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Article

WHERE BIAS LIVES IN THE CRIMINAL LAW AND ITS PROCESSES: HOW JUDGES AND JURORS SOCIALLY CONSTRUCT BLACK CRIMINALS

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I. INTRODUCTION

Is criminal conviction a reliable test of someone's subjective culpability? Or are criminals socially constructed by factfinders in racially biased ways that make criminal convictions of blacks, for instance, unreliable indicators of their moral blameworthiness? Criminal conviction can seem like a strong and reliable indicator of a black wrongdoer's moral blameworthiness by the following logic:

- Because wrongdoers enjoy a constitutionally protected presumption of innocence in criminal trials,[1] the jury is generally instructed that the State must prove beyond a reasonable doubt not only that a wrongdoer committed a prohibited act but that he or she did so with a certain level of blameworthiness or subjective culpability or *mens rea*.
- Accordingly, a criminal conviction generally means that a jury found the wrongdoer to be morally blameworthy (that is, to have acted with the necessary *mens rea*) beyond a reasonable doubt.[2]
- Hence, criminal conviction establishes accurately and reliably—i.e., beyond a reasonable doubt—that a black person deserves blame and contempt.

The hidden and mistaken assumption in this argument, however, is that jurors' judgments of black blameworthiness—and thus their *mens rea* findings about blacks—are not racially biased. For if jurors' moral judgments about blacks are racially tainted, if black wrongdoers systematically suffer harsher moral evaluations than similarly situated whites, they will more often satisfy the *mens rea* requirement for criminal conviction, which means that black criminals are "constructed" and not merely "found" in the bias-laden fact "finding" process of a criminal trial, which in turn means that a criminal conviction is unreliable evidence of blameworthiness in cases involving blacks. Put differently, proof of racially-biased moral assessments by ordinary people implies that many black criminals are manufactured in the adjudication process through the racially-biased *mens rea* findings of ordinary factfinders. As I discuss below, studies on attribution bias[3] and ingroup empathy bias[4] indeed do show that black wrongdoers systematically suffer harsher moral appraisals than similarly situated white wrongdoers.

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[1] *In re* Winship, 397 U.S. 358, 364 (1970).

[2] As I will show, contrary to what mainstream legal commentators say, direct moral judgments of a wrongdoer are the basis of guilty verdicts in many, if not most, criminal trials.

[3] *See infra* footnotes 13–19, 30–31 and accompanying text.

[4] *See infra* footnotes 35–71 and accompanying text.

II. DENIALS OF RACIALLY BIASED CONSTRUCTIONS OF BLACK CRIMINALS: WHY PARADIGMS MATTER

From the standpoint of the prevailing paradigm of *mens rea*, however, it is wild exaggeration to claim that large numbers of black convictions result from racially-biased moral judgments of black wrongdoers by judges and jurors or that many "Bad Negroes"[5] are socially constructed in the adjudication process. Those trained in American law schools have learned to think about the *mens rea* requirement in ways that conceal its central role as a vehicle for factfinders to make frontal moral judgments of wrongdoers. This is why paradigms matter—looking at things through the wrong ones can conceal where racial bias lives in the substantive criminal law and adjudication of just deserts. The concept of a scientific paradigm developed by Thomas Kuhn in *The Structure of Scientific Revolutions* applies as much to the legal as to the scientific arena. "Paradigm" for Kuhn means a model or theory that explains most or all phenomena within its scope. The power of a paradigm lies in its ability to channel thought, structure perceptions, and define the terms of analyses and debates about a subject; it determines what constitutes "normal science" for an area of inquiry.[6] The prevailing paradigm of *mens rea* in the substantive criminal law should be overhauled because it does not adequately serve the most basic function of a sound paradigm—it does not explain many phenomena within its scope. Worse still from a racial justice perspective, like a conceptual cataract, the prevailing paradigm obstructs a clear view of where bias lives both in black letter law and in the processes by which factfinders apply the black letter to blacks.

The following analysis will provide a clear picture of how under current law biased moral judgments of a wrongdoer can directly and indirectly determine whether factfinders "find" the necessary *mens rea* for criminal conviction. Once the conceptual cataract has been removed through this more coherent interpretation of *mens rea*, a clear and simple truth comes into focus: Bias lives in the *mens rea* requirement and in how judges and jurors apply it to black wrongdoers.

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[5] In RANDALL KENNEDY, RACE, CRIME, AND LAW (1997), Professor Kennedy urges blacks to practice a politics of respectability in criminal matters by distinguishing between law-abiding "good Negroes" and criminal "bad Negroes." Kennedy exhorts good law-abiding blacks to "distinguish sharply between 'good' and 'bad' Negroes" for the sake of safety and racial respectability. His litmus test for "bad Negroes" is criminal wrongdoing. My analysis undermines the normative basis for a politics of respectability in criminal matters, for it shows that many "bad Negroes" are products of racially biased adjudications of blameworthiness—it calls for epistemic humility in our moral judgments of others (especially if they belong to negatively stereotyped groups) and hence for skepticism about any politics rooted in moral distinctions between "good Negroes" and "bad Negroes."

[6] It achieves this in part by establishing pedagogical priorities that teachers use to inculcate in new students the assumptions and frames of reference widely shared by practitioners. In the legal arena, these trained practitioners then further entrench and disseminate the paradigm by having it inform their work as legislators, advocates, and judges, as well as legal commentators and pundits.

A. *EVIDENCE OF BIASED CONSTRUCTIONS OF BLACK CRIMINALS IN CHARACTER-BASED APPROACHES TO MENS REA*

The legal requirement of subjective culpability or *mens rea* assures that "the punishment fits the blame": In its liability function, the requirement shields morally innocent wrongdoers from any punishment,[7] and in its grading function the requirement subjects the less culpable to less punishment and the more culpable to more.[8] Because the subjective culpability or "desert" of an offender can be and often is measured by his character, the *mens rea* requirement often calls on jurors to judge the character of the wrongdoer. In RETHINKING CRIMINAL LAW, George Fletcher points out that "[a]n inference from the wrongful act to the actor's character is essential to a retributive theory of punishment"[9]—that is, a theory under which it is unjust to punish a person who does not deserve punishment and unjust to punish him more than he deserves (and deserts for punishment purposes are measured by subjective culpability). As he more fully states it:

> (1) [P]unishing wrongful conduct is just only if punishment is measured by the desert of the offender, (2) the desert of an offender is gauged by his character—i.e., the kind of person he is, (3) and therefore, a judgment about character is essential to the just distribution of punishment.[10]

Excuses negate "broad"[11] *mens rea*, so excuses, in Fletcher's words, "preclude an inference from the [wrongful] act to the actor's character."[12] Put differently, a wrongdoer makes out an excuse and defeats a finding of *mens rea* inasmuch as the jury attributes her wrongful act to her situation rather than her character.[13]

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[7] According to the maxim *actus non facit reum, nisi mens sit rea* or "an unwarrantable act without a vicious will is no crime at all" in Blackstone's translation.

[8] For instance, under ordinary *mens rea* analysis, culpable but unintentional wrongdoers are punished less than culpable but intentional ones because someone who kills a pedestrian accidentally generally deserves less blame than one who kills one on purpose.

[9] GEORGE FLETCHER, RETHINKING CRIMINAL LAW 800 (1978).

[10] *Id.*

[11] I recognize that under the prevailing *mens rea* paradigm, "excuses" are not called *mens rea* requirements; *mens rea* under the prevailing paradigm is limited to the aware mental states and negligence. Even traditional scholars (*see generally* KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS (8th ed. 2007).), however, grant *mens rea* status to excuses by saying excuses go to "broad" *mens rea*. I discuss the broad and narrow senses of *mens rea* and how excuses figure in both senses. *See infra* footnotes 89-96 and accompanying text.

[12] FLETCHER, *supra* note 9, at 799.

[13] As I discuss below, this character-based approach also explains the role of the "reasonable person" test of *mens rea* that figures centrally throughout the substantive criminal law, including negligence, recklessness, provocation, extreme emotional disturbance, self-defense, and duress. In sum, attributions and character judgments routinely guide jurors' *mens rea* judgments about whether wrongdoers cross the threshold from non-criminal mistakes and accidents to criminal killings and whether someone who has crossed into the criminal realm *deserves* to be blamed and punished more or less.

That *mens rea* findings often turn on whether jurors attribute the wrongdoer's act to his character or to his situation maps directly onto a body of social psychological research called attribution theory. Fritz Heider, known as "the father of attribution theory," focused his research on what he called "naive" or "commonsense" psychology, the kind employed by ordinary people, including jurors and court officials. For Heider, people were like amateur scientists, trying to understand other people's behavior (here the behavior of wrongdoers) by piecing together information to explain its causes. Put differently, this research describes how ordinary people ("social perceivers") answer the "why" questions that arise when they interpret another's (wrongdoer's) conduct.[14] According to attribution theory, when trying to decide why people (wrongdoers) behave as they do, social perceivers make either an internal, dispositional attribution or an external, situational attribution. ("Attributions" are the explanations social perceivers come up with.) An internal attribution is the inference that a person (wrongdoer) is behaving a certain way because of something about him or her, such as the person's attitudes, character, or personality. An external attribution is the inference that a person (wrongdoer) is behaving a certain way because of something about the situation he or she is in. Research indicates that individuals (wrongdoers) whose acts are viewed as stemming from external factors are generally held less responsible than those whose acts are viewed as stemming from internal factors.[15]

Most pregnant with implications from a racial justice standpoint are studies showing differences in social perceivers' attributions about the causes of wrongful behavior by white versus black wrongdoers. In a classic experiment, Birt Duncan showed white subjects a videotape depicting one person (either black or white) ambiguously shoving another (either black or white). Subjects who characterized the shove as "violent" more frequently attributed the wrongdoing to personal, dispositional causes when the harm-doer was black, but to situational causes when the harm-doer was white.[16] A recent study of juvenile offenders finds pronounced differences in court officials' attributions about the causes of crime by black versus white youths: Court officials are significantly more likely to perceive blacks' crimes as caused by internal factors and crimes committed by whites as caused by external ones.[17] In the words of the researchers, "[b]eing black

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[14]Attribution theory also probes how ordinary people explain or diagnose their own behavior, but that research is not relevant to this analysis.

[15] Julian B. Rotter, *Generalized Expectancies for Internal Versus External Control of Reinforcement*, 80 PSYCHOL. MONOGRAPHS: GEN. AND APPLIED 1 (1966). A well-documented finding of this research is that when people explain the behavior of others, they systematically tend to overlook the impact of situations and overestimate the role of personal factors. Because this bias is so pervasive, and often so misleading, it is called the fundamental attribution error.

[16] Birt. L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. OF PERSONALITY AND SOC. PSYCHOL. 590, 595–97 (1976).

[17] George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554 (1998).

significantly reduces the likelihood of negative *external* attributions by probation officers and significantly increases the likelihood of negative *internal* attributions, even after adjusting for severity of the presenting offense and the youth's prior involvement in criminal behavior."[18] In addition, researchers found that to the extent that court officials attribute black crimes to internal causes and white crimes to external causes, "they may be more likely to view minorities as culpable and prone to committing future crimes."[19] Thus, differential attributions about the causes of crime by blacks and whites contribute directly to differential evaluations of subjective culpability and dangerousness.[20]

Often, if factfinders attribute the prohibited conduct to the defendant's character, they find the necessary *mens rea*; if, instead, they attribute it to her situation, they do not find the requisite *mens rea*. Yet, the demonstrable race-based differences in attributions about the causes of crimes imply that in assessing *mens rea*, factfinders more readily find the requirement met for blacks than for similarly situated whites, for they will more readily attribute a black defendant's commission of the *actus reus* to his character than they will his similarly situated white counterpart.

B. Concrete Illustration

One arresting implication of this analysis is that criminals—including even murderers—are often socially constructed by factfinders in the adjudication process.[21] For instance, assume a black and a white actor, each of whom intentionally kills another person under similar circumstances and claims provocation. In a common law jurisdiction, the *mens rea* for murder is "malice"—unlawful killings committed with "malice" are murder and those without are manslaughter. Malice means (among other things) an unprovoked intention to kill; thus, an adequate provocation negates malice. Accordingly, if jurors in such a jurisdiction find that the defendant intentionally killed in the heat of passion, triggered by an adequate provocation, they will find no malice and hence convict him only of manslaughter, but if they do not find an adequate provocation, they will find malice and convict him of the more blameworthy kind of criminal homicide, murder. Under one common approach, the provocation, to be adequate, must

[18] *Id.* at 563–564 (emphasis in original).

[19] *Id.* at 557.

[20] Such findings support the anecdotal observation of a California public defender who noted, "If a white person can put together a halfway plausible excuse, people will bend over backward to accommodate that person. It's a feeling 'You've got a nice person screwing up,' as opposed to the feeling that 'this minority person is on track and eventually they're going to end up in state prison.' It's an unfortunate racial stereotype that pervades the system. It's all an unconscious thing." Christopher H. Schmitt, *Plea bargaining favors whites as blacks, Hispanics pay price*, SAN JOSE MERCURY NEWS, December 8, 1991.

[21] Such findings would also reveal why some studies might fail to recognize the existence or full magnitude of such discrimination, for such studies only compare blacks found guilty of, say, murder with whites found guilty of the same crime. But lost in such a comparison would be that blacks who intentionally kill are more likely to be found to have the *mens rea* for murder than whites who commit the same act.

be such as might cause[22] *a reasonable or ordinary person in the same situation* to "lose self-control and act on impulse and without reflection."[23]

It is here that there is room for biased moral judgments and social construction because it is here that judges and jurors make attributions. As Model Penal Code reporters Jerome Michael and Herbert Wechsler observed:

> Provocation . . . must be estimated by the probability that [the provocative] *circumstances* would affect *most men* in like fashion . . . . Other things being equal, the greater the provocation, measured in that way, the more ground there is for attributing the intensity of the actor's passions and his lack of self-control on the homicidal occasion to the extraordinary character of the *situation* in which he was placed rather than to any extraordinary deficiency in his own *character*.[24]

In other words, in determining whether the accused's intentionally homicidal act constitutes murder or manslaughter, the factfinders must decide whether to attribute that act to external, situational factors or to internal, dispositional ones. Inasmuch as they attribute such an act to his situation, they will find the necessary provocation to negate malice and hence find only the *mens rea* for manslaughter; inasmuch as they attribute it to his, in the words of one court, "wickedness of heart or cruelty or recklessness of disposition,"[25]—in other words, to his character—they will not find adequate provocation and hence will find malice or murderous *mens rea*.

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[22] To be more precise, the provocation must be such as would sorely test an ordinary person's self-control.

[23] United States v. Roston, 986 F.2d 1287, 1294 (9th Cir. 1993) (Boochever, J., concurring) (citing 9th Cir. Crim. Jury Instr. 8.24C (1992)). This does not mean reasonable people kill whenever adequately provoked. "[A] reasonable person does not kill even when provoked..." MODEL PENAL CODE § 210.3, cmt. AT 56 (AM. LAW INST. 1980) (citing Glanville Williams, *Provocation and the Reasonable Man*, 1954 CRIM. L. REV. 740, 742). As *Roston* further explains, "[t]his standard does not imply that his actions." *Roston*, 986 F.2d at 1294 (Boochever, J., concurring).

[24] Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1281 (1937) (emphases added). They continue: "While it is true, it is also beside the point, that most men do not kill on even the gravest provocation; the point is that the more strongly they would be moved to kill by circumstances of the sort which provoked the actor to the homicidal act, and the more difficulty they would experience in resisting the impulse to which he yielded, the less does his succumbing *serve to differentiate his character from theirs*. But the slighter the provocation, the more basis there is for ascribing the actor's act to an extraordinary susceptibility to intense passion, to an unusual deficiency in those other desires which counteract in most men the desires which impel them to homicidal acts, or to an extraordinary weakness of reason, and consequent inability to bring such desires into play." *Id.* at 1281-1282 (emphasis added).

[25] Maher v. People, 10 Mich. 212, 219 (1862). "[W]ithin the principle of all the recognized definitions [of malice aforethought], the homicide must, ... though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition." *Id.*

Hence, it is here that differential attributions about the causes of crime by blacks and whites can lead to differential evaluations of subjective culpability; it is here that murderous black criminals are socially constructed: Because of race-based attributional bias, factfinders will more readily attribute an intentional homicide committed by a black actor to his "wickedness of heart or cruelty of disposition" than a similar killing committed by a white actor. Thus, they will tend to find a black actor guilty of murder when a similarly situated white actor would only be convicted of manslaughter. Hence, black murderers are not merely found in the adjudication process, they are socially constructed through the racially biased moral evaluations of jurors.

