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MORAL CHARACTER, MOTIVE, AND THE PSYCHOLOGY OF BLAME

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

INTRODUCTION

It is a fundamental tenet of criminal law that we do not judge the criminality of an act based on the character of the actor. Rather, "[t]he sun of justice shines alike for the evil and the good… [T]he most vicious [defendant] is presumed innocent until proven guilty." [1] The purpose of a criminal trial is to determine whether a person committed a criminal act, as opposed to whether the person is good or bad in the abstract. The prosecutor's task is simply

[1] People v. White, 24 Wend. 520, 574 (N.Y. 1840) (opinion of Justice Verplanck) (*quoted in* JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 1, 126 (1984)).

to prove that the defendant's actions meet the statutory elements of a crime, and offense elements do not require proof of character. Blameworthiness, in this context, is conceived as the carefully calculated end product of discrete judgments about a transgressor's intentionality, causal proximity to harm, and the harm's foreseeability. The logic of criminal liability takes into account the particular harmful act, done with a particular mental state, causing a particular harmful result, and the combination of those elements determine the blame assigned to the offender; there is no room in this calculation for varying blame according to the actor's moral character.[2]

Research in social psychology, on the other hand, suggests that blaming is often intuitive and automatic, driven by a natural impulsive desire to express and defend social values and expectations. [3] Blaming serves an integral social function.[4] By blaming a wrongdoer, we establish, enforce, and express the social boundaries and rules of our community.[5] To this end, people are often willing to make sacrifices to punish cheaters, even when they themselves are not the ones who have been cheated.[6] Blaming in ordinary social life primarily serves as an expressive social tool to sort the 'bad' members of society from the 'good' members of society and, thereby, to foster solidarity and cohesion among those who are appropriately abiding social expectations.[7] In ordinary social life, an actor's perceived character and reasons for acting, therefore, are of primary importance to the process of administering blame for a harmful action.[8]

In this Article, we suggest that the legal and social psychological processes of blame cannot be completely divorced. Inevitably, formal legal processes of blame are informed and influenced by social psychological processes of blame, which often operate on a level beneath conscious awareness. Specifically, we suggest that perceptions of an actor's moral character and motive for acting together affect our intuitions of blame, responsibility, and ultimately criminal liability for their harmful act. We have a natural, psychological inclination to punish people with bad characters and who act with bad motives; that inclination shapes the way that we interpret information in a formal legal proceeding in a process that we refer to as "motivated inculpation." In a series of original social psychological experiments, we provide evidence that when people judge a harmful action

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[2] *But see* Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423 (1995) (arguing that Aristotelian virtue forms the basis for blame and punishment).

[3] *See* Emile Durkheim, THE DIVISION OF LABOR IN SOCIETY (W.D. Halls trans., The Free Press 1984)(suggesting that processes of blaming and punishing allow members of a society to express indignation at acts that offend the collective conscience, thereby affirming collective values and fostering social cohesion); Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284 (2002).

[4] *See* J.L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3 (1982); MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF CRIMINAL LAW (Clarendon Press, 1997); Ernst Fehr & Simon Gächter, *Altruistic Punishment in Humans*, 415 NATURE 137 (2002); Paul H. Robinson, Robert Kurzban & Owen D. Jones, *The Origins of Shared Intuitions of Justice,* 60 VAND. L. REV. 1633 (2007).

[5] *See* Neil Vidmar, *Retribution and Revenge*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 31 (Joseph Sanders & V. Lee Hamilton eds., 2001); Jonathan Haidt, *The New Synthesis in Moral Psychology*, 316 SCI. 998 (2007).

[6] *See* Ernst Fehr & Urs Fischbacher, *Third Party Third Party Punishment and Social Norms*, 25 EVOLUTION AND HUM. BEHAVIOR 63 (2004).

[7] Durkheim*, supra* note 3, at 64 ("Punishment is, above all, intended to have its affect on honest people.").

[8]*See, e.g.,* Michael D. Bayles, *Character, Purpose, and Criminal Responsibility*, 1 LAW & PHIL. 5 (1982) (arguing that blame and punishment are not meted for acts at all, but for the character traits indicated by those acts); Richard Brandt, ETHICAL THEORY: THE PROBLEMS OF NORMATIVE AND CRITICAL ETHICS 465-75 (1959) (suggesting that blameworthy actions are those that would not occur absent a bad moral character).

performed by bad person or performed with a bad motive, they perceive that person as more responsible, and the act as more causal and intentional, than when they judge an identical harmful action conducted by a 'good' person. Thus, it is possible that intuitive and automatic psychological blaming motivations can permeate more formal legal mechanisms of blame. Ultimately, this suggests that the social-psychological impulse to punish bad people who act with bad motives can color the legal process of blame, such that we are more likely to interpret the harmful action of a bad person as comporting with the statutory components of a crime and, in turn, as worthy of criminal condemnation and punishment.

This Article advances research and theory in bringing to light ways in which legal blame is driven by psychological blaming processes. Our analysis informs essential normative questions regarding the extent to which legal processes ought to take into account the psychological factors that drive the mechanisms of blame. For example, to what extent and under what circumstances should a defendant's motive for acting be admitted into evidence and considered in liability judgments? Can the rules of evidence effectively exclude information about moral character, and is exclusion of this evidence a proper goal, given how such information is likely used by jurors and judges? These normative lie at the heart of criminal adjudication; yet, they are outside the scope of this Article. These key normative questions can be dealt with only after we gain a deeper understanding of empirical questions about psychological blaming processes. This Article furthers our understanding of the empirical issues and provides the groundwork for normative analyses of the proper role of motive and character in criminal liability.

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

with a discussion of limitations of the current experiments, as well as directions for further empirical investigation.

I.   MORAL CHARACTER AND MOTIVE

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

In general, our legal system eschews the role of character in criminal liability determinations, relying instead on an act-based system of inculpation.[9] According to this view, the state's right to impose blame on an actor derives solely from the actor's commission of a prohibited act. [10] Put simply, we blame a criminal for what she did, not who she is.

That being said, as human beings we are nevertheless naturally motivated to punish people who we see as having a bad moral character or a lasting criminal disposition. As John Henry Wigmore has asserted, "The deep tendency of human nature to punish, not because our defendant is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of court."[11] Similarly, the United States Supreme Court has warned that evidence of prior criminal activity to display a "propensity" to commit a crime poses a "risk that a jury will convict for crimes other than those charged – or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment."[12]

In an article providing empirical confirmation of this tendency, Theodore Eisenberg and Valerie Hans analyzed a sample of real jury cases and found that, where the evidence is weak or ambiguous, a jury that learns of a defendant's prior criminal record is significantly more likely to convict than a jury without such knowledge.[13] Earlier experimental research also demonstrated the influence of prior crime on likelihood of judgment of guilt. The experimental research suggests that the seriousness and similarity of prior crimes plays an important role, such that serious crimes or those similar to the crime on trial are more likely to lead to guilt judgments than trivial or dissimilar crimes.[14] In fact, some experiments find

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

[10] *See, e.g., id.* ("Although a defendant's character sometimes can function as evidence of whether the defendant committed the alleged act with a culpable mental state, the defendant's character is not itself a criterion or an element of guilt."); *see also* G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 60 (Allen W. Wood trans., Cambridge University Press 1991)(1821)(suggesting that the commission of an act that infringes on a member of society is necessary and sufficient to justify the state's imposition of criminal sanction).

[11] *See* WIGMORE, *supra* note 1, at 127.

[12] Old Chief v. United States, 519 U.S. 172, 181 (1997) (quoting United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982)). *See also* Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 197 (2006).

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

[14] *See* Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study*, 2000 CRIM. L. REV. 734, 753-55; Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 47 (1985); Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries,* 18 CRIM. L.Q. 235, 237-38 (1976).

no increased likelihood of guilt judgments when the prior crime is dissimilar to the current crime.[15] The influence of prior similar crimes on guilt judgments seems to suggest that people make a simple inference about propensity that operates within a given category. For example, people might reason along the lines of, "Once a burglar, always a burglar."[16] But the delimitations of the categories employed in this regard remain unsettled in the literature; the relevant category might be as narrow as a particular offense, such as burglary, or as broad as a class of offenses, such as violent crimes. Regardless, the empirical literature provides fairly robust proof that evidence of defendants' prior crimes or character flaws can potentially influence judgments regarding proof that the defendant committed the specific instance of crime in question.

To protect against undue weight that jurors might place on prior crimes, Congress, state legislatures, and courts have put into place certain evidentiary safeguards that limit admission of evidence regarding moral character and prior crimes. For example, the Federal Rules of Evidence generally prohibit the admission of evidence to establish that a person has a bad character under Rule 404(a).[17] This rule bars the prosecution from presenting evidence that suggests a defendant's general immoral disposition as a strategy to demonstrate the likelihood that the defendant committed a specific crime. Additionally, evidence of a defendant's "other crimes, wrongs, or acts" is disallowed if it is being used "to prove the character of a person in order to show action in conformity therewith" under Rule 404(b).[18]

Despite the system's best efforts to prevent character-based inferences from affecting judgments of criminal liability, some character information will still leak into a trial as inextricably tangled up with other accepted elements of culpability, such as actus reus and mens rea, and various defenses such as duress.[19] In fact, Rule 404(b)'s bar against evidence of other crimes does not apply when the evidence is introduced to demonstrate "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[20] For example, in Smith's trial for unlawful gun possession, evidence that police also found cocaine and a large amount of cash in his car might be admissible show Smith's motive for possessing the gun, i.e., to protect himself. Thus, although other crimes or bad acts are not admissible to prove the defendant's bad character or propensity to commit the

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[15] *See* E. Gil Clary & David R. Shaffer, *Another Look at the Impact of Juror Sentiments Toward Defendants on Juridic Decisions*, 125 J. Soc. Psychol. 637 (1985). Howe (1991) suggests that it is similarity and not seriousness that does the work. Edmund S. Howe, *Judged Likelihood of Different Second Crimes: A Function of Judged Similarity*, 21 J. Applied Social Psychol. 697 (1991). But the design of the experiment reporting this finding employed a within-subjects design that posed a very large series of simple propensity questions. It is therefore likely that the findings of this study are properly limited to what people say ought to matter, and not how they actually make judgments. Other studies suggest that there are two separate effects, one for similarity and one for seriousness. *See* Wissler & Saks, *supra* note 14.

[16] *See* Hans & Doob, *supra* note 14.

[17] Fed. R. Evid. 404(a) (allowing such evidence only when it is used in specific rebuttal to evidence of good character submitted by the defense).

[18] Fed. R. Evid. 404(b). But see Fed. R. Evid. 413 (permitting admission of propensity evidence in sexual assault cases).

[19] However, Holmes suggests that the criminal law can more capably enforce standards of behavior to the extent that we separate liability from inferences of character derived from motive. Oliver Wendell Holmes, The Common Law 50 (1881) ("[W]hen we are dealing with that part of the law which aims more directly than any other at establishing standards of conduct… we should expect there more than elsewhere to find that the tests of liability are external, and independent of the degree of evil in the particular person's motives or intentions.").

[20] Fed. R. Evid. 404(b).

crime in question,[21] sometimes bad acts or crimes can be introduced to prove that the defendant had a special reason to commit the crime in question. In this sense, motive is sometimes relevant in proving criminal liability, for purposes other than showing that the defendant's bad character suggests that he acted badly in the instant case.

