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The Triumph of Fault in Public Law

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Abstract

Federal criminal law and constitutional remedies might seem distinct bodies of law. In the closing decades of the twentieth century, however, parallel transformations swept both domains. In each field, the Supreme Court demonstrated increasing unwillingness to impose individualized legal consequences simply because a defendant committed the discrete acts that comprised a crime or constitutional violation. Instead, it insisted on a showing of individualized "fault" to establish liability. This Article first documents this triumph of fault as a common regulatory principle across disparate domains of American public law. This doctrinal change, we demonstrate, has important implications for federal and state regulatory agendas. Intermittent use of a fault threshold for criminal or constitutional liability has shaped the relative cost profile of different regulatory tools. Fault, that is, makes some kinds of coercive regulation less costly even as it imposes an inhibiting tax on other species of state intervention. The triumph of fault in public law hence changes the occasions and populations that are subjected most routinely to state coercion. Rather than diagnosing fault's ascendency as an endogenous product of legal reasoning, we situate it within a broader historical and intellectual context and argue that what the triumph of fault reflects, and potentially even reinforces, broader changes in the relationship between state and society.

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Introduction

The substance of federal criminal law and the design of constitutional remedies at first blush seem to be distinct, acoustically separate bodies of federal law. Beyond a handful of First and Fourteenth Amendments precedent, the Constitution stipulates no substantive criminal law.[1] Legislators are free to fashion a criminal code only occasionally attending to the Constitution. The availability of remedies for violations of individual constitutional rights, by contrast, necessarily impinges upon how government uses both civil and criminal tools.[2] Some constitutional remedies, such as the exclusionary rule and post-conviction habeas relief, impinge exclusively on criminal investigations and prosecutions. Others, such as injunctive, declaratory, or monetary relief, influence a far wider array of state actors, including legislators, street-level officials, and policy-making bureaucrats.

In the closing decades of the twentieth century, however, parallel transformations swept across both domains of American public law. Across each field, the Supreme Court demonstrated an increasing unwillingness to impose individualized legal consequences—a criminal conviction, say, or an award of damages—solely because a defendant committed the discrete acts making up the crime or constitutional violation. Instead, it insisted on proof of some measure of individualized "fault" to establish liability. In the first few decades of the twenty-first century, the Court has increasingly required this kind of evidence in both criminal and constitutional tort cases. The result is that today criminal and constitutional penalties alike increasingly hinge upon whether there is explicit proof, or very strong circumstantial evidence, of a specific actor's culpable mental state. Across substantive criminal law and constitutional remedies, *fault* plays a gatekeeping role.

Fault today is a prerequisite to the imposition of legal consequences ranging from federal prison time to damages awards for constitutional violations. In this capacity, fault plays a powerful switching function by raising or lowering the relative cost of different regulatory instruments. This hydraulics of incremental, technocratic doctrinal recalibration pushes and channels the state's energies in ways that benefit or harm different interest groups in predictable ways. By making fault a predicate to liability, the Court is able to influence how the government allocates its resources, without plainly manifesting politically controversial positions.

The Court's deployment of fault as a predicate of liability can consequently be subtle. Two cases from the Supreme Court's most recent Term illustrate this. The first, *McDonnell v. United States,* concerned the interpretation of a federal law that prohibited the fraudulent deprivation of the "intangible right of honest services."[3] In 2014, former Virginia governor Robert McDonnell was convicted under this statute of several counts

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[1] William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 64 (1997) (noting that among the "aspects of criminal justice that constitutional law has left alone" is "the content of substantive criminal law").

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

[3] 136 S. Ct. 2355, 2364-65 (citing 18 U.S.C. § 1346 (2006)).

of honest services fraud.[4] The prosecution's theory of the case required proof that he had accepted "anything of value" in return for being "influenced in the performance of any official act."[5] Vacating and remanding the conviction, the Court held that the term "official act" did not reach the hosting or arranging of meetings with other officials.[6] The Court explained that casting a "pall of prosecution" over actions that "conscientious public officials [engage in] *all the time*" would raise "constitutional" concerns.[7] It would enable criminal liability "without fair notice, for the most prosaic interactions" for actors the Justices viewed as blameless.[8] By narrowing the predicate acts of liability, the Court hedged against the risk that criminal penalties could be imposed on "conscientious public officials."[9] Stated otherwise, the *McDonnell* Court construed the reach of the honest services statute narrowly to avoid imposing liability on those who were without fault.

The Court's insistence on fault as a predicate for liability was also demonstrated by its near-unanimous decision last term in *Utah v. Strieff*, which concerned the application of the Fourth Amendment exclusionary rule.[10] The Fourth Amendment exclusionary rule is governed by a reticulated body of case law.[11] But *Strieff* hones in upon a narrow question: When an officer makes an unconstitutional stop but then learns of a preexisting arrest warrant, must evidence from the ensuing search incident to arrest be excluded from a subsequent trial?[12] The Court found exclusion unnecessary. It held that because the officer's initial unlawful stop was at most "negligent" and the product of merely "good-faith mistakes," it was not the kind of unlawful action the exclusionary rule was designed to deter.[13] Because the Court presumed that the police officer, like the legislators in *McDonnell*, was a blameless type, it held that his subsequent search incident to arrest was "sufficiently attenuated by the pre-existing arrest warrant"[14] to preclude the exclusion remedy. Unlike *McDonnell*, *Strieff* concerned an individualized legal consequence, rather than the scope of a federal statute: Does *this* officer's violation of the Fourth Amendment entail a *retail* consequence? But as in *McDonnell*, the absence of clear evidence of the officer's fault—the lack of evidence that he acted in bad faith, rather than merely negligently—stayed the Justices' hand. Their concern about the class of the 'innocent' officers outweighed any benefit from constitutional remediation.

This Article describes and analyzes the triumph of fault in public law that culminates in *McDonnell* and *Strieff*. This phenomenon has been glimpsed but never fully

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[4] *Id.* at 2366.
[5] *Id*. (quoting the federal bribery statute, 18 U.S.C. §201(a)).
[6] *Id*. at 2368 (holding that this element of the honest services offense encompassed only "formal exercise[s] of governmental power … similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee").
[7] *Id.* at 2372 (emphasis added).
[8] *Id.* at 2373.
[9] *Id.* at 2372 ("[C]onscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time.").
[10] 136 S. Ct. 2056 (2016). Justices Ginsburg, Sotomayor, and Kagan dissented.
[11] A leading casebook devotes more than 150 pages to those precedential rules. RONALD J. ALLEN ET AL. CRIMINAL PROCEDURE: INVESTIGATION AND THE RIGHT TO COUNSEL 658-710 (2d ed. 2011).
[12] 136 S. Ct. at 2060.
[13] *Id.* at 2063.
[14] *Id.*

documented in the legal scholarship. We examine fault's ascendancy from doctrinal, institutional, and political economy perspectives. To these ends, we advance three interrelated claims about fault's ascendancy in public law.

Our first contribution is descriptive. We isolate the doctrinal progress of fault across the disparate fields of federal criminal law and constitutional remedies. Rather than natural or inevitable, we show, the logic of *McDonnell* and *Strieff* would have been surprising, even shocking, a half-century ago. That logic, moreover, rests on no deep historical tradition of using fault as a regulatory principle in either criminal law or the regulation of governmental actors. We isolate a series of doctrinal ruptures that traveled across the Court's handling of federal criminal law and constitutional remedies between the late 1960s and the present day. We argue that a series of temporally and substantively disparate shifts in the law are appropriately understood together as a larger turn toward fault in public law. It is critical to our argument, however, that this movement toward fault has been uneven and erratic. The judicial stress on fault does not emerge lockstep across different lines of cases, or across the criminal/constitutional law divide. Its results are also far from comprehensive. Gaps remain. In both the criminal law and constitutional remedies contexts, we see a continuing insistence on fault uneasily coexisting with seeming disregard for intentionality along other doctrinal margins.

The Article's second goal is to offer an explanation and accounting of fault's triumph. We demonstrate that the intermittent use of a fault threshold for criminal or constitutional liability shapes the relative cost profile of different regulatory tools contained in the government's arsenal. As a consequence, fault's ascension may have a subtle but profound impact upon how, when, and against whom the coercive resources of the state are deployed. For example, when the Court attaches a fault requirement to a species of criminal offense such as the honest services statute in *McDonnell*, it raises the cost of conviction under those statutes relative to other criminal statutes where no fault-related concern has been raised. In expectation, prosecutors are likely to shift resources toward convictions that are less costly to pursue.[15] Government as a whole may respond by moving resources to alternative non-prosecution means of achieving a given policy desideratum, or to wholly different social ends. In contrast, when the Court imposes a fault requirement on a constitutional remedy, it renders the regulated state action less expensive. After *Strieff*, for example, street policing and in particular narcotics-focused street policing will be less expensive at the margin. Narcotics possession offenses also become incrementally less expensive to secure. Again, the net effect is to render certain regulatory tactics more attractive in comparison to alternative uses of state resources.

Even looking narrowly at these two examples, it should be clear that the triumph of fault in public law is likely to have complex, cross-cutting effects on the frictional costs of governmental action in district regulatory domains. *McDonnell*, for example, renders some sorts of crimes more difficult to detect and prosecute, while *Strieff* lowers

[15] At least on the assumption that prosecutors aim to dampen crime. Edward L. Glaeser et al., *What Do Prosecutors Maximize?: An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 260-61 (2000) (finding evidence suggesting prosecutors maximize social welfare as well as career advancement).

the cost of other species of criminal enforcement. Fault's effect on the relative marginal of distinct regulatory strategies is further complicated by federalism dynamics. Although the Court's mens rea rulings have had, as we show below, an impact on the interpretation of *state* as well as *federal* criminal law, it is not necessarily the case that state and federal courts interpret fault requirements identically. A full accounting of the distributive consequences of fault's ascendance, therefore, must be inflected by attention to regulatory arbitrage possibilities between the state and federal governments.

Our third and final contribution is to situate the doctrinal phenomenon we isolate in its historical context and to illuminate its larger implications for American public law. No mechanical causal account explains fault's ascendency. Fault's rise was a gradual process. It unfolded in slow and near imperceptible shifts. It involved many judges over time. And it wanted for any organizing manifesto or focal leader. We would need to make reckless assumptions about the rationality and purposiveness of American legal and political development to ascribe intentionality or to discern a simple functional explanation behind the rise of fault.[16] Instead, we identify a set of political and intellectual *preconditions*, grounded in broader contemporaneous sociocultural ruptures, which likely facilitated the rise of fault in the public law.[17] Our aim in so doing is to surface the intellectual assumptions and political forces that motivated a central, if underappreciated, recent realignment of public law.

To our knowledge, no previous scholarship explores or identifies the trans-substantive trend we isolate here. Instead, substantive criminal law and constitutional remedies tend to be examined in isolation. Within each field, moreover, the role of fault occasions vigorous disagreements. There is lively debate, for instance, on the propriety of strict liability in the criminal law context,[18] although few doubt that it remains an effectual basis of criminal liability in practice.[19] Of particular importance to our project, Nicola Lacey's recent work on English criminal-law history has triggered new questions

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[16] For one thing, it has long been understood that most kinds of purposive social action have "unintended consequences." Robert Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 894 (1936).

[17] 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 inevitably and contingency. John Fabian Witt, *Contingency, Immanence, and Inevitably in the Law of Accidents*, 1(2) J. TORT L. 1, 4 (2007). Our claim about historical causality, however, is weaker than 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 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 rise of fault was necessary "ineluctabl[e]"; we sympathize instead with Robert Gordon's now-canonical critique of "evolutionary functionalism." Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 66 (1984).

[18] Leading attacks on strict liability in the criminal context include Douglas Husak, *The Costs to Criminal Theory of Supposing That Intentions Are Irrelevant to Permissibility*, 3 CRIM. L. & PHIL. 51, 54 (2009); Sanford H. Kadish, *Excusing Crime,* 75 CAL. L. REV. 257, 267 (1987). For defenses, see Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 745 (1960) (more cautiously suggesting that there "may be … reasons for accepting or disallowing strict liability offenses"); *see also* Kenneth W. Simons, *When Is Strict Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1121-24 (1997) (defending strict liability in the felony murder context).

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

about the historical role of fault.[20] On the constitutional remedies side, commentators have celebrated fault as a sensible mechanism for calibrating tort actions against public officials.[21] More recently, however, scholars have criticized a wider diffusion of fault-based requirements across otherwise dissimilar statutory and non-statutory remedies for constitutional wrongs.[22] To date, however, these various analyses have unfolded without recognizing the parallels and interactions between the two domains.

Our argument proceeds in four steps. Part I define the core term of our analysis, "fault," and situates developments at the core of our analysis within a longer historical context of criminal and governmental tort law. Part II focuses upon the postwar American period and demonstrates how, beginning in the 1960s, the Court turned to fault across distinct domains of public law. It demonstrates that fault's rise across the criminal and constitutional remedies domains, albeit with discontinuities and gaps. Part III considers the dynamic effects of fault's triumph on the relative costs of different regulatory strategies. Taking account of how federal law influences both federal and state actors, we consider how the triumph of fault has changed the cost profile of a range of regulatory tools and explore reasons why the installation of a fault requirement is likely to have differential effects. Finally, Part IV situates the rise of fault within a larger social and legal context and offers a preliminary account of its relationship with broader political and intellectual trends.

I. The Concept of Fault

A notion of fault threads its way through histories of the criminal law, the ordinary law of torts, and remedies for governmental wrongs. Because of its very ubiquity, the term 'fault' has accrued plural inflections. It shucks off and assumes new senses as it flits among judges, scholars, and different legal contexts. Our investigation of its gatekeeping role in public law today therefore demands a preliminary clarification of what, precisely, we mean by fault.

This Part accordingly specifies how we use the term fault and situates that idea in the deeper historical context of both private and public law. Historicizing the idea of fault shows that its gatekeeping function, in both private and public law, has been inconstant and fickle. While some historical precedent for the use of fault as a predicate for civil or criminal liability exists, it has not been a reliable staple of tort, criminal, or governmental liability.

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[20] *See, e.g.,* Nicola Lacey, *In Search of the Responsible Subject*, 64 MOD. L. REV. 350, 357-62 (2001) [hereinafter "Lacey, *Responsible Subject*"] (documenting doubts about the pedigree of strong demands for responsibility in English criminal law).

[21] *See, e.g.,* John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 98 (1989) [hereinafter "Jeffries, *Compensation for Constitutional Torts*"].

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

A. Fault Defined

"Fault" is a vague and slippery term. Legal scholars deploy it in different senses even within a single domain of law. In criminal law, for instance, the term is "ambiguous."[23] It can be used to signify a failure to satisfy an objective standard for conduct[24] or, alternatively, to flag an action undertaken with culpable intent.[25] Adding further complication, criminal offenses are sometimes described as imposing punishment "without proof of fault" when they impose strict liability, but the meaning of strict liability can vary considerably.[26] In the constitutional remedies context, "fault" is generally understood to signal the use of a "negligence-type inquiry,"[27] a gloss that is starkly at odds with our focus on intention. But commentators disagree about whether what "fault" refers to in this context is something that is subjective or objective in nature. In an influential series of articles, John Jeffries has argued that the term "fault" refers to a subjective state of mind.[28] While concurring with Jeffries definition of "fault," Sheldon Nahmood has countered that the relevant sense of wrongdoing at work in the constitutional tort context is "considerably broader in scope" and not necessarily contingent on a particular defendant's state of mind.[29] Adding a layer of further complexity, the idea of fault in constitutional remedies is itself a transplant from ordinary tort law.[30] In tort law, the term "fault" can be used alternatively to capture a moral

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[23] Wasserstrom, *supra* note 18, at 732.

[24] William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 694 (1994) ("Several state statutes, however, have embraced objective criteria in culpability provisions ….").

[25] Note, *Negligence and the General Problem of Criminal Responsibility*, 81 YALE L.J. 949, 956 (1972) (defining criminal negligence as "inadvertence amounting to fault"); John C. Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1373 (1979) (identifying the "paradigm case of liability without fault [as] a penal statute that punishes conduct without reference to any state of mind indicative of blameworthiness").

[26] R.A. Duff, *Strict Liability, Legal Presumptions, and the Presumption of Innocence*, in APPRAISING STRICT LIABILITY 125, 125-26 (A.P. Simester ed., 2005) [hereinafter "APPRISING STRICT LIABILITY"]; Stuart P. Green, *Six Senses of Strict Liability: A Plea for Formalism*, in APPRAISING STRICT LIABILITY, *supra*, at 2 (noting that "the term 'strict liability' has been used in the criminal law literature" to refer to, among other things "offenses that contain at least one material element for which there is no corresponding mens rea element; statutory schemes that bar the use of one or more mens-rea-negating defenses; [and] procedural devices that require a defendant's intent to be presumed from other facts").

[27] Jeffries, *Compensation for Constitutional Torts*, *supra* note 21, at 100; John C. Jeffries, *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 56 (1998) [hereinafter "Jeffries, *Eleventh Amendment*"].

[28] Jeffries, *Eleventh Amendment*, *supra* note 27, at 56-57 (focusing on defendant's subjective state of mind).

[29] Sheldon Nahmood, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1008 (1990) ("Fault connotes state of mind, but wrongdoing, while including fault in Jeffries' sense of the term, is considerably broader in scope.").

[30] John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1466-67 (1989) ("Damages actions for violations of constitutional rights are in many respects analogous to ordinary tort actions…. [B]oth regimes are based on fault."). Fault is also employed as a gatekeeping rule in a handful of contract doctrines in order to elicit efficient behavior. George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225, 1237-38 (1994).

intuition of blameworthiness, to specify an "objective" measure of cost-justified care,[31] or even to capture a notion of causation.[32]

We use the term "fault" here to refer to a demand for evidence that an individual was animated by a *morally defective intent* before he or she can be held civilly or criminally liable. This definition requires some unpacking. A *morally defective intent* is an intent to violate the law or achieve a legally-prohibited purpose. But a demand for fault does not need to be a demand for mental state evidence. Rather, proof of a morally defective intent can be established, depending on the legal context and circumstances of the case, either by purely objective criteria that are external to the individual, or by evidence of the individual's state of mind, or some mix of the two. For example, in some cases, fault is established by showing that an individual acted in a way that no reasonable, law-abiding person would.[33] In other cases, it can be established by evidence that the defendant knew one or more of the facts that made his or her conduct criminal, where this knowledge implies a morally defective orientation.[34] And in some criminal-law contexts, courts have not been satisfied with a demand for knowledge of all the facts that make one's conduct criminal, but have required evidence that the defendant *knew* his or her conduct violated the law.[35]

As we use the term, therefore, fault is a general, relatively abstract concept. It can be operationalized in several different ways. We nonetheless think that these cases share sufficient commonalities to be ranked and analyzed together. For in all these cases, what courts applying a fault standard (again, as we use the term) are looking for is evidence that the defendant acted on the basis of what William Blackstone once described as a "vicious will."[36] Conversely, the fault standard has the effect of excluding the possibility that the individual carried out the actions that constituted the criminal or constitutional violation 'innocently'—that is without a desire to violate the law or to achieve a proscribed purpose.