The Wechsler and Michael analysis of murderous *mens rea* and the provocation mitigation not only recognizes the central importance of the "character vs. situation" or "internal vs. external" distinction in jurors'[26] assessments of subjective culpability, it also points out the kind of information that ordinary people (including ordinary jurors) rely on to decide between an internal and external explanation or attribution, namely, information about how *most people* would respond to the provocative stimulus: "Provocation," they point out, ". . . . must be estimated by the probability that [the provocative] circumstances would affect *most men* in like fashion."[27] More generally, the reasonable person test[28] makes information about the reactions of *most people* decisive not only in provocation cases but also criminal negligence and recklessness and a host of defenses. In the words of Mark Kelman, implicit in the reasonable or ordinary person test is the moral norm that "blame is reserved for the (statistically) deviant"[29]—typical beliefs and reactions generally qualify as reasonable ones. Hence, the reasonable person test directs factfinders to consider information about typical reactions in assessing a wrongdoer's blameworthiness.

This approach to the reasonable person standard fits hand in glove with attribution research which finds that ordinary social perceivers give great weight to how typical an actor's reactions are in deciding whether to attribute them to external or internal factors. Thus, under Harold Kelly's Covariation Principle, one kind of information that people rely on when forming an attribution is consensus information.[30] Consensus information is

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[26] I'm interpreting their insights into how jurors determine *mens rea* murder cases as descriptive of how ordinary people currently do make judgments about subjective culpability rather than prescriptive of how they ought to make those moral judgments.

[27] Michael & Wechsler, *supra* note 24 (emphasis added). As the court puts it in *Maher v. People*, "In determining whether the provocation is sufficient or reasonable, *ordinary human nature*, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard." *Maher*, 10 Mich. at 221 (emphasis in original).

[28] Recall that to negate malice, the provocation must be viewed by the jury as the kind that might cause a reasonable or ordinary person in the same situation to lose self-control.

[29] Mark Kelman, *Reasonable Evidence of Reasonableness*, 17 CRITICAL INQUIRY, 798, 801 (1991).

[30] For Kelly there are three types of information that people consider when forming an attribution: consensus, distinctiveness, and consistency. Consensus information concerns how different persons react to the same stimulus. Distinctiveness information concerns how the same person reacts to different stimuli. Consistency information concerns the extent to which the behavior between one actor and one

information about the extent to which other people behave the same way toward the same stimulus as the actor does. If most others also respond to a stimulus in the same way as the actor, then social perceivers will see his behavior as high in consensus and will tend to attribute it to the stimulus or situation. Conversely, if most people do not respond to the stimulus in the same way as the actor, then social perceivers will see his behavior as low in consensus and thus more diagnostic of what kind of person he is—that is, they will tend to make an internal attribution.[31] Thus, the reasonable or ordinary person test, by calling on factfinders to consider consensus information in assessing defendants' subjective culpability, provides a very common legal vehicle for the formation and application of internal or external attributions and explanations by judges and jurors who are adjudicating a wrongdoer's just deserts.

Moreover, the Model Penal Code makes it clear that the point of the word "situation" (in phrases like "reasonable person in the actor's *situation*") is to furnish factfinders with a discretion-laden doctrinal vehicle for excusing those reactions of an actor that can be attributed to his "situation" (and hence do not reveal internal, dispositional defects) and blaming the actor for those reactions that do reveal character defects (because they cannot be attributed to situational pressures). Thus, the Code makes the test for heat of passion whether the defendant acted "under the influence of extreme emotional disturbance for which there is reasonable explanation or excuse," and then directs that the determination of the reasonableness of the explanation or excuse shall be made "from the viewpoint of a person *in the actor's situation.*"[32] In clarifying this formulation, the Comments state:

> The word "situation" is designedly ambiguous. . . . There thus will be room for interpretation of the word "situation," and that is precisely the flexibility desired. . . . In the end, the question is whether the actor's loss of self-control can be understood in terms that arouse *sympathy* in the ordinary citizen. Section 210.3 faces this issue squarely and leaves the ultimate judgment to the ordinary citizen in the function of a juror assigned to resolve the specific

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stimulus is the same across time and circumstances. Distinctiveness and consistency information generally will not be available to factfinders in that they would involve admitting into evidence historical facts about the defendant and evidence of prior bad acts, and such evidence is generally (but not always) inadmissible. Harold H. Kelley, *The Processes of Causal Attribution*, 28 AM. PSYCHOLOGIST 107 (1973).

[31] An alternative theory of the kind of information people take into account when making attributions, Edward Jones's and Keith Davis's Correspondent Inference Theory, still finds that social perceivers believe that a person's actions tell us more about him when they depart from the norm than when they are typical or otherwise expected under the circumstances. Edward E. Jones & Keith E. Davis, *From Acts to Dispositions: The Attribution Process in Person Perception*, 2 ADVANCES IN EXPERIMENTAL SOC, PSYCHOL. 220 (1965); *see also* ELLIOT ARONSON ET AL., SOCIAL PSYCHOLOGY: THE HEART AND THE MIND 176-77 (1994).

[32] MODEL PENAL CODE § 210.3 (AM. L. INST., Proposed Official Draft 1962) (emphasis added).

case.[33]

Thus, the Code recognizes the "situation" directive as a flexible standard that draws on the common sense and *sympathy* of ordinary social perceivers to determine whether to attribute the actor's wrongdoing to his situation and thus partially excuse or to his "moral depravity"[34] (or other character defect) and thus fully blame.

Because empathy and sympathy constitute a critical basis of jurors' blameworthiness or *mens rea* determinations whenever criminal liability turns on the "reasonable person in the situation" test, let's consider the empirical case for widespread anti-black empathy bias that makes jurors less likely to sympathetically identify with them in criminal prosecutions. "Ingroup empathy bias" has a neural basis in the brain that researchers have captured using functional magnetic resonance imaging (FMRI). FMRI measures brain activity by detecting the changes in blood oxygenation and flow that occur in response to neural activity—more active brain areas consume more oxygen and blood flow increases to the active area to meet this increased demand.[35] FMRI can produce an activation map or "NeuroImage" displaying which areas of the brain are active during a particular thought, action, or experience. [36] Recent studies in social neuroscience show that "empathy for [another's] pain is supported by neuroanatomical circuits underlying both affective and cognitive processes."[37] These studies reveal distinct neural mechanisms of empathy and altruistic motivation. Specifically, one area of the brain or "neural matrix" (including bilateral anterior insula (AI) and anterior cingulated cortex (ACC)) is thought to support the emotional or affective ingredients of empathy while another area (including parts of medial prefrontal cortex (MPFC)) is thought to underlie cognitive components of empathy, "such as the capacity to take another person's perspective."[38] According to these

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[33] MODEL PENAL CODE § 210.3, cmt. at 62-63 (AM. LAW INST. 1980).It is worth noting the Code's recognition of a link between attributions and sympathy. To the extent that we attribute an actor's misbehavior to her situation, we are more disposed to sympathize with her: "There but for the grace of God go I" suggests recognition that, because of ordinary human frailty, in the same situation, I, the person passing judgment, might commit the same act; conversely, the more we sympathize, the more disposed we may be to attribute her misbehavior to her situation. (So sympathy could drive attribution or attribution could drive sympathy or sympathy and attribution could be bi-directional and mutually influence each other.) By the same token, to the extent we attribute her misbehavior to her character, we may withhold sympathy, for we may think that we could not possibly commit the same act in the same situation. We see the act not as an expression of ordinary human frailty but rather as an expression of her extraordinary weakness or depravity. Put differently, to the extent that we sympathize with wrongdoers, it may be possible to feel some sense of solidarity with them despite their plight; but without sympathy we can more readily view them as inalterably different, alien, other. Attribution processes (especially attributional stereotypes) may strongly affect how we define "us" and "them"—whether we opt for a politics of solidarity or a politics of distinction—in relation to criminals.

[34] *Id.* at 63. As other examples of character defects, the code lists "exceptionally punctilious sense of personal honor" and "abnormally fearful temperament". *Id.* at 62.

[35] *Introduction to FMRI—Nuffield Department of Clinical Neurosciences*, UNIVERSITY OF OXFORD, https://www.ndcn.ox.ac.uk/divisions/fmrib/what-is-fmri/introduction-to-fmri (last visited Nov. 24, 2017).

[36] *Id.*

[37] Vani A. Mathur et al., *Neural Basis of Extraordinary Empathy and Altruistic Motivation*, 51 NEUROIMAGE 1468, 1468 (2010).

[38] *Id.*

findings, "the capacity to understand and share another's pain is supported by both affective (e.g., affect resonance) and cognitive (e.g., perspective-taking) mechanisms in the brain"[39] and these mechanisms can be mapped using functional magnetic resonance imaging.

While their brain activity was being monitored with FMRI, subjects (14 Black and 14 White) were shown scenes depicting either Black or White individuals "in a painful (e.g., in the midst of a natural disaster) or neutral (e.g., attending an outdoor picnic) situation."[40] During scanning, participants indicated how much empathy they felt for the person in the target image (e.g., how bad do you feel for this person?) using a four-point scale (1 =not at all to 4=very much). Outside of the scanner, subjects also rated how much money and how much time they would be willing to donate to help each target. In addition, participants were given behavioral exit surveys after scanning to test their disposition for "perspective taking" (that is, the reported tendency to spontaneously adopt the psychological point of view of others in everyday life)[41] and to test their love for, identification with, and loyalty to their social ingroup (using the Multigroup Ethnic Identity Measure or MEIM).

As in other social neuroscience studies of empathy, researchers found that, irrespective of race, subjects showed empathy for humankind in general through greater neural activity within anterior cingulated cortex (ACC) and bilateral anterior insula (AI) when observing the suffering of other humans.[42] However, only Black subjects showed extraordinary empathy for the pain of Black victims by showing greater response within the medial prefrontal cortex (MPFC) when perceiving Blacks in distress.[43] The MPFC, recall, is thought to support cognitive components of empathy like the capacity to take another person's perspective. Unlike Whites, Blacks "recruit medial prefrontal cortex when observing suffering of members of their own social group."[44] Across subjects, activity within the MPFC when perceiving the pain of ingroup relative to outgroup members predicted a subject's higher empathy ratings and greater willingness to donate money and time to help the distressed victim.[45] These findings suggest that there are distinct neural mechanisms of empathy and altruistic motivation in the brain and that these brain mechanisms (or neurocognitive processes) associated with an observer's self-identity underlie extraordinary empathy and altruistic motivation for members of her own social group.[46]

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[39] *Id.*

[40] *Id.* at 1469.

[41] Mark H. Davis, *A Multidimensional Approach to Individual Differences in Empathy*, 10 JSAS CATALOG OF SELECTED DOCUMENTS IN PSYCHOLOGY 85 (1980) (manuscript at 1), https://www.uv.es/~friasnav/Davis_1980.pdf. See also Mathur, supra note 37, at 1469-70.

[42] Mathur, *supra* note 37, at 1472.

[43] *Id.*

[44] *Id.* at 1468.

[45] *Id.* at 1472.

[46] *Id.* at 1468.

Researchers have also used electroencephalography (EEG) to capture White brains spontaneously displaying insensitivity to Blacks and other outgroups. When people are sensitive to the feelings, intentions and needs of others, they "resonate with them by adopting their postures, intonations, and facial expressions, but also their motivational states and emotions."[47] That is, when someone (the subject) observes another (the object), the object's body actions and facial expressions activate the subject's (observer's) neural networks for the same physical actions and expressions.[48] The observer's neural networks *mirror* those of the object. In short, observers vicariously participate in the experiences of people they observe by mentally simulating their actions and expressions (going beyond purely mental simulation in many cases and physically mimicking their expressions, gestures, and body postures).[49] Such vicarious activation of the observer's neural system for action during perception of others' actions and expressions is called "the perception-action-coupling." According to the "perception-action-model of empathy,"[50] such "perception-action-coupling" or mental simulation of another's actions and expressions is the way the observer's brain understands the other's actions, intentions, and emotions. This perception-action link is made possible by "shared neural networks"—neural mechanisms that allow observers to mirror the actions and emotions of those they observe, "thereby synchronizing the inner states of both individuals."[51] These shared neural networks are the basic building blocks of empathy. Research has identified shared neural networks for perception and experience of disgust,[52] pain,[53] touch,[54] and facial expressions.[55] The system of neurons making up these shared networks are often called "the mirror-neuron-system."[56] This mirror-neuron-system enables observers to mentally simulate actions and emotions of others (that is, to experience perception-action-coupling), thereby increasing interpersonal sensitivity and laying the foundation for empathy and social understanding.[57] Accordingly, sensitivity

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[47] Jennifer N. Gutsell & Michael Inzlicht, *Empathy Constrained: Prejudice Predicts Reduced Mental Simulation of Actions During Observation of Outgroups*, 41 J. OF EXPERIMENTAL SOC. PSYCHOL. 841, 841 (2010).

[48] *Id.*.

[49] *Id.* at 842.

[50] *Id.* at 841.

[51] *Id.*

[52] *Id.*.

[53] *Id.*.

[54] *Id.*.

[55] *Id.* (citing L. Carr et al., *Neural Mechanisms of Empathy in Humans: A Relay from Neural Systems for Imitation to Limbic Areas*, 100 PROC. NAT'L ACAD. SCI. 5497 (2003)).

[56] Mirror neurons were discovered in area F5 of the rhesus monkey premotor cortex and are visuomotor neurons that discharge in response to the execution or observation of similar action. Giacomo Rizzolatti & Laila Craighero, *The Mirror-Neuron System*, 27 ANNUAL REV. NEUROSCIENCE 169, 169 (2004) (citing G. Di Pellegrino et al., *Understanding Motor Events: A Neurophysiological Study*, 91 EXP. BRAIN RES. 176 (1992); V. Gallese et al., *Action Recognition in the Premotor Cortex*, 119 BRAIN 593 (1996); Giacomo Rizzolatti et al., *Premotor Cortex and the Recognition of Motor Actions*, 3 COGNITIVE BRAIN RES. 131 (1996)).

[57] "Simulating others' actions and expressions elicits the associated autonomic and somatic responses, thereby increasing social sensitivity." Gutsell & Inzlicht, *supra* note 47.

or indifference to the actions, thoughts, and feelings of ingroup and outgroup members should be reflected in the shared neural networks that make up the mirror-neuron-system.

The disturbing discovery of researchers is that the "mirror-neuron-system" underlying the capacity of observers to mentally simulate the actions, intentions, and emotions of others is biased against Blacks and other outgroups.[58] For instance, while observing others in pain, people show less activity in brain areas associated with the experience of pain when observing ethnic outgroup members in pain than when observing similarly situated ingroup members.[59] An even more basic and general bias against Blacks and other outgroups dwelling within "the mirror-neuron-system" of observers keeps Whites from mentally simulating simple, gross motor responses like those associated with reaching for a glass, picking it up, taking a small sip of water, and then putting the glass back in its place. An observer's ability to mentally mirror another person's gross motor responses is "the physiological process thought to be at the core of interpersonal sensitivity."[60] Such a fundamental bias against mentally simulating the actions of members of outgroups, say researchers, "would not only make it difficult to empathize with outgroup members' suffering, but also to understand their actions and intentions."[61]

EEG has been used to measure mirror neuron activity by recording "mu rhythm suppression" in observers while they passively observe ingroup and outgroup members. The "mu rhythm" is generated by the area of the brain involved in voluntary motor control. Mu rhythm or "mu waves"—waves in the frequency range of 8–13 Hz—attain maximal "amplitude" or "power" when individuals are at rest.[62] Early studies showed that the amplitude of "mu waves" could be *suppressed,* their power diminished, by execution, observation, or imagination, that is, by a subject's own physical movement or by his observation of others performing actions or by imagined movement.[63] "When mu power decreases during observation of an object other, the subject's motor neurons are active and the subject is presumed to

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[58] *Id.* These brain mechanisms are especially biased against disliked outgroups. *Id.* The idea that observers mirror the actions of ingroup more than outgroup members finds *behavioral* support in studies showing that people mimic others' expressions, gestures, and body postures with less frequency for outgroup members. *Id.* at 842. But this behavioral evidence does not give us strong evidence of exactly how such bias in mimicking or resonating with others occurs in the observer's brain.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] Henri J. Gastaut & Jacques Bert, *EEG Changes During Cinematographic Presentation*, 6 ELECTROENCEPHALOGRAPHY & CLINICAL NEUROPHYSIOLOGY, 433, 438 (1954); Deziree Holly Lewis, Mu Suppression, Mirror Neuron Activity, and Empathy (May 2010) (unpublished honors thesis, Texas State University) (on file with Texas State University Digital Collections), https://digital.library.txstate.edu/bitstream/handle/10877/3223/fulltext.pdf.