Motive comes in many guises here, because motive might influence decisions about blame for a variety of different reasons. Motive is most explicitly recognized as relevant in hate crimes, in which the defendant harms a victim because of a protected characteristic of that victim, such as disability, gender, race, etc.[22] Hate crime statutes are unusual in the sense that motive is an element of the offense, and so must be proven in order for liability to attach. In other cases, motive might be admitted into evidence, but is not required as an element of the offense. In the example of Smith discussed earlier, motive for possessing the gun tends to prove that he did in fact possess the gun. The fact that Smith had a good reason for carrying the gun (to protect against theft of his cash and drugs) makes less plausible his claim, for example, that the gun was not his, or that he was not aware that it was in the car. Another example of permissible (but not required) use of motive is to distinguish among possible mental states. For example, in a murder trial, evidence that Jones was having an affair with the victim's wife might be admissible to show that Jones killed the victim intentionally, rather than recklessly. Motive might also serve as the basis for non-liability. Examples of situations in which motive might lead to a defense against liability include killing in order to avoid being killed (i.e., self-defense justification), or driving through a red light to rush a dying person to a hospital (i.e., necessity justification).[23]

In this way, the law sometimes permits consideration of a defendant's motive, while it simultaneously disavows allowing the defendant's moral character to influence judgments of blame. But, as our examples illustrate, motive and character are not always readily distinguishable. The information about Jones' affair may be admissible for its relevance to his motive and mens rea, but this information also readily lends itself to unflattering inferences about Jones' character as the kind of person who would have an affair with his business partner's wife. Thus, the line between specific motive and general moral character is not always clear.[24]

The difficulty of distinguishing between motive and character also sometimes arises when harm was caused unintentionally. The Model Penal Code incorporates a definition of recklessness that takes into account the "nature and purpose" of the defendant's conduct, for purposes of determining whether the defendant's conduct constituted a "gross deviation from

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[21] *But see* FED. R. EVID. 413 (permitting admission of propensity evidence in sexual assault cases).

[22] *See, e.g.,* Cal. Penal Code § 422.55 (a) "Hate crime" means a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim: (1) Disability. (2) Gender. (3) Nationality. (4) Race or ethnicity. (5) Religion. (6) Sexual orientation. (7) Association with a person or group with one or more of these actual or perceived characteristics.

[23] In addition to the issue of the role of motive in liability judgments, there is a separate question about the role of motive in sentencing. *See* Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 90 n.1 2006-2007 (defendant's motive is traditionally an important factor in criminal sentencing).

[24] The extent to which motive ought to influence liability and blame has been a topic of some debate. *See, e.g.,* Elaine M. Chiu, *The Challenge of Motive in the Criminal Law*, 8 BUFF. CRIM. L. REV. 653, 673 (2004-2005) (motive ought to be part of criminal law to track ordinary perceptions of blame); Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in Criminal Law Past and Present,* 1993 UTAH L. REV. 635 (evil motive is a theoretical basis for defenses like insanity or duress, but not for offense definitions); Hessick, *id.*(motive should play an expanded role in criminal punishment).

the standard of conduct that a law-abiding person would observe in the actor's situation."[25] Recklessness in the Model Penal Code also involves the disregard of an "unjustifiable risk."[26] The justifiability of the risk is determined by "considering the nature and purpose of the actor's conduct and the circumstances known to him."[27] The same phrase is included in the MPC definition of negligence.[28] The nature and purpose of the actor's conduct are, in many situations, inextricably intertwined with the actor's motive for acting. The defendant who shoots a gun into a crowd for fun is reckless because the nature and purpose of his conduct is unjustifiable, and so the risk he creates is unjustifiable as well. The defendant who shoots to try to stop a purse snatcher, on the other hand, has a stronger argument that the risk he took was justified. In this way, the nature and purpose of the actor's conduct can be placeholders for motive, and motive can be a strong signal of moral character.

Motive, in the sense of nature and purpose of conduct that leads to unintended harm, does influence blame judgments as an empirical matter. Consider Mark Alicke's series of experiments, which suggest that we are more likely to assign blame when a transgressor had a bad motive for doing an act that resulted in harm. [29] In one study, participants read about a man who was speeding home in the rain and negligently collided with another car, causing injury.[30] Some people were told that the man was speeding home because he wanted to hide a vial of cocaine from his parents, whereas others were told that he was speeding home to hide an anniversary present for his parents. Judgments of blame varied systematically with the reason for why the driver was speeding: people who learned that he was speeding home to hide cocaine blamed him more than those who learned he was speeding home to hide the present.[31] Thus, the driver's motivation for speeding influenced lay judgments of blame. Alicke argues that we are inclined to blame transgressors with bad motives for acting because it leads to an inference that they had more control over the situation that led to the harm.[32] But Alicke's experimentally proffered reasons for acting come with obvious concomitant inferences as to the actor's underlying character: whereas we would generally make favorable inferences about the character of the kind of person who is motivated to plan the perfect surprise to honor their parents' anniversary, we would be prone to make quite opposite inferences about the character of a paranoia-panicked cocaine possessor.

It is easy to see that admissible information about a defendant's motive could, in some instances, implicitly encourage inferences about the defendant's moral character. These inferences are consonant with a theoretical literature on punishment and character that argues that inferences about moral character ought to be an integral component of legal blaming processes. On this view, responsibility for an action derives from the actor's responsibility for his or her own character.[33] Theorists within this tradition contend that a defendant only

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[25] MPC 2.02(2)(c).

[26] MPC 2.02(2)(c).

[27] *Id.*

[28] MPC 2.02(2)(d).

[29] *See* Mark D. Alicke, *Culpable Causation*, J. PERSONALITY & SOC. PSYCHOL. 368 (1992).

[30] *Id.*

[31] *Id.*

[32] *See* Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCH. BULL. 556 (2000). It is also possible to engage in motivated non-blaming. For example, only 15% of people in Arab countries believed that the 9/11 attacks were carried out by Arabs. *See* Lawrence M. Solan, *Cognitive Foundations of the Impulse to Blame*, 68 BROOK. L. REV. 1003 (2003).

[33] *See* Michael Moore, *supra* note 4, at 563 (describing but not endorsing this view).

ought to be culpable for a harmful action insofar as we can infer from the action that the defendant has a flawed character or a blameworthy disposition: if the action "reveals what sort of person he is in some respect."[34] According to this perspective, acts are only blameworthy to the extent that they betray an underlying character flaw in the actor.[35] Excuses, in this framework, operate to thwart the inference from action to character, thus blocking the attachment of blame.[36] Claims of duress, necessity, or accident each derive from situations in which someone of good character could nevertheless find themselves engaging in a harmful or socially undesirable action.[37]

Several contemporary theorists oppose the idea that blame derives from character, arguing that blame and punishment ought to be divorced from inferences about character.[38] In this Article, we theorize that character information that is wholly unrelated to the harmful action at issue can color the way in which factfinders' interpret that action. Thus, our claim in this Article is consistent with -- but broader than -- Alicke's culpable control theory. We hypothesize that people are more inclined to blame (and inclined to blame more harshly) not only when the actor's reasons for acting are bad, but, more generally, when they have *any reason* to believe that the actor is a bad person. We hypothesize that, as an empirical matter, a bad motive for acting is not necessary for perceivers to make character-based inferences with respect to blame and responsibility. Rather, any unfavorable character inferences will suffice to motivate the inculpation of a transgressor.

B. Motivated Inculpation

Earlier, we raised a core concern expressed by many judges and legal scholars over the years: namely, that knowledge of a previous conviction biases the case against the defendant.[39] The intuitions of Wigmore and of the Supreme Court justices regarding character and blame are examples of a broader phenomenon that social psychologists call

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[34] JOEL FEINBERG, DOING AND DESERVING 126 (1970); *see also* GEORGE FLETCHER, RETHINKING CRIMINAL LAW 801 (Boston: Little, Brown and Company, 1978) ("The question [of a just conclusion of culpability] becomes whether a particular wrongful act is attributable either to the actor's character or to the circumstances which overwhelmed his capacity for choice…");

[35] *See, e.g.*, Michael D. Bayles, *Character, Purpose, and Criminal Responsibility*, 1 L. & PHIL. 5, 7-15 (1982) (arguing that actions may or may not demonstrate underlying character traits, but that blame is only appropriate when a socially undesirable trait can be inferred); George Vuoso, *Background, Responsibility, and Excuse*, 96 YALE L.J. 1661, 1673-74 (1987) ("Whether an actor merits praise or blame… will depend on how it reflects on the agent, or on something enduring in the agent (which, following tradition, we are calling his 'character.'"); NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 68 (1988) (arguing that "it is unfair to hold people responsible for actions which are out of character, but only fair to hold them so for actions in which their settled dispositions are centrally expressed"); RICHARD B. BRANDT, ETHICAL THEORY: THE PROBLEMS OF NORMATIVE AND CRITICAL ETHICS 465-74 (1959).

[36] ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 383 (1981). ("Excuses show an act is not to be attributed to a defect in character...").

[37] Sendor points out that there is some corroboration of this conception of evidence in the commentaries to the Model Penal Code. Sendor, *supra* note 10, at n.7. For example, the MPC suggests that "one who kills in response to certain provoking events should be regarded as demonstrating a significantly different character deficiency than one who kills in their absence." MODEL PENAL CODE AND COMMENTARIES §210.3, at 55 (1985).

[38] See Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1027 (2004)(arguing that conclusions about immoral character creates a permanent criminal caste)

[39] *See supra* notes 11-12 and accompanying text.

"motivated reasoning." The general principle is that sometimes we have a preferred conclusion and we are motivated to assume the veracity of that conclusion, construing any evidence presented to us in a way that allows us to confirm our initial preference. For example, in a study on perceptions of risk, women who read an article claiming that caffeine posed a risk to women's health were less convinced by the evidence if they themselves were heavy caffeine users; no such difference was found for men.[40] The women who were heavy caffeine users had a stake in the results. They initially preferred a conclusion that allowed them to go on enjoying their coffee breaks, so they were motivated to discount the evidence. However, women who were light caffeine users, as well as men, had less reason to discount the evidence, so they generally did not.

There are many ways in which serving our own interests can drive the conclusions we endorse.[41] But having a personal stake in the results is just one source of motivation among many. We are also motivated to construe information before us in ways that confirm other previously-held biases or preconceived notions. For example, one recent study provides evidence that judges may misremember the facts of the case before them in ways that support subconsciously endorsed racial stereotypes.[42] And jurors sometimes engage in motivated evaluation of evidence by disregarding and failing to discuss evidence that supports the conclusion opposite to the one they already favor.[43]

A prime example of motivated reasoning in law lies in policy-biased judging. Judges profess to decide cases neutrally; some even profess that their role is like an umpire calling balls and strikes.[44] Very few judges would acknowledge that they decide cases according to their own policy preferences. Yet there is a wealth of evidence from real cases demonstrating that judges decide cases according to their personal political ideology.[45] In the laboratory,

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[40] *See* Ziva Kunda, *Motivated Inference: Self-serving Generation and Evaluation of Causal Theories*, 53 J. PERSONALITY & SOC. PSYCHOL. 636 (1987).

[41] *See* Linda Babcock, George Loewenstein, Samuel Issacharoff & Colin Camerer, *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV.1337 (1995); Linda Babcock, George Loewenstein & Samuel Issacharoff, *Creating Convergence: Debiasing Biased Litigants*, 22 L. & SOC. INQ. 401 (1997); Linda Babcock & George Loewenstein*, Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSPECTIVES 109 (1997).

[42] Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009).

[43] Kurt A. Carlson & J. Edward Russo, *Biased Interpretation of Evidence by Mock Jurors*, 7 J. EXPERIMENTAL PSYCH.: APP. 91 (2001).

