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### Retributivism Refined - Or Run Amok?

Kenneth Simons

*Boston University School of Law*

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## RETRIBUTIVISM REFINED—OR RUN AMOK?

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Kenneth W. Simons

A Review of  
*Crime and Culpability: A Theory of Criminal Law*  
Larry Alexander and Kimberly Kessler Ferzan, with Stephen Morse.  
Cambridge, 2009. Pp xiii, 330.

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## REVIEW

**Retributivism Refined—or Run Amok?***Kenneth W. Simons*<sup>†</sup>*Crime and Culpability: A Theory of Criminal Law*Larry Alexander and Kimberly Kessler Ferzan, with Stephen Morse.  
Cambridge, 2009. Pp xiii, 330.

## INTRODUCTION

What would the criminal law look like if we took retributivist principles very seriously? In this engagingly written, lively, philosophically astute book, the authors—Larry Alexander and Kimberly Kessler Ferzan, with contributions by Stephen J. Morse—provide a controversial set of answers. Whether a criminal act does or does not result in harm should not affect the actor's punishment (p 171). Only the last act of risk creation should suffice for liability (p 197). Conscious awareness of risk should always be necessary (pp 70–71). And all of criminal law, every category of mens rea and actus reus, should be reduced to the following single idea: *Do not be reckless; do not knowingly take risks that are clearly unjustifiable in light of your reasons for taking those risks* (p 263).

Few scholars and even fewer legislators will be persuaded, but that is of no moment. The authors have developed a set of arguments of remarkable breadth, depth, and originality. The arguments are fleshed out with terrific, vivid illustrations. The analysis is subtle and penetrating but leavened with playful humor. The authors are also brutally honest about the extreme implications of their positions. Indeed, they seem to relish these contrarian and radical repercussions, as we will see. I have no doubt that the book will be grist for the mill of criminal law theorists for many years to come.

In Part I of this Review, I briefly summarize the authors' most controversial claims, and also flag a few of their many intriguing secondary assertions. In Part II, I step back to examine the wider picture and ask whether, and to what extent, the authors are consequentialists in retributivist clothing. Part III turns to the authors' analysis of recklessness, and investigates two critical questions: Can recklessness really suffice as the sole criterion of culpability? (The answer, alas, is no.) And, is their

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<sup>†</sup> Professor of Law and The Honorable Frank R. Kenison Distinguished Scholar in Law, Boston University School of Law.

requirement of “conscious awareness” of risk too demanding? (Indeed it is.) In Part IV, I address a surprising phenomenon, the reappearance of the reasonable person as a central requirement of their culpability criterion, notwithstanding their unequivocal rejection of the reasonable person as part of a criterion of liability for culpable inadvertence to risk; I then critique that reincarnation.

#### I. FOUR CONTROVERSIAL POSITIONS

The four most controversial positions that the authors endorse are the following:

1. *Results should not matter.* Whether a harmful outcome of the defendant’s act occurs does not matter morally and should not matter legally. If D1 intends to kill, but the bullet misses his target, he should be punished to the same extent as if he succeeded in killing (p 172). And if D2 drives much too fast around a dangerous blind curve but just misses colliding with the car in the opposite lane, he should be punished to the same extent as if he actually killed all the occupants of the car. (Indeed, he should be punished the same even if there was no car in the opposite lane (p 30).)
2. *Only the “last act”<sup>1</sup> of risk creation should suffice for criminal liability.* Any earlier act—that is, any act over which the agent still retains control—is insufficient.<sup>2</sup> Thus, if D3 has not yet pulled the trigger of a gun he is pointing at the victim, he should not be punished as harshly as one who has done so (even if his intention to kill the victim is absolutely clear from other evidence) (pp 217–18). Indeed, on their view, so long as D3 retains control over the risk, he should not suffer any criminal penalty, regardless of the firmness of his illicit intention or his close proximity to causing the harm. Suppose D3, having carefully planned the killing of V, carries a concealed loaded gun, which he believes poses no risk to others until he pulls the trigger, and then approaches V from behind, points the gun, and is just about to pull the trigger when he hears a police siren and runs away. He should not be guilty of a crime, they assert

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<sup>1</sup> This is the standard term employed in the literature on criminal attempts. See Joshua Dressler, *Understanding Criminal Law* § 27.06[B][2] (Lexis 5th ed 2009) (defining the “last act” test). It refers to an act by which the defendant believes that he has done all that he must in order to produce the intended result (such as the death of a victim or the burning of a building). I put the term in quotes because the authors are also including risky acts that are not intended to produce harm, such as dangerous driving (pp 198–216).

<sup>2</sup> If D retains complete control of the risk—that is, if he believes that there is no chance that the risk will cause harm to a legally protected interest—then, on their view, criminal culpability is unwarranted (p 19). The authors also emphasize that the defendant must be able to control the risk of harm he has created “through exercise of reason and will alone” (p 197).

(p 212). Similarly, on their view, a dangerous driver should not suffer any criminal penalty so long as he has not genuinely “unleashed” the risk of harm (p 220). So if D4 drives at a high speed around a blind curve but confidently believes that he will be able to stop in time to prevent injury, he should not, the authors assert, be punished.

3. *Recklessness should be necessary for criminal liability.* Negligent inadvertence to a risk, no matter how unreasonable or outrageous, should be insufficient (p 70). I say more in Part III.A about the distinctive definition that they offer for recklessness. In essence, a person acts recklessly if the risks that he subjectively believes that his act poses are clearly unjustifiable in light of his reasons for taking those risks (p 27).
4. *Recklessness should be the only requirement for criminal culpability.*<sup>3</sup> It should replace all categories of mens rea and actus reus. “[T]here is really only one injunction that is relevant to criminal culpability: choose only those acts for which the risks to others’ interests—as you estimate those risks—are sufficiently low to be outweighed by the interests . . . that you are attempting to advance (discounted by the probability of advancing those interests)” (p 263). The special part of the criminal law, identifying all of the particular criminal offenses, should be eliminated (p 263).<sup>4</sup>

An unfriendly critic might declare that these various positions heap absurdity on absurdity. The first position asserts that criminal liability should exist even if the risky act caused no harm, and indeed had no objective possibility of causing harm. Moreover, the first and fourth positions combined would extend criminal liability to *any* act of unjustifiable risk creation, no matter how miniscule the risk. If Franklin takes a leisurely stroll through a crowd rather than staying home, and the sole purpose of his stroll is his sadistic desire that someone in the crowd will collide with him and suffer injury, we should deem his action criminal.<sup>5</sup>

To be sure, the second and third positions point in the opposite direction, narrowing criminal liability. Yet they appear to do so in absurd ways. Should the terrorist who unequivocally plans to bomb an airplane be immune from any criminal sanction simply because he is confident

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<sup>3</sup> I say “criminal culpability” and not “criminal liability” because the authors do acknowledge that consequentialist values could militate against criminal liability in some situations even though the actor is criminally culpable (pp 321–24) (discussing the burden of proof, plea bargaining, and other sentencing considerations).

<sup>4</sup> “Counting crime types,” the authors assert, “is easy for us: we have only one crime—manifesting insufficient concern for others’ legally protected interests” (p 246).

<sup>5</sup> The authors provide a comparable example, Frankie, discussed below in Part III.A.2.

that the explosive device cannot possibly be triggered until he pushes a switch? And should every actor who lacks awareness of the specific risks he is creating also be impervious to punishment, regardless of how obvious the risks would be to most actors and how blameworthy he is for not paying attention to them?

But I am a friendly critic. In my view, these positions, and the arguments for them, are coherent, illuminating, provocative and indeed sometimes extreme, but not (quite) absurd.<sup>6</sup>

In this Review, I focus on the third and fourth positions. The first and second positions have been much discussed in the literature, though the authors do bring fresh analysis to bear on them.<sup>7</sup> (I happen to agree in large part with the authors on the first point, and disagree with them on the second.)

The combined effect of the authors' four positions would be to expand the criminal law very substantially in many cases. The second and third positions do militate in the other direction, but one should not overstate their limiting implications. The "last act" requirement, for example, permits criminal liability in a wider range of situations than first appears. An actor who carries a loaded gun, believing that he probably can prevent it from causing harm, will often recognize that there is a small chance that he cannot (because, for example, he might drop it or it might discharge in a struggle); if he so recognizes, then he has indeed recklessly unleashed an unjustifiable risk of harm, albeit a much smaller (and thus less culpable) one than he unleashes after he pulls the trigger (pp 217–18).<sup>8</sup>

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<sup>6</sup> The second position, I must say, is precariously proximate to the precipice of the preposterous.

<sup>7</sup> For example, the authors provide intuitively powerful counterexamples to the claim that results should matter for criminal liability. In "The Satanic Cult," twenty people, in order to join a gang, each fire a gun at the victim, knowing that only one rifle contains a live shell, but not knowing whether he has fired the deadly shot; the authors plausibly argue that we should not care which one is the actual killer (p 175). "The Broken Window" is a similar case of two children creating equivalent risks of harm, but only one actually breaking a window (p 176). The authors also identify an underappreciated problem with the "results matter" position: if negative results increase blameworthiness, why do fortuitous positive results not decrease blameworthiness (pp 178–80)? With respect to their claim that anything short of the "last act" of risk creation is insufficient for criminal liability, they offer strong reasons for rejecting the alternative view that firm intentions are sufficiently culpable acts (pp 199–210). Those reasons include the conditionality of such intentions and the opacity and indeterminacy of the actor's associated beliefs about the risks he is running and about his reasons (pp 203–06).

<sup>8</sup> "Even Superman commits a culpable act by firing a gun because the sudden appearance of kryptonite may prevent him from stopping the speeding bullet" (p 199 n 2). A nice example, but misleading: to be culpable under the authors' approach, Superman must be reckless; he must actually consciously believe that there is some chance that he will suddenly be exposed to kryptonite and thereby be disabled from catching up to the bullet. If Superman is superconfident or is simply oblivious to that chance, he will not be culpable.

