

# MORAL CHARACTER, MOTIVE, AND THE PSYCHOLOGY OF BLAME

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*Criminal law conceives blameworthiness as the carefully calculated end product of discrete judgments about a transgressor's intentionality, causal proximity to harm, and the harm's foreseeability. Research in social psychology, on the other hand, suggests that blaming is often intuitive and automatic, driven by a natural impulsive desire to express and defend social values and expectations. Reconciling legal blame with psychological blame is not always feasible because the law does not always explicitly recognize or encourage the factors that influence judgments of legal blame. In this Article, we focus on two highly related motivational processes—the desire to blame bad people and the desire to blame people whose motive for acting was bad. We report three original experiments that suggest that an actor's bad motive and bad moral character can increase not only perceived blame and responsibility but also increase perceived causal influence and intentionality. We show that people are motivated to think of an action as blameworthy, causal, and intentional when they are confronted with a person who they think has a bad character even when the character information is totally unrelated to the action under scrutiny. We discuss implications for doctrines of mens rea definitions, felony murder, inchoate crimes, rules of evidence, and proximate cause.*

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## INTRODUCTION

It is a fundamental tenet of criminal law that we do not judge the criminality of an act based on the character of the actor. Rather, “[t]he sun of justice shines alike ‘for the evil and the good’ . . . . [T]he most vicious [defendant] is presumed innocent until proven guilty.”<sup>1</sup> The purpose of a criminal trial, then, is to determine whether a person committed a criminal act, not whether a person is good or bad in the abstract. The prosecutor’s task is simply to prove that the defendant’s actions meet the statutory elements of a crime; these offense elements do not require proof of character.<sup>2</sup> Blameworthiness, in this context, is the carefully calculated end product of discrete judgments about a transgressor’s intentionality, causal proximity to harm, and the harm’s foreseeability. The logic of criminal liability takes into account a particular harmful act, done with a particular

<sup>1</sup> *People v. White*, 24 Wend. 520, 574 (N.Y. 1840) (opinion of Senator Verplanck), quoted in 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 57, at 1183 (Peter Tillers ed., rev. 1983).

<sup>2</sup> See 2A CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE & PROCEDURE § 409 (4th ed. 2009 & Supp. 2011).

mental state, that caused a particular harmful result. The combination of these elements determines the blame assigned to the offender; there is no room in this calculation for varying blame according to the actor's moral character.<sup>3</sup>

Research in social psychology, on the other hand, suggests that blaming is often intuitive and automatic, driven by a natural, impulsive desire to express and defend social values and expectations.<sup>4</sup> In this way, blaming serves an integral social function.<sup>5</sup> By blaming a wrongdoer, we establish, enforce, and express the social boundaries and rules of our community.<sup>6</sup> To this end, people are often willing to make sacrifices to punish cheaters even when they themselves are not the cheated victims.<sup>7</sup> Blaming in ordinary social life primarily serves as an expressive social tool to sort the "bad" members of society from the "good" members of society and thereby, to foster solidarity and cohesion among those who are appropriately abiding by social expectations.<sup>8</sup> In ordinary social life, therefore, an actor's perceived character and reasons for acting are of primary importance to the process of administering blame for that actor's harmful action.<sup>9</sup>

<sup>3</sup> *But see* Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1458–59 (1995) (arguing that Aristotelian virtue forms the basis for blame and punishment).

<sup>4</sup> *See* Kevin M. Carlsmith et al., *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284, 284–85 (2002); Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 814–18 (2001); David A. Pizarro & David Tannenbaum, *Bringing Character Back: How the Motivation to Evaluate Character Influences Judgments of Moral Blame*, in *THE SOCIAL PSYCHOLOGY OF MORALITY: EXPLORING THE CAUSES OF GOOD AND EVIL* 91, 91–93 (Mario Mikulincer & Phillip R. Shaver eds., 2012); *see also* Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1, 2–6, 62–64 (2008) (finding that perceivers' cultural values shape their perceptions of and blame for contested self-defense killings). For a classic treatment of the function of blame and punishment, *see* ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 41–60 (W.D. Halls trans., The Free Press 1984) (suggesting that processes of blaming and punishing allow members of a society to express indignation at acts that offend the collective conscience, thereby affirming collective values and fostering social cohesion).

<sup>5</sup> *See* MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 92–95 (1997); Ernst Fehr & Simon Gächter, *Altruistic Punishment in Humans*, 415 NATURE 137, 137 (2002); J.L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3, 3–5 (1982); Paul H. Robinson et al., *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633, 1639 (2007).

<sup>6</sup> *See* Jonathan Haidt, *The New Synthesis in Moral Psychology*, 316 SCIENCE 998, 998–1001 (2007); Neil Vidmar, *Retribution and Revenge*, in *HANDBOOK OF JUSTICE RESEARCH IN LAW* 31, 31–32 (Joseph Sanders & V. Lee Hamilton eds., 2001).

<sup>7</sup> *See* Ernst Fehr & Urs Fischbacher, *Third-Party Punishment and Social Norms*, 25 EVOLUTION & HUM. BEHAV. 63, 64 (2004).

<sup>8</sup> *See* DURKHEIM, *supra* note 4, at 63 (“[P]unishment is above all intended to have its effect on honest people.”); Tom R. Tyler & Robert J. Boeckmann, *Three Strikes and You Are Out, but Why? The Psychology of Public Support for Punishing Rule Breakers*, 31 LAW & SOC'Y REV. 237, 255 (1997); Vidmar, *supra* note 6, at 49.

<sup>9</sup> *See, e.g.*, RICHARD B. BRANDT, *ETHICAL THEORY: THE PROBLEMS OF NORMATIVE AND CRITICAL ETHICS* 465–75 (1959) (suggesting that blameworthy actions are those that would not occur absent a bad moral character); Michael D. Bayles, *Character, Purpose, and Criminal*

In this Article, we suggest that the legal and social-psychological processes of blame cannot be completely divorced. Inevitably, social-psychological processes of blame, which often operate on a level beneath conscious awareness, inform and influence formal legal processes of blame. Specifically, we suggest here that perceptions of an actor's moral character and motive for acting together affect our intuitions of blame, responsibility, and ultimately criminal liability for that actor's harmful act. People have a natural, psychological inclination to punish others with bad characters who act with bad motives; that inclination shapes the way that people interpret information in a formal legal proceeding via a process that we refer to as "motivated inculcation."<sup>10</sup> In a series of original social-psychological experiments, we provide evidence that when people judge a harmful action performed by a bad person or performed with a bad motive, they are more likely to perceive that person as more responsible, and the act as more causal and intentional, than when they judge an identical harmful action performed by a good person or performed with a good motive. Thus, it is plausible that intuitive and automatic psychological blaming motivations can permeate more formal legal mechanisms of blame. Ultimately, this suggests that the social-psychological impulse to punish bad people who act with bad motives can color the legal process of blame, such that we are more likely to find that the harmful action of a bad person satisfies the statutory elements of a crime and in turn, is worthy of criminal condemnation and punishment.

This Article advances current research and theory in bringing to light ways in which psychological blaming processes drive legal blame. Our analysis informs essential normative questions regarding the extent to which legal processes ought to take into account the psychological factors that drive the mechanisms of blame. For example, to what extent and under what circumstances should a court admit into evidence a defendant's motive for acting and permit it to be considered in liability judgments? Can the rules of evidence effectively exclude information about moral character, and is exclusion of this

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*Responsibility*, 1 LAW & PHIL. 5, 7 (1982) (arguing that blame and punishment are not meted for acts at all, but for the character traits indicated by those acts).

<sup>10</sup> A number of recent studies examine motivated cognition in law. See, e.g., Kevin M. Carlsmith & Avani Mehta Sood, *The Fine Line Between Interrogation and Retribution*, 45 J. EXPERIMENTAL & SOC. PSYCHOL. 191, 191–96 (2009); Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 731–35 (2010); Dan M. Kahan et al., "They Saw a Protest": *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1755706](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1755706); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* *Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841–43 (2009); Avani Mehta Sood & John M. Darley, *The Plasticity of Harm: An Experimental Demonstration of the Malleability of Judgments in the Service of Criminalization* (July 15, 2010) (unpublished manuscript) (on file with authors).

evidence a proper goal given how jurors and judges likely use such information? These normative questions lie at the heart of criminal adjudication; yet, they are outside the scope of this Article. We can deal with them only after we gain a deeper understanding of empirical questions about psychological blaming processes. This Article furthers our understanding of the empirical issues and provides the groundwork for later normative analyses of the proper role of motive and character in criminal liability.

In proceeding, we will first discuss differences between legal and psychological processes of blame with particular focus on the role that character information plays within each paradigm. The law governing criminal trials generally attempts to purge character from its blaming process in several ways. Criminal law itself, especially in its contemporary form, breaks the blaming process into discrete, component parts—such as act, mental state, attendant circumstances, and result—and leaves little room for juror judgments about the defendant's moral character. Moreover, evidence law places strict limits on the admissibility of character evidence. By contrast, preexisting motivational factors strongly influence psychological blaming processes and prompt decision makers to assign importance to factors (like perceived character) that are legally incidental or even irrelevant. In Part I of this Article, we explore the criminal law's treatment of moral character and motive in legal blaming processes, which we later contrast with psychological blaming processes. In doing so, we draw on Durkheimian punishment theory and the psychological phenomenon of motivated reasoning to sketch an account of how information about a transgressor's character influences perceivers' determinations of that transgressor's blame and responsibility. In Part II, we present a test of our theory in a series of three original social-psychological experiments in which we find that perceived bad moral character or perceived bad motive can trigger perceivers' impulses to view an actor's harmful conduct as more causal, intentional, and blameworthy. These experimental results show that motivational forces can mold basic judgments of blame, responsibility, causation, and intentionality just as readily as everyday perceptions about, say, the adorableness of our own children or the negligible health implications of that delicious-looking piece of cake on the table. In Part III we analyze some practical applications of our findings for several legal doctrines in which evidence of bad moral character or motive may come into play, such as in proximate cause, felony murder, and the evidentiary treatment of character evidence. Finally, in Part IV we conclude with a discussion of the limitations of the experiments reported here and offer directions for further empirical investigation.

## I

## MORAL CHARACTER AND MOTIVE

## A. Motive and Character in Legal and Social-Psychological Processes of Blame

In general, our legal system eschews the role of character in criminal liability determinations, relying instead on an act-based system of inculcation.<sup>11</sup> According to this system, the State's right to impose blame on an actor derives solely from the actor's commission of a prohibited act.<sup>12</sup> Put simply, we blame a criminal for what she did, not who she is.

That being said, as human beings we are nevertheless naturally motivated to punish people we see as having a bad moral character or a lasting criminal disposition. As John Henry Wigmore asserted,

The deep tendency of human nature to punish not because our [defendant] is guilty this time but because he is a bad man and may as well be condemned now that he is caught is a tendency which cannot fail to operate with any jury, in or out of court.<sup>13</sup>

Similarly, the Supreme Court has warned that evidence of prior criminal activity to display a "propensity" to commit a crime poses a "risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment."<sup>14</sup>

In an article providing empirical confirmation of this tendency, Theodore Eisenberg and Valerie P. Hans analyzed a sample of real jury trials and found that, where the evidence is weak or ambiguous, a jury that learns of a defendant's prior criminal record is significantly

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<sup>11</sup> On the other hand, character does play an accepted role in processes of punishment. For a thoughtful discussion of the distinction between the role of character in phases of guilt versus phases of punishment, see Benjamin B. Sendor, *The Relevance of Conduct and Character to Guilt and Punishment*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 99, 99 (1996).

<sup>12</sup> See *id.* ("Although a defendant's character sometimes can function as evidence of whether the defendant committed the alleged act with a culpable mental state, the defendant's character is not itself a criterion or an element of guilt."); see also G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 123 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821) (suggesting that the commission of an act that infringes on a member of society is necessary and sufficient to justify the state's imposition of criminal sanction).

<sup>13</sup> See WIGMORE, *supra* note 1, § 57, at 1185.

<sup>14</sup> *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (quoting *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982)); see also Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 197 (2006) (discussing the importance of the exclusionary rule to combat the risk that judges and jurors will weigh evidence of past criminal activity too heavily).

more likely to convict than a jury without such knowledge.<sup>15</sup> Earlier experimental research also demonstrated the influence of prior crimes on the likelihood of guilt judgments. This experimental research suggests that the seriousness and similarity of prior crimes plays an important role, such that serious crimes or those similar to the crime on trial are more likely to lead to guilt judgments than trivial or dissimilar crimes.<sup>16</sup> In fact, some experiments found no increased likelihood of guilt judgments when the prior crime is dissimilar to the current crime.<sup>17</sup> The influence of prior similar crimes on mock-juror guilt judgments suggests that people make a simple inference about propensity that operates within a given category. For example, people might reason along the lines of “once a burglar, always a burglar.”<sup>18</sup> But the delimitations of the categories employed in this regard remain unsettled in the literature; the relevant category might be as narrow as a particular offense, such as burglary, or as broad as a class of offenses, such as violent crimes.<sup>19</sup> Regardless, the empirical literature provides fairly robust proof that evidence of a defendant’s prior crimes or character flaws can potentially influence judgments about whether the defendant committed the specific instance of the specific crime in question.

To protect against any undue weight that jurors might place on prior crimes, Congress, state legislatures, and courts have established certain evidentiary safeguards to limit the admission of evidence re-

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<sup>15</sup> Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1357, 1380–85 (2009).

<sup>16</sup> See Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 LAW & HUM. BEHAV. 67, 69 (1995); Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L.Q. 235, 237–38 (1976); Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant’s Previous Criminal Record: A Simulation Study*, 2000 CRIM. L. REV. 734, 753–55; Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 47 (1985).

<sup>17</sup> See E. Gil Clary & David R. Shaffer, *Another Look at the Impact of Juror Sentiments Toward Defendants on Juridic Decisions*, 125 J. SOC. PSYCHOL. 637, 648 (1985). Edmund Howe suggests that it is similarity and not seriousness that does the work. See Edmund S. Howe, *Judged Likelihood of Different Second Crimes: A Function of Judged Similarity*, 21 J. APPLIED SOC. PSYCHOL. 697, 697–98 (1991). But the experiment reporting this finding employed a within-subjects design that posed a very large series of simple propensity questions. It is therefore likely that the findings of this study are properly limited to what people say ought to matter, and not how they actually make judgments. Other studies suggest that there are two separate effects, one for similarity and one for seriousness. See Wissler & Saks, *supra* note 16, at 41–43.

<sup>18</sup> See Hans & Doob, *supra* note 16, 237–38.

<sup>19</sup> See A.P. Sealy & W.R. Cornish, L.S.E. Jury Project, *Juries and the Rules of Evidence*, 1973 CRIM. L. REV. 208, 217–18 (explaining that when the prosecution introduced a similar prior crime, mock juries were more likely to convict; when the prosecution introduced a dissimilar prior crime the likelihood of conviction did not increase and in fact in some cases even decreased).

garding moral character and prior crimes. For example, Federal Rule of Evidence 404(a) generally prohibits the admission of evidence to establish that a person has a bad character.<sup>20</sup> This rule bars the prosecution from presenting evidence that suggests a defendant's general immoral disposition as a strategy to demonstrate the likelihood that the defendant committed a specific crime.<sup>21</sup> Additionally, Rule 404(b) disallows evidence of a defendant's "other crimes, wrongs, or acts" if used "to prove the character of a person in order to show action in conformity therewith."<sup>22</sup>

Despite the system's best efforts to prevent character-based inferences from affecting judgments of criminal liability, some character information often will still leak into a trial when it is inextricably intertwined with other accepted elements of culpability, such as *actus reus* and *mens rea*, or with various defenses such as duress.<sup>23</sup> In fact, Rule 404(b)'s bar against evidence of other crimes does not apply when introduced to demonstrate "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."<sup>24</sup> Consider the fictional example of Smith. In Smith's trial for unlawful gun possession, evidence that the police also found cocaine and a large amount of cash in his car might be admissible show Smith's motive for possessing the gun, that is, to protect himself. Thus, although other crimes or bad acts are not admissible to prove a defendant's bad character or propensity to commit the crime in question,<sup>25</sup> sometimes bad acts or crimes may be admissible to prove that a defendant had a special reason to commit the crime in question. In this sense, motive is sometimes relevant in proving criminal liability for purposes other than connecting the defendant's bad character to the actions for which he is on trial.

