2018

Apparent Fault

Aziz Huq

Genevieve Lakier

VOLUME 131 APRIL 2018 NUMBER 6

HARVARD LAW REVIEW

ARTICLES

APPARENT FAULT

Aziz Z. Huq & Genevieve Lakier

CONTENTS

APPARENT FAULT

Aziz Z. Huq[*] *& Genevieve Lakier*[**]

Federal substantive criminal law and constitutional remedies might seem to be distinct bodies of law. But since the closing decades of the twentieth century, the Supreme Court has demonstrated an increasing unwillingness in both areas to impose either direct or indirect sanctions on persons who violate the law but whose conduct is not necessarily indicative of an unlawful or antisocial intent. Instead, the Court has tended to narrow liability or remedy to instances in which there is evidence that the regulated actor contravened not just the law on the books but also a social understanding of legality. We call this supervening criterion for individual criminal or civil liability an apparent fault requirement. This Article documents the contemporaneous rise of an apparent fault requirement across two domains of Supreme Court jurisprudence and explores its causes as well as its effects. We argue that the demand for apparent fault is likely to make some kinds of coercive regulation less costly even as it imposes an inhibiting tax on other species of state intervention. Rather than diagnosing apparent fault's rise as an endogenous product of legal reasoning, we situate it within a broader historical and intellectual context as a way of showing the value of understanding doctrine in the context of its sociocultural moment.

INTRODUCTION

Federal substantive criminal law and constitutional remedies at first blush seem to be distinct bodies of federal law. Both, to be sure, regulate the circumstances in which a court may impose individualized penalties or remedies in cases where a federal law or rule has been violated. Both also figure large on the Supreme Court's docket. Otherwise, their commonalities seem few and far between. Beyond a handful of First, Second, and Fourteenth Amendment precedents, the Constitution stipulates no substantive criminal law.[1] Federal legislators are thus free to fashion a criminal code only occasionally attending to the Constitution. The availability of remedies for violations of individual constitutional

[*] Frank and Bernice J. Greenberg Professor of Law, the University of Chicago Law School.

[**] Assistant Professor of Law, the University of Chicago Law School.

Our thanks to Rabia Belt, Andrew Manuel Crespo, David Fontana, Elizabeth Papp Kamali, Robin B. Kar, Jason Mazzone, Richard H. McAdams, Justin Murray, John Rappaport, Adam M. Samaha, Louis Michael Seidman, John F. Stinneford, Suja Thomas, and Laura Weinrib for terrific conversations and suggestions, which saved us from many errors of fact and judgment. The editors of the *Harvard Law Review* gave us terrific feedback and did tremendous editing work. We also received useful feedback from participants in workshops at the University of Illinois at Urbana-Champaign, the University of Chicago, and the University of Pennsylvania. Research on this Article was partly supported by the Frank J. Ciccone Fund. Our remaining errors are our fault in all possible senses of that term.

[1] William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 66 (1997) (noting that among the "aspects of criminal justice that constitutional law has left alone" is "the content of substantive criminal law").

rights, by contrast, necessarily impacts how both state and federal governments deploy civil and criminal tools alike.[2]

Over the past four decades, however, parallel shifts in the Supreme Court's substantive criminal law and constitutional remedies cases have taken place in rough temporal lockstep. In each domain, the Court has evinced increasing unwillingness to impose either direct or indirect sanctions — a criminal conviction, an award of damages, or a remedial order — on defendants or state actors who violate the law but whose conduct does not necessarily indicate an unlawful or antisocial intent. In a wide and heterogeneous array of cases, the Court has refused to sanction these "apparently innocent" actors — so named because their mental culpability is not apparent from their actions.[3] Instead, it has insisted on quite particular kinds of evidentiary showings that tend to demonstrate, either directly or indirectly, that the defendant or government official acted with a morally objectionable intent. More specifically, it has insisted on evidence that allows the Justices to conclude that the wrongdoer either knew or clearly should have known that his or her conduct was wrong. The result has been to make what we call "apparent fault" an increasingly important gatekeeper of civil and criminal liability in federal law.

The doctrinal mechanisms the Court has employed to ensure that litigants suffer consequences when they break the law — or are remediated for the violation of their constitutional rights — only when fault is in this sense apparent vary from case to case. Sometimes, the Court operationalizes the apparent fault requirement by reading very demanding mens rea requirements into statutes that do not obviously contain them. In other cases, it construes statutory actus reus requirements narrowly to ensure that only actions that are impossible to reconcile with an innocent intent are subject to judicial sanction. In yet other instances, it operationalizes the demand for apparent fault by creating a good faith exemption to a legal rule. In all these cases, however, the Court refashions liability rules to ensure that only those who it believes specifically intended to achieve an unlawful purpose or who violated a social understanding of legality, and who therefore should have known that what they did was unlawful, trigger legal consequences for their acts.

---

[2] By "constitutional remedies," we mean both "remedies that are available as a matter of constitutional right for the redress of constitutional wrongs," Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1111 (1969), and remedies available by dint of a federal statute.

[3] The phrase first appeared in *Liparota v. United States*, 471 U.S. 419, 426 (1985), but has been used quite prolifically since then in the Court's criminal law cases, *see, e.g.*, Bryan v. United States, 524 U.S. 184, 194–95 (1998) (citing Ratzlaf v. United States, 510 U.S. 135, 144–45 (1994)); United States v. X-Citement Video, Inc., 513 U.S. 64, 71 (1994) (quoting *Liparota*, 471 U.S. at 426); Staples v. United States, 511 U.S. 600, 622 (1994) (Ginsburg, J., concurring in the judgment); *Ratzlaf*, 510 U.S at 155 n.6 (Blackmun, J., dissenting) (quoting *Liparota*, 471 U.S. at 426). One of the contributions of this Article is to flesh out what the Court means when it talks about apparent innocence and (by implication) apparent fault.

The result has been to make judges' supervening judgments about the relevant social understanding of legality an increasingly important limit on the availability of judicial sanctions. Further, certain kinds of constitutional and criminal rules — rules for which it is difficult to establish directly that the regulated actor behaved with an unlawful intent, or difficult to show that the wrongfulness of the challenged act was apparent — are now more costly to enforce. What this means is that the apparent fault requirement not only limits the availability of constitutional remedies and the application of criminal sanctions but also has a potentially important distributive effect. It raises or lowers the relative cost of imposing judicial penalties and remedies, thereby acting as either a tax or a subsidy on state action. By making apparent fault a predicate to individualized judicial attention, the Court indirectly influences how the federal government (and sometimes state governments) allocates its coercive resources.

The subtle yet important role that apparent fault plays in the Court's criminal and constitutional remedies cases can be glimpsed in two recent cases. Neither directly focuses on the litigant's state of mind. Both nevertheless demonstrate the Court's unwillingness to impose sanctions on defendants whose actions are not irreconcilable with an innocent intent — that is, an intent to accomplish ends not prohibited by the social understanding of legality. As the two cases show, moreover, the Court's view of what counts as a social understanding of legality is hardly uncontroversial. Rather, apparent fault rests upon the Justices' eminently contestable normative judgments.

Consider first *McDonnell v. United States*,[4] which involved the criminal prosecution, and successful conviction, of Bob McDonnell, the former governor of Virginia,[5] under a federal statute that made it a crime for government officials "'to receive or accept anything of value' in return for being 'influenced in the performance of any official act.'"[6] The U.S. Attorney argued that McDonnell violated the statute when he arranged meetings for a local businessman with other government officials in exchange for $175,000 worth of loans and gifts, and a jury agreed.[7] The Fourth Circuit upheld the conviction,[8] but the Supreme Court vacated and remanded[9] after finding that McDonnell's actions,

---

[4] 136 S. Ct. 2355 (2016).
[5] *Id.* at 2361.
[6] *Id.* at 2365 (quoting 18 U.S.C. § 201(b)(2) (2012)).
[7] *Id.* at 2361.
[8] *Id.*; United States v. McDonnell, 792 F.3d 478, 486 (4th Cir. 2015).
[9] *McDonnell*, 136 S. Ct. at 2375.

which included hosting and arranging meetings with other officials,[10] did not qualify under the statute as "official act[s]."[11]

The Court reached this conclusion in part by employing venerable tools of statutory interpretation such as the canon of *noscitur a sociis* and the rule against superfluity.[12] A driving concern of its analysis, however, was the normative concern that the Court claimed would be raised by a broader interpretation of the law.[13] Construing the statute to prohibit government officials from arranging meetings for constituents in exchange for "things of value,"[14] the Court argued, would cast a "pall of potential prosecution" over actions that "conscientious public officials [engage in] . . . all the time."[15] It would enable criminal liability, "*without fair notice*, for the most prosaic interactions."[16] The Court therefore interpreted the acts covered by the statute more narrowly than the lower courts had to avoid imposing liability on actors it viewed as blameless. It redefined the statutory actus reus requirement, in other words, in order to avoid rendering liable those who acted in compliance with what the Court perceived to be a generally accepted norm of official behavior.

The Court's insistence on apparent fault as a predicate for an individualized judgment can also be discerned in its 6–3 decision the same Term in *Utah v. Strieff*.[17] This case concerned the application of the attenuation exception to the Fourth Amendment's exclusionary rule.[18] The defendant, charged with unlawful possession of a controlled substance, argued that evidence of his possession of drugs should be excluded from trial because it was discovered during a search incident to an arrest that — while itself lawful — occurred only as a result of what the government conceded to be an unconstitutional stop.[19] A majority of the Supreme Court disagreed.[20] Exclusion was unnecessary, it said, given the lack of evidence of "flagrant" wrongdoing by the police officer.[21] Placing great weight on this element of the attenuation test, the

---

[10] *Id.* at 2361.

[11] *Id.* at 2372 (holding that an official act "must involve a formal exercise of governmental power . . . similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee").

[12] *See id.* at 2368–72.

[13] *See id.* at 2372–73.

[14] *Id.* at 2365.

[15] *Id.* at 2372.

[16] *Id.* at 2373 (emphasis added).

[17] 136 S. Ct. 2056 (2016).

[18] *See id.* at 2060.

[19] *Id.*

[20] *See id.* at 2064 (reversing the Utah Supreme Court's judgment for the defendant, State v. Strieff, 357 P.3d 532, 536 (Utah 2015)).

[21] *Id.* at 2063.

Court characterized the officer's initial unlawful stop as "at most negligent" and the product of "good-faith mistakes" — and therefore not the kind of unlawful action the exclusionary rule was designed to deter.[22]

Unlike *McDonnell*, *Strieff* concerned an individualized legal remedy for a constitutional violation, rather than the scope of a federal statute: does *this* officer's violation of the Fourth Amendment entail a *retail* consequence of exclusion? But as in *McDonnell*, the case's disposition did not depend, ultimately, on the Court's interpretation of the underlying legal norm (here, the Fourth Amendment). Instead, it turned on the Court's judgment of whether, and to what extent, the officer's conduct violated a widely shared *social* understanding of what the law required. By requiring that the officer's violation of the constitutional rule be a "flagrant" one, the Court attempted to ensure — just as it attempted to ensure in *McDonnell* — that only actors whose conduct clearly violated the social norms of appropriate behavior, and who therefore betrayed, at the least, a less-than-conscientious attitude, suffered legal consequences for their bad acts.

McDonnell and *Strieff* are only the latest in a series of cases in which the Court's concern for an apparently innocent actor acting in apparent compliance with law has influenced its interpretation of federal criminal law and constitutional remedies. This Article describes and analyzes this apparent fault frame from doctrinal, institutional, and political economy perspectives. Our core aim is to isolate a distinctive intellectual move employed by the Justices in otherwise disparate strands of precedent. Our argument braids different doctrinal strands that often employ the same terms toward subtly different ends. We employ new terminology — the neologism of "apparent fault" — to capture a commonality that knits together an otherwise heterogeneous body of cases and legal doctrines.[23]

In what follows, we advance three interrelated claims. The first is descriptive: a demand for apparent fault emerged, at roughly the same time, in the Court's criminal law and constitutional remedies cases. This

---

[22] *Id.* Justice Kagan, writing in dissent, sharply disagreed with the majority's conclusion on this point (as on others). *Id.* at 2072 (Kagan, J., dissenting) ("The majority chalks up [the officer's] Fourth Amendment violation to a couple of innocent 'mistakes.' But far from a Barney Fife–type mishap, [the] seizure . . . was a calculated decision, taken with so little justification that the State has never tried to defend its legality." (citation omitted)). The striking disagreement on this point between the majority and the dissent points to the inevitably contestable nature of judgments about apparent fault — a point we discuss below.

[23] One early contribution to the Critical Race Studies field anticipates some of the themes we address but is focused on the equal protection doctrine's turn to a "perpetrator perspective" in the 1970s. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–57 (1978) (arguing that equal protection doctrine focused unduly on questions of "fault" and "causation," *id.* at 1054, thus "creat[ing] a class of 'innocents,' who need not feel any personal responsibility for the conditions associated with discrimination," *id.* at 1055).

claim is distinct from, yet builds on, previous work by one of us on the arc of constitutional remedies.[24] We hope it is also clear by now that our concept of apparent fault is distinct from the use of the term fault to connote mens rea in the federal criminal law context, a concept that has attracted some attention of late.[25] True, one of the ways in which the Court protects innocent defendants from liability is by reading stringent mens rea requirements into statutes that do not obviously contain them. But this is not the only instrument at its disposal. And our use of the term "fault" should not be taken as an attempt to draw upon the criminal law baggage that word commonly implies.

Second, we contend that the Court's embrace of apparent fault has complex, cross-cutting effects on the reach of state coercion. Installing apparent fault as a threshold for criminal liability or remedial relief shapes the cost profile of the government's different regulatory tools. We identify these effects and consider how they might shape the ways in which federal (and to a lesser extent state) power is deployed against individuals.

To see the basic intuition here, consider again the two cases discussed above. *McDonnell* makes it more difficult for the government to prosecute officials who trade their public power for private gain, whereas *Strieff* lowers the cost of street-level narcotics policing by making it harder for defendants to exclude evidence when police officers violate their constitutional rights. The likely effect of *McDonnell* is therefore to discourage the prosecution of government corruption.[26] The likely effect of *Strieff*, in contrast, is to encourage police officers to engage in fishing expeditions to find contraband.[27] While the magnitude of these effects is hard to estimate, we argue that, as a general matter, the demand for apparent fault makes it more difficult to prosecute or otherwise sanction high-status individuals and makes it easier to prosecute defendants, like Edward Strieff, who tarry in what to the Justices seem obviously criminal environments.

---

[24] Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 4 (2015) (arguing that "the Court has developed a gatekeeping rule of *fault* for individualized constitutional remedies").

[25] Scholarship exploring the Court's turn to fault as mens rea in its criminal law cases includes Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 861 (1999); John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1023 (1999); and PAUL LARKIN ET AL., HERITAGE FOUND., THE SUPREME COURT ON MENS REA: 2008–2015 (2016), https://www.heritage.org/courts/report/the-supreme-court-mens-rea-2008-2015 [https://perma.cc/5552-WS75].

[26] This is assuming that an official is corrupt when he or she trades his or her public power for private gain, as McDonnell clearly did. *See* Jacob Eisler, McDonnell *and Anti-Corruption's Last Stand*, 50 U.C. DAVIS L. REV. 1619, 1628–29 (2017).

[27] This was certainly what Justice Sotomayor argued in dissent. *See Strieff*, 136 S. Ct. at 2064 (Sotomayor, J., dissenting).

Our third and final contribution is to explore continuities between the idea of apparent fault and wider currents in American law and society. To be clear, we offer no simple, causal account of the idea's emergence. This was a gradual process. It unfolded in slow and near-imperceptible shifts. It involved many judges over time. And it wanted for an organizing manifesto or focal leader. We eschew reckless assumptions about the rationality and purposiveness of American legal and political development that ascribe intentionality or that discern a simple functional explanation.[28] Instead, we identify parallel sociocultural and political currents.[29] By illuminating continuities between the Court's doctrinal innovations and that wider context, we underscore the value of understanding even recent doctrine not simply as the endogenous product of judicial reasoning but instead as a product of larger cultural and ideological shifts.

Some preliminary caveats about the scope of our analysis are necessary. First, our analysis focuses primarily on Supreme Court rulings in the areas of substantive criminal law and constitutional remedies. We think the specific intellectual move we describe here is visible in both bodies of law. Both require courts to decide whether and when to sanction an individual's violation of federal law. This is not to say that the Court has not evinced somewhat similar concerns with social understandings of the law in other domains, or sliced up doctrine using quite different implements.[30] They are simply not our topic; we think the domains we study here are consequential enough to merit their own treatment. Second, we focus on the distributive effect of the apparent

---

[28] For one thing, most kinds of purposive social action have "unanticipated consequences." Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 894 (1936).

[29] The problem of causal attribution in legal history, and in particular the history of different kinds of liability, is persistently characterized by competing claims of inevitability and contingency. *See* John Fabian Witt, *Contingency, Immanence, and Inevitability in the Law of Accidents*, 1 J. TORT L., no. 2, 2007, at 1, 4. Our claim about historical causality, however, is weaker than Professor Witt's claim about tort law. Witt suggests that doctrinal developments can be "both contingent and inevitable at once — contingent in the sense that they rest on some other, contingent set of [social or political] arrangements, and inevitable in the sense that once those arrangements are in place, certain effects follow ineluctably." *Id.* at 39. We do not think the emergence of an apparent fault demand was necessarily "ineluctabl[e]"; we sympathize instead with Professor Robert Gordon's now-canonical critique of "evolutionary functionalism." Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 66 (1984).

[30] Indeed, we have separately identified quite different kinds of judicial strategies for calibrating interventions elsewhere in constitutional doctrine. *See* Genevieve Lakier, Reed v. Town of Gilbert, Arizona*, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 234 (flagging the rise of a unifying anticlassificatory principle in First Amendment free speech law); *see also* Aziz Z. Huq, *Judging Discriminatory Intent*, 103 CORNELL L. REV. (forthcoming 2018), https://ssrn.com/abstract=3033169 [https://perma.cc/5UZU-3XBS] (analyzing the role of intent in the context of the Religion Clauses and the Fourteenth Amendment); Aziz Z. Huq, *Separation of Powers Metatheory*, 118 COLUM. L. REV. (forthcoming 2018), https://ssrn.com/abstract=3064267 [https://perma.cc/Y264-FHVM] (reviewing JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017)) (identifying three deep lines of disagreement in structural constitutional cases).

fault demand upon the federal government, rather than the states, because its actions are necessarily influenced by the Court's interpretations of both federal substantive law and constitutional remedies. Only as an ancillary matter do we flag the effect of this demand upon state-level actors such as police, prosecutors, and judges who must reckon with the possibility of correction through a constitutional tort suit, habeas action, or motion for exclusion.

Our argument has four steps. Part I lays necessary groundwork, defining what we mean by apparent fault and relating it to cognate ideas in criminal law and the law of constitutional remedies. Part II demonstrates how, beginning in the 1960s but accelerating in the 1970s and 1980s, the Court manifested increasing concern, in both its federal criminal law and constitutional remedies cases, with the problem of the "innocent" or faultless defendant. The result was a series of interpretative and doctrinal moves that can be usefully understood as a symphonic whole, notwithstanding their distinct formulations and substantive contexts. Part III analyzes the dynamic effects of this development on the choice between different regulatory strategies and suggests that its differential effects on different populations are, at the margin, likely to have regressive consequences. Finally, Part IV situates the demand for apparent fault within a wider social and historical context.

I. FAULT AND APPARENT FAULT DEFINED AND EXPLORED

The idea that liability should attach only to defendants who are in some sense at fault is an idea with a long and complex history in both public and private law. Precisely for that reason, however, what jurists and scholars mean when they speak of fault varies significantly across and even within legal domains. So our investigation demands some preliminary clarification of what, precisely, we mean by fault and, more specifically, by apparent fault.

A. Fault and Apparent Fault Defined

"Fault" is a slippery term. In different contexts, it is used to mean different things. In ordinary tort law, fault usually refers to an objective standard of liability. Torts are considered fault based when they require proof that the defendant violated an objective standard of reasonable care; they are considered "no-fault" when they don't.[31] In criminal law, in contrast, fault usually refers to a subjective standard of liability. A

[31] *See, e.g.*, Marin Roger Scordato, *Innocent Threats, Concealed Consent, and the Necessary Presence of Strict Liability in Traditional Fault-Based Tort Law*, 37 PEPP. L. REV. 205, 237–38 (2010) ("Much of tort law, and almost all of the traditional doctrines such as the intentional torts, are considered fundamentally fault-based, requiring some undesirable or antisocial act by a party in order to justify imposing liability upon them.").

defendant is considered "at fault" when he or she acts with mens rea — usually defined as an evil or morally culpable mental state.[32] Even here, however, there is ambiguity about what it means to say that a defendant is at fault. Although it is widely understood that strict liability offenses are offenses that impose criminal sanctions "without proof of fault," courts and scholars differ in how they define offenses as strict liability.[33] Sometimes the term strict liability is used to refer to an offense that imposes criminal liability without requiring the prosecution to prove that the defendant acted with mens rea with respect to *any* of the elements that make up the crime.[34] Alternatively, the term can be used to refer to an offense that imposes criminal liability without requiring the prosecution to prove that the defendant acted with mens rea with respect to *every* one of its elements.[35] Sometimes, the term is used to mean something else entirely.[36]

We employ the term "apparent fault" to capture a distinct but related idea that has emerged in the Supreme Court's docket since the 1970s. A judicial demand for apparent fault is a demand for a showing that a person *not only violated the law but also violated what the Court perceives to be a social understanding of legality*. A person violates a social understanding of legality when he or she intentionally acts to further ends he or she either knew or should have known to be unlawful based on the circumstances in which he or she acted.[37] The concept of apparent fault thus encompasses consideration not only of the defendant's or government official's mental state but also of the norms and circumstances in which he or she acted. Hence, the Court reversed Bob McDonnell's conviction, and denied a suppression remedy for Edward Strieff, because it found that the relevant conduct in those cases was not flagrantly or self-evidently unlawful.[38] In reaching these judgments, the Court did not simply look to the relevant statutory text or constitutional

---

[32] *See, e.g.*, John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 210–11 (1991) (quoting Morissette v. United States, 342 U.S. 246, 250–51 (1952)); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 147–48.

[33] R.A. Duff, *Strict Liability, Legal Presumptions, and the Presumption of Innocence*, *in* APPRAISING STRICT LIABILITY 125, 125–26 (A.P. Simester ed., 2005).