[44] http://www.nytimes.com/2005/09/12/politics/politicsspecial/12cnd-text-roberts.html

[45] *See* Glendon A. Schubert, THE JUDICIAL MIND (Northwestern Univ. Press, 1965); Jeffrey A. Segal, *Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases*, 86 AMER. POLI. SCI. REV. 32 (1984) (finding that, in search and seizure cases, political ideology predicts outcome); Jeffrey A. Segal & Harold J. Spaeth, THE SUPREME COURT AND THE ATTITUDINAL MODEL (Cambridge Univ. Press, 1993) (judges' prior ideological preferences strongly influence case outcomes); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision-Making*, 86 AMER. POLI. SCI. REV. 323 (1992);
Jeffrey A. Segal & Harold J. Spaeth, *Norms, Dragons, and Stare Decisis: A Response*, 40 AMER. J. POLI. SCI. 1064 (1996) (judges engage in a biased decision process in which they find precedent consistent with their ideology more convincing than precedent that is contrary to their ideology); Eileen Braman, LAW, POLITICS, & PERCEPTION : HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING (University of Virginia Press, 2009); Eileen Braman, *Reasoning on the Threshold: Testing the Separability of Preferences in Legal Decision Making,*68 J. POLI. 308 (2006) (decisions about standing in a free speech case about abortion are influenced both by free speech attitudes and abortion attitudes); Richard E. Redding & N. Dicon Reppucci, *Effects of Lawyers' Socio-Political Attitudes on their Judgments of Social Science in Legal Decision Making*, 23 L. &

people predisposed to favor a policy permitting gay scout leaders judged other cases to be more similar if they involved a finding of illegal discrimination.[46] In another study, law students deciding the constitutionality of a proposed change in a school district's tax rate were more likely to find unconstitutionality when the proposed tax rate was inconsistent with their own tax policy preferences.[47] This finding emerged even though the participants were provided with a monetary incentive to arrive at the legally correct decision. Of course, judges (and everyone else) who engages in motivated reasoning are generally unaware that they are doing so.[48] For example, judges who understand that they must disregard information that is excluded from evidence, and genuinely attempt to ignore it, remain on the whole unable to refrain from being influenced by the barred information.[49]

When we make a decision, we often have several goals, even if we're not consciously aware of them. First, people generally want to reach the conclusion that is best supported by the available evidence. At the same time, other goals bias how we interpret and process this evidence, before we reach the conclusion. Sometimes we have initial intuitions or hypotheses that are driven by our pre-existing preferences.[50] We then tend to reject some evidence and accept other evidence in a biased fashion, consistent with our preferences.[51] We evaluate evidence according to what we already believe.[52] We selectively remember some things but not others.[53] We are influenced by factors that we ourselves regard as unjustifiable, though we often aren't aware of such influence.[54] This is especially true when the legitimate evidence is elastic – when there is more wiggle room to come out either way in the conclusion.[55] And, when we finally allow ourselves to reach the conclusion we preferred from the beginning, we convince ourselves that we chose it because of the evidence, not because of any other goals we have.[56] In sum, as Professors Hanson and Yosifon instruct,

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HUM. BEHAV. 31 (1999) (personal support for death penalty influences decisions about whether particular social science evidence is admissible under Daubert).

[46] *See* Eileen Braman & Thomas E. Nelson, *Mechanisms of Motivated Reasoning? Analogical Perception in Discrimination Disputes,* 51 AM. J. POLI. SCI. 940 (1997).

[47] *See* Joshua R. Furguson, Linda Babcock & Peter M. Shane, *Do a Law's Policy Implications Affect Beliefs about its Constitutionality? An Experimental Test*, 32 L. & HUM. BEHAV. 219 (2008) (The correct decision was determined by a law professor and a federal judge who independently arrived at the same ruling).

[48] *See* Richard E. Nisbett & Timothy DeCamp Wilson, *The Halo Effect: Evidence for Unconscious Alteration of Judgments,* 35 J. PERS. & SOC. PSYCH. 250 (1977).

[49] *See* Andrew J. Wistrich, Chris Guthrie & Jeffrey Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding,* 153 U. PA. L. REV. 1251 (2005).

[50] *See* Kunda, *supra* note 40.

[51] *See* Peter H. Ditto, James A. Scepansky & Geoffrey D. Munro, *Motivated Sensitivity to Preference-Inconsistent Information*, 75 J. PERS. & SOC. PSYCH. 53 (1998).

[52] *See* Babcock et al., 1995, *supra* note 41; Dan Simon, Lien B. Pham, Quang A. Le, & Keith J. Holyoak, *The Emergence of Coherence over the Course of Decision Making*, 27 J. EXP. PSYCH: LEARNING, MEMORY & COGNITION 1250 (2001).

[53] William M. Klein & Ziva Kunda, *Maintaining Self-Serving Social Comparisons: Biased Reconstruction of One's Past* Behaviors, 19 PERS. & SOC. PSYCH. BULL. 732 (1993).

[54] Christopher K. Hsee, *Elastic Justification: How Unjustifiable Factors Influence Judgments*, 66 ORG. BEHAV. & HUM. DEC. PROC. 122 (1996).

[55] *Id.*

[56] *See* Ziva Kunda, *The Case for motivated Reasoning*, 108 PSYCH. BULL. 498 (1990); Tom Pyszczynski & Jeff Greenberg, *Toward an Integration of Cognitive and Motivational Perspectives on Social Inference: A Biased Hypothesis-Testing Model*, 20 ADVANCES IN EXP. SOC. PSYCH. 297 (1987).

[56] *See* Babcock et al., 1995, *supra* note 41; Simon, et al. *supra* note 52.

"The first lesson of motivated reasoning, whatever its manifestation, is that we humans tend to hold beliefs and reach judgments and conclusions that we desire, and we vastly underappreciate that tendency – particularly in ourselves."[57]

We are especially prone to engage in motivated reasoning when we hold strong opinions on a complex issue. Under these circumstances, we examine relevant evidence in a biased manner, accepting favorable evidence at face value, while critically evaluating and discounting unfavorable evidence.[58] Sometimes we hold strong opinions about judgments involving justice – for example, we read about a heinous crime in the newspaper and feel strongly that the criminal ought to be harshly punished. In our own day-to-day lives, beliefs about justice and motivations to seek just outcomes can influence what we remember. We may adjust memories of past events to maintain a belief that people get what they deserve.[59] For example, people asked to recall the value of a lottery prize remember a smaller amount awarded when the winner was a bad person, compared to a good person.[60] Indeed, biased recall can extend to memories about ourselves as well as others. In one study, people who received a lucky break (a prize awarded by random numbers) were able to later recall more good deeds from their own past than those who had not been lucky.[61] Analogously, when we are prompted to think of ourselves as a bad person, then we tend to think that we had it coming if fate then deals us a bad hand. For example, people who were asked to recall bad deeds from their past were more accepting of their fate later when they were forced to spend 25 minutes on a mind numbing task, compared to people who recalled bad deeds of other people.[62] These studies suggest that we naturally inflate or devalue our conception of our own selves to see our fate as just and fair.

So how does the phenomenon of motivated reasoning relate to judgments of criminal liability? We contend that people harbor a generalized social preference to inculpate people with bad characters.[63] In understanding this initial preference, it is useful to consider Durkheim's account of the social function of crime and punishment. Attaching blame for a crime, according to Durkheim, performs a necessary expressive social function, allowing members of society to affirm and protect collective values. In punishing, says Durkheim, "we are avenging… the outrage to morality."[64] And by blaming and punishing, according to Durkheim, we are effectively differentiating ourselves from members of the society who are

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[57] Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics and Deep Capture*, 152 U. PENN. L. REV. 129, 138 (2003).

[58] Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERS. & SOC. PSYCH. 2098 (1979).

[59] *See also* Babcock, Loewenstein & Issacharoff, *supra* note 41.

[60] Mitchell J. Callan, Aaron C. Kay, Nicolas Davidenko & John H. Ellard, *The Effects of Justice Motivation on Memory for Self- and Other-Relevant Events*, 45 J. EXP. SOC. PSYCH. 614 (2009).

[61] *Id.* Conversely, those who had not received the lucky break were able to recall more bad deeds from their past than those who had received the lucky break.

[62] *Id.* (Experiment 4).

[63] A related claim is that, in assessing blameworthiness, we tend to infer personality traits from behavior. Thus, we reason, if Smith injured Jones, it must be because Smith is a bad person. At the same time, we tend to ignore or give insufficient weight to situational pressures that might have led Smith to injure Jones. Donald Dripps calls this the "Fundamental Retribution Error." *See* Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383 (2003). Our focus in this Article is different: we examine the influence of information about character that is apart from the act itself, including reasons for acting (Experiments 1 and 2), or even information about character that is independent of the act (Experiment 3).

[64] Durkheim, *supra* note 3, at 47.

not appropriately conforming to societal expectations, symbolically separating the 'bad' members of society from the 'good' members of society.[65] Inculpation of the wicked thus serves simultaneously as an expression of the solidarity of honest men and a reaffirmation of the values and expectations of the collectivity.

Durkheim's theory of punishment as a social tool ultimately suggests that we are naturally driven to inculpate and punish a person who we believe is not properly embracing and conforming to our collective moral code. Pairing this innate initial desire with the literature on motivated reasoning, when we are confronted with the complex task to assign blame for an allegedly criminal action within a formal, legal proceeding, we should be motivated to construe the information before us in a way that best allows us to reach our desired conclusion and punish a bad person. This leads to the hypothesis at the heart of the phenomenon that we call motivated inculpation: if a person has any reason to infer that a defendant has a bad moral character, that person will be more likely to construe the defendant's action as criminally culpable. Moreover, although formal legal proceedings try to dissuade character-based judgments by having factfinders focus on discrete elements of the act at issue when assigning blame, the research on motivated reasoning suggests that peoples' initial preference to blame bad actors would likely color the way in which they interpret all elements of the crime. Thus, we hypothesize that when a factfinder judges a harmful action to be performed by 'bad' defendant or performed with a bad motive, the defendant is perceived as more responsible, and the act as more causal and intentional, than when a factfinder judges an identical harmful action conducted by a 'good' defendant.

II. EXPERIMENTS: MORAL CHARACTER AND BLAME

In the experiments we conducted for this Article, we tested the idea that judgments about the underlying elements of criminal liability can be colored by initial inferences about the defendant's moral character, derived from information about the defendant's motive for acting or on character information that is wholly unrelated to the harmful act at issue. Thus, we explore the notion that, just as judges may decide some cases according to their own policy preferences, ordinary people can be motivated to blame a transgressor on the basis of perceived moral character. In the experiments presented here, we focus on situations in which the causal contribution of a transgressor's act is tenuous, and mens rea is weak or absent. By minimizing intentionality and causal connection, we are better able to observe the role of perceived moral character in blame attributions. We hypothesize that the perceived moral character of a transgressor will influence judgments of not only blame and responsibility, but also of mens rea and causality.[66] That is, when observers size someone up as a bad person, they will not only be more likely to blame that bad person for any harm, but they are also more likely to judge the act as more causal and the mental state as more culpable. Below, we summarize the results of three experiments we conducted to test the role of information regarding moral character in blame attributions for criminal offenses. Then we briefly discuss some of the implications of our findings for criminal law doctrines of felony murder, inchoate offense, causation, and the evidentiary admissibility of character evidence.

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[65] *Id.* at 64.

[66] Alicke, *supra* note 29, found that that the driver rushing home to hide the crack vial was perceived as playing a greater causal role in the accident than the driver rushing home to hide the anniversary present.

A. Experiment 1: Frank Brady and the Firefighters

We conducted this preliminary experiment to test the hypothesis that bad moral character influences perceptions of blame, responsibility, causation, and the like, for a bad outcome, holding constant mens rea and actus reus. We recruited a group of adults to answer an online questionnaire in which we presented a brief vignette loosely based on the case of *California v. Brady*.[67] In that case, the defendant was found criminally liable for the death of two firefighters after a trailer, which he used as a methamphetamine lab, exploded. In the vignette, we varied the contents of the trailer (methamphetamines or highly flammable fertilizer), to examine the effect of the defendants' character on subsequent judgments of blame and responsibility.

1. *Participants*

We recruited 205 participants through Amazon's Mechanical Turk web service, which allows assignment of simple tasks to a large population of users online. We paid participants 50 cents for completing the survey, which took about 5 minutes. Participants were assured that their responses would remain anonymous and that identifying information would not be collected. Seventeen participants were excluded because of missing data. Of the remaining, 63% were female, with a mean age of about 37 years. Seventy-nine percent identified themselves as White, 6% as Black, 5% as Hispanic, 5% as Asian Pacific, 2% as South Asian, and 3% as Other. Fifteen percent were full-time students, and 8% were part-time students. Seventy percent were college educated. Ninety-five percent had lived in the U.S. for at least 12 years. For 56% of the sample, their household income was less than $50,000 per year. Politically, 48% identified themselves as liberal or very liberal; 28% identified as moderate, and 25% identified as conservative or very conservative.