Motive in this sense comes in many guises because motive might influence decisions about blame for a variety of reasons. Motive is most explicitly recognized as relevant in hate crimes, in which the defendant harms a victim because of a protected characteristic of that

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<sup>20</sup> FED. R. EVID. 404(a) (allowing such evidence only when it is used in specific rebuttal to evidence of good character submitted by the defense).

<sup>21</sup> *See id.*

<sup>22</sup> FED. R. EVID. 404(b). *But see* FED. R. EVID. 413 (permitting admission of propensity evidence in sexual assault cases).

<sup>23</sup> However, Oliver Wendell Holmes suggests that the criminal law can more capably enforce standards of behavior to the extent that we separate liability from inferences of character derived from motive. *See* O.W. HOLMES, JR., *THE COMMON LAW* 50 (1881) ("[W]hen we are dealing with that part of the law which aims more directly than any other at establishing standards of conduct, we should expect there more than elsewhere to find that the tests of liability are external, and independent of the degree of evil in the particular person's motives or intentions.").

<sup>24</sup> FED. R. EVID. 404(b).

<sup>25</sup> *But see* FED. R. EVID. 413 (permitting admission of propensity evidence in sexual assault cases).

victim, such as disability, gender, or race.<sup>26</sup> Hate crime statutes are unusual in the sense that they make motive an element of the offense; that is, motive must be proven in order for liability to attach.<sup>27</sup> In other cases, motive might be admitted into evidence but is not required as an element of the offense. In the example of Smith above, Smith's motive for possessing the gun tends to prove that he did in fact possess the gun. The fact that Smith had a good reason for carrying the gun (to protect against theft of his cash and drugs) makes less plausible his claim that, for example, the gun was not his or that he was not aware that it was in the car. Another example of permissible (but again, not statutorily required) use of motive is to distinguish among possible mental states. For example, in a murder trial, evidence that Jones is having an affair with his business partner's wife might be admissible to show that Jones killed his business partner intentionally rather than recklessly. Motive might also serve as the basis for avoiding criminal liability. Examples of situations in which motive might lead to a defense to liability include killing in order to avoid being killed (i.e., a self-defense justification) or driving through a red light to rush a dying person to a hospital (i.e., a necessity justification).<sup>28</sup>

In this way, the law sometimes permits consideration of a defendant's motive even though it simultaneously forbids considerations of the defendant's moral character to influence judgments of blame. But, as our examples illustrate, motive and character are not always readily distinguishable. The information about Jones's affair may be admissible for its relevance to his motive and mens rea but this information also readily lends itself to unflattering inferences about Jones's character as the kind of person who would have an affair with his business partner's wife. As a result, the line between specific motive and general moral character is not always clear.<sup>29</sup>

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<sup>26</sup> See, e.g., CAL. PENAL CODE § 422.55(a) (West 2009) (“‘Hate crime’ means a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim: (1) Disability. (2) Gender. (3) Nationality. (4) Race or ethnicity. (5) Religion. (6) Sexual orientation. (7) Association with a person or group with one or more of these actual or perceived characteristics.”).

<sup>27</sup> See, e.g., *id.*

<sup>28</sup> In addition to the issue of the role of motive in determining the defendant's guilt or innocence, there is a separate question about the role of motive in sentencing. See I WAYNE LAFAYE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 3.6(b), at 324 (1st ed. 1986); Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 90 & n.1 (2006) (noting that the defendant's motive is traditionally an important factor in criminal sentencing) (citing *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993)).

<sup>29</sup> Scholars debate the role of motive in liability and blame. See, e.g., Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1, 5–7 (2002) (arguing that the maxim that motive is irrelevant to criminal liability is false); Elaine M. Chiu, *The Challenge of Motive in the Criminal Law*, 8 BUFF. CRIM. L. REV. 653, 673 (2005) (positing that motive ought to be part of criminal law to track ordinary perceptions of blame); Martin R. Gard-

The difficulty in distinguishing motive and character also sometimes arises when a defendant unintentionally caused the harm at issue. The definition of recklessness in the Model Penal Code (MPC), for example, takes into account the “nature and purpose” of the defendant’s conduct for the purpose of determining whether the defendant’s conduct constituted a “gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”<sup>30</sup> Recklessness in the MPC also involves the disregard of an “unjustifiable risk,”<sup>31</sup> which is determined by “considering the nature and purpose of [the actor’s] conduct and the circumstances known to him.”<sup>32</sup> The same phrase is also included in the MPC definition of negligence.<sup>33</sup> The difficulty of distinguishing motive and character is clear from these definitions since the nature and purpose of the actor’s conduct are, in many situations, inextricably intertwined with the actor’s motive for acting. The defendant who shoots a gun into a crowd for fun is reckless because the nature and purpose of his conduct is unjustifiable; accordingly, the risk he creates is unjustifiable as well. The defendant who shoots to try to stop a purse snatcher, on the other hand, has a stronger argument that the risk he took was justified. In this way, the nature and purpose of the actor’s conduct can be placeholders for motive, and motive can be a strong signal of moral character.

Motive, in the sense of the nature and purpose of the conduct that leads to unintended harm, does influence blame judgments as an empirical matter. Consider Mark D. Alicke’s series of experiments, which suggest that we are more likely to assign blame when a transgressor had a bad motive for doing an act that resulted in harm than when he had a good motive.<sup>34</sup> In one study, participants read about a man who was speeding home in the rain and negligently collided with another car, causing injury.<sup>35</sup> Some participants were told that the man was speeding home because he wanted to hide a vial of cocaine from his parents; others were told that he was speeding home to hide an anniversary present for his parents.<sup>36</sup> Participants’ judgments of

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ner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635,737–43 (noting that absence of evil motive is a theoretical basis for defenses like insanity or duress but not for offense definitions); Hessick, *supra* note 28, at 91 (suggesting that motive should play an expanded role in criminal punishment).

<sup>30</sup> MODEL PENAL CODE § 2.02(2)(c) (1985).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> MODEL PENAL CODE § 2.02(2)(d).

<sup>34</sup> See Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCHOL. 368, 376–77 (1992).

<sup>35</sup> *Id.* at 369.

<sup>36</sup> *Id.*

blame varied systematically with the driver's reason for speeding: people who learned that he was speeding home to hide the cocaine blamed him more than those who learned he was speeding home to hide the present.<sup>37</sup> Thus, the driver's motivation for speeding influenced lay judgments of blame.<sup>38</sup> Alicke argues that we are inclined to blame transgressors with bad motives for acting because it leads to an inference that they had more control over the situation that led to the harm—that is, those with “culpable control.”<sup>39</sup> More broadly, Alicke's experimentally proffered reasons for acting come with obvious concomitant inferences as to the actor's underlying character—whereas we would generally make favorable inferences about the character of the kind of person who is motivated to plan the perfect surprise to honor his parents' anniversary, we would be prone to make quite opposite inferences about the character of a paranoid cocaine possessor.<sup>40</sup>

It is easy to see that admissible information about a defendant's motive could, in some instances, implicitly encourage inferences about the defendant's moral character. These inferences are consonant with a theoretical literature on punishment and character that argues that inferences about moral character ought to be an integral component of legal blaming processes.<sup>41</sup> On this view, responsibility for an action derives from the actor's responsibility for his or her own character.<sup>42</sup> Theorists within this tradition contend that a defendant should only be culpable for a harmful action insofar as his action supports an inference of a flawed character or a blameworthy disposition, that is, if the action “reveals what sort of person he is in some respect.”<sup>43</sup> According to this perspective, acts are only blameworthy to

<sup>37</sup> *Id.* at 369–70.

<sup>38</sup> *Id.*

<sup>39</sup> See Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 *PSYCHOL. BULL.* 556, 558 (2000). It is also possible to engage in motivated nonblaming. For example, in one Gallup poll, only 18% of people in six Muslim countries believed that Arabs carried out the attacks of September 11, 2001. See Lawrence M. Solan, *Cognitive Foundations of the Impulse to Blame*, 68 *BROOK. L. REV.* 1003, 1021–22 (2003).

<sup>40</sup> In a subsequent experiment, Alicke tested likability more broadly and found that an unlikable actor was blamed more for identical harm than a likable actor. See Mark D. Alicke, *Evidential and Extra-Evidential Evaluations of Social Conduct*, 9 *J. SOC. BEHAV. & PERSONALITY* 591, 596–601, 603–10 (1994).

<sup>41</sup> See, e.g., JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 119–29 (1970) (positing arguments for this theory); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 10.3.2, at 805–06 (1978) (discussing theory that ties moral character to legal blameworthiness).

<sup>42</sup> See FLETCHER, *supra* note 41.

<sup>43</sup> FEINBERG, *supra* note 41, at 126; see also FLETCHER, *supra* note 41, § 10.3.1, at 801 (“[T]he question [of a just conclusion of culpability] becomes whether a particular wrongful act is attributable either to the actor's character or to the circumstances that overwhelmed his capacity for choice.”).

the extent that they betray an underlying character flaw in the actor.<sup>44</sup> In this framework, therefore, because claims of duress, necessity, or accident each derive from situations in which someone of good character could nevertheless find themselves engaged in a harmful or socially undesirable action,<sup>45</sup> excuses and justifications operate to thwart the inference from action to character and block the attachment of blame.<sup>46</sup>

Similarly, a legitimate motive can mitigate or even exculpate a harmful act. As discussed above, the purpose for which a person imposes a risk of harm to others can determine whether or not that person is considered to have acted with the mental state of recklessness or not.<sup>47</sup> Just as character theorists tie culpability to an inference of a flawed character, motive theorists tie culpability to the values expressed by offenders' motives. On this account, whether we should mitigate murder to voluntary manslaughter depends on our assessment of the worth of the offender's motive for and emotions accompanying the killing.<sup>48</sup> According to the moral-evaluation conception of emotion, if an offender's motives and emotions express values we deem atrocious—for example, a husband's outrage triggered by his wife's attempt to leave him, or a man's "panic" triggered by an unwanted homosexual advance—we will not mitigate, regardless of the extent to which the defendant's capacity to control his actions was

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<sup>44</sup> See, e.g., BRANDT, *supra* note 9, at 475 ("[A]n act is reprehensible (morally admirable) only if it would not have occurred had not its agent had a character in some respect less (in the case of "admirable," more) desirable than average."); NICOLA LACEY, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* 68 (1988) ("[I]t is unfair to hold people responsible for actions which are out of character, but only fair to hold them so for actions in which their settled dispositions are centrally expressed."); Bayles, *supra* note 9, at 7–15 (1982) (arguing that actions may or may not demonstrate underlying character traits, but that blame is only appropriate when a socially undesirable trait can be inferred); George Vuoso, *Background, Responsibility, and Excuse*, 96 *YALE L.J.* 1661, 1673 (1987) ("Whether an action merits praise or blame . . . will depend on how it reflects on the agent, or on something enduring in the agent (which, following tradition, we are calling his 'character.').").

<sup>45</sup> Benjamin Sendor points out that there is some corroboration of this conception of evidence in the commentaries to the MPC. See Sendor, *supra* note 11, at 100 n.7. For example, the MPC suggests that "one who kills in response to certain provoking events should be regarded as demonstrating a significantly different character deficiency than one who kills in their absence." MODEL PENAL CODE § 210.3 cmt. 5(a) (1985); see also Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 *ARIZ. L. REV.* 251, 252–53, 271 (1995) ("[E]xcused conduct should include cases in which the agent is responsible for what she does in the non-moral sense and leave to one side cases in which the agent is responsible in the moral sense.").

<sup>46</sup> See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 383 (1981) ("Excuses show an act is not to be attributed to a defect of character . . .").

<sup>47</sup> See *supra* text accompanying notes 30–33.

<sup>48</sup> See SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* 125–26 (1998).

impaired by his emotion.<sup>49</sup> On this account, an evaluation of the extent to which the actor's motives and emotions were appropriate for someone in his or her situation determines whether or not liability is mitigated or even justified or excused.<sup>50</sup>

Several contemporary theorists oppose the idea that blame derives from character, arguing that blame and punishment ought to be divorced from inferences about character.<sup>51</sup> Following Alicke's culpable-control theory, this Article posits that, as a descriptive matter, character information that is wholly unrelated to the harmful action at issue can color the way in which fact finders interpret that action. We hypothesize that people are more inclined to blame (and inclined to blame more harshly) not only when the actor's reasons for acting are bad, but more generally, when they have *any reason* to believe that the actor is a bad person. We hypothesize that, as an empirical matter, a bad motive for acting is not necessary for perceivers to make character-based inferences about an actor's blame and responsibility. Rather, any unfavorable character inferences will suffice to motivate the inculcation of a transgressor.<sup>52</sup>

## B. Motivated Inculcation

Earlier we raised a core concern expressed by many judges and legal scholars over the years: namely, that knowledge of a previous conviction biases the case against the defendant.<sup>53</sup> The intuitions of Wigmore and of Supreme Court Justices regarding character and blame are examples of a broader phenomenon that social psychologists call "motivated reasoning."<sup>54</sup> The general principle is that sometimes we have a preferred conclusion and are so motivated to assume the veracity of that conclusion that we construe evidence presented to

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<sup>49</sup> See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 368–72 (1996); see also CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* (2003) (arguing that majority-culture defendants often successfully rely on dominant social norms like masculinity and heterosexuality to successfully argue that their violence was partially or fully justified); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1332 (1997) (criticizing modern reform in the "crime of passion" defense and concluding that reform "leads to a murder law that is both illiberal and often pervasive.").

<sup>50</sup> See Kahan & Nussbaum, *supra* note 49.

<sup>51</sup> See, e.g., Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1027 (2004) (arguing that conclusions about immoral character creates a "permanent criminal caste").

<sup>52</sup> See generally Alicke, *supra* note 39, at 569–71 (studying how people attribute blame).

<sup>53</sup> See *supra* notes 12–13 and accompanying text.

<sup>54</sup> See Eileen Braman & Thomas E. Nelson, *Mechanisms of Motivated Reasoning? Analogical Perception in Discrimination Disputes*, 51 AM. J. POL. SCI. 940, 941 (2007).

us in a way that allows us to confirm our initial preference.<sup>55</sup> For example, in a study on perceptions of risk, women who read an article claiming that caffeine posed a risk to women's health were less convinced by the evidence if they themselves were heavy caffeine users than if they were caffeine abstainers.<sup>56</sup> The women who were heavy caffeine users had a stake in the results. They were motivated to discount the evidence and so initially preferred a conclusion that allowed them to go on enjoying their coffee breaks.<sup>57</sup> Women who were light caffeine users, however, had less reason to discount the evidence and so generally did not.<sup>58</sup>

Having a personal stake in the results is just one source of motivation; there are many ways in which serving our own interests can drive the conclusions we endorse.<sup>59</sup> For example, we are also motivated to construe information in ways that confirm previously held biases or preconceived notions. Judges may misremember the facts of the case before them in ways that support subconsciously endorsed racial stereotypes.<sup>60</sup> Jurors sometimes engage in motivated evaluation of evidence by disregarding and failing to discuss evidence that supports the conclusion opposite to the one they already favor.<sup>61</sup>

A prime example of motivated reasoning in law lies in policy-biased judging. Judges profess to decide cases neutrally; some even pro-

<sup>55</sup> See, e.g., Peter H. Ditto & David F. Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions*, 63 J. PERSONALITY & SOC. PSYCHOL. 568, 581–82 (1992); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 541–42 (2004); Eric Luis Uhlmann et al., *The Motivated Use of Moral Principles*, 4 JUDGMENT & DECISION MAKING 476, 489 (2009).

<sup>56</sup> The study found no such difference for men. See Ziva Kunda, *Motivated Inference: Self-Serving Generation and Evaluation of Causal Theories*, 53 J. PERSONALITY & SOC. PSYCHOL. 636, 646 (1987).

