

# Dimensions of Negligence in Criminal and Tort Law

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*This article explores different dimensions of the concept of negligence in the law. The first sections focus on the fundamental distinction between conduct negligence (unreasonable creation of a risk of harm), a conception that dominates tort law; and cognitive negligence (unreasonable failure to be aware of a risk either through inadvertence or through mistake), a conception that is much more important in criminal law. The last major section identifies five significant institutional functions served by a legal negligence standard: expressing a legal norm in the form of a standard rather than a rule; personifying fault; empowering the trier of fact to give content to the standard; creating a secondary legal norm parasitic on a primary legal norm; and distinguishing grades of fault. These functions reveal the distinctive significance of negligence, but also disclose numerous problems that the use of such a legal standard can pose.*

*Careful analysis of these different dimensions of negligence clarifies certain misconceptions and has important implications. For example, the question whether "negligence" is an appropriate minimum standard of liability (e.g., for criminal punishment) is unanswerable until we identify the type of negligence at issue (conduct or cognitive) and its role in norm-definition (providing a general standard of liability for harm-creation or, instead, merely an interstitial standard applying only to some elements of a crime). Similarly, comparing negligence*

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to supposedly "more serious" forms of fault, such as recklessness, knowledge, and purpose, is treacherous and sometimes amounts to comparing apples and oranges.

*A better understanding of the different conceptions of negligence and of the distinctive institutional functions of a legal negligence standard can facilitate the development of more coherent, and more justifiable, fault criteria in criminal law, torts, and other legal domains.*

## INTRODUCTION

The law frequently employs a concept of "negligence." What does the concept mean?

This question can be explored from many perspectives. One perspective analyzes different ways of articulating the *content* of the standard — as a cost-benefit balance, or a judgment about "community values," or a version of the Golden Rule. Another, related perspective considers the normative foundations of a negligence requirement — as a utilitarian metric of personal fault, as an economic rule designed to induce optimal precautions, as a norm of fairness, or as a type of fault subject to retributive blame or to a corrective justice duty of repair.<sup>1</sup>

In this essay, I take a somewhat different perspective. What specific conceptions of negligence are recognized in the law? How do these conceptions relate to one another? And why does the law employ these varying conceptions?

To illustrate some of the distinctions I have in mind, consider the following propositions:

- (A) Alon, through his dangerous driving, negligently creates an unreasonable risk of physical injury to Virgil.
- (B) Boris, through his dangerous driving, negligently causes physical injury to Virgil.
- (C) Claude negligently fails to foresee the risk of physical injury to Virgil.
- (D) David negligently drives his car.

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<sup>1</sup> For some thoughts on these issues, see Kenneth W. Simons, *Negligence*, 16 Soc. Phil. & Pol. 52 (1999) [hereinafter Simons, *Negligence*]; Kenneth W. Simons, *The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness As Well as Efficiency Values*, 54 Vand. L. Rev. 901 (2001) [hereinafter Simons, *The Hand Formula*].

- (E) Edna, a surgeon, performs an operation during which her hand slips, negligently causing physical injury to Virgil.
- (F) Frank has sexual relations with Violet and makes a negligent *mistake* about her age, believing that she is eighteen when she is actually fifteen.
- (G) George has sexual relations with Violet and is negligently *inadvertent* to her age: he forms no belief about her age and fails to realize that she is actually fifteen.
- (H) Harriet, in using deadly force against Vanna, negligently fails to realize that Vanna is not threatening Harriet with deadly force.
- (I) Irma, in using deadly force against Vanna, lacks any definite beliefs about the severity of Vanna's threat, but negligently fails to control her impulse to respond to Vanna's attack with deadly force.

Now consider the following questions.

- (1) Is Claude's failure to foresee the risk of injury sufficient to show that he is negligent in the same sense as Alon or Boris?
- (2) More generally: Are the conceptions of negligent inadvertence (e.g., Claude, George) and negligent mistake (e.g., Frank) essentially the same as the conception of negligent risk-creation (e.g., Alon, Boris)? If not, how do they differ?
- (3) Is the category of deficient *skill* (e.g., Edna) an instance of negligent risk-creation or, instead, of negligent inadvertence or negligent mistake? Or is it a separate category altogether?
- (4) Compare David (above) with two new characters — Donna, who "knowingly drives her car," and Delbert, who "purposely drives his car." Normally, knowledge and purpose are considered more serious forms of culpability than negligence. Yet David is conclusively at fault, while Donna and Delbert are not. What explains this paradox?
- (5) Is negligent lack of self-control (e.g., Irma) a coherent form of negligence?

In this essay, I will explore these questions, and others, concerning different dimensions or categories of negligence. Section I of the essay analyzes the standard tort conception of negligence as unreasonably risky conduct. Section II evaluates the modern criminal law conception of negligence as negligent inadvertence or negligent mistake. Subsequent sections compare the tort conduct conception and the criminal law cognitive conception and also introduce other varieties of negligence. Then, stepping back from these conceptions, I examine carefully five different functions that a legal negligence standard might serve. A conclusion identifies some

misconceptions that the analysis refutes and offers some final conjectures about whether, and how, different views of the content and normative underpinnings of negligence would affect the analysis.

I believe that the comparative treatment of different conceptions of negligence can be quite illuminating, especially to scholars and judges familiar with tort doctrine but unfamiliar with criminal law, and vice versa. But the proof is in the pudding ...

## I. THE STANDARD TORT CONCEPTION OF NEGLIGENCE: UNREASONABLY RISKY CONDUCT

Let us begin with what might be called the "standard" conception of negligence employed in tort law. Under this conception, negligence consists in creating an unreasonable risk of physical harm to another, a risk that the actor could and should have prevented by taking a precaution. The actor is considered to be at fault for not taking the precaution, although his fault is understood to be less serious than the fault of an actor who creates the risk of harm *intending* that the harm occur or *believing* that that harm is likely.<sup>2</sup>

On the standard conception, the primary fault underlying a negligence claim is the actor's failure to take a reasonable precaution against the risk of harm. To be sure, tort law demands compensation for negligently caused harm and normally does not provide a remedy for negligence unless the negligence results in harm. Still, it is the negligent act that determines the actor's fault. In other words, the state of affairs in which the negligent act does not occur is clearly preferable to that in which the actor negligently causes harm but pays compensation.<sup>3</sup>

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2 See Restatement (Third) of Torts: Liability for Physical Harm § 1 cmts. a, d (Tentative Draft No. 1, 2001). The "intentional" or "knowing" actor would be liable for a battery. Although damages for intentional torts and for torts of negligence are usually the same, the character of a tort as intentional rather than negligent makes punitive damages more readily available, often lessens the effect of victim fault under comparative fault principles, and might relax the rules of proximate cause. *Id.* § 5 cmt. a.

However, we will see that the tort culpability hierarchy is more complex than the text implies, for a battery does not require intent to cause *harm*. See text at *infra* notes 114-18.

3 See Simons, *The Hand Formula*, *supra* note 1, at 905. Accordingly, negligence liability (even in tort law) is best understood as a property rule, not a liability rule, insofar as the tortfeasor is not deemed entitled to cause harm so long as he pays. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972). Similarly,

The determination that an actor is negligent is made from an *ex ante* perspective, considering the foreseeable risks from the actor's conduct and the foreseeable benefits (in the form of risk-reduction) from the actor's taking a precaution. Negligence depends on foresight, not hindsight; on the reasonably apparent state of the world at the time of the action at issue, not on the actual state of the world at that time. Moreover, although negligence necessarily involves risk-creation,<sup>4</sup> negligence might or might not cause harm.

The standard conception treats negligence as an *evaluative* criterion and as a conclusive judgment of fault. If an actor is negligent, then he should have acted differently. By creating an "unreasonable" risk of harm, or failing to take a "reasonable" precaution against harm, he is necessarily unjustified in acting as he did. And if harm follows, he will be liable in damages. By contrast, "knowingly" or "intentionally" creating a risk of harm, even a very *high* risk of harm, need not be an unjustified act. (Intentionally or knowingly harming a person can be justified by self-defense, for example.) Put differently, lack of justification is built into the very concept of negligence; but it is not part of the concept of knowingly or intentionally harming another.

In principle, one could break down the analysis of unjustifiable risk-creation into two issues: (1) the significance of the risk created; and (2) the justifiability of creating that risk (which we might also characterize as the burden of taking a precaution against that risk). The law could then explicitly develop a range of standards: creating a trivial risk of a trivial harm requires only a slight justification; creating a more significant risk of a trivial harm requires a more weighty justification; creating a significant risk of a more significant harm requires an even more weighty justification; and so forth. But the tort conception of negligence instead ordinarily employs a single standard, with a sliding scale: the justification for imposing a risk must ordinarily be weightier as the probability and severity of the harm risked increases.<sup>5</sup> Only when the significance of the risk reaches a relatively high level and the actor is aware of a relatively high level of risk or intends to cause

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tort liability for negligence is better viewed as a sanction, not a price. Robert Cooter, *Prices and Sanctions*, 84 Colum. L. Rev. 1523, 1538 (1984).

- 4 A qualification: actors are sometimes liable for negligent omissions even when they have not created the risk of harm. (Consider parents' duties with respect to their children's health and safety.) In such cases, the actor has a duty to use reasonable care to reduce the risk of harm.
- 5 See Simons, *Negligence*, *supra* note 1, at 56-57; Dan Dobbs, *The Law of Torts* §§ 26, 27 (2000).

harm does the "sliding-scale" negligence test give way to the qualitatively different standards for reckless and intentional torts.<sup>6</sup>

## II. THE MODERN CRIMINAL LAW CONCEPTION OF NEGLIGENCE: UNREASONABLE INADVERTENCE AND UNREASONABLE MISTAKE

Although the standard tort conception understands negligence as unreasonably unsafe conduct, modern criminal law emphasizes a different, *cognitive* conception of negligence — namely, the actor's unreasonable *inadvertence* or unreasonable *mistake*. Criminal law employs other conceptions of negligence as well, but it will prove useful to characterize this cognitive conception as "the" modern criminal law conception before introducing further complexity.<sup>7</sup>

Cognitive negligence, or negligence in relation to beliefs, has two basic forms. An actor might be unreasonably ignorant or inadvertent in failing to form any belief about a relevant matter, when he should have formed a belief. (Consider George, above.<sup>8</sup>) Or the actor might form a definite belief, but that belief might be unreasonably mistaken. (Consider Frank, above.) I will use the term "cognitive negligence" for both negligent inadvertence (when the actor unreasonably fails to advert to a risk or to an existing fact) and negligent mistake (when the actor forms the unreasonable and incorrect belief that the risk or fact does not exist). In either case, the actor is negligent for not forming a belief that he reasonably should have formed.<sup>9</sup>

The highly influential Model Penal Code emphasizes a cognitive conception of negligence.<sup>10</sup> Under the Code, negligence is the least "culpable"

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6 See Restatement (Third) of Torts: Liability for Physical Harm §§ 1, 2 (Tentative Draft No. 1, 2001).

7 I describe this as the "modern" criminal law conception because the influential Model Penal Code emphasizes this conception. Traditional criminal law doctrine, by contrast, does not employ or emphasize any single conception of negligence. Instead, it contains a variety of doctrines that could be broadly classified as involving negligence — including general intent, mistake of fact, the *mens rea* for manslaughter, and objective requirements of self-defense.

8 Or consider Claude: suppose he switched lanes on a highway without considering the possibility that someone was in his blind spot and thus without realizing that his action posed a substantial risk of harm.

9 "Inadvertence" and "mistake" are two basic categories of cognitive deficiency, i.e., of the actor failing to form a belief that he should have formed. But other categories also exist, such as agnosticism. See Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. Rev. 463, 540 (1992).

10 The Israeli Penal Code appears to be similar in this respect:

category of four "culpability" terms. In order of increasing "culpability," with higher punishment potentially warranted for each increment, the categories are negligence, recklessness, knowledge, and purpose. In essence, a negligent actor is one who *should* be aware of an unjustifiable risk<sup>11</sup>; the reckless actor *is* aware of an unjustifiable risk but nevertheless takes it; the knowing actor is aware that a harmful result is practically certain to occur or that an incriminating circumstance very probably exists; and the purposeful actor has the conscious object of achieving the result.<sup>12</sup>

Why does the Code largely employ a cognitive conception of negligence? For two basic reasons. First, the Code drafters wanted to ensure that some form of "conscious" wrongdoing would normally be required for criminal liability. Doctrinally, they accomplished this by providing that "recklessness," rather than "negligence," is the presumptive minimum culpability term for every material element of every crime.<sup>13</sup> Accordingly, recklessness is defined (in part) as *awareness* that a harm may ensue or that an incriminating circumstance might obtain.<sup>14</sup> At the same time, *negligence*

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Negligence means unawareness of the nature of the act, of the existence of the circumstances or of the possibility of consequences of the act being brought about, such nature, circumstances and consequences being ingredients of the offence, when a reasonable person could, in the circumstances of the case, have been aware of it ...

Israeli Penal Code § 21(a) (1995) (unofficial English translation), *in* 30 Israel L. Rev. 1, 14 (1996). However, a proviso to this section acknowledges a "conduct negligence" requirement as well:

Provided that — ... (b) the possibility of the consequences being brought is not a reasonable risk.

- 11 Model Penal Code § 2.02(2)(d) (1985). Importantly, however, the Code defines criminal negligence as a *gross* deviation from reasonable conduct; thus, criminal negligence is a species of what tort law would call "gross" negligence, not ordinary negligence. Also, MPC negligence presupposes that the actor should have been aware of a "substantial" risk of harm. I put aside, for purposes of this article, the interesting question whether this substantiality requirement (common to the MPC definitions of both negligence and recklessness) should be understood as an independent requirement or instead as just an aspect of unjustifiability. *See* Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 Cal. L. Rev. 931, 933-35 (2000).
- 12 Model Penal Code § 2.02(2). Note two qualifications. First, the meaning of these culpability terms differs somewhat when they pertain to a circumstance element of an offense, rather than a result element. Second, the MPC strongly disfavors strict criminal liability, or liability in the absence of any form of culpability. *Id.* § 2.05.
- 13 *Id.* § 2.02(3).
- 14 Specifically, MPC "recklessness" requires that the actor be aware of a substantial risk of a relevant harm occurring or circumstance existing. *Id.* § 2.02(2)(c).

is understood *negatively*, as a form of culpability in which the actor lacks such awareness. (Indeed, the *only* difference between negligence and recklessness under the Code is this difference in awareness.<sup>15</sup>) Second, the drafters wanted negligence to fit within a structured hierarchy of mental states or culpability terms, under which "higher" forms of culpability within the hierarchy correspond to more serious crimes. (As we will later see, however, the cognitive conception only imperfectly achieves either of these objectives.)

