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The Inefficiency of Mens Rea

Claire Finkelstein†

In “The Decline of Innocence,” Sanford Kadish presents an eloquent defense of the notion of mens rea against Lady Wooton’s famous call for its elimination. His basic thought is that the criminal law’s mental state requirement reflects our commitment to values of autonomy. He writes:

Much of our commitment to democratic values, to human dignity and self-determination, to the value of the individual, turns on the pivot of a view of man as a responsible agent entitled to be praised or blamed depending upon his free choice of conduct. A view of men “merely as alterable, predictable, curable or manipulatable things” is the foundation of a very different social order indeed.¹

Throughout his work, Professor Kadish has developed the idea that the central doctrines of the criminal law mirror essential elements of our conception of personal responsibility. He writes elsewhere, “The whole so-called general part of the criminal law, as well as the mens rea definitions in the special part, are devoted to articulating the minimum conditions for the attribution of blame and the various features of conduct that warrant differential judgments of blameworthiness.”² As Kadish sees it, the central doctrines of the criminal law cannot be properly understood if detached from our ordinary practices of ascribing responsibility and assigning blame—practices premised on our basic commitment to individual autonomy.

Much recent criminal law scholarship has been devoted to exploring the vision of criminal liability as a reflection of basic principles of moral responsibility. It is because they are committed to his understanding of the criminal law that commentators voice nearly uniform agreement with Kadish’s rejection of Lady Wooton’s argument for converting criminals

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² Kadish, Why Substantive Criminal Law—A Dialogue, in BLAME AND PUNISHMENT, supra note 1, at 3, 12.
into patients. In this Essay I shall suggest that it is this same commitment that serves to explain the resistance of criminal law scholars to a more recent incarnation of Lady Wooton’s proposal: the legal economist’s call to structure liability rules in a way that would supply incentives for efficient behavior. In making his case, Kadish writes: “In the last analysis, what is entailed in the abolition of mens rea and the decline of innocence is only with slight exaggeration the conversion of the status of the entire population into that of persons on release on parole from mental institutions under an indeterminate commitment.” So we might caricature the economist’s project to reform the criminal law into a wealth-maximizing enterprise as the conversion of the entire population of rational actors into Burger King workers under a mandate to maximize company profits. Like Lady Wooton’s proposal, the economic account of crime largely dispenses with personal responsibility as the foundation for rules of liability. And again like Lady Wooton, the economist argues for a reductionist approach to criminal liability, namely that we should determine the various elements of criminal liability by treating them as subservient to a single, overarching value the institution as a whole supposedly serves. For her it was treatment, for him it is efficiency. On either account, the distinctive nature of criminal liability is eliminated, and the criminal law is absorbed into one of its surrounding institutions, such as the law of civil commitment or tort liability.

In this Essay I shall address the specific challenge to the view of criminal law as a reflection of our practices of personal responsibility posed by the legal economist. I shall make my case in the following way. My background assumption is that the criminal law’s requirement of mens rea is the central distinguishing characteristic of the institution. I then offer several reasons why it is difficult to assign systematic economic significance to the criminal law’s mental state requirement. While it may turn out in certain cases to be efficient to limit liability to the harm agents bring about with one particular mental state or another, there is no general economic argument for restricting criminal liability to the infliction of intentional, knowing, or reckless harms. My argument is thus a structural one: It points to fundamental features of economic analysis that make it ill-suited to explain the existence of the criminal law’s mens rea requirement.

Proceeding in this way may seem unfair, for it purports to demonstrate the impossibility of an economic account of mens rea without having examined all the various ways in which an economist might set about constructing one. Arguably, I cannot clinch my case in this manner, since I cannot demonstrate the failure of theories I am unable to anticipate. Moreover, so few legal economists have attempted to account for the

3. Kadish, supra note 1, at 79.
notion of mens rea that there is little evidence of what the general approach of the economist to mental states would be. Nevertheless, I think the structural argument against the possibility of an economic account of mens rea depends on a rather minimal set of economic assumptions, assumptions that I think no economic account can easily do without.

After presenting my basic argument against the possibility of an economic account of mens rea, I shall consider the predominant attempt to explain that notion in economic terms, that presented by Richard Posner. I focus on Posner’s account for two reasons. First, it is the only systematic and detailed attempt to account for the distinction between intentional and unintentional harm in economic terms. Second, although economists may wish to repudiate many of its details, economic analysis generally appears to share its basic premises. I suspect, then, that any economic account of mens rea would look something like Posner’s.

I argue against Posner’s account on two grounds. First I point out that it fails to provide for the criminal’s potential gain from the illegal act. Posner is thus able to reach reasonably intuitive results only by avoiding one of the central difficulties of an economic account of criminal law: the fact that some criminal acts are efficient, and thus we cannot account for the current shape of the criminal law in economic terms. This is, however, a somewhat minor criticism of the account, since there are ways of mitigating the difficulty created by counting the offender’s gain.

Once suitably corrected for the above difficulty, Posner’s account displays a second, and more significant, problem. The account provides an explanation only of the rather narrow mental state of purpose or intent. But, I shall suggest, it is only the occasional crime that requires that the defendant have engaged in the prohibited behavior, or brought about the prohibited result, intentionally. The basic mental state for criminal liability, I shall argue, is knowledge, whether knowledge that a certain result will occur or knowledge that there is a substantial risk of the occurrence of that result. I devote a fair bit of attention to this point, not only because it is crucial for my argument against the possibility of an economic analysis of


5. It is the same account Posner has presented with William Landes as an account of intentional torts. See Posner & Landes, supra note 4, at ch. 6.

6. Jeffrey Parker does not make Posner’s mistake on this point. See Parker, supra note 4, at 745. But mens rea remains a proxy on his account for those acts whose prohibition will not produce over-deterrence. As such, he fails to accord mens rea economic significance in its own right, and so remains subject to my criticism. Space limitations, however, preclude developing this point in greater detail.
mens rea, but also because it is a point of independent importance for criminal law theory. If I am correct, both about the core of mens rea and about the inability of economic analysis to explain it, the prospect of an economic analysis of the notion of crime seems dim. For if a knowledge requirement cannot be explained in economic terms, and if knowledge is as pervasive a requirement as I believe it to be, then economic analysis would be unable to explain the basic structure of criminal wrongs.

I
MENS REA AND ECONOMIC ANALYSIS

On the face of it, the economist has no use for a mental state requirement of any sort. Insofar as he sees the law entirely as a way of equipping agents with incentives for efficient behavior, he has no reason to favor imposing any additional conditions on the acts or omissions the law forbids—that is, any conditions over and above the basic condition that legal rules promote efficiency. Not only does the economist appear to have no use for any requirement that a defendant have violated a prohibitory norm intentionally, but he also appears to have no use even for the minimal requirement that the defendant's conduct not have been inadvertent or accidental. The reason for this is simple: The law can potentially deter or promote every act or omission a person can perform. It can influence not only an agent's decision to produce a certain harm, but also his decision not to desist from an activity he knows or thinks likely to produce that harm. Indeed, it can even influence his decision to engage in behavior that risks a harm of which he is entirely unaware. The only segment of human activity legal rules cannot influence is that which does not depend on a decision of the agent's. There is no possible incentive not to have an epileptic seizure or not to walk in one's sleep. But one can be given incentives to avoid having an epileptic seizure while driving, or to prevent oneself from sleepwalking by strapping oneself to the bed. Since driving and not strapping oneself to the bed are possible objects of an agent's decision making, they are subject to his control. That incentives operate on voluntary actions, not on behavior that is entirely involuntary.

