WHY THE MIND MATTERS IN CRIMINAL LAW
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Introduction

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

Mens rea—law Latin for “guilty mind”—is an architectural feature of criminal law. It is so central to the practice of criminal law that any theory interpretively grounded enough to be genuinely a theory of criminal law must be able to answer the question of why mens rea matters. Interestingly, to say that mens rea is central, constitutive, or definitive of criminal law in this sense is not to say that mens rea is either necessary or sufficient to criminal law as such: some

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crimes do not require mens rea (strict liability crimes, for example) and some civil wrongs do (bad intent is relevant to some wrongful termination suits, for example). How social practices can have constitutive features that are neither necessary nor sufficient is curious; I think it is possible that social artifacts like criminal law (or jazz, science, and democracy) are simply not the kind of things that have necessary and sufficient conditions. Whatever the reason, mens rea’s status as something both central and non-necessary in criminal law imposes on the theorist a complex burden. The theorist must minimally be able to explain why mens rea is generally required—that is the interpretive baseline—and at best why mens rea is both generally required and may sometimes be absent.

The two dominant theories of criminal law—retributivism and utilitarianism—can carry their baseline burden. For a retributivist, mens rea is indispensable to finding and fixing blame. The root of Kant’s moral theory—literally the first sentence of the first section of the Groundwork, published twelve years before he laid the foundation-stone of retributivism in The Metaphysics of Morals—is the idea that moral worth turns on the mind: “It is impossible to think of anything at all in the world, or indeed even beyond it, that could be considered good without limitation except a good will.” Blame follows the mind: it would be a category mistake to blame a volcano, whatever harm it caused; a person with a spotless mind is blameless even if he innocently caused harm; to the blameworthiness of a person with a wicked mind. For a utilitarian, the relationship of mens rea to criminality is less organic than it is for a retributivist, but solid enough. Bentham wrote that “intentionality, &c. may influence the mischief of an act,” with distinctions between acts “altogether involuntary,” “unintentional, but ... attended with heedlessness,” and “completely intentional.” Mens rea speaks to whether and how much punishment is necessary if utilitarianism’s typical goals in criminal law (deterrence, rehabilitation, and incapacitation) are to be accomplished. If someone causes harm while engaging reasonably in a desirable or acceptable form of activity—killing a patient in the course of surgery performed for good reason and with all due care and skill, for example—there is nothing to deter, nothing to rehabilitate, and no reason to incapacitate. We wouldn’t want the surgeon to desist from practice or to practice in any other way. Retributivism and utilitarianism

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2 See Joshua Kleinfeld, Enforcement and the Concept of Law, 121 YALE L.J. ONLINE 293, 309, 311 (2011) (“[L]aw is not the kind of thing that has strictly necessary features. . . . [E]nf orcement can be constitutive of law without having to be strictly necessary for it.”); Joshua Kleinfeld, Skeptical Internationalism: A Study of Whether International Law Is Law, 78 FORDHAM L. REV. 2451, 2503 (2010) (“[L]aw as experienced is a matter of multiple values in combination, none of which is strictly necessary or sufficient by itself but which in combination get some act or artifact or enterprise over the law/non-law threshold”).


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

In prior work, I’ve defended a comprehensive criminal theory for which the answer to the question of why mens rea matters is not obvious. The theory is the product of an intellectual tradition founded by Hegel and Durkheim and carried forward by a diverse array of scholars and lawyers working on different questions with different methodologies from the past and present of criminal theory. This tradition, “normative reconstruction” or “reconstructivism,” holds that the central object of criminal law is to reconstruct a community’s normative order in the wake of acts that violate and threaten that normative order—restitching the torn social fabric, to use the clichéd but helpful metaphor. Criminal law on a reconstructive view has a distinctive social function: where a wrong has been committed of such a nature as to attack the values on which social life is based, punishment reasserts and reconstructs those values. It acts as a sort of normative immune system against ideological invasions that, if left unanswered, would tend to weaken people’s sense of being bound to one another, to a shared set of values, and to a shared system of law. Reconstructivism is thus a form of communitarian consequentialism oriented to communities’ shared values, moral culture, and social solidarity. Its premise is that societies need some minimum degree of normative alignment if they are to sustain themselves over time, secure the benefits of social cooperation, and mitigate the risks of social conflict—if they are, in a word, to secure the flourishing of their members. That premise granted, reconstructivism merely observes the special role crime and punishment play in building and maintaining that minimum normative alignment.