[63] These studies showed that mu activity is inversely related to motor cortex activity—less mu activity or power (i.e. more mu suppression) reflects more motor cortex activity while more mu activity (i.e. less mu suppression) reflects less motor cortex activity.

be simulating the object's action."[64] Thus, more mu activity or power (i.e. less mu suppression) reflects less motor cortex activity; less mu activity or power (i.e. more mu suppression) reflects more motor cortex activity. Today, mu suppression is a common measure of motor cortex activity[65] and has recently been used to measure activity in the mirror-neuron-system by looking at motor cortex activity in subjects during passive observation of others performing actions.[66]

In an article published in the *Journal of Experimental Psychology*, Gutsell & Inzlicht used EEG to look at the neural networks that support mentally simulating the actions of others—the "mirror-neuron-system"—while people passively observed ingroup (other Whites) and outgroup (Blacks, South Asians, and East Asians) members. The subjects (or observers) in the experiment were 30 White, right-handed Canadian (University of Toronto Scarborough) students (13 female; mean age of 18.46). Researchers measured suppression of EEG oscillations in the 8–13 Hz "mu" frequency at scalp locations over the primary motor cortex, the area of the brain associated with gross motor responses. They found that observers showed increased mu suppression when passively observing ingroup members, indicating motor cortex activity when participants passively observed other Whites.[67] These findings suggest that they did mentally simulate the actions of ingroup members. Critically, however, participants did not show significant mu suppression when observing outgroup members, indicating no activity over motor areas when they observed outgroup members.[68] These findings suggest that they did not mentally simulate the actions of outgroup members.[69] Thus, in the words of Gutsell & Inzlicht, "those neural networks underlying the simulation of actions and intentions—most likely part of the 'mirror-neuron-system'—are less responsive to outgroup members than to ingroup members."[70] They conclude from this evidence that "people experience less vicarious action and their associated somatic and autonomic states," the basic building blocks of empathy, "when confronted with outgroups than with ingroups."[71]

The "reasonable person in the actor's situation" approach to *mens rea*, therefore, combines two discretion-laden standards that enable factfinders to

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[64] Gutsell & Inzlicht, *supra* note 47, at 842.

[65] *Id.*

[66] *Id. See also* Lewis, *supra* note 62, at 5 (citing S.D. Muthukumaraswamy & B.W. Johnson, *Changes in Rolandic Mu Rhythm During Observation of a Precision Grip*, 41 PSYCHOPHYSIOLOGY 152 (2004); L.M. Oberman et al., *EEG Evidence for Mirror Neuron Dysfunction in Autism Spectrum Disorders*, 2 *COGNITIVE BRAIN RES.* 190 (2005); J.A. Pineda et al., *The Effects of Self-Movement, Observation, and Imagination on Mu Rhythms and Readiness Potentials (RP's): Toward a Brain-Computer Interface (BCI)*, 8 IEEE TRANSACTIONS ON REHABILITATION ENGINEERING 219 (2000); S. Cochin et al., *Observation and Execution of Movement: Similarities Demonstrated by Quantified Electroencephalography*, 11 EUR. J. NEUROSCIENCE 1839 (1999); R. Hari et al., *Timing of Human Cortical Functions During Cognition: Role of MEG*, 4 TRENDS IN COGNITIVE SCI. 455 (2000)).

[67] Gutsell & Inzlicht, *supra* note 47, at 843.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 844.

[71] *Id.*

form and make attributions about, or to sympathetically identify with, wrongdoers:

1) The "reasonable person" ingredient, which directs factfinders to consider consensus information and
2) The "situation" ingredient, which directs factfinders to weigh situational factors in deciding whether to attribute conduct to external or internal causes, circumstances or character.

For convenience, I will use "the reasonable person" test as shorthand for "the reasonable person in the actor's situation" test, but the shorthand should be understood to include both attribution-enabling ingredients. As I show below, the reasonable person test constitutes a core element of many crimes. Hence, it figures pivotally in a wide range of legal directives jurors use to weigh and measure a wrongdoer's blameworthiness.[72] This insight will expose the many and varied opportunities in the substantive criminal law and its processes for the social construction of black criminals: The malleable reasonable person test enables differential juror attributions about the causes of crime by blacks and whites that can lead to differential evaluations of the subjective culpability of blacks and whites not only in provocation cases, where it drives the social construction of black murderers, but across the entire body of substantive criminal law, from criminal negligence to self-defense, where the malleable test drives the biased social construction of black criminals in general.[73] Further, the elastic reasonable person test provides a doctrinal vehicle for jurors to construct criminals in racially biased ways on the basis of ingroup empathy bias. What's more, common approaches to *mens rea* other than the reasonable person test—approaches that seem more factual and rule-like such as "awareness," "premeditation" and "intent"—can be just as malleable as the reasonable person formulation of the culpability requirement and thus can provide just as much room for the biased social construction of black criminals. Only through radically overhauling the prevailing *mens rea* paradigm can we shed light on the enormous number of opportunities that exist in criminal trials for jurors' racially biased moral judgments to result in the biased social construction of black criminals.

[72] Which is to say that it figures pivotally in jurors' liability and grading judgments.

[73] In other settings—e.g., negligence, recklessness, putative self-defense, duress—we will see the "reasonable person in the actor's situation" formula does precisely the same attributional work it does with respect to heat of passion, with one exception, namely, in these other settings, if the factfinders attribute the actor's wrongful actions and reactions to his situation, it results in full rather than partial exculpation.

III. PREVAILING *MENS REA* PARADIGM IGNORES ROOM FOR BIASED SOCIAL CONSTRUCTION OF BLACK CRIMINALS

Trained under the prevailing *mens rea* paradigm, many American lawyers think of *mens rea* as an "aware mental state"—like "purpose," "knowledge" or "conscious disregard"—that must accompany the prohibited act or *actus reus*; in other words, it refers to an actor's subjective awareness of wrongdoing.[74] One cannot *choose* to do wrong if he lacks awareness of wrongdoing and *choice* is the bedrock of personal and criminal responsibility for many courts[75] and commentators.[76] Under this familiar approach, *mens rea* is a "descriptive" requirement because it is "descriptive"[77] of—that is, it describes—an aware mental state.[78]

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[74] Mentalism rests on an approach to personal responsibility known as choice theory. Awareness is a necessary condition of responsibility under this theory because only if an individual is aware of engaging in prohibited conduct can we regard it as being a choice of his or an expression of his will. Thus choice theory is sometimes related to Kant's view of the "will" as the locus of moral worth and proper object of moral criticism. R. A. Duff, *Choice, Character, and Criminal Liability*, 12 LAW & PHIL., 345, 346 (1993). For Kant, whether my "will" accords with moral law alone determines the moral worth of my action; such "inclinations" —desires, aversions, etc. —as may help to motivate it are not relevant to the moral appraisal of my action. *Id.* Early in the career of this approach to responsibility, therefore, we see an effort to separate the choosing agency—the will—from those desires and aversions that may motivate choice. As we shall see, efforts to disembody the "choosing self" continue to inform modern choice theory. The important point for present purposes is that for choice theorists, an invasion or excessive imperiling of a protected interest can be properly imputed to a person if, but only if, that invasion or excessive risk creation represents an expression of her will or she chooses it. But if she lacks awareness that her conduct invades or unduly threatens a protected interest, the invasion or excessive risk creation cannot be said to express her will or to be chosen by her. Note that to choose to invade or excessively endanger a protected interest, she need not subjectively desire the invasion or act with the purpose of doing so. It is enough that she was aware that her conduct would invade or unduly jeopardize such an interest and that she chose to act or voluntarily proceeded to act as she did. (Such unintended but aware conduct can be said to be an expression of the will in the sense that it manifests a willingness (or preparedness) to cause a certain consequence or bring about a certain state of affairs.)

[75] *E.g.*, Morissette v. United States, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

[76] *E.g.*, SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 203 (7th ed. 2001) (emphasis added): "The vicious will [in Blackstone's translation of *actus non facit reum, nisi mens sit rea*] was the *mens rea*; essentially it refers to the blameworthiness entailed in *choosing* to commit a criminal wrong. One way the requirement of *mens rea* may be rationalized is on the common sense view of justice that blame and punishment are inappropriate and unjust in the absence of *choice*." *See also* H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 28 (1968). Because negligent actors lack awareness of wrongdoing and hence cannot be said to choose their wrongdoing, some staunch Choice Theorists refuse to recognize negligence as a form of *mens rea*. Professor Glanville Williams wrote: "The retributive theory of punishment is open to many objections, which are of even greater force when applied to inadvertent negligence *than in crimes requiring mens rea*." GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 122 (2d ed. 1961) (emphasis added). Larry Alexander argues that "negligence as inadvertent risk-taking is not culpable conduct" and hence is indistinguishable from strict liability. Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 949-952 (2000).

[77] Martin R. Gardner, *The Mens Rea Enigma: Observations of the Role of Motive in the Criminal Law Past and Present* 1993 Utah L. Rev. 635, 668 (1993).

78 Or lack thereof in cases of negligent inadvertence, which some commentators do not view as legitimate forms of *mens rea. See, e.g.,* Alexander, *supra* note 76, at 949-952; WILLIAMS, *supra* note 76 at 122. In the words of Williams, "With the best will in the world, we all of us at some times in our lives make negligent mistakes. It is hard to see how justice (as distinct from some utilitarian reason) requires mistakes to be punished." WILLIAMS, *supra* note 76, at 122.

Descriptive requirements (rules, elements, and tests) reduce the grounds of liability to predesignated and dispositive "facts" that jurors can "find" without needing to make moral judgments.[79] A statute criminalizing "sexual intercourse with a person less than fifteen years of age" and not recognizing a defense of mistake turns on a descriptive requirement.[80] The "fact" of the victim's age determines criminal liability and factfinders can determine whether that requirement was met without making a moral judgment about the defendant. There is little room for bias in finding such "facts" or applying such descriptive requirements. In contrast, nondescriptive or normative requirements (rules, elements, and tests) direct factfinders to make moral judgments in reaching their verdict. A statute defining murder as an unintentional killing accompanied by "a depraved and malignant heart"[81] turns on a nondescriptive, normative requirement. The depravity and malignancy—in a word, the wickedness—of the wrongdoer's heart determines criminal liability here and factfinders cannot determine the wickedness of his heart without making a moral judgment of him. In jury instructions that provide factfinders with nondescriptive and normative standards by which to judge a wrongdoer's *mens rea,* factfinders are *directed* to make a frontal evaluation of his moral blameworthiness before returning a guilty verdict.

The dominant *mens rea* paradigm gives short shrift to the role of nondescriptive and normative standards in the substantive criminal law and its processes and so may be fairly characterized as "mentalist" and "descriptivist": Its mentalism lies in its assumption that criminal culpability for wrongdoing lies only in an aware mental state, specifically, an intent to do wrong or at least a conscious awareness of wrongdoing; its descriptivism lies in its assertion that the *mens rea* tests contained in the jury instructions do not direct, invite, or enable factfinders to morally judge the wrongdoer. The legal directives used by jurors who sit in judgment on wrongdoers, according to descriptivists, avoid the background moral issue of the wrongdoer's wickedness and focus instead on the factual (or empirical) issue of whether the wrongdoer acted with an aware mental state. For descriptivists, once the issue of guilt or innocence has been reduced to that of the presence or absence of an aware mental state, there is no need for the factfinder to make any kind of direct moral judgment of the wrongdoer to convict him. For descriptivists, viewing *mens rea* tests as equivalent to an "aware mental states" requirement minimizes the factfinders' discretion and the legal room they have for biased social constructions of black wrongdoers.

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[79] Descriptive standards are legal directives that reduce the grounds for liability to predesignated and dispositive "facts" that fact finders can determine without making moral judgments. Alan C. Michaels, *"Rationales" of Criminal Law Then and Now: For a Judgmental Descriptivism*, 100 COLUM. L. REV. 54, 62 (2000).

[80] *Id.* at 64.

[81] *Id.* at 75.

In this respect, the distinction between descriptive standards of *mens rea* like "purpose," "knowledge," and "aware mental states" and normative ones like "depraved and malignant heart" tracks the more familiar one between rules and standards. In the words of Kathleen Sullivan:

> [L]egal directives take different forms that vary in the relative discretion they afford the decision maker. These forms can be classified as either 'rules' or 'standards' to signify where they fall on the continuum of discretion. Rules, once formulated, afford decision makers less discretion than do standards. . . . A legal directive is 'rule'-like when it binds a decision maker to respond in a determinate way to the presence of delimited triggering facts. . . . A legal directive is 'standard'-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.[82]

From this perspective, inasmuch as the *mens rea* requirement binds factfinders to focus only on the "facts" of aware mental states, it is "rule"-like and descriptive; conversely, inasmuch as it frees them to exercise discretion in morally judging the defendant's subjective culpability, it is "standard"-like, nondescriptive,[83] and normative.

If indeed the *mens rea* requirement is descriptive and "rule"-like[84] and concerned only with aware mental states, as proponents of the prevailing paradigm assert, then there is much less room in the criminal law and its processes for the biased social construction of criminals through racially-biased moral judgments. Bias in the social construction of black criminals thrives on juror discretion, which is greatest when factfinders are asked to make direct moral judgments on the basis of nondescriptive standards that

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[82] Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–58 (footnotes omitted).

[83] The worry that more nondescriptive directives may redound to the detriment of socially marginalized groups finds support in recent research on different tests for heat of passion. Under traditional common law and pre-Model Penal Code statutes, courts developed quite descriptive rules on what constituted adequate provocation to reduce murder to voluntary manslaughter. An intentional killing was reduced to manslaughter "almost as a matter of law" once certain *facts* were found—namely, if the ultimate victim provoked the defendant with battery, mutual combat, a serious crime against a close relative, illegal arrest, or adultery. A triable issue of fact on "heat of passion" could not be raised unless these facts were established. Many courts have moved toward a more nondescriptive regime by departing from the categorical approach in favor of a more subjective approach to the defendant's claims. The Model Penal Code has taken the most nondescriptive approach to provocation, allowing a reduction to manslaughter when the actor killed under "extreme mental or emotional disturbance for which there is reasonable explanation or excuse . . . . determined from the viewpoint of a person in the actor's situation." MODEL PENAL CODE § 210.3(1)(b) (AM. L. INST., Proposed Official Draft 1962). Professor Nourse found that in jurisdictions employing nondescriptive approaches, a significant number of cases got to juries involving women who were killed for simply rejecting or trying to separate from the killer without any evidence of infidelity or violence. No such cases got to juries in descriptive jurisdictions. Moreover, cases involving so-called "infidelity" after the relationship had *ended* were far more likely to reach juries in nondescriptive than descriptive jurisdictions. Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L. J. 1331 (1997).

[84] That is, if it merely directs factfinders to ascertain whether an aware mental state accompanied the wrongdoer's prohibited conduct.

are flexible and open-ended. Such discretion-laden and open-ended normative standards give maximum elbow room to conscious and unconscious bias.[85] But insofar as *mens rea* is no more than an aware mental state, it may be viewed as an empirical fact whose existence factfinders can ascertain without making any moral judgment, as they can ascertain a person's blood pressure, pulse, or, with the right equipment, the electroencephalographic oscillations of his brain.[86] This very narrow conception of *mens rea* leaves jurors and judges few doctrinal opportunities to socially construct black criminals through biased moral judgments based on "ingroup empathy biases" or "race-based attributions" or other distortions entrenched in our cognitive unconscious.[87]

IV. THE PREVAILING PARADIGM LIMITS ROOM FOR BIASED SOCIAL CONSTRUCTION TO "DEFENSES" AND "EXCUSES"

Proponents of the dominant *mens rea* paradigm acknowledge that, in limited situations, factfinders must weigh the reasons for a defendant's wrongdoing and so must make a moral judgment about his subjective culpability. Thus, once jurors determine that a defendant has committed a prohibited act *with mens rea*, he may still escape liability by raising a "*mens rea* defense" of justification or excuse. In the words of Paul Robinson and Jane Grall:

> *[M]ens rea* describes only a subjective state of mind *required by the definition of an offense*. One who has the necessary *mens rea* may nonetheless be blameless because of a general *defense*, such as insanity, self-defense, or duress, that precludes moral culpability. By adopting a *narrow* concept of *mens rea*, *which refers only to elements of an offense definition*, one does not necessarily reject a normative view of criminal liability.[88]

This approach regards substantive "defenses" as either "excuses" (e.g., duress, provocation, extreme emotional disturbance, putative or mistaken

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[85] Inquiring only into a wrongdoer's aware mental states would not require factfinders to make any kind of moral judgments or diagnostic assessments of motives and reasons for the wrongdoing

[86] As brain imaging technology grows more sophisticated, "aware mental states" may someday be photographable by, say, skullcaps outfitted with newfangled EEGs and MRIs. Certain neural patterns associated with cognition and affect could at least provide strong evidence of the actor's consciousness of a risk or circumstance.

