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TWO KINDS OF CULPABILITY[1]

Culpability plays an important role in the criminal law. Under the influence of broadly retributive ideas, culpable wrongdoing — that is, wrongdoing for which the agent is responsible — is a condition of criminal censure and sanction. Wrongdoing that is not culpable in this sense is excused. But culpability is also an ingredient in wrongdoing itself, describing the agent's mental states in relation to her wrongdoing — for instance, whether she intended the wrong, foresaw it, was reckless with respect to causing it, or was negligent with respect to causing it.

There are two different roles that culpability plays in the criminal law, corresponding to two different senses of *mens rea* or guilty mind. An older tradition of criminal jurisprudence conceives of *mens rea* broadly as signifying *blameworthiness*. An action might be wrong without being blameworthy if the agent is not responsible for her wrongdoing, because she lacks the right sort of mental capacities to recognize wrongdoing or conform her behavior to these norms or lacks freedom from interference by others. This would involve wrongdoing or offense without one kind of *mens rea* and culpability. However, in more recent criminal jurisprudence *mens rea* typically has a narrower sense, signifying *the mental elements of an offense*, such as whether the agent intended harm, foresaw harm, recklessly caused harm, or negligently caused harm. On this elemental view, *mens rea* is the mental dimension of the offense, complementing the objective dimension contributed by the specification of *actus reus* or guilty act.

These two kinds of culpability play different roles in an adequate criminal jurisprudence, forcing us to recognize two different concepts of culpability. We might call the sort of culpability without which wrongdoing is excused *broad culpability* and the sort of culpability that signifies the elemental *mens rea* of wrongdoing *narrow culpability*. As I hope to show, both narrow and broad culpability are essential to an adequate criminal jurisprudence. However, criminal jurisprudence is not always as clear as it might be about separating these two concepts of culpability. Even some very sophisticated writers fail to distinguish these two kinds of culpability or make claims about culpability that can be reconciled only by distinguishing broad and narrow culpability.[2] Other writers distinguish the two kinds of culpability but seem to suggest that they are rival conceptions of a common concept and focus only on the narrower kind of culpability associated with elemental *mens rea*, ignoring the broader kind of culpability as blameworthiness.[3] Still others distinguish broad and narrow culpability explicitly and make consistent claims about their roles in the criminal law but are

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[2] See, e.g., LARRY ALEXANDER, KIM FERZAN, AND STEPHEN MORSE, CRIME AND CULPABILITY 171 (2009). Though culpability is the cornerstone of their theory of the criminal law and they make claims about the extension of the concept, they never analyze the concept and write as if the same concept can specify elemental *mens rea* and blameworthiness. I discuss their assumptions more fully in §4 (*infra*), once I have explained the two different kinds of culpability at work in the criminal law.

[3] See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 118-19 (2012).

not as clear as they might be about the exact division of labor between the two kinds of culpability.[4] I want to remedy this situation by offering an account of these two kinds of culpability and their relationship to each other. On this account, broad and narrow culpability are complementary, rather than rival, conceptions. Each is an important part of an adequate criminal jurisprudence, because they correspond to different parts of a broadly retributive view that sees blame and punishment as fitting responses to culpable or responsible wrongdoing. The elemental sense of *mens rea* is the mental or subjective dimension of wrongdoing, whereas the broader sense of culpability attaches to wrongdoing for which the agent was responsible and blameworthy and without which she is excused. Each kind of culpability plays an important role in a broadly retributive rationale for the criminal law that predicates blame and punishment on the fair opportunity to avoid wrongdoing.[5] This analysis of the two kinds of culpability contributes to conceptual clarity in discussions of the role of culpability in criminal law and criminal jurisprudence. But it pays other dividends as well. The two kinds of culpability are tied to two different faces of responsibility — responsibility as attributability and as accountability. Narrow culpability is concerned with responsibility as attributability, because it reflects morally significant qualities of the agent's will, whereas broad culpability is concerned with responsibility as accountability, because fairness norms require that only wrongdoing for which the agent was responsible be punished. Moreover, the two kinds of culpability give rise to two different conceptions of strict liability crimes that are worth distinguishing — liability without narrow culpability and liability without broad culpability. The second sort of strict liability is even more problematic than the first; both are condemned by fairness norms in a broadly retributive criminal jurisprudence.

1. PREDOMINANT RETRIBUTIVISM AND BROAD CULPABILITY

An older tradition of thinking about culpability associates it with *mens rea* understood as blameworthiness. We can refine this idea by situating it within a broadly retributive conception of blame and punishment. A plausible form of retributivism identifies culpable or responsible wrongdoing as the desert basis for blame and punishment. It says that blame and punishment are fitting responses to wrongdoing for which the agent is culpable or responsible. More specifically, blame and punishment ought to be proportional to desert, which is itself the product of two independent variables — wrongdoing and culpability or responsibility.[6]

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[4] See, e.g., MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 191-93, 403-19 (1997). In fact, I am very sympathetic to Moore's claims about the two kinds of culpability. One could see my project as making explicit the sort of division of labor between broad and narrow culpability that is implicit in his account.

[5] Doug Husak, *Broad Culpability and the Retributivist Dream,* Ohio St. J. Crim. L. 449 (2012) also separates broad and narrow culpability. Like me, he thinks that narrow culpability (elemental *mens rea*) is better understood than broad culpability and its relation to narrow culpability. Husak's own conception of broad culpability is quite wide-ranging. It is a little hard to compare directly with my own conception, partly because he mixes explanation and justification of existing doctrine with normative reform, partly because he recognizes multiple categories (e.g. insanity and immaturity) that might figure as sub-categories in my analysis (e.g. different aspects of incompetence), and partly because he includes as aspects of broad culpability some things that I would include in narrow culpability (e.g. motive). I suspect that my conception is more parsimonious (posits fewer basic categories) but perhaps less inclusive than Husak's conception; nonetheless, there might be significant common ground in our accounts.

[6] Here, I adapt some related ideas in ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 363-66 (1981). My formula resolves some ambiguities and inconsistencies in his discussion in ways with which he might not have agreed.

$$P \propto D (= W \times R)$$

Predominant retributivism qualifies this retributivist claim in ways that point toward a mixed theory of punishment in which retributive elements play a dominant role.

First, the retributive formula represents a constraint on blame and punishment. As such, it purports to provide a necessary condition on blame and punishment. But there is more to the constraint it exercises than this gatekeeper function. It also provides a backward-looking desert-based reason in favor of blame and punishment. It says that blame and punishment are fitting responses to culpable wrongdoing. On this view, culpable wrongdoing is sufficient for a strong *pro tanto* case for blame and punishment. However, this *pro tanto* case won't carry the day if it encounters sufficient countervailing non-desert-based reasons, such as the costs of punishment, the prospects for rehabilitation, or the value of mercy or forgiveness. This is one way in which forward-looking rationales for blame and punishment can play a role in a conception that is constrained and informed by backward-looking desert-based considerations.