There is, however, a difference in the way incentives operate in the intentional and in the nonintentional cases. A law that provides stiff penalties for intentional behavior gives agents incentives to avoid punishment by abandoning the behavior itself. A law that provides stiff penalties for inad-
vertent behavior, however, does not work precisely this way. Instead, it gives agents incentives to abandon or take greater care in performing some other activity, an activity that produces the conduct or the result the law wants to discourage. A law that imposed a life sentence for causing a car accident would reduce the number of accidents. But it would not do so by inducing agents to decide not to cause them. Instead, it would supply them with incentives to drive more carefully, or perhaps to stop driving altogether. Thus, unlike where intentional harms are concerned, when the law gives rational actors incentives to avoid inadvertent wrongdoing, it does so by raising the costs of the activity from which the inadvertent harm results.

The foregoing discussion of incentive structure is familiar and obvious. What is less familiar, and certainly not obvious, is that the fact that incentives operate differently in the intentional and the unintentional cases does not help the legal economist to justify the existence of a mental state requirement. All it does is change the calculation by which one determines whether it would be efficient to attempt to deter the harm in question. For example, it would certainly turn out to be too costly to try to deter every car accident with a life sentence for the driver who causes the accident, because the fear of penalty would dramatically reduce the amount of driving. Indeed, it would reduce it so significantly that on balance, the costs imposed on otherwise productive activities would outweigh the benefits from deterrence. Thus, while the economist might observe certain economic patterns that correlate with the task of influencing behavior performed with one mental state as opposed to another, he cannot use this to vindicate those different mental state requirements.

For this reason, the distinguishing mark of criminal, as opposed to civil, liability falls by the wayside in the legal economist's picture. If all voluntary behavior is fair game for influencing through legal rules, then there seems to be no justification for sheltering a segment of our prohibitory norms from cost-benefit analysis. Just as the economist presses for selecting liability rules in civil law solely by determining which rules would maximize social wealth (or utility), so he would presumably do the same on the criminal side. This move would eliminate intentional torts as a separate category, but it would also eliminate the distinction between torts and crimes, since both would be structured around the organizing principle of efficiency. True, there might be some vestiges of the traditional differences between the institutions: While legal economists favor monetary sanctions over imprisonment (since they are cheaper to administer), it is not always possible to impose a sufficiently high fine to achieve optimal deterrence through monetary sanctions. This is because the sum required to deter an individual often outstrips his ability to pay. Thus sometimes incarceration will remain necessary, namely when there is no other way to deter a potential wrongdoer. In this way, the legal economist may be able to
resurrect a small portion of the current distinction between the law of torts and the law of crimes. But there is no systematic or categorical distinction between the two.

Some legal economists would welcome this result. But those who do must also be prepared to abandon the hope of using economic analysis to explain the current state of our legal institutions. Much of criminal law, by this criterion, would look inefficient, and thus the economist’s project would be normative, rather than descriptive. Ideally the legal economist would prefer to be able to account for the distinction between criminal law and tort law in a more fundamental and consistent way. And if I am correct that the most significant identifying mark of the criminal law is its mental state requirement, then the legal economist must account for it if he wishes to explain the tort/crime distinction noncontingently. Richard Posner, for one, appears to have seen the difficulty. In the next Part, therefore, I shall consider his attempt to provide a noncontingent account of the criminal category by assigning an economic meaning to the mens rea requirement. I conclude that the model Posner presents does not succeed in capturing the criminal law’s distinctive approach to mental states.

II

PURE AND IMPURE COERCIVE TRANSFERS

Posner argues that crimes are acts that are necessarily inefficient because they involve bypassing a voluntary market. While we normally determine an act’s economic status by weighing the gain to the actor against the harm to the victim, here cost-benefit analysis is unnecessary. According to Posner, any act that deliberately bypasses an available market is inefficient, regardless of the gains to the injurer. There are, however, different kinds of market bypass. “Pure coercive transfers” are instances in which an agent deliberately bypasses an available market under circumstances where transactions costs are low and the activity in which he engages is not itself productive. “Impure coercive transfers,” by contrast, are acts bypassing a voluntary market which are incident to a productive activity. Pure coercive transfers correspond to intentional harms, impure to unintentional harms. In the former case, the injurer expends resources in order to bring about the harm that bypasses the market. This is because the injury itself is the point or purpose of the activity. In the latter case, the injurer expends resources for some other purpose, and bypassing a market and inflicting a harm are incidental results.8

What does Posner mean when he says that the injury that bypasses the market is the point or purpose of the activity in the case of the pure coercive transfer? He means that the agent aims at the injury either as a means

8. See Posner & Landes, supra note 4, at ch. 6; Posner, supra note 4, at 1195.
to something further he hopes to achieve, or as an end in itself. Suppose I steal your car. The point or purpose of this activity is to transfer the car from you to me, thus obviating the need for me to purchase one. Perhaps, however, I plan to resell the car in order to make a profit. Either way, I take stealing the car to be my conscious object, and I thus invest energy in order to accomplish it. In the case of the impure coercive transfer, by contrast, the market bypass is a byproduct of an agent’s engagement in a productive activity. Suppose I own a railroad that emits sparks and thus destroys crops on an adjacent farm. I have, Posner says, bypassed the market in agricultural products by taking your crops without paying for them. Unlike the case of the pure coercive transfer, here the market bypass is incident to a productive activity, namely running a railroad.

Economic analysis of the impure coercive transfer is relatively straightforward. Cost-benefit analysis will tell us what level of precaution against accident it is efficient to take. In general, the more the potential injurer spends on prevention, the less likely the harm. At some point, however, the cost of preventing the harm may exceed the benefits from preventing it, since ensuring that no accidents occur will make a socially beneficial activity prohibitively expensive. Consider, for example, the vast expenditure that would be required to ensure that no airplanes ever crashed. In general, it is not efficient to eliminate all unintentional harms. Instead, we try to minimize the sum of the various costs of the activity overall, discounting the cost by the probability of the harm’s occurring, as well as by the total amount spent on prevention.

