

# **“Broad” Culpability and the Retributivist Dream**

Douglas Husak\*

*The criminal law is centrally concerned with culpability or mens rea—roughly, the mental (or quasi-mental) components of blame. But culpability has at least two dimensions. Narrow culpability involves the purpose, knowledge, recklessness, or negligence required by statute for each material element. What Joshua Dressler aptly calls broad culpability involves the other mental (or quasi-mental) components of blame. Penal theorists have made enormous progress producing a theory of narrow culpability. In this paper, I endeavor to make progress producing a theory of broad culpability. I describe several parts an adequate theory of broad culpability must contain. In particular, I describe the problems encountered by each part in explaining how blame can be expressed in various shades of gray rather than simply in black or white.*

## INTRODUCTION

The retributivist dream, as I will construe it, is to create a world in which impositions of criminal liability and punishment correspond to our considered judgments of blame and desert. To characterize this aspiration somewhat differently, a given jurisdiction is regarded as just—more precisely, as conforming to the principle of retributive justice—when its penal law imposes liability only on those persons who are blameworthy, and inflicts punishments only on those persons who deserve them—in proportion to their blame and desert.<sup>1</sup> When persons commit crimes, the law seeks to impose blame primarily through applications of its principles of culpability. But even the most zealous retributivists have focused almost exclusively on *narrow* culpability to the relative neglect of *broad* culpability. As I hope will become clear, both narrow and broad culpability must be reflected in the criminal law before the retributivist dream can be realized. Unfortunately, no legal philosopher has produced a comprehensive theory of broad culpability—for good reason. This undertaking, as we will see, is unbelievably complex. In this paper, I will make small progress toward constructing such a theory by exploring a few of these complexities. In particular,

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\* Professor of Philosophy and Law, Rutgers University. Special thanks to Mitch Berman and to the student editors of the *Ohio State Journal of Criminal Law* for their helpful assistance with earlier drafts.

<sup>1</sup> My characterizations of the retributivist dream are designed to be evasive about whether the failure to blame and punish persons who deserve to be punished is as much an affront to justice as is the blaming and punishment of persons who do not deserve to be punished.

I will focus on a single desideratum that I believe any such theory must satisfy: it must be able to conceptualize blame in shades of grey rather than simply in black or white.

My structure is as follows. I discuss several clarifications and qualifications of the retributivist dream in Part I. In Part II, I introduce the concept of *broad* culpability and distinguish it from the more familiar concept of narrow culpability. In Part III, I discuss four of the components of a theory of broad culpability: substantive defenses (i.e., justifications and excuses), the capacities needed for criminal responsibility, the requirement of a voluntary act, and the significance of motive. In Part IV, I conclude with a somewhat more extended discussion of a domain in which I contend that the existing rules and doctrines of the penal law are especially deficient in implementing the retributivist dream: those provisions that apply to persons who are unaware that their conduct is wrongful.

### I. THE RETRIBUTIVIST DREAM CLARIFIED AND QUALIFIED

Several clarifications and qualifications are needed before proceeding. First, like most other *isms*, the nature of retributivism is deeply contested. No particular account should be regarded as canonical; philosophers of criminal law use this label in countless different ways.<sup>2</sup> Commentators unsympathetic to retributivism sometimes offer a caricature of it in order to refute it, and even friends of this theory disagree substantially among themselves about how to characterize the content of the principle of retributive justice.<sup>3</sup> I understand retributivism to be the general name for a broad tradition or group of theories that regards desert as the central concept to be analyzed and preserved in efforts to justify punishment and the penal law that authorizes its infliction. A legal philosopher does not qualify as a retributivist if he neglects desert altogether or awards it only a peripheral role in his rationale for criminal law and punitive sanctions.<sup>4</sup> Of course, reasonable

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<sup>2</sup> Although he is the most influential retributivist in contemporary jurisprudence, Michael Moore offers a definition to which not all legal philosophers subscribe. He famously alleges that “Anglo-American criminal law is largely a formalistic description of the requirements of retributive justice.” Moore continues: “[t]o serve retributive justice,” he continues, “criminal law must punish all and only those who are morally culpable in the doing of some morally wrongful action.” See MICHAEL MOORE, *PLACING BLAME* 20, 35 (1997). Moore must struggle to explain why a great many moral wrongs neither are nor ought to be punished. See my response to Moore in Douglas Husak, *Repaying the Scholar’s Compliment*, 1 JERUSALEM REV. OF LEGAL STUD. 48 (2010).

<sup>3</sup> For some useful distinctions, see MITCHELL N. BERMAN, *Two Kinds of Retributivism*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 433 (R.A. Duff and Stuart P. Green, eds., 2011). A familiar alternative to my account is to understand retributivists to make a claim about intrinsic value. See generally VICTOR TADROS, *THE ENDS OF HARM, THE MORAL FOUNDATIONS OF CRIMINAL LAW* 26 (2011).

<sup>4</sup> Nearly every retributivist finds room for consequentialist considerations—most notably, the prevention of crime—somewhere in his account. It is hard to know when an approach qualifies as a “mixed theory,” blending backward-looking and forward-looking elements in a single view. But a theory need not be “pure” to count as retributive; it need only regard desert and blame as central to attempts to provide answers to normative questions about criminal law and punishment.

persons may disagree about whether a particular theorist affords desert a prominent or marginal place. No formula exists to mark this contrast; it may be controversial whether any number of contemporary theorists should be classified as retributivists.<sup>5</sup> But problems of categorization need not detain us. I use this label primarily to exclude those theorists who believe that no justification of criminal liability and punishment can be found or (more typically) purport to offer a consequentialist defense of them.

Even theorists fully committed to the retributivist dream acknowledge countless *practical* obstacles to attaining it. In the real world, states necessarily juggle a multiplicity of objectives and are limited by a variety of factors that compete with efforts to conform to the demands of retributive justice. Scarcity of resources is probably the most significant such limitation. The economic costs of attempts to incorporate considerations of desert throughout the penal law would be astronomical, and no sensible commentator recommends that they be incurred. To be sure, it may be difficult to decide whether a given barrier to the attainment of the retributivist dream is principled or practical, and theorists can be expected to draw this line in different places.<sup>6</sup> Still, any respectable retributivist should be loathe to allow principled reasons to stand in the way of the quest for retributive justice.

Admittedly, the retributivist dream tends to be pursued selectively. Few institutions that recognize *positive* desert are common in modern societies, and institutions that reflect *negative* desert are rare outside of our criminal justice system. Even within the latter domain, attention has been focused on judicial decisions, where justice or injustice is most conspicuous. Fewer attempts have been made to implement this dream in less visible places—when defendants are arrested and prosecuted, for example. Although judicial discretion has been curbed in the past few decades, police and prosecutors continue to operate according to standards much harder to identify and evaluate.<sup>7</sup> Equally puzzling is the relative neglect of retributive justice at the legislative stage of the penal process. Comparatively little thought has been given to the question of whether a given kind of conduct is something for which punishment can be deserved in the first place. Perhaps these facts about selectivity reflect the judgment that efforts should be expended where they are most likely to bear fruit. If the retributivist

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<sup>5</sup> Controversy especially surrounds the categorization of R.A. Duff's "communicative" theory of punishment. See R.A. DUFF, *Retrieving Retributivism*, in *RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY* 3 (Mark D. White, ed., 2011).

<sup>6</sup> Disagreement might involve (for example) whether the principle of legality and/or the jurisdictional limits of criminal justice systems involve principled or practical limitations on the pursuit of the retributivist dream. See the discussion in R.A. DUFF, *ANSWERING FOR CRIME* 37–56 (2007).

<sup>7</sup> See e.g., William Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV., 2548, 2567–68 (2004); see also Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1724 (2010).

dream cannot be implemented by the judiciary—the most public participant in the criminal process—it is unlikely to be realized elsewhere.

In addition, the details of the dream vary enormously from one retributivist to another. Legal philosophers continue to differ about the shape and content of a criminal justice system that correctly implements principles of desert. Sometimes their in-house quarrels are so vehement that it becomes easy to forget they share the same basic framework. Michael Moore, for example, has written a series of monographs that aspire to describe a desert-based criminal law. In each of these books he seeks to defend a model of “Anglo-American criminal law” that is “largely a formalistic description of the requirements of retributive justice.”<sup>8</sup> Larry Alexander and Kim Ferzan have also attempted to lay bare “the structure of the criminal law” that “is dictated by a retributive theory of criminal punishment.”<sup>9</sup> But the visions of these respective theorists diverge radically. Any number of examples of deep controversies within the retributivist camp could be offered; I will cite only three. First, desert theorists famously disagree about whether results should matter to criminal liability.<sup>10</sup> Do defendants really *deserve* more punishment when they successfully cause harm than when they try but fail? Second, retributivists employ very different tests to decide when persons proceed far enough along a criminal objective to incur liability for an inchoate offense such as attempt.<sup>11</sup> At what point along a time-line do defendants cross the threshold beyond mere preparation and deserve punishment? Third, desert theorists dispute whether negligence is a mode of culpability that makes individuals morally blameworthy.<sup>12</sup> Under what conditions, if any, does a criminal defendant merit blame because he falls short of the standard of the hypothetical reasonable person?<sup>13</sup> Explicating the details of a just deserts model of criminal law and punishment should guarantee gainful employment among penal theorists for generations to come.

In case there is doubt, the sense of desert and blame central to the retributivist dream is *moral*. If *legal* desert and blame are something distinct from their moral

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<sup>8</sup> See MOORE, *supra* note 2 at 20.

<sup>9</sup> See LARRY ALEXANDER & KIMBERLY KESSLER FERZAN WITH STEPHEN MORSE, *CRIME AND CULPABILITY* 7 (2009).

<sup>10</sup> Readers and anthologies on this topic continue to proliferate. See generally, e.g., MORAL LUCK (Daniel Statman, ed. 2010).

<sup>11</sup> See Daniel Ohana, *Desert and Punishment for Acts Preparatory to the Commission of a Crime*, 20 CAN. J.L. & JURIS. 113 (2007); see also GIDEON YAFFE, *ATTEMPTS* (2010).

<sup>12</sup> Among moral theorists, see, e.g., GEORGE SHER, *WHO KNEW? RESPONSIBILITY WITHOUT AWARENESS* (2009); see also Joseph Raz, *Responsibility and the Negligence Standard*, 30 OXFORD J. OF LEGAL STUDIES 1 (2010).

<sup>13</sup> Among penal theorists, see Douglas Husak, *Negligence, Belief, Blame and Criminal Liability: The Special Case of Forgetting*, 5 CRIM. L. & PHIL. 199 (2011); Michael S. Moore & Heidi M. Hurd, *Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence*, 5 CRIM. L. & PHIL. 147 (2011); Holly M. Smith, *Non-Tracing Cases of Culpable Ignorance*, 5 CRIM. L. & PHIL. 115 (2011).

counterparts, they are not the direct subject of my inquiry. Criminal theorists should be interested in moral desert and blame because they should be anxious to ensure that the sanctions imposed by the state are justified. Again, the sense of justification in question is moral. Unless a punishment is justified from a moral point of view, we should not be satisfied that it is justified at all. Obviously, an inquiry into the moral justification of punishment has consumed legal philosophers since at least the time of Plato, and I do not propose to contribute directly to that debate here.<sup>14</sup> My point is that no one should think that punishment is justified unless he is satisfied that the persons on whom it is inflicted deserve blame from the moral point of view.

Despite their considerable differences, all desert theorists place the *principle of proportionality* near the heart of retributive justice. I understand proportionality to require that the severity of punishment should be a function of the seriousness of the offense.<sup>15</sup> Like almost everything else about criminal theory, analyzing and applying the principle of proportionality has proved immensely difficult.<sup>16</sup> Nonetheless, retributivists cannot afford to abandon the effort. Disproportionate punishments are undeserved, blaming persons too much or too little. Such punishments are anathema to the retributivist dream.

