Interpretive Construction in the Substantive Criminal Law*

Mark Kelman†

Legal argument has a standard, and putatively rational, form: It states overarching purposes to the legal system, and from those purposes it deduces answers to specific doctrinal dilemmas. This article examines the standard doctrinal arguments routinely made by judges and commentators on the substantive criminal law.[1] I do not wish to challenge any results these commentators may reach, except insofar as it is important to challenge some universally held beliefs in order to counter claims that there are easy criminal law cases. Instead, I want to challenge the falsely complacent sense that the arguments, while grounded in politically controversial purposes, are deduced or derived in a rational and coherent fashion once the purposes are settled.[2] I will be contending, in essence, that legal argument has two

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† A.B. 1972, J.D. 1976, Harvard University. Associate Professor of Law, Stanford University.

1. This article does not review the traditional rationales of punishment—deterrence, retribution, detention, or rehabilitation. For general discussions of these traditional rationales, see, *e.g.*, J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 296–324 (2d ed. 1960); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 5 (1972); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 9–70 (1968); THE PHILOSOPHY OF PUNISHMENT (H. Acton ed. 1969).

For an analysis of a wide range of doctrine seen through the eyes of a deterrence-oriented theorist, see G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART (2d ed. 1961); for a retributionist's view, see G. FLETCHER, RETHINKING CRIMINAL LAW (1978).

Nor does this article speculate on the origins of particular proscriptions of any criminal code. *See, e.g.*, L. FREIDMAN, A HISTORY OF AMERICAN LAW 256–58, 508–12 (1973); E. THOMPSON, WHIGS AND HUNTERS (1975).

2. For discussions of the complacency-inducing, conservatizing impact of the perceived separatedness of legal and political discourse, see Heller, *Is the Charitable Exemption from Property Taxation an Easy Case? General Concerns About Legal Economics and Jurisprudence*, in ESSAYS ON THE LAW AND ECONOMICS OF LOCAL GOVERNMENTS 183, 201–07 (D. Rubinfeld ed. 1979); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209, 214–19, 346–50

phases, interpretive construction and rational rhetoricism, and that the former, a vital step which undercuts the rationality of the latter, goes virtually unexamined.

By interpretive construction, I refer to processes by which concrete situations are reduced to substantive legal controversies: It refers both to the way we construe a factual situation and to the way we frame the possible rules to handle the situation. What then follows logically, if not chronologically, is rational rhetoricism—the process of presenting the legal conclusions that result when interpretive constructs are applied to the "facts." This rhetorical process is the "stuff" of admirable legal analysis: distinguishing and analyzing cases, applying familiar policies to unobvious fact patterns, and emphasizing the degree to which we can rely on the least controversial underlying values. These rhetorical techniques are so intellectually complex that there is a powerful tendency to elevate falsely the importance of intellect in actual legal decisionmaking, to fail to see the interpretive construction that makes the wise posturing possible. I will look behind (or unpack) this rhetoric to the selection of "relevant" categories and "relevant" facts. At the same time, I will try to understand the appeal of the well-argued case, an appeal clearly felt by so many of my colleagues and students.

Part I of this article briefly summarizes the various interpretive constructs that pervade substantive criminal law. These constructs are sometimes unconscious techniques of sorting out legal material and are sometimes consciously held political or philosophical beliefs, although even the consciously held beliefs function so that the users seem unaware of them. Parts II and III discuss the process by which conscious and unconscious constructs settle doctrinal issues. I will try to illustrate how each of these interpretive constructs "operates," how a legal-sounding argument can be made only *after* a situation is characterized nonrationally, so that the advocate seems able to deduce a single result on principle. For example, I will show that issues of the voluntariness of a defendant's conduct can be resolved only *after* we have agreed, for reasons outside of our rational discourse, to include within the relevant time frame some obviously voluntary act that contributes to the ultimate harm. I will try to demonstrate the unresolved and unresolvable inconsistency in using such interpretive constructs in standard discourse; for instance, we neither frame time the same way in all criminal law settings nor do we ever explain why

(1979); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1760–66 (1976).

we use one time frame or another. Finally, I will suggest what role interpretive construction plays—why the interpreter does what he does, although I offer my accounts of why "analysts" do what they do with more trepidation than I have when I offer my account of what they are doing.

Though it may appear to some that I have nonrandomly selected the cases in which these interpretive constructs are involved, this charge strikes me as unwarranted. First, though the group of "hard" cases I have selected may seem unrepresentative, I have simply selected nearly *all* of the issues that I cover teaching a traditional substantive criminal law course, using a good casebook[3] that certainly was not edited with my concerns in mind. Second, and more importantly, I have attempted in Part IV to extend the discussion of interpretive constructs to the sorts of "easy" cases that legal commentators never bother to discuss, cases with few apparent puzzling aspects. If the interpretations I discuss are at work in these "easy" cases, they are at stake in *every* case.

I. A General Summary of Interpretive Constructs

Legal argument can be made only *after* a fact pattern is characterized by interpretive constructs. Once these constructs operate, a single legal result seems inevitable, a result seemingly deduced on general principle. These constructs appear both in conscious and unconscious forms in standard legal discourse. Before examining in detail how interpretive constructs reify substantive "textbook" law, it will be useful to examine them more precisely.

A. *Four Unconscious Interpretive Constructs*

Unconscious interpretive constructs shape the way we view disruptive incidents, but they are never identified or discussed by judges or commentators. There are basically four forms of unconscious constructs, two dealing with "time-framing" and two dealing with problems of categorization. I discuss unconscious constructs before conscious ones because the former are often used to avoid issues inherent in the latter, issues that the legal analysts are most prone to be aware are controversial, perhaps insoluble, and highly politicized.

1. *Broad and narrow time frames.*

We put people on trial. People exist over time; they have long,

3. S. Kadish & M. Paulsen, Criminal Law and Its Processes (3d ed. 1975).

involved personal histories. We prosecute particular acts—untoward incidents—that these people commit. But even these incidents have a history: Things occur before or after incidents that seem relevant to our judgment of what the perpetrator did. Sometimes we incorporate facts about the defendant's personal history.[4] Other times, we incorporate facts about events preceding[5] or post-dating[6] the criminal incident. But an interpreter can readily focus solely on the isolated criminal incident, as if all we can learn of value in assessing culpability can be seen with that narrower time focus.

Most often, though not invariably, the arational choice between narrow and broad time frames keeps us from having to deal with more explicit political questions arising from one conscious interpretive construct—the conflict between intentionalism and determinism. Often, conduct is deemed involuntary (or determined) rather than freely willed (or intentional) because we do not consider the defendant's earlier decisions that may have put him in the position of apparent choicelessness. Conversely, conduct that could be viewed as freely willed or voluntary if we looked only at the precise moment of the criminal incident is sometimes deemed involuntary because we open up the time frame to look at prior events that seem to compel or determine the defendant's conduct at the time of the incident. The use of "time-framing" as interpretive *method* blocks the perception that intentionalist or determinist issues could be substantively at stake. If one has somehow convinced oneself that the incident, narrow time-framed focus is the appropriate *technique* for interpreting criminal law material, there is simply no background data one can use, either to provide the grist for a determinist account or to locate a prior sphere of choice in a seemingly constricted world. The interpretive "choice" between narrow and broad time frames affects not only controversial, doctrinally tricky legal cases, but also "easy" cases, because narrow time-framing fends off, at the methodological level, the possibility of doing determinist analyses.

2. *Disjoined and unified accounts*.

A second unconscious interpretive construct relating to time involves the tension between disjoined and unified accounts of incidents. Many legally significant situations seem to require a

4. For example, we incorporate facts about a defendant's personal history in raising the insanity defense.

5. *E.g.*, in raising the defense of duress.

6. *E.g.*, in raising the defense of abandonment.

somewhat broad time frame, at least in the sense that we feel we must look beyond a single moment in time and account, in some fashion, for some clearly relevant earlier moment. The earlier "moment" may be the time at which a defendant made some judgment about the situation she was in, some judgment that at least contributed to the ultimate decision to act criminally. For instance, the defendant negligently believes she must use deadly force to defend herself and then she intentionally kills someone, having formed that belief. Alternatively, the earlier moment may simply be the moment at which the defendant initiated the chain of events that culminated in criminal results. For instance, the defendant may shoot at X, but the bullet will miss X and then kill Y, an unforeseeably present bystander.

Once we agree to look at these earlier moments, we must decide whether to disjoin or unify the earlier moment with the later moment. We can treat all the relevant facts as constituting a single incident, or we can disjoin the events into two separate incidents.

Once this arational interpretive decision is made, the question of criminal culpability is forever biased. Is a negligent decision to kill followed by an intentional killing a negligent or intentional act? Is the person who misses X and shoots Y someone who commits two crimes—attempted murder of X plus, say, reckless homicide of Y—or one crime—an intentional murder of a person? Sometimes, unifying two arguably separate incidents allows us to avoid making a hard-to-justify assertion that the arguably second incident or decision was determined by the first. Often, other interests are at stake in separating or joining a series of incidents.

3. *Broad and narrow views of intent.*

A third unconscious construct involves broad and narrow views of intent. Each time someone acts, we can say with fair confidence that, in the absence of some claim of accident, he intended to do precisely the acts that he has done. But we have difficulty categorizing those acts, because an individual set of acts may, in the observer's eyes, be an instance of a number of different categories of acts. For example, when the defendant intends to undertake certain deeds constituting a particular crime, it feels both misleading in significant ways, and perfectly proper in others, to assert that the defendant intended the particular crime. On one hand, it is odd to think of actors as viewing the world in criminal law categories when they act. On the other hand, it is equally odd to think of actors as focusing in their consciousness

only on the most precise physical motions they undertake. Thus, when we talk of the requisite intent to commit assault *with intent* to commit murder, it is peculiar to think *either* that the defendant must have mentally focused his conduct on the broadly interpreted *crime* of murder (with all its complications, *e.g.*, that he must intend to act with malice, premeditation, nonprovocation, nonjustification, etc.), or that it is sufficient that he simply focused on the physical *motions* which would predicate the crime (*e.g.*, pulling the trigger on the gun, which we may deem murder if, in fact, he acted with what we call malice, nonprovocation, etc.).

Similarly, a defendant may perform suspicious acts not in themselves criminal or abandon a particular criminal attempt. We wonder whether the defendant, in the first case, can accurately be thought of as intending only the precise acts he committed or whether, in some broader sense, he *intended* some apter deeds which we would deem criminal acts. Likewise, in the second case, we wonder whether the defendant abandoned only the one criminal incident or abandoned the criminal category of which that incident is but an instance.

4. *Broad and narrow views of the defendant.*

A fourth unconscious construct is that the interpreter may view defendants in broad or narrow terms. Each defendant is a unique individual, with a unique set of perceptions and capabilities. Every crime is committed in a unique setting. At the same time, every defendant has general human traits, and is thus a representative of the broader category of human beings. Similarly, the setting in which a crime is committed is an instance of those settings in which the crime is generally committed, and the features of the more general situation could be ascribed to the particular situation. By varying our interpretive focus, by particularizing at times and categorizing at others, substantive criminal law reaches all manner of results. Shifts in these perspectives underlie efforts to make doctrinal categories appear more cogent than they actually are.

B. *Conscious Interpretive Constructs*

Just as unconscious constructs shape the way we view disruptive incidents, conscious constructs settle doctrinal issues while obscuring the nondeductive nature of legal discourse. I discuss two forms of conscious construction: the choice between intentionalistic and deterministic accounts of human conduct, and the choice between stat-

ing legal commands in the form of precise rules or vague ad hoc standards. While judges and commentators seem to be aware of these constructs, they discuss them only as *general* philosophical themes in the criminal law.

But I will argue that any consciously stated "grand" choices elevating intentionalism or rules, determinism or standards, as *the* solution to legal dilemmas is inevitably partial. The "victory" of one framework or the other is a temporary one that can never be made with assurance or comfort. Each assertion manifests no more than a momentary expression of feelings that remain contradictory and unresolved. Most significantly, arguments based on these explicitly political issues feel less "legal" than arguments grounded in traditional doctrinal categories. Perhaps more important for this article, I will also argue that the *un-self-conscious* assertion of the inexorability of applying one or the other poles in these controversies to a particular setting settles many doctrinal issues, though the problematic nature of chosen doctrine would become more apparent if the use of interpretive consructs surfaced. In this sense, these interpretive constructs function just like the four unconscious constructs. Though they are conscious political positions when employed at a general level, they may function as unreasoned presuppositions that solve cases while obscuring the dissonant, fundamentally nondeductive nature of legal discourse.

1. *Intentionalism and determinism.*

Intentionalism is the principle that human conduct results from free choice.[7] An intentionalist interpretation of an incident gives moral weight to autonomous choice and expresses the indeterminacy of future actions.[8] Determinism, on the other hand, implies that subsequent behavior is causally connected to prior events. A determinist interpretation considers behavior by looking backward, and it expresses no moral respect or condemnation of these predetermined

7. Intentionalism gives "an account of experience which looks forward from the moment of human choice." Heller, *supra* note 2, at 237.

8. An intentionalist expresses "the indeterminancy of future action, the potential for a free exercise of intentional action implicit in indeterminate behavior. Necessarily, an existential phenomenology must take seriously the concepts of intentionality and responsibility and an ethical theory which gives moral weight to individual, autonomous choice." *Id.*

For a fuller account of responsibility-demanding existentialist phenomenology, see H. FINGARETTE, THE SELF IN TRANSFORMATION: PSYCHOANALYSIS, PHILOSOPHY AND THE LIFE OF THE SPIRIT 162-69 (1963).

acts.[9]

Most basic issues of the criminal law are issues of the applicability of an intentionalist model.[10] Notions of blameworthiness and deterrence[11] are both based on the assumption that criminal actors make intentional choices. Of course, criminal jurisprudence *acknowledges* the plausibility of a determinist discourse, but it *acts* as if the intentionalist discourse is ultimately complete, coherent, and convincing.[12] It is quite apparent, however, that standard criminal law doctrine often interprets facts in deterministic modes. For example, duress, insanity, and provocation are determinist excuses for otherwise criminal conduct.

2. *Rules versus standards*.

An overarching conflict within our legal system pertains to the form that legal pronouncements should take.[13] Our legal system bounces fitfully between "clearly defined, highly administrable, gen-

9. In a determinist discourse, the interpreter "reconsider[s] our behavior by looking backward across a series of acts . . . [rearranging] these acts by positing relations or theories which demonstrate their connectedness. This connectedness however implies their necessary succession, the determination of the later events once the sequence is grasped. . . . What is predetermined merits no moral respect or condemnation." Heller, *supra* note 2, at 237.

10. The standard text writers all must at some point refute the relevance of determinism to the criminal law. *See, e.g.*, G. FLETCHER, *supra* note 1, §§ 6.4.3, 10.3.1; J. HALL, *supra* note 1, at 455–60; H.L.A. HART, *supra* note 1, at 28–31, 179–85; H. PACKER, *supra* note 1, at 74–75; G. WILLIAMS, *supra* note 1, § 173, at 547–49.

11. Environmental and genetic factors determine people's relative tastes for criminal activity, but they generally do not render people utterly insensitive to punishment. Thus, a determinist who feels uncomfortable blaming someone prone to criminality might still find it worthwhile to punish in order to lower the amount of crime. Full-blown deterrence theorists generally suppose a great deal of rationality in the decision to pursue criminal ventures. *E.g.* Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. POL. ECON. 521 (1973). Determinists are more skeptical about whether many criminals act so rationally, since an indifference to consequences may be one of the prominent determined effects of deprivation. As a result, the price effects of higher punishment may be dimmed. *See, e.g.*, Gardiner, *The Purposes of Criminal Punishment*, 21 MOD. L. REV. 117, 122–23 (1958); California Assembly Committee on Criminal Procedure, Progress Report: Deterrent Effects of Criminal Sanctions 7 (1968).

12. *See, e.g.*, State v. Sikora, 44 N.J. 453, 470, 210 A.2d 193, 202 (1965) ("Criminal blameworthiness cannot be judged on a basis that negates free will and excuses the offense, wholly or partially, on opinion evidence that the offender . . . was predetermined to act the way he did at that time."); *id.* at 475–76, 210 A.2d at 205 (Weintraub, C.J., concurring) ("[The psychiatrist] traces a man's every deed to some cause truly beyond the actor's own making. . . . Now this is interesting, and I will not quarrel with any of it. But the question is whether it has anything to do with the crime of murder. I think it does not."); H. PACKER, *supra* note 1, at 74–75.

13. A fuller account of this conflict, assessing it as central to our legal culture, is given in Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

eral rules"[14] and "equitable standards producing ad hoc decisions with relatively little precedential value."[15]

Rules seem, on the positive side, capable of uniform and nonprejudicial application. They define spheres of autonomy and privacy and spheres of duty by giving clear notice to citizens of the legal consequences of their conduct. The void-for-vagueness and strict construction doctrines both resonate in the rule-respecting liberal tradition. On the negative side, rules will inevitably be both over- and underinclusive according to the purposes reasonably attributable to the law.[16] This not only leads to random injustice when particular culpable parties are acquitted[17] and nonculpable parties are convicted,[18] but it enables people to calculate privately optimal levels of undesirable behavior that are within the precise confines of the law.[19]

Standards alleviate the problems of nonpurposive applications of legal commands to particular cases. On the other hand, they may be difficult to administer or may be enforced in a biased, unequal, and uncertain fashion. The use of standards in the criminal law is rampant. Whether we are talking about requirements of "malice" in homicide law, looking at regulatory statutes that are openly vague in proscribing *unreasonable* restraints of trade,[20] or considering the use of discretion in prosecution and sentencing, it is difficult to deny that avoiding vagueness is more important as ideology than in practice. In any argument within our culture, *both* of these modes of framing legal commands are simultaneously appealing and unappealing;

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14. *Id.* at 1685.

15. *Id.*

16. Take a simple example: a statutory rape law designed to protect innocent girls from the sexual pressures of the sophisticated. In its rule form, the age of consent is given as, say, 16. Some girls under 16 will be perfectly sophisticated, however, and some over 16 will not be.

17. *See, e.g.*, Lewis v. Commonwealth, 184 Va. 69, 34 S.E.2d 389 (1945) (defendant not guilty of disorderly conduct on a bus when disorderly conduct statute referred only to cars, trains, and cabooses); Rex v. Bazeley, 168 Eng. Rep. 517 (1799) (when embezzlement was not contemplated by traditional legal category of larceny, bank teller who appropriated a note found not guilty because it was in his possession when he appropriated it).

18. *See, e.g.*, Regina v. Dudley & Stephens, [1884] 14 Q.B. 273, 288 (lifeboat passengers who killed a sick boy to survive found guilty of murder, because "compassion for the criminal . . . [must not] change or weaken in any manner the legal definition of the crime").

19. This problem is better recognized in private law than in criminal law. It is perhaps the dominant problem in tax law, where the courts affirm the rights of taxpayers to minimize tax liabilities as long as they follow the rules, *e.g.*, Gregory v. Helvering, 293 U.S. 465 (1935), but recharacterize transactions when taxpayers' characterizations fall outside of what "the statute intended." Knetsch v. United States, 364 U.S. 361, 365 (1960) (quoting Gregory v. Helvering, 293 U.S. at 469).

20. *See, e.g.*, 15 U.S.C. § 45(a) (1976 & Supp. III 1979).

neither has killer force.[21] Because neither position can dominate the other, legal arguments about the desirable form of legal commands are not just oscillating, unsettled, and unbalanced, but the choice of one resolution or the other ultimately feels like a product of whim—a reflection of one's most recent overreaction to the follies of the previously adopted form.

II. UNCONSCIOUS INTERPRETIVE CONSTRUCTS

Having examined the interpretive constructs in general, I shall now apply the four unconscious constructs to doctrinally "hard" cases in the substantive criminal law. This part illustrates how each construct is used and how certain results are apparently mandated only after an unwarranted interpretation is made. I shall also try in this section to account for the appearance of particular constructs in particular fact situations. Though I am generally skeptical of accounts of construction, it is most often my belief that interpretive construction appears to enable the legal analyst to avoid dealing with fundamental political problems.

A. *Broad and Narrow Time Frames*

1. *Narrow time-framing.*

Generally speaking, narrow time frames buttress the traditionally asserted intentionalism of the criminal justice system. In a number of doctrinal areas, though, conduct is deemed to be involuntary or otherwise outside the responsibility of the defendant even though, if we interpret the relevant legal material as including earlier decisions (that is, if we broaden the time frame), we can interpret the *course* of conduct that culminates in criminal harm as chosen.

Status versus conduct distinction. The tensions of time-framing are evident in the status versus conduct distinction. In *United States v. Moore*,[22] Judge Wright, in dissent, argued that a statute proscribing narcotics possession should not apply to drug addicts, because possession merely manifests their status of being addicted. He contended that drug addicts cannot be deterred from or blamed for possessing

21. Much of the technique of Socratic first-year law teaching involves the teacher driving the student towards a rule position and countering with a parade of horrible cases in which actors within the culture abuse the precisely framed rules, or driving the student towards advocacy of a vague, purposive standard and countering with a parade of horrors about the "nonlegal," fiat-based, bigoted system the student has created.

22. 486 F.2d 1139 (D.C. Cir. 1973).

narcotics *because* their addiction rendered them choiceless.[23] Since punishment is inappropriate unless its deterrence or retributory aims are met, it is inapt here.

Fully addicted people truly may not be deterrable by the prospect of punishment at the *moment* when they decide to possess or use drugs. In Judge Wright's narrow view of the relevant legal material, the defendant may be nondeterrable because his then-pressing desire makes him oblivious to the costs imposed by state punishment. But once we broaden the time frame, we can see that even the particular use by the addict in *Moore* would have been less likely if addicts were punished. Assuming, as one must in applying deterrence theories, that actors calculate rationally and try to avoid pain, we know that if a person can be punished at *any* future time he uses drugs, not just in the pre-addiction period, he will be less prone to start using drugs. But, of course, if the person who ultimately came to trial had not made the initial uses, he would not have become an addict or made the particular use we are concerned with.[24]

Precisely the same objection can be made to Judge Wright's argument that the status of addiction cannot be deemed blameworthy. Even if we should not blame people for *being* sick, we may well blame

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23. Judge Wright stated, "[R]ecognition of a defense of 'addiction' for crimes such as possession of narcotics is consistent not only with our historic common law notions of criminal responsibility and moral accountability, but also with the traditional goals of penology—retribution, deterrence, isolation and rehabilitation.

". . . [T]he retributive theory of criminal justice looks solely to the past . . . . Revenge, if it is ever to be legitimate, must be premised on moral blameworthiness, and what segment of our society would feel its need for retribution satisfied when it wreaks vengeance upon those who are diseased because of their disease?

". . . .

"The most widely employed argument in favor of punishing addicts for crimes such as possession of narcotics is that such punishment or threat of punishment has a substantial deterrent effect. . . . [But d]eterrence presupposes rationality . . . . In the case of the narcotic addict, however, the normal sense of reason, which is so essential to effective functioning of deterrence, is overcome by the psychological and physiological compulsions of the disease. As a result, it is widely agreed that the threat of even harsh prison sentences cannot deter the addict from using and possessing the drug." *Id.* at 1242–44.

24. Thus, to use obviously artificial numbers, assume the person on day one prevalues all future drug uses at 100 and prevalues punishment for use at (-200). However, there is only a 1 in 4 chance of being caught using before he is addicted. He may then use the drugs, since the expected value of use (100) exceeds the negative expected value of punishment (1/4 × (-200) or (-50)). Use may lead to the pressing desire of addiction, so at the time of the particular use for which he is arrested, drug use may have reached a value of, say, 50,000, so that, in Wright's terms, he is nondeterrable.