The difficulty is that there is no obvious link between reconstructing a violated normative order and interrogating the content of a defendant’s mind. Reconstructivism is indeed so sociologically oriented that it might appear to make the mind of the individual defendant irrelevant. Why not have a world of social solidarity based on strict criminal liability? Why not execute he who drank from the sacred stream, regardless of whether he knew or should have known that it was sacred? Why care about whether the person who took another’s life did so intentionally, negligently, or innocently if the community depends on a socially vital taboo against killing? Why not affirm a group’s shared norms through mob justice against a

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6 Note, that, although solidaristic and communitarian, reconstructivism’s factual and normative commitments in that vein are fairly thin. Some measure of normative alignment is necessary for people to flourish in communities, but not total alignment, and not alignment in areas outside those basic normative commitments protected by criminal law. See Kleinfeld, Three Principles, supra note 5, at 1458-59 (“Emphatically, a reconstructivist can acknowledge and even celebrate norm contestation, particularly if one follows the thread of reconstructivism to deliberative democracy, as I suggest below.”); see also Kleinfeld, Reconstructivism, supra note 5, at 1561-64 (discussing cultural diversity).
scapegoat—for it would be naïve to deny the solidaristic power of hating and hurting someone as a tribe in the name of tribal norms? Unless reconstructivism can answer these questions, it faces grave theoretical objections—and grave moral objections too, for no reasonable theory of criminal law could authorize punishing innocents, and to have an innocent mind is to be an innocent. If reconstructivism is to compete on all fours with retributivism, utilitarianism, and other candidates for fundamental theory in criminal law, it must carry its burden too: it must be able to account for mens rea.

The object of this essay is to explain why mens rea matters to a reconstructivist and also to explain why, under some unusual circumstances, it does not matter. That is, my goal is to carry both the baseline interpretive burden of explaining why mens rea generally matters and the “gold standard” interpretive burden of explaining why and when mens rea does not matter. I present three reasons, which differ in weight as well as register, but are all important in different ways. Part I lays out the most important of the three, which has to do with reconstructivism’s understanding of crime as a form of expressive action and the mind’s role in fixing the expressive meaning of an action. Part II argues that mens rea matters for reasons external to reconstructivism, as a control on reconstructivism’s own excesses. Part III shifts to strict liability crimes, arguing that one of reconstructivism’s strengths is its capacity to account for crimes that do not require mens rea.

7 I pass over two other reasons. First, as I argue in Textual Rules in Criminal Statutes (on file with author), an effect of mens rea’s morally pregnant language is to create a space in the courtroom for equitable arguments about whether the defendant is culpable within the meaning of a statute. That is, mens rea requirements dovetail with two other aspects of American criminal law—aspects of statutory interpretation and aspects of criminal procedure—in ways that lead American judges, lawyers, and juries to morally oriented, non-technical arguments about blame and innocence rather than merely technical legal guilt. This is a good thing from a reconstructivist point of view: it keeps the standards of legal innocence and guilt aligned with the folk morality of the broader culture in which the criminal system sits, undergirding the law’s capacity to rebuild a violated culture and forestalling the law’s tendency to forms of technical rule-governance that make sense from a legal but not from a cultural point of view. Yet this defense of mens rea is bound up with the particularities of American criminal law in ways that seem in tension with the sweeping, general character of the mens rea requirement—a requirement that predates the statutorization of American criminal law and that is widely shared by non-American criminal systems. Second, because reconstructivism is in certain respects a relativistic theory—because it ordinarily favors upholding the ambient norms in a culture, whatever they happen to be, provided the culture genuinely depends on them—reconstructivism will tend to uphold mens rea values in any culture that truly cares about mens rea values. Since American culture cares about offenders’ states of mind, reconstructivism holds that American criminal law should as well. But this seems both contingent and tautologous: it says only that criminal law should require mens rea in any culture that thinks criminal law should require mens rea, without saying anything about why a culture might think so. Thus, although true so far as it goes, it seems unilluminating.
I. Mens Rea and Crime’s Expressive Content

The first and chief reason mens rea matters to a reconstructivist is that reconstructivists care about social meaning and the social meaning of an act depends on the mens rea of the actor.