<sup>57</sup> See *id.* at 644.

<sup>58</sup> See *id.*

<sup>59</sup> See Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337, 1342 (1995) [hereinafter Babcock et al., *Biased Judgments*]; Linda Babcock et al., *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 915 (1997) [hereinafter Babcock et al., *Creating Convergence*]; Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 110 (1997).

<sup>60</sup> Cf. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (determining that sometimes judges hold implicit racial biases that affect decision making).

<sup>61</sup> See Kurt A. Carlson & J. Edward Russo, *Biased Interpretation of Evidence by Mock Jurors*, 7 J. EXPERIMENTAL PSYCHOL.: APPLIED 91, 91–92 (2001). Similarly, the good or bad motive of the defendant can influence the extent to which mock jurors credit various pieces of evidence in the trial. See Keith J. Holyoak & Dan Simon, *Bidirectional Reasoning in Decision Making by Constraint Satisfaction*, 128 J. EXPERIMENTAL PSYCHOL.: GEN. 3, 11–12 (1999) (using a vignette involving a libel action by a company against an investor, the researchers demonstrated that, compared to when the investor was motivated simply by honest concern, when his speech was motivated by malicious greed, perceivers were more likely to positively assess arguments supporting liability, and to negatively assess arguments undermining liability).

fess that their role is like an umpire calling balls and strikes.<sup>62</sup> Very few judges would acknowledge that they decide cases according to their own policy preferences. Nevertheless, a wealth of evidence from real cases demonstrates that judges sometimes decide cases according to their personal political ideology<sup>63</sup>—even though they are generally unaware that they are doing so.<sup>64</sup> Moreover, even judges who understand that they must disregard information that is excluded from evidence, and genuinely attempt to ignore it, still remain on the whole unable to refrain from being influenced by the barred information.<sup>65</sup>

Of course, these ideas apply outside the judiciary as well. In one study, people predisposed to favor a policy permitting gay scout leaders judged other cases to be more similar if they involved a finding of illegal discrimination.<sup>66</sup> In another study, law students deciding the constitutionality of a proposed change in a school district's tax rate were more likely to find the proposed tax rate unconstitutional when it was inconsistent with their own tax policy preferences.<sup>67</sup> This finding emerged even though the participants were provided with a monetary incentive to arrive at the legally correct decision.<sup>68</sup>

When we make a decision, we often have several goals, even if we are not consciously aware of them. We generally want to reach the

<sup>62</sup> See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

<sup>63</sup> See EILEEN BRAMAN, *LAW, POLITICS, & PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING* 4–5 (2009); GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES 1946–1963*, at 102 (1965); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 69 (1993) (asserting that judges' prior ideological preferences strongly influence case outcomes); Eileen Braman, *Reasoning on the Threshold: Testing the Separability of Preferences in Legal Decision Making*, 68 J. POL. 308, 318–19 (2006) (concluding that decisions about standing in a free speech case about abortion are influenced both by free speech attitudes and abortion attitudes); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 325 (1992); Richard E. Redding & N. Dickon Reppucci, *Effects of Lawyers' Socio-Political Attitudes on Their Judgments of Social Science in Legal Decision Making*, 23 LAW & HUM. BEHAV. 31, 43–48 (1999) (finding that judges' personal support for the death penalty influences decisions about whether particular social science evidence is admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

<sup>64</sup> See Richard E. Nisbett & Timothy DeCamp Wilson, *The Halo Effect: Evidence for Unconscious Alteration of Judgments*, 35 J. PERSONALITY & SOC. PSYCHOL. 250, 254–56 (1977).

<sup>65</sup> See Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1258–59 (2005). On the other hand, judges' probable cause decisions appear to be remarkably uninfluenced by the hindsight bias. See Jeffrey J. Rachlinski et al., *Probable Cause, Probability, and Hindsight* 1–5 (Vand. Pub. L. Research Paper No. 11-25, 2011), available at <http://ssrn.com/abstract=1877125>.

<sup>66</sup> See Braman & Nelson, *supra* note 54, at 949.

<sup>67</sup> See Joshua R. Furguson et al., *Do a Law's Policy Implications Affect Beliefs About Its Constitutionality? An Experimental Test*, 32 LAW & HUM. BEHAV. 219, 221–26 (2008) (noting that a law professor and a federal judge independently arrived at what the study determined to be the correct ruling).

<sup>68</sup> See *id.* at 221.

conclusion that is best supported by the available evidence. At the same time, however, other goals bias how we interpret and process this evidence before we reach the conclusion. Sometimes we have initial intuitions or hypotheses driven by our preexisting preferences.<sup>69</sup> We then tend to reject some evidence and accept other evidence in a biased fashion consistent with our preferences.<sup>70</sup> That is, we evaluate evidence according to what we already believe,<sup>71</sup> and we selectively remember some things but not others.<sup>72</sup> We are also influenced by factors that we ourselves regard as unjustifiable, though we may not be aware of such influence.<sup>73</sup> This is especially true when the legitimate evidence is “elastic”—that is, when there is more wiggle room to come out either way in the conclusion.<sup>74</sup> And, when we finally allow ourselves to reach the conclusion we preferred from the beginning, we convince ourselves that we chose it because of the evidence and not because of any other goals we have.<sup>75</sup> In sum, as Jon Hanson and David Yosifon instruct, “The first lesson of motivated reasoning, whatever its manifestation, is that we humans tend to hold beliefs and reach judgments and conclusions that we desire, and we vastly underestimate that tendency—particularly in ourselves.”<sup>76</sup>

Moreover, we are especially prone to engage in motivated reasoning when we hold strong opinions on a complex issue.<sup>77</sup> Under these circumstances, we examine relevant evidence in a biased manner, accepting favorable evidence at face value while critically evaluating and discounting unfavorable evidence.<sup>78</sup> Sometimes we hold strong opinions about judgments involving justice—for example, we read about a heinous crime in the newspaper and feel strongly that the criminal

<sup>69</sup> See Kunda, *supra* note 56, at 646.

<sup>70</sup> See Peter H. Ditto et al., *Motivated Sensitivity to Preference-Inconsistent Information*, 75 J. PERSONALITY & SOC. PSYCHOL. 53, 54, 64–67 (1998).

<sup>71</sup> See Babcock et al., *Biased Judgments*, *supra* note 59, at 1339–42; Dan Simon et al., *The Emergence of Coherence over the Course of Decision Making*, 27 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 1250, 1257 (2001).

<sup>72</sup> See William M. Klein & Ziva Kunda, *Maintaining Self-Serving Social Comparisons: Biased Reconstruction of One’s Past Behaviors*, 19 PERSONALITY & SOC. PSYCHOL. BULL. 732, 737 (1993).

<sup>73</sup> See Christopher K. Hsee, *Elastic Justification: How Unjustifiable Factors Influence Judgments*, 66 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 122, 122–23, 128 (1996).

<sup>74</sup> See *id.* at 123–24.

<sup>75</sup> See Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 482–83 (1990); Tom Pyszczynski & Jeff Greenberg, *Toward an Integration of Cognitive and Motivational Perspectives on Social Inference: A Biased Hypothesis-Testing Model*, 20 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 297, 319–23 (1987).

<sup>76</sup> Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 138 (2003).

<sup>77</sup> See Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2098 (1979).

<sup>78</sup> See *id.*

ought to be harshly punished. In our own day-to-day lives, our beliefs about justice and our motivations to seek just outcomes can influence what we remember.<sup>79</sup> We may even adjust memories of past events to maintain a belief that people get what they deserve.<sup>80</sup> In one study, for example, people asked to recall the value of a lottery prize remembered a smaller amount awarded when the winner was a bad person than when the winner was a good person.<sup>81</sup> Indeed, biased recall can also extend to memories about our own prior experiences.<sup>82</sup> For example, people who received a lucky break (such as a prize awarded by random numbers) were able to later recall more good deeds from their own past than those who had not been lucky.<sup>83</sup> Analogously, when we are prompted to think of ourselves as a bad person, we tend to think that we had it coming if fate then deals us a bad hand. For example, people who were asked to recall bad deeds from their past were more accepting of their fate later when they were forced to spend twenty-five minutes on a mind-numbing task, compared to people who recalled bad deeds of other people.<sup>84</sup> These studies suggest that we naturally inflate or devalue our conception of our own selves to see our fate as just and fair.

So how does the phenomenon of motivated reasoning relate to judgments of criminal liability? We contend in this Article that people harbor a generalized social preference to inculcate people with bad characters.<sup>85</sup> In understanding this initial preference, it is useful to

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<sup>79</sup> Motivations to seek justice can also influence subsequent behavior, even in unrelated domains. See Kenworthy Bilz & Janice Nadler, *Law, Psychology, and Morality*, in *MORAL JUDGMENT AND DECISION MAKING* 101–24 (Daniel M. Bartels et al. eds., 2009) (concluding that a mismatch between law and community attitudes can result in a behavioral backlash); Elizabeth Mullen & Janice Nadler, *Moral Spillovers: The Effect of Moral Violations on Deviant Behavior*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1239, 1244–45 (2008) (discussing how perceived moral violations can cause moral spillovers, increasing subsequent deviant behavior); Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1426–29 (2005) (finding that perceived injustice in legislation and judicial decisions can lead to lower levels of everyday legal compliance).

<sup>80</sup> See Mitchell J. Callan et al., *The Effects of Justice Motivation on Memory for Self- and Other-Relevant Events*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 614, 615 (2009); see also Babcock et al., *Creating Convergence*, *supra* note 59, at 916 (discussing “hindsight bias”).

<sup>81</sup> See Callan et al., *supra* note 80, at 616.

<sup>82</sup> See Klein & Kunda, *supra* note 72, at 737–38.

<sup>83</sup> See Callan et al., *supra* note 80, at 619. Conversely, those who had not received the lucky break were able to recall more bad deeds from their past than those who had received the lucky break. See *id.*

<sup>84</sup> See *id.* at 619–20.

<sup>85</sup> A related claim is that, in assessing blameworthiness, we tend to infer personality traits from behavior. Thus, we reason, if Smith injured Jones, it must be because Smith is a bad person. At the same time, we tend to ignore or give insufficient weight to situational pressures that might have led Smith to injure Jones. Donald Dripps calls this the “fundamental retribution error.” See Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1426 (2003). Our focus in this Article is different: we examine the influence of information about character that is sepa-

consider Émile Durkheim's account of the social function of crime and punishment. According to Durkheim, attaching blame for a crime performs a necessary expressive social function because it allows members of society to affirm and protect collective values.<sup>86</sup> In punishing, says Durkheim, "we are avenging . . . the outrage to morality."<sup>87</sup> And by blaming and punishing, we are effectively differentiating ourselves from members of the society who are not appropriately conforming to societal expectations, thus symbolically separating the "bad" members of society from the "good" members of society.<sup>88</sup> As a result, the inculcation of the wicked serves simultaneously as an expression of the solidarity of honest citizens and a reaffirmation of the values and expectations of the collectivity.

Durkheim's theory of punishment as a social tool ultimately suggests that we are naturally driven to inculcate and punish individuals we believe do not properly embrace and conform to our collective moral code.<sup>89</sup> This further suggests that when we are confronted with the complex task of assigning blame for an allegedly criminal action within a formal legal proceeding, we will be motivated to construe the information before us in a way that best allows us to reach our desired conclusion and punish a bad person. This then leads to the hypothesis at the heart of the phenomenon that we call motivated inculcation: if we have *any* reason to infer that a defendant has a bad moral character, we will be more likely to construe that defendant's action as criminally culpable. Moreover, although formal legal processes try to suppress character-based judgments by focusing our blaming attention on discrete elements of the crime at issue, the research on motivated reasoning suggests that our initial preference to blame bad actors would likely color the way in which we interpret those elements of the crime. Thus, we hypothesize that when a fact finder judges a harmful action performed by a "bad" defendant or performed with a bad motive, the defendant is perceived as more responsible, and the act as more causal and intentional, than when a fact finder judges an identical harmful action conducted by a "good" defendant or with a good motive.

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rate from the act itself, including reasons for acting (Experiments 1 and 2) or even information about character that is independent of the act (Experiment 3).

<sup>86</sup> See DURKHEIM, *supra* note 4, at 34, 61–63.

<sup>87</sup> *Id.* at 47.

<sup>88</sup> See *id.* at 31–67.

<sup>89</sup> See *id.*

## II

## EXPERIMENTS: MORAL CHARACTER AND BLAME

In the experiments we conducted for this Article, we tested the idea that people's judgments about the underlying elements of criminal liability can be colored by initial inferences about the transgressor's moral character as derived from information about the defendant's motive for acting or from character information that is wholly unrelated to the harmful act at issue. Thus, we explore the notion that, just as judges may decide some cases according to their own policy preferences, ordinary people can be motivated to blame a transgressor on the basis of perceived moral character.

In the experiments presented here, we focus on situations in which the causal contribution of a transgressor's act is tenuous and in which mens rea is weak or absent. By minimizing intentionality and causality, we are better able to observe the role of perceived moral character in blame attributions. We hypothesize that the perceived moral character of a transgressor will influence judgments not only of blame and responsibility but also of mens rea and causality. That is, when observers perceive someone as a bad person, they will not only be more likely to blame that person for any act that results in harm, but they will also be more likely to judge the act as more causal and the mental state as more culpable. Below, we summarize the results of three experiments we conducted to test the role of information regarding moral character in blame attributions for criminal offenses. Then we briefly discuss some of the implications of our findings for the criminal-law doctrines of felony murder, inchoate offense, causation, and the evidentiary admissibility of character evidence.

### A. Experiment 1: Frank Brady and the Firefighters

We conducted this preliminary experiment to test the hypothesis that for a bad outcome, bad moral character influences perceptions of blame, responsibility, causation, and the like, holding constant mens rea and actus reus. We recruited a group of adults to answer an online questionnaire in which we presented a brief vignette loosely based on *People v. Brady*.<sup>90</sup> In that case, the defendant was found criminally liable for the death of two firefighters after a trailer, which he used as a methamphetamine lab, exploded. In the vignette, we varied the contents of the trailer (methamphetamines or highly flammable fertilizer) in order to examine the effect of the defendant's perceived character on participants' subsequent judgments of blame and responsibility.

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<sup>90</sup> 29 Cal. Rptr. 3d 286 (Ct. App. 2005).

### 1. *Participants*

We recruited 205 participants through Amazon's Mechanical Turk web service, which allows assignment of simple tasks to a large population of users online.<sup>91</sup> We paid participants fifty cents for completing the survey, which took about five minutes, and assured them that their responses would remain anonymous and that we would not collect identifying information. We excluded seventeen participants because of missing data. Of the remaining 188, 63% were female, with a mean age of about thirty-seven years. Seventy-nine percent identified themselves as White, 6% as Black, 5% as Hispanic, 5% as Asian Pacific, 2% as South Asian, and 3% as Other. Fifteen percent were full-time students, and 8% were part-time students. Seventy percent were college educated. Ninety-five percent had lived in the United States for at least twelve years. For 56% of the sample, their household income was less than \$50,000 per year. Politically, 48% identified themselves as liberal or very liberal; 28% identified as moderate, and 25% identified as conservative or very conservative.

### 2. *Design and Materials*

We randomly divided participants into two groups. One group read the "Orchids" version, and one group read the "Meth" version of the vignette reproduced below:

Frank Brady lost control of a campfire that he had built on his property and it spread to a trailer he kept on the premises. He used the trailer

[Orchids:] to store highly flammable fertilizers to care for his collection of exotic plants in his orchid greenhouse.

[Meth:] as a methamphetamine laboratory where he used highly flammable chemicals to make illegal drugs.

When the fire made contact with the [fertilizers]/[chemicals] in the trailer, it caused a huge explosion and raged out of control. Four firefighter-pilots in helicopters and air tankers were called in to try and put the fire out by dousing it from overhead. During the sixth trip up to douse the fire, one of the pilots approached from the wrong direction and collided with another helicopter. Two pilots were killed in the collision.