[34] Stuart P. Green, *Six Senses of Strict Liability: A Plea for Formalism*, *in* APPRAISING STRICT LIABILITY, *supra* note 33, at 1, 2–3.

[35] *Id.* at 3.

[36] *Id.* at 5–9.

[37] That is, a social understanding of legality is an understanding held by members of the diffuse public of what the law requires. This is distinct from the idea of a social norm. *See* Peter Hedström & Peter Bearman, *What Is Analytical Sociology All About? An Introductory Essay*, *in* THE OXFORD HANDBOOK OF ANALYTICAL SOCIOLOGY 3, 18 (Peter Hedström & Peter Bearman eds., 2009) (describing Jon Elster's definition of social norms as "non-outcome-oriented injunctions to act or to abstain from acting, sustained by the sanctions that others apply to norm violators"); *see also* Jon Elster, *Norms*, *in* THE OXFORD HANDBOOK OF ANALYTICAL SOCIOLOGY, *supra*, at 195, 195–215.

[38] *See supra* pp. 1528–30.

test. Instead, it reached an independent judgment about what would have been obviously lawful or unlawful to a person in the relevant circumstances. We characterize this understanding as "social," and not legal, because it focuses upon shared expectations about what kind of behavior is licit and what is illicit, rather than on the formal substance of the law.

So defined, the demand for apparent fault is related to, without being identical to, the insistence on evidence of mens rea in criminal law cases. It is related to the doctrine of mens rea insofar as it serves a similar purpose: to sort more from less morally culpable behavior in order to better channel the state's coercive resources. It is distinct from the doctrine of mens rea insofar as it does not necessarily look directly at intentionality and can be, and indeed sometimes must be, satisfied by something other than direct evidence of the defendant's mental state or even direct evidence of gross negligence. Instead, it can be satisfied by showing what in *McDonnell* the Court found had not been demonstrated by the prosecution: namely, that the defendant acted in a manner that cannot be squared with an innocent — that is, neither unlawful nor antisocial — end. As *McDonnell* demonstrates, there may be cases in which the statutory mens rea requirement is satisfied and yet the defendant's fault is not apparent. A defendant may, for example, intentionally commit the acts that comprise the offense. But, as in *McDonnell*, if those actions are not prohibited by the social understanding of legality, the defendant cannot be presumed to have known or to have been expected to know that what he or she did was wrong. This explains, as we detail below, the Court's insistence in certain of its criminal law cases on evidence that the defendant not only acted intentionally but also committed those acts knowing that they were forbidden by law.[39]

Apparent fault is thus a general, relatively abstract concept that can be demonstrated by indicia purely external to the individual, by evidence of the individual's state of mind, or by a mix of both. It is also a concept whose application can be highly contested. This is because it relies upon an ultimately contestable judgment by judges about *what the social understandings of legality in fact are*.[40] To be clear, our claim is not that the Court always uses the term "fault" to refer to its demand that wrongdoing be shown to be the product of bad intent before it can

---

[39] *See infra* section II.B, pp. 1556-64.

[40] Professor Paul Robinson has diagnosed a "puzzling deference to lay intuitions of justice" in the instrumentalist approach to modern criminal codes. Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1841 (2000). Our claim is distinct from, and at odds with, Robinson's in the sense that we observe the Supreme Court applying a supervening judgment about something akin to Robinson's "lay intuitions of justice," *id.* at 1839, and modifying the scope of liability. Our claim also extends beyond federal criminal law to constitutional remedies.

trigger legal consequences. Rather, the Court's terminology in the cases is varied and inconstant. It is we who use the term to identify commonalities between the constitutional and criminal law cases that have been implicit rather than explicit. Still, as we show, a surprisingly significant swath of modern criminal and constitutional remedies doctrine can be understood in terms of a concern with apparent fault.

But perhaps our definition is too capacious, raising questions of what, if anything, falls beyond it. Quite a lot. The apparent fault demand excludes forms of liability that do not require either direct or indirect evidence of an unlawful or antisocial intent.[41] For example, a theory of criminal or constitutional liability that asked only whether "the [individual] . . . committed the act proscribed by the statute" (or constitutional provision) would *not* be apparent fault based.[42] A liability standard that asked only whether the wrongdoing was unreasonable would also not be fault based, in the sense that we use the term. Nor would a legal standard that required only that the defendant satisfy the statutory mens rea requirements, whatever they may be. Apparent fault is also uncorrelated to an objective, welfarist threshold. There is no reason to assume that liability based on apparent fault will track the cost-justified level of liability in either the criminal or civil contexts, or that it will generate the necessary incentives for efficient precaution taking. Indeed, as we argue below, there is good reason to believe that a liability standard based on fault will not generate such incentives — at least not across the board.

B. Historical Conceptions of Fault in Criminal, Tort, and Constitutional Law

While the demand for apparent fault is new, earlier law is haunted with precursors and partial parallels. It is a truism of criminal law, for example, that there may be no punishment without evidence of subjective fault, or what Blackstone famously called a "vicious will."[43] In practice, however, a notion of subjective fault has played an unstable and volatile role in the historical march of the criminal law. Fault has played even less of a role in the law of constitutional remedies.

1. Forms of Fault in Tort and Constitutional Remedies. — For much of American history, government liability for constitutional wrongs was secured using the mechanisms of ordinary tort law and the associated

---

[41] *Cf.* Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 205 n.2 (1973) ("The concept of strict liability . . . at its core is the notion that one who injures another should be held liable whether or not the injurer was negligent or otherwise at fault.").

[42] Richard A. Wasserstrom, *Strict Liability in the Criminal* Law, 12 STAN. L. REV. 731, 733 (1960); *see also* James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908) (explaining that strict liability simply asks whether the defendant did "the physical act which damaged the plaintiff").

[43] 4 WILLIAM BLACKSTONE, COMMENTARIES *21.

writ system.[44] Ordinary tort law continues to exercise a gravitational pull upon the contours of constitutional liability today.[45] Doctrinal tests that are used to determine when constitutional remedies are available tend to involve a determination of the reasonableness of the government official's behavior, picking up on one central tenet of ordinary tort law.[46]

This is not to say that proof of fault of some sort was always a prerequisite to recovery in tort law. To the contrary, from the nineteenth century onward, courts allowed defendants to be held civilly liable for certain torts absent a showing of either subjective culpability or negligence.[47] Before the Civil War, "negligence serv[ed] as the primary but by no means the exclusive liability standard."[48] It was also true after the Civil War, when the rapid pace of industrialization catalyzed the development of a diverse range of litigation-based and insurance-based responses to the growing tally of workplace accidents.[49] Many of these responses rejected any requirement that wrongdoing, either subjective or objective, be demonstrated in order to collect either a damage award or an insurance payment.[50] More recently, but for similar reasons, late twentieth-century tort law saw increasing use of this kind of strict liability in the products liability context.[51]

Evidence of fault was also not traditionally a prerequisite in suits against government officials. In fact, courts paid almost no attention in

---

[44] Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 150 (2012) ("[T]he common law system of remedies . . . [was] long assumed to be the vehicle by which the Constitution would be enforced.").

[45] For example, in analyzing the availability of constitutional remedies for a wrongful conviction and for certain Fourth Amendment claims, the Court has expressly and repeatedly drawn on the common law tort of malicious prosecution. *See, e.g.*, Manuel v. City of Joliet, 137 S. Ct. 911, 920–21 (2017) (holding that common law principles guide, but do not control, § 1983 claims); Heck v. Humphrey, 512 U.S. 477, 489–90 (1994) (drawing on the common law of malicious prosecution to define the availability of postconviction review under habeas).

[46] *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 85–101 (1977).

[47] *See, e.g.*, Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1730–33 (1981) (discussing New Hampshire and California case law).

[48] Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 644 (1989).

[49] John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690, 708 (2001) ("The United States and other industrializing nations experimented in the late nineteenth and early twentieth centuries with an array of policy alternatives to address the problem of compensation for accident victims . . . .").

[50] *See* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation,* 15 GA. L. REV. 925, 947 (1981).

[51] *See* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 461–65 (1985) (chronicling the evolution of strict liability products liability law in the last century). As early as 1929, then-Professor William Douglas had argued for liability premised on a least cost avoider principle. William O. Douglas, *Vicarious Liability and Administration of Risk I*, 38 YALE L.J. 584, 587–88 (1929).

such cases to the question of whether the official acted reasonably or, for that matter, with good intent. Under English law, suit by petition of right against the Crown was used to secure restitution of lands and goods, as well as money damages for wrongful detentions and contract violations.[52] Officers, by contrast, could be sued at common law without the Crown's consent (although the monarch could step in and claim an act as his or her own, thus insulating the official from tort liability).[53] Early American law discarded the petition of right as a mechanism for legal accountability[54] but permitted common law actions against officers "regardless of [their] good faith and caution and the best of intentions."[55] Several influential early decisions of the Supreme Court, such as *Little v. Barreme*[56] and *Osborn v. Bank of the United States*,[57] exemplify this use of common law actions to redress unlawful governmental action without any showing of fault.[58] Into the twentieth century, the Supreme Court continued to characterize officer suits as matters "sounding in tort"[59] that lay "between the individual plaintiff and the individual defendant" such that no sovereign immunity obtained.[60]

---

[52] Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 6–7 (1924); *see also* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 5 (1963).

[53] Jaffe, *supra* note 52, at 9. Perhaps the best-known example is *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.), which played a pivotal role in motivating the Fourth Amendment's proposal and ratification. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 563 nn.21–22 (1999).

[54] Jaffe, *supra* note 52, at 19.

[55] David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 17 (1972); *see also id.* at 47. Professor Louis Jaffe briefly mentions the availability of good faith immunity in the nineteenth-century case law. Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 220–21 (1963). But he immediately qualifies this by saying that officers remained liable for "negligence in the course of [their] official duty." *Id.* at 222.

[56] 6 U.S. (2 Cranch) 170 (1804).

[57] 22 U.S. (9 Wheat.) 738 (1824); *see also* Bates v. Clark, 95 U.S. 204 (1877) (damages for trespass by military officials under orders from a United States Attorney); Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806) (damages for trespass by government official).

[58] *See* Jaffe, *supra* note 52, at 21–23 (discussing *Osborn*); *see also* Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 760 (1987) ("Under principles of agency law well-accepted by the late 1860's and early 1870's, governmental agents were held responsible in damage suits for their negligent acts, misfeasances in offices, and intentional wrongs."). The question of constitutionality would arise if and when an officer raised a defense of valid legal authority. Hill, *supra* note 2, at 1123 ("[An] officer acting under a void statute, or outside the bounds of a valid statute, may be regarded as stripped of his [or her] official character, and answerable, like any private citizen, for conduct which, when attributable to a private citizen, would be an offense against person or property.").

[59] Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 686 (1949); *accord* Belknap v. Schild, 161 U.S. 10, 18 (1896); Stanley v. Schwalby, 147 U.S. 508, 518–19 (1893); Cunningham v. Macon & Brunswick R.R., 109 U.S. 446, 452 (1883).

[60] Scranton v. Wheeler, 179 U.S. 141, 152 (1900) (allowing recovery of property from a federal officer); *accord* Tindal v. Wesley, 167 U.S. 204, 223 (1897).

Forms of official immunity started to emerge in the mid-nineteenth century.[61] In 1840, the Supreme Court began to deny injunctive remedies such as mandamus where the challenged government action was "discretionary" rather than mandatory.[62] Five years later, a damages award was denied on the same ground.[63] Although this discretion model of officer liability limited the availability of remedies, it focused on the nature of the official power in question rather than the intentions of the government actor. Hence, it should be understood as an alternative to an apparent fault rule, not its precursor.[64] Indeed, the Court rejected a good faith exception to liability in the 1915 case of *Myers v. Anderson*.[65] Only in 1949 did the paradigm begin to change with Judge Learned Hand's decision in *Gregoire v. Biddle*,[66] and a new theory of official immunity from liability entered the law — a framework that, in time, would evolve into a demand for evidence of fault.[67]

2. Forms of Fault in Criminal Law. — Fault played more of a role in the criminal law. Indeed, from the eighteenth century onward, judges and commentators alike insisted that it was a fundamental principle of justice that, in order for there to be criminal punishment, the defendant

---

[61] *See* Kian, *supra* note 44, at 153.

[62] Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 509 (1840); *see also* Spalding v. Vilas, 161 U.S. 483, 499 (1896) (applying the discretion model and noting that allegations of bad intent could not be employed to oust discretionary immunity); Jaffe, *supra* note 55, at 218–19 (explaining discretionary immunity). Although the distinction between mandatory and discretionary acts was invoked in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–67 (1803), it was not the basis for the Court's refusal to issue a writ of mandamus in the case; it developed later. *Id.* at 176–77 (denying relief on the grounds that the statute that authorized individuals like William Marbury to petition the Supreme Court for writs of mandamus was in violation of the constitutional limits imposed on the Court's original jurisdiction). Unlike federal officials, state officials did not benefit from the doctrine of discretionary immunity. *See, e.g.*, Nixon v. Condon, 286 U.S. 73 (1932) (permitting damages action against officials who had denied plaintiffs the right to vote); Nixon v. Herndon, 273 U.S. 536 (1927) (same); Scott v. Donald, 165 U.S. 58 (1897) (similar for action that violated the dormant commerce clause). Hence, the main text concerns only suits against national officers.

[63] Kendall v. Stokes, 44 U.S. (3 How.) 87, 97–98 (1845).

[64] As the Court explained in *Amy v. The Supervisors*, 78 U.S. (11 Wall.) 136 (1870), the officer's "mistake as to his [or her] duty and honest intentions will not excuse the offender." *Id.* at 138; *see also id.* ("The rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he [or she] neglects or refuses to do such act, he [or she] may be compelled to respond in damages to the extent of the injury arising from his [or her] conduct.").

[65] 238 U.S. 368, 378–79 (1915) (rejecting an argument that "malice," *id.* at 371, was required for liability in a suit alleging racial discrimination in election administration in violation of the Fifteenth Amendment).

[66] 177 F.2d 579, 581 (2d Cir. 1949).

[67] *See* Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1125 (1981) (identifying *Gregoire* as beginning "the breakdown" of the "established" system of liabilities); Engdahl, *supra* note 55, at 41 (noting the novelty of immunity doctrines that have been expanded "beyond their traditional scope"); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 462–63, 463 n.368 (1987) (situating *Gregoire* in the larger context of the Supreme Court's efforts to reconcile the discretionary and legality models of official immunity).

must be shown to have possessed what Blackstone described as a "vicious will" or what courts generally glossed as mens rea.[68] The idea that the criminal law punished only those who were subjectively at fault served, in other words, as an important ideal of justice.

Yet in practice the role that mens rea played in the operation of criminal justice was far more nuanced and complex. For one thing, mens rea was not inevitably a prerequisite to conviction. Although the idea that criminal culpability generally requires proof of mens rea appeared in legal writings dating back to the twelfth century,[69] early modern jurists recognized the existence of some serious crimes that did not require it. In his 1644 *Institutes*, for example, Edward Coke approvingly discussed examples of murder in which mens rea was lacking.[70]

Beginning in the mid-nineteenth century, legislatures across the United States created many more such offenses in response to what were perceived to be the ramifying moral as well as physical harms of industrialization.[71] The result was what some observers characterized as an explosion in the number of strict liability crimes.[72] Many of these crimes

---

[68] *See, e.g.*, Davis v. United States, 160 U.S. 469, 484 (1895) ("No one . . . would wish either the courts or juries . . . to disregard the humane principle, existing at common law . . . that to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will." (quoting 4 BLACKSTONE, *supra* note 43, at *21)); JOHN HOLMES, THE STATESMAN, OR PRINCIPLES OF LEGISLATION AND LAW 412 (Augusta, Me., Severance & Dorr 1840) ("All persons are capable of committing crimes unless there be a defect of the will. But there must be both a vicious will and a vicious purpose . . . ."); *The Legal Doctrine of Insanity*, 2 AM. L. MAG. 346, 346 (1844) ("The vicious will and the unlawful act, are the vital elements of crime . . . ."); *see also* Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 55 (1933) (noting that criminal liability "is and always will be based upon a requisite state of mind").

[69] Eugene J. Chesney, *The Concepts of Mens Rea in the Criminal Law*, 29 J. AM. INST. CRIM. L. & CRIMINOLOGY 627, 630 (1939).

[70] EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 56 (London, W. Clarke & Sons 1817) (1644) ("So if one shoot at any wild fowle upon a tree, and the arrow killeth any reasonable creature afar off, without any evill intent in him, this is *per infortunium*: for it was not unlawful to shoot at the wilde fowle: but if he had shot at a cock or hen, or any tame fowle of another mans, and the arrow by mischance had killed a man, this had been murder, for the act was unlawfull."). This passage of the *Institutes* has occasioned much controversy, in large part because it recognized the possibility of criminal punishment absent proof of a vicious will. *See* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 81–85 (2004).

[71] *See generally* Sayre, *supra* note 68 (tracing the development of these so-called public welfare offenses).

[72] *See* Herbert L. Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 595 (1963) ("[A] vast number of crimes have been construed . . . to dispense with any mental element, or, to use the Code's term, any requirement of culpability."); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 731 (1960) ("The proliferation of so-called 'strict liability' offenses in the criminal law has occasioned the vociferous, continued, and almost unanimous criticism of analysts and philosophers of the law.").

resulted in only minor punishment. But this was by no means always the case. Even regulatory crimes could result in years of imprisonment.[73]

Even when mens rea was required, there was significant disagreement about what it meant. Some interpreted the requirement that there be proof of a "vicious will" to require only proof that the defendant intended to do something immoral. The famous British case of *Regina v. Prince*[74] held that the defendant could be convicted for taking an unmarried girl under the age of sixteen years from the custody of her parents even though he genuinely believed that the girl he was charged with taking was over the age of sixteen (which was not a crime).[75] This result, the Court insisted, did not undermine the doctrine of mens rea — to the contrary, it gave it its "full scope"[76] — because it penalized the defendant for conduct that, even had the facts been as he supposed them, violated the community's moral norms.[77]

The conception of mens rea employed in *Prince* resonates with the contemporary demand for apparent fault. Like apparent fault, it allows defendants to be criminally sanctioned even when they do not intend unlawful aims, so long as their actions violate a social understanding of the law. It allows individuals to be sanctioned for conduct that they *should* have known was wrong. But *Prince*'s approach proved controversial. Although many American courts followed *Prince* in concluding that mens rea was satisfied so long as the defendant violated what the judge perceived to be a widely held moral norm,[78] commentators criticized the decision for injecting into the criminal law an overly indeterminate liability rule.[79]

By the late nineteenth century, courts had, as a result, largely turned away from the moralistic approach to the mens rea inquiry articulated in *Prince*. Instead, courts tended to find that the mens rea requirement was satisfied if, but only if, the government was able to prove that the

---

[73] *See, e.g.*, United States v. Balint, 258 U.S. 250, 251, 254 (1922) (holding that defendant could be indicted under a provision of the Harrison Anti-Narcotics Act making selling coca without an order form a felony); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 62, 65, 70 (1910) (upholding the constitutionality of a statute that made it a felony to cut or remove timber without a valid permit).

[74] 2 L.R.-Cr. Cas. Res. 154 (1875).

[75] *Id.* at 173, 177.

[76] *Id.* at 175.

[77] *Id.* at 174–75.

[78] *See* Richard Singer, *The Resurgence of Mens Rea: II — Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459, 470 (1987).

[79] *See, e.g.*, Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1, 12 (1957) (criticizing *Prince* for introducing "arbitrariness" into the criminal law); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1025 (1932) (arguing that "[n]o two judges have the same standards of morals" and that the decision in *Prince* "undoubtedly did more to confuse and unsettle the law [of mens rea] than any recent case upon the subject"). Much the same criticism could be leveled against the apparent fault rule, as we discuss in section III.C.

defendant possessed whatever specific mental state was required by the statute.[80] Courts also upheld the power of the legislature to dispense with mens rea when it so desired.[81] The result was that consideration of the defendant's subjective fault played little practical role in late nineteenth- and early twentieth-century criminal law. Courts focused instead on the "narrow and constrained question [of whether] the defendant's conduct express[ed] the specific mental state . . . required by the statute."[82]

For its part, the Supreme Court vigorously endorsed the proposition that it was up to legislators, not judges, to decide what mental state had to be proven in order to convict someone of a crime. In *Shevlin-Carpenter Co. v. Minnesota*,[83] for example, it adamantly rejected the idea that the Federal Constitution prohibited the legislature from criminally sanctioning those who violated the law but did so without a criminal intent.[84] The case turned on a state law felony of cutting down timber without a valid permit.[85] The plaintiff argued that because, at the time he cut down the timber, he reasonably believed that he possessed a valid permit to do so, his conduct involved solely "innocent act[s]" that the government could not constitutionally punish.[86] A unanimous Court dismissed this argument. "The legislature may enjoin, permit, forbid and punish; they may declare new crimes and establish rules of conduct for . . . future cases," wrote Justice McKenna, quoting Justice Samuel Chase.[87] Hence, "innocence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse."[88] In subsequent cases, the Court held that the Constitution *did* require proof of criminal

---

[80] Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 640 ("The second and currently more predominant [mens rea] tradition adopts an essentially nonnormative approach that finds sufficient ground for liability in the presence of particular states of mind without evaluating or even appealing to the motives underlying the offender's actions."); Singer & Husak, *supra* note 25, at 860 (noting that although "[a]t common law, courts enjoyed wide latitude to define the conditions under which conduct was innocent and thus not eligible for the criminal sanction[,] . . . [b]y the end of the twentieth century, the judicial inquiry into guilt and blame . . . ostensibly came to be concerned with a much more narrow and constrained question: Did the defendant's conduct express the specific mental state — the *mens rea* — required by the statute?").

[81] *See* Sayre, *supra* note 68, at 68–72.

[82] Singer & Husak, *supra* note 25, at 860; *see also id.* at 860–61 (criticizing the twentieth-century courts for focusing too much on statutory interpretation and thereby "los[ing] sight of the basic and fundamental principle of justice that guided judgments of the courts in the nineteenth century: that innocent conduct should be spared from criminal sanctions," *id.* at 861).

[83] 218 U.S. 57 (1910).

[84] *Id.* at 69–70.

[85] *Id.* at 62–63.

[86] *Id.* at 68.

[87] *Id.* (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798)).

