

# Why the Mind Matters in Criminal Law

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## INTRODUCTION

A theory of a social practice must be able to carry a certain descriptive and interpretive burden: it must be able to account for those features of the practice so central to its character that, without them, the practice would become distorted or unrecognizable as a phenomenon in the social world. A theory of jazz music needs an account of improvisation; a theory of natural science needs an account of experimentation; a theory of democracy needs an account of voting. A theory with no place for these sorts of structural or architectural features is incompetent, revisionist, or, at the limit, not a theory *of the practice* (*of jazz, of science, of democracy*) at all. As Ernest Weinrib has argued in developing a theory of private law: “Within private law’s massive complex of cases, doctrines, principles, concepts, procedures, policies, and standards,” there are “certain features” whose “systematic absence would mean the disappearance of private law as a recognizable mode of ordering” and that therefore must, “[a]t the level of theory . . . be explained or explained away.”<sup>1</sup> Just so. The social theorist’s burden is either to explain

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1. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 9 (1995).

her practice's architectural features or show them to be less foundational than they seem, and thus to explain them away.

Mens rea—law Latin for “guilty mind”—is an architectural feature of criminal law. We don't just punish killing; we punish *intentionally* killing, *maliciously* killing, *negligently* killing—killing with a wrongful state of mind. We don't just punish taking another's property; we punish taking another's property *knowing* it is not one's own, *intending* to permanently deprive another thereof. And so it goes through countless other examples. The “we” here is deliberately ambiguous: it is unclear how universal mens rea is in systems of criminal law and moral judgment across time and place. But in Anglo-American law, mens rea has been part of the very concept of crime since at least AD 1215.<sup>2</sup> It is surely architectural in the relevant sense. Any theory interpretively grounded enough to qualify as a theory of criminal law should be able to answer the question of why mens rea matters.

At the same time, mens rea is *not* required of every crime under current law, nor required *only* of crime. Many regulatory offenses and some traditional felonies (statutory rape, for example) do not require mens rea, and some civil wrongs do (bad intent is relevant to some wrongful termination suits, for example). It is curious that mens rea can be one of criminal law's defining features while being neither necessary to it nor sufficient for it. I think it is possible that social artifacts like criminal law (or jazz, science, or democracy) are simply not the kind of things that have necessary and sufficient conditions of the right sort, though working out that ontology to the roots would be difficult.<sup>3</sup> In any case, mens rea's status as something both

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2. This startling fact is the yield of Elizabeth Kamali's remarkable historical work. Examining thirteenth- and fourteenth-century evidence, Kamali challenges “the assumption that medieval English criminal law was dependent upon a notion of strict liability, or a worldview in which acts were inextricably bound up with fault regardless of the actor's intentionality,” showing that “mens rea played a crucial role in jury considerations from the earliest days of the criminal trial jury. Although the formal law, what little there was, did not routinely invoke the language of mens rea, the idea of criminal intent lay at the heart of the word ‘felony,’ thus reducing the need for any systematic use of alternative terms connoting mens rea in records of jury verdicts.” ELIZABETH PAPP KAMALI, *FELONY AND THE GUILTY MIND IN MEDIEVAL ENGLAND* 36 (2019). In short, the “medieval understanding of felony . . . involved, in its paradigmatic form, three essential elements: an act that was reasoned, willed in a way not constrained by necessity, and evil or wicked in its essence.” *Id.* (front matter). The focus on the 1200s and 1300s is not coincidence. English criminal law as a form of law continuous with our own began when the ordeals ended—when proof of guilt ceased to turn on the verdict of battle, trial by water, and the like—with the Fourth Lateran Council of 1215. Since that origin point, criminal guilt has required a guilty mind.

3. See Joshua Kleinfeld, *Enforcement and the Concept of Law*, 121 YALE L.J. ONLINE 293, 309, 311 (2011), <https://www.yalelawjournal.org/forum/enforcement-and-the-concept-of-law> [<https://perma.cc/AP97-LAN6>] (“[L]aw is not the kind of thing that has strictly necessary features. . . . [E]nforcement can be constitutive of law without *having* to be strictly necessary for

central and non-necessary complicates the burden on descriptive/interpretive criminal theory. The theorist must at a minimum be able to explain why mens rea is typically required (that is the interpretive baseline) and at best why mens rea is *both* generally required *and* may sometimes be absent (that is the interpretive ideal).

The two dominant theories of criminal law—retributivism and utilitarianism—can carry their baseline burden. For a retributivist, mens rea is indispensable to finding and fixing blame. The nerve at the root of Kant’s moral theory—literally the first sentence of the first section of the *Groundwork*, published twelve years before he laid the foundation stone for retributivism in *The Metaphysics of Morals*—is the idea that moral worth turns on the mind: “It is impossible to think of anything at all in the world, or indeed even beyond it, that could be considered good without limitation except a *good will*.”<sup>4</sup> Blame follows the mind: it would be a category mistake to blame a volcano for erupting, whatever harm it caused; it would be a category mistake to blame a snake for biting; it is similarly a mistake to blame a person with a spotless mind and reasonable to blame a person with a wicked one. A criminal theory centered on blameworthiness cares about mens rea because blame and mind are linked.

For a utilitarian, the relationship of mens rea to criminality is, if less organic than it is for a retributivist, solid enough. Bentham wrote that “intentionality, etc. may influence the mischief of an act,” with distinctions between acts “altogether involuntary,” “unintentional, but . . . attended with heedlessness,” and “completely intentional.”<sup>5</sup> Mens rea speaks to whether and to what degree punishment is necessary if utilitarianism’s typical goals in the criminal context (deterrence, rehabilitation, and incapacitation) are to be accomplished. If someone causes harm while engaging reasonably in a desirable or acceptable form of activity—killing a patient in the course of surgery performed for good reason and with all due care and skill, for example—there is nothing to deter, nothing to rehabilitate, and no reason to incapacitate. We wouldn’t want the surgeon to desist from surgery or to go about surgery in any other way. Retributivism and utilitarianism can thus

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it.”); Joshua Kleinfeld, *Skeptical Internationalism: A Study of Whether International Law Is Law*, 78 *FORDHAM L. REV.* 2451, 2503 (2010) (“[L]aw as experienced is a matter of multiple values in combination, none of which is strictly necessary or sufficient by itself but which in combination get some act or artifact or enterprise over the law/non-law threshold”).

4. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* \*4:393, at 7 (Mary Gregor ed. & trans., Cambridge Univ. Press 1997) (1785).

5. JEREMY BENTHAM, *THE UTILITARIANS: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 152–54 (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1970) (1789) (emphasis omitted).

carry their basic theoretical burden: they have an answer to the question of why mens rea matters.