One straightforward example of the role of the cognitive conception in the Code hierarchy is the law of homicide. Purposely or knowingly causing a death is murder, the most serious form of homicide; recklessly causing a death is manslaughter; and negligently causing a death is negligent homicide, the least serious form of homicide.<sup>16</sup> Thus, if an actor causes death and is grossly negligent in lacking awareness of a substantial and unjustifiable risk of death, he has committed negligent homicide.

Similarly, consistent with the Code hierarchy, a legislature could differentiate three different degrees of rape according to the actor's culpability with respect to the critical circumstance element, the victim's non-consent. A defendant who had sexual intercourse with the victim knowing that she did not consent might, for example, be guilty of first-degree rape; a defendant who was reckless as to her non-consent might be guilty of second-degree rape; and a defendant who was negligent as to her non-consent might be guilty of third-degree rape. Thus, an actor's beliefs can be ordered in a hierarchy both when the beliefs pertain to a result of the actor's conduct

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15 It need not have been so. Criminal recklessness could be distinguished from criminal negligence not according to consciousness of risk, but according to the actor's greater indifference to risk or her more seriously culpable reasons for creating an unjustifiable risk. (One example of the latter approach is the usual doctrinal presumption, even in the MPC, that an intoxicated actor is legally "reckless" even if he is in fact unaware of the relevant risk.) Similarly, it is plausible to treat an actor as "reckless" if she is actually aware of a very slight risk and should have inferred that the risk was substantial; but the Code apparently would treat such an actor as only negligent, since she lacks actual awareness of a substantial risk. Insofar as non-Code criminal law doctrine distinguishes recklessness from negligence, it sometimes uses a criterion other than awareness of a substantial risk. See Joshua Dressler, *Understanding Criminal Law* § 10.04[D][3] (3d. ed. 2001) (formerly recklessness was on a continuum, together with criminal negligence and civil negligence, based on degree of risk); *id.* § 10.07[B][3] (The Model Penal Code influenced the transformation of the recklessness-negligence distinction from degree of risk to awareness); Wayne R. LaFare, *Criminal Law* § 3.7 n.6 (3d ed. 2000) (recklessness has been distinguished from negligence variously by degree of risk, awareness of risk, or both).

16 Model Penal Code §§ 210.2, 210.3, 210.4.



(as in homicide) and also when they pertain to an attendant circumstance (as in this rape example).<sup>17</sup>

### III. COMPARING THE STANDARD TORT AND MODERN CRIMINAL LAW CONCEPTIONS

It is illuminating to compare the tort and criminal law conceptions. In several important respects, the conceptions are similar:

(1) Both employ an evaluative rather than descriptive criterion: they ask a normative question (what the actor should have done or should have believed), not a factual one (what he actually did, or actually intended, or actually believed).<sup>18</sup> In this sense, at least, both conceptions are "objective" rather than "subjective."<sup>19</sup> By contrast, "knowledge" and "intention" criteria are descriptive.<sup>20</sup>

(2) Both employ "reasonableness" or "the reasonable person" as the evaluative criterion.<sup>21</sup>

(3) The evaluation is a conclusive judgment of fault, in the relevant sense. Negligent conduct is unjustified conduct, or conduct that should, all things considered, have been otherwise. Negligent ignorance and negligent mistake, similarly, are unjustified: all things considered, the actor should have formed a particular belief or should not have formed the belief that he did form.

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17 Few MPC crimes fully exploit the culpability hierarchy, especially with respect to circumstance elements. See Douglas Husak, *The Sequential Principle of Relative Culpability*, 1 *Legal Theory* 493, 503-05 (1995).

18 For grading purposes, to be sure, the cognitive conception also asks a *factual* question: Was the actor aware of the risk? If so, he is reckless; if not, he is only negligent.

19 For further discussion of the different senses of "subjective" and "objective" in connection with negligence, see George P. Fletcher, *Basic Concepts of Criminal Law* 117-20 (1998); see also George P. Fletcher, *Rethinking Criminal Law* 504-14 (1978).

20 Of course, a normative rationale ultimately explains why and when the law employs such descriptive criteria. But the actual application of the criterion by the fact-finder does not explicitly require normative judgment. (To be sure, this is a matter of degree; a juror familiar with the consequence of a determination that the actor "intended" to kill will undoubtedly use her moral judgment, and not just the judge's instructions defining "intent," in making that determination.)

21 However, the "reasonable person" formulation is not a necessary feature of a negligence standard. See text at *infra* notes 69-85.

(4) Both conceptions employ the idea of risk, chance, or probability.<sup>22</sup> The tort conception considers whether the actor created an unreasonable risk of future harm, while the criminal law conception considers whether he unreasonably lacked a belief as to either a relevant probability of a future harm occurring (e.g., Claude failing to foresee a significant risk of death) or the relevant probability of an existing fact (e.g., George failing to appreciate a significant chance that the victim was underage).

(5) Lastly — and related to the previous point — both conceptions permit a distinction between (a) a risk or possibility of a harm or fact and (b) that harm occurring or that fact existing. One can negligently create a risk of harm, and yet not cause harm. And one can negligently fail to form the belief that a fact exists or that a result will occur, even though the fact actually does not exist or the result actually does not occur.<sup>23</sup> (This conceptual separation permits liability for inchoate torts or crimes, an implication explored below.<sup>24</sup>)

But the tort and criminal law conceptions also differ in some fundamental ways:

(1) The tort conception focuses on deficient conduct and on the need to take a precaution against risks of future harm. The criminal law conception focuses on deficient beliefs, not deficient precaution: one can negligently

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22 I include "or probability" because the notion of "risk" implies an unwanted or adverse outcome. See Holly Smith, *Risk*, in *Encyclopedia of Ethics* 1109 (Lawrence C. Becker & Charlotte B. Becker eds., 1992). Accordingly, "risk" is a less apt term for describing beliefs as to existing circumstances, such as the age of a victim or the status of an assault victim as a police officer. One can negligently create a "risk" of killing someone, but it might be more precise to say that one is negligently unaware of the "possibility" or "probability" that a victim is under the age of eighteen or is a police officer. On the other hand, perhaps even a circumstance element is an "adverse outcome" in the following sense. Although, by definition, a circumstance cannot be changed by the actor, the actor's actual satisfaction of such an element makes his conduct criminal, and thus the actor should treat such satisfaction as unwelcome. (The MPC, in defining recklessness and negligence, employs the term "risk" for both result and circumstance elements. Model Penal Code §§ 2.02(2)(c),(d) (1985).)

23 Thus, the following might both be true: (a) George is unreasonable in failing to arrive at the belief that the victim is underage; but (b) the victim is not underage. (Suppose she has an unusually immature appearance and he meets her at a junior high school dance.)

By the same token, one can be unreasonable in forming the affirmative and exculpatory belief that a fact exists or that a harm will not occur, yet the exculpatory fact might actually exist or the harm might actually not occur. (Consider Frank, who is negligent in believing that the victim is *above* age; and again, suppose she actually is.)

24 See text at *infra* notes 102-04.

fail to believe something without necessarily failing to take a reasonable preventive measure.<sup>25</sup> Thus, in one sense, the tort conception is wider: it includes both cases where the actor was unreasonably unaware of the relevant risks and cases where the actor was fully aware of those risks.<sup>26</sup>

(2) The tort conception provides a pervasive standard for behavior subject to legal liability, for it broadly encompasses any act that negligently causes physical harm to person or property. The criminal law conception is interstitial and derivative: it is but one culpability term among many, and its significance depends on the substantive criminal law norm to which it attaches (homicide, assault, property interests, sexual autonomy, public morals, the administration of justice, and so forth).<sup>27</sup> For example, negligence in failing to determine whether a victim consents to sexual intercourse has much greater moral significance than negligence in judging the value of property one is stealing, and the consequences for criminal punishment are correspondingly quite different.<sup>28</sup>

(3) The tort conception endorses an *ex ante* perspective, while the criminal law conception, strictly speaking, does not. That is, in tort law the issue is whether the actor's conduct was reasonable in light of the risks it created

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25 Put differently, a precaution is conduct that would effectively prevent a risk from reaching fruition. In the case of negligent beliefs, often the only relevant default is the actor's failure to reasonably assess the significance of the information she already possesses. Characterizing that default as failure to take a "precaution" is a forced locution at best. Of course, in some cases, a faulty belief does indeed consist in a failure to take a "precaution" in the ordinary sense of the term. If Ford Motor Company negligently failed to realize that the location of the fuel tank on the Ford Pinto was dangerous, this default might have been a consequence of failing adequately to research in advance the possible safety hazards from that design. In other cases, too, the actor might fail to "give careful attention" to the results of his conduct; and paying close attention (for example, while driving) is indeed a kind of precaution. Nevertheless, if I am paying adequate attention and have no opportunity (or no duty) to conduct a further investigation, my failure to make a reasonable inference from facts at my disposal can be a negligent mistake *without* entailing that I have failed to take a reasonable "precaution."

26 Tort law does employ a concept of recklessness, but it is significantly different, and usually narrower, than modern criminal law's conception of recklessness. The latter conception is simply negligence plus advertence to risk, while the former also might require both indifference to risk and a greater departure from the standard of care than negligence requires. See Restatement (Third) of Torts: Liability for Physical Harm § 2 (Tentative Draft No. 1, 2001).

27 This contrast should not be overstated, however: a pervasive tort negligence standard applies only to physical injury to person or property, not to exclusively economic or emotional harms.

28 For further discussion of this point, see text at *infra* notes 36-37.

*ex ante*, prior to their fruition (or non-fruition) in harm. The criminal law conception instead asks whether the actor's belief was reasonable, in light of the information available to him when he formed the belief. Negligent inadvertence or mistake need not entail that the actor created (or failed to minimize) an unreasonable risk of future harm; it need only mean that he lacked adequate grounds for his belief. To put the matter differently: Although a belief can be reasonable or unreasonable, and thus can be non-negligent or negligent, the object of such a belief can be a proposition about the future, about the present, or even about the past.<sup>29</sup> So the *ex ante* perspective is not a necessary part of the cognitive negligence determination.

#### IV. A MORE COMPLETE PICTURE OF NEGLIGENCE IN TORT AND CRIMINAL LAW

At this point, an impatient reader might wonder whether I am exaggerating the differences between the conduct and cognitive conceptions. Indeed, am I unnecessarily multiplying conceptions of negligence, ignoring the fundamental and core similarities? Would Ockham's razor come in handy?

Consider the following (superficially) attractive reasons to cut down the complexity of the analysis. First, in criminal law, the cognitive negligence standard is often employed not alone, but in conjunction with a tort-like conception of negligent conduct. Second, the very meaning of cognitive "negligence" depends on the legal context; what counts as culpable inadvertence depends on the nature of the conduct that the actor should have realized he was engaging in or the nature of the harm he should have realized he was risking. Third, because the tort conception incorporates the

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29 This point is most obvious when the belief pertains to an existing *fact*. If Frank's belief as to Violet's current age is negligent, this does not entail that, *ex ante*, he is taking an unreasonable risk of some future consequence that may or may not come to fruition. But even when the relevant belief pertains to a risk of future harm, the reasonableness of the belief itself is not evaluated "*ex ante*" in the relevant sense. Thus, if Claude negligently failed to appreciate that the dangerous maneuver he was about to undertake would create a significant risk of death, his *cognitive* fault consists in his unreasonable failure of perception or inference, based on information reasonably available at the time that he formed his belief. (His *conduct* fault, however, does consist in his creating an *ex ante* unreasonable risk of future harm.)

Insofar as the law makes relevant the reasonableness of an actor's beliefs about *past* facts, clearly the reasonableness analysis does not involve an "*ex ante*" evaluation. (Consider a requirement that a police officer have reasonable grounds to believe that the defendant has committed a crime before arresting the defendant.)

idea of *ex ante* risk, it seems to presuppose a certain kind of cognitive inquiry — the inquiry into whether the risk is "reasonably foreseeable."

Each of these points merits more careful attention, for each is valid. In the end, however, none of them undermines the importance of the fundamental distinction between cognitive and conduct negligence. Indeed, I must regretfully report a further conclusion: it is useful to recognize an even greater profusion of conceptions of negligence than the two recognized thus far.

### A. When Criminal Law Employs a Conduct Conception of Negligence

Consider first whether the cognitive conception is the only important conception of negligence employed in criminal law doctrine. Closer examination reveals that it is not. Rather, criminal law negligence standards often employ the cognitive conception *in conjunction with* a tort-like conception of unreasonable, *ex ante* unjustifiable, risk-creation. Reconsider negligent homicide liability. Such liability requires more than that an actor was cognitively negligent, i.e., that he should have realized that he was posing a risk (even a substantial risk) of death to another. Medical operations, for example, often pose such risks. In addition, the risk posed (and the failure to take a precaution against the risk) must itself be unjustifiable.

A more careful analysis of the Model Penal Code definition of negligence reveals that it often encompasses these two different aspects of negligence. As explained above, the Code defines a category of unreasonably inadvertent actors (and contrasts them to advertent, "reckless"<sup>30</sup> actors). But it also implicitly establishes a standard of care with respect to the actor's *conduct*. A negligent actor is one who "should be aware of a *substantial and unjustifiable*" risk (emphasis added).<sup>31</sup> Thus, a negligent actor both (a) creates a substantial and unjustifiable risk (of death, in the case of homicide) and (b) unreasonably lacks awareness of that risk.<sup>32</sup> Notice that (a) suggests a

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30 However, recklessness has other important meanings besides advertence. It can also refer to culpable indifference or to gross negligence. See Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. Contemp. L. Issues 365, 372 (1994); Simons, *supra* note 9, at 482-90. For simplicity, in this paper I use the term only in the MPC sense.