Of course, if the actor is aware of some chance that the victim will suffer *fear* as a result of his inchoate act of brandishing the gun, the actor is, on the authors' theory, culpable for unleashing the

Before we turn to some of the larger themes, it is worth highlighting a handful of the authors' highly original arguments with respect to more particular issues. These are just illustrations of the creativity and wide range of the authors' analysis.

- Self-defense doctrine conventionally imposes two independent requirements for the use of force: necessity and proportionality. But is the former just a component of the latter (p 117)?
- Conventional doctrine disfavors defensive claims of mistake of criminal law. But should we more readily allow such a defense when the crime at issue, such as a crime penalizing possession of machine-guns or a crime presuming that those below a certain age are incapable of consent, is merely a proxy for a legitimate state interest (pp 154–55)? And conversely, should we punish for attempting a proxy crime, notwithstanding the usual rule that true legal impossibility is a complete defense (pp 312–13)?
- The conventional requirement that an accomplice or co-conspirator act with the “purpose” to assist the principal or other conspirator is overly narrow (and is often not rigorously applied). Can a “recklessness” criterion help solve these problems by reconceptualizing inchoate crimes as crimes in which one actor recklessly increases the risk that another will commit a crime (p 223)?<sup>9</sup>
- How do we determine the culpability of one who violates a deontological constraint, especially if the risk is consequentially justifiable (p 287)?<sup>10</sup>

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risk of causing fear, though not necessarily for unleashing the risk of causing physical injury (p 218).

I think the authors are too quick, however, to assume that an actor who intends to harm a victim and has come perilously close to doing so almost inevitably will actually believe that he has unleashed a risk that he cannot fully control (p 220). (Suppose he is about to light the fuse of a bomb or about to pull a loaded gun from his pocket.) Very often, actors who are bent on harming another form no specific beliefs of this sort; at most, they believe (in a vague sort of way) that they will probably succeed in what they are trying to do. In Part III.B, I discuss in more detail the requisite particularity, and degree of consciousness, of beliefs under the authors' theory.

<sup>9</sup> Specifically, under the authors' approach, there is no need for separate crimes of solicitation, conspiracy, and accomplice liability. All are just cases of recklessly increasing the risks that others will commit crimes, through unjustifiably risking, encouraging, or aiding others' criminality. This approach also avoids the need to prove that the actor had the purpose to assist some specific crime, as opposed to proving that he risked that the other might commit any one of a range of crimes (pp 223–24).

<sup>10</sup> The authors note that this problem is analogous to the problem of justifying a threshold version of deontology (p 287).

- Could society (as opposed to an individual defendant) be “excused” for certain policies, such as preventively detaining the sane but dangerous (p 150)?

Finally, this Review concentrates upon some critical issues of principle and theory that the authors’ arguments raise. However, their positions would engender significant problems of practical administration—problems that the authors do attempt to address in Part Four of *Crime and Culpability*, but that remain quite serious.<sup>11</sup>

## II. CONSEQUENTIALISTS IN RETRIBUTIVIST CLOTHING?

Before turning to the details of the authors’ arguments with respect to the third and fourth positions, let us pause to consider the wider picture. The authors helpfully situate their specific arguments within broader debates about the proper scope of retributivism or just deserts. They endorse a moderate, and partially consequentialist, version of retributivism (p 8). This version is stronger than the view (often denominated “negative retributivism”) that just deserts serves only as a side constraint on punishment, forbidding punishment in excess of desert; however, it is weaker than the view (one type of “affirmative retributivism”) that if an offender deserves punishment, the state is mandated to impose it (p 7). Rather, they believe that just punishment is one good among many, and sometimes can be outweighed by other goods (p 9).

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<sup>11</sup> For example, the authors rely heavily on standards rather than rules to define criminal conduct. They justify this, in part, by the assertion that our current codes also rely very heavily on standards (p 292). But this claim is an exaggeration. Although legal criteria of reasonableness, negligence, and recklessness do require that a risk be unjustifiable, and thus do employ standards, such criteria only rarely are decisive. Indeed, they are often not at all significant in routine criminal prosecutions. For example, even if a theft or drug offense formally requires recklessness as to the amount of property stolen or drugs possessed, it would be extraordinarily rare for the *justifiability* of the actor’s theft or possession to be a genuine issue. By contrast, their proposal, if implemented, would dramatically expand the use of standards in routine cases.

More specifically, their sample jury instruction (pp 327–29) gives absolutely no guidance to jurors about what kinds of “reasons” do or do not justify creating a risk. The jury is simply told:

For behavior to be justified, the reasons that the actor has for engaging in his behavior should be weighed against the risk that the actor perceives that his conduct will cause a prohibited result or results.

...

The actor’s reasons for action include not only the reason or reasons that motivate his conduct but also any other reason that might justify his conduct of which he is aware. These reasons should be accorded weight by (1) their positive or negative force and (2) the actor’s perception of the likelihood that the facts underlying the reasons do or will obtain (p 328).

Although the authors do suggest that the criminal code might codify the weight of different legally protected interests and of different reasons for creating risks, and might provide clarifying commentary, they also propose that the jury first make the extremely open-ended determination whether the risks outweigh the reasons (pp 278–79).



Throughout the book, the authors offer examples of specific contexts in which the good of calibrating an actor's punishment to his just deserts might indeed be outweighed by other social values, including deterring crime, reducing administrative costs, and conforming to distributive justice (pp 10, 322).

I have no quarrel with this moderate general stance. But I do have a quarrel with the unexpectedly consequentialist tenor of their argument for a retributivist account of culpability. It is one thing to balance the good of retributive justice against consequentialist values. It is quite another to profess to offer a mainly retributivist account of culpability but then to pervasively employ consequentialist reasoning in fleshing out that account.

Thus, on the first page of the text, the authors flatly declare, “the criminal law aims at preventing harm” (p 3). This consequentialist assertion is surprising in two ways. First, a system of criminal laws might do a very good job of preventing harm, yet in so doing might punish the innocent or punish out of all proportion to desert. The authors, as professed retributivists, could not countenance this state of affairs. Second, if some particular criminal law doctrine or practice is completely ineffective at preventing or reducing the risk of harm, then on this reasoning, that doctrine or practice would be unjustifiable; yet affirmative retributivists believe that one important reason for the criminal law is to afford just deserts, even when this does *not* reduce crime.

The authors are aware of these problems and make some effort to respond to them. But why do they begin with the assumption that criminal law aims to prevent harm? Why not describe its aims as both preventing harm and giving wrongdoers their just deserts?<sup>12</sup>

One possible reason for their surprising endorsement of consequentialism is this: they insist that an actor is culpable only if he is in some sense *reachable* by the criminal law (p 6). I largely agree with this premise; but the premise does not entail either: (1) that the underlying *justification* for criminal law must be to prevent harm, or (2) that the particular doctrines of criminal law cannot legitimately be applied to a particular defendant unless they are capable of influencing him.

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<sup>12</sup> Of course, what counts as culpable action in the first place—an action that triggers the state's right to punish according to what the actor deserves—often depends on the specific future harms or wrongs the actor intended or risked. Attempted murder depends on an intention to kill; reckless driving depends on the anticipated future risks of harm. But this is a completely distinct point. The mere fact that we often properly take an *ex ante* perspective in determining culpability does not convert a nonconsequentialist theory into a consequentialist one. See Kenneth W. Simons, *Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy*, 41 *Loyola LA L Rev* 1171, 1188–89 (2008) (arguing that justifications like self-defense similarly take an *ex ante* perspective, a perspective that can be explained through a consequentialist assessment of risk and future harm, but that can also be explained on moral and nonconsequentialist grounds).

Thus, the authors are right that it would be unfair to punish those who are completely incapable of abiding by criminal law norms—for example, due to infancy, insanity, or excusable ignorance. And they are right that the criminal law presupposes that people act for reasons. But they are wrong to then insist that punishment is apt only in those situations when the law *can influence* those reasons (p 6).

Consider two counterexamples to their claim. Suppose a terrorist expects to die in the course of his violent attack. He deserves serious punishment even if the prospect of criminal punishment cannot affect his decision to commit a crime. Or suppose a less extreme case: Dan, the wayward moralist. Dan has an anger management problem. He is also deeply religious, believing that he owes a strong moral duty to treat others without violence and with utmost respect. Indeed, his moral beliefs are so strong that the criminal law has absolutely no effect on him. Sometimes he loses his temper and physically assaults his friends and family. He is enormously ashamed and humiliated by his own behavior, to such a degree that even if there were no criminal law, or even if it imposed either less severe or more severe punishments, his conduct would be no different. Sometimes he is able to resist his urges, but often he is not. When he commits a crime, does he deserve criminal punishment? Many retributivists would answer yes, even though in his case, the law cannot influence his reasons or his behavior. Given the authors' endorsement of moderate retributivism, which holds that just deserts is sometimes a sufficient reason for punishment, they should support punishment of Dan, even though the law cannot influence Dan's reasons.

In short, I agree with the authors that responsiveness to reasons is a plausible requirement of any retributive theory, but I do not agree that responsiveness to the criminal law is an inexorable requirement. (Responsiveness to the criminal law might be a sensible requirement of the *consequentialist* element of their mixed approach to punishment; however, that is a distinct claim.)

To be sure, it is difficult to imagine any real-world criminal justice system that does not significantly influence the extent to which people commit crimes. At the very least, enactment and enforcement of criminal law rules have the effect of reinforcing social norms, which in turn quite clearly influence the incidence of criminal behavior. Indeed, the authors claim that norm-inculcation is the *only* proper way, under a retributivist approach, for the criminal law to prevent harm (pp 6–7). Norm-reinforcement is also central to their conception of retribution in another way—it explains why we properly blame those who violate criminal law norms:

[T]he inculcation of such norms involves as its corollary the inculcation of reactive attitudes toward those who comply with and those who violate the norms. The negative reactive attitudes, to be

directed at those who choose to violate the norms, include both blame and the sense that punishment is fitting (p 6).