As we show in what follows, a great deal of modern criminal and constitutional doctrine can be understood as a search for fault so defined. That is not to say, we hasten

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[31] Richard A. Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29, 31-32 (1972) (discussing the "moralistic" view of fault and an alternative "objective" welfarist one). A negligence rule resolves the "paradox of compensation" that arises under a strict liability regime. Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1, 6-7 (1985) ("[A] simple negligence rule creates a condition in which each party bears the costs of the harm caused by a small decrease in his precaution ….."); John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 515 (2003) (distinguishing the "conceptual claim that the fault standard in negligence is best understood as expressing an idea of inefficiency or waste" from the "functional claim that the fault standard operates so as to promote efficient precaution-taking").

[32] Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 404 (1959) (explaining that fault is a "close kin" to the idea of causation).

[33] This is the standard that applies in qualified immunity cases. *See* notes 146—163, and accompanying text.

[34] This was the Court's conclusion, for example, in *Staples v. United States,* 511 U.S. 600 (1994); *see infra* text accompanying notes 242 to 247.

[35] *See, e.g., Ratzlaf v. United States*, 510 U.S. 135 (1994); *Cheek v. United States*, 498 U.S. 201 (1991).

[36] 4 BLACKSTONE *21.

to add, that courts looking for morally defective intent always use the term "fault" to describe what they are doing. To the contrary, judicial terminology is varied and inconstant. We use the term fault to identify commonalities between constitutional and criminal law cases that are often implicit, rather than explicit. In so doing, we further contend that the idea of fault articulated above captures, roughly but usefully, a threshold requirement that courts have installed with increasing frequency before they will impose criminal liability or furnish a remedy for a discrete constitutional wrong.

What then falls beyond the domain of fault? And what, at least for our purposes, does that description exclude? As we use the term, a fault-based standard of criminal and civil law excludes those forms of liability that do not require either direct or indirect evidence of morally defective intent.[37] For example, a theory of criminal or constitutional liability that asked *only* whether "the defendant … committed the act proscribed by the statute [or constitutional provision]"—that did not require evidence in addition to this showing that the defendant acted with a "vicious will"—would *not* be fault-based.[38] A legal standard that simply asked whether the defendant acted unreasonably would also not be fault-based.[39] Nor is the conception of fault we highlight in this Article correlated to an objective, welfarist threshold. There is no reason to assume that fault, construed as intentionality, 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.

B. Fault in Criminal, Tort, and Constitutional Law

Criminal law, the rules of tort, and constitutional liability all define how the law will "identify and respond to unlawful conduct."[40] Given this shared functional orientation, it is perhaps unsurprising that all three bodies of rules would employ fault in some way as a regulatory principle for allocating liability, i.e., criminal penalties, or monetary or injunctive relief on behalf of, or against, specific individuals.

This section demonstrates that the regulatory function of fault in both the criminal and the ordinary tort context has ebbed and flowed over time. Correlatively, constitutional remedies (including both damages and injunctions) have not always hinged

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[37] *Cf.* Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEG. 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.").

[38] Wasserstrom, *supra* note 18, at 733; 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").

[39] This is because evidence of mere unreasonableness is not by itself sufficient to establish that the defendant acted to achieve an unlawful purpose. People may act unreasonably for all sorts of reasons. Recognition of this fact is what has led the Court, in its qualified immunity cases, to require more than evidence of unreasonable conduct to hold government officials liable for constitutional wrongs. Instead, the defendant must be shown to have violated a "clearly established right" and one that was " sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014). In other words, when the official acts, the unlawfulness of his action must be "apparent" before liability can attach. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

[40] Goldberg, *supra* note 31, at 517.

on a showing of fault under either American or antecedent British law. Instead, the conditions of liability across all these domains have been more varied than is generally appreciated.

1. Fault as a Historical Principle in Tort and Constitutional Remedies

For much of American history, government liability for constitutional wrongs was obtained using the mechanisms of the ordinary tort law and the associated writ system.[41] And ordinary tort law continued to exercise a gravitational pull upon the contours of constitutional liability.[42] Yet even ordinary tort law did not always require proof of fault—or even objective unreasonableness.

In Anglo-American tort law, the understanding and the role of fault in tort law have ebbed and flowed over time.[43] Tracking the resulting trajectory is difficult because judges and scholars have employed the term fault to multifarious ends (and rarely in the sense that we use the term). The Dutch jurist Hugo Grotius, for example, offered an early endorsement of the objective criteria of fault for civil liability, which in his view could be founded upon actions or inactions "in conflict with what men ought to do."[44] In the American context, the influential 1850 decision of *Brown v. Kendall* expressly required "fault" as a predicate for liability, but explained that "the conduct of the defendant was free from blame, he will not be liable."[45] Late nineteenth and early twentieth century tort scholars vigorously disagreed as to "whether the 'fault' standard of liability had been historically evolving towards or away from concern with actual moral blameworthiness."[46] Some scholars advocated different standards for different kinds of torts. For example, although he insisted on objective unreasonableness as the general standard for tort claims, Oliver Wendell Holmes advocated an actual malice standard for tortious interferences with contract.[47]

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[41] 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) (noting that "the common law system of remedies [was] long assumed to be the vehicle by which the Constitution would be enforced"); *accord* Hill, *supra* note 2, at 1131-32 (same).

[42] For example, in analyzing the availability of constitutional remedies based on 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.,* Heck v. Humphrey, 512 U.S. 477, 489 (1994) (drawing on the common law of malicious prosecution to define the availability of post-conviction review under habeas); *see also* Manuel v. City of Joliet, Ill., 136 S. Ct. 890 (2016) (granting certiorari to determine the relation between Fourth Amendment remedies and the common law tort of malicious prosecution).

[43] Nathan Isaacs, *Fault and Liability*, 31 HARV. L. REV. 954, 966 (1918); David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 703 (1992) ("[T]he role of fault, from time to time in the history of the law, has sometimes waned."). Some domains of tort law have long been characterized by strict liability. Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 360-61 (1951).

[44] F.H. LAWSON, NEGLIGENCE IN THE CIVIL LAW 28 (1950); *see also* John Fabian Witt, *Toward A New History of American Accident Law: Classical Tort Law and the Cooperative Firstparty Insurance Movement*, 114 HARV. L. REV. 690, 701 (2001) (glossing Grotius as the first to propose "a single standard of civil liability for 'fault'").

[45] Brown v. Kendall, 60 Mass. 292, 296 (1850); Owen, *supra* note 43, at 703 (discussing *Brown*).

[46] Robert W. Gordon, *Tort Law in America*, 94 HARV. L. REV. 903, 914 (1981).

[47] Oliver Wendell Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 6-7 (1894).

From the eighteenth century onward, strict liability has consistently been an important part of tort law on the ground.[48] Before the Civil War, "negligence serv[ed] as the primary but by no means the exclusive liability standard."[49] After the war, rapid industrialization catalyzed a diverse range of litigation-based and insurance-based responses to the growing tally of workplace accidents.[50] Many relied on forms of strict liability. Robert Rabin has argued, for example, that "the fault principle"—by which he meant, the requirement that the defendant be shown to have acted unreasonably—was a foreign element in the industrial injury context."[51] More recently, late twentieth-century tort law saw increasing use of strict liability in the products liability context.[52]

Strict liability also played a role in suits against government officials. 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.[53] 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).[54] Early American law discarded the petition of right as a mechanism for legal accountability[55] but permitted common law actions against officers "regardless of [their] good faith and caution and the best of intentions."[56] Fault, in the sense of a culpable mental state, was not a prerequisite to recovery. Several influential early decisions of the Supreme Court, such as *Little v. Barreme*[57] and *Osborn v. Bank of the United States*,[58] exemplify this use of common-law actions to redress

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[48] *See, e.g.,* Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1730-31 (1981) (discussing New Hampshire and California case law).
[49] Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 644 (1989).
[50] Witt, *supra* note 17, at 708 ("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.").
[51] Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation,* 15 GA. L. REV. 925, 947 (1981).
[52] 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, William Douglas had argued for liability premised on a least-cost avoider principle. William O. Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L.J. 584, 587-88 (1929).
[53] Edwin M. Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1, 6-7 (1924); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 5 (1963) [hereinafter "Jaffe, *Sovereign Immunity*"].
[54] Jaffe, *Sovereign Immunity*, *supra* note 53, at 9. Perhaps the best-known example is *Entick v. Carrington*, 2 Wils. 275 (K.B. 1765), which played a pivotal role in motivating the Fourth Amendment's proposal and ratification.
[55] Jaffe, *Sovereign Immunity*, *supra* note 53, at 19.
[56] David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COL. L. REV. 1, 17, 47 (1972). Jaffe briefly mentions the availability of good-faith immunity in the nineteenth-century case-law. Louis L. Jaffe, *Suits Against Governments and Officers: Damage Action*, 77 HARV. L. REV. 209, 220-21 (1963) [hereinafter "Jaffe, *Damages Actions*"]. But he immediately qualifies this by saying that officers remained liable for "negligence in the course of [their] official duty." *Id.* at 222.
[57] 6 U.S. (2 Cranch) 170 (1804).
[58] 22 U.S. (9 Wheat.) 739 (1824); *see also* Wise v. Withers, 7 U.S. (3 Cranch) 331, 337 (1806) (damages for trespass by government official); Bates v. Clark, 95 U.S. 204 (1877) (damages for trespass by military officials under orders from a United States Attorney).

unlawful governmental action without a showing of fault.[59] Into the twentieth century, the Supreme Court continued to characterize officer suits as matters that sounded in "tort"[60] and lay "between the individual plaintiff and the individual defendant" such that no sovereign immunity obtained.[61]

Forms of official immunity started to emerge in the mid-nineteenth century.[62] Initially these did not turn on fault. In 1840, the Supreme Court began to deny injunctive remedies such as mandamus where the challenged government action was "discretionary" rather than mandatory.[63] Five years later, a damages award was denied on the same ground.[64] Although this "discretion model of officer liability" limited the availability of remedies, it did not focus on the intent of the officer; instead, it focused on the nature of the official power in question. Hence it should be understood as an alternative to the fault rule, rather than its precursor. Indeed, the Court explained in its 1870 application of the ministerial/discretionary distinction in *Amy v. Supervisors* that the officer's "mistake as to his [sic] duty and honest intentions will not excuse the offender."[65] Indeed, the Court rejected a "good faith" exception to liability (which resembles a fault rule in the 1915 case of *Myers v. Anderson*.[66]

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[59] Jaffe, *Sovereign Immunity*, *supra* note 53, at 21-22 (discussing these cases); *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 1870's, government agents were held responsible 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 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.").

[60] Larson v. Domestic & Foreign Commerce Corp. 337 U.S. 682, 668 (1949); *accord* Stanley v. Schwalby, 147 U.S. 508, 518-19 (1893); Cunningham v. Macon & Brunswick Ry., 109 U.S. 446, 452 (1883); Belknap v. Schild, 161 U.S. 10, 18 (1896).

[61] Scranton v. Wheeler, 179 U.S. 141, 152-53 (1900) (allowing recovery of property from a federal officer); *accord* Tindal v. Wesley, 167 U.S. 204, 223 (1897).

[62] Kian, *supra* note 41, at 153.

[63] Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515 (1840); *see also* Spalding v. Vilas, 161 U.S. 483, 499 (1896) (applying the discretion model and noting that allegations of bad intent could be employed to oust discretionary immunity); Jaffe, *Damages Actions*, *supra* note 56, at 218-19 (discussing further twentieth-century applications of the discretionary principle). Although the distinction between mandatory and discretionary acts was invoked in *Marbury v. Madison,* it was not the basis for the Court's refusal to issue a writ of mandamus in the case; it comes later. 5 U.S. 137, 176-77 (1803) (denying relief on the grounds that the statute that authorized public officials like James Madison to petition the Supreme Court for writs of mandamus unconstitutionally violated 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. Herndon, 273 U.S. 536 (1927) (permitting damages action against officials who had denied plaintiffs the right to vote); Nixon v. Condon, 286 U.S. 73 (1932) (similar); 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.

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

[65] 78 U.S. (11 Wall.) 136, 138 (1870) ("The rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct.").

[66] 238 U.S. 368, 378-379 (1915) (rejecting an argument that "malice" was required for liability in a suit alleging racial discrimination in election administration in violation of the Fifteenth Amendment).

It was only in the twentieth century that the paradigm began to shift toward one grounded upon fault. More specifically, it was only in 1949, with Judge Learned Hand's decision in *Gregoire v. Biddle*,[67] that an alternative framework of official immunity from liability would enter the law—a framework that, as we shall explore in Part II.B, placed fault front and center.[68]

2. Fault as a Historical Principle of Criminal Law

Apparent consensus that evidence of morally defective intent is, or should be, a precondition of liability seems at first blush to be stronger in the criminal law context. Blackstone, famously, insisted in his *Commentaries on the Laws of England* that a "vicious will" was, in all cases, a prerequisite to criminal punishment.[69] Venerable commentators have echoed Blackstone in characterizing criminal liability in the absence of culpable intent as "impossible to defend"[70] or as lacking "moral justification [or] even a rational, amoral justification."[71] The Court has echoed this sentiment.[72] In a more positive vein, Francis Sayre explained in 1933 that criminal liability "is and always will be based on a requisite state of mind.[73]

In matter of fact, Sayre's dictum proves an overstatement as a matter of historical description. Both as a theoretical and a practical matter, the imposition of criminal punishment has not always required evidence of a "requisite state of mind." Although the idea that criminal culpability generally requires the presence of mens rea, or a guilty mind, appeared in legal writings dating back to the twelfth century,[74] early modern jurists recognized the existence of sometimes very serious crimes that did not require fault. In his 1644 Institutes, for example, Edward Coke approvingly discussed examples of murder in which fault (as we use the term) was lacking.[75]

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[67] 177 F.2d 579, 581 (2d Cir. 1949).

[68] Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE WEST. L REV. 396, 463 (1987) (discussing *Gregoire*); Engdahl, *supra* note 56, at 41 (noting the novelty of immunity doctrines that have been expanded "beyond their traditional scope"); Ronald 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).

[69] 4 BLACKSTONE *21.

[70] JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 304-05 (1947); Jerome Hall, *Interrelations of Criminal Law and Torts: I*, 43 COLUM. L. REV. 753, 778 (1943) ("[I]nsofar as legal rules rest on moral culpability, they must be confined to volitional misconduct.").

[71] Henry M. Hart, *The Aims of Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 422 (1958).

[72] Enmund v. Florida, 458 U.S. 782, 800 (1982) ("American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to [culpability.]").

[73] Francis Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 56, 56-57 (1933).

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

[75] EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 57 (Hein Co. 1986) (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

Even when mens rea was in principle required, what this meant in practice in the era of Blackstone was something very different than what it means today. As Nicola Lacey has explained, in eighteenth-century criminal law, "criminal responsibility" was determined by "an evaluation of the defendant's conduct judged in the light of his or her *character and reputation*," not a precise evaluation of his or her intentionality vis-à-vis the criminal acts.[76] In part this was a product of the institutional framework of the trial. The eighteenth-century English criminal trial lacked any structured framework of evidentiary rules that would have offered "minimum institutional conditions" for meaningful courtroom inquiry into culpable intent.[77] An average trial lasted twenty minutes and lacked "many of the features—legal representation, law reporting, a system of appeals for testing points of law—which would allow responsibility understood as a conscious mental state to be an object of proof."[78] As a result, "[o]nly a small fraction of eighteenth century criminal trials" in England were "genuinely contested inquiries into guilt or innocence."[79] Rather than training upon culpability, trials focused on questions of character.[80] The focus on questions of character rather than culpability further reflected the fact that during this period, the defendant's guilt was generally presumed.[81] As a result, Lacey argues, the requirement of mens rea operated more as a doctrine of mitigation than as a doctrine of proof.[82]

Trial practice in colonial America and later the United States was similarly informal and character-driven well into the early nineteenth century.[83] Although by the late nineteenth century, trial procedures had begun to take on the more elaborate structure familiar today, criminal sanctions continued to be imposed on defendants absent proof of fault. In cases involving relatively minor regulatory crimes, as well as very serious criminal offenses, such as murder and rape, American courts allowed conviction even though the defendant acted with neither intent nor knowledge of the facts that made their

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absent proof of a vicious will. *See* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 81-85 (2004).

[76] Nicola Lacey, *Responsibility and Modernity in Criminal Law*, 9 J. POL. PHIL. 249, 257 (2001) [hereinafter "Lacey, *Responsibility and Modernity*"]; Lacey, *Responsible Subject*, *supra* note 20, at 360 ("[T]he problem of criminal responsibility was not a big issue for Blackstone.").

[77] Lacey, *Responsible Subject*, *supra* note 20, at 360.

[78] Nicola Lacey, *Responsibility without Consciousness*, 36 OXFORD L. LEG. STUD. 219, 237 (2016).

[79] JOHN H. LANGBEIN, THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL 59 (2003).

[80] NICOLA LACEY, IN SEARCH OF CRIMINAL RESPONSIBILITY: IDEAS, INTERESTS, AND INSTITUTIONS 37-41 (2016).

[81] Nicola Lacey, *Institutionalizing Responsibility: Implications for Jurisprudence*, 4 JURISPRUDENCE 1, 7 (2013) [hereinafter "Lacey, *Institutionalizing Responsibility*"].

[82] Lacey, *Responsibility and Modernity*, *supra* note 76, at 262.

[83] James D. Rice, *The Criminal Trial before and after the Lawyers: Authority, Law, and Culture in Maryland Jury Trials*, 1681-1837, 40 Am J. Leg. Hist. 455, 463 (1996) ("[T]he vast majority of all trials in the nineteenth century closely resembled traditional colonial-era hearings. Trials continued to revolve around assessments of character, judges always had the ability to dominate proceedings, and jurors, attorneys, and judges continued to fulfill overlapping functions."). Similarly, the fragmentary records of post-Revolutionary judicial practice in Virginia suggest that trials operated in "an informal familial fashion." Kathryn Preyer, *Crime, the Criminal Law and Reform in Post-Revolutionary Virginia*, 1 Law & Hist. Rev. 53, 84 (1983).

conduct criminal.[84] Morals offenses such as adultery and bigamy were, moreover, often defined by state law not to contain a mens rea element or to require any other evidence of morally defective intent, such as evidence that the defendant acted in an egregious or unreasonable manner in doing what he did.[85]

During the twentieth century, the number of crimes for which defendants could be convicted without the government having to provide any evidence of morally defective intent multiplied. This change was most pronounced in two areas.

First, the number of what Sayre characterized as "public welfare offenses" grew significantly over the course of the twentieth century.[86] Public welfare offenses, in Sayre's terms, comprise laws that make the violation of public health and safety regulations a strict liability crime.[87] Offenses of this kind were widely used in the nineteenth century as a means of enforcing alcohol and liquor regulations, as well as food labeling laws.[88] They required proof only that the defendant voluntarily committed the acts that comprised the violation; not that he or she acted with bad intent, or unreasonably, when it did so. They consequently made it much easier for the government to establish liability. Hence, as the ambitions of the regulatory state expanded so too did the range and number of such offenses.[89] The result was what some observers characterized as an explosion in the number of strict liability crimes.[90] Many of these crimes resulted in only minor punishment. But this was by no means always the case. Statutory rape and bigamy convictions often resulted in significant jail time. Even regulatory crimes could result in years' imprisonment.[91]

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[84] Sayre notes that defendants could be convicted of the crime of statutory rape, as well as bigamy, even if they were mistaken about the facts that made their conduct criminal. Sayre, *supra* note 73, at 73-74. Defendants could also be punished for all deaths committed by themselves or their co-felons during the course of felonies. U.S. legislatures also created the strict liability crime of felony murder. Binder, *supra* note 75, at 64-65 ("The first felony murder rules were enacted not in medieval England, but in nineteenth-century America….").