31 Model Penal Code § 2.02(2)(d) (1985).

32 The Code also provides:

The risk must be of such a nature and degree that *the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation* from the standard of care that a reasonable person would observe in the actor's situation.

tort-like conception of unreasonable care, while (b) is a cognitive conception of unreasonable inadvertence.<sup>33</sup>

To be more precise, this conduct-plus-cognitive definition applies when negligence is the "culpability" term applicable to a *result* element of a crime (such as the causation of death in the crime of homicide or the destruction of a building in the crime of arson).<sup>34</sup> However, a *purely* cognitive conception necessarily applies when negligence pertains to a *circumstance* element of a crime (such as a victim's non-consent or age in a sexual assault crime). After all, an actor cannot *create* an unjustifiable risk that a victim of sexual assault is under age; by definition, a "circumstance" element is a legally relevant state of affairs over which the actor lacks control.<sup>35</sup> Thus, if rape requires that the actor be negligent as to the victim's non-consent, then the actor's negligence consists solely in his unreasonably lacking awareness of the risk (category (b), above), not in his creating a substantial and unjustifiable risk of some harm (category (a), above).

It is true, then, that the criminal law often (though not always) employs a conduct conception of negligence together with the cognitive conception.

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*Id.* § 2.02(2)(d) (emphasis added). This language underscores the cognitive orientation of the MPC definition. Notice the focus on the unreasonableness of the inadvertence, not on the unreasonableness (in the sense of unjustifiability) of the risk.

33 The commentary to MPC section 2.02 explicitly distinguishes these two aspects of negligence. *Id.* § 2.02 cmt. at 241.

34 The conduct-plus-cognitive definition also applies when MPC "recklessness" applies to a result element, because the Code's definitions of recklessness and negligence contain the same requirement of unjustifiable risk-creation. Thus, reckless manslaughter (reckless causation of death) requires proof both of awareness of a substantial risk of death and of unjustifiable creation of a substantial risk of death.

35 In this regard, it contrasts with "result" elements, which (again by definition) the actor does have power to bring about. *See* Paul Robinson, *Structure and Function in Criminal Law* 26 (1997); Simons, *supra* note 9, at 535-37.

A related point: the cognitive-plus-conduct negligence definition is a doubly *evaluative* standard, directly applied by the trier of fact. (In negligent homicide, for example, the jury decides both whether the actor should have been aware of the risk and whether he created an unjustified risk.) By contrast, when a purely cognitive negligence definition is coupled with other conduct requirements, the trier of fact's evaluative role is much more limited, for those conduct requirements reflect a conclusive culpability judgment that the legislature has already made. (In so-called "negligent rape," the jury decides whether the actor should have been aware that the victim was consenting, but not whether force or penetration should be required for rape. The latter is a legislative judgment, precluding the actor from raising the claim that it is justifiable to engage in nonconsensual forcible intercourse with another (apart from narrow criminal law defenses).)

But this hardly shows that the conceptions are identical. Indeed, it might be preferable to disaggregate the conceptions in order to clarify that in a result crime such as negligent homicide, the prosecution should prove both forms of negligence.

Let us turn to the second issue noted above, the issue of contextuality. A closer look at the conception of "negligent" inadvertence reveals that its very meaning depends on the other elements of the crime or tort with which it is associated. This contextual dependence illustrates that the distinction between "cognitive" negligence and "conduct" negligence is somewhat overdrawn.

In one obvious sense, the evaluative judgment that a cognitive negligence standard demands is distinct from the judgment that a conduct negligence standard demands: the question is what, all things considered, the actor should have believed, rather than what he should have done. But this way of putting it conceals an important connection between the two evaluations. The point of the cognitive evaluation is not simply to determine what the actor "should have believed" in the abstract. Rather, whether the actor is at fault in failing to arrive at a particular belief, and how seriously he is at fault, depends on the larger normative context and, indeed, is subsidiary to a broader normative judgment. Whether the actor "should" have realized that another person was less than age sixteen depends, for example, on whether he is charged with selling cigarettes to a minor, with employing an underage person, or with statutory rape. If one of these crimes is punished much more harshly than the others, the actor is under a more stringent duty to determine the age of the victim and thus avoid the risk of violating the prohibition.<sup>36</sup> The social context of the interaction is also significant: for example, it is more reasonable to expect an actor to request to see an identification card in a business setting (e.g., a sale in a liquor store) than in the setting of a consensual social date that has progressed to the point of sexual intimacy. At the extreme, the moral fault of making a mistake about another's age can be quite trivial, if the context is a purely social one in which the risk of criminal conduct appears to be insignificant. Thus, suppose an absentminded professor asks how a friend's daughter is enjoying high school, when it should be obvious that she is still in grade school. Since the only issue here is the moral, rather than legal, duty to use reasonable care to avoid embarrassing another, the professor's cognitive negligence reflects a weak form of fault.<sup>37</sup>

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36 See Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 *J. Crim. L. & Criminology* 1075, 1093, 1123-24 (1997).

37 Indeed, a variation of the cognitive negligence standard applies even outside of the context of fault liability. Notice that a "reasonable foresight of risks" criterion can

Indeed, because of its context-dependence, a cognitive negligence evaluation sometimes *will* consider *ex ante* risks in at least a limited way, notwithstanding the discussion earlier; for a determination that the actor was "negligently" inadvertent should consider the *ex ante* risks that the negligent mistake or ignorance will contribute to unjustified conduct or an unjustified harm. A passenger who pays no attention to the condition of the brakes of the car in which he has been traveling is not negligent, for he has no reason to believe that he will need to drive and that such information about risks could be relevant to his planned behavior. If the driver suddenly faints and the passenger must take over, his prior inadvertence to the poor condition of the brakes is hardly negligent. The original driver, by contrast, acts unreasonably if he does not take an appropriate precaution as soon as he discovers or should discover the condition.

We can see, then, that the criminal law conception of negligence is often employed in conjunction with the tort conception and that the cognitive conception ultimately has normative significance only in the context of the actor's overall conduct, as defined by all material elements of the crime or tort. Whether one "should" have believed otherwise is dependent on the context, including the acts that one should not have taken. And, of course, the ultimate criterion of the seriousness of a crime (and, sometimes, of a tort) depends on all of the elements of the crime and on all of the actor's relevant beliefs and motives, not just the unreasonableness of the actor's beliefs as to a particular element. For example, in assessing the seriousness of the crime of rape, one should not focus exclusively and narrowly on how

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be part of a strict liability standard, with respect to the scope of the risks as to which strict liability is imposed or the proximate cause limitations of liability for harm factually caused by the relevant activity. See Dobbs, *supra* note 5, § 346, at 951 (the *Rylands v. Fletcher* rule is based on the idea that "a person who introduces something to the land that is not naturally there and likely to do mischief if it escapes must be held strictly liable for foreseeable harms resulting if it does in fact escape."); *id.* § 349, at 959-60 ("defendant's strict liability activities must at least be a proximate or legal cause of that harm ... . For example, if the defendant's dog has a known propensity to bite house guests, the defendant will be strictly liable for the dog's bites, but not strictly liable when the dog merely gets in the plaintiff's way and causes a fall.").

On the other hand, in this context it does not appear that the reasonableness or unreasonableness of the actor's foresight of risk is really a judgment of fault. Rather than expressing a judgment that the strictly liable actor is at fault for not accurately perceiving the scope of the risks he creates, "reasonable foresight" might operate as an appropriate limitation on the extent of strict liability in the interests of a fair (or economically optimal) allocation of financial responsibility between a nonfaulty injurer and a nonfaulty victim.



unreasonable the actor is in believing that his victim is consenting; for it is also highly relevant whether the actor recognizes that she might not be consenting or knows that he is using force or a threat of force. Nevertheless, the conduct and cognitive conceptions of negligence remain fundamentally distinct, for they express very different inquiries — whether the actor should have done something different, rather than whether he should have believed otherwise.

### **B. When Tort Law Employs a Cognitive Conception of Negligence**

The third issue identified above is whether the tort conception of negligence can do without a cognitive conception of negligence. Can we really make any sense of unreasonably dangerous conduct without any reference to what the actor should have believed?

In many tort negligent cases, the judgment that the actor's conduct was deficient *does* rest in part on the actor's cognitive deficiency. Often, the judgment that a dangerous driver's creation of risk of harm was unreasonable depends in part on his unreasonable failure to foresee the risks of his conduct, either through negligent inadvertence or negligent mistake. One who fails to observe carefully whether pedestrians are nearby can be negligent because careful observation would have enabled him to avoid creating an unreasonable risk of harm.

Of course, in many standard negligence cases, the actor is quite aware of the relevant risks. In these cases, negligence often takes the form of an unreasonable decision to encounter the risks, a decision reflecting a socially unreasonable weighing of the risks and benefits of one's conduct. The actor can be unreasonable in assessing the probability of the risk: he realizes that pedestrians are in the vicinity but believes he has extraordinary driving skills that will permit him to avoid hitting them. Or he can be unreasonable in overvaluing the social importance of pursuing his own ends or in undervaluing the seriousness of the harms that he might inflict.

More fundamentally, the *ex ante* perspective that is normally a necessary feature of the tort negligence judgment itself presupposes a certain kind of "cognitive" judgment, quite apart from whether the actor is subjectively aware of the relevant risks. For an *ex ante* analysis requires that we characterize the relevant risks, and this in turn requires an *epistemic* judgment. That is, a negligent actor is one who creates an unreasonable risk that she could have prevented by a reasonable precaution. But the reasonableness of the risk and the reasonableness of the corresponding

precaution are ordinarily judged *ex ante*.<sup>38</sup> One cannot conclude that an actor took an unreasonable risk of future harm without some framework for identifying what risks she should have identified in advance. "On a clear day," the saying goes, "you can foresee forever." The question is not whether, in hindsight, we now know that the actor should not have taken the risk, in light of the harms and benefits that followed. Rather, the question is what precaution the actor should have taken, in light of the risks that, at the time of her action, she "should" (in some sense to be defended) have realized she was creating.<sup>39</sup>

Thus, the tort conception presupposes an idealized epistemic perspective with respect to the expected likelihood and nature of the risks posed by the actor's conduct.<sup>40</sup> An actor's inadvertence to those risks and an actor's mistaken belief (that those risks are less than what this ideal perspective suggests) are two ways in which an actor might fail to view the risks with sufficient seriousness and therefore fail to take a reasonable precaution.

Still, such instances of cognitive deficiency are not the only explanations of negligent conduct. An actor who does advert to the risks and who makes a reasonable judgment about their significance can still act negligently if he misjudges the benefits of his conduct or if he simply acts unreasonably in light of the risks and benefits. In all of these cases, the ultimate judgment of fault concerns the actor's conduct in light of his beliefs. Although an idealized epistemic perspective is normally part of the conception of conduct negligence, that perspective operates to identify which risks are and are not justifiable. It certainly does not imply that all instances of conduct negligent are due to cognitive deficiency. Thus, the necessity of

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38 This is not true, however, in cases of deficient *skill*. See text at *infra* notes 42-44.

39 From a *non*-epistemic perspective, the probability of a harmful result can be viewed as either 1 or 0. It either will or will not occur. See Larry Alexander, *Foreward: Coleman and Corrective Justice*, 15 Harv. J.L. & Pub. Pol'y 621, 634-35 (1992); Heidi Hurd, *The Deontology of Negligence*, 76 B.U. L. Rev. 249, 263-64 (1996); Michael Moore, *Placing Blame: A General Theory of the Criminal Law* 411-12 (1997). See generally Stephen R. Perry, *Risk, Harm, and Responsibility*, in *Philosophical Foundations of Tort Law* 321 (David G. Owen ed., 1995).

Michael Moore incorrectly attributes to me the view that negligence is a conduct requirement, not a mental state requirement. Moore, *supra*, at 411. My actual view is that some conceptions of negligence emphasize unreasonable conduct more than unreasonable beliefs or attitudes; but that even the unreasonable conduct conception ordinarily employs the idea of epistemic risk. See Simons, *supra* note 9, at 547-52.

40 The idealized epistemic perspective can also be applied to the costs, and not just to the risk-reduction benefits, of taking a precaution. (For example, taking a precaution might create an uncertain but significant risk of additional injuries to a different group of potential victims.)

an epistemic perspective in judging conduct negligence does not mean that the tort conception of negligence ultimately is merely a restatement of the cognitive conception.

Just as one can be reasonable in one's beliefs yet act negligently, one can be unreasonable in one's beliefs yet act reasonably. A clear illustration of this point is the following type of case: an actor unreasonably underestimates or lacks awareness of specific risks, yet the actor's response to possible risks is extraordinarily cautious, so that his precautions, in the end, are not negligent. Consider an example:

- (J) Jane, an elderly driver, forgets to check for traffic before taking a highway exit, but she also leaves her blinker on for an extended period of time and moves very slowly into the exit lane.

If this combination of inadvertence and extra precaution is no more risky than the actions of a careful, advertent driver who takes lesser precautions while exiting, then the elderly driver would not and should not be deemed negligent.<sup>41</sup>

In other contexts, too, determining whether conduct is negligent does not depend on what the actor should have believed. Careful observation and perception are neither necessary nor sufficient for careful conduct.<sup>42</sup> An especially important category here, and one sometimes neglected in the negligence literature, is deficient *skill* in conducting an activity. A person might be "hasty and awkward"<sup>43</sup> and thereby cause an injury. A surgeon's hand might slip during an operation. The operator of a bicycle or motor vehicle might fail to control the vehicle adequately due to slow reaction time or lack of dexterity. In none of these cases is "unreasonable failure to foresee risks" an essential element of the analysis.<sup>44</sup>

For all of these reasons, it is clear that conduct negligence does not collapse into cognitive negligence.

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41 If an actor *deliberately* compensates for what she realizes is a personal deficiency in observing risks, her strategy is clearly reasonable. See Simons, *supra* note 30, at 374-75 n.26. However, Jane's driving in the example is also reasonable, even if she did not consciously adopt such a compensatory strategy.

