

Beyond Belief: Rethinking the Role of Belief in the Assessment of Culpability

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I. INTRODUCTION

The relationship between a criminal defendant's mistaken factual beliefs and the various Model-Penal-Code-derived culpable mental states has long been thought to be confusing but essentially unproblematic. The confusion, it is said, arises from the courts' unfortunate practice of "dealing with such mistakes as a matter of defense."¹ If the courts were to abandon this practice and treat the defendant's mistaken beliefs merely as evidence tending to negate the culpable mental state for the offense, the matter no longer would give rise to substantial confusion. "One merely [would] identif[y] the mental state or states required for the crime, and then inquire[] whether that mental state can exist in light of the defendant's ignorance or mistake of fact"²

As far as it goes, this view is correct. Confusion has persisted, though, as a result of courts' and commentators' tendency to assign *categorical* evidentiary import to mistaken beliefs. This tendency is harmless when the culpable mental state for the offense is "knowledge" of the fact in question. After all, "knowledge" of a proposition requires belief in that proposition, and belief in a proposition generally cannot co-exist with belief in its negation.³ Trouble arises, however, when courts assign categorical import to the defendant's mistaken beliefs in cases where the culpable mental state is recklessness or negligence. When a statute requires proof that the defendant was reckless or negligent with respect to a result or an attendant circumstance, courts and commentators wrongly have assumed that liability will be foreclosed if the defendant either "reasonably believed" in the non-

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¹ WAYNE LAFAVE, CRIMINAL LAW § 5.6(a), at 283 (4th ed. 2003).

² *Id.* at 284; *see also* MODEL PENAL CODE & COMMENTARIES § 2.04 cmt. at 269 (1985) [*hereinafter* MODEL PENAL CODE] ("[I]gnorance or mistake has only evidential import; it is significant whenever it is logically relevant, and it may be logically relevant to negate the required mode of culpability or to establish a special defense.").

³ Thus, for example, where a theft statute requires knowledge that the property belongs to another person, the statute by implication will require *belief* that the property belongs to another person. A defendant's mistaken belief that the property does *not* belong to the another person will, then, negate the statutory requirement of knowledge that the property belongs to another. *But see* Anthony Quinton, *Knowledge and Belief*, in 4 ENCYCLOPEDIA OF PHILOSOPHY 345–46 (Paul Edwards ed. 1967) ("It is possible and not uncommon to believe something and its contradictory.").

existence of an attendant circumstance or “reasonably believed” in the non-existence of some causal condition upon which the proscribed result depended.⁴

As an introductory example, consider *Wilson v. Tard*,⁵ a federal habeas case in which petitioner Christopher Wilson challenged his New Jersey conviction for reckless manslaughter.⁶ Wilson had shot a friend during a discussion about which of them should be the first to inject some heroin in their possession.⁷ At trial, Wilson acknowledged that he had pointed the gun at his friend and then had pulled the trigger.⁸ Wilson testified, though, that he had believed the gun was unloaded.⁹ The trial judge instructed the jury that the government bore the burden of proving the culpable mental state of recklessness, but he also instructed the jury that Wilson bore the burden of proving that he reasonably believed the gun was unloaded and that this belief negated the culpable mental state of recklessness.¹⁰ This second instruction was wrong, of course. But the district court did not hold merely that the state court had erred in giving the instruction. Instead, the court held that the government affirmatively was required to prove that Wilson had not reasonably believed the gun was unloaded.¹¹ In so holding, the court said that a “reasonable belief” has “a mirror relationship” to recklessness; thus, a “reasonable belief” that the gun was unloaded “would negate the mental element necessary to constitute manslaughter.”¹²

⁴ See *State v. Hazelwood*, 946 P.2d 875, 879 (Alaska 1997) (finding that by imposing “reasonable mistake-of-age” standard in earlier statutory rape case, court had “[i]n effect . . . sustained prosecution on charges that the defendant was negligent as to the victim’s age”); MODEL PENAL CODE, *supra* note 2, § 213.6 cmt. at 413 (stating that “reasonable belief” defense “in effect . . . imposes a culpability standard of negligence”), § 2.04 cmt. at 271 (“[G]eneral formulations purporting to require that mistake be reasonable if it is to exculpate” are really appropriate only “in the case of mistake regarding an element of an offense as to which negligence is the culpability level.”); Dane Ciolino, *The Mental Element of Louisiana Crimes: It Doesn’t Matter What You Think*, 70 TUL. L. REV. 855, 896 (1996) (“To require reasonableness for mistakes effectively imposes a new level of culpability which will suffice for a conviction—negligence.”); George Fletcher, *Mistake in the Model Penal Code: A False False Problem*, 19 RUTGERS L.J. 649, 652–53 (1988) (explaining that mistake must be reasonable in order to negate culpable mental states of negligence and recklessness); Peter Low, *The Model Penal Code, The Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability*, 19 RUTGERS L.J. 539, 545 (1988) (stating that an instruction requiring defendant to prove that he “honestly and reasonably, although mistakenly, believed the facts to be other than they were” would be treated by a “modern lawyer” as imposing the equivalent of civil negligence).

⁵ 593 F. Supp. 1091 (D.N.J. 1984).

⁶ *Id.* at 1092–93.

⁷ *Id.* at 1093.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 1096.

¹² *Id.*; see also *State v. Sexton*, 733 A.2d 1125, 1132 (N.J. 1999) (holding that the defendant in a manslaughter case should be acquitted if he had not been reckless in forming what he asserted to be a reasonable belief that the gun was unloaded).

Where this and other decisions go wrong is in failing to recognize the role that *degrees* of belief play in the assessment of culpability. It is the degree of a belief, and not merely its reasonableness, that will determine whether the belief forecloses the possibility that the defendant was or should have been aware of a “substantial” risk. And it is the degree of the belief, not merely its reasonableness, that will determine whether the belief forecloses the possibility that the defendant’s disregard of the risk or failure to perceive the risk amounted to a gross deviation from the standard of care. Since the “reasonableness” of a belief tells us nothing about its degree, a determination that the defendant “reasonably believed” a gun was unloaded, say, does not foreclose the possibility that the defendant was reckless or negligent in pulling the trigger.

This would be much ado about nothing if the issue arose only in the occasional homicide case. But while this sort of confusion is the exception in homicide cases, it is commonplace in cases of rape and sexual abuse. In rape cases, courts often treat the defendant’s “reasonable belief” in the victim’s consent as the equivalent of proof that the defendant was not negligent or reckless with respect to the possibility of non-consent.¹³ Likewise, in cases of statutory rape or sexual abuse, courts often treat the defendant’s “reasonable belief” as to the victim’s age as the equivalent of proof that the defendant was not negligent or reckless with respect to the possibility that the victim was underage.¹⁴ The result of this confusion is that the government in rape and sexual abuse cases often is required to prove more than it should have to—more than the defendant’s awareness of an unacceptable risk. Further, the perception that this “reasonable belief” standard is the least-demanding alternative to strict liability for sexual abuse¹⁵ has made the debate over strict liability for sexual abuse more difficult to resolve than it ought to be.