Second, retributivism addresses the questions *why* we should punish, *whom* we should punish, and *how much* we should punish, and it provides a backward-looking desert-based answer to these questions. However, this doesn't address the question of *how* we should punish — that is, the nature of our penal institutions and practices. Forward-looking answers to this question that appeal to deterrence, rehabilitation, and the expression of community norms are compatible with desert provided they conform to the constraints imposed by the retributivist answer to these prior questions.

Yet a third way to reconcile forward-looking rationales for punishment and the retributivist backward-looking focus on desert is to allow consequentialist considerations to supplement considerations of desert in the determination of precisely how much to punish. Despite the apparent precision of the retributivist formula for punishment, it is quite possible that the punishment deserved for culpable wrongdoing is not a unique numerical value, but rather a range or interval of values. Indeed, interval sentencing is reflected in various sentencing guidelines, including the United States Federal Sentencing Guidelines.[7] Whether punishment intervals reflect genuine metaphysical indeterminacy in the desert basis of particular crimes or epistemological indeterminacy in our ability to track small but genuine differences in culpable wrongdoing is an interesting question, which we need not settle here. As long as there is limited indeterminacy in the desert basis for punishment, whether it is metaphysical or epistemological in nature, there is a need to specify further a precise punishment value within the deserved interval. By hypothesis, considerations of desert have been exhausted. So, it is open to us to appeal to various consequentialist rationales (e.g. rehabilitation, deterrence, and moral communication and education) to fine-tune the level of punishment within the space of punishments set by desert.

In these ways, various attractive forward-looking rationales can have an important role to play in justifying our practices of punishment, but they are constrained by the retributive insistence that punishment be conditioned on desert for culpable wrongdoing. Something like predominant retributivism has considerable intuitive appeal and fits well with important parts of criminal jurisprudence. If blame and punishment are predicated on wrongdoing for which the agent is culpable or responsible, as the predominant retributivist claims, this explains well the two main kinds of affirmative defense an agent might offer when blame or punishment threatens — *justifications* and *excuses*.[8] Justifications deny wrongdoing, whereas excuses deny culpability or responsibility. Just as justification is the flipside of wrongdoing, so too excuse is the flipside of responsibility.

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[7] United States Sentencing Commission, GUIDELINES MANUAL (Nov. 2011).

[8] While justifications and excuses are the two main affirmative defenses available to defendants, there are also policy-based exemptions, such as prosecutorial immunity for diplomats. See, e.g., PAUL ROBINSON,

On this picture, culpable wrongdoing is wrongdoing for which the agent is responsible or accountable. We could identify this retributivist conception of culpability with responsibility. This might be a little odd linguistically insofar as it would commit us to recognizing culpability for responsible actions that are praiseworthy as well as blameworthy. Though coherent, this proposal strains ordinary usage. We might say instead that culpability, in this sense, is the negative side of responsibility. This is culpability as blameworthiness, which involves wrongdoing for which the agent is responsible.

2. CULPABILITY, RESPONSIBILITY, AND FAIR OPPORTUNITY

Culpable wrongdoing is wrongdoing for which the agent is responsible. Because the denial of responsibility is an excuse, responsibility and excuse are inversely related. Those responsible for their wrongdoing lack an excuse, and excused wrongdoing is wrongdoing for which the agent is not responsible. This means that responsibility and excuse should have corresponding structure, and either could be studied by studying the other. Excuse is a window onto responsibility, and vice versa.[9] This allows us to model responsibility and, hence, broad culpability by attending to excuses.

The criminal law recognizes two main kinds of excuse — *incompetence* excuses such as insanity, and *duress* excuses. Incompetence involves impairment of an agent's internal capacities. By contrast, duress involves a situational failing in which wrongful interference by another with the agent's options deprives her of the fair opportunity to act on her own deliberations about how to behave. In this way, standard excuses recognized by the criminal law reflect impairment of the agent's capacities or opportunities. If we treat excuse as a window onto responsibility, we might factor responsibility and, hence, culpability into two main conditions — *normative competence* and *situational control* — which we can understand as two aspects of the *fair opportunity to avoid wrongdoing*. This conception of responsibility draws on and synthesizes two traditions of thinking about responsibility — the reasons-responsive wing of the compatibilist tradition of thinking about free will and responsibility and the fair choice approach to criminal responsibility.[10]

If someone is to be culpable or responsible for her wrongdoing, then she must be a responsible agent. Our paradigms of responsible agents are normal mature adults who are normatively competent. They must be able to distinguish between the *intensity* and *authority* of their desires and impulses. This requires that agents not simply act on their strongest desires, but be capable of stepping back from their desires, evaluating them, and acting for good reasons. If so, normative competence involves *reasons-responsiveness*, which itself involves both *cognitive*

STRUCTURE AND FUNCTION IN THE CRIMINAL LAW 96-124, 204-07 (1997) and Mitchell Berman, *Justification and Excuse, Law and Morality,* 53 Duke L. J. 1 (2003).

[9] Moore describes excuse as "the royal road" to responsibility (MOORE, *supra* note 4, at 548). But it's important to recognize that it is a two-way street.

[10] The reasons-responsive tradition of moral responsibility is reflected in SUSAN WOLF, FREEDOM WITHIN REASON (1990); R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS (1994); JOHN FISCHER AND MARK RAVIZZA, RESPONSIBILITY AND CONTROL (1998); DANA NELKIN, MAKING SENSE OF FREEDOM AND RESPONSIBILITY (2011); and Michael McKenna, *Reasons-Responsiveness, Agents, and Mechanisms,* 1 Oxford Studies in Agency and Responsibility 151 (2013), while the fair choice literature in criminal jurisprudence is reflected in H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); MOORE, *supra* note 4; and Stephen Morse, *Culpability and Control,* 142 U. Pa. L. Rev. 1587 (1994) and *Uncontrollable Urges and Irrational People,* 88 Va. L. Rev. 1025 (2002). A fuller presentation of the fair opportunity conception of responsibility is contained in David O. Brink and Dana K. Nelkin, *Fairness and the Architecture of Responsibility,* 1 Oxford Studies in Agency and Responsibility 284 (2013) and David O. Brink, *Responsibility, Incompetence, and Psychopathy,* 53 Lindley Lectures 1 (2013).

capacities to distinguish right from wrong and *volitional* capacities to conform one's conduct to that normative knowledge.