2. *Design and materials*

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

Frank Brady lost control of a campfire that he had built on his property and it spread to a trailer he kept on the premises. He used the trailer
[Orchids:] to store highly flammable fertilizers to care for his collection of exotic plants in his orchid greenhouse.
[Meth:] as a methamphetamine laboratory where he used highly flammable chemicals to make illegal drugs.
When the fire made contact with the [chemicals]/[fertilizers] in the trailer, it caused a huge explosion and raged out of control. Four firefighter pilots in helicopters and air tankers were called in to try and put the fire out by dousing it from overhead. During the sixth trip up to douse the fire, one of the pilots approached from the wrong direction and collided with another helicopter. Two pilots were killed in the collision.

Each participant read either the Orchids or the Meth version of the vignette, but not both. After reading the vignette, participants were asked to provide their own personal opinion about Frank Brady and his role in the death of the two pilots: to what extent he is

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[67] California v. Brady, 29 Cal. Rptr. 3d 286 (Ct. App. 2005).

responsible; how negatively he should be judged; how much he is to blame; to what extent he caused the deaths; how intentional were his actions; how foreseeable the deaths were from Frank Brady's perspective; the extent to which he was careless; and how likeable he is. All questions were measured on a scale ranging from 1 (not at all) to 7 (very much). The order of presentation of these questions was random.

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

3. Results[68]

a. *Judgments of Frank Brady*

Participants in the Meth condition judged Frank Brady to be more responsible,[69] blameworthy,[70] and worthy of negative judgment[71] for the death of the two pilots, compared to participants in the Orchids condition, as illustrated in Figure 1. In addition to ultimate judgments about blame and responsibility, other, more basic perceptions varied according to the contents of the trailer. Despite the fact that all participants learned that the fertilizer/drugs were "highly flammable," the participants in the Meth condition perceived Frank Brady's actions to be more of a cause of the pilots' deaths than participants in the Orchids condition,[72] also illustrated in Figure 1.

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[68] All analyses were conducted using Analysis of Variance (ANOVA) unless otherwise noted. An analysis of variance measures for statistical differences between the means of groups whose data are categorical (as opposed to continuous). See William L. Hays, STATISTICS 376-81(5th ed. 1994). Throughout this Article, "significantly" refers to statistical significance, which denotes the rejection of the null hypothesis--the possibility of no differences between the various groups--at a probability level indicated by the p-value reported. Thus, "p" is defined as the probability of finding a difference or relationship between two groups as large as that observed if there were, in fact, no difference or relationship between them. William L. Hays, STATISTICS 267-82 (5th ed. 1994).

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

[70] $F(1, 186) = 68.66$, $p < .001$, $\eta_p^2 = .270$.

[71] $F(1, 185) = 127.43$, $p < .001$, $\eta_p^2 = .408$.

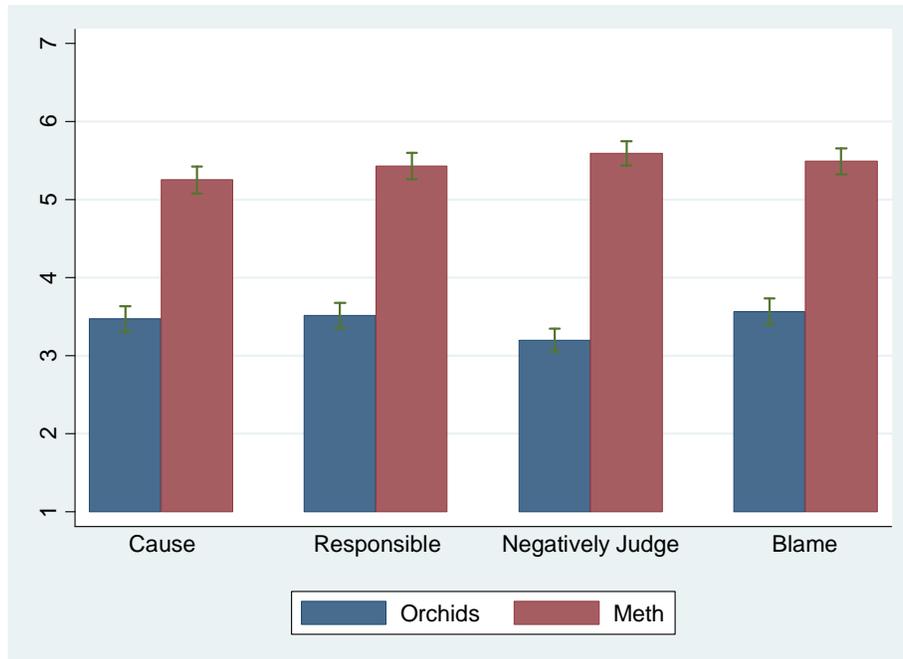[72] $F(1, 186) = 55.32$, $p < .001$, $\eta_p^2 = .229$.

Figure 1. Mean ratings of Frank Brady's role in the death of the two pilots, by moral character condition (1=not at all; 7=very much) (Experiment 1)

Figure 2 illustrates perceptions of Frank Brady's mental state, indicating the perceived controllability of the harm. When compared to participants in the Orchids condition, participants in the Meth condition perceived Frank Brady to be acting more intentionally[73] and carelessly in losing control of the campfire.[74] Participants in the Meth condition also perceived the deaths of the pilots to be more foreseeable.[75] Not surprisingly, participants assigned to the Meth group also perceived Frank Brady as less likeable (M = 1.84) than participants assigned to the Orchids group (M=3.65).[76]

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[73] $F(1, 186) = 25.77$, $p < .001$, $\eta_p^2 = .122$
[74] $F(1, 183) = 7.67$, $p < .01$, $\eta_p^2 = .040$
[75] $F(1, 184) = 5.56$, $p < .05$, $\eta_p^2 = .029$
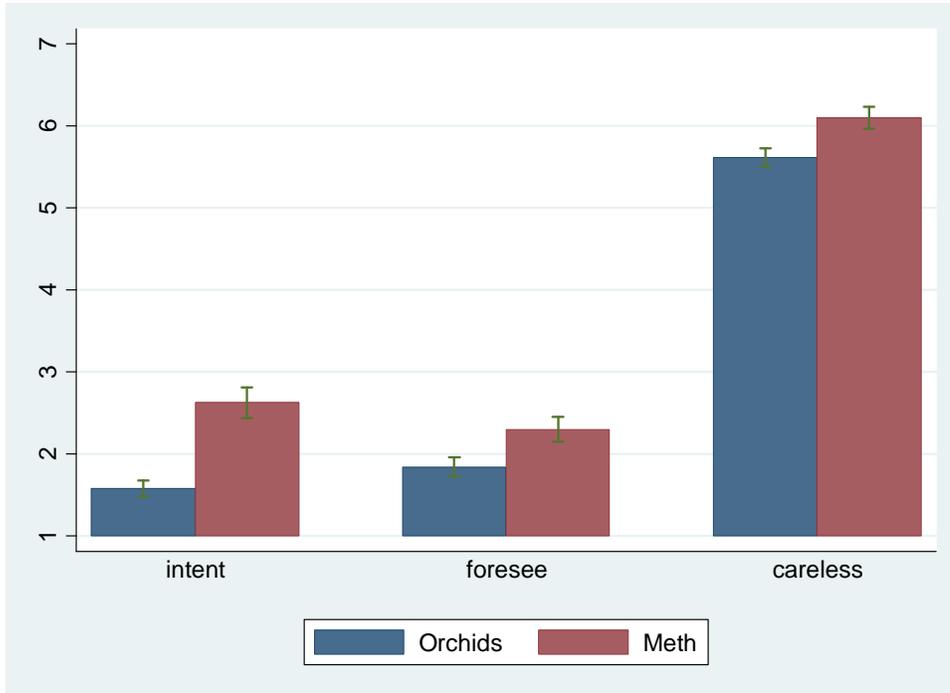[76] $F(1, 184) = 125.08$, $p < .01$, $\eta_p^2 = .405$

Figure 2. Mean ratings of Frank Brady's mental state in the death of the two pilots, by moral character condition (1=not at all; 7=very much) (Experiment 1)

b. *Judgments of the Pilot in Error*

After rating their perceptions of Frank Brady, participants were asked to think about the pilot who flew the wrong way. Interestingly, judgments of the pilot were the mirror image of judgments of Frank Brady, such that in the Meth condition the pilot was judged less harshly than in the Orchids condition.[77] Mean ratings are illustrated in Figure 3.

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[77] Pilot responsible: $F(1, 183) = 13.78$, $p < .01$, $\eta_p^2 = .070$; Pilot negatively judged: $F(1, 186) = 23.28$, $p < .01$, $\eta_p^2 = .111$; Pilot to blame: $F(1, 186) = 19.06$, $p < .01$, $\eta_p^2 = .093$; Pilot the cause: $F(1, 186) = 13.59$, $p < .01$, $\eta_p^2 = .068$
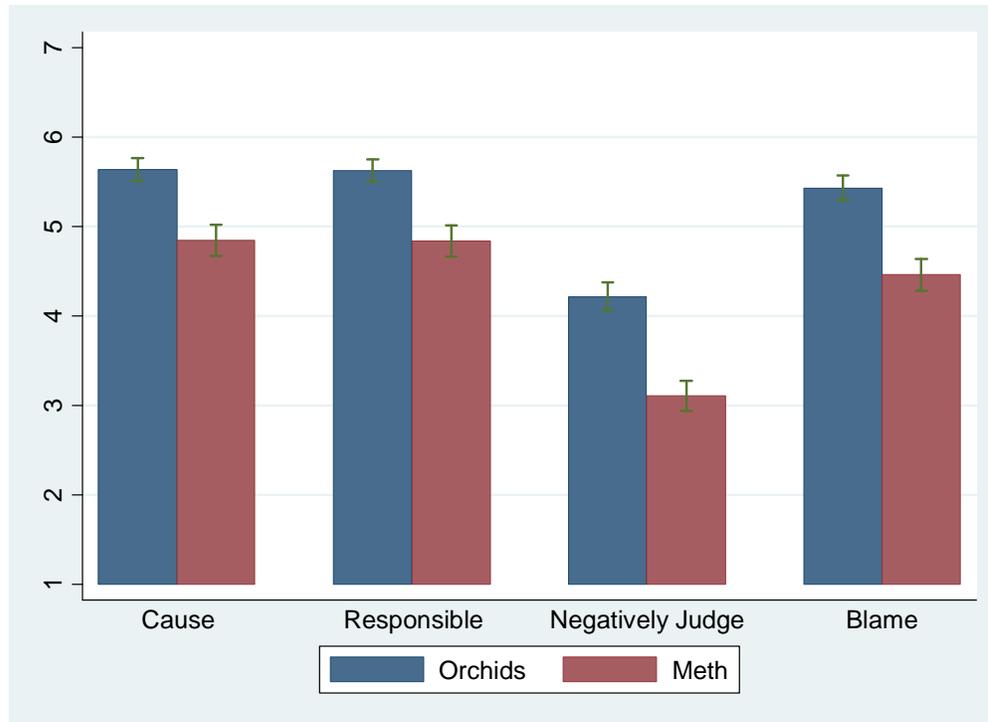
Figure 3. Mean ratings of the pilot who flew the wrong way, by Frank Brady's moral character (1=not at all; 7=very much) (Experiment 1)

The reversed pattern in judgments of the pilot's responsibility suggests that participants are perceiving a sort of conservation of responsibility, in which high responsibility for Frank Brady implies lower responsibility for the pilot in error, and vice versa. To illustrate this, we constructed single measures of perceived responsibility for both Frank Brady and for the pilot. Judgments regarding Frank Brady's responsibility, negative judgment, blame, and share of causation were highly correlated[78] as were those regarding the pilot.[79] Using the mean of these scores for Frank Brady and the pilot, respectively, we constructed a single measure of Frank Brady's responsibility, and a single measure of pilot responsibility. Interestingly, participants in the Meth condition seem to perceive reduced responsibility for the pilot who flew the wrong way, compared to participants in the Orchids condition. This is illustrated in Figure 4.