The first step is to see why reconstructivists care about an act’s social meaning. It is by now commonly recognized that punishment has expressive characteristics and functions. Reconstructivism holds that crime is also expressive—that crime carries social meaning. Consider, for example, an offender who commits a serious assault without justification or excuse, beating the victim badly, heedless of the consequences. That assault carries two layers of social meaning. First, it expressively denies the validity of moral norms against such violence and the authority of laws that, by prohibiting such violence, give legal recognition to the norms. Crimes with no direct victim stop there, on the level of abstract right, but crimes with a victim, like a beating, carry a second layer of expressive content: the crime denies the victim’s status as someone who matters—someone whose rights and welfare have value. As I’ve written:

[W]rongdoing challenges two parts of the social fabric of moral life. It says of the abstract norm, “This norm does not hold,” and of the victim, “You—and those like you—are degraded.” The moral order that sustains social life consists in equal measure of a system of abstract norms or rights and a socially approved status structure or hierarchy; societies must protect the one no less than the other. Wrongdoing offends and puts into jeopardy both parts of that moral order.8

Punishment’s primary function on a reconstructive view is to counteract these meanings, to deny the denial, reaffirming the validity of the norm, the authority of the law, and the dignity of the victim: “Thefts break down norms of property, and punishment rebuilds them. Burglaries deny the security of the home, and punishment affirms it. Domestic violence degrades its victims, and punishment denies their degradation.”10 Crime and punishment are thus an exchange of meanings; they are call and response. This call and response defines criminal justice as a distinctive mode of social ordering.

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

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9 Kleinfeld, Reconstructivism, supra note 5, at 1509.

10 Kleinfeld, Three Principles, supra note 5, at 1462.
The moral culture principle of criminalization holds that the only conduct that may justly be criminalized is conduct that violates and expressively attacks the values on which a community’s social organization is based, unless the merits of criminalizing another type of conduct are so great as to substantially outweigh the harm criminalizing it does to those same community values.11

The moral culture principle has normative force because it fits into reconstructivism’s teleological or functionalist understanding of what criminal law is for. If punishment exists to reconstruct a violated normative order, then it doesn’t make sense to punish conduct unless it expressively violates the normative order. That is, if we ask a reconstructivist what actions should be eligible for criminalization, the answer is not, “Acts of harmdoing” or “Acts of wrongdoing.” The answer is, “Acts of social destabilizing.” I hasten to add that reconstructivists by no means favor criminalizing all such acts. The moral culture principle is a limiting principle. However morally objectionable an act, however dangerous, it may only be criminalized if it also expressively attacks the community’s social order. It must be antisocial.

That is why reconstructivists care about crime’s expressive content. The key move with respect to mens rea is to see that crime’s expressive content depends on the offender’s mind: a predatory or indifferent mind is the ingredient that turns merely harmful or dangerous conduct into an attack on shared values. The mind is the link between prohibited conduct and norm-denial. Imagine two scenarios: in the first, Peter innocently falls into Paul, knocking him over and injuring him; in the second, Peter deliberately collides with Paul in order to hurt him, knocking him over and injuring him. Externally, Peter’s bodily movements in the two scenarios may be all but identical, yet most people, if fully informed of the situation, would describe it differently: Peter in the first case would be described as “tripping” into Paul, and in the second case would be described as “pushing” Paul. Indeed, there are few words even to describe such a matter in a purely physical, neutral way; the very vocabulary language makes available to us—“tripping,” “falling,” “pushing,” “shoving”—imputes ideas about the actor’s mental state. The verbal difference reflects the degree to which ordinary language and intuition understands wrongdoing as the combination of an evil-meaning mind with an evil–doing hand. Criminal law recognizes this difference as well, for criminal liability attaches in the second scenario but not the first: whether Peter assaulted Paul depends, not on Peter’s bodily movements alone, nor on the results of his bodily movements alone, but on Peter’s mental state at the time he knocked Paul to the pavement. As a reconstructivist would see the situation, innocently tripping into someone denies no norms and degrades no victims; it is just an accident. Pushing someone to hurt him both denies a norm and degrades a person: it announces disdain for Paul’s rights and welfare and for moral and legal norms of nonviolence. Ordinary intuition, language, and law track that reconstructivist line.

Mens rea’s role in making crime expressively meaningful is a special case of a more general phenomenon that has to do with the nature of action generally. At the very root of action