It is important to frame this approach to responsibility in terms of normative *competence* and the possession of these *capacities* for reasons-responsiveness. In particular, responsibility must be predicated on the possession, rather than the use or exercise, of such capacities. We do excuse for lack of competence, not for lack of performance. Provided the agent had the relevant cognitive and volitional capacities, we do not excuse the weak-willed or the willful wrongdoer for failing to recognize or respond appropriately to reasons. If responsibility were predicated on the proper use of these capacities, we could not hold weak-willed and willful wrongdoers responsible for their wrongdoing. Indeed, the fact of wrongdoing would itself be exculpatory, with the absurd result that we could never hold anyone responsible for wrongdoing. It is a condition of our holding wrongdoers responsible that they possessed the relevant capacities or competence.

Normative competence, on this conception, involves two forms of reasons-responsiveness: an ability to *recognize* reasons for or against conduct, in particular, wrongdoing and an ability to *conform one's will* to this normative understanding. Both dimensions of normative competence involve norm-responsiveness. As a first approximation, we can distinguish moral and criminal responsibility at least in part based on the kinds of norms to which agents must be responsive. Moral responsibility requires capacities to recognize and conform to moral norms, including norms of moral wrongdoing, whereas criminal responsibility requires capacities to recognize and conform to norms of the criminal law, including norms of criminal wrongdoing. Though there will typically be considerable overlap between moral and criminal norms, especially in morally legitimate criminal systems, there is no reason to expect the coincidence to be perfect. Indeed, in most liberal regimes there will be many moral norms that the legal system will not criminalize.

Normative competence requires the cognitive capacity to make suitable normative discriminations, in particular, to recognize wrongdoing. If so, then we can readily understand one aspect of the criminal law insanity defense. Most plausible versions of the insanity defense include a cognitive dimension, first articulated in the M'Naghten rule that excuses if the agent lacked the capacity to discriminate right from wrong at the time of action.[11]

But there is more to normative competence than this cognitive capacity. It is a common view that intentional action is the product of representational states, such as beliefs, and motivational states, such as desires and intentions. Though our beliefs about what is best can influence our desires, producing optimizing desires, our desires are not always optimizing. Sometimes they are good-dependent but not optimizing, when they are directed at lesser goods, and sometimes they are completely good-independent. This is reflected in cases of weakness of will in which we have beliefs about what is best (and perhaps optimizing desires) but in which we act instead on the basis of independent non-optimizing passions and desires. In such cases, I know what is best to do, but act otherwise due to conflicting passions and desires. This psychological picture suggests that being a responsible agent is not merely having the capacity to tell right from wrong but also requires the capacity to regulate one's actions in accordance with this normative knowledge. This kind of volitional capacity requires emotional and appetitive capacities to enable one to form intentions based on one's practical judgments about what one ought to do and execute these intentions over time, despite distraction, temptation, and other forms of interference.

If one's emotions and appetites are sufficiently disordered and outside one's control, this might compromise volitional capacities necessary for normative competence. In principle, volitional impairment might take the form of irresistible urges, paralyzing phobias, severe depression, or damage to the prefrontal cortex of the brain. Recognition of a volitional dimension of normative

[11] M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

competence argues against purely cognitive conceptions of insanity, such as the M'Naghten test, which recognizes only cognitive deficits as the basis for insanity, and in favor of a more inclusive conception, such as the Model Penal Code's wider conception of insanity as involving significant impairment of *either* cognitive or volitional competence (§4.01).[12]

Both cognitive and volitional competence involve *sensitivity* to reasons. But sensitivity is a *scalar* notion. People can be more or less sensitive to reasons, and cognitive or volitional competence can be more or less impaired. If we analyze responsibility and excuse in terms of normative competence, this implies that both responsibility and excuse are, at least in principle, scalar concepts. There may be important pragmatic reasons for making bright line discriminations in certain contexts, privileging certain degrees of normative competence, as necessary and sufficient for responsibility and excuse. These are interesting and complicated issues, beyond the scope of this essay. But if we must recognize thresholds of normative competence, if only for pragmatic reasons, it seems fair to require, as the Model Penal Code does, substantial, rather than bare, normative capacity as a condition of responsibility and significant, rather than complete, impairment of capacity as grounds for an excuse.

An important part of an agent's being responsible for wrongdoing that she chose and intended consists in her being a responsible agent. This we have conceptualized in terms of normative competence and analyzed into cognitive and volitional capacities. Evidence for this view is that one seems to have an excuse, whether complete or partial, if one's normative competence is compromised in significant ways. Some of the most familiar kinds of potential excuse — insanity, immaturity, and uncontrollable urges — involve compromised normative competence.

But there is more to an agent being culpable or responsible for her wrongdoing than her being responsible and having intentionally engaged in wrongdoing. Excuse is not exhausted by denials of normative competence. Among the factors that may interfere with our reactive attitudes, including blame and punishment, are external or situational factors. In particular, coercion and duress may lead the agent into wrongdoing in a way that nonetheless provides an excuse, whether full or partial. The paradigm situational excuse is coercion by another agent, as when one is threatened with physical harm to oneself or a loved one if one doesn't participate in some kind of wrongdoing, for instance, driving the getaway car in a robbery. The Model Penal Code adopts a reasonable person version of the conditions under which a threat excuses, namely, when a person of reasonable firmness would have been unable to resist, provided the actor was not himself responsible for being subject to duress (§2.09). Situational duress does not compromise the wrongdoer's status as a responsible agent and does not challenge her normative competence, but it does challenge whether she is responsible for her wrongdoing.[13]

So far, the conception of responsibility emerging here is a two-factor model twice over. Responsibility is factored into normative competence and situational control, and normative

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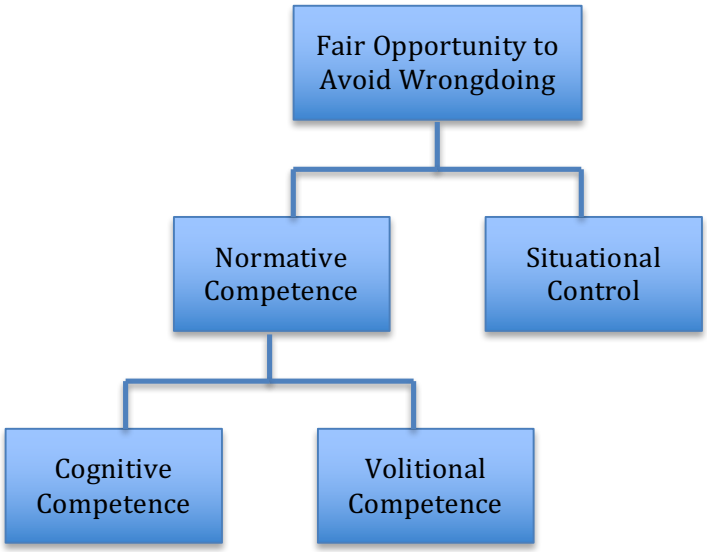
[12] For further discussion, see Brink, *Responsibility, Incompetence, and Psychopathy, supra* note 10.