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[78] Cronbach's alpha = .95. Cronbach's alpha measures the internal consistency of a set of items, and ranges between 0 and 1, with higher numbers indicating higher consistency. See Rick H. Hoyle, et al., RESEARCH METHODS IN SOCIAL RELATIONS 83-84 (7th ed. 2002).
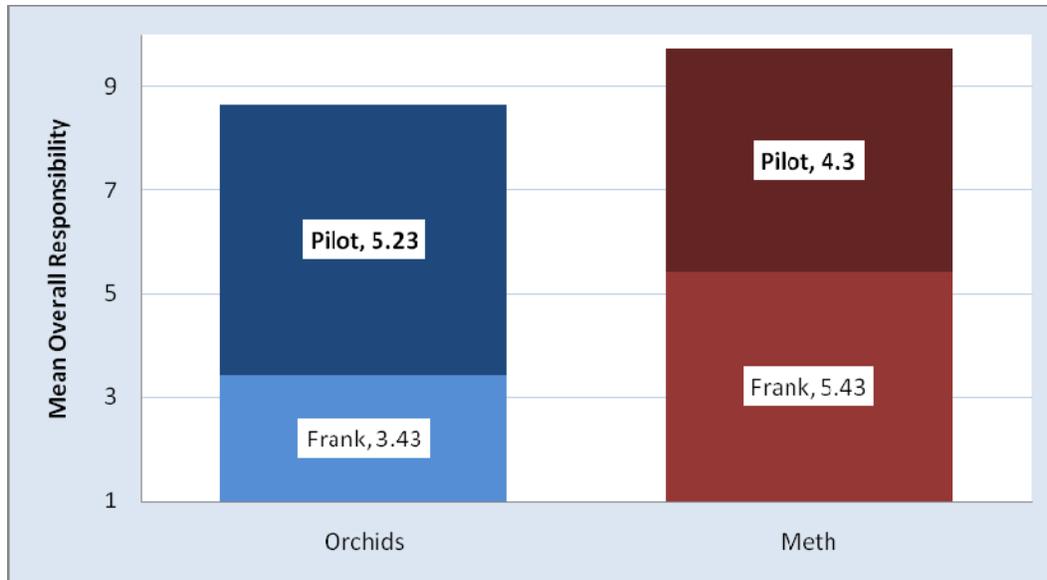
[79] Cronbach's alpha = .90.

Figure 4. Mean perceived relative responsibility for the crash of Frank and of the pilot who flew the wrong way, by moral character condition (Experiment 1)

4. *Discussion*

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

It must be noted, however, that the differences in foreseeability ratings give rise to a possible alternate explanation for the results. Even though both the chemicals for manufacturing the methamphetamine and the chemical fertilizers were both given identical descriptions of dangerousness – namely, "highly flammable" – it might be that participants perceived the methamphetamine chemicals to be more flammable or more dangerous than the fertilizer. Moreover, it might be that participants judged Frank Brady as more likely to anticipate a fire occurring with chemicals for methamphetamine than with chemicals for greenhouse fertilizer. After all, the process of methamphetamine manufacture has a general reputation for dangerousness; greenhouse fertilizers generally do not. To rule out this explanation, we conducted a separate experiment (Experiment 2) also involving the storage of flammable materials, in which we hold constant the material stored.

Another question that arises about the results of this experiment is whether we successfully varied moral character. It stands to reason that a person who is manufacturing an illegal and dangerous drug like methamphetamine is perceived as having a worse moral

character than a person who is engaged in greenhouse gardening. Indeed, the difference in the likeability ratings in the two versions of the story we reported earlier confirms this notion. In the next experiment, we include additional measures designed to more directly measure the perceived moral character of the transgressor.

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

B. *Experiment 2: Sam Norton and the youths*

1. *Participants*

We recruited 195 participants through Amazon's Mechanical Turk web service, which allows assignment of simple tasks to a large population of users online. We paid participants 50 cents for completing the survey, which took less than 5 minutes. Participants were assured that their responses would remain anonymous and that identifying information would not be collected. Demographic characteristics were similar to the sample in Experiment 1.

2. *Design and Materials*

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

Sam Norton used his backyard shed to store oxygen tanks. He knew the tanks posed a fire hazard, but he stored them there because

[Daughter:] his young daughter has serious respiratory disease, and he provides around the clock care for her
[Business:] he has just started his own business providing in-home delivery of healthcare equipment
[Cheating Coach:] he is a high school football coach and administers oxygen to his players even though it provides an unfair advantage and is against the rules

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

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

3. *Results*

We asked three questions to gauge the perceived moral character of Sam Norton.[80] As expected, the Sam Norton who cares for his sick daughter was judged to be more moral in character,[81] more trustworthy,[82] and more of a good person,[83] than Norton the businessman, who in turn was judged more favorably than Norton who cheats at football.

Participants' judgments of the extent to which Sam Norton is responsible,[84] blameworthy,[85] and worthy of negative judgment,[86] for the death of the youth differed significantly across moral character condition, as did his perceived causal role.[87] The differences are in the direction expected, with Norton who takes care of his daughter the least blameworthy and causal, and the Norton who cheats at football the most blameworthy as causal, as illustrated in Figure 5.
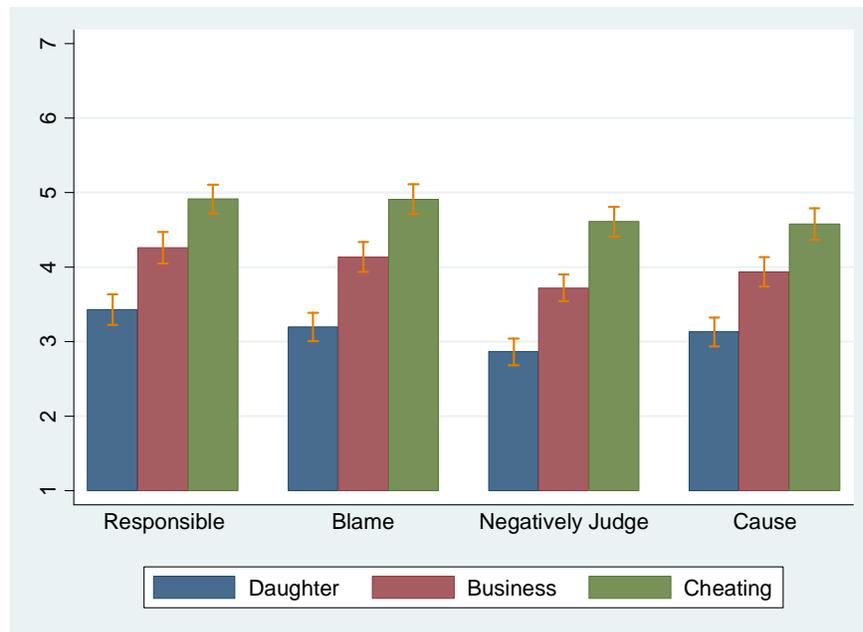

Figure 5. Mean ratings of Sam Norton's role in the death of the youth, by moral character condition (1=not at all; 7=very much) (Experiment 2)

As illustrated in Figure 6, Moral Character also influenced perceptions of intentionality, with Good Character leading to perceptions of lesser intentionality, but no

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[80] In the questionnaire, these questions were asked last, after all of the measures reported below.

[81] $F(2, 192) = 38.60$, $p < .001$, $\eta_p^2 = .287$. Daughter ($M = 4.98$); Business ($M = 4.23$); Cheating ($M = 3.11$).

[82] $F(2, 192) = 37.98$, $p < .001$, $\eta_p^2 = .283$. Daughter ($M = 4.68$); Business ($M = 3.78$); Cheating ($M = 2.81$).

[83] $F(2, 191) = 30.05$, $p < .001$, $\eta_p^2 = .239$. Daughter ($M = 4.90$); Business ($M = 4.17$); Cheating ($M = 3.52$).

[84] $F(2, 192) = 13.12$, $p < .001$, $\eta_p^2 = .120$.

[85] $F(2, 191) = 18.63$, $p < .001$, $\eta_p^2 = .163$.

[86] $F(2, 192) = 21.47$, $p < .001$, $\eta_p^2 = .183$.

[87] $F(2, 191) = 12.84$; $p < .001$, $\eta_p^2 = .119$.

differences between Neutral and Bad Character.[88] There was no observed influence of Moral Character on foreseeability judgments.[89]
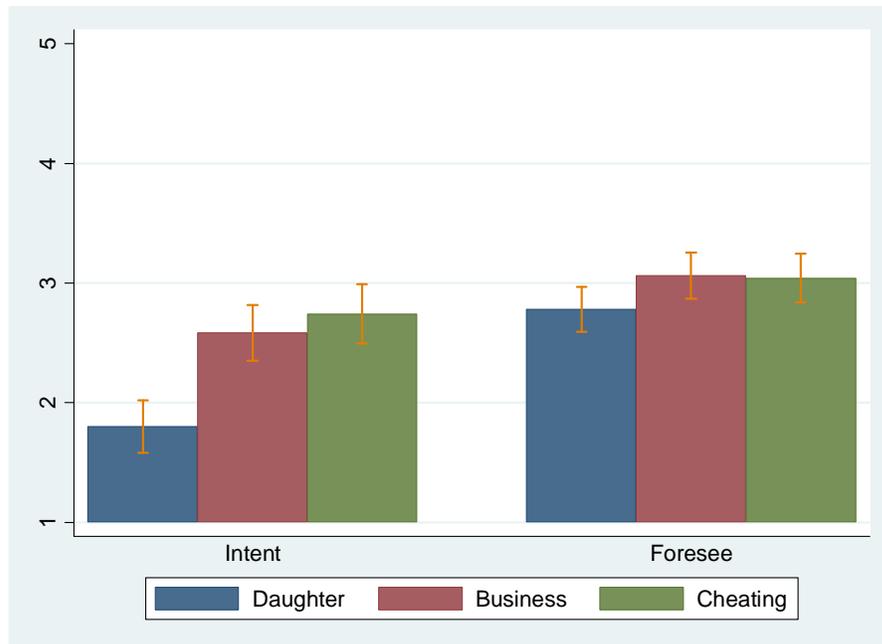

Figure 6. Mean ratings of Sam Norton's mental state in the death of the youth, by moral character condition (1=not at all; 7=very much) (Experiment 2)

4. *Discussion*

In Experiment 2, we replicated the results of the first experiment, while providing more reliable controls for dangerousness of the act, as well as more directly measuring perceived moral character. As in the first experiment, we again found that a transgressor with a bad moral character is perceived as more blameworthy. Additionally, we found that a transgressor with a good moral character (as opposed to neutral) is less blameworthy, so that the moral character effect extends in both negative and positive directions, compared to the neutral midpoint. We again demonstrated that bad moral character gives rise to attributions of controllability, as demonstrated by the effect on perceived intent. It is noteworthy that good moral character had no observed effect on intent.

In demonstrating the role of moral character in the first two experiments, however, we did not separate the effects of motive or reason for acting. That is to say, in the bad moral character condition, the inference about character arose from the transgressor's reason for storing the flammable materials; the same was true for good moral character. When a person disregards a substantial risk, and the nature and purpose of her conduct is not legitimate, the law recognizes such risk taking as the basis for criminal liability.[90] On the other hand, when the disregard of a substantial risk is motivated by a laudatory purpose, the law might

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[88] $F(2, 192) = 4.40$, $p < .05$, $\eta_p^2 = .044$.
[89] $F(2, 191) = 0.62$, $p = .54$.
[90] See MPC 2.02(2)(c).

recognize the nature of the risk, as well as its disregard, as being legitimate and therefore insufficient to form the basis of criminal liability. Thus, Experiment 2 fails to distinguish the influence of moral character from the influence of motive or reason for disregarding a risk. The law does not consider moral character, standing alone, to form the basis for criminal liability; the law does, however, consider the nature and purpose of a person's conduct when that person disregards a risk. To begin to try to tease these apart, the next experiment attempts to separate moral character from the nature and purpose of the conduct that led to harm.