If a potential drug user knows he will be punished even if addicted, he may never use drugs at all. Thus, even postaddiction drug use is less likely if we broaden the time frame to include the defendant's earlier decisions to use drugs.

them for *becoming* sick. The addict may seem blameless in the narrow time frame, but in a broader time frame he may well be blameworthy. Certainly, it is not at all uncommon or bizarre for a parent to blame (and punish) a child who goes out of the house in a storm without adequate raingear for *getting* a cold, even though the same parent would not punish the child for the "status" of *being* ill. Venereal disease is another clear case: That VD is generally considered a disease hardly precludes us from blaming its victims, because they *contracted* it through *earlier* voluntary acts.[25]

Judge Wright dismissed, in conclusory fashion, the possibility of using a broader time frame in assessing retributive demands.[26] Presumably, Judge Wright used a very *narrow* time frame here to reach the determinist result he would like to reach by using the very *broadest* one: I surmise that the judge actually believes that the initial "voluntary" drug uses are themselves determined by social and environmental pressures that predate those early uses. Despairing of the possibility of applying a very wide time focus and a more general determinism, he avoided this political confrontation by constructing the legal "material" in terms of the traditional *incident* focus, a focus which the majority implicitly rejected in the following conclusory terms:

> The gist of appellant's argument is that "the common law has long held that the capacity to control behavior is a prerequisite for criminal responsibility."
>
> It is inescapable that the logic of appellant's argument, if valid, would carry over to all other illegal acts of any type whose purpose

25. In his concurring opinion in Robinson v. California, 370 U.S. 660, 676–78 (1962), Justice Douglas argued that it is unconstitutionally cruel and unusual to punish a person for being an addict, since addiction is an illness. But why are we morally duty-bound to treat, rather than to condemn, sick people, if we believe that having an illness is not an inevitably disconnected incident, but may be part of an historical process to which the ill person voluntarily contributed?

Besides the time-framing issue, his argument is ambiguous in two other ways: First, what does it mean to say that addiction is an illness? If, for instance, an illness is something doctors can treat, would addiction count? Second, even if addiction is an illness and illnesses must be treated, how do we know that punishment is not a form of treatment or that traditional "treatment" is not, at least when unwanted, punishment? *See In re* De La O, 59 Cal. 2d 128, 378 P.2d 793, 28 Cal. Rptr. 489 (1963) (upholding mandatory civil commitment program for addicts because it was not deemed punishment under *Robinson*).

26. Judge Wright noted that "there may have been a time in the past before the addict lost control when he made a conscious decision to use drugs. But imposition of punishment on this basis would violate the long-standing rule that '[t]he law looks to the immediate, and not to the remote cause; to the actual state of the party, and not to the causes, which remotely produced it.' " 486 F.2d at 1243 (quoting United States v. Drew, 25 F. Cas. 913, 914 (C.C.D. Mass. 1828) (No. 14,993)).

was to obtain narcotics.[27]

If we take it as given that we *must* punish the people we are now punishing—and a lot of those people are stealing to obtain narcotics—then we must avoid Judge Wright's incident-based determinism. But this is simply a functionalist complacency, the belief that things are right because they are done: a world view hardly more or less acceptable than any other political assertion (*e.g.*, things can be presumed to be wrong, if done, because the world we see is pretty crummy), and hardly the outcome of piercing legal analysis.

The voluntary act requirement. Unconscious shifting between broad and narrow time frames also arises in applying the criminal law's voluntary act requirement. In *Martin v. State*,[28] police officers arrested the defendant at his home and took him onto a public highway, where the defendant used loud and profane language. He was convicted under a statute prohibiting public exhibition of a drunken condition. The appellate court reversed, holding that the defendant was involuntarily and forcibly carried to the public place by the arresting officers. The court concluded, uncontroversially, that an involuntary act cannot give rise to liability.[29] But in *People v. Decina*,[30] the court sustained the defendant's conviction for negligent homicide, though at the time his car struck the victims, he was unconscious as a result of an epileptic fit, not voluntarily operating the vehicle. The court held that the defendant was culpable because he had made a conscious decision to drive, knowing that an epileptic attack was possible.[31]

The hidden interpretive time-framing construct becomes visible when one tries to square *Martin* with *Decina*. In *Decina*, the court opened up the time frame, declaring that if the defendant commits a voluntary act at time one which poses a risk of causing an involuntary harm later—drives the car knowing he is a blackout-prone epileptic—then the second act—crashing while unconscious—will be deemed voluntary. But the defendant in *Martin*, as well, may have done *something* voluntarily (before the police came) that posed a risk that he would get arrested and carried into public in his drunken state. While it is plausible that Martin was arrested on an old war-

27. 486 F.2d at 1145.

28. 31 Ala. App. 334, 17 So. 2d 427 (1944).

29. *Id.* at 335, 17 So. 2d at 427.

30. 2 N.Y.2d 133, 138 N.E.2d 799, 157 N.Y.S.2d 558 (1956).

31. *Id.* at 139-40, 138 N.E.2d at 803-04, 157 N.Y.S.2d at 565.

rant[32] and could not foresee that he would wind up in public on this occasion, it is quite possible that the defendant was arrested for activity he was engaging in at home: for instance, beating his wife.[33] Why did the court not consider saying that the voluntary act at time one (wife beating) both posed a risk of and caused a harmful involuntary act at time two (public drunkenness) and assessing the voluntariness of the alleged criminal act with reference to the wider time-framed scenario? It cannot be that the involuntary, harmful act at time two was unforeseeable:[34] The probability of an epileptic blackout is almost certainly far lower than the probability of ending up in public after engaging in behavior likely to draw police attention. Arguments that we are less concerned with people "thinking ahead" to avoid public drunkenness than unconscious driving seem inadequate

32. In a truly intentionalist discourse, the hypothetical fact that Martin did not foresee arrest on the particular occasion that he was drunk (*e.g.*, when he was arrested on a past warrant) would still not preclude a finding of voluntariness, at least if the arrest was valid. (An invalid arrest, as in Finch v. State, 101 Ga. App. 73, 112 S.E.2d 824 (1960), would make the public appearance that follows seem involuntary in a broad time frame as well.) One of the risks one (voluntarily) takes when one performs acts for which one ultimately may be arrested is that one will someday be forced to go places with the police, when *they* want to go and not when the individual wants to. This sort of broad voluntary reading of human intention typifies traditional assumption of risk doctrine, in which a worker is deemed to contract away his rights to a safe workplace when he makes a deal that includes, but makes no explicit reference to, the abnormal risks of the workplace.

33. Courts do not examine whether the defendant's voluntary acts brought the police to his home just prior to the arrest. Instead, they unconsciously use a narrow time frame in assessing voluntariness. Cases where the defendant clearly took such recent acts, *e.g.*, Marshall v. State, 70 Ga. App. 106, 27 S.E.2d 702 (1943) (defendant arrested after a reported disturbance at a soda plant); People v. Lane, 8 Misc. 2d 325, 32 N.Y.S.2d 61 (1942) (defendant taken from a friend's apartment by police after he began fighting with the friend's guest); People v. Brown, 64 Misc. 677, 120 N.Y.S. 859 (1909) (defendant hauled away from a private house because he had been "licking his horse"), read just like the cases where the root of the public appearance is unsure or unclear, *e.g.*, Martin v. State, 31 Ala. App. 334, 17 So. 2d 427 (1944); Gunn v. State, 37 Ga. App. 333, 140 S.E. 524 (1927); Reddick v. State, 35 Ga. App. 256, 132 S.E. 645 (1926).

Two recent California cases do broaden the time frame in looking at the voluntariness of a public appearance. People v. Perez, 64 Cal. App. 3d 297, 134 Cal. Rptr. 338 (2d Dist. 1976); People v. Olson, 18 Cal. App. 3d 592, 96 Cal. Rptr. 132 (2d Dist. 1971) (both deciding questions of suppressing evidence obtained after arrest, rather than validity of drunk-in-public conviction).

34. First, one must note that the court made no foreseeability arguments; the interpretive characterization of the situation precluded the need for such an argument. Second, in courts using narrow time frames, a defendant who is involuntarily brought into public, even when he could clearly foresee when that involuntary appearance would occur, will be acquitted of a drunk-in-public charge. *See, e.g.*, Moody v. State, 131 Ga. App. 355, 206 S.E.2d 79 (1974) (defendant brought by deputy sheriff into public in response to subpoena; court did not see that although presence in public may not have been voluntary over the short run, it was clearly foreseeable).

as well; the penalties for public drunkenness are presumably set lower to reflect the relative lack of gravity of the offense. Ultimately, the *Martin* finding of voluntariness "works" not because it is "right," but because all the hard points disappear in the initial interpretive construction of the potentially relevant facts.[35]

Hostility to strict liability. Commentators who attack the use of strict liability in criminal law invariably use narrow time-framing. They imply that the defendant deemed guilty of an offense which allows no mental state excuses as to some element of the crime is treated unjustly because he could somehow not avoid criminality. Look, for instance, at H.L.A. Hart's comments on criminal responsibility:

> The reason why, according to modern ideas, strict liability is odious, and appears as a sacrifice of a valued principle . . . is that those whom we punish should have had, when they acted, the normal capacities . . . for doing what the law requires and abstaining from what it forbids. . . . [T]he moral protest is that it is morally wrong to punish because "he could not have helped it" or "he could not have done otherwise" or "he had no real choice."[36]

But this implication is not valid. Often, the actor could readily avoid

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35. The case ultimately may be better understood as involving issues traditionally raised either as entrapment, *see* notes 135–36 *infra* and accompanying text (*i.e.*, the police may simply be too entwined in this particular violation to sustain a conviction), or justification, *see* notes 192–93 *infra* and accompanying text (*i.e.*, we actually *want* Martin to violate the drunk-in-public law in these particular circumstances, because, on balance, we like obedience to police much more than we dislike public drunkenness). The interpretive construction may obviate the need to apply inevitably vague entrapment and justification doctrines; thus, it expands the core of the criminal law covered by rules rather than ad hoc standards.

36. H.L.A. HART, *supra* note 1, at 152.

See J. FEINBERG, DOING AND DESERVING 111–12 (1970) ("[S]trict liability to *imprisonment* . . . 'has been held by many to be incompatible with the basic requirements of our Anglo-American, and indeed, any civilized jurisprudence.' . . . [T]he reason why strict liability to' imprisonment (punishment) is so much more repugnant to our sense of justice than is strict liability to fine (penalty) is simply that imprisonment in modern times has taken on the symbolism of public reprobation. . . . We are familiar with the practice of penalizing persons for 'offenses' *they could not help*. It happens every day in football games, business firms, traffic courts, and the like. But there is something very odd and offensive in *punishing* people for admittedly faultless conduct. . . ."") (second emphasis added) (footnotes omitted).

All the major commentators, with the partial exception of Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960), share this hostility to strict liability. *See, e.g.*, G. FLETCHER, *supra* note 1, § 9.3, at 717–36; J. HALL, *supra* note 1, at 342–59; H. PACKER, *supra* note 1, at 121–31; G. WILLIAMS, *supra* note 1, § 89; Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1108–09 (1952). The Model Penal Code predicates criminality only on negligence, recklessness, purpose, or knowledge. MODEL PENAL CODE § 2.05 (Tent. Draft No. 4, 1955) provides that any strict liability "crime" can be no worse than a "violation," with no nonmonetary penalties.

liability—so that all metaphors of "unobeyable laws," or "helpless victims" are inappropriate—if we simply broaden the time frame. Chief Justice Burger did precisely this in *United States v. Park*.[37] *Park* sustained a conviction of a responsible corporate official for shipping adulterated food, though the official had not been "aware of wrongdoing." The Chief Justice argued that corporate officials voluntarily assume a duty to ensure that violations will not occur when they take on managerial responsibility.[38]

The problem is further illuminated by one of the classic—and classically criticized—applications of strict liability in the criminal law: statutory rape cases. Assume that the age of consent is 16. Defendant admits having sexual intercourse with a girl who is 15, but asserts that he reasonably believed she was 16. The narrow time-framed argument against liability is that the defendant, at the time of intercourse, reasonably perceived the girl to be 16; given the defendant's reasonable perception, he did not act in a culpably antisocial fashion; since it is legally acceptable to have sexual relations with 16-year-olds, to punish the defendant is to punish him when he "did all that could reasonably be expected of him to avoid criminality."[39]

The narrow time focus obliterates the difficulties of deciding what constitutes a reasonable belief. Should our decision focus on percep-

37. 421 U.S. 658 (1975).

38. Chief Justice Burger wrote: "Thus *Dotterweich* and the cases which have followed reveal that in providing sanctions which reach and touch the individuals who execute the corporate mission—and this is by no means necessarily confined to a single corporate agent or employee—the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, *but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority* in business enterprises whose services and products affect the health and well-being of the public that supports them . . . .

"The Act does not, as we observed in *Dotterweich*, make criminal liability turn on 'awareness of some wrongdoing' or 'conscious fraud.' The duty imposed by Congress on responsible corporate agents is, we emphasize, one that requires the highest standard of foresight and vigilance, but the Act, in its criminal aspect, *does not require that which is objectively impossible*." *Id.* at 672-73 (emphasis added).

39. For an illustration of this view, see People v. Hernandez, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964), the major case reversing a conviction for statutory rape when the defendant was not allowed to produce evidence that he had a good faith, reasonable belief that the "victim" was past the age of consent. "[I]f [defendant] participates in a mutual act of sexual intercourse, believing his partner to be beyond the age of consent, with reasonable grounds for such belief, where is his criminal intent? In such circumstances, he has not consciously taken any *risk*." *Id.* at 534, 393 P.2d at 676, 39 Cal. Rptr. at 364 (emphasis added).

tions available at the moment of seduction,[40] or do we require that

40. The primary time-framing problem is that if we look at the defendant with a broader time perspective, we should perhaps demand that he avoid making mistakes of age, not just that he refrain from sex once he has made them. But let us assume that we are dealing with a defendant who has been truly duped; the girl produced a forged birth certificate, her parents lied to him about her age, etc. Now the question is, assuming we are trying to protect rather than undermine statutory rape laws, whether he can legitimately claim that the legal violation was meaningfully unavoidable, given that the sexual intercourse was fully voluntary.

As in the imperfect self-defense situation, *see* notes 58-66 *infra* and accompanying text, an interpretive construction as to whether to unify or disjoin two arguably separate incidents—the decision about the girl's age and the decision to have intercourse—can be determinative. As in the imperfect self-defense situation, a unified view favors the defendant: He would prefer to say, "I innocently perceived the girl to be overage as I had sexual relations with her." The act of intercourse thus would not be judged separately as a voluntary, avoidable act; rather, it would be the inseparable finish of the morally relevant decision, the decision about the girl's age. A disjoined perspective (age determined, followed by a separate decision to have sexual relations) may be far less favorable to a claim of unavoidability: No longer can the defendant focus solely on the easy way to avoid statutory rape (determining age) without accounting for this second chance to avoid criminality (avoiding sex).

The interpretive construction of the event swamps policy, though I recognize there are a number of policy arguments lurking. The dominant legal view in this culture would be that it is not permissible to punish the defendant who reasonably (under some time frame or another) perceives the girl to be overage, both for reasons of fairness (Unless one punishes all men who have sexual relations with overage girls, one cannot punish one who is unlucky enough to discover that the apparently overage girl he had relations with is not. *See* G. WILLIAMS, *supra* note 1, § 83, at 241.) and legislative accountability (If the legislature views sexual relations with even overage girls as illicit, it must outlaw them specifically, not just make them risky. *See, e.g.*, G. FLETCHER, *supra* note 1, § 9.3.3, at 727; H. PACKER, *supra* note 1, at 127.).

On the other hand, proponents of the claim that even a reasonable (broadly time-framed) mistake as to the victim's age is no defense could make the following argument: The "real" statutory rape law is, "Don't have sex with innocent girls." Because we do not trust state administrators to apply such a vague standard, we name an age (*e.g.*, "Don't have sex with 16-year-old girls."). *See* H. PACKER, *supra* note 1, at 307-10. Some men may be lucky enough not to be prosecuted because the innocent girls they have relations with are overage. They are beneficiaries of our desire to restrain state power, like the beneficiaries of evidentiary exclusion rules, *see, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (excluding the use of evidence acquired in violation of the fourth amendment). But there is no reason to acquit the defendant who both causes the harm we worry about and can be convicted without excessive state discretion. Certainly the plea that injustice has been done because the defendant has done all he can do to avoid crime is laughable: He has done no more than would the Holmesian "bad man" trying to take advantage of the inevitably mechanical nature of a legal code, and he has failed. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

Moreover, the fact that the seduced girl is under 16 may simply be treated as conclusively presumptive evidence of blameworthy carelessness in perceiving her age. Whether this sort of inevitably imprecise conclusive presumption is appropriate is a policy question. *See* note 46 *infra* and accompanying text.

Whichever way one resolves this dispute, one should note that it cannot arise if one unifies the arguably separate incidents of deciding on age and having intercourse, as if the second is swallowed up by the legally significant act of perception. But this is what the court did un-self-consciously in *Hernandez* when it said that the defendant had "*eliminated* the risk" of committing statutory rape by "satisfying himself on reasonable evidence," 61 Cal. 2d at 534, 393 P.2d at 676, 39 Cal. Rptr. at 364 (emphasis added), that his partner was beyond the

some checks *prior* to seduction be taken?[41] If one is generally hostile to statutory rape laws,[42] one can readily negate them by *defining* reasonable *perceptions* (negligence vel non)[43] in terms of judgments that can be made, such as judgments about the girl's appearance, at the time of the allegedly criminal incident. But a defendant may deserve little sympathy for being *unable* to avoid crime when he has had prior opportunities to discover the girl's true legal age. If one is interested in using the criminal law to protect the chastity of the young, one should insist that people *take affirmative steps to avoid mistakes of age*. The practical difference between framing this policy in terms of strict liability and instructing a jury that the reasonable person must take affirmative steps to avoid mistakes of age (which would almost certainly eliminate the *practical* effect of the nonnegligent mistake defense)[44] is ultimately insignificant.

What is striking is that a number of reasonably traditional "pol-

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age of consent. While this unifying step may lead to an acceptable result, the step itself is nonjustifiable and unreasoned.

41. Note that a person may be duty-bound to take steps to avoid sales of obscene materials to minors, even where he is supposedly not strictly liable for sales to minors. *E.g.*, N.Y. PENAL LAW § 235.22(2) (McKinney 1980) (establishing as an affirmative defense to a charge of disseminating obscene material that defendant reasonably believed recipient was 17 or older and that prior to the dissemination, recipient had shown him an official document verifying his age). *See* State v. Kinkead, 57 Conn. 173, 180, 17 A. 855, 857 (1889) (defendant-bartender's honest and reasonable belief that minor was over 21 not a defense, because inquiry could "hardly fail to elicit the proper information" and, in cases of doubt, defendant could, without detriment to his business, remain within the law).

42. *E.g.*, People v. Hernandez, 61 Cal. 2d 529, 536 n.4, 393 P.2d 673, 677 n.4, 39 Cal. Rptr. 361, 365 n.4 (1964) (" 'The crime of statutory rape is unsupportable in its present form.' ") (quoting Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 82 (1952)). The *Hernandez* court also noted, "The assumption that age alone will bring an understanding of the sexual act to a young woman is of doubtful validity. . . . [A] girl's actual comprehension [may] contradict[] the law's presumption . . . ." 61 Cal. 2d at 531, 393 P.2d at 674, 39 Cal. Rptr. at 362.

43. A different way of framing the debate is to consider whether the legal system *observes* or *defines* the negligence standard. The question is whether the law identifies the "reasonable man" as behaving the way people would in the absence of legal system norms, or whether the "reasonable man" should act according to a different, usually higher, standard announced by the court. For a view that the negligence standard is created, not simply observed by a court, see Judge Hand for the court in The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) (discussing the problem of defining negligence in the torts context: "[I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. . . . Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.").

44. In *Hernandez*, for instance, the defendant and the prosecutrix "had been companions for several months" prior to the date of the illicit intercourse. 61 Cal. 2d at 530, 393 P.2d at 674, 39 Cal. Rptr. at 362. Though the defendant had plenty of opportunity to ascertain her age, the court noted that "the prosecutrix in the instant case was but three months short of 18

icy" arguments *for* strict liability, arguments lodged in traditional liberal concerns for promoting rules rather than standards and for decentralized control of production decisions, simply do not appear in our legal discourse. Whether any particular political actor would ultimately deem them to "outweigh" arguments against strict liability is less interesting than that the arguments have simply been psychically suppressed by the narrow time-framed assertion of the supposed "helplessness" of the defendant condemned by a strict liability statute.

In essence, the legislative "policy" decision whether to condemn a defendant only where negligence is shown or to condemn wherever harm is caused is simply a perfectly traditional "balancing" of interests between rules and standards. If the legislature enacts a negligence standard, so that, *e.g.*, a manufacturer is liable for sending out adulterated food only if he acted unreasonably, or a liquor license holder is liable for selling to underage customers only if he screened customers unreasonably, two rather poor, though different, sets of bad consequences can result. If the negligence standard is vaguely defined, so that each jury is simply instructed to determine whether the particular defendant was reasonable, jury verdicts will be inconsistent, unpredictable and biased—classic problems of standards. Moreover, if the particular jury equates reasonable behavior with ordinary behavior, an entire industry may free itself of responsibility by uniformly acting less carefully than the legislature would like. On the other hand, the legislature may *predefine* "reasonable care," setting out a precise series of steps which the defendant must take to be found nonnegligent. The problem is that this centralized command may be imperfectly tuned to the precise circumstances each potential defendant is in. Each defendant may know a cheaper, more effective way of averting harm. But it may be in the defendant's selfish interest to adopt the legislature's technique, even if it will cause more social harm.[45]

Strict liability—that is, conclusively presuming that causing

years of age" and therefore not of "obviously tender years." *Id.* at 536, 393 P.2d at 677, 39 Cal. Rptr. at 365.

45. Consider the following case: A liquor store license holder faces a $100 fine for each violation of the sale-to-minors proscription. In a strict liability regime, he would adopt System A, which costs $400 to implement and would result in five violations. His net private and social cost is $900. In a negligence regime, he might adopt System B—the one preordained as nonnegligent by the legislature—though it costs $600 to implement and results in 10 violations. If he is certain to be found nonnegligent using System B, and he is fairly certain that System A, though better in his circumstances at avoiding the socially feared result, will lead to his being judged negligent, then given a preordained description of reasonable care, he will

harm is blameworthy—has its costs too. Like all conclusive presumptions, it is inaccurate in particular cases. There will be cases where someone gets blamed who, on closer analysis, we should not have blamed.[46] Of course, that is true in the "rule-like" form of negligence too, where we demand that actors take predefined steps. And what may be worse, the "rule-like" form of negligence may induce socially irrational behavior. The standard-like form of negligence may convict some innocents, too. But it may convict innocents for *bad* reasons (*e.g.*, race prejudice of juries) rather than for *no* reason (*i.e.*, the accidental overinclusiveness of the conclusive presumption).

In terms of "explaining" the narrow time-framed interpretation that suppresses the policy complexities of the strict liability issue, one could conceivably see the construction in either result-oriented or ideological terms. One can view this attack on strict liability as a simple class-biased, result-oriented defense of corporate managers, those persons most likely to "unintentionally" harm others through routine business operations. Certainly, the bulk of strict liability crimes are regulatory crimes which, unlike the traditional common law incidental harms, are most likely to be committed by those who conrol the means of production. Of course, the *defense* of strict liability crimes is likewise grounded in a political agenda—in an attempt to "get" harm-causing managers—rather than in abstract "legal" thought. But since strict liability crimes have rarely been imposed in ways that threaten corporate managers, the narrow-time-frame-based dismissal of strict liability more likely serves ideological needs. The opponents of strict liability may be seen as raising hysterically excessive defenses against charges that the criminal justice system routinely blames those who are, in the eyes of more general determinists, quite blameless. If one insists loudly enough that punishment

adopt B: Its private cost will be only $600, while System A will cost him $900, though its social cost is $1600 rather than $900.