42 Indeed, overly attentive and cautious drivers can sometimes be more dangerous than drivers who rely on safe habits. See Joel Feinberg, *Sua Culpa, in Doing and Deserving: Essays in the Theory of Responsibility* 190 (1970).

43 Cf. O.W. Holmes, *The Common Law* 108 (Little, Brown & Co. 1881).

44 It is doubtful, however, that the fault exhibited by deficient skill is sufficiently serious that it should amount to *criminal* negligence.

### C. Other Varieties of Negligence

The concepts of conduct negligence and cognitive negligence are more nuanced than they might first appear. As we have seen, conduct negligence includes not only an unreasonable conscious judgment about whether to take a precaution and unreasonable failure to take a precaution due to unreasonable inadvertence or mistake, but also deficient skill in conducting an activity. To put the point differently, conduct negligence can consist in unreasonable conduct as judged by an evaluative standard, even if the actor's actual *decision-procedure* does not reflect an unreasonable weighing of values and risks.<sup>45</sup>

Moreover, a closer look at "cognitive" negligence reveals that it can encompass a variety of forms of fault and that the supposedly sharp distinction between inadvertent fault (negligence) and advertent fault (recklessness) is often blurry indeed. An actor might recognize a risk, but later forget about it. She might believe that a risk of injury is very small when she reasonably should have appreciated that it was much greater.<sup>46</sup> She might be aware of relevant facts, yet fail to appreciate that they reveal the existence of a substantial risk.<sup>47</sup> Or she might have a latent awareness of background risks (e.g., if asked, she would readily admit that driving quickly around a blind curve is potentially very dangerous), yet fail to bring that awareness to the forefront at the moment of action. In all of these cases, fault exists in the general sense of an unreasonable failure of inference or an

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45 See Simons, *supra* note 1, at 932.

46 Consider *People v. Strong*, 37 N.Y.2d 568 (1975). Defendant, a Sudan Muslim who believed in the power of mind over matter, claimed that he believed it was safe to insert a knife into the chest of a fellow member of the cult, having allegedly done so safely many times before. A claim by the defendant that he believed there was literally zero risk of injury from the procedure is not very credible; it is much more likely that he was aware of at least a slight risk. (This is a question for the jury, however. Thus, it is understandable that the Court of Appeals reversed the trial court for refusing to submit the charge of negligent homicide to the jury along with the manslaughter charge, since negligent homicide does not require any awareness of a risk of death.)

47 Thus, Restatement (Second) of Torts § 12 (1965) distinguishes "reason to know" (where the actor actually has information from which he should infer a relevant fact), from "should know" (where the actor should ascertain the fact). And the Restatement (Third) of Torts: Liability for Physical Harm § 2 (Tentative Draft No. 1, 2001), provides that a person acts with recklessness if she either knows of the risk or "knows facts that make that risk obvious to anyone in the person's situation."

unreasonable failure to draw upon beliefs or perceptions,<sup>48</sup> but it is difficult to say whether the actor is "advertent" or "inadvertent."

I have thus far focused on the use of a negligence criterion either as a general tort liability standard or as a culpability element in a criminal law offense. Of course, negligence and reasonableness criteria are employed more widely. Within tort law, reasonableness criteria govern the use of defensive force in a number of ways: with respect to the proportionality of the force used relative to that threatened; with respect to its necessity; and, finally, with respect to the adequacy of the evidence for defendant's beliefs concerning each of these matters.<sup>49</sup> Negligent misrepresentation is a recognized tort.<sup>50</sup> Negligence as to the falsity of a publication also plays an important role in defamation law.<sup>51</sup> Within criminal law, the rules of self-defense are sometimes even more elaborate than in tort law, and the proportionality and necessity requirements are frequently specified in rule-like form, and not simply defined in terms of "reasonableness."<sup>52</sup> Negligence criteria are frequently used outside of tort and criminal law as well.<sup>53</sup>

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48 See Simons, *supra* note 30, at 382-84; R.A. Duff, *Intentions, Actions, and Criminal Liability* 159-60 (1990); Andrew Simester, *Can Negligence be Culpable?*, in *Oxford Essays in Jurisprudence: Fourth Series* 85, 95 (Jeremy Horder ed., 2000) ("What goes wrong when beliefs are faulty? Either the belief that the defendant acts upon is unreasonably acquired, or there is some further belief, relevant to her behavior, that unreasonably is not considered. Expressed in this way, it is the *process* by which the defendant accumulates and considers beliefs that has failed."). See also Kimberly Ferzan, *Opaque Recklessness*, 91 *J. Crim. L. & Criminology* 597 (2001) (arguing that "recklessness" should not include all latent knowledge, but should extend to cases where the actor recognized the dangerousness of her conduct and at some preconscious level appreciated the risks that made her conduct dangerous).

49 To justify the use of nondeadly defensive force, the Restatement (Second) of Torts requires simply that the degree of force be "reasonable" in proportion to that threatened and also requires that the actor reasonably believe that he is under threat. § 63. To justify the use of deadly defensive force, the Restatement requires that the degree of force satisfy certain rule-like criteria specifying the circumstances in which such force is considered proportionate. § 65. More generally, a reasonableness requirement qualifies the exercise of a number of privileges to intentional torts. See Dobbs, *supra* note 5, § 69, at 157; *id.* § 70 (self-defense); *id.* § 76 (defense of possession of land or chattels); *id.* § 108 (public necessity).

50 See Dobbs, *supra* note 5, § 472.

51 See *id.* § 419, at 1179 (noting that, as a constitutional matter, even private plaintiffs must prove such negligence when the defamation touches on an issue of public concern).

52 See Model Penal Code § 3.04 (1985).

53 To take one of many examples from property law, the Restatement (Third) of Property § 6.13 (2000), frames a common-interest community's duties to its members in terms of reasonableness:

Moreover, the concept of negligence or unreasonableness can be applied beyond beliefs and conduct, to encompass other features of the actor or the act. Negligence criteria in self-defense, for example, while often formally articulated in terms of beliefs, are also in substance criteria for reasonable or unreasonable control of one's emotions and violent impulses. Thus, suppose a self-defense provision requires that the actor "reasonably believe that immediate use of deadly force is necessary to avoid deadly force." The emergency circumstances and lack of time for calm judgment are certainly relevant to the reasonableness of a defender's response. Indeed, it is often unrealistic to expect an actor in such a crisis situation to form *any* clear and definite belief about the precise degree of force threatened or the availability of alternatives. Accordingly, "reasonableness" is not just a question of justifiable "beliefs" about the nonexistence of alternative, less deadly forms of response.<sup>54</sup> (Consider the example of Irma, above.)

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- (a) to use ordinary care and prudence in managing the property and financial affairs of the community that are subject to its control;
  - (b) to treat members fairly;
  - (c) to act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design control powers;
  - (d) to provide members reasonable access to information about the association, the common property, and the financial affairs of the association.

Moreover, the law of nuisance, at the borderland of tort and property, often employs reasonableness criteria. *See Dobbs, supra* note 5, ch. 34. The provisions on nuisance law in the Restatement (Second) of Torts are problematic, however, insofar as "unreasonableness" criteria govern both fault and strict liability. *See Simons, supra* note 9, at 494-95 n.110. Furthermore, according to Professor Dobbs, *supra* note 5, at 1326,

"Unreasonable" in nuisance law is not like "unreasonable" in the law of negligence, for it does not refer to risk-creating conduct of the defendant but to the reasonable expectations of a normal person occupying the plaintiff's land.

In contract law, the duty of good faith is sometimes interpreted as requiring reasonable care, though a narrower interpretation requires only avoidance of certain forms of bad faith and dishonesty. *See U.C.C. § 1-203* (2001); Restatement (Second) of Contracts § 205 cmt. a (1981); E. Allan Farnsworth, *Contracts* § 7.17 (1999).

<sup>54</sup> *See Simons, supra* note 9, at 548-49 n.288. *See also* Cynthia K.Y. Lee, *The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification*, 2 *Buff. Crim. L. Rev.* 191 (1998) (arguing that self-defense standards should more explicitly distinguish requirements of reasonable belief and reasonable conduct); Restatement (Second) of Torts § 70 cmt. b ("[T]he qualities which primarily characterize a reasonable man [for purposes of self-defense] are ordinary courage and firmness.").

Indeed, the criminal law implicitly recognizes a spectrum of degrees of fault in failing to control one's violent impulses. The defendant who responds to a mild

Finally, one might also characterize conative or desire states, such as culpable indifference or "extreme indifference to the value of human life," as exhibiting one type of negligence — namely, a "negligent" or "unreasonable" attitude towards the suffering of others.<sup>55</sup> There are difficulties, however, with expanding the "negligence" concept this far.<sup>56</sup>

Thus, there are many ways that an actor's beliefs, desires, temperament, reasoning powers, emotional self-control, capacities for physical dexterity, and other characteristics can issue in deficient or "unreasonable" conduct. This variety is obscured if we limit our attention to the concepts of "negligent" conduct and "negligent" cognition.

## V. DISTINCT LEGAL FUNCTIONS OF THE NEGLIGENCE CONCEPT

The discussion above of the similarities between the tort and criminal law conceptions of negligence identified several important commonalities. Each conception employs an evaluative rather than descriptive criterion; incorporates a "reasonableness" standard; embodies a conclusive judgment that the relevant conduct or belief was unjustified; considers the "risk" or "chance" of a harm occurring or a fact existing; and distinguishes between the existence of such a risk or chance, on the one hand, and the harm actually coming to pass, or the fact actually existing, on the other.

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insult with homicidal rage is guilty of murder; the defendant who responds to a more serious provocation is guilty of the lesser crime of voluntary manslaughter; and the defendant who responds to deadly force might not be guilty of any crime. Of course, these three legal categories are not expressly defined in terms of varying degrees of deficiency of self-control; still, this type of deficiency at least partly explains the categories.

Some self-defense cases also illustrate the point that reasonable care might embrace both justified conduct and conduct that is unjustified but excused. *See text at infra* notes 83-85.

55 *See* Duff, *supra* note 45, ch. 7; Simons, *supra* note 30, at 375-79.

56 *See* Henry W. Edgerton, *Negligence, Inadvertence, and Indifference; The Relation of Mental States to Negligence*, 39 Harv. L. Rev. 849 (1926) (rejecting the view that negligence requires a culpable mental state of indifference). *See also* Simons, *supra* note 30, at 375-79, for a discussion of some difficulties with a conative conception of negligence. In the criminal law context, punishing for "indifference" is arguably an unjustifiable punishment for an actor's bad character rather than for his acts. For a qualified rejection of this argument, 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. (forthcoming 2002).

Consistent with these commonalities, however, negligence standards are employed in law in a number of different ways. In the following, I identify five important functions<sup>57</sup> that such standards serve: expressing a legal norm in the form of a standard rather than a rule; personifying fault; empowering the trier of fact to give content to the standard; creating a secondary legal norm parasitic on a primary legal norm; and distinguishing grades of fault. The significance of the function sometimes depends on whether the conduct or cognitive conception of negligence is at issue, as we shall see. But the different functions also represent an additional set of dimensions of the negligence concept, dimensions that are important in their own right.

These functions, although distinct in principle, are by no means mutually exclusive. In examining them, I sometimes speculate about how a legal regime would look if it focused principally on the function under discussion. The analysis will show that we could avoid some misconceptions and confusions about the significance and justifiability of employing negligence standards if we were clearer about which function we want the standard to serve.

### **A. Express the Legal Norm in the Form of a Standard Rather than a Rule**

If a legal criterion provides that conduct or a belief must be "negligent" or "unreasonable," the legal norm takes the form of a relatively vague standard rather than a relatively precise rule. There are many ways to distinguish between standards and rules; for our purposes, the most important distinction is in terms of the specificity of the norm. This distinction is one of degree. At the most abstract, negligent conduct could be simply "unreasonable conduct" or "unreasonably risky conduct." In tort law, indeed, an extremely general and fairly abstract standard is employed: liability exists for any negligently caused physical harm, and negligence is defined in very general terms.<sup>58</sup>

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57 By suggesting that negligence standards serve different "functions," I do not mean to presuppose that the underlying normative rationale for negligence liability itself is instrumental or consequentialist. Rather, I only suggest that it is worth attending to some distinctive institutional roles that legal negligence standards play. These roles or functions are consistent with retributive and corrective justice, as well as utilitarian, accounts of the content of a negligence standard and of its rationale.

58 See Restatement (Third) of Torts: Liability for Physical Harm § 6 (Tentative Draft No. 1, 2001) ("An actor who negligently causes physical harm is subject to liability for that harm."). See also *id.* § 3 (identifying the primary factors to be balanced in ascertaining whether an actor is negligent). Moreover, jury instructions in negligence cases often merely ask the jury to decide, without further elaboration, what would be



At the same time, more specific standards are employed in particular tort contexts. In products liability, for example, the criteria for design and warning defects are in essence negligence tests adapted to the relevant features of that subject matter.<sup>59</sup> Often, when tort law identifies with precision the scope or limits of the actor's duty, the point is to crystallize into more rule-like form the meaning of "negligence" in a particular context.<sup>60</sup> And special rules apply to particular types of harm: thus, American tort law permits only limited liability for negligent infliction of emotional distress or economic harm.<sup>61</sup>

Criminal law uses the concept of negligence much less pervasively than tort law does, and for good reason. The negligence concept, even if articulated somewhat by such criteria as "reasonable person in the community" or risk-utility balancing, remains fundamentally vague.<sup>62</sup> To employ such a standard more extensively in the criminal law would present serious problems of fair notice and unreviewable discretion. Of course, there is also a serious question whether tort negligence is ever sufficiently faulty to warrant criminal liability; but even if an aggravated form of tort negligence (such as "gross negligence") were the standard, pervasive use of such a standard would remain highly troublesome.

At the same time, however, *implicit* negligence criteria are employed more widely, even in the criminal law. Even a norm that is quite "rule-like" can, in substance, be a negligence norm, if it identifies behavior that is comparable in fault or culpability to behavior described simply as "negligent" or "grossly negligent." One must carefully examine the norm's conduct, circumstance, and result requirements, as well as the norm's rationale, in order to determine what degree of substantive fault or culpability is embodied in a norm. For example, a legal duty never to drive at an excessive speed or never to use hand-held cell phones while driving is just a codification, in rule-like form, of the duty not to drive negligently.<sup>63</sup>

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reasonable or ordinary care under the circumstances. See Michael Wells, *Scientific Policymaking and the Torts Revolution: The Revenge of the Ordinary Observer*, 26 Ga. L. Rev. 725, 732 (1992).