[85] *See, e.g.,* Commonwealth v. Elwell, 43 Mass. (2 Met.) 190 (1840) (defendant can be convicted of adultery even if his mistaken belief that his sexual partner was unmarried was reasonable); Commonwealth v. Mash, 48 Mass. (7 Met.) 472 (1844) (defendant can be convicted of bigamy despite reasonable but mistaken belief that his wife was dead).

[86] Sayre, *supra* note 73, at 56.

[87] *Id.* at 70.

[88] *Id.* at 63-67.

[89] *Id*. at 68 ("[T]he growing complexities of twentieth century life have demanded an increasing social regulation; and for this purpose the existing machinery of the criminal law has been seized upon and utilized."); *see also* LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 282-283 ("There have always been regulatory crimes, from the colonial period onward.... But the vast expansion of the regulatory state in the twentieth century meant a vast expansion of regulatory crimes as well. Each statute on health and safety, on conservation, on finance, on environmental protection, carried with it some form of criminal sanction for violation.").

[90] *See* Wasserstrom, *supra* note 18, at 731 ("The proliferation of so-called "strict liability" offences in the criminal law has occasioned the vociferous, continued, and almost unanimous criticism of analysts and philosophers of the law."); Herbert Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 595 (1963) [hereinafter "*Packer, MPC*"] ("[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.").

[91] *See, e.g.,* Shevlin-Carpenter Co. v. State of Minn., 218 U.S. 57, 65 (1910) (upholding constitutionality of statute that made it a felony to cut or remove timber without a valid permit); United States v. Balint, 258

Second, the reach of conspiratorial liability dramatically increased—this time as a result of judicial intervention. Most famously, in *Pinkerton v. United States*, the Supreme Court held that members of a 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.[92] Although the Court justified its holding by arguing that the existence of a conspiratorial agreement was, by itself, evidence of a vicious will[93]—hence the decision may be, in some respects, reconcilable with a fault standard—in practice, what *Pinkerton* meant was that defendants could be held liable for criminal acts of their co-conspirators that they neither intended nor knew anything about.[94] It hence absolved prosecutors of the requirement of proving fault with respect to the specific criminal acts with which the defendant was charged. While *Pinkerton* only applied in the federal courts, many state courts came to adopt the same rule. By the early 1990s, some version of *Pinkerton* had been adopted in "virtually every jurisdiction in the United States."[95]

During the same period, many states enacted criminal syndicalism laws—many of which imposed serious criminal liability on defendants who joined what were considered to be "criminal syndicates" even when those defendants did not know the facts that made the groups unlawful—that is to say, even when their membership in these groups could not be taken as evidence of their morally defective intent.[96] Although these laws did not technically punish defendants for entering into conspiratorial agreements, like *Pinkerton*, they effectively sanctioned individuals for the criminal acts of those with whom they associated. In a series of important mid-twentieth century decisions, however, the Court held that the government could not constitutionally punish defendants under these laws

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U.S. 250, 251 (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).

[92] 328 U.S. 640, 647-48 (1946).

[93] *Id.* at 646 ("Having joined in an unlawful scheme, having constituted agents for its performance . . . until he does some act to disavow or defeat the purpose [of the conspiracy, a conspirator] is in no situation to claim the delay of the law. As the offense has not been terminated or accomplished, he is still offending. And we think, consciously offending,—offending as certainly, as we have said, as at the first moment of his confederation, and consciously through every moment of its existence.") (quoting Hyde v. United States, 225 U.S. 347, 369 (1912)).

[94] Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM & MARY BILL RIGHTS J. 1, 7 (1992) (noting that to be liable for the crimes of coconspirators under the *Pinkerton* rule "[t]he crimes themselves do not have not be agreed upon, intended or even discussed" and that "[l]iability is based upon a simple negligence standard, reasonable foreseeability.").

[95] *Id*. at 6; Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of* Pinkerton, 57 AM. U. L. REV. 585, 599 (2008). *But see* State v. Stein, 144 Wash. 2d 236, 246 (2001) (holding *Pinkerton* incompatible with Washington state law).

[96] Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917-1927*, 85 OR. L. REV. 649, 659 (2006) (noting that between 1917 and 1920 roughly half the states passed laws that criminalized, among other things, belonging to an organization "committed to teaching or advocating criminal syndicalism"); *id.* at 710 ("In the enforcement of criminal syndicalism laws, guilt was largely premised on the simple fact of membership in or association with the [Industrial Workers of the World], or, to be more precise, on the basis of conduct suggestive of such a relationship to the IWW."); *see also* Whitney v. California, 274 U.S. 357 (1927) (upholding the conviction, under the California Criminal Syndicalism Act, of a defendant who joined a group deemed a criminal syndicate, not knowing or intending that it engage in criminal acts).

for acts of expression or association without proving that they specifically intended, by their actions, to incite violence.[97] The Court insisted that this heightened mens rea requirement was necessary to protect freedom of speech and expression.[98] But this limitation applied only when First Amendment rights were imperiled.

In cases dealing with antitrust conspiracies, for example, the Supreme Court continued to approve criminal liability absent proof of subjective bad intent. Specifically, it held that defendants could be criminally liable under Section I of the Sherman Act if they engaged in practices that had the effect of unreasonably restraining competition, even if they acted with "good intentions."[99] The Court also construed certain practices as presumptively unreasonable given their anticompetitive effects.[100] Defendants engaged 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."[101] Something close to ordinary negligence, or less, could thus warrant criminal liability under the Sherman Act.[102]

In other contexts, as well, the Court declined to infer a mens rea requirement when the statute failed to include one. In *United States v. Behrman*, for example, the Court upheld the indictment of a physician charged under the Harrison Narcotics Act of illegally dispensing narcotics.[103] The defendant argued that, because the Act did not apply to narcotics dispensed by physicians "in the course of [their] professional practice," the government had to allege that he either knew his patient was not going to use the narcotics for therapeutic purposes or that he intended to violate the Act.[104] The defendant

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[97] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (striking down Ohio's Criminal Syndicalism Statute on the grounds that "the 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, 205 (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," evidence of "active and purposive membership, purposive that is as to the organization's criminal ends"); *see also* Dennis v. United States, 341 U.S. 494, 499 (1951) (construing a provision in the Smith Act that made it a crime "to knowingly or willfully advocate . . . or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence" to "require[] as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence").

[98] *Brandenburg,* 395 U.S. at 448.

[99] United States v. Trenton Potteries Co., 273 U.S. 392, 395 (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").

[100] Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal …."); *accord* United States v. Container Corp. of Am., 393 U.S. 333, 340 (1969) (Marshall, J., dissenting).

[101] *Northern Pacific Railway*, 356 U.S. at 5.

[102] Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657, 667-68 (2001) ("Ever since the Supreme Court's decision in *United States v. Standard Oil,* it has been clear that the reasonableness standard applies as the default conduct rule in Section 1 cases.").

[103] 258 U.S. 280 (1922).

[104] *Id.* at 285, 287.

argued, in other words, that the government had to prove bad intent. But the Court summarily rejected this argument.[105]

The Court also refused to interpret the Constitution to impose significant constraints on the legislative ability to impose liability absent proof of fault. In a series of important First Amendment decisions, the Court held that the government could not punish defendants for acts of expression or association without proof of specific intent to violate the law.[106] But when First Amendment rights were not involved, it rejected constitutional challenges to criminal laws that punished innocent or merely negligent conduct. In *Shevlin-Carpenter Co. v. Minnesota*, for example, the Court rejected a due process challenge to a state law that made it a felony to cut down timber without a valid permit.[107] 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.[108] "[I]nnocence cannot be asserted of an action which violates existing law," Justice McKenna wrote on behalf of the unanimous Court, "and ignorance of the law will not excuse."[109]

The Court also upheld Congress's power to create vicarious strict liability crimes. In *United States v. Dotterweich*, for example, it upheld the conviction of the president and general manager of corporation that repackaged and sold drugs it purchased from others to physicians.[110] On several occasions, the corporation labeled the drugs it sold incorrectly because the information it received from the drug manufacturer was incorrect. Dotterweich and his corporation were charged under a provision of the Federal Food, Drug, and Cosmetics Act ("FDCA") making it a crime to "introduce[] into interstate commerce any … adulterated or misbranded [drug]."[111] The jury acquitted the corporation but convicted Dotterweich.[112] The Supreme Court upheld the conviction, even though there was no evidence that Dotterweich knew the labels contained incorrect information. The FDCA, the Court explained, "is a now familiar type of legislation whereby penalties serve as effective means of regulation."[113] Such legislation "dispenses

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[105] *Id.* at 288; *see also* 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.").

[106] Scales v. United States, 367 U.S. 203, 205 (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," evidence of "active and purposive membership, purposive that is as to the organization's criminal ends"); Dennis v. United States, 341 U.S. 494, 499 (1951) (construing a provision in the Smith Act that made it a crime "to knowingly or willfully advocate … or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence" to "require[] as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence").

[107] 218 U.S. 57 (1910).

[108] *Id.* at 68.

[109] *Id.* at 69.

[110] 320 U.S. 277 (1943).

[111] *Id.* at 278.

[112] *Id.* at 279.

[113] *Id.* at 280-81.

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."[114] Any "[h]ardship 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 "the innocent public."[115]

In its 1957 decision in *Lambert v. California*, the Court changed course somewhat. It held for the first time that a criminal law violated a provision of the Constitution other than the First Amendment because it lacked a mens rea element.[116] *Lambert* concerned a Los Angeles ordinance making it a crime for anyone convicted of what was, or would be, a felony under state law to remain in the city for more than five days without registering.[117] Justice Douglas's majority opinion began by affirming the "wide latitude" lawmakers enjoyed "to declare an offense and to exclude elements of knowledge and diligence from its definition."[118] But, Douglas continued, the L.A. ordinance was distinctive in punishing "conduct that [was] wholly passive" and that occurred in "circumstances which might move one to inquire as to the necessity of registration are completely lacking."[119] He reasoned that "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."[120] "[A] law which punished conduct which would not be blameworthy in the average member of the community," Douglas concluded, somewhat cryptically, "would be too severe for that community to bear."[121]

On its face, *Lambert* hinted at a newly invigorated due process doctrine of mens rea. But the distinction it relied upon—between conduct that was "wholly passive" and conduct that was not—was hardly self-explanatory.[122] Further, as Justice Frankfurter argued in his dissent, it is hard to see why this distinction between action and inaction mattered for due process purposes.[123] The Court did not rely upon *Lambert* in subsequent

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[114] *Id.* at 281.
[115] *Id.* at 285.
[116] 355 U.S. 225 (1957); Herbert L. Packer, *Mens Rea and the Supreme Court,* 1962 SUP CT. REV. 107, 127 (1962) [hereinafter "Packer, *Mens Rea*"] (noting that *Lambert* was "the first invalidation by the Supreme Court on mens rea grounds of legislation unrelated to the First Amendment").
[117] *Lambert*, 355 U.S. at 226.
[118] *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.").
[119] *Id.* at 229.
[120] *Id.*
[121] *Id*.
[122] Packer, *Mens Rea, supra* note 116, at 133 ("It is a little hard to know what distinction Mr. Justice Douglas was drawing.").
[123] *Lambert*, 355 U.S. at 230 (Frankfurter, J., dissenting) ("Surely there can hardly be a difference as a matter of fairness, of hardship, or of justice … between the case of a person … who is imprisoned for five years for conduct relating to narcotics, and the case of another person who is placed on probation for three years on condition that she pay $250, for failure … to register under a law passed as an exercise of the State's 'police power.'").

decades to strike down other laws on due process grounds.[124] Lower courts also easily distinguished it.[125] As Frankfurter predicted, *Lambert* proved "an isolated deviation from the strong current of precedents—a derelict on the waters of the law."[126] The result was that, as Herbert Packer mournfully noted in 1962 after surveying the "traditional corpus of criminal law," "the pervasive principle of mens rea is not pervasive at all."[127]

Packer and other members of the American Law Institute attempted to rectify this by drafting a Model Penal Code ("MPC") that engrafted a mens rea of at least gross negligence with respect to each element of every crime.[128] But while the MPC was in some respects a remarkable success, its attempt to "frontal[ly] attack" the use of strict liability in the criminal law largely foundered.[129] In a study of twenty-four states that adopted part or all of the MPC's mens rea provisions by statute, Darryl Brown determined that twelve states "notably weaken[ed]" the requirement of mens rea for every element.[130] Even in states in which the MPC mens rea requirements were adopted in full, Brown found that courts interpreted criminal offenses in ways that continued to allow defendants to be convicted even when they did not possess a culpable mental state with respect to all elements of the crime. By the late twentieth century, in short, proponents of a fault-based standard of criminal liability had ample reason to lament.[131]

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This Part has set two foundational predicates of our general argument. First, we have defined fault in psychological rather than moral or objective terms. Second, our brief sketches of the role of fault in criminal law, ordinary tort law, and the remediation

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[124] Packer, *Mens Rea*, *supra* note 116, at 136-37 (noting that "[t]he Court has not itself paid much attention to *Lambert*" 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").

[125] *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 did not occur under "circumstances which might move one to inquire as to the necessity of registration are completely lacking"); United States v. Juzwiak, 258 F.2d 844, 847 (2d Cir. 1958) (same).

[126] *Lambert*, 355 U.S. at 232 (Frankfurter J., dissenting). The Court has acknowledged that Justice Frankfurter may have been correct when he forecast that the decision would come to be "a derelict on the waters of the law." Texaco, Inc. v. Short, 454 U.S. 516, 537 n. 33 (1982) (quoting *Lambert*, 355 U.S. at 232 (Frankfurter, J., dissenting)).

[127] Packer, *Mens Rea*, *supra* note 116, at 138.

[128] MPC § 2.02(1); *cf.* Packer, *MPC*, *supra* note 90, at 594-95 ("The most important aspect of the Code is its affirmation of the centrality of mens rea, an affirmation that is brilliantly supported by its careful articulation of the elements of liability and of the various modes of culpability to which attention must be paid in framing the definitions of the various criminal offenses.").

[129] MPC, § 2.05 Commentary ("This section makes a frontal attack on absolute or strict liability in the penal law, whenever the offense carries the-possibility of criminal conviction, for which a sentence of probation or imprisonment may be imposed.").

[130] Brown, *supra* note 19, at 317.

[131] *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, 216 (1991) (worrying that "[s]ince the mid-1980s, American law has experienced a little noticed explosion in the use of public welfare offenses").

of constitutional wrongs has demonstrated the varied and inconstant gatekeeping function that fault has traditionally played in American public law.

II. The Diffusion of Fault in Public Law

A subtle but powerful reordering of American public law started in the 1970s and has continued apace up to the present. The Court—which evinced little concern with questions of fault in the early twentieth century—began increasingly to demand evidence of bad intent as a prerequisite to the award of remedies, or the imposition of criminal punishment. In some domains of constitutional law, the Court even insisted that constitutional rights themselves could be violated only if government officials acted with bad intent, i.e., fault.

The central aim of this Part is to document the emergence of parallel demands for fault in federal criminal statutory interpretation and constitutional remedies jurisprudence. We reserve the analysis and preliminary explanation of this shift to Parts III and IV, respectively. Our account of fault's ascendancy emphasizes the steering hand of the judiciary,[132] rather than the influence of regulators or Congress. We show how federal judges employed their hermeneutical authority to interpret federal criminal statutes to require fault. In the constitutional domain, the same judges filled gaps in statutory remedial schemes with "creative," de novo rules,[133] and narrowed constitutional remedies using their authority to fashion "constitutional common law."[134] Perhaps because judges employed different species of interpretive authority in the two domains, the parallelism of doctrinal development has been to date missed.

A. The Fault Principle in Constitutional Remedies (and Beyond)

The turn to fault in public law emerges first in the constitutional remedies cases. These include damages remedies pursuant to 42 U.S.C. §1982 and its federal common-law analog action against federal officials;[135] the exclusionary rule under the Fourth

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[132] Congress has played some role in sharpening the fault rule in the post-conviction habeas context. Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 534-35 (2014) [hereinafter "Huq, *Habeas*"] (discussing Congress's role in the creation of elements of the scheme in the post-conviction review context); *accord* John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 262 (2006).

[133] 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).

[134] Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 9-10 (1975) (supplying the exclusionary rule as an example of "a common law power" exercised by the Supreme Court in the remedial domain); 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 a constitutionally mandated one).

[135] *See* Bivens v. Six Unknown Named Agents of Federal 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).

Amendment;[136] and the post-conviction remedy of habeas corpus.[137] Otherwise heterogeneous in the sense of straddling 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. In this sense, they all enable individuated constitutional redress of a sort—and so are appropriately labeled constitutional remedies.[138]

Across all these remedial devices, the Court has, over the past four decades, imposed an increasingly rigorous fault requirement.[139] It has done so explicitly in order to ration judicial intervention.[140] What this has meant in practice is that those seeking judicial intervention after an alleged rights violation must produce evidence of the offending official's state of mind. Over time, moreover, this demand for such psychological evidence, commonly made usually in contexts wherein rights holders have no access to discovery, has become more onerous. At the same time, a parallel development can be observed in certain domains of substantive constitutional law, in particular those likely to be characterized by frequent retail claims for individual redress.

Our argument in this section builds upon the common assumption that federal courts play distinct dual roles in constitutional adjudication. One is a "law declaration" function, whereby the content of the law is specified, and the other is a separate "dispute resolution" function, which entails determinations of whether "standing law, decisional or statutory, provides a remedy."[141] Although courts can (any often do) engage in both law declaration and dispute resolution in the same litigation, it is nonetheless analytically tractable to sift their second dispute resolution function for consideration separate from its more legislation-like fellow traveller.[142]

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[136] *See* Mapp v. Ohio, 367 U.S. 643, 651 (1961) (applying exclusionary rule as a remedy for Fourth Amendment violations); *see also* Weeks v. United States, 232 U.S. 383, 389 (1914) (applying the exclusionary rule in federal prosecutions).

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

[138] Technically, federal habeas corpus relief is available for violations of "federal law," 28 U.S.C. § 2254(d), but in practice the Constitution supplies almost all federal rules applicable to state criminal adjudicative proceedings.

[139] The rise of fault has bypassed one individuated constitutional remedy—the vindication of Fifth Amendment rights under the Takings Clause, which are relegated to state courts with review in the Supreme Court by certiorari. *See* San Remo Hotel, L.P. v. City & Cnty. of San Francisco, Cal., 545 U.S. 323, 338 (2005).

[140] Huq, *Judicial Independence*, *supra* note 22, at 4.

[141] Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 673 (2012). For similar versions of this distinction, see Meir Dan-Cohen, *Bureaucratic Organizations and the Theory of Adjudication*, 85 COLUM. L. REV. 1, 1-7 (1985) (dividing adjudication into "arbitration" and "regulation" models); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 625-36 (1992) (proposing "dispute resolution" and "public values" models); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959)

[142] For an analysis that takes a cohort of cases involving quintessentially individual disputes (challenges to confinement), and that segregates analytically and quantitatively the law declaration from the dispute resolution functions, see Aziz Z. Huq, *The President and the Detainees*, 116 U. PA. L. REV.-- (forthcoming 2017).

