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The Nature and Significance of Culpability

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Abstract

Culpability is not a unitary concept within the criminal law, and it is important to distinguish different culpability concepts and the work they do. Narrow culpability is an ingredient in wrongdoing itself, describing the agent's elemental *mens rea* (purpose, knowledge, recklessness, and negligence). Broad culpability is the responsibility condition that makes wrongdoing blameworthy and without which wrongdoing is excused. Inclusive culpability is the combination of wrongdoing and responsibility or broad culpability that functions as the retributivist desert basis for punishment. Each of these kinds of culpability plays an important role in a unified retributive framework for the criminal law. Moreover, the distinction between narrow and broad culpability has significance for understanding and assessing the distinction between attributability and accountability and the nature and permissibility of strict liability crimes.

Keywords Accountability · Attributability · Broad culpability · Culpability · Fair opportunity · Inclusive culpability · Narrow culpability · Responsibility · Retributivism · Strict liability

Moral psychology and criminal jurisprudence share several important concepts, such as responsibility, excuse, blame, and punishment. Even if these shared concepts

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play somewhat different roles in these two domains, there is clearly significant overlap in their nature and demands. In fact, given the importance of moral ideas to the formation and reform of criminal law principles and practices and the effect of well-settled criminal law doctrine on our moral assumptions and beliefs, we should expect mutual influence and interaction between these domains.

Culpability is one concept shared by moral psychology and criminal jurisprudence. But while culpability is a concept recognized in moral philosophy, it is deployed more regularly within the criminal law. Culpability plays an important role in the criminal law and in a broadly retributive justification of punishment, which understands the desert basis of criminal censure and sanction to consist in culpable wrongdoing. However, culpability is not a unitary concept in the criminal law. We can and should distinguish three different kinds of culpability within a retributive criminal jurisprudence.

First, one kind of culpability is an ingredient in wrongdoing itself, describing the agent's elemental *mens rea*—for instance, whether she intended the wrong, foresaw it, was reckless with respect to causing it, or was negligent with respect to causing it. These different mental states of the wrongdoer create a hierarchy of wrongdoing, ranging from intent to negligence. We might call this *narrow culpability*. Second, there is the kind of culpability that forms a proper part of the retributive desert basis of censure and sanction. Culpable wrongdoing—that is, wrongdoing for which the agent is responsible and blameworthy—is a condition of criminal censure and sanction. Wrongdoing that is not culpable in this sense is excused. We might call this *broad culpability*. Third, we can and do identify culpability with the retributivist desert basis itself—the combination of wrongdoing and responsibility or broad culpability. This is how we understand culpability when we claim that the criminal law should punish only the culpable. We might call this *inclusive culpability*.

These different kinds of culpability correspond to different senses of *mens rea* or guilty mind. In recent criminal jurisprudence *mens rea* typically has a narrow sense, signifying *the mental elements of an offense* (purpose, knowledge, recklessness, and negligence), complementing the objective dimension contributed by the specification of *actus reus* or guilty act. This is narrow culpability. But 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 wrongful interference by others. This would involve wrongdoing or offense without one kind of *mens rea* and culpability. When thinking about *mens rea* as blameworthiness, we might focus on the kind of responsibility that makes wrongdoing blameworthy—broad culpability—or we might focus on the combination of wrongdoing and responsibility—inclusive culpability—that makes someone blameworthy. Because these three kinds of culpability appeal to narrow and broad *mens rea*, we might recognize narrow culpability and two species of broad culpability—broad and inclusive culpability. For some purposes, the bipartite distinction—between narrow and broad culpability—is the most important. For other purposes, the tripartite distinction—among narrow, broad, and inclusive kinds of culpability—is essential.

How are these different kinds of culpability related? Because they are different kinds of culpability, we might be tempted to think that they are rival conceptions of a common concept. But that can't be correct, because, as we will see, they play different roles in an adequate criminal jurisprudence. If so, these different kinds of culpability are complementary, and it is important to distinguish them clearly and identify their different roles in the criminal law.

However, discussions of culpability have not always been clear about separating these different culpability concepts and their roles in the criminal law.[1] Even some very sophisticated writers fail to distinguish these kinds of culpability or make claims about culpability that can be reconciled only by distinguishing different kinds of culpability.[2] Other writers distinguish broader and narrower kinds of culpability but 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 kinds of culpability as blameworthiness.[3] Still others distinguish broad and narrow culpability and make consistent claims about their roles in the criminal law but are not as clear as they might be about the exact division of labor between these kinds of culpability.[4]

I want to remedy this situation by offering a unified account of these three kinds of culpability and their relationship to each other. On this account, narrow, broad, and inclusive culpability are complementary, rather than rival, conceptions. Narrow culpability corresponds to the elemental sense of *mens rea*, which provides the mental or subjective dimension of wrongdoing. Broad culpability is the responsibility condition in virtue of which the agent's wrongdoing is blameworthy and without which she would be excused. Inclusive culpability is the combination of wrongdoing and responsibility that together make the agent blameworthy and deserving of blame and punishment. As we will see, 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 different

[1] Initially, I was puzzled by disparate claims made about the nature and significance of culpability in the criminal law literature that either employed the concept without analyzing it or asked it to do very different kinds of work. This essay began as an attempt to make sense of and reconcile these disparate claims within a unified framework.

[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 part of the title of their book) 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 §5 (*infra*), once I have explained the different kinds of culpability at work in the criminal law.

[3] See, e.g., Joshua Dressler, Understanding Criminal Law 118–19 (2015).

[4] See, e.g., Michael Moore, Placing Blame: A General Theory of the Criminal Law 191–93, 403–19 (1997). In fact, I am sympathetic to Moore's bipartite claims about the culpability. One could see my project as making explicit the sort of division of labor between three different species of culpability that is implicit in his account.