59 Thus, in the Restatement (Third) of Torts: Product Liability § 2 (1998), the criteria for determining design and warning defects consider whether "reasonable" alternative designs exist, whether "reasonable" warnings are feasible, and whether the omission of such designs or warnings "renders the product not reasonably safe" for "reasonably foreseeable uses and risks." See also *id.* § 2 cmts. e, f, n.

60 See Simons, *The Hand Formula*, *supra* note 1, at 927.

61 Dobbs, *supra* note 5, § 3.08.

62 For a powerful statement of this objection, concluding that the vagueness of the negligence standard is highly problematic even as applied to *tort* law, see Kenneth Abraham, *The Trouble with Negligence*, 54 Vand. L. Rev. 1187 (2001).

63 Moreover, one must also look beyond a legal norm's explicit *culpability* requirements

The distinction between understanding negligence as a rule and understanding it as a standard can be made even more vivid by conducting the following two thought-experiments.

First, following a suggestion by Heidi Hurd,<sup>64</sup> imagine replacing the general negligence standard in tort law with a set of minirules or minimaxims of the following sort:

- Don't use a hand-held cell phone while driving.
- Stop, look, and listen before crossing a train track.<sup>65</sup>
- Don't perform a medical operation unless you are experienced in the technique.
- Don't prescribe drug X for condition Y in the face of contraindications Z1 and Z2.

Second, and more heroically, imagine the converse type of replacement. All the specific norms of the criminal law — regulating particular types of theft, infliction of personal injury, invasion of sexual autonomy, breaches of public trust, and so forth — are replaced by a global norm:

- Don't act unreasonably.

Or, to preserve the usual understanding that negligence requires only the most minimal degree of fault, imagine replacing all current crimes (at least those not reflecting genuine strict liability) that impose the most minimal level of punishment with this norm:

- Don't act in an unreasonable way that deserves minimal criminal punishment.

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(or lack thereof), in order to determine what degree of substantive fault or culpability it embodies. Thus, if the legal duty is not to "knowingly" use hand-held cell phones while driving, that duty still is essentially an instance of the duty not to drive negligently. Even a norm that contains no explicit culpability requirements could nonetheless reflect fault. Indeed, such a norm might, as applied, more effectively target persons who are at fault than would a nominal fault requirement. Consider an apparently "strict liability" rule such as a criminal prohibition against selling alcohol to a person who has not produced a form of identification. Such a rule might, in actual application, more accurately identify persons who negligently sell alcohol to those under age than would a standard explicitly framed in negligence terms. *See* Simons, *supra* note 36, at 1125-31.

The ability of the law-creator to manipulate both offense elements and accompanying culpability terms means that statutory or other legal "culpability" criteria have only secondary significance. For a further discussion of this issue, see Simons, *supra* note 30, at 394-97 (discussing varying culpability requirements and varying definitions of non-consent in the law of rape).

<sup>64</sup> *See* Hurd, *supra* note 39, at 266-68.

<sup>65</sup> *Cf.* *Baltimore & O.R.R. v. Goodman*, 275 U.S. 66, 70 (1927), *overruled by* *Pokora v. Wabash Ry.*, 292 U.S. 98 (1934).

And we might similarly replace all other crimes, however seriously they are now punished, by adopting a series of norms of escalating fault or culpability:

- Don't act in an unreasonable way that deserves moderate criminal punishment.
- Don't act in an unreasonable way that deserves moderately serious criminal punishment.
- Don't act in an unreasonable way that deserves serious criminal punishment.

Both replacements clearly are objectionable, but why, exactly, is this so?

The complete replacement of a negligence standard with specific rules that abjure any mention of reasonableness or negligence raises two significant problems.<sup>66</sup> The first problem is scope: it is impossible to articulate in advance specific rules to cover the full range of ways in which one might be at fault and risk harm to others. Even Oliver Wendell Holmes lacked the foresight to announce a rule for cell phones.

The second problem is a difference in content. An articulation of negligence in the form of a rule will ordinarily differ from its articulation in the form of a standard: to paraphrase G.E. Moore, it is always an open question whether violating a rule (such as the rule about using cell phones) really is negligent in every imaginable case.<sup>67</sup>

Perhaps these defects of substituting rules for standards could be addressed by adding a requirement that the rule violation be "unjustified." But this change would undermine the advantages of the rule-like form, bringing us closer to the standard-like formulation of negligence. The tort doctrine of negligence *per se* is illustrative here. Insofar as violation of a criminal statute is considered negligence "per se," i.e., without engaging in the normal (standard-like) inquiry into whether the actor used reasonable care under all the circumstances, the doctrine is a rule-like form of negligence. Yet the doctrine is not applied mechanically; and courts are receptive to at least

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66 See Hurd, *supra* note 39, at 266-68, whose arguments I restate and modify somewhat in the next two paragraphs.

67 Similarly, it is an open question whether *complying* with a rule intended to substitute for a negligence standard is always non-negligent. If it is negligent to sell alcohol to a minor, then a substitute rule forbidding the sale of alcohol to one who has not furnished two forms of identification might be both overinclusive and underinclusive. For example, it would be overinclusive if the seller provides alcohol to his own underage son without checking identification and underinclusive if the seller is acquainted with the buyer and knows that he is underage, despite his apparently valid identification.

some justificatory defenses.<sup>68</sup> The broader the defenses, however, the less the rule-like form achieves its distinctive benefits of certainty and predictability.

Now consider the converse thought-experiment: replacing all existing criminal law rules with a simple injunction not to act unreasonably (or with a series of such injunctions graded only by degree of unreasonableness). Such a standard would not merely lack the virtues of rules (including notice, predictability, and control of discretion). It would also conceal or mischaracterize the disparate and distinctive normative commitments embodied in the separate criminal law categories. For it would treat such values as sexual autonomy, bodily integrity, property interests, and duties of loyalty to a nation as fully commensurable exemplifications of a more general criterion of unreasonable conduct. The fact that the existing criminal law clearly differentiates these different types of wrongs would have to be understood as merely an historical anachronism or a convenient drafting shorthand for recurring fact patterns. Although I cannot pursue the issue here, it is highly doubtful that the topography of fault is as flat and boring as this.

## B. Personify Fault

Another important function of a negligence norm is to personify fault. Negligence is often defined as the failure to observe the degree of care in conduct (or in forming beliefs) that a *reasonable person* in the same situation would observe. But this "reasonable person" formulation is only one possible formulation of negligence. (Notice that I have avoided employing this formulation in the text until now.) Moreover, defining negligence only as the care that "a reasonable person" or "a reasonable person in the community" would exercise, without further elaboration, is problematic. Such a criterion is obscure, and there is a significant danger that the standard will be applied inconsistently across similar fact patterns.<sup>69</sup>

What, then, is gained by anthropomorphizing the negligence test? If

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<sup>68</sup> See Simons, *supra* note 36, at 1126 n.162. The Restatement (Second) of Torts, although purporting to treat violation of statutes as conclusive evidence of negligence, also provides some broad, all-purpose defenses: violation of a law or regulation may be excused "when [the actor] is unable after reasonable diligence or care to comply, ... [or when] compliance would involve a greater risk of harm to the actor or to others." Restatement (Second) of Torts § 288A (2) (c), (e) (1965). The Draft Restatement (Third) of Torts is quite similar. Restatement (Third) of Torts: Liability for Physical Harm § 15 (b), (e) (Tentative Draft No. 1, 2001).

<sup>69</sup> See Simons, *The Hand Formula*, *supra* note 1, at 930-31.

employed in conjunction with a Learned Hand or other specification of the factors relevant to a negligence determination, one significant benefit is to make vivid a negligent standard that might otherwise be extremely abstract.<sup>70</sup> This benefit might be especially valuable if a lay jury is to apply the standard.<sup>71</sup> But does a "reasonable person" standard amount only to a useful rhetorical device for helping the fact-finder to analyze and apply the (otherwise abstract) considerations that are relevant to the negligence inquiry? If negligence should be understood as an unreasonable balance of the advantages and disadvantages of taking a precaution, perhaps the reasonable person is simply the person who balances those advantages and disadvantages in a reasonable way.<sup>72</sup> The "reasonable person" formulation then adds nothing of substance to the content of the negligence test.

But personification might also serve three additional functions. First, it seems preferable to an "impersonal" Learned Hand balancing test in accounting for cases of deficient skill in conducting an activity. The surgeon whose hand slips during surgery or the bicyclist who loses control despite the utmost attention to the risks acts carelessly, but we misdescribe their fault if we try to characterize it as an unreasonable balance of the advantages and disadvantages of taking a precaution. The very fact that they are not consciously balancing any considerations is a telling objection to using a risk/utility test as the exclusive criterion of negligence.<sup>73</sup>

Second, a reasonable person test can readily express any desired degree of individualization: in asking what a reasonable person "under

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70 Under the Learned Hand test, failure to take a precaution is negligent if the burden (B) of taking the precaution is less than the risks of injury that the precaution would prevent, where risk is the product of the probability of an injury (P) and its severity (L). In short, one is negligent if  $B < P \times L$ .

71 Simons, *The Hand Formula*, *supra* note 1, at 931.

72 See Restatement (Third) of Torts § 3 cmt. a. Also, in cases of inadvertent negligence, when the actor is not consciously weighing advantages and disadvantages of taking a risk, the balancing or calculus of risk analysis that many negligence tests call for is often inapt. The anthropomorphic test then appears to give some guidance. See Simons, *The Hand Formula*, at 931-33; Restatement (Third) of Torts § 3 cmt. k. Still, whatever genuine guidance it does provide derives from the specific content given to "the reasonable person." That test is still a normative one, not a test of customary conduct. And the test would ideally be more fully articulated, for example, as "a reasonable person considerate of the interests of others," in order to provide guidance.

73 These examples also illustrate that the negligence standard is sometimes used as a standard of evaluation, not as a decision-procedure. See text at *supra* note 45.

all the circumstances"<sup>74</sup> or "in the actor's situation"<sup>75</sup> would have done, we can relativize negligence to certain individual capacities and traits. At the same time, other forms of individualization can be rejected, for prudential or principled reasons. Hence, a jurisdiction might relativize to "the reasonable blind person," "the reasonable ten-year old of similar intelligence and experience," and "the reasonable person who has been mugged before," but not "the reasonable racist" or "the reasonable hot-head."<sup>76</sup> The "reasonable person" formulation seems especially well suited to articulating the situations that do and do not call for relativizing the reasonableness standard.<sup>77</sup>

Can we take the anthropomorphic approach much farther? Should we simplify the analysis of negligence by employing a "super-personification"? In lieu of the daunting range of negligence conceptions identified in this paper, perhaps we could ask a single question — namely, whether the actor failed to satisfy a standard of reasonableness in *any* respect whatsoever (beliefs, desires, self-control, conduct, and so forth) that could possibly affect legal culpability or responsibility. On this view, reasonable care is the care that a person would take if the person were to have reasonable beliefs and also reasonable values, if he were to reasonably moderate or balance conflicting desires, exercise reasonable self-control, draw reasonable inferences, act with reasonable skill, and the like.<sup>78</sup>

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74 See Restatement (Third) of Torts § 3.

75 See Model Penal Code § 2.02(2)(d) (1985). See also *id.* § 210.3(1)(b) (providing for individuation in the context of murder mitigated by reason of "extreme emotional disturbance," which is the MPC's version of voluntary manslaughter).

76 Cf. *People v. Goetz*, 68 N.Y.2d 96 (N.Y. 1986).

77 To be sure, individualization might also be analyzed in other ways. One might ask not whether a reasonable blind person would employ the precaution of using a cane in crossing the street, but whether and how a socially acceptable balance of the advantages and disadvantages of taking that precaution would include consideration of the actor's blindness. Still, analyzing legally relevant (and irrelevant) capacities in anthropomorphic terms is less abstract and often more intelligible than this last formulation.

78 See Michael Moore, *Law and Psychiatry: Rethinking the Relationship* 84 (1984) (the reasonable person embodies "those qualities of character that we think people should possess, and those capacities of mind that we think all people do possess"); Jeremy Horder, *Criminal Culpability: The Possibility of a General Theory*, 12 *Law & Phil.* 193, 207 (1993) (the criterion of minimal criminal culpability should refer to "an idealised conception of an agent of good character"). See also Simons, *The Hand Formula*, *supra* note 1, at 933-34 (discussing the virtue theory account of negligence, which might naturally take the form of "super-personification").

Moreover, one could imagine replacing *all* torts and crimes with a standard that merely asks whether the actor modestly, seriously, or very seriously departed from the reasonable person standard. Indeed, in the more limited domain of risky conduct

But quite apart from the forbidding problems of vagueness and unequal enforcement posed by such a test, the test is unacceptable. First, it offers an overly idealized and homogeneous model of legally permissible behavior. Reasonable people differ in their values, in their beliefs, in their skills, in numerous other ways. In a pluralist society, diversity of values is a positive good and a good to be acknowledged in negligence law as elsewhere.<sup>79</sup> Second, employing only such a superpersonification would make it very difficult to judge the reasonableness of an action if (as is virtually always the case) in *some* respects the actor or action falls below (or rises above) the standard of reasonableness. Yet the law must, and does, make such "partial" reasonableness judgments. Thus, suppose that assaulting a police officer is an aggravated form of assault. A reasonable person would not assault another; but we might, for grading purposes, wish to inquire whether a person who commits an assault should have known that his victim was a police officer. At the same time, an actor might adventitiously possess greater knowledge of some facts than a "reasonable" person would possess (for example, he might be aware of the existence of a pothole on a particular street); and the judgment of negligence should ordinarily consider the additional knowledge that the actor actually possesses.<sup>80</sup> More generally, for certain forms of fault such as cognitive negligence, it is relatively easy to isolate the fault and ask whether, apart from that fault, the person acted reasonably. We can readily evaluate whether, given an actual unreasonable belief, an actor's encountering a risk was reasonable.<sup>81</sup>

Third, this global "supertest" precludes separate analysis of different dimensions of unreasonableness; yet separate analysis is often desirable. Deficient attention or skill might be considered less morally significant than deficient judgment about whether to take a known risk or deficient control

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causing physical harm, current tort doctrine occasionally asks whether the actor is "grossly negligent" in the sense of grossly departing from the standard of care that a reasonable person would observe. However, such a broad substitution rule would pose the same problems noted in the prior section.