With the foregoing clarifications and qualifications behind us, I hope that the retributivist dream is attractive to many commentators—however its details are explicated.<sup>17</sup> I subscribe to it myself, although I cannot hope to defend it here. Consequentialist perspectives on criminal liability and punishment have a long history, and I make no effort to refute theorists who regard deontological positions on normative issues as misguided or primitive.<sup>18</sup> Nor will I attempt to respond to abolitionists—those who reject *any* justification for institutions of penal justice.<sup>19</sup>

<sup>14</sup> See generally WHY PUNISH? HOW MUCH? A READER ON PUNISHMENT (Michael Tonry, ed., 2011).

<sup>15</sup> See ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING 137–41 (2005).

<sup>16</sup> Some theorists contend that the retributivist dream should be abandoned because the “anchoring problem” cannot be solved and the principle of proportionality cannot be implemented. See, e.g., Greg Roebuck & David Wood, *A Retributive Argument Against Punishment*, 5 CRIM. L. & PHIL. 73 (2011). A different set of problems applying a principle of proportionality are explored by Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009).

<sup>17</sup> Admittedly, many legal theorists dissent. The most eloquent critics of retributivism include David Dolinko, *Some Thoughts about Retributivism*, 101 ETHICS 537, 539 (1991); Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 849 (2002); JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1990).

<sup>18</sup> See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002).

<sup>19</sup> In my judgment, abolitionists tend to spend too much time rehearsing familiar critiques of criminal law and punishment and too little time defending their alternatives about what could possibly replace them. Recent abolitionist works include: DAVID BOONIN, THE PROBLEM OF PUNISHMENT (2008); DEIRDRE GOLASH, THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW (2005); MICHAEL J. ZIMMERMAN, THE IMMORALITY OF PUNISHMENT (2011).

Although the intelligibility of the retributivist dream has frequently been challenged, in what follows I presuppose that the aspiration is both coherent and attractive. *Ceteris paribus*, one jurisdiction is normatively preferable to another if its system of criminal law and punishment more closely approximates the principle of retributive justice by treating offenders as they deserve.

## II. CULPABILITY BROAD AND NARROW

Retributivists seek to create a world in which impositions of criminal liability and punishment correctly reflect our considered judgments of blame and desert. Thus they are eager to ensure that the severity of a sentence is proportionate to the blame offenders deserve. What prerequisites must be satisfied before this goal can be achieved? Many candidates come to mind, but in what follows I confine most of my attention to a single desideratum. Among the most important truisms about blame (moral or otherwise) is that it admits of degrees.<sup>20</sup> One person can be more blameworthy than another for performing the same action.<sup>21</sup> Not all moral predicates are comparable. Permissibility, for example, is unlike blame: actions are either permissible or they are not, and no action is more or less permissible than another. But culpability judgments admit of degrees. Moreover, I will assume that this truism applies to each of the many components that contribute to overall assessments of blame. If some factor adds to the quantum of blame a person deserves, that variable should not be conceptualized as a *cliff* or *threshold*—a sharp boundary beyond which non-culpable defendants suddenly become culpable—but rather as a *spectrum* or *continuum*—a series of points at which the not-so-very culpable become more and more culpable as they move further along the spectrum. In order to implement the principle of proportionality, the criminal law must have a device to reflect this truism and distinguish degrees of blame among persons who perform the same act. Of course, such a device exists. Defendants become eligible for different quanta of blame when they commit the same criminal act with different levels of culpability.

Commentators concur that the culpability structure of the Model Penal Code is among its most important innovations. The Code famously restricts the set of mental (or quasi-mental) states in statutes to exactly four, each of which is carefully defined: purpose, knowledge, recklessness and negligence.<sup>22</sup> *Ceteris paribus*, a defendant who performs the actus reus of a crime purposely is more blameworthy than one who acts knowingly, who in turn is more blameworthy than

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<sup>20</sup> Although no one disputes this claim, it is surprisingly difficult to say *why* one person is more blameworthy than another. Commentators disagree both on the level of principle and about any number of particular examples. See generally LEO KATZ, *WHY THE LAW IS SO PERVERSE* (2011).

<sup>21</sup> Moreover, the same person can be more blameworthy for performing one action than for performing another.

<sup>22</sup> See MODEL PENAL CODE, § 2.02(2) (1962). I describe these culpable states as *quasi-mental* because they obviously contain components that are not mental. Unlike the components of crime assigned to actus reus, these culpable states are *largely* or at least *partly* mental.

one who acts recklessly, who in turn is more blameworthy than one who acts negligently, who in turn is more blameworthy than one who is strictly liable because he acts with no culpability at all.<sup>23</sup> The elimination of the many additional undefined culpability terms employed in common law and ordinary language has greatly enhanced precision and clarity in the substantive criminal law of most states.<sup>24</sup> Of course, many commentators have expressed reservations about the adequacy of the Code's treatment of mens rea.<sup>25</sup> I quickly mention three familiar objections. First, several moral philosophers allege that persons who perform an actus reus purposely are no more blameworthy than those who do so knowingly.<sup>26</sup> Second, it is arguable the Code surreptitiously employs additional culpable states: willful blindness and extreme indifference to the value of human life, for example. Finally, the Code has been criticized for its failure to make finer distinctions by explicitly adding new culpable states.<sup>27</sup> Notwithstanding the importance of these reservations, I will not discuss them here. Each has been the subject of exhaustive arguments and counterarguments in the recent history of criminal law theory. The culpability structure of the Code may be imperfect, but it represents a major innovation nonetheless.

Even though the Code's culpability structure contains the resources to depict blame in various degrees and thus is able to ensure that punishment is roughly proportionate to desert, commentators should be perplexed about why the substantive criminal law has not gone to greater lengths to exploit this potential. The enormous advantage of the Code's hierarchy of culpable states—its ability to conceptualize blame in shades of grey rather than simply in black or white—is not well-utilized throughout the special part of the criminal law. With the almost unique exception of homicide, legislatures have failed to enact distinct grades of a single offense depending on the culpability of the actor.<sup>28</sup> Instead, when a crime

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<sup>23</sup> See DOUGLAS HUSAK, *The Sequential Principle of Relative Culpability*, in *THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS* 177, 177–83 (2010).

<sup>24</sup> Unfortunately, confusion remains in federal law where undefined mens rea terms continue to proliferate. See Gerard E. Lynch, *Towards A Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 *BUFF. CRIM. L. REV.* 297, 311–17 (1998).

<sup>25</sup> See, e.g., Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 *OHIO ST. J. CRIM. L.* 179 (2003).

<sup>26</sup> Such doubts are expressed by H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 122–25 (1968).

<sup>27</sup> Acceptance is one candidate. See Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 *S. CAL. L. REV.* 953, 958 (1998).

<sup>28</sup> Even homicide offenses are not a perfect illustration of how the special part of the criminal law might exploit the Code's culpability structure to its full extent. Three puzzling features are as follows. First, persons who kill purposely are guilty of the same offense—murder—as persons who kill knowingly. Second, some persons who kill knowingly are guilty of manslaughter. Third, some persons who kill recklessly are guilty of murder. These facts about the Code's homicide laws are noteworthy in light of the general supposition that persons who perform the same criminal act purposely are more blameworthy than those who act knowingly, who in turn are more culpable than

requires a given degree of culpability, a person who acts with more culpability than what is needed commits the very same crime as someone who acts with the minimum amount. If recklessness about non-consent is the required kind of culpability for sexual offenses, for example, a defendant who knows that he lacks consent commits the identical offense as someone who consciously disregards the risk that consent is lacking. Yet it is hard to believe that the former defendant is not substantially more blameworthy than the latter. The reckless rapist, for example, might well have desisted had he been cognizant of the facts of which the knowing rapist is aware. The knowing rapist, by contrast, has already demonstrated through his behavior what he would do in the very circumstances in which the reckless rapist might have done otherwise. Why should the Code not reflect this (presumably obvious) difference in the culpability of perpetrators by creating two distinct grades of the offense: reckless rape and knowing rape? Under existing law, each of these perpetrators commits the same crime, so any significance afforded to their different degrees of blame can only take place at the sentencing stage rather than at the liability stage of the criminal justice system. We might hope that sentencing authorities tend to take account of such differences in the culpability of offenders even when statutes do not, but it is hard to be sure.<sup>29</sup>

Although the special part of the Code does not fully exploit the available resources to depict blame in distinct degrees, its culpability structure at least allows the possibility that the principle of proportionality can be implemented. A far more important source of difficulties in realizing the retributivist dream stems from the realization that the culpability hierarchy of the Code does not provide an exhaustive account of blame. Any competent textbook of criminal law—including Joshua Dressler’s masterful *Understanding Criminal Law*—informs readers of an important “ambiguity” in the terms *culpability* or *mens rea*.<sup>30</sup> As Dressler indicates, these terms are used “broadly” or “narrowly.” Criminal law theorists are far more accustomed to working with the narrow meaning of these terms—the meaning I have already recounted and which Dressler aptly names “elemental.”<sup>31</sup> In this narrow sense, culpability is “the particular mental state provided for in the definition of the offense.”<sup>32</sup> In what follows, my focus will be on the second, broad meaning of culpability or *mens rea*. Like retributivism itself, no single formulation of the concept of broad culpability can be gleaned from the literature. According to Dressler, the broad sense of *mens rea* refers to “a general notion of

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those who act recklessly. For a critical discussion of several of these issues, see the essays in *HOMICIDE LAW IN COMPARATIVE PERSPECTIVE* (Jeremy Horder ed., 2007).

<sup>29</sup> This hope may lead to constitutional problems. If a sexual offender were to be punished more severely because he acted knowingly, but conviction for the substantive offense only requires the state to prove that he acted recklessly, his greater culpability might have to be proved beyond a reasonable doubt. See *United States v. Booker*, 543 U.S. 220, 244 (2005).

<sup>30</sup> JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 118 (5th ed. 2009).

<sup>31</sup> *Id.* at 119.

<sup>32</sup> *Id.*



moral blameworthiness, i.e., that the defendant committed the actus reus of an offense with a morally blameworthy state of mind."<sup>33</sup> Unquestionably, this broad sense of mens rea has received much less scrutiny from criminal theorists. Dressler himself devotes only a single page to the broad meaning in his lengthy chapter on mens rea; narrow culpability occupies the bulk of his attention. My project here is to rectify this imbalance by expanding on his brief remarks and sketching the beginnings of a theory of broad culpability.

Legal philosophers are not always careful to distinguish broad from narrow culpability. They frequently discuss given topics by referring to culpability generically without indicating which sense they have in mind. With the contrast before us, however, we usually are able to understand which meaning the theorist intends.<sup>34</sup> For example, a recent collection of essays on the relevance of previous convictions at sentencing asks whether and according to what principles a prior criminal record might increase the culpability of the offender and thus render him eligible for an enhanced punishment.<sup>35</sup> Any puzzle that arises here—and I believe it to be genuine—must involve *broad* rather than *narrow* culpability. No one could possibly contend that a person who commits a second bank robbery purposely has more narrow culpability than he possessed when he committed his first bank robbery purposely. Purpose (or intention) is as much narrow culpability as a defendant can possibly have. Nonetheless, the bank robber might conceivably be more broadly culpable—and thus merit a greater quantum of blame and punishment—for his second offense than for his first. Are repeat offenders really more blameworthy than first offenders who commit the same crime? If so, an explanation of the rationale for the recidivist premium is one of the many problems to be addressed by a theory of broad culpability.<sup>36</sup>

Several of the most basic questions about broad culpability have not been adequately explored. Although Dressler distinguishes narrow from broad culpability, for example, he does not endeavor to specify the relation between them. It is tempting to suppose that mens rea understood narrowly is a necessary condition of mens rea construed broadly. If this supposition were true, a defendant could not be morally blameworthy for his conduct unless he were narrowly culpable, that is, unless he possessed the particular mental state provided in the definition of his offense. For at least two reasons, however, this supposition almost certainly is false. First, a defendant might be morally blameworthy for his conduct even though no law proscribes it. Not all culpable wrongs have been (or

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<sup>33</sup> *Id.* at 118.