Nevertheless, a purely nonconsequentialist criminal law that has little or no influence on the incidence of crime, not even by way of norm-reinforcement, is entirely *conceivable*. Imagine, for example, that we were able to prevent almost all crime by means of noncriminal legal institutions such as civil regulation, systems of preventive detention, tort law, mental health institutions, and other social programs. And suppose a few crimes continue to be committed—by people like Dan, or, more likely, by people who rationally calculate that the risk of prosecution for their particular crime will be less than their anticipated benefits from the crime. Principles of just deserts would still demand that these remaining criminals be punished.

The authors' surprisingly consequentialist account of the foundation of culpability has problematic implications later in the book when they turn to more specific issues. For example, when they argue for a "last act" requirement, one of their rationales is that the criminal law aims to influence the actor's reasons for action; so if an actor who intends to harm or endanger another still is able to change his mind and decide not to unleash the risk, the law remains capable of influencing him, and he should not be criminally liable (pp 198–99, 212–14, 216). But, again, an actor might be completely insensitive to the criminal law, yet still amenable to moral or other reasons for reconsidering his wrongful intent; should the latter not be the test of whether he has committed the last act?

A second example is the authors' incentive-based argument that the law should not require an actor faced with a choice of a greater, lesser, and least evil to choose the least. Suppose a runaway trolley will kill five unless it is redirected either to track A, where it will kill two, or to track B, where it will kill one (p 105). The actor is considering whether to redirect the trolley. If the law were to permit him to redirect the trolley only if he chooses the least evil, that is, only if he chooses to redirect it to track B, not track A, then, they worry, the actor might choose *neither* the lesser nor the least evil, but might simply allow the greater evil to occur, an option that the law normally will consider permissible (p 104–08).<sup>13</sup> But here, too, it should be irrelevant on a retributivist ac-

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<sup>13</sup> The authors' approach might also appear to be too consequentialist insofar as it requires a comprehensive, systematic balancing of risks, reasons, and duration of risk, in determining whether the risky act is culpable. Some will object that this is just a utilitarian cost-benefit analysis, similar to the Learned Hand test of tort negligence, and equally indefensible if one is a genuine nonconsequentialist.

I am happy to leap to their defense here. I agree that we must balance the advantages and disadvantages of taking a precaution to judge an actor's negligence in tort law. And we might similarly want

count how this actor or similarly situated actors will respond to the law's incentives. (It is also a bit unlikely that anyone but a few philosophers or law professors would even recognize, in the real world, that they are facing a choice between the "lesser" and the "least" evil.) The proper question, rather, is whether a choice of lesser rather than least evil can be justified as consistent with retributive values.<sup>14</sup>

### III. THE PROBLEMATIC RECKLESSNESS CRITERION

Let us turn to the authors' analysis of recklessness and investigate two critical questions. Can recklessness really suffice as the sole criterion of culpability? And, is their requirement of "conscious awareness" of risk too demanding?

#### A. Recklessness as the Supposed Single Criterion of Culpability

One of the most arresting of the authors' claims is that they can reduce culpability to a single criterion, recklessness, that would swallow up and replace all other criteria such as purpose, knowledge, recklessness as defined in the Model Penal Code, extreme indifference, and willful blindness (p 41).<sup>15</sup>

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to balance the risks and the reasons for choosing to take a risky course of action when we are judging criminal culpability. But in both cases, the balance need not, and should not, aim simply to maximize utility or welfare. See *id.*

<sup>14</sup> For a tentative negative answer, see Kenneth W. Simons, *Exploring the Intricacies of the Lesser Evils Defense*, 24 L & Phil 645, 653–54 (2005) (explaining that if permission either to choose or not to choose the lesser evil is autonomy-based, then arguably an actor who chooses to act forfeits any objection to then being required to choose the least rather than lesser evil).

<sup>15</sup> I am surprised, however, at the authors' criticism of the willful blindness doctrine, under which a mens rea of knowledge is deemed to include some cases in which the actor lacks knowledge only because she deliberately avoids confirming the relevant facts (pp 33–35). That doctrine is intended to accomplish just what they want to achieve with their two-variable recklessness criterion: avoid the inflexibility of the knowledge-recklessness distinction and treat certain especially culpable cases of cognitive recklessness as harshly as cases of knowledge. See Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 Ohio St J Crim L 179, 196–98 (2003) (arguing that an exclusively cognitive criterion for distinguishing between knowledge and recklessness is too narrow).

In their example, a mule knows there is a 1 percent chance that his suitcase contains illegal drugs. The willful blindness doctrine would treat him as "knowing" if the reason why he does not inquire into whether his suitcase contains drugs (though he could easily do so) is in order to remain part of the criminal gang and obtain illegal profits (p 34). The doctrine thus is entirely consistent with the authors' approach, which looks both at the perceived risk and at the (good or bad) reasons for running the risk. Here, the mule has a socially unacceptable reason for not inquiring further, and this plausibly elevates his 1 percent estimation of the risk that he is smuggling to roughly the level of culpability of another (knowing) actor who is 90 percent sure that his suitcase contains illegal drugs. Deeming such a reckless actor to be "knowing" is not "absurd" (p 34), but is simply a way of expressing their comparable culpability. By contrast, if the mule is willing to take a 1 percent risk that he is smuggling drugs for a much less culpable reason, for example to show friendship to a person he admires, he is *not* comparable in culpability to a knowing actor.

Their basic idea is powerful and elegant: replace all mens rea terms with just one, reckless risking, involving only two variables: (1) how probable the actor subjectively believes the risk to be, and (2) what reasons the actor has for imposing the risk (p 24).

And if the actor poses risks to several protected interests, such as life, bodily integrity, and property, then: simply aggregate the risks he believes he is imposing (pp 46–47). (They call this a “holistic” approach to the risks, but “aggregate” is a more accurate term.<sup>16</sup>)

According to the authors, “knowledge” (for example, that one will cause a death) is just the extreme case on the first axis of culpability, for it is a belief that the risk is almost certain to be realized (p 32). And “purpose” (for example, to cause death) is just an extreme case on the second axis, because an intention to kill is ordinarily one of the most unjustifiable types of reasons (p 39).

Is “reckless risking” a persuasive simplification of mens rea and actus reus categories? Regrettably, it is not. On closer examination, this approach: (1) is unlikely, in operation, to radically simplify the criminal law; (2) cannot, in principle, avoid making complex and subtle qualitative, rather than merely scalar, distinctions; and (3) creates a significant ambiguity, namely about whether the “insufficient concern” (p 24) that recklessness exhibits actually operates as a criterion of culpability. I address these points in turn.

#### 1. Radical simplification is unattainable in practice.

First, I doubt that the new approach, once implemented, will simplify nearly as much as the authors imply. Compare two cases. D5 shoots a gun at a victim, wanting him dead. D6 shoots a gun in the air, believing there is only a small risk of death. The authors would expect the jury, applying their approach, to categorize D5’s act as more culpable than D6’s. But, the authors concede, the jury should not have complete dis-

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Perhaps the authors’ objection is that automatically classifying willful blindness as “knowledge” oversimplifies the analysis, given that knowledge can be more or less culpable than recklessness, depending on context. But the point of the willful blindness doctrine is to underscore that even though in many or most contexts cognitive recklessness (in the sense of awareness of a substantial but not very high risk of harm) is less culpable than knowledge, sometimes it is just as culpable.

<sup>16</sup> In philosophical discourse, holism is a concept quite distinct from aggregation of risks: it is the idea that the whole cannot be reduced to any simple, invariant formula combining the parts, or that the meaning and significance of the parts depend on the larger whole of which they are a part. See Jonathan Dancy, *Moral Particularism*, in Edward N. Zalta, ed, *The Stanford Encyclopedia of Philosophy*, online at <http://plato.stanford.edu/archives/spr2009/entries/moral-particularism> (visited Oct 29, 2009); Ned Block, *Holism, Mental and Semantic*, in Edward Craig, ed, *Routledge Encyclopedia of Philosophy Online* (Routledge 1998), online at <http://rep.routledge.com/article/W015> (visited Oct 29, 2009) (“Mental (or semantic) holism is the doctrine that the identity of a belief content (or the meaning of a sentence that expresses it) is determined by its place in the web of beliefs or sentences comprising a whole theory or group of theories.”).

cretion to make this type of culpability judgment on a case-by-case basis (pp 280–81). Rather, they make several suggestions about how to constrain that discretion when their theory is implemented in practice: (1) the legislature should establish predetermined weights for different legally protected interests and for different types of reasons; (2) the judge should employ a sentencing matrix; and (3) the legislature could place commentaries within the criminal code and employ presumptions (pp 280–82, 285–86, 307–09). They anticipate, in short, that the law will crystallize into at least a weak version of current criminal codes. For example, it is likely to produce distinct de facto crimes of what we would now call attempted murder for actors like D5, and reckless discharge of a firearm for actors like D6.

2. The “risks versus reasons” formula requires subtle qualitative distinctions.

Second, even in the abstract, the apparent simplicity of this “risks versus reasons” formula is deceptive. The elaboration of the formula will require subtle, complex distinctions. Those distinctions are much more qualitative and nuanced than the scalar “risk versus reasons” formula (roughly modeled on the scalar Learned Hand test (p 81)<sup>17</sup>) that the authors initially suggest will suffice.

The category of “reasons” for imposing a risk is especially complex. The possible reasons are numerous and varied, and encompass a wide range of qualitatively distinct considerations that have their own intricate structure. This structure, once fully articulated, might well be at least as elaborate as the structure of the Model Penal Code or other modern criminal codes.

Thus, under the Model Penal Code, recklessness requires both that the actor is aware of a substantial risk and that the risk is unjustifiable<sup>18</sup> (though the Code provides little guidance about what counts as unjustifiable). But when it addresses *knowing or purposeful* causation of serious harm, the Code permits justification only in very narrow circum-

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<sup>17</sup> See Simons, 41 *Loyola LA L Rev* at 1172–73 (cited in note 12):

In the famous Learned Hand formulation [of negligence, an actor] should take a precaution if, but only if, the marginal costs (or “burden,” “B”) of that precaution (in the form of the tangible costs of the precaution or the lost benefits that taking the precaution would entail) are less than its marginal benefits (in the form of reduced risks of injury, measured by multiplying the probability (“P”) of the injury times the magnitude (“L”) of the injury if it occurs).