[5] Doug Husak, *Broad Culpability and the Retributivist Dream,* Ohio St. J. Crim. L. 449 (2012), also makes the bipartite distinction between narrow and broad 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 exist-

kinds of culpability and their different roles within the criminal law contributes to conceptual clarity in criminal jurisprudence. But it pays other dividends as well.

Narrow and broad culpability are tied to two different faces of responsibility—responsibility as *attributability* and as *accountability*—that have been much discussed by moral philosophers. Agents are attributively responsible for those actions that reflect the quality of their wills, and narrow culpability—elemental *mens rea*—tracks morally significant differences in an agent's quality of will. By contrast, agents are accountable for their actions insofar as they deserve praise or blame for them, and when they are not accountable for misconduct, they are excused. Accountability tracks broad culpability and is best modeled in terms of the fair opportunity to avoid wrongdoing.

Moreover, the bipartite contrast between narrow and broad culpability provides a new lens through which to understand the nature and permissibility of *strict liability*. Strict liability offenses involve liability without culpability, and so we can distinguish between narrow and broad strict liability crimes. Narrow strict liability offenses are forms of liability without narrow culpability—in which there is no elemental *mens rea* requirement, not even negligence, with respect to at least one element of the wrongdoing. By contrast, broad strict liability offenses would be forms of liability without broad culpability—in which there is no requirement of responsibility or possibility of excuse. These are distinct kinds of strict liability. Whereas narrow strict liability crimes are somewhat anomalous in the criminal law and widely viewed as morally problematic, broad strict liability crimes do not exist, because excuses of incompetence and duress are general defenses that apply to all forms of wrongdoing. Though these strict liability offenses are distinct and should be distinguished, they are both problematic insofar as they offend in different ways against the norm that blame and punishment must afford agents the fair opportunity to avoid wrongdoing.

1 Predominant Retributivism

As we will see, all three kinds of culpability play important roles within a broadly retributive conception of blame and punishment. Consequently, we should be clear about the retributive character of the criminal law. Retributivism says that blame and punishment ought to be proportional to desert, which is itself the product of two independent variables—wrongdoing and culpability or responsibility.[6]

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

Footnote 5 (continued)
ing 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); 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.

On this view, the quantum of desert is the product of the magnitude of the wrongdoing and the degree of responsibility. Though the magnitude of a wrong is typically positively related to the magnitude of the harm caused, wrongdoing cannot be reduced to harm, because there are permissible harms (e.g. justified harms) and harmless wrongs (e.g. unfair free-riding that harms no one). Retributivism requires that there be a scale to measure the magnitude of wrongdoing with anchors for the ends of the scale (most and least wrong). Once those are fixed, what's required is a capacity to grade the comparative seriousness of various wrongs. Responsibility should be conceived of in terms of degree or percentage of full responsibility on scale from 0 to 1. It functions as a multiplier on the kind and amount of punishment associated with a particular kind of wrongdoing. If the punishment associated with a particular offense is 10 units of incarceration or community service, then the wrongdoer who is fully responsible deserves the full 10 units, the wrongdoer who is not responsible at all deserves 0 units, and wrongdoers with intermediate degrees of responsibility deserve corresponding fractions of 10 units of punishment.

What is the *currency* of desert? Both retributivists and their critics often assume that it is *suffering* and claim that retributivism is committed to the proposition that it is intrinsically good for culpable wrongdoers to suffer.[7] That's one form that retributivism might take. But it is not essential to retributivism. Retributivism can instead be understood as the idea that the currency of desert is *accountability*, where it is fitting to hold wrongdoers accountable in ways that reflect the nature and gravity of their wrongs and their degrees of culpability. But the currency of accountability need not be suffering. It might consist in the *deprivation of certain rights and privileges of citizenship*, which is temporary for all but the most serious forms of wrongdoing. Retributivists often endorse the idea that punishment is a fitting response to the culpable wrongdoer deciding to free-ride on the mutually beneficial social contract among citizens involved in the rule of law.[8] The free-rider's noncompliance with the rule of law unfairly exploits the compliance of others for his own benefit. So, fairness requires punishing culpable wrongdoers who free-ride. But if this is part of the rationale for retributive deserts, then there's a strong case to be made that the appropriate currency of punishment should be some modification in the rights and privileges of citizenship, which is the currency of the social contract on which the wrongdoer free-rides.

For present purposes, I will assume that the best formulation of retributive ideas is *predominant retributivism*.[9] Predominant retributivism is a *mixed* theory of punishment in which a *backward-looking* emphasis on desert predominates over *forward-looking* rationales for punishment, such as deterrence, rehabilitation, and the expression of community norms.

[7] See, e.g., Immanuel Kant, The Metaphysics of Morals 6: 331 (Prussian Academy pagination) (1797–98); W.D. Ross, The Right and the Good 135–38 (1930); H.L.A. Hart, Punishment and Responsibility 234–35 (1968); Moore, *supra* note 4, at 163; Adam Kolber, *The Subjective Experience of Punishment*, 109 Colum. L. Rev. 182 (2009); Victor Tadros, The Ends of Harm 63 (2011); and Mitchell Berman, *Rehabilitating Retributivism*, 32 Law & Phil. 87 (2013).

[8] See Herbert Morris, *Persons and Punishment*, 52 The Monist 475 (1968).

[9] See David O. Brink, *Retributivism and Legal Moralism*, 25 Ratio Juris 496 (2012).

Any form of retributivism insists that culpable wrongdoing serves as a *constraint* on blame and punishment. This is sometimes called the *negative* retributivist thesis. Desert is a necessary condition for blame and punishment because both are impermissible in the absence of culpable wrongdoing, and desert places an upper limit on permissible punishment, which must not exceed what would be proportional to desert.