By contrast, Posner suggests that it is always efficient for a potential injurer to refrain from bringing about the harm where the pure coercive transfer is concerned. First, the injurer must invest resources to bring about the harm in this case. If he did not engage in the activity, Posner claims, there would be a cost savings. Thus, he says, the cost of preventing the pure coercive transfer is negative, by contrast with the impure coercive transfer, which always costs something to prevent. Second, Posner suggests, the probability of bringing about the harm is higher where the agent aims at bringing it about than where she merely runs a risk of its occurrence. And if the probability of harm is higher, the expected costs of the activity are higher. Once again, this suggests the efficiency of eliminating the pure coercive transfer.

To be more precise, let us consider the way Posner formalizes his account. Begin, first, with his explanation of social cost in the case of the impure coercive transfer:

$$L(y) = p(y)D + B(y)$$

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9. See Posner & Landes, supra note 4, at ch. 6.
10. See id. at 151. This is a slightly altered version of Posner’s equation.
$L(y)$ represents the social cost of the activity at a given level of precaution; $p(y)$ represents the probability of the occurrence of the harm, again, at a given level of precaution; $D$ represents the amount of damage that the victim would suffer were the harm to occur; and $B(y)$ represents the cost to the injurer, $B$, of expending $y$ dollars on precautions. Thus, the more $B$ spends on precautions (that is, the higher the value of $y$, and hence $B(y)$), the lower $p$ becomes. It would be possible to make $p = 0$. But this might require an arbitrarily high number for $y$. What we want to do, then, is to find the value of $y$ which will minimize $p(y)D + B(y)$. This will be the efficient level of precautions to take. It will usually be some value of $y$ at which $y > 0$.

In the case of the pure coercive transfer, by contrast, Posner says that the optimal value for $y$ is 0. This is a function of two factors: First, $B(y)$ is negative in the intentional case, since the injurer must invest "real resources" to bring about the harm. Posner says, therefore, that the cost of avoiding the injury is negative. Unlike the case of the impure coercive transfer, where the cost of preventing the harm is always positive, if the cost of prevention is negative in the case of the pure coercive transfer, there must be a cost savings if the injurer refrains from injuring. Second, $p$ is presumably high, since a harm is more likely to occur if one aims at its occurrence.

First a minor correction. Posner cannot seriously mean that in the case of the pure coercive transfer, the cost of preventing the harm is negative. For this would mean that the injurer gains by not performing the act, and that cannot be right. If we think of not-spending ten dollars as gaining, we cannot simultaneously think of spending ten dollars as losing, since this would count the ten dollars twice. Since Posner has consistently treated spending as a social cost, he is foreclosed from thinking of not spending as gaining.

Once suitably corrected, however, it becomes clear that Posner ignores the injurer’s potential gain from the criminal act. Indeed, we must assume at the very least that a person who is rationally motivated to commit a crime believes that her expected benefit from its commission outweighs her expected cost. This means that the injurer herself loses by not attempting to bring about the harm in this case, since she loses the chance at the benefit the crime would have conferred had she successfully accomplished it. If I do not spend five dollars to steal a coat that would...
fetch one hundred dollars were I to resell it, it costs me ninety-five dollars to do nothing, that is, not to steal the coat.

In fairness, Posner does address the problem. His answer in one place is that it does not matter how great the injurer’s gain from injuring under these circumstances; the gain can never outweigh the economic costs of allowing market bypass. “Market bypassing in such situations is inefficient . . . no matter how much utility it may confer on the offender.” But how can we simply assume that this is the case? The injurer’s gains might be very large, and the effects of market bypass are presumably variable. Might the injurer’s gains not sometimes outstrip the social costs of market bypass? Posner in effect simply assumes that a zero activity level in the case of activities producing intentional harms is efficient, but rejects this assumption for harms incident to a productive activity. If it is not efficient, however, to require an airline to fly zero planes in order to ensure there will never be another plane accident, then we cannot assume that it is efficient to require a rapist never to rape to assure there will never be another act of nonconsensual intercourse, or require people never to kill one another (justification defenses aside), in order to ensure that there will never be another intentional death of a human being. Whether rape and murder are efficient will be up for grabs once we allow that potential defendants may have gains from those activities. Where a killing is incident to a productive activity, it is obvious how this might be so. But even where the killing is not incident to another activity, but is itself the point or purpose of the activity, the killing may turn out to be efficient once we count the gains to the defendant from killing. From an economic perspective, we have no grounds for ignoring the defendant’s gains in either case.

Elsewhere Posner argues for the inefficiency of intentional harm by focusing on the damage to the victim. He represents the potential gain to the injurer by introducing another term into the equation for the intentional case:

$$L(y) = p(y)(D - G) + B(y).$$

Here $G$ is the gain to the injurer if she succeeds in bringing about the harm. (Posner correctly omits $G$ from the equation for unintentional harms, on the grounds that the injurer receives no benefit from the harm in that case.) But Posner once again simply assumes that for the vast majority of intentional harms, $D$ (damage to the victim) is greater than $G$. Nevertheless, he admits that there are rare cases in which $G$ is greater than $D$, and that for such cases, deterrence is not desirable. He suggests that in these cases the injurer should be allowed to injure, but that she be made to pay compensation to the victim equal to the latter’s damages. As Posner thus admits,
where \( G \) is greater than \( D \), and where the difference between \( G \) and \( D \) (offset by the probability) is not overwhelmed by \( B(y) \), economic analysis implies a social benefit from the activity rather than a social harm. And if we allow, as we should, that any intentional harm is potentially one in which \( G > D \), we cannot conclude that the loss to the injurer from the non-occurrence of the crime would be less than the loss to the victim from its occurrence. The reason intentional harms turn out to be systematically inefficient on Posner's view is that he includes in his assumptions the restriction that the gains to the injurer in the intentional case are less than the cost to society or the damage to the victim. The conclusion that intentional harms are usually inefficient thus does not follow from the economic character of the activity, as Posner seems to think, but rather from a noneconomic intuition about the types of harms under consideration.

What I have argued is that we must supplement an economic analysis of crime with a normative theory of legitimate and illegitimate economic gains if we wish to avoid some deeply counterintuitive conclusions about the legitimacy of criminalizing certain kinds of acts. This point is not new. Alvin Klevorick argued in 1985 that economic analysis of criminal law is fundamentally incomplete because it requires supplementation by a "political theory of rights."\(^6\) We cannot capture the criminal category without discounting the gains to the injurer, he argued, and we cannot do that without a normative theory that dictates whose utility to count in the social welfare function. George Stigler before him argued against taking the criminal's utility from the illegal act into account in the social utility function: "what evidence is there that society sets a positive value upon the utility derived from a murder, rape, or arson?"\(^7\)

Rather than simply accept this point, however, Posner does have a response he can make, one suggested in his second answer to the problem of injurer gain discussed above.\(^8\) This is to bite the bullet and say that even in the most heinous crimes, if the injurer's gains exceed the harm to the victim, there are no grounds for criminalization. For example, in one place he admits that if what the potential rapist wants is nonconsensual sex, there are no grounds for criminalization. For example, in one place he admits that if what the potential rapist wants is nonconsensual sex, there are no grounds for criminalization, since his act does not bypass an available market. (There is by definition no market in nonconsensual activities.) But Posner also hopes to avoid far reaching absurdities such as these, since he hopes to enhance the plausibility of an economic analysis of crime by showing that it maps well onto our current patterns of criminalization. Thus, he claims, it is no coincidence that murder, rape, burglary, robbery,