Though the argument that follows is somewhat elaborate, it really has just two steps. The first step, in which I “unpack” the Model Penal Code definitions of negligence and recklessness, is intended to show that a “reasonable belief” cannot negate either of these culpable mental states unless the word “reasonable” implies something about the belief’s degree of certainty. The second step is intended to show that the phrase “reasonable belief” cannot plausibly be interpreted to imply anything about the belief’s degree of certainty.

¹³ See, e.g., *People v. Williams*, 841 P.2d 961, 965 (Cal. 1992) (recognizing defense of reasonable mistake as to victim’s consent to sex).

¹⁴ See, e.g., *People v. Hernandez*, 393 P.2d 673, 676 (Cal. 1964); *State v. Guest*, 583 P.2d 836, 839 (Alaska 1978); see also Ill. Pattern Jury Instructions, Crim., No. 11.64 (4th ed. 2000) (instructing jury that it is a defense to statutory rape that the defendant reasonably believed the victim had reached the critical age).

¹⁵ See, e.g., Catherine Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 383 (2004); Larry Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105, 135 (1964); Kelly Vance, Comment, *State v. Elton: The Failure to Recognize a Defense to Statutory Rape*, 1983 UTAH L. REV. 437, 451–52.

II. REFRAMING THE QUESTION OF CULPABILITY AS A QUESTION ABOUT PROBABILITY

Under the Model Penal Code and most state criminal codes,¹⁶ a defendant's liability for either negligence or recklessness hinges on questions about whether the risk posed by the defendant's conduct was "substantial" and "unjustifiable." The definition of negligence requires the trier of fact to determine whether the risk would have seemed both "substantial" and "unjustifiable" to a reasonable person who knew just what the defendant knew about the surrounding circumstances.¹⁷ The definition of recklessness requires the trier of fact to determine whether, in addition,¹⁸ the risk actually was perceived by the defendant himself as "substantial" and "unjustifiable."¹⁹

To begin, think about how exactly a defendant's "reasonable belief" might negate the *unjustifiability* component of negligence or recklessness. Whether a risk is unjustifiable depends mainly on three factors. First, it depends on the severity of the harm that might have resulted from the defendant's conduct; other things being equal, conduct that poses a risk of death is obviously more culpable than conduct that poses only, say, a risk of property damage. Second, whether the risk is unjustifiable depends on the extent to which the defendant's conduct might potentially have proven beneficial; it is, for example, the hoped-for social benefits that distinguish the surgeon who performs a risky operation from other people who create comparable risks.²⁰ Third and finally, whether a risk is unjustifiable depends on the *probability* attached to the potential harm and to the potential benefits; the probability, that is, that the harm or the social benefits would actually come to pass.

¹⁶ MODEL PENAL CODE, *supra* note 2, § 2.02 cmt. at 233 (noting that "virtually all recent legislative revisions and proposals follow [the Model Penal Code] in setting up general standards of culpability").

¹⁷ *Id.* § 2.02(2)(d).

¹⁸ The better view is that "recklessness" requires everything that negligence requires plus something more. See GLANVILLE WILLIAMS, CRIMINAL LAW, THE GENERAL PART § 25, at 58 (2d ed. 1961); David Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. L. 281, 300-03 (1981); see also *People v. Stanfield*, 330 N.E.2d 75, 77 (N.Y. 1975) (holding that "in a practical, if not a literal definitional sense, if one acts with criminal recklessness he is at least criminally negligent").

¹⁹ Commentators appear to agree that the defendant, in addition to being aware of the risk's existence, must be aware that the risk is "substantial." See Treiman, *supra* note 18, at 362-65; Kenneth Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 189 (2003). Beyond this, however, they disagree. Some argue that "the defendant needs to be aware only that the risk is substantial, not that it is unjustifiable." *Id.* at 189. Others argue that the subjective component of recklessness requires that the defendant be aware of "the extent of probability of damage." WILLIAMS, *supra* note 18, § 26, at 62. For the sake of our inquiry, it makes sense to assume that latter position is right: the more demanding our definition of recklessness, the harder it will be to prove that reasonable belief does not negate recklessness and so the more robust our ultimate conclusion will be.

²⁰ See MODEL PENAL CODE, *supra* note 2, § 2.02 cmt. at 237.

The relationships among these three factors can usefully be described in the language of decision theory.²¹ The decision theorist first would identify the possible courses of action from which the defendant was required to choose, then would identify the possible outcomes of each course of action. To each of these possible outcomes, the decision theorist would assign, first, a positive or negative number “*d*” reflecting the desirability or undesirability of the outcome and, second, a number “*p*” between 0 and 1 reflecting the probability that the outcome would have occurred if the defendant had embarked on that course of action. What remains is just math: for each outcome of each course of action, multiply *p* times *d*; then, for each course of action, add the figures so obtained to calculate the expected utility of that course of action. The course of action with the greatest expected utility is the rational choice.

To illustrate, consider the rationality of the defendant’s actions in *Wilson*, leaving aside for now the question of his culpability. Once he had aimed the gun at the victim, the defendant was faced with a choice between two courses of action: pulling the trigger and not pulling the trigger. The possible outcomes of the first course of action are: (1) the defendant pulls the trigger but the gun isn’t loaded (everyone has a good laugh); (2) the defendant pulls the trigger and the gun is loaded (victim dies). The possible outcomes of the second course of action are: (3) defendant does not pull the trigger and the gun is not loaded; and (4) defendant does not pull the trigger and the gun is loaded. To the first of the four outcomes, we might assign a slight positive desirability of 1. But to the second outcome (in which a person dies), we would have to assign a massive negative desirability, say –100. If the probability that the gun was unloaded was, for example, .9, then the probability of the gun being loaded would be .1, of course. And we accordingly would calculate the expected utility of the first course of action (pulling the trigger) as $(.9 \times 1) + (.1 \times -100)$, or –9.1. Since the expected utility of the second course of action is essentially 0 (neither the third nor the fourth outcome has any real desirability or undesirability), the second course of action obviously has the greater expected utility.

It is also possible, given the same or any other “desirability” values, to calculate the probability at which it would have been reasonable to accept the risk that the gun was loaded.²² To calculate this figure (using our previously defined desirability figures), we would simply determine for what probability “*p*” the expected utility of pulling the trigger $((p)(1) + (1-p)(-100))$ is greater than or equal to the expected utility of not pulling the trigger (which happens to be roughly 0). The answer is that the expected utility of pulling the trigger will equal the expected utility of not pulling the trigger when the probability of the gun being unloaded is

²¹ See ELLERY EELLS, *RATIONAL DECISION AND CAUSALITY* 4–8 (1982); RICHARD JEFFREY, *THE LOGIC OF DECISION* 1–6 (2d ed. 1983).