In prior work,<sup>6</sup> I've defended a comprehensive theory of criminal law for which the answer to the question of why mens rea matters is *not* obvious. The theory is the product of an intellectual tradition founded by Hegel and Durkheim—the one a sociological philosopher, the other a philosophical sociologist—which I've termed “reconstructivism.”<sup>7</sup> Reconstructivism holds that the central object of criminal law is to reconstruct a community's normative order in the wake of acts that violate and threaten that normative order—restitching the torn social fabric, to use the clichéd but helpful metaphor.<sup>8</sup> Criminal law on a reconstructive view has a distinctive social function: where a wrong has been committed that is of such a nature as to attack the values on which social life is based, punishment reconstructs those values.<sup>9</sup> It acts as a sort of normative immune system against ideological invasions that, if left unanswered, would tend to weaken people's sense of being bound to one another, to a shared set of values, and to a shared system of law. A murder performatively denies the right to life; punishment reasserts that right. A theft performatively denies rights of property; punishment reasserts them. Reconstructivism is thus a form of communitarian consequentialism oriented to communities' shared values, moral culture, and social solidarity.<sup>10</sup> Its premise is that societies need some minimum degree of normative alignment if they are to sustain themselves over time, secure the benefits of social cooperation, and mitigate the risks of social conflict—if they are, in brief, to secure the flourishing of their members.<sup>11</sup> That premise granted, reconstructivism merely observes the special role crime and punishment play in building and maintaining normative alignment.<sup>12</sup>

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6. Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485 (2016) [hereinafter Kleinfeld, *Reconstructivism*]; see also Joshua Kleinfeld, *Three Principles of Democratic Justice*, 111 NW. L. REV. 1455 (2017) [hereinafter Kleinfeld, *Three Principles*]; Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933 (2016).

7. Kleinfeld, *Reconstructivism*, *supra* note 6, at 1487.

8. *Id.* at 1500.

9. *Id.* at 1489.

10. *Id.* at 1532–33.

11. *Id.* at 1493–94.

12. Note that reconstructivism does not insist on total normative alignment. A measure of normative alignment is necessary for people to flourish in any kind of society, but criminal law in liberal societies defends a thin floor of shared values and leaves the rest to cultural contestation and development. See Kleinfeld, *Three Principles*, *supra* note 6, at 1458–59 (“Emphatically, a reconstructivist can acknowledge and even celebrate norm contestation, particularly if one follows the thread of reconstructivism to deliberative democracy, as I suggest below.”); see also Kleinfeld, *Reconstructivism*, *supra* note 6, at 1561–64 (discussing cultural diversity).

The difficulty is that there is no obvious link between reconstructing a violated normative order and investigating the content of an offender's mind. Reconstructivism is indeed so sociologically oriented that it might appear to make the mind of the individual defendant irrelevant. Why not have a world of social solidarity based on strict criminal liability? Why not execute he who drank from the sacred stream, regardless of whether he knew or should have known it was sacred? Why care whether the person who took another's life did so intentionally, negligently, or innocently if the community depends on a socially vital taboo against killing? Why not affirm a group's shared norms through mob justice against a scapegoat—for it would be naïve to deny the solidaristic power of hating and hurting someone as a group in the name of tribal norms? Unless reconstructivism can answer these questions, it faces grave theoretical objections—and grave moral objections too, for no reasonable theory of criminal law could authorize punishing innocents, and to have an innocent mind is to be an innocent. If reconstructivism is to compete on all fours with retributivism, utilitarianism, and other candidates for fundamental theory in criminal law, it must carry its burden too: it must be able to account for *mens rea*.

The object of this essay is to explain why *mens rea* matters to a reconstructivist and also why, under some unusual circumstances, it does not matter. That is, my goal is to carry *both* the baseline interpretive burden of explaining why *mens rea* typically matters and the “gold standard” interpretive burden of explaining why and when *mens rea* does not matter. Part I addresses the baseline burden: it focuses on reconstructivism's understanding of crime as a form of expressive action and the mind's role in fixing the expressive meaning of an action. Part II attempts to meet the gold standard interpretive goal of explaining why *mens rea* sometimes does not matter: it argues that one of reconstructivism's strengths is its capacity to make sense of strict liability crimes, including not only regulatory offenses but also forms of sacred taboo that contemporary criminal theory too often overlooks. Thus Parts I and II both attempt to explain *mens rea*'s status in criminal law from a reconstructivist perspective, building on the internal logic of the theory.

Part III returns to the interpretive goal of Part I—explaining why *mens rea* matters—in a different register. Once one sees clearly the temptation and power of punishing the blameless in order to produce normative alignment, one also sees reconstructive punishment's potential to underwrite a kind of cruelty. Some who have read my past work have come away with the impression that I view reconstructive processes in criminal law as an unqualified good. That is not my view: I think reconstructivism is an accurate description of sociological processes that are necessary, inevitable, and

substantially good. But not *unqualifiedly* good. A theory can be descriptively accurate and normatively illuminating and still leave a moral remainder. Reconstructivism's basic insight—that punishment secures group norms—is one of the most dangerous truths of human social life, fire wrapped in steel. What keeps criminal law decent, when it is decent, is a combination of constraints, some of which come from the internal logic of a system of punishment grounded in community norms and geared toward the maintenance of those norms, but others of which come from external considerations of individual justice in a liberal society. A reconstructive system of criminal law must be *nested* within a larger commitment to justice. Due process in criminal law, for example, is a constraint on reconstructive processes based, not on solidaristic considerations internal to the logic of reconstructivism, but on larger considerations of individual justice. The argument of Part III is that *mens rea* is another such constraint. Taking the arguments in Parts I and III together, then, *mens rea* is doubly justified: it is both an implication of reconstructivism's internal logic and a constraint on reconstructivism imposed by external considerations of individual justice.

#### I. MENS REA AND CRIME'S EXPRESSIVE CONTENT

The first and chief reason *mens rea* matters to a reconstructivist is that reconstructivists care about social meaning and the social meaning of an act depends on the *mens rea* of the actor. The argument, syllogistically, is this: reconstructivism focuses on what crimes *express*; a crime's expressive content depends on the mind of the offender; therefore reconstructivists care about the mind of the offender.

As to that first step, it is by now commonly recognized that punishment has expressive characteristics and functions.<sup>13</sup> Reconstructivism holds that *crime* is also expressive—that crime carries social meaning.<sup>14</sup> Consider, for example, an offender who commits a serious assault without justification or excuse, beating the victim badly, heedless of the consequences. That assault carries two layers of social meaning. First, it expressively denies the validity of moral norms against such violence and the authority of laws that, by prohibiting such violence, give legal recognition to the norms. Crimes with no direct victim stop there, on the level of abstract right, but crimes with a victim, like a beating, carry a second layer of expressive content: the crime

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13. See, e.g., Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397 (1965), reprinted in *DOING AND DESERVING* 95 (1970); ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 370–74 (1981).

14. Kleinfeld, *Reconstructivism*, *supra* note 6, at 1510.

denies the victim's status as someone who matters—someone whose rights and welfare have value. As I've written:

[W]rongdoing challenges two parts of the social fabric of moral life. It says of the abstract norm, "This norm does not hold," and of the victim, "You—and those like you—are degraded." The moral order that sustains social life consists in equal measure of a system of abstract norms or rights and a socially approved status structure or hierarchy; societies must protect the one no less than the other. Wrongdoing offends and puts into jeopardy both parts of that moral order.<sup>15</sup>

Punishment's primary function on a reconstructive view is to counteract these meanings, to deny the denial, reaffirming the validity of the norm, the authority of the law, and the dignity of the victim: "Thefts break down norms of property, and punishment rebuilds them. Burglaries deny the security of the home, and punishment affirms it. Domestic violence degrades its victims, and punishment denies their degradation."<sup>16</sup> Crime and punishment are thus an exchange of meanings; they are call and response. This call and response define criminal justice as a distinctive mode of social ordering.