11 Id. at 1476.
theory as a philosophical field is the observation that a bodily movement must be minded to count as “action” at all: a raindrop does not “act” when it falls on one’s head and a person does not “act” in a philosophical sense when turning over during sleep, striking someone during a seizure, or bumping into someone because someone else propelled his body forward. The type of mindedness that turns mere movement into action is a matter of philosophical controversy, and I don’t propose to explore the issue to the philosophical roots here. But Gideon Yaffe has mapped this territory before, advancing “a general theory of the importance of mental state to criminal liability” in which “we care about an agent’s mental states, and the deliberative processes they guide, when assessing his responsibility because, thanks to them, his actions manifest his culpability-relevant values. In particular, thanks to the agent’s mental states, his actions manifest the evaluative weight that he gives to his own interests in comparison to the interests of other people.” Notice how elegantly that formulation fits into reconstructivism’s account of the expressive character of crime. To a reconstructivist, crime is fundamentally a form of ideological assault: an action is a crime only if it represents an attack on a core communal value. On Yaffe’s account, an agent’s mental state is the component of an action in virtue of which the action represents the agent’s relationship to values. It follows that crimes’ expressive content—its capacity to manifest an ideological assault on core communal values—turns on mens rea.

The general form of the idea is that, in morally expressive action, the mind interposes between the physical fact of a bodily movement and the values that the bodily movement puts at issue. If Jane holds the door open for John, her act ordinarily carries moral content—it is considerate—but it only carries that content if certain things are true of Jane’s mind. She must minimally know that there is another person, John, nearby who might wish to go through the doorway. Perhaps she must also aim to show regard for him. We must tread carefully here: to say that the mind mediates the relationship between conduct and value is not to say an action’s moral meaning is purely a matter of authorial intent. Meaning is intersubjective: if Jane holds the door open for John because she is compulsive rather than considerate, the gesture still carries social meaning that is not under her control. Also, actions may carry entailed meanings subtler than anything in the actor’s mind: if Paul beats Peter savagely with nothing in his thoughts but pure dumb pleasure in violence, his actions still expressively deny the validity of the norm against non-violence, the authority of the law against non-violence, and Peter’s status as a person of worth. That would not be true if Paul beat Peter no less severely during an epileptic fit: the issue is more one of authorial ownership of an action than authorial intent by an action. Those nuances in place, however, it remains the case that the mind mediates the relationship between action and value in such a way as to render action either virtuous or wicked. It is as though morally meaningful action were a triangle with bodily movement at one corner, a value at another, and the mind at the third.

12 Gideon Yaffe, The Point of Mens Rea: The Case of Willful Ignorance, 10 CRIM. L. & PHIL’Y (2016).
Our syllogism is thus in place: reconstructivists care about crime’s social meaning; crime’s social meaning depends on mens rea; reconstructivists therefore care about mens rea. But is this connection deeply rooted enough for the interpretive burden it must bear? Mens rea is a central aspect of criminal law; a good theory of the practice of criminal law must therefore identify an adequately central place for mens rea. Can reconstructivism meet that burden? In fact, the reconstructivist’s understanding of why mens rea matters is no less deeply rooted than the retributivist’s. Retributivists hold that criminal law should be about moral wrongdoing and see that the mind is the root of all wrongdoing. Reconstructivists hold that criminal law should be about antisocial wrongdoing and see that the mind is at the root of all such wrongdoing as well. In both cases, blame turns on the mind. Indeed, the reason the mind matters on both theories is the same: in Yaffe’s words again, “we care about an agent’s mental states, and the deliberative processes they guide, when assessing his responsibility because, thanks to them, his actions manifest his culpability-relevant values.” The difference is just in what counts as “culpability-relevant values.” For a retributivist, those have to do with an ultimate moral order. For a reconstructivist, they have to do with a society’s embodied ethical life.

The reconstructivist view of mens rea also explains a lot of doctrine. It is black letter law, for example, that “negligence” doesn’t mean the same thing in civil and criminal contexts. Civil negligence is a departure from the standard of care of a reasonable person. In traditional common law jurisdictions, criminal negligence requires a level and kind of negligence that is, in the California Supreme Court’s words, “aggravated, culpable, gross, or reckless, that is, … such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life.”13

In that formulation, the definition of the relevant mens rea term actually makes explicit criminal law’s interest in whether the crime expressed disdain for a core communal value. The Model Penal Code takes the traditional common law notion of criminal negligence and splits it into two categories—negligence and recklessness—where negligence involves basically a “gross deviation” from a reasonable person’s standard of care and recklessness involves both a “gross deviation” and a “conscious[] disregard[]” of a known risk.14

The concern for ideological assault is less clear in the MPC’s formulation than it was in the common law’s, but the higher degree of culpability required for the criminal form of accident continues to track cases in which the defendant’s behavior attacks or denies shared values rather than simply falling short of them. Criminal liability for accidents is for the parent who leaves the baby to fend for itself in an unsafe apartment all day, indifferent to the risks, rather than the one who absent-mindedly leaves the baby in a hot car for one disastrous hour. Or consider a variation on our earlier case: Peter accidentally trips into Paul, knocking him over and causing Paul’s

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death, but not quite innocently, because Peter tripped into him while running headlong through the airport to catch a plane. Peter would obviously be civilly liable for wrongful death, but he would not in traditional jurisdictions be criminally guilty of common manslaughter or MPC negligent homicide. Why? Because desperately running through the airport to catch a plane is less careful than a reasonable person would be, but it does not bespeak indifference to the rights or welfare of others. Peter would probably be horrified to have killed someone in his rush. It is a tort, not a crime. Had he done it blindfolded for fun, it would have been a crime.