²² See Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 106–07 (2002) (demonstrating how to use desirability or “utility” values to calculate the level of probability at which a particular course of action is rational).

roughly .99 (or 99 percent). This means that, at least from a decision-theoretic perspective, it would have been reasonable for Wilson to pull the trigger only if the probability of the gun being unloaded under the circumstances known to Wilson was at least .99.

The reason why this matters is that Wilson's claim of "reasonable belief" really was, at bottom, a claim about probability. When a defendant asserts a "reasonable belief" as to the existence of an attendant circumstance or (as Wilson did) as to the existence of a causal condition upon which the proscribed result depends, he is not making a claim about the relative desirability of the various possible outcomes. Rather, he is making a claim about how probable the existence of the attendant circumstance or causal condition seemed to him or would have seemed to a reasonable person. Decision theory teaches us how to evaluate this claim. It teaches us, first, that it is indeed possible to frame the ultimate question of "unjustifiability" as a question about probability: once the jury has assigned desirability values to the various possible outcomes of the defendant's actions, it is possible for the jury to calculate the level of probability at which the risk posed by the defendant's conduct would have been unjustifiable. The defendant's culpability then turns simply on how probable a bad outcome seemed to the defendant or would have seemed to a reasonable person. Second, decision theory teaches that the critical level of probability will vary depending on the relative desirability of the various possible outcomes; in cases like *Wilson*, where the positive value of the hoped-for benefit is dwarfed by the negative value of the possible harm, this level of probability will be very low.

It would be wrong, of course, to portray the jury's task in these cases as a purely mathematical one. The desirability values assigned to the various outcomes by the jury will usually be rough, intuitive values. Further, community standards will affect the process of deriving from these desirability values the level of probability at which the risk will be deemed unjustifiable,²³ as will the requirement that the defendant's conduct be not just a deviation but a "gross" deviation from the standard of care.²⁴ Finally, the process of calculating the actual probability that a reasonable person would have assigned to a particular outcome under the circumstances will likewise be a rough, intuitive one, rather than a mathematical one.²⁵ Nevertheless, the basic relationships described by decision theory will hold true. First, the question whether the risk was unjustifiable can be reframed as a question about "[t]he degree of probability of the consequence."²⁶ Further, "[t]he degree of probability" that will qualify as unjustifiable "must vary in each instance

²³ See Richard Wright, *Hand, Posner, and the Myth of the "Hand Formula,"* 4 THEORETICAL INQUIRIES L. 145, 145 (2003) (arguing that determination "whether conduct was reasonable or negligent" rests in part on "various justice-based standards that take into account the rights and relationships among the parties").

²⁴ MODEL PENAL CODE, *supra* note 2, § 2.02(2)(c)-(d).

²⁵ WILLIAMS, *supra* note 18, § 26, at 59 ("In many cases [the degree of probability of the consequence] does not admit of mathematical calculation.").

²⁶ *Id.* (title of section).

with the magnitude of the harm foreseen and the degree of utility of the conduct.”²⁷ Finally, in cases where the “magnitude of the harm” is far greater than the “degree of utility,” the degree of probability that will qualify as unjustifiable may be very low indeed.²⁸

Like the question whether the risk was “unjustifiable,” the separate question whether the risk posed by the defendant’s conduct was “substantial” can be reframed as a question about probability. Indeed, the better view is that “substantiality” depends exclusively on the probability of a bad outcome occurring.²⁹ According to this view, the requirement that the risk be “substantial” is intended solely to establish an invariant minimum-probability threshold; thus, regardless of whether the defendant is charged with manslaughter or a mere regulatory offense, the requirement that the risk be “substantial” demands only the same invariant level of probability. The only alternative is to view the substantiality component of negligence and recklessness as a kind of shadow of the unjustifiability component. On this view, the required threshold level of probability varies with the interests at stake in the same way (or roughly the same way) as it does where unjustifiability is concerned.³⁰ On either view, though, the question whether the risk overlooked or disregarded by the defendant was “substantial” can be reframed as a question about probability—as a question about how probable the result or attendant circumstance would have seemed to the defendant or to a reasonable person who knew exactly what the defendant knew.

What we have accomplished so far is to reframe the component parts of negligence and recklessness in a way that makes the defendant’s mistaken factual beliefs potentially dispositive of the question whether the defendant was negligent or reckless. To be dispositive of the question whether the defendant was negligent or reckless, the defendant’s “reasonable belief” must tell us how *probable* the proscribed result or attendant circumstance seemed to the defendant or would have seemed to a reasonable person in the defendant’s place. It must tell us, specifically, that this perceived probability fell below both a variable “unjustifiability” threshold and an invariant “substantiality” threshold.

III. WHAT THE DEFENDANT’S “REASONABLE BELIEF” MUST TELL US ABOUT WHETHER THE RISK WAS “SUBSTANTIAL”

Reasonableness aside, does a mere “belief” in, say, the non-existence of an attendant circumstance preclude awareness of a “substantial” probability that the circumstance exists? The answer to this question obviously is no. In ordinary

²⁷ *Id.* at 62.

²⁸ Williams suggests, for example, that if there were one thousand guns on a table and all but one was unloaded, it would be unreasonable and culpable for the defendant, knowing this, to pick up one of the guns at random and fire it at someone. *Id.* at 59–60.

²⁹ See Simons, *supra* note 19, at 189–192.

³⁰ *Id.* at 190–92.

usage, a person's mere "belief" in a proposition does not prevent her from being aware of a substantial possibility that she is wrong. "The statement 'I believe *p*, yet I may be mistaken' makes perfectly good sense."³¹ Indeed, the Model Penal Code itself tacitly acknowledges that "actual belief" in a proposition can co-exist even with subjective awareness of a "high probability" that the proposition is false. This acknowledgment appears in § 2.02(7), which contains the Code's version of the "wilful blindness" exception to the general definition of knowledge. It provides: "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, *unless he actually believes that it does not exist.*"³²

The mere possession of a "belief," then, is not the same as absolute certainty; beliefs vary in their degree of certainty. Though scholars of substantive criminal law rarely, if ever, talk about "degrees of belief," there is nothing controversial about the notion that beliefs come in degrees.³³ For lawyers, the most familiar manifestation of "degrees of belief" is the variation among the burdens of proof applied by fact-finders.³⁴ The "reasonable doubt" standard, for example, requires a greater degree of belief than does the "clear and convincing evidence" standard, which in turn requires a greater degree of belief than does the "preponderance of the evidence" standard. In none of these three cases would we misuse the word "belief" if we were to refer the verdict as reflecting a "belief" in the proposition to be proved. Indeed, in the view of some (though not all) courts, even the least-demanding of these three standards is satisfied *only* where the evidence induces in the fact-finder an "actual belief in [the proposition's] truth."³⁵

This last point is an important one. It is important not because of what these courts have held, which is controversial,³⁶ but because of what the courts' holding

³¹ Ruth Weintraub, *Fallibilism and Rational Belief*, 44 BRIT. J. PHIL. SCI. 251, 258 (1993).