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

The previous experiments varied perceived moral character through a manipulation of the actor's purpose for creating the hazardous condition. In Experiment 3, we sought to make the source of moral character more remote from the hazardous condition that was created. Additionally, we tested a second independent variable along with moral character. In this experiment we varied the extent to which the transgressor was aware that harm was likely. We hypothesized that offenders who were aware of and disregarded a risk of harm are perceived as more responsible and blameworthy than offenders who are not aware of risk – this prediction follows directly from criminal law theory. We also predicted that bad moral character can serve as a kind of proxy for awareness of risk, so that even when there is reason to believe a transgressor was unaware of a risk, she will be blamed as if she were aware if she is perceived to be a generally bad person.

1. Participants

We recruited 203 participants through Amazon's Mechanical Turk web service, which allows assignment of simple tasks to a large population of users online. We paid participants $1 for completing the survey, which took about 5 minutes to complete. Participants were assured that their responses would remain anonymous and that identifying information would not be collected. A number of respondents failed to correctly respond to an instructional manipulation check[91] and were thus excluded, leaving a final sample size of 182 participants. Demographic characteristics were similar to the sample in Experiment 1.

2. Design and Materials

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

[Good Character] Sara Davidson is a 39 year old woman who lives in a house with her two dogs. Sara has two young nieces whom she adores and sees often. She spoils them with birthday

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[91] See Daniel M. Oppenheimer, Tom Meyvis & Nicolas Davidenko, *Instructional manipulation checks: Detecting satisficing to increase statistical power*, 45 J. OF EXPERIMENTAL SOCIAL PSYCHOLOGY 867-872 (2009). In our experiment, we asked "According to the story, to what extent did Sara Davidson realize that her dogs were not well behaved?" and asked respondents to choose one of two options: "Sara was NOT really aware of this" or "Sara was aware of this."

presents and special outings. Sara spends much of her free time volunteering for various local charities. She tries to maintain a healthy lifestyle by eating well and exercising. She has many close friends and an active social life.

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

Sara's dogs are not well behaved [and she is/ but she is not really] aware of this. They are in a fenced yard, but they sometimes escape and roam the neighborhood. On one occasion the dogs escaped and cornered two children, barking and growling. The children were unable to escape until a neighbor ran outside with a baseball bat and chased the dogs away. Even when fenced in the yard, the dogs growl and act aggressively toward people walking on the sidewalk.
One morning while Sara was asleep, her dogs escaped and terrorized a neighbor who had just opened his garage door to leave for work. They circled the man's truck and the man jumped in the truck to escape. His wife heard the yelling and chased them off by startling them with the noise of the automatic garage door.

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

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

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

3. *Results*[92]

Responses to the three variables just described, which were used to check whether we successfully manipulated Sara Davidson's perceived moral character, were all highly correlated, so we combined these three items to form a single measure of Moral Character (1:not at all; 7:very much).[93] As expected, Sara Davidson's moral character depended on whether she was described as sociable, generous, and healthy (in the good character

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[92] ANOVA was used for analyses, unless otherwise noted.
[93] Cronbach's alpha = .92.

condition) or nonsociable and unhealthy on the other (in the bad character condition).[94] This provides evidence that we successfully manipulated perceived moral character.[95]

In this study, we manipulated moral character, as well as awareness of the risk of harm. We first examined the effect of moral character and of awareness on judgments of the extent to which Sara Davidson is responsible for the boy's death, is worthy of negative judgment for the boy's death, and is blameworthy for the boy's death. These responses were highly correlated, so we combined them into a single measure of Overall Responsibility.[96] The means are illustrated in Figure 7. Sara Davidson was perceived as having more Overall Responsibility for the boy's death if her character was bad than if it was good;[97] and possibly if she was aware than if unaware.[98] As is apparent from Figure 7, Unaware Sara is treated as if she was aware of the risk if her moral character is bad, but is assigned noticeably less overall responsibility if her moral character is good.

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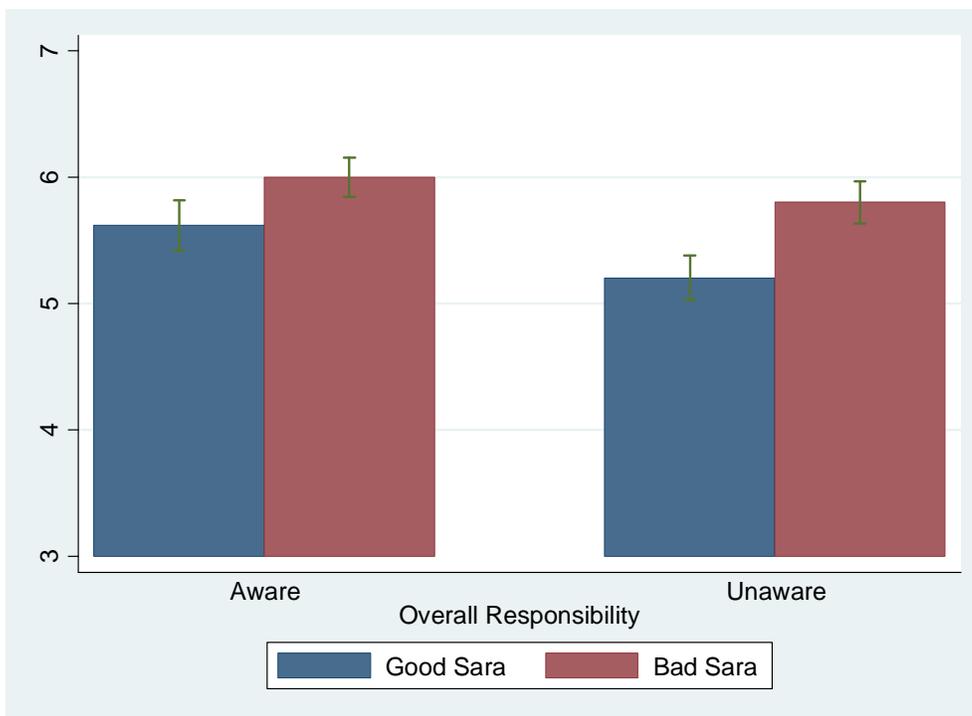
[94] F(1, 181) = 152.01, p < .001, η_p^2 =.458; Mean (Good Character) = 4.40; Mean (Bad Character) = 2.61.

[95] Note that we manipulated moral character, in part, by manipulating the food and exercise choices of the target person (Sara). There is some empirical evidence that eating specific types of foods (i.e., healthy v. unhealthy) gives rise to moral judgments about the eater. *See, e.g.*, Richard I. Stein & Carol J. Nemeroff, *Moral Overtones of Food: Judgments of Others Based on What They Eat*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 480 (1990). Our manipulation check results (i.e., that Sara was seen as less moral based partly on food choices and exercise, is consistent with this evidence. *See also,* Adam Benforado, Jon Hanson & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1777 n. 467 ("…don't run off and file a lawsuit if you are fat…. Look in the mirror because you're the one to blame" (quoting Congressman F. James Sensenbrenner, regarding the Personal Responsibility in Food Consumption Act)).

[96] Cronbach's alpha = .92.

[97] F(1, 181) = 10.77; p < .01; η_p^2 =.040.

[98] This difference was only marginally statistically significant. F(1, 181) = 4.32; p = .08; η_p^2 =.016. The interaction between moral character and awareness of risk was not statistically significant. F(1, 181) < 1.

Figure 7. Mean ratings of Sara Davidson's overall responsibility in the death of the boy, by moral character and awareness (1=not at all; 7=very much) (Experiment 3)

Judgments of causation varied according to Sara Davidson's awareness of risk,[99] and possibly also by moral character,[100] as illustrated in Figure 8. Awareness of risk played a clear role in judgments of causation; in addition, the Unaware Sara Davidson was perceived to have a lessened causal role if her moral character was good.
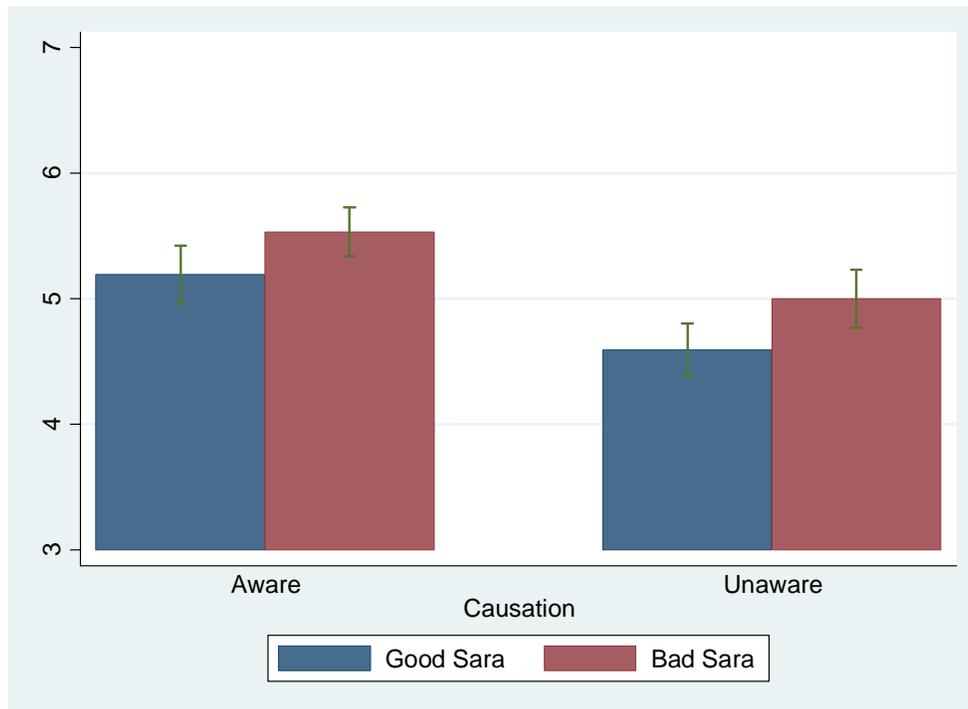

Figure 8. Extent to which Sara Davidson was perceived to have caused the boy's death (1=not at all; 7=very much) (Experiment 3).

Participants were asked about the extent to which the boy's death was intentional, and was foreseeable. Sara Davidson's role in the boy's death was perceived as more intentional if Sara's character was bad,[101] and if she was aware of the risk.[102] These main effects were qualified by an interaction,[103] illustrated in Figure 9. Sara Davidson with both bad character and awareness of risk was perceived as having acted intentionally, whereas lack of awareness or good character did not give rise to an inference of intentionality in the death of the boy. Finally, perceived foreseeability of the boy's death varied, not surprisingly, by whether Sara Davidson was aware of the risk.[104] There was no observed effect of moral character on perceptions of foreseeability, and no interaction between moral character and foreseeability.

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[99] $F(1, 181) = 6.83$; $p < .01$; $\eta_p^2 = .036$.

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

[101] $F(1, 181) = 19.74$; $p < .001$; $\eta_p^2 = .091$.

[102] $F(1, 181) = 16.75$; $p < .001$; $\eta_p^2 = .077$.

[103] $F(1, 181) = 3.99$; $p < .05$; $\eta_p^2 = .018$.