46. Of course, conclusive presumptions are rampant in the criminal law; it is certainly not surprising that they are used in the basic mental state definitions. We inevitably label someone more or less blameworthy because his act fits into a *category* that we deem more or less blameworthy, whether or not the act shares the traits of the category. To name just a couple of examples from the innumerable instances of conclusive presumptions: A nighttime burglary may be punished more than a daytime burglary, even when the structure entered at night is not the sort likely to contain inhabitants to be startled. *E.g.*, TENN. CODE ANN. §§ 39-901, -903 (1980). Similarly, burglaries of dwellings, structures defined as being *capable* of being occupied by persons, are conclusively presumed to be more serious than burglaries of other structures, whether or not the dwelling is in fact occupied, or is even known to be unoccupied. *E.g.*, Schwabacher v. People, 165 Ill. 618, 46 N.E. 809 (1897); ARIZ. REV. STAT. ANN. §§ 13-1501, -1506 to -1508 (1978 & Supp. 1980–1981); CONN. GEN. STAT. ANN. §§ 53a-102, -103 (West 1972).

can *only* be practiced where there is personal fault—if one reacts with enough horror and shock at the idea of punishing those one defines as faultless without paying much attention to how faultlessness is defined—perhaps one can ignore the charge that in our routine accounts of fault in ordinary "intentional" criminal cases, we simply rule out the determinist claim that "crime is unavoidable." The determinists can be warded off by pointing out just how sensitive we purportedly are to punishing the blameless; the desired rhetorical point is that such sensitive people err only on the side of the accused.

2. *Broad time-framing.*

Much criminal law doctrine departs from the traditional incident focus and opens up the time frame. Broad time frame construction is most often used when deterministic discourse supplants the usual intentionalism. The substantive doctrines of duress, subjective entrapment, provocation, and insanity are examples of such uses of broad time-framing.[47] These doctrines describe how certain blameworthy acts are in fact blameless because rooted in or determined by factors that preceded the criminal incident. The question, of course, is why the broad time frame is selected in these cases, while it continues to be excluded as methodologically inappropriate in most other cases for no apparent reason.

Broad time-framing unrelated to determinism and intentionalism also occurs in other areas of the substantive criminal law. The time frame can be opened up to account for events both prior and subsequent to the criminal incident.

Abandonment. The basic decision to allow *any* abandonment defense follows a wide time-framed interpretive construction.[48] The defendant has already committed some act which, if interrupted by external forces, would constitute an offense, an attempt of some other substantive crime. Yet we judge the act innocent because of the defendant's *subsequent* failure to consummate the harm. Although many reasons for this widened time frame have been offered, none overcomes the fundamentally nonrational, interpretive aspect of the initial broadening of focus. Some deterrence-oriented theorists sug-

47. *See* notes 128-54 *infra* and accompanying text.

48. *See, e.g.*, MODEL PENAL CODE § 5.01(4) (Tent. Draft No. 10, 1960), exculpating an actor who completely and voluntarily renounces an unconsummated criminal plan, even though he had already done enough so that were he interrupted by external forces, he would be guilty of attempt. *Cf.* People v. Staples, 6 Cal. App. 3d 61, 85 Cal. Rptr. 589 (2d Dist. 1970) (denying that voluntary abandonment is a good defense).

gest that an abandonment defense provides incentives to avoid the consummation of harm.[49] But there are surely a number of "completed" crimes whose harm can be as effectively "undone" as can the abandoned attempt: An embezzler, for instance, may return money to victims unaware of their loss[50] and "undo" as much harm as the person who desists from an assault with intent to commit rape because the victim talks him out of continuing.[51]

Retributively oriented commentators note that abandonment makes us reassess our vision of the defendant's blameworthiness or deviance.[52] Of course, if we admitted evidence of post-criminal conduct (whether remorse, restitution, condonation, or reform) into *every* trial, we would frequently change our views of the defendant's blameworthiness. Once more, the act of interpretation, the open time frame, *allows* the policy conclusion.

Broad time-framing is used in the abandonment area because the general rule-oriented nature of the criminal law has already stumbled in the less rule-like attempt area. Attempt law is generally problematic in our legal culture because it is inexorably less rule-like than the law of consummated harms; the actus reus of "attempting" refers not so much to particular proscribed acts[53] as to unavoidably noncategorizable acts which, in the particular case, seem to give evidence of the particular defendant's subjective disposition to act criminally. To commit rape is to force carnal knowledge of a woman; to attempt rape is to do sufficient acts to indicate that one *would* force carnal knowledge. Whether the requisite "sufficient" acts include the precise acts of undressing, fondling, cornering, isolating from public view, using force, and/or simply implying that force will be used is inevitably a case-by-case determination. I suspect that the use of a forward-looking broad time frame in considering the blameworthiness of an attempter is the predictable outcome of the breakdown of the rule-like form. The system demands all available information

49. *See, e.g.*, W. LAFAVE & A. SCOTT, *supra* note 1, § 60, at 450; G. WILLIAMS, *supra* note 1, § 199, at 620–21.

50. G. FLETCHER, *supra* note 1, § 3.3.8, at 186.

51. *See* Le Barron v. State, 32 Wis. 2d 294, 145 N.W.2d 79 (1966).

52. G. FLETCHER, *supra* note 1, § 3.3.8, at 187–88.

53. *See* the discussion of distinguishing preparation from attempt, notes 167–80 *infra* and accompanying text. H. PACKER, *supra* note 1, at 100 states: "[A]ll of us frequently make moves in the direction of criminal activity, thereby satisfying this essential element of the attempt concept. It is, therefore, instructive to note the doctrinal mechanisms whose function it is, baldly put, to keep from making criminals of us all." The difficulties of squaring this vague doctrine with legalism are discussed in *id.* at 101; G. FLETCHER, *supra* note 1, § 3.3.4, at 157-59.

about defendant's blameworthiness, taken from as wide a period as possible, as soon as it departs from the rule-like form.

The attachment to overtly political Rule of Law ideals *precludes* a general broadening of time focus in the traditional consummated harm case; the idea is that blameworthiness must be conclusively presumed from the performance of one of the proscribed acts in one of the narrow time-framed blameworthy fashions. Once we allow ourselves to recognize the breakdowns in our inevitably imprecise conclusive presumptions, we see the strains of legalism. To recognize that we were probably thinking about the unremorseful, nonrestitutionary thief when we set out general penalties for larceny is to remind ourselves of the limit of the universalistic model. But we can avoid overtly political defenses of obviously inapt conclusive presumptions by implying that, as a matter of *method*, our factual inquiry simply does not go forward once a criminal act is complete.

The undefended, but deviant, broad time frame appears in constructing an abandonment defense because of the inevitable breakdown of pure legalist form in the attempt area. Since we *cannot* infer blame from a single act, because no such act is present in attempting, we move, at the very least, to more partial Rule of Law strictures: We try to infer a disposition to perform one of the still automatically blameworthy acts. But this does not imply, as Fletcher seems to believe,[54] the *logical* necessity of allowing an abandonment defense: Once one performs acts indicating a firm intention to commit blameworthy criminal acts, there is no rational reason not to treat the performance of these acts as conclusively presumed proof of criminal intent. Of course, such a conclusive presumption would be inaccurate, as all conclusive presumptions are; the abandoning defendant demonstrates that our presumption that defendants who have "at-

54. Fletcher argues not precisely that the abandonment undermines our sense that the defendant is a blameworthy harm-causer, but that it undermines the far more specific criminal intent that he feels is required to carry out a crime. G. FLETCHER, *supra* note 1, § 3.3.8, at 189. This more complex vision, though, is ultimately circular: It is based solely on Fletcher's notion that consummated harms are more than simply indicators of blameworthiness or need for reformation, incapacitation, etc., *cf.* MODEL PENAL CODE § 1.02(1) (Proposed Official Draft 1962) ("The general purposes of the provisions governing the definition of offenses are: . . . (b) to subject to public control persons whose conduct *indicates* that they are disposed to commit crimes.") (emphasis added), while attempts, uniquely, are simply indicators. But the validity of the vision of attempts as indicators of blameworthiness and completed harms as inexorably blameworthy, without regard to the rest of the defendant's revealed attitude about harming, is precisely the question here; it cannot be used to provide the answer to the question of whether the open time frame used in the abandonment defense is uniquely appropriate.

tempted" are firmly resolved to commit crimes is sometimes wrong. But the remorseful consummated criminal would equally well demonstrate that conclusive presumptions about the need to incapacitate, reform, or blame a person because he has committed some crime can be inapt. The abandonment defense, then, appears not because a forward-looking broad time frame is logically better suited to attempt law, but because the always available policy attacks on rules (and conclusive presumptions) are allowed sway only in an area where the rule-form is already weakened by the imprecision of the definition of the act upon which criminal liability is predicated.

Consent. Problems of time-framing also appear in deciding whether consent has been given to otherwise criminal acts.[55] Assuming, arguendo, that no action is harmful which the *subject* assents to, we still can *identify* the supposedly consenting subject using either a broad or a narrow time frame. We can look into the subject's past or just at a single moment of assent. Should that moment be immediately before the act is performed? If the victim at one point did not assent to the harmful act but has assented to it right before the act is taken, has he assented to it? When Odysseus demands at one point to be bound up when the Sirens sing, and *later* demands to be released, which choice most fulfills his "desires"? When someone goes on a diet, do you give him the piece of chocolate cake he begs for if you are trying to do *his* will? That we have no ready rules of thumb—*e.g.*, "last statement counts," or "statements made under oath count"—can be seen not just from these sorts of explicitly ambivalent expressions over time, but by noting that we vary our defini-

55. Libertarian commentators have long been hostile to the idea that one can convict a defendant when the purported "victim" has agreed to allow that defendant to treat him in a certain way. *See, e.g.*, H.L.A. HART, THE MORALITY OF THE CRIMINAL LAW, 37-39 (1965); J.S. MILL, ON LIBERTY 95-100, 179-89, 206-09 (Everyman American ed. 1951). This hostility is manifested in a generalized opposition both to so-called "victimless crime" legislation, *see, e.g.*, E. SCHUR, CRIMES WITHOUT VICTIMS (1965), and to the judicial practice of disallowing consent as a defense in particular cases of, say, assault. *See, e.g.*, MODEL PENAL CODE § 2.11 (Proposed Official Draft 1962). The libertarian argument is quite straightforward: The criminal law is designed to deter harm (or blame those who do harm), and it is (definitionally) absurd to say that harm has been done when all parties affected by conduct have assented to it.

Antilibertarians have generally relied on two positions to justify punishing acts that have been consented to: pure paternalism (the victim's capacity to judge what will be good for him is not to be trusted), *see, e.g.*, H.L.A. HART, LAW, LIBERTY, AND MORALITY 30-34 (1963); Dworkin, *Paternalism* in MORALITY AND THE LAW 107 (Wasserstrom ed. 1971), and a view that there are broad harmful externalities to the purportedly private interaction, *see, e.g.*, P. DEVLIN, THE ENFORCEMENT OF MORALS (1965); E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 96-110 (1933).

tions of assent to account for *implicit suppositions* of ambivalence over time. For instance, in ordinary commercial dealings, a simple nod and a grunted, "I'll take that box of strawberries for 59 cents" allows the other actor to consummate a sale without much fear of harming the buyer. But if someone grunts, "I wish you'd kill me," we do not take the remark as manifesting welfare-maximizing assent on which the would-be killer is entitled to act.

In terms of broadening the time frame backward, we must also determine whether the origins of preference formation should be considered. Does it matter if the assent follows threats or bribes (restricted determinism) or a warped childhood (fuller determinism)? Does it matter whether the subject chose these influences or that, ultimately, no one privately chooses the most basic influences? Is the subject we are interested in the developing person or only that person who actually developed?[56]

Just as significant—and perhaps more operationally significant to judicial efforts to define consent—is whether we open the time frame to account for beliefs held subsequent to the action, too. Do we require that the subject not regret or disown the earlier choice before we exculpate the defendant? It is perfectly plausible that a defendant be deemed guilty of a "harmful" assault if there is ultimately a complainant: that the harm may be revealed only *after* the fact. A philosophical scheme that denies the possibility that one can harm those who have consented to one's acts seems mechanically workable only if we define the consenting subject in the narrowest time frame, accounting only for preferences expressed by the subject at the moment of defendant's conduct. This definition of the consenting subject is hardly compelling, however, since it is unlikely that the victim dissociates himself into a disconnected series of assenters. More likely, the subject views himself as a person with a continuous personal identity, a person concerned about later reevaluation of current decisions and the impact of past pressures on choice.

Ultimately, the narrow time-framed view of consent serves a vital *ideological* function, though it produces rather trivial criminal law results. Narrow time-framing here may serve not so much to deny the criminality of otherwise culpable drug sellers, sex criminals, or prostitutes, but to buttress the ideological argument for the beneficence of

56. *See, e.g.*, Gintis, *Consumer Behavior and the Concept of Sovereignty: Explanations of Social Decay*, 62 AM. ECON. REV. 267 (1972) (discussing the development in a capitalist society of taste for private appropriation of goods rather than for "community" and "meaningful work").

untrammeled markets, to certify the wage-work trade and buyer-seller dealings as nonexploitative and harmonious, without regard to the historical, wide time-framed conditions in which these "deals" occur.[57]

B. *Disjoined and Unified Accounts of "Incidents"*

A second unconscious interpretive construct is the choice between "disjoined" and "unified" accounts of relevant legal facts. Substantive criminal law unknowingly, or at least without rational argument, shifts between viewing a series of significant events as a single incident or as separate incidents.

1. *Imperfect self-defense.*

Imperfect self-defense doctrine is one example of the arational choice between disjoined and unified accounts of incidents. In these cases, the defendant genuinely believes that the ultimate victim is attacking him with deadly force that cannot be warded off unless he counters with deadly force, but a reasonable person in the defendant's position would not believe this.[58] Holding this negligent but genuine belief, the defendant intentionally kills the victim. Is the homicide intentional or negligent? On the one hand, we might view the killing incident as temporally disjoined; a negligent perception of the need to kill is *followed* by an intentional killing. Under this view, the defendant is more blameworthy than the traditional negligent killer (*e.g.*, the bad driver,[59] the person who plays with guns[60]), because he has focused on the issue of whether to take human life and has gone ahead and done it. On the other hand, if the perception of the need to kill and the conduct are unified as a single incident, we will not see the killing as worse than the traditional negligent killing. The Model Penal Code,[61] reflecting a partial judicial and legislative trend,[62] considers such defendants guilty only of negligent homicide.

57. For a more in-depth discussion of the relationship between single-moment choices and desires manifested over time in the context of traditional neoclassical welfare economics, see Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769, 778–87.

58. I will not discuss whether a reasonable belief in the necessity of self-defense is a belief the ordinary man would have in the circumstances *or* a belief generated by a reasonable process, given the physical and/or emotional perceptions the defendant actually has. The problem is analogous to the problem of interpreting "reasonable provocation." *See* notes 109–15 *infra* and accompanying text.

59. *See, e.g.*, Jones v. Commonwealth, 213 Ky. 356, 281 S.W. 164 (1926).

60. *See, e.g.*, State v. Tucker, 865 S.C. 211, 68 S.E. 523 (1910).

61. MODEL PENAL CODE § 2.02(10) (Proposed Official Draft 1962).

62. *See, e.g.*, Allison v. State, 74 Ark. 444, 86 S.W. 409 (1905); State v. Thomas, 184 N.C.

The Code does not recognize, if only to deny its importance, the distinction between deliberately taking human life under unreasonable perceptions and taking life without being subjectively aware of the risk of death.

In contrast, in *United States v. Calley*,[63] the defendant deliberately shot Vietnamese villagers after unreasonably believing that he was lawfully ordered to do so. The court held that Calley committed intentional murder, even if he believed he was acting under orders, because: "The acts of a subordinate done in compliance with an unlawful order given him by his superior are [not] excused . . . [if] the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful . . . ."[64] The court, without comment or apparent awareness, disjoined a potentially unified incident, classifying negligent perception *followed by* the legally relevant intentional killing as separate incidents, each incident to be judged on its own merits.

One might believe that the intentional killing should be separate from the perception in this particular case because the Calley "incident" occurred over a longer period than does the typical imperfect self-defense incident. Calley did have a longer time to consider his perceptions *before* he killed intentionally. But that reasoning is hard to fathom: As long as Calley *still* believed at the time he killed that he was acting legally, he is like the imperfect self-defender. Both could say: "At the moment I pulled the trigger, intentionally killing the victim, I believed that I was legally authorized to kill. Although my belief was unreasonable, it was not based on a misunderstanding of legal duties. I simply misapplied these legal norms to the particulars of this case."

We must recognize that disjoined time-framing has made a hard case seem easy. The unstated, unjustified, disjoined perspective of *Calley* suppresses the sense that the actor did not kill in the manner the worst intentional killers do—with a subjective sense of wrongfulness. On the other hand, the Model Penal Code's unified perspective similarly suppresses the recognition that negligent self-defenders cause death differently than do ordinary negligent killers in that they at least sense the presence of death.

The Model Penal Code's perspective is, I would guess, intended

757, 114 S.E. 834 (1972); Commonwealth v. Colandro, 231 Pa. 343, 80 A. 571 (1911); ILL. ANN. STAT. ch. 38, § 9-2 (Smith-Hurd 1979); WIS. STAT. ANN. § 940.05 (West Supp. 1980).

63. 46 C.M.R. 1131, *aff'd*, 22 C.M.A. 534 (1973).

64. *Id.* at 1183.

to preserve the "rule-like" nature of the Code's mens rea categories.[65] The disjoined perspective would require a finding that the defendant is somewhat "worse" than the typical negligent killer, though perhaps still "better" than the typical purposeful one. Yet the Code's intermediate categories do not aptly portray the defendant, for he certainly does not kill "recklessly" or with "knowledge." This implies that "blameworthiness" is not aptly summarized by the Code's categories, an implication quite unsettling to the politically significant notion that the blameworthy mental state, a necessary condition to conviction, a core element of the definition of each offense, can be precisely described in a rule-like form.[66] Moreover, the disjoined perspective raises, if only metaphorically, the highly unsettling determinist position that it is not enough to know that the defendant acted intentionally without inquiring into the *roots* of his intention. If we treat the negligent self-defender as a partly excused intentional killer, one partly exculpated because the roots of his intentional decision to kill are clearly less than culpable, we are led to wonder why we should not *always* inquire into the temporally separated background of the vicious will. Perhaps we should always ask how culpable the defendant was in *becoming* an intentional criminal. Interpretive construction suppresses this disturbing question: We unify when we want to account for but deny that we are looking at the background of an intentional act; we disjoin and focus on the "second" incident when we want to obliterate the past altogether.

2. *Voluntary acts*.

A second example of the shift between unified and disjoined accounts of incidents appears in the criminal law's voluntary act requirement. Assume that we decide that the drunken defendant in *Martin v. State*[67] involuntarily appeared in public, that we ignore the problem that he may have taken earlier voluntary acts that might make us view the appearance as, on the whole, voluntary. The stat-

65. *See* MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962) (describing levels of blameworthiness).

66. *See* H. PACKER, *supra* note 1, at 107: "If one is engaged in drafting a criminal code, *which must prescribe precisely what has to be proven to convict of crime and precisely what distinctions separate one crime from another* when the same external facts are present (as, for example, in differentiating murder from manslaughter), there can be no doubt that the positive approach [which "attempts to identify particular states of mind"] is much the superior. . . . It is no accident that the positive approach is adopted in the masterly legislative construct underlying the American Law Institute's Model Penal Code." (emphasis added) (quoted material in brackets is from *id.* at 105).

67. 31 Ala. App. 334, 17 So. 2d 427 (1944); *see* notes 28–35 *supra* and accompanying text.

ute required that perpetrators be publicly drunk *and* boisterous.[68] One interpretation of the court's opinion is that *each* element of the crime must be performed voluntarily; *i.e.*, that it is unjust to punish a person who has not been given *every* chance to avoid the crime.[69] The court thus joined the dissociated elements. It found the drunken public appearance as a whole involuntary and exculpated the defendant. But deciding to require each statutory element to be performed voluntarily by the defendant illustrates the time-framing tension that is present. Courts no doubt would find violations of public exhibitionism statutes even if exposure occurs during an involuntary public appearance.[70] The exhibitionism is separated or disjoined from the earlier involuntary public appearance and judged on its own.[71] In the public drunkenness cases, however, the incidents are unified: "Boisterousness in public" is one incident, and if that incident is involuntary, the defendant must be acquitted.[72] There is no exacting principle that explains why this should be the case.

I suspect that the unifying/disjoining techniques are merely useful, dissonance-reducing masks. What is really at stake is a political judgment that acting boisterous when drunk is less intentional than exposing oneself once in public. The exhibitionist can more easily "avoid criminality," once in public, than can the drunkard. For the drunkard to be given "adequate" opportunity to avoid the offense, his appearance in public cannot be determined externally, because

68. An Act to prevent public drunkenness, No. 86, 1885 Ala. Acts (at the time of the *Martin* decision, codified at ALA. CODE tit. 14, § 120 (1940)). The statute remained in essentially the same form until it was repealed in 1977 by the comprehensive Criminal Code, No. 607, 1977 Ala. Acts § 9901.

69. The other plausible interpretation is that the boisterous behavior may be involuntary for drunk persons. Thus, *no* element of the crime was performed voluntarily.

If this interpretation is correct though, the supposedly easy case of a person voluntarily appearing in public becomes problematic. If the boisterousness is involuntary, a key element of the crime cannot be avoided. Yet the legislature punishes public drunkenness *only* if one behaves boisterously. The net effect is that drunks will be punished or go free entirely because they have done, or not done, something over which we have decided they have no control. It would be as if the statute were written: "The seventh public drunk a policeman sees shall be punished." Whether one is the first or seventh is hardly in his control.

70. For instance, Minneapolis City Charter and Ordinances § 37:9-4, cited in State v. Wilson, 244 Minn. 382, 69 N.W.2d 905 (1955), was written like the *Martin* drunk-in-public statute. It required both the public appearance and the additional offending acts: "Any person *who shall appear* in any street or public or exposed place . . . in a state of nudity . . . or in any indecent or lewd dress, or *shall make any indecent exposure* of his or her person . . . shall be guilty." *Id.* at 387, 69 N.W.2d at 907 (emphasis added).

71. Just as Calley's intentional murder is dissociated, *i.e.*, treated as a separate incident from his judgment about background circumstances.

72. Just as the negligent self-defender is treated as taking a single act, which is morally dominated by our sense of his negligence.

his boisterousness once drunk is *always* partially determined. Of course, boisterousness is not viewed as so unintentional as to constitute an utterly arbitrary basis for imposing criminal liability,[73] but rather than face the disturbing reality that we view many things as *partially* determined (and open up the possibility of a general discourse in which we recognize that many things are in some part chosen, but still explicable), we simply avoid the issue by using disjunctive or unified accounts of incidents.

C. *Broad and Narrow Views of Intent*

A third unconscious construct is the unstated choice between broad and narrow views of the actor's intent. A narrow view assumes that the actor intends only the precise physical act he performs. A broad view assumes that the precise act is an instance of some broader category of acts the actor intends.

1. *Impossible attempts.*

The shifting between broad and narrow views that unconsciously occurs in the criminal law is evident in the doctrine of impossible attempts. The typical attempt case has a decidedly temporal dimension; the defendant fails to cause harm because his criminal conduct is incomplete, interrupted, or thwarted. In impossible attempts, the defendant completes the physical acts, yet no criminally cognizable harm occurs.