<sup>34</sup> Later I will suggest, however, that questions about the culpability of defendants who act in ignorance of law are not easily assigned to the domain of a theory of broad culpability. See *infra* Part IV.

<sup>35</sup> See PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES (Julian V. Roberts & Andrew von Hirsch, eds. 2010).

<sup>36</sup> Any such explanation must reconcile thought about the recidivist premium with a position about the bulk-offending discount. See Kevin R. Reitz, *The Illusion of Proportionality: Desert and Repeat Offenders*, in PREVIOUS CONVICTIONS AT SENTENCING, *supra* note 35, at 143–48.

should be) criminalized.<sup>37</sup> A defendant who commits a moral wrong can hardly act with the degree of culpability required by a statute if no statute proscribes his act. Second, a defendant might be morally blameworthy for conduct that *has* been proscribed despite lacking narrow culpability. A particular statute may require that a defendant is not liable unless he acts knowingly, for example, but it does not follow that a defendant who commits the same criminal act recklessly is not blameworthy at all. Perhaps legislators believed his blame (if any) to be too minimal to rise to the level that warrants the imposition of *criminal* liability.<sup>38</sup> If I am correct, the above supposition is false and these two senses of mens rea have no obvious or straightforward connection to one another. Perhaps they stand in some complex relation.<sup>39</sup> But narrow culpability does not appear to be necessary (and certainly is not sufficient) for broad culpability. Despite this important insight, my subsequent discussion presupposes that defendants have violated an existing penal law with the requisite degree of mens rea. I will ignore the complications that arise when the principle of legality demands that a particular defendant who is broadly culpable is ineligible for liability and punishment because he lacks narrow culpability. This assumption will allow me to focus more closely on how broad culpability functions within the criminal law rather than within moral philosophy more generally.

Even when joined to a theory of narrow culpability, a theory of broad culpability is a far cry from a comprehensive theory of blame. Many aspects of blame are not matters of mens rea or culpability at all. In particular, those components of blame that involve actus reus are not included within a theory of culpability.<sup>40</sup> Questions of criminalization fall outside the scope of a theory of culpability as I construe it. No one should be blamed for conduct that is not wrongful, but a theory of wrongfulness is not a part of a theory of culpability, either broad or narrow. Among the foremost challenges facing theorists who aspire to produce a theory of broad culpability is to determine whether given

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<sup>37</sup> As I have indicated, many of the most egregious moral wrongs neither are nor ought to be criminalized. See Leo Katz, *Villainy and Felony*, 6 BUFF. CRIM. L. REV. 451, 455 (2003). But theorists disagree about why this is so. For an argument that only *public wrongs* should be criminalized, see DUFF, *supra* note 6, at 140–46.

<sup>38</sup> Presumably, criminal wrongs cannot be trivial. See Douglas Husak, *The De Minimis 'Defense' to Criminal Liability*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW, *supra* note 3, at 334.

<sup>39</sup> Some of these complex relations are minimal. Presumably an agent can be liable for a legally proscribed act only if he has some degree of narrow culpability with respect to at least some of its material elements.

<sup>40</sup> My claim that a theory of mens rea (whether broad or narrow) excludes considerations of actus reus presupposes some device to distinguish the two domains. This distinction is deemed “simply an analytical tool which should not stand in the way of principled argument” in Andrew Ashworth, *The Unfairness of Risk-Based Possession Offences*, 5 CRIM. L. & PHIL. 237, 244 (2011). Other commentators allege that the “division of crimes into actus reus and mens rea elements is a helpful expository device but not an analytical necessity.” A.P. SIMESTER ET AL., SIMESTER AND SULLIVAN’S CRIMINAL LAW: THEORY AND DOCTRINE 67 n.2. (4th ed. 2010).

matters that unquestionably pertain to blame are within the domain of their theory or should be treated elsewhere. I will return to several of these challenges below.

A theory of broad culpability will be of limited use to the criminal law unless it preserves the desideratum of the Code's narrow culpability structure I have emphasized: it must allow blame to be depicted in varying degrees. In other words, it must enable us to understand how one defendant can be more blameworthy than another for performing the same act. We have less reason to be impressed by the Code's ability to implement a principle of proportionality that tailors the severity of a sentence to a defendant's narrow culpability once we acknowledge that his overall blame is heavily dependent on his broad culpability. As I have stressed, the criminal law must struggle to ensure that the conditions that make defendants broadly culpable do not merely create a cliff or threshold, but rather a spectrum or continuum. My subsequent remarks will evaluate particular components of a theory of broad culpability largely by assessing their potential to satisfy this single desideratum.

I hope it is clear that the topic of broad culpability is of major importance to retributivists and their dream. Respectable progress has been made about narrow culpability, but the remaining part of a theory of blame is radically under-theorized. Ultimately, the components of a theory of culpability must be merged to produce a general theory of blame. Commentators who aspire to construct a penal law that conforms to our considered judgments of blame and desert have at least as much reason to be concerned about whether defendants are culpable broadly than about whether they are culpable narrowly. Punishment is not morally justified unless a defendant is blameworthy. If any of the conditions of broad culpability is not satisfied, blame is undeserved and punishment should not be inflicted. Thus a system of criminal law that disregards the components of broad culpability would fail to implement the principle of retributive justice. As a matter of fact, our penal law *does* make substantial efforts to ensure that persons are not liable unless they are broadly culpable. In the following Part I will discuss four areas of the substantive criminal law in which progress in developing a theory of broad culpability has been considerable. As we will see, however, several complexities remain. In the final Part of this paper I will focus on a particular respect in which I contend that positive law is especially deficient in its treatment of broad culpability. Defendants who do not know that their conduct is wrongful, I will suggest, often are less broadly culpable than those who are fully cognizant of the normative status of their behavior. I will conclude this Part with some speculative thoughts about how the criminal law might refine its position on ignorance of law to better reflect our considered judgments of blame and desert and thus promote the retributivist dream.

### III. COMPONENTS OF BROAD CULPABILITY

Producing a comprehensive theory of broad culpability would be an ambitious undertaking. Such a theory would seek to provide an exhaustive list of the types of

mental conditions (excluding narrow culpability) that make one defendant more or less blameworthy than another for committing the same criminal act. At least three fundamental challenges confront a legal philosopher who aspires to develop such a theory. First, he must compile a list of the mental conditions that preclude or reduce blame. For the most part, I will evade the hard work of defending a normative account of the significance of a given condition. The moral relevance of any given condition typically is supported by appeals to intuition—a notoriously controversial methodology that does little to persuade skeptics who do not share the intuition in question.<sup>41</sup> In addition to defending the inclusion of particular candidates, he would have to “prove a negative”—that is, argue that no additional condition should be placed on the list. Second, he must show that a given condition that belongs on the list is properly included within the domain of mens rea. As I have indicated, conditions better conceptualized as part of a defendant’s actus reus are not part of a theory of culpability, either broad or narrow. Third, he must sort the mental conditions relevant to blame into types. A list would be redundant and theoretically inelegant if one condition were reducible to another. As we will see, the task of organizing the components of broad culpability into types is especially problematic. But each of these three challenges is daunting, and I can only begin to tackle them here. Even a cursory discussion will demonstrate why no philosopher of criminal law has claimed to have produced a comprehensive theory of broad culpability.

In this part, I briefly discuss four areas of the criminal law that are plausibly regarded as components of a theory of broad culpability: substantive defenses (i.e., justifications and excuses), the capacities for criminal responsibility, the requirement of a voluntary act, and the significance of motive. Obviously, each of these four topics has generated a massive literature, and I do not purport to summarize or add to those discussions here. Instead, I will focus on the peculiar difficulties that arise in attempts to integrate scholarly thought in these areas into a theory of broad culpability. In particular, I will discuss how the treatment of each of these conditions in positive law manages to preserve the Code’s ability to depict blame in differing degrees. Unless we preserve the desideratum of allowing blame to be expressed in varying amounts, it is hard to see how scholarly thought about any of these four components of broad culpability could hope to be satisfactory.

#### *A. Justification and Excuse*

Which items belong on a list of mental (or mostly mental) conditions that preclude or reduce blame? Although none is wholly beyond controversy, one might suppose that the most obvious candidates are the several defenses

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<sup>41</sup> See, e.g., Jonathan M. Weinberg et al., *Normativity and Epistemic Intuitions*, in EXPERIMENTAL PHILOSOPHY 17 (Joshua Knobe & Shaun Nichols eds. 2008). For a qualified defense of the use of intuitions, see Alvin I. Goldman, *Philosophical Naturalism and Intuitional Methodology*, 84 PROCEEDINGS AND ADDRESSES OF THE AMERICAN PHILOSOPHICAL ASSOCIATION 115 (2010).

categorized as justifications or excuses. Each of these types of defense is a *substantive* defense, which, by definition, precludes liability because it eliminates or overrides the blame a defendant otherwise merits for committing a crime.<sup>42</sup> Even though justifications and excuses preclude blame for a very different reason,<sup>43</sup> both do so by their very status as substantive defenses. In other words, someone who denies that an alleged justification or excuse precludes blame would effectively be denying that the condition *is* a justification or excuse. Of course, controversy may surround the question of whether given pleas *do* justify or excuse.<sup>44</sup> But some examples are beyond serious debate. A defendant who deliberately kills someone he knows to be a culpable aggressor in self-defense, for example, is clearly less deserving of blame and punishment than a defendant who deliberately kills someone in order to marry his widow.

Persons who kill others they know to be culpable aggressors in self-defense not only deserve *less* blame and punishment, they deserve *no* blame or punishment at all. The fact that self-defense functions as a *complete* defense to liability highlights one of the most difficult problems confronting a comprehensive theory of broad culpability. As I repeatedly emphasize, blame allows for degrees. A complete theory of broad culpability not only must describe the conditions that preclude blame and punishment altogether, but also must identify those conditions that reduce it below what it otherwise would be. In the present context, the latter conditions are *partial* justifications and excuses. They do not yield an acquittal, but mitigate the blame and punishment a defendant deserves. A partial justification reduces but does not override or negate the wrongfulness of a criminal act, while a partial excuse reduces but does not negate the blame agents ordinarily deserve for performing a criminal act. Although enormous scholarly effort has been expended in producing a theory of complete defenses,<sup>45</sup> relatively little progress has been made in producing a theory of mitigation. That is, little work has been done to identify the factors that reduce wrongfulness or blame partially but not totally. Elsewhere, I have suggested that a given circumstance mitigates when it has an *analogue* in a complete defense.<sup>46</sup> In other words, partial justifications, for example, justify partially because they have counterparts in complete justifications, which justify completely. Partial excuses, in turn, partially excuse because they have counterparts in complete excuses, which excuse

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<sup>42</sup> Non-substantive defenses, by contrast, preclude liability for policy reasons. See DOUGLAS N. HUSAK, *PHILOSOPHY OF CRIMINAL LAW* 187–223 (1987).

<sup>43</sup> Justifications typically are construed to override or negate the wrongfulness of acts, while excuses typically are construed to preclude the blame agents ordinarily merit for performing wrongful acts. For a critical discussion, see Douglas Husak, *On the Supposed Priority of Justification to Excuse*, 24 *LAW & PHIL.* 557 (2005).

<sup>44</sup> For example, commentators disagree about the so-called cultural defense. Does it justify, excuse, or do neither? See ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* (2004).

<sup>45</sup> The most impressive systematic treatment remains that of 1 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* (1984).

<sup>46</sup> See DOUGLAS HUSAK, *Partial Defenses*, in *THE PHILOSOPHY OF CRIMINAL LAW* 311 (2010).

completely. The main problem with this suggestion, I believe, is to defend criteria to decide when a given circumstance has an analogue in a complete defense.