Each participant read either the Orchids or the Meth version of the vignette, but not both. After reading the vignette, we asked participants to provide their own opinion about Frank Brady and his role in the death of the two pilots: to what extent he is responsible; how negatively he should be judged; how much he is to blame; to what extent he caused the deaths; how intentional were his actions; how

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<sup>91</sup> See AMAZON MECHANICAL TURK, <https://www.mturk.com/mturk/welcome> (last visited Oct. 24, 2011).

foreseeable the deaths were from Brady's perspective; the extent to which he was careless; and how likeable he is. We measured all questions on a scale ranging from 1 (not at all) to 7 (very much). We randomized the order of these questions.

After evaluating Frank Brady, we asked participants to think about the pilot who flew in the wrong direction. We asked participants their personal opinions about the pilot's role in the collision: to what extent he was responsible; how negatively he should be judged; how much he is to blame; and the extent to which he caused the collision. We measured all questions on a scale ranging from 1 (not at all) to 7 (very much). Again, the order of presentation of these questions was random.

### 3. Results<sup>92</sup>

#### a. Judgments of Frank Brady

Compared to participants in the Orchids condition, participants in the Meth condition judged Brady to be more responsible,<sup>93</sup> blameworthy,<sup>94</sup> and worthy of negative judgment<sup>95</sup> for the death of the two pilots. This is illustrated in Figure 1. In addition to ultimate judgments about blame and responsibility, other, more basic perceptions varied according to the contents of the trailer. Despite the fact that all participants learned that the fertilizer or drugs were "highly flammable," the participants in the Meth condition perceived Brady's actions to be more of a cause of the pilots' deaths than participants in the Orchids condition.<sup>96</sup> This is also illustrated in Figure 1.

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<sup>92</sup> All analyses in this Article were conducted using Analysis of Variance (ANOVA) unless otherwise noted. An ANOVA measures for statistical differences between the means of groups whose data are categorical (as opposed to continuous). See WILLIAM L. HAYS, STATISTICS 376–81 (5th ed. 1994). *F* is a ratio that measures mean differences relative to variability within the sample. See *id.* at 360. Throughout this Article, "significantly" refers to statistical significance, which denotes the rejection of the null hypothesis—the possibility of no differences between the various groups—at a probability level indicated by the *p*-value reported. Thus, *p* is defined as the probability of finding a difference or relationship between two groups as large as that observed if there were, in fact, no difference or relationship between them. See *id.* at 267–82.

<sup>93</sup>  $F(1, 185) = 66.97, p < .001, \eta_p^2 = .266$ . Partial eta-squared ( $\eta_p^2$ ) is a measure of the percent of total variance in the dependent variable accounted for by the independent variable, analogous to  $R^2$  in regression analysis. Interpretation is as follows: .01 small; .06 medium; .14 large.

<sup>94</sup>  $F(1, 186) = 68.66, p < .001, \eta_p^2 = .270$ .

<sup>95</sup>  $F(1, 185) = 127.43, p < .001, \eta_p^2 = .408$ .

<sup>96</sup>  $F(1, 186) = 55.32, p < .001, \eta_p^2 = .229$ .

FIGURE 1.

EXPERIMENT 1: MEAN RATINGS OF FRANK BRADY'S ROLE IN THE DEATH OF THE TWO PILOTS, BY MORAL CHARACTER CONDITION (1 = not at all; 7 = very much).

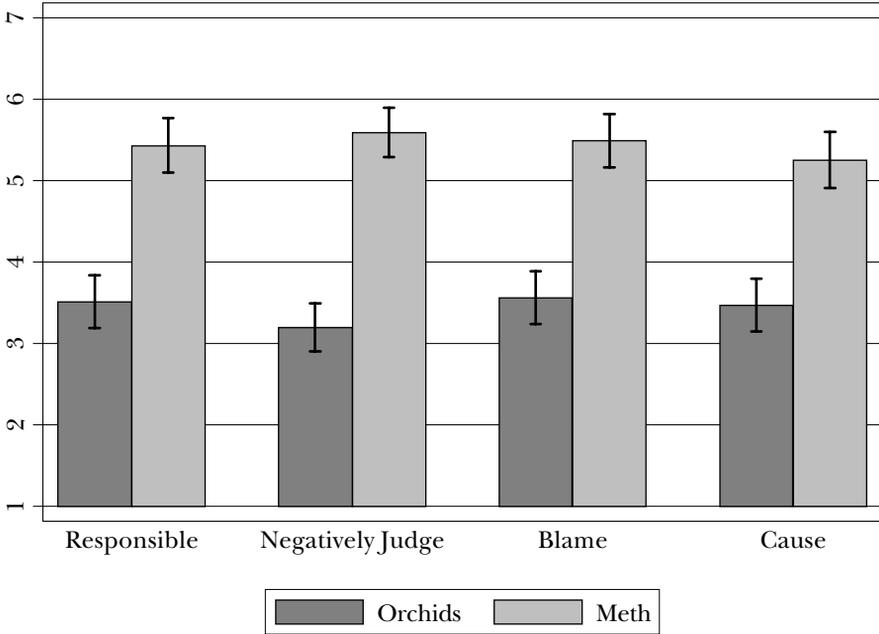


Figure 2 illustrates participants' perceptions of Brady's mental state, indicating his perceived control over of the harm. When compared to participants in the Orchids condition, participants in the Meth condition perceived Brady to be acting more intentionally<sup>97</sup> and carelessly<sup>98</sup> in losing control of the campfire. Participants in the Meth condition also perceived the deaths of the pilots to be more foreseeable.<sup>99</sup> Not surprisingly, participants assigned to the Meth group also perceived Brady as less likeable than participants assigned to the Orchids group.<sup>100</sup>

<sup>97</sup>  $F(1, 186) = 25.77, p < .001, \eta_p^2 = .122$ .

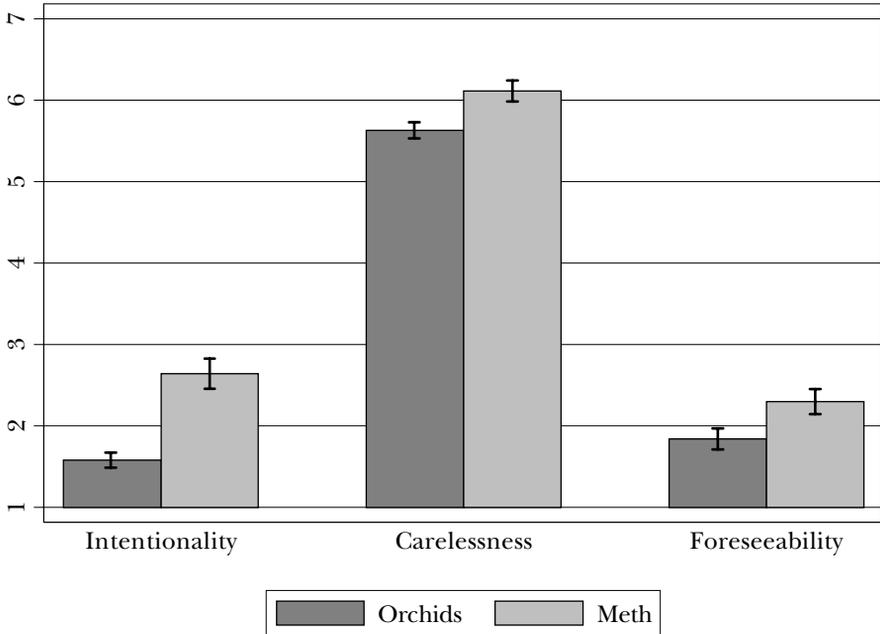
<sup>98</sup>  $F(1, 183) = 7.67, p < .01, \eta_p^2 = .040$ .

<sup>99</sup>  $F(1, 184) = 5.56, p < .05, \eta_p^2 = .029$ .

<sup>100</sup>  $F(1, 184) = 125.08, p < .01, \eta_p^2 = .405$ . Meth ( $M = 1.84$ ); Orchids ( $M = 3.65$ ).

FIGURE 2.

EXPERIMENT 1: MEAN RATINGS OF FRANK BRADY'S MENTAL STATE IN THE DEATH OF THE TWO PILOTS, BY MORAL CHARACTER CONDITION (1 = not at all; 7 = very much).



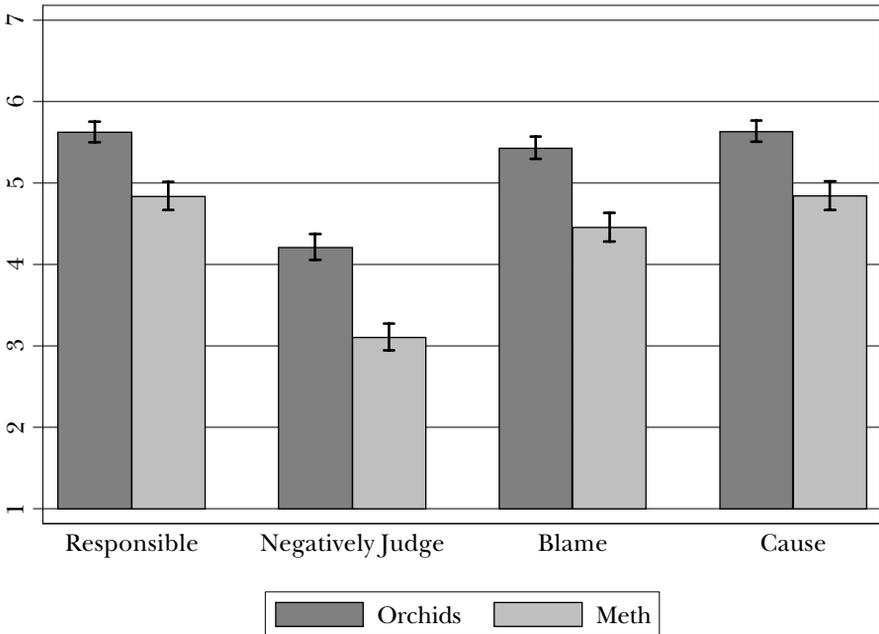
b. *Judgments of the Pilot in Error*

After rating their perceptions of Frank Brady, we asked participants to think about the pilot who flew the wrong way. Interestingly, participants' judgments of the pilot were the mirror image of their judgments of Brady, such that in the Meth condition they judged the pilot less harshly than in the Orchids condition.<sup>101</sup> Figure 3 illustrates mean ratings.

<sup>101</sup> Pilot responsible:  $F(1, 183) = 13.78, p < .01, \eta_p^2 = .070$ ; Pilot negatively judged:  $F(1, 186) = 23.28, p < .01, \eta_p^2 = .111$ ; Pilot to blame:  $F(1, 186) = 19.06, p < .01, \eta_p^2 = .093$ ; Pilot the cause:  $F(1, 186) = 13.59, p < .01, \eta_p^2 = .068$ .

FIGURE 3.

EXPERIMENT 1: MEAN RATINGS OF THE PILOT WHO FLEW THE WRONG WAY, BY FRANK BRADY'S MORAL CHARACTER (1 = not at all; 7 = very much).



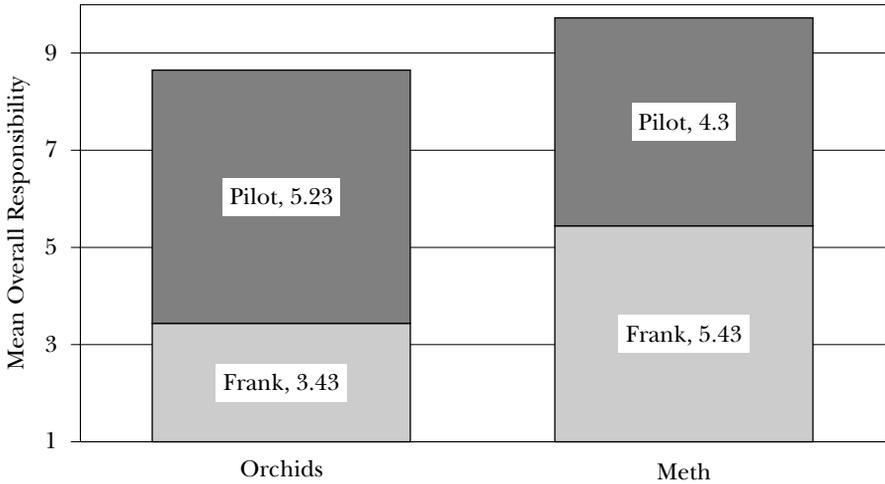
The reversed pattern in judgments of the pilot's responsibility suggests that participants' perceptions followed a rule of conservation of responsibility, in which attributing high responsibility to Brady implies attributing lower responsibility to the pilot in error and vice versa. To illustrate this, we constructed single measures of perceived responsibility for both Brady and for the pilot. Judgments regarding Brady's responsibility, negative judgment, blame, and share of causation were highly correlated<sup>102</sup> as were those regarding the pilot.<sup>103</sup> Using the mean of these scores for Brady and the pilot, respectively, we constructed a single measure of Brady's responsibility and a single measure of pilot responsibility. Participants in the Meth condition seemed to perceive reduced responsibility for the pilot who flew the wrong way compared to participants in the Orchid condition. This is illustrated in Figure 4.

<sup>102</sup> Cronbach's alpha = .95. Cronbach's alpha measures the internal consistency of a set of items, and ranges between 0 and 1, with higher numbers indicating higher consistency. See RICK H. HOYLE ET AL., RESEARCH METHODS IN SOCIAL RELATIONS 83-84 (7th ed. 2002).

<sup>103</sup> Cronbach's alpha = .90.

FIGURE 4.

EXPERIMENT 1: MEAN PERCEIVED RELATIVE RESPONSIBILITY FOR THE CRASH OF FRANK AND OF THE PILOT WHO FLEW THE WRONG WAY, BY MORAL CHARACTER CONDITION.



#### 4. Discussion

Experiment 1 demonstrates that, even holding constant the severity of the harm and the transgressor's mental state, participants' judgments about the controllability of the harm and the transgressor's responsibility—as well as the responsibility of other parties involved—vary extensively depending on the perceived moral character of the transgressor. In the Meth version of the vignette—where Frank Brady stored flammable chemicals to make methamphetamine—study participants perceived him as an unlikeable guy doing bad things even though the fire started with an innocent campfire. Compared to the Orchid vignette in which Brady stored “innocent” orchid fertilizer, participants attributed the consequences that followed from the actions of the “bad” Brady as more blameworthy as well as more intentional, causal, and foreseeable. Seemingly, a campfire accidentally started by a “bad” person has more causal power and gives rise to more negative attributions than a campfire accidentally started by a “regular” person.

It must be noted, however, that the differences in foreseeability ratings give rise to a possible alternate explanation for the results. Even though we gave both the chemicals for manufacturing the methamphetamine and the chemical fertilizers identical descriptions of dangerousness—namely, “highly flammable”—it might be that participants perceived the methamphetamine chemicals to be more flammable or more dangerous than the fertilizer. Moreover, it might be

that participants judged Brady as more likely to anticipate a fire occurring with chemicals for methamphetamine than with chemicals for greenhouse fertilizer. After all, the process of methamphetamine manufacture has a general reputation for dangerousness; greenhouse fertilizers generally do not. To rule out this explanation, we conducted a separate experiment (Experiment 2) also involving the storage of flammable materials in which we hold constant the material stored.

Another question that arises about the results of this experiment is whether we successfully varied moral character. It stands to reason that participants will perceive a person who manufactures an illegal and dangerous drug like methamphetamine as having a worse moral character than a person who engages in greenhouse gardening. Indeed, the difference in the likeability ratings in the two versions of the story we reported earlier confirms this notion. In Experiment 2, we included additional measures designed to more directly measure the perceived moral character of the transgressor.

Finally, this experiment leaves a question about whether the observed trend in attributing more blame and controllability to a person with bad moral character also extends to attributing less blame and controllability to a person with good (as opposed to neutral) moral character. To address this, in the next experiment we include three versions of moral character: bad, neutral, and good.