[13] The details of duress are tricky. Some situational pressures, such as the need to choose the lesser of two evils, may actually *justify* the agent's conduct, as is recognized in *necessity* defenses. If the balance of evils is such that the evil threatened to the agent is worse than the evil involved in her wrongdoing, then compliance with the threat is justified. But in an important range of cases, coercion and duress seem not to justify conduct (remove the wrongdoing) but rather to *excuse* wrongdoing, in whole or in part. In such cases, where the evil threatened is substantial but less than that contained in the wrongdoing, the agent's wrongdoing should be excused because the threat or pressure was more than a person should be expected to resist. Whether the difference between when duress justifies and when it excuses should be settled by applying the balance of evils test depends on the moral framework in which we measure evils. The criminal law sometimes employs a consequentialist version of the test, but one might instead measure the moral seriousness of evils in ways that reflect agent-centered prerogatives.

competence is factored into cognitive and volitional capacities. This kind of two-factor model seems plausible, in significant part because it promises to fit our practices of excuse in both moral assessment and the criminal law pretty well. Incapacity excuses deny normative competence, whereas duress excuses deny the opportunity to exercise those capacities free from inappropriate interference by others. But it would be nice if there were some unifying element to its structure.

One possible umbrella concept is *control*. Freedom from coercion and duress, cognitive competence, and volitional competence all seem to be aspects of an agent's ability to control her actions. But control seems important, at least in part, because it seems *unfair* to blame agents for outcomes that are outside their control. This suggests that the umbrella concept should be fairness, in particular, *the fair opportunity to avoid wrongdoing*, because failure of either normative competence or situational control violates the norm that blame and punishment be reserved for those who had a fair opportunity to avoid wrongdoing. If we treat the fair opportunity to avoid wrongdoing as the key to responsibility, we get the following picture of the architecture of responsibility.



The fair opportunity conception of responsibility provides a framework for understanding broad culpability as responsibility. It draws on resources familiar from philosophical discussions of moral responsibility and fair choice approaches to criminal responsibility and makes sense of the criminal law's conceptualization of excuses into impairments of capacities (incompetence) and impairment of opportunities (duress).

3. CULPABILITY AND ELEMENTAL *MENS REA*

However, the predominant conception of culpability in the criminal law understands it in terms of *mens rea* and the specific mental states of agents that are ingredient in the idea of criminal offense. This conception of culpability appeals to half of a familiar division of labor between *actus reus* and *mens rea*.

The *actus reus* of an offense includes the objective or material elements of the offense. The *actus reus* must be a voluntary act that brings about (causally or constitutively) wrongful conduct.[14] Wrongdoing can involve one or more of three elements.

[14] Omissions are generally not understood as acts, unless the omissions occur in the capacity of someone with a defined role-responsibility, such as a lifeguard's decision not to save a drowning swimmer. However, this is

- *Conduct:* Sometimes the wrong consists simply in proscribed conduct, independently of consequences or circumstances, as when the criminal law prohibits driving while intoxicated, whether or not harm ensues.
- *Results*: Sometimes conduct is only proscribed when it issues in certain results; for instance, murder requires that the attempt succeed in killing another.
- *Attendant circumstances*: Some offenses build in attendant circumstances. For instance, the common law burglary offense requires that there be "breaking and entering of the *dwelling* of *another* at *nighttime.*"

These three elements can interact in ways that depend on how fine-grained the specification of conduct is. For instance, is a killing an action or a result? If rape or sexual assault involves nonconsensual sexual penetration, is penetration an act or result, and is its being nonconsensual part of the act or an attendant circumstance? One could imagine describing the conduct in such a way that it includes the relevant results and/or circumstances, in which case many wrongs would simply be conduct crimes. Alternatively, one could specify the conduct narrowly, such that the offense in question requires the addition of particular results and/or attendant circumstances, and not just conduct. It is not clear if anything substantive hangs on this question about how narrowly to construe conduct.[15]

The elemental sense of *mens rea* refers to the subjective or mental elements of an offense. It involves the agent's mental attitudes or relation toward the material elements of the wrong, especially toward the harm caused or risked. Here especially, common law doctrines are variable and idiosyncratic, and so it will be convenient to rely on the more systematic treatment of *mens rea* in the Model Penal Code (§2.02), which recognizes four culpable mental attitudes possible for each material element of the offense.

- The agent acts *purposely* if she intends the material element (conduct, result, or circumstance).
- The agent acts *knowingly* if she foresees that the material element is a certain or highly probable result of what she does, even if she does not intend it.
- An agent acts *recklessly* if she consciously disregards a substantial and unjustifiable risk that the material element exists or will result from her conduct.
- An agent acts *negligently* if she should have been aware of a substantial and unjustifiable risk that the material element exists or will result from her conduct.

These categories reflect four grades of culpability from greater to lesser culpability and sometimes define distinct offenses. This can be readily appreciated in a case of harmful wrongdoing, such as homicide. Other things being equal, intending a wrongful harm is worse than foreseeing and causing it without intending it, which is worse than recklessly causing it, which is worse than negligently causing it. In the case of homicide, these different mental elements define different offenses. Murder is homicide with purpose or knowledge, manslaughter is reckless homicide, and negligent homicide is just that, homicide committed negligently.

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a contingent feature of the substance of our doctrine of *actus reus* and is not an essential feature of *actus reus* and its relation to *mens rea*.

[15] Robinson argues for construing conduct narrowly and for a correspondingly greater role for results and attendant circumstances in the specification of *actus reus*. See ROBINSON, *supra* note 8, at 25-27, 51.

As a rough first approximation, this is the elemental sense of *mens rea*.[16] It combines both conceptual and substantive claims. The conceptual claim of elemental *mens rea* is just that most offenses have a mental element, distinct from the material elements of the offense. The substantive claim is that these four mental elements are the ones and only ones that matter and that they differentially affect the seriousness of the offense. The conceptual claim can be true, even if the substantive claim is not and merits reform.[17]

4. TWO KINDS OF CULPABILITY

Now that we have examined these two kinds of culpability, we are in a better position to appreciate their roles in the criminal law. These two forms of culpability are distinct, but they are not rival conceptions of a common concept. Instead, they play different but complementary roles in the criminal law. Each is essential to an adequate criminal jurisprudence.

Broad culpability is culpability as blameworthiness or negative responsibility without which wrongdoing is excused. Broad culpability is part of the retributivist idea that blame and punishment are fitting responses to culpable wrongdoing. This is wrongdoing for which the agent is responsible and, hence, blameworthy. It is the kind of culpability whose denial is an excuse. Moreover, it is the kind of culpability that requires both normative competence and situational control and implies that the agent had the fair opportunity to avoid wrongdoing. In particular, broad retributivism condemns blame and punishment of wrongdoing as unfair unless the agent was responsible for her wrongdoing.