Courts and commentators must deal with four categories of impossibility: pure legal impossibility, traditional legal impossibility, legal/factual impossibility, and factual impossibility. In pure legal impossibility the defendant aims to violate a criminal proscription, but no criminal statute actually proscribes his conduct, nor does any statute proscribe an apter version of his intention.[74] Similarly, in traditional legal impossibility, the defendant's *acts* do not violate a criminal proscription. However, an existing criminal prohibition does narrowly describe the defendant's *aim*.[75] In the third category,

73. That is, the interpretation discussed in note 69, *supra*, cannot be correct.

74. For instance, defendant possesses liquor, believing he is breaking the law, though in fact Prohibition has been repealed. All commentators exculpate defendant.

75. A classic example is Wilson v. State, 85 Miss. 687, 38 So. 46 (1905). The trial court convicted defendant of attempting to commit forgery when he changed the *numbers* on a check. Defendant was unaware that changing the numbers, rather than the letters, is not a forgery. The appeals court, subsequently supported by all the commentators, reversed.

Professor John Kaplan suggested to me that "enlightened" commentators do not share this judgment of *Wilson*. This is an area where I am unsure who I am allowed to attack

legal/factual impossibility, the defendant again fails to consummate the harm. This time, however, it is because of a fairly particularized mistake about the *legal attributes* of the situation he faces.[76] The mistake preventing harm is not a pure legal mistake—believing it is illegal to receive stolen goods when it is in fact legal—nor a traditional legal mistake—believing that goods attained through fraud are stolen when the jurisdiction does not describe fraudulently obtained goods as stolen for purposes of the stolen goods receipt statute. Rather the mistake concerns the *legal status* of the particular goods—attempting to receive stolen goods that have been "recovered" by the police. Finally, in factual impossibility the defendant fails to cause harm because he mistakenly perceives the probability of effectiveness of his conduct. His mistake concerns some nonlegal fact. The classic case involves defendants convicted of attempted larceny when they stick their hands into empty pockets.[77]

I believe that the lines drawn among, and the arguments separating, these four categories are generally based on submerged interpretive shifts between broad and narrow views of the defendant's intent. When we view the defendant as intending only precise physical acts, we acquit the defendant because these precise acts do not constitute a crime. On the other hand, when we view the defendant as intending a broader category of acts, an apter version of the acts he did, we inculpate the defendant for attempting a crime. These interpretive shifts can be seen if we analyze the doctrinal positions of the major commentators in two paradigm cases—*Wilson v. State*[78] and *People v. Jaffe*.[79] In *Wilson*, defendant was acquitted of a forgery because he

without being accused of picking on small-fry. The *Wilson* result is supported by the major writers, and I have been unable to find it explicitly attacked. G. FLETCHER, *supra* note 1, § 3.3.7, at 178; J. HALL, *supra* note 1, at 595–98; G. WILLIAMS, *supra* note 1, § 205; Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 MINN. L. REV. 665 (1969); Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005 (1967).

76. The classic case is People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906). Defendant attempted to receive what he thought were stolen goods. Actually, police had recovered the goods. The court exculpated defendant. Some commentators agree, *see* G. FLETCHER, *supra* note 1, § 3.3.7, at 182; Enker, *supra* note 75, at 694, but some do not, *see* J. HALL, *supra* note 1, at 598; Deusner, *The Doctrine of Impossibility in the Law of Criminal Attempts*, 4 CRIM. L. BULL. 398 (1968); Hughes, *supra* note 75, at 1009; Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 853–54 (1928).

77. *See, e.g.*, People v. Fiegelman, 33 Cal. App. 2d 100, 91 P.2d 156 (4th Dist. 1939); People v. Moran, 123 N.Y. 254, 25 N.E.2d 412 (1890). *Cf.* Mullen v. State, 45 Ala. 43 (1871) (defendant shot at victim with defective weapon, incapable of causing harm); State v. Moretti, 52 N.J. 182, 244 A.2d 499 (1968) (defendant tried to perform illegal abortion on woman who was not in fact pregnant).

78. 85 Miss. 687, 38 So. 46 (1905). *See* note 75 *supra*.

79. 185 N.Y. 497, 78 N.E. 169 (1906). *See* note 76 *supra*.

changed numbers rather than letters on a check—a case of traditional legal impossibility, since the change in numbers was not a material alteration of the check and the crime of forgery requires material alterations. In *Jaffe*, the defendant was acquitted of a charge of attempting to receive stolen goods because the stolen goods he thought he was to receive had been recovered by the police, and hence were no longer stolen—a case of legal/factual impossibility.

Lafave and Scott, reflecting both the Model Penal Code[80] and traditional commentators,[81] make nonrational interpretive switches in distinguishing traditional legal impossibility from legal/factual impossibility. They argue:

> In Wilson the defendant may have thought he was committing a crime, but if he did it was not because he intended to do something that the criminal law prohibited but rather because he was ignorant of the material alteration requirement of the crime of forgery. In Jaffe, on the other hand, what the defendant intended to do was a crime and if the facts had been as the defendant believed them to be he would have been guilty of the completed crime.[82]

Lafave and Scott simply interpret, without rationale, Wilson's intent narrowly and Jaffe's intent broadly. They view Wilson as intending the most precise deed imaginable—altering the numbers on the check—rather than as intending a broader category of acts—intending to receive money from a bank by aptly altering an instrument. They view Jaffe as intending a broader category of acts—receiving stolen property—rather than intending a precise act—receiving the particular goods that were actually delivered to him. Viewed narrowly, Jaffe "thought he was committing a crime" but was not because the criminal law does not prohibit receiving unstolen goods. Similarly, viewed broadly, Wilson intended to violate the law of forgery; had he *correctly* altered the instrument (so as to make a bank pay him money), he would have been guilty of the completed crime.[83]

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80. MODEL PENAL CODE § 5.01(a) (Proposed Official Draft 1962).

81. *See, e.g.*, J. HALL, *supra* note 1, at 594–99.

82. W. LAFAVE & A. SCOTT, *supra* note 1, § 60, at 443.

83. The nonrational choice between broad and narrow interpretations of intention recurs no matter how one states the policy issue. One might claim that Wilson is harmless because if he keeps changing numbers on checks, he'll never take anyone's money, whereas if the pickpocket keeps sticking his hands in pockets, someday he'll steal. Such a claim involves an unwarranted interpretation of Wilson as someone mentally fixed on changing numbers rather than on getting money. One could just as plausibly say, "If you keep sticking hands in *empty* pockets, you'll never steal anything." The claim that a defendant doing the "same" thing will not cause harm follows from an unwarranted narrow view of what the "same"

Fletcher, desiring to inculpate *only* factually impossible attempters, sets out a more refined and elegant test than do the earlier commentators. In essence, Fletcher argues as follows: The general category of "attempting" must be objectively defined so as to satisfy constraints proscribing vague statutes. What does it mean, in ordinary language, to attempt or try to do a certain something? To attempt something means that it is part of the rational motivation of the actor that all conditions defining that certain something be present. How do we know if someone attempts [to fix a faucet on Saturday] when he fixes it on Sunday, believing it to be Saturday? We know that he attempts the bracketed act only if a rational person's motivation changes when he is informed of the counterfactual nature of all the assumptions contained in the brackets. For example, someone who fixes a faucet while mistakenly believing that the capital of California is Sausalito would not be affected if he were to find out that Sacramento is the capital;[84] thus, he does not attempt to [fix a faucet if the capital is Sausalito].

Fletcher's account of "attempting" is interesting,[85] but its application to the cases hinges on how broadly or narrowly the crime which is arguably attempted is defined.[86] Fletcher says the empty-pocket pickpocket is guilty of attempted larceny because larceny is defined as [taking money from a full pocket], and the rational pickpocket would not stick his hand in the pocket if he knew the pocket were empty. The counterfactual assumption contained in the brack-

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thing is. Narrowly viewed, Wilson repeats precisely the same acts. Yet we imagine the pickpockets as doing more apt versions of some broader category of acts.

One might argue that Wilson should not be convicted because had he obtained money from the bank by altering numbers, that money would have been a gift from the bank rather than the proceeds of forgery, whereas the pickpocket's getting money from a pocket is a theft. Once more, the interpretation of the facts is indefensibly inconsistent. Had the pickpocket received money through the *precise* means he used—for instance, after he stuck his hands in an *empty* pocket, had the would-be victim said, "You must be desperate. Here's a twenty for your trouble"—then *that* receipt would not have been the proceeds of theft. And had Wilson received money by altering the instrument effectively, he would have been guilty of forgery. In *any* impossibility case, the *precise* means used do not result in harm. Otherwise, we would not be talking about attempts.

84. G. FLETCHER, *supra* note 1, § 3.3.4, at 160–66.

85. Although it is not my main complaint with Fletcher's test, I should note that the test leads to some peculiar results. Take, for instance, the case of United States v. Thomas, 13 C.M.A. 278, 32 C.M.R. 278 (1962), in which the defendant had sexual intercourse with a dead woman. Has he attempted rape? Under Fletcher's theory, the defendant is *less* likely to be convicted of attempted rape if he is indifferent to whether the victim is alive.

86. It is noteworthy that Fletcher makes the categorization errors he makes, since he seems aware that LaFave and Scott have ignored the categorization issues I have described. G. FLETCHER, *supra* note 1, § 3.3.7, at 178–79.

eted definition of the crime affects his rational motivation. But Fletcher says that Jaffe is not guilty of attempting [to receive stolen property] because he is indifferent to whether the property is stolen. If anything, Jaffe would be more willing to receive unstolen property.[87] Similarly, Fletcher says that Wilson does not attempt to [forge a check] because he is indifferent to whether the money is received by way of forgery.[88]

Fletcher engages in the simplest kind of nonrational interpretive construction here. To inculpate, he defines the attempted crime in terms of the precise physical acts consummating the harm. To exculpate, he defines the attempted crime in broad, categorical terms, focusing on the legal attributes of the situation. Thus, he does not ask the categorical question of whether the would-be pickpocket is attempting to [steal money from a pocket]. Of course, the pickpocket is indifferent to whether the money received is stolen. Nor does Fletcher define the crime of forgery as [getting money from a bank by apt means] and ask whether Wilson has attempted *that* particular criminal act. If he did, Wilson would be guilty under Fletcher's rational motivation test: Had Wilson known his alterations were ineffective to get money, he would not have made them.

The writing in this field uniformly supports exculpating defendants in traditional legal impossibility cases. Thus, a narrow interpretation of intention must be used. It probably arises from an unstated desire to preserve the rule form of the criminal law in a rather trivial case. All the posturing done to ensure that no one is convicted of attempting a crime when his acts do not precisely correspond to the definition of the consummated crime is charmingly ludicrous. We tolerate far greater vagueness in everything from the definition of murder to sentencing and probation policy. If anyone asserted, as a straightforward political matter, that these cases were an important bulwark against governmental arbitrariness and citizen insecurity, I suspect that the statement would be written in an ironic trope. Once more, I sense that "the lady doth protest too much." We suppress our real queasiness about the breakdown of legalism by rallying around its banner with staggeringly inappropriate gusto in unimportant circumstances.

87. *Id.* § 3.3.4, at 161–62. It is interesting that Fletcher's argument is wrong on its own terms. If one views the receiver of goods as wondering whether the goods are stolen or recovered, this legal attribute question will matter a great deal to the person's "rational motivation." Only a rather self-destructive fence agrees to receive goods he knew were recovered; the hovering presence of the police deters most.

88. *Id.* § 2.2.1, at 82.

2. *Attempts at crimes unreasonably believed to be excused.*

A second example of unconscious shifts between broad and narrow views of intent occurs when the defendant attempts to commit an act under the unreasonable belief that it is excused. Assume that the defendant is charged with attempted rape or with assault with intent to commit rape. The defendant took steps beyond mere preparation to have intercourse with a woman he unreasonably believed had given her consent.[89] Assume that a negligent mistake as to consent is no defense to a rape charge in the particular jurisdiction.[90] Ordinarily, however, an attempt or an assault with intent to commit a crime requires purpose: that is, the actor must make it his object to engage in that conduct.[91]

The interpretive conflict appears in deciding whether purpose or specific intent exists in this context. The defendant asks the court to take a broad, categorical view of the intent necessary for conviction. He says, "I did not intend to commit rape, which is categorically defined as an unconsented-to act of intercourse. What I intended was not rape, but consented-to intercourse."[92] Prosecutors counter that a narrower, act-focused view of intent is appropriate. They state, "You intended only the precise physical acts you took or were about to take—fondling, undressing, having intercourse—and *these acts would have constituted rape* had you proceeded." The choice between the constructions is ungrounded; neither construct seems very compelling. The notion that the defendant must intend the crime seems unrealistic, since people never really intend crimes, unless they get a perverse pleasure out of disobedience for its own sake. But a counterclaim that we can convict whenever a defendant intends the precise physical actions which constitute the crime seems equally preposterous, since it implies that people focus in a morally meaningful

89. *See* United States v. Short, 4 C.M.A. 437, 16 C.M.R. 11 (1954).

90. *See id.* at 444-45, 16 C.M.R. at 18-19 (citing McQuirk v. State, 84 Ala. 435, 4 So. 775 (1887)). *Contra*, Regina v. Morgan, [1976] A.C. 182.

91. *See* Merritt v. Commonwealth, 164 Va. 653, 180 S.E. 395 (1935). Purportedly, a crime of specific intent requires that the actor intend some harm beyond the physical acts constituting the actus reus of the crime. A general intent is purportedly simply the intent to do the acts. *See* R. PERKINS, PERKINS ON CRIMINAL LAW 762 (2d ed. 1969). However, the distinction is problematic. Attempt is a specific intent crime; yet courts and commentators alternate between more and less categorical characterizations of an actor's intention *within* the attempt category.

92. *See* W. LAFAVE & A. SCOTT, *supra* note 1, § 47, at 358: "The crime of assault with intent to rape clearly sets forth a mental element; the defendant's purpose in assaulting the woman must be rape. This purpose of intercourse against the woman's will cannot be present if the defendant believes—even unreasonably—that the woman is consenting."

way on the most narrow physical movements.[93]

"Policy" arguments are indeed made for choosing one view of intent over the other. For instance, even if it is appropriate to convict someone of rape who has intercourse while unreasonably believing that the victim is consenting,[94] one can argue that it is inappropriate to convict someone of the *inchoate* crime of *attempting* rape, because prior to the consummation of the harm the defendant can still desist if he becomes aware of his mistake. Since rapes occur over time, the victim generally has a number of opportunities to manifest her nonconsent. On the other hand, one can argue that in the most common attempt situation—one in which the defendant's plan is thwarted by outside intervention—the simple fortuitous lack of harm does not indicate the absence of culpability. We ought not to presume that abandonment was likely. Under this view, the attempt is simply the consummated crime *minus* the harm. As long as voluntary abandonment is a defense to criminal attempt in any case, we need worry about but one group of potential defendants if we inculpate negligently mistaken attempters. Persons interrupted by external forces before learning of the victim's resistance will be treated like rapists even if they would have desisted had they had all

93. As Michael Moore has noted, we can rarely assume when talking of "mental states" that because someone wants X, it is also true that he wants Y, which is equivalent to X. Thus, in ordinary scientific discourse, we believe that if X and Y are the same entity, statements true for X will also be true for Y (*e.g.*, "The farthest planet from the sun has a smaller diameter than Earth" implies that "Pluto has a smaller diameter than Earth."). But in the ordinary legal discourse on will, it is not true that if someone said, "I want the biggest room in your hotel" and the biggest room was the dirtiest room, then one could infer a desire for the dirtiest room in the hotel. *See* Moore, *The Semantics of Judging*, 54 So. Cal. L. Rev. 151, 208–14 (1981).

94. Believing in "relatively strict liability" for rapists—that is, believing that it is *not* unjust to punish someone severely when he is "merely" negligent as to a material element of a crime (here, the absence of consent)—is supported by a disjoined view of the rape incident. If we view the negligent perception of consent as *the* morallly relevant incident and the intentional intercourse as a morally irrelevant incident, we are prone to view the defendant as someone punished quite severely for negligence. If, on the other hand, we view the decision to have intercourse where consent is ambiguous as a *separate* decision, we are prone to be less sympathetic to the defendant. It is not as if the defendant is "trapped" into criminality either unavoidably or in the course of doing perfectly ordinary or protected acts. By avoiding sexual intercourse with women who are not clearly consenting, the defendant can avoid criminality.

But while criminality is not hard to avoid here, the price—repressing certain violent forms of sexual encounters—*may* be one that, as a matter of political/cultural belief, some do not want to impose. Depending on how seriously we take the unconsenting victim's plight and, on the other hand, how worried we are about chilling or suppressing "kinky," somewhat violent sex, the result in McQuirk v. State, 84 Ala. 435, 4 So. 775 (1887) (allowing *only* a defense of *non*-negligent mistake as to consent), seems more or less justified. *See* note 90 *supra* and accompanying text.

the opportunities the typical rapist gets to learn of the victim's nonconsent.

One is more likely, I suppose, to be sympathetic to the possibly desisting defendant if, as a matter of ideology, one stresses the intentionalists' favorite capacity, that of the ongoing capability for self-governance, or if, taking a result-oriented perspective, one is more sympathetic to defendants than to victims of sexual assaults. But this "policy" dispute is simply obscured by interpretive construction. Since actors using standard legal discourse agree on the "doctrine" that an attempt requires purpose, framing the intent issue broadly simply ends the analysis.

3. *Aiding and abetting.*

A third example of shifts between broad and narrow intent occurs in doctrine relating to aiding and abetting the sale of a proscribed good. In *People v. Gordon*,[95] the defendant referred an undercover agent to a seller of marijuana and was charged with the accessorial crime of facilitation.[96] Because neither purchase nor possession of marijuana by the agent is a felony, the defendant could not be convicted for aiding the undercover agent. Moreover, the appeals court acquitted the defendant of facilitating the seller's felonious sale because the seller could not possibly have intended to commit the crime of selling marijuana to the agent at the time of the referral.[97]

The interpretive problem here is apparent: The court assumes that when the statute says that the facilitation must aid a party who "intends to commit a crime," a *categorical* intent—to sell marijuana generally, rather than to commit a number of specific crimes—is irrelevant. The court implies that even a drug dealer constantly in the business of making sales *never* intends to commit a crime until the moment of commission, because he never intends to sell to *the* person he ultimately sells to. But why stop with the identity? Does a drug dealer ever intend a crime unless he knows beforehand exactly when and where he will sell, or what the buyer will be wearing? While the result seems somewhat silly here, the narrow interpretive construct the court uses is neither uncommon nor attackable in anything but

95. 32 N.Y.2d 62, 295 N.E.2d 777, 343 N.Y.S.2d 103 (1973).

96. *See* N.Y. PENAL LAW § 115.00 (McKinney 1975), which provides that a person is guilty of criminal facilitation when "believing it probable that he is rendering aid to a person who intends to commit a crime, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit a felony."

97. 32 N.Y.2d at 66, 295 N.E.2d at 780, 343 N.Y.S.2d at 106.

result-oriented terms.[98]

4. *Abandonment*.

Broad and narrow views of intent also frame our abandonment doctrine. Suppose a defendant sets out to shoplift from a department store. He has taken steps sufficient to constitute an attempt, were he to be interrupted by external forces. However, he stops of his own accord because: (a) he decides that stealing is bad; (b) he decides that stealing is too risky; (c) he spots a warning that "Shoplifters will be apprehended and prosecuted"; or (d) he spots the store detective watching him. Many jurisdictions would exculpate the defendant in any of the first three situations. But none would allow a voluntary abandonment defense in the last case. They would find the defendant guilty of attempt if he decided that unpredicted legal consequences would befall him and so decided "to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim."[99] In other words, using interpretive construction language, if the defendant abandons because of fear of legal consequences on the particular occasion, he has still demonstrated an intent to commit the categorical crime of theft, but has simply shifted the instance of the category.

The application of this principle that renunciation motivated by "fear of legal consequences" is inadequate is rather uncontroversial. But the "fear of legal consequences" doctrine expresses an ambivalence of our liberal legal culture about deterrence in criminal law, and more generally, about the purported union of selfish and socially

98. A result of conviction could have been reached by applying an equally arational broad view of intent, as is done in cases of transferred intent.

When a defendant intentionally shoots at X, but hits and kills Y, courts traditionally hold her guilty of intentional homicide, saying the intent transfers from one victim to another. *See, e.g.*, Mayweather v. State, 29 Ariz. 460, 242 P. 864 (1926). The defendant might claim that while she may be guilty of attempting to kill X, the killing of Y was at worst negligent. That claim gets lost in the interpretive shuffle when the court says that the defendant intended to kill a person, and then it defines *that* intent, rather than the narrow intent to kill X, as the relevant, requisite intent for murder. Similarly, the *Gordon* court could have found that the defendant displayed the intent to sell drugs and defined *that* as the requisite intent.

It may be fair to presume that people *generally* set out to kill particular people rather than to kill, while people set out to sell drugs rather than to sell them to particular people. But this is a probabilistic generalization rather than a necessary truth. Some killers *are* more interested in killing than in killing particular enemies; many drug dealers really do select the people to whom they sell.

99. MODEL PENAL CODE § 5.01(4) (Proposed Official Draft 1962).

beneficial behavior attained in a properly designed legal regime.[100] While an avowed *purpose* of punishment is to influence conduct by altering the relative benefits and costs of criminal activity, an individual who calculates whether the benefits of criminal conduct *on a particular occasion* outweigh the expected costs is considered antisocial. He is deemed to transfer his intent to more appropriate circumstances. Because of our discomfort with the purely calculating citizen, we convict the attempter who renounces only because it is not in his interests *this time* to proceed with the crime. Of course, though, this discomfort clashes with the philosophical underpinnings of a culture that exalts selfish calculation and views deterrence as an ordinary and acceptable aim of the criminal code. In a normative sense, someone who fails to pursue a criminal plan because criminals are punished is simply responding to desired signals. We expect and want calculation; but it must remain somewhat general to be decent and respectable.

The feeling of discomfort that I suspect accompanies this recognition of ambivalence about when it is appropriate to excuse deterred behavior can be avoided through inexplicit interpretive construction. If we view an abandoned attempt as requiring the intent to do the crime, then the defendant who spots the store detective can be inculpated only if we say that he has not abandoned a generalized categorical attempt to commit larceny. That is, we must treat his steps towards crime in the store as steps towards an *instance* of the category of larceny, not as steps in the commission of *that particular larceny*. We exculpate the defendant who stops when he spots the warning sign by interpreting the relevant requisite intention as an intention to commit only *that* larceny. Only then are we sure he has abandoned the malignant intention.

This particular interpretive construction seems defensible, at least at first blush. The person who reads the sign has not discovered anything unique to the particular situation. There appears to be no reason *not* to equate the abandonment of this larceny with the abandonment of larcenies in general, because other larcenies appear to pose the same threats. But imagine that one defendant decides not to crack a safe because he discovers there is an alarm system he cannot

100. For a fuller account of the significance of unifying the selfless and selfish to the legitimation of capitalist cultures, see Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211–19, 258–61 (1979); D. Kennedy & M. Kelman, The Interpretation of Political Dreams: The Search for Efficient Tort Rules (Jan. 1981) (unpublished manuscript draft on file with *Stanford Law Review*).

crack, while another desists when he discovers there are alarm systems in general, none of which he *ever* can hope to crack. The first safecracker is looking for an easier safe system to break, the second for an object of his larcenous desires that is unprotected. Both could be seen as simply looking for safer targets. Yet it is implausible that a defendant who abandoned his attempted crime because he read a sign, "This Safe Protected by Alarms" could be convicted while one who read a sign, "Safe-crackers will be Apprehended and Prosecuted" would be acquitted. Both are simply being informed of the riskiness of their activity. It is simply unwarranted assertive construction to treat these defendants as renouncing larceny because they renounce *this* larceny. It is not clear how we would ever know that someone is moving on to a more advantageous time and place for his mischief, rather than abandoning a life of crime because he has at last understood the social signals about the costs of crime. It is quite plain we cannot *know* that, because the social signals concerning the propriety of cost-benefit calculation are ambivalent and uninterpretable. We suppress the recognition of this ambivalence by asserting clear cases of total acceptable renunciation and by blocking the knowledge that in a world where selfish calculation is acceptable, all renunciations are in significant senses partial.