[88] *Id.*

intent when First Amendment rights were at stake.[89] Otherwise, it declined to construe the Constitution as a limit on the legislature's power to "enjoin, permit, forbid, and punish."[90]

The Court also vindicated Congress's power to create vicarious strict liability crimes. In *United States v. Dotterweich*,[91] it endorsed the use of vicarious strict liability as a tool to advance the general good. Dotterweich, president and general manager of a corporation that repackaged and sold drugs, was charged under a provision of the Federal Food, Drug, and Cosmetics Act (FDCA) making it a crime to "introduc[e] into interstate commerce . . . any . . . adulterated or misbranded" drug after the corporation sold mislabeled drugs on several occasions due to incorrect information received from the drug manufacturer.[92] The jury acquitted the corporation but convicted Dotterweich.[93] The Court upheld the conviction even though no evidence showed that Dotterweich knew the labels contained incorrect information or that he had been involved in the specific acts that resulted in their introduction into interstate commerce.[94] The Court observed that the FDCA "dispenses with the conventional requirement for criminal conduct — awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[95] Any hardship flowing from this interpretation, noted the Court, fell "upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers," and not upon "the innocent public."[96]

---

[89] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); Scales v. United States, 367 U.S. 203, 209 (1961) (requiring, for prosecution under the membership provision of the federal Smith Act, which prohibited belonging to "any organization which advocate[d] the overthrow of the Government of the United States by force or violence," *id.* at 205, evidence of "active and purposive membership, purposive that is as to the organization's criminal ends," *id.* at 209).

[90] *See, e.g.*, United States v. Balint, 258 U.S. 250, 251–52 (1922) ("While the general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime, . . . there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement."); United States v. Behrman, 258 U.S. 280, 288 (1922) ("It is enough to sustain an indictment that the offense be described with sufficient clearness to show a violation of law . . . . If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent.").

[91] 320 U.S. 277 (1943).

[92] *See id.* at 278 (quoting 21 U.S.C. § 331(a) (2012)).

[93] *Id.*

[94] *Id.* at 280–81, 285.

[95] *Id.* at 281.

[96] *Id.* at 285.

In yet other cases, the Court construed conspiracy statutes liberally, making it easier to sanction individuals for criminal conduct they perhaps unintentionally aided and abetted. *Pinkerton v. United States*[97] held that members of a continuing conspiracy could be liable for any criminal act performed by co-conspirators so long as it was in furtherance of the conspiracy and reasonably foreseeable.[98] Although the Court argued that a conspiratorial agreement was, by itself, evidence of a vicious will,[99] in practice *Pinkerton* meant that defendants could be held liable for criminal acts of their co-conspirators that they neither intended nor knew anything about.[100] Similarly, in cases dealing with antitrust conspiracies, the Court allowed criminal liability under section 1 of the Sherman Act if defendants' acts had the effect of unreasonably restraining competition, even if they acted with "good intentions."[101] Individuals engaging in such practices, the Court declared, could be sanctioned "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[102] The result was that defendants could receive sometimes very serious punishment for merely negligent, but well-intentioned actions.[103]

On the surface, the 1957 decision in *Lambert v. California*[104] appeared to signal a renewed commitment on the Court's part to the importance of consideration of moral fault and innocence in criminal cases.[105] *Lambert* invalidated a Los Angeles ordinance that made it a crime for anyone convicted of what was, or would be, a felony under California state law to remain in the city for more than five days without

---

97 328 U.S. 640 (1946).

98 *Id.* at 647–48.

99 *Id.* at 646 ("Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he [or she] does some act to disavow or defeat the purpose . . . [the defendant] is still offending. And we think, consciously offending, offending as certainly, as we have said, as at the first moment of his [or her] confederation, and consciously through every moment of its existence." (quoting Hyde v. United States, 225 U.S. 347, 369 (1912))).

100 Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 6 (1992) (noting that to be liable for the crimes of co-conspirators under the *Pinkerton* rule "[l]iability is based upon a simple negligence standard, reasonable foreseeability").

101 United States v. Trenton Potteries Co., 273 U.S. 392, 395, 397–98 (1927) (upholding convictions when the jury "found the agreements or combination complained of, . . . without regard to the reasonableness of the prices fixed, or the good intentions of the combining units," *id.* at 395).

102 N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

103 Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657, 666–68 (2001) ("Ever since the Supreme Court's decision in *Standard Oil Co. v. United States,* it has been clear that the reasonableness standard applies as the default conduct rule in section 1 cases." *Id.* at 666 (footnote omitted).).

104 355 U.S. 225 (1957).

105 Packer, *supra* note 32, at 127 (noting that *Lambert* was "the first invalidation by the Supreme Court on *mens rea* grounds of legislation unrelated to the First Amendment").

registering.[106] Justice Douglas's majority opinion affirmed the "wide latitude" lawmakers enjoyed "to declare an offense and to exclude elements of knowledge and diligence from its definition."[107] But, it continued, this ordinance was distinctive in punishing "conduct that [was] wholly passive"[108] in a situation where the "circumstances which might move one to inquire as to the necessity of registration are completely lacking."[109] For this reason, the opinion concluded, "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand."[110] "A law which punished conduct which would not be blameworthy in the average member of the community," Justice Douglas added cryptically, "would be too severe for that community to bear."[111]

Lambert hinted at a newly invigorated due process doctrine of mens rea. It suggested that innocence — and fault — might have constitutional meaning after all. But the distinction it relied upon — between conduct that was "wholly passive" and conduct that was not — was hardly self-explanatory.[112] Furthermore, as Justice Frankfurter cautioned in dissent, it is hard to see why this distinction mattered for due process purposes.[113] In any event, the Court did not subsequently rely upon *Lambert* to strike down any other laws on due process grounds.[114] Lower courts easily distinguished it.[115] The result was that, as Professor Herbert Packer mournfully noted in 1962 while surveying the "corpus of the criminal law," "the allegedly pervasive principle of *mens rea* is not pervasive at all."[116] Instead, courts regularly imposed "the stigma of a

---

106 355 U.S. at 226–27.

107 *Id.* at 228 ("We do not go with Blackstone in saying that 'a vicious will' is necessary to constitute a crime, for conduct alone without regard to the intent of the doer is often sufficient." (citation omitted) (quoting 4 BLACKSTONE, *supra* note 43, at *21)).

108 *Id.*

109 *Id.* at 229.

110 *Id.*

111 *Id.* (quoting OLIVER WENDELL HOLMES, THE COMMON LAW 50 (1881)).

112 Packer, *supra* note 32, at 132 ("It is a little hard to know what distinction Mr. Justice Douglas was drawing.").

113 *Lambert*, 355 U.S. at 231–32 (Frankfurter, J., dissenting).

114 Packer, *supra* note 32, at 136–37 (noting that "[t]he Court has not itself paid much attention to *Lambert*," *id.* at 136, and concluding that "this first foray in the direction of a general doctrine of mens rea in constitutional law has been, as it seems, abortive," *id.* at 137).

115 *See, e.g.*, Reyes v. United States, 258 F.2d 774, 784–85 (9th Cir. 1958) (distinguishing a federal law that imposed strict liability on those who used narcotics or had been convicted of a narcotics offense from leaving the United States without registering for a departure certificate on the ground that the conduct prohibited by the law was "attended by circumstances which 'move one to inquire as to the necessity of registration,'" *id.* at 784 (quoting *Lambert*, 355 U.S. at 229)); United States v. Juzwiak, 258 F.2d 844, 847 (2d Cir. 1958) (same).

116 Packer, *supra* note 32, at 138.

criminal conviction on persons who are unaware of the factual circumstances that make their conduct potentially criminal or . . . who are, without fault on their part, unaware of the existence of a legislative norm affecting their conduct."[117]

Eyeing state criminal codes, Packer and other members of the American Law Institute attempted to rectify this by drafting a Model Penal Code (MPC) that required a mens rea of at least gross negligence with respect to each element of every crime.[118] In this way, the drafters attempted to ensure that those who violated the law innocently — that is, without intending to achieve criminal aims, and without engaging in conduct that flagrantly violated community norms of reasonable behavior — were not held criminally liable. But while the MPC was in some respects a remarkable success, its attempt to reform courts' approach to the question of culpability had only a "modest effect."[119] In a study of twenty-four states that adopted part or all of the MPC's mens rea provisions by statute, Professor Darryl Brown determined that twelve states failed to fully adopt the MPC's strong affirmation of mens rea.[120] More relevant to the purposes of this Article, the MPC did not control Congress. The result was that, notwithstanding repeated assertions by the Court that without an evil mind there could be no crime, concepts of moral fault and innocence played a relatively unimportant role in federal criminal law in the first half of the twentieth century.

II. Apparent Fault in Supreme Court Doctrine

A subtle but powerful reordering of certain parts of American constitutional and federal substantive criminal law started in the 1970s and has continued apace up to the present. The Court began increasingly to demand either direct or indirect evidence that the criminal defendant, or the government official, not only broke the law but also violated a social understanding of legality before the Court would award remedies or impose punishment. The central aim of this Part is to document the emergence of these parallel demands for apparent fault. We reserve our main analysis and preliminary explanation of this shift to Parts III and IV, respectively. Our account emphasizes the steering hand of the judiciary,[121] rather than the influence of regulators or Congress. We show how federal judges employed their hermeneutical authority to

---

[117] *Id.* at 147.

[118] Model Penal Code § 2.02(1) (Am. Law. Inst. 1985); *cf.* Packer, *supra* note 72, at 594 ("The most important aspect of the Code is its affirmation of the centrality of *mens rea* . . . .").

[119] Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 Duke L.J. 285, 297 (2012).

[120] *Id.* at 317.

[121] Congress has played some role in sharpening the fault rule in the postconviction habeas context. Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. Chi. L. Rev. 519, 534–35 (2014).

gloss federal criminal statutes with an additional screen of apparent fault. In the constitutional domain, the same judges filled gaps in statutory remedial schemes with "creative," de novo rules[122] and narrowed constitutional remedies using their authority to fashion "constitutional common law."[123]

A. Apparent Fault in Constitutional Remedies (and Beyond)

The Court's new concern with the problem of the innocent lawbreaker first manifested in its constitutional remedies cases. These include damages remedies pursuant to 42 U.S.C. § 1983 and its federal common law analog action against federal officials,[124] the exclusionary rule under the Fourth Amendment,[125] and the postconviction remedy of habeas corpus.[126] Otherwise heterogeneous in the sense that they straddle civil and criminal adjudication, these procedural vehicles are alike insofar as all are triggered by an individual's assertion that his or her constitutional right has been violated. They all enable individuated constitutional redress of a sort — and so are appropriately grouped together as constitutional remedies.[127]

1. Apparent Fault as a Regulatory Principle for Constitutional Remedies. — In the 1950s and the 1960s, jurisprudential developments in constitutional remedies trended in favor of dispersed, relatively politically disempowered rights bearers such as criminal defendants, the convicted, and the objects of police surveillance or violence. Courts created the exclusionary rule, rediscovered money damages under § 1983 and *Bivens*[128] actions, and fashioned vigorous postconviction habeas review. These mechanisms furnished individual rights holders with powerful instruments for negating the consequences of constitutional violations.

---

122 For a critique of the "quite creative constructions of § 1983's text and history," see Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 60 (1989).

123 Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 9–10 (1975) (supplying the exclusionary rule as an example of "a common law power," *id.* at 10, exercised by the Supreme Court in the remedial domain); *see also* George D. Brown, *"Counter-Counter-Terrorism via Lawsuit" — The* Bivens *Impasse*, 82 S. CAL. L. REV. 841, 870–71 (2009) (discussing the debate as to whether the *Bivens* remedy is constitutionally mandated).

124 *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396–97 (1971) (creating a private cause of action for money damages against federal officials who violate some constitutional rules in their personal capacity).

125 *See* Mapp v. Ohio, 367 U.S. 643, 655, 657 (1961) (applying the exclusionary rule as a remedy for Fourth Amendment violations); *see also* Weeks v. United States, 232 U.S. 383, 398 (1914) (applying the exclusionary rule in federal prosecutions).

126 *See* 28 U.S.C. § 2241 (2012) (authorizing federal courts to grant habeas relief to prisoners); *id.* §§ 2254, 2255 (setting forth, respectively, rules for state prisoners and federal prisoners).

127 Technically, federal habeas corpus relief is available for violations of "[f]ederal law," *id.* § 2254(d)(1), but in practice the Constitution supplies almost all federal rules applicable to state criminal adjudicative proceedings.

128 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388.

But they also produced what the Court perceived as a flood of litigation. In response, the Court developed, in each of these areas, a screening rule for judicial intervention that sought to shield from litigation constitutional violations that were the product of what the Court viewed as reasonable and well-intentioned government actions.

Consider the Court's qualified immunity cases.[129] As Part I explained, in the nineteenth and early twentieth centuries, official immunity from suit for constitutional violations did not rest on the officials' culpability. It depended, instead, on the mandatory or discretionary character of the official obligation.[130] In 1949, Judge Hand's ruling in *Gregoire v. Biddle* shucked off the distinction between mandatory and discretionary in favor of a functional inquiry into whether an officer should benefit from some sort of "immunity."[131] Anticipating a dominant motif in later jurisprudence, Judge Hand conceded that it would be "monstrous" to deny relief to plaintiffs whose rights were violated by "truant" public officers, but underscored the necessity of immunity to prevent officials who made "honest[] mistake[s]" from suffering the burdens and risks of trial.[132] "[T]o submit all officials, the innocent as well as the guilty," warned Judge Hand, "to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."[133] Rationing at the courthouse door was required, in Judge Hand's view, given his assumption of a large class of innocent officials — officials who carried out their duties in "good faith" — whose behavior might be distorted by the shadow of tort liability.[134]

Gregoire concerned only the scope of absolute immunity. But, in later cases, the Supreme Court echoed *Gregoire*'s worry that constitutional tort litigation might "dampen the ardor" of innocent government officials in a sequence of decisions in which it recognized that certain kinds of executive branch officials enjoyed qualified immunity from suit, provided they acted with "good faith."[135] By allowing government officials to invoke a defense of good faith, the Court followed *Gregoire* in

---

129 For excellent overviews of qualified immunity's development, see Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 233–61 (2006); and David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 55–56 (1989).

130 *See supra* notes 61–67 and accompanying text.

131 177 F.2d 579, 581 (2d Cir. 1949).

132 *Id.*

133 *Id.*

134 *Id.* ("[I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.").

135 *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 245–46 (1974); Pierson v. Ray, 386 U.S. 547, 555 (1967).

striving to protect the rights of those "required to exercise their discretion."[136] It presented this concern as inextricable from "the related public interest in encouraging the vigorous exercise of official authority."[137]

Over time, the Court ratcheted up the fault requirement to make the security provided by qualified immunity to public officials ever more impregnable.[138] Initially, the Court hinged the defense of qualified immunity on officers' subjective good faith, which required that the defendant either knew or reasonably should have known of the action's illegality for qualified immunity to be ousted.[139] This first iteration of a fault rule, however, proved ineffectual. Plaintiffs could simply allege bad faith to get to trial, thwarting Judge Hand's ambition to protect "innocent" officials.[140] The Court reacted by making it harder to defeat qualified immunity. In *Wood v. Strickland*[141] and *Procunier v. Navarette*,[142] it held that government officials would be subject to liability only if they violated constitutional rights "clearly established" at the time they acted.[143] In *Harlow v. Fitzgerald*,[144] the Court discarded the subjective prong of the good faith test. Instead, it held that government officials acted in bad faith only when they "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known."[145] The Court later explained that this test would be applied in a "more particularized" sense, so that the illegality of an alleged violation "must be apparent."[146]

The Court's insistence that official conduct must violate rights that were clearly established at a high degree of specificity has meant that, notwithstanding its overt concern with the reasonableness of the official's action, the good faith test of qualified immunity now shields from

---

136 Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

137 *Id.* (quoting *Butz*, 438 U.S. at 506).

138 *Id.* ("For executive officials in general . . . our cases make plain that qualified immunity represents the norm.").

139 *See* Wood v. Strickland, 420 U.S. 308, 321–22 (1975).

140 Comment, Harlow v. Fitzgerald*: The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901, 908 (1984) ("The implication of this fact-oriented evaluation of good faith was that courts would find it extremely difficult to dispose of the qualified immunity question at an early stage of the litigation — for example, prior to discovery.").

141 420 U.S. 308.

142 434 U.S. 555 (1978).

143 *Navarette*, 434 U.S. at 565 (holding that there can be no § 1983 liability when "there [is] no 'clearly established' . . . right" at the time of the alleged tort's commission); *Wood*, 420 U.S. at 322 ("A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.").

144 457 U.S. 800 (1982).

145 *Id.* at 818.

146 Anderson v. Creighton, 483 U.S. 635, 640 (1987); *accord* Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014).

liability not only government officials who make reasonable mistakes but all officials who act in ways that are not obviously unconstitutional. Indeed, today the Court characterizes the qualified immunity standard as shielding "all but the plainly incompetent or those who knowingly violate the law."[147]

The practical effect of this specification of qualified immunity is that plaintiffs commonly find it necessary "to plead and prove intentional misconduct in order to rebut qualified immunity defenses."[148] This is why, somewhat paradoxically, the Court's concern with "innocent" officials means that qualified immunity operates as a demand for clear and objective context-specific evidence of defendants' bad mental states. Even when such evidence is available, moreover, the fact that a defendant's actions might be "objectively justified" in retrospect is exculpatory.[149] The screening rule of qualified immunity is hence not simply a demand for evidence of subjective fault or mens rea. It is a demand for exceptionally clear evidence that a defendant's actions were so objectively ultra vires that he or she either knew or should have known that what he or she did was wrong. It is a demand, that is, for apparent fault.

A similar transformation occurred in the Court's exclusionary rule jurisprudence. Since the early twentieth century, the Court had required that evidence obtained in violation of the Fourth Amendment be excluded from federal criminal trials.[150] In 1961, it extended this rule to state criminal trials.[151] In 1984, however, the Court in *United States v. Leon*[152] held that the exclusionary rule did not apply to material gathered as a result of erroneous warrants upon which police had reasonably relied.[153] It thus seeded a pool of rights holders with no realistic means of redress.[154] It did so in order to prevent the same evil it invoked in its qualified immunity cases: the potential chilling of "objectively reasonable law enforcement activity."[155]

As was also true of the qualified immunity cases, the Court came to interpret this "reasonableness" exception to the exclusionary rule expansively. *Leon* was at first limited to cases in which the issuing magistrate

---

147 Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

148 Jennifer E. Laurin, *Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1028 (2010); *see also id.* at 1028 n.91.

149 *al-Kidd*, 563 U.S. at 740.

150 Weeks v. United States, 232 U.S. 383, 393–94, 398 (1914).

151 *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

152 468 U.S. 897 (1984).

153 *Id.* at 920–22.

154 Donald Dripps, *Living with* Leon, 95 YALE L.J. 906, 907 (1986) (noting that "the *Leon* majority has withdrawn that remedy in a class of cases for which no other remedy is available").

155 *Leon*, 468 U.S. at 919.

had made a mistake, and the officer had reasonably relied on the resulting warrant. But it was quickly extended to contexts in which other nonpolice actors erred.[156] The Court also refused to allow exclusion when what was alleged was simple negligence. As it explained in *Herring v. United States*,[157] "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it."[158] This did not mean, the Court made clear, that the police officer had to be shown to have deliberately violated another's Fourth Amendment rights.[159] It did mean, however, that exclusion was appropriate only if and "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights."[160] In its exclusionary rule cases, just as in its qualified immunity cases, the Court has, in other words, made the availability of the constitutional remedy hinge on a showing that an officer's conduct not only violated the Fourth Amendment but also did so in an especially explicit and egregious manner. Contempt for the law must be written on the face of the police encounter.

Consider two recent examples. In *Heien v. North Carolina*,[161] the Court denied the exclusionary remedy when an officer stopped the defendant for violating a regulation that a state court subsequently found did not cover the conduct at issue.[162] The *Heien* Court extended the reasonableness exception to include not only officers' "reasonable mistake[s] of fact" but also their "reasonable mistake[s] of law,"[163] thus barring exclusion when "the officer's error of law was reasonable."[164] *Heien*'s creation of a reasonable mistake of law exception to the Fourth Amendment's protections is a qualitative leap in the Court's willingness to assume officers' good faith. It suggests that exclusion requires a set

---

156 For extensions of *Leon*, see *Davis v. United States*, 564 U.S. 229 (2011), which extended the *Leon* good faith exception to instances in which police rely on later-overruled appellate or Supreme Court precedent, *id.* at 241; *Herring v. United States*, 555 U.S. 135, 144 (2009), which barred exclusion when an error in warrant was due to negligence by police personnel, *id.* at 147–48; *Arizona v. Evans*, 514 U.S. 1 (1995), which barred exclusion when an error was due to negligence by a clerk of the court, *id.* at 14–16; *Illinois v. Krull*, 480 U.S. 340 (1987), which upheld searches pursuant to warrants issued as a result of legislative mistakes, *id.* at 359–60; and *Franks v. Delaware*, 438 U.S. 154 (1978), which held that criminal defendants can defeat a warrant based on flaws in the underlying affidavits only in cases of "deliberate falsehood" or "reckless disregard for the truth," *id.* at 171.

157 555 U.S. 135.

158 *Id.* at 144.

159 *Id.* (construing the exclusionary rule to deter not only "deliberate . . . conduct" but also conduct that was "reckless, or grossly negligent" and stating that the rule might "in some circumstances [also apply to] recurring or systemic negligence").

160 *Davis*, 564 U.S. at 238 (quoting *Herring*, 555 U.S. at 144).

161 135 S. Ct. 530 (2014).

162 *Id.* at 540.

163 *Id.* at 536.

164 *Id.* at 540.

of facts that on their face make it clear that the officer violated a rule he or she should have known about — in effect, evidence that the officer acted with something akin to a "vicious will."[165]

Then, in *Strieff*, the Court addressed the question of when the fruit of a search incident to arrest following a plainly unlawful street stop had to be excluded.[166] As we noted earlier, because the *Strieff* majority found the initial unlawful stop to be "negligent" and a "good-faith" mistake, it concluded that exclusion was not required.[167] Like *Heien*, *Strieff* involved a seizure without adequate lawful authority in violation of *Terry v. Ohio*[168] — hardly an obscure precedent. Again, the concededly unlawful character of the officers' behavior was insufficient to oust the judicial presumption of "good faith" and "reasonableness." As such, these cases reflect, once again, the Court's concern with sheltering "all but the plainly incompetent or those who knowingly violate the law."[169]

Finally, a demand for apparent fault increasingly provides an organizing principle in the postconviction context. In net, habeas law's complex morass of procedural rules, plural standards of review, and nonstatutory presumptions "allocates relief based on a normative judgment about the degree to which both the state and its prisoners have complied with relevant legal norms."[170] Typically, petitioners "prevail . . . by demonstrating an extraordinary measure of fault akin to gross negligence or recklessness on the part of the state."[171] Gatekeeping doctrines that titrate habeas relief, in contrast, are designed to "reflect a 'presumption that state courts know and follow the law.'"[172] Relief issues only when it is exceptionally clear on the face of the record that the state courts did not do so.