Narrow culpability is culpability as elemental *mens rea*. Narrow culpability consists in different mental attitudes or relations that the agent might bear to the objective or material elements of the offense (its *actus reus*) — whether she intended the wrong, whether she foresaw and caused it without intending it, whether she was reckless in bringing it about, or whether she was negligent in bringing it about. These different forms of elemental *mens rea* represent different grades of culpability, from more to less, and help define different offenses.

These two kinds of culpability function quite differently in the criminal law. Along with wrongdoing, broad culpability is one of two independent variables in the retributivist desert basis for blame and punishment. By contrast, narrow culpability is the subjective element in wrongdoing insofar as elemental *mens rea* is a constituent of the offense itself. But then the two different kinds of culpability play different roles within the retributivist rationale for blame and punishment. Whereas narrow culpability is part of the wrongdoing itself, broad culpability is a separate condition that has to be met if the wrongdoing is to be blameworthy. Though both kinds of culpability are important to a retributive rationale for blame and punishment, they play very different roles within this rationale.

We can see that these are different kinds of culpability by seeing how they require different burdens of proof. As an element of the offense itself, the prosecution bears the burden of proof for

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[16] One advantage of focusing on the Model Penal Code is that it allows us to avoid the vexed common law distinction between general and specific intent. On one reading, specific intent crimes require the elemental *mens rea* of intent, whereas offenses that require one of the remaining three forms of elemental *mens rea* are general intent crimes. Alternatively, specific intent offenses are those that specify the possession of a further criminal intent, whereas general intent offenses do not. For instance, common law larceny is a specific intent crime, on this reading, because it involves the appropriation of the personal property of another *with the intent of permanently depriving the other of her property*. For discussion, see, e.g., DRESSLER, *supra* note 3, at 137-39.

[17] For some skepticism about the substantive claim, see ALEXANDER, FERZAN, AND MORSE, *supra* note 2, and Seana Shiffrin, *The Moral Neglect of Negligence,* Oxford Studies in Political Philosophy (forthcoming). Alexander, Ferzan, and Morse reduce purpose and knowledge to special cases of recklessness and express skepticism about negligence as a form of elemental *mens rea*. By contrast, Shiffrin thinks that the comparative culpability of negligence is frequently underestimated.

establishing elemental *mens rea* and, hence, narrow culpability, and that burden is proof beyond a reasonable doubt. While the prosecution bears the burden of proof that the defendant has committed wrong, including narrow culpability, it does not have the burden of proof of establishing broad culpability. The presumption is in favor of broad culpability. Denying broad culpability or responsibility is an excuse, and, as with all affirmative defenses, it is the burden of the defense to establish the excuse by either a preponderance of the evidence or a clear and convincing case (depending on the jurisdiction). The different burdens of proof associated with the two kinds of culpability (and their denials) show that they play very different roles within criminal jurisprudence.

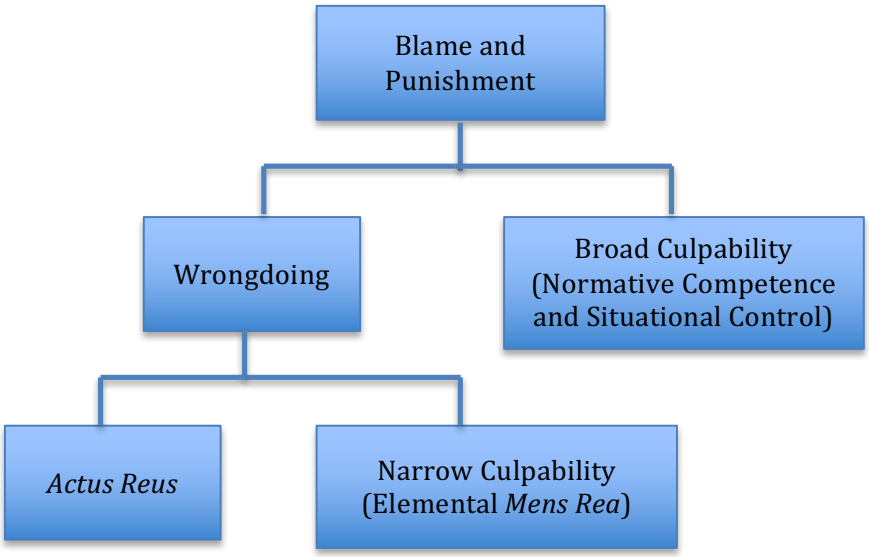
Another way to see the difference between these two forms of culpability is to see how they are independent of each other. On the one hand, one might possess narrow culpability without broad culpability. This is the familiar possibility that an agent might have done everything necessary to commit the wrong, including the required elemental *mens rea*, without being broadly culpable, because she is excused, either by reason of insanity or duress. Sometimes what disqualifies one from being broadly culpable also disqualifies one from being narrowly culpable, as when a particular form of normative incompetence prevents the agent from forming the elemental *mens rea* required by the offense. But this is not generally true. It is not true in traditional insanity or duress defenses in which the defendant does not deny any element of wrongdoing but alleges an excuse based on normative incapacity or duress. On the other hand, one might possess broad culpability without narrow culpability. This possibility is a little more difficult to see, because of the tendency, encouraged by the Model Penal Code (§2.02(3)), to assume that every offense must have at least one of the four forms of elemental *mens rea*. But some jurisdictions recognize strict liability offenses that do not require any elemental *mens rea* — intent, knowledge, recklessness, or negligence. Strict liability can apply to any elements of the *actus reus* — the conduct, the results, or the attendant circumstances. We will return to issues about strict liability below (§7). For present purposes, we might consider statutory rape, which is a strict liability offense in some jurisdictions insofar reasonable ignorance about the age of the consenting minor is not a defense. This appears to be a strict liability crime that does not require narrow culpability with respect to the attendant circumstances of sexual intercourse, viz. the age of one's sexual partner. Anyone convicted of such a crime who is responsible and does not have an excuse would be broadly but not narrowly culpable.

Still another way to appreciate the difference between the two different kinds of culpability is to see how each interacts with *actus reus* in the criminal law. When narrow culpability is associated with elemental *mens rea*, *actus reus* refers to the material or objective elements of the offense. *Actus reus* and *mens rea* are individually necessary and jointly sufficient for the wrongdoing or offense. But wrongdoing or offense, while necessary for blame and punishment, is not sufficient for it. Blame and punishment are fitting responses to wrongdoing only when the agent is broadly culpable or responsible for the wrongdoing. Alternatively, if we associate *mens rea* with broad culpability, then *actus reus* and *mens rea* could be individually necessary and jointly sufficient for blame and punishment only if *actus reus* included all elements of the wrongdoing, both objective and subjective elements. That, of course, is not the usual way of conceiving of *actus reus*, which conventionally refers only to the objective elements of the offense. But then we can see that *actus reus* and *mens rea* could not be jointly sufficient for the desert basis for blame and punishment unless *both* kinds of *mens rea* and culpability are present.