³² MODEL PENAL CODE, *supra* note 2, § 2.02(7) (emphasis added). At least two states have adopted this basic formula. See ALASKA STAT. § 11.81.900(a)(2) (2004); DEL. CODE ANN. tit. 11, § 255 (2005).

³³ JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 40 (1825) ("Nobody can be ignorant[] that belief is susceptible of different degrees of strength or intensity."); see also D.H. Mellor, *Consciousness and Degrees of Belief*, in PROSPECTS FOR PRAGMATISM 139 (D.H. Mellor ed., 1980) ("Many of our beliefs come by degrees."); Brian Carr, *Knowledge and Its Risks*, 1982 PROC. ARISTOTELIAN SOC'Y 115, 120 ("Beliefs can vary in strength, or as we sometimes say we hold our beliefs with varying 'degrees of conviction,' or with varying degrees of (subjective) certainty.").

³⁴ See J.P. McBaine, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242, 242-44 (1944).

³⁵ *Sargent v. Mass. Acct. Co.*, 307 Mass. 246, 250 (1940) ("[An issue] is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind . . . of the tribunal notwithstanding any doubts that may still linger there."); see also 2 MCCORMICK ON EVIDENCE § 339, at 439-40 (1992) ("[Some courts] have been shocked at the suggestion that a verdict, a truth-finding, should be based on nothing stronger than an estimate of probabilities. They require that the trier must have an 'actual belief in' or be 'convinced of' the truth of the fact by this 'preponderance of evidence.'").

³⁶ What is controversial about the court's holding is its insistence that the preponderance

uncontroversially assumes—namely, that we do not violate ordinary usage if we use the term “actual belief” to refer to a belief whose degree of certainty corresponds roughly to “more probable than not” or “at least fifty-one percent certain.” This, of course, is consistent with the Model Penal Code’s recognition that “actual belief” can co-exist with awareness of a “high probability” that one is mistaken. And it gives the lie to those who would treat “belief” as the equivalent of absolute certainty.³⁷ Whatever the merits of demanding, for instance, that a man be absolutely certain of his partner’s consent before proceeding to engage in sexual intercourse with her, it is beyond dispute that the word “belief” does not remotely convey such a demand to jurors.³⁸

It is apparent, then, that if a defendant’s “reasonable belief” is to negate the possibility that the defendant either was or should have been aware that the probability of a bad outcome was “substantial,” then the word “reasonable” must tell us something about the *degree* of the belief. Specifically, it must tell us either that the defendant himself possessed a very high degree of belief in, say, the non-existence of the attendant circumstance, or that a reasonable person in the defendant’s place would have possessed the same very high degree of belief. The remaining question (which we must put aside briefly while we address the matter of “unjustifiability”) is whether the word “reasonable” actually conveys this kind of information about the degree of the belief.

IV. WHAT THE DEFENDANT’S “REASONABLE BELIEF” MUST TELL US ABOUT WHETHER THE RISK WAS “UNJUSTIFIABLE”

Now consider the question of the risk’s unjustifiability. This part of the inquiry will require us to find a connection between “reasonable belief” and the case-specific level of probability at which the risk posed by the defendant will be deemed “unjustifiable.” This connection is less obvious than the connection between the defendant’s belief and the “substantiality” of the risk. To make *that* connection, we merely were required to recognize that the invariant minimum-

standard is satisfied *only* where the jury “actually believes” in the proposition to be proved. Some commentators have argued, and some courts have concluded, that the preponderance standard also is satisfied where the evidence induces merely “an actual belief as to the balance of probability.” Ralph Winter, *The Jury and the Risk of Nonpersuasion*, 5 LAW & SOC’Y REV. 335, 339 (1971).

³⁷ See Helen Power, *Towards a Redefinition of the Mens Rea of Rape*, 23 OXFORD J. LEGAL STUD. 379, 389 (2003) (“[S]omeone who is aware of the risk [that his sexual partner does not consent to sex] certainly does not believe his victim consents, except perhaps in the weak and legally inadequate sense that he thinks, but is not sure, that she *might* be consenting.”).

³⁸ If “belief” were equivalent to absolute certainty, then even unreasonable beliefs would foreclose a finding of recklessness. Courts and commentators alike have recognized that unreasonable beliefs do not negate recklessness. See, e.g., *State v. Cavness*, 911 P.2d 95, 101 (Haw. Ct. App. 1996); *State v. Williams*, 696 S.W.2d 809, 813 (Mo. Ct. App. 1985); *State v. Pridgen*, 584 A.2d 869, 873 (N.J. Super. Ct. App. Div. 1991); Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 FORDHAM L. REV. 263, 288 (2002); Andrew Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN’S STUD. 387, 413 (1996).

probability “substantial risk” threshold can be expressed as a demand for a very high degree of belief—something akin to “near certainty.” By contrast, it is hard at first to see any connection between the variable, case-specific “unjustifiable risk” threshold and some attribute of a “belief.” The connection is, however, a close one. Indeed, in contexts like the criminal law, where “events are unique in the sense that the situations cannot be duplicated,”³⁹ it may well be that the only plausible way to interpret questions about “probability” is as questions about degrees of belief.⁴⁰

To explain: As the mathematics of probability has developed, scientists and others have remained divided about exactly what people mean when they talk about the “probability” of an event occurring.⁴¹ Most scientists fall into one of two camps. The most popular view among experimental scientists is “frequentism,” which defines probability objectively as the relative frequency with which the event would recur if the conditions in which the event occurred were repeated an infinite, or at least very large, number of times.⁴² The most popular view among economists and social scientists, by contrast, is “Bayesianism,” which defines probability subjectively as some person’s degree of belief that the event will occur.⁴³ The “someone” might be a real person, like a criminal defendant. Or it might be a hypothetical “reasonable” person, e.g., a reasonable person who knows what the defendant knows.⁴⁴

The Bayesian account of probability is less mushy than it sounds. Bayesians do not measure degrees of belief by reference to, say, the intensity of feeling that accompanies a belief; as philosopher Frank Ramsey pointed out long ago, we have no feeling at all about many of the beliefs we hold most strongly, e.g., that the sun

³⁹ P.G. MOORE & H. THOMAS, *THE ANATOMY OF DECISIONS* 135 (1976); *see also* LEONARD SAVAGE, *FOUNDATIONS OF STATISTICS* 61–62 (1954).