## B. Experiment 2: Sam Norton and the Youths

### 1. *Participants*

We recruited 195 participants through Amazon's Mechanical Turk web service. We paid participants fifty cents for completing the survey, which took less than five minutes, and assured them that their responses would remain anonymous and that we would not collect identifying information. Demographic characteristics were similar to the sample in Experiment 1.

### 2. *Design and Materials*

We randomly divided participants into three groups. One group read the "Daughter" (good character) version, one group read the "Business" (neutral character) version, and one group read the "Cheating Coach" (bad character) version of the vignette reproduced below:

Sam Norton used his backyard shed to store oxygen tanks. He knew the tanks posed a fire hazard, but he stored them there because  
[Daughter:] his young daughter has serious respiratory disease,  
and he provides around the clock care for her.

[Business:] he has just started his own business providing in-home delivery of healthcare equipment.

[Cheating Coach:] he is a high school football coach and administers oxygen to his players even though it provides an unfair advantage and is against the rules.

One night, some neighborhood youths were smoking cigarettes behind Sam Norton's shed. One of them tossed a lit cigarette butt on the ground near the shed. Some dry leaves ignited, and soon after, the oxygen tanks in the shed exploded. One of the youths was killed in the explosion.

Each participant read only one version of the vignette. After reading the vignette, we asked participants to provide their own opinion about Sam Norton and his role in the death of the youth. The measures were the same as those in Experiment 1 and appeared in random order with the following exception. To check whether we successfully manipulated perceived moral character, we asked to what extent Norton has a good moral character (1 = not at all; 7 = very much), is trustworthy (1 = not at all; 7 = very much), and is a bad or good person (1 = bad person; 4 = not sure; 7 = good person). We asked these questions about moral character last so as not to alert participants to the hypothesis of interest beforehand.

### 3. Results

As expected, participants judged the Sam Norton who cares for his sick daughter as more moral in character,<sup>104</sup> more trustworthy,<sup>105</sup> and more of a good person<sup>106</sup> than Norton the businessman, and judged Norton the businessman more favorably than the Norton who cheats at football.<sup>107</sup>

Participants' judgments of the extent to which Sam Norton is responsible,<sup>108</sup> blameworthy,<sup>109</sup> and worthy of negative judgment<sup>110</sup> for the death of the youth differed significantly across moral character condition, as did his perceived causal role.<sup>111</sup> The differences are in the direction expected, with the Norton who takes care of his daugh-

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<sup>104</sup>  $F(2, 192) = 38.60, p < .001, \eta_p^2 = .287$ . Daughter ( $M = 4.98$ ); Business ( $M = 4.23$ ); Cheating ( $M = 3.11$ ).

<sup>105</sup>  $F(2, 192) = 37.98, p < .001, \eta_p^2 = .283$ . Daughter ( $M = 4.68$ ); Business ( $M = 3.78$ ); Cheating ( $M = 2.81$ ).

<sup>106</sup>  $F(2, 191) = 30.05, p < .001, \eta_p^2 = .239$ . Daughter ( $M = 4.90$ ); Business ( $M = 4.17$ ); Cheating ( $M = 3.52$ ).

<sup>107</sup> As described above, as a manipulation check, we asked three questions to gauge the perceived moral character of Sam Norton. We asked these questions last after all the measures reported here. See *supra* Part II.B.2.

<sup>108</sup>  $F(2, 192) = 13.12, p < .001, \eta_p^2 = .120$ .

<sup>109</sup>  $F(2, 191) = 18.63, p < .001, \eta_p^2 = .163$ .

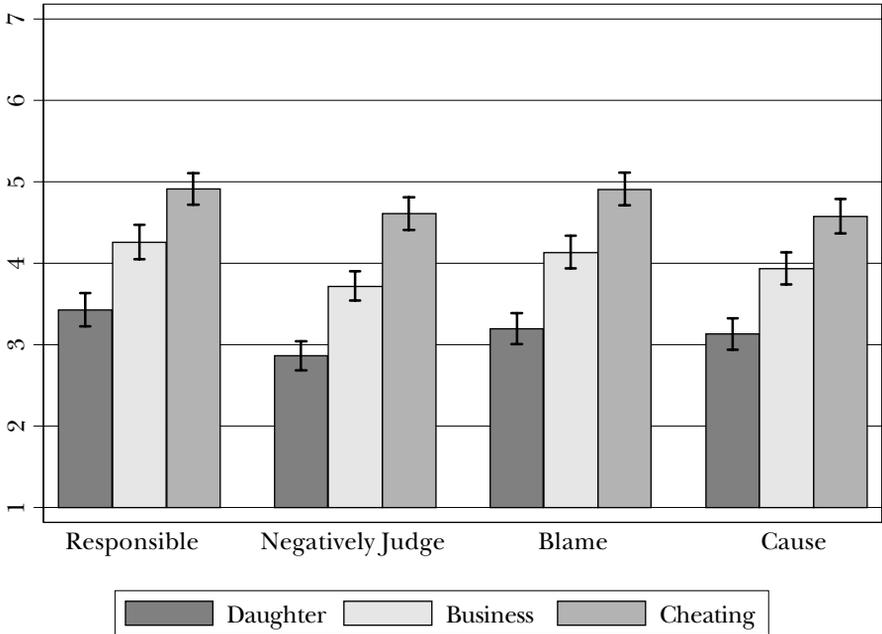
<sup>110</sup>  $F(2, 192) = 21.47, p < .001, \eta_p^2 = .183$ .

<sup>111</sup>  $F(2, 191) = 12.84, p < .001, \eta_p^2 = .119$ .

ter as the least blameworthy and causal, and the Norton who cheats at football the most blameworthy and causal, as illustrated in Figure 5.

FIGURE 5.

EXPERIMENT 2: MEAN RATINGS OF SAM NORTON'S ROLE IN THE DEATH OF THE YOUTH, BY MORAL CHARACTER CONDITION (1 = not at all; 7 = very much).

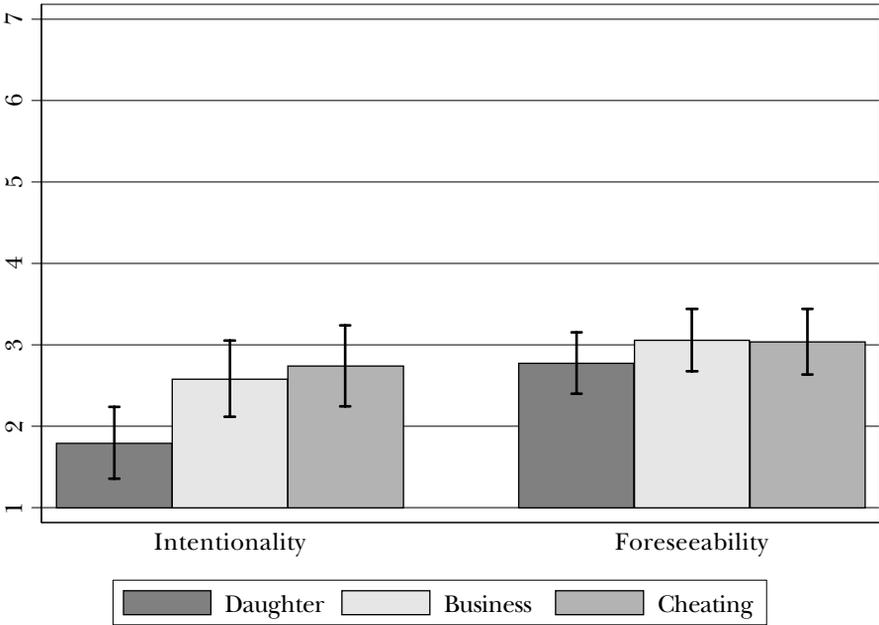


Furthermore, as illustrated in Figure 6, moral character also influenced participants' perceptions of intentionality, with good character (Daughter) leading to perceptions of lesser intentionality, but no differences between neutral (Business) and bad character (Cheating).<sup>112</sup> As to foreseeability, we found no statistically significant influence of moral character.<sup>113</sup>

<sup>112</sup>  $F(2, 192) = 4.40, p < .05, \eta_p^2 = .044$ .

<sup>113</sup>  $F(2, 191) = 0.62, p = .54$ .

FIGURE 6.  
 EXPERIMENT 2: MEAN RATINGS OF SAM NORTON'S MENTAL STATE IN  
 THE DEATH OF THE YOUTH, BY MORAL CHARACTER CONDITION  
 (1 = not at all; 7 = very much).



#### 4. Discussion

In Experiment 2, we replicated the results of the first experiment, while providing more reliable controls for the dangerousness of the act and more directly measuring perceived moral character. As in Experiment 1, we again found that participants perceive a transgressor with a bad moral character as more blameworthy. Additionally, we found that a transgressor with a good moral character (as opposed to a neutral moral character) is less blameworthy, so that when compared to the neutral midpoint, the moral character effect extends in both negative and positive directions. We also again demonstrated that bad moral character gives rise to attributions of controllability, as shown by the effect on perceived causation. It is noteworthy that bad moral character had no observed effect on intent; at the same time, good moral character led participants to perceive the transgressor as having acted less intentionally compared to the control condition.

In demonstrating the role of moral character in the first two experiments, however, we did not separate moral character from the nature and purpose of the conduct that led to harm. That is to say, in the bad moral character Meth condition of Experiment 1, the participants' inference about Brady's character arose from his motive or pur-

pose for storing the risky, flammable materials; the same was true for the good moral character Orchid condition. Notably, the law's tolerance for risk taking like Brady's—or Norton's in Experiment 2—sometimes takes into account motive- or purpose-based welfare considerations. This is particularly evident in the MPC's definition of recklessness and of negligence, both of which account for the nature and purpose of the risky conduct.<sup>114</sup> Specifically, when an individual disregards a substantial risk and the nature and purpose of that disregard is not legitimate, that individual may be criminally liable.<sup>115</sup> On the other hand, when an individual disregards a substantial risk but is motivated in that disregard by a laudatory purpose, the law might recognize both the nature of the risk and its disregard as legitimate and thus, as insufficient to form the basis of criminal liability.<sup>116</sup> In Experiment 1, growing orchids arguably increases social welfare; manufacturing methamphetamine does not. In Experiment 2, the same can be said of caring for a sick daughter and cheating at football, respectively. To begin to try to isolate the influence of social welfare considerations, we attempted in the next experiment to separate moral character from the nature and purpose of the conduct that led to the harm.

### C. Experiment 3: Sara Davidson and the Dogs

The previous experiments varied perceived moral character by manipulating the actor's purpose for creating the hazardous condition. In Experiment 3, we sought to make the source of moral character more remote from the hazardous condition that the actor created. Additionally, we tested a second independent variable along with moral character by varying the transgressor's awareness of the likelihood of harm. We hypothesized participants would perceive offenders who were aware of and disregarded a risk of harm as more responsible and blameworthy than offenders who were not aware of risk—this prediction follows directly from criminal-law theory.<sup>117</sup> We also predicted that bad moral character can serve as a kind of proxy for awareness of risk, so that even when there is reason to believe a transgressor was unaware of a risk, participants would still blame her just as if she were aware of the risk if they perceive her to be a generally bad person.

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114 See MODEL PENAL CODE §§ 2.02(2)(c), (d) (1985).

115 See *id.*

116 See *id.*

117 See *supra* notes 114–116 and accompanying text.

### 1. *Participants*

We recruited 203 participants through Amazon's Mechanical Turk web service. We paid participants one dollar for completing the survey, which took about five minutes to complete, and assured them that their responses would remain anonymous and that we would not collect identifying information. We excluded a number of respondents who failed to correctly respond to an instructional manipulation check,<sup>118</sup> leaving a final sample size of 182 participants. Demographic characteristics were similar to the sample in Experiment 1.

### 2. *Design and Materials*

We randomly divided participants into four groups. We independently varied two factors: first, moral character (Bad; Good) and second, mental state (Aware; Unaware). Each participant read one version of the vignette reproduced below:

[Good Character:] Sara Davidson is a 39 year old woman who lives in a house with her two dogs. Sara has two young nieces whom she adores and sees often. She spoils them with birthday presents and special outings. Sara spends much of her free time volunteering for various local charities. She tries to maintain a healthy lifestyle by eating well and exercising. She has many close friends and an active social life.

[Bad Character:] Sara Davidson is a 39 year old woman who lives in a house with her two dogs. Sara has two young nieces but she rarely sees them, and does not really like to spend time with them. She spends much of her free time watching trash-tv talk shows while smoking and eating junk food, even though she is aware that it's not good for her blood sugar problem. She doesn't socialize much and prefers to keep to herself.

[Aware/Unaware:] Sara's dogs are not well behaved [and she is]/[but she is not really] aware of this. They are in a fenced yard, but they sometimes escape and roam the neighborhood. On one occasion the dogs escaped and cornered two children, barking and growling. The children were unable to escape until a neighbor ran outside with a baseball bat and chased the dogs away. Even when fenced in the yard, the dogs growl and act aggressively toward people walking on the sidewalk.

One morning while Sara was asleep, her dogs escaped and terrorized a neighbor who had just opened his garage door to leave for work. They circled the man's truck and the man jumped in the

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<sup>118</sup> See Daniel M. Oppenheimer et al., *Instructional Manipulation Checks: Detecting Satisficing to Increase Statistical Power*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 867, 867-68 (2009). In our experiment, we asked respondents, "According to the story, to what extent did Sara Davidson realize that her dogs were not well behaved?" We then asked them to choose one of two options: "Sara was NOT really aware of this" or "Sara was aware of this."

truck to escape. His wife heard the yelling and chased them off by startling them with the noise of the automatic garage door.

A few minutes later, two brothers, Chris and Travis, aged 8 and 11, were waiting at a school bus stop when they saw the dogs coming at them. They panicked and climbed up a tree; the dogs circled the tree, barking wildly. The dogs eventually headed down a ravine, and Chris climbed down to check and see where they were. The dogs circled back toward him and chased him. Just as the school bus approached, the dogs caught Chris and began mauling him, within view of the bus driver and the children. The driver called 911 but it was too late—Chris died from his injuries within minutes.

After reading the vignette, we asked participants to provide their own opinion about Davidson and her role in the death of the child. Specifically, we asked the following questions: To what extent is Sara Davidson responsible for the death of the boy? How negatively should Sara Davidson be judged for the death of the boy? How much blame goes to Sara Davidson for the death of the boy? To what extent did Sara Davidson cause the death of the boy? How intentional was Sara Davidson toward the death of the boy? From the perspective of someone in Sara Davidson's position, how foreseeable was the death of the boy? We randomized the presentation of these questions and measured them on a scale ranging from 1 (not at all) to 7 (very much).

To check whether we successfully manipulated perceived moral character, we asked at the end of the questionnaire to what extent Davidson has a good moral character (1 = not at all; 7 = very much), is trustworthy (1 = not at all; 7 = very much), and is a bad or good person (1 = bad person; 4 = not sure; 7 = good person). We varied the order of these questions randomly.

### 3. Results

Responses to the three questions just described, which we used to check whether we successfully manipulated Davidson's perceived moral character, were all highly correlated, so we combined these three items into a single measure of moral character (1 = not at all; 7 = very much).<sup>119</sup> As expected, participants' perceptions of Davidson's moral character depended on whether participants read the Good Character condition (in which Davidson was sociable, generous, and healthy) or the Bad Character condition (in which Davidson was unsociable and unhealthy).<sup>120</sup> This provides evidence that we successfully manipulated perceived moral character.<sup>121</sup>

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<sup>119</sup> Cronbach's alpha = .92.

<sup>120</sup>  $F(1, 181) = 152.01, p < .001, \eta_p^2 = .458$ ; Good Character ( $M = 4.40$ ); Bad Character ( $M = 2.61$ ).