As with exclusionary-rule jurisprudence, the notion of fault here is a borrowing from constitutional tort jurisprudence.[173] And as in the

---

165 *Cf.* Richard H. McAdams, *Close Enough for Government Work?* Heien*'s Less-than-Reasonable Mistake of the Rule of Law*, 2015 SUP. CT. REV. 147, 166–67 (noting recent evidence that police in Kansas City, Missouri frequently engaged in pretextual investigatory stops and that minority drivers were a disproportionate target of these stops).

166 Utah v. Strieff, 136 S. Ct. 2056, 2060–63 (2016).

167 *Id.* at 2063.

168 392 U.S. 1, 27 (1968).

169 Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

170 Huq, *supra* note 121, at 528.

171 *Id.*

172 Woods v. Donald, 135 S. Ct. 1372, 1376 (2015) (per curiam) (quoting Woodford v. Visciotti, 537 U.S. 19, 24 (2002)).

173 *See, e.g.*, Butler v. McKellar, 494 U.S. 407, 414 (1990) (citing *Leon* with approval); *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1735 (1991) (discussing the parallels between qualified immunity and habeas doctrine); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 635–40 (1993) (same).

exclusionary-rule context, the strength of the presumption of faultlessness on officials' part has waxed over time. Its current apogee in the habeas context is a 2011 case, *Harrington v. Richter*,[174] in which the Court held that a federal habeas court must defer not only to those legal grounds offered by state judges for denying a constitutional claim but also to hypothetical, never-expressed reasons that might support dismissal of that claim.[175] Two years later, in *Johnson v. Williams*,[176] the Court extended *Richter* to hold that, when a state court rules against a defendant in an opinion that rejects some of the defendant's claims but does not expressly address a federal claim, a federal habeas court must nevertheless presume, subject to rebuttal, that the federal claim was adjudicated on the merits.[177] Some circuit courts have further extended *Richter*'s logic to allow federal habeas courts to hypothesize, in the face of an unreasonable and erroneous state court ruling, an alternative ground of decision and to thereby deny habeas relief.[178] Even open and manifest error in convicting a state prisoner to a term of years or death, on this view, is not sufficient for relief.[179] What is required instead is evidence that the state court acted on the basis of a view of the law, or the evidence, that *no* reasonable or fair-minded person could hold.[180]

2. The Parallel Emergence of Apparent Fault in Substantive Constitutional Law. — Beginning in the 1970s, a similar concern with the innocence or fault of state actors emerged as an important regulatory principle in the Court's substantive constitutional law cases. This trend was not universal. The Court continued to recognize that Fourth Amendment rights, for example, can be violated by merely negligent — even well-

---

174 562 U.S. 86 (2011).

175 *Id.* at 102.

176 568 U.S. 289 (2013).

177 *Id.* at 298.

178 *See, e.g.*, Wilson v. Warden, 834 F.3d 1227, 1230–31 (11th Cir. 2016) (en banc), *cert. granted sub nom.* Wilson v. Sellers, 137 S. Ct. 1203 (2017); *accord* Cannedy v. Adams, 733 F.3d 794, 797 (9th Cir. 2013) (O'Scannlain, J., dissenting from the denial of rehearing en banc) (taking the same position). *But see, e.g.*, Grueninger v. Dir., Va. Dep't of Corr., 813 F.3d 517, 526 (4th Cir. 2016) ("[W]e may assume that the Supreme Court of Virginia has endorsed the reasoning of the Circuit Court in denying [the defendant's] claim, and it is that reasoning that we are to evaluate . . . .").

179 *Richter* cited "a state judiciary [wish] to concentrate its resources on the cases where opinions are most needed" as a justification for its decision. 562 U.S. at 99. This again reflects a presumption that state officials are acting in good faith, and that the costs of burdening their behavior at the margin cannot be effectively defrayed by the benefits of remediation. Stephen R. Reinhardt, Essay, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1229 (2015) (noting that, if *Richter*'s language was taken literally, "in order to grant habeas relief, [federal judges] would need to find that each of the state court judges who denied the petitioner's claim was not fairminded").

180 *Richter*, 562 U.S. at 101 ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004))).

intentioned — state actions, even as it denied litigants remedial relief absent proof of fault.[181] But in two areas of constitutional law, the demand for either specific evidence of bad intent or apparent fault has come to play an increasingly pivotal role.

The first involves claims of unconstitutional deprivations of individuals' procedural rights. These cases tend to arise among populations somehow subject to state supervision, whether in a carceral context or a governmental employment context,[182] or who depend on the government for some form of social assistance.[183] In this domain, the Court has held that allegations of government negligence alone are not sufficient to state a claim under the procedural prong of the Due Process Clause.[184] It has also consigned due process violations alleged to be the result of "random and unauthorized" state action (as opposed to systemic policies) to state tribunals by creating a state remedies exhaustion requirement.[185] And, at least in some contexts — for example, in cases in which the government is accused of violating due process by failing to preserve evidence — the Court has required the criminal defendant to prove the government's "bad faith."[186]

At the same time as qualified immunity was calcifying into its current form, in other words, the Court held that isolated or merely negligent state actions could not violate the Due Process Clause.[187] Also around the same time, the Court developed a distinction between unconstitutional random acts and unconstitutional policies in its Eighth Amendment cases,[188] hence limiting federal court access in Eighth

---

181 Whren v. United States, 517 U.S. 806, 813 (1996) (noting that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment" and that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis").

182 Stephen Braun, *U.S. Intelligence Officials to Monitor Federal Employees with Security Clearances*, PBS NEWSHOUR (Mar. 10, 2014, 9:46 AM), https://www.pbs.org/newshour/nation/us-intelligence-officials-monitor-federal-employees-security-clearances [https://perma.cc/C2Z4-RDD2].

183 *See* Julilly Kohler-Hausmann, *"The Crime of Survival": Fraud Prosecutions, Community Surveillance, and the Original "Welfare Queen,"* 41 J. SOC. HIST. 329, 334–37 (2007) (documenting the rise of surveillance elements within welfare provisions from the 1970s onward in Illinois).

184 Supernumerary in the constitutional tort context, this requirement has potential bite when injunctive or declaratory relief is sought.

185 Parratt v. Taylor, 451 U.S. 527, 543 (1981) (holding that no due process deprivation has occurred if the state provides adequate post-deprivation process to remedy "random and unauthorized," *id.* at 541, acts of state officers), *overruled in part by* Daniels v. Williams, 474 U.S. 327 (1986); *see also* Hudson v. Palmer, 468 U.S. 517, 533 (1984) (extending *Parratt*'s exhaustion principle to intentional torts). In general, there is no exhaustion requirement for actions under 42 U.S.C. § 1983. *See* Patsy v. Bd. of Regents, 457 U.S. 496, 516 (1982).

186 Arizona v. Youngblood, 488 U.S. 51, 58 (1988).

187 *Daniels*, 474 U.S. at 330–31 (holding that merely negligent acts do not amount to a deprivation under the Due Process Clause).

188 *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 834 (1994) (requiring proof of deliberate indifference of prison officials to state an Eighth Amendment claim for failure to protect from injury or

Amendment cases to instances in which a state official acts with sufficient intentionality and generality to warrant the label of "policymaking."[189]

Second, an intent rule has come to dominate the equal protection law related to race and gender. Prior to the mid-1970s, the Court's racial equality jurisprudence gave no priority to notions of discriminatory intent.[190] Rather, the Court in this era "did not sharply distinguish proof of purpose and proof of impact."[191] In the 1971 decision *Palmer v. Thompson*,[192] for example, the Court declared that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."[193] Within five years, however, the Court in *Washington v. Davis*[194] repudiated *Palmer*'s approach and insisted on evidence of an unconstitutional motive as a predicate of equal protection liability.[195] It subsequently interpreted this to mean that plaintiffs in equal protection cases had to show that a government actor selected a particular course of action in order to harm a disfavored group.[196] What was required, in other words, was evidence of something close to malice.[197]

The Court also imposed a heavy evidentiary burden on plaintiffs who sought to prove the existence of a discriminatory purpose,[198] thus

---

assault); Hudson v. McMillian, 503 U.S. 1, 9 (1992) (requiring a showing of malicious or sadistic use of force in Eighth Amendment claims by prisoners for excessive force).

189 *See, e.g.*, Zinermon v. Burch, 494 U.S. 113, 136–38 (1990) (holding that *Parratt* does not apply when the deprivation was foreseeable and authorized — as distinct from random and unauthorized — and when predeprivation process would have been feasible); *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 436–37 (1982) (holding that postdeprivation remedies do not satisfy due process where deprivation is caused by established state procedures).

190 Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1131–35 (1997) (describing the doctrinal shift to an intent-based model of equal protection in the mid-1970s).

191 Reva B. Siegel, *The Supreme Court, 2012 Term — Foreword: Equality Divided*, 127 HARV. L. REV. 1, 12 (2013).

192 403 U.S. 217 (1971).

193 *Id.* at 224.

194 426 U.S. 229 (1976).

195 *Id.* at 239 ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.").

196 Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (citation and footnote omitted)).

197 Siegel, *supra* note 190, at 1135.

198 *See* United States v. Armstrong, 517 U.S. 456, 459, 470 (1996); *see also* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491–92 (1999) (dismissing a selective prosecution claim without analyzing whether the evidentiary burden could be overcome).

insulating most kinds of facially neutral government actions from constitutional equality challenge.[199] Only in the rare instance in which evidence of bias somehow makes its way to a litigant outside the discovery process can courts usually even reach the merits of an equal protection challenge to a facially neutral law or policy.[200] It is only, that is, when the bad intent of the government actor becomes starkly apparent that litigants can hope to vindicate equal protection rights.[201]

B. Apparent Fault and Substantive Federal Criminal Law

The rise of apparent fault in the Court's federal criminal law jurisprudence has been more tentative and limited than in the constitutional remedies and Fourteenth Amendment contexts. This is in part a result of the Court's persistent refusal to interpret the Constitution to impose anything but the weakest constraint on legislatures' ability to dispense with mens rea. While *Lambert* remains in principle good law, the Court has not subsequently identified any other criminal law whose lack of a mens rea element violates the Due Process Clause.[202] Although the Court has continued to impose a weighty scienter requirement when First Amendment rights are involved,[203] elsewhere it has repeatedly vested legislators with "wide latitude . . . to declare an offense and to exclude elements of knowledge and diligence from its definition."[204] The Court's unwillingness to constitutionalize mens rea has restricted lower

---

199 *See* Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605, 606 (1998) (contending that the standard established by the Court in *Armstrong* is nearly impossible for many defendants with meritorious claims to satisfy).

200 *See, e.g.*, Foster v. Chatman, 136 S. Ct. 1737, 1747–55 (2016) (permitting defendant to bring a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), after defendant found evidence of discrimination related to preemptory jury strikes in the contents of the prosecution file obtained via a state open-records request).

201 The one important exception to this general rule involves equal protection claims of discrimination based on sexual orientation. In these cases, as Professor Russell Robinson recently argued, the Court has proven much more willing to infer bad intent from "context and history." Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 180 (2016); *see also id.* at 155 ("[T]he variant of animus that the Court seemed to apply in *Obergefell* is novel in its generosity to plaintiffs asserting equality claims . . . .") (referencing landmark same-sex marriage case *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

202 Lower courts have, however, on occasion applied *Lambert* to narrow the scope of criminal laws or to strike them down entirely. *See, e.g.*, Bartlett v. Alameida, 366 F.3d 1020, 1024 (9th Cir. 2004) (construing *Lambert* to require that a convicted sex offender must be shown to have actual knowledge of his or her duty to register in order to be liable for failure to register); Conley v. United States, 79 A.3d 270, 273 (D.C. 2013) (invalidating local law making it a felony to be in a car knowing that another in the vehicle unlawfully possesses a firearm, even when "the defendant [has no] notice of any legal duty" to leave the car).

203 *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

204 Lambert v. California, 355 U.S. 225, 228 (1957).

courts' freedom to fashion criminal liability rules to accord with normative or policy judgments, as happens in the common law crafting of constitutional remedies. Only when confronted with otherwise ambiguous statutes can judges make decisions about what kind of fault is required.

As a result, the diffusion of the fault principle in federal criminal law has worked through the judicial power of statutory interpretation, rather than constitutional adjudication of the kind employed in *Lambert*. The power vested in judges to interpret statutes to include fault concerns is considerable, however. Because federal criminal statutes frequently fail to specify precisely what mens rea they require or contain ambiguous actus reus requirements, federal courts in practice enjoy substantial latitude to determine how broadly or narrowly to construe criminal liability.[205] Exercising this interpretive freedom, the Supreme Court has increasingly glossed statutes to avoid imposing liability on those who act negligently, or recklessly, or even in some cases, purposefully, but who have not been shown to have acted in ways that represent a sufficiently clear violation of social understandings of proper behavior.

The Court signaled the potency of statutory interpretation as a vehicle for infusing federal criminal law with concerns about fault and innocence five years before *Lambert*'s false start, in *Morissette v. United States*.[206] *Morissette* held that courts should not presume that Congress's failure to explicitly require evidence of mens rea when it codified common law crimes necessarily meant that those crimes should be construed to impose strict liability.[207] Because the notion that crime "constituted only from concurrence of an evil-meaning mind with an evil-doing hand"[208] took "deep and early root in American soil,"[209] the Court held that Congress should be presumed to have intended to include some kind of mens rea requirement when it codified common law crimes.[210] But the Court cautioned that when Congress did not "borrow[] terms of art in which are accumulated the legal tradition and meaning of centuries of practice,"[211] the presumption in favor of mens rea would fall away.[212]

---

[205] Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347 ("[F]ederal criminal law, no less than other statutory domains, is dominated by judge-made law crafted to fill the interstices of open-textured statutory provisions.").

[206] 342 U.S. 246 (1952).

[207] *Id.* at 263.

[208] *Id.* at 251.

[209] *Id.* at 252.

[210] *Id.* at 263 ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . .").

[211] *Id.*

[212] *See id.* at 260 ("The conclusion reached in the *Balint* and *Behrman* cases has our approval and adherence for the circumstances to which it was there applied.").

In subsequent decades, federal courts read *Morissette*'s mens rea rule for common law crimes narrowly. Courts interpreted federal statutes as codifications of common law crimes only when specific common law terms appeared in the text.[213] Even then, judges refused to add mens rea when doing so appeared "inconsistent with the statute's purpose."[214] As a result, lower federal courts continued to interpret many federal crimes as strict liability offenses.[215] Conviction required a showing that the defendant intentionally performed the acts proscribed by law, not evidence of wrongful intention.[216] Even when statutes did explicitly require proof of some kind of mens rea, courts refused to interpret this to mean that the defendant had to have acted intentionally or knowledgeably with respect to each element of the crime.[217]

Beginning in the late 1970s, however, the Court started to evince increasing concern about the risk that criminal liability might fall upon defendants who acted without full knowledge of the facts that made their conduct criminal or who otherwise did not manifestly possess a "vicious will." An early sign of this concern was its repudiation of strict liability in the antitrust context.[218] In 1978, *United States v. United States Gypsum Co.*[219] unsettled decades of precedent by holding that bad intent of some sort had to be proven in all criminal prosecutions

---

[213] *E.g.*, Carter v. United States, 530 U.S. 255, 264 (2000) ("The canon on imputing common law meaning applies only when Congress makes use of a statutory *term* with established meaning at common law . . . .").

[214] Taylor v. United States, 495 U.S. 575, 594–95 (1990) ("This Court has declined to follow any rule that a statutory term is to be given its common-law meaning, when that meaning is obsolete or inconsistent with the statute's purpose."); *see also* Bell v. United States, 462 U.S. 356, 362 (1983) (holding that the common law meaning of "larceny" was not incorporated in the Bank Robbery Act because "[t]he congressional goal of protecting bank assets is entirely independent of the traditional distinction on which [the defendant] relies"); Perrin v. United States, 444 U.S. 37, 43–45 (1979) (holding that the Travel Act prohibition on bribery does not codify the common law crime of bribery because, by the time it was enacted, "federal and state statutes had extended the term bribery well beyond its common-law meaning," *id.* at 43); United States v. Nardello, 393 U.S. 286, 292–93 (1969) (holding that the Travel Act did not incorporate the common law definition of "extortion," because such an interpretation would conflict with the Act's purpose "to curb the activities of organized crime," *id.* at 293).

[215] *See, e.g.*, United States v. FMC Corp., 572 F.2d 902, 908 (2d Cir. 1978); United States v. Weiler, 458 F.2d 474, 477–80 (3d Cir. 1972); *see also* United States v. Freed, 401 U.S. 601, 607–10 (1971).

[216] *See, e.g.*, United States v. Park, 421 U.S. 658, 675 (1975) (upholding jury instructions that asserted that company president could be liable under a federal law that prohibited the adulteration of food shipped in interstate commerce "even if he did not consciously do wrong" so long as he was in a "responsible relation to the situation," *id.* at 665 n.9).

[217] *See, e.g.*, United States v. Perkins, 488 F.2d 652, 654–55 (1st Cir. 1973) (upholding conviction of defendants charged with assaulting federal officers even though the government did not show that they knew their victims' identities). *See generally* Darryl K. Brown, *Federal Mens Rea Interpretation and the Limits of Culpability's Relevance*, 75 LAW & CONTEMP. PROBS. 109 (2012).

[218] *See supra* text accompanying notes 101–103.

[219] 438 U.S. 422 (1978).

under the Sherman Act.[220] The Court thought this requirement necessary to avoid imposing liability on defendants who made "good-faith error[s] of judgment"[221] in a context wherein it could not easily distinguish "the behavior proscribed by the Act . . . from the gray zone of socially acceptable and economically justifiable business conduct."[222] The Court required explicit proof of bad intent, in order to safeguard actors who violated the law but behaved in accord with socially accepted understandings.

Antitrust law was not to be sui generis. Seven years later in *Liparota v. United States*,[223] the Court again construed a federal statute narrowly to avoid imposing liability on individuals who neither knew nor should have known that their conduct violated a legal rule.[224] *Liparota* concerned a restaurant owner who sold food stamps at a substantial discount to their face value[225] and was prosecuted under a federal statute prohibiting "knowingly . . . transfer[ring]" food stamps "in any manner not authorized by [law]."[226] The lower courts held that the defendant could be convicted because he "realized what he was doing, and was aware of the nature of his conduct, and did not act through ignorance, mistake, or accident."[227] Reversing, the Court held that the government also had to prove that the defendant knew that his conduct was "unauthorized by statute or regulations."[228]

In interpreting the statute to require proof that the defendant not only broke the law intentionally but also did so knowing that his conduct was unlawful, the Court violated the general principle that ignorance of the law is no excuse — as Justice White pointed out in dissent.[229] The Court justified doing so by arguing that it was necessary to avoid "criminaliz[ing] a broad range of apparently innocent conduct."[230] This was because, given the nature of the conduct that the statute regulated, individuals could easily violate its prohibition knowingly even when they did not seek to achieve criminal aims, or act in an

---

[220] *Id.* at 436 ("We are unwilling to construe the Sherman Act as mandating a regime of strict-liability criminal offenses."); *accord* George E. Garvey, *The Sherman Act and the Vicious Will: Developing Standards for Criminal Intent in Sherman Act Prosecutions*, 29 CATH. U. L. REV. 389, 391 & n.16 (1980).

[221] *U.S. Gypsum Co.*, 438 U.S. at 441.

[222] *Id.* at 440–41.

[223] 471 U.S. 419 (1985).

[224] *See id.* at 433–34.

[225] *Id.* at 421–22.

[226] *Id.* at 420 (quoting 7 U.S.C. § 2024(b)(1) (1982)).

[227] *Id.* at 422.

[228] *Id.* at 425.

[229] *Id.* at 441 (White, J., dissenting) ("In relying on the 'background assumption of our criminal law' that *mens rea* is required, the Court ignores the equally well founded assumption that ignorance of the law is no excuse." (citation omitted) (quoting *id.* at 426 (majority opinion))).

[230] *Id.* at 426 (majority opinion).

unreasonable or socially prohibited manner.[231] It thus rejected what the dissent (persuasively) argued was the most linguistically natural reading of the statute[232] in order to avoid imposing liability on those who did not know, and should not reasonably be expected to know, that their conduct violated the law. It read into the food stamp law, in other words, a demand for apparent fault.

Several years later, in *Cheek v. United States*,[233] the Court again construed a federal statute to require knowledge that one's conduct violated the law.[234] The defendant claimed that he failed to file his income taxes, as required by federal law, because he genuinely believed he had no constitutional duty to do so.[235] He was convicted after the trial court instructed the jury that Cheek's mistake of law could excuse his conduct only if it was reasonable.[236] The Supreme Court reversed.[237] Even unreasonable mistakes could be excused, it held, given the complexity of the federal tax code and the risk that defendants could innocently, even if unreasonably, believe their conduct was lawful when it was not.[238] What needed to be shown to establish liability, therefore, was *knowledge* that one's actions violated the law.[239] Again, an extraordinary kind of mens rea was employed to shield against the prospect of imposing liability on defendants who did not intentionally violate the law or, the Court suggested, a well-established social understanding of what the law required.[240]

Three years after that, in *Staples v. United States*,[241] the Court once again read a mens rea requirement into a federal law that had not previously been interpreted to require it — once again to avoid imposing

---

[231] *Id.* at 432–33 (arguing that lesser mens rea was required when "Congress . . . rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation," *id.* at 433, but that this was not such a case).

[232] *Id.* at 434–36 (White, J., dissenting).

[233] 498 U.S. 192 (1991).

[234] *Id.* at 206–07.

[235] *Id.* at 195–96.

[236] *Id.* at 196–97.

[237] *Id.* at 201.

[238] *See id.* at 200–01.

[239] *Id.* at 201 ("Willfulness, . . . in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.").

[240] One could read *Cheek*, in its acceptance of even unreasonable but genuine mistakes of law as a defense to liability under the federal tax law, to establish something closer to a subjective fault standard than an apparent fault standard. The language in the opinion suggests, however, that the Court was not convinced that even the basic requirement to file taxes was sufficiently clear and widely shared to justify extending liability to those who violated it. *See id.* at 205 (noting that "in 'our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law,' and '[i]t is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care'" (alteration in original) (quoting United States v. Bishop, 412 U.S. 346, 360–61 (1973))).