Predominant retributivism insists that desert is not just a constraint on blame and punishment but also provides an important *rationale* for these attitudes and practices. This is sometimes called the *positive* retributivist thesis. In particular, it claims that blame and punishment are *fitting responses* to culpable wrongdoing in the sense that culpable wrongdoing is sufficient for a strong *pro tanto* case for blame and punishment. Other things being equal, we should blame and punish culpable wrongdoers proportionate to their desert.

However, other things are not always equal. There can be non-desert-based reasons not to punish proportionately, in particular, to punish less than required by desert. Such non-desert factors can include the costs of punishment, the prospects for rehabilitation, evidence of remorse and restitution, and the value of mercy or forgiveness. The strong *pro tanto* case for blame and punishment based on desert must sometimes compete with these countervailing considerations and may not always carry the day. Because predominant retributivism allows that desert can compete with non-desert reasons against proportionate punishment, it is already a mixed theory of punishment.[10]

Predominant retributivism is also a mixed theory of punishment insofar as it allows desert and non-desert factors to address different questions about punishment. A complete theory of punishment should address *whom* to punish, *why* we should punish, *how much* we should punish, and *how* we should punish. Retributivism offers a unified answer to the first three questions: we should punish culpable wrongdoers; we should do so, because they deserve punishment for culpable wrongdoing; and we should punish in proportion to the degree of their culpable wrongdoing. Though desert may *constrain* how we punish, because it constrains how much we should punish, it leaves the manner of punishment largely *underdetermined*.[11] Provided that we punish all and only the guilty, punish them because they deserve punishment, and punish them in proportion to their just deserts, we are free to and should punish them in ways likely to promote various forward-looking values, such as rehabilitation, deterrence, and moral communication and education.

Another way to reconcile forward-looking rationales for punishment and the retributivist backward-looking focus on desert is to allow consequentialist

[10] Predominant retributivism, which is a mixed theory of punishment in which retributive elements dominate, might be contrasted Michael Moore's pure retributivism, which says that desert is both necessary and sufficient for punishment and eschews mixed conceptions of punishment. See Moore, *supra* note 4, at 88, 97–102, 154, but also see 174. Whereas Moore's pure retributivism claims that desert is necessary and sufficient for punishment, predominant retributivism claims that desert is necessary for punishment and sufficient for an important *pro tanto* case for punishment.

[11] For a similar view, see Douglas Husak, *Kinds of Punishment*, in Moral Puzzles and Legal Perplexities (Heidi Hurd, ed., 2018).

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, desert may determine only an interval, rather than a precise quantum, of punishment. Indeed, interval sentencing is reflected in various sentencing guidelines, including the United States Federal Sentencing Guidelines.[12] 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 metaphysical or epistemological, there is a need to specify further a precise punishment value within the deserved interval. So, it is open to us to appeal to various consequentialist rationales to fine-tune the quantum of punishment within the space of punishments set by desert.

Predominant retributivism is a conception of punishment that mixes a backward-looking focus on desert with various forward-looking rationales for punishment, but in which desert conditions forward-looking considerations in three ways.

1. Desert in the form of culpable wrongdoing is a necessary condition of blame and punishment.
2. Proportionate justice sets an upper limit on permissible blame and punishment.
3. Blame and punishment are fitting responses to culpable wrongdoing, and there is a strong *pro tanto* case for blame and punishment that is proportionate to desert.

Something like predominant retributivism has considerable intuitive appeal and fits well with important parts of criminal jurisprudence. For instance, it explains well the two main kinds of affirmative defense a defendant can offer—*justifications* and *excuses*.[13] Justifications and excuses deny the two independent variables in the retributivist desert basis for blame and punishment. Justifications, such as self-defense or necessity, deny wrongdoing, whereas excuses, such as insanity or duress, deny culpability or responsibility.[14] Just as justification is the flipside of wrongdoing, so too excuse is the flipside of responsibility.

[12] United States Sentencing Commission, Guidelines Manual (Nov. 2016).

[13] While justifications and excuses are the two main affirmative defenses available to defendants, there are also pragmatic or policy-based exemptions, such as prosecutorial immunity for diplomats. See, e.g., Paul Robinson, 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).

[14] A true justification concedes that the offense has been proven but claims that in light of the circumstances and the law's larger purposes the conduct in question is nonetheless not wrong. We could acknowledge this fact by distinguishing between *prima facie* and all-things-considered wrongdoing and claiming that the prosecution has the burden of proving *prima facie* wrongdoing and that justification is an affirmative defense that denies all-things-considered wrongdoing. That shows that the wrongdoing in the retributivist desert basis for punishment is all-things-considered wrongdoing.

2 Broad Culpability, Responsibility, and Fair Opportunity

Retributivism asserts that culpable wrongdoing is the desert basis for punishment. In this formulation, culpable wrongdoing is wrongdoing for which the agent is responsible and blameworthy and without which she is excused. This is broad culpability and involves responsibility. 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.[15] 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, broad culpability into two main conditions—*normative competence* and *situational control*. 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.[16]

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

[15] 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.

[16] 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); Michael McKenna, *Reasons-Responsiveness, Agents, and Mechanisms,* 1 Oxford Studies in Agency and Responsibility 151 (2013); and Manuel Vargas, Building Better Beings (2013). The fair choice literature in criminal jurisprudence is reflected in Hart, *supra* note 7; 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).

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 test that excuses if the agent lacked the capacity to discriminate right from wrong at the time of action.[17] For instance, this cognitive conception of competence and insanity is reflected in the Federal insanity test.

> It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.[18]

However, normative competence requires more than cognitive competence. It also requires volitional capacities to form intentions based on one's practical judgments about what one ought to do and to execute these intentions over time, despite

[17] M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).
[18] 18 U.S.C. §17(a) (2005).

distraction, temptation, and other forms of interference.[19] Volitional impairment might take the form of (a) irresistible urges or paralyzing phobias that are neither conquerable nor circumventable,[20] (b) severe depression or listlessness, or (c) damage to the prefrontal cortex of the brain, causing significant difficulty for agents in conforming to their own judgments about what they ought to do, as in the famous case of Phineas Gage.[21] Recognition of a volitional dimension of normative competence argues against purely cognitive conceptions of insanity, such as the M'Naghten test, and in favor of a more inclusive conception, represented in the Model Penal Code, which conceives of insanity as involving significant impairment of *either* cognitive or volitional competence.[22]

> A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law. [§4.01]

If so, normative competence involves *both* cognitive and volitional competence.