Recognizing crime's expressive character is partly a matter of understanding descriptively how social life works, but it is also a normative matter: on a reconstructive view, *only* actions that assail shared values are proper candidates for criminalization, for only those actions are candidates for punishment's expressive denials. This leads to a principle of criminalization:

The moral culture principle of criminalization holds that the only conduct that may justly be criminalized is conduct that violates and expressively attacks the values on which a community's social organization is based, unless the merits of criminalizing another type of conduct are so great as to substantially outweigh the harm criminalizing it does to those same community values.<sup>17</sup>

The moral culture principle has normative force because it fits into reconstructivism's teleological or functionalist understanding of what criminal law is for. If punishment exists to reconstruct a violated normative order, then it doesn't make sense to punish conduct unless it expressively violates the normative order. That is, if we ask a reconstructivist what actions should be eligible for criminalization, the answer is not, "Acts of harmdoing" or "Acts of wrongdoing." The answer is, "Acts of social destabilizing."

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15. *Id.* at 1509.

16. Kleinfeld, *Three Principles*, *supra* note 6, at 1462.

17. *Id.* at 1476.

However morally objectionable an act, however dangerous, it may only be criminalized if it *also* expressively attacks the community's social order. It must be antisocial. What reconstructivists fundamentally want to know about the expressive content of an act alleged to be a crime is whether the act expressed something antisocial.

Turning now to the second step of the syllogism—that a crime's expressive content turns on the mind of the offender—the core intuition is that a predatory or indifferent mind is the ingredient that turns merely harmful or dangerous conduct into an attack on shared values. The mind is the link between prohibited conduct and norm denial. Imagine two scenarios: in the first, Peter innocently falls into Paul, knocking him over and injuring him; in the second, Peter deliberately collides with Paul in order to hurt him, knocking him over and injuring him. Externally, Peter's bodily movements in the two scenarios might be all but identical, yet most people, if fully informed of the situation, would describe it differently: Peter in the first case would be described as "tripping" into Paul, and in the second case would be described as "pushing" Paul. Indeed, the very vocabulary language makes available to us—"tripping," "falling," "pushing," "shoving"—imputes ideas about the actor's mental state; it is difficult even to find words with which to describe the event in a neutrally physical way. That feature of language reflects the degree to which ordinary intuition understands action as mind-bearing and wrongdoing as the combination of an evil-meaning mind with an evil-doing hand.<sup>18</sup> Criminal law recognizes this difference as well, for criminal liability attaches in the second scenario but not the first:<sup>19</sup> whether Peter *assaulted* Paul depends not on Peter's bodily movements alone, nor on the results of his bodily movements alone, but on Peter's mental state at the time he knocked Paul to the ground. As a reconstructivist would see the situation, innocently tripping into someone denies no norms and degrades no victims; it is just an accident. Pushing someone to hurt him both denies a norm and degrades a person: it announces disdain for Paul's rights and welfare and for moral and legal norms of nonviolence. Ordinary intuition, language, and law track that reconstructivist line.

To unpack this intuition with care, however, requires delving into the philosophical subfield known as action theory and linking that subfield to criminal theory. At the root of action theory as a philosophical field is the observation that a bodily movement must be somehow *minded* to count as

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18. See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1676–77 (1992).

19. Kleinfeld, *Reconstructivism*, *supra* note 6, at 1546–47.



“action” at all<sup>20</sup>: a raindrop does not “act” when it falls on one’s head, and a person does not “act” in a philosophical sense when turning over during sleep, striking someone during a seizure, or bumping into someone because someone else propelled his body forward. Specifying with precision the type of mindedness that gives action its psychological structure is not easy; the field’s internal debates largely turn on that challenge. But the proposition that action as such must be accompanied by some sort of mental state is uncontroversial. Crime is a special case of action and what is true of all action is true of it: a crime must be minded somehow, accompanied by some form of intentionality or other mental state, to count as fully human action at all—to be any more meaningful than a hurricane or tornado.

What makes crime particularly interesting as a matter of action theory is that the physical doing and its concomitant mental states take place under an evaluative framework. The familiar philosophical challenge in action theory is to connect the physical and the mental, like a line with two points, but now the shape is a triangle: there are three points, the physical, the mental, and the normative. The relationship between these elements is not easy to see. But the well has already been dug, decisively in my view, by Gideon Yaffe.<sup>21</sup> Yaffe argues that

we care about an agent’s mental states, and the deliberative processes they guide, when assessing his responsibility because, thanks to them, his actions manifest his culpability-relevant values. In particular, thanks to the agent’s mental states, his actions manifest the evaluative weight that he gives to his own interests in comparison to the interests of other people.<sup>22</sup>

Notice that this account is almost perfectly general—almost totally agnostic about what normative theory is correct. On Yaffe’s account, an agent’s mental state is the component of an action in virtue of which the action represents the agent’s relationship to “culpability-relevant” values, *whatever they might be*.<sup>23</sup> That is the theory’s agnosticism and generality. But whatever the culpability-relevant values turn out to be, the mind interposes between the physical fact of a bodily movement and the values that the bodily movement puts at issue. The mind tells you what the action *means*.

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20. JESÚS H. AGUILAR & ANDREI A. BUCKAREFF, CAUSING HUMAN ACTIONS: NEW PERSPECTIVES ON THE CAUSAL THEORY OF ACTION 16 (2010).

21. GIDEON YAFFE, THE AGE OF CULPABILITY: CHILDREN AND THE NATURE OF CRIMINAL RESPONSIBILITY 66–97 (2018); *see also* Gideon Yaffe, *The Point of Mens Rea: The Case of Willful Ignorance*, 12 CRIM. L. & PHIL. 19 (2016) [hereinafter Yaffe, *The Point of Mens Rea*]; Gideon Yaffe, *Conditional Intent and Mens Rea*, 10 LEGAL THEORY 273 (2004).

22. Yaffe, *The Point of Mens Rea*, *supra* note 21, at 21, 25–26 (emphasis omitted).

23. *Id.* at 25–26.

Think of it this way: when we see someone take action in the world, we might think his action manifests a desire to harm or to help or whatever else, but we cannot really know until we find out what was in the that person's head. (In fact, our impression about the person's desire to harm or help is a guess about what was likely in his head in light of what he physically did.) The meaning of his action depends on the combination of his bodily movements and the mind standing behind those movements. Now, add to that picture a third element: that our background moral theory makes the desire to harm or help important to culpability (it is a "culpability-relevant value"). It follows that the person's mind is the link connecting what he physically did to culpability. The physical-mental hybrid that is an action "manifests" something about how the person thinks and feels about the world—something about his mind—and we judge the action to be right or wrong, good or bad, in virtue of what it manifests. If Jane holds the door open for John, her act ordinarily carries normative content—it is considerate—but it only carries that content if certain things are true of Jane's mind. She must know, for example, that there is another person, John, who wishes to go through the doorway, and she must wish him well. Normatively meaningful action is a triangle with bodily movement at one corner, a value at another, and the mind at the third.