These considerations testify to the different roles that these two kinds of culpability play in the criminal law. We can represent these different roles propositionally.

1. Elemental *mens rea* — narrow culpability — and *actus reus* are individually necessary and jointly sufficient conditions of wrongdoing.[18]
2. Only wrongdoing for which the agent is blameworthy or responsible — broadly culpable — is an apt target for blame and punishment.

We could also represent these different roles diagrammatically.



These are not just different roles; they are also complementary roles. Each is essential to a broadly retributive criminal jurisprudence.[19]

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[18] Strictly speaking, elemental *mens rea* (narrow culpability) and *actus reus* are individually necessary and jointly sufficient conditions for *pro tanto* wrongdoing. A justification denies wrongdoing, but it does not deny that the material and mental elements of the offense have been met. This implies that justifications deny *all-things-considered* wrongdoing, not *pro tanto* wrongdoing. So, elemental *mens rea* and *actus reus* are necessary and sufficient for *pro tanto*, rather than all-things-considered, wrongdoing.

[19] I am now in a position to explain more fully my reservations about the treatment of culpability in ALEXANDER, FERZAN, AND MORSE, *supra* note 2. Despite the central role that culpability plays in the argument of their book, they never analyze the concept and make conflicting claims about its extension, writing as if the same concept can specify elemental *mens rea* and blameworthiness. (1) They appeal to culpability as the desert basis for their retributivist justification of punishment (p. 9). Then (2) they defend a novel theory of culpability as recklessness or unjustifiable risk creation, in opposition to the Model Penal Code's four-fold conception of elemental *mens rea* (chs. 2-3). Subsequently, (3) they conclude that culpability as recklessness is both necessary and sufficient for culpability as blameworthiness (p. 171). (1) and (2) are compatible only if (1) is understood as a claim about broad culpability and (2) is understood as a claim about narrow culpability. But (3) cannot be defended. Narrow culpability cannot be sufficient for blameworthiness if only because elemental *mens rea* is part of wrongdoing and is not sufficient for blameworthiness if wrongdoing is excused by virtue of insanity or duress. These problems are remediable according to the model of culpability advocated here, provided Alexander et al. relativize (1) and (2) to different kinds of culpability and renounce (3). Moreover, these problems are independent of the merits of their other provocative claims (e.g. their claim that criminal responsibility reduces to unjustifiable risk creation, which implies skepticism about the need for a special part of the criminal code, defining particular crimes; their claim that the narrow culpability categories of purpose and knowledge are special cases of recklessness; their skepticism about negligence as a form of culpability; and their skepticism about resultant luck and insistence that completed crimes should be punished no differently than attempts).

5. *MENS REA*, ATTRIBUTABILITY, AND QUALITY OF WILL

The importance of distinguishing these two kinds of culpability is reinforced by looking at the ways in which they interact with a distinction that some have drawn between two different kinds of responsibility. Writing primarily about moral responsibility, Gary Watson has distinguished two faces of responsibility: *attributability* and *accountability*.[20] As a rough first approximation, we ascribe responsibility in the attributive sense to agents for their actions insofar as we see those actions reflect the quality of their wills, whereas we ascribe responsibility in the accountability sense to agents for their actions insofar as it is fair to blame them for those actions. Narrow culpability plays an important part in attributability, whereas broad culpability plays an important part of accountability.

We hold an agent attributively responsible for her actions and the foreseeable consequences of those actions based on the *quality of her will,* where that discloses her character or true self and reflects her fundamental evaluative orientation. Different conceptions of quality of will are possible. We might understand it (1) in characterological terms as a will expressing one's stable character traits,[21] (2) in terms of a will in which the agent endorses her motivating desires,[22] or (3) in terms of the regard and concern the agent displays for the interests and rights of others.[23] However, it is not clear that we should limit responsibility and blame to culpable states of mind that express an agent's stable character traits or dispositions that she endorses, for then we could not hold agents responsible for wrongs that were out of character or for familiar forms of weakness of will, in which the agent acts on desires she does not endorse. It seems more reasonable to identify an agent's quality of will with the kind of regard she has for the interests and rights of others.

We might not hold an agent responsible for harm that she causes to others if this was beyond her control, for instance, if she was manipulated by natural forces or the will of another. For in such cases, her actions do not reflect her orientation toward the interests and rights of others. But we do hold someone responsible in this attributive sense if the harms she causes reflect her will in certain ways — if she intended the harm, if she tolerated the harm as an acceptable byproduct of what she did intend, if she was aware of the risks she posed to others and was indifferent, or if she was not aware of risks she posed to others when she could and should have been.

T.M. Scanlon develops a conception of blame that appeals to attributive responsibility conceived along these lines.[24] He thinks that blame can be a fitting response to the quality of the agent's will, in particular, to the insufficient regard she displays for the interests and rights of others. Normal interpersonal relations and attitudes reflect expectations about appropriate regard for the

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[20] Gary Watson, *Two Faces of Responsibility,* reprinted in GARY WATSON, AGENCY AND ANSWERABILITY (2004). Whereas Watson endorses a bipartite distinction between attributability and accountability, David Shoemaker endorses a tripartite distinction in *Attributability, Answerability, and Accountability: Toward a Wider Theory of Moral Responsibility,* 121 Ethics 602 (2011). I am not yet convinced of the need for a tripartite distinction, and present purposes require only a bipartite distinction.

[21] Hume gives expression to a characterological conception of responsibility and quality of will in DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS §VII, Part II (1751).

[22] Frankfurt develops a conception of responsibility in terms of a mesh between the agent's first-order motivating desires and her second-order or aspirational desires in Harry Frankfurt, *Freedom of the Will and the Concept of a Person,* 68 J. Phil. 5 (1971). Watson develops a conception of responsibility in terms of a mesh between the agent's first-order motivating desires and her evaluative endorsement of those desires in Gary Watson, *Free Agency,* reprinted in GARY WATSON, AGENCY AND ANSWERABILITY (2004).

[23] Scanlon develops an account of attributive responsibility and blame in terms of the agent's evaluative orientation toward others in T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, AND BLAME (2008).

[24] SCANLON, *supra* note 23, at 202.

interests and rights of others, and when agents breach these expectations they become appropriate targets of blame and other reactive attitudes. On this view, A is justified in her hard feelings toward B and in blaming B if B injures A through malice, indifference, recklessness, or negligence. Here, our reactive attitudes track the insufficient regard that B shows A's interests and rights.

If we understand attributive responsibility in terms of quality of will, then elemental *mens rea* and, hence, narrow culpability speak to the quality of the agent's will that bears on attributive responsibility.