[87] Accordingly, this traditional paradigm cannot recognize or acknowledge the enormous role racial and other social bias plays in the legal and social construction of black criminals. Because this impoverished *mens rea* paradigm conceals where bias lives in jury instructions and the adjudication process, its inadequacies must be exposed so that it can be replaced with one more up to the task of explaining the many opportunities there are in the substantive criminal law and its processes for judges and jurors to socially construct criminals in racially biased ways.

[88] Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 686 n.21 (1983) (emphasis added).

self-defense, insanity) or "justifications" (e.g., actual self-defense). From this standpoint, if a harm-doer has a valid excuse or justification for consciously committing a prohibited act, he lacks *mens rea* in its *broad* sense—that is, in its "all-encompassing usage, which treats the term '*mens rea*' as synonymous with moral fault."[89] Thus, under this approach, "defenses that aim to establish the absence of moral blameworthiness" "can be considered '*mens rea*' defenses."[90] In contrast, *mens rea* also has a formal, legalistic, *narrow* sense under the traditional approach: "*Mens rea* in its narrow sense," according to the dominant model, "refers only to the kind of awareness or intention that must accompany the prohibited act."[91] Because most "excuses" or "*mens rea* defenses" (duress, provocation, extreme emotional disturbance, self-defense) hinge on an extremely open-ended and malleable nondescriptive test of blameworthiness (namely, the "reasonable person in the situation" test), the traditional approach must admit that sometimes the criminal law directs jurors to evaluate the wrongdoer's blameworthiness on the basis the flexible, nondescriptive, "reasonable person in the situation" standard—precisely the kind of legal directive that provides the most latitude for jurors to make biased attributions and indulge ingroup empathy bias.[92]

In sum, the traditional model of *mens rea* bifurcates blameworthiness, creating a two-pronged conception and analysis of subjective culpability and limits the opportunity for biased moral judgments and biased social construction in the adjudication process: The first culpability prong, denominated definitional or "narrow" *mens rea,* comprises aware mental states[93] and calls on factfinders to make purely factual judgments about the wrongdoer's psychic condition based on descriptive, "rule"-like legal directives;[94] the second culpability prong, denominated "defenses" or "broad" *mens rea*, comprises excuses and justifications and calls on factfinders to make discretionary, moral judgments based on nondescriptive standards like the reasonable person test.[95] So, under the traditional paradigm's bifurcation of blameworthiness, each culpability prong—the *prima facie* fault or "narrow" *mens rea* prong (driven by descriptive rule-

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[89] KADISH ET AL., *supra* note 11, at 213.

[90] *Id.*

[91] *Id.*

[92] But, as we will see, it minimizes the impact of that admission by strictly limiting the excuses and defenses available to wrongdoers.

[93] It perhaps also includes negligence, a frowned upon form of *mens rea* by some commentators because the wrongdoing lacks awareness of wrongdoing and hence is not choosing to do wrong.

[94] Most crimes are *defined* to require that narrow *mens rea* be proven before any exculpatory claim—broad *mens rea*—comes into play. According to this logic, saying that an individual invaded a legally protected interest without *broad mens rea* amounts to saying that he is excused for consciously committing a prohibited act; but saying that he committed such an act without *narrow mens rea* amounts to saying that he needs no excuse because an indispensable element of the crime has not been satisfied, thus resulting in failure of the *prima facie* case.

95 Hence, under this analysis, someone who *intentionally* (with an aware mental state) gives away important state secrets under death threats sufficient to cause a *reasonable person* in his situation to do the same acts both with and without *mens rea*—he acts with narrow *mens rea* but without broad *mens rea.*

like tests of aware mental states) and the excuses or defenses prong (driven by the non-descriptive "reasonable person in the situation" test)—turns on fundamentally different kinds of legal directives and calls for radically different kinds of judgments (factual in the first prong, moral in the second) from the factfinders.[96] Again, from this perspective there may be some room for biased moral judgments and social construction with respect to excuses and justifications, given their focus on motives and their grounding in the flexible and nondescriptive reasonable person standard, but from this viewpoint there is hardly any room for the biased social construction of black criminals in narrow and definitional "*mens rea*," the form of *mens rea* that as a practical matter comes into play most in criminal trials.

This posited cleavage in the *mens rea* requirement makes it possible for descriptive mentalists to reconcile their narrow, descriptive conception of the *mens rea* requirement with its historical, doctrinal, and functional role of ensuring that criminal liability turns on blameworthiness. Because the category "defenses" includes all the considerations relevant to *broad mens rea* or "all-encompassing moral fault," it seems that without losing anything important the term "*mens rea*" can be limited to and treated as synonymous with *narrow mens rea*.[97] Thus, the distinction between definitions and defenses provides crucial doctrinal support for the contention of proponents of the prevailing *mens rea* paradigm that a descriptive, factual, non-

[96] Under this distinction, all considerations relevant to the objective wrongfulness of the act, on the one hand, and the subjective culpability of the actor, on the other, fall into either the category of inculpatory definitional elements or exculpatory defense elements. The offense definition establishes the *prima facie* wrongfulness of the act by identifying the protected interest that ordinarily must not be invaded or excessively imperiled, and it establishes the *prima facie* subjective culpability of the actor by identifying the aware mental state that must accompany such act. Defenses defeat the inferences (or presumptions) of wrongfulness or subjective culpability to which the offense definition normally gives rise by going behind the definition and weighing the defendant's reasons or explanations for his behavior. Explanations that defeat the inference of wrongfulness, such as self-defense, are justifications; those that defeat or attenuate the inference of subjective culpability, such as duress, provocation, and extreme emotional distress, are excuses.

[97] Thus, different substantive standards—reflecting substantive differences in the nature and scope of the subjective culpability inquiry—are supposed to apply to definitional than to defense elements. Suppose, for example, that the offense definition for criminal homicide requires the killing of a human being. The defendant shoots at a target (or what he believes to be a bear) and kills a nearby bystander (or fellow hunter). Because the error (or mistake) concerns a definitional fact, descriptive mentalists hold that the defendant should *not* be criminally liable if he was unaware of risk of hitting a bystander (or of being mistaken), even if a reasonable person would have possessed such awareness. In contrast, suppose the mistake concerns a justificatory fact, such as whether he was under attack by a gun wielding assailant. Because this mistake concerns a defense fact, it is not enough that he lacked awareness that he might be mistaken in his perceptions; he must be reasonably mistaken to make out a valid claim of self-defense. In *Regina v. Morgan*, the landmark rape case, the court followed the same methodology, suggesting that because non-consent was part of the definition of rape, the defendant had to be aware that the intercourse was without consent to be criminally liable (i.e., any actual belief in its existence was exculpatory), but that if it had been proper to characterize consent as a defense (a justification), the defendant could be liable even though he lacked such awareness (i.e., only a reasonable belief that there was consent would have sufficed). Seeking to avoid the result in *Morgan* while still adhering to and forcefully advocating the same methodology, George Fletcher in Rethinking Criminal Law argues that consent should be viewed as a defense element (a justification) in rape, thereby rendering defendants liable despite their lack of an aware mental state, so long as a reasonable person in their position would have been aware. KADISH ET AL., *supra* note 11, at 213–214.

normative approach to *mens rea* does not mean the law does not care about the subjective culpability of citizens it blames and punishes.[98] Nevertheless, this traditional perspective minimizes the opportunities for jurors' race-based attribution and empathy bias to infect criminal cases and socially construct black criminals by limiting the reach of potentially biased moral judgments jurors can make to a few narrowly circumscribed "defenses," reserving the standard "*mens rea*" designation for inquiries into "aware mental states," a factual inquiry that leaves little room for the social construction of black criminals through the racially-biased moral assessments of judges and jurors.

V. ANOMALIES THAT EAT THE PARADIGM

There are fatal flaws with this approach. First, it is simply wrong to say that excuses, justifications, motives, causes, non-descriptive standards, and normative or moral judgments do not figure in definitional *mens rea*. To the contrary, they are at the core of *mens rea* tests required by the "offense definition" of countless crimes. For instance, of the four "kinds of culpability" (*mens rea* tests) of the Model Penal Code (purpose, knowledge, recklessness and negligence), half (specifically, negligence and recklessness) explicitly require factfinders to use the malleable and nondescriptive "reasonable person standard" to determine a wrongdoer's subjective culpability,[99] that is, to determine whether the motives or causes of his harmful act support a claim of justification or excuse.

Of course, referring to offense definition elements like negligence and recklessness as excuses is unconventional; conventionally, these levels of culpability are viewed as requirements—preconditions—that must be met before there is a crime to excuse. Thus, for criminal homicide, it might seem that the prosecution must first prove that the defendant negligently, recklessly (or intentionally) killed the victim, for only then is there a criminal homicide to excuse. So *in form* negligence and recklessness (and intent) seem like "inculpatory" elements; excuses and defenses like duress and self-defense seem like "exculpatory" elements. But negligence and recklessness often *function* as excuses; legally they are exculpatory elements masquerading in inculpatory clothing.

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[98] Unfortunately, however, the promise to give full or principled or even coherent attention to the wrongdoer's general blameworthiness in the "defenses" and "excuses" prong of the *mens rea* analysis is never made good. Primarily for reasons of policy and social welfare rather than justice to the individual, courts and legislatures and commentators severely circumscribe defenses like duress and provocation and filter out mitigating factors like a wrongdoer's "disadvantaged social background" in ways that leave defendants with very few doctrinal opportunities to argue that he is not blameworthy once he has met the *prima facie* tests of narrow *mens rea* and been relegated to the "defenses" and "excuses" culpability prong.

[99] We are only looking at moral guilt or innocence at the stage of *mens rea* analysis because it presupposes that the actor has already been found "guilty" of committing the *actus reus* and so is a wrongdoer—someone who has committed a prohibited act.

A. The Negligence Anomaly

For instance, under the MPC, a person acts negligently when he fails to appreciate that his conduct creates a substantial and unjustifiable risk, and when his lack of awareness "involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."[100] The "unjustifiable risk" element calls for a judgment of whether the conduct itself is excessively risky.[101] Whether an act is excessively or unjustifiably risky goes to *actus reus* (prohibited conduct) not *mens rea* (subjective culpability)—justifications center on acts, excuses, on actors.[102] Anytime someone engages in harmful and unjustified conduct, his wrongful act—wrongdoing—must be excused.

State v. Everhart clearly illustrates this crucial distinction between ingredients of the negligence definition that require factfinders to morally appraise the *act* and those that require them to morally appraise the *actor* and her excuses. In *Everhart*, a young girl with an IQ of 72 gave birth in her own bedroom, wrapped the baby in a blanket from head to foot, and, believing that the baby had been born dead, accidentally smothered him to death. To convict the girl of criminal negligence, the prosecution had to prove not only that wrapping the baby in that way under those circumstances was an unjustified (excessively risky) act. Assuming the factfinders conclude that his act was unjustifiably risky (which it clearly was in this case), the law directs them to determine whether the person who created those excessive risks (someone we can now call the "wrongdoer") did so with subjective culpability or *mens rea*. That is, to prove criminal negligence, the prosecution must show not only that the defendant engaged in excessively risky conduct (wrongdoing), but also that her mental and emotional shortcomings, her cognitive and volitional failings, were *not* those of a "reasonable" or "ordinary person in the situation." This is the "excuse" dimension of negligence. Under this ingredient, someone who runs excessive risks without wickedness—i.e., without differentiating herself from ordinary people "in her situation"—is excused for her unjustifiably risky act.[103] If the court viewed her IQ of 72 as a morally relevant excuse, it can make her low IQ part of her "situation" for purposes of the "reasonable person in her situation" test.[104] The court in *Everhart* followed precisely this

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[100] MODEL PENAL CODE § 2.02(2)(d) (AM. L. INST., Proposed Official Draft 1962).

[101] For example, whether its benefits outweigh its risk or respects individual rights.

[102] J. L. Austin, *A Plea for Excuses*, 57 PROC. OF THE ARISTOTELIAN SOC'Y 1, 2–3 (1956–1957).

[103] Thus, drawing on "consensus information" (the reactions of ordinary or typical people to the same stimulus or "situation"), factfinders who attribute the inadvertent and unjustifiably risky conduct to the "situation" *do* excuse—that is, do not find negligence. (If most people would respond to the situational stimulus the same way, the response can be attributed to the "situation" rather than the wrongdoer's character.) But those who attribute such conduct to the defendant's character deficiencies *do not* excuse—that is, do find negligence. FLETCHER, *supra* note 9.

[104] The act can be unjustified without the actor being unreasonable; reasonable people in certain situations can—without subjective culpability—commit unjustified acts. Calling someone who creates unjustified risks reasonable is functionally equivalent to excusing her; calling her unreasonable is

analysis, holding that because of the defendant's low IQ and the accidental nature of the death, the prosecution failed to prove culpable negligence.[105]

Someone driving a car in an emergency—to rush a relative to the hospital, for instance—provides a more general illustration of the *excuse* function that the reasonable person test routinely serves in negligence or recklessness analyses. This Distraught Driver might expose others to more risk than can be justified by the benefit of his speeding. If the injury to the relative was clearly not life-threatening, for instance, the cost (increase) in health and safety risks imposed on others by speeding may outweigh the benefit (decrease) in health and safety risks to the relative produced by speeding to get him there sooner. Or the driver might suffer some other failure of judgment or self-control (like failing to keep a proper lookout or taking longer to react to a suddenly appearing pedestrian), lapses that he would have avoided under less stressful circumstances. A factfinder might find that the driver's act or conduct was "unreasonable" (i.e. excessively risky or unjustified) but nevertheless conclude that his error in judgment or reduced self-control was "excusable" (an ordinary expression of human frailty) and *therefore* ultimately "reasonable."[106] Reasonable responses need be neither rational nor right when the reasonable person test functions as an excuse inquiry and directs factfinders to make allowances for the harm-doer's ordinary human limitations. Thus, our hypothetical Distraught Driver can claim to be excused and reasonable if an ordinary person confronted by a similar emergency could have made similar mistakes on the basis of similar cognitive and volitional failings.

Even in torts, where some commentators claim that negligence only focuses on acts and their justifications, not actors and their excuses, the reasonable person test clearly directs jurors to excuse some excessive risk-takers. Only the excuse function, for instance, explains so-called emergency doctrine in civil negligence. Under the emergency doctrine, trial judges in effect instruct juries that they may excuse an actor for an unjustified act if he acted under the taxing cognitive and volitional pressure of an emergency. Specifically, under the doctrine, judges instruct juries to consider the emergency that confronted the defendant in determining his reasonableness. As Dan Dobbs points out, the only logical application of the emergency doctrine occurs when there is wrongdoing—when the act inflicted more evil than it prevented. If the defendant's conduct would be reasonable even without considering the pressure of the emergency, then the emergency doctrine is irrelevant, for there is no wrongdoing to excuse. For instance, assume an emergency that confronts a defendant with a sudden and pressure-filled choice between causing death and causing property damage. If the defendant chooses the presumptive lesser of available evils—property

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equivalent rejecting her excuse claim. Thus, the "reasonable person in her situation" ingredient in definitions of criminal negligence and recklessness functions as an excuse claim.

[105] KADISH ET AL., *supra* note 11, at 425.

[106] Because reasonable *acts* are always justified yet reasonable *actors* may be merely excused, a reasonable actor can commit an unreasonable act.

damage—he is doing exactly what he would be expected to do even with hours for calm deliberation and decision. But then nothing about the choice being sudden and pressure-filled is doing any independent moral or legal work. In such a case, as Dobbs observes, "it is right to hold that he is not negligent and not liable, but wrong to suggest that the emergency doctrine has anything to do with the decision."[107]

Clearly, then, the function of the emergency doctrine is to highlight for the factfinders that the "reasonable person in the situation" test excuses *ordinary* expressions of human frailty in the face of certain situational pressures. The cognitive and volitional deficiencies (expressions of human frailty) caused by the situational pressures excuse an unjustified act when the actor was "*reasonably* [i.e., an ordinary person would have been] so disturbed or excited [by the emergency] that the actor [could not] weigh alternative courses of action."[108] But, paradoxically, the most compelling evidence that the emergency doctrine provides for the existence of an excuse function at the heart of the reasonable person test in negligence is that courts increasingly reject the emergency doctrine itself; the reason they increasingly reject giving a separate instruction on emergency circumstance is because they recognize that judges already always instruct the jury that the defendant is held to the standard of the reasonable person in the "situation" or under the "circumstances." "Emergency, if one exists, is one of the circumstances, and lawyers are free to argue to the jury that the defendant behaved reasonably considering the emergency (*or any other circumstance*)."[109] Courts increasingly reject a specific emergency instruction because they see that the general instruction on the reasonable person standard fully covers the emergency excuse and all other excuses arising from the circumstances. A separate emergency instruction lacks neutrality because the "the effect is to emphasize one circumstance that favors the defendant."[110] Any sound application of the general reasonable person test already makes allowances for all kinds of situational pressures, including those generated by emergencies, so a separate emergency instruction "highlights a single circumstance, the emergency, for special consideration"[111] and thus "unduly emphasizes the defendant's side of the

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[107] 1 DAN B. DOBBS, THE LAW OF TORTS 305–06 (1st ed. 2001).