So far, we have linked crime's normative meaning to the mind. Let us now remove Yaffe's agnosticism about what normative considerations are "culpability-relevant." Those "culpability-relevant values" are like the X in an algebraic equation: they can be filled in with whatever a particular normative theory of crime regards as relevant to culpability. For a retributivist, the culpability-relevant values will be moral ones: retributivists in criminal law are interested in moral blame and blamelessness. For a utilitarian, the culpability-relevant values will presumably have to do with harm: utilitarians are interested in an action's consequences. Yaffe himself is intent to establish a space between *legal* wrong and *moral* wrong: one of his larger projects in *The Age of Culpability* is to show that an action can be right or wrong as a legal matter without regard to its ultimate moral status.<sup>24</sup> But what are the culpability-relevant values for a reconstructivist? The answer is: those values that constitute a community's normative order and on which its ethical life depends. To a reconstructivist, crime is fundamentally a form of ideological assault: an action is a crime only if it represents an attack on a core communal value. Coupling this feature of reconstructivism with Yaffe's account of how normatively freighted action works, we can see that the offender's mind is the indispensable element giving crime its expressive

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24. See YAFFE, *supra* note 21, at 72.

meaning. If the mind tells you what an action *means*, reconstructivists need to know about an alleged offender's mind, because reconstructivists need to know if the crime expressed something antisocial.

Our syllogism is thus in place: reconstructivists care about crime's social meaning; crime's social meaning depends on mens rea; reconstructivists therefore care about mens rea. But is this connection deeply rooted enough for the interpretive burden it must bear? Mens rea is a *central* aspect of criminal law; a good theory of the practice of criminal law must therefore identify an adequately central place for mens rea. Can reconstructivism meet that burden? In fact, the reconstructivist's understanding of why mens rea matters is no less deeply rooted than the retributivist's. Retributivists hold that criminal law should be about moral wrongdoing and see that the mind is the root of all moral wrongdoing.<sup>25</sup> Reconstructivists hold that criminal law should be about antisocial wrongdoing and see that the mind is the ingredient that makes it possible for action to be antisocial.<sup>26</sup> (Part II will note an exception.) In both cases, blame of the relevant kind depends at its foundations on the mind. The difference is only in what counts as "culpability-relevant values." For a retributivist, those have to do with an ultimate moral order.<sup>27</sup> For a reconstructivist, they have to do with a society's embodied ethical life.<sup>28</sup>

Reconstructivism's account of mens rea can elucidate a variety of theoretical and doctrinal puzzles in criminal law. For example, if the mind has the principal role in determining culpability, why care about conduct at all? Why not just dispense with the bodily movement part of the picture and treat culpability as turning on mental states, full stop? Why not hold, as some religions do, that one is saved or condemned by faith alone, never mind good works? The answer turns on whether a criminal theory's "culpability-relevant values" require something external in the world or merely internal states of virtue or vice. This is a hard (though not unanswerable) question for retributivists. But reconstructivists are interested in attacks on society's normative order. A wicked thought by itself is not an attack: it does not undermine shared values. Only an action in full dress, bodily movement and mind together, can threaten the normative order.

The reconstructivist view of mens rea also explains the definitional content of various mens rea terms. It is black letter law, for example, that "negligence" doesn't mean the same thing in civil and criminal contexts. Civil

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25. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 597 (1996).

26. Kleinfeld, *Reconstructivism*, *supra* note 6, at 1490.

27. DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY* 43 (1990).

28. Kleinfeld, *Reconstructivism*, *supra* note 6, at 1560.

negligence is a departure from the standard of care of a reasonable person.<sup>29</sup> But criminal negligence is something different both in degree and kind. In traditional common law jurisdictions, criminal negligence requires a level and kind of negligence that is, in the California Supreme Court's words, "aggravated, culpable, gross, or reckless, that is, . . . such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life."<sup>30</sup> That is, criminal negligence is not just a matter of carelessness—of failing to live up to the relevant standard of care—but of the kind of carelessness that bespeaks indifference to the value of human life. The California formulation of the common law standard thus makes explicit criminal law's interest in whether the crime expressed disdain for a core communal value.

The Model Penal Code (MPC) version of the negligence standard, though different from that of the common law, is similar in the relevant respect: it too insists, not just that the offender fell short of due care, but that he behaved in a way that manifests indifference to shared values. The MPC splits the unified common law notion of criminal negligence and splits it into two categories—negligence and recklessness—where negligence involves basically a "gross deviation" from a reasonable person's standard of care, and recklessness involves both a "gross deviation" and "consciously disregard[ing]" a known risk.<sup>31</sup> The concern for ideological assault is less clear in the MPC's formulation than it was in the common law's, but the higher degree of culpability required for the criminal form of accident continues to track cases in which the defendant's behavior attacks or denies shared values rather than simply falling short of them.

In other words, criminal liability for accidents is for the parent who leaves his baby to fend for itself in an unsafe apartment all day, indifferent to the risks, rather than the one who absent-mindedly leaves the baby in a hot car for one disastrous hour. Or consider a variation on our earlier case: Peter accidentally trips into Paul, knocking him over and causing Paul's death, but not quite innocently, because Peter tripped into him while running headlong through the airport to catch a plane. Peter would obviously be civilly liable for wrongful death, but he would not in traditional jurisdictions be criminally

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29. RESTATEMENT (SECOND) OF TORTS § 282 (AM. L. INST. 1965).

30. *People v. Sargent*, 970 P.2d 409, 414 (Cal. 1999). This standard is focused on manslaughter—hence the focus on whether the carelessness indicates disregard for the value of human *life*. A formulation applicable to non-homicide crimes might speak of carelessness incompatible with a proper regard for other people's welfare and rights, or for the law's commands.

31. MODEL PENAL CODE § 2.02(2)(c)–(d) (AM. L. INST. 1985).

guilty of common law manslaughter or MPC negligent homicide. Why? Because desperately running through the airport to catch a plane is less careful than a reasonable person would be, but it does not bespeak indifference to the rights or welfare of others. Peter would probably be horrified to have killed someone in his rush. It is a tort, not a crime. Had he done it blindfolded for fun, it would have been a crime.

The reconstructivist view of mens rea explains a number of other points of doctrine as well. Attempt and other inchoate crimes make sense: we punish attempt because, even absent the tangible harm of a completed crime, the ideological assault on shared values is complete when the defendant takes action that expresses disdain for communal norms.<sup>32</sup> Or consider affirmative and failure-of-proof defenses: if a defendant is insane such that he thinks he is striking a demon when in fact he is striking a person, or if a defendant is mistaken such that he thinks the victim consented to a boxing match when in fact the victim only meant to tour the gym, the defendant intended to strike. He even intended to harm. What he did *not* do was express disdain for shared values.<sup>33</sup> The same is true if the defendant struck the victim only because the victim was attacking him (self-defense) or if the defendant opened the bank vault because a gun was put to his head (duress) or if he drove above the speed limit to get a gravely injured person to the hospital (necessity). The reconstructive approach also explains some of the limits and nuances of these defenses. If a defendant uses a knife against a victim who merely shoved him, the defendant is responding to physical force, but the response is so excessive that it *does* signal a criminal lack of regard for human life. If a defendant drives above the speed limit merely to get groceries before the store closes, he has no defense in necessity: he has simply valued his own welfare excessively in relation to others.