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and so on are virtually universally criminal. It is simply a fact that these acts are generally inefficient. He allows that if one counts the injurer’s gains from the activity, it is always possible that a rape or murder will turn out to be efficient. But he then argues that the class of rapes and the class of murders is mostly comprised of a series of inefficient acts. Even if we knew act-by-act which acts were efficient and which were not, it would not be feasible to outlaw acts according to their particular lack of social utility. Potential criminals cannot be asked to make such specific efficiency judgments. Instead, they must follow general rules, rules that outlaw classes of acts, rather than individual acts. Thus Posner might argue that it is simply an empirical fact that the overwhelming majority of rapes and murders are inefficient, and as for those that are actually efficient, they cannot be treated as such for purposes of law unless they fall into some more general category that makes them a member of a class of efficient acts.

Let us consider Posner’s account, then, in this form. The relevant equation for measuring the social cost of the pure coercive transfer is

\[ L(y) = p(y)(D - G) + B(y), \]

as above, except that we cannot simply assume that \( D > G \). In the case in which \( G > D \) (or where, for example, there is no voluntary market the injurer is bypassing), we must admit that deterring the activity would not be desirable. And let us assume, with Posner, that it turns out that in general, the cases of pure coercive transfers we want to outlaw are those in which \( D > G \), and those we do not are ones in which \( G > D \). Even in this convenient economist’s world, however, there is a problem. For as it turns out, the class of cases that will now belong to the criminal category are only a small segment of all the cases that we currently recognize as subject to criminal sanctions. This is because many of the acts we consider appropriate objects of criminal prohibition belong, in Posner’s terms, to the class of the impure coercive transfer instead.

In Part V, I shall argue that the central deficiency of Posner’s account is its focus on too narrow a class of harm: those an agent brings about purposely. That is, his account of “intentional harm” treats the entire category as though it were comprised of only things an agent has a conscious object to do. But in law when we refer to intentional harms, whether in crimes or torts, we mean to refer to a much broader category, roughly the category of harms an agents brings about with awareness of what he is doing. At the heart of the criminal law’s notion of mens rea is the requirement that the defendant have committed a knowing violation of a prohibitory norm. Insofar as Posner’s account of crime is articulated as the category of the pure coercive transfer, and this category includes only cases in which the agent is trying to bring about the harm, Posner’s account leaves out the vast majority of the acts to which mens rea applies.

19. Reckless harms might better be omitted from this category, although extremely reckless harms, such as can satisfy the mens rea for murder, might belong here as well.
Before addressing Posner’s account on this point, however, I must first take a lengthy digression to make the case for the view of mens rea I have suggested. For criminal law theorists, as well as judges and legislators, often make the same mistake Posner does. I shall thus devote considerable space to showing that intention is an extremely minor, and relatively unimportant notion in the criminal law. In the next Part, I shall present a brief sketch of the nature of mens rea, in particular as it appears in the law of murder. In Part IV, I shall then consider several apparent exceptions to my claim that it is knowledge, rather than intention, that comprises the basic mental state requirement in the criminal law.

III

KNOWING VIOLATION OF A PROHIBITORY NORM

Consider the following hypothetical. Suppose a man wants to kill his business partner, whom he suspects of cheating him out of his profits, and he settles on a plan that he thinks will allow him to do so while avoiding detection. He pays a ground crew employee to plant a bomb on the flight his partner will take to Europe, setting it to explode in midair. As he watches the passengers board the plane, he suddenly sees his old college roommate handing his ticket to the flight attendant at the gate. For a moment he considers announcing the bomb and scuttling his plan. But he fears letting the opportunity go, and so, somewhat reluctantly, he decides to proceed. He knows his roommate will be killed along with his business partner, and he is sorry about this. Indeed he fervently hopes his roommate will survive. But no such luck: all passengers and crew members are killed. Let us call him “the bomber.”

The bomber is guilty of the murder of all those who died in the blast. That is, he is as guilty of the murder of his roommate and the others on the plane as he is of the murder of his partner. The law of murder does not care that he intended the death of one, actively hoped for the survival of another, and was indifferent about the deaths of the rest. The lowest common denominator for all the bomber’s victims is his knowledge that by blowing up the plane he would cause their deaths, a mental state that is sufficient to make all the killings murder.

The example illustrates what I take to be a general feature of mens rea: For the most part, the mens rea requirement does not focus on the defendant’s reason for violating a prohibitory norm. Mens rea does not focus on it because the basic concept of guilt the criminal law reflects is more concerned with conformity to a conduct norm than with the motives from which an agent acts. Murder is the emblematic crime in this respect,

since it is largely indifferent to the reasons why the defendant caused the victim’s death. Instead, what criminal law cares about is that the defendant caused a death, and that he was aware either that he would do so, or that there was a substantial likelihood that he would do so. For the sake of brevity, I shall put the point by saying that the criminal law mostly cares about the knowing violation of a prohibitory norm, by which I mean knowingly performing an act or causing a result that constitutes a violation of a prohibitory norm. To be clear: I do not mean that the defendant must have known that he was violating a norm, since his culpability is in many cases fully compatible with his belief in the innocence of his conduct. It is sufficient if he knew what he was doing, provided that what he was doing violated a norm. Nor do I mean that the defendant must have known that what he was doing would produce a prohibited result with certainty. It is sufficient if he was aware that he was doing something that ran a substantial risk of producing a prohibited result. At this point I mean only to claim that the criminal law’s mental state requirement is at base a requirement about the defendant’s awareness of what he was doing, rather than about his doing an act for some particular purpose or goal.

There are some apparent exceptions to this claim, places where the law assigns culpability if the defendant acted for one reason, but rejects it if he acted for another. But many of these exceptions turn out to be only apparent exceptions when studied carefully. A small number of others are true exceptions, in that they involve instances in which the criminal law does indeed care about why a person violated a prohibitory norm. But before I turn to these exceptions, let me first consider two preliminary objections someone might make to my more specific claims about murder. While these objections are easily answered, they are worth addressing in order to forestall confusion.

First, someone might wish to argue that the bomber does intend the death of his college roommate after all. If he is absolutely certain that he will die if the bomb goes off as planned, and he intends the bomb to go off, is it not a bit sophistical to say he does not intend to kill him? The Model Penal Code’s distinction between intent (or in MPC terminology, “purpose”) and knowledge provides a helpful framework for explaining why not, namely that the bomber does not make killing him his “conscious object.” One way to see this is to focus on the fact that the bomber does not want his roommate to die, and indeed, he might even take steps to improve the chances of his roommate’s survival. It is awkward to say a person intends to do something he is trying not to do. Considering the fate of the other passengers, it would also be strange to say he intends their deaths, since killing them is not his conscious object either.