[108] KEETON ET AL., PROSSER AND KEETON ON TORTS 196 (5th ed. 1984) (emphasis added). Under such conditions, as Prosser and Keeton observe, "the actor cannot reasonably be held to the same accuracy of judgment or conduct as one who has had full opportunity to reflect, even though it later appears that the actor made the wrong decision, one which no reasonable person could possibly have made after due deliberation." *Id.* Another civil court found that a defendant acted reasonably because "he was suddenly confronted with unusual emergency which 'took his reason prisoner." *Id.*, at n.29. In the words of one civil court, in an emergency, the actor's choice "may be mistaken and yet prudent." *Id.*, at 196.

[109] DOBBS, *supra* note 107, at 308 (emphasis added).

[110] *Id.* The same defendant-friendly redundancy infects the "unavoidable accident" (no negligence if the accident was unavoidable by the exercise of ordinary care) and "mere happening" (the mere happening of the accident or injury is not itself evidence of negligence) instructions—both "unduly emphasize the defendant's side of the case in preference to the plaintiff's." *Id.*

[111] *Id.*

case."[112] Accordingly, courts increasingly see emergency instructions as unnecessary and unfair.

The upshot of this analysis is that, in everyday operation, the general reasonableness standard functions as a legal vehicle for excuse claims in negligence, civil or criminal.[113] In fact, the reasonableness test does double duty, functioning as a legal vehicle for two separate levels of excuse claims: the general first-level excuse claim, covering mistakes and accidents of ordinary people caused by emergencies and other external situational pressures;[114] and the second-level excuse claim, covering mistakes and accidents of atypical people—like the young girl with an IQ of 72 in *Everhart*—caused by an idiosyncratic deficiency, one afflicting a limited subdivision of the population. The general first-level excuse—always implicit in a reasonable person test—claims that the wrongdoer, in the words of H.L.A Hart, has taken "those precautions which any reasonable man with normal capacities would in the circumstances have taken."[115] Applied to emergencies, for instance, the claim is that the psychological and emotional pressures created by the emergency could cause any ordinary person with normal capacities to suffer similar cognitive or volitional impairments. In contrast, the second-level excuse—the relevant moral basis for appraising the defendant in *Everhart*—claims that, again in Hart's words, given the wrongdoer's idiosyncratic "mental and physical capacities," she "[c]ould . . . [not] have taken those precautions." [116] Applied to the case of the accidental baby killing by the girl with an IQ of 72, her excuse claim is that because of her cognitive deficiency she could not have taken "those precautions which any reasonable man with normal capacities would in the circumstances have taken."[117] From the standpoint of subjective culpability, she can reason, why treat someone with less mental and psychological capacity differently than someone with less physical capacity? Just as a shorter or blind person cannot be faulted for failing to see or avoid danger that could only be seen by a taller or sighted person, someone with an IQ of 72 cannot be faulted for failing to appreciate danger that could only be appreciated by someone of normal intelligence. Her excuse claim is that because of her cognitive deficiency she, once more in Hart's words, "could not have helped [her] failure" to act and think like someone without her disability.[118] As Hart observes, if the criminal law punishes those who could not help themselves by refusing to adjust the reasonable person test to the individual capacities of the wrongdoer, then it

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[112] *Id.*

[113] KEETON ET AL., *supra* note 108, at 197 n.32 ("doctrine merely emphasizes the 'under the circumstances' portion of general standard of 'reasonable under the circumstances'").

[114] The first-level excuse claim is commonly called the "objective" test of reasonableness; the second-level, the "individualized" test.

[115] HART, *supra* note 76, at 154.

[116] *Id.*

[117] *Id.*

[118] *Id.* Excuse claims generally take the form of either "I couldn't help myself" or "I didn't mean to."

punishes the morally innocent, for in such a case "criminal responsibility will be made independent of any 'subjective element.'"[119]

B. The Recklessness Anomaly

Recklessness is another dominant approach to "definitional" *mens rea* that contradicts the prevailing paradigm's tenet there is little or no room in definitional *mens rea* for the biased social construction of black criminals because excuses and normative standards do not figure in definitional *mens rea*. Under the MPC, a person acts recklessly when he *consciously* disregards a substantial and unjustifiable risk, as well as when his disregard "involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."[120] Once again, just as with negligence, the factfinders must first determine whether the conduct was unjustifiably risky, then, assuming an affirmative answer to that question, whether such conduct was accompanied by subjective culpability, that is, whether the wrongdoer was consciously aware of his excessive risk taking and, if so, whether such conscious wrongdoing represents a "gross deviation" from what "a law-abiding [read: reasonable][121] person...in the actor's situation" would have done. Once more, factfinders who attribute the actor's conscious creation of unjustifiable risks to the "situation" will not find a gross deviation from the reasonable person standard and so will not find recklessness; but those who attribute such conscious behavior to the defendant's lack of a "law-abiding" disposition or other character flaw will typically find a gross deviation and hence recklessness.[122]

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[119] *Id.* Just like the "reasonable person" test, the "gross deviation" test directs the factfinders on how to distinguish unjustifiable acts that are excused from those that are unexcused and hence criminally blameworthy: The requirement tells jurors not to excuse a wrongdoer who creates excessive risks if they find both that an ordinary person in the same situation would *not* inadvertently have run the same risks (the civil test of negligence) and that the wrongdoer's inadvertence was "gross," that is, that his inadvertence displayed criminally culpable indifference to the wellbeing of others.

[120] MODEL PENAL CODE 2.02(2)(c) (AM. L. INST., Proposed Official Draft 1962).

[121] There is no reason to treat "law-abiding" as significantly different than "reasonable." Both formulations are clearly nondescriptive standards inviting normative judgments by the factfinders, and if anything, the "law-abiding person" verbalization focuses attention on the state of the actor's internal dispositions (and whether to attribute the unjustifiably risky conduct to those dispositions or to the situation) even more directly and explicitly than the "reasonable person" verbalization.

[122] Consider, for instance, the case of *Parrish v. State*, 97 So.2d 356 (Fla. Dist. Ct. App. 1957), in which a man in a car with companions pursued his ex-wife through the city streets of Jacksonville in the early hours of the morning. He was armed with a bayonet and was apparently attempting to carry out his threat to kill her. He caught up with her at one point and broke her car window with his bayonet, but she maneuvered her car and eluded him. Continuing her escape, she disregarded a stop sign and drove at a high rate of speed into a through street. In so doing she struck another car and subsequently died of the injuries. The ex-husband was convicted of second-degree murder. Suppose, however, that the ex-wife had survived but the driver of the car she struck had been killed. Could *she* be convicted of negligent or reckless homicide? First, whether this raises a question of negligence or recklessness depends on whether she was aware of the risk of injury to others as she ran the stop sign. This could go either way, as her defense attorney could say (and the factfinders could conclude) that fear flooded her consciousness to the point that she was completely oblivious of such risks, or the counsel representing the interests of her victims could perhaps persuasively contend that she was aware of *some* degree of risk. (As we will see, this awareness line between negligence and recklessness is sheer and permeable.) The next issues would

Because negligence and recklessness establish the minimum requisite levels of culpability for a vast array of crimes, the collapse of the standard organizing distinctions—inculpatory vs. exculpatory elements, definitional elements vs. defenses, *mens rea* vs. excuses, aware mental states vs. reasonable person standards, descriptive directives vs. normative standards—demolishes the descriptivist dream of a non-normative approach to *mens rea* that limits factfinder discretion and thus minimizes the opportunities for the racially biased social construction of criminals in the adjudication process. This fantasy could be entertained only so long as a crime—at least at the "prima facie," "inculpatory," "offense definition" level—only consists of the description of prohibited conduct coupled with an accompanying aware mental state. Under such a conception, direct moral judgments by jurors about the wrongdoer's character are relegated to the realm of "defenses," especially "excuses." Once cabined in this way, normative factors and discretionary judgments can be further discounted and disregarded by severely circumscribing what can constitute an excuse or defense.

But contrary to this bifurcated conception of blameworthiness, in cases of negligence and recklessness, justification and excuse claims are incorporated into the definitional *mens rea* analysis. When these two core *mens rea* tests determine guilt and innocence, the prevailing paradigm's distinctions between narrow, descriptive, definitional *mens rea* and broad, nondescriptive *mens rea* defenses dissolve into incoherence.[123] Under both *mens rea* requirements, jurors must weigh a host of different factors

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be, first, whether the risk she created was unjustified, and second, whether the risk she took, "considering the nature and purpose of [her] conduct and the circumstances known to [her], involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." Model Penal Code § 2.02(2)(d) (AM. L. INST., Proposed Official Draft 1962). However justified the conduct appears under this original statement of facts, we could alter them in various ways until they struck us as not sufficient to actually justify the conduct (say, the threat she was fleeing was dramatically less grave, or there was a police station she could have pulled into before reaching the stop sign, which she would have noticed under ordinary circumstance, but which she failed to perceive in her panic). Then we would have an "unjustified act" and the question would become whether she should be excused for excessively risky conduct. Under the MPC's approach she should be excused unless her unjustified act "involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." Under this language, the distorting effect that fear can have on an ordinary person's awareness of options and judgment of appropriate risk-taking could affect whether jurors excuse her (by hypothesis) unjustified act, as could any post-traumatic stress disorders she may have developed at the hands of her abusive ex-husband.

[123] But with malice we saw that a single inquiry into subjective culpability may turn on both descriptive and nondescriptive legal directives, requiring factfinders to make both factual and normative judgments in evaluating blameworthiness—a factual judgment about the presence of an aware mental state (namely, intent) coupled with a normative one about the presence of provocation sufficient to sorely test the self-control of a reasonable person in the actor's situation. Like recklessness, malice is clearly an element of the offense definition when state law defines murder as an "unlawful killing with malice aforethought," as the Supreme Court made clear in *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Consequently, provocation is not a "defense" under such a statute, but rather also a definitional element, whose absence the State must prove beyond a reasonable doubt, according to the Court. Hence, definitional elements can encompass both descriptive and nondescriptive directives. With malice, if factfinders attribute the intentional homicide to the situation, it only results in a mitigation from murder to manslaughter; but with recklessness, if they attribute the conscious creation of unjustified risks to the situation, it results in full exculpation.

simultaneously in reaching an unavoidably moral judgment about whether to attribute excessively risky conduct to the situation (and exculpate) or to the actor's bad character (and inculpate).[124]

Finally, negligence and recklessness cannot be treated as minor anomalies in the prevailing *mens rea* paradigm. Negligence is a common ground of criminal liability, which, in some legal arenas, such as rape, constitutes the dominant approach—in the words of one casebook, "Most of the recent American cases permit a mistake defense, but only when the defendant's error as to consent is honest and *reasonable*."[125] And recklessness—the all-purpose and possibly most common *mens rea* requirement under the Model Penal Code[126] and throughout the common law[127]—figures centrally in an enormous number and variety of crimes. Thus, the prevailing paradigm cannot serve the most basic function of a sound paradigm—it cannot adequately explain many phenomena within its scope.

Because the malleable and amorphous "reasonable person in the situation" test (with help from the "gross deviation" requirement) does most of the *mens rea* or subjective culpability work in both negligence and recklessness, black wrongdoers are looking at double-barreled bias from jurors who must determine their guilt or innocence in crimes requiring negligence or recklessness:

- Inasmuch as the Model Penal Code rightly views the reasonable person test as a flexible vehicle for jurors to express sympathy and empathy with the wrongdoer,[128] "ingroup empathy bias"[129] makes it less likely that white jurors will sympathize with a black wrongdoer and find that he acted like a reasonable person in the situation.
- Inasmuch as the MPC rightly views the reasonable person test as a flexible vehicle for jurors to make attributions about the wrongdoer, "attribution bias" makes it less likely that jurors of all races will find that a black wrongdoer met the reasonable person test.

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[124] Negligence not only contradicts descriptivist interpretations of *mens rea*, but also mentalist ones, as it requires no aware mental state.

[125] KADISH & SCHULHOFER, *supra* note 76, at 358 (emphasis added).

[126] MODEL PENAL CODE § 2.02(3) (AM. L. INST., Proposed Official Draft 1962): "Culpability Required Unless Otherwise Provided. When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto."

[127] *See, e.g.*, R v. Cunningham [1957] 2 QB 396 (Eng.).

[128] *See* MODEL PENAL CODE § 210.3, cmt. at 62-63 (AM. LAW INST. 1980). "The word 'situation' is designedly ambiguous . . . . In the end, the question is whether the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen." *Id.*

[129] *See infra* at pp. 8-13.

VI. HOW RACIAL BIAS INFECTS "FACTUAL" OR DESCRIPTIVE TESTS OF MENS REA THROUGH "INTERPRETIVE CONSTRUCTION"

Descriptivist proponents of the prevailing paradigm assume that because recklessness *includes* an aware mental state requirement (namely, conscious awareness of a substantial and unjustifiable risk), it is the kind of "descriptive" *mens rea* test—call it the "conscious awareness" test—whose existence can be "found" by factfinders without any moral judgment rather than socially constructed through biased moral judgments.[130] But the awareness requirement only looks like a descriptive directive which requires a purely factual determination by the jury;[131] through the hidden and often unconscious manipulation of factual descriptions—that is, through the process of "interpretive construction"[132] of the underlying facts—the awareness requirement often functions like a flexible and discretion-laden standard that can therefore enable the racially-biased social construction of black criminals through jurors' biased moral judgments. In other words, we come now not just to where bias lives in the criminal law and its processes—but to where it hides. The concept of "interpretive construction"[133] will help us root out bias in seemingly factual judgments and descriptive standards like woodlice from under the lumber pile.[134]

A. Interpretive Construction and Intent

Let's begin with a fact pattern that frequently arises in criminal law textbooks—a case of Russian roulette. Assume that in a park after school a sixteen-year-old wrongdoer produces a handgun from his backpack and proposes to a friend that they place a live round in one of the gun's six empty chambers, spin the cylinder, and each take turns pointing the revolver at the shin of the other and pulling the trigger. The cylinder would be spun again after each turn. Either participant could end the game at any time by saying the word "chicken" and calling off the contest—in which case the other player would be the winner. After five or ten turns where the hammer drops harmlessly on an empty chamber, the wrongdoer takes his turn, spins

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[130] That is, rather than socially constructed through a value-laden diagnostic interpretation of the wrongdoer by jurors.

[131] One that requires the jury to make a factual finding about a precise and empirically verifiable mental state.

[132] *See generally* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

[133] For a thoughtful general discussion of the phenomenon of interpretive construction in criminal law settings, *see id.*

[134] To that end, first I will illustrate how easily and often factfinders inconspicuously manipulate or "interpretively construct"—or what I will call "play the accordion" on—the legal facts in a case in which the prototypical aware mental state of "intent" governs the dispute. Then I show how easy it is for well-meaning and conscientious jurors to consciously or unconsciously play the accordion on the facts of a criminal case and thereby interpretively construct the aware mental states of awareness and premeditation. In turn, this analysis will show how readily biases in the adjudication of just deserts can socially construct black criminals.

the cylinder, points the gun at the victim's lower leg, and fires a live round into his tibia.

In a prosecution for "intentional wrongdoing," assume the jury believes the wrongdoer when he says that he had firmly resolved not to call off the game or "chicken out," but also that he did not subjectively desire to shoot the victim; rather, he sincerely hoped and subjectively desired that the other player "chicken out" before someone suffered a gunshot wound. In that case, to prove the wrongdoer intended to cause the victim's injury, the prosecution must prove that he knew with substantial certainty one of the two of them would be shot. In turn, whether the shooter "intended" to cause this injury (in the "knew it would result from his conduct" sense of intent) depends entirely on how the jury frames or interpretively constructs the facts, not on the substantive test of intent itself (namely, knowledge with substantial certainty) or on the shooter's actual state of mind as he squeezed the trigger. At the instant he squeezed the trigger, the shooter could only be aware of a 1-in-6 chance of injuring the victim; so if we frame the *actus reus* or prohibited conduct narrowly as only encompassing each discrete turn in the game (that is, if we interpret the facts from the standpoint of each individual spin of the cylinder and squeeze of the trigger), the shooter's act cannot be characterized as accompanied by any knowledge-based or constructive intent to injure the victim. In contrast, if we frame or "interpretively construct" the facts broadly (that is, if we view the *actus reus* as the entire course of conduct and see both players as firmly resolved not to "chicken out"), the victim's injury can be characterized as an intended consequence of the shooter's conduct in that he knew with substantial certainty that eventually—inevitably—someone would be shot and then the doctrine of "transferred intent" makes him responsible for the intended shooting of that particular victim who was eventually shot, whoever that turned out to be. Seen in this light, the constructive intent requirement itself is mere window dressing, the real basis of the decision being how the facts are interpretively constructed; whatever factors determine that characterization really determine the outcome of the case, not the window dressing "intent" requirement.