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.

[19] For skepticism about the volitional dimension of normative competence, see Morse, *Uncontrollable Urges and Irrational People*, *supra* note 16. For a defense of the volitional dimension of normative competence, against volitional skepticism, see Brink and Nelkin, *Fairness and the Architecture of Responsibility*, *supra* note 16, at 296–302.

[20] See Alfred R. Mele, *Irresistible Desires* 24 Noûs 455 (1990). A desire is conquerable when one can resist it and circumventable when one can act so as to make acting on the desire impossible or at least more difficult. The alcoholic who simply resists cravings conquers his impulses, whereas the alcoholic who throws out his liquor and stops associating with former drinking partners or won't meet them at places where alcohol is served circumvents his impulses. Conquerability is mostly a matter of will power, whereas circumventability is mostly a matter of foresight and strategy. Both are matters of degree.

[21] Phineas Gage was a nineteenth century railway worker who was laying tracks in Vermont and accidentally used his tamping iron to tamp down a live explosive charge, which detonated and shot the iron bar up and through his skull, damaging his prefrontal cortex. Though he did not lose consciousness, over time his character was altered. Whereas he had been described as someone possessing an "iron will" before the accident, afterward he had considerable difficulty conforming his behavior to his own judgments about what he ought to do. The story of Phineas Gage is discussed in Antonio Damasio, Descartes' Error: Emotion, Reasons, and the Human Brain (1994).

[22] For further discussion, see Brink, *Responsibility, Incompetence, and Psychopathy, supra* note 16.

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. 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, duress can induce an agent to engage in wrongdoing that she would not otherwise have performed. 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 herself responsible for being subject to duress (§2.09).[23]

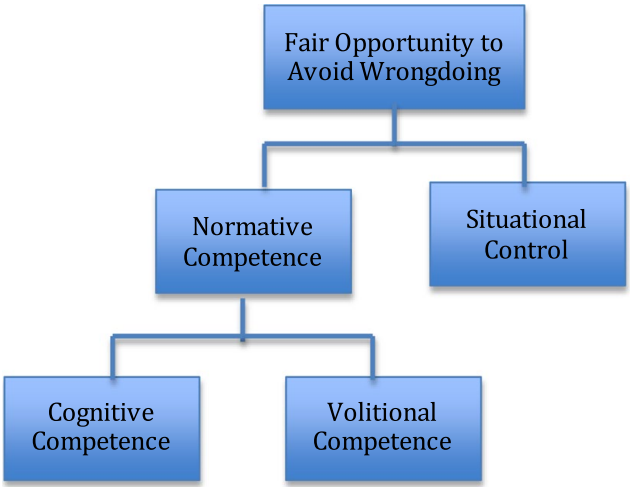
Duress is not an incompetence excuse. It does not compromise the wrongdoer's normative competence or her status as a responsible agent. But it does challenge whether she is responsible for her wrongdoing. This shows that we need to distinguish between *being a responsible agent* and *being responsible for one's wrongdoing*. Being normatively competent is sufficient for being a responsible agent, but it is necessary but not sufficient for being responsible for one's wrongdoing. The duressed wrongdoer is a responsible agent, but nonetheless she is not responsible for her wrongdoing. Responsibility for wrongdoing requires both normative competence and situational control. Or, to put the same point another way, being responsible is a matter of having the right capacities, but being responsible for one's conduct requires both capacities and appropriate opportunities.

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 competence is factored into cognitive and volitional capacities. This kind of two-factor model is plausible insofar as 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*

[23] For present purposes, I accept the Model Penal Code's assumptions that duress involves hard choice whose source is wrongful interference by another agent and that duress is an excuse, rather than a justification. Interesting questions can be raised about both assumptions. I cannot address these questions here, though I hope to do so in future work. For some relevant discussion, see Peter Westen, *Does Duress Justify or Excuse?,* in Moral Puzzles and Legal Perplexities (Heidi Hurd, ed., 2018).

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 impairments, of opportunities (duress).

3 Narrow 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 is often said to include the objective or material elements of the offense. The *actus reus* must be a voluntary act that brings about (causally or constitutively) wrongful conduct.[24] Wrongdoing can involve one or more of three material elements.

- *Conduct* The proscribed conduct, independently of consequences or circumstances.
- *Results* Some conduct is proscribed only when it causes certain results or consequences.

[24] The voluntary act requirement of *actus reus* gives the lie to the assumption that *actus reus* involves purely objective elements, in contrast to the subjective or mental elements of *mens rea*.

- *Attendant circumstances* Some offenses build in attendant circumstances.

Every offense requires a conduct element.[25] Only some offenses require result or attendant circumstance elements. For instance, driving while intoxicated is a conduct offense that does not require specific results, such as an accident or injury. But some offenses do require specific results. Homicide requires conduct that results in death. If vehicular homicide due to intoxication were a separate crime, then it would have both conduct elements (driving while intoxicated) and result elements (when it led to death). Some offenses require specific attendant circumstances. For instance, the common law burglary offense requires that there be "breaking and entering of the *dwelling* of *another* at *nighttime*" (emphasis added).[26]

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 a comparatively thick way that includes the relevant results and/or circumstances, in which case many wrongs would simply be conduct crimes. Alternatively, one could specify the conduct thinly, 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.[27]

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. 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 has proven extremely influential. The Model Penal Code 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, but 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.