When considering acts that resemble self-defense, it does not seem overly difficult to recognize that some plausible candidates for mitigation have analogues in complete defenses. Consider the debate about whether the right of self-defense extends beyond the paradigm mentioned above: situations involving the killing of persons known to be culpable aggressors. Commentators have long debated the moral status of deliberate killings of persons who are either (a) non-culpable, and/or (b) non-aggressors. Suppose the aggressor is not culpable—as when the threat is posed by a child or a psychotic adult.<sup>47</sup> In such cases, some commentators allege that a defendant may lack a complete defense for killing.<sup>48</sup> But even if they are correct, it would be perverse to deny mitigation to such defendants. If blame and punishment were not reduced in these situations, defendants who kill non-culpable aggressors to save their own lives would be treated exactly like defendants who kill for the worst possible reasons—for monetary gain, for example. Equating these two killers would be a monstrous injustice. Since the killing of non-culpable aggressors has an analogue in a complete defense—a paradigm case of self-defense—these defendants are entitled to mitigation, even if (*arguendo*) they lack a complete justification or excuse.<sup>49</sup>

Even when no dispute arises about whether a given condition justifies completely or partially, there is ample room for doubt about whether it is properly conceptualized as a component of a theory of broad culpability.<sup>50</sup> Some commentators insist that justifications (whether complete or partial) do not involve *mental* conditions at all. Instead, they are part of *actus reus*.<sup>51</sup> They serve to refine or amend the description of the prohibited action specified incompletely in the statute.<sup>52</sup> Pursuant to this approach, justifications are part of the penal law's *actus reus*. They should be conceptualized as “unless clauses” that are implicit rather than explicit in statutory definitions of crimes. According to the so-called

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<sup>47</sup> For additional discussion, see George P. Fletcher & Luis E. Chiesa, *Self-Defense and the Psychotic Aggressor*, in CRIMINAL LAW CONVERSATIONS 365 (Paul H. Robinson et al. eds., 2009); Jeff McMahan, *Self-Defense Against Morally Innocent Threats*, in CRIMINAL LAW CONVERSATIONS 385 (Paul H. Robinson et al. eds., 2009).

<sup>48</sup> See, e.g., Fletcher & Chiesa, *supra* note 47.

<sup>49</sup> The same analysis applies to killings of persons who are not aggressors. In the famous case of *R v. Dudley & Stephens* [1884] 14 QBD 273 DC, for example, sailors cast adrift for several days without food eventually killed and cannibalized a boy. Although the killers may not be entitled to a complete defense because the boy was not an aggressor, it would be monstrous to ignore their hardship altogether and to treat them like more typical murderers. For a nice discussion, see A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW* (1984).

<sup>50</sup> Of course, not all justifications need be alike. See Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070 (2008).

<sup>51</sup> Such disputes are taken by some commentators as showing that the division between *actus reus* and *mens rea* is stipulative. See SIMESTER ET AL., *supra* note 40.

<sup>52</sup> See MOORE, *supra* note 2.

*objectivist* approach, defendants may be justified despite having no idea of the existence of the circumstances that justify their conduct.<sup>53</sup> Thus a killing would be justified in self-defense even if the killer were wholly unaware of the threat posed by the culpable aggressor. Since I have assumed that any component of *mens rea* involves a mental element (at least in part),<sup>54</sup> objectivist theories of justification fall outside the scope of a comprehensive theory of broad culpability. Most criminal theorists, however, prefer a subjectivist approach to justification. If the defendant *at least* must be aware of the existence of the justificatory circumstances before he is not blameworthy for the killing, justifications would still be conceptualized within a theory of broad culpability.<sup>55</sup> Only those theorists who provide a subjectivist account of justifications (whether complete or partial) and believe them to be distinct from the *actus reus* of a statute should include them within a theory of broad culpability.

Thus the case for including justifications within a theory of broad culpability is more complex than commentators might have supposed. Perhaps the basis for including *excuses* in such a theory is less problematic. No one disputes that excusing conditions are (wholly or partly) mental. As will become clear, however, controversy arises about excuses as well. As always, debate may involve whether a given condition precludes the blame a defendant deserves for performing a wrongful action.<sup>56</sup> But even if this question could be resolved, commentators differ radically about whether some of these conditions are reducible to other, more basic categories. Consider insanity and infancy, for example. Commentators in the United States tend to regard these conditions as paradigm cases of excuse.<sup>57</sup> But the dominant tendency among commentators in the United Kingdom is to conceptualize insanity and infancy as undermining criminal capacity—an altogether different part of a theory of broad culpability.<sup>58</sup> Thus I will briefly return to these conditions in my discussion of the capacities needed to render persons criminally responsible.<sup>59</sup>

Even if a given condition is confidently placed on the list of excuses—duress, for example—the foregoing problem of mitigation resurfaces.<sup>60</sup> Conditions that do

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<sup>53</sup> See Paul Robinson, *Competing Theories of Justification: Deeds v. Reasons*, in HARM AND CULPABILITY 45, 47 (A.P. Simester & A.T.H. Smith eds., 1996).

<sup>54</sup> The assumption that any component of *mens rea* involves a mental element complicates attempts to treat negligence within a theory of culpability.

<sup>55</sup> See John Gardner, *Justifications and Reasons*, in HARM AND CULPABILITY 103 (A.P. Simester & A.T.H. Smith eds., 1996).

<sup>56</sup> Consider the wide range of excusing conditions tentatively proposed by Jeremy Horder. See JEREMY HORDER, *EXCUSING CRIME* 1 (2004).

<sup>57</sup> See DRESSLER, *supra* note 30, at 205.

<sup>58</sup> See DUFF, *supra* note 6, at 41.

<sup>59</sup> See *infra* Part III.C.

<sup>60</sup> The status of duress as an excuse has been challenged. See Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—And Why It Matters*, 6 BUFF. CRIM. L. REV. 833 (2003).

not negate blame altogether may still reduce it.<sup>61</sup> When persons succumb to external threats to commit crimes, they may have a claim in mitigation even if the threat does not fully excuse. Many statutes, for example, allow only threats of *physical* harm to excuse criminal conduct under the duress defense.<sup>62</sup> Suppose, however, that a thug makes an unlawful threat to burn a defendant's house if he does not assist in a criminal endeavor. Even if the defendant lacks a complete excuse, it seems perverse to deny him a claim to mitigation and equate his blame and punishment with that of an accomplice who assists in the same crime but was not threatened at all. As such examples illustrate, the same problems in generating a theory of partial justification reappear in attempts to construct a theory of partial excuse. A comprehensive theory of broad culpability must find some way to solve these problems.

If I am correct, the difficulties of integrating thoughts about justification and excuse into a theory of broad culpability are greater than one might have anticipated.<sup>63</sup> This area of the law illustrates the three general problems that plague the production of such a theory: one must argue that a given factor has exculpatory significance, that it should not be conceptualized as part of *actus reus*, and that it is not reducible to other categories. Each of these tasks poses a challenge to efforts to defend a theory of broad culpability that includes justifications and excuses. At the very least, commentators should make greater efforts to depict the exculpatory significance of substantive defenses in shades of gray rather than in all-or-nothing terms. The resources to achieve this objective are available; legal philosophers need only to exploit them.

### B. Capacities for Criminal Responsibility

No one doubts that criminal responsibility requires capacities of some sort or another.<sup>64</sup> In the absence of some such requirement, it is hard to see why infants—or even animals—would not be eligible for liability and punishment.<sup>65</sup> In particular, the insanity defense has long reflected agreement that some adults may lack the capacities needed for criminal responsibility. Most importantly for present

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<sup>61</sup> Perhaps the “but everyone does that” plea is an example. See DOUGLAS HUSAK, *The ‘But Everyone Does That!’ Defense*, in *THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS*, *supra* note 23, at 338.

<sup>62</sup> MODEL PENAL CODE § 2.09(1) (1985).

<sup>63</sup> I do not pretend to have exhausted the problems. Yet another difficulty is to decide whether every substantive defense should be conceptualized as a justification or excuse. For a critical discussion, see Douglas Husak, *Beyond the Justification/Excuse Dichotomy*, in *CRIME, PUNISHMENT, AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTONY DUFF* 141 (Rowan Cruft et al. eds., 2011).

<sup>64</sup> See Stephen J. Morse, *Crazy Reasons*, 10 J. CONTEMP. LEGAL ISSUES 189, 189–94 (1999).

<sup>65</sup> Modern sensibilities are unable to comprehend the medieval practice of prosecuting animals. For a valiant effort, see Jen Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals*, 9 ANIMAL L. 97, 131–32 (2003).



purposes, no one doubts that these capacities evolve over time as children mature. Clearly, they do not appear in adults instantaneously. Moreover, persons may have some but not all of the relevant capacities, and thus could be capable of being held accountable for some but not all offenses. Hence this area would seem to provide an example of a component of broad culpability that would easily satisfy our central desideratum: the blame for which persons become eligible as a result of possessing these capacities admits of degrees.<sup>66</sup> In fact, however, this appearance is deceptive; the rules and doctrines of the criminal law have struggled mightily to reflect the fairly obvious point that the capacities for criminal responsibility are possessed by defendants to varying extents.

Before I discuss this difficulty, a preliminary point merits brief discussion. *What capacities are prerequisites to criminal liability?* The most well known account—with which I tend to concur—conceptualizes criminal responsibility as requiring responsiveness to reasons.<sup>67</sup> Even if we accept a reason-responsiveness account, however, we still must decide *to which* reasons persons must be responsive in order to become eligible for blame and punishment. Presumably, persons must be responsive to whatever reasons are supplied by the criminal law before they may be found to be liable.<sup>68</sup> But which reasons are these? I will simply assume without argument that the criminal law (insofar as it is just) requires *moral* reasons for acting.<sup>69</sup> Thus a person who is sufficiently non-responsive to moral reasons lacks criminal responsibility and should not be subject to state punishment. I contend that a “responsiveness-to-moral-reasons” account is able to make sense of insanity and infancy—which, as I have indicated, provide the two contexts in which commentators have thought most deeply about the capacities needed for criminal responsibility.

If I am correct so far, we need to understand what it means to be *responsive* to a moral reason. This quagmire is riddled with controversy I cannot hope to resolve. But it should be clear that more is needed than just the ability to *conform* to the reason. A person can conform to a moral reason from any motive at all, including a desire to avoid ostracism or retaliation. Although these motives for compliance allow persons to avoid punishment, I am skeptical that they manifest the capacities necessary to be responsive to moral reasons. In addition to mere conformity, persons must be able to understand the special motivating force of

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<sup>66</sup> More precisely, the blame for which persons become eligible as a result of exercising these capacities in criminal conduct admits of degrees.

<sup>67</sup> For example, see R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* 158–64 (1994); see also John Martin Fischer, *Recent Work on Moral Responsibility*, 110 *ETHICS* 93, 127–28 (1999). Of course, rivals can be found. For example, see Angela M. Smith, *Control, Responsibility, and Moral Assessment*, 138 *PHIL. STUD.* 367, 385 (2008).

<sup>68</sup> See DUFF, *supra* note 6, at 39.

<sup>69</sup> The most sophisticated account of the normative status of legal rules is provided by JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 1 (1983).

moral reasons. But what motivating force do moral reasons exert?<sup>70</sup> And what capacities are required in order to understand them?<sup>71</sup> The beginning of an answer is provided by Stephen Morse, who contends that persons must possess the capacities for empathy and remorse. "Unless an agent is able to put himself affectively in another's shoes. . . and is able at least to feel the anticipation of unpleasant guilt for breach, that agent will lack the capacity to grasp and be guided by the primary rational reasons for complying with moral expectations" and attributions of criminal responsibility would be unfair.<sup>72</sup> Without these capacities, it is hard to see how a person could really be said to appreciate that his criminal act is *wrong*.