Some thoughtful authorities on the nature and scope of the constructive intent requirement take issue with my conclusion. Professors Henderson and Twerski, for instance, argue that proper conceptualization of the constructive intent requirement requires recognition of a distinction between "the proximate consequences of discrete acts, on the one hand, and the inevitable consequences of general courses of conduct, on the other."[135] They contend that the concept of "intended consequences" should not be applied to a course of repetitious conduct—such as batting in the lineup on a major league baseball club throughout a long season—undertaken by an

[135] James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1141 (2001).

actor, because over the course of such conduct "some types of unhappy consequences are, sooner or later, virtually certain to occur."[136]

> For a batter in the major leagues, hitting foul balls into the stands, thereby striking patrons, is certain to occur from time to time across many thousands of swings of a bat. Yet, in connection with any given swing, not only does the batter not desire to hit a foul ball when he swings the bat, he does not believe that such a consequence is certain—or even very likely—to follow. The player understands at the outset of the baseball season that foul balls will inevitably occur; but the "act" referred to in the phrase "one intends the consequence of an act" is the discrete act of swinging a bat at a pitched ball, not the deliberate undertaking of the course of conduct involved in batting regularly in a major-league lineup. Properly conceptualized, intent focuses on discrete acts, not general courses of conduct.[137]

This clever distinction works, however, only to the extent that we accept their interpretive construction of the facts, for, again, regardless of the substantive legal standard applied to a fact pattern, choosing to broadly or narrowly describe the facts can make a case "easy" or "hard" and preordain its outcome. In proximate cause, for instance, the substantive legal criterion may be "foreseeability," but these cases really hang on how the jury or other factfinder interpretively constructs the facts. Thus, in *Hines v. Morrow*, the defendant negligently permitted a railroad crossing to become full of potholes.[138] A car became mired in the mud at the crossing. The plaintiff attempted to step out from between the two vehicles, but found that he could not because his wooden leg had sunk into a mud hole. A coil from the tow rope caught the plaintiff's good leg, causing it such serious injury that it had to be amputated below the knee. On appeal, the defendant argued that the condition of the crossing was not the proximate cause of the plaintiff's injury, that is, he argued that it was not foreseeable that the victim would suffer injury in such a bizarre and freakish way.[139]

In cases that turn on a flexible test like "foreseeability," lawyers and factfinders put the rabbit in the hat (predetermine the outcome) when they interpretively construct the facts and pull it out again (confirm the predetermined outcome) when they wed the substantive law to those "found" facts. As Professor Morris has pointed out, had the court focused on the details of the events, the defendant might have proved the absence of foreseeability and prevailed. Instead, the court adopted a broader interpretive focus in line with the plaintiff's description of the facts:

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[136] *Id.*
[137] *Id.* at 1141–42 (internal citations omitted).
[138] Hines v. Morrow, 236 S.W. 183, 184 (Tex. 1921).
[139] *Id.*

> The case, stated in the briefest form, is simply this: [Plaintiff] was on the highway, using it in a lawful manner, and slipped into this hole, created by [defendant's] negligence, and was injured in undertaking to extricate himself. . . . [To the defendant's argument that it] could not reasonably have been foreseen that slipping into this hole would have caused the [plaintiff] to have become entangled in a rope, and the moving truck, with such dire results. . . . [the] answer is plain: The exact consequences do not have to be foreseen.[140]

This kind of interpretive legerdemain lies behind the intuitive appeal of the authors' foul ball analogy. A demystifying counter-analogy could be a shooter who fires not a single shot from a single action rifle into a crowd, but one who, armed with an automatic AK-47 with a long ammunition belt, takes aim at a crowd. Imagine that the ammunition belt he feeds the AK-47 contains a hundred randomly selected rounds, ninety-nine of which are blanks and only one of which is "live." If we interpretively construct the facts by narrowing the time frame to each discrete shot and disjoining (or disaggregating) each shot from its predecessor and successor, we might conclude that he did not "intend" or "know with substantial certainty" that he would injure anyone in the crowd. Indeed, we can even assume that the shooter connects the AK-47 to an automatic timer and abandons it, so that it only fires one round from the ammunition belt per day or week, resulting in great temporal distance between the *discrete* acts. Nevertheless, our intuitions would demand that he be responsible for an intentional injury when the "live" round is finally discharged into the crowd. Whether we expand or narrow the relevant time frame—how we play the interpretive accordion—depends on such moral intuitions, which means these moral intuitions really produce the outcome, not the knowledge or constructive intent requirement, which merely serves as window dressing or a conclusory label that does no real independent normative work.

B. Interpretive Construction and Awareness

To be reckless, the Model Penal Code requires that the actor "consciously disregard a substantial and unjustifiable risk" that some circumstance exists or that some result will occur. Does this formulation require the actor to be aware (i) of the risk, (ii) that it is substantial, *and* (iii) that it is unjustifiable? Or does it only require the actor to be aware of some risk, which the jury finds to be substantial and unjustifiable? Or does it require the actor to be aware of a substantial risk, which the jury finds to be unjustifiable? As one casebook correctly observes, "Grammatically, the Model Penal Code appears to require conscious awareness as to all three of

[140] *Id.* at 187–88.

the crucial factors. But is this interpretation tenable in practice?"[141] Certainly such an interpretation seems required by the conception of *mens rea* championed by mentalists and choice theorists—only if an actor was aware that his conduct was unjustified, could it be said that he was aware of wrongdoing and consciously chose to do wrong. Simply being aware of creating "substantial" risks proves nothing about an actor's awareness of wrongdoing; as the MPC Comment points out, "Even substantial risks, it is clear, may be created without recklessness when the actor is seeking to serve a proper purpose."[142] So any equation of subjective culpability with awareness of wrongdoing and choosing to do wrong cannot logically avoid requiring the actor to be aware that the risk is unjustifiable. Nevertheless, no such interpretation is tenable, for it would insulate from criminal liability persons whose idiosyncratic values, beliefs and attitudes lead them (perhaps unconsciously) to honestly conclude that conduct most of us would find outrageously risky either was not very risky[143] or promoted interests so weighty that its social utility outweighed its social costs (that is, it "served a proper purpose"). An honest mistake about the relative social value of competing interests might cause an actor to lack awareness that certain risky conduct is unjustifiable (does not "serve a proper purpose"), yet to exculpate on this ground would amount to excusing him because of his mistake or ignorance of law, in violation of the principle that such mistakes and ignorance are no excuse. Thus, the awareness and choice approach to subjective culpability does not fit a plausible interpretation of the awareness requirement in recklessness.

Requiring the actor to be aware of a "substantial" risk which the jury finds to be unjustifiable is not tenable, either. Just as "[e]ven substantial risks . . . may be created without recklessness when the actor is seeking to serve a proper purpose," conversely, even very small—i.e., insubstantial—risks may be created with recklessness when the actor seeks to serve a patently improper purpose.[144] In shooting a gun into the air to celebrate a Lakers win, an actor may be aware of creating only a tiny risk that the bullet will hit someone when it falls back to earth, but because the creation of such a risk is so egregiously unjustifiable and constitutes such a gross deviation from the reasonable (or law-abiding) person in the situation standard, if it causes an innocent death, a jury could have little difficulty finding the actor reckless. Substantiality remains geared to unjustifiability and does little work independent of it. Jurors who are instructed to "find" awareness of a substantial risk before convicting someone who has created what they see as an outlandishly unjustified (albeit small) risk can simply conclude that he

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[141] KADISH & SCHULHOFER, *supra* note 76, at 215.

[142] MODEL PENAL CODE § 202, cmt. at 237 (AM. LAW INST. 1985).

[143] Kadish and Schulhofer make this point with the following hypothetical: "Consider a person who regards himself as an extraordinarily skillful driver. Finding himself in a hurry, he drives in a manner that creates an outrageously high risk of killing someone. He believes, however, that there is little risk because of his expertise as a driver. He drove negligently, but did he drive recklessly?" KADISH & SCHULHOFER, *supra* note 76, at 215.

[144] Alexander, *supra* note 76, at 933-935.

was aware of a substantial risk in view of its outlandishness and his subjective culpability in creating it. Nothing in the Code or Commentaries defines what constitutes a substantial risk nor prohibits such discretionary judgments by factfinders. To the contrary, in the words of the Comment:

> Some standard is needed for determining *how* substantial and *how* unjustifiable the risk must be in order to warrant a finding of culpability. There is no way to state this value judgment that does not beg the question in the last analysis; the point is that the jury must evaluate the actor's conduct and determine whether it should be condemned.[145]

Clearly the Comment recognizes that both the substantiality and unjustifiability criteria are flexible nondescriptive legal directives, each calling on factfinders to make a "value judgment" in determining whether it has been met. The substantiality criterion does no independent work either in defining whether the risk was excessive or whether the actor's awareness of creating an excessive risk was reckless.[146]

The most tenable interpretation of recklessness is that it only requires the actor to be aware of *some* risk, which the jury finds to be unjustifiable. As discussed above, the jury's inquiry into whether the risk was unjustifiable concerns the *actus reus* ingredient in recklessness—excessively risky conduct is prohibited conduct. That leaves all the *mens rea* or subjective culpability work on the requirements that the actor be aware of *some* risk and that acting with such awareness constituted a gross deviation from the behavior of a reasonable person in the actor's situation. But because we are all aware of *some* risk in just about everything we do (from getting behind the wheel of a car to getting out of bed), this element also does little independent work as a basis for distinguishing between negligence and recklessness as it amounts to a featureless generality—"awareness of some risk"—that hovers over all human activity and hence can easily be "found" (or not) at the discretion of the factfinders.

Take a prosecution for "date" rape, for instance, in a jurisdiction in which the *actus reus* or prohibited act is defined as nonconsensual sexual intercourse. Assume no dispute as to the conduct element (both parties agree that intercourse occurred) and further assume that the factfinders conclude

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[145] MODEL PENAL CODE § 202, cmt. at 237 (AM. LAW INST. 1985).

[146] Of course, we must be careful here to distinguish between the role of substantial and unjustifiable risks in establishing the *actus reus* (excessively risky conduct) as against *mens rea* (according to mentalists, awareness of engaging in excessively risk conduct). The substantiality requirement does no work independent of the unjustifiability requirement in either case. Thus, conduct that jurors deem extremely unjustified will not have to be very likely to cause harm to be judged reckless, and an actor who is aware of creating risks the factfinders deem extremely unjustified will not have to be aware of a high likelihood of harm to be judged reckless. It would make little sense to say that jurors could find a very small risk "substantial" for *actus reus* purposes but would require the actor to be aware of a larger risk before determining it to be "substantial" for purposes of *mens rea*. How much larger for *mens rea* purposes than for *actus reus* purposes?

that the complaining witness was not subjectively willing to have sex. The dispositive issue, then, distills to whether the defendant had *mens rea* as to the circumstance element of non-consent. What difference does it make whether the jurisdiction's *mens rea* requirement for rape is negligence (the weight of authority) or recklessness? Because "the crucial factor distinguishing these levels of culpability is awareness,"[147] where the requisite *mens rea* is recklessness, the jury must find that the defendant acted with awareness of a risk of being mistaken about the fact of consent. But aren't we all always aware of some risk (however slight) of miscommunication or erroneous factual judgments? In general, we all know that things are not always as they seem, that appearances can be deceiving, that there is some risk of error in all human perceptions, inferences, and beliefs. Again, awareness of *some* risk amounts to a featureless generality that hovers over all human judgments, perceptions, and beliefs and hence can easily be "found" (or not) at the discretion of the factfinders.

The awareness requirement in recklessness is malleable and indeterminate in still other ways. Deaths from distracted drivers who text, dial, talk and tune are tragically common. Many of these drivers do not see themselves as more skillful than anyone else, so they are aware—on some level—of taking added risks. But do they have the requisite level awareness for reckless manslaughter (or perhaps even depraved heart murder)? For instance, a two-year-old child named Morgan Pena was killed by a driver who was attempting to dial a number on his cell phone. The driver surely was aware that failing to keep a proper lookout increases risks to pedestrians like Morgan and that a proper lookout is impossible while his eyes and attention are on his key pad. Nevertheless, the driver "apparently failed to appreciate the full extent of the danger his conduct created."[148] The driver was cited for careless driving and running a stop sign, "but he was not charged with a more serious offense because the police determined that he was not reckless."[149] Professor Kimberly Ferzan refers to this level of culpability as "opaque recklessness"—"awareness of some risk but failure to appreciate how substantial it was."[150] Opaque recklessness "is probably a regular feature of dangerous behavior, and it arguably lies somewhere between the Model Penal Code notions of recklessness and negligence."[151] Amorphous, indeterminate, "in between" states of awareness like opaque recklessness—states of awareness that may accompany the majority of unintentional homicides and other crimes—leave it to the unguided discretion of the factfinder whether to find the harm-doer responsible for recklessness or negligence.[152]

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[147] KADISH & SCHULHOFER, *supra* note 76, at 214.

[148] KADISH ET AL., *supra* note 11, at 229.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] Let's say that out of this welter of workaday risks of which we are all dimly aware emerge certain more concrete and specific ones, and let's assume it is these more concrete, specific, and salient risks to which the recklessness requirement of awareness refers. Put differently, let's assume that only

To avoid a vague and amorphous to the point of vacuous awareness test, we could frame the risk he must be aware of more narrowly—that is, rather than saying he must be aware of the general risk of driving while talking on a cell phone, we could say he must be aware that driving in such a manner poses risks to pedestrians, or more specifically still, that such driving poses a risk to the particular pedestrian who was in the crosswalk when the actor's car entered it. But nothing in the awareness requirement itself dictates at what level of generality or particularity the relevant risk must be framed, thus leaving it to the discretion of the factfinder whether to frame the risk the actor must be aware of broadly or narrowly.[153] If the risk is framed very broadly (risk of an accident from cell phone use), the awareness requirement may be more easily met; but if the risk is framed very narrowly (the risk of this particular pedestrian, who the actor may not have noticed on the occasion of the collision, being hit due to cell phone use), then the awareness requirement may not be as easily met. So, much of the work is being done not by the awareness requirement but by how broadly or narrowly the risk is framed or interpretively constructed, and no legal directive tells the factfinders at what level of generality they must frame the risks, leaving it to their unregulated discretion, which may be guided by any number of conscious or unconscious influences. In a word, the frame of the relevant risk can be stretched or squeezed like an accordion, with the awareness requirement dancing to whatever tune played by the interpretive construction of the facts.[154] Thus, a finding of awareness (or lack thereof) by ordinary jurors may often serve as a conclusory label attached to a negative evaluation of the defendant that plays the interpretive accordion that then becomes the justification or rationalization for the initial and underlying negative evaluation.

For instance, in *People v. Hall*,[155] the harm-doer, while skiing, flew off of a knoll and collided with the victim, who was crossing the slope below.

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those risks that present themselves to our conscious mental processes with a certain degree of clarity, immediacy, and vividness matter for purposes of the awareness requirement. Such criteria still leave enormous latitude for factfinders to determine *how* concrete, *how* specific, *how* vivid.

[153] *See* MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST., Proposed Official Draft 1962).

[154] Among the factors influencing how the accordion is played–i.e., how widely or narrowly the risks are framed–may be attributional processes, especially since a pivotal requirement that factfinders must consider in determining both recklessness and negligence (namely, the "reasonable person in the actor's situation" test) encourages attributional processes. To the extent that excessively risky conduct is attributed to the actor's serious character deficiencies, the factfinders may more readily frame the risks broadly, thus increasing the likelihood of a finding of awareness and recklessness. But if they attribute such conduct to somewhat less serious character deficiencies, they may more readily frame the risks narrowly, thus decreasing the likelihood of a finding of awareness. Thus, attributional processes may do double duty, driving both grading and liability determinations. As to liability determinations, inasmuch as factfinders attribute dangerous conduct to the situation, they find no criminal liability for either negligence or recklessness. As to grading determinations (assuming they have already decided to attribute such conduct to the actor's character), the more grave they view his dispositional deficiency, the more likely they are to frame the risks in such a way as to satisfy the (descriptive) criterion for the greater crime (recklessness) over the lesser (negligence); normative and psychological factors play the accordion to which the purportedly non-normative and non-discretionary directives dance.