5. *An analogue: mistake doctrine.*

An analogous categorization problem involves broad and narrow views of defendants' mistakes (as opposed to intent). Assume the mens rea requirement for larceny is such that defendant is excused unless he knowingly or purposely takes the property of another. If the defendant takes someone else's umbrella, believing it is his because it looks like his—a classic mistake of fact—he will be exculpated.[101] Of course, if the crime required only negligence as to whether the seized property was that of another and a reasonable person would not have mixed up the umbrellas, the defendant would not be exculpated. If, on the other hand, the defendant takes an umbrella believing that theft is not proscribed—a classic mistake of

101. Mistake of fact exculpates if it negates the purpose, knowledge, or recklessness required to establish a material element of the offense. *See* MODEL PENAL CODE § 2.04 (Proposed Official Draft 1962). Thus, if one must knowingly or purposely deprive another of his property to be guilty of larceny, entertaining a mistaken belief that the property one takes is one's own constitutes a defense. If, on the other hand, larceny required only negligence as to the ownership of the property, the mistake of fact would not be exculpatory unless it were reasonable. *See, e.g.*, G. WILLIAMS, *supra* note 1, § 32, at 79.

law—then he will be guilty.[102] Finally, if the defendant takes someone else's umbrella because he believes it to be his own owing to some legal error—*e.g.*, believing it to have been a gift though the gift was in fact incomplete—he has made a mistake of "legal fact."[103] In this case, legal theorists split on the question of culpability.[104]

These traditional accounts are nonsensical without considerable interpretive construction. The mistake of legal fact category is far more complex and troublesome than I have indicated. The defendant's mistake of legal fact may not be one that is well-integrated into the dominant culture (*e.g.*, whether one has received a gift or not), but rather be disorientingly deviant from the dominant cultural norms.[105] For example, suppose the defendant claims that he thought the umbrella was "his" because he believed he was legally entitled to take an umbrella whenever he was sick and it was raining hard. The relationship between "legal facts" and the "offense in chief" may be far more intimate than the Model Penal Code suggests, if one *interprets* the legal system as something of a seamless web rather than a separate series of pronouncements. It is not clear what it means to know the laws against theft but to make "big" mistakes about what property belongs to you and what property does not. Take another mistake of legal fact: A defendant accused of bigamy claims that he knew bigamy is illegal. However, he believed he was divorced at the time of his second marriage because he thought phys-

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102. People are generally found strictly liable when they plead mistakes about the content of the law. *See, e.g.*, G. WILLIAMS, *supra* note 1, § 100 (discussing the "doctrine" that ignorance of the law is no excuse). This general formula is too broad. There are constitutional limits on punishing people unless they actually know a statutory proscription or could be expected to follow the statutory norm simply by observing the ordinary behavior in the community. When a statute demands "unusual" steps be taken, a person without actual notice will be exculpated. *See, e.g.*, Lambert v. California, 335 U.S. 225 (1957) (declaring a law requiring a felon to register upon entering Los Angeles void as applied to someone unaware of the statute). It seems that people are culpable for negligent mistakes of law and that, for the bulk of "ordinary" offenses, the failure to know the law is simply conclusively presumed to be negligent.

103. The Model Penal Code describes it as a mistake as to some legal rule other than the law defining the offense. MODEL PENAL CODE § 2.02, Comment, at 131 (Tent. Draft No. 4, 1955).

104. *Id.; see* State v. Woods, 107 Vt. 354, 179 A. 1 (1935), where defendant was found guilty of adultery though she was unaware that the person she slept with had obtained a legally improper divorce. While she was aware that adultery is illegal, she was unaware of some legal fact (whether he was married or not) relevant to applying the statute.

105. For a fuller discussion of disorienting deviance, see A. Katz, Studies in Boundary Theory 43-71 (Mar. 1976) (unpublished manuscript draft on file with *Stanford Law Review*). Some of Katz's method, though not the specific insights into disorienting deviance, can be seen in Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 BUFFALO L. REV. 383 (1979).

ical separation from his first wife was legally equivalent to divorce. We may say that the defendant did not respect the bigamy "*regime*" if he was unaware of the difficulty of breaking up a marriage.

Despite the temptation to interpret the legal regime as a system to inculpate in both of these cases, traditional liberal legalist attacks on, for example, law by analogy or vague proscriptions of wrongdoing imply that it is *inappropriate* to talk of hovering "legal regimes" and general legal principles. In this interpretive tradition, there is no general law of property/theft, just particular proscriptions against larceny, embezzlement, and fraud. And to violate these proscriptions, one must possess a blameworthy mens rea which can be negated by mistakes.

If we look closely at the case of the umbrella "thief" who falsely believes that umbrellas go to those who need them, we can see the degree to which results are determined by slightly shifting the breadth of focus, causing a subtle shift in our perception of whether the defendant's error was a particularized error within a settled regime or an error which, if made more generally, would undermine the regime itself. We should also recognize that we decide the case not by explicitly defending our focus, but by asserting that the mistake falls into one or another well-settled doctrinal category; we then get to the bottom-line result, the decision to inculpate or exculpate, simply by restating the traditional doctrine.

If we take the broadest view, the mistake will be doctrinally labeled as purely legal, and we will intone the principle that ignorance of the law does not excuse. The defendant must be inculpated because he was unaware that stealing was illegal. How do we convince ourselves that he thought stealing was legal? He was unaware that what he did was illegal, and what he did was an instance of stealing. Even ignoring that this syllogism is illogical, this view is question-begging, for the defendant's act was not stealing unless the defendant had a culpable mental state. Whether he had a culpable mental state depends on the issue at stake—the categorization of his mistake.

Alternatively, using an intermediately broad focus, we can inculpate the defendant not because we convince ourselves he was utterly ignorant of the offense category, but because he was unaware of the *boundaries* of the offense category. That is, the defendant knew that stealing was wrong, but he did not understand the category well enough to identify his conduct as an instance of stealing. If we take this focus, presumably we will also label the mistake a "mistake of

law," disingenuously viewing a mistake about the boundaries of the law as indistinguishable from ignorance of the whole proscription.

Finally, under the narrowest view, we exculpate, labeling the mistake purely factual. Under this narrow rule, we see the defendant as someone who knew both that stealing is illegal and that stealing is the taking of property that is not one's own, but was unaware that the particular property he took was not his own.

To the extent that the last exculpatory interpretation feels unnatural to us, though it is a perfectly plausible application of the Model Penal Code view, it is because we sense that the defendant's mistake is unlikely to be confined to this particular factual setting; we believe him dangerous, because there will be a large number of settings where his deviant views of property would be applicable. But this sense is merely a vision that one can recognize deviance "when one sees it," precisely the sort of instinct a legal regime is meant to supplant. Either of the first two interpretations avoids the sense that we have abandoned the strictures of legality, while it gets the same substantive results we would get in a regime where fact-finders judge conduct without the mediation of legal categories.

D. *Broad and Narrow Views of the Defendant*

A fourth unconscious interpretive construct involves shifts between broad and narrow views of the defendant. The defendant can be viewed as a person with specific traits or as an instance of some broader class of people.

1. *Concurrence doctrine.*

The shift between broad and narrow views of the defendant occurs in concurrence doctrine, which requires a union between actus reus and mens rea. Doctrinally, blameworthiness in the criminal law is not supposed to be a hovering wickedness; it is supposed to attach to particular harmful acts. Thus, in *Regina v. Cunningham*, the court held that a defendant who negligently broke a gas line while trying to steal coins from the gas meter had to have purposely, knowingly, or recklessly poisoned the victim to be convicted.[106] The court refused to transfer the requisite mental state from the defendant's attempt to steal coins to the poisoning. Except for felony-murder, we (purportedly) do not transfer or impute the mens rea of one crime to another one; on the contrary, the actus reus and mens rea must con-

106. [1957] 2 Q.B. 396, 401.

cur. Yet, as I shall demonstrate, concurrence doctrine can readily be (and has readily been) interpreted away by altering the focus on the defendant and his circumstances.

Assume that larceny and poisoning are the two different crimes in *Cunningham*, and that poisoning can be committed purposely, recklessly, or negligently.[107] The breadth of focus on the defendant's behavior can be manipulated in two ways. Assume we want the defendant convicted of negligent poisoning, believing that breaking a gas meter posed an unreasonable, unjustified risk of poisoning that a reasonable man would not have suffered. The Model Penal Code definition of negligence requires that the risk taken must be one that would be avoided by a reasonable person "*in the actor's* situation." The interpretive question is whether to view defendant as a member of a narrowly defined class—the class of gas meter thieves—or a broader class of persons—those dealing with gas meters in general or those people dealing with poisonous substances in general. If we focus on the defendant's most particularized situation, that of a thief, we see that he may have been as careful as any thief—for thieves rush around carelessly—while if his situation is that of the typical meterman, he may have been unreasonably careless. If the narrow view

107. MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962) states:

"(1) . . . a person is not guilty of an offense unless he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offense.

"(2) *Kinds of Culpability Defined.*

"(a) *Purposely.*

"A person acts purposely . . .

"(1) if . . . it is his conscious object to engage in conduct of that nature or to cause such a result . . .

"(b) *Knowingly.*

" . . .

"(c) *Recklessly.*

"A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct tht a law-abiding person would observe in the actor's situation.

"(d) *Negligently.*

"A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."

is appropriate, a seemingly perverse result occurs: Thieves are less likely to be inculpated for negligent poisoning than are gas line repairmen because, if we focus narrowly on their particular situation, they can be expected to take fewer precautions.

Before dismissing the narrow focus, one should note that through a second manipulation of interpretive focus, the defendant can more readily be convicted through use of this focus. Model Penal Code definitions of both recklessness and negligence require the creation of substantial *and* unjustifiable risk. Risks created by repairmen are generally justified by the social value of the repairs. But the same risk may be unjustifiably high if one is talking about the more focused, narrower version of defendant's activity—*stealing*. *Nearly any risk* of poisoning is unjustifiably high if one weighs the risks against the benefits of stealing, a presumptively socially valueless activity.

Ultimately, of course, a narrow focus on the defendant's activity undercuts concurrence doctrine. Nearly any defendant can be convicted of a higher crime which can be committed negligently as well as recklessly, and many defendants can be convicted where the higher crime must be committed at least recklessly, once one assesses the justifiability of the actor's risk-taking in the criminal context he actually acted in. A conviction-prone interpreter can apply a methodologically nondefensible broad focus in assessing what constitutes reasonable precaution and an equally indefensible narrow focus on the nature of the risk, and thereby interpret away the concurrence doctrine.[108]

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108. To illustrate further, assume that there are two different classes of fire offenses, malicious damage (burning fields) and the more serious offense of arson (burning structures). The black letter concurrence rule would state that if a person intentionally burns a field, "unaware" of the possibility that a structure will be burned, he cannot be convicted of arson. But it is quite clear to me that if we take two persons—one having a marshmallow roast with his Boy Scout troop and the other deliberately burning a field—who pose equally small risks of burning a building and are each aware of this risk, the malicious damager's risk-taking activity will be interpreted narrowly (and thus be deemed unjustifiably risky or reckless) to overcome the supposed strictures of concurrence doctrine.

Since the interpretations will be made by fact-finders (prosecutors deciding which crimes to charge, juries instructed by judges who read them abstractions about "substantial and unjustifiable risks"), it is not likely that appellate court decisions will show the extent of the breakdown of formal concurrence doctrine. Nevertheless, one can find appellate cases where the breakdown is rather overt, *see, e.g.*, Caywood v. Commonwealth, 13 Ky. Op. 576 (1885) (defendant may be guilty of poisoning though unaware of the poisonous character of the drug given to excite the animal passions of a girl as part of what was undoubtedly another crime—seduction). *Accord*, State v. Schaub, 231 Minn. 512, 44 N.W.2d 61 (1950) (defendant tried to commit suicide by gas; when landlord later flicked light switch, spark ignited gas; building blew up, killing landlord's wife; no issue of mental state vis à vis death considered in discussing conviction for second degree manslaughter); People v. Vizzini, 78 Misc. 2d 1040, 359

2. *Provocation*.

The role of broad and narrow views of the defendant is explicit in provocation doctrine. In many jurisdictions, an intentional homicide is punished less severely if the defendant was reasonably provoked; the grade of the crime may be reduced to manslaughter.[109] The problem, as courts[110] and commentators[111] recognize, is that there exists no convincing interpretation of reasonable provocation. The *ordinary* man would *never* be provoked to take another life by jibes, assaults, or even the bad fortune of discovering adultery in progress.[112] So when we say that a defendant was reasonably provoked to kill, we *cannot* mean that the defendant's conduct was typical of people in similar situations.[113] Nor does the narrowest view of reasonableness acceptably define provocation: Someone just like the defendant, with all his fears, foibles, and disabilities, would *obviously* be provoked to kill under the same pressures he faced, because that someone just *did*.

Courts include or exclude certain traits of the defendant in the profile of the typical individual to whom the defendant's conduct is to be compared. For instance, a court may say that it is irrelevant that a particular defendant is generally impotent in assessing whether a prostitute's taunts on the subject are reasonable provok-

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N.Y.S.2d 143 (1974) (firefighter union leaders who deliberately falsified a strike vote charged with reckless endangerment for calling a walkout; court sustained conviction though the proof of mental state on reckless endangerment, as opposed to coercion charge inherent in distorting strike vote, seems rather threadbare).

109. *See, e.g.*, MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft 1962): "Criminal homicide constitutes manslaughter when . . . a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." *Accord*, DEL. CODE ANN. tit. 11, §§ 632, 641 (1979); MINN. STAT. ANN. § 609.20 (West 1964); N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1975); UTAH CODE ANN. § 76-5-205 (1978).

110. *See, e.g.*, Bedder v. Director of Public Prosecutions, [1954] 1 W.L.R. 1119 (H.L.) (impotent defendant insulted by prostitute's taunts is not reasonably provoked if his reaction is typical only of impotent men).

111. *See, e.g.*, G. FLETCHER, *supra* note 1, § 4.2.1, at 247.

112. *See* Williams, *Provocation and the Reasonable Man*, 1954 CRIM. L. REV. 740, 751–52.

113. We *might* mean that the typical person would be *more likely* to kill. *See, e.g.*, G. FLETCHER, *supra* note 1, 4.2.1, at 248; Wechsler & Michael, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1281–82 (1937) ("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 . . . the less does [the actor's] succumbing serve to differentiate his character from theirs."). But this formula still evades the categorization problem: When assessing the *situation* the average person "faces," are elements of the particular person's character part of a *quasi-external situation* or not?

ing;[114] commentators respond that the defendant's reaction ought to be compared to the reasonable impotent man's.[115] Presumably, everyone tries to exclude from his vision of the typical man to whom the defendant is to be compared all the narrow-focused traits the defendant has that the criminal law is designed to alter—hotheadedness, hypersensitivity, proclivity toward violence—but this line ultimately collapses. Of course the criminal code is not trying to deter or to blame impotence itself. But if the impotent as a group pose a menace because impotence is associated with hypersensitivity, if they are prone to violence when confronted by situations that routinely confront people, it is not clear why we would want to exculpate them. Ultimately, the real battle here is between our asserted determinist (excusing) notions of impotence and our intentionalist (inculpatory) models of hotheadedness. Unconscious interpretive construction avoids this more openly political battle: As we take a broader, more categorical view of the typical provoked defendant, fewer and fewer defendants appear to have acted reasonably.

3. *The omission/commission problem.*

Broad and narrow views of intent, along with disjoined and unified accounts of incidents, are unconsciously employed in trying to solve the omission/commission problems in the criminal law. Since the criminal law requires that the defendant perform some voluntary act, a common issue is whether the defendant has commmitted some act or simply failed to act. Unless the defendant has a duty to act,[116] an omission is not culpable. Of course, the line between omissions and commissions is blurry. There is considerable circularity in claiming that a defendant can be culpable only if he has committed an act, when we often describe an event in active conduct terms rather than passively if we have already (somehow) determined that the party is culpable. For instance, a parent who *does not feed* a child may readily be said to *starve* the child—to commit an act—while a stranger would

114. *See* Bedder v. Director of Public Prosecutions, [1954] 1 W.L.R. 1119 (H.L.). *But cf.* Regina v. Raney, 29 Crim. App. 14 (1942) (provocation inherent in knocking out the crutch of a one-legged man judged by the reaction of one-legged men to the incident).

115. *See, e.g.*, G. FLETCHER, *supra* note 1, § 4.2.1, at 248-49.

116. *See* Jones v. United States, 308 F.2d 307 (D.C. Cir. 1962) ("There are at least four situations in which the failure to act may constitute breach of a legal duty. One can be held criminally liable: first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.") (footnotes omitted).

be said to *fail to feed*—a passive nonact.[117]

Consider the following case. Defendant, a skid row grocer, routinely sells wood alcohol to chronic alcoholics, knowing that they drink it with only moderate ill effects. One day, he switches the brand of wood alcohol at his store to a brand with higher alcohol contents; he is perhaps knowing, perhaps reckless, perhaps negligent as to the fact that they will die if they drink it. The bottles, though, contain warning labels which the chronic alcoholics could, at least in theory, read.

If we view this as an omissions case, a case in which the defendant "failed to warn," it is probable that defendant will not have the actus reus for homicide, since there is no "duty to warn." The legal deduction from the interpreted facts is orderly and rather clear-cut. On the other hand, if we conceive of this as a *poisoning* case, then we are more likely to inculpate the defendant.

Of course, nearly *every* poisoning case can be interpreted in an omissions mode (depending on both the time-framing characterization and the breadth of focus). At some point in time after a victim is likely to ingest a poisonous substance, the defendant merely "fails to warn" the victim. Failing to warn is *temporally* most proximate to the death. Generally, though, we treat the *earlier* placing of the poison as the more morally relevant act. The grocer, however, is not traditionally held culpable for this earlier act, because it seems to resemble a "routine" commercial act, placing an item out for sale. But we now see the unwarranted interpretive construction. If we focus broadly on the grocer's act—as an instance of the broad category of routine commercial activities by grocers—it seems unexceptionable. Coupling this broad view of the defendant's conduct with a time-dissociated or -disjoined view of the poisoning incident, we have a routine sale followed by a morally but not legally culpable failure to warn. If, on the other hand, we focus more narrowly on *this* grocer's acts in *these* particular circumstances—making more toxic wood alcohol available to an unusual group of customers who are likely to ingest the wood alcohol—and then interpret that sale plus the subsequent failure to warn as comprising the typical mode of a single unified poisoning incident (secretly making poison available for ingestion),

117. G. FLETCHER, *supra* note 1, § 8.2.3, at 601–02 recognizes this point. Fletcher uses the active verb form to determine the proper legal results, though the general verb form may simply reflect probabilistic assumptions about how events usually happen. For example, if *generally* speaking, strangers *allow to drown* rather than *drown*, we may use the passive verb form as a matter of supposition even when blame is more reasonable in the particular case.

the defendant appears more culpable.[118]

The interpretive construction is more entrenched in the commonly debated omissions case of the easily saved drowning child.[119] Whether the would-be defendant who stands nearby is characterized as "failing to rescue" or as "drowning" the child is again interpretive. The active verb-form ("drowning") is a more plausible description of the scene if we think of the defendant in his precise circumstances—near the child, viewing the child—than if we think of him simply as an *instance* of all of mankind unrelated to the child. When opponents of liability in the drowning case speak of the inability to fully discharge a duty to save,[120] they are unconsciously seeing the defendant in his broadest terms—as a member of the broad class of mankind responsible for seeking out whatever drowning victims they can find—rather than as the particular person at the scene of the drowning.

Similarly, applying the ordinary or categorical mental state to the particular defendant may cause confusion. In typical "omissions" cases, the defendant does not deliberately seek the proscribed result; we are unlikely to use active commission verbs unless our standard case is one of purpose. If, for instance, someone who stands by while a child drowns has said to a parent, "I'll watch your kid swim while you're away" *in order* to ensure that the kid dies, we would be prone to call this an intentional killing, not an intentional failure to save. Presumably, mens rea requirements can account for a particular defendant's culpability; it is unnecessary to find the absence of an actus reus[121] because most "similarly situated" persons would lack the

118. Fletcher may acknowledge this, *id.* at 602, but I sense he views these cases as more extraordinary than I am suggesting.

119. *See, e.g.*, J. HALL, *supra* note 1, at 210; Dawson, Negotiorum Gestio: *The Altruistic Intermeddler*, 74 HARV. L. REV. 1073, 1101-08 (1961).

120. *See, e.g.*, Kleinig, *Good Samaritanism*, 5 PHIL. & PUB. AFF. 381 (1976); Trammel, *Tooley's Moral Symmetry Principle*, 5 PHIL. & PUB. AFF. 305 (1976). For a response somewhat parallel to the one presented here, see Broot, *Dischargeability, Optionality, and the Duty to Save Lives*, 8 PHIL. & PUB. AFF. 194 (1979).

121. Fletcher actually does argue that whether a particular defendant has actively killed ought to be answered on the basis of our suppositions about whether most people who do the physical deeds that the defendant did are killers. The *typical* failure to render aid does not constitute a primary form of harm. This explains, I believe, the *intuitive oddity* of "intending" a particular result by failure to intervene. I agree with Fletcher wholeheartedly, but I draw from his observation the conclusion that intuitions and common verbal practices, grounded as they are in generalizations that fit particular circumstances poorly, are a most untrustworthy basis for stable, ultimately legitimated argument. Making people recognize that they are simply falling back on a probabilistic—but not especially applicable—supposition is a standard way of unsettling their sense of making reflective "rational decisions" of the sort that rationalist legal systems are supposed to make.

mens rea requisite for conviction.

Drowning incidents, like poisoning incidents, are arguably divisible: In the standard active case, we focus on the act of putting the victim in peril, of shoving him in the water, and let the failure to rescue, the more temporally immediate cause of death, fade from the picture. The categorical focus suppresses the relevance of failing to rescue.

The political debate over omissions duties is sufficiently familiar that I need only mention the underlying significance of the interpretive battle. At the level of criminal justice system results, members of the dominant classes are not particularly threatened by inevitably circumscribed charges of failing to discharge positive duties, though these charges would likely be more randomly distributed across class than most charges. At the ideological level, though, the sense of blamelessness and self-righteousness one can feel in the face of the correctable suffering of others is buttressed forcefully by drawing a rigid distinction between acts and nonacts. Once more, the association between blame and *disruption*, critical to conservative dominance, is solidified: One cannot be a criminal actor when one simply lets things go on as they are, regardless of the consequences.

4. *An analogue: causation.*

Just as unconscious shifts in viewing the defendant affect substantive results, so do shifts between broad and narrow views of causation. Here is a standard causation problem: The defendant hits the victim on the head and the victim ultimately dies. Homicide requires not just the actus reus and mens rea, but a harm; the blameworthy blow must cause the death. Assume that this particular victim does not die on the spot but on the trip to the hospital in an ambulance.

The defendant is not culpable unless he is both a "but-for" cause and a culpable "proximate" cause of the death.[122] Clearly, the defendant is the but-for cause of death, since the victim would not have been in the ambulance but for the blow. But is the defendant the proximate cause? Ignoring the circularity of traditional *definitions* of

122. "With crimes so defined as to require not merely conduct but also a specified result of conduct, the defendant's conduct must be the 'legal' or 'proximate' cause . . . . [I]t must be determined that the defendant's conduct was the cause in fact of the result [and] . . . that any variation between the result intended . . . or hazarded . . . and the result actually achieved is not so extraordinary that it would be unfair to hold the defendant responsible for the actual result." W. LAFAVE & A. SCOTT, *supra* note 1, § 35, at 246. *See also* their discussion of doctrinal issues and cases in causation, *id.* § 35, at 246–51.

proximate cause,[123] the interpretive problem is that everything looks accidental when looked at too particularly. Moreover, there is no defensible scheme for aggregating "similar" events. For instance, assume that there is a 50% chance, ex ante, that the victim will die if hit. This 50% chance is, of course, a sum of many different possibilities. For our purposes, a few possible categories will be sufficient: There is a 49% chance of dying on the spot or after responsible ambulance and hospital care, a 0.8% chance of dying as a result of hospital negligence, a 0.1% chance of dying as a result of malicious care in the hospital or ambulance, and a 0.1% chance of the ambulance having a fatal crash.