Morse is probably correct to suppose that these emotional capacities are needed to be capable of responding to moral reasons and thus to be eligible for criminal liability. If so, it should be clear that the capacities needed for criminal responsibility can be possessed to varying degrees. Developmental psychologists have sought to describe the stages through which children pass as they gradually acquire the skills and abilities that eventually transform them into fully competent adults. On any sensible account, responsiveness to reasons develops gradually throughout maturation, and ultimately becomes present in adults to different extents. Many factors affect the emergence of empathy and remorse: genetic constitution, poverty, trauma, education, and the like. Yet the penal law, as is well known, tends to establish an *age* limit for criminal responsibility. This age differs substantially from one jurisdiction to another. But any specification of this age is problematic in light of the enormous individual differences in the development and understanding of child offenders.<sup>73</sup>

The question of degree of reason-responsiveness is perhaps even more vexing as we move from the cognitive and emotional capacities to the volitional prerequisites for criminal responsibility. Although few jurisdictions allow volitional impairments under an insanity defense, it seems obvious that a person must be *able* to conform to a reason in order to be responsive to it. That is, he must be capable of modifying his behavior if he notices that he is deviating from what the reason requires.<sup>74</sup> Psychological pressures that are literally irresistible

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<sup>70</sup> See the contrast between *internalism* and *externalism* developed, for example, in MICHAEL SMITH, *THE MORAL PROBLEM* 60–63 (1994).

<sup>71</sup> For an early effort to address these questions, see generally Peter Arenella, *Convincing the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511 (1992).

<sup>72</sup> Stephen J. Morse, *Deprivation and Desert*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE 114, 122 (William C. Heffernan & John Kleinig eds., 2000).

<sup>73</sup> See CLAIRE MCDIARMID, *CHILDHOOD AND CRIME* 97 (2007).

<sup>74</sup> See Jeremy Waldron, *Vagueness and the Guidance of Action*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 58, 62–63 (Andrei Marmor & Scott Soames eds., 2011).

may not exist.<sup>75</sup> Nonetheless, everyone agrees that some impulses are easier for some persons to resist than for others. No one contests that children as a group are less able to resist temptation and defer gratification. Of course, children do not comprise the only group in which degrees of volitional capacities must be acknowledged. Drug addicts, for example, are presumably less responsive to reason than non-addicts. In other words, reasons that would ordinarily lead persons to desist from an activity—that it would cost us our job or marriage, for example—are notoriously less influential when persons are addicted to drugs. The challenge for a theory of broad culpability, then, is to explain why such persons remain eligible for criminal liability and may not even be entitled to mitigation.<sup>76</sup>

Psychopaths present another hard case.<sup>77</sup> Although the empirical evidence remains in dispute, psychopaths appear to lack empathy and are unable to distinguish moral from conventional rules. As a result, commentators are divided about whether these persons are responsive to moral reasons.<sup>78</sup> The consequences of finding psychopaths to be immune from punishment would be enormous; it is noteworthy that no jurisdiction currently recognizes psychopathy even in mitigation of punishment. This fact about positive law is puzzling; it seems apparent that psychopaths are *less* reason-responsive than normal adults. A theory of broad culpability must wrestle to come to terms with this difficult issue.

How might it do so? Many alternatives are possible.<sup>79</sup> Stephen Morse, for example, has proposed the recognition of a new mitigating excuse of partial responsibility that would apply to all crimes.<sup>80</sup> This excuse would be available when the rationality of a defendant is (non-culpably) compromised, depriving him of full responsibility for the crime charged. Although Anglo-American criminal law presently contains no such generic partial excuse, the recognition of this defense would not represent a radical departure from positive law. Several existing doctrines—such as provocation/passion and extreme mental or emotional disturbance—operate as precedents for the excuse Morse envisages. Although

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<sup>75</sup> See R.J. Wallace, *Addiction as Defect of the Will: Some Philosophical Reflections*, 18 LAW & PHIL. 621, 621–22 (1999); and Michael Smith, *Irresistible Impulse*, in INTENTION IN LAW AND PHILOSOPHY 37, 40–42 (Ngairé Naffine, Rosemary Owens & John Williams eds., 2001).

<sup>76</sup> See generally Douglas Husak, *Addiction and Criminal Responsibility*, 18 LAW & PHIL. 655 (1999); Neil Levy, *Addiction, Responsibility, and Ego Depletion*, in ADDICTION AND RESPONSIBILITY 89 (Jeffery Poland & George Graham eds., 2011); Gideon Yaffe, *Lowering the Bar for Addicts*, in ADDICTION AND RESPONSIBILITY 113 (Jeffery Poland & George Graham eds., 2011).

<sup>77</sup> See generally Paul Litton, *Responsibility Status of the Psychopath: On Moral Reasoning and Rational Self-governance*, 39 RUTGERS L. J. 349 (2008).

<sup>78</sup> See generally RESPONSIBILITY AND PSYCHOPATHY (Luca Malatesti & John McMillan eds., 2010).

<sup>79</sup> A novel proposal for dealing with the diminished responsibility of mentally abnormal offenders is discussed by Elizabeth Nevins-Saunders, *Not Guilty As Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, NEW YORK UNIVERSITY PUBLIC LAW AND LEGAL THEORY WORKING PAPERS 265 (2011).

<sup>80</sup> Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 290–91 (2003).

these partial excuses apply only in limited contexts, Morse would extend them to all crimes. This proposal would be implemented by means of a new verdict: “guilty-but-partially-responsible.”<sup>81</sup> Morse’s idea seems to me to be sensible. Such proposals show that existing law has the resources to preserve the central desideratum of a theory of broad culpability by conceptualizing blame in terms of degrees—even if it fails to do so at the present time.

Many of the foregoing matters are deeply controversial. But additional difficulties must be addressed in order to integrate an account of the capacities needed for criminal responsibility into a theory of broad culpability. Commentators must decide whether the absence of these capacities is reducible to a different component of broad culpability. As I have indicated, theorists in the United States tend to conceptualize the absence of these capacities as excusing conditions.<sup>82</sup> In Great Britain, by contrast, these capacities are typically treated as a distinct category—as prerequisites to penal liability more basic and fundamental than excuse.<sup>83</sup> According to R.A. Duff, for example, persons who plead an excuse for criminal wrongdoing affirm rather than deny their responsibility. Infants and the insane, by contrast, deny their responsibility and thus are in no position to offer an excuse.<sup>84</sup> This debate is partly terminological, but is theoretically significant and may even have practical significance. If the categorization of given pleas as a defense or as a denial of responsibility has implications for such procedural matters as the allocation of burdens of proof, commentators must be clear about how to classify the absence of whatever capacities are needed for criminal responsibility. Here, as elsewhere, the development of a theory of broad culpability could enhance the operation of criminal justice.

### C. Non-Voluntariness

Most commentators agree that criminal law contains a *voluntariness* requirement. More specifically, they concur that the criminal law contains a *voluntary act* requirement.<sup>85</sup> The precise formulation of this requirement, however, is contested. In particular, the exact connection between the act prohibited by statute and the voluntary act the defendant must perform is mysterious.<sup>86</sup> The Model Penal Code, for example, does not require that the prohibited act *itself* be voluntary. Instead, it mandates that liability must be “based

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<sup>81</sup> *Id.* at 299.

<sup>82</sup> See DRESSLER, *supra* note 30, at 118.

<sup>83</sup> See, e.g., HORDER, *supra* note 56.

<sup>84</sup> DUFF, *supra* note 6.

<sup>85</sup> Some commentators challenge orthodox thought that the criminal law contains a voluntary act requirement at all. See generally Douglas Husak, *Does Criminal Liability Require an Act*, in THE PHILOSOPHY OF CRIMINAL LAW, SELECTED ESSAYS 17 (2010). R.A. Duff contends that criminal law should countenance an “act presumption.” See DUFF, *supra* note 6, at 120–21.

<sup>86</sup> See Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2347 (2007).

on" conduct that "includes" a voluntary act or omission.<sup>87</sup> What do the "based on" and "includes" relations mean? Presumably, this cryptic provision is designed to deal with so-called *culpability-in-causing* cases.<sup>88</sup> In these situations, defendants perform a voluntary act that somehow causes them to perform a subsequent criminal act that is non-voluntary.<sup>89</sup> In *People v. Decina*, for example, the defendant killed several pedestrians when he drove onto a sidewalk after losing control of his car during an epileptic seizure.<sup>90</sup> No one would pretend that the bodily movements during a seizure are voluntary actions. Nonetheless, the defendant was punished because he had known of his susceptibility to epilepsy and had voluntarily omitted to take medicine that would have prevented the seizure and accident. Hence his liability is said to be consistent with the voluntary act requirement because it is "based on" conduct that "includes" this prior voluntary omission.

Serious questions have been raised about "culpability-in-causing" strategies to reconcile liability with the voluntary act requirement.<sup>91</sup> An even more basic question, however, involves the meaning of voluntariness itself. Despite its celebrated elegance, the Model Penal Code notoriously fails to define this elusive term. Instead, it simply offers several examples of conduct that are *not* voluntary, followed by a general catch-all category of "a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual."<sup>92</sup> Unquestionably a *mental* element (frequently referred to as the will) is needed to make a bodily movement a product of the "determination" of the actor, so questions about voluntariness are part of a theory of broad culpability or *mens rea*. My central question is whether the approach to voluntariness taken by this statutory provision is capable of preserving the desideratum of a theory of broad culpability. Does it allow blame to be expressed in degrees? Contrary answers might be given. On the negative side, the failure to satisfy the voluntary act requirement defeats liability altogether. The law deals with borderline cases by pigeonholing them into one category or the other; pleas for exculpation either succeed totally or fail altogether. On the positive side, it seems obvious that given acts express the effort or determination of the actor to a greater or lesser extent.<sup>93</sup>

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<sup>87</sup> MODEL PENAL CODE § 2.01(1) (1962).

<sup>88</sup> See Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study of the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985).

<sup>89</sup> Moral philosophers sometimes say these examples involving *tracing*. See Matt King, *The Problem with Negligence*, 35 SOC. THEORY & PRAC. 577 (2009).

<sup>90</sup> *People v. Decina*, 138 N.E.2d 799 (N.Y. 1956).

<sup>91</sup> See Larry Alexander, *Reconsidering the Relation Among Voluntary Acts, Strict Liability and Negligence in Criminal Law*, 7 SOC. PHIL. & POL'Y 84 (1990); Douglas Husak & Brian McLaughlin, *Times-Frames, Voluntary Acts, and Strict Liability*, 12 LAW & PHIL. 95 (1993).

<sup>92</sup> MODEL PENAL CODE, § 2.01(2)(d) (1962).

<sup>93</sup> See Deborah Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269 (2002).

The supposition that some acts are more voluntary than others does no great violence to our intuitions. Many of the examples of behavior Morse argues are eligible for his mitigating defense of partial responsibility would seem to qualify as examples.<sup>94</sup> If the general characterization of voluntariness supplied by the Code can be invoked to show that some acts are more voluntary than others, this part of a theory of broad culpability will satisfy my central desideratum.

We need a theory of voluntariness to understand how one act can be more or less voluntary than another. Joel Feinberg has made an impressive contribution on this topic.<sup>95</sup> Drawing from Aristotle,<sup>96</sup> Feinberg depicts voluntariness as a *variable* concept "determined by higher and lower cut-off points depending on the nature of the circumstances, the interests at stake, and the moral or legal purpose to be served."<sup>97</sup> A *perfectly* voluntary act is completely controlled by the will, performed in full knowledge of all relevant facts, and is wholly immune from all external pressures and influences. Perhaps no act ever performed in the real world meets this exacting standard. In any event, we must draw a line somewhere along the continuum between a perfectly voluntary act and an act that is wholly non-voluntary in order to identify those acts that fail to satisfy the voluntariness requirement of the criminal law.

Of course, line drawing is always difficult and vulnerable to allegations of arbitrariness. For present purposes, however, the problem is not that lines must somehow be drawn. Instead, the problem is that the criminal law seems not to adhere to Feinberg's model; it treats a continuum or scalar concept as though it were all-or-nothing. Variables on this spectrum are regarded as defeating voluntariness altogether when they should be regarded as reducing it. Just before this cliff, a defendant is said to act voluntarily; the fact that his action is quite distant from the paradigm of full voluntariness is held to be irrelevant to his liability and blame. Moreover, it is hard to see how this fact about positive law might be altered. How can our rules and doctrines be modified to preserve our desideratum of a theory of broad culpability and make the voluntariness of criminal conduct a matter of degree? If the law cannot answer this question successfully, must we conclude that its treatment of voluntariness is radically defective?