I want to note one point of uncertainty in the account above—something I haven't settled yet in my own thinking. It is not clear to me whether and to what extent the meaning or normative status of an action is *purely* a matter of authorial intent. As with the meaning of an utterance, the meaning of an action seems at least partly intersubjective: if Jane holds the door open for John because she is compulsive rather than considerate, the gesture still carries social meaning that is not under her control. Also, actions may carry entailed meanings subtler than anything in the actor's mind: if Paul beats Peter savagely with nothing in his thoughts but pure dumb pleasure in violence, his actions still expressively deny the validity of the norm against non-violence, the authority of the law against non-violence, and Peter's status

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32. Kleinfeld, *Reconstructivism*, *supra* note 6, at 1523–24.

33. *Id.* at 1563–64.

as a person of worth. That would not be true if Paul beat Peter no less severely during an epileptic fit: the issue is more one of authorial ownership of an action than authorial intent by an action. For present purposes, we can set these uncertainties and nuances aside: it remains the case that the mind mediates the relationship between action and value in such a way as to render action antisocial or not. But they are worth flagging for future work.

Earlier, I remarked that, for a reconstructivist, “the answer to the question of why mens rea matters is *not* obvious.” What I hope emerges from this discussion is that, even if less obvious, mens rea is no less theoretically central to a reconstructivist than it is to a retributivist, who needs mens rea to make assessments of blame. And mens rea is more theoretically central to a reconstructivist than it is to a utilitarian, who needs mens rea instrumentally to know when to apply its powers of deterrence, rehabilitation, and incapacitation. Reconstructivism needs mens rea to know what crimes *mean*. That is the first step in the call and response that defines criminal law on a reconstructive view.

## II. STRICT LIABILITY: THE REGULATORY AND THE SACRED

Some types of strict liability in criminal law essentially make offenders liable when their intentional crimes carry unexpected consequences, as with felony-murder (accidentally causing death in the course of another, typically intentional felony) or with doctrines that make accomplices and conspirators, engaged intentionally in a target crime, responsible for one another’s ancillary crimes. The underlying act is not innocent, and lawmakers think it right that the intentional offender be held responsible for all the harms that arise under its umbrella. Strict liability in statutory rape might reflect a similar logic: a mistake of fact regarding the victim’s age is no defense because judges and legislators do not see the underlying, intentional conduct as fully innocent. It is only in a limited sense that these crimes count as strict liability at all—they basically attach strict liability pieces to intentional wrongdoings—and I submit that, for all the ink spilled about them, they are not true exceptions to the mens rea edifice.

True strict liability crimes fall mainly into three categories. First is the sort of strict liability associated with crimes of sacredness or purity (drinking from the sacred stream and the like), which, although not prominent in contemporary American law, is significant comparatively and historically. A theory that aims to explain crime and punishment to the roots must be able to make sense of such crimes. Second is the sort of strict liability associated with contemporary regulation and the administrative state (e.g., failing to affix a proper label to a product, regardless of whether the failure was

knowing or even negligent), which is highly visible in contemporary American law. Third is the sort of episodic strict liability that overrides *mens rea* in order to achieve a collectivist end—as with the spasms of passionate group self-affirmation characteristic of mob justice and the calculated efforts to assert group identity characteristic of Soviet-style inquisitions. I address the first two categories here in Part II and reserve the third category for Part III.

Crimes of sacredness and purity are often and perhaps characteristically strict liability, and one of the challenges of comparative law and legal history is to explain why. Consider Uzzah, son of Abinadab. When David was bringing the Ark of the Covenant to Jerusalem,

[t]hey placed the Ark of God on a new cart and brought it from Abinadab's house which is on the hill. Uzzah and Ahio, the sons of Adinadab, were leading the cart. Uzzah walked alongside the Ark of God and Ahio went in front . . . . [W]hen they came to the threshing-floor of Nacon, Uzzah stretched his hand out to the Ark of God and steadied it, as the oxen were making it tilt. Then the anger of Yahweh blazed out against Uzzah, and for this crime God struck him down on the spot, and he died there beside the Ark of God.<sup>34</sup>

He who touches the Ark must die, though he only meant to steady it. He who drinks from the sacred stream must die, regardless of whether he knew or should have known the stream was sacred. Today, we think of criminal law as paradigmatically concerned with acts of malicious injury to others, but historically it was also and perhaps even more about “touching an object that is taboo, or an animal or man who is impure or consecrated, of letting the sacred fire die out, of eating certain kinds of meat, of not offering the traditional sacrifice on one's parents' grave, of not pronouncing the precise ritual formula.”<sup>35</sup>

But why? To a retributivist, this sort of crime without blame is nonsensical. It is difficult from a retributivist perspective *not* to view the civilizations that approached criminal law this way, numerous though they have been, as just benighted, morally confused. To a utilitarian, this sort of crime without blame—this sort of crime altogether—seems to proceed from an alien consciousness. The whole point of Benthamite materialism is to dispense with this sort of thing. A utilitarian explanation can be imagined of course, perhaps bootstrapped to some notion of ultra-deterrence, but the explanation rings false: it is anachronistic, and it makes utilitarianism so

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34. 2 *Samuel* 6:3–7 (Jerusalem Bible).

35. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 58 (W.D. Halls trans., 1984).

capacious as to be unilluminating. The root problem is that modern moral thought fixates on matters of guilt and blame in ways that tend to exclude other systems of value—moral categories of purity, pollution, sacredness, and sacrilege—that are no less important from an anthropological and historical perspective.

Reconstructivism, however, can explain strict liability crimes of sacredness and purity on their own terms. If the point of punishment is to uphold the norms on which social solidarity is based, it is no surprise to find societies willing to protect their most vital wellsprings of solidarity even at the cost of innocent life. Retributive blame and utilitarian control turn on the mind, but social solidarity is external; it is located in the sociology of the community rather than the psychology of the offender. A theory that sees punishment's function in sociological term can make sense of punishment that accomplishes its sociological function regardless of the offender's mind. Striking down Uzzah just for touching the Ark makes it clear to all Jews that the Ark is sacred and that their tribe's identity is connected to reverencing it. That is precisely what punishment, on a reconstructive view, is supposed to accomplish.

There is a further nuance as well, something that sets aside crimes of sacredness from other crimes not just as a matter of degree (the importance of the norm protected) but as a matter of kind. As discussed in Part I, the reason *mens rea* matters to a reconstructivist with respect to most crimes is that the mind endows action with expressive meaning, and reconstructivism's concern is with expressive denials of shared values.<sup>36</sup> But the sacred and the pure are special kinds of object that can be invaded by the very fact of illicit contact, regardless of expressive meaning. Sacredness and purity have to do with separateness; the very etymology of the word "sacred" has to do with separation (from the Latin *sacare*, a cutting away, a cutting off, or *sacer*, something set off, restricted).<sup>37</sup> Just as ink spreads in a pool of water, it is the mere fact of contact that renders something pure into something impure. He who drinks from the sacred stream pollutes it when his mouth touches it because that is the nature of moral pollution. He who steps on holy land trespasses on a sacred space because that is the nature of sacrilege. Because the offender touched it, the stream *is* polluted, the sacred *is* transgressed. Thus illicit contact with the sacred or the pure is a *per se* challenge to the community's cosmological order, and the normative challenge is not a matter of expressive meaning; it is a not a matter of the mind of the offender. Though the action might be blameless in a mind-centered moral system, mind-

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36. See *supra* note 6 and accompanying text.