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

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

II. Mens Rea as a Constraint on Reconstructivism

For all that is true or valuable in it, reconstructivism carries some alarming implications. How can we accept a relativistic theory given some of the abusive cultures in the world? What
about the solidaristic effect of mob justice? &c. I confess that, although an ardent advocate of reconstructivism, I have grown more rather than less alarmed by some of these implications as time has gone by. I would like here to suggest that mens rea is not only an implication of reconstructivism but also an external constraint imposed on reconstructivism by broader considerations of justice. Some philosophers would call it a “side-constraint”; it might even be a retributive side-constraint. In any case, I have never argued that reconstructivism is the whole truth about justice or a normative theory of all society. It is a normative theory of criminal law, which must be, as I have written in the past, nested within a theory of justice.15

A reconstructive approach to criminal law presents two great risks, all of which stem from the theory’s instrumentalism (its treatment of the criminal instrument as a means by which to achieve solidaristic ends), and its orientation to the point of view of the community rather than the defendant. The first great risk is the risk of criminalizing mere dissent—that is criminalizing expressions of disagreement with prevailing norms. Such disagreement might be more disruptive to the normative solidarity of the community as any tangibly harmful conduct. Harriet Beecher Stowe’s *Uncle Tom’s Cabin* was an attack on the normative order of the slaveholding South; an unconstrained reconstructivism would give southerners reason to criminalize and punish her for writing it. The second great risk is sacrificing individuals for the sake of community solidarity, for the sake of securing normative consensus, or both. This comes in different variations. The most obvious are show trials, where officials deliberately prosecute an actual innocent unbeknownst to the public. (In Shirley Jackson’s *The Lottery*, villagers randomly choose one townsman each year to stone to death, achieving catharsis and group affirmation by knowingly sacrificing an innocent.) In other cases, the offender may or may not be wholly innocent, but he is in any case a scapegoat, and the moral nuances of his conduct become subsumed in the thrill of hating and hurting someone as part of a group. This is mob justice. In George Orwell’s *1984*, the people of Oceania gather together every morning for a “Two Minutes Hate”—a ritual of frenzied rage at Emmanuel Goldstein, the great “Enemy of the People.” The idea is so chilling because we can all grasp how such a ritual might be pleasurable, solidaristic, and effective. It is also easy to imagine a group, perhaps a leadership class, that feels its hold on the community’s shared norms is fragile and furiously attacks individual violators, regardless of actual moral wrongdoing, in order to elevate some norms as sacred and their violation as taboo. This is persecution.

A criminal law that ran along any of these lines would be oppressive, violent, and unjust, but there is no denying that it could work wonders, at least in the short-term, for social solidarity. And there is no denying that, empirically, crime and punishment often work this way. The old Soviet Union was notorious for show trials; it also had punishment quotas, in which local officials were expected to make a certain number of arrests regardless of actual

15 Kleinfeld, *Reconstructivism*, supra note 5, at 1549.
In the Cultural Revolution, denunciation was a routine tool of social control, independent of innocence or morally nuanced guilt. And although less extreme, much of what makes American campus politics today so bitter is a structurally similar process of suppressing simple disagreement with dominant norms by means of social processes of group condemnation and ostracism. Those social processes are clearly efforts to establish normative alignment through punishment. Although formally extralegal, campus politics today are in substance best interpreted as a form of crime and punishment. Reconstructivism has extraordinary descriptive purchase on these sorts of social phenomena. And it has some internal normative grounds by which to curb them. For example, suppressing dissent, punishing innocents, and engaging in mob justice might ensure normative alignment in the short-term while producing a solidarity that is brittle in the long-term. But I have come to think that reconstructivism stands in need of external principles by which to restrain its instrumental, group-centric orientation.