Judge Learned Hand first announced this test in *United States v Carroll Towing Co*, 159 F2d 169, 173 (2d Cir 1947).

<sup>18</sup> See MPC § 2.02(2)(c) (stating the requirement for recklessness that the actor “consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct”).

tances—mainly, only in cases of self-defense or lesser evils. Something quite similar is very likely to evolve under the authors' culpability scheme.<sup>19</sup>

The authors themselves recognize quite a bit of qualitative variation within the “reasons” that might justify a risk. They mention four types of reasons, which they concede will have to be spelled out further:

[T]he jury should consider whether the actor's reasons were evil, substantially enhancing the actor's culpability; antisocial, enhancing the actor's culpability; trivial, leaving the actor's culpability unaffected; decent, reducing the culpability substantially, but insufficient to justify the act; or weighty enough to justify or require the act socially (justification) or personally (excuse).

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[T]hese reasons will have to be spelled out more elaborately. We are not able here to list all of the reasons that would fall into each category (p 285).<sup>20</sup>

Consider two other significant qualitative dimensions of such “reasons”—the significance of the actor's intentions relative to her beliefs, and the role of consent. On a plausible nonconsequentialist account of permissible risk creation, if someone acts with the *intention* to harm or *intention* to expose someone to what she believes to be level L of risk, then (all else being equal) she displays greater culpability than if she acts while merely *believing* that she is exposing someone to level L of risk. Indeed, despite the authors' assertion to the contrary, the existence vel non of a purpose or intention to harm will often trump differences in belief in the probability of success. Suppose Kim wants to kill me, but also wants the killing to be a bit more exciting and more of a challenge. So she deliberately fires her gun (containing only one bullet) from the other side of the room. Larry also wants to kill me and simply fires the gun point blank. Is Kim really significantly less culpable merely because she believes she is imposing only a 30 percent rather than a 99 percent risk of death?<sup>21</sup>

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<sup>19</sup> The authors seem to concede as much (pp 42–43).

I do agree with the authors that the Model Penal Code's “substantial risk” threshold for recklessness should be rejected, or at least supplemented by a provision that if the actor has an especially unjustifiable reason for imposing the risk, he may not impose even a “less than substantial” risk (p 27). See Simons, 1 Ohio St J Crim L at 190–92 (cited in note 15).

<sup>20</sup> Elsewhere, the authors indicate that relevant features of “reasons” include their “weight” (p 27), and whether the reasons are “misanthropic” (p 27) or “frivolous” (such as obtaining a thrill) (p 33).

<sup>21</sup> Similarly, the authors concede that if a circumstance (such as the victim's nonconsent) is a *motivating reason* for the actor's engaging in sexual intercourse with her, that is more culpable than if the actor is simply aware of that circumstance (or, I would add, than if the actor merely

Another crucial qualitative distinction is *consent*, either actual or hypothetical. When risks are extremely low, those who are exposed to the risks often consent to them, or would consent if they had full information about the risks. That consent often justifies the risk imposition. The authors provide some instructive and troubling examples of very low-level risk imposition, in which even a very carefully conducted activity in principle *seems* to be impermissible because the actor's reason for acting is immoral (or simply has little weight) (p 48). But consent helps explain why these examples need not be viewed as culpable acts.

Consider one of the authors' memorable characters, Deborah, who drives carefully but obtains only the slightest enjoyment from doing so (p 50). It is, the authors plausibly suggest, a close case whether her conduct is justifiable, inasmuch as even careful driving creates risks to others. But if other drivers and pedestrians would have no objection to her safe driving for very slight reasons, her conduct does seem justifiable. Compare another of the authors' ingenious examples, Frankie, who drives carefully towards the house of a person she intends to murder. Is her act of driving unjustified and reckless? The authors conclude that it is (p 50). This seems correct, since she is the only one who benefits from the drive, and the benefit she obtains is of course without social value. But suppose she chooses to drive carefully to the victim's house rather than bicycle there because this mode of transportation permits her to drop a friend off at the store along the way. Even this very small social benefit from her careful driving probably suffices to make her driving justifiable.<sup>22</sup> When the risks are this small, either consent or a small social benefit can make the risky act nonculpable.

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hopes or desires that she does not consent even if he is not motivated thereby) (p 40). See Kenneth W. Simons, *Does Punishment for "Culpable Indifference" Simply Punish for "Bad Character"?* *Examining the Requisite Connection between Mens Rea and Actus Reus*, 6 *Buff Crim L Rev* 219, 243–47 (2003) (arguing that some causal but nonmotivational desires are relevant to criminal liability).

<sup>22</sup> Compare an example from a leading criminal law casebook: D gives a gift of an airplane ticket to his hated aunt, hoping the plane will crash, which it does. If this result is genuinely fortuitous—that is, D has no reason to believe that this plane is more unsafe than any other—then someone in the position of V might be happy to accept the ticket as a gift. (Suppose D is a crazy, wealthy person who gives away thousands of plane tickets, hoping thereby to kill some of the recipients.) Given that each recipient expects to benefit *ex ante* from the gift, D's risk creation might well be justifiable. See Sanford H. Kadish, Stephen J. Schulhofer, and Carol S. Steiker, *Criminal Law and Its Processes: Cases and Materials* 227–28 (Aspen 8th ed 2007) (proposing the example).

The authors are correct that we perhaps assume too readily that "driving" is an innocuous and justifiable activity, merely because it is so familiar and commonplace. As they point out, if Frankie instead walked to the victim's house with a gun strapped to her back and it misfired, we would not hesitate to judge her reckless (pp 50–51). This is so, I would add, even if the risk she believed the gun posed was no greater than the risk she believed she would have posed if she had driven carefully to the house. Nevertheless, careful driving, even for an improper purpose, may indeed be justifiable if its risks are quite small and are consented to, whereas it is much less likely that the endangered public does or hypothetically would consent even to the very small risks posed by a person carrying a gun.



Finally, the apparent simplicity of the “risks versus reasons” formula is also belied by the inevitable complexity of the “risk” half of the recklessness equation. The authors endorse a largely consequentialist balance of risks and reasons, but a nonconsequentialist account of risk can and should also consider the distribution and concentration of the risks that the actor creates.<sup>23</sup> In mathematical terms, the culpability function of the relevant variables might *not* be purely continuous and smooth.<sup>24</sup> To use an example of Leo Katz’s, if someone is speeding to the hospital to save a very sick passenger, it is more unjustifiable for the driver to knowingly kill one pedestrian in order to save five passengers, than to create a 20 percent risk of killing one pedestrian in order to save one passenger.<sup>25</sup> The first scenario is more unjustifiable even though the same five-to-one ratio of benefit to harm characterizes both scenarios. This difference constitutes one sense in which “knowingly” causing death is worse than “recklessly” causing death (in the Model Penal Code’s sense of these terms). More precisely, it is not just worse, it is disproportionately worse. And this suggests that knowledge differs from recklessness, not just in degree along a cognitive culpability axis (as the authors claim), but in kind.

3. Is “insufficient concern” a term of art or a criterion of culpability?

Third, the authors often say that a “reckless” act in their sense demonstrates “insufficient concern” (p 24), but the quoted phrase can be understood in one of two very different ways. It could be a mere label, a term of art for unjustifiable and inexcusable acts. On this view, the actual standards for determining the actor’s culpability require us to look at more specific criteria of justification and excuse, of whether the actor

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<sup>23</sup> The authors do address some of these nonconsequentialist features. They point out, for example, that there might be a moral distinction between imposing risks on “statistical” rather than identifiable victims:

Suppose, for example, that the risks of tunnel building were concentrated on one known individual—Sam. Sam lives near the construction site, has a rare medical condition such that repetitive jack-hammering will eventually cause him to die, and cannot be moved. If tunnel building’s benefits justify the loss of several statistical lives, does it likewise justify the killing of Sam? It is possible that some acts are justifiable only if, from our ungodlike epistemic vantage point, the risks of an act are borne by many individuals rather than concentrated on one—even if God knows the one on whom the harm will actually fall, and whose risk is therefore one (p 65).

<sup>24</sup> In their sketch of how a factfinder should combine the “risk versus reason” variables in an actual sentencing decision, the authors assume a simple aggregative formula: (1) for each type or degree of harm, we multiply the perceived probability and the associated harm, and (2) we then sum these results (pp 282–85).

<sup>25</sup> Kenneth W. Simons, *Negligence*, 16 Soc Phil & Pol 52, 65 (1999).

lacks sufficient reasons for the risks he believes himself to be imposing (p 102). But, alternatively, insufficient concern could actually be an operative evaluative criterion of when acts are indeed unjustifiable and inexcusable. When, in murder prosecutions, courts instruct the jury to determine whether the actor demonstrated “extreme indifference” to human life, they often mean this in the second sense: they want the jury to decide whether the actor’s conduct showed that his attitude towards the victim was extraordinarily uncaring and callous.

For the most part, the authors interpret “insufficient concern” in the first sense, as a term of art (p 44).<sup>26</sup> They give the example of Darla, who plays Russian roulette with Abe, of whom she is very fond (pp 43–44). When Darla pulls the trigger and causes Abe’s death, she is in one sense not indifferent: she cares deeply about Abe and might be devastated by his death. If “caring” about the welfare of the victim were the only operative criterion of culpability, we might not consider Darla to be culpable. “Nevertheless,” the authors explain, “we may still say that her choice, to play Russian roulette, manifests culpable indifference to human life” (p 44). However, on at least two occasions, the authors employ the second interpretation. In doing so, they both sully the purity of their basic “risk versus reasons” criterion of culpability and raise doubts about whether that criterion is sufficient to explain all relevant dimensions of culpability.