[155] People v. Hall, 999 P.2d 207, 210 (Colo. 2000).

Hall, a "trained ski racer who had been coached about skiing in control and skiing safely,"[156] "for some time over a considerable distance"[157] travelled too fast for conditions in an out of control fashion—"back on his skis, with his ski tips in the air and his arms out to his sides to maintain balance." A witness, himself a ski instructor, "said that Hall was bounced around by the moguls on the slope rather than skiing in control and managing the bumps."[158] Hall admitted that he first saw the victim "when he was airborne and that he was unable to stop when he saw people below him just before the collision."[159] The People charged Hall with reckless manslaughter ("recklessly causing the death of another person"), requiring the prosecution to prove that Hall "consciously disregarded"—was aware of[160]—a substantial and unjustifiable risk that, in the court's words, "by skiing exceptionally fast and out of control [over a prolonged period]161 he might collide with and kill another person on the slope."[162]

These facts initially seem to support a slam-dunk finding of awareness if this requirement actually turns on an empirical judgment about an empirical fact—surely an experienced skier speeding down a popular slope out of control "for some time over a considerable distance" is aware of the possibility of a fatal collision with someone. Yet in a later trial, the jury rejected the charge of reckless manslaughter and convicted only of the lesser offense of negligent homicide.[163] Colorado statutes follow the Model Penal Code's definitions of manslaughter and negligent homicide, so "the crucial factor distinguishing these levels of culpability is awareness." In other words, the jury had to conclude that Hall met the elements that negligence and recklessness have in common—namely, substantial and unjustified risk-taking that grossly deviates from the kind of risk-taking that a reasonable person in the situation would undertake—but that he lacked awareness of doing so.

One can only suppose that the jury found only negligence—despite abundant proof that Hall was aware of creating unnecessary risks—because to them a manslaughter conviction simply seemed too severe; on their intuitive grading scale, he only deserved to be blamed and punished for negligence. That is not to say that they consciously disregarded their duty to apply the law to the facts. This analysis assumes that most factfinders do not practice jury nullification in most cases. Rather, they may have sincerely concluded that Hall lacked the *requisite* awareness of the *requisite* risk at

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[156] *Id.*, at 223.

[157] *Id.*

[158] *Id.* at 222.

[159] *Id.*

[160] The Court equates conscious disregard of a risk with awareness of that risk: "[W]e next ask whether a reasonably prudent person could have entertained the belief that Hall consciously disregarded that risk. . . . Hall's knowledge and training could give rise to the reasonable inference that he was aware of the possibility that by skiing so fast and out of control he might collide with and kill another skier unless he regained control and slowed down . . ." *Id.*, at 223.

[161] "[N]ot the type of momentary lapse of control or inherent danger associated with skiing . . ." *Id.*

[162] *Id.* at 224.

[163] *Colorado Skier Is Convicted in Fatal Collision on Slopes*, N.Y. TIMES, Nov. 18, 2000, at 9.

the time of the fatal collision.[164] Nevertheless, their conclusion that Hall deserves to be blamed and punished for something less than manslaughter was probably directly and intuitively generated by urges and values rooted in conscious and unconscious psychological processes, preceding and merely rationalized by their finding of no aware mental state.

In practical application of the recklessness test of wickedness by jurors, the concepts of *awareness* and wickedness often reverse the roles usually assigned to them in moral and legal theory. Looked at from the "common sense view of justice that blame and punishment are inappropriate and unfair in the absence of choice,"[165] one might expect the conclusion that A should be blamed for recklessly causing B's death to be based, in part, on the factfinder's judgment that A was at least subjectively aware of creating an unjustified risk of causing B's death. Because there can be no choice without awareness and no wickedness (*mens rea*) without choice, there can be no wickedness without awareness. However, in practice the conclusion of factfinders that A deserves to be blamed and punished may be directly and intuitively generated by evaluative judgments or retributive urges rooted in conscious and unconscious psychological processes, preceding and merely rationalized by the finding of an aware mental state. If factfinders can play the interpretive accordion on the awareness requirement to suit their retributive urges and moral judgments, a finding of fact about awareness may often really be a value judgment about the wrongdoer's wickedness masquerading as a factual judgment about the presence or absence of an aware mental state.

In the end, the legal directives doing the lion's share of the subjective culpability work in recklessness come down to whether the actor's beliefs or reactions constituted a "gross deviation[166] from those of a "reasonable

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[164] The Model Penal Code requires for recklessness that the person "consciously disregards a substantial and unjustifiable risk." MODEL PENAL CODE § 202(2)(c) (AM. LAW INST. 1985). Grammatically, it seems to require conscious awareness of the substantiality and unjustifiability of the risk. But taking the awareness requirement this seriously is hard to defend. Under this approach, a factfinder *must* acquit on the charge of reckless manslaughter despite concluding that Hall skied in a manner that created an outrageously high risk of killing someone, if she also concludes that Hall himself did not believe that he was creating extra risk, or substantial extra risk, because of his honest but inflated sense of his own skills—his oversized ego is a complete defense! Focusing solely on the harm-doer's state of awareness forces the factfinder to morally and legally ignore the reason why he lacks the required awareness—his culpable over-confidence. By the same logic, another result of this approach is that even if she concludes that he was aware that the increased danger was substantial, she still must acquit him if she concludes that he lacked awareness of wrongdoing because he personally "figured that taking risks was part of the good life and hence justifiable" —his idiosyncratic or egoistic moral values exculpate. In practice factfinders are unlikely to morally ignore why a harm-doer lacks awareness—his motivations—and can easily manipulate the awareness test to give legal effect to their moral evaluation of those reasons and motivations.

[165] "The vicious will was the *mens rea*; essentially it refers to the blameworthiness entailed in choosing to commit a criminal wrong. The requirement of *mens rea* reflects the common sense view of justice that blame and punishment are inappropriate and unfair in the absence of choice." KADISH, *supra* note 11, at 213.

[166] The "gross deviation" element—"gross" being about as nondescriptive and open-ended as directives get—tags along as a reminder that the fault should be greater than that which suffices for civil liability.

person in the actor's situation," with lots of latitude for the factfinder to play the interpretive accordion on the awareness part of the test. Just as with negligence, in short, determinations of recklessness turn decisively on jurors' moral judgments of the actor by means of malleable nondescriptive standards like "reasonable person" and "gross deviation"; the extremely malleable and amorphous "awareness" requirement follows jurors' (often unspoken or even unconscious) urges[167] and intuitions.

C. Interpretive Construction and Premeditation

Awareness requirements are not the only "mental state" ingredients of guilt and grading that look like descriptive standards calling for factual judgments but really allow factfinders to play the descriptive accordion in vindication of their potentially bias-ridden character judgments of defendants. Similarly, premeditation—actual reflection by the harm-doer on his intent to kill—seems to require a simple factual judgment from the juror, namely, whether the harm-doer actually reflected on his murderous intent. Yet many courts hold that some premeditation is required while simultaneously holding that "no time is too short" for the requisite premeditation to occur.[168] In *Young v. State*, for instance, an argument erupted over a card game, escalating into a scuffle during which the defendant shot two men in the chest with .22 caliber gun. Upholding the defendant's conviction on two counts of premeditated (first-degree) murder, the court reasoned that "[no] appreciable space of time between the formation of the intention to kill and the act of killing" was required and that "[p]remeditation and deliberation may be formed while the killer is 'pressing the trigger that fired the fatal shot.'"[169] It is a transparent fiction to maintain that premeditation can occur in the nanoseconds it takes to squeeze a trigger; saying that it can essentially collapses the distinction between intentional and premeditated acts. A mental process that can be fully realized in a small fraction of a second can be called meditation and reflection only in a Pickwickian sense. The Arizona Supreme Court reached this same conclusion in a case where the Arizona legislature tried to define premeditation as an intention that "precedes the killing by any length of time to permit reflection" with the further clarification that "[p]roof of actual reflection is not required."[170] The Court reasoned that eliminating proof of actual reflection eliminates the difference between intentional killings that are first-degree murders and those that are second-degree. Because real legal consequences ride on the formal distinction between premeditated (first-degree) and merely intentional (second-degree) murders, the way the Arizona legislature tried to define premeditation, concluded the Court, was

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[167] *See* Jody Armour, *Nigga Theory: Contingency, Irony, and Solidarity in the Substantive Criminal Law*, 12 OHIO ST. J. CRIM. L. 9, 46-56 (2014).

[168] KADISH, *supra* note 11, at 385.

[169] Young v. State, 428 So.2d 155, 158 (Ala. Crim. App. 1982).

[170] State v. Thompson, 65 P.3d 420 (Ariz. 2003).

unconstitutional because arbitrary and capricious, in violation of due process.[171] To salvage its constitutionality, the court interpreted the statute to require proof of actual reflection.

Be that as it may, in the many jurisdictions where "[no] appreciable space of time between the formation of the intention to kill and the act of killing" is required, the rule simply gives the jury the unfettered discretion to make a *mens rea* grading judgment[172] about the defendant based on their assessment of his deserts: If they think he does not deserve maximum condemnation and punishment, they can conclude that less than a second between the formation of the intention and its execution is not enough time for actual reflection on the intention to kill, but if they think he does deserve the maximum, then—in keeping with the "oft repeated statement . . . that 'no time is too short for a wicked man to frame in his mind the scheme of murder'"[173]—they can conclude that he did adequately meditate the intent in the instant it took to squeeze the trigger.[174]

VII. PREJUDICE ABOUT BLACK CHARACTER AND *MENS REA*

Exacerbating the often unconscious tendencies to attribute black wrongdoing to character flaws rather than situational factors discussed earlier is the quite conscious belief by many Americans that blacks have defective characters that render them prone to criminality.[175] This supposed bad black character increases the likelihood that any particular black wrongdoer acted with the requisite *mens rea* or wickedness for criminal guilt. Thus, in *People v. Zackowitz*, the defendant's wife broke into tears after being insulted by one of four men at work repairing an automobile on a city street. The enraged defendant, Zackowitz, warned the men that "if they did not get out of there in five minutes, he would come back and bump them all off."[176] Once back at their apartment, his wife disclosed the content of the insult—one of the men had propositioned her as a prostitute. With rekindled rage, Zackowitz returned to the scene of the insult with a pistol in his pocket. After words and blows—defendant kicked Coppola in the stomach, Coppola went for defendant with a wrench—there was a single fatal shot. On the key question of the Zackowitz's state of mind at the moment of the killing, the question was not whether he intended to kill but whether that

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[171] *Id.* at 427.

[172] There are two basic *mens rea* judgments: liability judgments and grading judgments.

[173] Commonwealth v. Carroll, 194 A.2d 911, 916 (1963). Defendant contended that the logic of this claim implied that, "conversely, a long time is necessary to find premeditation in a 'good man.'" *Id.*

[174] Formally, it is possible to go further than "no time is too short" for the necessary premeditation to occur approach in *Carroll* by holding, as Pennsylvania decisions after *Carroll* have, that "the requirement of premeditation and deliberation is met whenever there is a conscious purpose to bring about death . . . . We can find no reason where there is a conscious intent to bring about death to differentiate between the degree of culpability on the basis of the elaborateness of the design to kill." Commonwealth v. O'Searo, 352 A.2d 30, 37–38 (1976).

[175] Tom W. Smith, *Ethnic Images 9* (Dec. 1990) (General Social Survey Topical Report No. 19).

[176] People v. Zackowitz 172 N.E. 466, 467 (1930).

intent was formulated before the shot (before "he went forth from his apartment"),[177] making the crime first-degree murder, or whether the intent to kill was first formulated during the fight, making it murder in the second-degree. As proof of premeditation, the prosecution pointed to three pistols and a teargas gun Zackowitz kept in a radio box in his apartment. The prosecution did not claim that Zackowitz brought the pistols or teargas gun with him to the encounter. The only relevance of the weapons was to prove "that here was a man of vicious and dangerous propensities, who because of those propensities was more likely to kill with deliberate and premeditated design than a man of irreproachable life and amiable manners."[178] In his appellate brief, the District Attorney defended the admissibility of the evidence on precisely this ground, stating that "the possession of the weapons characterized the defendant as 'a desperate type of criminal,' a 'person criminally inclined.'"[179] In Cardozo's words, "[a]lmost at the opening of the trial the People began the endeavor to load the defendant down with the burden of an evil character."[180] He was put before the jury as "a man of murderous heart, or criminal disposition..."[181] The jury found that Zackowitz acted with premeditation and sentenced him to death.

Cardozo, writing for the majority, ultimately reverses the judgment of conviction, but first admits that evidence designed to show "bad character" or criminal propensity *is* relevant in the Rules of Evidence sense of "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[182] Quarrelsome defendants, he admits, are "more likely to start a quarrel than one of milder type" and "a man of dangerous mode of life more likely than a shy recluse."[183] He assumes that evidence of bad character or criminal propensity tends to show that the defendant was more likely to have acted "in conformity therewith."[184] He assumes a statistically significant relationship between character traits and actions in conformity therewith. McCormick agrees, stating that evidence designed to show the defendant had "bad character" and thus was more likely to be guilty of the crime "is not irrelevant."[185] It is rational to consider character in

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[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.* at 469.
[182] FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). *See also* FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided. . . . Evidence which is not relevant is not admissible.").
[183] *Zackowitz*, 172 N.E. 466.
[184] *See* FED. R. EVID. 404(b): "Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . ."
[185] EDWARD W. CLEARY ET AL., MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 447 (2d ed. 1972). Bad character is the 800 pound gorilla in the middle of criminal trials of blacks, "but in the setting of jury trial the danger of prejudice outweighs the probative value." *Id.*

assessing blameworthiness for the same reason it is rational to consider race in assessing the likelihood that someone has or will engage in criminal activity. Defenders of racial profiling contend that blackness itself indicates propensity, at least in the statistical sense, that blacks pose a greater risk of crime than non-blacks. In surveys, most Americans agree with the statement that "Blacks are prone to violence." Both evidence of "bad character" and "evidence" of blackness—and its associated propensities—can be viewed as increasing the likelihood of actions in conformity therewith. Bad character evidence and "rational" racial profiling practices rest on the same statistical logic. Cardozo attacks this logic, however, as inadequate to justify allowing even relevant evidence of "murderous propensity" to get to the factfinder. "Character is never an issue in a criminal prosecution unless the defendant chooses to make it one," he declares.[186] The underlying reason for keeping relevant evidence of the defendant's character and propensities away from the factfinder, he says, "is one, not of logic, but of policy,"[187] specifically, the "policy" of protecting the innocent by preserving the rationality and accuracy of the fact-finding process.[188] Recast in the language of the Federal Rules of Evidence, Cardozo views otherwise relevant evidence of the defendant's bad character as inadmissible because its prejudicial effects *categorically*[189] outweigh its probative value:

> The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to [such evidence] and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.[190]

Cardozo worried if the jury believed that, generally speaking, the accused has "an evil character" or is a "man of murderous disposition,"[191] they would too readily conclude that he premeditated his intent on the occasion of the murder, or that even if he did not premeditate his intent on that particular occasion, he still deserves to be blamed and punished "consistent with guilt in its highest grade." Again, recast in the language of the Federal Rules of Evidence, the prejudicial effect of character evidence arises

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[186] *Zackowitz*, 172 N.E at 468.

[187] *Id.*

[188] *Id.*

[189] Generally speaking, it may be true that evidence of other crimes, wrongs, acts or dispositions is more prejudicial than probative in one of the senses Cardozo identifies. But this cannot be claimed categorically. There can be cases where the danger of prejudice is arguably insufficient to justify exclusion. So, in addition to the "intrinsic" reasons for excluding character evidence (the ones that center on the rationality and accuracy of the factfinding process), there may be weighty "extrinsic" reasons for restricting the admissibility of character or other-crimes evidence.

[190] There may be cases where the danger of prejudice is arguably not enough to justify the exclusion. Then we would have to invoke more basic principles and assumptions about criminal responsibility and just punishment.