To my mind, the foregoing questions pose huge problems for a general theory of blame. Perhaps surprisingly, however, they may *not* raise insuperable difficulties for a theory of broad culpability. To understand why this is so,

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<sup>94</sup> Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289 (2003).

<sup>95</sup> JOEL FEINBERG, *HARM TO SELF* (1986). Feinberg's discussion of voluntariness is designed to explain the conditions under which (soft) paternalism is justified. Still, his views have a broader application and may be adapted for my purposes.

<sup>96</sup> ARISTOTLE, *NICOMACHEAN ETHICS*, III 1, 11(oa) (W.D. Ross trans., Oxford University Press, 1925).

<sup>97</sup> FEINBERG, *supra* note 95, at 117.

consider three "solutions" that positive law tends to offer to these questions. First, consider cases in which bodily movements are not controlled by the will to any degree. A paradigm example is an (unforeseeable) seizure or spasm. Under existing law, exculpation in these cases is conceptualized as defeating the *actus reus* rather than the *mens rea* of an offense. Thus it is not treated within a theory of culpability at all.<sup>98</sup> Second, consider cases of external pressure or undue influence. Such exculpatory factors raise the defense of duress, which is treated as an excuse. Although excuses *are* part of a theory of broad culpability, we have already seen how degrees of duress that do not excuse altogether might mitigate blame and thus preserve the main desideratum of a theory of broad culpability.<sup>99</sup> Finally, consider cases of ignorance, treated by Feinberg (and Aristotle) as undermining voluntariness. Among the central innovations of the Code is its conceptualization of ignorance within its theory of *narrow* culpability. Murder, for example, is (roughly) defined as the act of purposely or knowingly killing another human being. Thus, for example, a defendant who does not know that his victim is a human being lacks the narrow culpability needed for liability under this statute. If we want to ensure that a theory of broad culpability does not duplicate the work done by a theory of narrow culpability, we must exclude ignorance from its scope. Much can be said about the adequacy of each of these alleged "solutions." At the very least, they help to remove the pressure to cope with the problems that non-voluntariness appears to pose for a theory of broad culpability.

Until we defend an account of voluntariness and a formulation of the voluntary act requirement itself, it may seem premature to discuss whether the normative issues raised by this topic are reducible to other, more basic concerns. I can only sketch my thoughts here. My own view, which certainly departs from orthodoxy in criminal law scholarship, is that what is generally called the voluntary act requirement in penal theory is better construed as a complex principle that precludes criminal liability and punishment for states of affairs over which persons lack *control*. This principle has somewhat different implications in each of the four domains in which a voluntary act is frequently said to be absent: omissions, status offenses, non-voluntary movements, and thoughts.<sup>100</sup> It would be hard to argue that the criminal law should *not* include a control principle—although the meaning of control remains enormously controversial.<sup>101</sup> Suppose one borrows the reason-responsiveness test of control from a theory of capacities needed for criminal responsibility.<sup>102</sup> According to this account, a state of affairs is

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<sup>98</sup> See, e.g., *State v Baker*, 571 P.2d 65 (Kan. Ct. App. 1977). Moreover, as every law student learns—and is puzzled to explain—a finding of non-voluntariness defeats liability even for offenses of strict liability in which no narrow culpability need exist.

<sup>99</sup> See *infra* Part III.A.

<sup>100</sup> Husak, *supra* note 23, at 36–42.

<sup>101</sup> See, e.g., JOHN MARTIN FISCHER & MARK RAVIZZA, *RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY* (1999).

<sup>102</sup> See generally *id.*

under our control if we have the ability to alter it when given a reason to do so. If we adopt this conception, the normative concerns that underlie the voluntary act requirement turn out to have greater similarities with those that pertain to responsibility—which I discussed above.<sup>103</sup>

Obviously, these sketchy remarks only gesture to the immense amount of theoretical work to be done in understanding the role played by the (alleged) voluntary act principle in a larger theory of broad culpability. Without a better understanding of what voluntariness *is*, and how the supposed voluntary act requirement should be construed, much of the work in integrating this topic into a theory of broad culpability has yet to be completed.

#### D. Motive

It is hard to believe that the motives that lead two persons to commit the same criminal act are always irrelevant to the blame and punishment they deserve.<sup>104</sup> But even though the importance of motive to sentencing is seldom disputed, its significance to liability continues to be denied, sometimes emphatically.<sup>105</sup> Much of this disagreement stems from uncertainty about what motives *are*.<sup>106</sup> I hope to avoid this conceptual question by relying on an intuitive ability to recognize motives. If we are able to agree that given mental states are indeed motives, the best strategy to persuade a theorist who regards them as immaterial to liability is to point out the several relatively uncontroversial respects in which the substantive criminal law *already* holds motives to be relevant. In some of these areas, as we will see, the law resorts to subterfuge and fiction. In any event, the treatment of this issue within positive law is haphazard and almost entirely undeveloped theoretically. Any attempt to integrate thoughts about the significance of motive into a theory of broad culpability would need to begin with the most basic questions. I can only sketch some of the problems that arise in an attempt to meet this challenge.

Since the relevance of motive is contested, I will dwell on the issue of its materiality at some length. Perhaps the first order of business would be to prepare a rough categorization of the kinds of motives that lead persons to commit crimes and to distinguish those that seemingly bear on blame from those that do not. Compiling an inventory of motives is an ambitious task that few penal theorists

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<sup>103</sup> See *infra* Part III.B.

<sup>104</sup> See Douglas Husak, *Motive and Criminal Liability*, in HUSAK, *supra* note 23, at 53–54. For a more recent and extended treatment, see STEVEN SVERDLIK, *MOTIVE AND RIGHTNESS* (2011).

<sup>105</sup> According to one commentator, “hardly any part of penal law is more definitely settled than that motive is irrelevant.” JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 88 (2d ed. 1960). Many theorists continue to quote Hall with approval.

<sup>106</sup> See Michael T. Rosenberg, *The Continued Relevance of Irrelevance-of-Motive Maxim*, 57 DUKE L.J. 1143 (2008).



have systematically undertaken.<sup>107</sup> The context of capital punishment, however, provides a partial exception. Death penalty jurisprudence requires states to explicitly list in statutes the aggravating factors that make offenders eligible for execution.<sup>108</sup> Several (although not most) of these factors involve motive. Arizona, for example, allows capital punishment when the murder is designed to prevent the victim from testifying. Arkansas makes defendants eligible for execution when the killing is intended to facilitate escape. Delaware permits capital punishment when the victim is murdered in order to interfere with his First Amendment rights.<sup>109</sup> Other states that retain the death penalty recognize additional motives that elevate murder into a capital crime.

If the foregoing motives render some murderers more blameworthy than others, as seems plausible, I see no reason to doubt that they aggravate blame when offenders commit less serious crimes. Thus a study of death penalty jurisprudence provides the most sensible place to begin in preparing a list of motives that increase blame. Still, an examination of death penalty statutes could not be expected to yield an exhaustive list of bad motives. The explanation is that any such list is *offense-relative*. The possible motives for treason, for example, are unlike those that might lead someone to commit a property offense. In order to make the ensuing discussion manageable, it might be helpful to select a relatively common offense: theft or assault, for example. As a very crude approximation, the vast majority of thefts or assaults are perpetrated with three different kinds of motives. First, they might be motivated by thrill-seeking. Adolescents, especially when fueled by alcohol, appear to fight or steal for fun, excitement, or to enhance their reputational status. Other thefts or assaults are motivated by monetary gain. Victims are frequently mugged for their money or other valuable goods. Still other thefts or assaults are motivated by a personal vendetta. Perpetrators know their victims and believe they have a grievance to settle. Of course, this list is woefully incomplete, and finer distinctions are easy to draw. Still, it offers a tolerable beginning in identifying the motives that lead people to commit these common crimes.

As I have suggested repeatedly, a theory of broad culpability must be able to make sense of the idea that one defendant can be more blameworthy than another for committing the same criminal act. In the present context, the basic question is whether and to what extent any of the above motives renders one defendant more blameworthy than another. The answer is hardly obvious. If one defendant is more blameworthy than another for committing a theft or assault with one of these motives, the contrast in blame is subtle. Positive law apparently aggravates

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<sup>107</sup> For a notable exception, see SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* (1998).

<sup>108</sup> See *Aggravating Factors for Capital Punishment by State*, DEATH PENALTY INFORMATION CENTER, at <http://www.deathpenaltyinfo.org/aggravating-factors-capital-punishment-state> (last visited March 22, 2012).

<sup>109</sup> *Id.*

punishment only when more unusual motives are involved.<sup>110</sup> For example, approximately forty-five states have enacted statutes that enhance the sentence of defendants who commit crimes motivated by bias against the race, religion, or ethnicity of the victim; many of these states also proscribe bias attacks against members of other groups such as gays or the disabled.<sup>111</sup> The necessity and justifiability of these penalty-enhancing statutes has been a topic of heated controversy among penal theorists. To a large extent, this debate questions whether the act of victimizing a person because of his race is more blameworthy than the act of victimizing a person from a more typical motive.<sup>112</sup>

It would be a mistake, however, to infer that positive law makes motive irrelevant to blame outside of a limited and controversial range of cases. The significance of motive can be found in at least two additional areas of the law, although its importance is disguised. The law of (non-capital) homicide provides the first such area, reflecting the relevance of motive in two very different ways. First, consider non-voluntary euthanasia. Suppose James is a greedy son who kills his elderly father for his inheritance and John is a loving son who kills his elderly father because he is wracked with pain from an incurable disease. As is well known, states do not openly allow non-voluntary euthanasia.<sup>113</sup> Thus it may be hard to appreciate how positive law could make the different motives of James and John relevant to their respective liability. Yet the failure to do so would amount to a massive injustice. Even those commentators who contend that non-voluntary euthanasia should remain illegal cannot believe that John should be treated like James, a murderer who kills from a selfish rather than a benevolent motive.

To avoid the absurdity of equating the blame of James and John, positive law must have a device to differentiate them. A few such devices exist, although they work imperfectly and frequently by subterfuge.<sup>114</sup> One such device is as follows.

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<sup>110</sup> On this score, death penalty jurisprudence is controversial. California and a handful of other states, for example, allow capital punishment when the killing is motivated by pecuniary gain. *Id.*

<sup>111</sup> See *Anti-Defamation League State Hate Crime Statutory Provisions*, ANTI-DEFAMATION LEAGUE'S WASHINGTON OFFICE, at [http://www.adl.org/99hatecrime/state\\_hate\\_crime\\_laws.pdf](http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf) (last visited March 22, 2012).

<sup>112</sup> For competing points of view, see Heidi M. Hurd, *Why Liberals Should Hate 'Hate Crime' Legislation*, 20 LAW & PHIL. 215 (2001); see also Mohamed Al-Hakim, *Making Room for Hate Crime Legislation in Liberal Societies*, 4 CRIM. LAW & PHIL. 341 (2010).

<sup>113</sup> The Death with Dignity Act in Oregon allows terminally ill residents to end their life through the voluntary self-administration of lethal medications, expressly prescribed for that purpose by a physician. Initiative 1000 created a similar procedure in Washington. Still, non-voluntary mercy killings are prohibited in all states. See *About the Death with Dignity Act*, OREGON HEALTH AUTHORITY, at <http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/faqs.aspx> (last visited March 22, 2012).

<sup>114</sup> See Andrew Ashworth, *Criminal Liability in a Medical Context: The Treatment of Good Intentions*, in SIMESTER & SMITH, *supra* note 53, at 173; Alan Norrie, *Legal Form and Moral Judgment: The Problem of Euthanasia*, in THE STRUCTURE OF THE CRIMINAL LAW (Anthony Duff et al. eds., Feb. 2012).