Thus, the authors suggest that “quality of contemplation”—whether the actor premeditated or instead decided quickly, and whether his rationality was impaired—should play a substantial role in determining the level of deserved punishment (pp 284–85). “[I]f we hold risks and reasons constant, an actor who has more time to reflect and still chooses to risk harming another manifests insufficient concern *to a greater extent* than someone who acts without that opportunity” (p 284) (emphasis added). This is a significant qualification of the “risk versus reasons” culpability formula. Moreover, the emphasized language clearly reflects the second conception of insufficient concern, for it treats insufficient concern as a single scalar property. I believe that the authors run into difficulty here because they have chosen to employ the evaluatively laded, misleading terminology “insufficient concern”; instead, they

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<sup>26</sup> Indeed, the authors devote several pages to a critique of the argument that “culpable indifference” or similarly culpable forms of inadvertence should operate as a criterion of culpability (pp 71–77) (analyzing the views of Simons, Victor Tadros, and Stephen Garvey). I agree with the authors that the criminal law should not simply ask whether an actor’s attitude towards the victim or the victim’s fate is “indifferent” or “insufficiently caring.” We must indeed consider whether the actual choices and actions of the actor display indifference. “Culpable indifference” is not negated simply because the Russian roulette player or the murderer feels enormous remorse after killing the victim. See Simons, 6 *Buff Crim L Rev* at 220–22, 260–67 (cited in note 21). However, I do not have space here to respond to the authors’ critique of my views on this issue.

should have employed an unambiguously conclusory label for the variety of factors—including risks, reasons, beliefs, intentions, and quality of deliberation—that they believe affect and constitute criminal culpability. (On the other hand, a less misleading, more accurate, but still pithy label does not spring immediately to mind: “Insufficient reasons in light of the risks and the quality of deliberation” is not the most felicitous phrase.)

As a second illustration of the authors’ problematic use of “insufficient concern” as an operative criterion, consider their discussion of conflicting forms of justification. Suppose an actor acts wrongly in violating deontological constraints, yet he acts in order to produce a very beneficial consequentialist goal. (He tortures a terrorist to prevent a possible terrorist attack.<sup>27</sup>) Here, they say, although violating the deontological constraint is “the epitome of insufficient concern,” the actor’s beneficent motive does not seem to engage our negative reactive attitudes (p 102). “Is it possible,” they ask, “that deontologically wrong acts that have good consequences that D is aware of and motivated by produce conflicting reactive attitudes—both blame and praise?” (p 102). The authors have identified a genuine and difficult moral problem. But their solution is troubling, for they appear to treat whether the community has a certain kind of reactive attitude to an act as an important indicium of whether that act demonstrated insufficient concern. Yet by proceeding in this direction, beginning with the community’s reaction in order to determine whether the act was sufficiently culpable to deserve punishment, they generate a significant problem. Now, “insufficient concern” seems to reflect the second interpretation, an interpretation that the authors generally disavow. Indeed, it appears to reflect a particularly unattractive version of that interpretation, insofar as “negative reactive attitudes” might simply reflect the emotional, ill-considered, vengeful reactions of the community.

#### B. The Requirement of Conscious Awareness of Risk

The authors’ insistence that culpability requires “conscious awareness” of the risk invites two sets of inquiries. Is their requirement of “conscious awareness” of risk too demanding? They respond to this concern by significantly watering down what conscious awareness actually entails. But when they dilute the requirement in this way, is the requirement too *undemanding*? Does it undermine the choice-based

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<sup>27</sup> This is my own example. The authors’ actual examples are either much less plausible instances of justified action (a surgeon kills an innocent person to save five patients who need the victim’s organs to survive) or much more plausible instances (D borrows a rowboat to save several lives) (pp 101–02).

character of their account? And does it eviscerate the distinction between recklessness and negligence, a distinction that they claim is crucial to maintain?

The authors admit that a literal requirement that an actor be consciously aware of the specific risk that she is posing is too demanding (p 51). Accordingly, as we shall see, they modify this requirement by permitting an adulterated form of awareness to suffice.<sup>28</sup> But, unfortunately, they end up with a test that is either too indeterminate to be useful, or that collapses into a version of a negligence test, which of course they disavow (p 70).

Here is their problem. The authors are committed to the idea that culpability depends on conscious choice, which in turn depends on conscious awareness of the legally relevant facts. They are insistent on rejecting criminal liability for negligent inadvertence, for two main reasons—because there is no principled, nonarbitrary way to define the reasonable person in this context (pp 81–85), and because imposing criminal punishment for negligent acts is unjust (pp 70–71). A brief discussion of these two arguments is useful at this point, in order to clarify why the authors are willing to interpret “consciousness of risk” somewhat, but not too, flexibly.

The reasonable person construct is arbitrary, they assert, because there is no coherent and defensible definition of such a reasonable person other than two extreme constructs, each of which is unacceptable (p 82). First, the reasonable person could be a person aware of all the facts that actually bear on a correct moral decision. Second, the reasonable person could be a person with all the actual beliefs of the actor. Neither construct, the authors correctly conclude, is defensible, for the first collapses the distinction between strict liability and negligence, and the second collapses the distinction between negligence and recklessness (pp 82–83). But the authors have created a straw person here. Those of us who believe that the reasonable person construct is indeed intelligible and valuable in a range of moral and legal contexts<sup>29</sup> endorse neither of these two conceptions. Rather, the reasonable person is, essentially, a person with the actual beliefs of the defendant, but with the capacity for perception, reasoning, inference, investigation, motivation, and self-control that the community fairly expects of a person in his circumstances.<sup>30</sup> For example, if John pays no attention to whether Joan is consenting to his sexual advances, his awareness that he is making sexual advances should put him on notice—that is, would put the reasonable

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<sup>28</sup> See notes 32–36 and accompanying text.

<sup>29</sup> See generally Kenneth W. Simons, *Dimensions of Negligence in Criminal and Tort Law*, 3 *Theoretical Inq L* 283 (2002).

<sup>30</sup> *Id.* at 311–15.

person on notice—of the need to determine whether she is willing for him to continue.

The second argument offered by the authors is more plausible, though still unpersuasive. In cases of negligent inadvertence, they claim, the actor lacks control over whether he is aware of the relevant risk; accordingly, criminal punishment would be unjust (pp 83–85). The inadvertent actor, they say, has no *internal reason* to become aware, to pay more attention, to focus on the facts that would tell her that she is now posing an unjustified risk. In this sense, she has “no control” of whether she is aware of the risk (p 83). Accordingly, punishment would violate the maxim, “ought” implies “can” (pp 56–57). To their credit, the authors offer an illustration that, to most observers, is a strong counterexample to their thesis that negligent inadvertence is insufficient for criminal liability:

Sam and Ruth are a self-absorbed yuppie couple with a small child. They are throwing a dinner party for some socially prominent people who can help both of their careers and social standing . . . . They put their child in the bathtub and begin drawing bathwater, but just then the first guests begin to arrive. Sam and Ruth both go downstairs to greet the guests, both realizing that the child would be in grave danger if they failed to return and turn off the water, but both believing correctly that at the rate the tub is filling, they will have plenty of time to return to the child after they have welcomed the guests. Of course, when they greet their guests they become so absorbed with making the right impression that both forget about the child, with tragic consequences.

. . .

When they went downstairs they did not believe they were taking any substantial risk with their child, perhaps no more substantial a risk than we believe we are taking (for the sake of our careers) when we attend a workshop and leave our children with a sitter. Of course, once Sam and Ruth became engaged with their guests, the child’s situation slipped out of their minds. And once the thought was out of their minds, they had no power to retrieve it. They were at the mercy of its popping back into their minds, which it did not (pp 77–78).<sup>31</sup>

For reasons that I suggest below, this “lack of control” argument is unpersuasive. But the argument provides the necessary background for the authors’ answer to a critical question within their own theory

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<sup>31</sup> See also pp 83–84 (containing further discussion of the “no internal reason” argument).

about the minimum culpability an actor must manifest in order to deserve punishment: how aware must the actor be, and of what facts must he be aware? Of course, a test requiring the actor to be consciously thinking, while he is committing his criminal act, about exactly how risky his act is, and in exactly what respect, is much too demanding. Many criminal acts occur in an instant, in a blur, on impulse, or with only a vague recognition of the risks the actor is running. This is true both for prima facie liability and for defenses. When someone is suddenly attacked, for example, he might simply lash out defensively, without consciously focusing on the risks of harm he is posing to his attacker.<sup>32</sup>

The authors finesse this problem by requiring only “opaque” recklessness, not transparent recklessness. They say it is enough that the actor merely has “preconscious” awareness of the specific risks she is running (pp 51–58). For example, consider a driver (Red) who runs a red light with the conscious awareness that this conduct is in some vague sense dangerous, but with only preconscious awareness of why or to what extent this is dangerous. The authors would nevertheless treat Red as aware of the specific risks that she would have been aware of, *if* she thought about them for a second. (If she thought for a moment, she would recognize that running the light might cause her to hit a pedestrian or cause an accident (p 52).)

But the authors are on slippery ground here—as they realize.

Consider a different actor, driving on the highway, who looks away from the road for a couple of seconds in order to remove a CD from the car’s CD player and insert a Green Day CD. If Green (as I call him) had paused and thought for a moment, he *also* would immediately recognize the risks of harm that his conduct posed. Yet Green is clearly not advert-ing to the risk when he changes the CD. Green seems to be simply negligent: he *should* have been paying attention to the risk, but he was not. So, *if* under the authors’ analysis, we consider both Red and Green to be sufficiently “conscious” of the risk, then the “consciousness” requirement means very little.

The authors would likely reply that they can indeed distinguish Red from Green. The opaque or preconscious aspects of Red’s decisionmaking, unlike Green’s, are still *part of her choice*, and still inform her practical reasoning. When she consciously thinks, “this is dangerous,” she must mean something, and whatever she means by this, is properly treated as part of her conscious choice (pp 53–54).