⁴⁰ Laurence Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1346–47 (1971) (a personalistic account of probability provides the only answer to the question: “[D]oes it really mean anything at all to be ‘four-fifths’ certain in a particular case?”); MOORE & THOMAS, *supra* note 39, at 134–35 (“On the other hand, there are many events which can be thought of in probabilistic terms, but cannot be given a relative frequency interpretation”; this is why “[t]he subjective interpretation of probability is fundamental to the analysis of many decision problems in business and government, particularly those in which the events are unique in the sense that the situations cannot be duplicated.”); SAVAGE, *supra* note 39, at 61–62 (1954) (explaining that frequentists are willing to make probability statements only about “very special events”).

⁴¹ MOORE & THOMAS, *supra* note 39, at 134 (“Whilst the mathematical results of probability theory are seldom in dispute, the same cannot be said about the interpretation of the probability concept.”).

⁴² *See* Matthew D. Adler, *Risk, Death and Harm: The Normative Foundations of Risk Regulation*, 87 MINN. L. REV. 1293, 1313–14 (2003).

⁴³ SAVAGE, *supra* note 39, at 3.

⁴⁴ For an article illustrating the application of decision theory to legal problems, *see* Matthew D. Adler, *Against “Individual Risk”: A Sympathetic Critique of Risk Assessment*, 153 U. PA. L. REV. 1121, 1142 (2005) (explaining that the degree of belief might be “the actual scientist’s degree of belief, a ‘reasonable scientist’s’ degree of belief, an idealized observer’s degree of belief, etc.”).

will rise tomorrow.⁴⁵ Rather, to measure the degree of a person's belief, the Bayesian asks the person "not how he feels, but what he would do in such and such a situation";⁴⁶ the Bayesian measures "the degree of a belief by measuring how strongly its owner is disposed to act on it."⁴⁷ For example, a Bayesian might measure a degree of belief according to the person's willingness to wager. Laurence Tribe provides a nice example of such a method of measuring degrees of belief:

[O]ne could take a sequence of boxes each containing a well-shuffled deck of one hundred cards, some marked "True" and others marked "False." The first box, B_0 , would contain no cards marked "True" and 100 marked "False"; the second box, B_1 , would contain 1 card marked "True" and 99 marked "False;" the next box, B_2 , would contain 2 cards marked "True" and 98 marked "False"; and so on, until the last box, B_{100} , would contain 100 cards marked "True" and no cards marked "False." To say that a person is "four-fifths" or "eighty percent" certain of X is simply to say that he would be as willing to bet that the proposition X is true as he would be willing to bet (with the same stakes) that a card chosen at random from box B_{80} will turn out to be marked "True." In these circumstances, the person would say that, for him, $P(X) = .8$.⁴⁸

With this background, it is easy to see why *degrees* of belief must play a pivotal role in any effort to connect "reasonable beliefs" to the ultimate question of "degree of probability." First of all, it is at least arguable that, within the context of criminal cases, questions about "degrees of probability" just *are* questions about degrees of belief. Whatever the relative merits of the frequentist and Bayesian accounts of probability, the Bayesian really is the only account of probability that can make sense of the case-specific probability questions juries face in criminal cases.⁴⁹ Consider, for example, a case where the question is whether the defendant was negligent in overlooking the possibility that his sexual partner was underage. In determining whether the risk was unjustifiable, the jury would be required to calculate the "probability" that a reasonable person in the defendant's place would

⁴⁵ F.P. RAMSEY, *Truth and Probability*, in F.P. RAMSEY: PHILOSOPHICAL PAPERS 52, 65 (1990) ("[T]he beliefs which we hold mostly strongly are often accompanied by practically no feeling at all; no one feels strongly about things he takes for granted.").

⁴⁶ SAVAGE, *supra* note 39, at 28.

⁴⁷ Mellor, *supra* note 33, at 140; *see also* Carr, *supra* note 33, at 121; RAMSEY, *supra* note 45, at 68.

⁴⁸ Tribe, *supra* note 40, at 1347.

⁴⁹ See WILLIAMS, *supra* note 18, § 26, at 59 ("In many cases [the degree of probability of the consequence] does not admit of mathematical calculation."); Adler, *supra* note 44, at 1207 ("[O]ne virtue of Bayesian approaches . . . is that they permit the attachment of probability numbers to propositions where ascribing frequentist probabilities is unthinkable or at least extremely silly."); Tribe, *supra* note 40, at 1346–47.

have assigned to the possibility that the victim was underage. But this calculation will depend in part on factors that are utterly unique to the defendant's case, like the physical appearance of the victim. Given this, it arguably would be "unthinkable or at least extremely silly"⁵⁰ for the jury to attempt to ascribe a frequentist probability to this circumstance; to attempt, that is, to estimate what percentage of a large sample of girls identical in appearance to the victim would turn out to be over sixteen. By contrast, the Bayesian approach is quite workable here. The jury simply would determine what degree of belief a reasonable person in the defendant's position would have assigned to the possibility that the victim was underage. The ultimate question, then, can be framed as a question about degrees of belief.

Even if one adopts a frequentist account of probability, however, questions about "degree of probability" can always be *translated* as questions about degree of belief. This should be apparent from Tribe's example, which not only provides a method of measuring degrees of belief but also demonstrates that "translation can be made from probability as a measure of objective frequency in the generality of cases to probability as a measure of subjective belief in the particular instance."⁵¹ To illustrate: If a jury concluded (on the basis of the relative desirability of the possible outcomes) that it would have been culpable for the defendant to disregard or overlook more than a .2 probability of, say, a gun being loaded, then it could readily translate the ultimate question of culpability into a question of degree of belief. Using Tribe's approach, for example, the jury would ask whether a reasonable person in the defendant's place would have been at least "as willing to bet [that the gun was unloaded] as he would be willing to bet (with the same stakes) that a card chosen at random from box B₈₀ will turn out to be marked 'True.'"⁵²

The reason why this works—the reason why it is possible to reframe the culpability question as a question of "degree of belief"—is that degrees of belief play exactly the same role in decision-making that degrees of probability play. That is, the same relationship that holds true between the relative desirability of outcomes and degrees of probability also holds true between the relative desirability of outcomes and degrees of belief. This relationship is evident, for example, in the law governing burden of proof, where the degree of belief required of the fact-finder varies with the proportionality of the interests at stake in the proceeding.⁵³ In a civil damages case, where the burden of proof is

⁵⁰ Adler, *supra* note 44, at 1207.

⁵¹ Tribe, *supra* note 40, at 1346.

⁵² *Id.* at 1347.