[25] In principle, omissions could count as conduct, but in general they do not. An exception to this rule is when omissions occur in the capacity of someone with a defined role-responsibility. For instance, a lifeguard's conscious omission to save a drowning swimmer could count as conduct. The tendency not to recognize omissions as conduct is a contingent, rather than essential, feature of the substance of our doctrine of *actus reus*.

[26] See, e.g., Dressler, *supra* note 3, at 115.

[27] 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 13, at 25–27, 51.

- An agent acts *negligently* if she should have been, but was not, 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.

This is the elemental sense of *mens rea*.[28] Insofar as offenses require *mens rea*, wrongdoers must possess some specified *mens rea* element—at least negligence—toward each material element of the offense. One kind of *strict liability* is any offense that does not require some form of *mens rea*—at least negligence—for some material elements of the offense. It is common to distinguish between mere *violations* and serious *crimes*, where crimes involve stigma and possible imprisonment and violations involves fines, rather than imprisonment, and do not carry stigma. Whereas it is not uncommon for there to be strict liability violations, strict liability crimes are rarer and more controversial. For instance, the Model Penal Code rejects the possibility of strict liability crimes, insisting that all crimes must have *mens rea* elements, at least negligence, with respect to the material elements of the offense (§§2.02(1) and 2.05). We will explore the nature and wisdom of strict liability crimes later (§8 below). For present purposes, there are two important points about elemental *mens rea*. The first claim is that there is a strong presumption that crimes must have a *mens rea* element, distinct from the material elements of the offense. The second claim is that these four mental elements—purpose, knowledge, recklessness, and negligence —are the only ones that matter and that they differentially affect the seriousness of the offense. The first claim is more robust than the second and would survive revision to the list of four *mens rea* elements or their relative significance.[29]

[28] 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.

[29] For some skepticism about the second claim, see Alexander, Ferzan, and Morse, *supra* note 2, and Seana Shiffrin, *The Moral Neglect of Negligence,* 3 Oxford Studies in Political Philosophy 197 (2017). 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.

4 Broad and Narrow Culpability

Now that we have examined narrow and broad 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.

Broad culpability is the responsibility condition that makes wrongdoing blameworthy and 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, predominant retributivism condemns blame and punishment of wrongdoing as unfair unless the agent was broadly culpable 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 have different kinds of significance in the justification of blame and punishment. Whereas narrow culpability is part of the wrongdoing itself, broad culpability is a separate condition that must be met if the wrongdoing is to be blameworthy.

We can see that these are different kinds of culpability by seeing how they typically require different burdens of proof. As an element of the offense itself, the prosecution bears the burden of proof for 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) serve as a signal 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 not equivalent. They are not equivalent if they are not mutually

entailing. They are not mutually entailing if 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 and, in fact, intends the wrong, but alleges an excuse based on normative incapacity or duress.

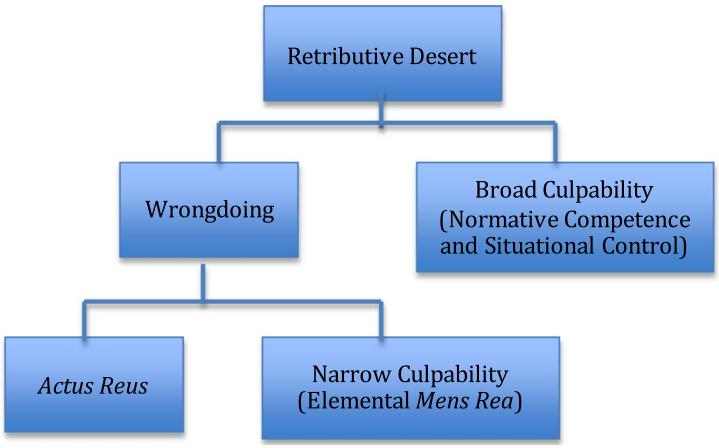
Still another way to appreciate the difference between the two different kinds of culpability is to see how each interacts with *actus reus* in the criminal law. Narrow culpability signifies elemental *mens rea*. *Actus reus* and *mens rea* are individually necessary and jointly sufficient for the wrongdoing 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* itself 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 narrow and broad 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.[30]
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.

[30] 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. Another way to make this point is to distinguish *violation* and *wrongdoing*, which is an unjustified violation. Then we might say that *actus reus* and elemental *mens rea* are individually necessary and jointly sufficient for a violation but individually necessary and not jointly sufficient for wrongdoing.

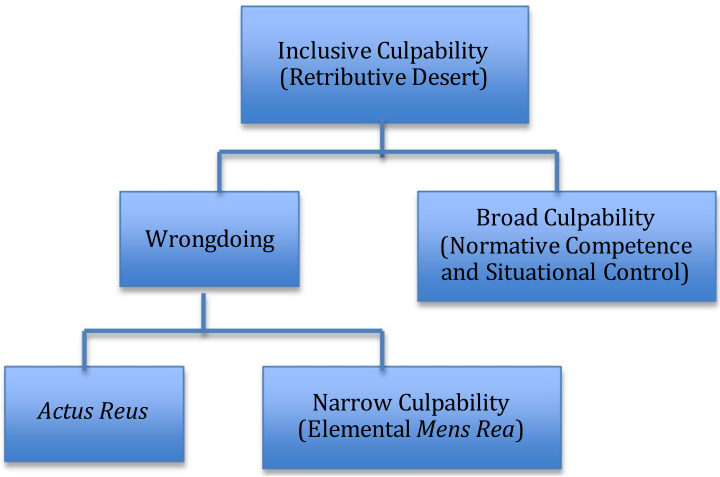


This shows clearly the different roles that narrow and broad culpability play in the determination of retributive desert.

5 Inclusive Culpability

The retributivist formula treats culpable wrongdoing as the desert basis of blame and punishment. This is broad culpability and consists in responsibility, which can and should be modeled in terms of fair opportunity. Only wrongdoing for which the agent is responsible is blameworthy, and wrongdoing for which the agent is not responsible or broadly culpable is excused.