Of course, from the broadest perspective *none* of these deaths is *accidental*, in that hitting foreseeably leads to death. But is the broadest category appropriate? What if the victim dies in an ambulance crash, and ambulances crash no more often than do other vehicles? Presumably, at least if we break off that mode of death as a relevant category, the defendant will not be culpable.[124] But do we subcategorize further? Assume that ambulances are more dangerous than normal vehicles because they speed and run lights. What if the defendant is killed in an ambulance crash that is not of the sort that makes ambulances more dangerous than other vehicles—for example, what if the ambulance is rear-ended while peacefully stopped in the hospital driveway, not sideswiped as it dashes through an intersection?

Legal systems devise a number of aggregating and disaggregating presumptions. For instance, when someone dies after a blow to the head, it is insignificant which vein burst or where the clot was. Each of these *forms* of death will be aggregated so that they are deemed predictable and nonaccidental. On the other hand, the condition of the victim, though it may dramatically affect the chances of death and is thus causally related, is never treated as relevant in deciding whether a particular death is accidental. A victim in bad shape will be implicitly disaggregated, precipitated out from the class of victims

123. The Model Penal Code states that a defendant is deemed to cause a result that is "not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability." MODEL PENAL CODE § 2.03(2)(b) (Proposed Official Draft 1962) (brackets in original).

124. In the analogous area of torts, "coincidence" cases do not give rise to liability. *See, e.g.*, Berry v. Borough of Sugar Notch, 191 Pa. 345, 43 A. 240 (1899) (no liability when streetcar, traveling at excessive speed along route, gets hit by falling tree; negligent conduct must increase the probability of the harm that occurred, in order to cause it). *See also* Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. LEGAL STUDIES 463 (1980).

in general, so that the death appears nonaccidental.[125]

But conventional aggregating devices are incomplete—I have no idea how our legal culture would deal with the ambulance accident cases—and arbitrary. It is not simply that the typical proximate cause standard is circular.[126] The more serious concern is that even less subjectively stated standards for "improbable" or "accidental" are meaningless in the absence of nondefensible interpretations of the breadth of focus of the "category" of the event whose probability is to be ascertained.

III. Conscious Interpretive Constructs

Conscious interpretive constructs, like the unconscious ones, operate to avoid fundamental political problems. This part applies the two conscious constructs to the substantive criminal law.

A. *Intentionalism and Determinism*

Anglo-American courts and commentators assert that our criminal justice system is based on the supposition of "free will" or intentionalistic conduct.[127] Of course, though, in a number of areas we allow determinist excusing conceptions of the defendant to be considered. This residual determinism negates the simplest claims justifying the generally asserted intentionalism, *i.e.*, that a determinist discourse is somehow technically infeasible or methodologically inapplicable to legal contexts. The standard methodological objections to a more general determinism are twofold: first, a simple skepticism about the *necessity* of any effect following from any cause, and second, a distrust of our capacity to account for the roots of particular decisions that explain the *precise* conduct that the actor ultimately engaged in. Yet, these objections apply as well to the uses of determinism that we do tolerate.

125. Was it predictable that "a person" would die if tapped? Was it predictable that a hemophiliac would die if tapped? Do we judge probability by referring to the broader group of human beings of whom hemophiliacs are instances, or narrow the focus? If we interpret broadly, we are prone to say, "Hemophilia caused the death"; if the latter, "the defendant caused it."

126. The logic says a defendant must cause a harm to be justly punished, and a defendant causes a harm when it is not so accidental as to make it unjust to punish him.

127. *See, e.g.*, Heller, *supra* note 2, at 237.

1. *Apparent determinism: duress, subjective entrapment, and provocation.*

Ordinarily, we judge criminal liability at the moment the crime occurs. A defendant is guilty if he performs a harmful act in a blameworthy fashion. The origin of a decision to act criminally is ordinarily of no concern.[128]

At times, though, we open the time frame to look at earlier events in the defendant's experience and construct deterministic accounts of the intentional wrongdoing. For instance, a defendant may perjure himself after being threatened.[129] At the moment the defendant is perjuring himself, he is intentionally telling a lie. But the decision to lie under duress may seem normal, expectable, and therefore blameless.

Duress. Some decisions seem explicable, the result of background pressures that rendered the defendant less deterrable or less blameworthy. The duress defense represents a severe threat to ordinary criminal law discourse and is strictly *confined*, in terms of both time and the pressures that may influence the reasonable defendant.[130] For the most part, we accept only discrete incidents as forming the basis of a duress plea, and we demand that these incidents occur close in time to the arguably criminal incident.[131] Furthermore, the pressures must be attributable to a single human agent or group of agents that focuses his or their efforts on inducing the defendant to commit the crime.[132] This second restriction maintains the illusion of an intentionalist discourse, but the relevant will is now that of the *source* of the duress, not that of the defendant. Of course, though, from the vantage point of the defendant on trial, we have shifted to a determinist mode. What is odd is that the "substitution of wills" meta-

128. *See, e.g.*, G. WILLIAMS, *supra* note 1, § 21.

129. Regina v. Hudson, [1971] 2 Q.B. 202 (C.A.).

130. For an expression of anxiety about this defense, see, *e.g.*, G. FLETCHER, *supra* note 1, § 10.3.1, at 801 ("It goes without saying that a person's life experience may shape his character. Yet if we excuse on the ground of prolonged social deprivation, the theory of excuses would begin to absorb the entire criminal law. . . . Now it may be the case that all human conduct is compelled by circumstances; but if it is, we should have to abandon the whole process of blame and punishment. . . .").

131. Duress is predicated only on imminent and specific threats, generally of death or severe bodily injury. *See, e.g.*, D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952); Nall v. Commonwealth, 208 Ky. 700 (1925); Regina v. Hudson, [1971] 2 Q.B. 202 (C.A.); GA. CODE ANN. § 26-906 (1977).

132. *See, e.g.*, People v. Richards, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1st Dist. 1969) (no defense of duress available when parties threatening prisoner's life did not ask him to escape).

phor implies that the defendant is acting involuntarily, or at least without exercising normal rational facilities, when he commits the crime. In fact, his conduct may be as voluntary and sensible as any behavior we can imagine, given the background conditions. The defendant is not rendered will-less; it is simply that the *content* of the expressions of his will, in the typically relevant broader time perspective we are suddenly using, is deemed to be determined.[133]

Subjective entrapment. Courts use the same deterministic account of the origin of an intentional decision when they acquit a defendant entrapped by government action because he is not predisposed to commit the crime.[134] While an objective entrapment standard may be grounded in a desire to deter undesirable government activity,[135] a subjective standard is based on the notion that, at least in certain cases, it is unsurprising, reasonable, and therefore blameless that someone solicited by a government agent would commit crimes. Defendant's conduct is deemed determined by the agent: The defendant would not have committed the crime had the agent never come along with the plan. Of course, we could give equally persuasive deterministic accounts of other pressures that cause crime, but somehow we do not. For instance, we ignore a history of a pestering private party continually urging some crime.[136] While this distinction in treatment may reflect as much the impact of the objective theories of entrapment as it does the force of a determinist discourse

133. For a parallel, but more political discussion of duress, in the context of assessing the "voluntariness" of ordinary contractual relationships, see Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 606 (1943) (noting that many unfortunate choices are willed and reasonable, given the background conditions which people impose on one another).

134. *See* United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932). In a "subjective" entrapment case, the defendant is exculpated if he was not predisposed to commit the crime the government agent procured or planned. Subjective entrapment functions like excuse in that the actor admits he has done culpable acts but pleads that the circumstances render him less blameworthy, not because they justify the acts but because they do not demonstrate his ordinary character.

135. The objective view, typified by State v. Mullen, 216 N.W.2d 375 (Iowa 1974), focuses on curbing improper law enforcement techniques. The objective test asks whether the government agent has taken steps which would ensnare persons who would not ordinarily commit crimes, not whether the particular defendant would have committed the crime. *See, e.g.*, Sorrels v. United States, 287 U.S. 435, 457 (1932) (Roberts, J., concurring) (courts should refuse to convict persons when government agent is excessively zealous in creating criminality for the purpose of obtaining a defendant).

136. *See, e.g.*, Henderson v. United States, 237 F.2d 169, 175 (5th Cir. 1956) ("Well settled, of course, it is that the doctrine of entrapment does not extend to acts of inducement on the part of a private citizen who is not an officer of the law.").

in these cases, in any nominally subjectivist jurisdiction, we do have to face the fact that we see the appearance of a purportedly anomalous determinism.

Provocation. Provocation, though not a complete excuse to assault crimes, also uses determinism to minimize culpability. Instead of looking just at the moment of, say, an intentional homicide, we look back to the homicide's roots.[137] If we feel that the decision to kill is grounded in some earlier incident[138] that makes homicides unusually likely, that excites the passion of some reasonable man,[139] then we partially excuse.

Any attempt to account rationally for the *restriction* of determinist discourse to these excuses seems doomed. Fletcher's account, as usual, is the most sophisticated. He makes two different arguments to distinguish the presently accepted deterministic excuses from a defense of "harsh background circumstances." First, he argues that an excuse is appropriate when and only when the conduct the defendant engages in is rooted in atypical circumstances that do not permit us to infer a blameworthy character.[140] He further argues that a retributionist punishes because he is certain that the actor's character is bad, but the principle of legality precludes a *generalized* inquiry into character and forces the retributionist to judge character solely on the basis of a single incident.[141] Finally, he says that when looking at *any* incident, we can determine whether it is attributable to "the actor's character" or to "the circumstances that overwhelmed his ca-

137. For a traditional list of *past* events that may *cause* people to be abnormally likely to kill (*e.g.*, combat, assault, illegal arrest, discovery of adultery), see W. LAFAVE & A. SCOTT, *supra* note 1, § 76, at 574–77.

138. Again, we demand that the incident not be temporally too separate from the crime, for fear that provocation will expand into a general determinist category. *See, e.g.*, Sheppard v. State, 243 Ala. 498, 10 So. 2d 822 (1942) (adultery discovered several days before murder not legally cognizable provocation).

139. Nearly all murderers are abnormally *angry*; presumably we could, if we wished, trace the roots of the anger. This possibility provides a particularly wide-ranging threat to ordinary criminal law discourse where, as in MODEL PENAL CODE § 2.01(3) (Tent. Draft No. 9, 1959), the defendant may be partially exculpated when he kills someone who is not himself the *source* of the provocation. *But cf.* Dow v. State, 77 Ark, 464, 92 S.W. 28 (1906) (killing nonprovoking bystander while in a reasonable rage at a provoker held to be murder). Long-term provocation claims are generally noncognizable, even when the victim is the source of the provocation. *See, e.g.*, Sheppard v. State, 243 Ala. 498, 10 So. 2d 822 (1942). *But cf.* People v. Berry, 18 Cal. 3d 509, 556 P.2d 777, 134 Cal. Rptr. 415 (1976) (recognizing that two-week period when victim alternately taunted defendant and sexually excited him could amount to provoking event).

140. G. FLETCHER, *supra* note 1, § 10.3.1, at 800–01.

141. *Id.*

pacity for choice." Fletcher stresses the either/or nature of that attribution question, noting that the broad determinist argument that background conditions of deprivation are excusing circumstances interweaves the two sorts of arguments.[142]

His argument, however, is circular. If we hypothesize that people have "true" characters outside the fortuitous circumstances in which they live, we should at least search for a full determinist account. The behavior of the former battered child tells us nothing of the defendant's "true character," just as the behavior of the coerced, threatened thief tells us nothing of his "real nature." And, if character is nothing but a summary of *actual* behavior given *actual* life circumstances, then it is part of a defendant's "character" that he "is" a killer if he has, given the pressures he has faced, killed.

Ultimately, Fletcher relies on ordinary-language blaming conventions to rescue him. He argues that our culture assumes people are generally accountable for what they do.[143] But these conventions are particularly suspect when the people administering our criminal justice systems, who know they will never (because they already have not had to) face the pressures of a truly bleak social background, but who are as likely as anyone to encounter short-run incidental pressures that are legally recognized as excuses, blame those who have faced long-term background pressures.[144] To note that there *are* conventions for blaming says *nothing* about the universal acceptability of applying the general practice of blaming to particular cases. The

142. *Id.*

143. He argues: "The arguments against excusing too many wrongdoers are both moral and institutional. The moral or philosophical argument is addressed to the problem of determinism and responsibility in the standard cases of wrongdoing. It is difficult to resolve this issue except by noting that we all blame and criticize others, and in turn subject ourselves to blame and criticism, on the assumption of responsibility for our conduct. In order to defend the criminal law against the determinist critique, we need not introduce freighted terms like 'freedom of the will.' Nor need we 'posit' freedom as though we were developing a geometric system on the basis of axioms. The point is simply that the criminal law should express the way we live. Our culture is built on the assumption that, absent valid claims of excuse, we are accountable for what we do. If that cultural presupposition should someday prove to be empirically false, there will be far more radical changes in our way of life than those expressed in the criminal law." *Id.* § 10.3.1, at 801–02.

144. Take the following loose analogy: A large social group is setting up a massive health insurance, risk-pooling plan. Should treating hemophilia be included? Since hemophilia is a purely hereditary ailment, everyone will know whether he faces high bills for the disease. Purely selfish insurance purchasers will exclude the disease from coverage. If the defense of duress is "insurance" against being blamed or incarcerated, the dominant social group will exclude "long-term pressures" as a covered syndrome since they already know they will not be afflicted.

supposedly exacting legal method, which purportedly tells us when to explain and excuse and when to condemn, ends up as nothing more than the proud assertion of complacency. It asserts no more than that "our culture" (*whose* culture?) holds certain people accountable because that's what we have always done.

Second, Fletcher argues that the traditionally excused acts are in some significant sense "involuntary," while acts that might be more broadly determined remain "voluntary."[145] While the argument is far less lucid than the usual arguments in Fletcher's work, I take him to mean that those acts usually excused are determined or involuntary at the particular level. Fletcher seems to agree that acts performed by the "generally pressured" defendant may be morally involuntary, but he thinks the particulars of the crime are more freely chosen than in the traditional duress case.[146] This view of Fletcher's interpretive construct is supported by a statement in his earlier "inference to character" attack on full-blown determinism: "The moral circumstances of an actor's life may account for some of his dispositions, but explaining a life of crime cannot excuse particular acts unless we wish to give up the entire institution of blame and punishment."[147] But Fletcher's choice of a narrow act-oriented, rather than categorical, focus in refuting the general determinist plea cannot be explained. As always, the level of aggregation is flexible. If a traditionally coercive source of duress orders you to steal him some food, it hardly matters that he leaves you a choice as to which store to rob or when to rob it. Similarly, if one is under unusual long-term pressures to commit crimes, it may not matter much that the precise nature of the crimes committed is unknown and "intended."

2. *Apparent determinism: insanity and diminished capacity.*

The insanity "defense" is best understood as the portion of the trial that determines whether to incarcerate the defendant in a prison

145. He states: "Another way to approach the rationale of excusing conditions is to start with the premise that law should punish only in cases of voluntary wrongdoing. Excuses arise in cases in which the actor's freedom of choice is constricted. His conduct is not strictly involuntary as if he suffered a seizure or if someone pushed his knife-holding hand down on the victim's throat. In these cases, there is no act at all, no wrongdoing and therefore no need for an excuse. The notion of involuntariness at play is what we should call moral or normative involuntariness. Were it not for the external pressure, the actor would not have performed the deed. In Aristotle's words, he 'would not choose any such act in itself.'" G. FLETCHER, *supra* note 1, § 10.3.2, at 802–03.

146. *See id.*

147. *Id.*

or a mental institution.[148] But for a variety of both practical[149] and "theoretical"[150] reasons, it is seen as a genuine defense. Certainly, diminished capacity constitutes a partially exculpatory defense.[151]

Along with the defense of infancy, the insanity defense is determinism's most obvious domain in the criminal law. Without speculating on the cultural history of this particular determinism, I wish to note two things. First, the hegemonic power of medical models and "hard science" in our culture made insanity as a disease appear more concrete, more thing-like than other explained forms of deviance.[152] Second, and more interesting, I share Katz's sense that the criminal justice system must distinguish between two classes of defendants who might, in a nonlegal context, seem equally "crazy." The legal system will dismiss as insane those defendants who, while acting in a fashion we deem "medically explicable," *reinforce* our abstract social practices. Other defendants, equally "explicable" in their actions, may be disorientingly deviant, may implicitly *attack* our abstract social practices, and these defendants will not be dismissed, but actively suppressed, corrected and put away.[153]

Compare the following hypotheticals. Defendant A (a classically legally insane person) says, "I killed the victim because I thought he was a snake, about to attack me." This delusion is nondisorienting at the abstract level; the defendant's implicit rule structure is socially acceptable. (Once we perceive objects as snakes, we too shoot them.)

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148. *See, e.g., id.* § 10.4.4, at 835.

149. A defendant "acquitted" by reason of insanity is held involuntarily in a facility. But the party may not be civilly committed or held in a treatment facility once he is "cured," regardless of whether he has been detained as long as he would have been had he been convicted and incarcerated in a prison. *See, e.g.*, Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968).

150. *See, e.g.*, H. PACKER, *supra* note 1, at 132 ("Let us . . . assume . . . that . . . a verdict [of not guilty by reason of insanity] . . . operates to deprive the person of liberty through confinement in an institution . . . in most respects very like a prison . . . . We must [still] put up with the bother of the insanity defense because to exclude it is to deprive the criminal law of its chief paradigm of free will.").

151. *See, e.g.*, People v. Conley, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966) (diminished capacity, an inability to comprehend one's duty to govern one's actions under duty imposed by law, negates possibility of finding malice requisite to conviction for either first or second degree murder).

152. *See, e.g.*, J. HALL, *supra* note 1, at 449–54, 466–72 (criticizing the extension of psychiatric defenses because psychiatrists are inadequately scientific). "The problem of mental disease and criminal responsibility has, therefore, the appearance of utter simplicity. It is merely a matter of finding out which harm-doers had a serious mental disease at the legally relevant time, and the experts in that kind of disease are psychiatrists. . . . It happens, however, that a very large number, perhaps half, of the practicing psychiatrists in this country are not doctors of medicine . . . ." *Id.* at 449.

153. A. Katz, Studies in Boundary Theory, *supra* note 105, at 44–46.

Defendant B (a disorienting deviant) says, "I killed the victim because he is an exploitative pig who deserves to die." While in the culture's ordinary discourse, desert *is rooted in* the law—people deserve punishment if they violate the law, people deserve to own property the law says they are entitled to—disorienting deviants root the law in their own concept of desert. For the society in general, law is the universal, applied in particular cases to determine desert. The disorienting deviant is disorienting precisely because his own sense of desert is the universal; law is just a particular application.

A more general, medically based determinism does not enable us to screen out and condemn disorienting deviants. Concerning the insanity defense, it is imporant to realize that we only occasionally decide to listen to the doctors' accounts of personality. If we were to admit the possibility of a more general determinism, doctors might well be glad to describe the psychic roots of all harm-causing behavior. We could not make any good arguments, in terms of the explanatory capabilities of psychiatrists, to restrict the occasions on which we would listen to their descriptions to those occasions on which a defendant's atypical thought and moral structure is nondisorienting. But rather than make difficult explicit political arguments that we must condemn the disorienting deviant, whether he is psychologically explicable or not, we fall back on the pseudo-methodological claim that we are simply applying the usual rule that determinist discourse is unavailable.[154]

3. *Obscured determinism: abandonment.*

Defendants will not be exculpated for voluntary abandonment of a criminal attempt if the purported *cause* of their abandonment is either fear of apprehension or some other cause that permits the fact-finder to infer that the defendant is merely postponing the criminal act.[155] For instance, in *Le Barron v. State*,[156] a defendant was found

154. The prototypical defendant excused for duress is likewise exculpated because his deviant acts are nondisorienting. The acts represent the kind of response that some (dominant) "we" would make to the pressures of some "they." The general determinist's duress plea is unacceptable because it disorientingly switches "we's" with "they's": "We" (who profess at least some sort of control over the social world) become a "they"—a source of horror—while "they"—the supposed source of horror—simply have typical, unexceptionable reactions to our unwarranted intrusions on their "real" characters.

155. *See* MODEL PENAL CODE § 5.01(4) (Proposed Official Draft 1962) ("Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.").

156. 32 Wis. 2d 294, 145 N.W.2d 79 (1966).

guilty of attempted rape when he abandoned the crime only after the victim informed him she was pregnant. The state's attempt statute inculpated when a crime was not completed as a result of "the intervention of another person or some other extraneous factor."[157]

The need to use a supposedly anomalous determinist discourse in this area is acute. Just as we ordinarily do not blame people for criminal acts that are determined and understood, we do not give credit for "undoing" criminal acts when the "undoing" is determined and understood. In *Le Barron*, the unstated notion must be that "any rapist" facing the situation the particular defendant faced—a pregnant victim—would have desisted (or at least that desistance is atypically probable in such a case). The abandonment provides no assurance that our initial sense of the party's culpability (revealed by the acts constituting an attempt) has been contradicted by subsequent desistance. The defendant in *Le Barron* argued that failing to consummate the crime was internal, not due to an "extraneous factor";[158] the court's assumption that the failure was a feature of the external fact situation, analogous to a physical impediment to completion of the crime, is nothing more than a determinist assertion.[159]

One view of the question is whether the abandonment was purely *particular*—the defendant may have abandoned only this specific incident—or a more *categorical* renunciation of the crime. We exculpate only if we believe that the defendant has renounced the categorical activity, yet all we ever know for sure is that he has abandoned the incident. A determinist account of the abandonment supports a particularistic view of the renunciation by breaking ordinary inference links between instance and category. (Abandoning *this* rape is not abandoning rape, because this rape has special features that make us think of it as especially "abandonable" and make it atypical of the broader category of rapes.) But the original "decision" to use the generally scorned determinist accounts is essentially unjustified or unconsciously asserted.

For instance, the "decision" to employ deterministic discourse might conceivably arise from the high probability of certain effects following certain causes. But I see no reason to assume that *most* would-be rapists desist when their victims are pregnant. Alterna-

157. WIS. STAT. ANN. § 939.32(2) (West 1958).

158. 32 Wis. 2d at 298, 145 N.W.2d at 81.

159. The court analogized the failure to consummate the harm in *Le Barron* to the failure of a defendant to consummate a killing because the pistol the defendant used was unloaded. 32 Wis. 2d at 300, 145 N.W.2d at 82 (citing State v. Danns, 9 Wis. 2d 183, 100 N.W.2d 592 (1960)).

tively, the decision may be based on a supposition that the defendant remains "dangerous" because the *typical* victim does not have the traits of the *spared* victim. Thus, a defendant desisting after a woman explains the special rage, vulnerability, and humiliation she will feel after being raped would deserve no "credit" for a *voluntary* renunciation, since the typical victim probably does not try to talk to her attacker. It is silly to talk about being sure beyond a reasonable doubt that one person is simply postponing or transferring a categorical criminal intention once he has stopped manifesting the particularized criminal intention on any occasion, while also talking with assurance about another person internally and voluntarily renouncing a criminal plan. All renunciations are accomplished in unique fact settings that may not recur. Shifting between determinist and intentionalist discourse is needed to make this sort of argument even vaguely plausible.