⁵³ See *Addington v. Texas*, 441 U.S. 418, 424–25 (1979); see also C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1334 (1982) (arguing that the real content of any particular burden of proof—e.g., "reasonable suspicion"—is determined by measuring the dispositions of a neutral factfinder who keeps in mind "the practical role of reasonable suspicion," i.e., who keeps in mind both the government interest in law enforcement and the suspect's interest in freedom from unreasonable

“preponderance of the evidence,” the interests of the plaintiff and the defendant are roughly proportional: Any benefit conferred on the plaintiff as a result of a damages award will be proportional to the cost inflicted on the defendant by the award. By contrast, in a disbarment proceeding, where the burden of proof is “clear and convincing evidence,” the parties’ interests are not proportional: what the lawyer stands to lose from disbarment is disproportionate to the partly intangible benefits—e.g., deterrence of other lawyers—that society stands to gain from disbarment. The same is true to an even greater extent in criminal cases, where the burden of proof is “beyond a reasonable doubt”: What the defendant stands to lose from being imprisoned is vastly disproportionate to the mostly intangible benefits—e.g., deterrence and general reinforcement of societal norms—that society hopes to obtain by imprisoning him.

This example also brings home why “degrees of belief” must be taken into account if the defendant’s “reasonable belief” is to negate culpability. Just as the negative value of an unjust conviction is disproportionate to the positive value of a just conviction, the negative value of a bad outcome in, say, the situation facing Christopher Wilson is grossly disproportionate to the positive value of a good outcome.⁵⁴ In cases like *Wilson*, then, it would be wrong to assign exculpatory import to a belief without considering the *degree* of the belief. After all, belief *simpliciter* can co-exist even with awareness of a “high probability” that one is wrong.⁵⁵ The question whether a belief negates recklessness or negligence—whether a belief justifies action under the circumstances—cannot be answered without taking into account the degree of belief. Specifically, where the defendant asks the jury to assign exculpatory import to a “belief,” the jury must reframe the ultimate question of “degree of probability” as a question of “degree of belief.” Where, for example, the degree of probability whose disregard would qualify as a “gross deviation” from the standard of care is .2, the ultimate question can be reframed as whether the defendant’s “degree of belief” exceeded .8. If the defendant’s degree of belief exceeded .8, then he was not reckless. And if a reasonable person’s degree of belief would have exceeded .8, then the defendant was not negligent either.

What remains is just the question whether the phrase “reasonable belief” actually conveys this kind of information about the degree of the belief: actually tells us, that is, whether the defendant’s degree of belief foreclosed an awareness of the case-specific level of probability at which the risk would qualify as “unjustifiable.”

detention).

⁵⁴ See *supra* text accompanying notes 5–12.

⁵⁵ MODEL PENAL CODE, *supra* note 2, § 2.02(7).

V. "REASONABLE BELIEF" AS A BELIEF WHOSE FORMATION WAS NOT ATTENDED BY NEGLIGENCE OR RECKLESSNESS

If the phrase "reasonable belief" is to accomplish what we require of it, then it obviously cannot mean merely a belief for which the defendant has "reasonable grounds."⁵⁶ So defined, the "reasonableness" of the belief might have no connection to the gravity of the actions undertaken in reliance on the belief; the reasonableness of a defendant's belief that his sex partner is sixteen, for example, might be evaluated no differently than the belief of a theater clerk at an R-rated movie that a ticket purchaser is seventeen. At the very least, a "reasonable belief" must be defined to require that the formation of the belief be attended by care commensurate with the interests at stake.⁵⁷ This, for example, is the approach adopted in the Model Penal Code, which defines a "reasonable belief" as "a belief that the actor is not reckless or negligent in holding."⁵⁸

Though the demand for care in the formation of beliefs is a step in the right direction, it does not go far enough. The trouble is that decision-making really involves two distinct processes, of which belief-formation is just the first.⁵⁹ The second part of the decision-making process requires the actor to evaluate the various courses of action on the basis of his beliefs. From the mere fact that the actor has exercised care commensurate with the risk in the first phase of the decision-making process—i.e., has not been negligent or reckless in *forming* his

⁵⁶ *People v. Hernandez*, 393 P.2d 673, 676 (Cal. 1964) (using phrase to define reasonable mistake-of-age defense in prosecution for statutory rape).

⁵⁷ *See* TEX. PENAL CODE ANN. § 1.07(a)(42) (Vernon 1989) ("Reasonable belief" means a belief that would be held by an ordinary and prudent man in the same circumstances as the actor."); *People v. Williams*, 841 P.2d 961, 965 (Cal. 1992) (holding that "regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable"); *State v. Sexton*, 733 A.2d 1125, 1131–32 (N.J. 1999) (holding that where defendant asserted "reasonable belief" that gun was unloaded as defense to charge of reckless manslaughter, defendant would be required to prove that he was not reckless in forming belief); *see also* Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 462–63 (1993) (arguing that mistake-of-age defense in statutory rape prosecutions should require, among other things, proof that defendant "made reasonable affirmative efforts to learn the true state of the circumstances to comply with the law").

⁵⁸ MODEL PENAL CODE, *supra* note 2, § 1.13(16). *But see* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 728–29 (1983), where the authors argue that "element analysis" under the Model Penal Code requires greater specificity in the categorization of mistaken beliefs than is afforded by the traditional distinction between "reasonable" and "unreasonable" beliefs. What is required, they argue, is a threefold distinction among "reckless mistakes," "negligent mistakes," and "faultless mistakes." One of the virtues of this reconceptualization is that the terms "reckless mistake" and "negligent mistake" make explicit the demand that the defendant exercise a level of care in the formation of his beliefs that is commensurate with the interests at stake.

⁵⁹ *See* ELLS, *supra* note 21, at 5 ("[D]ecision making involves two processes: (i) obtaining a body of relevant information (the process of information-acquisition) and (ii) evaluating the available courses of action in terms of the information at hand (the process of deliberation, or of information-use).").

beliefs—it is not possible to infer that the actor has exercised due care in deciding whether to *act* on the basis of those beliefs. In choosing among various courses of action, a reasonable actor will consider not just the content of his beliefs but their *degree* as well. And the fact that the actor has exercised care, even extraordinary care, in the formation of his beliefs will tell us nothing about the *degree* of his beliefs.

An example will make this plainer. Say Fred is considering engaging in sexual intercourse with Rochelle, who is a recent immigrant from Minsk. Fred actually believes that Rochelle has reached the critical age, in part on the basis of Rochelle's own avowals and in part on the basis of her physical appearance. But Fred is far from certain. Because he wants to be certain, he undertakes an extensive investigation that includes traveling bodily to a records office in Minsk. Minsk officials have lost the record of Rochelle's birth, however, and so Fred's investigation ultimately neither dispels his doubts nor divests him of his belief; his degree of belief remains unchanged. In this situation, there is nothing negligent or reckless about Fred's belief that Rochelle has reached the critical age; a reasonable person in Fred's situation might well believe exactly what Fred believes. But the question remains whether it would be negligent or reckless for Fred to engage in sexual intercourse with Rochelle given his lingering uncertainty. After all, the benefits of sex with a girl sixteen or older are trifling compared to the costs of sex with a girl under sixteen. So if Fred's degree of certainty is only, say, .7 or seventy percent, then his acceptance of a .3 or thirty percent risk that Rochelle is underage might well be a gross deviation from the standard of care.