[241] 511 U.S. 600 (1994).

liability on the "apparently innocent."[242] *Staples* involved the prosecution of a defendant who possessed a semiautomatic machine gun modified so as to be capable of fully automatic fire.[243] The gun was unregistered in violation of the National Firearms Act.[244] Staples contended that he could not be penalized unless the government proved that, at the time he possessed the gun, he knew it had been modified to be capable of automatic fire.[245] Lower courts rejected this argument.[246] The trial judge instructed the jury that liability could rest on proof that the defendant knew "that he [was] dealing with a dangerous device of a type as would alert one to the likelihood of regulation."[247] The Court reversed, once again cautioning of the risk that liability could be imposed on those who had no reason to suspect they were in violation of the law.[248] Although guns may be "dangerous device[s]," the Court explained, this did not mean that their possession was "not also entirely innocent."[249]

Liparota, *Cheek*, and *Staples* implicitly reject the thesis articulated in *Shevlin-Carpenter* that innocence is whatever the legislature says it is.[250] Instead, these cases insist that federal courts interpret federal statutes to avoid imposing criminal liability on those who did not possess a vicious will or know that their conduct was likely to be regulated by the criminal law — at least absent clear evidence of contrary legislative intent.[251] Formally cases about mens rea, these cases are also usefully

---

[242] *Id.* at 610 (quoting Liparota v. United States, 471 U.S. 419, 426 (1985)).

[243] *Id.* at 603.

[244] *Id.*

[245] *Id.* at 603–04.

[246] *Id.* at 604.

[247] *Id.* (quoting trial transcript).

[248] *Id.* at 619–20.

[249] *Id.* at 611.

[250] Other cases from the same period in which the Court employed the same approach include *Ratzlaf v. United States*, 510 U.S. 135, 136–37 (1994), which held that a conviction for "willfully" structuring financial transactions to evade reporting requires proof that a defendant not only intended to violate the federal reporting laws but did so knowing his or her conduct was unlawful, because "currency structuring is not [an] inevitably nefarious [act]," *id.* at 144; and *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68–69 (1994), in which the Court held that a conviction for interstate trafficking of child pornography requires knowledge of all its elements, lest the law "sweep within the ambit of the statute actors who had no idea that they were even dealing with sexually explicit material," *id.* at 69.

[251] *See, e.g.*, Liparota v. United States, 471 U.S. 419, 425 (1985) ("Absent indication of contrary purpose in the language or legislative history of the statute, we believe that [the food stamp fraud law] requires a showing that the defendant knew his conduct to be unauthorized by statute or regulations."); *see also X-Citement Video*, 513 U.S. at 72–78 ("*Morissette*, reinforced by *Staples*, instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct," *id.* at 72, "so long as such a reading is not plainly contrary to the intent of Congress," *id.* at 78.).

understood to be demands for statutory readings that preclude punishment unless there is clear evidence that a defendant violated the social understanding of legality.

In subsequent decades, the Court continued to add mens rea requirements to federal criminal laws as a hedge to protect the "apparently innocent" against liability. In some (but hardly all) cases, mens rea was imposed on criminal statutes in the shadow of the First Amendment. In *Elonis v. United States*,[252] for example, the Court held that a federal statute that made it a crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another"[253] did not prohibit merely negligent behavior — behavior that a reasonable observer would interpret as a threat — but required some kind of subjective fault.[254] The Court cited *Liparota*, *Staples*, and their progeny for the proposition that "[w]hen interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from "otherwise innocent conduct."'"[255] Despite the absence of First Amendment language in the decision, one could interpret the Court's reading of the law as partly a product of its concern about the peril that a broader reading of the threats that criminal law might pose to expressive freedom.

Judicial concern with "innocent" behavior being penalized has continued to exercise a gravitational pull in the Court's criminal cases, however, even in cases involving statutes that do not create obvious First Amendment concerns. Three cases are illustrative.

First, in 1999 the Court in *United States v. Sun-Diamond Growers of California*[256] interpreted a federal law that prohibited "giv[ing] . . . anything of value to any public official, . . . for . . . any official act"[257] as applying only to gifts that were intended as "reward[s] for some future act that the public official will take . . . or for a past act that he has already taken."[258] The Court rejected the government's argument that the statute applied more broadly, to gifts that were given to government officials "motivated, at least in part, by the recipient's *capacity to exercise governmental power or influence* in the donor's favor."[259] The Court

---

252 135 S. Ct. 2001 (2015).

253 *Id.* at 2004 (omission in original) (quoting 18 U.S.C. § 875(c) (2012)).

254 *See id.* at 2011. Although the Court made clear that mere negligence was insufficient to convict, it did not reach a conclusion about whether a showing of recklessness was sufficient. *Id.* at 2012.

255 *Id.* at 2010 (quoting Carter v. United States, 530 U.S. 255, 269 (2000)); *see id.* at 2009–11.

256 526 U.S. 398 (1999).

257 *Id.* at 401 (quoting 18 U.S.C. § 201(c)(1)(A) (1994)).

258 *Id.* at 405.

259 *Id.* (quoting Brief for the United States Department of Justice as Amicus Curiae at 17, *Sun-Diamond*, 526 U.S. 398 (No. 98-131)).

asserted that its significantly narrower reading of the statute's reach was not only the more "natural" one[260] but also was necessary to avoid creating a "snare[] for the unwary."[261] The government's view of the statute, the Court warned, would "criminalize . . . token gifts to the President . . . such as the replica jerseys given by championship sports teams each year during ceremonial White House visits"[262] or "a high school principal's gift of a school baseball cap to the Secretary of Education, by reason of his office, on the occasion of the latter's visit to the school."[263] Criminalizing such obviously innocent acts, the Court intimated, could not have been Congress's intent when it enacted the law, even if the statutory text could be stretched to reach them.[264]

Second, in *Yates v. United States*,[265] the Court held that a provision in the Sarbanes-Oxley Act prohibiting the knowing destruction of any "tangible object with the intent to impede . . . [a federal] investigation"[266] applied only to objects "use[d] to record or preserve information" and not — as the government had argued — to any physical object.[267] The Court's narrow interpretation of the statute's text was again motivated by its desire to avoid creating snares for the unwary. The government's reading of the statute, the Court argued, would mean "expos[ing] individuals to 20-year prison sentences for tampering with *any* physical object that *might* have evidentiary value in *any* federal investigation into *any* offense, no matter whether the investigation is pending or merely contemplated, or whether the offense subject to investigation is criminal or civil."[268] It thus limited the range of objects to which the statute applied in order to protect those who had no reason to know that their conduct courted criminal penalties.[269] It cited *Liparota* to the effect that criminal statutes should "provide fair warning concerning conduct rendered illegal."[270] Once again, the Court interpreted a statutory actus reus element in order to ensure that it reached only those who were obviously at fault.[271]

Finally, as we explained in the Introduction, in *McDonnell*, the Court held that a federal law prohibiting officials from performing "official

---

[260] *Id.* at 406.
[261] *Id.* at 411.
[262] *Id.* at 406–07.
[263] *Id.* at 407.
[264] *See id.* at 406, 408–09.
[265] 135 S. Ct. 1074 (2015).
[266] *Id.* at 1078 (quoting 18 U.S.C. § 1519 (2012)).
[267] *Id.* at 1081.
[268] *Id.* at 1088.
[269] *Id.*
[270] *Id.* (quoting Liparota v. United States, 471 U.S. 419, 427 (1985)).
[271] Note, however, that the effect of *Yates* is to limit the statute's reach to the white-collar context. This element of *Yates* is hence a counterexample to the general trend we observe of favoring the prosecution of street crime over "suite crime." *See infra* note 329 and accompanying text.

acts" in exchange for gifts from others applied only in cases in which the official made a decision or took an action on a pending government issue.[272] Simply arranging meetings or hosting events in exchange for gifts, the Court made clear, did not violate the terms of the law.[273] Once more, the Court expressed concern about a broad reading's effect on "conscientious" government actors.[274]

In a wide array of cases, then, the Court has construed diverse federal criminal laws to avoid imposing liability on "innocent" or "apparently innocent" conduct — that is, on the conduct of reasonable law-abiding persons (high school principals, conscientious legislators, lawful gun owners).[275] By either reading into the law a stringent mens rea requirement or construing the actus reus element narrowly, the Court ensures that only defendants evincing apparent fault are found liable. These decisions reflect the Court's concern that punishment track not just the law on the books but also its judgments of what counts as a social understanding of legality.

III. Apparent Fault and the Distribution of State Power

We begin in this Part by examining how apparent fault may shape the paths by which state resources, and in particular the state's coercion, flow across and among different policy domains and populations. We contend that the doctrinal architecture described in Part II can channel both when and how state officials intervene in private ordering. It thereby operates as an obscure yet potent mechanism by which federal judges nudge the state to target this home over that business, to apply coercion against this population and not that one, and to penalize one species of criminality and not another. In brief, the rise of apparent fault influences how we, the people, tangibly experience the state.

To flesh this out, we develop three claims in this Part. First, we explain how and why an apparent fault requirement likely influences official behavior. Second, as prefigured in Parts I and II, we identify noteworthy discontinuities in the judicial demand for apparent fault. Third, we argue that the ensuing "gappiness" has distributive effects: by

---

[272] 136 S. Ct. 2355, 2368–71 (2016).

[273] *Id.*

[274] *Id.* at 2372.

[275] Lower courts have followed the Court's lead. *See, e.g.*, United States v. Project on Gov't Oversight, 616 F.3d 544, 550–51 (D.C. Cir. 2010) (construing a statute making it a crime to compensate government officials for government services to require proof of specific intent in order to avoid penalizing innocent conduct); United States v. Bronx Reptiles, Inc., 217 F.3d 82, 88–90 (2d Cir. 2000) (construing a statute that prohibits the importation of wild animals or birds under inhumane or unhealthful conditions to require proof that the defendant knew the conditions were inhumane or unhealthful).

making it more or less costly to pursue different kinds of legal claims, it shapes the choices that state actors make between different policy goals and instruments. Apparent fault does not per se make the stick and the sword unattractive policy tools, but by paying attention to *when* and *against whom* coercion is more costly, we can discern better the effects of judicial innovation of the fundamental contours of state action.[276] One implication of our analysis is that it is a mistake to assume that imposing a fault demand on criminal liability will necessarily diminish the coercive or carceral reach of the state: rather than acting as a friction, apparent fault is a valve that directs the flow of coercion toward different populations.

A. Apparent Fault as Tax and Subsidy

A judicial demand for apparent fault has bilateral effects: it can either enable or deter state action. Where governmental actors are forced to substantiate fault before they can take coercive action, their transaction costs increase. The result is to make it less likely that such action will occur. In contrast, when it is those who are targeted by coercive state action who must prove the bad intentions of adversely positioned officials, the expected frictions of state action diminish. Errors, malevolence, and experimentation at the legal boundary all become less expensive. They therefore become more likely to occur. Apparent fault, in short, can act *either* as a frictional tax *or* as an enabling subsidy, depending on whether it is the state or a private actor who must demonstrate fault to elicit judicial action. What empowers in one moment weakens in another.

Consider first that the superficial doctrinal symmetry in the case law that we mapped above can be peeled away to reveal a functional dichotomy. In both the constitutional remedies and the substantive criminal law contexts, apparent fault works as a prerequisite to a judicial finding that the status quo can be disturbed. Yet this formal symmetry across doctrinal domains is accompanied by an important difference in the identity of the party laboring under the fault requirement: In the criminal law context, it is the *federal government* that seeks to alter the status quo through a judicial proceeding to the detriment of an individual. In the constitutional remedies context, it is a private individual (generally) who seeks the benefit of a judicial intervention to the detriment of the government.

---

[276] We emphasize that our argument is not empirical; we make no claim, as a result, about the magnitude of the effects identified here. Testing the effect of the fault rule is possible — for example, using a regression discontinuity design around an appropriate exogenous judicial shock — but is beyond our ambit here: our aim is more modestly to sketch the basic hydraulics of judicial influence on state power.

Depending on whether it is allocated to the government or to its opponents, the fault requirement can therefore operate as a friction or an accelerant for state action. The basic intuition here — that judicial regulation in the public law domain can act as either a tax or a subsidy — derives from a series of justifiably famous articles by Professor William Stuntz.[277] By making certain actions either more or less costly at the margin, judges either suppress existing behaviors or elicit new kinds of conduct. For example, Stuntz argued that the availability of the exclusionary rule would alter the mix of claims that criminal defense lawyers, faced with limited resources, would raise on behalf of their clients.[278] He hence predicted that exclusion motions would crowd out motions related to factual innocence in ways that, across the whole population, benefited the guilty (who gain from exclusion) over the innocent (who usually do not).[279] So here, a judicial decision as to whether fault should be required before a criminal penalty or a civil sanction can be imposed changes the likelihood of that sanction being imposed.

Stuntz's claim that friction-inducing regulation leads to a reduction in governmental activity levels, however, contains hidden premises. It assumes that officials are sensitive to regulatory costs imposed by judicial fiat. It also assumes that their activity levels are sensitive to (that is, elastic to) the level of litigation-related costs.[280] We think these assumptions are correct. But they need some justification as applied here.

Our claim that apparent fault operates as a tax on government behavior concerns federal prosecutors (on the criminal law side) and a wide range of police, prison officials, and bureaucrats (on the constitutional remedies side). This claim builds on the assumption that when officials seek to act upon their legal authority, either by prosecuting or using coercive force, they are sensitive to the frictional costs imposed by fault. Prosecutors, we assume, are sensitive to the risk of acquittal. Street-level officials, the modal defendants in actions for constitutional remedies, are treated as being sensitive to the downstream litigation risk. But are these assumptions justified?

We think they are. Across this range of public officials, a mixture of motives — including concerns about effective policy implementation,

---

[277] *See* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 782 (2006); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1275–76 (1999) (describing Fourth Amendment rules as "taxes" that shape police behavior, *id.* at 1275).

[278] William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443, 443–44 (1997).

[279] *Id.* at 444 ("[Exclusion] litigation is displacing something else, and the something else may well have more to do with guilt and innocence.").

[280] The standard view in law and economics is that negligence liability in accident law does not influence activity levels, whereas strict liability does. *See* Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 1–3 (1980).

fiscal cost, and the personal expenditure of time and effort — all likely have an effect.[281] Empirical evidence suggests that prosecutors select cases in order to pursue policy metrics (such as sentence length or crime reduction) keyed to career advancement.[282] But prosecutors also exercise discretion among cases on the basis of judgments about when there is sufficient evidence to proceed to trial.[283]

The case for treating street-level bureaucrats as sensitive to litigation-related costs is more complex. Both evidence[284] and theory[285] suggest that bureaucrats are insensitive to financial penalties. In addition, some remedies, such as postconviction relief at the end of a habeas proceeding, may come so long after a criminal trial that incentive effects dissipate (except in high-profile and capital cases). But officials also have preferences over policy outcomes that work independent of deterrence-related effects. There is some evidence, for example, that police have more punitive preferences than the general population,[286] making the prospect of downstream exclusion an unhappy one for them. It would seem likely that prison officials also have strong preferences for order and safety in their workplaces. And it also seems likely that many bureaucrats identify to some extent with their organizations' missions as a consequence

---

[281] *Cf.* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 920 (2005) ("Government officials will have a predictable array of interests . . . including effectuating their preferred policies, contributing to the success of their political party, seeking greater personal influence within their institution, and angling for higher office.").

[282] Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys*, 7 AM. L. & ECON. REV. 379, 379 (2005) (finding that "the length of prison sentences is positively related to subsequent favorable career outcomes for U.S. attorneys"); Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 259 (2000) (finding evidence that crime reduction is a motive).

[283] *See* Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1252–54 (2011) ("[A] prosecutor [may have] sufficient evidence to secure a conviction against a defendant for conduct that violates a criminal law, but decline[] prosecution . . . ." *Id.* at 1252.); *see also* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1657 (2010) ("[A] prosecutor may decide not to charge because (i) she feels she may lack sufficient proof of legal guilt, (ii) she wishes to preserve limited resources, or (iii) she concludes that the prospective defendant is insufficiently blameworthy.").

[284] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (finding that fewer than one half of one percent of police defendants in a study of forty-four major jurisdictions made any personal contribution to damages awards).

[285] Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 354–57 (2000) (rejecting the proposition that government litigants are guided by financial incentives).

[286] *See* Dhammika Dharmapala, Nuno Garoupa & Richard H. McAdams, *Punitive Police? Agency Costs, Law Enforcement, and Criminal Procedure*, 45 J. LEGAL STUD. 105, 112–14 (2016) (summarizing studies).

of "organizational socialization,"[287] which results in a form of "institutional loyalty."[288] Tort and habeas litigation, moreover, impose nonpecuniary costs upon defendants related to lost time and damaged reputation, which might well be viewed in expectation as undesirable.[289] So while we are reluctant to draw strong conclusions about the magnitude of fault's effect on official behavior, we think that Stuntz's model of judicial regulation as tax and subsidy generates useful purchase in both the contexts we consider.

B. The Uneven Distribution of Apparent Fault

It is not enough to point out, however, that apparent fault operates as a tax or subsidy on government action. To fully assess its consequences on the operation of state power, it is necessary to also take into account variations in the size of the tax or subsidy it imposes. And we must account for limitations on its scope. It is only by doing so that one can properly understand how apparent fault pushes and pulls, redirecting state resources by making certain actions more or less costly than others.

This and the next section map these incentive effects. To this end, we first explore the significant variation in the difficulty of establishing apparent fault in different cases; we then identify the doctrinal gaps where the federal courts have failed to deploy fault in the substantive criminal law context and the constitutional remedies context respectively. Finally, we provide a simple framework for capturing the underlying pattern of transsubstantive regularities and analyze the effects of apparent fault on different groups of defendants.

1. Differences in the Size of the Apparent Fault Tax. — Although up until now we have discussed apparent fault as if it were a singular phenomenon, in practice there can be no doubt that apparent fault is easier to establish in certain kinds of cases than in others, and with respect to certain kinds of defendants. This is because defendants who travel in respectable social and professional worlds generally receive from the

---

[287] Daniel Carpenter & George A. Krause, *Transactional Authority and Bureaucratic Politics*, 25 J. PUB. ADMIN. RES. & THEORY 5, 13 (2014); *see also* JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC 3 (1999) (summarizing historical research that shows the influence of "the bureaucrat's own preferences, peer bureaucrats, supervisors, and the bureaucrat's clients" on agency work decisions).

[288] David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 1 (2018).

[289] The Court has obliquely referenced this concern. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982) (noting the "special costs to 'subjective' inquiries"); *see also* Mark R. Brown, *The Demise of Constitutional Prospectivity: New Life for* Owen*?*, 79 IOWA L. REV. 273, 309 (1994) ("[A] general fear of litigation costs (for instance, attorneys' fees and time) might support concerns about overdeterrence."); Harold J. Krent, Essay, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039, 2061–62 (1993) ("[B]ecause decisionmakers do not know which decisions will be challenged, they must consider the possibility of a lawsuit in every case.").

Court a presumption of good faith that the government must specifically overcome in order to establish the existence of fault. The same is not true of defendants who circulate in more obviously criminal social and professional circles.

Consider drug possession cases. Possession is one of the most numerically significant narcotics offenses.[290] Possession of contraband was identified by Professor Francis Sayre as an archetypal "public welfare" offense.[291] Yet, under federal law, as well as in most states, the government has the burden of proving the defendant's knowledge of what he or she possessed.[292] This mens rea requirement is easily understood as related to the apparent fault rule — at least if we assume, as proponents of the drug laws clearly do, that possession of illicit drugs is not only an unlawful but also an immoral act and one that betrays the possessor's degraded or vicious character.[293] It is nevertheless a requirement that is relatively easy for prosecutors to satisfy. Indeed, courts generally presume the defendant knew what he or she possessed, unless provided evidence that establishes otherwise, and defendants can be held liable for possession of illegal narcotics when found with those drugs on their person, close to their person, or on property that they control.[294] This is why, in practice, drug possession has been said to resemble a strict liability crime.[295]

Now contrast this burden of proof with what the government has to prove in cases involving other kinds of possession crimes. Consider, for example, the standard of proof that governs charges brought under the National Firearms Act after the Court's decision in *Staples v. United*

---

[290] Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 834–36 (2001) (describing the pervasiveness of possession offenses in both narcotics enforcement and criminal law enforcement more generally).

[291] Sayre, *supra* note 68, at 78 (listing several forms of contraband possession as quintessential public welfare offenses).

[292] *See, e.g.*, United States v. Verners, 53 F.3d 291, 294 (10th Cir. 1995); *see also* Sean Mullins, Comment, *Innocent Until Presumed Guilty: Florida's Mistreatment of Mens Rea and the Presumption of Innocence in Drug Possession Cases*, 46 J. MARSHALL L. REV. 1157, 1162 & n.27 (2013) (noting that Florida is "one of only two states to define felony drug possession as a strict liability crime," *id.* at 1162, and that knowledge is required by all but one other).

[293] *See, e.g.*, THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY 17 (1989), https://www.ncjrs.gov/pdffiles1/ondcp/119466.pdf [https://perma.cc/2T55-BJQL] ("[W]e declare clearly and emphatically that there is no such thing as innocent drug use.").

[294] *See, e.g.*, *Verners*, 53 F.3d at 294.

[295] Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163, 167 (2008) ("The criminal law has evolved so that possession is now typically a strict liability crime in which mere presence in a location where there are drugs is sufficient to prove constructive possession, and there are no meaningful defenses to a charge of possession." (citing MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME 32–39 (2002))); *see also* Dubber, *supra* note 290, at 859 ("In many cases, possession statutes . . . save prosecutors the trouble of proving . . . mens rea . . . . This means that many possession statutes, particularly in the drug area[,] . . . are so-called strict liability crimes.").