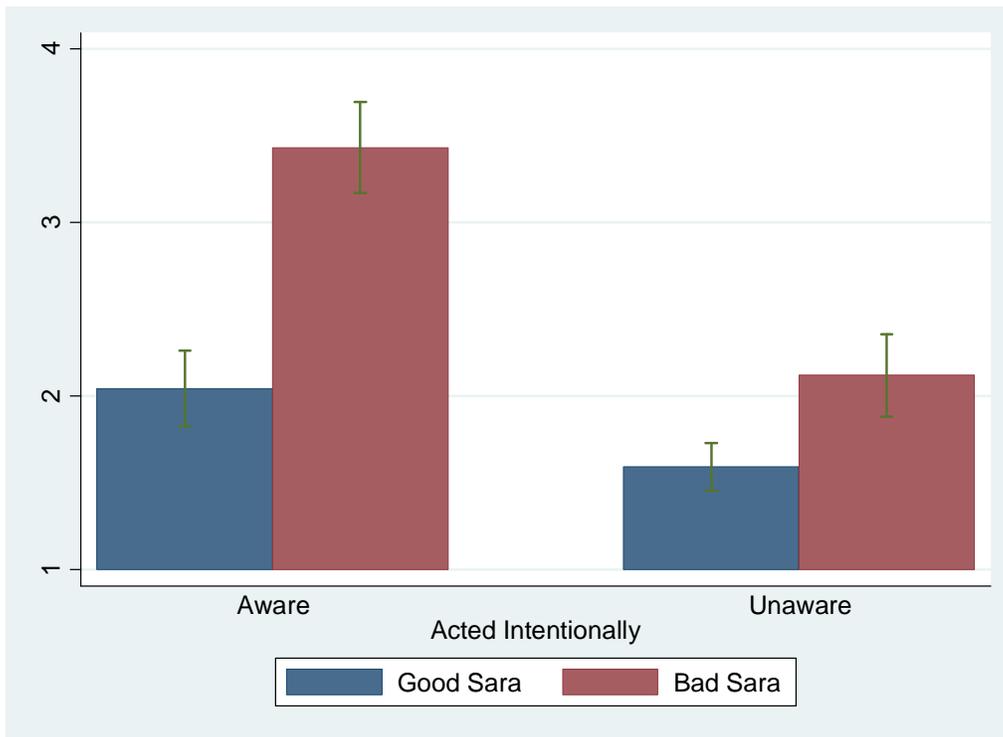[104] $F(1, 181) = 34.70$; $p < .001$; $\eta_p^2 = .162$.

Figure 9. Extent to which Sara Davidson was perceived to have acted intentionally toward the boy's death (1=not at all; 7=very much) (Experiment 3).

4. *Discussion*

In this third experiment, we attempted to more cleanly separate motive from character. In Experiment 1, the chemicals for manufacturing methamphetamine signaled Frank Brady's bad moral character, but the chemicals also were his reason for creating the hazardous situation that started the fire and led to the pilots' deaths. In Experiment 2, Sam Norton's motive for storing the flammable oxygen signaled his moral character (bad, neutral, or good), but it was also the reason that created the hazardous situation that led to the explosion and the death. In Experiment 3, Sara Davidson's traits of generosity, sociability, and even physical fitness, signaled her moral character. The hazardous situation she created was separate from the moral character signal. Thus, unlike in the first two experiments, Sara's motive for creating the hazardous situation was independent from the earlier source for inferring moral character. Under these facts, the criminal law would permit an inference of liability based on the hazardous situation Sara created, but not based on her personality or lifestyle. Yet, participants viewed the boy's death differently, depending on whether Sara was the type of person who ignores her nieces, sits alone watching trash tv and eating junk food on the one hand, or who spoils her nieces, volunteers, exercises, and watches her diet, on the other. Compared to "good" Sara, "bad" Sara was perceived not only as more responsible overall for the boy's death. In accordance with criminal law theory, being aware of the risk that the dogs posed to people led to greater inferences about responsibility. Interestingly, the effects of bad

character are comparable to the effects of awareness: in this way, having a bad character is akin to being reckless to the extent that bad character gives rise to inferences about blame and responsibility, as well as causation. The intentionality data suggest that bad character motivates unfavorable inferences regarding mental state. Here, failure to safeguard unruly dogs was perceived as an intent to kill when the dog owner was not only aware of the risk but also a bad person.

In this set of experiments, we have demonstrated empirically that perceptions of moral character sometimes influence judgments of blameworthiness. Aside from empirically demonstrating that moral character can in fact influence blame judgments, this set of studies makes several other contributions to the literature on blame and character. First, we replicate and extend Mark Alicke's culpable control model[105] – we demonstrated that negative blame judgments arise not only because of bad reasons for acting (Experiments 1 and 2), but also because of bad moral character that is signaled independently from reasons for acting (Experiment 3). Alicke argued that bad reasons for acting lead to greater perceptions of control and more extreme judgments about blame.[106] Extending this model, we show additionally that bad character (apart from reasons for acting) influences control inferences (such as causation, intent, and foreseeability) and blame judgments. We suggest that this tendency is rooted in more general theories about motivated reasoning. Specifically, people are generally motivated to inculpate a defendant who they see as "bad" and this initial motivation leads them to interpret the defendant's transgression in a way that makes it more legally blameworthy. Our results are consistent with the notion that bad moral character prompts inference to a desired conclusion, namely, increased blame. Judgments about greater causal influence and intent are also increased to justify the blame conclusion, which is likely to follow quickly and intuitively from the information about the severity of the harm and the moral character of the actor.

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

III. IMPLICATIONS FOR LEGAL DOCTRINE

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

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[105] Alicke, *supra* note 29.
[106] *Id.*

implications of our finding for felony murder, evidentiary issues in sexual assault, criminal statutory interpretation, and causation.

A. Motive and Felony Murder

In the first two experiments reported, bad motive was associated with more severe judgments of blame and responsibility, compared to good motive. These findings mapping intuitive notions of blame correspond well with modern definitions of mens rea. The general hierarchy of mens rea[107] corresponds to strongly held intuitions. The criminal law categorizes intentional killings, for example, as more serious than reckless killings, which are in turn more serious than negligent killings. Likewise, outside of a legal context we are more inclined psychologically to blame (or inclined to blame more harshly) when a transgressor acted intentionally, as opposed to recklessly or negligently.[108] This hierarchy is so deeply ingrained that even young children invoke it to mitigate their own responsibility for harm.[109]

Historical conceptions of mens rea required finding an evil purpose in order to impose liability – terms like "vicious will," "wickedness," and "malevolence" were common occurrences in judicial opinions. One prominent manifestation of this idea is traditional felony murder doctrine, in which unforeseen deaths are treated as murder. The basis for this treatment is the malice that is implicit in the underlying felony. The implication underlying the doctrine is that in committing the felony, the defendant acted with an evil mind or evil purpose, so that in doing a bad act the felon has no standing to complain about being punished for the harmful consequences. This historical conception of mens rea as malice or bad motive is consistent with the results from the first two experiments, showing that bad motive is sufficient, in some circumstances, to justify blame for the harmful consequence, even if that consequence is unanticipated.

Accordingly, public support for the felony murder rule may stem from the intuition that anyone committing a felony is by definition acting with an evil motive, which in itself justifies liability for ensuing harm, even an unforeseen death. By contrast, an innocent person involved in an innocent activity that leads to a death is usually deemed as simply being involved in an accident. But that accident becomes criminally blameworthy when the person involved is engaged in a morally blameworthy activity.[110] Felony murder, therefore, is designed to protect society from people acting for bad reasons – those who are engaging in dangerous felonies that demonstrate a willingness to harm others. A defendant who can demonstrate that he was really acting for good reasons, but got caught up in producing a dangerous situation is much less likely to be found blameworthy.

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[107] i.e., purposely (intentionally), knowingly, recklessly, negligently. These are referred to as "culpability levels," in Model Penal Code terminology.

[108] Lawrence M. Solan & John M. Darley, *Causation, Contribution, and Legal Liability: An Empirical Study*, 64 L. & CONTEMP. PROBS. 265 (2001); John M. Darley et al., *Doing Wrong Without Creating Harm*, 7 J. EMP. LEGAL STUD. 30 (2010). Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment,*83 J. PERSONALITY & SOC. PSYCHOL. 284 (2002).

[109] E.g., "But I didn't mean to!"

[110] *See* James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429 (1994).

Conversely, absence of evil motive often motivates recognition of various defenses in criminal law.[111] Most notably, duress is based on the notion that punishment is unjustly imposed on those who acted out of fear for themselves or their loved ones, rather than because of any evil motivation. Similarly, self-defense is permitted as a defense to liability when a defendant can show that he harmed another to avoid harm to himself, rather than for a reason reflecting an evil motive.

B. Moral Character and Implicit Mental State Requirements

Aspects of motive commonly come into play as necessary to understand a defendant's mental state, especially where mental state requirements use normatively-valenced descriptors like "vicious will," "wickedness," and "malevolence." But, although these terms might indicate an implicit requirement of bad motive, they might also indicate an implicit judgment of bad moral character.[112] Historically, certain crimes involved acts that were viewed as so inherently wrongful that mens rea was essentially self proving, because any person who would do such an act was assumed to have acted with a bad intent. Thus, for example, if I intentionally shoot a gun at someone and they are killed by my bullet, my malicious intent is implicit in my decision to shoot at them. I cannot make a viable claim that it was my intent only to injure them, so that their death was only negligent.

There is reason to think that the U.S. Supreme Court has implicitly held onto this distinction. In cases where the defendant might plausibly offer a version of events where he was a good guy who got caught up in a bad situation, the Court is more demanding of the government and will more readily read in a specific mens rea requirement, even when it does not appear in the statute being applied. Professor Joseph E. Kennedy has argued that this explains the U.S. Supreme Court's decision in *Staples v. US*, in which the Court read a knowledge requirement into a statute criminalizing conduct that could arguably be innocent.[113] On the other hand, when the crime involves an inherently wrongful actus reus (e.g., robbery) the Court is hesitant to impose a mental state requirement when it does not explicitly appear in the statute.[114] "In this sense, only those of good character need apply for relief under *Staples*."[115]

C. Moral Character in Evidence

Our experiments also have particularly potent practical implications for the treatment of character evidence in criminal trials. Our findings highlight the highly influential potential

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[111] *See* Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present,* 1993 UTAH L. REV. 635, 641-667.

[112] 511 U.S. 60 (1994). The criminal action at question in this case was for the possession of a weapon capable of automatically firing. The defendant Staples did not dispute his possession of the weapon, but rather claimed that he was unaware of the weapon's ability to fire automatically. For a discussion of the role of character in this case, see Joseph E. Kennedy, *The Story of* Staples v. United States *and the Innocent Machine Gun Owner: The Good, the Bad, and the Dangerous* (April 26, 2010). UNC Legal Studies Research Paper No. 1596222. Available at SSRN: http://ssrn.com/abstract=1596222; SAMUEL H. PILLSBURY, HOW CRIMINAL LAW WORKS: A CONCEPTUAL AND PRACTICAL GUIDE 84 (2009). ("The language was that of character judgment, and courts assumed that in judging the criminal conduct they were making character assessments as well.")

[113] *See* Kennedy, *supra*.

[114] *Id.* at 35-36

[115] *Id.*

of evidence of bad character, even when it is only tangentially related to the crime at hand. Our results provide further substantiation of the concerns expressed by the judges that first crafted and applied the common law ban on character evidence.[116] These findings are also consistent with other empirical work suggesting that the likelihood of conviction increases if prior crimes are admitted into evidence.[117]

Restrictions on character evidence are primarily targeted at evidence meant to prove the defendant's probability of conforming to a bad moral character.[118] However, several exceptions to this general rule exist. For example, Congress and several states allow evidence of any past sexual transgressions to be admitted in cases involving child molestation and sexual assault.[119] A few states allow the presentation of propensity evidence in cases involving domestic abuse.[120] Also, if a defendant chooses to participate as a witness, the Federal Rules of Evidence allow the prosecutor to present character evidence in the form of "[o]pinion and reputation evidence" that impugns the credibility of the witnesses.[121] And, as discussed above, some character evidence can be introduced as motive in order to prove mens rea. Although the Federal Rules of Evidence expressly classify evidence relating to motive as "non-character,"[122] juries are likely to extrapolate information about character from evidence about a person's priorities, choices, and motivations.[123] Thus, "what we regulate as 'character evidence' is only a small part of the evidence and arguments that lawyers use to develop competing versions of the characters… in the events that are subject to litigation."[124] Despite procedural efforts to control the influence of character evidence in criminal trials, therefore, the competing narratives that prosecutors and defense attorneys use in criminal

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

[117] *See, e.g.,* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1357, 1380–85 (2009) (finding a significant association between the jury's learning of a criminal record and conviction in cases with weak evidence).