Regarding the first of those three problems, the punishment of mere dissent, mens rea plays little role. The actus reus requirement that a defendant have committed some wrongful conduct is one source of restraint. A still more powerful protection is the First Amendment and, relatedly, the culture of liberalism the First Amendment reflects. If early societies had a “first crime,” so to speak, a reconstructivist would predict that first crime to be, not assault or murder, but sedition and blasphemy—speech against political authority and speech or practice against religious authority—for sedition and blasphemy are enormously socially destabilizing, and criminal law’s first order of business is suppressing that which is socially destabilizing. Interpersonal violence should only take center stage much later, when societies came to see individual rights and welfare as central matters of political concern. The first commandments are “to have no other gods before me,” to “not take the name of the Lord thy God in vain” (pure speech), to “remember the Sabbath day” and “keep it holy,” to “honor thy father and thy mother,” and only then, at commandment number five, “Thou shalt not kill.” I do not know whether these historical and anthropological musings are right, but they suggest the strength of the inclination to suppress dissenting speech and worship with criminal punishment. Much of what the First Amendment does is fight against that temptation. Indeed, I think the First Amendment’s character as an anti-criminalization provision—one of the Constitution’s very few provisions on criminalization—has not been sufficiently appreciated. It is of course the case that the First Amendment applies to all law, not just criminal law. But, historically, sedition and blasphemy laws, and related kinds of law and forms of punishment, have played an outsized role in criminal law’s development. As I have written elsewhere: “The First Amendment can usefully be understood as an anti-criminalization provision—indeed, historically it has often functioned as an anti-criminalization provision—freeing up a sphere of normative challenge and norm entrepreneurship outside the reach of criminal law.”

16 Kleinfeld, Three Principles, supra note 5, at 1476.
Regarding the second of these three problems, however—sacrificing individuals for community goals—mens rea plays an essential role. Mens rea individualizes the criminal inquiry, insists upon the point of view of the defendant, and resists instrumentalism. It makes using individuals as pure tools for building community solidarity and securing normative consensus difficult. The most obvious example is show trials involving actually innocent defendants: so long as mens rea is taken seriously, those are impossible. But there are more subtle examples as well.

Consider the real-life case of Debra and Priscilla, which the philosopher/criminal defense lawyer Bob Burns describes in his book *A Theory of the Trial*. Debra was a teenager charged with the care of Priscilla, a baby. One night, Debra threw or pushed Priscilla onto the floor, twice, apparently without reason, in a state of blankness of mind she could not later explain. In a sense, it was an easy case for the prosecution: Debra admitted what she had done; she was young but a legal adult; she had no legally cognizable defense (although troubled, she was not legally insane); and all the state had to prove under the murder statute was that Debra killed with “knowledge” that serious bodily harm was probable from her actions, which in a sense she had. She understood that she was propelling a baby to the floor and that the fall would harm the baby in the same sense that she understood that pushing a vase to the floor would shatter the vase. But that prosecutorial understanding of the case silences other vitally salient facts: that Debra was herself abused to a staggering extent in a household of utmost chaos; that she was always charged with Priscilla’s care, though the two were not related, and that she was normally a loving caretaker; and that on the night in question, after she first threw Priscilla to the floor, she picked Priscilla up, “told her how sorry she was, and then they lay in bed together, the two of them, for a short time. Debra then pushed Priscilla off the bed again. When Debra saw Priscilla getting pale, she was snapped back into reality, began giving CPR … call[ed] her uncle, for help … began screaming for help.”

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

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18 Id. at 118.

19 See generally *Equitable Interpretation of Criminal Statutes*, 85 Univ. of Chicago L. Rev. ___ (forthcoming 2018).
which that inquiry unfolds. Mens rea forces criminal law to deliberate and to empathize, and to do so in the context of a court.

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

IV. Strict Liability: The Regulatory and the Sacred

Mens rea is both an architectural feature of criminal law and a non-necessary one: it is absent from strict liability crimes. The criminal theorist’s minimal burden is to explain why mens rea matters, but a complete theory would be able both to explain why mens rea matters and why it sometimes doesn’t matter. Reconstructivism can explain both halves of that equation and do so more convincingly than retributivism or utilitarianism. There are three phenomena to explain. One is the sort of strict liability associated with crimes of sacredness or purity and more visible in ancient or foreign criminal systems than in contemporary American law. Another is the sort of strict liability associated with contemporary regulation and the administrative state, which is highly visible in contemporary American law. The third is the sort of episodic strict liability associated with spasms of passionate group self-affirmation, as with mob justice, or with calculated efforts to assert group identity, as with Soviet-style inquisitions. Reconstructivism provides interpretive purchase on all three categories of crime; it has the explanatory advantage over its competitors.