It is controversial proposition in normative ethics that the agent's intentions or other mental states can affect the deontic status or valence — especially the permissibility — of her actions. Some deny the proposition, while others affirm it.[25] Proponents appeal to the doctrine of double effect and other ways in which an agent's intentions seem to affect the permissibility of her actions. For instance, proponents of the doctrine of double effect claim that all else being equal it is worse to intend harm than merely to foresee it as a byproduct of one's actions. Opponents insist on a sharp distinction between assessments of the deontic valence of actions and assessments of the agent's motives and character. Though Scanlon denies that narrow culpability can affect the permissibility of actions — that is a purely objective matter — he does allow that it can affect their meaning and blameworthiness. The criminal law seems to disagree insofar as elemental *mens rea* is an ingredient in most wrongdoing, at least those offenses that are not strict liability offenses. Moreover, elemental *mens rea* is relevant not only to the criminalization of conduct but also to grading offenses in terms of their seriousness. Other things being equal, first-degree murder is a more serious offense than reckless homicide, and reckless homicide is a more serious offense than negligent homicide. For instance, under Model Penal Code doctrine, homicide with intent to kill is murder, whereas reckless homicide (not manifesting extreme indifference to the value of human life) is the lesser offense of manslaughter, whereas negligent homicide is the still lesser offense of negligent homicide (§210.1-4). It is true that the criminal law distinguishes objective and subjective elements of criminal offenses and treats the objective elements as prior to and independent of the subjective elements, inasmuch as the subjective elements are specified in relation to particular objective elements. But the subjective and objective elements are individually necessary and jointly sufficient for the offense or wrongdoing. So, the criminal law conception of wrongdoing affirms the relevance of the agent's intentions and other mental attitudes to the deontic valence of her actions.

6. BLAMEWORTHINESS, ACCOUNTABILITY, AND FAIR OPPORTUNITY

There may be senses of responsibility and blame — attributability senses — that track narrow culpability. But there are also important senses of responsibility and blame — accountability senses — that require more. Consider again a case in which B intends to violate A's rights to bodily integrity or property. We said that this licenses us in attributing harmful agency to B and would justify A's anger and hard feelings toward B. Perhaps this would even license a kind of blame toward B. But suppose that we learn that B did not in any relevant sense have a fair opportunity to do otherwise, either because B was insane and lacked basic normative competence to recognize or conform to the relevant norms or because B's behavior was the product of duress in which a third party threatened B or his loved ones with grievous bodily harm if he did not violate A's rights.

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[25] Those who deny the relevance of intention and other mental states to deontic valence include Judith Thomson, *Physician-Assisted Suicide: Two Moral Arguments,* 109 Ethics 497, 517 (1999), and SCANLON, *supra* note 23, ch. 1. Those who affirm the relevance of intention and other mental states to deontic valence include proponents of the doctrine of double effect, such as Warren Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect,* 18 Philosophy & Public Affairs 344 (1989) and Dana Nelkin and Samuel Rickless, *Three Cheers for Double Effect,* 89 Philosophy and Phenomenological Research 125 (2014), and STEVEN SVERDLIK, MOTIVE AND RIGHTNESS (2011).

Insanity and duress are excuses and imply that the agent was not at fault for the harm he did. It is natural in such circumstances to say that B was not responsible for the wrongs he committed. But since by hypothesis B was attributively responsible for the harm he caused, the sense in which he is not responsible must be a different sense of responsibility. This is Watson's sense of responsibility as accountability. It is also natural to say in these circumstances that B is not blameworthy for his wrongdoing. It would be unfair to punish B for wrongdoing that he did not have an adequate opportunity to avoid.[26] But blame is itself a sanctioning response, even if it is usually less severe than punishment, and so it would be unfair to blame B for wrongdoing that he did not have adequate opportunity to avoid. Broad culpability is a necessary condition for the agent to be responsible — accountable — for his wrongdoing and for blame and punishment to be fair.[27]

Broad culpability is tied to responsibility, understood as accountability, and it is plausibly modeled by the fair opportunity to avoid wrongdoing. Broad culpability conditions appropriate reactive attitudes and practices in a way that narrow culpability does not.[28] Retributivism insists that narrow culpability is insufficient for punishment and that only broadly culpable wrongdoing — wrongdoing for which the agent is accountable — is a fit object of punishment.

7. CULPABILITY AND TWO KINDS OF STRICT LIABILITY

A further benefit of distinguishing these two kinds of culpability is that it allows us to see a potential ambiguity in the doctrine of strict liability. Because strict liability crimes are those for which there is criminal liability without culpability, we can see the possibility of two different forms of strict liability, one without narrow culpability and one without broad culpability. While the first sort of strict liability crime is anomalous and controversial, there are no strict liability crimes of the second sort.

Strict liability offenses are offenses for which there is liability without culpability. It is common to recognize that strict liability offenses are morally problematic. The usual reason for thinking that they are morally problematic is that they are unfair, because they make one liable despite all reasonable efforts to avoid wrongdoing. This violates the norm that blame and sanctions be imposed only for conduct that the agent had a fair opportunity to avoid.

In "Legal Responsibility and Excuses" H.L.A. Hart suggests that the criminal law conditions liability on culpability out of respect for "the efficacy of the individual's informed and considered choice in determining the future."[29] A corollary of this concern with individual autonomy is the demand for the fair opportunity to avoid wrongdoing. This principle is at work in support of the

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[26] Of course, while blaming and punishing normatively incompetent wrongdoers might be unfair, civil commitment might nonetheless be appropriate if the pose a significant danger to themselves or others.

[27] The possibility of wrongdoing for which the agent is not responsible because she lacked the fair opportunity to avoid wrongdoing is perhaps the best reason for rethinking the voluntarist claim that ought implies can. But that is the topic for another paper.

[28] I take myself to be disagreeing with Scanlon about paradigmatic forms of blame being predicated on attributability. It's hard to know how deep this disagreement is, because it's hard to know whether he thinks blame and punishment never presuppose more than attributability. On the one hand, he seems to predicate blame, as such, on attributability and quality of will. On the other hand, he may allow that "hard treatment" and punishment require accountability and fair opportunity, and not just attributability and quality of will. If Scanlon accepts this second claim, he can admit that attributability is not sufficient for accountability and claim that whereas blame requires only attributability and quality of will, punishment requires accountability and fair opportunity. Even this weaker set of claims would be problematic insofar as central expressions of blame, and not just punishment, are apt if and only if and insofar as the agent is accountable and had the fair opportunity to avoid wrongdoing.

[29] H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 47 (1957).

fundamental legal principle of *legality*. Legality is the doctrine that there should be no punishment in the absence of public notice of a legal requirement. The principle of legality is usually defended as part of fair notice. *Ex post facto* or retroactive criminal law would be unfair, because it would punish those for failing to conform to behavioral expectations of which they had not been apprised in advance. *Ex post facto* law thus threatens individual autonomy and its demand of fair opportunity to avoid wrongdoing. But a similar rationale is at work against strict liability crimes. Just as it would be unfair to convict actors for failing to conform to standards that had not been promulgated in advance, so too it would be unfair to convict actors for failing to conform to standards (promulgated in advance) that they did everything within their power to obey. Conviction without culpability denies the fair opportunity to avoid wrongdoing.