But the authors’ phenomenological account is hardly the only possible interpretation of Red’s state of mind. Suppose instead that

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<sup>32</sup> See Kenneth W. Simons, *Self-Defense: Reasonable Beliefs or Reasonable Self-Control?*, 11 *New Crim L Rev* 51, 61–62 (2008).

when Red runs the red light, she thinks to herself, “I shouldn’t do this,” but she has no clearly formed idea why she should not. She just knows that running a light is against the rules or conventions of driving. Or, suppose that while she runs the red light, Red actually *sees* a pedestrian nearby, and has a sense of unease, but she does not specifically think, “this is dangerous.” Indeed, compare Green. When he is changing the CD, he might have a feeling of guilt or unease similar to Red’s, again without being able to say exactly why.

In all of these cases, the actor has *some* kind of conscious notice that she ought to be more careful. If any of these actors are conscious enough to be considered criminally culpable, then arguably all of them are, notwithstanding the authors’ arguments to the contrary.

Finally, imagine a variation of the Green example in which the actor is even less conscious of the risk. Suppose that Green, while changing the CD, has *no* awareness of danger or of risk, and not even a sense of guilt or unease. But he would immediately admit, if the question were put to him and he answered honestly, that he ought to pay more attention to the road. He is of course aware that he is driving a car on a public road and is aware that he is changing a CD. Thus, he is fully capable, most of us would say, of paying just a little more attention to his surroundings, and thus of fully appreciating the risk. Why is his inadvertence, which he could so easily overcome merely by paying attention, not sufficiently culpable?

Of course, the authors want to avoid this slide down the slope into punishing for mere negligent inadvertence. And there are some independently good reasons for resisting the slide.<sup>33</sup> But the actual explanation that they give here does not suffice (pp 69–77).

A further problem with their analysis is how extraordinarily sensitive their culpability determination is to the *precise* subjective, preconscious state of mind of the actor. Reconsider Red. She has a dim awareness that she is doing something dangerous, and this is enough, they say, to count as recklessness (p 52). But what level of reckless risk has she consciously created? Is she guilty of a *serious* crime of risking death, or just a *minor* crime of risking only property damage? The answer, according to the authors, depends on what she would say if we asked her why she thought running the red light was dangerous (p 52). (And if she replied honestly.)

The implications of this approach are highly problematic. Red deserves a very significant punishment if her vague feeling that her con-

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<sup>33</sup> Criminal culpability should depend on a serious type and degree of moral fault. Not every instance of negligent inadvertence or negligent lack of skill or competence should suffice for criminal liability, even if it would suffice for tort liability or for ascription of minimal moral responsibility.

duct is dangerous is due to a preconscious belief that she will likely kill a pedestrian. But she deserves only a very minimal punishment if that vague feeling is due to a preconscious belief that she will merely smash into a parked car. Yet it is not even clear that there *is* a determinate answer to the question of which preconscious belief caused her to feel that she was posing some kind of danger.<sup>34</sup>

Concededly, any account that gives weight to consciousness of risk in determining criminal culpability is going to run into significant difficulties of definition and characterization. But my objection is not just a quibble about how to draw a line. The problem under the authors' approach is very serious. *Their* line marks the boundary between noncriminal and criminal conduct. Moreover, on their view, the answer to a complex and indeterminate question, "Of what risks was defendant preconsciously aware?" could make the difference between a criminal fine and life in prison. Accordingly, it is fair to ask the authors, who so vigorously defend an account of culpability premised on conscious choice, and who mock the suggestion that one might legitimately employ any conception of risk other than a purely subjective one (pp 27–31),<sup>35</sup> to explain more precisely and persuasively what such a "choice" actually entails.

And finally, their account of preconscious awareness seems unprincipled, for they are now premising criminal culpability on a *diluted* type of choice. The actor who knows she is doing something dangerous, but is not conscious of why it is dangerous, is not really either *choosing* to endanger life, or instead merely *choosing* to risk minor injury or property damage, and so forth. Rather, she is simply choosing to take some kind of risk, without thinking through why or how her act is risky.

To be sure, if she were to consciously *focus* on why the act is risky, she might immediately recognize that it is because of the risk of death. But the fact remains: she *did not* actually consciously focus on this

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<sup>34</sup> Consider T.M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* 62–69 (Belknap 2008) (asserting that there may be no answer to the question which of two intentions "caused" or motivated my action).

<sup>35</sup> The authors validly point out certain difficulties, such as the problem of identifying the relevant reference class, with conceptions of objective risk. But they move too quickly to the conclusion that any nonsubjective conception is completely arbitrary.

One who drops a bowling ball from the top of a building to measure the force of gravity for himself, and who believes there are people below whom he is putting in extreme danger, is reckless. This is true despite the fact that his companion believes the risk is greater than he does; the building's doorman would have estimated the risk to be slightly lower; and a window washer, with a better view below, knows that there are very few people below so that dropping the ball is unlikely to injure anyone. It simply makes no sense to allow the actor's liability to hinge not upon what he knows, or God knows, but upon the arbitrary selection among the friend, doorman, and window washer for the correct perspective for assessing "objective risk" (pp 29–30).

However, the authors ignore an option that is both non-arbitrary and plausible, namely, the risk as perceived by a reasonable person in the shoes of the actor. See text accompanying note 30.



when she acted. And so, the authors *should* say, she cannot help that she did not focus, just as the authors *do* say, in cases of negligent inadvertence such as Green, or Sam and Ruth, that the actor cannot help not advertent to the risk (pp 77–78).

In other words, why is it not the case, both for Red and for Green, that the actor has no “internal reason” to be consciously aware of the precise risks that make her conduct dangerous (pp 83–84)? And why is it not equally true in both cases that she has “no control” over whether she is consciously thinking about the risk of death from running the light, or the risk of property damage—or nothing at all (p 83)?

In all of these variations, the actor *should* be alert to the specific risks, given the circumstance of which she is already aware. And in all of these cases, it is relatively easy for her to take the next step. Red should focus on the particular reason why she has a feeling of unease running the red light. And Green should remind himself why he should not change a CD while he is driving. Depending on the circumstances, both actors might be sufficiently culpable to deserve at least minimal criminal punishment.

One can find many more examples in which a requirement of conscious awareness of the facts that make the agent’s conduct risky and unjustifiable is unrealistic. Indeed, even in cases of *intentional* risk creation, the specific risk perceived or desired is often indeterminate. When someone strikes out at another in anger, he commits a conscious and intentional act, but his perception of the risks of harm he is thereby imposing is often opaque and even indeterminate. The mental states of even some premeditated murderers are cloudier than one might initially suspect: the actor often is not in a constant state of awareness of the risks he is deliberately posing, but is instead culpable for not taking proper steps to access his prior state of awareness. Consider a simple example. D plans to kill V. He (a) takes out his gun, (b) aims it at V, and (c) pulls the trigger. Just prior to moment (c), D is preoccupied with feelings of elation and excitement. If he was to honestly explain his thoughts and feelings at that moment, he would, let us suppose, say: “I am excited, I feel a rush, I feel immensely powerful.” But, let us further suppose, his consciousness does not include any beliefs or feelings concerning the resulting death he is about to cause. Even if we could reliably ascertain these facts, does D really deserve to be acquitted of intentional murder? Yet, at that instant, he has no “internal reason” to kill (unless enjoying a feeling of power counts as a “reason,” which is quite doubtful in this context). Is it not plausible to permit conviction here, on the ground that, having formed an intention to kill, he has an ongoing responsibility to ensure that he does not execute that intention?

Moreover, the authors’ consciousness requirement also runs into difficulties when we address (1) the difficulty ordinary people face in un-

derstanding the concept of probability and (2) the culpability of conduct that extends over time. First, consider probability. Suppose Red believes that running the red light under the circumstances creates a 10 percent chance of striking a pedestrian, and believes that if she strikes a pedestrian, there is a 20 percent chance he will suffer serious injury. Does she recognize that the probabilities are independent, so that the chance of seriously injuring the pedestrian is (10 percent x 20 percent), or 2 percent? Or does she mistakenly believe that one adds the probabilities, so that the chance of seriously injuring the pedestrian is 30 percent? These different beliefs should, under the authors' approach, result in significantly different levels of punishment.<sup>36</sup>

Secondly, consider the issue of culpable conduct that extends over time. Here is one of the authors' vivid (and contrarian!) examples:

Joe, John, and Jake . . . all drink themselves into an extreme state of intoxication in a pub. Joe is so drunk he cannot find his car and passes out in the parking lot. John does find his car and drives it quite dangerously, but luckily hits no one. Jake also finds his car, also drives it quite dangerously, and plows into another car, killing its occupants.

. . .

Under our schema, if getting intoxicated in a public place without surrendering one's car keys is unjustifiably risky to others—because one might then drive dangerously—then Joe, John, and Jake have committed the same culpable act in getting intoxicated and are equally culpable. They are not culpable for what they do subsequently if after they become intoxicated they do not perceive their conduct to be risky. John's dangerous driving and Jake's fatal crash are merely fortuitous "results" of their culpable act of excessive drinking and are immaterial to their culpability (pp 191–92).

Those who believe that consequences matter to criminal liability will of course find this set of examples a *reductio ad absurdum* of the authors' contrary position. But I share the authors' view that outcome luck should be irrelevant. Nevertheless, I find their analysis here prob-

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<sup>36</sup> The authors might plausibly reply that, in the end, all that matters for criminal culpability is what probability of harm the D believed she was creating, in light of the reasons she had for imposing the risk. Whether erroneous or confused reasoning produces that bottom-line probability is arguably irrelevant. But this reply does not entirely solve the problem, since D might not consciously come to any specific conclusion about how to combine the two probabilities. Recall that, in the preconscious category of cases, the authors are willing to consider what the actor means when she vaguely recognizes the dangerousness of her conduct (p 52). Should one similarly not ask what the actor means when she vaguely recognizes that two distinct probabilities must interact in producing a final probability?

lematic, though for a very different reason: it treats as completely irrelevant the fact that John and Jake actually decided to drive after they became intoxicated. Although Joe initially intended to do so, as well, he never faced the moment of choice. Should an account focused on culpable choice not give some weight to the actual choices that actors make? The authors take a narrow time-slice view of choice, asking at each moment what risks the actor consciously took. A more capacious and plausible conception of criminal culpability would frame the issue differently: given that John and Jake were aware of the risk at time T1, and given that they made a decision to drive very soon thereafter at T2, is it not fair to ask them to exercise the control they still had (albeit an impaired control due to alcohol) not to drive at T2?