Modern moral thought fixates on matters of guilt and blame in ways that tend to exclude other systems of value—moral categories of purity, pollution, sacredness, and sacrilege—that are no less important from an anthropological and historical perspective. Comparative criminal law must have the capacity to understand the criminality of “touching an object that is taboo, or an animal or man who is impure or consecrated, of letting the sacred fire die out, of eating certain kinds of meat, of not offering the traditional sacrifice on one’s parents’ grave, of not pronouncing the precise ritual formula, or of not celebrating certain feasts, etc.”20 Such crimes are often strict liability: he who drinks from the sacred stream must die, regardless of whether he knew or should have known the stream was sacred. Consider Uzzah, son of

Abinadab. When David was bringing the Ark of the Covenant to Jerusalem, “they placed the Ark of God on a new cart, and brought it from Abinadab’s house which is on the hill. Uzzah and Ahio, the sons of Adinadab, were leading the cart. Uzzah walked alongside the Ark of God and Ahio went in front . . . . [W]hen they came to threshing-floor of Nacon, Uzzah stretched his hand out to the Ark of God and steadied it, as the oxen were making it tilt. Then the anger of Yahweh blazed out against Uzzah, and for this crime God struck him down on the spot, and he died there beside the Ark of God.”21 To a retributivist, this sort of crime without blame is nonsensical. To a utilitarian, an explanation can perhaps be bootstrapped to some notion of ultra-deterrence, perhaps, but the explanation rings false: it is anachronistic and it makes utilitarianism so capacious as to be unilluminating.

Reconstructivism, however, can explain strict liability crimes of sacredness and purity on their own terms. As discussed in Section I, the chief reason mens rea matters to crime on a reconstructive view is that the mind endows action with expressive meaning, and reconstructivism’s concern is with expressive denials of shared values. But invasions of the sacred or the pure are special kinds of action for which meaning is not tied to the mind. Sacredness and purity have to do with separateness; the very etymology of the word “sacred” has to do with separation (from the Latin sacrare, a cutting away, a cutting off). The mere fact of illicit contact with the sacred or the pure is a per se challenge to the community’s cosmological order. He who drinks from the sacred stream pollutes it when his mouth touches it because that is the nature of moral pollution. He who drinks from the sacred stream trespasses on a sacred space because that is the nature of sacrilege. The normative challenge is not a matter of the mind. Because the offender touched it, the stream is polluted, the sacred is transgressed. The action is blameless in a mind-centered moral system, but normative attack—crime—is not exclusively a matter of blame and not exclusively the province of mind-centered moral system. It is one of reconstructivism’s strengths that it can make sense of these crimes; reconstructivism has the explanatory advantage in comparative criminal law.

Strict liability regulatory crimes’ classification as criminal law is a matter of historical contingency. With the rise of the administrative state in the early twentieth century, certain types of rules were promulgated to a degree they had not been before—licensing requirements for selling certain products or engaging in certain kinds of work, labeling requirements for food and drugs, public health and safety rules, financial regulations, traffic laws—and those rules had to be enforced somehow. They might have been enforced on an exclusively civil basis or by a system of administrative oversight and fines not understood in criminal terms, but, as Justice Jackson put it in the landmark case of Morissette, “lawmakers, whether wisely or not, have sought to make such regulations more effective by invoking criminal sanctions to be applied by the familiar technique of criminal prosecutions and convictions” and, in so doing,

21 2 Samuel 6:3-7.
often dispensed with mens rea requirements.\textsuperscript{22} Courts recognized that these regulatory crimes were qualitatively different from the sort of moral wrongdoing with which criminal law traditionally dealt: “These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but … their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted.”\textsuperscript{23} But “penalties commonly are relatively small, and conviction does not grave damage to an offender’s reputation.”\textsuperscript{24} Whatever misgivings courts felt, they did not generally think such crimes violated the Constitution, which would be the only basis for striking them down. The result is the criminal system we have today, with crimes of malum in se wrongdoing that generally require showing blameworthiness and a second set of crimes of malum prohibitum rulebreaking that often do not require showing blameworthiness. As Bill Stuntz writes, “criminal law is not one field but two. The first consists of a few core crimes, the sort that are used to compile the FBI’s crime index—murder, manslaughter, rape, robbery, arson, assault, kidnapping, burglary, larceny, and auto theft. The second consists of everything else. . . . These two fields have dramatically different histories.”\textsuperscript{25} It was just the forcefulness and convenience of criminal law’s enforcement apparatus that led this second field to be criminal law at all.