But whereas only wrongdoing for which the agent is responsible is culpable or blameworthy, we often apply the concepts of culpability and blameworthiness to the *combination* of wrongdoing and responsibility or broad culpability. When we describe an actor as culpable, we often signify *both* that she acted badly and that she was responsible for having done so. When we say that criminal law should punish only the culpable, we mean it should punish only wrongdoers who were responsible or broadly culpable for their wrongdoing. The combination of wrongdoing and responsibility or broad culpability is inclusive culpability. Though related to the other forms of culpability, this is plainly a distinct kind. Indeed, inclusive culpability just is the retributive desert basis for blame and punishment.



We can now see clearly that these three kinds of culpability are different. But they are not rival conceptions of a common concept. Rather, they play essential and complementary roles in a broadly retributive criminal jurisprudence. To avoid confusion, it is important to distinguish these kinds of culpability clearly and be clear about their different roles in the division of labor in the foundations of criminal liability.[31]

6 *Mens Rea*, Attributability, and Quality of Will

The importance of distinguishing narrow and broad culpability is reinforced by looking at the ways in which they interact with a distinction that some moral philosophers have drawn between two different kinds of responsibility. Writing primarily about moral responsibility, Gary Watson has distinguished two faces of

[31] 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 (and title) 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 (*supra* note 2, at 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 (*supra* note 2, at 171). (1) and (2) are compatible only if (1) is understood as a claim about inclusive 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, Ferzan, and Morse relativize (1) and (2) to different kinds of culpability and abandon (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).

responsibility: *attributability* and *accountability*.[32] 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 and sanction them for those actions. Narrow culpability plays an important part in attributability, whereas broad culpability plays an important part in 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,[33] (2) in terms of a will in which the agent endorses her motivating desires,[34] or (3) in terms of the regard and concern the agent displays for the interests and rights of others.[35] 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 unaware 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.[36] 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

[32] 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 Shoemaker's tripartite distinction, and present purposes require only a bipartite distinction.

[33] 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).

[34] 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).

[35] 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).

[36] Scanlon, *supra* note 35, at 202.

for the interests and rights of others. Normal interpersonal relations and attitudes reflect expectations about appropriate regard for the 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 a 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.[37] 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 disagrees 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 (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.

If narrow culpability tracks an agent's quality of will, it also tracks her normative *performance*, because her wrongdoing manifests the improper use of her normative

[37] 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 35, 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 Phil. & Public Affairs 344 (1989); Dana Nelkin and Samuel Rickless, *Three Cheers for Double Effect,* 89 Phil. and Phenom. Research 125 (2014); and Steven Sverdlik, Motive and Rightness (2011).

competence in different possible ways, involving intentional wrong, foreseen but unintended wrong, recklessness, or negligence. This means that narrow culpability and attributability are concerned with normative performance, not normative competence.

7 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. 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.[38] But blame is itself a sanctioning response, even if it is usually less severe than punishment, and so it would also be unfair to blame B for wrongdoing that he did not have adequate opportunity to avoid. Broad culpability requires the agent to be responsible—accountable—for his wrongdoing and for blame and punishment to be fair.[39]

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.[40] Retributivism insists that narrow culpability is insufficient for

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

[39] 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>. Voluntarism is plausible for blame, not wrongdoing. But that is the topic for another occasion.

[40] I take myself to be disagreeing with Scanlon about paradigmatic forms of blame being predicated on attributability. However, it's hard to know how deep this disagreement is, because it's hard to know when he thinks attributability is sufficient for blame and punishment. On the one hand, he seems to predicate blame, as such, on attributability and quality of will. On the other hand, he allows that "hard treatment" and punishment require accountability and fair opportunity, and not just attributability and quality of will. See Scanlon, Moral Dimensions, *supra* note 35, at 202–04. If Scanlon accepts this second claim, he can admit that attributability is not sufficient for accountability and claim that, whereas blame requires

punishment and that only broadly culpable wrongdoing—wrongdoing for which the agent is accountable—is a fit object of punishment. These relationships can also be viewed from the perspective of excuse. Excuses deny accountability, but not all excuses deny attributability, since agents who are attributively responsible for wrongdoing may still be excused if they are incompetent, for instance, insane. Earlier, we noted that responsibility and excuse are inversely related such that those responsible for wrongdoing are not excused for it and those excused for wrongdoing are not responsible for it. But only responsibility as accountability, not responsibility as attributability, bears this inverse relationship to excuse. This suggests an important respect in which the criminal law is more concerned with responsibility as accountability. Though there is a role for attributability to play in specifying the kind of wrongdoing at stake in a given case, when the criminal law addresses the sort of responsibility ingredient in broad culpability, it is concerned with accountability, not attributability. We can summarize this conclusion by noting that broad culpability and accountability presuppose normative competence, not normative performance.

8 Culpability and Strict Liability

Our discussion of different kinds of culpability provides an interesting perspective on issues about the nature and wisdom of strict liability offenses. Strict liability can be understood as liability without culpability.[41] Our distinction between narrow and broad culpability allows us to formulate two different forms of strict liability—one without narrow culpability and one without broad culpability.

Strict liability is usually understood to involve liability without narrow culpability. On this view, strict liability offenses do not have an elemental *mens rea* component, not even negligence. Because elemental *mens rea* can apply to any element of the *actus reus*—the conduct, the results, or the attendant circumstances—we can understand strict liability offenses as offenses that contain *at least one* material element for which there is no *mens rea* requirement.[42] Because this form of strict liability is defined in terms of the absence of narrow culpability, we might call it *narrow strict liability*.

Footnote 40 (continued)
only attributability and quality of will, punishment requires accountability and fair opportunity. Even this weaker set of claims would be problematic if, as I believe, 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.