1. 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.[143] Courts created the exclusionary rule, rediscovered the availability of money damages under §1983 and *Bivens* actions, and provided vigorous post-conviction habeas review.[144] These mechanisms furnished individual rights holders with powerful instruments for negating the consequences of constitutional violations. But they also produced a flood of litigation. In response, the Court developed, in each of these areas, a fault trigger for judicial intervention.

Consider the Court's qualified immunity cases.[145] As Part II makes clear, 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.[146] In 1949, however, Judge Hand's ruling in *Gregoire v. Biddle* abandoned the distinction between mandatory and discretionary in favor a functional inquiry into whether an officer should benefit from some sort of "immunity."[147] The functional argument of *Gregoire* anticipated one of the animating concerns of subsequent jurisprudence. Recognizing the costs of lawless official action, Hand asserted that "it is impossible to know whether the claim is well founded until the case has been tried," and thereby "to submit all officials, *the innocent as well as the guilty*, to the burden of a trial and to the inevitable danger of its outcome."[148] Rationing at the court-house door was required, in Hand's view, assuming a large class of "innocent" officials, whose behavior might be distorted by the shadow of tort liability.[149]

Although *Gregoire* concerned the scope of absolute immunity, the Court adopted and diffused *Gregoire*'s deterrence-related concern with the "innocent" official by developing a doctrine of qualified immunity from suit for certain executive-branch officials provided that they acted with "good faith."[150] In doing so, the Court minimized not only liability but also litigation costs for public officials.[151] By "provid[ing] government officials with the ability reasonably to anticipate when their conduct may give rise to liability for damages"[152] the Court followed *Gregoire* in striving to protect the

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[143] *See supra* Part I.B.2.
[144] Monroe v. Pape, 365 U.S. 167, 172 (1961).
[145] 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); 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).
[146] *See supra* text accompanying notes 62 to 68.
[147] 177 F.2d 579, 580 (2d Cir. 1949).
[148] *Id.* at 581 (emphasis added).
[149] *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.").
[150] *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 245-46 (1974); Pierson v. Ray, 386 U.S. 547, 555 (1967).
[151] The Court has described qualified immunity as "an entitlement not to stand trial or face the other burdens of litigation." Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985).
[152] Anderson v. Creighton, 483 U.S. 635, 645 (1987) (internal quotations omitted).

rights of those "who are required to exercise their discretion," a concern deemed inseparable from "the related public interest in encouraging the vigorous exercise of official authority."[153]

Over time, the Court has incrementally ratcheted up the fault requirement to make the "security" provided by qualified immunity to public officials ever more impregnable.[154] Federal courts evolved the current legal infrastructure for threshold screening of constitutional tort actions between the late 1960s and the early 1980s. 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.[155] This first iteration of a fault rule, however, proved an ineffectual means of reducing the volume of constitutional tort litigation. Plaintiffs could simply allege bad faith to get to trial, thereby thwarting Hand's ambition to protect "innocent" officials.[156]

But in decisions starting with *Procunier v. Navarette*[157] and culminating in *Harlow v. Fitzgerald*,[158] the Court recalibrated the fault requirement to render its screening function more potent. *Harlow* shielded officials from liability unless their conduct "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known."[159] The Court later explained that this test would be applied in the most "particularized" sense feasible, such that the illegality of an alleged violation must be starkly "apparent."[160] This formulation, like the structure of qualified immunity doctrine as a whole, expressly adopts the perspective of the "innocent" official. It aims to minimize litigation risk that this hypothesized "innocent" faces. It does so by assuming that unless a constitutional violent is "apparent," it is not intentional, and hence warrants no remedy. Today, the Court characterizes this qualified-immunity standard as protecting "all but the plainly incompetent or those who knowingly violate the law."[161] But it is difficult to think of instances in which state officials violate clearly established law by mere incompetence. Rather, 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."[162]

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[153] *Id*. at 646.
[154] *Id*.
[155] *See* Wood v. Strickland, 420 U.S. 308, 322 (1975); *see also* Pierson v. Ray, 386 U.S. 547, 555 (1967) (allowing dismissal on a showing of "good faith"); Scheuer v. Rhodes, 416 U.S. 232, 247 (1974).
[156] Note, 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.").
[157] 434 U.S. 555, 565 (1978) (holding that there can be no § 1983 liability when "there is no 'clearly established' … right" at the time of the alleged tort's commission).
[158] 457 U.S. 800, 818 (1982).
[159] *Id.* at 818.
[160] Anderson v. Creighton, 483 U.S. 635, 640 (1987); *accord* Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014).
[161] Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) (quoting Malloy v. Riggs, 475 U.S. 335, 341 (1985)).
[162] Jennifer E. Laurin, *Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1028 & n.91 (2010).

Paradoxically, concern with "innocent" officials means that qualified immunity operates as a demand for context-specific evidence of defendants' bad mental state. And even when such evidence is available, the fact that a defendant's actions might be "objectively justified" in retrospect is treated as exculpatory.[163]

A similar transformation occurred subsequently in the Court's exclusionary rule jurisprudence. Recall that the Court had required evidence obtained in violation of the Fourth Amendment to be excluded from federal and state criminal trials from 1914 and 1961, respectively.[164] In 1984, however, the Court in *United States v. Leon* held that the exclusionary rule did not apply to material gathered as a result of erroneous warrants upon which police had reasonably relied.[165] *Leon*'s exception to the exclusionary rule applies to searches based on warrants that were erroneously issued by a magistrate unless it was "'entirely unreasonable' for an officer to believe, in the particular circumstances of this case, that there was probable cause."[166] Citing qualified immunity precedent, *Leon* bounded the exclusionary rule to cases in which police engaged in intentional unlawful or recklessly negligent action.[167] Like qualified immunity doctrine, *Leon* created a pool of rights holders with no path of redress after unconstitutional treatment.[168] Like qualified immunity doctrine, *Leon* rested on a concern about the potential chilling of "objectively reasonable law enforcement activity."[169]

A singular focus on protecting the individual arresting officer acting in reasonable good faith remained a touchstone of the exclusionary-rule doctrine—at least until recently. The *Leon* exception was at first limited to cases in which the issuing magistrate had slipped up, and the officer had reasonably relied on the resulting warrant. But it was quickly extended to contexts in which other non-police actors erred.[170] As a result, current doctrine directs that exclusion is appropriate only if and "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights."[171]

The apotheosis of fault in the exclusionary rule context is a pair of recent cases in which officers concededly ignored and violated the law, and the Court nonetheless denied remedies on the theory that the officers' errors were without fault. In *Heien v. North*

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[163] *al-Kidd*, 563 U.S. at 734.
[164] *See* Weeks v. United States, 232 U.S. 383, 393-94 (1914); Mapp v. Ohio, 367 U.S. 643, 651 (1961).
[165] 468 U.S. 897, 920-21 (1984).
[166] Messerschmidt v. Millender, 132 S. Ct. 1235, 1246 (2012).
[167] *Leon*, 468 U.S. at 922 & n.23.
[168] 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").
[169] *Leon*, 468 U.S. at 919.
[170] For extensions of *Leon*, see Illinois v. Krull, 480 U.S. 340 (1987) (upholding searches pursuant to warrants issued as a result of judicial mistakes); Arizona v. Evans, 514 U.S. 1 (1995) (barring exclusion when error was due to negligence by clerk of the court); Herring v. United States, 129 S. Ct. 695, 702 (2009) (barring exclusion when error in warrant was due to police administrative personnel); Davis v. United States, 131 S. Ct. 2419, 2427 (2011) (extending the *Leon* good-faith exception to instances in which police rely on later-overruled Supreme Court precedent); Franks v. Delaware, 438 U.S. 154, 165-71 (1978) (holding that criminal defendants can defeat a warrant based on flaws in the underlying affidavits only in cases of "deliberate falsehood" or "reckless disregard of the truth").
[171] *Davis*, 131 S. Ct. at 2427.

Carolina, the Court denied the exclusionary remedy when an officer stopped the defendant for violating a state regulation that did not exist.[172] Even though the officer's grasp of the criminal law he was authorized to enforce was "not … perfect," the Court found the resulting search "reasonable."[173] *Heien* marks an innovation in exclusionary rule jurisprudence insofar as the Court finds official action reasonable notwithstanding its inconsistency with state law. It announcement of a "reasonable ignorance of the law" exception to the Fourth Amendment's protections marks a qualitative leap in the Court's willingness to assume officers' good faith.[174]

Then, in *Utah v. Streiff*, the Court addressed the fruit of a search incident to arrest that had followed a plainly unlawful street stop.[175] Characterizing the initial unlawful stop as "negligent" and a "good-faith" mistake,[176] the Court found that the subsequent search was "sufficiently attenuated by the pre-existing arrest warrant," such that exclusion was not required.[177] Like *Heien*, *Streiff* involves a plainly lawless action by police: a seizure without adequate lawful authority. *Strieff* concerned a violation of *Terry v. Ohio*[178]—hardly an obscure or hard-to-follow precedent. In both cases, the manifest and concededly unlawful quality of the officers' behavior was insufficient to oust the judicial presumption of "good faith" and "reasonableness." As such, these cases reflect a version of the fault rule that, like contemporary qualified immunity, shelters "all but the plainly incompetent or those who knowingly [and openly] violate the law."[179]

The limitations on exclusion in *Heien* and *Streiff* diverge from the qualified immunity framework insofar as the both hinge on errors about clearly established law. But *Heien* and Streiff cannot be explained by some consistently applied trans-substantive principle about mistakes of law. Such errors are a symmetrical phenomenon. People can err about when and how to invoke a right, just as much as officials might err about what state law (as in *Heien*) or federal law (as in *Streiff*) demands. But when individual rights holders err about how and when to invoke a right, the Court has consistently taken a minatory view and denied a remedy.[180]

Finally, a fault principle increasingly provides an organizing principle in the post-conviction context. The net effect of habeas law's complex morass of procedural rules (common law and statutory), plural standards of review, and non-statutory presumptions at bottom "allocates relief based on normative judgment about the degree to which both

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[172] 135 S. Ct. 530 (2014).
[173] *Id.* at 536.
[174] *See, e.g.,* Richard McAdams, *Close Enough for Government Work:* Heien's *Less Than Reasonable Mistake of Law*, 2015 SUP. CT. REV. 147, 166-67 (2016) (noting recent evidence that police in Kansas City, Missouri, frequently engaged in pretextual investigatory stops and that minority drivers are a disproportionate target of these stops).
[175] 136 S. Ct. 2056, 2060-63 (2016).
[176] *Id.* at 2063.
[177] *Id.*
[178] 392 U.S. 1 (1968).
[179] Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) (quoting *Malloy v. Riggs*, 475 U.S. 335, 341 (1985)).
[180] *See, e.g.,* Moran v. Burbine, 475 U.S. 412, 424-26 (1986) (finding affirmative police misrepresentations about availability of defendant's lawyer did not undermine waiver of Fifth Amendment rights); Bowles v. Russell, 551 U.S. 205, 207-08 (2007) (finding that filing error caused by a judicial misstatement of the law did not excuse tardy filing of a habeas petition).

the state and its prisoners have complied with relevant legal norms."[181] Typically, petitioners prevail by demonstrating "an extraordinary measure of fault akin to gross negligence or recklessness" on the state's part.[182] Gate-keeping doctrines that titrate habeas relief, in contrast, are designed to "reflect a 'presumption that state courts know and follow the law.'"[183]

As in exclusionary-rule jurisprudence, fault's deployment as a regulative limit on remedial availability was explicitly inspired by developments in constitutional tort jurisprudence.[184] And as in the 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*, in which the Court held that a federal habeas court must not only defer to those legal grounds offered by state judges for denying a constitutional claim, but also to those hypothetical, but never-expressed, reasons that might have supported dismissal of that claim.[185] Two years later, in *Johnson v Tara Williams*, 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.[186] Some circuit courts have further extended *Richter*'s logic to allow federal habeas courts to ignore an unreasonable and erroneous state-court ruling by hypothesizing an alternative ground of decision, and to thereby deny habeas relief.[187] Even open and manifest error in convicting a state prisoner to a term of years or death, on this view, is not sufficient to oust the presumption that state-court judges have, hidden in some occluded mental recess, a reasonable legal justification for their actions.[188] What is required instead is evidence that

[181] Huq, *Habeas*, *supra* note 135, at 528.
[182] *Id.*
[183] Woods v Donald, 135 S. Ct. 1372, 1376 (2015) (quoting *Woodford v Visciotti*, 537 US 19, 24 (2002) (per curiam)).
[184] *See, e.g.,* Butler v McKellar, 494 U.S. 407, 409, 414-15 (1990) (citing *Leon* with approval); *see also* Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 635-40 (1993) (discussing the convergence of qualified immunity and habeas doctrine); Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1735 (1991) (same).
[185] 562 U.S. 86, 102 (2011).
[186] 133 S. Ct. 1088, 1094 (2013).
[187] *See, e.g.,* Wilson v. Warden, Georgia Diagnostic Prison, 834 F.3d 1227, 1230-31 (11th Cir. 2016) (en banc); *accord* Cannedy v. Adams, 733 F.3d 794, 795 (9th Cir. 2013) (O'Scannlain, dissenting from denial of rehearing en banc) (taking the same position).
[188] *Harrington* 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. For further criticism of the decision, see Stephen R. Reinhardt, *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").

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.[189]

2. The Parallel Emergence of Fault in Substantive Constitutional Law

Beginning in the 1970s, fault also emerged as an important regulatory principle in substantive constitutional law. The Court conceived some constitutional rights as principles that could be violated only when government officials acted with fault. This trend is not universal. The Court has continued to recognize that Fourth Amendment rights, for example, can be violated by negligent—even will-intentioned—state actions, even as it denies litigants remedial relief absent fault.[190] In two areas of constitutional law, however, considerations of fault have come to be increasingly pivotal.

First, due process claims to the effect that officials have seized a discrete liberty or property interest either without adequate notice or hearing, or in a manner that cannot be redeemed by any quantum of procedural regularity, tend to arise among populations of dispersed, relatively disempowered individuals. These are often individuals who are subject to state supervision, whether in a carceral context or a governmental employment context,[191] or who depend on the government for some form of social assistance. In this domain, the Court established the same requirement it established in its constitutional remedies cases: namely, that to get into court, litigants had to allege bad intent even to state a claim.[192] That is to say, at roughly the same time that qualified immunity was calcifying into its current form, the Court rejected the idea that isolated or merely negligent state actions could ever violate the Due Process Clause. It therefore permitted only allegations of intentional due process to proceed.[193] Further, it consigned due process violations that result from "random and unauthorized" state action (as opposed to systemic policies) to state tribunals by creating a state-remedies exhaustion requirement.[194] At roughly the same time, the Court also developed a distinction between unconstitutional random acts and unconstitutional policies in its Eighth Amendment

[189] *Harrington,* 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)).

[190] 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").

[191] *See* Julilly Kohler-Haussma, *"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 provision from the 1970s onward in Illinois and then nationally).

[192] Potentially supernumerary in the constitutional tort context, this requirement has potential bite when injunctive or declaratory relief is sought.

[193] Daniels v. Williams, 474 U.S. 327, 329-30 (1986) (holding that merely negligent acts do not amount to a deprivation under Due Process Clause).

[194] Parratt v. Taylor, 451 U.S. 527, 543 (1981) (holding that no due process deprivation has occurred if State provides adequate post-deprivation process to remedy random, unauthorized acts of state officers), *overruled in part by Daniels*, 474 U.S. at 327; Hudson v. Palmer, 468 U.S. 517 (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. Florida Bd. of Regents, 457 U.S. 496 (1982).

cases.[195] The net result of these rules has been to limit federal-court access to instances in which a state official acts with sufficient intentionality and generality to warrant the label of 'policy-making.'[196]

The second domain in which fault's simultaneous emergence can be charted is the equal protection doctrine of race.[197] Prior to the mid-1970s, the Court's racial equality jurisprudence gave no priority to notions of discriminatory intent.[198] Rather, the Court in this era "did not sharply distinguish proof of purpose and proof of impact."[199] In the 1971 decision, *Palmer v. Thompson*, 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."[200]

Within five years, however, the Court in *Washington v. Davis* repudiated *Palmer*'s approach and insisted on evidence of an unconstitutional motive to predicate equal protection liability.[201] In subsequent cases, the Court has stripped individuals of the ability to discover of evidence that could substantiate allegations of unconstitutional bias in many contexts,[202] making it in practice impossible for most persons who believe they have been subject to a discrete, individualized equal protection violation to secure judicial relief—at least in cases in which the Court is unwilling to presume ab initio that bad intent is at work.[203] The move to discriminatory purpose, in short, "now insulates many, if not most, forms of facially neutral state action from equal protection

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[195] *See, e.g.,* Farmer v. Brennan, 511 U.S. 825, 834 (1994) (requiring proof of deliberate indifference of prison officials to state a due process claim for failure to protect from injury or assault); Hudson v. McMillian, 503 U.S. 1, 9 (1992) (requiring showing of malicious or sadistic use of force in Eighth Amendment claims by prisoners for excessive force).

[196] *See, e.g.*, Zinermon v. Burch, 494 U.S. 113, 137-38 (1990) (holding that *Parratt* does not apply when the deprivation was foreseeable and authorized—as distinct from random and unauthorized—and when pre-deprivation process would have been feasible); *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 436-37 (1982) (holding that post-deprivation remedies do not satisfy due process where deprivation is caused by established state procedures).

[197] Outside the race context, intent has not played a regulatory role, and challenges to state action have accordingly been more successful. *See, e.g.,* Obergefell v. Hodges, 135 S. Ct. 2584, 2594, 2602 (2015) (ascribing "sincere" and "good faith" reasons to opponents or same-sex marriage); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 162-63 (2016) (noting the differential treatment of motive across different equal protection contexts).

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

[199] Reva Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 11-13 (2013).

[200] 403 U.S. 217, 224 (1971).

[201] 426 U.S. 229, 239 (1976) ("[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."); Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979).

[202] 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 (1999) (dismissing a selective prosecution claim without analyzing whether the evidentiary burden could be overcome).

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

challenge."[204] Only in the rare instance in which evidence of bias somehow makes its way to a litigant outside the discovery process can a court even reach the merits of an equal protection challenge to a facially neutral law or policy.[205]

3. Fault's Justifications

Fault's domain on the constitutional rights and remedies side of the line is a surprisingly extensive one. It includes most mechanisms whereby individuals challenge isolated state actions in violation of the Constitution. Fault as a regulatory instrument also emerges in areas of substantive constitutional law where retail litigation is common.