<sup>121</sup> Note that we manipulated moral character, in part, by manipulating the food and exercise choices of the target person (Sara Davidson). There is some empirical evidence

As mentioned previously, we manipulated both moral character and awareness of the risk of harm in this experiment. We first examined the effect of moral character and of awareness on participants' judgments of the extent to which Davidson is responsible for the boy's death, is worthy of negative judgment for the boy's death, and is blameworthy for the boy's death. Participants' responses were highly correlated, so we combined them into a single measure of overall responsibility.<sup>122</sup> Figure 7 illustrates the means. Specifically, participants perceived Davidson as having more overall responsibility for the boy's death if her character was bad than if it was good,<sup>123</sup> and also possibly if she was aware of the risk of harm than if she was unaware.<sup>124</sup> As is also apparent from Figure 7, participants treated Davidson in the Unaware condition as if she was aware of the risk when they also learned that her character is bad, but assigned her noticeably less overall responsibility if they also learned that her character is good.

Additionally, participants' judgments of causation varied according to Davidson's awareness of risk<sup>125</sup> and possibly also according to her moral character,<sup>126</sup> as illustrated in Figure 8. Specifically, awareness of risk played a clear role in participants' judgments of causation; in addition, participants perceived Davidson in the Unaware condition to have a lessened causal role if her moral character was good.

We also asked participants about the extent to which the boy's death was intentional and the extent to which it was foreseeable. Participants perceived Davidson's role in the boy's death as more intentional if her character was bad<sup>127</sup> and if she was aware of the risk.<sup>128</sup>

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that eating specific types of foods (i.e., healthy as compared to unhealthy) gives rise to moral judgments about the eater. See, e.g., Richard I. Stein & Carol J. Nemeroff, *Moral Overtones of Food: Judgments of Others Based on What They Eat*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 480, 480–81, 489 (1995). Our manipulation check results—that Sara was seen as less moral based partly on food choices and exercise—is consistent with this evidence. See *id.*; see also Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1777 & n.467 (2004) (quoting Congressman F. James Sensenbrenner on the proposed Personal Responsibility in Food Consumption Act, H.R. 554, 109th Cong. (2005), as saying, “Don’t run off and file a lawsuit if you are fat . . . . Look in the mirror because you’re the one to blame.” (omission in original) (citing Carl Hulse, *Vote in House Offers a Shield in Obesity Suits*, N.Y. TIMES, Mar. 11, 2004, at A1)).

<sup>122</sup> Cronbach's alpha = .92.

<sup>123</sup>  $F(1, 181) = 10.77$ ;  $p < .01$ ;  $\eta_p^2 = .040$ .

<sup>124</sup> This difference was only marginally statistically significant.  $F(1, 181) = 4.32$ ;  $p = .08$ ;  $\eta_p^2 = .016$ . The interaction between moral character and awareness of risk was not statistically significant.  $F(1, 181) < 1$ .

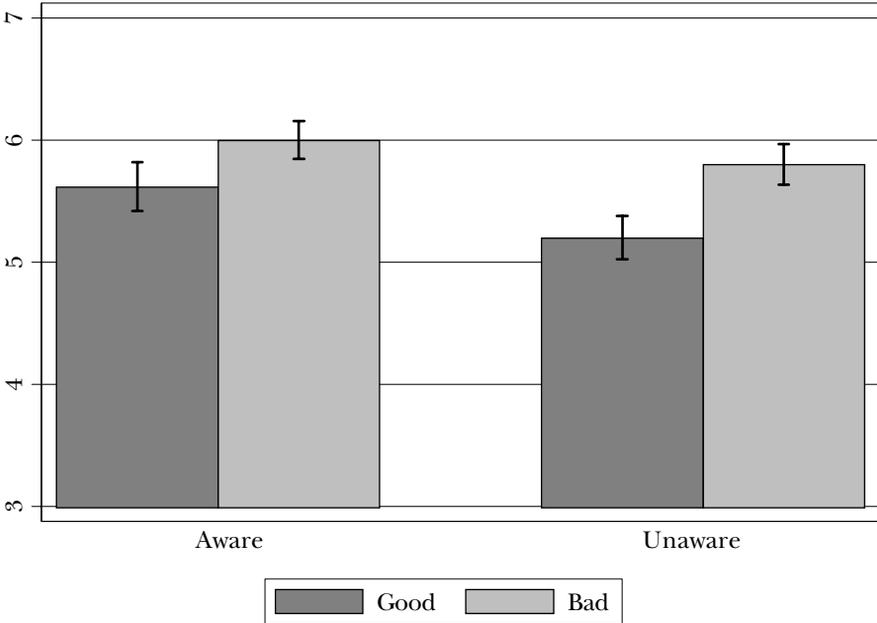
<sup>125</sup>  $F(1, 181) = 6.83$ ;  $p < .01$ ;  $\eta_p^2 = .036$ .

<sup>126</sup> This difference was only marginally statistically significant.  $F(1, 181) = 2.94$ ;  $p = .08$ ;  $\eta_p^2 = .016$ . The interaction between moral character and awareness of risk was not statistically significant.  $F(1, 181) < 1$ .

<sup>127</sup>  $F(1, 181) = 19.74$ ;  $p < .001$ ;  $\eta_p^2 = .091$ .

<sup>128</sup>  $F(1, 181) = 16.75$ ;  $p < .001$ ;  $\eta_p^2 = .077$ .

FIGURE 7.  
 EXPERIMENT 3: MEAN RATINGS OF SARA DIVIDSON'S  
 OVERALL RESPONSIBILITY IN THE DEATH OF THE BOY,  
 BY MORAL CHARACTER AND AWARENESS  
 (1 = not at all; 7 = very much).



An interaction,<sup>129</sup> illustrated in Figure 9, qualified these effects. Participants perceived Davidson with both bad character and awareness of risk as acting with the highest degree of intentionality; participants inferred less intentionality, however, where either awareness or good character was lacking. Finally, participants' perceived foreseeability of the boy's death varied, not surprisingly, by whether Davidson was aware of the risk.<sup>130</sup> We observed no effect, however, of moral character on perceptions of foreseeability<sup>131</sup> and no interaction between moral character and foreseeability.<sup>132</sup>

#### 4. Discussion

In this third experiment, we attempted to more cleanly separate motive from character and to hold constant the social-welfare consequences of the risky conduct. In Experiment 1, the chemicals for manufacturing methamphetamine signaled Frank Brady's bad moral

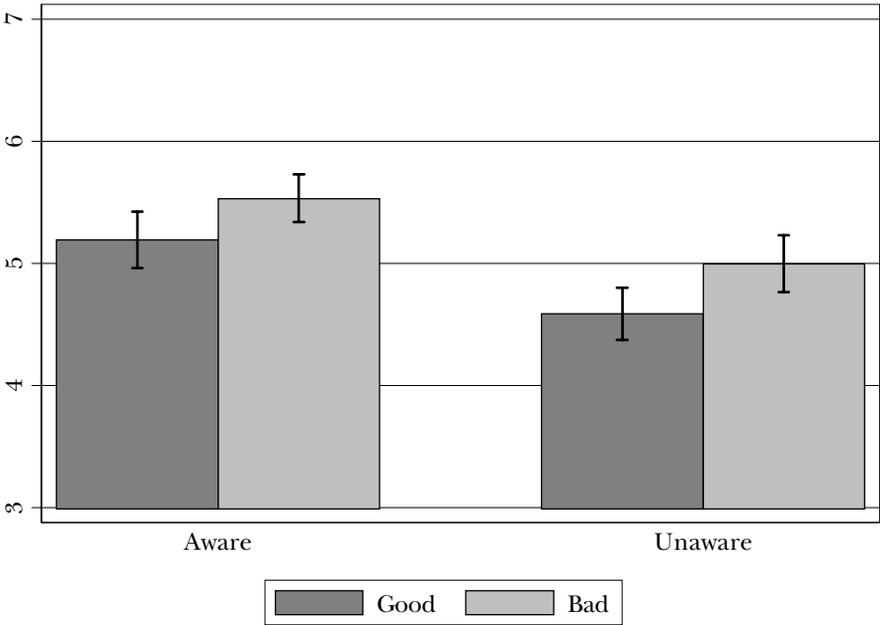
<sup>129</sup>  $F(1, 181) = 3.99; p < .05; \eta_p^2 = .018$ .

<sup>130</sup>  $F(1, 181) = 34.70; p < .001; \eta_p^2 = .162$ ; Aware of Risk ( $M = 4.77$ ); Unaware of Risk ( $M = 3.32$ ).

<sup>131</sup>  $F(1, 181) = 0.07; p = .78$ .

<sup>132</sup>  $F(1, 181) = 2.31; p = .36$ .

FIGURE 8.  
 EXPERIMENT 3: EXTENT TO WHICH SARA DAVIDSON WAS  
 PERCEIVED TO HAVE CAUSED THE BOY'S DEATH  
 (1 = not at all; 7 = very much).

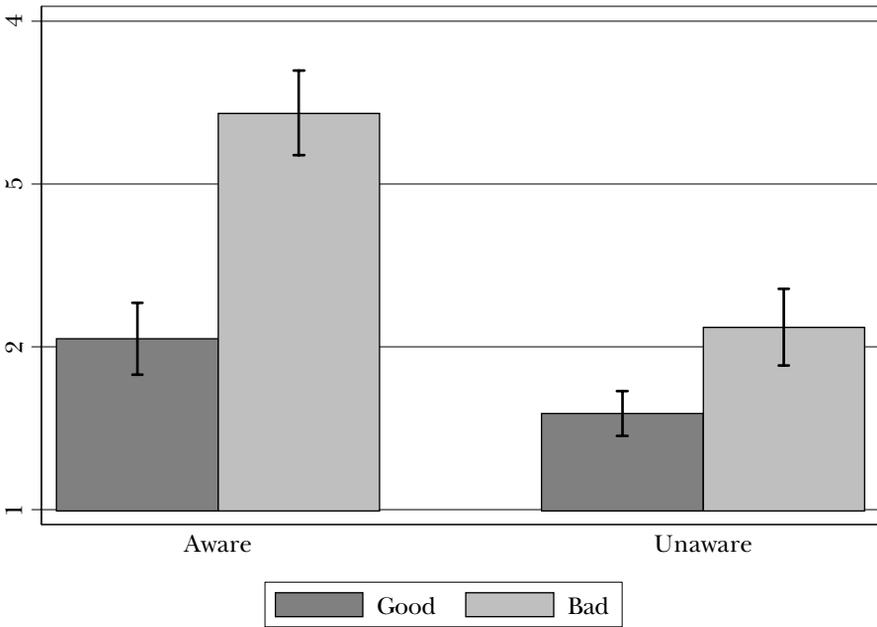


character, but the chemicals also were his reason for creating the hazardous situation that started the fire and led to the pilots' deaths. In Experiment 2, Sam Norton's motive for storing the flammable oxygen signaled his moral character (bad, neutral, or good), but it was also his reason that created the hazardous situation that led to the explosion and the death. In Experiment 3, Sara Davidson's traits of generosity, sociability, and even physical fitness, rather than her possible motive or purpose for owning dogs, signaled her moral character. In other words, we separated the moral character signal from the hazardous situation Davidson created. Thus, unlike Brady's and Norton's motives, Davidson's motive for creating the hazardous situation was independent of the source from which participants could infer her moral character.

Under these facts, the criminal law would permit an inference of liability based on the hazardous situation Davidson created but not based on her personality or lifestyle.<sup>133</sup> Yet, participants viewed the boy's death differently depending on whether Davidson was either the

<sup>133</sup> See *supra* notes 30–33 and accompanying text; cf. Bayles, *supra* note 9, at 7 (explaining that, beyond the conception of *mens rea*, if an act does not indicate an undesirable character trait, then blame is inappropriate).

FIGURE 9.  
 EXPERIMENT 3: EXTENT TO WHICH SARA DAVIDSON WAS PERCEIVED  
 TO HAVE ACTED INTENTIONALLY TOWARD THE BOY'S DEATH  
 (1 = not at all; 7 = very much).



type of person who ignores her nieces and sits alone watching trashy TV and eating junk food, or the type of person who spoils her nieces, volunteers, exercises, and watches her diet. Compared to “good” Davidson, participants perceived “bad” Davidson as more responsible overall for the boy’s death. In accordance with criminal-law theory, being aware of the risk that the dogs posed to people led to greater inferences about responsibility.<sup>134</sup> Interestingly, the effects of bad character are comparable to the effects of awareness: possessing a bad character is akin to being reckless to the extent that bad character gives rise to inferences about blame and responsibility as well as to inferences about causation. The intentionality data suggest that bad character motivates unfavorable inferences regarding mental state. Here, participants perceived Davidson’s failure to safeguard unruly dogs as intent to kill when Davidson was not only aware of the risk but was also a bad person.

<sup>134</sup> See SAMUEL H. PILLSBURY, *HOW CRIMINAL LAW WORKS: A CONCEPTUAL AND PRACTICAL GUIDE* 106 (2009) (stating that a criminal defendant who “acts with awareness of a high and unjustifiable risk that the result will occur” will be criminally responsible for her actions).

In this set of experiments, we demonstrate empirically that perceptions of moral character sometimes influences judgments of blameworthiness. Additionally, this set of studies makes several other contributions to the literature on blame and character. Our findings are consistent with Alicke's culpable control model<sup>135</sup>—that is, we demonstrate that negative blame judgments arise not only because of bad reasons for acting (Experiments 1 and 2), but also because of bad moral character that is signaled independently from those reasons for acting (Experiment 3). Alicke argues that bad reasons for acting lead to greater perceptions of control and more extreme judgments about blame.<sup>136</sup> We add to this by showing that bad character (apart from reasons for acting) influences control inferences (such as causation, intent, and foreseeability) as well as blame judgments. We suggest that this tendency is rooted in more general theories about motivated reasoning. Specifically, people are generally motivated to inculpate a defendant they see as “bad”; this initial motivation leads them to interpret the defendant's transgression in a way that makes it more legally blameworthy. Conversely, people are generally motivated to exculpate a defendant they see as “good,” leading them to interpret the transgression as less legally blameworthy.<sup>137</sup> Our results are consistent with the notion that bad moral character prompts an inference to a desired conclusion, namely, increased blame. Judgments about greater causal influence and intent are also increased to justify the blame conclusion, which is likely to follow quickly and intuitively from the information about the severity of the harm and the moral character of the actor.

To further explore the phenomenon of motivated inculpation, in the following section we discuss its implications for legal doctrine with a specific focus on criminal law.

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<sup>135</sup> See Alicke, *supra* note 39, at 556–58.

<sup>136</sup> See *id.* at 568–69; see also Alicke, *supra* note 40, at 607–10 (demonstrating that an actor's prior bad or good behavior influences judgments of blame).

<sup>137</sup> The conclusion that good moral character influences blame judgments in a similar, but opposite, way as bad moral character is supported by the results of Experiment 2, which contrasted good and bad moral character with a third neutral moral character condition that acted as a control. Recall that blame judgments for the bad actor were more severe than the neutral actor; blame judgments for the good actor were less severe than the neutral actor. The notion that good deeds can license subsequent bad behavior has been recently demonstrated by Daniel A. Effron & Benoît Monin, *Letting People Off the Hook: When do Good Deeds Excuse Transgressions?*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 1618, 1631–33 (2010) (showing that good deeds reduce condemnation when they are in a different domain (e.g., crusading against drugs) than the subsequent transgression (e.g., committing sexual harassment)).

### III IMPLICATIONS FOR LEGAL DOCTRINE

The results of our experiments have implications that branch into two different strands. The first is that an actor's motive (along with its implicit suggestions about moral character) can strongly influence inferences about causation, intent, and blame. The second is that moral character, inferred independently from an actor's motive for creating harm (or the conditions that led to harm) can influence judgments about causation, intent, and blame. Our findings are most consequential in legal situations when character or motive information is most likely to enter the process. In this Article, we have concentrated on criminal cases, but character and motive can potentially sway judgments in any kind of case. For example, an employer being sued for discrimination might introduce evidence that the employee has a history of cocaine use, either to provide a nondiscriminatory reason for firing the employee or simply to try to undercut the employee's claim for emotional-distress damages. Our experiments focus on blame attributions for acts that the law treats as criminal, and so we focus our discussion of implications on criminal law and related issues in evidence. We specifically examine the implications of our findings on felony murder, evidentiary issues, criminal statutory interpretation, and causation.