The upshot? Taken literally, the “conscious awareness of risk” requirement of the recklessness criterion will almost never be satisfied. So it is understandable that the authors want to loosen the requirement. But in doing so, they either ask a question that often cannot be answered, or else, they implicitly insert an evaluative reasonableness element into their analysis: given what the actor already *did* specifically (or even vaguely) believe, what specific risks *should* he have been worried about? And what *should* he have been aware of? What should he have inferred? If such judgments of reasonableness become part of the analysis, however, then the authors’ supposedly bright-line distinction between recklessness and negligence becomes just a matter of degree.

Once again, I do acknowledge that any culpable criterion that makes legally relevant an actor’s consciousness or belief will face difficult questions about the requisite degree and quality of that consciousness, and about its requisite objects. Should latent knowledge of facts suffice? Unconscious awareness? Is it enough to believe that changing a CD could cause some type of unspecified harm? Or must the actor advert to the possibilities of death, and serious bodily injury, and minor bodily injury, and property damage?<sup>37</sup> How thoroughly must the legally relevant belief occupy the actor’s mind? Suppose Irma carries a loaded gun in public. Is she culpable only if she is thinking about the gun and its loaded status the entire time that she is in a public place? Is it enough that she had such thoughts immediately before appearing in public? Immediately after? What if the actor forgets that she is posing a risk? Forgetting is “involuntary,” the authors say, so the failure to advert to the forgotten facts cannot, by itself, be the basis of criminal liability (p

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<sup>37</sup> See Kimberly Kessler Ferzan, *Beyond Intention*, 29 *Cardozo L Rev* 1147, 1185–90 (2008) (analyzing the difficult problem of matching the actor’s intention with what the criminal law prohibits); Michael S. Moore, *Placing Blame: A General Theory of Criminal Law* 449–59 (Oxford 1997) (discussing whether intent should affect the level of culpability for a result).

81).<sup>38</sup> Yet one's ability to access facts that one has momentarily forgotten seems to differ only in degree from one's ability to access facts that one holds in the preconscious (which, the authors claim, suffices for criminal liability (p 58)). Moreover, even those of us who support criminal liability in *some* cases of negligent inadvertence acknowledge that the duty to become aware of risks of harm is triggered by the actor's actual awareness of *some* contextual facts—of enough contextual facts that it is seriously wrongful not to recognize the risks. If an actor is completely unaware of any facts about her environment, she cannot even be negligent.<sup>39</sup>

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<sup>38</sup> The authors offer an intriguing example of forgetting that not only displays the radical subjectivism of their approach (under which results are entirely irrelevant), but also demonstrates, once again, why we should not always demand that the actor be consciously aware of the legally relevant facts.

Consider someone who, as he is returning from work and driving into his driveway, notices that his brakes are soft. He realizes that it would be reckless to drive with the brakes in that condition, so he resolves to have them fixed before driving. He also knows that he is likely to forget this by the next morning, so he resolves to write a reminder note to himself when he gets inside his house.

Suppose he does not do so. Then he may be reckless for deciding not to write the note, even if the next morning he remembers to get the brakes fixed, or drives without incident. For he consciously ran an unjustifiable risk of forgetting the brakes, then driving, and then causing an accident.

On the other hand, if his failure to write the reminder note was due to being greeted upon entering the house with the news that his father was deathly ill, or that his daughter had been severely injured in a soccer collision—news that completely occupies his attention and crowds out his resolution to write himself a reminder about the brakes—then his failure to write the note will not be reckless, again irrespective of what it leads to the next day. The cost of averting one's attention from, say, news of a family crisis in order to write a reminder note about one's car is high relative to the risks (of forgetting to write the note, then forgetting about the brakes, then driving, and then having an accident). Forgetting is itself involuntary. Failing to act to avert forgetting is voluntary and may be culpable depending on the reasons for failing to act. But very often, those reasons will be good reasons and will not display insufficient concern for others' welfare (pp 80–81).

This analysis is problematic, however. The authors suggest that if one has a good enough reason for failing to write the note, one would not be reckless for not doing so. But under their approach, it should not matter whether one has a good or bad reason for failing to write the note. If the actor does not write the note because he gets a call from his partner in crime about the bank robbery they are planning, and this causes him to forget to write the note, he is still not reckless, under their theory. Once he gets the call, he is no longer advertent to the risks from the bad brakes. It should not matter, on their approach, why he does not advert to the risks. By contrast, under an approach that permits punishment for some forms of culpable indifference or unreasonable failure to be aware of or to infer the existence of risks, the reason why an actor is not aware of a risk is indeed legally relevant. (Their actual example is consistent with their theory only if the actor *consciously decides* not to write the note when he gets the phone call; however, that is not a very realistic scenario.)

<sup>39</sup> The issue is actually a bit more complicated. If D1 deliberately drinks herself into an unconscious stupor, knowing that she is likely to harm V while in that state, she might not be negligent at the time that she harms V (assuming that she is then entirely unconscious), but of course

I am not suggesting that any actor who at one point in time is aware of creating a risk of harm thereafter has an ongoing duty to remain in a state of constant high alert to ensure that the risk does not persist. Such a duty is both entirely unrealistic and frequently counterproductive.<sup>40</sup> The point is simply that any culpability requirement that depends on consciousness also must depend on capacity—capacity to bring latent knowledge to bear, to make straightforward inferences from the facts of which one is vividly aware, to investigate further, and so forth. But once one lets this camel’s nose into the tent, there is no principled reason for concluding that *no* type of inadvertent negligence or culpable indifference can be sufficiently culpable to deserve punishment. The heart of the debate, in other words, should be: what types and degree of incapacity should preclude criminal liability? Although it is not an easy matter to say what kinds of less than fully conscious decisions and actions demonstrate sufficient culpability for criminal liability, that is where the debate over the minimally necessary culpability for criminal punishment should focus.<sup>41</sup>

The authors would, I suspect, respond as follows. A person who is “capable” (in the sense just described) of acting otherwise but who lacks awareness of the legally relevant facts has no “internal reason” to act differently. Punishing him would therefore violate the maxim that “ought” implies “can” (pp 56–57). This reply proves far too much, however. Consider a straightforward case, not of failure to perceive a risk, but failure to draw a reasonable inference from what one perceives. Recall the self-absorbed yuppie couple, Sam and Ruth, who placed their small child in the bath upstairs, with the water running, then greeted their guests. Suppose, in this variation, that while they socialized with their guests, they did remember that the child was in the bath. But they

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her prior culpable act justifies criminal liability. Compare permanently unconscious D2, who indeed cannot be negligent because at no point in time was he capable of recognizing legally relevant risks.

<sup>40</sup> For example, this “high alertness” strategy might be counterproductive if it causes the actor to be less responsive to dangers than if he attended both to the risks and to how carefully he is engaging in the risky activity. Drivers who focus only on who might be victimized by their driving might pay too little heed to how carefully they are driving.

<sup>41</sup> For some valuable discussions of capacity and its relationship to moral and criminal responsibility, see George Sher, *Who Knew?: Responsibility without Awareness* 109–10, 113–15 (Oxford 2009) (arguing that moral and prudential demands only apply to those actors with sufficient cognitive capacity); R.A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* 57–77 (Hart 2007) (arguing that in situations where an actor has an exculpatory justification for her actions, she can be held morally responsible, but not answerable, for those actions); John Gardner, *The Gist of Excuses*, 1 Buff Crim L Rev 575, 580–85 (1998) (arguing that capacity should be understood in relation to the actor’s social role); H.L.A. Hart, *Punishment and Responsibility* 155 (Oxford 1968) (rejecting the “mistaken assumption that the only way of allowing for individual incapacities is to treat them as part of the ‘circumstances’ in which the reasonable man is supposed to be acting”); George Sher, *In Praise of Blame* 57–59 (Oxford 2006) (arguing that moral blame attaches to moral failings but not to failings caused by mental or physical defects).

reassured each other that the child would be perfectly safe because they would hear a splash or scream if the child was in any real trouble. Their inference from the facts (that the child is in no danger) clearly is grossly unreasonable and, let us assume, flows from their selfish concern with their social standing. The authors must now claim that Sam and Ruth have “no internal reason” to make a different, correct inference, for they did not consciously *choose* to draw the mistaken inference. But that claim in turn seems to presuppose that an actor is not culpable unless he is consciously aware, at the relevant moment of action, not only of certain minimal facts bearing on the risks and reasons that render his act unjustifiable, but also of all deficiencies in his own practical reasoning that bear on the justifiability of his act—an extraordinarily unrealistic assumption.

#### IV. THE SURPRISING REAPPEARANCE OF THE REASONABLE PERSON

A final topic deserves attention. Despite their unequivocal rejection of the “reasonable person” as part of a criterion of liability for culpable inadvertence to risk, the authors *endorse* a reasonable person criterion elsewhere in their theory, and indeed make it central to the recklessness determination. For they insist that the factfinder must make the judgment of whether the actor, in improperly weighing the reasons for his act against the risks it creates, grossly deviated from the standard that a law-abiding person (pp 43, 87)<sup>42</sup> or a “reasonable person” (pp 91, 286) would observe.<sup>43</sup> Moreover, they apply this gross deviation approach both to excuses such as duress, and to justifications and prima facie liability (pp 43, 91, 135).<sup>44</sup> The authors are remarkably casual and un-specific in identifying the content and contours of this “reasonable person” criterion, which they occasionally (and without distinction) describe instead as a “law-abiding person” criterion or even the criterion

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<sup>42</sup> The source of the reference to the “law-abiding” person is the Model Penal Code, which uses this phrase in its definition of recklessness instead of the “reasonable” person language it employs in its definition of negligence. See MPC § 2.02(2)(c)–(d). But it is doubtful that the different formulations were meant to have different meanings. See Simons, 1 Ohio St J Crim L at 186 (cited in note 15) (pointing out that the Model Penal Code commentary gives no explanation of the difference between the terms).