Certain themes, moreover, consistently emerge across these disparate cases. The demand for fault is often framed in terms of a worry about overdeterrence.[206] But this formulation, of course, begs the question of precisely what kind of official conduct is being deterred, and whether it is in the first instance desirable. In its on-the-ground operation, the fault principle of constitutional remediation reflects an optimistic judgment that most officials wielding state power will be well-intentioned and 'innocent,' such that they can be trusted to comply with constitutional rules absent any motivating penalty. In the policing context, for example, the Court has expressly invoked the "increasing professionalism of police forces" as an explanation for remedial rationing.[207] In the national security context, the Court avoids remedial interventions out of "concern with the protection of hard-working and well-meaning government officials."[208] In the post-conviction review context, the Court similarly assumes that "state judiciaries have the duty and competence to vindicate [constitutional] rights."[209] And in the exclusionary rule context, the doctrine rests on the (typically untested) assumption that an officer acted with solely crime prevention-related motives.[210] Finally, fault has also emerged as a rationing principle where the availability of individual litigation strikes the Court has having "potentially radical implications"[211] in terms of the volume or scope of federal-court interference in "the routine day-to-day administration of state government."[212] Thus concern intimates the possibility that both the regulated state conduct and the courts themselves would be thrown out of equilibrium by the ensuing volume of cases. It thus reflects worries about both innocent officials and also overworked judges.

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[204] Siegel, *Equal Protection*, *supra* note 198, at 1136.
[205] *See, e.g.,* Foster v. Chatman, 136 S. Ct. 1737, 1747-55 (2016) (defendant inadvertently found evidence of racial discrimination through the use of preemptory strikes and hence was able to make a successful *Batson* challenge).
[206] *Id.* at 21-22 (collecting sources).
[207] Hudson v. Michigan, 547 U.S. 586, 598 (2006).
[208] JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 88 (2017).
[209] Williams v. Taylor, 529 U.S. 362, 436-37 (2000); *see also* Cullen v. Pinholster., 563 U.S. 170, 182 (2011) ("The federal habeas scheme leaves primary responsibility with the state courts.") (citation and quotation marks omitted).
[210] Hence, even actions plainly in violation of state or federal law are often categorized as mere slips, not warranting remediation. *See, e.g.,* Heien v. North Carolina, 135 S. Ct. 530, 536 (2014).
[211] Lewis v. Casey, 518 U.S. 343, 376 (1996).
[212] Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 980 (1986).

The fault threshold, in short, embodies an *a priori* belief in the integrity and good-faith of individual officials across different levels of government, distinct functionalities, and a wide spectrum of institutional specializations. It is a demand that strong evidence be produced that *this* official in *this* particular circumstance did wrong and meant to do wrong.

B. The Fault Principle in Substantive Federal Criminal Law

The rise of fault in criminal-law jurisprudence has been more limited than in the constitutional remedies and Fourteenth Amendment contexts. This is in part a consequence 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.[213] Although the Court has continued to impose a weighty scienter requirement when First Amendment rights are involved,[214] elsewhere it has repeatedly vested legislators with "wide latitude … to declare an offense and to exclude elements of knowledge and diligence from its definition."[215] The Court's unwillingness to constitutionalize mens rea has restricted lower 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.

But this is not the end of the story. Fault's trajectory in federal criminal law has been facilitated through the judicial power of statutory interpretation, rather than constitutional adjudication of the kind employed in *Lambert*. Because federal criminal statutes frequently fail to specify precisely what mens rea they require, federal courts in practice enjoy substantial latitude to determine how broadly or narrowly to construe criminal liability.[216] In exercising this interpretive freedom, the Supreme Court has increasingly glossed statutes to avoid imposing liability on those who act negligently, or

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[213] *See, e.g.,* United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 564-65 (1971) (finding no "substantial due process questions" raised by regulation criminalizing shipment of hazardous chemicals across interstate lines without specifying as such on the shipping papers); United States v. Freed, 401 U.S. 601 (1971) (rejecting a due process challenge to a strict liability provision in the National Firearms Act). Lower courts have 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 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 possesses a firearm, even in cases where the defendant had no connection to the firearm).

[214] *See, e.g.,* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[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.").

[215] Lambert v. California, 355 U.S. 225, 228 (1957).

[216] Dan M. Kahan, *Lenity and Federal Common Law Crimes,* 1994 SUP. CT. REV. 345, 346 (1994) ("[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.").

recklessly, or even in some cases, purposefully, but not necessarily with a vicious will. It has, in other words, read fault into the criminal law.

We start by showing how the Court has interpolated a mens rea requirement into statutes that do not, on their face, require it. We then explore other interpretive moves employed by the Court to intricate fault into the substance of federal criminal law. Finally, we briefly note the impact that the Court's turn to fault has had on the interpretation of state criminal law. The net result of these developments has been a marked resurgence of concern with questions of "moral culpability,"[217] not only on the Supreme Court's part but also among lower federal and state courts.

The Court signaled the potency of statutory interpretation as a vehicle for infusing federal criminal law with fault five years before *Lambert*'s false start, in *Morissette v. United States*.[218] *Morrissette* held that courts should not presume that Congress's failure to explicitly require evidence of fault when it codified common-law crimes necessarily meant that those crimes imposed strict liability.[219] According to *Morrissette*, Congress acted against the background presumption that common-law crimes were interpreted to include some mens rea.[220] But the Court also cautioned that when Congress did not "borrow[] terms of art in which are accumulated the legal tradition and meaning of centuries of practice," the presumption in favor of mens rea would fall away. Indeed, *Morissette* explicitly approved the strict-liability reading of public-welfare offenses adopted in earlier cases.[221]

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.[222] Even then, judges refused to add mens rea when doing so appeared "inconsistent with the statute's purpose."[223] As a result, lower federal courts continued to interpret many federal

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[217] *See* John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1023 (1999) ("When reading statutes, the Justices today suppose that Congress does not want blameless people to be convicted of serious federal crimes."); 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) ("[T]he Supreme Court has recently reinvigorated its concern with protecting innocent persons as a bedrock of federal criminal law.").

[218] 342 U.S. 246 (1952).

[219] *Id.* at 263.

[220] *Id*. ("[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 ….").

[221] *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.").

[222] Carter v. United States, 530 U.S. 255, 64-67 (2000) ("The canon on imputing common-law meaning applies only when Congress makes use of a statutory *term* with established meaning at common law …").

[223] *See, e.g.,* Taylor v. United States, 495 U.S. 575, 594-96 (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 common-law meaning of "larceny" not incorporated in 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

laws as strict liability offenses.[224] Conviction required a showing that the defendant intentionally performed the acts proscribed by law, not evidence of wrongful intention.[225] Moreover, even when statutes did explicitly require proof of some kind of mens rea—when they required, for example, that the defendant act with knowledge or intent—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.[226]

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 otherwise did not manifestly possess a "vicious will." An early sign of this concern was a reversal of the longstanding deployment of strict liability in the antitrust context.[227] In its 1978 decision in *United States v. United States Gypsum Company*, the Court repudiated decades of precedent by holding that bad intent of some sort had to be proven in all criminal prosecutions brought under the Sherman Act.[228] The Court thought this necessary to avoid imposing liability on defendants who made "good-faith error[s] of judgment" in a

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prohibition on bribery does not codify the common law crime of bribery because, by the time it was enacted, "the common understanding and meaning of 'bribery' had extended beyond its early common-law definitions"); United States v. Nardello, 393 U.S. 286, 293 (1969) (Federal 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).

[224] *See, e.g.,* United States v. Freed, 401 U.S. 601, 607–10 (1971) (holding that conviction under the registration provision of the National Firearms Act does not require proof of any "specific intent or knowledge that the [firearms] were unregistered" and that "the only knowledge required to be proved was knowledge that the instrument possessed was a firearm"); United States v. Weiler, 458 F.2d 474, 477 (3d Cir. 1972) (construing federal law that prohibited felons from transporting guns across state lines did not require proof of mens rea); United States v. FMC Corp., 572 F.2d 902, 903 (2d Cir. 1978) (holding that the Migratory Bird Treaty Act, which makes it unlawful to kill any migratory bird specified in the Migratory Bird Treaty as a strict liability law); St. Johnsbury Trucking Co. v. United States, 220 F.2d 393, 395–97 (1st Cir. 1955) (holding that to convict defendant for violation federal law regulating the shipment of hazardous material across state lines the government need not prove "criminal intent" but must prove only that the defendant knew "the nature of the commodity" he shipped "and its volume"); *see also* United States v. Feola, 420 U.S. 671, 684 (1975) (upholding conviction of defendants charged with conspiring to assault federal officers even though the government did not show that the defendants knew their victims were federal officers); United States v. Irwin, 354 F.2d 192, 196 (2d Cir. 1965) (upholding indictment under federal statute that made it a crime to "give[], offer[] or promise[] anything of value to any public official . . . for or because of any official act" even though indictment failed to allege that defendant intended to influence the official by making the gift)

[225] *See, e.g.,* United States v. Park, 421 U.S. 658, 658-59 (1975) (upholding jury instructions that asserted that company president could be liable under 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").

[226] *See, e.g.,* United States v. Perkins, 488 F.2d 652, 654 (1st Cir. 1973) (upholding conviction of defendants charged with assaulting federal officer even though the government did not show that they knew their victims' identities).

[227] *See supra* text accompanying notes 99—100.

[228] 438 U.S. 422, 435-36 (1978) ("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).

context wherein it could distinguish "the behavior proscribed by the Act … from the gray zone of socially acceptable and economically justifiable business conduct."[229]

Antitrust law proved not to be sui generis. Seven years later in *Liparota v. United States*, the Court again construed a federal statute narrowly to avoid imposing liability on individuals who made potentially good-faith errors of judgment.[230] The case involved the prosecution of a restaurant owner who sold food stamps at a substantial discount to their face value.[231] The restaurant owner was prosecuted under a federal statute that prohibited the "knowing[] transfer" of food stamps "in any manner not authorized by [law]."[232] The lower courts held that the defendant could be convicted if the government was able to prove that, at the time he sold the food stamps, the defendant "realized what he was doing, and was aware of the nature of his conduct, and did not act through ignorance, mistake, or accident."[233] Reversing, the Court held that the government also had to prove that the defendant knew that his conduct was "unauthorized by statute or regulations."[234]

As Justice White pointed out in dissent, *Liparota*'s logic violated the general rule that ignorance of the law was no defense to criminal prosecution.[235] The *Liparota* Court, though, insisted that its interpretation of the statute was needed to avoid "criminaliz[ing] a broad range of apparently innocent conduct."[236] Rather than focusing on the facts of Liparota's own case, the Court invoked the possibility that other "innocent" actors such as "a food stamp recipient who … used stamps to purchase food from a store that, unknown to him, charged higher than normal prices to food stamp program participants" might be held liable under the law in order to justify reading into the statute an extremely demanding mens rea standard.[237]

Several years after *Liparota* was handed down, in *Cheek v. United States*, the Court once again construed a federal statute to require knowledge that one's conduct violated the law.[238] In this case, the law in question was the federal tax code. The defendant, John Cheek, claimed that he failed to file his income taxes, as required by federal law, because he genuinely believed he had no duty to do so. He was convicted after the lower court instructed the jury that Cheek's mistake of law could only excuse his conduct if it was reasonable. The Supreme Court reversed.[239] Even unreasonable mistakes could excuse, it held. This is because, given the complexity of the federal tax code, defendants could innocently even if unreasonably believe their conduct was lawful when

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[229] *U.S. Gypsum Co.*, 438 U.S. at 440-41.
[230] 471 U.S. 419 (1985).
[231] *Id*. at 421.
[232] *Id.* at 420-21.
[233] *Id.* at 422-23.
[234] *Id*. at 425.
[235] *Id*. at 436 (White, J., dissenting).
[236] *Id*. at 426.
[237] *Id.* at 426. The Court warned that the lower courts' interpretation of the statute would also "render criminal a nonrecipient of food stamps who "possessed" stamps because he was mistakenly sent them through the mail due to administrative error, "altered" them by tearing them up, and "transferred" them by throwing them away." *Id.* at 426-427.
[238] 498 U.S. 192 (1991).
[239] *Id.* at 201..

it was not.[240] What needed to be shown to establish liability, therefore, was knowledge that one's actions violated the law; in other words, morally defective intent.[241]

Three years later, in *Staples v. United States,* the Court once again read a fault requirement into a federal law that had not previously been interpreted to require it—and did so, once again, in order to avoid imposing liability on the "apparently innocent."[242] *Staples* involved the prosecution of a defendant who possessed a semi-automatic machine gun modified so as to be capable of fully automatic fire.[243] The gun was unregistered. This violated the National Firearms Act, which required all machine guns, but not semi-automatic machine guns, to be registered with the Treasury Secretary.[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. 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."[246] The Court reversed, cautioning against the risk that liability could be imposed on those who had no reason to suspect they were in violation of the law. Although guns may be "dangerous device[s]," the Court explained, this did not mean that their possession was not "also entirely innocent."[247]

In *Liparota, Cheek*, *Staples*, and elsewhere, the Court forcefully, albeit implicitly, rejected the thesis articulated in *Shevlin-Carpenter* that innocence is whatever the legislature says it is.[248] Instead, it insisted that federal courts had to interpret federal statutes to avoid imposing criminal liability on those who did not possess a vicious will,

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[240] *Id.* at 200.
[241] *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.")
[242] 511 U.S. 600 (1994).
[243] *Id.* at 603.
[244] *Id.* at 603-04.
[245] *Id.* at 604.
[246] *Id.* at 602.
[247] *Id.* at 611.
[248] 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) (holding that conviction for "willful[ly]" structuring of financial transactions to evade reporting requires proof that defendant not only intended to violate the federal reporting laws but did so knowing his conduct was unlawful because "currency structuring is not [an] inevitably nefarious [act]"); United States v. X-Citement Video, 513 U.S. 64, 69 (1994) (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"). *But see* Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 524 (1994) (rejecting argument that prohibiting the sale of "items primarily intended or designed for use" with illegal drugs requires evidence that the defendant intended that the instruments he sold were used with drugs and holding instead that government must prove "that the defendant knew that the items at issue are likely to be used with illegal drugs").

or at least know that their conduct was likely to be regulated by the criminal law—at least absent clear evidence of contrary legislative intent.[249]

In subsequent decades, the Court continued to read mens rea into federal criminal laws as a device 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*, 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" required awareness on the defendant's part that the relevant statement contained a threat.[250] It reached this conclusion notwithstanding decades of precedent interpreting threats laws to create an objective, rather than a subjective, standard of liability.[251] And it did so, strikingly enough, *not* by relying upon First Amendment principles. Rather, Chief Justice Roberts' majority opinion cited *Liparota, Staples*, and their progeny for the proposition that "when interpreting federal criminal statutes that are silent on the required mental state, we read into the statute … that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'"[252]

Although framed in sweeping terms, *Elonis* might have had limited implications if cabined to instances in which a statute raised free-speech concerns. Judicial concern with "innocent" behavior being penalized, however, has continued to exercise a gravitation pull in the Court's criminal cases, even absent clear First Amendment worries. Three recent cases concerning white-collar crime, and various forms of governmental or financial corruption, are illustrative.

First, the 1999 *United States v. Sun-Diamond Growers of California* decision glossed a federal prohibition on "giv[ing] … anything of value to any public official, . . . for … any official act."[253] Rejecting the government's reading that required only that a gift be "motivated, at least in part, by the recipient's *capacity to exercise governmental power or influence* in the donor's favor," the Court held that criminal liability also required that the gift be motivated by a specific act that the official performed or intended

[249] 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."); *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… so long as such a reading is not plainly contrary to the intent of Congress.").

[250] 135 S. Ct. 2001, 2011 (2015) (interpreting 18 U.S.C. § 875(c)).

[251] *Id.* at 2020-21 (Thomas J., dissenting) (citing earlier precedents).

[252] *Id.* at 2010-11 (quoting *Carter v. United State*s, 530 U.S. 255, 269 (2000)). The opinion did not in fact decide, however, what mens rea standard was required to separate wrongful from "otherwise innocent" conduct. It noted only that the mens rea element was clearly satisfied if the defendant acted with "the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Id.* at 2012. Nevertheless, it made clear that, whatever standard of liability was used, it had to be a subjective one. Mere negligence was not sufficient. *Id.* at 2012.

[253] 526 U.S. 398, 405 (1999) (interpreting 18 U.S.C. § 201(c)(1)(A)) (construing the law to punish the giving of gifts as "reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken").

to perform.[254] The Court found this reading of the statute not merely more "natural,"[255] but also necessary to avoid any "snare for the unwary."[256] 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" 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."[257] These obviously innocent acts, the Court intimated, fell beyond statute's domain.

Second, in *Yates v. United States*, 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" applied only to objects "use[d] to record or preserve information.[258] The government's reading of the statute to apply to any physical object,[259] the Court explained, 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."[260] Gesturing at the risk that "innocent individuals" with no reason to know that their conduct courted criminal penalties, the majority cited *Liparota* to the effect that criminal statutes should "provide fair warning concerning conduct rendered illegal."[261]

Finally, as we explained in the Introduction, in *McDonnell,* the Court held that a federal law prohibiting officials from performing "official acts" in exchange for gifts from others only applied in cases in which the official made a decision or took an action on a pending government issue.[262] Simply arranging meetings or hosting events in exchange for gifts, the Court made clear, did not violate the terms of the law.[263] Once more, the *McDonnell* Court expressed concern about a broad reading's effect on "conscientious" actors.[264]

In a wide array of cases, then the Court construed diverse federal criminal laws narrowly 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).[265] It instead insisted on "fault," in the sense of culpable intentionality, as a predicate for liability.

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[254] *Id.* at 405.
[255] *Id*. at 406.
[256] *Id.* at 411.
[257] *Id.* at 406–07.
[258] Yates v. United States, 135 S. Ct. 1074, 1081 (2015).
[259] *Id*.
[260] *Id.* at 1088 (emphasis in original).
[261] *Id.* (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985)).
[262] 136 S. Ct. 2355, 2368-69 (2016).
[263] *Id*. at 2368.
[264] *Id.* at 2372.
[265] For examples of the same phenomenon among the lower courts, *see, e.g.,* United States v. Project on Gov't Oversight, 616 F.3d 544, 550–51 (D.C. Cir. 2010) (construing statute making it a crime to compensate government officials for government services to require proof of specific intent in order to

The Court offered two arguments to justify this stance. First, it expressed concern that laws criminalizing socially acceptable behavior lead to socially undesirable overdeterrence. In *U.S. Gypsum Co.*, for example, the Court 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."[266] This, of course, echoes concerns raised in the constitutional remedies context.

Second, the Court argued that laws that criminalize socially acceptable behavior create notice problems akin to those produced by the registration law the Court struck down on due process grounds in *Lambert*. Hence in *Staples*, it warned 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.[267] Similarly, in *United States v. X-Citement Video*, the Court held that a law criminalizing the knowing shipment in interstate commerce of certain forms of child pornography required knowledge of *both* the nature of the depictions and the age of the participants in order to avoid imposing liability on those who neither knew nor had any reason to know they were subject to criminal regulation.[268] By reading mens rea into these and other laws, the Court avoided the difficult constitutional questions it wrestled with so unsuccessfully in *Lambert*. In this sense, these cases represent quintessential examples of "quasi-constitutional lawmaking" through statutory interpretation.[269]

Lower federal courts in turn relied upon these arguments to justify reading mens rea requirements into federal criminal laws that did not explicitly require them.[270] State courts have also relied upon these precedents to justify reading mens rea requirements

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avoid penalizing innocent conduct); United States v. Bronx Reptiles, Inc., 217 F.3d 82, 88 (2d Cir. 2000) (construing 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); United States v. Pasillas-Gaytan, 192 F.3d 864, 868 (9th Cir. 1999) (holding that a federal statute that prohibited the unlawful procurement of naturalization must be interpreted to require proof that the defendant knew the facts that made his conduct criminal in order to avoid "criminaliz[ing] completely innocent conduct"); United States v. Nguyen, 73 F.3d 887, 893 (9th Cir. 1995) (construing federal statute that prohibits the bringing of aliens into the United States other than at a designated port of entry to require proof of criminal intent on the grounds that to do otherwise would "expose[] persons who perform innocent acts to lengthy prison sentences")

[266] 438 U.S. 422, 441 (1978).