[118] *See* Normal Krivosha, Thomas Lansworth & Pennie Pirsch, *Relevancy: The Necessary Element in Using Evidence of Other Crimes, Wrongs, or Bad Acts to Convict,* 60 NEB. L. REV. 657, 664 (1981) (tracing the roots of the common law ban on character evidence to the 1810 case of Rex v. Cole); FED. R. EVID. 413-14 ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion…."). *See also* Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 989 (1938); KENNETH S. BROUN, MCCORMICK ON EVIDENCE §186, at 311 (6th e.d. 2006); Sherry F. Colb, *"Whodunit" Versus "What was Done": When to Admit Character Evidence in Criminal Cases*, 79 N.C. L. REV. 939, 941 (2001).

[119] FED. R. EVID. 413-415. *See also* Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases,* 21 AM. J. CRIM. L.127, 159 (1993).

[120] *See* Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women,* 36 IND. L. REV. 687, 700-02, n. 44 (2003).

[121] FED. R. EVID. 608(a).

[122] FED. R. EVID. 409(b).

[123] *See, e.g.*, Peter Tillers, *What is Wrong with Character Evidence?*, 49 HASTINGS L.J. 781, 810, 825 (suggesting that a connection exists between motive and character insofar as "[h]uman creatures have an internal system of rules, principles, or operations that regulates or organizes their behavior.… [and] it is logically permissible to suppose that 'character' is 'caused' by matters such as 'choice' and 'decision'); Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 754-55.

[124] Samuel R. Gross, *Make-Believe: The Rules Excluding Evidence of Character and Liability Insurance,* 49 HASTINGS L. J. 843, 845-46 (1998).

cases are largely concerned with conveying a distinct impression of the character of the parties involved in the case.[125] Thus, characterizations about the moral character of the parties continue to enter trials in various ways.[126]

D. Moral Character and Proximate Cause

One distinctive feature of the vignettes tested in these experiments is they all involved a force that intervened between the actors' initial action and the harm. For Frank Brady, a negligent pilot flew in the wrong direction; for Sam Norton, a youth tossed a burning cigarette butt onto dry leaves; for Sara Davidson, her dogs attacked the boy. These types of situations raise the issue of proximate cause, a doctrine that helps sort those causes that are blameworthy from those that are too remote.[127] As a doctrine, proximate cause is notorious for its lack of specific standards to guide outcomes; instead, the analysis is based heavily on fairness considerations. Yet, a cursory look at familiar criminal law proximate cause cases is revealing when viewed through the lens of moral character and motive, rather than more traditional notions of remoteness and foreseeability. For example, in a case where the defendants robbed the victim and left him passed out drunk on the side of a dark rural highway, the court found that the robbers proximately caused the victim's death after he was run over by a passing car.[128] In another case, the defendant led police on a dangerous 48-mile high speed chase, resulting in the death of a police helicopter pilot; the appellate court upheld the finding of proximate cause.[129] But where the defendant had participated in a drag race where both cars crashed through a guardrail, leading to the death of the other participant, the appellate court reversed the conviction on proximate cause grounds.[130] Arguably, these results fit within the pattern found in the experiments: the worse the moral character of the defendant, the more likely we are to hold him liable. Admittedly, this is an extremely small, non-randomly selected sample of proximate cause cases. Note, however, that causation was one of the attributes rated by the participants in the experiments: in both experiments, bad moral character led to higher ratings of causation. Thus, it may be that proximate cause judgments follow on the heels of intuitive judgments about blame.

IV. CONCLUSION AND LIMITATIONS

In these experimental studies, we demonstrated that a transgressor's motive for acting can influence judgments of blame, responsibility, causation, and intention. We also showed that perceptions of a transgressor's moral character can influence judgments of blame, responsibility, causation, and intention. We certainly do not claim, however, that motive and

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[125] *See* Richard A. Posner, *Legal Narratology,* 64 U. CHI. L. REV. 737, 738 (1997) (characterizing trials as competitions between stories, where "[p]laintiff and defendant in a trial each tell a story… and the jury chooses the story that it likes better"); Jim M. Perdue, *Winning with Stories*, 69 TEX. B.J. 894, 990 (2006) (arguing that "[a] trial story is all about character."); Kenworthey Bilz, *We Don't Want to Hear It: Psychology, Literature and the Narrative Model of Judging*, 2010 U. ILL. L. REV. 429.

[126] For a discussion of the myriad ways in which character evidence leaks into criminal cases despite its prohibition, see, e.g., Tillers, *supra* note 123; Park, *supra* note 123.

[127] Welch v. State, 235 So.2d 906 (1970) ("Mankind might still be in Eden, but for Adam's biting an apple.").

[128] Kibbe v. Henderson, 534 F.2d 493 (1976).

[129] People v. Acosta, 284 Cal. Rptr. 117 (1991).

[130] Velasquez v. State, 561 So.2d 347 (1990).

moral character always exert influence on blame related judgments. The influence of motive and moral character is subject to limitations, and we have not yet explored the contours of these boundary conditions. One likely limitation on the relationship between motive and moral character on the one hand, and blame related judgments on the other, is intentionality. Note that the harm in each of the three experiments reported here was caused unintentionally: Frank Brady stored flammable chemicals which led to the unintentional death of a firefighter; Sam Norton stored oxygen which led to the unintentional death of the youth; Sara Davidson kept unruly and dangerous dogs which led to the death of a child that she in no way intended. These narrow circumstances of recklessly or negligently caused deaths contain features that tip the blaming process toward consideration of motive and moral character. We will discuss a few of them here.

First, when the harm of a transgression is severe, as is the case when a victim dies, our drive to blame kicks into high gear.[131] More severe harm results not only in more severe judgments of punishment, but also a greater likelihood of finding that the actor is responsible for the consequences of their harmful action.[132] For example, when people read a story about a bank robber whose bullet misses the teller but ricochets and hits a customer, they are likely to judge the robber as more responsible, more reckless, and his action more causal, when the injury is severe as opposed to mild.[133] A harm-based version of retributivism can explain why punishment should increase with severity of harm. That liability judgments should become more likely with severity of harm is more puzzling, but nonetheless consonant with the notion that we generally treat more severe harm more harshly.[134] Thus, in our three experiments, perceivers were highly motivated to blame, and as a result, were especially motivated to search for information that could justify this impulse. Bad motive and bad character might have fit this need.

Second, none of the trangressors in our experiments acted intentionally in causing harm. When mental state is ambiguous, it can be difficult to gauge the blameworthiness of the actor. When a wrongdoer kills another person intentionally, we know to assign a great deal of blame, and the wrongdoer's moral character would likely have minimal influence on blame perceptions. Note here that we are discussing judgments of blame and responsibility, rather than punishment judgments.[135] A cold-blooded killer who is perceived as having a

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[131] *See* Jennifer K. Robbennolt, *Outcome Severity and Judgments of "Responsibility": A Meta-Analytic Review*, J. APP. SOC. PSYCH. 2575 (2000); Solan & Darley, *supra* note 108.

[132] *Id. But see* Loran F. Nordgren and Mary-Hunter Morris McDonnell, *The Scope-Severity Paradox: Why Doing More Harm is Judged to be Less Harmful*, 2 SOC. PSYCHOL. & PERSONALITY SCI. 97 (finding an inverse correlation between harm to victims and punishment in cases where there is more than one victim and the victims are not readily identifiable).

[133] *See* Chimaeze D. Ugwuegbu & Clyde Hendrick, *Personal Causality and Attributions of Responsibility*, 2 SOC. BEHAV. & PERSONALITY 76 (1974). Related to this, observers are sometimes more likely to blame the defendant depending on the physical attractiveness, race, or gender of the victim. *See* Norbert L. Kerr, *Beautiful and Blameless: Effects of Victim Attractiveness and Responsibility on Mock Jurors' Verdicts* 4 PERSONALITY & SOC. PSYCHOL. BULL. 479 (1978); Edward L. Glaeser & Bruce Sacerdote, *Sentencing in Homicide Cases and the Role of Vengeance,* 32 J. LEGAL STUD. 363 (2003).

[134] *See* Robbennolt, *supra* note 131. When no immediate injury occurs but the potential exists for future harm (such as increased risk of stroke in the future), people do not award full compensation, but many prefer to reserve the right to compensate should the injury materialize (via an escrow mechanism). *See* Darley et al., *supra* note 108.

[135] *See* Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?* 88 B.U.L. Rev. 1109 (2008)(exploring reasons why criminal sentencing takes bad but not good acts into account).

good character might receive less punishment than if his character is perceived as bad; but judgments of responsibility and blame for the killing might not reflect any difference in moral character.[136]

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

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

The twin notions of guilt and blame give rise, perhaps surprisingly, to an important distinction. The propensity studies discussed in the beginning of this Article suggest that learning about a criminal defendant's prior crimes can increase the likelihood of a guilty verdict in the current case. These findings are subject to certain limitations. For example, if the prior crime is very dissimilar, or is not serious, the influence of the propensity information on verdict diminishes or disappears. Likewise, the influence of propensity information on initial individual juror preferences can dissipate when jurors deliberate and reach a group verdict.[137] Taken as a whole, the focus of this body of research is different, and also more specific, than our aim in the experiments we discuss in this Article. Whereas the propensity studies focus on the influence of prior crimes, our focus is on the influence of two constructs that are broader in scope: moral character and motive. It may well be the case that prior crimes serve as a proxy for moral character information, so that prior crimes is simply a subset of the set of information that gives rise to inferences about moral character. It might alternatively be the case that the influence of prior crimes also works through a slightly different mechanism that draws more on processes of analogical reasoning than does the influence of moral character. Recall that the seriousness of prior crime is not the only dimension along which the influence of prior crimes varies; similarity of prior crime might well be an influence that operates independently of seriousness. Although the seriousness of prior crime could logically be interpreted as a proxy for moral character, this is unlikely to be the case with regard to crime similarity, as an independent dimension.

The important point in this Article is that the focus of the experiments reported here is quite different than the focus of the earlier research on prior crimes as propensity evidence. In addition, the objects of influence are different in our research as well. The earlier propensity evidence studies focused almost exclusively on judgments of guilt – either in the

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[136] *See* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 368-372 (1996).

[137] *See* Clary & Shaffer, *supra* note 25.

form of individual mock juror judgments, or verdicts of mock juries. In the current experiments, by contrast, we are interested not specifically in guilt judgments or punishment, but rather in basic psychological processes of blame and responsibility. These basic processes play a key role in verdicts, to be sure. But their importance goes beyond modeling jury behavior. Intuitive judgments of blame and responsibility are made very quickly, and probably automatically, as the perceiver first processes the story about the transgression.[138] Our initial inclinations about whether to categorize the person that we are judging as "good" or "bad" can motivate us to blame or exculpate them. This initial motivation, in turn, can influence our interpretation of the person's actions in a way that allows us to excuse their responsibility or find them blameworthy for the harm they caused. These quick, initial, intuitive blame judgments are also likely to play a key role in how potential litigants perceive a harm-relevant event, how parties approach dispute resolution processes, and outside of the legal system, how ordinary people interact when faced with a perceived wrong. But, as demonstrated by our studies in this Article, motivated inculpation can also enter into the criminal context, where law has tried -- through the imposition of formalized processes -- to separate liability from character-based inferences. Even here, when all other aspects of the harm caused by an action and the situation in which it occurred are held constant, the actor's perceived moral character or bad reasons for acting can color the way that we determine discrete components of criminal liability like knowledge, mental state, and forseeability.

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[138] Jonathan Haidt & Selin Kesebir, *Morality*. In S. Fiske, D. Gilbert, & G. Lindzey (Eds.), HANDBOOK OF SOCIAL PSYCHOLOGY, 5th Ed., 797-832 (2010).