#### A. Motive and Felony Murder

In the first two experiments we report in this Article, participants associated bad motive with more severe judgments of blame and responsibility than good motive. These findings mapping intuitive notions of blame correspond well with modern definitions of mens rea.<sup>138</sup> The general hierarchy of mens rea<sup>139</sup> corresponds to strongly held intuitions. The criminal law categorizes intentional killings, for example, as more serious than reckless killings, which are in turn more serious than negligent killings.<sup>140</sup> Likewise, outside of a legal context we are more psychologically inclined to blame (or to blame more harshly) when a transgressor acted intentionally than when he acted recklessly or negligently.<sup>141</sup> This hierarchy is so deeply in-

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<sup>138</sup> See MODEL PENAL CODE § 2.02(1) (1985).

<sup>139</sup> See *id.* § 2.02(2) (identifying "purposely," "knowingly," "recklessly," and "negligently" as the four levels of culpability).

<sup>140</sup> See PILLSBURY, *supra* note 134, at 157–59.

<sup>141</sup> See John M. Darley et al., *Doing Wrong Without Creating Harm*, 7 J. EMPIRICAL LEGAL STUD. 30, 52 (2010); Lawrence M. Solan & John M. Darley, *Causation, Contribution, and Legal Liability: An Empirical Study*, 64 LAW & CONTEMP. PROBS. 265, 284–95 (2001); see also Carlsmith et al., *supra* note 4, at 285 (discussing how the "just deserts" theory of punishment dictates that the punishment should be proportional to the harm caused by the defendant).

grained that even young children invoke it to mitigate their own responsibility for harm.<sup>142</sup>

Historical conceptions of mens rea required finding an evil purpose in order to impose liability—terms like “vicious will,” “wickedness,” and “malevolence” were common occurrences in judicial opinions.<sup>143</sup> One prominent manifestation of this idea is traditional felony-murder doctrine, in which unforeseen deaths that occur during the commission of a felony are treated as murder.<sup>144</sup> The basis for this treatment is the malice that is implicit in the underlying felony.<sup>145</sup> Put differently, the implication underlying the doctrine is that in committing the felony, the defendant acted with an evil mind or evil purpose such that in doing a bad act the felon has no standing to complain about being punished for the harmful consequences of her actions.<sup>146</sup> This historical conception of mens rea as malice or bad motive is consistent with the results from the first two experiments, which show that bad motive is sufficient, in some circumstances, to justify blame for the harmful consequence even if that consequence is unanticipated.

Accordingly, public support for the felony-murder rule may stem from the intuition that anyone committing a felony is by definition acting with an evil motive that in itself may justify liability for any ensuing harm—even for an unforeseen death.<sup>147</sup> By contrast, the law (and the public) usually deems an innocent person involved in an innocent activity that leads to a death as simply involved in an accident.<sup>148</sup> That accident, however, becomes criminally blameworthy when the person involved was engaged in a morally blameworthy activity.<sup>149</sup> Felony murder, therefore, is designed to protect society from people acting for bad reasons—that is, those who engaged in dangerous felonies that demonstrate a willingness to harm others.<sup>150</sup> The law is much less likely to find blameworthy a defendant who can demonstrate that he

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<sup>142</sup> An example of this is when children say, “But I didn’t mean to!” See Thomas R. Shultz et al., *Assignment of Moral Responsibility and Punishment*, 57 CHILD DEV. 177, 182–83 (1986) (showing that children assign greater moral responsibility to acts involving intention than to negligence or accident).

<sup>143</sup> See, e.g., James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1435 & nn.22–24 (1994).

<sup>144</sup> See *id.* at 1433 (“[T]he felony-murder rule provides that the killing of another human being in the furtherance of any felonious enterprise constitutes the crime of murder.”).

<sup>145</sup> See *id.* at 1446.

<sup>146</sup> See *id.*

<sup>147</sup> See *id.* at 1472–75.

<sup>148</sup> See *id.* at 1472.

<sup>149</sup> See *id.* at 1472–73; Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 1032–46 (2008) (proposing an expressive theory of felony-murder culpability that punishes values expressed through dangerous actions).

<sup>150</sup> See Binder, *supra* note 149.

was really acting for good reasons but got caught up in producing a dangerous situation.<sup>151</sup>

Conversely, the absence of evil motive often motivates the criminal law to recognize various defenses.<sup>152</sup> Most notably, the duress excuse is based on the notion that punishment is unjustly imposed on those who acted out of fear for themselves or their loved ones rather than out of any evil motivation.<sup>153</sup> Similarly, the self-defense justification is permitted as a defense to criminal liability when a defendant can show that he harmed another to avoid harm to himself rather than out of an evil motive.<sup>154</sup>

## B. Moral Character and Implicit Mental State Requirements

Aspects of motive commonly come into play as necessary to understand a defendant's mental state, especially where mental state requirements use normatively valenced descriptors like "vicious will," "wickedness," and "malevolence." Although these terms might indicate an implicit requirement of bad motive, they might also indicate an implicit judgment of bad moral character. Historically, certain crimes involved acts that were viewed as so inherently wrongful that *mens rea* was essentially self-proving; the law assumed that any person who would do such an act acted with a bad intent.<sup>155</sup> Thus, if a killer's actions evidence an inner wickedness such that he has "an abandoned and malignant heart," then he is guilty of a more serious grade of homicide than a killer whose heart was not abandoned and malignant, even if the abandoned-and-malignant heart killing was unintentional.<sup>156</sup>

There is reason to think that the Supreme Court has implicitly held onto the idea that moral character properly informs the criminal liability analysis. In cases where the defendant might plausibly offer a version of events in which he was a good guy who got caught up in a bad situation, it may be the case that the Court is more demanding of the government and will more readily read in a specific *mens rea* requirement, even when it does not appear in the statute being applied.<sup>157</sup> Joseph E. Kennedy has argued that this explains the Court's

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<sup>151</sup> See *id.* at 1472 ("Wholly accidental killings by otherwise innocent persons are not criminalized . . . [W]e excuse such persons because we can attribute no fault to them.")

<sup>152</sup> See Gardner, *supra* note 29, at 660–67.

<sup>153</sup> See *id.* at 738.

<sup>154</sup> See *id.* at 660–61.

<sup>155</sup> See, e.g., *Wilkerson v. Utah*, 99 U.S. 130, 131 (1878).

<sup>156</sup> See *id.*

<sup>157</sup> See, e.g., *Staples v. United States*, 511 U.S. 600, 604–07, 614–16 (1994) (requiring a specific *mens rea*, despite the lack of such a requirement in the relevant statute, for a defendant who claimed that he was unaware a firearm he possessed was actually a machine gun); cf. *Cheek v. United States*, 498 U.S. 192, 194–96, 203–04 (1991) (requiring knowledge that conduct was illegal, even though the statute included a willfulness requirement,

decision in *Staples v. United States*,<sup>158</sup> in which the Court read a knowledge requirement into a gun-possession statute criminalizing conduct that could arguably be unknowing and innocent.<sup>159</sup> Similarly, in *Cheek v. United States*, the Court read into a criminal tax-evasion statute the requirement that the defendant knew that his actions violated the law because the tax laws are complex and because it believed that Congress did not intend to deem a person who misunderstands that complexity a criminal.<sup>160</sup> On the other hand, when the crime involves an inherently wrongful actus reus (for example, robbery) the Court is hesitant to impose a mental state requirement when it does not explicitly appear in the statute.<sup>161</sup> “In this sense,” Kennedy argues, “only those of good character need apply for relief under *Staples*.”<sup>162</sup>

In the experiments we present in this Article, participants perceived a greater degree of intent when the actor’s character was bad, compared to when it was good. In Experiments 1 and 2, Frank Brady and Sam Norton’s bad character was revealed through their bad reasons for storing flammable substances, and participants perceived these actors as having acted more intentionally toward the victims’ death compared to actors with good reasons for storing them. In Experiment 3, by contrast, Sara Davidson’s bad character was independent of the dangerous situation she created with her dogs. Despite her slothful and unhealthy lifestyle, “bad” Davidson displayed the very same values as “good” Davidson in failing to control her unruly dogs. Yet this difference in moral character led to inflated perceptions of “bad” Davidson’s intentions. This pattern of results suggests that observers’ evaluations of the actor’s moral character influence more than just straightforward blaming judgments—bad character gives rise to inferences about more culpable mental states regarding the resulting harm.

One account of the Court’s reasoning in *Staples* and in *Cheek*, then, is that the Justices perceive the possibility that these respective

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for a commercial airline pilot who evaded taxes after “learning” that wages were not taxable income from lectures by members of a tax protest group).

<sup>158</sup> 511 U.S. 600. The criminal action at question in this case was for the possession of a weapon capable of automatically firing. The defendant Staples did not dispute his possession of the weapon but rather claimed that he was unaware of the weapon’s ability to fire automatically. For a discussion of the role of character in this case, see Joseph E. Kennedy, *The Story of Staples v. U.S. and the Innocent Machine Gun Owner: The Good, the Bad, and the Dangerous*, (Univ. N.C. Legal Studies Research Paper No. 1596222, 2010), available at <http://ssrn.com/abstract=1596222>. For a more historical discussion, see PILLSBURY, *supra* note 48, at 84, which notes that under the mens rea requirements of the English common law, “[t]he language was that of character judgment, and courts assumed that in judging the criminal conduct they were making character assessments as well.”

<sup>159</sup> See Kennedy, *supra* note 158, at 1.

<sup>160</sup> 498 U.S. at 199–201.

<sup>161</sup> See Kennedy, *supra* note 158, at 35–36.

<sup>162</sup> *Id.* at 36.

defendants are being good people acting for good reasons, with the absence of the level of culpability that is otherwise required for serious felonies such as the ones that were at issue in these two cases. Perceptions of these defendants' good character may have motivated the Justices to blame these defendants lightly. Requiring a high level of mental culpability is consistent with this desire for light blame in these two instances. The result, then, is a rule imputing a mens rea element in these two particular offenses.

This account shares some similarities with the moral-evaluation conception of emotion in criminal law discussed earlier.<sup>163</sup> The moral-evaluation account holds that impassioned offenders' emotions express values, and our evaluation of the goodness or badness of those values leads to our appraisal of full blame, mitigation, or exoneration.<sup>164</sup> Similarly, the Court in *Staples* and in *Cheek* evaluated those defendants' respective motives as non-evil, and interpreted the respective statutes as requiring proof of conscious wrongdoing with the end result that liability was less likely. Finally, the participants in all three experiments discussed here evaluated the goodness or badness of the actor's character, perceived their mental state as less or more intentional, and blamed them less or more, respectively.<sup>165</sup>

### C. Moral Character in Evidence

Our experiments also have particularly potent practical implications for the treatment of character evidence in criminal trials. Our findings highlight the highly influential potential of evidence of bad character, even when it is only tangentially related to the crime at hand. Our results further substantiate the concerns expressed by the judges that first crafted and applied the common-law ban on charac-

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<sup>163</sup> See text accompanying notes 49–50.

<sup>164</sup> See Kahan & Nussbaum, *supra* note 49.

<sup>165</sup> There is an important difference, however, between the moral-evaluation conception and the account of motivated moral reasoning that we suggest accounts for at least some of our results. See Dan M. Kahan, *Two Conceptions of Emotion in Criminal Law: An Essay Inspired by Bill Stuntz*, in *THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ* (Michael Klarman et al. eds., forthcoming 2012). According to the moral-evaluation conception developed by Dan M. Kahan and Martha C. Nussbaum, guilt assessments flow from jurors' perceptions of the moral quality of the defendant's emotions, regardless of whether those emotions may have reduced the defendant's ability to freely choose to act. See Kahan & Nussbaum, *supra* note 49. By contrast, Kahan, offers a "cognitive conception" of moral evaluation, in which jurors' moral evaluations of a defendant's emotions influence their perceptions of volition, which in turn drive guilt assessments. See Kahan, *supra*. Thus, a defendant whose emotions betray atrocious values is perceived as acting with full volitional capacity, and is judged fully guilty. See *id.* In these experiments we examine character and mens rea rather than emotion and volition, but the upshot is consistent with Kahan's "cognitive conception" of moral evaluation. In our experiments, participants evaluated the actor's moral character, which influenced both blame judgments as well as perceptions of intentionality. Actors with bad character were seen as having acted more intentionally and were assessed as more blameworthy.

ter evidence.<sup>166</sup> These findings are also consistent with other empirical work suggesting that the likelihood of conviction increases if a defendant's prior crimes are admitted into evidence.<sup>167</sup>

Restrictions on character evidence are primarily targeted at evidence meant to prove the defendant's propensity to conform his conduct to his bad moral character.<sup>168</sup> There are, however, several exceptions to this general rule. For example, Congress and several states allow evidence of any past sexual transgressions to be admitted in cases involving child molestation or sexual assault.<sup>169</sup> A few states allow the presentation of propensity evidence in cases involving domestic abuse.<sup>170</sup> Also, if a defendant chooses to testify as a witness, the Federal Rules of Evidence allow the prosecutor to present character evidence in the form of "[o]pinion and reputation evidence" that impugns the credibility of the witnesses.<sup>171</sup> And, as discussed above, some character evidence can be introduced as motive in order to prove *mens rea*.<sup>172</sup> Although the Federal Rules of Evidence classify evidence relating to motive as noncharacter evidence,<sup>173</sup> juries are

<sup>166</sup> See, e.g., *State v. Lapage*, 57 N.H. 245, 289 (1876) ("The very fact that a man is charged with a crime is sufficient to create in many minds a belief that he is guilty. It is quite inconsistent with that fairness of trial to which every man is entitled, that the jury should be prejudiced against him by any evidence except what relates to the issue; above all it should not be permitted to blacken his character . . .").

<sup>167</sup> See, e.g., Eisenberg & Hans, *supra* note 15, at 1357, 1380–85 (finding a significant association between the jury's learning of a criminal record and conviction in cases with weak evidence).

<sup>168</sup> See FED. R. EVID. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . ."); Norman Krivosha et al., *Relevancy: The Necessary Element in Using Evidence of Other Crimes, Wrongs, or Bad Acts to Convict*, 60 NEB. L. REV. 657, 664 (1981) (tracing the roots of the common-law ban on character evidence to the 1810 English case *Rex v. Cole*) (citing Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954, 959, 960–61 (1933)); see also KENNETH S. BROUN, MCCORMICK ON EVIDENCE 311 (6th ed. 2006) (defining character evidence as "evidence offered solely to prove a person acted in conformity with a trait of character on a given occasion"); Sherry F. Colb, "Whodunit" Versus "What was Done": When to Admit Character Evidence in Criminal Cases, 79 N.C. L. REV. 939, 941 (2001) ("The rule prohibits the introduction of character evidence to prove that an individual acted in conformity with his character on the occasion in question."); Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 989 (1938) ("So great, runs the thought, was the solicitude of the common law to avoid damning the accused with prejudice, diffusion, and confusion of issues that, however relevant and on whatever issue, similar facts and, above all, similar bad acts of the accused were never admitted.").

<sup>169</sup> See FED. R. EVID. 413–15; see also Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 159 (1993) (discussing state law exceptions to character-evidence rules in sexual-assault and child-molestation cases).

<sup>170</sup> See Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 700–02 & n.44 (2003).

<sup>171</sup> FED. R. EVID. 608(a).

<sup>172</sup> See *supra* notes 23–25 and accompanying text.