37. JAMES STORMONTH & PHILIP HENRY PHELP, A DICTIONARY OF THE ENGLISH LANGUAGE 883 (1895).



centered moral systems are not all there is; the action is a normative attack—a crime—in itself. When the normative object in view is, given the normative cosmology of the community, the sacred or the pure, reconstructivism shifts from the expressive *meaning* of the act to the *nature* of the act. It is one of reconstructivism's strengths that it can make this shift, making sense of patterns of moral thought and punishment permanently alien to retributivism and utilitarianism. Reconstructivism has the explanatory advantage in comparative criminal law.

Turning now to strict liability regulatory crimes is to cross thousands of years of cultural history. With the rise of the administrative state in the early twentieth century, certain types of rules were promulgated to a degree they had not been before—licensing requirements for selling certain products or engaging in certain kinds of work, labeling requirements for food and drugs, public health and safety rules, financial regulations, traffic laws, etc.<sup>38</sup> Those rules had to be enforced somehow. They might have been enforced on an exclusively civil basis or by a system of administrative oversight and fines not understood in criminal terms; it is a matter of historical contingency that the rules of the administrative state were backed by criminal penalties. It is a further contingency that those regulatory crimes were often strict liability. As Justice Jackson put it in the landmark case of *Morissette v. United States*, “lawmakers, whether wisely or not, have sought to make such regulations more effective by invoking criminal sanctions to be applied by the familiar technique of criminal prosecutions and convictions” with legislation that often, “as a matter of policy, does not specify intent as a necessary element.”<sup>39</sup>

Like crimes of sacredness or purity, these regulatory crimes were *qualitatively* different from the sort of moral wrongdoing with which criminal law familiarly dealt. Courts recognized the difference:

These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but . . . their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted.<sup>40</sup>

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38. See RONALD PESTRITTO, THE HERITAGE FOUND., THE BIRTH OF THE ADMINISTRATIVE STATE I (2007), [http://s3.amazonaws.com/thf\\_media/2007/pdf/fp16.pdf](http://s3.amazonaws.com/thf_media/2007/pdf/fp16.pdf) [<https://perma.cc/R9CE-8E3W>].

39. 342 U.S. 246, 254–56 (1952).

40. *Id.* at 255–56.

But, courts reasoned, “penalties commonly are relatively small, and conviction does no grave damage to an offender’s reputation.”<sup>41</sup> Whatever misgivings courts felt, they did not generally think such crimes violated the Constitution, which would be the only basis for striking them down.<sup>42</sup> The result is the criminal system we have today, with crimes of wrongdoing that are typically *malum in se* and require mens rea, on the one hand, and crimes of rulebreaking that are typically *malum prohibitum* and do not require mens rea, on the other.<sup>43</sup> As Bill Stuntz writes, “Criminal law is not one field but two. The first consists of a few core crimes . . . murder, manslaughter, rape, robbery, arson, assault, kidnapping, burglary, larceny, and auto theft. The second consists of everything else. . . . These two fields have dramatically different histories.”<sup>44</sup>

The question is how a *theory* of criminal law should deal with this second field and, in particular, should make sense of its widespread use of strict liability. Retributivists generally cannot explain it: unless strict liability regulatory crimes can be reinterpreted as genuine forms of wrongdoing, they are unjust. Utilitarians can easily explain it—strict liability regulatory crimes are just another instance of deterring harmful conduct—but in a sense *too* easily: utilitarianism cannot explain why strict liability regulatory crime is qualitatively different from traditional criminal law’s “positive aggressions or invasions,” or, for that matter, why criminal law should be distinct from any other system of risk management.

Reconstructivism, by contrast, neither rejects strict liability regulatory crime as categorically unjust nor allows it to turn all criminal law into risk management, with strict liability as just one more tool in the utilitarian toolbox. Consider a driver who gets a ticket for failing to affix an updated registration sticker to her license plate. From a reconstructivist perspective, the failure to affix a registration sticker does not in any realistic sense expressively deny the values on which social life is based. It does not, for example, disdain the welfare or rights of other human beings, and where the driver was neither intentional nor negligent in failing to update her registration sticker (a true case of strict liability), failing to affix it does not

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41. *Id.* at 256.

42. *Id.* at 256, 263.

43. Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 IOWA L. REV. 1067, 1072–73 (1983).

44. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512 (2001). Stuntz’s “second field” was probably more inclusive than I’m presenting it. He had in mind the crimes produced by contemporary legislation rather than common law processes—a field that includes but is not limited to strict liability regulatory offenses. I think it does no violence to his point, however, to divide the world of criminal law into the regulatory and non-regulatory, as I do here.

even express disdain for the authority of the law. The driver's conduct is not, on a reconstructive view, really criminal. On the other hand, the fix-it ticket she gets is not really punishment either, because it expresses no community condemnation: it is an incentive to affix the sticker, not an effort to reconstruct a violated social order. The whole arrangement just falls outside the logic of reconstructive criminal law. That does not make it unjust. And it does not change the nature of core criminal law. It just means that criminal law is, as Stuntz wrote, "not one field, but two."<sup>45</sup>

In other words, reconstructivism regards typical strict liability regulatory crimes not as a problem of *injustice* but as a problem of *misclassification*. Regulatory crime is administrative law by other means. Its offenses and penalties do not correspond to the internal logic of criminal law, but that does not mean they have to be rejected (as a retributivist would think) or normalized (as a utilitarian would think). So long as the penalties, not being condemnatory, "are relatively small" and do no "grave damage to an offender's reputation," they do not unjustly misuse criminal law's distinctive powers. They just inaccurately use the criminal law label, or rather, expand that label to encompass two different things: a process of social condemnation for the sake of social solidarity, on the one hand, and a process of administrative regulation for the sake of general utility, on the other. The use of the criminal label for this second enterprise might be ill-advised—it might cheapen the criminal law's condemnatory force, for example, or put regulatory law on a slippery slope to excessive punishment—but it is not by itself unjust.

The theoretical virtue of this perspective is to keep criminal theory relevant in a changing legal world. Reconstructivism makes room for strict liability regulatory crimes, as a theory must if it is to be realistic in modern times, without thereby surrendering its core understanding of criminal law to the administrative state. It offers an understanding of regulatory offenses that "fits" the very contingent history of this area of criminal law. After all, historically, it was just the forcefulness and convenience of criminal law's enforcement apparatus that led regulatory offenses and penalties to be classified as criminal law at all. And, finally, the reconstructivist view preserves the possibility of criticizing strict liability regulatory crime if the punishments attached to such crimes become too harsh: the argument then would be that the administrative state is misusing a power—the power to punish—that can only be justified by the need to uphold shared norms against those who performatively deny those norms. In that sense, reconstructivism

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<sup>45</sup> *Id.*

insists on the *separateness* of strict liability regulatory crimes, while preserving its critical force if that category of crime should be abused.