States. In these cases, the government must prove not only that the defendant possessed the illegal weapon in question. It must also affirmatively prove that the defendant knew the weapon possessed the features that made it unlawful under the Act.[296] This is a much more difficult standard to satisfy. This distinction reflects the different status of the activity charged in each case. On the Court's view, there are simply fewer respectable reasons to possess a highly controlled substance such as marijuana or cocaine than there are reasons to have firearms like the converted automatic machine gun at issue in *Staples*.[297]

The comparison between drug and firearm possession cases underscores a more general point. Apparent fault is harder to establish in cases in which the bare fact of the underlying conduct is not viewed *by the Justices* as evidence of a vicious will of some sort. In such cases, the government must prove that the defendant knew not only all the facts that made his or her actions criminal but also that his or her actions violated the law. This principle illuminates *Liparota*. It is also at work in the subsequent case of *Ratzlaf v. United States*,[298] which involved a federal statute prohibiting the willful structuring of financial transactions to evade reporting requirements.[299] To establish liability, the *Ratzlaf* Court held, what the government had to show was not only that the defendant intentionally "structured cash transactions . . . with knowledge of, and a purpose to avoid, the banks' duty to report currency transactions in excess of $10,000"[300] but that the defendant *also* knew that structuring his transactions for this end constituted a crime.[301] The Court did so because it found there to be innocent, nonnefarious reasons why individuals might attempt to structure their financial transactions in this way.[302] *Ratzlaf* and *Liparota* show how concern about innocent, faultless defendants can override the maxim that ignorance of the law is no excuse.

---

296 *See* Staples v. United States, 511 U.S. 600, 619 (1994).

297 *See id.* at 611 (reasoning that knowledge of the weapon's characteristics is required because "[e]ven dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation . . . [and] despite their potential for harm, guns generally can be owned in perfect innocence").

298 510 U.S. 135 (1994).

299 *Id.* at 136.

300 *Id.* at 140.

301 *Id.* at 149.

302 *Id.* at 144–46 ("Undoubtedly there are bad men who attempt to elude official reporting requirements in order to hide from Government inspectors such criminal activity as laundering drug money or tax evasion. But currency structuring is not inevitably nefarious. . . . Courts have noted 'many occasions' on which persons, without violating any law, may structure transactions 'in order to avoid the impact of some regulation or tax.' . . . In light of these examples, we are unpersuaded by the argument that structuring is so obviously 'evil' or inherently 'bad' that the 'willfulness' requirement is satisfied irrespective of the defendant's knowledge of the illegality of structuring." (footnote omitted) (quoting United States v. Aversa, 762 F. Supp. 441, 446 (D.N.H. 1991))).

Conversely, in cases in which the defendant's underlying conduct is obviously immoral as well as unlawful, the concerns animating judicial demands for apparent fault ebb. The Court has hence held that, in order to impose a ten-year minimum sentencing enhancement for discharging a firearm during a drug trafficking crime, the government does not have to show that the firearm was discharged either knowingly or intentionally.[303] "It is unusual," the Court explained, "to impose criminal punishment for the consequences of purely accidental conduct. But it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts."[304] Because the underlying conduct the defendant was engaged in when he discharged the gun was not only illegal but obviously and perniciously so, the Court declined to require any further evidence of mens rea to impose the sentencing enhancement.

An important caveat to this analysis concerns magnitudes: prosecutors already have incentives to target low-status defendants who lack effective counsel. Empirical evidence suggests that prosecutors also charge racial minorities more harshly than whites for comparable offenses.[305] Given these headwinds, it is quite plausible to think that the asymmetries we identify here would exist even without the apparent fault regimes — although for reasons we explore in Part IV, extant disparities and the apparent fault demand likely emerge from the same sociocultural and ideological matrix.

2. The Gappiness of Fault. — It is also the case that, notwithstanding the Court's assiduous concern with the problem of innocent defendants, there remain significant areas of federal criminal and constitutional law in which fault is not the governing liability standard. The gaps in the apparent fault regime are perhaps broadest in the domain of federal criminal law, for all the reasons canvassed in section II.B. The statutory regimes in which fault is not elicited remain quite varied. Defendants can be convicted of a variety of environmental crimes without any proof of fault.[306] The FDCA and similar regulatory statutes also continue to

---

303 Dean v. United States, 556 U.S. 568, 577 (2009).

304 *Id.* at 575.

305 Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 5 (2013) ("[W]hile a black-white gap appears to be introduced during the criminal justice process, it appears to stem largely from prosecutors' charging choices, especially decisions to charge defendants with 'mandatory minimum' offenses.").

306 *See, e.g.*, United States v. Apollo Energies, Inc., 611 F.3d 679, 681–82 (10th Cir. 2010) (holding that the Migratory Bird Treaty Act requires only proof that defendants' actions proximately harmed protected birds); United States v. Nguyen, 916 F.2d 1016, 1018–19 (5th Cir. 1990) (upholding conviction under the Endangered Species Act even though government did not prove that defendant knew that the animal in question was a threatened species or that it was illegal to transport it into the United States).

be construed to impose liability free from fault, even vicariously.[307] And it remains the case today that, under federal (as well as state) law, defendants can be held liable for crimes carried out by their co-conspirators that they neither intended nor knew anything about.[308]

In constitutional remedies cases, the triumph of apparent fault has been similarly incomplete. Not all constitutional challenges require a showing of fault to succeed. This is the case for two primary reasons. First, not all venues for making constitutional arguments are hedged about with a demand for apparent fault. Litigants do not, for example, have to show fault in order to challenge the constitutionality of a plea bargain, or to overturn the results of a trial that violated their constitutional rights, so long as they are able to do so on direct appeal. Before a conviction is final, an appellate court can provide a remedy for constitutional error, provided that the error is not "harmless beyond a reasonable doubt."[309] These constitutional errors, furthermore, frequently do not require any showing that those who committed them did so knowingly or intentionally.[310] In effect, this is a no-fault standard. It contrasts starkly with the high hurdle that confronts habeas petitioners.[311]

Of course, not all individual rights holders have equal access to such venues. Whether a litigant is able to challenge constitutional errors committed during plea bargaining or trial on direct appeal will frequently depend on whether his or her trial lawyer was able to identify the error and challenge it immediately. In other words, the difference in access to a constitutional remedy will frequently depend on whether a litigant has a good lawyer.[312] To the extent that access to competent legal advice is correlated with wealth and income, apparent fault is imposed in a regressive fashion.

Second, the rise of apparent fault has not impacted nonindividualized constitutional remedies. It has thus not made it harder to facially

---

[307] Amy J. Sepinwall, *Crossing the Fault Line in Corporate Criminal Law*, 40 J. CORP. L. 439, 475 (2015).

[308] *See, e.g.*, United States v. Adams, 789 F.3d 713, 714 (7th Cir. 2015) (co-conspirator can be liable for possessing a weapon found in conspirators' car even if he did not place it there or know of its existence); United States v. Adams, 746 F.3d 734, 739–43 (7th Cir. 2014) (defendant can be liable for drugs sold by co-conspirators).

[309] Chapman v. California, 386 U.S. 18, 24 (1967).

[310] The government, for example, may violate the defendant's Sixth Amendment rights by providing ineffective assistance of counsel when it furnishes a lawyer whose performance falls "below an objective standard of reasonableness," even if it does so with no bad intent. Strickland v. Washington, 466 U.S. 668, 687–88 (1984).

[311] *See supra* pp. 1552–53.

[312] That said, ineffective assistance of counsel at trial — if it can be documented — provides a gateway to habeas review on the merits. *See* Coleman v. Thompson, 501 U.S. 722, 753–54 (1991).

challenge federal laws on constitutional grounds. Notionally, facial challenges on constitutional grounds are "disfavored."[313] Yet, as a practical matter, successful facial challenges to statutes on constitutional grounds — and in particular structural constitutional grounds — abound.[314] In these challenges, and through mechanisms such as the Declaratory Judgment Act, "federal courts frequently entertain actions for injunctions and for declaratory relief aimed at preventing future activities that are reasonably likely or highly likely, but not absolutely certain, to take place."[315] Nationwide injunctions against nascent programs ensue.[316] Such constitutional review in federal court, in effect, operates as a functional parallel to the "abstract" judicial review of legislation immediately after enactment exercised by the French Conseil Constitutionnel.[317] The apparent fault requirement does not generally apply to such quasi-anticipatory challenges.[318] Other potential constraints, such as Article III standing limitations, are also applied not infrequently with a light touch.[319]

In some contexts, the Court's concern with fault has only made it *easier* to bring certain kinds of facial challenges. For example, although the Court has insisted that bad intent is necessary to establish a violation of the Equal Protection Clause,[320] it also applies a categorical presumption that laws or practices that classify on the basis of race or some other "suspect" characteristic are the product of a bad intent.[321] The result has been to relieve litigants seeking to challenge laws that employ racial or other suspect classifications of the onerous burden imposed on litigants who seek to challenge facially neutral laws.

Note the striking contrast between the kind of plaintiff burdened by apparent fault and the pool of litigants able to avail themselves of quasi-

---

313 Citizens United v. FEC, 558 U.S. 310, 398 (2010) (Stevens, J., concurring in part and dissenting in part) (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008)); *accord* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006).

314 In recent Terms, these have included *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015); *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 14–15 (2013); *Bond v. United States*, 564 U.S. 211, 222–24 (2011); and *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 497–98 (2010).

315 Clapper v. Amnesty Int'l USA, 568 U.S. 398, 431 (2013) (Breyer, J., dissenting).

316 *See, e.g.*, Texas v. United States, 809 F.3d 134, 146, 188 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.).

317 For a summary of this system, see Alec Stone Sweet, *The Politics of Constitutional Review in France and Europe*, 5 INT'L J. CONST. L. 69, 71 (2007).

318 The exception, of course, involves challenges predicated on the Equal Protection Clause or some other constitutional provision that has been interpreted to require a showing of fault. *See, e.g.*, Hawai'i v. Trump, 245 F. Supp. 3d 1227, 1236 (D. Haw. 2017) (citing "religious animus" in finding a likely Establishment Clause violation), *aff'd in part and vacated in part*, 859 F.3d 741 (9th Cir. 2017), *vacated on other grounds*, 138 S. Ct. 377 (2017). *But see infra* note 321 and accompanying text.

319 *See* Huq, *supra* note 24, at 65 & n.343 (collecting cases).

320 *See supra* note 195 and accompanying text.

321 *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2208 (2016) (applying strict scrutiny to a public university's use of race in admissions for diversity ends).

anticipatory challenges to abstract policies that are often still awaiting full implementation. The latter does not include dispersed, relatively politically disempowered rights bearers, such as criminal defendants, the convicted, and the objects of police surveillance or violence. It is more likely to include sophisticated, fiscally endowed interest groups, such as industry groups, state-level politicians, and wealthy criminal defendants.

The resulting latticework of fault's application is summarized in Table 1.

Table 1: The Uneven Application of Apparent Fault

	CRIMINAL LAW	CONSTITUTIONAL LAW
APPARENT FAULT REQUIRED	Acts involving "apparently innocent" conduct, such as meeting with constituents and possessing handguns	Individual remedies (§ 1983, *Bivens*, habeas, and exclusion) Certain substantive constitutional norms (subsidy)
APPARENT FAULT NOT REQUIRED	Acts growing out of criminal agreement or criminal intent Criminal actions that result from participation in grey markets	Facial challenges to statutes Structural challenges

C. The Distributive Consequences of Apparent Fault

As the previous section indicates, the operation of the apparent fault rule is likely to have relatively predictable distributive effects. In this section, we map them out. Our aim is to identify roughly how its costs and benefits fall upon different forms of state action, and to suggest how these costs and benefits alter the distribution and form of state action observed in the world.

We begin by characterizing the effect of including or omitting apparent fault in the federal criminal law and constitutional law contexts we have identified in Part II. Table 2, which tracks the basic conceptual template of Table 1, summarizes the doctrine's effect upon federal officials' incentives to engage in state action.

Table 2: The Distributive Effects of Apparent Fault on State Action

	Criminal Law	Constitutional Law
Apparent Fault Required	Antistatist	Statist
Apparent Fault Not Required	Statist	Antistatist

Given these general effects, it is possible to characterize in broad strokes the general distributive effect of fault across the incentives of the federal government. At the most general level, apparent fault's emergence across some (but not all) aspects of federal governmental action imposes pressure to shift state resources away from the enforcement of complex, generally white-collar and regulatory offenses, and toward the direct, physical enforcement of law in arenas such as narcotics and immigration.

As Part II demonstrated, the Supreme Court has imposed supplemental mens rea requirements in the antitrust, securities, and public corruption contexts as a means of protecting "innocent" conduct.[322] Concern for apparent fault, to be sure, is by no means pervasive across white-collar crimes.[323] But the examples identified in Part II are hardly insignificant. Nor have the courts of appeals ignored the Court's signal. One high-profile example is worth recounting despite our focus on the Supreme Court: the criminal and civil suit against Countrywide Home Loans executives for mortgage-related fraud during the financial crisis of 2008–2009 based on alleged violations of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.[324] The Second Circuit vacated a jury's verdict for the government with instructions to enter judgment for the corporate officer defendants because the prosecution had failed to produce sufficient evidence of intent.[325] It explained that "where allegedly fraudulent misrepresentations are promises made in a contract, a party claiming fraud must prove fraudulent intent at the time of contract execution," and "evidence of a subsequent, willful breach

---

[322] *See supra* pp. 1558–64.

[323] Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 Duke L.J. 823, 843 (2014) (arguing that federal corporate criminal law "often dispense[s] with mens rea").

[324] United States *ex rel.* O'Donnell v. Countrywide Home Loans, Inc., 822 F.3d 650, 652 (2d Cir. 2016).

[325] *Id.* at 652–53.

cannot sustain the claim."[326] This ruling deflates the likelihood of further prosecutions. Even where a financial institution such as a mortgage provider engages in deliberate fraud, it will be exceedingly difficult to find evidence of that mens rea memorialized contemporaneously with the relevant deal.[327] And the ruling created this effect out of a concern that the "innocent" conduct of contract breach will be mistaken for criminal conduct — precisely the concern animating the demand for apparent fault.

Whereas the white-collar activities of business and government have prompted courts to erect some prophylactic safeguards in the form of fault demands, the more blue-collar (or no-collar) activities of street crime and other activities associated with the "off the books" economy have not elicited analogous judicial solicitude.[328] In very rough terms, the sociologist Professor John Hagan's juxtaposition between "the financial crimes of the suites" and "the common crimes of the streets"[329] is a useful summary of the two categories across which the fault rule has asymmetrical incentive effects.

These incentive effects play out within U.S. Attorney's offices, and also between federal and state law enforcement efforts. To begin with, federal prosecutorial priorities vary widely between U.S. Attorney's offices depending on local circumstances.[330] While U.S. Attorneys certainly target complex forms of financial crimes, international offenses, and collective culpability, the uneven weight of apparent fault demands across federal criminal law creates an incentive for a U.S. Attorney to substitute between different kinds of cases. It means that the expected return from many species of white-collar prosecution is tamped down. But no kindred dampening effect obtains when the street-level crimes are targeted. The net effect of apparent fault as presently articulated is to channel enforcement and prosecution resources away from white-collar and toward street crime. Beyond this intraoffice effect, there is an interjurisdictional effect. Despite an increasing level of federal involvement,[331] it is still state and local authorities who deal "overwhelmingly [with] traditional 'index' or street crimes — violence, property, and

---

[326] *Id.* at 658.

[327] Sara Sun Beale, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability and the Yates Memo*, 46 STETSON L. REV. 41, 67 (2016) (highlighting the Second Circuit's reversal as "demonstrat[ing] just how hard it might be to impose criminal liability").

[328] SUDHIR ALLADI VENKATESH, OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR 11–12 (2006) (describing the scope of this "underground economy," *id.* at 11).

[329] JOHN HAGAN, WHO ARE THE CRIMINALS? 2 (2010).

[330] Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 854 (2015) (noting "large disparities among the . . . U.S. Attorneys' Offices in terms of what cases are prosecuted, what kinds of plea agreements are offered, and whether prosecutors move for departures under the Sentencing Guidelines").

[331] *See* Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 523–26 (2011).

drug crimes, plus traffic offenses."[332] A demand for apparent fault imposes little burden on their ability to prosecute these crimes.

These incentive effects are reinforced by the operation of the fault rule in the constitutional remedies context. Here, the apparent fault rule renders prosecution less costly across the board as a regulatory strategy: government attorneys need spend less effort anticipating and countering exclusion motions or insulating convictions from postconviction review. Perhaps a more significant effect, though, concerns the frontline state and federal officials charged with applying physical coercion on the ground. It is in the dispersed, decentralized deployment of discretionary coercion by police, border patrols, prison staff, and other state agents that the fault-related limits on constitutional tort, Fourth Amendment exclusion, and retail unconstitutional discrimination have the most bite. For this class of state actors, the knowledge that "all but the plainly incompetent or those who knowingly violate the law"[333] can disregard constitutional liability likely has a large effect on incentives for legal compliance.

In contrast, legislators and agency officials engaged in the crafting of first-order regulation have no such assurance. They must anticipate not only the full force of constitutional limits but also the possibility of preenforcement challenges adjudicated without the benefit of a factual record of how a legal measure operates on the ground.[334] Therefore, to the extent that government decisionmakers are debating whether to deal with a social problem through a new civil regulatory framework or through on-the-ground coercive intervention, the fault rule in constitutional remedies pushes toward the latter. This likely has the marginal effect of blunting legislative incentives to enact new criminal measures in regulatory domains where white-collar prosecutors operate, while increasing the returns from enactment of new street-level criminal regulation. As a result, it is in the same "street" context that federal action is liberated by the demand for apparent fault from government actors in constitutional remedies cases, and the same "suites" context where a demand for apparent fault from criminal defendants means that the state remains subject to potentially disabling frictions.

The markedly uneven consequences of the Court's embrace of apparent fault on differently positioned defendants, we should note, were neither inevitable nor natural. We have repeatedly stressed that apparent fault hinges on a contestable normative judgment by the Justices about what counts as a violation of social understandings of legality. We

---

[332] Darryl K. Brown, *The Distribution of Fraud Enforcement*, 28 CARDOZO L. REV. 1593, 1594 (2007).

[333] Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

[334] *See supra* note 314 (collecting examples of facial constitutional challenges of statutes).

have carefully avoided any suggestion that the doctrine constrains judicial discretion in making that judgment. To the contrary, we think that the observed judgments of apparent fault catalogued in Part II might well be sharply contested on normative grounds. But our purpose here is not to give an alternative account of apparent fault "done right." It is rather to show how it works as a vessel into which judicial preferences and perspectives can be poured.

Alternatively, the Court could have switched out apparent fault in favor of a different screening rule with distinct distributive effects. In the criminal law context, for example, the Court could have embraced instead a fault principle akin to that advocated by the drafters of the MPC. It could have insisted that, at minimum, recklessness must be proven with respect to each element of any criminal offense. Such a rule would have significantly limited the government's ability to prosecute those involved in street crime as well as those involved in the crime of the suites. However, although liberal members of the Court have at times hinted at such a rule,[335] it is not a conception of fault that now orients federal criminal law.

Other trajectories can be imagined. For example, the Court could have interpreted the Due Process Clauses of the Fifth and Fourteenth Amendments as limits on the government's ability to impose liability on defendants who had no reasonable opportunity to conform their conduct to the requirements of the law. For example, careful ethnographic work in highly impoverished, urban, and racially segregated communities by sociologists such as Professor Sudhir Venkatesh, Professor Mary Pattillo,

---

[335] In his majority opinion in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), Justice Breyer proposed a general rule of statutory interpretation that, when a statute requires that a defendant act "knowingly," courts should interpret it to require proof of knowledge with respect to each element of the crime. *Id.* at 650. Justice Breyer's rule acknowledges no distinctions based on the innocent or not-so-innocent nature of the underlying conduct. Three members of the Court concurred specifically to register their disapproval of this portion of the majority opinion. *See id.* at 657–59 (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment); *id.* at 659–61 (Alito, J., concurring in part and concurring in the judgment). Justice Alito warned that Justice Breyer's suggestion could lead to an "overly rigid rule of statutory construction," *id.* at 659, and eliminate strict liability where it was unproblematic. *Id.* at 659–60. In the nine years since *Flores-Figueroa* was decided, there is no evidence that Justice Breyer's approach has been widely adopted by the lower courts. Instead, courts continue to interpret statutes that require proof of some kind of culpable intent on the defendant's part to require proof of that intent with respect to only some, or even one, of the elements of the crime when doing so does not risk imposing liability on the apparently innocent. *See, e.g.*, United States v. Wynn, 827 F.3d 778, 785 (8th Cir. 2016) (construing federal law making it a crime to threaten a federal officer to not require proof of knowledge that the victim was a federal officer because requiring intent to threaten is sufficient to separate "'wrongful conduct' from innocent conduct"); United States v. Allen, 788 F.3d 61, 69–70 (2d Cir. 2015) (holding that federal law prohibiting the burning of federal lands does not require proof that defendant knew the lands were federal because "[a]rson is hardly 'otherwise innocent conduct,'" *id.* at 69 (quoting United States v. LaPorta, 46 F.3d 152, 158 (2d Cir. 1994))).

and others points toward the thorough entangling of licit and illicit livelihoods and practices in these communities,[336] which are often racially homogenous.[337] Exit, moreover, is not costless, since even middle-class African American communities "continue to be unique in the degree to which they are spatially linked with communities of severe concentrated disadvantage."[338] Again, African American middle-class families face especially acute challenges in separating themselves from illicit networks even after they flee blighted urban areas for suburbs or exurbs.[339] Accounting for such background facts, one could imagine a series of post-*Lambert* decisions in which courts analyzed the hazardous and stressful conditions of impoverishment and violence in which much urban street crime occurs and developed a set of mens rea rules that accounted for the difficulties faced by those most often subject to narcotics or immigration enforcement.

The federal bench, however, has evinced no such empathy or compassion. Instead, in closely analogous fact situations, courts have generally refused to find that the imposition of criminal liability absent fault violates the Due Process Clause. They have deflected due process challenges to sex offender registration laws that make a convicted sex offender's failure to register a strict liability offense.[340] In the civil context, courts have rejected due process challenges to laws that allow the eviction from public housing of tenants whose guests or family members engage in drug-related criminal activity without those tenants' knowledge or control.[341]

The result of apparent fault's rise has thus been to make it easier for the state to punish certain kinds and classes of crimes than others. It has engendered a web of doctrinal rules that at the margin make it more difficult for the government to criminally regulate white-collar activities

---

[336] *See* ALICE GOFFMAN, ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY 141–62 (2014) (describing illegal side businesses in a poor Philadelphia neighborhood); VENKATESH, *supra* note 328, at 10 (noting the "interpenetration of outlawed and legitimate ways of making money").

[337] Douglas S. Massey & Jonathan Tannen, *A Research Note on Trends in Black Hypersegregation*, 52 DEMOGRAPHY 1025, 1027 (2015) ("Over the period from 1970 to 2010, 52 metropolitan areas satisfied the criteria for black hypersegregation at one point or another.").

[338] Patrick Sharkey, *Spatial Segmentation and the Black Middle Class*, 119 AM. J. SOC. 903, 905–06 (2014).