79 See generally Guido Calabresi, *Ideals, Beliefs, Attitudes, and the Law* (1985).

80 See, e.g., Restatement (Third) of Torts: Liability for Physical Harm § 12 (Tentative Draft No. 1, 2001). Under this provision, actors are also judged by the above-average skills that they happen to possess.

81 However, for other forms of fault, isolating the fault in this manner is more difficult. Consider the claim that the actor has an "unreasonable" set of desires or values. Normally one cannot intelligibly pose the question whether, given that he happened to possess those values, the actor nevertheless acted reasonably. See Simons, *supra* note 30, at 376-77. (But note that the insanity defense might be the exception that "proves" this rule.)

of violent impulses and, thus, less worthy of legal liability. The culpability structure of the criminal law, in particular, presupposes that the significance of "unreasonableness" depends on the context, including the offense element to which it attaches. For example, the Model Penal Code's basic distinction between negligent inadvertence and recklessness is based on the judgment that an actor who is unreasonably unaware of a risk presumptively deserves less punishment than an actor who is aware of a risk but unreasonably proceeds to encounter it. After all, we normally cannot be confident that the inadvertent actor would have proceeded to unreasonably encounter the risk had he been aware of it.<sup>82</sup>

A final possible value of personification is to articulate a notion of reasonable care that includes excused as well as justified conduct. Suppose we are considering what action would constitute "reasonable care" in an emergency. If we conclude that excused conduct, as well as justified conduct, is "reasonable," then it might be helpful to employ a "reasonable person faced with an emergency" test to accommodate this idea — i.e., the idea that a person in an emergency might make a decision that is unjustified but understandable, taking into account such emotions as fear or panic as well as the short timeframe for choice.<sup>83</sup> By contrast, a non-personified test (such as "a reasonable balance of the advantages and disadvantages of a precaution") cannot so easily accommodate the idea of unjustified but excused conduct. In criminal law, similarly, one formulation of the excuse of duress considers what a person of "reasonable firmness" would do in response to a threat.<sup>84</sup>

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82 See *id.* at 374. On the other hand, when an actor is inadvertent but culpably indifferent to risk, his blameworthiness is sometimes as serious as that of the advertent actor. This might be so, for example, if it were clear that had the inadvertent actor been aware of the risk, he *would* have taken it, *id.* at 381, or if the reason for his lack of awareness is intoxication, anger, or a similar unjustifiable cause, *id.* at 388. See also Andrew Ashworth, *Principles of Criminal Law* 185-87 (3d ed. 1999) (noting that an actor who is inadvertent to risk because he acts impulsively or in anger can be as blameworthy as an advertent actor). Moreover, it is also relevant whether the advertent actor honestly (though mistakenly) believes that he can avoid the risk entirely. If so, the advertent actor might be less culpable than many inadvertent actors. See Jeremy Horder, *How Culpability Can, and Cannot, be Denied in Under-age Sex Crimes*, 2001 *Crim. L. Rev.* 15, 20.

83 See Restatement (Third) of Torts § 9 cmts. b, c at 122 (supporting an excuse rationale, insofar as "the person's judgment may have been less sound than usual" and the person may have "made the less satisfactory choice."). To be sure, many emergency decisions are justifiable *ex ante*, even though an alternative choice, in hindsight, would have been better. But some actions in an emergency are not justifiable even *ex ante*; for these, the question of excuse arises.

84 See Model Penal Code § 2.09(1) (1985). Some formulations of the partial excuse



Although a reasonable person test is especially useful in articulating a conception of negligence as conduct that is both unjustified and unexcused, this is ironic. The "reasonable person" formulation is one of the most traditional ways of articulating negligence. And yet shielding from negligence liability conduct that is unjustified (albeit excused) is in tension with one of the distinguishing characteristics of negligence itself: that it is an all-things-considered judgment that the actor's conduct or belief is deficient and unjustified. On the other hand, insofar as negligence is understood as a derivative legal concept, parasitic on other legal norms (see category D, below), and insofar as primary legal norms do offer defenses of both justification and excuse, the view that excused conduct is not negligent is less surprising.<sup>85</sup>

### C. Empower the Trier of Fact to Give Content to the Legal Standard

In addition to expressing the legal norm as a standard rather than a rule and personifying fault, a negligence standard often has a third important function: as applied, the standard effectively results in delegation of lawmaking power to the trier of fact. A general tort standard of negligence, whether defined in anthropomorphic terms as "the care that a reasonable person would exercise" or in balancing terms as "a duty to take a precaution if the costs of a precaution are less than its foreseeable benefits," does not have a very definite content. When applied to a given fact pattern, however, its content is necessarily specified. The trier of fact (either trial judge or jury) is the

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of provocation similarly ask whether a reasonable person would lose control of his emotions under the circumstances. See Dressler, *supra* note 15, § 31.07, at 529 (provocation is deemed adequate for mitigation if it prompts a reasonable person to act from passion rather than reason); LaFave, *supra* note 15, § 7.10[b], at 705 ("reasonable provocation" is provocation which causes a reasonable man to lose his normal self-control"). See also Samuel H. Pillsbury, *Judging Evil: Rethinking the Law of Murder and Manslaughter* 128-30 (1998) (under the modern psychological approach, the emphasis is on "the intensity of emotion experienced by the accused and its impact on his choice-making abilities").

- 85 The Model Penal Code does not clarify whether unjustified but excused conduct is necessarily non-negligent. On the one hand, its definitions of negligence and recklessness refer to "unjustified" but not to "unexcused" risk-taking. Model Penal Code § 2.02 (2) (c), (d). On the other hand, the definitions also refer to the standard of care that a reasonable person would observe "in the actor's situation," a qualification that is intended to permit courts to consider a wide range of individualizing conditions, *id.* § 2.02 cmt. 4. And it is possible that those conditions encompass some excuses (e.g., a panicky reaction to an emergency).

legal body that gives content to this standard. Similarly, in criminal law, the legislature typically provides a very general definition of negligence, while the jury, in applying the standard, provides specific content.

On this view, "negligence" is similar to "unreasonable restraints of trade" under the Sherman Act<sup>86</sup> and to any other vague legal standard that is enunciated by one legal decisionmaker, but given more specific content by a different one. The second decisionmaker could be an administrative agency, a court, or a jury; in negligence law, the decisionmaker is either the judge or jury, acting as trier of fact. This third function of a negligence test overlaps significantly with its first function (as a fault standard rather than a rule): the more specifically negligence is predefined by an appellate court or a legislature, the less power the ultimate fact-finder has to give content to the standard.<sup>87</sup>

The tort and criminal law standards of self-defense are an interesting example of how a negligence standard can function as a delegation of lawmaking authority from one legal body to another. These standards typically include predefined, rule-like criteria of proportionality and necessity, as well as standard-like residual reasonableness criteria governing the defender's belief and, sometimes, governing certain proportionality and necessity issues. Thus, the proportionality criteria for permissible use of deadly force are often predefined in rule-like form, while the proportionality criteria for use of non-deadly force are often defined only in terms of "reasonableness," effectively delegating this judgment to the trier of fact.<sup>88</sup> The question of the duty to retreat before using deadly force (an aspect both of necessity and proportionality) is sometimes predefined, but sometimes treated

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86 Under the 1890 Sherman Act, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is ... illegal." 15 U.S.C.A. § 1 (1997). The Supreme Court has read this language as ordinarily prohibiting only "unreasonable" restraints of trade, and has spilled much ink explaining the meaning of that "rule of reason." See, e.g., *State Oil Co. v. Kahn*, 522 U.S. 3, 10 (1997); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 342-43 (1982); *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898).

87 In principle, though, the functions are distinct. Imagine a legal system in which an administrator has authority to adopt whatever normative standard she feels appropriate, and suppose she adopts a standard of negligence and applies it to the cases before her. In such a system, the allocation of decisionmaking function would no longer be served, but the negligence test continues to operate as a standard rather than a rule.

88 In criminal law, see Model Penal Code §§ 3.04(1), (2)(b), 3.09(2); Dressler, *supra* note 15, § 18.01. In tort law, see Restatement (Second) of Torts §§ 63, 65, 70 (1965).

as just an aspect of the delegated issue of whether a reasonable alternative means was available to the actor other than deadly force.<sup>89</sup> The evaluation of the reasonableness of the actor's *beliefs* — that his action was proportional (as predefined) or necessary — is normally delegated to the fact-finder, though even here, one could imagine a predefined criterion.<sup>90</sup>

The practice of delegating substantial discretion to the fact-finder to apply a vague normative standard of negligence or reasonableness often grants a largely unreviewable power to create a new legal norm.<sup>91</sup> This practice obviously raises serious legality concerns, especially in the criminal law. Accordingly, it is highly desirable to restrict the use of such standards in the criminal law, or else to define them with much greater care. However, this concern is less troubling in the case of *cognitive* negligence, for it is often fair to assume that different fact-finders will have similar views about the "reasonableness" of an actor's beliefs about a particular matter.<sup>92</sup> Accordingly, permitting the jury to decide, in a prosecution for negligent homicide, whether the actor created an "unreasonable" risk of death without providing much guidance about the meaning of that term is more troubling than permitting a similarly unguided jury to decide, in a hypothetical prosecution for a crime of "negligent receipt of stolen property," whether the actor "should have realized" that the property was stolen.

#### **D. Create a Secondary Legal Norm Parasitic on a Primary Legal Norm**

A fourth and highly important function of negligence is to serve as a secondary legal norm parasitic on a primary legal norm. On this perspective, conduct negligence amounts to creating a substantial and unjustifiable risk of violating a primary legal norm. And cognitive negligence amounts to unreasonable ignorance or mistake about the possibility that one's conduct is violating a primary legal norm. In a loose sense, both types of negligence can

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89 For a good discussion of the alternative approaches, see Richard J. Bonnie et al., *Criminal Law* 352 (1997).

90 Somewhat greater predefinition occurs if the negligence criterion refers to the beliefs of the average (rather than reasonable) person in the community or to customary practice (as when medical malpractice liability depends on whether the doctor possessed customary knowledge relevant to diagnosing or treating the patient's medical condition). It also occurs if a tort standard demands (reasonable) inferences only from facts of which the defender was *actually* aware. See *supra* note 47 (noting the tort concept of "reason to know").

91 See Abraham, *supra* note 62, at 1190-99.

92 See Simons, *Negligence*, *supra* note 1, at 88.

be characterized as secondary legal norms against "creating an unreasonable risk" of violating a primary legal norm.<sup>93</sup>

For example, a primary legal norm forbids the unjustified killing of another. The fault in negligent homicide then consists of the following: creating a substantial and unjustifiable<sup>94</sup> risk that one will bring about the (unjustifiable) killing of another. Now consider a case involving cognitive rather than conduct negligence. A primary legal norm forbids nonconsensual sexual intercourse with another. The "negligence" in negligent rape then amounts to acting in unreasonable ignorance of (or based on an unreasonable mistake about) the possibility that the victim does not consent and, thus, that one's conduct is in violation of this primary norm.

Ordinarily, this parasitic function is a necessary feature of negligence.<sup>95</sup>

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93 See Hurd, *supra* note 39, at 264; Heidi Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 74 Notre Dame L. Rev. 1551, 1558 (1999) ("Moral culpability consists in intending to do an action that is wrongful, knowing that one will do an action that is wrongful, or failing to infer from available evidence that one will do an action that is wrongful."); Moore, *supra* note 39, at 411 ("[W]e ... blame people for risking that their actions might be of a wrongful sort even when they do not desire, intend, or believe that their actions will be of that sort."); Simester, *supra* note 48, at 89 ("The fact that an action is harmful or to be avoided generates two types of moral reason: a reason not [to choose] to do that action, and a reason to take care lest that action be done.").

The statement in the text is a bit loose insofar as cognitive negligence involves "possibility," not "risk," and need not, strictly speaking, involve unreasonable risk-creation. See text at *supra* note 29.

- 94 It might appear redundant to require, for negligent homicide, both that the actor was unjustified\* in creating the risk and also that the killing he risked was (or would have been) unjustified\*\*. But the dual requirement (that the risk be unjustified\* and the killing be unjustified\*\*) is not redundant. For the first form of lack of justification is broader: it addresses whether, *ex ante*, the actor had sufficient reason to create the risk, unlike the second form of lack of justification, which addresses whether, *ex post*, the killing itself was warranted. Thus, an unjustified\*\* killing is one that, *ex post*, we know was not warranted (for example, by self-defense, law enforcement, or necessity). In contrast, whether risk-creation is justified\* or unjustified\* takes into account that the actor was only creating a risk of death; and such an act is much easier to justify than an actual killing. For example, if Xavier rushes his two very sick children to the hospital and unfortunately causes a fatal accident along the way, he is only justified\*\* in causing the death if both children would otherwise have died (and perhaps not even then). But it is far more likely that he will be justified\* in speeding to the hospital, notwithstanding the death that he causes.
- 95 I qualify this assertion because cases of deficient skill are not so obviously parasitic on wrongdoing. On the other hand, perhaps even these cases are derivative in the relevant sense. When a surgeon's hand slips during an operation, the reason she is negligent is not simply that she was clumsy. It is also critical that in the

After all, the reason that unjustifiable risk-creation is blameworthy, or unfair, or important to deter is not that risk-creation is itself wrongful, but only that it can lead to a (primary) wrong.<sup>96</sup> If we have no reason to think that the "risky" conduct could lead to further harm, the conduct is not really risky at all.<sup>97</sup>

Indeed, if we all knew to a certainty the results (both beneficial and harmful) of all of our actions, there would be little need for a negligence

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actual circumstances, her clumsiness creates a great risk to another's health. Put differently: if she were to move her hand *deliberately* in precisely the manner that she accidentally moved it, she would clearly create an unreasonable risk; in this sense, the fault displayed by the accidental act is derivative of the fault displayed by the hypothesized deliberate act, which, in turn, is derivative of the wrongfulness of causing unjustified harm to a patient.

