that the question of whether obscene material lacked serious literary, artistic, political, or scientific value is to be judged by a “reasonable person” test and not by “community standards.” Pope v. Illinois, 481 U.S. 497 (1987). The Court does not seem to realize that all reasonable person tests are judged according to some “community,” and the Court gives no guidance about which community is now relevant.

304 They are pure except that “knowledge” means more than “belief”; it implies that the proposition believed is true. See discussion supra app. B.1.

305 MODEL PENAL CODE § 2.02(2)(c).

306 Id. § 2.02(2)(d).
as the mental state pertaining to one element of an elaborately defined offense. That is, with crimes such as reckless homicide, negligent homicide, or reckless endangerment, the hybrid standards are the most important part of a general test of liability. In contrast, "reckless" may be a mental state requirement for a less important element of an offense, such as liability for "recklessly" taking or enticing a committed person away from lawful custody without privilege.\(^{307}\)

Whatever the explanation, incorporating justifications into mental states such as recklessness or negligence deemphasizes the pure mental state aspect. Moreover, it provides the defendant a significant advantage compared to the usual structure of "intentional" torts and crimes. In these latter cases, the defendant might have to fit within a much narrower justification, and (in tort law at least) he might have the burden of persuasion.

Consider a claim of self-defense or necessity in a criminal assault prosecution. If the state can prove an intentional or knowing assault, the defendant will at least have the burden of production on self-defense or necessity, and will have to fit within that or some other explicit defense. But if the state can prove only a reckless assault, the defendant should not need to prove a separate defense because the prosecution must prove that the risk was unjustifiable as part of its proof that defendant was reckless.\(^{308}\) The situation in tort law is the same.\(^{309}\)

f. **Strict Liability**

Strict liability is a negative concept, but it can be the negative of two different positive models. Like negligence, strict liability can refer either to beliefs or to conduct. First, a person might be strictly liable despite his non-

\(^{307}\) *Id.* § 212.4(2). Note also that what I have called "global" desires or states of mind—such as "extreme indifference to the value of human life"—seem implicitly to entail that the actor lacks any justification or excuse, such as necessity, self-defense, duress, or provocation. For the global state of mind itself is a comprehensive evaluation of the defendant’s motives and desires. *See* discussion *supra* note 89.

\(^{308}\) But not all courts have agreed. In New York, the Court of Appeals has held that self-defense is a valid defense even to crimes of recklessness. *People v. McManus*, 496 N.E.2d 202 (N.Y. 1986) (holding that self-defense is a valid defense to depraved indifference murder); *People v. Huntley*, 452 N.E.2d 1257 (N.Y. 1983) (holding that justification is a valid defense to reckless manslaughter). Although I agree that the doctrine of self-defense should provide a full justification, I believe it should negate the mental state of "recklessness," and need not come in by way of separate defense at all.

The hybrid recklessness standard probably does not include matters of excuse, since it refers to "unjustifiable" but not "inexcusable" risks. If a person under duress sets fire to a building and creates a substantial risk of death, probably he is prima facie liable for manslaughter, and must rely on the duress defense.

\(^{309}\) Thus, an intentional tort is subject to such defenses as self-defense and necessity. But torts of negligence and recklessness are not subject to such defenses, because the plaintiff does not establish a prima facie tort in the first instance if the defendant has such a reasonable explanation for his actions.
negligent belief in a fact (usually, his nonnegligent mistake). Second, a person might be strictly liable even though his conduct was nonnegligent. The first conception is more familiar in criminal law. For example, a boy might be strictly liable for statutory rape despite his reasonable belief that the girl was not a minor. The second conception is more familiar in tort law. For example, a manufacturer might be strictly liable for a flaw in its product although its conduct was not negligent. In the second case, neither the presence nor the absence of a mental state is directly relevant.

Of course, even in the first category, "strict liability" is something of a misnomer. Legal liability always requires "intentional" conduct in the sense of a voluntary act. The law typically also requires a distinct mental state as to some elements of the offense. Consider felony murder, for example, which requires a culpable mental state as to the underlying felony but not as to the death. Thus, "strict liability" usually denotes liability when the defendant lacks a culpable mental state (or has not acted culpably) with respect to at least one element of the offense, not with respect to all.311

310 A third conception of strict liability also exists. A person who fails to satisfy the "reasonable person" test due to some personal inadequacy or incapacity might be considered "strictly liable," in the sense that he is either unable to conform or blameless for failing to conform. Note that this conception of strict liability assumes that persons are not blameworthy for such incapacies or failures to conform, and that liability without blame amounts to strict liability. These two assumptions, though defensible, are controversial. See, e.g., Michael Davis, Strict Liability: Deserved Punishment for Faultless Conduct, 33 Wayne L. Rev. 1363 (1987) (arguing that nonnegligent, strictly liable defendants can nonetheless deserve punishment for taking unfair advantage). The second conception of strict liability discussed in the text does not adopt these assumptions.

311 See Peter W. Low, The Model Penal Code, the Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?, 19 Rutgers L.J. 539, 551 (1988) ("There is no instance of which I am aware where the criminal law uses strict liability for one element of an offense without any inquiry into fault on other elements." Low excepts true regulatory offenses from this generalization.)

This feature of strict liability suggests that the classic debate over the propriety of "strict liability" offenses is somewhat misleading. An offense of "strict liability" might plainly display a defendant's blameworthiness, while an offense requiring one of the "highest" mental states might not. Instead, we must examine what the "objective" elements of the offense (conduct, circumstances, and results) require, and how significant the objects of the "highest" mental states are. For example, one who illegally possesses an unlicensed gun typically decided in the past to buy or keep a gun; and the important question is how much the defendant's ignorance that it is unlicensed or that the law requires a license diminishes his culpability. And conversely, the "purpose" to bring about certain types of results or to engage in certain types of conduct may say little about culpability. If any person who purposely drives his car is strictly liable for any harm that he causes, we would still worry about the appropriateness of the strict liability rule.