[339] MARY PATTILLO-MCCOY, BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE BLACK MIDDLE CLASS 36–42 (1999) (developing this point through an analysis of a Chicago neighborhood described under the pseudonym "Groveland").

[340] *See, e.g.*, United States v. Elkins, 683 F.3d 1039, 1049–50 (9th Cir. 2012) (finding that federal sex offender registration law did not require proof that defendant knew of his obligations under the law to register); *see also* Morrow v. State, 452 S.W.3d 90, 94 (Ark. 2014) (upholding constitutionality of Arkansas sex offender law).

[341] *See, e.g.*, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 135–36 (2002) (rejecting lower court conclusion that federal policy "'raise[d] serious questions under the Due Process Clause of the Fourteenth Amendment,' because it permit[ted] 'tenants to be deprived of their property interest without any relationship to individual wrongdoing,'" *id.* at 135 (quoting Rucker v. Davis, 237 F.3d 1113, 1124–25 (9th Cir. 2001)).

and the activities of those otherwise deemed to be respectable than it is to regulate the activities of lower-status, often minority, actors who live in close proximity to the border between the formal and informal economies. For these reasons, we think it would be too quick to suggest that fault and its kin necessarily operate as frictions on state power: what we have described is not a story of constraint but a tale of how state coercion has been reallocated from some populations to others.

IV. Apparent Fault in Historical and Intellectual Context

The emergence of judicial demands for apparent fault observed in the doctrine calls for explanation: Why have so many judges, arrayed across time, converged on a substantially parallel conception of fault as an instrument for titrating coercive state resources in a variety of federal law domains? And why have they done so with the particular distributional consequences we have charted? This Part offers, if not a causal account, then a tentative diagnosis. We develop first an account of the political context in which demands for apparent fault arose. We then explore the deep-rooted assumptions and larger intellectual formations at work under its surface. Such external, contextualizing analyses of apparent fault are, in our view, necessary because explanations derived from the jurisprudence's internal logic are so manifestly deficient.

A. What Doesn't Explain Apparent Fault

The Court has made a number of arguments to justify the increasing concern with fault in its constitutional remedies and criminal law cases. None of these arguments, however, provides a very persuasive explanation for the turn to apparent fault.

First, there is the argument that a fault rule is necessary to avoid overdeterring socially beneficial behavior. As we saw in Part II, in its qualified immunity cases, the Court has argued that a fault rule is necessary to allow the "vigorous exercise of official authority."[342] In other remedial contexts, the Court has also argued that allowing relief absent a showing of fault would chill "objectively reasonable" state action.[343] The Court has made similar arguments in its criminal law cases. In *U.S. Gypsum Co.*, for example, it argued that criminal intent had to be read into the Sherman Act to prevent businessmen from avoiding "salutary and procompetitive conduct lying close to the borderline of impermissible conduct."[344] Similarly, in *McDonnell*, the Court justified its

---

[342] Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

[343] United States v. Leon, 468 U.S. 897, 919 (1984); *see also id.* at 919–21.

[344] United States v. U.S. Gypsum Co., 438 U.S. 422, 441 (1978).

narrow reading of federal anticorruption law by invoking the risk that a broader reading might "chill federal officials' interactions with the people they serve and thus damage their ability effectively to perform their duties."[345] In all these contexts, the Court has suggested that a fault rule provides government officials or private citizens the security they need to engage in beneficial, but risky, behavior.

On its face, this argument may seem reasonable enough. But as one of us has previously pointed out about the constitutional remedies cases, the Court has provided no empirical evidence to substantiate its concerns.[346] It has provided no evidence, for example, that overdeterrence is a problem in any given domain that judicial doctrine needs to address.[347] Nor has it provided any evidence showing that the overdeterrence costs that might be created by a more expansive criminal or civil liability regime outweigh the underdeterrence costs created by a regime in which individuals can escape liability for harmful acts that are not sufficiently egregious to satisfy the demand for apparent fault.[348] This absence is particularly striking in the constitutional remedies cases, where the Court's effort to avoid criminalizing "objectively reasonable" behavior has meant that a considerable amount of plainly illegal, inefficient, and even malevolent state action can proceed without remedy.[349] Yet it is also noticeable in the criminal law cases, where the restrictive interpretation of federal criminal laws can have considerable costs.[350]

The Court's failure to even try to weigh the costs and benefits that may flow from alternative regimes of liability not only makes the overdeterrence argument hard to evaluate but also makes it difficult to believe that the concern with overdeterrence was solely, or even primarily, responsible for the Court's turn to fault. Rather than a rational effort to avoid creating unnecessary costs, the Court's embrace of an apparent fault rule appears to reflect instead an optimistic judgment that most officials wielding state power — and certain kinds of criminal defendants — will be well-intentioned. But what grounds that belief? Nothing in the cases does.

Second, there is the argument that a fault rule is necessary for judicial economy reasons. In its constitutional remedies cases, the Court has argued that requiring evidence of some sort of fault is necessary to limit the volume or scope of federal-court interference in "the routine day-to-

---

[345] McDonnell v. United States, 136 S. Ct. 2355, 2372 (2016) (quoting Brief of Former Federal Officials as *Amici Curiae* in Support of Petitioner at 6, *McDonnell*, 136 S. Ct. 2355 (No. 15-474)).

[346] Huq, *supra* note 24, at 23–25.

[347] *Id.* at 24.

[348] *See* Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 637–38 (1982).

[349] *See, e.g.*, Ashcroft v. al-Kidd, 563 U.S. 731, 734 (2011); *supra* pp. 1551–52.

[350] *See, e.g.*, Eisler, *supra* note 26, at 1648–51 (discussing the serious systemic consequences that may flow from the Court's restrictive interpretation of federal anticorruption law in *McDonnell*).

day administration of state government."[351] Commentators have made similar arguments to defend the Court's focus on fault in its criminal law cases. They have argued, for example, that the Court's newfound focus on mens rea is an aversive response to the growth of the regulatory state.[352]

It is certainly the case that concerns about judicial economy explain *some* of the developments we describe in Part II. They help explain, for example, the Court's efforts to limit the availability of constitutional remedies.[353] But a concern with judicial economy cannot explain all of the developments we describe. It cannot explain, for example, why the Court has embraced a fault rule that leaves federal as well as state prosecutors with such wide latitude to rack up large volumes of criminal convictions in narcotics and immigration cases — in cases, that is, where fault is extremely easy to establish. If courts were in fact motivated by docket control concerns, they would ratchet up the fault threshold in these cases as well. That they have failed to do so, while appealing to caseload concerns in other contexts, suggests that their perceptions of the sources of docket pressure are mediated by some other set of normative concerns. It also makes it hard to view the Court's embrace of an apparent fault rule as a serious response to the problem of overcriminalization.

Third, the Court has suggested that evidence of fault is required by basic principles of justice. In *Elonis*, for instance, it insisted that evidence of fault was necessary to vindicate a fundamental principle of the criminal law: namely, that "wrongdoing must be conscious to be criminal."[354] In other cases, it suggested that imposing criminal liability on the apparently innocent would create constitutional problems akin to those produced by the registration law the Court struck down on due process grounds in *Lambert*. In *Staples*, it warned in this vein that extending the reach of the National Firearms Act to owners of converted machine guns would create serious notice problems given the pervasiveness of gun ownership and the widely shared perception that owning a gun is a "licit and blameless" act.[355] In *United States v. X-Citement Video, Inc.*,[356] the majority made a similar notice argument to justify its

---

[351] Henry Paul Monaghan, Comment, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 980 (1986).

[352] *See, e.g.*, LARKIN ET AL., *supra* note 25, at 8 (celebrating the Court's focus on questions of fault as an important response to "the problems of overcriminalization"); Singer & Husak, *supra* note 25, at 861 (arguing that the turn to fault represents the Court's "reinvigorated . . . concern with protecting innocent persons as a bedrock of federal criminal law").

[353] Huq, *supra* note 24, at 58–63 (developing this argument).

[354] Elonis v. United States, 135 S. Ct. 2001, 2009 (2015) (quoting Morissette v. United States, 342 U.S. 246, 252 (1952)); *see also id.* (asserting that the "basic principle that 'wrongdoing must be conscious to be criminal' . . . is 'as universal and persistent in mature systems of law as belief in the freedom of the human will'" (first quoting *Morissette*, 342 U.S. at 252; then quoting *id.* at 250)).

[355] Staples v. United States, 511 U.S. 600, 613 (1994).

[356] 513 U.S. 64 (1994).

demanding interpretation of the mens rea element in a federal child pornography law.[357]

This argument is also unsatisfying. For one thing, the Court's insistence that courts "read into [federal] statute[s] . . . 'that *mens rea* which is necessary to separate wrongful conduct from "otherwise innocent conduct"'"[358] does *not* always mean, in practice, that defendants must be conscious of their wrongdoing to be held criminally liable for their, or others', acts.[359] Whatever the virtues or the vices of the insistence on apparent fault, the demand for apparent fault cannot therefore be justified simply by invoking "basic" and "universal" principles of justice.

Nor can the apparent fault rule be justified by invoking the constitutional concern with notice. This is because the rule creates plenty of notice problems of its own. Consider, for example, the defendant who sells drugs near a school without knowing that he is proximate to that school. He has no notice of the heightened penalties that follow from his criminal activity. Nevertheless, under the logic of apparent fault, he can be sanctioned. If the Court were truly concerned with giving notice to criminal actors, it would have embraced the much more restrictive fault rule advocated by the drafters of the MPC and required evidence that the defendant acted at least recklessly with respect to each element of the offense. Arguments about notice, or the injustice of imposing liability on "apparently innocent" defendants, thus provide at best a very partial explanation for the growing role of apparent fault in federal criminal law.

Finally, we do not think that the rise of apparent fault can be attributed to simple partisan politics. Liberal and conservative judges alike have embraced fault as a limiting principle in constitutional as well as criminal law. Justices from Brennan in *Liparota* to Roberts in *McDonnell* have insisted on the importance of fault in criminal cases. Similarly, a broad coalition of ideologically diverse judges have embraced the fault rule in habeas, exclusionary rule, and constitutional torts cases.[360] As a result, attitudinal models of the judiciary cannot provide a comprehensive explanation for the shift we trace out in the Court's, as well as the lower federal courts', public law cases.

---

[357] *Id.* at 69 (holding that a conviction for interstate trafficking of child pornography requires knowledge of all its elements because otherwise the law "would sweep within the ambit of the statute actors who had no idea that they were even dealing with sexually explicit material").

[358] *Elonis*, 135 S. Ct. at 2010 (quoting Carter v. United States, 530 U.S. 255, 269 (2000)).

[359] This is true, for example, of those held liable for the criminal acts of their co-conspirators under *Pinkerton*. *See supra* text accompanying notes 97–103.

[360] Huq, *supra* note 24, at 47 (noting that in constitutional remedies cases "key precedent . . . is surprisingly bereft of sharp ideological division[, and] qualified immunity and habeas precedent include frequent supermajoritarian and even unanimous opinions").

B. The Political Context of Apparent Fault's Ascent

Rather than simply a response to deterrence, cost, or justice concerns, we think the rise of apparent fault is a product of broader political and intellectual shifts in widely held conceptions of appropriate individual and state responsibility, and the appropriate allocation of regulation's social costs. In what follows, we offer conclusions that are professedly tentative. Determining how ideas migrate into circulation, and then become bedrock elements of the conventional wisdom among judges and lawyers, is a tricky business. We think, however, that the enterprise of situating broad legal developments such as the rise of apparent fault in its political and intellectual context is a worthwhile, even necessary, predicate for a clear understanding of federal law's trajectory.[361]

We sketch first the political context in which apparent fault became an increasingly important principle of Supreme Court doctrine. Its ascendency in the 1970s and 1980s, we suggest, corresponds to a general shift from regulatory to punitive modes of social control. During this period, social welfarist elements of the Great Society gave way to punitive approaches to the social problems attendant on poverty. In this context, judicial changes in constitutional remedies doctrine made it easier to deploy the coercive instruments of the state. A subsequent deregulatory turn in American politics corresponded to the moment that apparent fault filtered into federal criminal law on the white-collar side.

Consider first the well-known punitive turn in late twentieth-century American politics and policymaking. Its basic contours are by now familiar: Over the course of the twentieth century's second half, both crime rates[362] and punitive attitudes among the American public[363] steadily increased. Public attitudes toward crime, however, did not mechanically respond to changes in the level of criminal activity. Rather, they lagged considerably behind.[364] Partisan mobilization among political elites aimed at rendering crime salient as an object of policymaking

---

[361] *Cf.* Guyora Binder & Robert Weisberg, Response, *What Is Criminal Law About?*, 114 MICH. L. REV. 1173, 1176–77 (2016) (describing different approaches to the intellectual history of criminal law); Gordon, *supra* note 29, at 116 (describing scholarship that uses "legal historiography as the intellectual history of the rise and fall of paradigm structures of thought designed to mediate contradictions").

[362] GARY LAFREE, LOSING LEGITIMACY 20–22 (1998) (noting that reported street crime quadrupled in the twelve years from 1959 to 1971 and homicide rates doubled between 1963 and 1974); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION — AND HOW TO ACHIEVE REAL REFORM 2–3 (2017).

[363] Peter K. Enns, *The Public's Increasing Punitiveness and Its Influence on Mass Incarceration in the United States*, 58 AM. J. POL. SCI. 857, 862 fig.1 (2014).

[364] Joachim J. Savelsberg, *Knowledge, Domination, and Criminal Punishment*, 99 AM. J. SOC. 911, 919–20 (1994).

instead played a necessary mediating role between observed crime rates and perceptions of crime as an important object of public policy.[365]

One of the most consequential policy-related adjuncts of this trend was a turn away from "the opportunity, development, and training programs of the War on Poverty" toward "the surveillance, patrol, and detention programs of . . . [the] 'War on Crime.'"[366] By the 1980s, the latter forms of social control had almost "completely supplant[ed]" Great Society–style antipoverty programs as a solution to urban poverty.[367] Ultimately, this shifted into a broader "revolution in favor of markets [and] . . . against intrusions by Big Government" outside the crime-control domain.[368]

Importantly, this was largely a *bipartisan* realignment.[369] In the 1960s, Republicans employed a "mutually reinforcing" strategy of "depoliticization and criminalization of racial struggle" and a "racialization of crime."[370] Major national media blamed the civil rights movement not only for urban riots, but also "more generally, for lawbreaking by 'Negroes.'"[371] Rather than resisting this framing, Democrats responded by "trying desperately to mimic" and even outbid their partisan foes.[372] Democrats did not merely speak to crime fears, "they also fueled

---

[365] *See generally* KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997); Dennis D. Loo & Ruth-Ellen M. Grimes, *Polls, Politics, and Crime: The "Law and Order" Issue of the 1960s*, 5 W. CRIMINOLOGY REV. 50 (2004) (closely analyzing polling data to show that "the 1960s' crime issue was a social construction — a moral panic — initiated and fostered by conservative elites in an effort to counter the gains made by the 1960s' social insurgencies," *id.* at 50).

[366] Elizabeth Hinton, *"A War Within Our Own Boundaries": Lyndon Johnson's Great Society and the Rise of the Carceral State*, 102 J. AM. HIST. 100, 101 (2015); *see also id.* at 101–02; Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, 3 PUNISHMENT & SOC'Y 43, 46 (2001) (noting that the penal turn "coincided with efforts to scale back the welfare state"); Julilly Kohler-Hausmann, *Guns and Butter: The Welfare State, the Carceral State, and the Politics of Exclusion in the Postwar United States*, 102 J. AM. HIST. 87, 89 (2015).

[367] Hinton, *supra* note 366, at 111.

[368] James Q. Whitman, *The Free Market and the Prison*, 125 HARV. L. REV. 1212, 1214 (2012) (book review).

[369] Professor Nicola Lacey argues that the distinctively bilateral character of American political competition conduces to competition over crime policy. *See* NICOLA LACEY, THE PRISONERS' DILEMMA 63–67 (2008).

[370] Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230, 247 (2007); *see also* NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 57 (2014) ("[R]ace conservatives *displaced* the root of violence onto civil rights liberalization itself.").

[371] Melissa Hickman Barlow, *Race and the Problem of Crime in* Time *and* Newsweek *Cover Stories, 1946 to 1995*, 25 SOC. JUST., Summer 1998, at 149, 162 (1998); *see also id.* at 161–66.

[372] Weaver, *supra* note 370, at 251.

them."[373] By 1973, indeed, crime had crowded out civil rights as a concern in the national Democratic Party's agenda.[374] By the early 1980s, penal and welfare regimes were tightly coupled into a "single policy regime aimed at the governance of social marginality."[375] This regime increasingly shifted resources from socialized programs of welfare toward the individualized assignment of criminal punishment at both the federal and state levels.[376] This regime was coupled with a broader deregulatory agenda closely associated with President Ronald Reagan.[377] But in a signal of the bipartisan nature of the resulting consensus, it was a Democratic president who promised to end welfare, and who did so by signing a reform measure "largely written on Republican terms."[378]

One can interpret the Court's efforts during this period to limit the availability of constitutional remedies as consonant with this more general policy realignment. Qualified immunity doctrine, for example, is framed in transsubstantive terms. But it developed "primarily in cases involving law enforcement"[379] at a moment in which crime "ha[d] in some sense captured the imagination of those exercising state power."[380] It seems plausible to postulate that the specific policy context in which immunity doctrine developed would influence the Justices' thinking. This context also helps explain why judicial economy concerns that bit in the remedies context (where volume is produced by increasing state reliance on coercion) did not register in the criminal law context (where volume is produced by the increased penalization of private conduct). One could conclude, then, that the ongoing turn from the Great Society to the War on Crime influenced judicial perceptions of the relative costs of different forms of state action, without collapsing into crude functionalism.

The Court's embrace of apparent fault in its interpretation of federal criminal law can be understood as part of the broader deregulatory turn that started in the 1980s. The move to scale back government intervention in the economy, and the concomitant celebration of the unregulated

---

[373] Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703, 729 (2010).

[374] *See* Weaver, *supra* note 370, at 252.

[375] Beckett & Western, *supra* note 366, at 55; *accord* Kohler-Hausmann, *supra* note 366, at 89.

[376] Beckett & Western, *supra* note 366, at 53–55.

[377] Abner J. Mikva, *Deregulating Through the Back Door: The Hard Way to Fight a Revolution*, 57 U. CHI. L. REV. 521, 521 (1990) (describing President Reagan's deregulatory agenda during the campaign and while in office). Deregulation, though, started to dominate the political agenda under President Carter. *See id.* at 524.

[378] John F. Harris & John E. Yang, *Clinton to Sign Bill Overhauling Welfare,* WASH. POST, Aug. 1, 1996, at A01; *see also* BECKETT, *supra* note 365, at 51 (arguing that "the central premise of the conservative project of state reconstruction[was that] public assistance is an 'illegitimate' state function, whereas policing and social control constitute its real 'constitutional' obligation").

[379] Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 22 (2017).

[380] JONATHAN SIMON, GOVERNING THROUGH CRIME 21 (2007).

market,[381] provide the context in which the Court's growing concern with the imposition of criminal liability on the "apparently innocent" appears comprehensible, even inevitable. It offers one explanation for the Court's new sensitivity, in cases such as *U.S. Gypsum Co.*, to the threat that a faultless regime might chill valuable economic activity. More generally, it helps explain why courts were increasingly unwilling to treat crime deterrence as a sufficient justification for criminal regulation when otherwise respectable defendants were involved. In a context in which the propriety and wisdom of state regulation were increasingly called into question, it is easy enough to see why courts may have found it entirely inappropriate to subject individuals who had no proven criminal intent to the very intensive regulation of the criminal law.

On the other hand, this deregulating turn occurred against a backdrop of continuing anxiety about street crime.[382] This context helps explain the many gaps in the fault regime, and why innocence came to be defined not by the statutory particularities of crime (as the MPC drafters wanted), but instead by something more inchoate — namely, whether defendants knew or should have known that their actions were subject to the criminal law. The concept of fault that the MPC drafters urged states to adopt might have imposed significant costs on the government's ability to prosecute ordinary criminal activity by requiring prosecutors to prove at least recklessness with respect to each statutorily defined element of the charged offense. The notion of apparent fault observed in the case law, in contrast, divides defendants into roughly the "apparently innocent" and the "facially culpable," and therefore imposes weaker constraints on the federal and state governments' ability to, among other things, wage the War on Drugs. One could say, following Professor Bernard Harcourt, that apparent fault helped distinguish two classes of citizens: those who were participants in the free market, and therefore not properly the subject of intensive state regulation, and those who were instead inhabitants of the "penal sphere, where [state regulation was both] necessary and legitimate."[383]

Thinking about the emergence of apparent fault in relation to these changes in the political and economic environment also helps illuminate the doctrine's timing. The embrace of fault as a limiting principle in substantive criminal law cases occurred, as Part II indicates, somewhat later than the embrace of fault in constitutional remedies cases. This may reflect the political dynamics involved — and specifically, the fact

---

[381] BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS 41 (2011) ("The punitive society we now live in has been made possible by . . . this belief that there is a categorical difference between the free market, where intervention is inappropriate, and the penal sphere, where it is necessary and legitimate.").

[382] *See* Enns, *supra* note 363, at 862 fig.1. Punitive attitudes, however, vary widely by race. Mark D. Ramirez, *Punitive Sentiment*, 51 CRIMINOLOGY 329, 352 fig.3 (2013) (identifying lower rates of such attitudes among racial minorities).

[383] HARCOURT, *supra* note 381, at 41.

that it was only after the consolidation of bipartisan support for punitive policy approaches that the "bidding war" over crime policy abated and there was space for complaints about "innocent" defendants, whose cause aligned politically with the deregulatory turn.

C. The Ideological Context of Apparent Fault

The fact that the apparent fault rule helped advance particular (deregulatory and punitive) policy ends does not mean, of course, that the Court employed it purely instrumentally, as a means to those ends. Instead, what it may reflect is the influence on the Justices of the particular set of moral and political intuitions that helped justify, and motivate, the policy changes sketched out in the previous section. One can understand the turn to fault, in other words, as a product of the ideological changes that helped refashion the welfare state over the second half of the twentieth century.