[41] For useful discussions of strict liability in the criminal law, to which I am indebted, see 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) and the essays in Appraising Strict Liability (A.P. Simester, ed., 2005)—especially Stuart Green, *Six Senses of Strict Liability: A Plea for Formalism*; A.P. Simester, *Is Strict Liability Always Wrong?*; Doug Husak, *Strict Liability, Justice and Proportionality*; and Alan Michaels, *Imposing Constitutional Limits on Strict Liability: Lessons from the American Experience*.

[42] See, e.g., Andrew Ashworth, Principles of Criminal Law 135–36 (1991); Green, *supra* note 41, at 2–4; Simester, *supra* note 41, at 22.

Tort law recognizes strict liability offenses—liability without a requirement of negligence—in connection with the design, manufacture, and handling of dangerous materials and products. The justification for strict liability in tort law is usually some combination of deterrence—discouraging risky activity altogether or encouraging special care and diligence in risky pursuits—and administrative efficiency—avoiding the difficulties and costs of trying to ascertain whether there has been negligence. These benefits of strict liability in tort may be acceptable insofar as tort law can be seen as a pricing system for behavior that does not attach imprisonment and stigma for liability. Some requirements of the criminal law, concerning things such as parking and licensure, are primarily regulative in nature and do not attach condemnation or imprisonment to their violation. We might call these *violations* and distinguish them from *crimes* for which one is liable for stigma and incarceration. The distinction between violations and crimes is important, even if it isn't always easy to draw. Criminal violations are more like tort offenses, and it is not uncommon to see strict liability violations in the criminal law. However, strict liability crimes are less common and typically viewed as more problematic, precisely because culpability seems important where stigma and incarceration hang in the balance. While the Model Penal Code permits strict liability violations, it categorically rejects strict liability crimes (§§2.02(1) and 2.05).[43] Nonetheless, strict liability crimes are recognized in some jurisdictions. One example would be a statutory rape statute that made it a crime for an adult to have consensual intercourse with someone who is in fact a minor, regardless of whether the adult reasonably believed the minor to be another adult. In this case, the statute may require that sexual intercourse be intentional, but it would not require any elemental *mens rea*—not even negligence—with respect to the age of one's sexual partner. Another example is the felony murder rule that allows conviction for murder for any participants in a felony when death results from conduct pursuant to the underlying felony.[44] So, for example, though the underlying felony, such as armed robbery, may require intent or knowledge, any participant in the robbery is guilty of murder, regardless of whether he participated in or was aware of the killing. Yet another example is the use of Proposition 21, passed in California in 2000, to prosecute anyone who associates with gang members and who "willfully promotes, furthers, assists, or benefits" from criminal gang activity, even rap artists who are not themselves gang members and whose music concerns gang culture but who do not participate in and have no knowledge of the criminal activities of the gangs.[45]

[43] The limitation of strict liability offenses to violations that do not potentially result in stigma and imprisonment is reflected in Justice Blackmun's opinion in Holdridge v. United States 282 F.2d 302, 310 (8th Cir. 1960).

[44] See, e.g., Cal. Pen. Code §§187–8. Also see, Dressler, *supra* note 3, at 517–18.

[45] 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

Narrow strict liability offenses are morally problematic. The most serious complaint about them is that they are *unfair*. Because strict liability offenses, in this sense, do not require elemental *mens rea*—not even negligence—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."[46] 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 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 offenses. 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.

We tolerate this unfairness in the case of strict liability torts and in the case of strict liability violations, for the sake of deterrence and administrative efficiency, where stigma and incarceration do not hang in the balance. 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. This is why desert is central for adjudicating crimes, and this makes liability without culpability problematic. Strict liability violates the norm that censure and imprisonment be imposed only for conduct that the agent had a fair opportunity to avoid. This is why strict liability crimes, as distinct from violations, are anomalous within the criminal law and viewed as morally problematic. So, principles of fairness support the position of the Model Penal Code, which tolerates violations but otherwise categorically rejects strict liability crimes (§§2.02(1), 2.05).

So much for narrow strict liability crimes. However, because we distinguished narrow and broad culpability, there is potentially another form of strict liability. This would be liability without broad culpability or blameworthiness. Because wrongdoing that is not blameworthy is excused, this would be liability without excuse. We might call this *broad strict liability*.

Footnote 45 (continued)
virtue of benefiting from the criminal activity of others in which one had no direct involvement in cases where there is a specific underlying crime.

[46] Hart, *supra* note 7, at 46.

Hart's own discussion mixes broad and narrow strict liability together. For instance, he conflates broad and narrow culpability.

> In the criminal law of every modern state responsibility for serious crimes is excluded or 'diminished' by some of the conditions we have referred to as 'excusing conditions'. In Anglo-American criminal law this is the doctrine that a 'subjective element', or 'mens rea', is required for criminal responsibility, and it is because of this doctrine that a criminal trial may involve investigations into the sanity of the accused; into what he knew, believed, or foresaw; or into the questions whether or not he was subject to coercion by threats or provoked into passion, or was prevented by disease or transitory loss of consciousness from controlling the movements of his body or muscles.[47]

Here, Hart runs together narrow culpability requirements—conditions of elemental *mens rea*—and broad culpability requirements—conditions of responsibility and blameworthiness, without which wrongdoing is excused. Later, he explains why strict liability is problematic in the criminal law, which he regards as imposing liability without the possibility of excuse. This is where he invokes the idea that criminal liability is predicated on the fair opportunity to avoid wrongdoing, which requires that wrongdoers only be held liable when they had the capacities and opportunities that make them responsible and, hence, blameworthy for their wrongdoing.[48]

Other commentators have been more careful to distinguish narrow and broad strict liability. They sometimes distinguish *formal* and *substantive* conceptions of strict liability.[49] Most commentators who draw this distinction focus on formal or narrow strict liability, although Doug Husak has insisted on the significance of substantive or broad strict liability as a separate form of strict liability.[50] It's important to see what broad strict liability would involve. Because broad culpability involves wrongdoing for which the agent is responsible and, hence, blameworthy, it is culpability without which the agent would be excused for her wrongdoing. But then broad strict liability would involve criminal liability without responsibility and the possibility of an excuse. Being clear about broad strict liability allows us to make two important points.