4. *Obscured determinism: negligent crimes.*

While many commentators sympathize with predicating liability on negligent behavior,[160] many do not.[161] Opponents of negligence culpability claim that: (a) negligent acts cannot be deterred because they are, by definition, acts that the perpetrator has not focused on; and (b) negligent acts are not blameworthy, from a retributionist viewpoint, because they are not willed. The remarks of Glanville Williams are typical:

> [T]he deterrent theory . . . finds itself in some difficulty when applied to negligence. . . . [T]he threat of punishment must pass [the negligent person] by, because he does not realize that it is addressed to him.
>
> 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*. *Some people are born feckless, clumsy, thoughtless, inattentive, irresponsible*, with a bad memory and a slow "reaction time."[162]

The first argument—that negligent crimes cannot be deterred—is sensible only if we insist on taking a narrow time frame. One may be unaware of one's harmfulness at the moment one unleashes harmful forces, and yet still be aware of whether the course of conduct under-

160. *See, e.g.*, H.L.A. HART, *supra* note 1, at 136–57; Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401 (1971).

161. *See, e.g.*, G. WILLIAMS, *supra* note 1, § 43; Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632 (1963).

162. G. WILLIAMS, *supra* note 1, § 43, at 122–23 (emphasis added) (paragraphs in reverse order of original).

taken is more careful or less. Even Glanville Williams notes that "it is possible for punishment to bring about greater foresight, by causing the subject to stop and think before committing himself to a course of conduct."[163] One is more pensive when one knows one will be punished if one does not consider risks that others consider.

More interesting is Williams's seemingly unconscious use of a deterministic (and therefore excusing) discourse in describing the negligent person. In Williams's world, people are *born* careless or inattentive.[164] Presumably, this *same* discourse can be used in describing purposeful criminals: People are born vicious or are rendered malicious by environmental factors. Similarly, the intentionalist discourse generally used for crimes of purpose, knowledge, and recklessness could readily be applied to negligent crimes: We can suppose people choose an inadvertent or careless character as much as they choose an overtly hostile one. What is fascinating is that writers like Williams can so blithely dismiss deterministic accounts in general,[165] while adopting them wholeheartedly, without explanation, when it suits some particular program. Once more, the point is not the ultimate result, but the nonrationality of method in a purportedly rationalistic discourse.

B. *Rules versus Standards*

Conscious interpretive construction exists in the choice between rules and standards. At the philosophical level, the liberal state's commitment to a rule-like criminal law is pervasive and grandiose. Jerome Hall's comments are typical: "The principle of legality is in some ways the most fundamental of all the principles. . . . The essence of this principle of legality is limitation on penalization by the State's officials, effected by the prescription and application of specific rules."[166] Yet, in practice, limiting a legal system to mechanical application of rigidly defined rules is both practically unthinkable and substantively objectionable. We must explore the strong antirule tendency in a supposedly rule-worshipping legal culture.

1. *Preparation versus attempt.*

Courts and commentators alike have offered a variety of tests to

163. *Id.* § 43, at 123.

164. *Id.* § 43, at 122.

165. He notes, "Abandonment of the concept of legal responsibility . . . would omit the elements of justice . . . which are an indispensible part of our arrangements." *Id.* § 15, at 33.

166. J. HALL, *supra* note 1, at 25, 28.

distinguish between nonpunishable "mere preparation" and culpable "attempts" to commit crimes. The basic tension in defining this actus reus of attempting seems relatively straightforward. We punish attempts (despite the general absence of harm)[167] for two reasons: first, because the actor has manifested the same blameworthy disposition as any other criminal, the lack of harm is a fortuity outside his control;[168] second, because we wish to deter people from taking steps that ordinarily result in harm, and it may add significantly to deterrence to punish people even when they fail in their aim.[169] Of course, the failure to consummate the harm makes us doubt whether the actor had the malicious resolve of the typical effective offender. If the defendant is apprehended when we are still especially uncertain about the resoluteness of the criminal plan, we call the action "preparation."

My claim is that the tests *labeling* or *defining* attempts can easily be aligned along a continuum of rule-like to standard-like. That is, tests may be framed in terms that are mechanically applicable and categorical or in terms that are ad hoc. All these tests will seem unsatisfactory in precisely the way that *no* rule form or standard form of doctrine can *ever* be satisfactory.

Under the most rule-like test, an actor has not attempted a crime until he has taken the last possible step within his control to consummate the harm.[170] This test can be applied uniformly, without regard to the defendant's personal qualities. Moreover, it leaves maximum room for people to engage in not-yet-harmful conduct without state intrusion. Unfortunately, the test is obviously underinclusive—a defendant would be acquitted of attempting murder in a slow poisoning case until the last dose of a fatal series of doses was given; some significant crimes would be impossible to attempt—*e.g.*, rape and theft, where there is always some other act to be taken before the crime is complete. Moreover, a regime in which this test is

167. Some attempts cause an apprehension of harm when the would-be victim is aware that the attempt is being made, or they cause anxiety when the victim learns the attempt was made. *See, e.g.*, *id.* at 218.

168. *See, e.g.*, Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1519–21 (1974); MODEL PENAL CODE, § 5.01, Comment (Tent. Draft No. 10, 1960).

169. There may be people who would be willing to endure criminal punishment if they had the satisfaction of causing the harm they desired. Such persons would not be effectively deterred unless attempts were criminalized. *See* H.L.A. HART, *supra* note 1, at 129.

170. Rex v. Eagleton, 169 Eng. Rep. 766 (1855). The case test was definitively rejected in Rex v. White, [1910] 2 K.B. 124 (in a case of slow poisoning, the last dose of poison needed to kill need not be administered to constitute the offense of attempted murder).

employed will discourage the police from taking preventative action to stop crimes if they are afraid to "blow" convictions. Furthermore, this test enables people to plan their harmful conduct in a roundabout fashion so as to eliminate a major purpose of attempt law—it enables them to assure that they will either cause harm or go unpunished.[171] Finally, a rule-like attempt definition puts pressure on the broader legal regime to establish other rule-like preparatory crimes (*e.g.*, curfew violations, loitering) to permit early police intervention. Thus, to gain the *procedural* freedom inherent in the rule form—freedom from the arbitrariness of random state enforcement—the society may end up restricting *substantive* freedom. If the police cannot stop nighttime strollers who seem suspicious—because suspiciousness is too vague a standard—and if citizens deeply fear nighttime breakins, one solution is to ban *all* nighttime strolling. This would be a highly intrusive limit on substantive autonomy within a formally free and rule-like system.[172]

The second test is relatively rule-like: An action constitutes an attempt only if it is unequivocally directed towards the consummation of a crime.[173] Since this test focuses on how the act appears, without regard to the actor, the test is less likely to be prejudicially enforced against "criminal types." Of course, whether one can recognize when an act is unequivocally directed at harm without regard to one's belief about what the actor is likely to do next, a belief based on suppositions about the actor, not the act, is highly problematic. But if the test is taken seriously in its most rule-like sense, it is plausible that *no* conduct will be deemed unequivocally oriented towards the consummation of harm.[174] For instance, attempted rape would be impossible, since no acts prior to intercourse are unequivocally inconsistent with a design to molest rather than rape. But if the test is read as proscribing "acts unequivocally directed at harm under the circumstances for that person" it dissolves into the Model Penal Code

171. Fletcher recognizes the advantages and disadvantages of the tests. G. FLETCHER, *supra* note 1, §§ 3.3.1, 3.3.2.

172. *Cf.* Katz & Teitelbaum, *PINS Jurisdiction, The Vagueness Doctrine, and The Rule of Law*, 53 IND. L.J. 1 (1978) (noting that a command from the judge to the teen in need of supervision that is rule-like and consistent with procedural norms of freedom, like "obey *all* parental commands," restricts substantive autonomy more than a command that is a good deal vaguer and therefore less consistent with procedural norms of freedom, like "obey all *reasonable* commands").

173. The King v. Barker, [1924] N.Z.L.R. 865 (Ct. App.). Fletcher is fond of this test. G. FLETCHER, *supra* note 1, § 3.3.2, at 142–45.

174. *See* G. WILLIAMS, *supra* note 1, § 202, at 630 (noting that a man approaching a haystack with a lighted match may simply intend to light his pipe).

test,[175] with all the problems of a standard-like test.

The third test is moderately rule-like and moderately standard-like, with the faults or virtues of both. An act constitutes an attempt when it reveals a physical or dangerous proximity to the consummated harm[176] or if it would have resulted in the harm but for an unforeseen interruption.[177] If we read "proximity" as relating to how close we believe *that* actor was to causing harm, the test is as standard-like as the Model Penal Code test. If we read it in physical terms, it is as rule-like as the "last possible step" test. In applying the "unforeseen interruption" test the question is whether we are allowed to consider our belief about the particular defendant's propensity to desist. If we are, the test is like the Model Penal Code's. If we simply consider the natural physical circumstances of acts that are irretrievably done when judging whether harm would have occurred but for unusual circumstances, the test reverts once more to the "last possible step" test.

Under the Model Penal Code test, an act constitutes an attempt if it is strongly corroborative of the actor's criminal intention.[178] This test allows no roundabout schemes that are immune from attempt law. The police need not wait to intervene until danger rises in order to preserve a potential conviction.[179] People fortuitously interrupted before they have taken all the necessary steps to consummate the harm are not freed. On the other hand, when the fact-finder suspects the defendant is a "criminal sort" or is simply prejudiced against the defendant, acts consistent with both criminal and noncriminal plans are likely to be deemed corroborative of a criminal plan.[180] No one has clear notice about what is and is not permitted when the ultimate legal standard varies so much with the fact-finder's opinion.

Ultimately, I sense that no one is comfortable with any of these tests. An "argument" for one simply suppresses the terror of the rules/standards dilemma that faces any actor within our culture:[181]

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175. *See* notes 178–80 *infra* and accompanying text.

176. *See, e.g.*, Hyde v. United States, 225 U.S. 347, 387 (1912).

177. Commonwealth v. Peaslee, 177 Mass. 267, 59 N.E. 55 (1901) (opinion by Holmes, C.J.).

178. MODEL PENAL CODE § 5.01 (Proposed Official Draft 1962).

179. G. WILLIAMS, *supra* note 1, § 203, at 632, particularly emphasizes this point.

180. *E.g.*, activity described as "casing the joint" may be preparation for a larceny or a manifestation of curiosity about the way a neighborhood looks.

181. Reading the works in this field, *e.g.*, G. FLETCHER, *supra* note 1, §§ 3.3.1, 3.3.2; J. HALL, *supra* note 1, at 576–86; G. WILLIAMS, *supra* note 1, §§ 201–203; Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 585–611 (1961), one senses that the

The position ultimately settled on is simply a temporary assertion.

2. *Merger of conspiracy with the substantive crime.*

The rules/standards dilemma also arises in the issue of whether the crime of conspiracy is separate from the substantive crime that was the aim of the conspiracy. The primary practical import of this question is whether the sentences for a conspiracy and for the crime that was the object of the conspiracy can be tagged on to each other. The question is also significant when conspiracy penalties are set higher than those for the object crime.

One rule-like answer is that a conspiracy penalty should always be "tagged" to the penalty imposed for committing the crime that was the object of the conspiracy;[182] another rule-like answer is *never* to tag.[183] A standard-like answer, typified by the Model Penal Code, is that one should not tag "[w]hen a conspiracy is declared criminal because its object is a crime . . . [because] it is entirely meaningless to say that the preliminary combination is more dangerous than the forbidden consummation; the measure of its danger is the risk of such a culmination," but one should tag at other times because "the combination may and often does have criminal objectives that transcend any particular offenses that have been committed in pursuance of its goals."[184]

All of these solutions are profoundly unwarranted. The first rule-like solution, *i.e.*, always tag, is, as the Model Penal Code draftsmen point out, senselessly overinclusive. The supposed *purpose* of nonmerger doctrine[185] is presumably that many agreements establish dangerous groups, ongoing engines of social destruction.[186] But

problem is truly exasperating for each commentator, but that each sees the need to assert a solution. *But see* H. PACKER, *supra* note 1, at 100–02 (viewing all the tests as nonsensical, though viewing the effort to avoid punishing preparation as a significant antipreventive detention effort).

182. *See* Callanan v. United States, 364 U.S. 587, 593 (1961) ("The distinctiveness between a substantive offense and a conspiracy to commit is a postulate of our law.").

183. *See, e.g.*, WIS. STAT. ANN. § 939.72 (West 1958).

184. MODEL PENAL CODE § 5.03, Comment, at 99 (Tent. Draft No. 10, 1960). *See also id.* § 1.07(1)(b) (Proposed Official Draft 1962).

185. Nonmerger doctrine states that a conspiracy does not merge into the substantive crime that is the object of the conspiracy, but is punished separately. By way of contrast, attempted murder, which is inevitably factually present when someone murders, "merges" into a murder and is not punished on top of the murder, when the defendant succeeds in killing.

186. A typical statement of these dangers is in Callanan v. United States, 364 U.S. 587, 593–94 (1961): "Collective criminal agreement . . . presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the crimi-

many agreements do no such thing: Agreements, for instance, of a woman and her lover to kill an unwanted husband are typically focused on the single act and create no general "criminal organization."[187]

At the other extreme, the standard-like Model Penal Code solution is antithetical to ordinary notions of legality: The fact-finder decides, presumably on the basis of some gut feeling about the defendants, whether they were planning to do bad things they had not yet actually agreed to.[188] Arbitrariness and prejudice abound; the jury will clearly search for "criminal types."

The *second* rule-like solution, *i.e.*, never tag, avoids both the overinclusiveness of the first rule and the bigotry and uncertainty of the standard, but leaves all other aspects of conspiracy doctrine in muddled shape.[189] The reason conspirators are derivatively liable for acts they could not be said to aid and abet under traditional accomplice liability analysis[190] is that "joining" and thus "creating" a conspiracy is itself a dangerous and culpable act. The conspiracy, the reified "entity," aids and abets all its members; all those who create "it" are responsible for what "it" does. But the implication of a full-fledged merger doctrine, of a decision never to tag, is that there really is no "it," no thing-like conspiracy to worry about. Moreover, one of the two usual rationales for punishing conspiracies at a more inchoate stage of criminality than when one would punish individual perpetrators for attempting is that the agreement itself is an antisocial

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nal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes . . . makes possible the attainment of ends more complex than those which one criminal could accomplish . . . . Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed." An equally unsupported assertion of these purported characteristics of "conspiracies" is contained in the oft-cited Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276, 283–84 (1948).

187. The notion that "conspiracies" have significant things in common with one another simply because they may all be *called* conspiracies is, even in familiarly reified legal thought, an instance of truly magical thinking. *See* Johnson, *The Unnecessary Crime of Conspiracy*, 61 CALIF. L. REV. 1137 (1973) (deriding the "reified" conspiracy category).

188. *See* Rex v. Morris, [1951] 1 K.B. 394 (defendants punished for acts of smuggling not proven at trial).

189. Those who disapprove of the general doctrine of conspiracy—like Johnson, *supra* note 187—may well find this result perfectly acceptable.

190. *See* Pinkerton v. United States, 328 U.S. 640, 645–48 (1946) (defendant responsible for acts by co-conspirator in furtherance of conspiracy, though defendant did not participate in or know of acts).

act.[191] That belief implies, of course, that conspiring is itself a dangerous act that should be punished. Thus, the second rule form works only if we ignore the legal regime of which it would be a part. In a sense, this second rule is underinclusive, if criminal enterprises are more dangerous than the plans actually agreed upon at the time the conspirators are apprehended.

No one could seriously back either the first rule-like position or the Model Penal Code position without suppressing acceptable interpretations of the desired procedural form of legal pronouncements. Many commentators (like myself) would happily abolish the conspiracy category because they doubt that conspiracy in and of itself is ever harmful. These commentators might support the second rule, but they would do it knowing that the rule-form is underinclusive under typical factual suppositions regarding "criminal enterprises."

3. *Defenses and discretion.*

A rule-like criminal law punishes persons equally whenever they perform certain acts with a blameworthy mental state. Departing from such a system inevitably allows prejudice and arbitrariness and diminishes the clarity of notice, while adhering to such a system leads to random injustices. Moreover, the rule-like system is inevitably infirm in its reliance on categories that nominally include a range of behavior that seems more or less culpable either from the perspective of rule-appliers enforcing their own values or as one imagines how the rule-makers would have dealt with the particular case had they had it in front of them. Particularizing conditions enable the system to maintain the appearance of a rule-like system while functioning in a more standard-like way.

The less important particularizing conditions are those that function *doctrinally*, at trial. These are situations in which an actor deliberately performed criminal acts but, under the particular circumstances, it was desirable for him to do so. For example, an ambulance driver speeds and runs lights to deliver heart attack victims to the hospital. The possible strict rules—either "all speeders and light-runners are punishable" *or* "ambulances are categorically immune from traffic laws"—will be respectively over- and underinclusive as to who is punished. Yet a standard negating the criminal violation if the benefits of nominal violations substantially outweigh

191. The other usual rationale is that conspirators egg each other on and are less likely to desist when they are at a "preparatory stage" than are individual perpetrators.

the harms[192] is troublingly uncertain and politically tainted in application.[193] Likewise, there are situations in which the defendant, though clearly violating the terms of a statute and not acting laudably, has acted under pressures (*e.g.*, duress, entrapment) that we believe negate blameworthiness.[194] Standard-like particularization may match legal results to purposes. If punishment should hit only the blameworthy, to punish an unblameworthy person because people who deliberately perform acts he has performed are *generally* blameworthy is inappropriate. But particularization leads to vagueness. What pressures does a reasonably firm person give in to? Will juries find defendants they dislike unreasonably weak in succumbing?

More important as a practical matter, discretion exercised by prosecutors and judges can negate all ill effects of criminal violations besides conscience pangs. Naturally, using discretion draws criticism from those making the customary claims for rules,[195] but two critical facts remain. First, legal categories do not exhaust our apprehension of conduct: Not everything called burglary or assault is like everything else called burglary or assault. There are significant distinctions between fighting in bars, slugging other lads in school, and slugging old women in the park, and even between different fights in bars. Second, the background circumstances in which two equally bad acts are performed really may affect our perception of the defendant. A defendant who deliberately kills a wife who has assaulted him on previous occasions and kept her lover in the house[196] may seem less blameworthy or in need of reform or incapacitation than a

192. *See, e.g.*, MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962).

193. This is a major worry of United States v. Kroncke, 459 F.2d 697 (8th Cir. 1972) (disallowing defendant's contention that jury should have been instructed that his act of interfering with Selective Service might be justified to end the war in Vietnam). *See also* State v. Wootton, Crim. No. 2685 (Cochise County, Arizona, September 13, 1919) (allowing as defense to kidnapping charges the justification that kidnappers who rounded up and deported more than a thousand I.W.W. strikers believed the I.W.W. strikers a threat to life and property); Comment, *The Law of Necessity as Applied in the Bisbee Deportation Case*, 3 ARIZ. L. REV. 264 (1961).

194. *See* notes 128–47 *supra* and accompanying text.

195. *See, e.g.*, K. DAVIS, DISCRETIONARY JUSTICE 189–95 (1969); M. FRANKEL, CRIMINAL SENTENCES (1973); Dershowitz, *Background Paper*, in TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 67–124 (1976); LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 535–39 (1970).

196. This is a reference to a presentence report reprinted in F. MILLER, R. DAWSON, G. DIX & R. PARNAS, SENTENCING AND THE CORRECTIONAL PROCESS 92–101 (1976).

deliberate killer who kills for profit.[197]

While the attack on discretion will always be readily at hand, so is the particularist's attack on adhering to rules. The assertion of one position or the other is, once more, the suppression of dissonant thoughts, not the working through of a rational program.

4. *Vagueness doctrine.*

One plausible account of the invalidation of vague statutes is that the Constitution (or, in Britain, a more general principle of criminal law)[198] *mandates* a rule-like criminal code. Certainly, courts invalidating statutes as unconstitutionally vague make the usual pleas for clearly administrable rules. In *Papachristou v. City of Jacksonville*,[199] for instance, Justice Douglas wrote that an ordinance is void for vagueness if it:

> "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden" . . . and . . . [if] it encourages arbitrary and erratic arrests and convictions.
>
> . . . .
>
> . . . It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."[200]

The problem with viewing the vagueness doctrine as "settling" the rule/standard tension is that the void-for-vagueness strictures are rarely used, though so many statutes are undeniably fuzzy. Thus, we must account for the judiciary's occasional invalidation of ambiguous laws. A coherent account focuses on the interaction of a series of "standards" and "policies" disparaging or supporting vagueness that are themselves exceedingly vague, rather than on some hypothetical "quantum" of vagueness. Thus, ironically, the "rule system" is upheld only occasionally, and in a very un-rule-like fashion.

A detailed account of the vagueness doctrine is unnecessary given Professor Amsterdam's seminal work.[201] It is enough to say that the outcome of any case is unpredictable without at least considering three factors: facts and values, core conduct, and nearby conduct.

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197. Of course, in some sense, someone so morally unmoored as to find killing for profit conceivable can scarcely be deemed blameworthy.

198. *See* G. WILLIAMS, *supra* note 1, § 185, at 578.

199. 405 U.S. 156 (1972).

200. *Id.* at 162, 170 (quoting, respectively, United States v. Harriss, 347 U.S. 612, 617 (1953) and Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)).

201. Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

The first factor asks whether the court believes the statute *could* have been written more precisely. Statutes may refer to facts, to values-as-facts, or to values. For example, a statute refers to values if it says, "Don't be obscene"; it refers to values-as-facts if it says, "Don't say things that the average citizen of Pensacola would consider obscene"; and it refers to facts if it says, "Don't say any of the following 'dirty words.' " Generally, within this culture, values are considered individual and widely dispersed.[202] Thus, *any* statute making reference to values will *inevitably* seem vague: There can be no precise understanding of the content of any "value" since that content is not communally shared. All else being equal, courts are generally more tolerant of vagueness where value references are inevitable than where the legislature *could* define facts more precisely.[203]

The second factor asks whether the court believes that the core conduct described by the statute—conduct clearly fitting *within* its murky boundaries—is substantively innocent. In *Papachristou*, for instance, the Jacksonville ordinance outlawed "neglecting all business and habitually spending . . . time . . . where alcoholic beverages are sold or served."[204] This is not a particularly vague description of the illicit activity *unless* one assumes, as did Justice Douglas, that it cannot *possibly* be intended to apply to "members of golf clubs and city clubs."[205] Vagueness doctrine—a procedure-oriented constitutional jurisprudence—is in this manner used to strike down substantively objectionable statutes.[206]

Thus, there is a second layer of irony in dealing with vagueness

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202. For a discussion of the liberal culture's premise of the subjectivity of values, see R. UNGER, KNOWLEDGE AND POLITICS 51–55, 76–81, 88–104 (1975).

203. *Compare, e.g.*, Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (homicide statute not extended to apply to killing of fetus; statute could readily be drawn to encompass fetuses) *with* Johnson v. Phoenix City Court, 24 Ariz. App. 63, 535 P.2d 1067 (1975) (upholding laws against lewd and immoral behavior, presumably because varieties of lewdness would be difficult to specify). Of course, a number of "vague" statutes must be limited to ensure that conduct protected by the first amendment is not proscribed. *See, e.g.*, Coates v. City of Cincinnati, 402 U.S. 611 (1971) (ordinance prohibiting three or more persons from assembling on sidewalk and annoying passers-by); *In re* Bushman, 1 Cal. 3d 767, 463 P.2d 727, 83 Cal. Rptr. 375 (1970) (statute prohibiting disturbance of peace; defendant claimed to be engaging in "symbolic speech").

204. 405 U.S. at 156 n.1.

205. *Id.* at 164.