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21. That is, ignorance of the law is no excuse.
But, the argument might continue, some foreseen effects are so “close” to the intended effects that it seems hair-splitting to try to tease the two apart. To “paraphrase” Philippa Foot’s quip about the potholers who blow up a fat man stuck in the mouth of a cave in which they are trapped: “We didn’t intend to kill him . . . only to blow him to small bits.” 23 A person who intends the latter surely intends the former, the fact that he does not independently hope for it notwithstanding. So blowing up the plane might be sufficiently close to killing the passengers under the circumstances that a person who intends the former also might be said to intend the latter.

I do think the claim that the bomber intends to blow up the plane but does not intend to kill his roommate or the other passengers is a defensible one. But we need not defend drawing the line between intended and merely foreseen effects precisely here for my general argument to go through. All that is necessary is that we draw the line between intended and merely foreseen effects somewhere—that we allow that an agent does not intend all the effects of his actions he foresees. And if the line between intended and merely foreseen effects must be drawn somewhere, then my claim is that no matter where we draw it, the law of murder does not attach normative significance to the intention/foresight distinction.

Someone might also wish to question my claim about the mens rea for murder. While the Model Penal Code is crystal clear that a knowing or extremely reckless killing is as good as an intentional one, 24 the proposition has not commanded uniform assent. In a series of British cases, for example, various members of the House of Lords took the position that malice aforethought could not be satisfied by knowledge or extreme recklessness. Lord Hailsham, for example, argued in Hyam v. Director of Public Prosecutions 25 that the necessary mens rea for murder is intent, or as he put it, “direct intent.” 26 Mrs. Hyam had killed the child of her rival by stuffing kerosene-soaked newspaper through the latter’s letterbox and lighting it. Her intention, she said, was to scare the woman and her children into leaving town; she did not intend to kill them. The prosecution relied on an earlier decision where the Lords had readily accepted that malice aforethought could be satisfied by awareness of a risk of death or serious

24. See MODEL PENAL CODE § 210.2 (Official Draft 1980). When I say “extreme” recklessness, I mean to refer to the MPC’s enhanced recklessness standard as set out in § 210.2(1)(b), namely recklessness amounting to “extreme indifference to the value of human life.” Id.
26. Id. He uses this terminology to distinguish it from the Benthamite concept of “oblique intent.” But “oblique intent” is really not a kind of intent at all: If a person obliquely intends something, that means he foresees it as an effect of something else he does intend. The terminology is confusing, and I thus eschew it in favor of talking about the “intended” and the “foreseen.”
bodily injury. Malice aforethought, they argued, did not require intent. The defense, by contrast, argued for the more traditional position that the mens rea for murder is intent. While Hailsham agreed with the defense’s view of malice aforethought, he did not agree that it would exonerate Mrs. Hyam. Mrs. Hyam did, after all, intend to expose her victim to a risk of serious bodily harm or death, and Hailsham thought that sufficient to satisfy malice aforethought under a direct intent standard.

It is not surprising that having adopted the curious position that the mens rea requirement for murder is intent, Hailsham then ended up distorting the meaning of intent in order to reach the result he would have reached under a broader interpretation of malice aforethought. This attests to the firmness of the intuition that the knowing or egregiously reckless killer is as bad as the intentional one. One might wonder why it matters which approach one takes—the narrow definition of malice aforethought coupled with the broad view of intent (Hailsham’s approach), or the broad definition of malice aforethought coupled with the narrow view of intent (my argument and the more standard approach to both murder and intent). The result appears to be the same either way. But there are several reasons why the standard approach is preferable to Hailsham’s.

First, Hailsham’s approach would eliminate the distinction between intent and recklessness, a distinction it is essential to retain. If every intent to expose a person to a risk of death were equivalent to an intent to kill, then any time a defendant recklessly risked the death of another, he would be guilty of murder if death resulted. Second, it is not clear what would happen to knowledge under Hailsham’s approach. What, for example, about the bomber? Would he be guilty of murder on the grounds that he intended to expose his roommate to a substantial risk of death? If so, then we will need to reconstruct the line between intent and knowledge elsewhere, and any place we try to draw it seems subject to Hailsham’s argument. Moreover, there is still the difficulty that Hailsham’s approach would require us to say that the bomber intended to kill his roommate, even if he ardently did not want to kill him.

Finally, what happens to the familiar high risk surgeon on Hailsham’s account? Ironically, Hailsham uses him as a reason for turning from a foresight based standard of malice to a direct intent approach, since that allows him to say the surgeon lacks the mens rea for murder because he lacks the

27. D.P.P. v. Smith, [1961] App. Cas. 290. Smith tried to evade a police officer whom he feared would discover stolen goods in his vehicle by driving away, whereupon the officer clung to the outside of the vehicle. He drove in a "zig-zag pattern" to try to shake the officer, and the latter was thrown from the vehicle and killed. The question was whether knowledge of a high risk of death or bodily injury is sufficient for the malice aforethought required for murder. The Lords thought it was and held that it was sufficient that Smith intended to do something unlawful, aware that the act was likely to result in death or serious bodily injury. See id.

intent to kill. But by Hailsham’s own lights, it looks as though the surgeon at least intends to expose his patient to a risk, and that should be enough for malice aforethought. Hailsham’s answer to this difficulty is that the surgeon does indeed intend to expose his patient to a risk of death. Because the reason he does so is to cure him, however, the surgeon has a lawful excuse. But if this is correct, why not just say in the first place that although the surgeon has the mental state for murder—awareness of a high risk that he will kill the patient—he is not guilty because he has a justification? We can then extend the mens rea for murder beyond intent without having to exonerate the surgeon by finding that he lacks malice aforethought.

I have argued that the criminal law does not in general care about the reasons why a defendant violated a prohibitory norm. Instead, I suggested, it cares only that the defendant knowingly did something that violated the norm. My claim, in short, is that the law’s basic notion of mens rea is the one on display in the law of murder, where a defendant is as culpable if he merely knew his action would result in someone’s death as if he intended his action to have that result. The basic argument of this Essay, then, is that the line between knowing and unknowing violations of a prohibitory norm is not one to which it is possible to ascribe economic significance. So if the requirement of mens rea is in essence the requirement that a defendant have been aware of what she was doing, economic analysis will be unable to account for it. Before I turn to that argument, however, let us consider some of the exceptions to the claim that the law does not care about reasons for acting. For there appear to be many such exceptions—indeed so

29. See id. at 74.
30. See id. at 74-78.
31. Confusion between intent and knowledge occurs with alarming frequency, even in the best opinions. Consider, for example, Richard Posner’s excursus on intent in United States v. McAnally, 666 F.2d 1116 (7th Cir. 1981). The crime was that of making false entries in the records of a bank, a crime that required that the defendant have acted with “intent to injure or defraud.” Instead of thinking this requires that the defendant take injuring or defrauding as his conscious object, Posner says the requirement of “intent” can be met by knowledge. Indeed, he considers our very hypothetical, and comes to the wrong conclusion: “If a man plants a bomb on an airplane on which he is about to embark, and knows the bomb will kill the other passengers if (as he intends) it goes off, then in law he intends their deaths even though he cares only about killing himself and is indifferent to the fate of the others.” Id. at 1119 (emphasis added).