Penal liability cannot attach unless the defendant's conduct violates a duty. Each person owes a duty to all other persons not to cause their death through positive action. In such cases, the rule that liability requires the violation of a duty is satisfied trivially and thus is easy to overlook. But persons owe a duty not to kill by omission only when they bear some "special relation" to one another.<sup>115</sup> The criminal law has been reluctant to expand the number of special relations that would allow persons to incur criminal liability when they kill by omission.<sup>116</sup> As a result, a defendant who kills another is much more likely to escape criminal liability if he is able to persuade a court that the death was brought about by an omission rather than by a positive action.<sup>117</sup>

The contrast between positive action and omission, however, is notoriously elusive.<sup>118</sup> Cases of euthanasia often illustrate this uncertainty perfectly. Depending on the details of how death is caused, no violence to ordinary language results when some particular instances of conduct are described either as an action or as an omission. For example, is the withdrawal of the tube of a drip feed that keeps a patient alive an action or omission? Is the failure to replace an empty drip feed mechanism an action or omission?<sup>119</sup> Should liability for homicide really depend on how these questions are answered?<sup>120</sup> Because of these conceptual and normative uncertainties, the contrast between positive actions and omissions is frequently gerrymandered to achieve desired outcomes. When liability is widely regarded as unjust, commentators and courts have incentives to describe the defendant's conduct as an omission rather than as a positive action. Clearly, the motivation of the defendant is among the most important factors that lead judges to categorize his conduct in one way rather than another. Of course, the potential to gerrymander any concept is limited. But if sons do not owe duties to their parents not to kill them through omission, courts that seek to differentiate between the blame of James and John have ample grounds to categorize the conduct of the latter as an omission rather than as a positive action. If I am correct, the body of law that contrasts acts from omissions surreptitiously takes account of the motive of the defendant in imposing criminal liability for homicide.

The positive law of (non-capital) homicide includes a second hidden device to reflect the relevance of motive to liability. Every jurisdiction allows some version of the defense of *provocation*. As an imperfect defense, this plea reduces a

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<sup>115</sup> See DRESSLER *supra* note 30, at 106–09.

<sup>116</sup> See Larry Alexander, *Criminal Liability for Omissions: An Inventory of Issues*, in CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 121 (Stephen Shute & Andrew Simester, eds., 2002).

<sup>117</sup> The concept of causation is also manipulated to allow many acts of euthanasia. See generally Richard H.S. Tur, *Just How Unlawful is "Euthanasia"?*, 19 J. APPLIED PHIL. 219 (2002).

<sup>118</sup> See generally MICHAEL S. MOORE, ACT AND CRIME (1993).

<sup>119</sup> Helen Beynon, *Doctors as Murderers*, 17 CRIM. L. REV. 18, 21–22 (1982).

<sup>120</sup> Positive law appears to answer this question affirmatively. See DAVID ORMEROD, SMITH & HOGAN CRIMINAL LAW 87 (11th ed. 2005).

conviction of murder to manslaughter even though the killing is intentional.<sup>121</sup> I assume that the law of provocation expresses the judgment that persons who kill in response to a provocative event have a less blameworthy motive than persons who kill for other reasons. Admittedly, the law of provocation is not generally cited as an example of the relevance of motive to liability. Perhaps this failure reflects disagreement about other fundamental issues that commentators have discussed extensively: first, how a particular statute should codify the relevance of provocation, and second, whether provocation reduces blame as a justification or excuse.<sup>122</sup> But theoretical uncertainty about these two unresolved matters should not blind us to the fact that provoked defendants kill from motives the penal law regards as less blameworthy.

The significance of motive to liability is not even disguised in other areas of law. Motives are included as elements of any number of statutes typically described as *crimes of specific* (or *ulterior*) *intent*.<sup>123</sup> Although not all of these statutes are alike,<sup>124</sup> each crime of ulterior intent proscribes conduct x when performed in order to bring about outcome y. Burglary is the most familiar but hardly the only example.<sup>125</sup> The fact that existing penal codes contain any number of such offenses is proof of the relevance of motive to liability. Many commentators, however, seem ambivalent about the very existence of crimes of ulterior intent. Indeed, this area of the substantive criminal law is a hodge-podge without a coherent rationale. As Jeremy Horder points out, it is puzzling that many jurisdictions proscribe assault with the intent to rape or to rob, but no jurisdiction proscribes assault with the intent to murder or to do grievous bodily harm.<sup>126</sup> But even though this area of the law demands more systematic thought and structure, the justificatory rationale for many crimes of ulterior intent is strong. If the ulterior intent y were not amended to the underlying conduct x, statutes would frequently be over-inclusive and impose liability on persons whose behavior is innocent. Thus California, for example, prohibits the possession of burglar's tools with the intention to break into any dwelling or vehicle.<sup>127</sup> If the ulterior intent were not an element of this offense, persons would be exposed to criminal liability for possessing tools they intend to use for a legitimate purpose. The addition of an

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<sup>121</sup> Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1331 n.1 (1997).

<sup>122</sup> These issues are discussed exhaustively in Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1027-1109 (2011).

<sup>123</sup> See Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89 (2006).

<sup>124</sup> See the sophisticated categories developed in Jeremy Horder, *Crimes of Ulterior Intent*, in HARM AND CULPABILITY 153, 153-54 (A.P. Simester & A.T.H. Smith eds., 1996).

<sup>125</sup> Common law burglary requires the entering of a dwelling with the intent to commit a felony therein.

<sup>126</sup> Horder, *supra* note 124, at 155.

<sup>127</sup> CAL. PENAL CODE § 466 (West 2010).

ulterior intent prevents the injustice that would result if a state simply proscribed the possession of given tools.

I hope that this cursory discussion helps to identify a few respects in which motives are and ought to be relevant to penal liability and blame. If I am correct, a theory of broad culpability must struggle to identify when and to what extent motives play this role. The categorization of motives as part of *mens rea* rather than *actus reus*, and as not reducible to other components of a theory of broad culpability, can begin after this preliminary task is completed. I am optimistic that these latter questions can be resolved fairly easily, although I will not attempt to do so here. In any event, efforts to integrate thoughts about the relevance of motive into a theory of broad culpability must start by addressing these basic and fundamental issues. On this topic, a great deal of work remains to be done both in positive law and in criminal theory if we hope to realize the retributivist dream.

#### IV. AWARENESS OF WRONGDOING

Each of the foregoing areas of the substantive criminal law is plausibly regarded as a component of a theory of broad culpability. Moreover, each has the resources to succeed (perhaps imperfectly) in preserving our central desideratum of conceptualizing blame in various degrees. In this final Part, I propose to comment in somewhat more detail on a particularly controversial component of broad culpability—awareness of wrongdoing. As we will see, blame seems hard to color in shades of gray when defendants act in ignorance of the norm they violate. I will conclude by discussing a means by which this problem might be overcome and our central desideratum preserved.

This topic has two variants—one moral, the other legal. The moral variant includes cases in which persons are not aware that what they are doing is *wrongful*. The counterpart of this topic in law includes cases in which persons are not aware that what they are doing is *criminal*. In what follows, I focus almost entirely on the *legal* dimension of this issue. The general question is easily posed. Suppose:

- (1) Persons A and B both perform action x.
- (2) X is wrongful (morally) and/or criminal (legally).
- (3) A is aware that x is wrongful but B is not.

The question, then, is how the presence or absence of awareness of wrongfulness bear on the blame A and B respectively deserve for their conduct.<sup>128</sup> Although this question is remarkably difficult to answer, it seems unlikely that the difference has *no* bearing on their respective amounts of blame. My own intuition, which I will not endeavor to defend, is that the difference is *almost always* relevant

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<sup>128</sup> For further thoughts, see Douglas Husak, *Mistake of Law and Culpability*, 4 CRIM. L. & PHIL. 135, 135–59 (2010).

to the blame A and B deserve.<sup>129</sup> If I am correct, the retributivist dream requires that our considered judgments about the relative blame and desert of these offenders should be reflected in our impositions of criminal liability and punishment.

I have four reasons to devote a bit more attention to this component of broad culpability than to its predecessors. First, the topic of ignorance of law is radically under-theorized. Philosophers of criminal law have written less about this issue than about any of those four components of a theory of broad culpability surveyed above. The bulk of commentary has been written by utilitarians,<sup>130</sup> and a single weekend is all that is needed to familiarize oneself with virtually all of the noteworthy contributions that non-consequentialists have made.<sup>131</sup> Second, respondents report wildly discrepant intuitions about how to assess particular cases involving lack of awareness of wrongdoing. Although judgments about this question in morality should be used to illuminate the parallel question in law, no consensus among moral philosophers has emerged.<sup>132</sup> Some thinkers regard factors as totally exculpatory that others do not concede to have even the smallest force in mitigation. Third, positive law seems spectacularly unable to depict the blame merited by ignorant defendants in different degrees. If the ability to color blame in shades of grey is essential to an adequate theory of broad culpability, the posture positive law adopts to legal ignorance is doomed at the outset. Finally, as we will see, the very conceptualization of legal ignorance within a theory of broad culpability is controversial. Arguably, most (but not all) of this topic belongs in a theory of narrow culpability. At the very least, an examination of this topic reveals that the boundary between the domains of narrow and broad culpability is more elusive than we might have anticipated.

A bit of background may be helpful. Despite the familiarity of the maxim *ignorantia juris non excusat*, modern criminal codes do not make ignorance of law totally irrelevant to blame and punishment. Existing law acknowledges the exculpatory significance of ignorance of law through two very different mechanisms. First, a large number of penal statutes include knowledge of law among the explicit elements the prosecution must prove in order to establish guilt. This result is achieved by providing, for example, that an offense must be

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<sup>129</sup> For a more moderate position, see Andrew Ashworth, *Ignorance of the Criminal Law, and Duties to Avoid It*, 74 MOD. L. REV. 1, 1–26 (2011).

<sup>130</sup> See generally DRESSLER, *supra* note 30, at 168–70.

<sup>131</sup> For an earlier foray into the area, see Douglas Husak & Andrew von Hirsch, *Culpability and Mistake of Law*, in ACTION AND VALUE IN CRIMINAL LAW 157, 157–74 (Stephen Shute, John Gardner & Jeremy Horder eds., 1993).

<sup>132</sup> The proposal to draw from moral philosophy to illuminate legal theory would be easier to manage if moral philosophers agreed about the issue. For some provocative positions, see Alexander A. Guerrero, *Don't Know, Don't Kill: Moral Ignorance, Culpability, and Caution*, 136 PHIL. STUD. 59 (2007); Gideon Rosen, *Culpability and Ignorance*, 103 ARISTOTELIAN SOC'Y 61 (2003); Holly Smith, *Culpable Ignorance*, 92 PHIL. REV. 543 (1983); Michael J. Zimmerman, *Moral Responsibility and Ignorance*, 107 ETHICS 410 (1997).

"willful," which often is interpreted to mean that a defendant must be aware he is violating the law in order to be liable for breaching it.<sup>133</sup> Other statutes specify that the defendant must act "knowing that his conduct is illegal" or "believing that he is in violation of law"—clauses that achieve the same outcome even more directly. A defendant commits the offense of "Tampering with Records," for example, when he falsifies given kinds of documents "knowing that he has no privilege to do so."<sup>134</sup> Comparable clauses that afford exculpatory significance to mistakes of law are surprisingly common in statutes.<sup>135</sup> As a matter of positive law, these provisions settle the question of when a mistake of criminality is material to liability.