<sup>173</sup> See FED. R. EVID. 404(b).

likely to extrapolate information about character from evidence about a person's priorities, choices, and motivations.<sup>174</sup> Thus, "what we regulate as 'character evidence' is only a small part of the evidence and arguments that lawyers use to develop competing versions of the characters of the actors in the events that are subject to litigation."<sup>175</sup> Despite procedural efforts to control the influence of character evidence in criminal trials, the competing narratives that prosecutors and defense attorneys use in criminal cases are largely concerned with conveying a distinct impression of the character of the parties involved in the case.<sup>176</sup> As a result of all this, characterizations about the moral character of the parties continue to enter trials in various ways.<sup>177</sup>

#### D. Moral Character and Proximate Cause

One distinctive feature of the vignettes tested in the three experiments we report here is that they all involved a force that intervened between the actors' initial actions and the harms that resulted. For Frank Brady, a negligent pilot flew in the wrong direction; for Sam Norton, a youth tossed a burning cigarette butt onto dry leaves; for Sara Davidson, her dogs attacked a young boy. These types of situations raise the issue of proximate cause, a doctrine that helps observers attach blame to an actor for some causes and withhold blame from actors for other, more remote, causes.<sup>178</sup>

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<sup>174</sup> See, e.g., Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 754–55 (1998) (noting that in the context of limiting instructions about character evidence, it is hard for juries to be "consistent in resisting common sense"); Peter Tillers, *What is Wrong with Character Evidence?*, 49 HASTINGS L.J. 781, 810, 825 (1998) (suggesting that a connection exists between motive and character insofar as "human creatures have an internal system of rules, principles, or operations that regulates . . . or organizes their behavior" and "it is logically permissible to suppose that 'character' is 'caused' by matters such as 'choice' and 'decision'").

<sup>175</sup> Samuel R. Gross, *Make-Believe: The Rules Excluding Evidence of Character and Liability Insurance*, 49 HASTINGS L.J. 843, 845–46 (1998).

<sup>176</sup> See Kenworthy Bilz, *We Don't Want to Hear It: Psychology, Literature and the Narrative Model of Judging*, 2010 U. ILL. L. REV. 429, 430, 473–75 ("[L]egitimate criminal condemnation demands complete, rich, narrative trials."); Jim M. Perdue, *Winning with Stories: Using the Narrative to Persuade in Trials, Speeches & Lectures*, 69 TEX. B.J. 984, 990 (2006) (arguing that "[a] trial story is all about character"); Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 738 (1997) (reviewing LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996) (characterizing trials as competitions between stories, where the "[p]laintiff and defendant in a trial each tell a story . . . and the jury chooses the story that it likes better").

<sup>177</sup> For a discussion of these various ways see, for example, Tillers, *supra* note 174 and Park, *supra* note 174.

<sup>178</sup> See *Welch v. State*, 235 So. 2d 906, 907 (Ala. 1970) ("Mankind might still be in Eden, but for Adam's biting an apple.").

As a criminal-law doctrine, proximate (legal) cause is notorious for its lack of specific standards to guide outcomes.<sup>179</sup> The proximate-cause inquiry typically focuses on one or more of the following standards: the remoteness of the result, the foreseeability of the result, the extent to which the result seems accidental, and the degree of dependence of the result on another person's act.<sup>180</sup> These factors, however, are difficult to apply with any degree of precision, and the inquiry typically collapses, either implicitly or explicitly, into a normative one about whether it seems just to hold the actor morally responsible for the result under the circumstances.<sup>181</sup> The Model Penal Code gestures toward the normative inquiry when it specifies that the result must be "not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense."<sup>182</sup>

A cursory look at familiar criminal-law proximate-cause cases reveals a connection between blameworthiness and liability when we view those cases through the lens of moral character and motive rather than through more traditional notions of remoteness and foreseeability. For example, in a case where the defendants robbed the victim and left him passed-out drunk on the side of a dark rural highway, the court found that the robbers proximately caused the death of the victim who was run over by a passing car.<sup>183</sup> In another case, the defendant led police on a dangerous forty-eight-mile high-speed highway chase that resulted in the death of a pursuing police helicopter pilot; the appellate court upheld the finding of proximate cause.<sup>184</sup> But where the defendant participated in a drag race where both cars crashed through a guardrail and the driver of the other car died, the appellate court reversed the conviction on proximate-cause grounds.<sup>185</sup>

Arguably, these results fit within the pattern found in our experiments: the worse the moral character of the defendant, as inferred from the defendant's choice of activity, the more likely we are to hold him criminally liable for the harm. Admittedly, this is an extremely small, nonrandomly selected sample of proximate-cause cases. Note, however, that causation was one of the attributes participants in our

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<sup>179</sup> See Mark F. Grady, *Proximate Cause Decoded*, 50 UCLA L. REV. 293, 294 (2002) ("[M]any believe that proximate cause is basically incoherent, that its cases cannot be predicted, and even that they illustrate some fundamental disorder of the common law.").

<sup>180</sup> See PAUL H. ROBINSON CRIMINAL LAW: CASE STUDIES & CONTROVERSIES 260 (2d ed. 2008).

<sup>181</sup> See *id.*

<sup>182</sup> MODEL PENAL CODE § 2.03(2)(b), (3)(b) (1985) (alterations in original).

<sup>183</sup> See *People v. Kibbe*, 321 N.E.2d 773, 776-77 (N.Y. 1974).

<sup>184</sup> See *People v. Acosta*, 284 Cal. Rptr. 117, 120, 129 (Ct. App. 1991).

<sup>185</sup> See *Velazquez v. State*, 561 So. 2d 347, 354 (Fla. Dist. Ct. App. 1990).

experiments rated; in all three experiments, participants gave higher causation ratings to actors with bad moral character.<sup>186</sup>

In Experiments 1 and 2, participants' perception of causation was arguably consistent with proximate-cause doctrine, at least in its more explicitly normative form. In both of these experiments, when the actor had a nefarious motive for storing flammable substances, his actions were perceived to be a stronger cause of death than when he had an acceptable motive. Arguably, the law of proximate cause accounts for these judgments: death resulting from exploding chemicals is arguably not too remote or accidental to have a just bearing on liability when the actor's motive is nefarious, such as methamphetamine production or football cheating. At the same time, when the actor's motive is virtuous, death from exploding chemicals is arguably closer to being too remote or accidental to have a just bearing on liability. This is closely analogous to the Model Penal Code's definition of recklessness, which takes into account the "nature and purpose" of the defendant's conduct for the purpose of determining whether the defendant's conduct constituted a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."<sup>187</sup> Under each doctrine, the assessment of the moral quality of the values driving the actor's conduct leads directly to judgments of causation or recklessness, as the case may be.

#### CONCLUSION AND LIMITATIONS

In these experimental studies, we demonstrate that a transgressor's motive for acting can influence judgments of blame, responsibility, causation, and intention. We also show that perceptions of a transgressor's moral character can influence judgments of blame, responsibility, causation, and intention. We certainly do not claim, however, that motive and moral character always influence blame-related judgments. The influence of motive and moral character is subject to limitations, and we have not yet explored the contours of these boundary conditions. For example, intentionality is one likely limitation on the relationship between motive and moral character on the one hand, and blame related judgments on the other. Note that the actors in each of the three experiments reported here caused harm unintentionally: Frank Brady stored flammable chemicals which led to the unintentional death of a firefighter; Sam Norton stored oxygen which led to the unintentional death of a youth; Sara Davidson kept

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<sup>186</sup> Note that in Experiment 3, the mean difference in causality rating between good Sara Davidson and bad Sara Davidson did not reach conventional levels of statistical significance. See *supra* note 126.

<sup>187</sup> MODEL PENAL CODE § 2.02(2)(c) (1985).

unruly and dangerous dogs which led to the unintentional death of a child. These narrow circumstances of recklessly or negligently caused deaths contain features that influence individuals in the blaming process to consider the actor's motive and moral character. We will discuss a few of them here.

First, when the harm of a transgression is severe, such as when a victim dies, our drive to blame kicks into high gear.<sup>188</sup> More severe harm influences us to make not only more severe judgments of punishment, but also to more likely find that the actor is responsible for the consequences of his harmful action.<sup>189</sup> For example, when people read a story about a bank robber whose bullet misses the teller but ricochets and hits a customer, they are likely to judge the robber as more responsible, more reckless, and his action more causal when the injury is severe than when it is mild.<sup>190</sup> In cases like this, a harm-based version of retributivism can explain why punishment should increase with severity of harm. That liability judgments should become more likely with severity of harm is more puzzling but nonetheless consonant with the notion that we generally treat more severe harm more harshly.<sup>191</sup> Thus, because of the severity of the harm in our three experiments, our participant perceivers were highly motivated to blame. As a result, they were especially motivated to search for information that could justify this impulse. Bad motive and bad character might have fit this need.

Second, when an actor's mental state is ambiguous, we often find it difficult to gauge that actor's blameworthiness. Conversely, when an actor's mental state is unambiguous, we assign or withhold blame more easily. When a wrongdoer kills another person intentionally, for

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<sup>188</sup> See Jennifer K. Robbennolt, *Outcome Severity and Judgments of "Responsibility": A Meta-Analytic Review*, 30 J. APPLIED SOC. PSYCHOL. 2575, 2579–81 (2000); Solan & Darley, *supra* note 141, at 282.

<sup>189</sup> See Mark D. Alicke et al., *A Posteriori Adjustment of A Priori Decision Criteria*, 12 SOC. COGNITION 281, 282, 303–06 (1994); Robbennolt, *supra* note 188, at 257. *But cf.* Lorán F. Nordgren & Mary-Hunter Morris McDonnell, *The Scope-Severity Paradox: Why Doing More Harm Is Judged to Be Less Harmful*, 2 SOC. PSYCHOL. & PERSONALITY SCI. 97, 97 (2011) (finding an inverse correlation between harm to victims and punishment in cases where there is more than one victim and the victims are not readily identifiable).

<sup>190</sup> See D. Chimaeze Ugwuegbu & Clyde Hendrick, *Personal Causality and Attribution of Responsibility*, 2 SOC. BEHAV. & PERSONALITY 76, 84 (1974). Relatedly, observers are sometimes more likely to blame the defendant depending on the victim's physical attractiveness, race, or gender. See, e.g., Edward L. Glaeser & Bruce Sacerdote, *Sentencing in Homicide Cases and the Role of Vengeance*, 32 J. LEGAL STUD. 363, 364–65 (2003); Norbert L. Kerr, *Beautiful and Blameless: Effects of Victim Attractiveness and Responsibility on Mock Jurors' Verdicts*, 4 PERSONALITY & SOC. PSYCHOL. BULL. 479, 479 (1978).

<sup>191</sup> See Robbennolt, *supra* note 188, at 2601. When no immediate injury occurs but the potential for future harm exists (such as an increased risk of stroke in the future), people do not award full compensation. Instead, many prefer to reserve the right to compensate, via an escrow mechanism, should the injury later materialize. See Darley et al., *supra* note 141, at 59.

example, we know to assign a great deal of blame;<sup>192</sup> the wrongdoer's moral character would likely have minimal influence on our blame perceptions. Note here, however, that we are discussing judgments of blame and responsibility rather than punishment judgments.<sup>193</sup> A cold-blooded killer whom people perceive as having a good character might receive less punishment than if they perceive his character as bad; even so, judgments of responsibility and blame for the killing might not reflect any difference in moral character.<sup>194</sup>

The picture likely changes, at least to some degree, when we turn from moral character to motive. The influence of motive on blame judgments could perhaps still emerge in the context of an actor who intentionally causes death. We might perceive a person who kills another out of greed (for example, for inheritance money) as more blameworthy than one who is driven by mercy (for example, killing a terminally ill and suffering loved one). This will be an important question to explore in future work, and for now we are limited to mere speculation. Outside of this extreme example, however, it may be that we assign little weight in our blame judgments to an actor's motive when that actor acts intentionally because the intentional mental state overwhelms other influences like motive and moral character.

Our analysis of boundary conditions is speculative but is supported by findings in the context of the influence of propensity evidence (such as prior crimes) on jury verdicts. Recall that Eisenberg and Hans found that juries who learned of a defendant's prior criminal record were more likely to convict when the overall evidence was relatively weak.<sup>195</sup> Thus, the weight of other factors can easily overwhelm the influence of similar prior acts, and by extension, perhaps also the influence of moral character and motive on guilt judgments and blame judgments.

The twin notions of legal guilt and moral blame give rise, perhaps surprisingly, to an important distinction. The propensity studies discussed at the beginning of this Article suggest that a jury which learns about a criminal defendant's prior crimes is more likely to return a guilty verdict in the case for which the jury is empaneled.<sup>196</sup> These

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<sup>192</sup> See Bertram F. Malle, *Intentionality, Morality, and Their Relationship in Human Judgment*, 6 J. COGNITION & CULTURE 87, 102–05 (2006) (finding that when people evaluate a negative action, they are especially sensitive to issues about the intentionality of that action).

<sup>193</sup> See Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1137–61 (2008) (exploring reasons why criminal sentencing takes bad but not good acts into account).

<sup>194</sup> Cf. Kahan & Nussbaum, *supra* note 49, at 368–72 (discussing the role of mercy in determinations of criminal guilt compared to moral blameworthiness).

<sup>195</sup> See Eisenberg & Hans, *supra* note 15, at 1380–85.

<sup>196</sup> See *supra* notes 15–19.

findings are subject to certain limitations. For example, if the prior crime is very dissimilar to the one at issue or is not serious, the influence of the propensity information on the jury's verdict diminishes or disappears. Likewise, the influence of propensity information on initial individual juror preferences can dissipate when jurors deliberate and reach a group verdict.<sup>197</sup>

Taken as a whole, the focus of this body of research is different, and also more specific, than our aim in the experiments we discuss in this Article. Whereas the propensity studies focus on the influence of prior crimes, we focus on the influence of two constructs that are broader in scope: moral character and motive. It may well be the case that prior crimes serve as a proxy for moral character information so that prior crimes is simply a subset of the set of information that gives rise to inferences about moral character. It might alternatively be the case that the influence of prior crimes works through a slightly different mechanism that draws more on processes of analogical reasoning than does the influence of moral character. Recall that the seriousness of the prior crime is not the only dimension along which the influence of prior crimes varies; similarity of prior crime might well be an influence that operates independently of seriousness. Although observers could logically interpret the seriousness of an actor's prior crime as a proxy for his moral character, observers are unlikely to do the same with regard to crime similarity as an independent dimension.

One important point in this Article is that the focus of the experiments reported here is quite different than the focus of the earlier research on prior crimes as propensity evidence. In addition, the objects of influence are different in our research as well. The earlier propensity-evidence studies focused almost exclusively on judgments of guilt—either in the form of individual mock-juror judgments, or mock-jury verdicts. In the current experiments, by contrast, we are interested not specifically in guilt judgments or punishment, but rather in basic psychological processes of blame and responsibility. To be sure, these basic processes play a key role in verdicts. But their importance goes beyond modeling jury behavior. Human beings inside and outside of the jury box often make intuitive judgments of blame and responsibility very quickly and automatically as they first process the story about a transgression.<sup>198</sup> Our initial inclinations

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<sup>197</sup> See Clary & Shaffer, *supra* note 17, at 645–50.

<sup>198</sup> See Jonathan Haidt & Selin Kesebir, *Morality*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 797, 803 (Susan T. Fiske et al. eds., 5th ed. 2010). There is some evidence that analytic circuitry of the brain (right dorsolateral prefrontal cortex) is involved when people make certain kinds of judgments about criminal responsibility; at the same time, punishment-magnitude judgments involve emotional circuitry (right amygdala). See Joshua W. Buckholz et al., *The Neural Correlates of Third-Party Punishment*, 60 NEURON 930, 934 (2008).

about whether to categorize the person that we are judging as “good” or “bad” can motivate us to blame or exculpate him or her. This initial motivation, in turn, can influence our interpretation of the person’s actions in a way that allows us to excuse their responsibility or to find them blameworthy for the harm they caused. These quick, initial, intuitive blame judgments are also likely to play a key role in how potential litigants perceive a harm-relevant event, how parties approach dispute-resolution processes, and outside of the legal system, how ordinary people interact when faced with a perceived wrong.

As our studies demonstrate, however, motivated inculcation can also enter into the criminal context, where the law has tried—through the imposition of formalized processes—to separate liability from character-based inferences. Even here, when we hold constant all other aspects of the harm an action causes and the situation in which the harm occurs, the actor’s perceived moral character or bad reasons for acting can still color the way that we determine discrete components of criminal liability like knowledge, mental state, and foreseeability.