First, there are no broad strict liability crimes insofar as the excuses are perfectly general affirmative defenses, applicable to any form of wrongdoing. We noted that excuses factor into incompetence (e.g. insanity) and duress. While there could in principle be broad strict liability crimes, there are in fact none. Indeed, the Model Penal Code treats insanity and duress as perfectly general defenses (§§4.01(1), 2.09(1)). So, whereas narrow strict liability crimes are somewhat anomalous and morally problematic, there do not appear to be any broad strict liability crimes.[51]

[47] Hart, *supra* note 7, at 31.

[48] Hart, *supra* note 7, at 43–49.

[49] See, e.g., Green, *supra* note 41, at 10; Simester, *supra* note 41, at 23; and Husak, *supra* note 41, at 86–93.

[50] Husak, *supra* note 41.

[51] In *From My Lai to Abu Ghraib: The Moral Psychology of Atrocity,* 31 Midwest Studies in Philosophy 25 (2007) John Doris and Dominic Murphy appeal to situationist psychology to claim that we should

Second, we can explain why there are no broad strict liability crimes. Broad strict liability crimes would involve liability without a requirement of responsibility or the possibility of an excuse. Indeed, as we saw, responsibility and excuse are inversely related—if an agent is responsible for wrongdoing, she has no excuse for it; and if she is excused for her wrongdoing, she is not responsible for it. If we attend to the criminal law's conception of excuse as involving incompetence or duress, we can see that responsibility requires both normative competence and situational control. The explanation for recognizing normative competence and situational control is that significant impairment of either compromises the fair opportunity to avoid wrongdoing. This is one way of articulating Hart's point about why responsibility and excuses are central to criminal liability.

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 broad and narrow strict liability crimes. This provides an explanation and partial vindication of Hart's conflation of narrow and broad strict liability. We do need to distinguish narrow and broad culpability, as he does not, and this will allow us to distinguish narrow and broad strict liability, as he does not. But Hart may not distinguish them, as he should, because he sees that both narrow and broad culpability speak to the criminal law's concern with requirements of fairness and that strict liability crimes, whether narrow or broad, offend against the fair opportunity to avoid wrongdoing, though in different ways. Narrow strict liability crimes are unfair because they do not require any elemental *mens rea*—not even negligence—as a part of wrongdoing and so make agents liable despite reasonable care to avoid wrongdoing. Broad strict liability crimes are unfair, not because of how they conceive of wrongdoing, but because they don't recognize the way in which excuses defeat responsibility for wrongdoing and, hence, blameworthiness. Incompetence and duress excuses are important, because they compromise the agent's fair opportunity to avoid wrongdoing.

9 Concluding Remarks

Culpability is not a unitary concept within the criminal law, and it is important to distinguish different culpability concepts and the work they do within an adequate criminal jurisprudence. Narrow culpability is an ingredient in wrongdoing itself, describing the agent's elemental *mens rea*—for instance, whether she intended the wrong, foresaw it, was reckless with respect to causing it, or was negligent with respect to causing it. Broad culpability forms a proper part of the retributive desert basis of censure and

Footnote 51 (continued)
offer a wide-ranging excuse for wartime wrongdoing. 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).

sanction. Culpable wrongdoing—that is, wrongdoing for which the agent is responsible and blameworthy—is a condition of criminal censure and sanction. Without broad culpability, wrongdoing is excused. Inclusive culpability is the retributivist desert basis itself—the combination of wrongdoing and responsibility or broad culpability. This is how we understand culpability when we claim that the criminal law should punish only the culpable. Once we make this tripartite distinction in culpability, we can see that these kinds of culpability are not rival conceptions of a single concept but rather complementary concepts each of which plays an important role in a broadly retributive conception of the criminal law. This tripartition allows us to avoid asking one concept to play fundamentally different roles and to avoid talking past each other when we make what would otherwise be incompatible claims about culpability.

Broad culpability is a proper part of inclusive culpability, and so both can be understood as species of broad culpability in a bipartite contrast with narrow culpability. This bipartite culpability distinction helps clarify other debates in moral psychology and the criminal law.

First, the bipartite culpability distinction allows us to understand the difference between responsibility as attributability and as accountability as tracking the difference between narrow and broad culpability. Agents are attributively responsible for wrongdoing when it reflects their quality of will, and the different forms of elemental *mens rea* track a hierarchy among different qualities of will. By contrast, agents are only blameworthy for their wrongdoing and, hence, broadly culpable insofar as they are accountable for it. The denial of accountability is an excuse, and the fair opportunity to avoid wrongdoing requires that agents only be blamed and punished for wrongdoing for which they are accountable.

Second, the bipartite culpability distinction also allows us to make better sense of the nature and permissibility of strict liability crimes. Narrow strict liability offenses are forms of liability without narrow culpability—in which there is no elemental *mens rea* requirement, not even negligence, with respect to at least one element of the wrongdoing. By contrast, broad strict liability offenses would be forms of liability without broad culpability—in which there is no requirement of responsibility or possibility of excuse. These are distinct kinds of strict liability. Whereas narrow strict liability crimes are somewhat anomalous in the criminal law and widely viewed as morally problematic, broad strict liability crimes do not exist insofar as excuses of incompetence and duress are perfectly general defenses that apply to all forms of wrongdoing. Though these strict liability offenses are distinct and should be distinguished, they are both problematic insofar as they offend in different ways against the norm that blame and punishment must afford agents the fair opportunity to avoid wrongdoing.