The elaborateness of this example belies the frequency with which similar cases occur. Criminal liability often arises from choices made in situations in which the acquisition of additional information was not an option. In the sexual abuse context, for example, a prospective partner's sexual interest might not survive the delay that would be necessary for a trip to the Minsk records office. Much the same can be said of most cases involving the receipt of stolen property. If you are offered the opportunity to purchase a new DVD player from the back of a truck for just thirty dollars, you will probably have a chance to ask the seller where he obtained it; but you likely will not have an opportunity to investigate further than this before you are faced with a choice about whether to buy. In these and other similar situations, the defendant's fault may well lie neither in his decision to forego a genuine opportunity to acquire additional information nor in his formation of a belief on the basis of the available information. His fault may lie instead in his decision to *act* on the basis of a belief that was insufficient in degree to justify his action.

True, there are situations where the defendant's negligence or recklessness in the *formation* of a belief is the appropriate test of his culpability.⁶⁰ This is true, for

⁶⁰ MODEL PENAL CODE, *supra* note 2, § 3.02(2) (explaining that where actor who raises necessity defense was reckless or negligent “in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability”); § 3.09 (explaining

example, of self-defense. Section 3.09 of the Model Penal Code provides that an actor who genuinely believes that force is necessary to defend himself will be subject to prosecution for reckless or negligent conduct if he was “reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of force.”⁶¹ But the reason why this approach works in the self-defense context is that the costs of mistakenly using force in self-defense are roughly proportional to the costs of mistakenly *refraining* from the use of force; an injury to the supposed aggressor is no worse than an injury to the defender. Given this proportionality, the actor will be justified in acting in self-defense on the basis of any degree of belief greater than, say, .5; that is, he will be justified in acting on any belief that qualifies as a “belief” in common parlance. Because degrees of belief do not matter in the self-defense context, the courts are justified in looking for fault only in the *formation* of beliefs.

Self-defense, though, is the exception that proves the rule. In most contexts where the defendant asserts “reasonable belief” as a defense, the expected costs of the action that was undertaken in reliance on the mistaken belief will have been grossly disproportionate to the expected costs of mistakenly *refraining* from action. In *Wilson*, for example, the costs of the action Wilson undertook in reliance on his mistaken belief that the gun was unloaded were grossly disproportionate to the costs he would have incurred by mistakenly refraining from action.⁶² In this and other cases characterized by the same gross disproportionality of costs, the acceptance of even a slight risk will qualify as a gross deviation from the standard of care.⁶³ And, of course, to say that the acceptance of even a slight risk will qualify as a gross deviation from the standard of care is the same thing as saying that a reasonable person would not have acted on the basis of the belief unless he possessed a high degree of certainty. In these cases, then, it would be wrong to look for fault exclusively in the belief-formation phase of the decision-making process. Fault also can inhere in the decision to act on the basis of a belief whose degree of certainty is insufficient to justify action under the circumstances.

VI. “REASONABLE BELIEF” AS A BELIEF UPON WHICH THE DEFENDANT WAS JUSTIFIED IN ACTING UNDER THE CIRCUMSTANCES

There appears to be an obvious solution to the problems that arise from defining “reasonableness” merely to require care in the formation of belief. The obvious solution is to define “reasonable belief” to require both (1) that the belief be one whose formation was not attended by negligence *and* (2) that the belief be

that where actor believed use of force was necessary, he will still be subject to prosecution for reckless or negligent conduct if he was “reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief that is material to the justifiability of his use of force”).

⁶¹ MODEL PENAL CODE, *supra* note 2, § 3.09(2).

⁶² See *supra* text accompanying notes 5–12.

⁶³ WILLIAMS, *supra* note 18, § 26, at 59–60.

one upon which a reasonable person would have relied under the circumstances, i.e., that the *degree* of belief be sufficient to justify action by a reasonable person. This solution has grave problems of its own, however. Specifically, the second part of this definition is at odds with the way that jurors and other ordinary people actually use the word “belief”; it overlooks a critical distinction between reasonable beliefs and reasonable actions.

Though no court seems to have ever defined “reasonable belief” as a belief upon which the defendant was justified in relying under the circumstances, a somewhat similar definition was provisionally advanced by philosopher Brian Carr in a 1982 paper entitled *Knowledge and Its Risks*.⁶⁴ In his paper, Carr suggested that perhaps the reasonableness of a “firm belief” depends in part on “the *risks* involved in acquiring the belief that *P*, in accepting *P* non-tentatively.”⁶⁵ By “risks,” Carr did not mean merely “the risk of being wrong.”⁶⁶ Rather, he meant

such things as would normally be regarded [as] relevant to the decisions we make on *what to do*: such things as loss of life and limb, or the preservation thereof; loss or gain of friendships, money, possessions, social and professional status; these may all be included as part of *what is at stake* in coming to have a firm belief which is rational or reasonable on the evidence.⁶⁷

A definition like Carr’s would accomplish what we want it to accomplish. Carr appears to have in mind that the reasonableness of a belief will depend in part on the belief’s *degree*; specifically, the reasonableness of a belief will depend in part on whether the belief is sufficient in *degree* to justify the various actions the believer might be tempted to undertake in reliance on the belief. For example, if a defendant finds himself in a situation where his options include aiming a supposedly unloaded gun at another person and pulling the trigger in jest, then his belief that the gun is unloaded will qualify as “reasonable” only if the belief is sufficiently certain to justify this action. Likewise, if a defendant finds himself in a situation where his options include engaging in sex with a teenage girl, then his belief that she has reached the critical age will qualify as “reasonable” only if the belief is sufficiently certain to justify a decision to have sex with her.

But this approach to defining “reasonable belief” is at odds with the way ordinary people talk about beliefs and their reasonableness. In a nutshell, the principal defect of this definition is that it collapses the second phase of the decision-making process into the first; it assumes that the outcome of the decision-making process is a foregone conclusion once the defendant has decided *what* he believes. Only on such an assumption does it make sense to speak, as Carr does,

⁶⁴ Carr, *supra* note 33.

⁶⁵ *Id.* at 116.

⁶⁶ *Id.*

⁶⁷ *Id.* at 117.

of “the risks involved in acquiring the belief that *P*”⁶⁸ and of the “practical consequences of our believing.”⁶⁹ And only on such an assumption does it make sense to classify a belief as “unreasonable” purely on the basis of the fact that it would not justify action under the circumstances. This assumption is, of course, belied by the way people talk about beliefs.