[267] 511 U.S. 600, 613 (1994) (arguing that federal regulation of guns is not sufficiently pervasive to undermine this perception); *id.* at 610-11 ("Even dangerous items can … be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation.").

[268] 513 U.S. 64, 69 (1994) (noting that "[p]ersons do not harbor settled expectations that the contents of magazines and film are generally subject to stringent public regulation"); *id.* at 69 (arguing that the contrary interpretation of the statute would lead to "absurd" results by "sweep[ing] within the ambit of the statute actors who had no idea that they were even dealing with sexually explicit material").

[269] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

[270] *See, e.g.,* United States v. Bruguier, 735 F.3d 754, 760-61 (8th Cir. 2013) (construing federal statute that prohibits having sex with someone incapable of consenting to require proof that the defendant knew the victim was incapable of consent).

into state criminal laws that did not explicitly require them.[271] The result has been to make fault an important limiting principle in state, as well as federal, criminal law.

Fault, in short, has come to play an increasingly significant role in large swathes of public law. In the following Parts, we turn to the consequences and potential explanations for this turn away from strict liability.

III. Fault and the Distribution of State Power

We begin in this Part by examining how the ascendancy of fault may shape the paths by which state resources, and in particular the state's coercion, flows across and among between different policy domains and populations. As we show, the architecture of fault described in Part II can channel both the *when* and the *how* state officials intervene in private ordering. It thereby operates as an obscure yet powerful mechanism by which federal judges nudge the state to target this home over that business, to apply obdurate coercion against this population and not that one, and to penalize one species of criminality and not another. In brief, the rise of 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 the fault requirement in public law likely influences official behavior. Second, as prefigured in Parts I and II, we demonstrate that there are important discontinuities in the judicial demand for fault. Third, we argue that the ensuing 'gappiness' has distributive effects: by 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. 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.[272]

A. The Fault Rule as Tax and Subsidy

Fault in public law has a bilateral effect: It can either enable or deter state action. Where state actors are forced to substantiate fault before they can take coercive action, the 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. Fault, in short, can

[271] *See, e.g.*, State v. Ndikum, 815 N.W.2d 816, 818-22 (Minn. 2012) (relying on *Staples* to conclude that state law making it a gross misdemeanor offense to possess a pistol in public without a permit requires proof the defendant knew he possessed the pistol); People v. Tombs, 472 Mich. 446, 457 (2005) (relying upon *Staples* and *X-Citement Video* to conclude that statute that prohibits the distribution of child sexually abusive material requires proof of specific intent to distribute).

[272] 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.

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 emasculates in another.

To see this, consider first that the superficial doctrinal symmetry in the case law that we have mapped can be peeled away to reveal a functional dichotomy. In both the constitutional remedies and the substantive criminal law contexts, 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 *state* 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 benefit to the detriment of the state. In both domains, the nature of the ensuing alteration to the status quo varies from case to case. Just as the judicial response to a constitutional violation can vary from money damages to a refusal to consider evidence to an order of release, so criminal penalties can range from fiscal penalties to restitution orders to sentences of imprisonment for a term of years. This variation in remedies, however, is unrelated to the causal effect of fault, which is the main focus of our analysis here, and we set it to one side.

Depending on whether it is allocated to the state or its opponents, the fault requirement will therefore operate as a friction or an accelerant of state action. The basic intuition here that judicial regulation might act as either a tax or a subsidy derives from a series of justifiably famous articles by the late criminal-law scholar William Stuntz. Judicially imposed regulation is like any other form of regulation, explained Stuntz, insofar as it operates as a "series of taxes and subsidies" on state activity.[273] By making certain actions either more or less costly at the margin, judges either suppressed existing behaviors or elicit new kinds of conduct. For example, Stuntz argued that the availability of the exclusionary rule under conditions of limited criminal-defense-side resources would alter the mix of claims that public defenders in particular would raise on behalf of their clients.[274] He plausibly predicted, for example, 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).[275]

A judicial decision as to whether fault should be required before a criminal penalty or a civil sanction can be imposed similarly changes the likelihood of that sanction being imposed. Depending on whether the sanction is imposed on the government's behalf, or directed against a state actor, judicial action will alter the

[273] William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 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).
[274] William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443, 444 (1997) ("The exclusionary rule generates a lot of litigation—tens of thousands of contested suppression motions each year.").
[275] *Id.* ("[Exclusion] litigation is displacing something else, and the something else may well have more to do with guilt and innocence.").

likelihood of the state acting in the first instance in either a positive or a negative direction.

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 (i.e., elastic to) the level of fault-related costs.[276] We think these assumptions are correct, but also that they require some supplement justification as applied here.

Our claim that fault operates as a tax on government behavior concerns 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 diverse 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 thus assume, are sensitive to the risk of acquittal. Street-level officials who 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, fiscal cost, and the personal expenditure of time and effort—all likely have an effect.[277] Empirical evidence suggests that prosecutors select cases in order to pursue policy metrics (such as sentence length or crime reduction) keyed to career advancement.[278] Prosecutors, moreover, are thought to exercise discretion even among cases in which there is sufficient evidence to proceed to trial.[279] Hence, it seems likely that an increased risk of acquittal in one class of cases makes the latter less attractive.

The case for treating street-level bureaucrats as sensitive to litigation-related costs is more complex. Both evidence[280] and theory[281] suggest that bureaucrats are insensitive

[276] The standard view in law and economics is that negligence liability in accident law does not influence activity levels, whereas strict liability does. Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 1-2 (1980).

[277] For a similar judgment, see Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (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.").

[278] Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys*, 7 AM. L. & ECON. REV. 379 (2005) (finding evidence of sentence-length maximization); Glaeser et al., *supra* note 15, at 259 (finding evidence that crime reduction is a motive).

[279] 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 declines prosecution."); *accord* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1657 (2010).

[280] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (finding that less than one half of percent of police defendants are personally responsible for damages awards).

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

to financial penalties, In addition, some remedies, such as post-conviction 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 may 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, making the prospect of downstream exclusion an unhappy one for them.[282] It would seem likely that prison officials similarly have strong preferences as to order and safety in their workplaces. And it also seems likely that many bureaucrats identify to some extent with their organization's mission as a consequence of "organizational socialization,"[283] which results in a form of "institutional loyalty."[284] 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.[285] 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 describe.

For the purpose of our analysis, in sum, we posit that judicial imposition of fault rule creates a marginal friction on (or accelerant for) state action, although we advance here no claim about the precise magnitude of this effect. For the sake of parsimony, we treat the fault rule for substantive criminal liability as falling solely on federal actors, whereas the fault rule for constitutional remedies influences the incentives to both state and federal actors. We bracket variation in the functions played by state and federal governments, however, for the sake of clear analysis.

B. The Uneven Distribution of Fault in Public Law

Fault will only play the role of tax or subsidy, however, if officials can substitute in different actions. Hence, it is central to our analysis that the triumph of fault has not been complete. There are substantial gaps and irregularities in the doctrinal landscape. Along whole swatches of the litigation world, no fault rule obtains. This 'gappiness' means that state actors face choices about how to deploy resources between different activities that fall both inside and outside fault's dominion. Following Stuntz, we suggest

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

[283] Daniel Carpenter & George A. Krause, *Transactional Authority and Bureaucratic Politics*, 25 J. PUB. ADMIN. RES. & THEORY 5, 13 (2014); 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).

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

[285] The Court has obliquely referenced this concern. 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, *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.").

that at these interstitial points, the marginal effect of costs associated with fault (whether positive or negative) creates an incentive to do more or less of different activities. For instance, differences in the expected marginal cost of distinct prosecutions might lead to different arrays of litigation costs. A selection between different kinds of potentially unconstitutional action, similarly, will entail different downstream risks of remedial litigation.

This and the next subsection map these incentive effects across the public law domain. To this end, we first identify the doctrinal gaps where the federal courts have failed to deploy fault in the substantive criminal law context and the constitutional remedies contexts respectively. We then provide a simple framework for capturing the underlying pattern of trans-substantive regularities.

1. Fault's Gaps in Criminal Law

The gaps in the fault regime are perhaps broadest in the domain of federal criminal law, for all the reasons canvassed in Part II.B. The statutory regimes in which fault is not elicited remain quite varied. Defendants can be convicted of a variety of environmental crimes, both state and federal, without any proof of fault.[286] They can also be convicted of statutory rape,[287] as well as other sex-related offenses,[288] without proof of all, or sometimes any, of the elements that make their conduct criminal.

These are not isolated examples. Indeed, some of the most commonly prosecuted offenses lack a fault requirement. Hence, evidence of fault plays only a limited role in the enforcement of federal and state narcotics laws.[289] Consider the crime of possession, one of the most numerically significant narcotics offenses.[290] Possession of contraband was identified by Sayre as an archetypal "public welfare" offense. In many states, conviction of possessing narcotics does not require the prosecution to prove any culpable mental

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[286] *See, e.g.,* United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010) (Migratory Bird Treaty Act requires only proof that defendants' actions proximately caused the death of protected birds); United States v. Nguyen, 916 F.2d 1016 (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).

[287] *See, e.g.,* United States v. Wilcox, 487 F.3d 1163, 1174 (8th Cir. 2007) (construing federal statutory rape provision to allow conviction even when defendant was mistaken about victim's age).

[288] *See, e.g.*, State v. Sims, 195 So. 3d 441, 445–46 (La. 2016) (upholding statute that prohibits the knowing trafficking of children for sexual purposes but does not require knowledge of the child's age against due process challenge); United States v. Taylor, 239 F.3d 994, 996–97 (9th Cir. 2001) (construing federal anti-trafficking law to require knowledge only that defendant was transporting a person, not that defendant was transporting a person who was underage).

[289] *See, e.g.,* Whitaker v. People, 48 P.3d 555, 557 (Colo. 2002) (holding that state law that made it a crime to knowingly import more than 1,000 grams of a controlled substance did not require the defendant to know the quantity of drugs he imported nor that he knew he was importing a controlled substance); State v. Michlitsch, 438 N.W.2d 175, 178 (N.D. 1989) (construing state law prohibiting possession of a controlled substance to require neither knowledge nor criminal intent).

[290] Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 835-36 (2001) (describing the pervasiveness of possession offense in both narcotics enforcement and criminal-law enforcement more generally).

state.[291] Even under federal narcotics law, which does require some kind of intent, such intent is presumed when drugs are found in the defendant's possession or "constructive possession."[292] The result is that, in practice, possession resembles a "strict liability crime in which mere presence in a location where there are drugs is sufficient to prove constructive possession."[293]

Fault plays no greater role in federal offenses collateral to narcotics dealing. The Court, for example, has refused to interpret a law that imposes a ten-year minimum sentence on those who discharge a firearm during a drug trafficking crime to require proof that the defendant discharged the firearm either knowingly or intentionally.[294] Similarly, both state and federal courts have refused to interpret drug-free school zone laws—laws that impose heightened penalties on those who deal drugs close to schools—to require proof that the defendant knew of the proximity of the school.[295]

Fault also plays a limited role in the prosecution of federal immigration crimes, another high-volume offense category.[296] Most circuit courts have long permitted unlawful reentry convictions to stand on the basis of "general intent" evidence that a defendant had knowingly reentered the United States, rather than the specific intent to violate federal law.[297] Further, removal can be predicated on a criminal offense for which no mens rea requirement obtains—in effect rendering immigration removal a strict liability matter.[298]

Finally, it remains the case today that, under both state and federal law, defendants can be held liable for crimes carried out by their coconspirators that they

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[291] Sayre, *supra* note 73, at 78 (listing several forms of contraband possession as quintessential public welfare offenses).

[292] United States v. Hill, 142 F.3d 305, 312 (6th Cir. 1998).

[293] 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."); Dubber, *supra* note 290, at 952 (same).

[294] Dean v. United States, 556 U.S. 568, 575 (2009) ("It is unusual 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.") (emphasis in original).

[295] *See, e.g.,* State v. Denby, 235 Conn. 477, 481-82 (1995); United States v. Pitts, 908 F.2d 458, 461 (9th Cir. 1990); United States v. Falu, 776 F.2d 46, 50 (2d Cir. 1985); State v. Morales, 539 A.2d 769, 775-76 (N.J. 1987).

[296] United States v. Heredia, 768 F.3d 1220, 1225-26 (9th Cir. 2014) (describing rapid increase in the volume of immigration enforcement on the Mexican border).

[297] *See, e.g.,* United States v. Berrios-Centeno, 250 F.3d 294, 299 (5th Cir. 2001) (collecting authorities from other circuits). *But see* United States v Gracidas-Ulibarry, 231 F3d 1188, 1190 (9th Cir. 2000) (requiring specific intent).

[298] In re Esqueda, 20 I. & N. Dec. 850, 860 (B.I.A. 1994) ("We find nothing in the legislative history of the Anti-Drug Abuse Act of 1986 to indicate that Congress meant to restrict its expansive language by allowing an exception to be made for statutes lacking a mens rea component."). In specific contexts, though, the Supreme Court has required that state-law offenses have a mens rea element to predicate removal. *See, e.g.,* Leocal v. Ashcroft, 543 U.S. 1, 11 (2004) (driving under the influence).

neither intended nor knew anything about.[299] The rise of fault has not, in other words, had a noticeable impact on the expansive reach of conspiracy law.

These gaps in the fault regime do not necessarily represent a departure from the principles articulated in *Liparota* and *Staples*. To the contrary: judges frequently justify conviction in these cases absent proof of fault by categorizing the underlying conduct as not "apparently innocent." Consider for example, the Court's explanation in *Dean v. United States* of why defendants could be subject to a ten-year mandatory minimum for even the accidental discharge of a firearm during a drug trafficking offense. "It is unusual," the Court noted, "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."[300]

The D.C. Circuit made a similar argument to explain why defendants could be subjected to a ten-year mandatory minimum for carrying a semi-automatic weapon during a drug trafficking or violent offense even if they did not know the weapon was semi-automatic. That provision, the panel wrote, "poses no danger of ensnaring an altar boy [who made] an innocent mistake, because the government must first prove the defendant is guilty of either drug trafficking or a violent crime, and must further prove that the defendant intentionally used or carried a firearm, or intentionally possessed a firearm, during or in furtherance of that offense."[301] Similar arguments are deployed to justify the expansive reach of conspiracy law, as well as to justify the very limited mens rea requirements applied to many immigration, sex, and drug crimes.[302]

Arguments about innocence have been used, in other words, to justify the imposition of a fault rule, to dictate the kind of fault that is required, *and* to justify the many cases in which proof of fault is not required. The consequence is that the rise of fault has had a much more significant impact on the government's ability to prosecute certain kinds of crimes than on others. As a rough generalization, the fault requirement has had the greatest effect on the government's ability to prosecute offenses where the underlying conduct involves respectable behavior: behavior that law-abiding people might engage in. The rise of fault has had much less impact on the government's ability to criminally regulate those engaged in black market or grey market activities: those to whom a presumption of lawfulness does not apply. Here, courts typically have found no showing of individualized fault to be necessary.

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[299] *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, 739-40 (7th Cir. 2014) (defendant can be liable for drugs sold by co-conspirators).

[300] Dean v. United States, 556 U.S. 568, 575 (2009) (emphasis in original).

[301] United States v. Burwell, 690 F.3d 500, 507-08 (D.C. Cir. 2012); *see also* United States v. Shea, 150 F.3d 44, 52 (1st Cir. 1998) (holding that no knowledge of the features of the gun is required because "the § 924(c) defendant whose sentence is enhanced based on the type of weapon he carried has demonstrated a 'vicious will' by committing the principal offense").

[302] *See, e.g.,* United States v. Dyer, 589 F.3d 520, 528 (1st Cir. 2009) (construing federal statute prohibiting the trafficking of child pornography to require only general intent on the grounds that the statute prohibited conduct "that Congress had deemed inherently harmful").

2. Fault's Gaps in Constitutional Law

In constitutional remedies cases, the triumph of fault has been similarly incomplete. Not all constitutional challenges require a showing a fault to succeed. This is the case for a number of reasons.

First, not all venues for making constitutional arguments are hedged about with a fault requirement. 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 it is not "harmless beyond a reasonable doubt."[303] These constitutional errors, furthermore, frequently do not require any showing that those who committed them did so knowingly or intentionally.[304] In effect, this is a no-fault standard. It contrasts starkly with the high hurdle of fault that confronts habeas petitioners.[305]

Not all individual rights holders, however, 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 between no-fault access and fault-based access to a constitutional remedy will frequently depend on whether a litigant has a good lawyer.[306] To the extent that access to competent legal advice is correlated with wealth and income, fault is likely to be imposed in a regressive fashion.

Second, the rise of fault leaves largely untouched the effect of facial constitutional challenges and, in particular, challenges based on structural constitutional principles such as federalism and the separation of powers. Notionally, facial challenges on constitutional grounds are "disfavored."[307] Yet, as a practical matter, facial challenges to statutes on constitutional grounds—and in particular structural constitutional grounds—abound.[308] In these challenges, and through mechanisms such as the Declaratory Judgment Act, "federal courts frequently entertain actions for injunctions and for declaratory relief

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

[304] 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 (1984).

[305] *See supra* text accompanying notes 181 to 185.

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

[307] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 398 (2010) (quoting Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 450 (2008)); *accord* Ayotte v. Planned Parenthood of Northern New Eng., 546 U.S. 320, 329 (2006).

[308] In recent Terms, these have included *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2095 (2015); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257 (2013); *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011); *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 497 (2010).

aimed at preventing future activities that are reasonably likely or highly likely, but not absolutely certain, to take place."[309] Nationwide injunctions against nascent programs can ensue.[310] Such constitutional review in federal court, in effect, operates as a functional parallel to the "abstract" judicial review of legislation immediately after legislation exercised by the French Conseil d'État.[311] The fault requirement does not generally apply to such quasi-anticipatory challenges.[312] Other potential constraints, such as Article III standing limitations, are also applied not infrequently with a light touch.[313]

In some contexts, the rise of fault has in fact 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, 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.[314] The result has been to relieve litigants seeking to challenge laws that employ racial or other suspect classifications of the very onerous burden imposed on litigants who seek to challenge facially neutral laws.

Note once more the striking contrast between the kind of plaintiff burdened by fault and the pool of litigants able to avail themselves of quasi-anticipatory challenges to abstract policies that are often still awaiting full liquidation. The latter do 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 be sophisticated, fiscally endowed interest groups, including industry groups, state–level politicians, and wealthy criminal defendants.

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

[309] Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1160 (2013) (Breyer, J., dissenting).
[310] 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).
[311] For a summary of this system, see Alec Stone Sweet, *The Politics of Constitutional Review in France and Europe*, INT'L J. CONST. L. 69, 71 (2007).
[312] 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, __ F. Supp. 3d. __ (2017). But see *infra* note 314 and accompanying text.
[313] See Huq, *Judicial Independence*, *supra* note 22, at 65 (collecting cases).
[314] *See, e.g.,* Fisher v. Univ. of Texas at Austin, 136 S. Ct. 2198, 2208 (2016) (applying strict scrutiny to a public university's use of race in admissions for diversity ends).