### III. MENS REA AS A CONSTRAINT ON RECONSTRUCTIVISM

For all that is true and valuable in it, reconstructivism carries some alarming implications. Reconstructivism is a relativistic theory: it explains and to some extent justifies upholding community norms regardless of whether those norms are good or just. But how can we accept a relativistic theory given some of the abusive cultures in the world? And what about the solidaristic effect of mob justice? What about the normative alignment produced by persecutions and scapegoating? I confess that, although an ardent advocate of reconstructivism, I have grown more rather than less alarmed by some of these implications since first articulating the theory in 2016. I would like here to suggest that mens rea is not only an implication of reconstructivism but also an external constraint or side-constraint imposed on reconstructivism by broader considerations of justice. It might even be a retributive side-constraint.<sup>46</sup> In any case, I have never argued that reconstructivism is the whole truth about justice or a normative theory of all society. It is a normative theory *of criminal law*, which must be, as I state above and have written in the past, *nested* within a theory of justice.<sup>47</sup>

A reconstructive approach to criminal law presents two great risks, both of which stem from the theory's instrumentalism (its treatment of the criminal instrument as a *means* by which to achieve solidaristic ends),<sup>48</sup> and its orientation to the point of view of the community rather than the point of view of the defendant.<sup>49</sup> The first is the risk of criminalizing mere dissent—that is, criminalizing expressions of disagreement with prevailing norms. Such disagreement might be more disruptive to the normative solidarity of the community than any tangibly harmful conduct. Harriet Beecher Stowe's *Uncle Tom's Cabin* was an attack on the normative order of the slaveholding South;<sup>50</sup> an unconstrained reconstructivism would give southerners loyal to that normative order reason to criminalize it and punish her for writing it.

The second great risk is sacrificing individuals for the sake of securing normative consensus. Show trials, where officials deliberately prosecute an actual innocent unbeknownst to the public, are one example. This is

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46. See Kenneth W. Simons, *When Is Strict Liability Just*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1090 (1997).

47. See *supra* pp. 509–10; Kleinfeld, *Reconstructivism*, *supra* note 6, at 1549.

48. *Id.* at 1495–96.

49. *Id.* at 1518.

50. HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN* (Penguin Classics 1981) (1852).

persecution. In other cases, the offender may or may not be wholly innocent, but he is in any case a scapegoat, and the moral nuances of his conduct become subsumed in the thrill of hating and hurting someone as part of a group. This is mob justice. In Shirley Jackson's *The Lottery*, villagers randomly choose one townsman each year to stone to death, achieving catharsis and group affirmation by knowingly sacrificing an innocent.<sup>51</sup> In George Orwell's *1984*, the people of Oceania gather together every morning for their daily "Two Minutes Hate"—a ritual of frenzied rage at Emmanuel Goldstein, the great "Enemy of the People."<sup>52</sup> The idea is so chilling because we can all grasp how such a ritual might be pleasurable, solidaristic, and effective. It is also easy to imagine a group, perhaps a leadership class, that feels its hold on the community's shared norms is fragile and furiously attacks individual violators, regardless of actual moral wrongdoing, in order to elevate some norms as sacred and their violation as taboo. This too is persecution. Consider the defendant, Tom Robinson, in Harper Lee's *To Kill a Mockingbird*.<sup>53</sup> He was innocent of raping the alleged victim, a white woman, as everyone in the courtroom knew. The jury convicted him for reasons a reconstructivist can see all too clearly: to affirm the network of values and group understandings that undergirded white supremacy, and, especially, to establish as an ultimate taboo sex between a black man and a white woman. Tom Robinson's conviction was precisely an exercise in group and norm affirmation.

A criminal law that ran along any of these lines would be oppressive, violent, and unjust, but there is no denying that it could work wonders, at least in the short-term, for social solidarity. And there is no denying that, empirically, crime and punishment often work this way. The old Soviet Union was notorious for show trials;<sup>54</sup> it also had punishment quotas, in which local officials were expected to make a certain number of arrests regardless of actual guilt.<sup>55</sup> In the Cultural Revolution, denunciation was a routine tool of social control, independent of innocence or morally nuanced guilt.<sup>56</sup> And although less extreme, much of what makes American campus politics today so bitter is a structurally similar process of suppressing simple disagreement

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51. Shirley Jackson, *The Lottery*, NEW YORKER (June 26, 1948), <https://www.newyorker.com/magazine/1948/06/26/the-lottery> [<https://perma.cc/VLU8-DQNS>].

52. GEORGE ORWELL, NINETEEN EIGHTY-FOUR 10–18 (1949).

53. HARPER LEE, *TO KILL A MOCKINGBIRD* (Harper Collins 2014) (1960).

54. *Great Purge*, ENCYC. BRITANNICA (Mar. 6, 2020), <https://www.britannica.com/event/Great-Purge> [<https://perma.cc/4T3Y-R8VT>].

55. Michael Ellman, *Regional Influences on the Formulation and Implementation of NKVD Order 00447*, 62 EUR.-ASIA STUD. 915, 925 (2010).

56. Philip Bridgham, *Mao's "Cultural Revolution": Origin and Development*, 29 CHINA Q., Jan. – Mar. 1967, at 32–33.

with dominant norms by means of social processes of group condemnation and ostracism.<sup>57</sup> Those social processes are clearly efforts to establish normative alignment through punishment. Although formally extralegal, campus politics today are in substance a form of crime and punishment, which reconstructivism illuminates. Indeed, reconstructivism has extraordinary descriptive purchase on all of these social phenomena. That is part of its power: as a teleological or functionalist explanation of criminal law, reconstructivism is at once an attempt to explain how crime and punishment typically work, sociologically speaking, and how they ought to work, normatively speaking. It is a mark of the theory's strength that it can explain phenomena like Soviet show trials, Maoist denunciations, and campus persecutions. But there must be *some* further theoretical resources by which to see such things as wrong.

Can those theoretical resources be found internally? That is, does reconstructivism itself provide grounds with which to object to solidarity-oriented injustices? To some extent, I think the answer is yes. For example, suppressing dissent, punishing innocents, and engaging in mob justice might yield normative alignment in the short term while producing a solidarity that is brittle in the long term. But I have come to think that such internal principles of restraint are not strong enough. Reconstructivism stands in need of external principles by which to restrain its instrumental, group-centric orientation. My argument here in Part III is that mens rea requirements are among those external principles. They are not *only* that: reconstructivists have internal reasons to care about mens rea, as the argument in Part I showed. But I want now to attend to the ways in which mens rea plays a normatively vital role external to the internal logic of reconstructivism. My claim is that mens rea requirements are part of liberalism—part of the commitment to individual justice that liberal societies uphold—and reconstructive processes of crime and punishment must, as a normative matter, be constrained by the values at work in a liberal political order.

Let us therefore take up the two problems in turn: the punishment of mere dissent and the sacrifice of individuals for the sake of group solidarity.