Despite this unfairness, tort law recognizes strict liability offenses in connection with the design, manufacture, and handling of dangerous materials and products. The justification for strict liability is usually some combination of deterrence and administrative efficiency. These benefits of strict liability in tort may seem acceptable in part because tort law can be seen as a pricing system for behavior that does not attach imprisonment and stigma for liability. But the willingness to sacrifice fairness to the defendant for the sake of deterrence and efficiency is harder to justify in the criminal law where there is the prospect of blame and punishment and not just financial liability. In the criminal law, desert is central, and this makes liability without culpability problematic. This is why strict liability crimes are anomalous within the criminal law, at least in cases in which there is the prospect of imprisonment, rather than fines.

Conventional discussions of strict liability crimes, including skepticism about strict liability crimes, focus on instances in which there is criminal liability without elemental *mens rea* — where there is not even a requirement of negligence — and, hence, liability without narrow culpability.[30] There can be strict liability in this sense in both the criminalization of conduct and in the grading of offenses for their seriousness. Strict liability can apply to any elements of the *actus reus* — the conduct, the results, or the attendant circumstances. What would count as a strict liability crime in this sense depends on the limits of negligence — what might count as a reasonably foreseeable but unjustifiable risk.

One example of strict liability without narrow culpability in the criminal law is the common law conception of statutory rape that allows no defense of reasonable belief that the consenting sexual partner was not a minor. This conception of statutory rape is controversial and not universal in common law jurisdictions. It appears to be a strict liability crime that does not require narrow culpability with respect to the attendant circumstances of sexual intercourse, viz. the age of one's sexual partner. Another example is the recent use of Proposition 21, passed in California in 2000, in order to prosecute anyone who associates with gang members and who "willfully promotes, furthers, assists, or benefits" from criminal gang activity, even when these associates did not participate in and had no knowledge of the criminal activities of the gang.[31] Despite exceptional examples of strict

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[30] For a useful discussion of strict liability in the criminal law, understood as liability without elemental *mens rea*, see, e.g., Kenneth Simons, *When Is Strict Liability Just?*, 87 J. Crim. L. & Criminology 1075 (1997) and *Is Strict Criminal Liability in the Grading of Offenses Consistent with Retributive Justice?*, 32 Oxford J. Legal Stud. 445 (2012).

[31] See CAL. PEN. CODE §182.5. Recently, rapper Brandon Duncan (aka Tiny Doo), who had no criminal record, was prosecuted under the provisions of Proposition 21 for participating in criminal gang activity by virtue of benefiting from the sales of his album *No Safety*. Duncan's album displays a loaded revolver on the cover, and his lyrics refer to gang life. He did not otherwise participate in or have knowledge of the gang's criminal activities. Had he been convicted, he would have faced up to 25 years imprisonment. The charges were ultimately dismissed on the ground that Duncan could not be charged with conspiracy without a specific underlying crime. However, this ruling does not preclude conviction for conspiracy by virtue of benefiting

liability crimes, The Model Penal Code tolerates strict liability offenses only for mere violations, rather than crimes, and otherwise categorically rejects strict liability crimes (§§2.02(1), 2.05).[32] Strict liability crimes in this sense are morally problematic, because they are unfair, making agents liable for blame and punishment, in various degrees, for behavior that they did not have a fair opportunity to avoid.[33]

But we should notice that this is only one form of strict liability, because it is only one form of liability without culpability. For there could in principle be crimes for which there was liability without broad culpability. These would be crimes for which there was liability without blameworthiness and responsibility. Responsibility and excuse, we said, are inversely related; an excuse is a denial of responsibility for wrongdoing, and responsibility for wrongdoing implies the absence of excuse. This means that a strict liability crime that involved liability without broad culpability would be a crime without the possibility of the affirmative defense of excuse. More specifically, it would mean that there were crimes that did not admit of defenses of incompetence (e.g. insanity) or lack of situational control (e.g. duress). While there could in principle be such crimes, there are in fact none.[34] Indeed, the Model Penal Code treats insanity and duress as perfectly general defenses (§§4.01(1), 2.09(1)).[35] Presumably, the reason for refusing to recognize these kinds of strict liability crimes is precisely the reason for recognizing general excuses of incompetence and duress in the first place — namely, that significant impairment of either normative competence or situational control deprives the agent of the fair opportunity to avoid wrongdoing.

If so, the same fairness norm that predicates blame and punishment on the fair opportunity to avoid wrongdoing is at work in explaining what is problematic about both forms of strict liability crimes, viz. liability without narrow culpability and liability without broad culpability. If so, then we should follow the Model Penal Code's skepticism about any form of strict liability for crimes that go beyond mere violations and involve significant stigma and deprivation of liberty.

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from the criminal activity of others in which one had no direct involvement in cases where there is a specific underlying crime.

[32] The limitation of strict liability offenses to violations that do not potentially result in stigma and imprisonment is also reflected in Blackmun's opinion in Holdridge v. United States 282 F.2d 302, 310 (8th Cir. 1960). Traffic violations fall within the class of principled exceptions to this skepticism about strict liability. Also see ROBINSON, *supra* note 8, at 47.

[33] The felony murder rule might look like another instance of a strict liability crime insofar as it allows conviction for murder by participants in a felony who did not kill or intend to kill and may in this way seem unfair to accomplices who did not intend to kill. See, e.g., CAL. PEN. CODE §§187-8. However, since the rule applies to inherently dangerous felonies, it does in fact require recklessness, and is not unfair inasmuch as participants in the underlying felony had fair opportunity to avoid engaging in an inherently dangerous crime.

[34] In *From My Lai to Abu Ghraib: The Moral Psychology of Atrocity,* 31 Midwest Studies in Philosophy 25 (2007) John Doris and Dominic Murphy claim that we should offer a wide-ranging excuse for wartime wrongdoing on situationist grounds. They try to avoid the unwelcome consequences of this kind of promiscuity about excuse by endorsing a form of strict liability that would punish despite the existence of an excuse. But this compounds one mistake — an insufficiently discriminating conception of excuse — with another — the failure to recognize that excuse is a true defense that justifies acquittal. We can easily avoid the second mistake by not making the first one. For discussion, see David O. Brink, *Situationism, Responsibility, and Fair Opportunity,* 30 Soc. Phil. & Pol'y 121 (2013).

[35] There are limitations in the duress excuse in cases in which the defendant recklessly or negligently exposed herself to the prospect of duress. I think that this can be explained as the foreseeable consequence of the agent's earlier recklessness or negligence and so does not constitute a true limitation on the duress excuse.