Table 1. The Uneven Application of Fault

	Substantive Criminal law	Constitutional law
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
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 Fault

As the previous section indicates, the operation of the 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. We then explore 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 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. We then bring in a federalism component to our analysis. Across all these diverse regulatory contexts, a fault rule can either be "statist," in the sense of lowering the expected costs of coercive intervention, or "anti-statist," in the sense of raising the expected costs of state force. Table 2 provides a brief summary of the possibilities.

Table 2: The Distributive Effects of Fault on State Action

	Criminal law	Constitutional law
Fault demand	Anti-Statist	Statist
No fault demand	Statist	Anti-Statist

Given these general effects, it is possible to characterize the general distributive effect of fault across the incentives of the federal government in broad strokes. At the most general level, fault's triumph 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 contests such as narcotics and immigration enforcement.

As Part II demonstrated, the Supreme Court has imposed supplemental fault requirements in the antitrust, securities, and public corruption contexts as a means of protecting 'innocent' conduct.[315] Fault, to be sure, is by no means pervasive across white-collar crimes.[316] But the examples identified in Part II are hardly insignificant. Nor have the courts of appeal ignored their signal. One high-profile example is the criminal and civil suit against Countrywide Home Loans executives for mortgage-related fraud during the financial crisis of 2008-09 based on alleged violations of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.[317] The Second Circuit vacated a jury's verdict for the government. It reversed with instructions to enter judgment for the corporate officer defendants because the prosecution had failed to produce sufficient evidence of intent.[318] The panel 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 cannot sustain the claim."[319] This ruling substantially 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 in the modal case to find evidence of that mens rea memorialized contemporaneously with the relevant deal.[320] The Second Circuit's decision, moreover, alerts potential defendants to the risks of contemporaneous memorialization, making the latter even less likely.

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 prompted analogous judicial solicitude.[321] In very rough terms, we think the sociologist John Hagan's juxtaposition between "the financial crimes of the suites" and "the common crimes of the street" is a useful summary of the two categories across which the fault rule has asymmetrical incentive effects.[322]

These incentive effects will play out within U.S. Attorney's offices, and between federal and state law-enforcement efforts. To begin with, federal prosecutorial priorities vary widely between the ninety-four U.S. Attorneys offices depending on local

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[315] *See supra* text accompanying notes 227 to 264.
[316] 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").
[317] 12 U.S.C. § 1833a.
[318] United States ex rel. O'Donnell v. Countrywide Home Loans, Inc., 822 F.3d 650, 652 (2d Cir. 2016).
[319] *Id.* at 658.
[320] 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) (pointing to elements of the decision that "demonstrate[e] just how hard it might be to impose criminal liability").
[321] SUDHIR ALLADI VENKATESH, OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR 11-12 (2006) (describing scope of "underground" economy).
[322] JOHN HAGAN, WHO ARE THE CRIMINALS: THE POLITICS OF CRIME POLICY FROM THE AGE OF ROOSEVELT TO THE AGE OF REAGAN 2 (2010).

circumstances.[323] While U.S. Attorneys certainly target complex forms of financial crimes, international offenses, and collective culpability, it is important to emphasize that their dockets are varied. The uneven weight of the fault rule across federal criminal law creates an incentive for a U.S. Attorney to substitute between different kinds of cases. It means that expected return from many species of white-collar prosecutions is tamped down, whereas no parallel dampening effect obtains when the street-level crime is targeted. The net effect of the fault rule, at least as presently articulated, is thus to channel enforcement and prosecution resources away from (much) white-collar to (much) street crime. Beyond this intra-office effect, there is an interjurisdictional effect. Despite an increasing level of federal involvement, it is still state and local authorities who deal "overwhelmingly [with] traditional "index" or street crimes--violence, property, and drug crimes, plus traffic offenses," with little "excess capacity" for other priorities.[324] The rise of fault has left their hands relatively free.

These incentive effects are reinforced by the operation of the fault rule in the constitutional remedies context. The latter renders prosecution across-the-board less costly as a regulatory strategy. Government attorneys need spend less effort anticipating and countering exclusion motions or insulating convictions from post-conviction review. Perhaps a more significant effect, though, concerns the front-line 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 fault rule for constitutional remedies means that all but the "incompetent or those who knowingly [and openly] violate the law"[325] can disregard worries about constitutional liability.

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 pre-enforcement challenges adjudicated without the benefit of a factual record of how a legal measure operates on the ground.[326] To the extent that government decision-makers are debating whether to deal with a social problem through a new civil regulatory framework or through on-the-ground coercive intervention, therefore, the fault rule in constitutional remedies pushes toward the latter. This likely has the marginal effect of blunting the legislative incentive 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.

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[323] Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 853 (2015) (noting "large disparities among the ninety-four different 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").

[324] Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 526 (2011).

[325] Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) (quoting Malloy v. Riggs, 475 U.S. 335, 341 (1985)).

[326] *See supra* note 308 (collecting examples).

As a result, it is in the same "street" context that federal action is liberated by the fault rule for constitutional remedies, and the same "suites" context where the absence of a fault rule means that the state remains subject to potentially disabling frictions. This effect is only amplified, finally, by the federalism dimension of the turn to fault.

The markedly uneven consequences of courts' embrace of a fault rule on differently positioned defendants, we should note, were neither inevitable nor natural. Fault could have come to mean something else, with different distributive effects. In the criminal law context, courts could, for example, have embraced instead a fault principle akin to that advocated by the drafters of the MPC. They could have insisted, that is, that at minimum recklessness must be proven with respect to each element of every criminal offense. A rule of that sort 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, this is not the conception of fault that has come to orient either state[327] or federal criminal law.[328]

Alternatively, courts might have interpreted the constitutional principle articulated in *Lambert* more expansively than they have so far proven willing to do. They could, for

[327] Some state courts, however, have invoked Staples to narrow some forms of 'street' liability. *See, e.g.,* In re Welfare of C.R.M., 611 N.W.2d 802, 808–10 (Minn. 2000) (construing state statute that made it a felony to possess a dangerous weapon on school property to require knowledge that one possessed a dangerous weapon on the grounds that possession is not innocent because possession itself is demonstrative of intent" but "knives as common household utensils are clearly not inherently dangerous, as they can be used for a myriad of completely benign purposes); State v. Bash, 130 Wash. 2d 594, 608–09, 925 P.2d 978, 984–85 (1996) (relying upon *Staples* to conclude that state statute that made it a felony to possess a dangerous dog that ends up harming another requires knowledge that one's dog is potentially dangerous). But these cases are exceptional, and not typical.

[328] In his majority opinion in *United States v. Flores-Figueroa*, for example, Justice Breyer suggested that it was 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. 556 U.S. 646, 650 (2009). Although couched as a grammatical principle, Justice Breyer's rule acknowledges no distinctions based on the innocent or not-so-innocent nature of the underlying conduct. For this reason, three members of the Court concurred specifically to register their disapproval of this portion of the majority opinion. Read literally, Justice Alito warned, this dictum could lead to an "overly rigid rule of statutory construction" and eliminate strict liability where it was unproblematic. *Id.* at 659 (Alito J., concurring in part and concurring in the judgment). In the seven or so years since *Flores Figueroa* was decided, there is no evidence that Justice Alito's fears have come to pass or that the much more expansive interpretation of the fault principle that the opinion articulated 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, 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 not to 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. Caldwell, 75 M.J. 276, 281 (C.A.A.F.), *cert. denied*, 137 S. Ct. 248 (2016) (construing military crime that prohibited the mistreatment of subordinates to require only general intent because that was all that is required to separate wrongful conduct from innocent conduct); United States v. Allen, 788 F.3d 61, 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'" (quoting *United States v. LaPorta*, 46 F.3d 152, 158 (2d Cir. 1994)).

example, have interpreted the Due Process Clause of the Fifth and Fourteenth Amendments as a limit on the government's ability to impose liability on defendants who have no reasonable opportunity to conform their conduct to the requirements of the law. Careful ethnographic work in highly impoverished communities by sociologists such as Sudhir Venkatesh, Mary Patillo, and others, however, point toward the thorough entangling of licit and illicit livelihoods and practices in impoverished urban communities,[329] which are often racial homogenous.[330] 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."[331] 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.[332]

Accounting for these 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 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. But this did not occur.

Instead, in closely analogous fact situations, courts have generally refused to find the imposition of criminal liability absent fault to violate the Due Process Clause. They have, for instance, deflected due process challenges to sex-offender registration laws that make a convicted sex offender's failure to register a strict liability offense.[333] They have upheld against constitutional challenge state as well as local ordinances that make parents criminally liable for the immoral or criminal acts of their children.[334] In the civil context, courts have rejected due process challenges to laws that allow the eviction from public

[329] For sources demonstrating this entanglement, see VENKATESH, *supra* note 321, at 10 (noting the "interpenetration of outlawed and legitimate ways of making money"); ALICE GOFFMAN, ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY 141-62 (2014) (describing illegal side-line of legal businesses in a Philadelphia ghetto).

[330] Douglas S. Massey & Jonathan Tannen, *A Research Note on Trends in Black Hypersegregation*, 23 DEMOGRAPHY 1025, 1027 (2015) (noting that the degree of urban hypersegregation has remained unchanged since the 1970s).

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

[332] MARY PATILLO-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").

[333] *See, e.g.*, Morrow v. State, 2014 Ark. 510, 6, 452 S.W.3d 90, 94 (2014) (upholding constitutionality of Arkansas sex offender law); United States v. Elkins, 683 F.3d 1039, 1049-50 (9th Cir. 2012) (upholding constitutionality of federal sex offender registration law, even though law did not require proof that defendant knew of his obligations under the law to register).

[334] *See, e.g.,* Williams v. Garcetti, 5 Cal. 4th 561, 566, 853 P.2d 507 (1993) (upholding against due process challenge California law that made it a misdemeanor for parents to fail to "exercise reasonable care, supervision, protection, and control" when the result was "to cause or encourage any person under the age of 18 to come within the provisions of [the juvenile law]"); *see generally* Sarah Swan, *Home Rules*, 64 DUKE L.J. 823, 863 (2015).

housing of tenants whose guests or family members engage in drug-related criminal activity without their knowledge or control.[335]

The result has been to make to it much easier for the state to punish certain kinds and classes of crimes than others. Speaking broadly, what the triumph of fault has produced is a set of doctrinal rules that makes it significantly more difficult for the government to criminally regulate white collar activities 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.

IV. Explaining Fault's Triumph

The patterns of fault observed in the doctrine call 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 public law domains? And why have they done so with the particular distributional consequences we have charted? This Part offers tentative diagnoses of the rise and (partial) triumph of fault. It develops first an account of the political context in which the fault rule arose. It then maps the deep-rooted assumptions and larger intellectual formations that can be glimpsed at work under its surface.

These external, contextualizing analyses of fault's triumph are, in our view, necessary because explanations derived from the jurisprudence's internal logic are so manifestly deficient. Consider again the various justifications for fault articulated in the case law. None of these accounts provides a sufficient or wholly satisfying explanation.

First, there is the claim that a fault threshold is necessary to prevent imposing liability on the innocent.[336] While on its surface appealing, this argument is unsatisfying for a number of reasons. For one thing, it does not explain why concerns with innocence became salient when they did, and not before. Why, in other words, did courts in the 1940s, 1950s, and 1960s not show the same concern with protecting the "apparently innocent" from liability that they would in later decades? Some have construed the increasing emphasis on questions of fault in the Court's criminal law cases as a response, albeit long-overdue, to the growth of the regulatory state.[337] This argument, however, fails to take into account fault's role in *enabling* as well as *limiting* state power. It fails, therefore, to provide a complete explanation for the doctrinal changes chronicled above.

Arguments about innocence also fail to explain why courts embraced the particular conception of fault that they did. Courts could, after all, have embraced the

[335] Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 135 (2002) (rejecting lower court conclusion that federal policy "raised serious questions under the Due Process Clause of the Fourteenth Amendment," because it permits "tenants to be deprived of their property interest without any relationship to individual wrongdoing") (quoting *Rucker v. Davis*, 237 F.3d 1113, 1124-25 (9th Cir. 2001)).
[336] *See, e.g., supra* text accompanying notes 266 to 269.
[337] *See, e.g.,* Paul Larkin, Jr., Jordan Richardson, and John-Michael Seibler, *The Supreme Court on Mens Rea, 2008-2015,* LEGAL MEM. (Heritage Found., January 14, 2016).

fault rule advocated by the drafters of the Model Penal Code. They could have defined innocence, in other words, in statutory terms, as the failure to purposely, knowingly, or recklessly violate each element of a specific criminal offense. Instead, they developed a fault rule that depended upon a notion of innocence that was not statutorily defined; that instead asked whether the defendant knew or had any reason to know that he or she was engaging in criminal behavior. Nothing in the cases satisfactorily explain, however, why *this* is the appropriate metric of innocence: in other words, why a defendant who assaults a federal officer but does not know that he is a federal officer should be considered any less innocent of the crime of assaulting a federal officer than a defendant who did not know he unlawfully possessed a firearm regulated by the Firearms Act.

Indeed, the claim, made in *Staples* and other cases, that it is fundamentally unjust to impose liability on someone who does not know they are acting criminally could as easily be deployed to support the notion that it is unjust to impose liability on someone who does not know all the facts that make their conduct criminal—and yet courts have, for the most part, adamantly resisted this interpretation of the fault rule.[338] They have also, except in the isolated instances identified above, continued to insist that ignorance of the law is no excuse—and yet, failed to insist on any measures to require lawmakers to provide the public anything close to actual notice of the laws.[339] Appeals to innocence *tout court* thus provide at best a very partial explanation for the growing importance of fault in public law. This is especially so when the argument is considered in light of federal courts' hostility towards innocence claims in other contexts.[340]

Second, there is the expressed judicial concern for zealous enforcement of the law in the constitutional remedies context, which is often articulated as a worry about chilling "objectively reasonable" state action.[341] The Court's definition of objectively reasonable action, however, in practice allows a considerable quantum of plainly illegal, inefficient, and even malevolent, state action to proceed without remedy.[342] The Court has failed to explain why authorization of such illegal or bad-faith behavior is necessary to achieve generally held social ends, especially given its assumption of increasing professionalism among the important category of police defendants.[343] It is, indeed, more accurate to say that it simply has not tried.

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[338] *See infra,* note 299, and accompanying text.

[339] *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR. SUBSTANTIVE CRIMINAL LAW § 5.1(D) (1986) ("Even if there was once a time when the criminal law was so simple and limited in scope that [the presumption that everyone knows the law] was justified, it is now an 'obvious fiction' and 'so far-fetched in modern conditions as to be quixotic. No person can really 'know' all of the statutory and case law defining criminal conduct. Indeed, the maxim has never served to explain the full reach of the ignorance-of-the-law-is-no-excuse doctrine, for the doctrine has long been applied even when the defendant establishes beyond question that he had good reason for not knowing the applicable law.").

[340] In the post-conviction review context, an "actual innocence" claim is not a basis for relief but mitigates the effect of a procedural bar. Nevertheless, the Court has required that petitioners shod that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence" even to secure a hearing on the merits. Schlup v. Delo, 513 U.S. 298, 327 (1995). This is not the standard a Court concerned with punishing the innocent would select.

[341] United States v. Leon, 468 U.S. 897, 920-21 (1984).

[342] *See, e.g.,* Ashcroft v. al-Kidd, 563 U.S. 731, 734 (2011); *supra* text accompanying notes 172 to 179.

[343] Hudson v. Michigan, 547 U.S. 586, 598 (2006).

Third, the worry about judicial economy,[344] while powerful in the constitutional remedies context, does not explain why the Court has left U.S. Attorneys and state prosecutors with such wide latitude to rack up a large volume of criminal convictions, generating much pressure on state and federal dockets. If courts were in fact motivated by docket control controls, they would ratchet up the fault threshold in the narcotics and immigration enforcement contexts. 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.

Finally, the rise of fault is not wholly a partisan story. Both liberal as well as conservative judges 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.[345] Attitudinal models of the judiciary as a result cannot provide a comprehensive explanation.

Rather than simply a response to deterrence or cost or justice concerns, therefore, we think the rise of fault is best understood as a product of broader political and intellectual shifts in widely held conceptions of 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, the enterprise of situating broad legal developments such as the rise of fault in its political and intellectual context is a worthwhile, even necessary, predicate for a clear understanding of public law's trajectory.[346]

A. The Political Context of Fault's Triumph

We sketch first the context of partisan and political dynamics in which fault became an increasingly important principle of public law in the 1970s and the 1980s. Fault's ascendency, we suggest, corresponds to a general shift from regulatory to punitive modes of social control. The social-welfare 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 later deregulatory turn in American politics corresponded to the moment that fault filtered into federal criminal law on the white-collar side.

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[344] *Id.* at 58-63 (developing this argument).

[345] Huq, *Judicial Independence*, *supra* note 22, at 47 (noting that in constitutional remedies cases "key precedent … is surprisingly bereft of sharp ideological division [and] qualified immunity and habeas precedent includes frequent supermajoritarian and even unanimous opinions.").

[346] *Cf.* Gordon, *supra* note 17, 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"); Guyora Binder & Robert Weisberg, *What Is Criminal Law About*, 114 MICH. L. REV. 1173, 1176 (2016) (describing different approaches to the intellectual history of criminal law).

Consider first the well-known punitive turn in late twentieth century American politics and policy-making. Its basic contours familiar: Over the course of the twentieth century's second half, both crime rates[347] and punitive attitudes among the American public[348] steadily increased. Public attitudes to crime, however, did not mechanically respond to changes in criminality levels. Rather, they lagged considerably behind.[349] Partisan mobilization among political elites aimed at rendering crime salient as an object of policy-making instead played a necessary mediating role between observed crime rates and perceptions of crime as an important object of public policy.[350]

One of the most consequential policy-related results of this trend was a turn away from the "blended opportunity, development, and training programs of the War on Poverty [to] the surveillance, patrol, and detention programs of the War on Crime."[351] 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.[352] Ultimately, this shifted into a broader "revolution in favor of markets [and] … against intrusions by Big Government" outside the crime-control domain.[353]

This, importantly, reflected in large measure a *bipartisan* realignment.[354] In the 1960s, Republicans employed a "mutually reinforcing" strategy of "depoliticization and criminalization of racial struggle" and a "racialization of crime."[355] Major national media blamed the civil rights movement not only for urban riots, but also "more generally, for lawbreaking by 'Negros' [sic]."[356] Rather than resisting this framing, Democrats responded by "desperately" trying to "mimic" and even outbid their partisan foes.[357] By

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[347] GARY LAFREE, LOSING LEGITIMACY: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS IN AMERICA 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).

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

[349] Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230, 245 fig. 4 (2007); *accord* Joachim J. Savelsberg, *Knowledge, Domination, and Criminal Punishment*, 99 AM. J. SOC. 911, 920 (1995).

[350] KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (2000).

[351] Elizabeth Hinton, *'A War Within Our Boundaries': Lyndon Johnson's Great Society and the Rise of the Carceral State*, 102 J. AM. HIST. 100, 101-02 (2015); *see also* Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, 2 PUNISHMENT & SOC. 43, 46 (2001) (noting that the penal turn "coincided with efforts to scale back the welfare state").