<sup>43</sup> The authors argue for a gross deviation rather than a simple deviation from the standard of the law-abiding or reasonable person: “The criminal law should not be concerned with those actors who, although they impose risks that are not justified by their reasons, are only minimally culpable (because their reasons *almost* justify the risks they perceive)” (p 43).

<sup>44</sup> The authors emphasize that their “gross deviation” requirement is both a crucial principle of lenity and an important constraint on the discretion of state officials (pp 314–15).

of the “ordinary person” (p 314).<sup>45</sup> Ordinary or customary behavior is of course quite distinguishable from reasonable behavior.

The authors’ endorsement of a reasonable person criterion here is surprising and in tension with their rejection of any form of criminal liability for unreasonable inadvertence.<sup>46</sup> If a reasonable person test is an incoherent or arbitrary construct, as they claim in the latter context, how can it be an intelligible guide in other contexts? To be sure, invoking a reasonable person criterion to limit criminal liability (in the form of a requirement that the conscious decision to create an unjustified risk be grossly unjustifiable or grossly inexcusable, relative to a reasonable person standard) might be less disquieting than invoking it to *extend* criminal liability to where an actor should, as a reasonable person, have been aware of a risk but was not, or should have made sound inferences from the facts of which he was aware. If one is generally troubled by “reasonable person” criteria, it is especially problematic to employ them as criteria of inculcation. Nevertheless, the authors never explain why their general objection to reasonable person criteria has no force in this context.

What is the source of the authors’ apparently inconsistent attitude towards reasonable person criteria? The fact-law distinction appears to be the answer. The authors oppose a criterion that asks what *facts* a reasonable person would be aware of (recall Red and Green, and Sam and Ruth).<sup>47</sup> But they endorse a criterion that asks whether as a matter of *law*, consciously taking a particular risk for a particular set of reasons is a gross deviation from what a reasonable person would do (pp 152–53). Put differently, their highly subjective approach to culpability insists that the actor have a subjective understanding of the relevant facts but not of the governing legal norms.

To illustrate, imagine yet another variation of the story of yuppie couple Sam and Ruth. Suppose they do remember that their child is in the bath as they are socializing with their guests, but they honestly, subjectively believe (1) there is only a 1 in 1,000 chance that the child will drown, and (2) that chance is worth taking because the benefits of uninterrupted socializing outweigh that risk. The second subjective belief is irrelevant, under both current criminal law and the authors’ approach

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<sup>45</sup> In one instance, the authors frame the question as whether “what the actor did is a ‘gross deviation’ from what the ordinary citizen, with ordinary concern for the interests of others, would do” (p 314). In their proposed jury instruction, they use all three terms interchangeably: the jury must find that the actor “grossly deviated from what an ordinary, reasonable, law-abiding actor would do” (p 329).

<sup>46</sup> It is also in tension with their argument that, in defining “objective risk,” there is no non-arbitrary way to specify an “objective” risk of harm. See notes 30–31 and accompanying text.

<sup>47</sup> See notes 31–36 and accompanying text.

(pp 152–53). It is irrelevant because their mistaken belief concerns a matter of law, not fact—assuming, as is very likely, that the factfinder would consider it unjustifiable to take such a risk (or assuming that the criminal code itself predefines the objective value of the relevant risks and reasons in such a way that their conduct is unjustifiable) (p 280). Even subjectivist retributivists such as the authors are properly reluctant to require all actors to be subjectively aware of the immorality or illegality of their conduct.<sup>48</sup> Such a requirement would permit terrorists and others with belief systems radically at odds with the community’s social and legal norms to obtain a full defense to criminal liability.

But are the authors really entitled to rely on the fact-law distinction in this way? After all, if, as they believe, culpability requires a conscious choice not to conform to social and legal norms, and not simply a grossly unreasonable failure to so conform, it seems plausible to insist that the actor must be conscious of the legal as well as factual features of his conduct that make that conduct unjustifiable. Should we therefore not require the actor to recognize that he is violating the governing legal norms? The authors concede that they have not offered a full justification of the distinction.<sup>49</sup> What they should also concede is that asking whether a reasonable person would be aware of the relevant *facts* is also sometimes an appropriate element of determining criminal liability. For here, too, we are employing an objective standard to measure the culpability of the actor. If Sam and Ruth are culpable despite their sincerely held but socially objectionable values (as in the last variation), why are they not culpable in the original example, when their socially unacceptable values explain why they did not remember the risk to their child? Ignorance or mistake of fact, like ignorance or mistake of law, can have its source in the actor’s objectionable values. In either case, the actor displays “insufficient concern” (in the authors’ sense) for the interests of others (pp 151–54).

A further problem with the authors’ use of the reasonable person criterion is this: they invoke the criterion to limit criminal liability to grossly unjustifiable *or* grossly inexcusable acts, and thus they conflate two quite distinct categories, justification and excuse. To be sure, they are not alone in suppressing the difference by employing an opaque reasonable person standard. The Model Penal Code sometimes does em-

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<sup>48</sup> “A choice that reflects insufficient concern for others’ interests is the paradigmatic culpable choice. The fact that the actor believes her lack of concern is justifiable cannot make it so” (p 153).

<sup>49</sup> “Here we can do no more than merely assert our belief, one that most of our practices of blaming and punishing presuppose, that one is morally culpable for ‘mistakes’ of justificatory strength but not for mistaken beliefs about factual matters” (p 153 n 76).



ploy reasonableness language in its excuse provisions.<sup>50</sup> But this undifferentiated approach is unwise. When otherwise criminal acts are justified, those acts instantiate ideal, or at least permissible, behavior. When otherwise criminal acts are merely excused, those acts instantiate understandable human failures of will, cognition, and the like. The language of “reasonableness” fits far more comfortably with this conception of justification than with excuse. The reasonable person criterion is best interpreted as a standard by which one should guide one’s behavior. But the better characterization of a person who harms an innocent under the threat of duress, or who kills the victim in response to an understandable provocation, is that he acts without (or with diminished) culpability, not that he acts in an ideal or even permissible manner. Accordingly, it would be much more desirable to banish “reasonableness” criteria from legal doctrines of excuse in order to assure that this distinction is preserved.<sup>51</sup>

Consider specifically the authors’ treatment of duress. They provide plausible arguments for expanding the duress defense to cover, not only unlawful threats of force, but also lawful threats, nonhuman threats, and threats of harm less severe than serious bodily injury (pp 141–43).<sup>52</sup> But the omnibus criterion that they would adopt is a version of the (problematic) Model Penal Code test: an actor should be excused “in any situation in which a ‘person of reasonable firmness’ would impose the risk that the actor believed he was imposing” (p 135).<sup>53</sup>

This standard obscures more than it clarifies. In their actual analysis of the normative basis of duress, the authors provide an extremely illuminating framework: some conventional cases of duress count as justified in an agent-neutral sense, some as personally justified in an agent-relative sense, and some as excused (pp 135–41). But the opaque “person of reasonable firmness would impose the risk” standard muddles these distinctions. The term “reasonable” suggests justification in at least

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<sup>50</sup> Thus, the excuse of duress turns on whether a “person of reasonable firmness” would have been able to resist the threat, and the partial excuse of voluntary manslaughter on whether the actor had a “reasonable explanation or excuse” for killing. See MPC §§ 2.09(1) (duress), 210.3(1)(b) (manslaughter).

<sup>51</sup> Possible substitute language for excuses includes: what can “fairly” be expected of an actor; or whether it is “understandable” that the actor did not conform to the law. Indeed, the following emphasized language in the authors’ proposed jury instruction is much more apt than the “reasonable person” portion of the instruction:

You need not conclude that what defendant did was the “right thing to do,” but rather, that *taking into account a realistic sense of faults and failings of the ordinary human being*, we could not have expected a reasonable person, one who shows proper regard for the interests of others, to have acted otherwise than defendant acted (p 329) (emphasis added).

<sup>52</sup> Moreover, they would also expand the duress defense to innocent threats, shields, and bystanders (p 144).

<sup>53</sup> See note 50.

one of the authors' two senses. But the focus on the actor's "firmness" connotes the volitional dimension of excuse: one who is sufficiently "firm" in response to the force or pressure of a sudden threat, yet still submits to that threat, is one who cannot fairly be blamed for violating the criminal law. His conduct is excused, not justified. As the authors concede, "When duress excuses because the actor's 'will is overborne,' the argument is that the actor was volitionally impaired, not that the actor was personally justified" (p 140). The elegant simplicity of their reasonable person formulation of excuse is, alas, inadequate to express the relevant distinctions that their own analysis elucidates.<sup>54</sup>

#### CONCLUSION

You are conversing with a lively interlocutor. She offers a brilliant but outlandish argument against conventional wisdom. "That can't be right," you think. You pause. "Or can it?"

Your initial reaction was correct. But you suffer from a nagging unease: the standard view she is criticizing is surprisingly difficult to explain and justify. And you know there is much to be learned from your interlocutor.

This scintillating (and sometimes exasperating) book is unlikely to overturn conventional wisdom about the desirable scope and content of the criminal law. But it will certainly provoke and incite criminal law scholars in the most worthy of enterprises—making sense of positions that they take for granted, rebutting arguments that they too easily dismiss, and identifying a coherent and attractive conception of retributivism. The authors hope to be accomplices to the destruction of the criminal law as we know it. I hate to be the bearer of bad news; they will fail. Nevertheless, their rigorous romp through the retributivist landscape is a bracing reminder that there is much we do not yet understand about this familiar terrain.

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<sup>54</sup> I do agree with the authors that insofar as their formulation addresses excuse rather than justification, it may properly be formulated as an open-ended standard rather than a rule (p 146).