Elsewhere Posner evinces a firmer grasp of the distinction between intent and knowledge, but clarity does not guard against misuse. In Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995), for example, he invoked the distinction between intent and knowledge to find that strip searches in prisons conducted by a member of the opposite sex do not violate the Eighth Amendment. Pain inflicted by the State, he says, is not punishment unless it is inflicted for the purpose of inflicting pain or injuring, which conducting strip searches by a member of the opposite sex is not. If a practice is not punishment, it cannot violate the prohibition on cruel and unusual punishment: “No intent to injure means no ‘punishment’; and no ‘punishment,’ no violation.” Id. at 149. So Posner seems to think knowledge satisfies “intent” in the context of financial fraud, but that it is restricted to an actual purpose in constitutional law.
many that the mental state requirement for murder may itself seem the exception rather than the rule.

IV
WHERE LAW CARES ABOUT INTENT

The largest class of crimes for which the defendant’s reason for violating the prohibitory norm matters is the class of “specific intent” crimes. These are crimes where the offense definition itself requires that the defendant have performed the prohibited conduct with some further purpose in mind. Consider, for example, a classic definition of forgery: “A person is guilty of forgery in the first degree when, with intent to defraud, deceive, or injure another, he falsely makes, completes or alters a written instrument.”

To be guilty of forgery, it is not enough simply to alter a written instrument knowingly. The defendant must alter it for the purpose of defrauding, deceiving, or injuring. Or take the crime of burglary, which the MPC defines as “enter[ing] a building . . . with purpose to commit a crime therein.” It is not enough for the defendant to enter a building. He must do so with the purpose of committing a crime inside. A typical definition of larceny is “when, with intent to deprive another of property . . . [a defendant] wrongfully takes, obtains or withholds such property from an owner thereof.”

These crimes all seem to make liability turn, among other things, on a defendant’s reasons for acting. For the requirement that the defendant have entered a building with the intent to commit a crime seems to be a requirement that the defendant have entered it for a particular reason, namely to commit a crime. So it looks as though a crime of specific intent is a crime that requires a defendant to violate a prohibitory norm for a particular reason, and that flatly contradicts my thesis about mens rea.

But I believe that this understanding of crimes of specific intent is incorrect. These crimes are better understood as instances in which the special intent provision is itself part of the statement of the prohibitory norm. Although the defendant must have a particular reason for acting, it is not the case that he must have had a particular reason for violating the prohibitory norm itself. In the case of burglary, for example, the defendant must have had a particular reason for entering the building. But his entering the building for that reason is how he violates the norm. The intent requirement is not itself the mental state with which the norm must be violated. That mental state remains knowledge. The New York burglary provision makes the point explicitly: “A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a

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34. N.Y. Penal Law § 155.05.
building with *intent* to commit a crime therein . . . . The statute's basic mens rea requirement is "knowingly," and the intent provision does not apply to the conduct with which the norm is violated, namely entering or remaining in a building.

It may help to notice that the same point can be made about actions outside of a legal context. There are things an agent can do either purposely or knowingly: Smiling, crying, staring, listening, and moving are some. By contrast, there are things a person can only do if she does them with a certain intention: lying (that is, deliberately telling a falsehood), fighting, dancing, challenging. It is not correct to describe someone as lying, for example, unless she has an intent to deceive her listener. But notice that she need not have the intent to lie itself. For she need not think that by deceiving she is lying.

Granted, disentangling intention from knowledge in this context is difficult to do. To make the point absolutely clear, we would need a case in which a person knowingly enters or remains in a building for perfectly legitimate reasons, and while there forms the purpose of committing a crime. Suppose a defendant knowingly (but not intentionally) remains in a jewelry store after it has closed for the purpose of putting out a fire, and while there forms the intent to steal some of the jewelry. He would be guilty of burglary under New York law, despite the fact that he does not remain in the building for the purpose of stealing the jewelry. The point is that it is possible to do something *with* a certain purpose without that purpose being one's reason for doing it.

The other significant place where the criminal law seems to care about reasons for acting is in the area of affirmative defenses. While the law of murder, for example, normally does not care what a person's reasons were for killing, there are some reasons he can offer that will exculpate him despite the fact that he otherwise fulfills the conditions for liability. Such reasons are typically justifications, such as self-defense or necessity. Thus although a person knowingly violates the prohibitory norm against intentional killing, if he kills for the further purpose of saving his own life, the law may exonerate him.

Here, however, we must distinguish the law's criteria for violating a prohibitory norm from the criteria it uses to override a prima facie judgment of criminal liability. The first are the rules governing inculpation, while the second are conditions that speak exclusively to exculpation. Justifications show that the law is sensitive to a defendant's reasons for acting for purposes of exculpation, that is, where the defendant's reasons serve to override a basic judgment of blameworthiness. But rules of inculpation remain largely indifferent to reasons for acting. We might see the claim

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35. *Id.* § 140.25 (emphasis added).
that the law is interested in the reasons why a defendant violated a prohibitory norm as confusing inculpation and exculpation.

Here is one way to sum up the foregoing two points. Where crimes of specific intent are concerned, the defendant’s reason for acting comes in too early, whereas where justifications are concerned, it comes in too late. For the required reason in the former context is too local to apply to the entire prohibitory norm; instead it helps constitute that norm. And the required reason in the latter context applies only after the inquiry into guilt has already been completed. The defendant is responsible for having violated the norm, and now the question is whether he can show he had a good, indeed an overriding reason, for doing so.

I have argued that crimes of specific intent and justification defenses are not really places where criminal culpability turns on an agent’s reason for violating a prohibitory norm, despite the fact that they appear to be. There are several instances, however, where guilt does turn on such reasons. First, attempt liability has traditionally required that the defendant intend to perform the act or to bring about the result that constitutes a violation of the prohibitory norm. While there are various proposals and decisions eliminating this requirement, it is still widely in place and defended by many criminal law scholars. Another example is accomplice liability, where traditionally a person cannot be convicted if he did not intend to promote the principal’s violation of the prohibitory norm. And the law of conspiracy has also traditionally required that the defendant have intended to promote the act that is the subject matter of the agreed-upon conspiracy. Although these are true exceptions to the irrelevance of reasons for acting in the criminal law, it is notable that they are all controversial doctrines. Some scholars call for eliminating the intent requirement for attempt, for example, suggesting instead that the mens rea for an attempt should track that of the completed offense. Others have called for a doctrine of reckless complicity, suggesting that a person can be an accomplice to a crime he was aware he might be furthering, even if he had no purpose to further it. And the MPC has proposed the elimination of the purpose requirement for both attempt and accomplice liability where result crimes are concerned. In those cases, the MPC says it is sufficient for a person to be guilty of an attempt, or for him to be an accomplice to a crime, if he was aware that he would bring about the prohibited result by acting as he did.