The question is how a theory of criminal law should deal with this second field, and, in particular, should make sense of its widespread use of strict liability. Retributivists generally cannot explain it: unless strict liability regulatory crimes can be reinterpreted as genuine forms of wrongdoing, they are unjust (although there are nuances here, which I address below). Utilitarians can easily explain it—strict liability regulatory crimes are just another instance of deterring harmful conduct—but in a sense too easily: utilitarianism cannot explain why strict liability regulatory crime is qualitatively different from traditional criminal law’s “positive aggressions or invasions,” or, for that matter, why criminal law should be distinct from any other system of risk-management. To a reconstructivist, strict liability regulatory crimes fall outside the internal logic of criminal law, but they are not necessarily unjust for that reason. Consider a driver who gets a ticket for failing to affix an updated registration sticker to her license plate. The failure to affix a registration sticker does not in any realistic sense expressively deny the values on which social life is based—it does not, for example, disdain the welfare or rights of other human beings, and, where the driver was neither intentional nor negligent in failing to update her registration sticker (a true case of strict liability), her failure

\begin{footnotesize}
\begin{enumerate}
\item Id. at 255-56.
\item Id. at 256.
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to affix the sticker does not even express disdain for traffic law. It is not, on a reconstructive
view, properly criminal. On the other hand, the fix-it ticket she gets is not properly punishment
either; it’s an incentive to affix the sticker, not an expression of community condemnation.

Strict liability regulatory crimes ordinarily present, then, not a problem of injustice but a
problem of misclassification. There would be injustice if the punishment expressed community
condemnation and were therefore severe in the ways genuinely criminal punishment is severe.
But so long as the penalties, not being condemnatory, “are relatively small” and do no “grave
damage to an offender’s reputation,” the reconstructivist’s functional conception of criminal
justice is not at issue. The misclassification might be ill-advised—it might cheapen the criminal
law’s condemnatory force, for example, or get police and prosecutors over-involved in
people’s lives, or put regulatory law on a slippery slope to excessive punishment—but it is not
by itself unjust. And there is a theoretical virtue in reconstructivism’s capacity to understand
this sort of strict liability regulatory crime as misclassification rather than as either an ordinary
part of crime and punishment or as simple injustice. Reconstructivism’s understanding fits the
very contingent history and odd character of this area of criminal law. To a reconstructivist,
the regulatory crime enterprise is administrative law by other means. This enables
reconstructivism to accommodate strict liability regulatory crimes, as a theory must to stay
realistic and relevant in the modern world, without thereby surrendering its core understanding
of criminal law to the administrative state.

Finally, mob justice and Soviet-style inquisitions often involve innocent defendants. They
are not formally strict liability affairs, but they are commonly indifferent to mens rea. Think
of the defendant, Tom Robinson, in Harper Lee’s To Kill a Mockingbird. He was innocent of
raping the alleged victim, a white woman, as everyone in the courtroom knew. Why punish
him? A retributivist can see the injustice of the punishment, but not the logic of it; punishing
innocents is either a mistake or just a way of using criminal punishment for purposes of sheer
violence. A utilitarian can see such punishment only as (again) a kind of ultra-deterrence. But
what is really at work in such cases is group and norm affirmation. The reason the jury
convicted Tom Robinson despite its awareness of his innocence was to affirm the network of
values and group understandings that undergirded white supremacy, and, especially, to
establish as an ultimate taboo sex between a black man and a white. It is, again, a theoretical
strength of reconstructivism that it provides tools by which to interpret and understand this
sort of social activity.

**Conclusion**

The three arguments above are quite different from one another. The first links
reconstructivism to mens rea by highlighting the role of the mind in making actions—
including crimes—expressively meaningful. The second presents mens rea as an external
constraint on reconstructivism’s communitarian logic. The third shows that reconstructivism’s fluid relationship to mens rea makes room for forms of strict liability criminal law—including sacred taboos, regulatory strict liability crimes, and persecutions—that are important for understanding descriptively how criminal law functions. I submit that reconstructivism emerges from these three arguments stronger than its main competitors, retributivism and utilitarianism, with respect to mens rea. Despite the nuances of contemporary retributivism, the root impulse of the theory is to reject all forms of strict liability as mistaken or wrongheaded. Despite the nuances of contemporary utilitarianism, the root impulse of the theory is to treat mens rea as a mere disposable convenience. Reconstructivism carves out a place for mens rea that is deeply rooted but not indispensable, and that can make sense of various strict liability social practices.