96 To be sure, judging someone to be negligent is a conclusive judgment of fault, whether or not the negligence results in harm on a given occasion. In this sense, acting negligently itself seems to violate a primary norm of wrongdoing. But the negligence judgment also depends on an *ex ante* judgment about future risks. If there were no reason to expect a particular type of (allegedly negligent) act to result in harm on any occasion, the act would not be negligent.

A separate question is the proper treatment of risky conduct that causes *secondary* harms, including fear to potential victims and emotional distress to bystanders not themselves at risk. These harms are genuine and are sometimes a basis for legal liability. And at first blush, liability for causing such harms seems to be a counterexample to the present "derivative of primary norms" rationale for negligence. On the other hand, these secondary harms are often insufficient to explain or justify the *severity* of such legal sanctions as criminal punishment for attempts or for speeding well above the speed limit. Rather, the *ex ante* risk of future harm is also critical to that explanation; thus, the occurrence of secondary harms does not place a risk outside the "derivative" rationale under discussion. For example, attempted murder by use of a normally effective means such as a loaded gun is properly punished more severely than a malicious practical joke in which the actor points a realistic toy gun at a stranger (or at a collaborator in the presence of bystanders not privy to the joke) — for the latter case implicates only secondary harms, while the former also involves a very significant *ex ante* risk.

97 Similarly, if we have no reason to think that an actor's belief that his conduct is legally permissible (e.g., that the victim is consenting) could possibly be incorrect, then there is no real possibility that his conduct is in violation of the primary norm.

Of course, it is a distinct question whether an actor should nevertheless be liable if *he* thinks his conduct creates a substantial risk of death, even though a reasonable person would not share that belief, or if *he* thinks that the victim is not consenting, even though a reasonable person would believe that she is.

standard.<sup>98</sup> Instead, a varied set of legal norms would undoubtedly develop along the following lines:

- Don't kill a pedestrian unless absolutely necessary to save the lives of several persons being rushed to the hospital.
- Don't accelerate the death of a patient through a medical procedure unless the procedure is designed to relieve his or her unbearable pain.
- Don't kill a person in self-defense unless he or she would otherwise cause your death or permanent and severe disability.

In our actual world, however, both the risks and benefits of actions are highly uncertain. A negligence standard recognizes the difficulty of such predictions; permits lower-risk actions to be justified more readily than higher-risk actions; and permits a fact-finder to consider the qualitative as well as quantitative aspects of risk analysis.<sup>99</sup> For these and other reasons, the derivative character of the negligence standard does not mean that negligence analysis is a simple, mechanical extrapolation from the primary norm. (One cannot, for example, simply define negligent homicide as a killing in which the actor should have realized that he created a 2%, or 5%, risk of unjustifiably causing a death.) Indeed, it is fair to say that most of the difficult and interesting questions in negligence law do not turn on which harms would be unjustifiable to cause if we knew for certain that they would ensue. Rather, they turn on when one might justifiably create a low-level risk of harm even though it is quite clear that creating a virtually certain risk of the harm would be unjustifiable.

Understanding negligence as a derivative concept also helps explain why it is so extraordinarily difficult to develop a "formula" for negligence that seems adequate to capture all relevant considerations. For negligence is simply the "low-risk" version of all moral and legal norms; yet these

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98 I say "little" rather than "none" because it is possible that some of the other functions of negligence would still be served in such a world. While all probabilities of injury and benefit would now be 0 or 1, the relative *valuation* of the harms and benefits might, within some range, be left to the normative judgment of a trier of fact applying a "reasonableness" standard. For example, although the law of this hypothetical world would undoubtedly include a clear rule about the permissibility of intentionally killing one innocent to save another, it might not include a rule about the permissibility of a driver, in an emergency, ruining someone's rose bushes in order to avoid running his car into a curb and suffering a flat tire. Although one harm or the other will inevitably occur, the relative value of the two harms might still be analyzed under a general "reasonableness" standard.

99 Thus, negligence analysis can: (a) consider such qualitative risk factors as whether the risk was voluntarily incurred, *see* Simons, *Negligence*, *supra* note 1, at 71; (b) "launder" or ignore socially objectionable preferences, *id.* at 73-74; and (c) consider fair distribution of risks, as well as their minimization, *id.* at 82.

norms themselves are numerous and cannot possibly be encapsulated by any single formula.<sup>100</sup> Thus, viewed as a moral concept, negligence is continuous with the rest of action-guiding morality, including the moral rules that would apply if we were certain what consequences our actions would bring. If it is categorically wrong to kill one innocent person to save six, then it is probably wrong to create a 50% risk of death to one in order to save three. If it is permissible to turn a trolley and kill three to save four, then it is probably permissible to turn a trolley if this creates a 10% risk of death to three but avoids a 10% risk to four.<sup>101</sup> Yet moral norms, including the norms that are embodied in law, are plural and complex. We should thus hardly expect that a single *legal* norm of negligence will easily capture this plurality — especially since the "low-risk" version of these norms will typically impose a weaker constraint than the higher-risk version (in the sense that low-risk conduct is normally easier to justify than higher-risk conduct).

Because negligence can function as a derivative norm of "risk-creation" (loosely speaking), it is conceptually possible to impose liability for risk-creation alone, even if it does not issue in the ultimate, primary harm. To some extent, the law does impose such liability. The Model Penal Code recognizes a crime of reckless endangerment.<sup>102</sup> Other examples include such traffic offenses as speeding, driving while intoxicated, and negligent operation of a motor vehicle. Moreover, many statutory inchoate offenses, while not formally defined in terms of risk-creation or negligence, are in substance derivative legal norms, since the reason for punishing the relevant conduct is to avoid a more serious, primary harm. Burglary and possession offenses are good examples.<sup>103</sup> Attempts are another, though they typically involve a much higher degree of risk, or a more culpable state of mind, than negligence does.<sup>104</sup> In short, although legal norms of negligent risk-creation (or negligent ignorance or mistake) are typically parasitic on primary legal

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100 See Simons, *Negligence*, *supra* note 1, at 61-66; Simons, *The Hand Formula*, *supra* note 1, at 928-29.

101 The continuity of negligence with other norms is not entirely smooth, however. If a driver speeds to the hospital in order to save five passengers from imminent death and thereby creates an almost certain risk of killing a pedestrian, his action is impermissible. Yet it is not so clearly impermissible for such a driver to create a 20% risk of killing a pedestrian in order to save one passenger. See Simons, *Negligence*, *supra* note 1, at 65.

102 Model Penal Code § 211.2 (1985).

103 See generally Douglas Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 *Ariz. L. Rev.* 151 (1995).

104 Attempted murder, for example, is a crime parasitic on the primary wrong of committing an unjustified killing. There is nothing wrong with trying to kill someone, except — and it is a rather significant "exception"! — that one might

norms, they share this characteristic with a much broader category of inchoate crimes. Still, it is sensible to identify the parasitic function of negligence as a distinctive characteristic of the negligence concept, for negligence is almost always defined by reference to a primary harm.

### E. Distinguish Grades of Fault

Last but not least, a negligence criterion very often performs the function of distinguishing grades of fault. A legal system might only recognize one grade of fault, but often it recognizes some categories of strict as well as fault liability or it recognizes numerous categories of fault. This section will explore three very important ways in which a negligence criterion performs this grading function: articulating the distinction between fault and strict liability; serving as the least-serious category in a hierarchy of fault; and increasing the grade of a legal wrong.

First, consider the distinction between negligence and strict liability. A negligence standard might be employed as a necessary condition for legal liability, whether in tort, criminal law, or another area of law. Strict liability would then be excluded.<sup>105</sup> The American legal system is not this firmly committed to a fault perspective. However, American tort law does treat negligence as normally sufficient for legal liability, at least with respect to physical harms; by contrast, it views strict liability as somewhat exceptional and limited to a set of particular rules.<sup>106</sup>

The border between negligence and strict liability is hotly contested. In products liability, for example, much ink has been spilled over the question of what types of product "defects" should incur liability and much of the

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well succeed. See Heidi Hurd, *What in the World Is Wrong?*, 5 J. Crim. L. & Criminology 157, 193-95 (1994).

105 In Canada, strict criminal liability violates the national constitution if imprisonment is authorized for the crime. *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

106 See Restatement (Third) of Torts: Liability for Physical Harm ch. 4, Scope Note at 291 (Tentative Draft No. 1, 2001).

Moreover, even when strict liability is recognized as a possible basis of liability, a negligence standard performs the important function of differentiating fault from non-fault. Just where this distinction is drawn can be significant. In criminal law, the penalties for negligence might exceed those for strict liability. In tort law, although characterizing an actor's tort as involving fault rather than strict liability does not, by itself, affect the size of the compensatory damage award, it has some doctrinal consequences — for example, it may increase the faulty actor's comparative share of responsibility. See Restatement (Third) of Torts: Apportionment of Liability § 8 (2000).



debate is about whether, and in what sense, defectiveness should depend on a showing of fault. More subtly, one might question whether certain aspects of the negligence standard itself are genuinely "fault"-based. Thus, the objective "reasonable person" test for adults ignores whether they lack ordinary capacities of intelligence and mental competence, in apparent violation of the maxim that "ought implies can." Also, the reasonable person test, as actually employed, probably requires a superhuman ability to act with due care on all occasions (e.g., requiring a driver's attention never to waver), again suggesting that a pocket of strict liability exists within the nominal domain of fault-based negligence liability.<sup>107</sup>

Second, a negligence standard is conventionally the least culpable or serious form of genuine fault in any liability system that recognizes multiple degrees or types of fault. Establishing a hierarchy of fault or culpability is especially important in the criminal law, given the desirability of imposing punishments proportional to culpability.

But if proportionality of this sort is to be achieved, it is critical to identify the relevant conception or conceptions of negligence to which more serious types of fault are to be compared. And here, the conventional Model Penal Code hierarchy leaves much to be desired.<sup>108</sup> That hierarchy, you will recall, considers the following forms of culpability increasingly serious: strict liability; negligence; recklessness; knowledge (i.e., awareness that a result is practically certain to occur or that a circumstance is highly probable); and purpose.

Consider the following paradoxical example, illustrating the inadequacy of the conventional hierarchy. Suppose "negligent driving" is a crime.<sup>109</sup>

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107 See Restatement (Third) of Torts: Liability for Physical Harm § 3 cmt. k (Tentative Draft No. 1, 2001).

108 For a thorough exploration of this point, see Simons, *supra* note 9.

109 The analysis above considered "result" and "circumstance" elements of a crime. The crime of "negligent driving" implicates a third type of offense element recognized by the MPC — namely, a "conduct" element. Other examples are "breaking and entering" in the crime of burglary or "exceeding the speed limit" in the crime of speeding. Such elements are probably best analyzed in the same manner as explicit result elements (or, sometimes, as circumstance elements). Implicitly, "conduct" elements require an actor to perform some basic act or acts and thereby engage in, or cause, the statutorily defined "conduct." Consider "negligent driving." If you enter a car, turn the ignition, and press the accelerator, you will be "driving" the car. More precisely, we might say that your "driving" is the result of your basic acts, i.e., that "driving" requires you to perform basic acts that in turn cause the operation of a motor vehicle. See Michael Moore, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law* at ch. 8 (1993).

A reckless driver might be more culpable than a negligent driver insofar as the former, but not the latter, is aware of the substantial risks posed by his manner of driving. So far so good. But now compare someone who "knowingly" or "purposely" drives. Although these culpability terms rank higher in the conventional hierarchy than negligence or recklessness, a knowing or purposeful actor is obviously less, not more, deserving of punishment than a negligent or reckless driver. After all, knowing that one is driving imports no culpability at all.

Why might negligent and reckless drivers (who are supposedly lower on the culpability hierarchy) deserve some criminal punishment, while a knowing driver clearly does not? Because "driving" can be restated as "causing the operation of a motor vehicle"; and negligence and recklessness, when applied to such a result, both embody an evaluative judgment, all things considered, that one should not drive in that manner (i.e., negligently or recklessly). Both forms of culpability entail lack of justification. But knowledge and purpose are different in these respects: both are descriptive, not evaluative, culpability terms and neither entails lack of justification.<sup>110</sup>

The crime of homicide also exhibits these differences, but much less dramatically. Negligent and reckless killings are, by definition, unjustified acts; the inquiry into justification precedes the finding of fault. By contrast, knowing and purposeful killings might or might not be justified, depending on whether such defenses as self-defense or lesser evils apply. The "knowing driving" example is more striking than "knowing killing," however, because driving is not a *prima facie* unjustifiable act, as killing is. Obviously, bringing about the death of another is an act that demands a strong justification. If one knowingly or purposely brings about that result, then the burden of production or proof on justification might shift to the actor, and available justifications themselves will be limited in scope. But if one knows only that one has created a low-level risk of bringing about the result (i.e., one is "reckless" in the Model Penal Code sense) or if one merely should be aware of such a risk, then it makes some sense not to shift the burden of proof and not to limit unduly the scope of possible justifications.

These examples illustrate that it is a mistake to compare culpability categories directly when some include lack of justification as part of their

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110 Contrast a crime of speeding, defined as "operating a vehicle in excess of the speed limit." Here, with respect to the element "in excess of the speed limit," the MPC hierarchy more plausibly applies. One who purposely or knowingly exceeds the speed limit is ordinarily more culpable than one who recklessly or negligently does so. (Again, however, the knowing or purposeful actor might have a defense of justification, while the reckless or negligent actor is necessarily unjustified.)

definitions while others do not. The solution? A careful *ceteris paribus* approach. But that, in turn, requires carefully distinguishing the different types of negligence and fault, so that the hierarchy of fault directly compares only those categories of fault that are genuinely comparable.