Regarding the first of those problems, the punishment of mere dissent, commitments related to political liberalism—chiefly the First Amendment and the culture of freedom the First Amendment reflects—play a vital role,

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57. See, e.g., Conor Friedersdorf, *Evidence that Conservative Students Really Do Self-Censor*, ATLANTIC (Feb. 16, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/evidence-conservative-students-really-do-self-censor/606559/> [https://perma.cc/W724-PY8V].

but I don't think mens rea does.<sup>58</sup> If early societies had a "first crime," so to speak, a reconstructivist would predict it to be, not murder or theft, but sedition and blasphemy—not individual harms that might have been dealt with by the ancient equivalent of a tort system, but defiance of the public order, for challenges to political and religious authority are socially destabilizing, and criminal law's first order of business is suppressing that which is socially destabilizing. Interpersonal violence should only take center stage much later, when societies came to see *individual* rights and welfare as central matters of *political* concern. There is a reason the first five commandments are about the order of the world—honoring God and parents ("have no other gods before Me,"<sup>59</sup> worship no "graven image," do not "take the name of the Lord thy God in vain,"<sup>60</sup> "honour thy father and thy mother"<sup>61</sup>) and sacralizing daily life ("Remember the Sabbath day, to keep it holy"<sup>62</sup>). It is not until commandments six through ten that we are told not to kill, not to commit adultery, not to steal, not to bear false witness, not to covet.<sup>63</sup>

If these historical and anthropological musings are right, notice how neatly the First Amendment's dual protections of speech and religion fit into the reconstructive criminal structure. The First Amendment fights back at exactly the places where the temptation to use criminal law to punish dissent is strongest. Indeed, I think the First Amendment's character as an anti-criminalization provision—one of the Constitution's very few provisions to address substantive criminal law rather than criminal procedure—has not been sufficiently appreciated. It is of course true that the First Amendment applies to all law, not just criminal law. But, historically, sedition and blasphemy laws, and related kinds of criminal law, have played an outsized role in the First Amendment's development. As I have written elsewhere: "The First Amendment can usefully be understood as an anti-criminalization provision—indeed, historically it has often functioned as an anti-criminalization provision—freeing up a sphere of normative challenge and norm entrepreneurship outside the reach of criminal law."<sup>64</sup> The First Amendment is a model of how crime and punishment must be constrained, not only by the internal logic of reconstructivism, but by the external logic of political liberalism.

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58. See U.S. CONST. amend I. Arguably, the act requirement—the requirement that a defendant have committed some wrongful conduct—is also a source of restraint, as it stands in the way of pure thought crimes and crimes of association.

59. *Exodus* 20:2 (King James).

60. *Id.* at 20:7.

61. *Id.* at 20:12.

62. *Id.* at 20:8.

63. *Id.* at 20:13.

64. Kleinfeld, *Three Principles*, *supra* note 6, at 1476.

Regarding the second problem, however—the problem of sacrificing individuals for the sake of group solidarity—mens rea plays the key role, for mens rea individualizes the criminal inquiry, insists upon the point of view of the defendant, and resists instrumentalism. Particularly the traditional, morally thick conception of mens rea—the idea that criminal offenders must have acted wickedly, with evil in their hearts—interferes with the effort to use individuals as mere tools for building community solidarity and securing normative consensus. The most obvious example is show trials involving actually innocent defendants: so long as mens rea is taken seriously, those are impossible. But there are subtler examples as well—examples that don't involve total factual innocence, but in which the mens rea inquiry fosters consideration of moral nuance and individual justice in the criminal process.

Consider the real-life case of Debra and Priscilla, which the philosopher-criminal defense lawyer Bob Burns describes in his book *A Theory of the Trial*.<sup>65</sup> Debra was a teenager charged with the care of Priscilla, a baby.<sup>66</sup> One night, Debra threw or pushed Priscilla onto the floor, twice, apparently without reason, in a state of blankness of mind she could not later explain.<sup>67</sup> In a sense, it was an easy case for the prosecution: Debra admitted what she had done; she was young but a legal adult; she had no legally cognizable defense (although troubled, she was not legally insane); and all the state had to prove under the murder statute was that Debra killed with “knowledge” that serious bodily harm was probable from her actions, which in a sense she had.<sup>68</sup> She understood that she was propelling a baby to the floor and that the fall would harm the baby in the same sense that she understood that pushing a vase to the floor would shatter the vase. But that prosecutorial understanding of the case silenced other vital facts: that Debra was herself abused to a staggering extent in a household of utmost chaos; that she was always charged with Priscilla's care, though the two were not related; that she was normally a loving caretaker; and that on the night in question, after she first threw Priscilla to the floor, she picked Priscilla up,

told her how sorry she was, and then they lay in bed together, the two of them, for a short time. Debra then pushed Priscilla off the bed again. When Debra saw Priscilla getting pale, she was snapped back into reality, began giving CPR . . . . [C]all[ed] her uncle, for help. . . . [B]egan screaming for help.<sup>69</sup>

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65. ROBERT P. BURNS, *A THEORY OF THE TRIAL* 103–23 (2001).

66. *Id.* at 106.

67. *Id.* at 109–11.

68. *Id.*

69. *Id.* at 118.



Mens rea was the discursive and procedural instrument by which the defense brought these individualizing, defendant-centric, and anti-instrumental considerations into the courtroom. The defense argued that the statute required not just bare factual knowledge of cause and effect but blameworthy knowledge of a kind that, if one believes Debra's account of her blankness of mind, she did not have.<sup>70</sup> This kind of nuancing of criminal justice is a traditional function of mens rea in criminal courtrooms.<sup>71</sup> Mens rea provides a legal hook and a procedural vehicle by which to have an equitable argument in the courtroom about the sort of culpability a defendant evinced—about blameworthiness and about the sort of values expressed by the defendant's actions. This kind of discourse is itself an instrument of restraint on mob justice. Mob rage at Debra for killing Priscilla would reject both the nuanced inquiry into the nature of Debra's wrongdoing and the legalistic, courtroom procedural context in which that inquiry unfolds. Mens rea forces criminal law to deliberate and to empathize and to do so in the context of a court.

Is treating mens rea as an external constraint on reconstructivism to concede too much? Is it giving up on reconstructivism? No. Indeed, it is a strength of reconstructivism to be so open to external constraints arising from other aspects of justice. Kantian retributivism is deontological and absolute: it cannot concede. Benthamite utilitarianism is materialist: it cannot *not* be instrumental. But reconstructivism has a distinct theoretical structure. It is explicitly grounded in human flourishing and simply adds to that orientation two factual observations: that human flourishing requires communities with a high degree of normative alignment and that criminal law plays a special role in producing normative alignment.<sup>72</sup> A theory with that structure is genetically open to other considerations relevant to human flourishing.

#### CONCLUSION

The three arguments above are quite different from one another. The first links reconstructivism to mens rea by highlighting the role of the mind in making actions—including crimes—expressively meaningful. The second shows that reconstructivism's fluid relationship to mens rea makes room for forms of strict liability in criminal law that are important for understanding descriptively how criminal law functions, including sacred taboos and regulatory strict liability crimes. The third presents mens rea as an external

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70. *Id.*

71. See generally Bruce Ledewitz, *Mr. Carroll's Mental State or What Is Meant by Intent*, 38 AM. CRIM. L. REV. 71 (2001).

72. See generally Kleinfeld, *Reconstructivism*, *supra* note 6.

constraint on reconstructivism's communitarian logic. I submit that reconstructivism emerges from these three arguments *stronger* than its main competitors, retributivism and utilitarianism, with respect to mens rea. Despite the nuances of contemporary retributivism, the root impulse of the theory is to reject all forms of strict liability as mistaken or wrongheaded. Despite the nuances of contemporary utilitarianism, the root impulse of the theory is to treat mens rea as a mere disposable convenience. Reconstructivism carves out a place for mens rea that is deeply rooted but not indispensable and that can make sense of various strict liability social practices.