[352] Hinton, *supra* note 351, at 111.

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

[354] Nicola Lacey argues that the distinctively bilateral character of American political competition conduces to competition over crime policy. *See* NICOLA LACEY, THE PRISONERS' DILEMMA 64-66 (2008).

[355] Weaver, *supra* note 349, at 247; *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."); MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 213-24 (2006) (same).

[356] Melissa Hickman Barlow, *Race and the Problem of Crime in* Time *and* Newsweek *Cover Stories 1947 to 1994*, 25 SOC. JUST. 149, 161-66 (1998).

[357] Weaver, *supra* note 349, at 251.

1973, indeed, crime had crowded out civil rights as a concern in the national Democratic Party's agenda.[358] By the early 1980s, penal and welfare regimes were tightly coupled into a "single policy regime aimed at the governance of social marginality."[359] This regime increasingly shifted resources from socialized programs of welfare toward the individualized assignment of criminal punishment at both the federal and state levels.[360] This regime was coupled to a broader deregulatory agenda closely associated with President Ronald Reagan.[361] But in a signal of the bipartisan nature of the resulting consensus, it was a Democratic president who in the 1990s would promise to end welfare, and do so by signing a reform measure "largely written on Republican terms."[362]

One can interpret the Court's efforts during this period to limit the availability of constitutional remedies in light of this policy realignment. Qualified immunity doctrine on its face is framed in trans-substantive terms. But it "developed primarily through cases alleging constitutional claims against law enforcement"[363] at the precise moment in which crime "ha[d] in some sense captured the imagination of those exercising state power."[364] It seems implausible that the specific policy context in which immunity doctrine was largely developed would have no influence on the Justices' thinking. Moreover, this context helps illuminate why judicial economy concerns might bite in the remedies context (where volume is produced by increasing state reliance on coercion) but not register in the criminal-law context (where volume is produced by the increased penalization of private conduct). Without collapsing into crude functionalism, therefore, we think that it is plausible to think 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.

The Court's embrace of a fault rule in its criminal cases can also be understood as part of the broader deregulatory turn that took place in the 1980s onward. The move to scale back government intervention in the economy, and the concomitant celebration of the unregulated market,[365] provides 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 deter

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[358] *Id.* at 252.
[359] Beckett & Western, *supra* note 351, at 55.
[360] *Id.* at 53-55.
[361] Abner J. Mikva, *Deregulating Through the Back Door: The Hard Way to Fight a Revolution*, 57 U. CHI. L. REV. 521, 522 (1990) (describing Reagan's deregulatory agenda during the campaign and while in office). Deregulation, though, started to dominate the political agenda under President Carter.
[362] John F. Harris & John E. Yang, *Clinton to Sign Bill Overhauling Welfare,* WASH. POST, Aug. 1, 1996, at A1; *see also* BECKETT, *supra* note 350, 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").
[363] Joanna Schwarz, *How Qualified Immunity Fails* 13-14 (January 2017) (draft on file with authors).
[364] JONATHAN SIMON, GOVERNING THROUGH CRIME 21 (2007).
[365] BERNARD HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF THE NATURAL ORDER 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 both necessary and legitimate.").

valuable economic activity. More generally, it helps explain why courts were increasingly unwilling to treat deterrence alone 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 was increasingly called into question, it is easy enough to understand 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.

Of course, this deregulatory turn occurred against a backdrop of continuing anxiety about crime.[366] This likely helps explain the many gaps in the fault regime, and why it was that innocence came to be defined not by the statutory particularities of crime (as the MPC drafters wanted), but instead by something broader—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 even 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 fault that courts instead employed—by dividing defendants into roughly the 'apparently innocent' and the 'facially culpable'—imposed far fewer constraints on the government's ability to, for example, wage the War on Drugs. Its primary effects, as we argued in Part III, were instead to make it more costly for the government to use the tools of the criminal law to regulate the business and political spheres.[367]

Thinking about the rise of fault in relation to these changes in the political and economic environment also help illuminate the doctrine's timing. The embrace of fault as a limiting principle in the 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 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.

B. The Intellectual Context of Fault's Triumph

The Court's increasing emphasis on fault can also be understood in light of a shift away from the largely instrumental conception of culpability evident in the early and mid-twentieth century cases towards a much more individualized and more moralistic account. The correlation between doctrinal and intellectual developments suggests the possibility of a connection between these trends.

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[366] Enns, *supra* note 348, at 862.

[367] One could say, following Harcourt, that this notion of 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 [intensive state regulation was] both necessary and legitimate." *Id.*

To see this, step back and consider first the mid-twentieth century view of culpability. 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 primarily as tools of a larger social policy to deter harmful acts and encourage good behavior. This instrumental view 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.[368] It also explains the Court's willingness in *Dotterweich* and like cases to punish defendants who simply failed to take adequate precautions against the risk that their subordinates might violate the law. In these instances, the Court recognized, such liability might impose "hardship" but nevertheless promoted the "interest of the larger good" by protecting the "innocent public" against the dangers that the defendants in these cases had the duty, and the authority, to prevent.[369] A necessary assumption of such logic is the existence of a collectivity whose interests are embodied in that "larger good," and whose interests in some sense transcend those of any given individual.[370]

An instrumental and socially nested view of culpability also illuminates the Court's willingness, during this period, to craft broad prophylactic rules of criminal procedure, as in *Miranda v. Arizona*,[371] that regulated beyond strictly defined constitutional parameters.[372] The *Miranda* decision reflected the Court's view that effective enforcement of the Fifth Amendment required a broad liability rule.[373] *Miranda* embodies, in other words, the Court's recognition that, when crafting rules of criminal procedure, it had an obligation to take into account the practical difficulties of enforcement and administration associated with different liability rules as a matter of the collective good.[374]

The perspective upon individual culpability does not explain, however, the Court's insistence in *Staples* that, even if automatic machineguns were dangerous weapons, individuals who wrongly—perhaps even unreasonably—believed they did not possess such firearms did not have to comply with regulations enacted to limit their

[368] Shevlin-Carpenter Co. v. State of Minn., 218 U.S. 57, 69 (1910).
[369] United States v. Dotterweich, 320 U.S. 277, 285 (1943); 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 Cosmetics] 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.").
[370] Mark Grief's account of midcentury American metaphysics captures something of the same sense. *See* MARK GRIEF, THE AGE OF THE CRISIS OF MAN: THOUGHT AND FICTION IN AMERICA 1933-1973, at 14 (2015) (discussing images of "the human family, alike as paper dolls, linking hands and girdling the earth" in postwar American literature).
[371] 384 U.S. 436 (1966).
[372] *See, e.g.,* Joseph D. Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988).
[373] *Miranda*, 384 U.S. at 444 (arguing that a prophylactic rule "was necessary … to insure that what was proclaimed in the Constitution had not become but a 'form of words' in the hands of government officials").
[374] *See* David Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 194 (1988) (arguing that what *Miranda* represents is the Court's attempt to craft a liability rule that "minimize[s] the sum of administrative costs and error costs").

harms.[375] Nor can it explain the Court's refusal in *Leon* and others cases to apply the exclusionary rule in cases involving the good faith violation of defendants' constitutional rights. The *Leon* Court argued that deterrence concerns did not justify exclusion in such cases because there was no wrongful or even negligent police behavior to deter.[376] But, of course, laws can deter bad behavior by requiring individuals to take more care, not only by requiring them to act reasonably.[377] A better explanation for the Court's decision in *Leon* is the intuition that excluding evidence gathered by police officers who did not intend to violate the Constitution was itself morally problematic because it "offend[ed] basic concepts of the criminal justice system," even if it resulted in some marginal deterrence of unconstitutional acts.[378]

What decisions such as *Staples* and *Leon* demonstrate instead is the Court's new approach during the 1970s and 1980s to the crafting of constitutional as well as criminal liability rules. This later approach focused less and less on any conception of the *collective* good. Concerns about deterrence and administrability do not entirely disappear from the cases. But the Court across the 1970s and 1980s became increasing unwilling to impose liability on individuals it viewed as *morally*, if not necessarily *legally*, innocent of wrongdoing.[379] Moreover, it increasingly tended to equate moral innocence with a particular kind of subjective intent, rather than with what best served society's collective interests.

The increasing emphasis the Court placed in its criminal and constitutional remedies cases on questions of individual culpability reflects a broader shift in how legal rights and responsibilities were coming to be discussed during this period. For example, Loic Wacquant has noted that "the trope of individual responsibility" played an important role in justifying the increasing punitiveness of American criminal justice policy in the 1980s and 1990s.[380] Supporters of the "War on Drugs," for example, argued that even minor drug violations should be harshly penalized because consuming, let alone selling drugs, indicated a "degrad[ation of] human character" that the government could ignore only "at great peril" to the health of society.[381] Drug use, they argued, constituted a moral

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[375] As Justice Stevens argued vigorously in his dissent, *Staples* removed any incentive owners of convertible semi-automatic machine guns might have had to ensure that their guns did not fall within the terms of the Act. Staples v. United States, 511 U.S. 600, 633-34 (1994) (Stevens, J., dissenting).

[376] United States v. Leon, 468 U.S. 897, 908 (1984) ("[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.").

[377] Wasserstrom, *supra* note 18, at 736-37.

[378] *Leon*, 468 U.S. at 908.

[379] 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 Williams' 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 determinatism." *Id.* at 194.

[380] Loïc Wacquant, *Three steps to a historical anthropology of actually existing neoliberalism*, 20 SOC. ANTHROPOLOGY 66, 72 (2012).

[381] WILLIAM BENNETT, NATIONAL DRUG CONTROL STRATEGY 7 (UNITED STATES OFFICE OF NATIONAL DRUG CONTROL POLICY 1989).

wrong for which the individual should, in all cases, be held criminally responsible.[382] Similarly, proponents of welfare reform argued that limiting the availability of welfare would improve the moral character of its recipients by encouraging self-reliance.[383] Indeed, the significant reform, or more accurately, the restriction or slow strangulation, of 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 choice."[384]

The notion of fault articulated in cases such as *Staples* and *Leon* echoes the strong conception of personal responsibility in the rhetoric surrounding the War on Drugs and the elimination of social welfare. It too divides the world into two classes: those who know, or should have known, that they are violating the law (the lawbreakers); and those who do not (the "apparently innocent" or, in the constitutional remedies cases, the good faith actors). For the first group, liability can be imposed even absent proof of knowledge or intentionality. The idea here is that once one decides to engage in crime, or act in bad faith, one is responsible for everything that follows from it.[385] For the second group, however—those who are not similarly culpable, or we might say, "responsible" for their bad acts—there can be no legal sanction, even when imposing one could encourage socially beneficial behavior.

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[382] *Id.* at 17 ("[W]e declare clearly and emphatically that there is no such thing as innocent drug use."); *id.* at 53 ("Drug use is a moral problem."). *See also* FRANKLIN E. ZIMRING AND GORDON HAWKINS, THE SEARCH FOR RATIONAL DRUG CONTROL 7-8 (1992) (noting that "one of the most extraordinary features of [Bennett's report on the War on Drugs] is the characterization of the effort to control drugs as essentially a struggle between good and evil…The justification for targeting casual users is that they present 'a highly contagious' example to potential drug users… But the enforcement of laws against this group can also be justified because . . . their deliberate infraction of the law is the central harm, the essential drug problem. [Because] these persons are neither addicted nor collaterally criminal [means that] their defiance of the legal authority of the state is more blameworthy and dangerous than that of addicts driven by a craving.")

[383] 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. CRIM. 321, 334 (2000) ("[W]orkfare programmes in the Unites States and welfare programs in the United Kingdom seek to micromanage the behavior 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," *codified as amended,* 42 U.S.C. § 608(a) *et seq.* (2006).

[384] 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 forces" and its reliance on market solutions" rather than social ones. DAVID GARLAND, THE WELFARE STATE: A VERY SHORT INTRODUCTION 74 (2016).

[385] Darryl Brown has helpfully described the notion of culpability articulated in cases such as *Staples* as articulating a theory of "threshold culpability" Darryl K. Brown, *Federal Mens Rea Interpretation and the Limits of Culpability's Relevance*, 75 LAW & CONTEMP. PROBS. 109, 111 (2012). Threshold culpability, Brown writes, is the idea that *mens rea* is needed "only to determine whether one is innocent or blameworthy of some offense" rather than to ensure that punishment is proportional to one's moral culpability. *Id.* He contrasts this conception of culpability—which he notes is dominant in federal criminal law—with the idea of culpability advanced by the drafters of the MPC, which he describes as "proportionate culpability." *Id.*

The increasing emphasis on individual responsibility in political and legal discourse during this period in turn should be understood in relation to a set of broader changes in American state and society during this period. The historian Daniel Rodgers has argued that the collapse of the Fordist economy that had dominated post-World War II American society—and provided a great swathe of particularly the white working class unprecedented prosperity and security—and the increasing destabilization of existing social norms produced by the (partial) success of movements for racial and gender equality produced an age of "fracture."[386] This was characterized by pervasive doubt about the existence—or at least, the thickness—of a shared moral community, and about the propriety of limiting individual freedom in the name of the collective good. Even though conceptions of society and social obligation continued to circulate through divergent scholarly and policy currents, Rodgers explains, the idea of moral community morphed over this period into "something smaller, more voluntaristic, fractured, easier to exit, and more guarded."[387] What remained after the "sense of society as an interconnected whole withered" was an "enchanted, disembedded, psychically involved sense of freedom" that was "[i]ndividualized and privatized … cut loose from the burdens and responsibilities that had once so closely accompanied it."[388] It was in this context that "conceptions of human nature. . . thick with context, social circumstances, institutions and history gave way to conceptions of human nature that stressed choice, agency, performance, [] desire"—and responsibility.[389]

Rodgers's description of the changes taking place in public discourse also captures the trajectory of American public law with remarkable fidelity. As we have attempted to demonstrate throughout this Article, the Court's doctrines of constitutional remedies and criminal liability became, over the past four decades or so, increasingly less attentive to questions of social context and power and increasingly focused on questions of individual subjectivity instead. At one point in time, decisions such as *Dotterweich* and

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[386] DANIEL RODGERS, AGE OF FRACTURE 3-9, 111-179 (2003). Rodgers also identifies as a cause of the "age of fracture" the increasing influentialness of conservative institutions and thinkers. Certainly, conservative thinkers and politicians challenged the idea of social obligation they believed to be then-dominant in public discourse. Milton Friedman, for example, argued during this period that it was harmful to think in terms of social obligations—at least when regulating individuals in market society. *Id.* at 219. The "doctrine of social responsibility," Friedman wrote, as applied to corporate managers "means that [those managers much] act in some way that is not in the interest of [their] employer" and was therefore a "fundamentally subversive doctrine" in a free society. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG. (September 13, 1970). Similarly, Margaret Thatcher, famously insisted in 1987 that there was "no such thing [as society]!" There were, Thatcher argued, instead only "individual men and women and . . . families." RODGERS, *supra,* at 219. Rodgers notes that, in other contexts, Thatcher recognized—even valorized—the importance of social bonds and obligations. Nevertheless, her remark became well-known because it captured the growing skepticism among conservatives about the legitimacy of political arguments that did not take as their precondition the maximization of individual self-interest. *Id.* at 219-220; *see also* YUVAL LEVIN, THE FRACTURED REPUBLIC: RENEWING AMERICA'S SOCIAL CONTRACT IN THE AGE OF INDIVIDUALISM 2-3 (2016) (making a similar claim).

[387] RODGERS, *supra* note 386, at 220.

[388] *Id.* at 39-40. Consistent with these trends, other historians have identified a broader trend toward "individual rights, meritocracy, and property ownership" as core political values. Kim Phillips-Fein, *Conservatism: A State of the Field*, 98 J. AM. HIST. 723, 731 (2011).

[389] RODGERS, *supra* note 386, at 3.

Miranda reflected what was a broadly-shared view that liability absent fault could be imposed on those who wield distinct forms of social power—the power of the company CEO in *Dotterweich*, and the power of the interrogating police officers in *Miranda*—in order to prevent them from misusing that power. In contrast, more recent decisions, such as *McDonnell* and *Heien*, pay almost no attention to questions of social context or asymmetries of power. Instead, they focus intently on questions of individual "choice, agency, . . . and desire."[390] 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[]" or those of a lawbreaker? Similarly, did the police officier in *Heien* act in good or bad faith? These examples suggest that in public law, as in various domains of American social and political life, a particular, highly moralized conception of individual responsibility untethered from the social has come to dominate.

What Rodgers aptly calls "the fracture of the social" is hence as much a motif of public law as it is a description of broad shifts in intellectual thought and social practice.[391] The leading analysis of this trend isolates "ideology" as its cause.[392] We, instead, perceive a roughly simultaneous (if not lockstep) shift in material relations, market structures, and ideological conceptions of the individual and society. Without offering a singular account of causation, we think it is not unreasonable to perceive the law as influenced by—because imbricated within—this larger constellation of material, intellectual, and social changes. We hence leave open the possibility that the larger shifts in intellectual life and the doctrinal metamorphosis we have mapped may be causally related the triumph of fault. Or both may be impelled by some other, perhaps materialistic, transformation. Or perhaps any singular account of causation here would be a dangerous flattening of a complex, multivalent dynamic.[393] We need not adjudicate conclusively between those possibilities here. Rather, what we hope we have established here is more straightforward: that one of the more important consequences of this fracturing has been the increasing prominence of fault in American public law, with all that this entails.

How, then, should the triumph of fault be evaluated as a new organizing principle in public law? Normative judgment on the trend we have described hinges crucially on 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, although nothing in our argument stands or falls on whether a reader concurs with those views.[394] Rather, it is the questions themselves—to date largely viewed as outside the

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[390] *Id.*
[391] *Id.* at 8.
[392] HACKER, *supra* note 384, at 37.
[393] *Cf.* CLAUS OFFE, CONTRADICTIONS OF THE WELFARE STATE 104 (1984) (arguing that "social policy consists of answers to what can be called the internal problem of the state apparatus, namely how it can react consistently to the twin poles of the 'needs' or labor and capital" (emphases omitted)).
[394] In our view, the fault principle we have described in public law assigns the cost of producing social order is highly regressive ways, imposing both static and dynamic burdens unwisely and unfairly. We think its desiccated and isolated ideal of that human animal blinks inevitable and important forms of human interdependency, while cloaking that blindness in a moralizing and inequitable argot of responsibility and

bailiwick of legal and constitutional scholars—that are, in our view, of central importance for any meaningful judgment about our shared public law. These questions should hereinafter be center stage as scholars try to grapple with public law's fraught and divisive function in an increasingly polarized, unequal, and perhaps even unstable nation.

Conclusion

This Article has traced the triumph of a fault principle—partial, inconstant, and sometimes implicit—across different domains of American public law 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 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 stake of even incremental shifts in public-law doctrine, this suggests, are more consequential than previous 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 public law, in short, 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 its repercussions, both proximate and distal. Only once that perspective is in hand can a normative judgment about our fractured, fracturing, and fault-dependent public law landscape be sensibly reached.

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just desserts. We hence see scant reason to recommend fault as a regulative principle in public law—at least, not the version of fault that currently dominates American public law.