Thus, any hierarchy of culpability categories that employs negligence as one category must carefully identify which conception of negligence it has in mind. When *cognitive* negligence is the relevant meaning, then the Model Penal Code hierarchy usually works well. Holding everything else constant, one can directly compare an actor who should be (but is not) aware that a victim is not consenting with an actor who recklessly suspects that the victim might not consent — and, further "up" the hierarchy, with an actor who knows that the victim does not consent.<sup>111</sup>

However, when *conduct* negligence is the relevant meaning, then the hierarchy sometimes fails to work, as we have seen in the "negligent vs. knowing driving" example. Part of the difficulty is this: if the legal norm specifies a type of conduct (such as "operating a motor vehicle") that is not presumptively unjustifiable, then even if we require that the specified conduct occur "knowingly" or "purposely," these descriptive culpability terms do not change the presumptive legal status of the conduct. By themselves, they do not transform morally neutral conduct into conduct that presumptively needs justification.

On the other hand, conduct negligence *can* be part of a defensible hierarchy of fault if the hierarchy focuses on the degree of unjustifiability of the conduct, not on the actor's beliefs or intentions. Thus, in tort law, the distinction between ordinary and gross negligence is perfectly defensible, insofar as the latter represents a more serious departure from the standard of due care or from the conduct that a reasonable person in the circumstances would observe.<sup>112</sup>

The Model Penal Code, by combining cognitive negligence and conduct

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111 Even higher up the hierarchy is the actor who "hopes" that the victim does not consent. In MPC terminology, such an actor is purposeful but not knowing as to that circumstance element. Model Penal Code § 2.02(2)(a), (b) (1985). It is doubtful, however, that the cognitive mental state of hope should invariably be ranked as more serious than the cognitive state of belief. See Simons, *supra* note 9.

Moreover, even if we limit our attention to cognitive states, the single hierarchy is problematic. See *supra* note 82 (describing situations in which cognitive negligence can be as culpable as recklessness); Husak, *supra* note 17, at 508.

112 See W. Page Keeton et al., Prosser and Keeton on the Law of Torts 211-12 (5th ed. 1984); Dobbs, *supra* note 5, at 349-52. Note that the Learned Hand formulation of negligence makes it relatively easy to compare simple and gross negligence within a single category. On this view, gross negligence is a case in which the burden

negligence, inevitably makes it unlikely that any single hierarchy of fault will suffice.<sup>113</sup> In principle, the best approach would be to disentangle the distinct features embedded within "negligence" and "recklessness" as those culpability terms are often used. If negligence is meant to convey both conduct negligence and cognitive negligence, it is worthwhile to separate these out; likewise for recklessness, which is often intended to convey both conduct negligence and awareness of a risk.

Similar difficulties undermine any contention that American tort law reflects a unified hierarchy of fault. American tort law does not contain the multiplicity of grading distinctions that characterize American criminal law. But it does broadly differentiate three kinds of torts — intentional, negligence, and strict liability. This differentiation creates the appearance of a single, very general hierarchy of fault. However, the appearance is an illusion. Thus, with respect to causation of physical harm, it is tempting to assume that the intentional tort of battery identifies the most serious form of fault, knowingly or purposely causing physical harm, while negligence identifies a less serious form.<sup>114</sup> Moreover, the Draft Restatement (Third) of Torts contains language to this effect.<sup>115</sup> Yet the type of intentional "harm" that the tort of battery protects against is not the intentional infliction of physical harm, or even offense, to another. Rather, battery protects against the nonconsensual intentional interference with the victim's bodily integrity, i.e., against nonconsensual intentional "touchings."<sup>116</sup> (This explains, for example,

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of taking a precaution is *much* less than the risk-reduction benefits of taking the precaution.

- 113 Indeed, I have endorsed a *tripartite* hierarchy, with separate hierarchies of belief (embracing knowledge, the cognitive dimension of MPC recklessness, and cognitive negligence), desire (embracing intention and the "culpable indifference" sense of recklessness), and conduct (embracing gross negligence and ordinary negligence). See Simons, *supra* note 9. For some qualifications and modifications of this model, see Simons, *supra* note 56.
- 114 Tort "recklessness" is an intermediate category. Relative to negligence, it requires that the conduct be more clearly unjustifiable, and it requires awareness either of the risk or of the facts that should make the risk obvious. See Restatement (Third) of Torts: Liability for Physical Harm § 2 (Tentative Draft No. 1, 2001).
- 115 Thus, *id.* § 5, provides: "An actor who intentionally causes physical harm is subject to liability for that harm"; and *id.* cmt. a states that this rule "provides a framework that encompasses many of the specific torts described in much more detail in the Restatement Second of Torts," including harmful battery. This suggests, misleadingly, that battery requires an intent to cause physical harm, rather than an intent to cause contact that, as it turns out, is harmful.
- 116 See Dobbs, *supra* note 5, at 52-53. Although "harmful" batteries require physical harm, the harm need not be intended or known to be a likely consequence of the

why a medical operation beyond the scope of the actor's consent is a battery. In such a case, the doctor can be liable without any intent to cause harm or offense.<sup>117</sup>) Accordingly, the object of the intentional tort of battery is different from the object of the general tort of negligence, and the torts are not directly comparable. Granted, tort law sometimes treats intentional risk-creation or causation of harm more seriously than negligent risk-creation or causation of harm.<sup>118</sup> But too often the tort hierarchy of fault is articulated in a way that compares apples and oranges, in which case the hierarchy is unpersuasive.

A third and last variation of the grading function of the negligence standard deserves particular note: the use of negligence to increase the grade of a legal wrong. Thus far I have been assuming that the negligence in question marks a distinction between fault liability and strict (or no) liability. Yet sometimes, and in criminal law especially, negligence differentiates lesser and greater wrongs. Thus, negligent homicide is a crime, while non-negligent causation of death is not. But if assault of a police officer is a more serious crime than simple assault and if negligence as to the victim's status as a police officer is the culpability required for guilt of the more serious offense, then negligence performs this third function.<sup>119</sup>

When negligence performs this grade-increasing function, the meaning of "negligence" should again be sensitive to the context. The question is not simply whether in the abstract, the person who committed the assault should have realized that his victim was a police officer. Rather, the more seriously the law views the circumstance in question and the more obvious the risk should be in light of the other offense elements that the actor must satisfy, the more readily one can conclude that the actor was cognitively negligent in failing to appreciate the incriminating circumstance. And, by way of contrast, whether a passive bystander to the assault who paid little attention to the affray "should have realized" that one of the participants was a police officer is a completely different question. (It is not clear that the bystander deserves even moral blame.)

But the context is also relevant in a special way when negligence is employed to increase the grade of an offense. For the very fact that the actor

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touching. And, of course, merely "offensive" batteries are also recognized. *Id.* at 53.

117 See *Mohr v. Williams*, 105 N.W. 12 (Minn. 1905).

118 See *supra* note 2.

119 For example, under Virginia law, simple assault is a Class 1 misdemeanor, while assault of a police officer is a Class 6 felony; and conviction of the latter requires that the actor knows or has reason to know that the victim was a police officer. Va. Code Ann. § 18.2-57 (A), (C) (Michie 2001).

has committed a lesser crime affects the justifiability of his taking risks of committing an even greater crime. A prominent example here is the crime of felony murder. If an actor commits an inherently dangerous felony and thereby accidentally causes a death, he is often treated as harshly as one who intends to cause a death. (Suppose X and Y together rob V, and Y is carrying a loaded gun; if the gun accidentally discharges, killing a bystander, both X and Y might be liable for felony-murder.) Although the traditional felony murder doctrine is, I believe, much too harsh, a modest version of the doctrine is defensible. Specifically, an actor who commits a dangerous felony and who is also negligent as to the risk of death arising from such a felony<sup>120</sup> may justifiably be treated as harshly as an actor who does not commit a felony but *recklessly* causes a death<sup>121</sup> and more harshly than an actor who does not commit a felony but negligently causes a death. The rationale is that the underlying conduct that led to a death — commission of a serious felony — is both dangerous and seriously culpable.<sup>122</sup> An alternative approach that analyzes the question of "negligence as to death" in isolation from this context arguably fails to impose a sanction that is proportional to the seriousness of the felon's acts and culpability.<sup>123</sup>

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120 Some jurisdictions that apply the felony-murder rule explicitly require negligence as to the resulting death. Most do not, however. See Guyora Binder, *Felony Murder and Mens Rea Default Rules: A Study in Statutory Interpretation*, 4 Buff. Crim. L. Rev. 399 (2000).

Moreover, if the jurisdiction specifies that the underlying felony, or the circumstances under which it is committed, must be dangerous and if the definition of dangerousness is narrow and clear enough, then those factors alone might suffice to demonstrate the actor's negligence as to resulting death, and an explicit negligence culpability requirement might be unnecessary.

121 In their interesting study of popular views about deserved punishment, Paul Robinson and John Darley find that those surveyed would endorse a "felony-manslaughter" rule in place of a "felony-murder" rule. That is, survey participants believe that when death occurs in the course of a felony, the felon deserves a level of punishment corresponding to reckless manslaughter, not to knowing or intentional murder. Paul Robinson & John Darley, *Justice, Liability and Blame* 169-81 (1995).

122 See Simons, *supra* note 36, at 1121-25.

123 A similar issue arises in determining how mistakes as to justification should be graded. The Model Penal Code adopts an "equivalence" approach, whereby an actor who makes a negligent mistake in assessing the need to use deadly force is guilty only of negligent homicide, while the actor who makes a reckless mistake is guilty of reckless homicide. Model Penal Code § 3.09(2) (1985). Whether this approach is sound is an open question. Some would view a negligent mistake in the context of knowingly and intentionally using deadly force against another (a mistake relevant to justification) as more seriously culpable than a negligent

## CONCLUSION

Conduct negligence and cognitive negligence, I have suggested, are fundamentally distinct conceptions. What an actor should do is a different inquiry from what an actor should believe. At the same time, the conceptions are often employed in conjunction, especially in criminal law; and the conduct conception ordinarily does presuppose reasonable foresight of risk, which is a cognitive concept. Moreover, legal standards explicitly or implicitly recognize other types of negligence as well — for example, deficient self-control.

This essay also identifies five significant institutional functions served by a legal negligence standard. These functions reveal the distinctive significance of negligence, but also disclose some problems that the use of such a legal standard can pose.

The analysis of these different dimensions of negligence clarifies certain misconceptions and has some important implications:

1. The question whether "negligence" is an appropriate minimum standard of liability (e.g., for criminal punishment) is ill-formed. One cannot analyze the desirability of "negligence liability" in the abstract without considering its type (conduct or cognitive) or its role in norm-definition (as a general standard of liability for harm-creation or, instead, as an interstitial standard applying only to some elements of a crime or wrong).
2. Negligence is more pervasively employed in the law than one might realize. It sometimes takes the form of an inchoate crime of risk-creation. And it sometimes takes the form of a relatively clear and predefined rule.
3. Comparing negligence to supposedly "more serious" forms of fault, such as recklessness, knowledge, and purpose, is treacherous. Depending on the type of negligence, as well as the type of recklessness or other fault, this might amount to comparing apples and oranges.
4. Defining negligence in purely cognitive terms (i.e., simply as unreasonable failure to be aware of a risk) is often inadequate,

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mistake about whether a driving maneuver will cause another's death (a mistake relevant to the *prima facie* case). The Code's equivalence approach might, in the end, be defensible, but it does need normative defense. Again, not all negligent mistakes are the same; the context of a negligent mistake can be critically important to deciding what degree of culpability the mistake exhibits.

for the legal norm often also demands that the actor has created an unreasonable risk or has failed to take a reasonable precaution.

5. Negligence need not be understood as failing to exercise the care that a "reasonable person" would exercise.
6. Negligence ordinarily identifies a type of fault that is derivative of a primary wrong or harm.

Finally, although this paper has not focused on the different possible normative rationales for negligence liability, I offer a few thoughts about the relationship between such rationales and the dimensions of negligence that the paper more directly addresses.

First, the choice of a normative rationale for negligence liability does not dictate the choice between a cognitive or conduct conception of negligence. Under an economic and deterrent rationale, for example, a cognitive test might be useful in calibrating the actor's amenability to deterrence, but a fairness rationale might also employ a cognitive test, as reflecting the actor's degree of fault or culpability.<sup>124</sup> Of course, the precise formulation and content of any negligence test (e.g., whether it is defined in terms of costs and benefits or in terms of the "reasonable person in the community") will reflect its normative underpinnings.

Second, the five different functions of legal negligence standards discussed above are also not directly dependent on the normative rationale for negligence liability. Still, some relationships do exist between the rationale and certain of those functions.

An economic approach is likely to emphasize deterrence of negligent behavior. Accordingly, advocates of this approach will be concerned about the inefficiency and imprecision of standards relative to rules and about the unpredictability of a legal negligence standard if a trier of fact has the largely unreviewable power to define its content. On the other hand, a broader utilitarian approach might give significant weight to the norm-reinforcement achieved when the community expresses its disapproval of faulty conduct, even if that disapproval is conveyed in vague "unreasonableness" terms.

From a corrective or retributive justice perspective, the standard-like articulation of negligence might better express the meaning of fault; and on many accounts, it is fault that justifies a tortfeasor's duty of repair to a wronged victim as well as the state's right (or duty) to punish a wrongdoer.

The choice of normative rationale seems to bear only a slight relationship to the desirability of negligence's personification function. This is so whether the point of this function is merely rhetorical, or, instead, is to explain that

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124 For further thoughts along these lines, see Simons, *supra* note 9, at 495-515.



deficient skill can be negligent, or to facilitate individualization, or to rationalize excuse.

Finally, the last two functions of legal negligence standards — creating a secondary legal norm parasitic on a primary one and distinguishing grades of fault — again do not depend directly on the choice of normative justification. Of course, the precise ways in which fault is actually defined, graded, and sanctioned clearly will and should depend on the underlying normative rationale. Thus, in deciding which types of inchoate risk-creation should give rise to legal liability, we might conclude that a largely undeterrable but very dangerous individual deserves significant punishment under a retributive rationale but not under a utilitarian one.



The dimensions of negligence are many. A better understanding of the difference between conduct negligence and cognitive negligence and of the distinctive institutional functions of a legal negligence standard should facilitate the development of more coherent, and more justifiable, fault criteria in criminal law, torts, and other legal domains.