[191] *Zackowitz*, 172 N.E at 467.

because the jury is likely to give the evidence too much weight (overestimate its probative value) or because the evidence will arouse undue hostility toward one of the parties.[192] Prejudice, used here as a term of art, includes (but means more than) conscious bias, the kind that tempts jurors to disregard an instruction from the judge on what elements the prosecution must prove for conviction. This amounts to jury nullification.[193] The kind of prejudice contemplated by the Rules of Evidence can also arise from the impact of certain evidence on mental processes that occur without the factfinders' conscious awareness or control. For instance, prejudice arising from the impact of character evidence on the factfinders' cognitive unconscious may determine how they interpretively construct the "facts"[194] or otherwise manipulate malleable and discretion-laden legal tests like "the reasonable man." The reason for the analytic work we did above on the nature of legal directives used by factfinders was to identify where character- and stereotype-driven judgments can invisibly and unconsciously determine legal (and moral) judgments and outcomes. It should come as no surprise that when the substantive criminal law, through jury instructions, requires the jury to perform an intellectual feat that runs counter to the jury's moral intuitions and gut reactions and other inclinations, the jury may unwittingly follow its inclinations rather than the blackletter laid down in the jury instructions. Thus, as Justice Jackson admonishes, "The naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."[195] And in the words of another court:

> [O]ne cannot unring a bell; after the thrust of the saber it is difficult to say forget the wound; and finally, if you throw a skunk into the jury box, you can't instruct the jury not to smell it.[196]

Empirical research corroborates these concerns: studies find that jurors exposed to a defendant's record of prior convictions for similar offenses significantly increases the likelihood of conviction and that cautionary instructions eliminate little or none of the prejudicial effects that flow from such evidence.[197] Similarly, studies found that exposure to a legally inadmissible confession significantly increased the chance of a guilty verdict

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[192] KADISH ET AL., *supra* note 11, at 19.

[193] For a defense of jury nullification in cases where it would promote rather than subvert racial justice in criminal matters, *see generally* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

[194] *See* discussion of interpretive construction *supra,* notes 132–173 and accompanying text.

[195] Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

[196] Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962).

[197] *See* Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589, 601 (1997) ("For example, significantly more uninstructed participants (72%) than instructed participants (50%) incorrectly understood that evidence about a defendant's prior convictions could not be used for any purpose. In addition, whereas 50% of instructed participants incorrectly thought evidence of prior conviction could not be used to assess the defendant's believability, significantly more (74%) uninstructed jurors made the same mistake.").

despite weak other evidence and that instructions to the jury to ignore the confession had no measurable effect on the probability of conviction.[198] Again, the jury may strive to "approach their task responsibly and to sort out discrete issues given to them under proper instructions,"[199] but courts and codes generally recognize that certain kinds of evidence, like bad character and criminal propensity evidence, is likely to have an improper impact on the legal outcomes. Specifically, the jury gives such evidence "excessive weight," which implies that such evidence causes jurors to convict more often than they would if they were not improperly influenced in a way detrimental to the accused. Bad character and criminal propensity evidence, in the words of Justice Harlan in *Winship*, increases the risk of "factual errors that result in convicting the innocent."[200] Jurors may not think they are giving certain evidence "too much weight," may strive not to do so, and may even be prompted to resist the temptation or human tendency to do so by instructions from the judge. Evidence is nevertheless excluded as prejudicial when it is likely to subvert the rationality and accuracy of the fact-finding process despite jury instructions and despite dutiful factfinders. Thus, according to McCormick, character evidence "is not irrelevant, but in the setting of jury trial the danger of prejudice outweighs the probative value."[201] And when the Judicial Conference of the United States, the policy-making body of the federal judiciary, was chaired by Chief Justice Rehnquist, the Conference decried new rules permitting evidence of bad character and criminal propensity in prosecutions for child molestation and sexual assault, pointing out that the new rules posed a "danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person."[202] As the Judicial Conference noted, its conclusion that evidence of bad character and criminal propensity distorts the rationality, accuracy and fairness of the fact-finding process reflects a "highly unusual unanimity" of the judges, lawyers, and academics who make up its advisory committees.[203]

This near unanimous recognition of the rationality-subverting effect of evidence of character carries negative implications for black people on trial.

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[198] *See* Saul M. Kassin & Lawrence S. Wrightsman, *Coerced Confessions, Judicial Instruction and Mock Juror Verdicts*, 11 J. OF APPLIED SOC. PSYCHOLOGY 489, 503–04 (1981) ("Experiment 1 demonstrated quite clearly that the currently available forms of the instruction are ineffective. Instruction effects were obtained on certain dependent variables, but not on the two practically important judgments. Experiment 2 revealed that although no instruction significantly affected verdicts, the dual instruction (i.e., emphasizing both the unfairness and the unreliability of an induced confession) did significantly alter subjects' voluntariness judgments.").

[199] Spencer v. Texas, 385 U.S. 554, 565 (1967).

[200] *In re* Winship 397 U.S. 358 (1970).

[201] CLEARY ET AL., *supra* note 184, at 447. *See also* Michelson v. United States, 335 U.S. 469, 475–476 (1948): "The inquiry is not rejected because character is irrelevant; on the contrary it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."

[202] KADISH ET AL., *supra* note 11, at 26.

[203] *Id.*

In cases involving black defendants, their pigmentation[204] is proof of their bad character or criminal propensity. Stereotypes—both as statistical generalizations and as well-learned sets of associations[205]—often relate to character traits, such as "blacks are hostile or prone to violence."[206] The propensities (or proclivities) associated with blacks are established as stereotypes early in the memories of factfinders, in early childhood, and can function as conscious beliefs (especially when supported by statistics) or unconscious sets of associations;[207] so in a real sense, in the courtroom (as well as on the street), a black actor wears evidence of his "bad character" and criminal propensity on his face. Accordingly, the prejudicial effects of evidence of bad character and criminal propensity pointed out by the Federal Rules of Evidence, McCormick, Rehnquist, the Judicial Conference and many others, may routinely influence the adjudication of black blame and punishment. When we put together our understanding of the gravitational pull exerted by value judgments about defendants' character on the factfinders' judgments about every other element of a charged offense, with our understanding of the role of negative stereotypes about black character traits in the perceptions and judgments of jurors and other social decisionmakers, we see much room within the rules and standards themselves for bias to thrive in adjudications of criminal guilt. As *Zackowitz* teaches, the seemingly factual judgment about whether the defendant actually reflected on his intent, for instance, may often be—or merely reflect[208]—a moral appraisal of the killer's character and deserts, with a finding of premeditation merely serving as a conclusory label for the determination that "he was a man of murderous heart, of criminal disposition."[209]

Often the substantive criminal law directs jurors to make explicitly character-based assessments of the defendant's deserts, character, and subjective culpability in assessing *mens rea*. Thus, an unintentional killing can constitute not only manslaughter (if the jury concludes that it resulted from criminal negligence or recklessness) but also murder (if it concludes that it resulted from criminal negligence or recklessness *plus* some "additional" degree of wickedness or subjective culpability). All the epithets describing the "additional" *mens rea* requirement invite the factfinder to directly evaluate the defendant's character, especially when traits of

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[204] And identity performance. *See, e.g.*, Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998).

[205] Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 741 (1995).

[206] *Id.* at 753.

[207] *Id.* at 741-42, 753-59.

[208] Interpretive construction may mediate the relationship between the factfinder's moral judgment of the harm-doer and the formal legal requirements that must be met by a factfinder (who seeks to follow jury instructions) to back up that moral judgment with criminal blame and punishment. Interpretive construction can consciously or unconsciously message the legal materials to align the factfinder's moral judgment of the accused with the formal legal requirements.

[209] People v. Zackowitz, 172 N.E. 466, 469 (1930).As a propensity argument the evidence goes to the increased likelihood that a bad person will premeditate the intent; as a character argument the evident goes to that he deserves punishment whether or not he premeditated!

character are viewed as "the kinds of dispositions that wants and aversions are,"[210] that is, when character traits are viewed as desires, desire-states, cares, concerns, values and aversions. Collectively and for convenience, this constellation of wants and aversions can be referred to as the "heart" of the accused. To be succinct, the legal tests jurors use to distinguish between murder and manslaughter all center on the condition of the defendant's heart. Thus, the verbal formulas given to the jury to guide its identification of the added element of subjective culpability it must find for murder include: "the dictate of a wicked, depraved and malignant heart," "an abandoned and malignant heart," "a depraved heart regardless of human life," and "that hardness of heart or that malignancy of attitude qualifying as 'depraved indifference.'"[211] Because factfinders can *diagnose* a harm-doer's depraved heart even from inadvertent or negligent risk creation,[212] the harm-doer need not even be aware of running excessive risks to be convicted of murder. The malice for murder need not include an aware mental state: different factfinders could convict the *same* inadvertent killer of negligent homicide, manslaughter, or murder solely on the basis of different diagnoses of the condition of his heart at the time of the excessively risky conduct. The depraved heart approach of the common law and statutes based upon it makes the distinction between murder and manslaughter turn on "the degree of the jury's moral abhorrence"[213] to the killing and killer. Such a test "remits the issue to varying and highly subjective judgment calls of the judge or jury."[214] Does the Model Penal Code fare any better in providing decision rules that avoid remitting the issue of the harm-doer's moral blameworthiness to "varying and highly subjective judgment calls of the judge or jury?" The leaner, modern *mens rea* language of the Model Penal Code, with its precise delineation of levels of culpability, has been hailed as a vast improvement over the vague and value-laden traditional definitions of *mens rea* which required proof that the harm-doer acted "willfully," "maliciously," "corruptly," and "wantonly." These traditional *mens rea*

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[210] Richard B. Brandt, *Traits of Character: A Conceptual Analysis*, 7 AM. PHIL. Q. 22, 28 (1970).

[211] 4 WILLIAM BLACKSTONE, COMMENTARIES *199; CAL. PENAL CODE § 188 (West 2014); MODEL PENAL CODE § 210.2 cmt. at 22 (AM. LAW INST. 1980); *People v. Roe*, 542 N.E.2d 610, 618 (1989).

[212] The Model Penal Code appears to oppose murder liability for inadvertent risk creation: "The Model Penal Code provision makes clear that inadvertent risk creation, however extravagant and unjustified, cannot be punished as murder... At least it seems clear that negligent homicide should not be assimilated to the most serious forms of criminal homicide catalogued under the offense of murder." MODEL PENAL CODE § 210.2, cmt. at 27-28 (AM. LAW INST. 1980). Nevertheless, the MPC provides in Section 2.08(2) that recklessness need not be shown if the defendant lacked awareness of the risk because he was voluntarily intoxicated. MODEL PENAL CODE § 2.08(2) (AM. LAW INST. 1985). But this approach contradicts the Code's own claim that "inadvertent risk creation" or "negligent homicide"—"however extravagant and unjustified"—"cannot be punished as murder." This approach treats negligence in drinking before driving as sufficient *mens rea* for murder where, for instance, the defendant honestly but stupidly believes that he can safely drive drunk and has a substantial personal history of doing so without incident. *See* United States v. Fleming, 739 F.2d 945 (4th Cir. 1984); State v. Dufield, 549 A.2d 1205 (N.H. 1988). The illusion of a bright descriptive line (awareness) between at least murder and manslaughter if not between criminal and civil liability cannot be nursed under these approaches.

[213] KADISH ET AL., *supra* note 11, at 429.

[214] *Id.*

formulas were criticized as conveying "more atmosphere or emotion than concrete meaning."[215] To distinguish between manslaughter and unintentional murder, instead of proof of a depraved heart, the Model Penal Code requires proof of recklessness "in circumstances manifesting *extreme indifference to the value of human life*." But this test of unintentional murder requires a judgment call just as subjective as depraved heart. The jury's moral abhorrence is still the touchstone of murder. The leaner, more modern, less vituperative language of the Model Penal Code can lull the unwary into a false impression that modern approaches to *mens rea* require the factfinder to make fewer direct moral judgments of the harm-doer. The unacknowledged truth is that there is as much room for "subjective judgment calls" in the modern terminologies and approaches to *mens rea* as there was in the traditional formulations—it's the same old value-laden and discretionary wine in high-tech terminological bottles. At many levels of narrow, definitional *mens rea* analysis—negligence, recklessness, depraved heart malice, extreme indifference—the rule of decision that goes to the jury not only invites but requires it to make a "subjective judgment call" about the harm-doer's deserts and character. Other ostensibly factual *mens rea* elements—premeditation and awareness—remain tightly tethered to such subjective judgment calls through both interpretive construction and the open-ended malleability of the substantive legal tests. And according to a Model Penal Code Comment, even the most factual or "descriptive" *mens rea* tests—knowledge and purpose—are morally rooted in the same depravities of heart or extreme indifference that make some unintentional killings murder.[216] Where there is ambiguity in the interpretation or application of even knowledge and purpose, there is room for judgments about the harm-doer's character and deserts to determine whether factfinders find the *mens rea* for guilt.

Although Cardozo's warning about the dangers of character evidence are forceful and accurate, his claim that "character is never an issue in a criminal prosecution unless the defendant chooses to make it one" is misleading; for measuring the harm-doer's subjective culpability or *mens rea* routinely requires factfinders to make character judgments about harm-doers. The universally accepted principle (subject to certain "exceptions") is that evidence offered "to prove the character of a person in order to show action in conformity therewith"[217] is inadmissible. Under this rule, the

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[215] *Id.* at 217.

[216] MODEL PENAL CODE § 210.2, cmt. at 21-22 (AM. LAW. INST. 1980).: "In a prosecution for murder, however, the Code calls for the further judgment whether the actor's conscious disregard of the risk, under the circumstances, manifests extreme indifference to the value of human life. The significance of purpose or knowledge as a standard of culpability is that, cases of provocation or other mitigation apart, purposeful or knowing homicide demonstrates precisely such indifference to the value of human life." *Id.*

[217] *See* FED. R. EVID. 404(b)(1, 2): "Crimes, Wrongs, or Other Acts. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. . . . This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

prosecution cannot prove that the accused had a bad character or criminal propensity in order to prove that he was more likely to have committed the charged criminal act. In a word, bad character must be inferred from a wrongful act, not a wrongful act from bad character.[218] But the jury can properly infer from a criminal act that the harm-doer has a depraved heart, insufficient care and concern for others, or other bad character trait for which he deserves blame and punishment.

VIII. How *Mens Rea* Bias Can Prevent Detection of Bias by Sentencing Studies

This same analysis also reveals how easily investigators who compare punishments meted out to blacks and whites for the same crimes can either completely miss or grossly underestimate such bias. For to the degree that race-based attribution bias infects jury findings about *mens rea,* much racial discrimination cannot be captured by seemingly neutral statistics about race and sentencing. Thus, even if the sentences meted out to blacks and whites *convicted* of, say, murder or manslaughter were the same, it would not prove that white and black defendants are treated equally in the adjudication process. Rather, the real discrimination may very well have been swept under the rug of jury findings about the presence or absence of the *mens rea*—malice—for murder. These differential diagnoses of wrongdoing as a function of the wrongdoer's race result in racial differences in blame and punishment that are easily hidden from empirical examinations of racial biases in criminal justice. Comparing sentences meted out to whites and blacks convicted of the same crime would not capture it.

For instance, say hypothetically that blacks convicted of negligent homicide get the same sentences as whites convicted of the same crime. By the same token, assume blacks convicted of manslaughter get the same sentences as whites, as do blacks and whites convicted of either 2nd or 1st degree murder. Such race-neutrality in sentencing can conceal profound racial discrimination in moral judgments by jurors and factfinders about black wrongdoers. This easily overlooked racial discrimination could be swept under the carpet of jury findings about whether the wrongdoer crossed a significant moral threshold: from, say, ordinary negligence to criminal negligence, or from criminal negligence to ordinary recklessness, or from the ordinary recklessness (for manslaughter) to the "extreme" or depraved heart recklessness (for murder), or from voluntary manslaughter to 2nd degree murder. Despite the mistaken claims of some criminal scholars and commentators, each and every one of these liability or grading thresholds requires a direct moral judgment of the wrongdoer. So this kind of racial bias can remain hidden in jury characterizations of a killing as either

[218] Nor can subjective culpability requirements—such as premeditation or depraved heart—be directly inferred from other crimes, wrongs, or other evidence of bad character and criminal propensity.

criminal or not criminal, or, if criminal, either murder, manslaughter, or criminal negligence. The differences between these characterizations turn entirely on differences in the moral appraisals of wrongdoers by jurors, for the *mens rea* requirement directs jurors to morally appraise a wrongdoer before finding him guilty of any of these grades of criminal homicide.

All this casts serious doubt on the reliability, rationality, and trustworthiness of criminal conviction as a test for identifying morally blameworthy blacks who, according to some commentators, deserve our moral contempt and social ostracism. Although criminal courtrooms are major construction sites for the biased social construction of morally blameworthy blacks through racially differential moral evaluations, other busy construction sites abound, for the same bias that infects moral judgments of blacks by jurors also infects moral judgments of blacks by ordinary people. Whenever the moral turpitude of black wrongdoers becomes the topic of the moment on talk radio, in coffee shops, and around water coolers, another potential site for the biased social construction of black criminals becomes active. Cognitive and social psychology tell us that whether we are official or unofficial factfinders, given our inability to avoid most unconscious bias against certain stereotyped groups, we should approach our moral judgments of members of such groups with grave doubts about our objectivity and impartiality—in a word, with great "epistemic humility." This epistemic humility should temper our contempt toward black wrongdoers inside and outside the courtroom.