Imagine having a conversation with a juror who has just returned a not-guilty verdict in a criminal trial. There would be nothing unreasonable or even unusual in the juror acknowledging that, in spite of the prosecution’s failure to meet its burden of proof, she nevertheless “believed” that the defendant was actually guilty. Moreover, if we wanted to persuade the juror that her belief was “unreasonable,” it would surely not help to remind her that her belief was insufficient in degree to justify action in the circumstances in which she, as a juror, found herself. We would need, rather, to talk about the evidence. Specifically, we would need to persuade her that the evidence not only was insufficient to satisfy the prosecutor’s burden of proof but was insufficient even to justify her belief in the defendant’s guilt.

What underlies this way of talking is, first, the recognition that beliefs come in degrees and, second, the recognition that people take degrees of belief into account in deciding whether to act. Because beliefs come in degrees and people take degrees of belief into account in choosing among available courses of action, a person’s mere possession of a belief *simpliciter* will not predetermine her choice among available courses of action. Thus, the belief itself cannot be described as “unreasonable” merely by virtue of the fact that it is insufficient in degree to justify action; it is, rather, the *action* undertaken in reliance on the belief that might be described as unreasonable. To put it another way, “reasonable” people sometimes hold beliefs on which they rightly decline to act; thus, a belief that is insufficient in degree to justify action under the circumstances is not necessarily an “unreasonable” belief.⁷⁰

To be fair to Brian Carr, Carr’s remarks about “rational belief” appear in an article devoted to the narrow question, “What do we mean when we say that a proposition is ‘certain’?”⁷¹ And where “certainty” as opposed to mere “belief” is at issue, Carr’s argument actually makes sense. It would be odd to attribute “certainty” to someone who declined to act on the belief of which she supposedly was “certain.” Thus, whether she is subjectively “certain” really does appear to depend in part on whether her degree of belief is sufficient to justify action under the circumstances in which she finds herself. Karl Popper made the same point with an example:

⁶⁸ *Id.* at 116.

⁶⁹ *Id.* at 119.

⁷⁰ *Id.* at 124 (acknowledging that “[w]e can and do hold beliefs which we do not act on, and act on propositions which we do not believe, so the distinction [between rational action and rational belief] must be recognized”).

⁷¹ *Id.* at 115.

With my hands in my pockets, I am quite ‘certain’ that I have five fingers on each of my hands; but if the life of my best friend should depend on the truth of this proposition, I might (and I think I should) take my hands out of my pockets to make ‘doubly’ sure that I have not lost one or the other of my fingers miraculously.⁷²

Thus, as Popper said, “experienced or subjective ‘certainty’ depends not merely upon degrees of belief and upon evidence, but also upon the situation—upon the importance of what is at stake.”⁷³

The same cannot, however, be said of “belief,” as Carr himself ultimately appeared to acknowledge. Because “any belief may have application in many practical decisions, where risks will vary,”⁷⁴ and because, moreover, a person faced with a particular “practical decision” always has the option of concluding that his belief is insufficient in degree to justify action, the reasonableness of a belief cannot depend on the reasonableness of acting on the belief in a particular set of circumstances. There is, finally, an unbridgeable divide between the reasonableness of action, which is the concern of the Model Penal Code’s definitions of recklessness and negligence, and the reasonableness of a belief. The reasonableness of a belief cannot tell us what we need to know in order to decide whether it was reasonable to act on the belief.⁷⁵

VII. CONCLUSION: WHY THIS MATTERS

None of this is meant to imply that juries require instruction on “degrees of belief.” In the end, it does not matter whether the jury instructions speak of “degrees of belief” or instead speak, as the standard definitions of negligence and recklessness do,⁷⁶ of “degrees of risk.” Either vocabulary can adequately convey the critical truth: that “[t]he degree of probability of the consequence”⁷⁷ that is sufficient to trigger liability will vary depending on the interests at stake, and sometimes will be very slight. It is this critical truth that is obscured when judges instruct juries to assign exculpatory import to “reasonable beliefs,” since even a *reasonable* belief can co-exist with awareness of a high probability that the belief is mistaken. In cases where a statute identifies the culpable mental state for the offense as recklessness or negligence, the judge simply should instruct the jury

⁷² KARL R. POPPER, OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH 79 (1972).

⁷³ *Id.*

⁷⁴ Carr, *supra* note 33, at 122.

⁷⁵ *Id.* (summarizing potential objection to his remarks about belief: “we are led to make a distinction between rational action and rational belief, and to the former alone is the risk element applicable”); *id.* at 124 (acknowledging existence of distinction “between rational action and rational belief,” but arguing that “[t]here is, however, a close relation between *knowledge* and action”).

⁷⁶ MODEL PENAL CODE, *supra* note 2, § 2.02(2).

⁷⁷ WILLIAMS, *supra* note 18, § 26, at 59.

using the statutory definitions of these terms and should say nothing about the legal significance of “beliefs.”

This is not the only conclusion to be drawn from the analysis, however. The analysis also has implications for cases where the statutes are silent as to *mens rea*. Particularly in cases of rape⁷⁸ and sexual abuse,⁷⁹ judges have been quick to adopt a “reasonable belief” standard as a default *mens rea*, apparently on the assumption that this standard is the equivalent of civil negligence⁸⁰ and so defines the minimum level of culpability that is consistent with the criminal law’s objectives.⁸¹ This assumption is wrong, of course; a person who “reasonably believes” that his partner has reached the critical age or has given her consent may nevertheless be criminally negligent or even reckless in deciding to *act* on this belief. If girls and women deserve protection from partners who are, or ought to be, aware of an unjustifiable risk of sexual imposition, then negligence or recklessness is a better choice than “reasonable belief” as the default *mens rea* for rape and sexual abuse.

⁷⁸ See, e.g., *People v. Williams*, 841 P.2d 961, 965 (Cal. 1992).

⁷⁹ See, e.g., *People v. Hernandez*, 393 P.2d 673, 676 (Cal. 1964); *State v. Guest*, 583 P.2d 836 (Alaska 1978); see also Illinois Pattern Jury Instructions, Criminal, No. 11.64 (4th ed. 2000) (stating that a pattern jury instruction on mistake-of-age instructs the jury that it is a defense to the crime charged that the defendant reasonably believed the victim had reached the critical age).

⁸⁰ See *State v. Hazelwood*, 946 P.2d 875, 879 (Alaska 1997) (finding that by imposing “reasonable mistake-of-age” standard in earlier statutory rape case, court had “[i]n effect . . . sustained prosecution on charges that the defendant was negligent as to the victim’s age”); MODEL PENAL CODE, *supra* note 2, § 213.6 cmt. at 413 (stating that a provision making statutory rape defensible where the defendant “reasonably believed the child to be above the critical age” in effect “imposes a culpability standard of negligence”).

⁸¹ *Hernandez*, 393 P.2d at 676 (“[I]f [the defendant] participates in a mutual act of sexual intercourse, believing his partner to be beyond the age of consent, with reasonable grounds for such belief, where is his criminal intent?”).