206. *See* Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). Tribe discusses the use of ostensibly procedural norms to reach substantive results. In part, of course, one of the traditional "procedural" concerns in vagueness doctrine—that potential defendants know the criminal law—is implicated whenever "generally innocent" conduct is proscribed. Since few citizens read the statutes to learn the law, a statute proscribing conduct few would imagine illegal is likely to be unknown. Still, the substantive

doctrine. It is designed to invalidate generalized statutes like "Don't do bad things" because what is "bad" is unknown and unknowable in a culture premised on the subjectivity of value. Yet a major criterion for invalidating a statute is that the conduct it proscribes is substantively approved, not "bad." The judge must thus know what is least knowable.

The third factor makes this worry even more apparent. Vagueness doctrine is *predominantly* used when the conduct that is *ambiguously* covered by the statute, conduct that the court fears will be deterred because citizens are unsure whether or not it falls within the ambit of the statute, is either affirmatively constitutionally protected[207] or at least desirable.[208] When this "nearby" conduct is unprotected or affirmatively undesirable in the judge's eyes, courts are less likely to overturn.[209] Naturally, the court's interpretation of the breadth of conduct that may be deterred is quite flexible. For instance, does a facially vague statute outlawing vexatious phone-calling[210] chill protected "speech" or less protected "telephoning to strangers"? From the rules/standards vantage point, the critical observation is that the "rule-like" form of law is not preserved in rule-like fashion: Substantive standards are used to define the occasions on which rules are required.

IV. THE EASY CASE

Parts II and III delineated the conscious and unconscious use of interpretative construction in the traditional "hard" cases of substantive criminal law. It would be possible to claim that interpretive construction is at work only in the tricky but rare gray area cases which implicate the sort of elevated doctrine that occupies academic commentators and appellate courts. The criminal justice system predominantly processes much *simpler* facts: The harm is consummated, the precise act is "intended," the act and intent concur, and

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aspects of the decision seem powerful; it is unlikely that public announcements would cure the defects Douglas was getting at in *Papachristou*.

207. *See, e.g.*, Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); NAACP v. Button, 371 U.S. 415 (1963); Winters v. New York, 333 U.S. 507 (1948) (each discussing a possible chilling effect on exercise of the first amendment right to freedom of speech).

208. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972) (extolling virtues of strolling and loafing, activities arguably covered by vagrancy statute).

209. *See, e.g.*, Rose v. Locke, 423 U.S. 48 (1975) (upholding a statute proscribing "crimes against nature," even as applied to cunnilingus).

210. *See, e.g.*, CAL. PENAL CODE § 653m (West Supp. 1981): "Every person who with *intent to annoy* telephones another and addresses to or about such other person any *obscene language* . . . [is punishable]." (emphasis added).

there are no legally cognizable mistakes. Paradigmatic "easy cases" are ones in which a defendant wishes to kill a nonprovoking victim and, without the slightest thought that he is defending himself, kills the victim, or a thief takes property he knows belongs to another.

This part shows that even to inculpate these defendants with any sense of consistency, one must perform all the critical interpretive steps illustrated in parts II and III. My purpose is to show that interpretive constructs are at work in *every* case.

A. *Conscious Interpretation*

Both the basic intentionalist assertion and the purported devotion to the rule form apply to the "easy case." The significance of rejecting a determinist discourse is made most obvious by the panic that retributionists feel when confronting a more full-blown determinism. They worry about the criminal law being "swallowed up." It is quite plausible that we could still incarcerate in order to incapacitate those persons whose unacceptable conduct was perfectly understood. However, losing the illusion that we are treating criminals justly, rather than simply conveniently, would alter both our beliefs about the cruelty of our punishment practices and our more ordinary beliefs about merit. If we came to conceive of the typical criminal act as just one more horror in a lifelong parade of never-ending horrors, we might still decide to conquer and subdue the criminal, but we would not self-righteously condemn him.

The concern over rule-bound precision in drafting a criminal code is most readily seen in the "easy case" in the context of debates over punishment policy.[211] Devotion to rule-form is harder to see, though more politically significant, in understanding a key ideological basis for excluding nondisruptive harms (*e.g.*, unnecessary deaths caused by routine commercial dealings) from the criminal code. It is difficult to imagine rule-like forms proscribing *unreasonably* dangerous

211. For example, there have been many attacks on the broad discretion involved in parole practice. *See, e.g.*, N. MORRIS, THE FUTURE OF IMPRISONMENT 35–36 (1974); Bronstein, *Rules for Playing God*, CIV. LIB. REV., Summer 1974, at 116, 120; Loewenstein, *Bringing the Rule of Law to Parole*, 8 CLEARINGHOUSE REV. 769, 775 (1975). *Contra*, Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960).

The trend toward more rule-like forms in sentencing and parole provisions reflects the hostility toward discretion. *See, e.g.*, McGee, *California's New Determinate Sentencing Act*, FED. PROBATION, Mar. 1978, at 3, 8–9; Taylor, *In Search of Equity: The Oregon Parole Matrix*, FED. PROBATION, Mar. 1979, at 52, 56. *See generally* Citizens' Inquiry on Parole & Criminal Justice, Inc., *Report on New York Parole: A Summary*, 11 CRIM. L. BULL. 273 (1975) (urging nondiscretionary release provisions); O'Leary, *Parole Theory and Outcomes Reexamined*, 11 CRIM. L. BULL. 304 (1975) (rebuttal).

conduct, particularly conduct not taken on single discrete occasions by single actors to whom the harm can easily be attributed. These may be seen as "easy" cases of noncriminality solely *because* of an unshakably strong procedural norm against vagueness.

B. *Unconscious Interpretation*

More interesting, though, is the way the more obscured, un-self-conscious interpretive constructs serve to buttress conventional blaming practices. This section applies the four unconscious constructs to the easy cases.

1. *Broad and narrow time frames.*

Choosing a time frame is critical for a number of reasons. Most critically, the interpreter's ability to convince himself of the legitimacy, or better, the necessity of a narrow focus eliminates the more obvious political tensions inherent in the choice of an intentionalist account. Narrow time-framing simply excludes all the potentially explanatory background data.[212] For instance, a criminologist's familiar category for homicide—that the crime is fundamentally victim-precipitated[213]—disappears in ordinary criminal law discourse, except in those rare provocation cases where the victim enrages the perpetrator just before the killing, rather than over some longer time period. The distinction between those who are partially exculpated because they were enraged once (provoked), and those who are inculpated though they were tortured for years before reacting makes no sense as a matter of retribution[214] and only superficial sense in terms of deterrence.[215] Ultimately, I suspect, the distinction is grounded in

212. For instance, it excludes the sort of pseudo-scientific analysis of behavior in Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Defendant*, 63 MINN. L. REV. 1 (1978).

213. *See, e.g.*, M. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 245–65 (1958); Gobert, *Victim Precipitation*, 77 COLUM. L. REV. 511, 530–34 (1977).

214. In ordinary discourse, a party who kills after he has been repeatedly provoked would almost certainly be deemed less culpable than one who boils over and kills the first time he is so provoked. Somehow, in legal discourse, the fact that the long-term provoked defendant has managed to squelch his violent reactions in the past makes him more culpable when he finally gives in. The legal discourse makes sense only if we assume that a person should leave rather than slowly build up an uncontrollable rage—an assumption that depends on the exaggerated assertions that the person is aware of his rage and that there are no other reasons that compel him to stay in spite of that rage.

215. Deterrence theory, I take it, assumes that the short-run provoked party is blind to the criminal law signals; the longer-run provoked party ought to have time to consider the jailer and leave if he fears he is being worked into a frenzy. Again, this strikes me as a phenomenologically unsound reading of many cases of long-run provocation: People may get

a nearly primeval fear of the collapse of the easy case: If long-term interactions are appropriate subjects of judicial scrutiny, then there is indeed no certainty in blaming.

2. *Disjoined and unified accounts*.

Disjoined time-framing eases blaming practices where an exculpatory, broad time-framed determinism presses on the would-be condemnor. The quasi-methodological notion is that the ultimate criminal act, even if comprehensively grounded in prior experience, must be separated from its backdrop. While we sometimes unify an overt criminal decision with its backdrop,[216] our more usual technique is to say, in essence, that the criminal moment stands separate, as a matter of technique, from even obviously relevant background.

But while narrow or disjoined time-framing is connected with the artificial and problematic restriction of "excused" behavior, its more politically central role may be in its suppression of the recognition of something akin to the "justification" of behavior. Take our easy-case thief. It is true that he alters the current holdings of property, but the legitimacy of these holdings is politically contingent and problematic. It does not matter, for our purposes, whether these present property holdings can be satisfactorily justified in the eyes of some relevant group or other. The justification of the distribution of goods that preceded the "theft" is decidedly *not* an issue in any particular criminal trial. The incidental focus that supports this limitation of issues—a focus that blurs the "crime" by freezing or taking for granted the background conditions in which the "crime" is committed—serves important ideological purposes. First, it normalizes, sanitizes, and decriminalizes the property holdings of dominating groups, which are unlikely to be traceable to single, easily identified *disruptive* incidents. The dominant rarely appear "criminal" when the implicit theory of criminality is *disruption*, when the only sort of crime we comfortably discuss is temporally limited. Second, the incidental focus decontextualizes, delegitimatizes, and thereby criminalizes the activities of the dispossessed. Instead of viewing, say, theft and episodic violence as part of a dynamic struggle for control over resources, as one group's more or less self-conscious "strategy" to counter another long-term strategy of control over "privately held"

upset and then find themselves, for a moment that need last no longer than that which the traditionally provoked party faces, in an unforeseeable oblivious-to-punishment rage.

216. For instance, we can ground the decision to kill in the perception of the need to defend oneself and judge the defendant's blameworthiness as to the whole scene.

means of production and concomitant definitions of job roles and productivity,[217] and control over the state and its resources,[218] a narrow time-framed focus views each act of theft as occurring outside of history.

Note the implicit disjunctive, nonunified interpretation of time: Criminal trials implicitly assume that property systems are *followed by* theft rather than that real property systems are continually being created by a social struggle that includes everything from alternately encouraging and discouraging the flow of illegal aliens[219] to "stealing." The political beliefs flowing from the unified perspective are naturally by no means unambiguous. On the other hand, if one becomes fully smugly functionalist and views *everything* as part of some single, unified grand scheme, punishing labeled thieves is just another aspect of the ultimate "system" of property. On the other hand, the unified perspective may be counter-complacent as well: If "taking" is just another technique for getting distributive shares straight, "antitaking" (punishment for theft) seems like a simple act of force, a victory for one group in a dynamic struggle rather than a restoration of some prepolitical equilibrium.

Just as the ordinarily asserted narrow time frame inculpates the "easy case" defendant by denying him both determinist excuses and contextual justifications, so an asserted broad and unified time frame precludes labeling as criminal those who sell unsafe products or those who insist on the performance of unsafe work. Rather than viewing the introduction of an unsafe product onto the market as a reckless act which later causes harm, exculpating interpretations focus on the act as *part* of a longer-term process of market interaction. In this long-term process, the victim's (buyer's) participation is deemed crucial; the focus is precisely opposite that of the typical criminal law analysis in which the victim's participation (precipitation) is irrelevant. The marketing of dangerous products is interpreted simply as a *part* of a *generally* justified system of producing and exchanging goods. The sale of a particular dangerous product is not viewed as a disruptive departure from a more narrowly normatively justified sys-

217. *See, e.g.*, Stone, *The Origins of Job Structure in the Steel Industry*, REV. RADICAL POL. ECON., Summer 1974, at 113 (arguing that the extensive division of labor in the steel industry is not technically mandated, but serves to immunize steel bosses from effective in-plant opposition).

218. *See, e.g.*, P. BARAN & P. SWEEZY, MONOPOLY CAPITAL (1966).

219. *See* S. CASTLES & G. KOSACK, IMMIGRANT WORKERS AND CLASS STRUCTURE IN WESTERN EUROPE (1973) (discussing impact of "guest workers" in dampening labor's hopes for larger share of national income).

tem in which *safe* goods are produced and marketed. Instead, it is seen as one part of a properly equilibrated system of distribution where goods, not harms, are delivered. The otherwise criminal act gains legitimacy because it need not justify *itself*; one need show only that production is worthwhile, not that this production serves any of the purposes that generally make production worthwhile. Contrast that account with the typical criminal law account of the thief: Theft is deemed to represent a departure from a normatively justified general system of property rights rather than as a part of the establishment of a normatively justified system. Each instance of theft must be justified on its own; it is not enough to claim that the distributive scheme that would exist in a world without thieves would be normatively less desirable on the whole than the system that has emerged in a world with thieves.

3. *Broad and narrow views of intent.*

Interpretive flexibility in determining the actor's intent is the ability to oscillate between views that the actor intended precisely what he did and views that he intended some broader category of act of which his conduct is an instance. This flexibility is critical in drawing the vital, but ultimately ungrounded, line between legally irrelevant motive and legally relevant purpose. Again, take our thief. The standard, reassuring criminal law view of the *act* of grabbing a bundle of goods with the *expressed intent* or *purpose* of feeding the proverbial starving family is to steal, while only the irrelevant motive is to feed.[220] But the supposed actual intention is a sham: While a defendant may intend acts which constitute theft, he need not intend theft. Yet, when the defendant claims the legitimated but still broader category for his actions, in this case, *feeding*, the usual response is to narrow the permissible breadth of category. One's precise acts become *only* an instance of the midrange category (criminal takings) rather than of the broader one that might include attempts to better oneself, to survive, etc.[221]

Certainly, there are reasons of expediency for adopting the midrange categorization: If we want to prevent theft or incapacitate people who take other people's goods, we can reassure ourselves that people who take intend to do what they do, and that is taking. But

220. Obviously, justification doctrine, *see* notes 192-93 *supra* and accompanying text, limits the purported irrelevance of motive to some extent.

221. *See, e.g.*, United States v. Berrigan, 482 F.2d 171, 188 n.35 (3d Cir. 1973), for a typical statement of this midrange categorization.

the notion that this is an adequate account of their mental state—rather than a deliberately circumscribed, partially blinded account of their actual "state of mind"—is nothing but comforting illusion. To jump from "people who intend to steal are blameworthy" to "this defendant is blameworthy because he deliberately took actions which constitute stealing" without recognizing the subtle category shift is to ease the judgment process far too much. The statement that "people who intend to steal are blameworthy" translates too closely into the uncontroversial assertion that "people who intend to cause harm are blameworthy." When one says, "People who intend to steal are blameworthy," one implies that: First, the person takes the dominant norms on property as given or acceptable[222] and characterizes his activity predominantly in terms of the norm;[223] second, he flouts the norm he has accepted, simply for harm's sake.[224] There may be no distinction between the core blameworthy character who gains pleasure from harming others and the person who gains pleasure from the act of stealing or from the stolen goods, not from the harm to others. But unless one believes these characters are indistinguishable, the ability to categorize intentions serves a mediating function in blaming. It translates the second account into the reified category of intending to steal, with all the negative implications about deliberate harming implicit in that category.

There is a further irony in all this. The core *easy* case of blame in categorization terms may also be a core case of exculpation, in terms of the intentionalism/determinism line. No one seems truly blameworthy unless he has harmed for harm's sake, yet anyone who does harm for harm's sake seems clearly pathological, probably insane—a standard case of a determined and excused actor.

4. *Broad and narrow views of the defendant.*

The interpretive decision characterizing defendants either in terms of capacities generally available to people or in terms of their own capacities is germane to the stability of the "easy case" because of its connection with the intentionalism/determinism rule. If one looks back at our first discussion of provocation,[225] the relationship of subcategorization to "easy case" blame is readily apparent. Serious

222. For example, he does *not* simply say, "I intended to get this good which *you* think is yours" or "I intend to do what *you* call stealing."

223. That is, he does *not* simply say, "I intend to put this good in my pocket."

224. Thus, he does *not* simply say, "I know that a by-product of my activity is to steal."

225. *See* notes 137–47 *supra* and accompanying text.

crimes inevitably require meaningful capacity to conform as a prerequisite to liability. Capacity, though, can be assessed either in terms of general human capabilities which the defendant, as a human, is improperly syllogistically presumed to possess[226] *or* narrowly, negating the possibility of capacity.[227] There must be some *implicit*, undefended comparison of the defendant to some person who has avoided crime before anyone can be inculpated. The killer who kills for money—arguably the easiest case of premeditated, malicious murder—might be impossibly complex, were it not for an odd category trick. What could it mean to say that someone who kills for money understands the sanctity of life, such that we would say he "comprehend[ed] his duty to govern his actions in accord[ance] with the duty imposed by law,"[228] or to "maturely and meaningfully reflect upon the gravity of his contemplated act"?[229] Presumably, we get around these problems by categorizing the hired killer as just another commercial actor, able, like any buyer or seller of goods, to accept or reject offers after determining whether they are in his interest.

V. CONCLUSION

I can interpret my own task of deconstructing rhetoric in three distinct, though not wholly incompatible, fashions. First, I can view the piece as a rather traditional legal realist's plea for the "politicization" of legal discourse. One might view my arguments as having the following structure: The courts and commentators purport to solve the particular doctrinal dilemma, but their "solutions" use an unsupportable "interpretation" or "characterization" to make the case appear manageable. Had they been doing "good" legal analysis, they would instead "balance" the substantive policy concerns at stake to reach a well-reasoned result.

I have very limited sympathy for this account. First of all, this account fails to come to grips with a central and undeniable fact: Perfectly competent and intelligent commentators continue to mask

226. *E.g.*, "Humans have the capacity to conform to law. Defendant is a human. Therefore, defendant has the capacity to conform to the law."

227. *E.g.*, "Defendant is only truly like himself. That person did not resist criminality. Therefore, we have no real reason to believe that someone truly like the defendant can resist criminality."

228. People v. Conley, 64 Cal. 2d 310, 322, 411 P.2d 911, 918, 49 Cal. Rptr. 815, 822 (1966) (defining malice).

229. People v. Wolff, 61 Cal. 2d 795, 821, 394 P.2d 959, 975, 40 Cal. Rptr. 271, 287 (1964) (defining premeditation).

so-called policy with a powerful residual conceptualism. The commentators I have cited are hardly Langdellians, the courts hardly premodern. I am dealing almost exclusively with the masters of realist thinking. Second, and quite related, I sense that the policy-balancing act that the traditional realist advocates *never* takes very full hold, both because it renders all legal outcomes highly ad hoc and because it makes legal discourse seem less distinct from nonlegal argument. Third, by failing to deconstruct the mechanisms needed to maintain the persistence of conceptualist solutions, traditional realists are unable to see that the culture's *blindness* to its constructs is critical. Thought takes on a natural, apolitical, noncontingent quality unless it is subject to ordered deconstruction.

A second plausible account of my work is that I am attempting to account for the existence of interpretive construction, and that identifying the forms that characterization takes is just one important step towards understanding the process of interpretation at a broader level. At various points I have accounted for the appearance of a particular interpretive construct as manifesting a simple class conflict between those protecting the position that the legal system routinely allows them from sudden, incidental disruption, and those disfavored by the routine distortion of benefits that the legal system generates. Naturally, those disfavored by the ordinary legal distributions of economic power are most prone to use means generally considered criminal.

Interpretive construction could play very distinct roles in this class conflict. It is possible that each construction might correspond to the political program of a social class. I would call this view "construction determinism": a belief that the interpretive technique an analyst uses is itself a product of the social class he politically supports. Alternatively, each legal *result* could correspond to the political program of a social group, and interpretive construction may serve simply to *cover up* the result-oriented, overtly political nature of resolving disputes. I would call this view "result determinism": a belief that the "bottom line" of any case results from class conflict, and the interpretive technique is just a ruse to hide a primitive assertion of power to promote one's selfish interests behind a mask of legal deductions. Finally, it may be that maintaining the appearance (or illusion) of legal argument is a significant political program of any dominant social class, so that making formal arguments which do not refer to the unexplainable interpretations that actually ground the arguments may sometimes be more vital than maintaining either the

construction or particular results. I would call this "legal form determinism": a belief that the preservation of the faith in an orderly, nonarbitrary distribution of political and economic benefits is more central to dominant classes than either the result of any particular case or the preservation of the dominance of any one construction.

Throughout the essay, I have proffered all these sorts of explanations. I argued, for instance, in Part IV, that the most basic task of a dominant group is to identify criminality with disruption, with incidents that break the ordinary flow of distribution of burdens and benefits. My claim was that certain characterizations or constructions are most compatible with that end. In Part II, I frequently gave "result-oriented" explanations, made claims that an advocate of a certain position constructs the legal material simply to reach a desired result, and that the result is based on some *real* interest in winning a certain class of cases, either because they are significant to maintaining economic or political control or because they help solidify a certain ideological story that is helpful to maintaining domination. Finally, even in those cases when it seemed as if no one could possibly care about construction form or results in a particular setting, there is always the fallback claim that a legal system ought not to have gaps; it ought to look as if *every* case can be resolved by some similar "scientific" method.

A third account of my enterprise is that the interpretive constructs I note are not politically meaningful at all, but simply inexplicably unpatterned mediators of experience, the inevitably nonrational filters we need to be able to perceive or talk at all. If that were the case, my role would be largely aesthetic: I speak on behalf of those who no longer like to listen to people making arguments that mask a hidden structure of "nonarguments" with insistent, false rigor. In the preface to their property casebook, Professors Casner and Leach wrote that, "In order to move the student along the road of becoming a lawyer, he must be subjected to close analytical testing that rejects generalities or approximations. We think this must come at the beginning of his law study to get him to recognize and abhor superficiality."[230] I don't know whether to laugh or cry. When the unwarranted conceptualist garbage is cleared away, dominant legal thought is nothing *but* some more or less plausible common-wisdom banalities, superficialities, and generalities, little more on close analysis than a tiresome, repetitive assertion of complacency

230. A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY vii (2d ed. 1969).

that "we do pretty well, all considered, when you think of all the tough concerns we've got to balance." Legal thought *does* have its rigorous moments, but these are largely grounded in weak and shifting sands. There is some substance, but we tend to run for cover when it appears.

In the criminal law, two substantive concerns recur. Intentional action and rule-like form are purportedly necessary to construct our ordinary jurisprudence. But no one truly believes in absolute intentionalism or in rules, though the departures from the polar positions are vague and weakly defended. We must avoid the issues in order to talk like lawyers, partly because we have so little to say about them that is not deeply contradictory and ambivalent. What is worse for the lawyer rhetoritician is that when we assert a bottom line, we are rarely very convincing. We rarely do more than restate some utterly nonlegal functionalist preference, some pompous version of Pollyanna's principles, or some equally nonlegal anger or contempt for a system in which the comfortable beneficiaries of a rule structure cash in on their strengths and self-righteously condemn those marginalized by the most central social and collective decisions—the decisions about how rights, duties, and privileges are created and enforced. Rather than face our inability to speak, we hide the uses of standards and determinist discourses, or proclaim, loudly if not clearly, that when we are *obviously* using them, we are in an "exceptional" circumstance.

Most often, we avoid the issues altogether by constructing the legal material in terms of apparently well-established conceptualist dogma, looking to concepts that, at some broad level, are doubtless policy-"justified" (somewhere or other). As best I can tell, we do these interpretive constructions utterly un-self-consciously. I have never seen or heard anyone declare that they are framing time broadly or narrowly, unifying or disjoining an incident, broadly or narrowly categorizing a defendant's actual or required intent or a defendant's being or circumstances, let alone explain why they are doing it. It is illuminating and disquieting to see that we are nonrationally constructing the legal world over and over again; it is a privilege to discern some structure to this madness, a privilege one gets when a system feels unjust and unnatural. The outsider sees patterns that the insider, committed to keeping the enterprise afloat, never sees; structuring the practices of others is a funny and fun form of dismissal.

One real conclusion, one possible bottom line, is that I've con-

structed a very elaborate, schematized, and conceptual piece of winking dismissal: Here's what they say, this is how far they have gotten. You know what? There's not much to it.