Perhaps the most important challenge to my claim that the concept of criminal culpability is primarily about the knowing violation of a

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37. See id. at § 13.3. For a discussion of this point and of Duff’s view of it, see Claire Finkelstein, No Harm No Foul? Objectivism and the Law of Attempts, 18 L. & Phil. 69 (1999).
prohibitory norm is the importance of purpose in cases of low probability harm. Suppose I shoot at you from a distance, and suppose there is a five percent chance I will hit my mark. If I succeed in hitting you I am guilty of murder, despite these low odds. If, however, I am engaged in target practice next to a pedestrian walkway, and there is a five percent chance (of which I am aware) that I will hit and kill someone passing by, I am not guilty of murder if I do hit someone. I may be guilty of manslaughter if hitting someone is sufficient to make me reckless. But I cannot be convicted of murder because I lack the required mens rea for that offense. In this case, the law does care whether the reason I fired was that I wanted to kill someone, or that I was improving my aim. And this makes it look as though the law is not indifferent to reasons for acting, even where the crime of murder is concerned.

This feature of the law of murder is a deep puzzle, all the more so since it is neither terribly controversial nor counterintuitive. No one to my knowledge, for example, calls for revising this aspect of criminal culpability. And it does indeed pose a true exception to my claim, since in this case the law cares whether one violates a prohibitory norm intentionally or with mere awareness. Rather than attempt to deal with this difficult problem here, however, I will accept that this kind of case provides an exception to my claim that at the criminal law’s mens rea requirement is the requirement that the defendant have knowingly done a thing that violates a prohibitory norm in order to be guilty of a crime.

A final objection is worth noting. It is an implication of the view of mens rea I have proposed that negligent criminal liability is exceptional and arguably problematic, for here the defendant has no knowledge of either causing or risking the violation of the prohibitory norm. But while some will find this conclusion objectionable, it is rather one I welcome. If criminal liability is premised on fundamental principles of individual responsibility, it strikes me as problematic to punish an agent for violating a prohibition with no awareness of what he was doing. Further, it is precisely here that we should look for the true dividing line between civil and criminal wrongs: Unlike criminal liability, civil liability need not be based on ordinary notions of responsibility and blameworthiness. Negligence and strict liability are thus substantially less problematic in tort law than in criminal law.

40. George Fletcher, for example, has pointed out to me that almost every criminal code in the world has a provision for negligent homicide.

V

THE LIMITS OF ECONOMIC ANALYSIS

Let us return to the economic analysis of mens rea. The central problem with Posner’s account should now be clear: The category of the pure coercive transfer includes only harm the actor tries to bring about. It does not include harm the agent is aware of bringing about but which she does not try to produce. Many criminal harms, however, are not themselves intended by the defendant who performs them—witness the bomber’s killing of his roommate. The bomber is not trying to bring about his roommate’s death; he will not invest resources designed to produce that result. This suggests that killing his roommate would fall under the heading of the impure coercive transfer. But it is an open question whether we should seek to deter impure coercive transfers; we are supposed to decide by using cost-benefit analysis. Thus if it turns out, on balance, to be more efficient to allow the bomber to destroy the plane than to deter him for doing so, we would have no grounds for punishing him for murder.

I have placed the bomber’s killing of his roommate among the impure coercive transfers by noticing that it could not be a pure coercive transfer, since the bomber does not invest resources to bring about that result. But arguably this is not quite right, since Posner says that impure coercive transfers are transfers that take place incident to a productive activity. And trying to acquire a greater share of company profits is not a productive activity. Alternatively, then, one might say that there is a large segment of cases that falls neither into the class of pure coercive transfers, nor into the class of impure coercive transfers. Nevertheless, these are cases in which we often think criminalization appropriate. For this sort of crime, then, it is not clear that Posner has any sort of analysis at all.

But let us take a different example, to make clear that there are instances of serious crimes that Posner will have to place in the category of impure coercive transfers, and so decide whether to permit them by applying cost-benefit analysis. A blasting company has been hired to level a residential building. The owner has been told the building has been evacuated, and that there is no one inside. He has installed explosives around the base of the building and set them to detonate at a certain time. Just prior to the moment of explosion, he sees a small child leaning out the window of the building. There is still time to stop the explosion, but if he does, it will take him several more hours to reset the devices, requiring him to pay large sums in overtime pay for his team of workers who will have to work into the evening. He is sorry about the child, but he decides to proceed anyway. As in the case of the bomber, “the blaster,” as we shall call him, does not intend to kill, although he is fully aware he will. In this case, the killing is incident to a productive activity. It is, therefore, an impure coercive transfer, by Posner’s lights. This suggests that whether it should be
impermissible to kill the child in this case depends on whether the costs of
doing so outweigh the benefits. Only, for Posner, if the blaster had set out
to kill the child would the decision whether to criminalize his behavior be *exempt* from cost-benefit analysis.

Now one might argue that at least Posner is able to account for a large
segment of criminal liability outside this sort of case, namely crimes of
specific intent and other crimes that require purpose. Numerically, crimes
of specific intent dominate crimes of general intent. Arguably then, Posner
would at least have explained criminal liability with respect to many of the
prohibitions of the typical criminal code. But if my argument above about
such crimes is correct, Posner’s account would not apply to them, for they
would not belong to the category of the pure coercive transfer after all.
These cases, like burglary or forgery, would be ones in which the injurer
need not in fact make bypassing the relevant voluntary market the point or
purpose of his activity. Presumably the prohibition on forgery seeks to
protect voluntary transfers of wealth by the use of legal instruments. If the
specific intent requirement were such that the defendant must have had a
purpose to commit forgery, then Posner’s account would work (suitably
corrected, that is, for the problem of counting the injurer’s gain). But it is
not, as we saw above. The specific intent requirement is a requirement that
the defendant have had some other, separate intention, in this case, the
intention to deceive. Seeking to deceive is not, as such, market bypass, or
at any rate, it is not the market bypass at issue. Moreover, it need not even
be unproductive. In short, the investment of resources the criminal makes
is not an investment in committing forgery. It is an investment in deceiv-
ing, and the mental state with which a person must perform the act by
which he carries out this purpose is still knowledge. Thus we are back to
having to explain a mens rea of knowledge in economic terms, and here the
idea of the pure coercive transfer is unhelpful.