Historians of the 1970s and 1980s have argued that a characteristic feature of this period was the shift in public discourse away from the rhetoric of collective responsibility that characterized the Great Society era and toward the rhetoric of personal responsibility that would dominate public discourse from then until now.[384] Rather than assuming that political rights were primarily determined by the fact of one's membership in a political community, political discourses of the period increasingly assumed that individual entitlements depended upon that individual's choices, and particularly whether his or her choices were good or bad.[385]

Conservative thinkers and politicians first promoted the idea that the obligations the state owed its citizens depended in large part on whether their behavior was "responsible" and challenged the idea that the state possessed a duty to take care of those who did not take care of themselves.[386] But as liberal intellectuals and politicians picked it up,

---

[384] *See, e.g.*, YASCHA MOUNK, THE AGE OF RESPONSIBILITY 4 (2017) ("Over the last thirty years, the notion of personal responsibility has become central to our moral vocabulary, to philosophical debates about distributive justice, to our political rhetoric, and to our actual public policies." (footnotes omitted)); DANIEL T. RODGERS, AGE OF FRACTURE 3–9, 127–79 (2011); Loïc Wacquant, *Three Steps to a Historical Anthropology of Actually Existing Neoliberalism*, 20 SOC. ANTHROPOLOGY 66, 72 (2012) (noting that "[t]he trope of individual responsibility" played an important role in justifying the punitiveness of American criminal justice policy).

[385] MOUNK, *supra* note 384, at 5 ("In the postwar years, there was a broad societal consensus that many of the duties the state owes to its citizens are largely independent of the choices those citizens have made. . . . Today, by contrast, more and more welfare commitments are conditioned on good, or 'responsible' behavior.").

[386] *Id.* at 31–37; RODGERS, *supra* note 384, at 189–91, 219–20.

the notion soon became hegemonic.[387] A focus on individual responsibility soon came to characterize normative debates in areas far beyond the political.[388]

It is not entirely clear why the rhetoric of personal responsibility proved so popular. Historian Daniel Rodgers argues that it was a response to popular anxieties many were coming to feel during the period about the existence, or at least thickness, of a national moral community. The decline of the Fordist economy in the 1970s — which had provided a great swath of the white working class prosperity and security[389] — and the increasing destabilization of social norms produced by the (partial) success of movements for racial and gender equality, Rodgers argues, produced an age of "fracture."[390] This was characterized by pervasive doubt about the existence of broadly shared moral norms, and about the propriety of limiting individual freedom in the name of the collective good. It was in this context, he claims, that the idea of moral community morphed into "something smaller, more voluntaristic, fractured, easier to exit, and more guarded"[391] and "conceptions of human nature . . . thick with context, social circumstances, institutions, and history gave way to conceptions of human nature that stressed choice, agency, performance, and desire."[392]

Leading historical accounts of the period depict a process in which the increasing prominence of the idea of personal responsibility in political rhetoric in the 1970s and 1980s encouraged the individualization and the moralization of social problems. Poverty, for example, which President Lyndon Johnson famously equated to a public health problem that everyone owed a duty to eradicate,[393] came instead to be represented as a moral problem — that is to say, as a product of the bad or irresponsible choices of the poor.[394] Proponents of welfare reform accordingly argued that limiting the availability of welfare would improve the moral character of its recipients by encouraging self-reliance.[395] Indeed, the significant reform, or more accurately slow strangulation, of

---

387 MOUNK, *supra* note 384, at 35–37.

388 *Id.* at 37–64.

389 THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 17–22, 92–95 (Princeton Classic ed. 2005).

390 RODGERS, *supra* note 384, at 3–11.

391 *Id.* at 220.

392 *Id.* at 3.

393 MOUNK, *supra* note 384, at 66 ("[O]ur . . . effort must pursue poverty, pursue it wherever it exists . . . . Our aim is not only to relieve the symptom of poverty, but to cure it and, above all, to prevent it." (quoting Annual Message to the Congress on the State of the Union, 1 PUB. PAPERS 112, 114 (Jan. 8, 1964)).

394 *See* RODGERS, *supra* note 384, at 201–09.

395 DAVID GARLAND, THE CULTURE OF CONTROL 196 (2001) (noting that the same emphasis on personal responsibility that has come to infuse criminal justice policy in the United States also informed welfare reform); Nikolas Rose, *Government and Control*, 40 BRIT. J. CRIMINOLOGY 321,

social insurance against labor-market, health, and income shocks that occurred during this period was propelled, and primarily justified, by "the mantra of individual control and personal responsibility."[396]

We see a parallel between these developments and the doctrinal arc we have mapped so far: the Court's embrace of apparent fault as a limiting principle in its criminal and constitutional remedies cases similarly individualized, and moralized, questions of legal liability. To see this, step back and consider first the early and mid-twentieth-century Court's approach to the crafting of liability rules.

A dominant theme in both the Court's criminal and constitutional remedies cases from this period was that legal sanctions could and should be viewed instrumentally, as a means of deterring harmful acts and encouraging good behavior. This instrumental approach to the crafting of liability rules is evident, for example, in *Shevlin-Carpenter*'s insistence that legislatures have broad power to "adjust legislation to evils as they arise and to the ways by which they may be effected" by legal interventions.[397] It also explains the Court's willingness in *Dotterweich* and like cases to punish corporate officers who simply failed to take adequate precautions against the risk that their subordinates might violate the law. The Court recognized that imposing punishment in such cases would place a "burden" on those who did not necessarily intend to break the law, but that it was nevertheless justified by the "interest of the larger good."[398] It recognized, in other words, that the rights and responsibilities of individuals could be adjusted to serve the "larger good." As a consequence, it assumed that differently positioned individuals might possess different legal obligations, not because of anything they did, but by virtue of their social position — and specifically, the power it gave them to do harm.

---

334 (2000) ("[W]orkfare programmes in the Unites States and welfare reform in the United Kingdom seek to micro-manage the behaviour of welfare recipients in order to remoralize them. . . . The aim, once more, is responsibilization: to reconstruct self-reliance . . . ."). Hence, President Clinton's primary welfare reform legislation was entitled the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of the U.S. Code).

396 JACOB S. HACKER, THE GREAT RISK SHIFT 37 (2006). It is important to emphasize that the United States has been an outlier in comparison to its international peers in its longstanding "predilection for the private sector and market processes" and its "reliance on market solutions" rather than social ones. DAVID GARLAND, THE WELFARE STATE: A VERY SHORT INTRODUCTION 74 (2016).

397 Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 69 (1910).

398 United States v. Dotterweich, 320 U.S. 277, 281 (1943); *see* United States v. Park, 421 U.S. 658, 672 (1975) ("*Dotterweich* and the cases which have followed reveal that in providing sanctions which reach and touch the individuals who execute the corporate mission . . . the [Federal Food, Drug, and Cosmetic] Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur.").

This assumption is explicit in the *Dotterweich* opinion. To explain why Congress might have wanted to burden corporate officers like Dotterweich with the risk of strict criminal liability, the Court pointed to the significant power differential that existed between them and the consumers who purchased their goods. Congress must have believed, the Court explained, that it was better that hardship fall on corporate officers "who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce" than on members of "the innocent public who are wholly helpless" to defend themselves against the harms produced by the introduction into the stream of commerce of defective goods.[399] But this assumption is also evident in other criminal cases from the period — for example, the decision in *United States v. Balint*[400] construing the Anti-Narcotics Act to impose liability absent proof of fault.[401]

In its constitutional cases, the Court evinced a similar approach to the crafting of liability rules. Consider, for example, the landmark decision in *Miranda v. Arizona*,[402] which imposed on police officers what the Court later recognized to be a "prophylactic [liability] rule[]."[403] The Court justified the decision to craft a prophylactic rule of police procedure on the grounds that doing so was necessary to ensure effective enforcement of the Fifth Amendment, given the tremendous power inequality that existed between police officers and criminal suspects in the interrogation room.[404] It was the "police-dominated atmosphere"[405] of the interrogation room, the Court made clear, and the risk of abuse and coercion that it created, that required the enforcement of a broader liability rule than might otherwise apply.[406]

The Court's embrace of fault as a limiting principle in both its criminal and constitutional remedies cases represents a marked shift away from this instrumental and context-sensitive approach to the crafting of liability rules. Indeed, what is striking about the apparent fault decisions is how little concern they evince for the downstream effects of

---

399 *Dotterweich*, 320 U.S. at 285.

400 258 U.S. 250 (1922).

401 *Id.* at 254 (concluding that, in crafting the law, "Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided" and asserting that it was "[d]oubtless" that "consideration[] as to the opportunity of the seller to find out the fact" of his law violation, when compared to the buyer's opportunity to do so, "contributed to this conclusion").

402 384 U.S. 436 (1966).

403 Michigan v. Tucker, 417 U.S. 433, 439 (1974).

404 *Miranda*, 384 U.S. at 457–58.

405 *Id.* at 456.

406 *Id.* at 445, 456; *see also* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 194 (1988) (arguing that *Miranda* represents the Court's attempt to craft a liability rule that "minimize[s] the sum of administrative costs and error costs").

making evidence of fault a prerequisite of either criminal liability or constitutional remedy.

Consider, for example, the decision in *Staples*, which interpreted conviction under the National Firearms Act to require proof that the defendant knew the characteristics that rendered his weapon subject to registration under the Act, not just that he possessed a "dangerous device of a type as would alert one to the likelihood of regulation."[407] As Justice Stevens noted in dissent, by requiring the prosecution to prove specifically that the defendant knew, in this case, that the weapon was capable of automatic fire, the Court deviated from the principle articulated in *Dotterweich* and other earlier opinions: namely, when individuals stand "in responsible relation to a public danger,"[408] courts "have assumed that . . . Congress intended to place the burden on [those individuals] to 'ascertain at [their] peril whether [their conduct] comes within the inhibition of the statute.'"[409] It thus removed any incentive owners of convertible semiautomatic machine guns might have had to ensure their guns did not fall within the terms of the Act. And it did so not because it found that the costs imposed by the lower courts' interpretation of the statute on those who unknowingly possessed regulated firearms outweighed the costs produced by the Court's interpretation, or that it was required by either the statutory text or legislative history.[410] It did so because it found it "unthinkable . . . that Congress intended to subject . . . law-abiding, well-intentioned citizens" to criminal liability under the Act.[411] Rather than basing its interpretation of the Firearms Act on a careful construction of its effects, or careful attention to what Congress intended, the Court relied upon an assumption that Congress would not have wished to impose criminal punishment on those who were not truly blameworthy.

In its constitutional remedies cases, the Court also moved away from the instrumental, context-sensitive approach it employed in *Miranda* and toward an approach that focused much more on the moral character of the constitutional violator's acts. The decision in *United States v. Leon* is representative of the new approach. Recall that in that case, the Court held that evidence unconstitutionally collected by police officers acting in reasonable reliance on a defective warrant did not have to be

---

[407] Staples v. United States, 511 U.S. 600, 604 (1994) (quoting trial transcript).

[408] *Id.* at 630 (Stevens, J., dissenting) (quoting United States v. Dotterweich, 320 U.S. 277, 281 (1943)).

[409] *Id.* at 634 (quoting United States v. Balint, 258 U.S. 250, 254 (1922)).

[410] Indeed, in his dissent, Justice Stevens provided persuasive evidence that Congress *did* intend to criminalize "innocent" possession. *Id.* at 625–28. Certainly, all but one of the lower courts to interpret the statute had concluded as much. *Id.* at 636–37, 637 n.23 (citing the cases).

[411] *Id.* at 615 (majority opinion) (quoting United States v. Anderson, 885 F.2d 1248, 1254 (5th Cir. 1989)).

excluded from trial.[412] The Court claimed that its recognition of a good faith exception to the exclusionary rule was justified by a rational accounting of the costs and benefits of applying the exclusionary rule in cases involving reasonable police mistakes.[413] In fact, the Court's analysis of the costs of limiting the exclusionary rule to cases involving bad faith violations of the Fourth Amendment was extremely thin. The *Leon* Court asserted that allowing the inclusion of evidence gathered by police officers who acted in reasonable reliance on defective warrants would not result in appreciably greater numbers of Fourth Amendment violations because officers would not act differently even if the evidence they gathered was excluded from trial.[414] This was because, the Court asserted, "an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient."[415] In focusing solely on the question of whether the individual officer could be expected to question, on his own initiative, the magistrate's actions, the Court entirely ignored the possibility that police departments might put in place policies and procedures to prevent officers from relying on defective warrants, or to minimize their issuance.[416]

The notion that liability rules can reduce the incidence of institutional wrongdoing by creating incentives for entities to identify new policy and procedures is hardly a novel one[417] — yet neither *Leon* nor any of its successor cases has even entertained the possibility. This suggests

---

412 United States v. Leon, 468 U.S. 897, 922 (1984).

413 *Id.* ("We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.").

414 *Id.* at 920 ("[E]xcluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances." (quoting Stone v. Powell, 428 U.S. 465, 539–40 (1976) (White, J., dissenting))).

415 *Id.* at 921.

416 As Justice Brennan noted in his dissent, "[i]f evidence is consistently excluded [when officers rely upon defective warrants], police departments will surely be prompted to instruct their officers to devote greater care and attention to providing sufficient information to establish probable cause when applying for a warrant, and to review with some attention the form of the warrant that they have been issued, rather than automatically assuming that whatever document the magistrate has signed will necessarily comport with Fourth Amendment requirements." *Id.* at 955 (Brennan, J., dissenting).

417 For an analysis of how courts can use "open-ended second-order decisions" that speak to policymakers in order to "prevent arbitrary or discriminatory law enforcement behavior," see John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205, 218 (2015) (emphasis omitted). For a critique of *Leon* that accords with our own, see Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 608–09 (1985) ("[A] close examination of the deployment of cost-benefit data by the majority in *Leon* reveals that this whole attempt at empirical utilitarian analysis is something of a charade. . . . [T]he Court's decision rests on little but prior dispositions and unarticulated premises.").

that, notwithstanding the Court's effort to justify *Leon* and similar decisions in cost-benefit terms, in fact what ultimately motivated the Court in these cases was not a desire to maximize the public good of security at minimal cost but instead a moral intuition: namely, that allowing guilty defendants to go free due to the exclusion of evidence gathered even "when law enforcement officers have acted in objective good faith . . . offends basic concepts of the criminal justice system."[418]

More recent decisions, such as *McDonnell* and *Heien*, also pay almost no attention to questions of social context or institutional incentives. Instead, they focus intently on questions of individual "choice, agency, . . . and desire."[419] Did the defendant official in *McDonnell*, for example, choose to engage in behavior that he knew to be criminal in nature? Were his desires those of a "conscientious public official[]"[420] or those of a lawbreaker? Similarly, did the police officer in *Heien* act reasonably? These are the questions that dominate the Court's analysis, rather than questions about the costs and benefits of implementing one or the other liability regime evaluated with a wide-angle lens that accounts for social and institutional context.

In short, decisions such as *Staples*, *Leon*, *McDonnell*, and *Heien* showcase the Court's turn away from an analysis grounded in careful consideration of how to minimize social costs, and toward a narrower focus on what is morally appropriate conduct, given social understandings of legality.[421] This is not to say that any conception of the collective good vanishes from the case law: the expansion of law enforcement discretion to investigate and question subjects under the Fourth and Fifth Amendments might be understood to be a means of serving the public good — although there is good reason to doubt the empirics of this claim.[422] Nevertheless, when weighing the costs and benefits associated with different liability regimes, the Court in these cases has tended to find that the cost of imposing liability on the "apparently innocent" is a cost that cannot be borne.

---

418 *Leon*, 468 U.S. at 908.

419 RODGERS, *supra* note 384, at 3.

420 McDonnell v. United States, 136 S. Ct. 2355, 2372 (2016).

421 The term "moral" is an ambiguous and complex one. *See* BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 174–96 (1985). We use it in its most general sense, although we concur with Professor Williams's concern that morality is concerned only with "[a] focused, particularized judgment. There is a pressure within it to require a voluntariness that will be total and will cut through character and psychological or social determination . . . ." *Id.* at 194.

422 The idea that expanding police discretion will inevitably lead to improvements in crime control, for instance, is not necessarily true: police may adopt measures that impose asymmetric costs on marginalized groups because of the belief that such groups are especially likely to be criminal. The result of such policies, in the medium term, can be to reduce the efficacy of policing and exacerbate criminogenic conditions. *See* Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2398–401 (2017) (developing an argument along these lines in respect to urban stop-and-frisk).

The result is that a narrow focus on the individual object of judicial regulation, and whether he or she in some sense deserves to be penalized or blamed for a violation of the law, has come to eclipse consideration of whether that person is best placed to mitigate potential costs. Hence, in *McDonnell*, the Court did not consider whether elected politicians are least cost avoiders in efforts to stymie improper influence on public action, whether any equally effective alternative regulatory strategies existed, or whether its very demanding interpretation of the actus reus element of the federal anticorruption statute might have a systemic negative effect on the responsiveness of elected bodies to the general public.[423] Similarly, in *Heien*, the majority entirely disregarded the likely possibility that the ruling would only exacerbate the problem of discriminatory traffic stops.[424]

The consequence has been to produce a set of doctrinal rules that are largely insensitive to differences in social power. Cases such as *Dotterweich* and *Shevlin-Carpenter* take seriously the idea that concentrated social power might warrant a greater measure of social responsibility. No such sense is apparent in the Court's more recent constitutional remedies or criminal cases. By insisting on evidence of fault as a nonnegotiable prerequisite to criminal punishment or constitutional remedy, the Court has equalized the obligations imposed on the powerful and the powerless. The result is, in many cases, to obscure the external costs imposed by the unlawful but apparently innocent actions of the powerful, while at the same time requiring the powerless to live up to a demanding (and, one might argue, overly burdensome) standard of responsibility.

We have characterized apparent fault as hinging on the Justices' views about the *social* understanding of legality. Why doesn't that lead to an emphasis on social context more generally? The short answer is that it could — but the particular way in which apparent fault is operationalized in practice has tended to exculpate those wielding social or governmental power from more careful and responsible exercise of their power, and it does not account better for the social context of powerful actors' decisions. Selective attention to social understandings of legality is emphatically not the same as a nuanced judicial understanding of the workings of power in the Weberian sense. In consequence, apparent fault is not a means of socializing risk despite the fact that it hinges on a social understanding of legally relevant acts: it is a way of denying the means by which the costs of socially and governmentally privileged acts are externalized.

Like the rhetoric of personal responsibility in the political sphere, what the Court's embrace of an apparent fault rule in its public law cases does, in other words, is to moralize and in many respects decontextualize the analysis of legal rights and responsibilities. This suggests

---

[423] *See* Eisler, *supra* note 26, at 1645–51.

[424] *See* McAdams, *supra* note 165, at 195.

that the same factors that led politicians of all stripes to embrace personal responsibility as a mantra may also be responsible for the change in the Court's approach to questions of criminal statutory interpretation and constitutional remedies. It suggests, in other words, that what Rodgers so aptly called "the fracture of the social"[425] may not only capture the shape of important shifts in political discourse but also describe a good deal of contemporary public law.

Conceptualizing the turn to apparent fault in the Court's public law jurisprudence not only as a product of internal jurisprudential changes or external political changes, but also as a product of changes in the dominant conception of the relationship between the state and its citizens, has further implications. It helps explain why a jurisprudential rule that — as we have argued — tends to assign the cost of producing social order in highly regressive ways has nevertheless enjoyed such wide (and bipartisan) support among the Justices. It also points to continuities between the cases and the broader political and intellectual landscape in which they occurred that have so far largely gone unobserved, both by historians and by doctrinal scholars. These continuities suggest that the Court is unlikely to move away from its focus on apparent fault any time soon. Certainly in political discourse, the rhetoric of personal responsibility continues to enjoy widespread support.[426] If the future is any replay of the past, the Court's public law cases will, similarly, continue to emphasize questions of agency, choice, and desire.

The ascendancy of apparent fault may not, in other words, be anywhere close to ending yet. To that end, this Article has attempted to diagnose its causes, its characteristics, and its consequences. We have not attempted to conclusively adjudicate its normative merits. Ultimately, normative judgment about the virtue of employing apparent fault to limit the operation of state power will depend on the answers to large and contestable questions about the meaning of culpability, the desirable socialization of risk, and the relative importance of the structural and the individual in determining specific life patterns. We have our own views on these larger questions. Nothing in our argument stands or falls on whether a reader concurs with those views. But lest there be doubt, it is our view that the demand for apparent fault we have described imposes both static and dynamic burdens unwisely and unfairly. We think its desiccated and isolated conception of the human animal blinks inevitable and important forms of human interdependency, while cloaking that blindness in a moralizing and inequitable ar-

---

425 RODGERS, *supra* note 384, at 8.

426 *See, e.g.*, Yascha Mounk, Opinion, *Democrats Copied the GOP's Politics of "Personal Responsibility," and It Hurt America*, WASH. POST (May 26, 2017), http://wapo.st/2qtuj3c [https://perma.cc/U38U-8E8N] (noting that President Trump has justified his economic policies "with the classic rhetoric of 'personal responsibility'").

got of responsibility and just deserts. We hence see scant reason to recommend apparent fault as a regulative principle — at least, not the version of fault employed in important strands of the Supreme Court's public law case law.

Even if you disagree with this assessment, however, we think that questions of coherence between doctrinal change and larger intellectual trends — to date largely viewed as outside the bailiwick of doctrinal scholars — will resonate. These questions challenge easy assumptions about the autonomy and integrity of the law, the facile juxtaposition between "political" branches and an "independent" judiciary. They consequently ought to be center stage as scholars try to grapple with constitutional law's fraught and divisive function in an increasingly polarized, unequal, racially divided, and unstable nation.

CONCLUSION

This Article has traced a genealogy of apparent fault — partial, inconstant, and sometimes implicit — across different lines of Supreme Court jurisprudence during the last thirty years. Our threshold aim has been to demonstrate previously ignored commonalities that knit together that jurisprudence. By attending not just to the instances in which courts have insisted on evidence of fault but also to those instances in which strict liability still obtains, we have sought to develop a deeper account of how jurisprudential changes, in net, both reflect and potentially reinforce shifting distributions of state coercive power. The stakes of even incremental shifts in this corner of constitutional doctrine, we think, are more consequential than is generally appreciated. Further, they cannot be understood in isolation from larger cultural and intellectual shifts. Indeed, our final contribution is an account of the historical and intellectual context in which fault triumphed.

American constitutional doctrine should not be understood in isolation from its historical and intellectual context. Nor should its incremental doctrinal components be isolated from one another and treated as discrete specimens. The law may not work itself pure — as if such an end state were even possible for an institution so deeply imbricated in its social, political, and intellectual context — but viewing it synoptically makes it easier to comprehend the currents that shape its course, their motive springs, and their repercussions, both proximate and distal. Only once that perspective is in hand can a sound normative judgment about our fractured, fracturing, and fault-dependent jurisprudential landscape be sensibly reached.