The central thought behind Posner’s account of mens rea is an
inspired one: The notion of mens rea helps to distinguish those harms
whose social worth is *not* measured in cost-benefit terms from those that
*are*. We criminalize certain kinds of intentional harms whether or not
allowing them is socially efficient. But Posner’s account makes a crucial
mistake. It suggests that only those harms the agent tries to bring about fit
the law’s general category of intentional harm. While Posner’s pure coer-
cive transfers do fit the model of the small number of crimes for which the
law cares about an agent’s reason for violating a prohibitory norm (the
central case being low probability intentional killing), the category of
intentional harm goes far beyond the narrow category of harms intended by
the agent. Thus the category of the pure coercive transfer is too narrow to
capture the criminal law’s notion of mens rea.
Suppose, then, we were to try to fix Posner’s account by replacing the narrow category of intentional harms with the broader category of acts an agent is aware of performing or is aware of running a risk of performing. The new class of “pure coercive transfers” would now include those harms an agent inflicts knowingly and recklessly, in addition to intentionally. The revised economic argument would be that the pure coercive transfer is an activity in which the agent is aware she is bypassing an available market, or at least where she is aware there is a significant risk that she is doing so. The impure coercive transfer would now be restricted to the class of acts in which the injurer bypasses the relevant market unwittingly. But now the category of the pure coercive transfer would contain a number of acts of harm-infliction that Posner would say are incident to productive activities. And whether or not these are efficient depends on the outcome of cost-benefit analysis; we cannot simply assume their inefficiency, and so we cannot defend their illegality in economic terms.

Notice too that the move we made above on Posner’s behalf to answer this criticism will not work here. To recall, that was to say that as a contingent matter, the crimes we recognize as instances of serious harm-infliction are cases in which the harm to society or to the victim almost always exceeds the gain to the injurer. And since we must criminalize under general categories, rather than act-by-act, we cannot allow for the occasional act of efficient murder or rape. But if the class of “pure coercive transfers” now contains instances in which the harm is incident to a productive activity, we cannot assume that the acts that fall into that class will generally be inefficient. On the contrary, the bulk of them will probably turn out to be efficient, especially if the injurer is forced to internalize the costs of the activity through a system of civil liability. Clearly, then, if economic analysis cannot defend criminalizing killing the child in the blasting case except contingently as dictated by the outcome of cost-benefit analysis, it cannot be thought to have captured the special impermissibility of knowingly inflicting injury on another, an impermissibility the criminal law itself is structured to capture.

Thus the attempt to broaden the category of the pure coercive transfer by including cases of knowing or reckless harm-infliction results in a dissolution of the economic argument. This can be shown by turning again to the equation for social cost, \( L(y) = p(y)D + B(y) \). Posner’s claim that social costs are minimized in the intentional case when \( y = 0 \) (because then \( p = 0 \)) does not apply to intentional harms where purpose is lacking, that is, to the extended class of intentional actions. It would cost something to remove the child from the building before destroying it. Therefore, in order to make \( p = 0 \), the blaster has to expend resources on prevention. Thus \( B(y) > 0 \). Whether it is efficient to require him to remove the child from the building depends on the value of \( y \) at which \( p(y)D + B(y) \) is minimized. In
this case, of course, since the harm is extremely likely to occur ($p$ is close to 1) and the harm from death is high, and given that $B(y)$ is probably fairly low, a legal rule requiring people to remove children from buildings under such circumstances will probably be efficient. But this may not be the case whenever the optimal value of $y$ is greater than zero.

I have argued that economic analysis fails to offer an adequate descriptive account of the criminal category. This, I have suggested, is because the exemption of that category from cost-benefit analysis is based on the fact that the harm is inflicted with awareness and control. It is not based on the defendant's intending the harm, as Posner seems to think. If I am correct that Posner's attempt to account for the category of intentional harm is emblematic of how economic analysis must set about trying to explain the notion of mens rea, then it looks as though economic analysis is fundamentally at odds with the structure of criminal liability.

CONCLUSION

If it is indeed correct that the criminal category is demarcated by the notion of mens rea, then the distinctive nature of criminal, as opposed to civil, liability cannot be accounted for in economic terms. My guess is that any other reductionist account of criminal liability will founder for similar reasons, namely that it will treat the central concepts of personal responsibility as valuable only insofar as they contribute to some further and more fundamental value these concepts supposedly serve. The failure of the reductionist project, I have in effect argued, lies in the nonreducibility of the basic mens rea requirement. That an agent have been aware of what she was doing to be responsible for violating a prohibitory norm may lie at the core of our conception of human agency. As such, we should expect a system of criminal liability that dispenses with that requirement to draw little support from ordinary intuitions.

At the outset, I conceded that the legal economist might find my procedure unfair, since I have focused on only one attempt to account for mens rea in economic terms. My answer to that objection is twofold: First, since I present general, structural reasons why we should not expect the concept of mens rea to have economic significance, the burden is on the legal economist to provide the necessary argument. Second, the account I have explored uses rather minimal economic assumptions, and I therefore think it not unfair to take it as representative of the best economic analysis has to offer on this subject. But in light of the conclusion I have reached about Posner's account, some legal economists might respond with an entirely different objection, an objection I find more difficult to meet.

The legal economist might object that thus far I have failed to articulate any argument against economic analysis of the criminal category. For all I have shown is that economic analysis would for the most part dispense
with the category. It is open to the legal economist, after all, to bite the bullet and embrace the charge that his project is revisionist: He might simply say that he sets out to prove the notion of mens rea a confusion, and with it, to dispense with the idea of a theoretical distinction between civil and criminal wrongs. So, he might respond, if the legal economist cannot assign a distinctive character to criminal liability per se, so much the worse for the criminal law. Some economists would be happy to endorse this conclusion, and even Posner (ironically) sometimes sounds tempted by it. He has written that if the central characteristics of the criminal law turn out to be governed by the rules of deontological morality, and so resistant to efficiency analysis, “this would be a deficiency of the law and a spur to reform.”

But as Posner himself has recognized throughout his writings, there is an important difficulty with the revisionist stance. The legal economist has consistently staked the plausibility of his approach on the descriptive adequacy of economic analysis. He has repeatedly sought to show that courts implicitly attempt to maximize efficiency, and that applying economic analysis to the law only captures what has always been at the heart of common law reasoning anyway. So although the legal economist shows himself willing to dispense with mens rea, and with it, the distinctive nature of the criminal category, he would presumably prefer to obviate the need for the revisionist move by showing that the class of intentional harms, and of the notion of mens rea generally, can be accounted for as an economic category in its own right.

But still, the economist might answer, it is not necessary to show every legal institution to be vindicated in economic terms in order to view economic analysis as both descriptively plausible and normatively compelling. And against this I have little by way of response to the economist, or at least little by way of quick and immediate response that I can present here. For I am, of course, in agreement with his premises; it is only his conclusion I reject. In favor of preserving the apparently inefficient concept of mens rea and saying so much the worse for economic accounts of the criminal law, I can only offer the thought, with Sandy Kadish’s help, with which I began: To abandon the requirement that the defendant have been aware of what he was doing would be to cut criminal law loose from our ordinary practices of personal responsibility, and that seems to me to

provide a strong, if not an ample, defense of the institution. But, as they say, one person’s *modus ponens* is another’s *modus tollens*. 