Second, criminal codes create a "true defense" of ignorance of law. The Model Penal Code, for example, recognizes a separate defense from liability when notice is somehow defective. Notice is said to be defective when the statute "has not been published or otherwise reasonably made available prior to the conduct alleged," or when the defendant "acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous," made by specified authorities.<sup>136</sup> The scope of these provisions has given rise to lively interpretive disputes,<sup>137</sup> and many theorists have complained that they do not go far enough. In particular, a few states allow a defense when the defendant acts in reasonable reliance on the erroneous advice of his attorney,<sup>138</sup> and several commentators have recommended that the Code should recognize a defense in such circumstances as well.<sup>139</sup> Although these controversies must be resolved if a theory of culpability aspires to be comprehensive, they need not detain us now. Unless awareness of wrongdoing has *some* bearing on culpability, it is hard to see why existing law would contain *any* such provisions.

Is a theory of the impact of awareness of wrongdoing on blame and desert part of a theory of broad culpability? An affirmative answer may seem obvious. By its very nature, awareness is mental. Moreover, the exculpatory significance of ignorance of law is not a part of the Code's *mens rea* structure. Any lingering doubts about this latter matter are explicitly settled by statute.<sup>140</sup> Nonetheless, it is

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<sup>133</sup> See Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 343–47 (1998).

<sup>134</sup> MODEL PENAL CODE § 224.4 (1962).

<sup>135</sup> Still, it is noteworthy that these provisions are far less common than those that afford exculpatory significance to mistakes of fact.

<sup>136</sup> MODEL PENAL CODE § 2.04(3) (1962).

<sup>137</sup> See generally John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1 (1997).

<sup>138</sup> See, e.g., N.J. STAT. ANN. § 2C:2-4(c)(3) (West 2009).

<sup>139</sup> See Miriam Gur-Arye, *Reliance on a Lawyer's Mistaken Advice—Should it be an Excuse from Criminal Liability?*, 29 AM. J. CRIM. L. 455 (2002).

<sup>140</sup> MODEL PENAL CODE § 2.02(9) (1962) states "[n]either knowledge nor recklessness or negligence as to whether conduct constitutes an offense . . . is an element of [an] offense, unless the definition of the offense or the Code so provides."

not altogether clear whether questions about legal ignorance should be assigned to a theory of broad or narrow culpability. No dispute arises when the exculpatory significance of ignorance of law is derived from a separate defense. In such cases, ignorance of law functions as an excuse, which is a central component of a theory of broad culpability.<sup>141</sup> As we have seen, however, statutes frequently stipulate that ignorance of law is relevant to liability. When this mechanism is used, the impact of legal ignorance follows from what might be called elemental analysis. For the exculpatory significance of ignorance of law to be a component of a theory of broad culpability, it must be the case that not all mental elements included in statutes are part of a theory of narrow culpability. In other words, some mental elements in statutes are not part of *mens rea* as narrowly conceived. This conclusion is significant. As far as I can see, no other area of law is so hard to assign to the domain of narrow or broad culpability. An examination of this topic reveals that the very contrast between broad and narrow culpability is murky.

Wherever it is ultimately assigned, a normative theory of the relevance of ignorance of law to blame and liability is sorely required. The need for such a theory stems from the fact that the foregoing statutory provisions that create a separate defense are conclusory; they fail to resolve the preliminary and deeper issue of *why* some but not all laws include clauses that exculpate defendants who are ignorant of law. On what basis should legislators decide that persons should be acquitted when they are unaware of the criminality of their conduct? Why should the legislature include such a provision within the statutory elements of tax evasion, for example, but not within its proscription of deceptive business practices? Notice that much the same questions could be asked about legislative decisions to afford exculpatory significance to ignorance of fact. Why, for example, do some statutes require defendants to act knowingly while others require mere recklessness? The conclusion that legislatures should determine *ex ante* when mistakes have exculpatory significance does not begin to address the more basic issue of how legislatures should make such determinations in the first place. Principles of legislation are needed to answer this question, and statutes alone offer no clue about the content of these principles.

A normative account of whether and under what conditions ignorance of law should serve as a complete or partial defense is urgently needed. Philosophers of criminal law have made surprisingly little progress on this topic. Although it is hard to see why ignorance should not exculpate or mitigate generally, I make no effort to defend this conclusion here.<sup>142</sup> For present purposes, the pressing

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<sup>141</sup> Even when ignorance of law functions as a defense, its status as an excuse has been contested. See Re'em Segev, *Justification, Rationality, and Mistake: Mistake of Law is No Excuse? It Might be a Justification!*, 25 LAW & PHIL. 31, 33 (2006). Segev's argument is original in contending that a defense in these circumstances should be conceptualized as a justification. As I have indicated, theorists disagree about whether justifications are part of *actus reus* rather than *mens rea*. See MOORE, *supra* note 2, at 65.

<sup>142</sup> For a noble effort, see Gideon Yaffe, *Excusing Mistakes of Law*, 9 PHILOSOPHERS' IMPRINT 1, 2 (2009).



problem is that each of the two above mechanisms for affording exculpatory significance to legal ignorance seems incapable of depicting blame in shades of grey. Defendants either *are* or *are not* liable for an offense that makes awareness of criminality a material element. Moreover, when ignorance of law functions as a defense—as when notice is somehow defective—it either precludes blame altogether or not at all. According to the approach taken by positive law, it is hard to imagine how the normative significance of ignorance of law could possibly be a matter of degree. If each acceptable part of a theory of broad culpability must satisfy this desideratum, we must pronounce positive law on this topic to be radically defective.

Positive law aside, it seems intuitively clear that the blame of persons who are legally ignorant is *not* an all-or-nothing affair. Regardless of how our thoughts about legal ignorance should be conceptualized within a theory of culpability, we might borrow the narrow culpability structure of the Model Penal Code—invented to give exculpatory significance to ignorance of fact—to represent legal ignorance as a matter of degree. As we have seen, defendants who act purposely are more culpable than those who act knowingly, who in turn are more culpable than those who act recklessly, who in turn are more culpable than those who act negligently (or with no culpability at all). These same mental states familiar to us in our theory of ignorance of fact could be borrowed and applied to cases of ignorance of law. If we (temporarily) make the simplifying hypothesis that levels of culpability apply to statutes as a whole rather than to particular elements of statutes, we can draw the following distinctions. First, a defendant may have the purpose to violate the law. Or she may know she is violating the law. Alternatively, she may be reckless; she may not believe she is breaking the law but consciously disregard a risk that her conduct is illegal. Or she may be negligent; even though she is not aware of a risk that she is breaking the law, a reasonable person in her situation would have been aware of this risk. Finally, she might be strictly liable, that is, liable even though she has no culpability at all—not even negligence—about whether she is committing an offense.

Defendants with each of these four culpable states about the law can be found in the real world. A purpose to violate the law would be unusual, although certainly possible. For example, a gang initiation might require a member to commit an illegal act. The initiate would fail to gain membership if his act turned out not to be criminal. Knowledge is probably the most typical culpable state about the law. It seems likely that most defendants who breach statutes are fully aware that their conduct is criminal. In addition—as I will describe in greater detail below—recklessness is not uncommon. Many defendants suspect that they are violating the law, even though their degree of belief does not rise to the level of knowledge. Negligence is also fairly frequent. Some persons who are wholly uninformed that their act is illegal *should* have been aware of its legal status. Finally, many individuals make mistakes of law that are perfectly reasonable. If liability is incurred by a defendant who is ignorant of law even when a reasonable person in his circumstances would not have believed otherwise, the state holds him

strictly liable with respect to his mistake. It is noteworthy that even though many commentators strenuously object to strict liability when a defendant is ignorant of fact, relatively few criticisms of strict liability are voiced when a defendant is ignorant of law. The familiar maxim *ignorantia juris non excusat* suggests that strict liability with respect to mistakes of law is the rule rather than the exception.<sup>143</sup>

As the following example is designed to illustrate, mistakes of law can be reckless. When I dispose of the drained batteries from my flashlight, I am vaguely aware that the rules in my jurisdiction might require these batteries to be recycled in special containers. Am I right or wrong? I honestly do not know. My mental state about the law is a textbook example of recklessness; I am consciously aware of a risk that my conduct might be illegal, but my mental state falls short of knowledge.<sup>144</sup> Suppose I throw my batteries into the garbage although the law mandates recycling. For present purposes, the question is how my blame compares and contrasts to that of persons on either side of me along the culpability continuum—a person who understands perfectly well that batteries must be recycled, and a person who has no inkling that batteries should not be discarded in this way. We might construct many realistic permutations on the foregoing example, each of which poses novel questions. Suppose I can easily find out what the law specifies. Imagine that my city goes to the trouble to mail me a flyer about recycling each year, but I decide not to read it because I want to persist in my behavior and am afraid I would discover it to be illegal if I bothered to inform myself. In other words, I am willfully ignorant in my failure to know that my conduct amounts to an offense. The criminal law tends to equate willful ignorance with knowledge when defendants make mistakes of fact.<sup>145</sup> A theory of broad culpability might well reach the same conclusion when defendants are willfully ignorant of law.

I offer a simple proposal to conceptualize in shades of grey the culpability of defendants who are ignorant of law. To adequately express our considered judgments about blame and desert when persons make legal mistakes, we need to reproduce the structure of narrow culpability that applies to mistakes of fact. In other words, a defendant who purposely violates the law would be more blameworthy than a person who violates the law knowingly, who in turn would be more blameworthy than a person who violates the law recklessly, who in turn would be more blameworthy than a person who violates the law negligently, who in turn would be more blameworthy than a person who violates the law with no

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<sup>143</sup> Few commentators recognize that existing doctrines about ignorance of law impose a type of strict liability. See Douglas N. Husak, *Varieties of Strict Liability*, 8 CAN. J.L. & JURIS. 189, 211–12 (1995).

<sup>144</sup> I leave to one side the issue of whether the risk of which I am aware is “substantial” and “unjustifiable,” both of which are included in statutory definitions of recklessness.

<sup>145</sup> See Douglas N. Husak & Craig A. Callender, *Willful Ignorance, Knowledge, and the Equal Culpability Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 86 (1994), reprinted in HUSAK, *supra* note 23, at 204.

culpability at all. If these mental states are adequate to allow us to depict blame in various degrees in our theory of narrow culpability, their parallel use in the domain of ignorance of law should be adequate as well.

We might draw additional distinctions in the degree of blame of defendants who are ignorant of law by borrowing further from a theory of narrow culpability. To do so, we must revisit a simplifying assumption I made about mistakes of law. These mistakes, no less than mistakes of fact, might be about particular elements of crimes rather than about the existence of crimes as a whole. To illustrate this possibility, consider the crime of endangering the welfare of a child. A person supervising the welfare of a child under 18 commits the *actus reus* of this offense when he "endangers the child's welfare by violating a duty of care, protection or support."<sup>146</sup> A given defendant might make a mistake of law about different elements of this statute. Imagine that Black does not believe he has a legal duty to supervise the welfare of the child he is charged with endangering. He believes, for example, that he has no duty to supervise the child of the woman he has married. Alternatively, imagine that White does not believe that his conduct violates a legal duty of care he owes to his child. He believes, for example, that he has no duty to ensure that his child is taken to a doctor when he displays the symptoms of a serious illness. Under positive law, neither Black nor White would be exculpated. They would be no less guilty of child endangerment than a person who understands perfectly that his conduct is criminal. Suppose, however, that we are prepared to represent the culpability of legally ignorant defendants in shades of grey. If so, we should entertain the possibility that Black might be more (broadly) culpable than White. A mistaken belief that one owes no duty at all to a child may be more blameworthy than a mistaken belief about the particular duties one owes. Of course, this judgment is controversial. The point is not to resolve this normative question, but to indicate how it might be expressed in positive law. A theory of broad culpability (about mistakes of law) that mimics a theory of narrow culpability (about mistakes of fact) creates ample opportunities to satisfy our desideratum of a theory of broad culpability by depicting the blame of legally ignorant defendants along a continuum.

If I am correct so far, we need information about two matters in order to decide which of two legally ignorant defendants is more culpable. First, we need to know about the (narrow) culpability of the mistake each defendant has made. Second, we need to know about which element of the crime each defendant is mistaken. Suppose that Jack consciously disregards a risk that he is mistaken but Jill does not, even though a reasonable person in Jill's situation would not have made her mistake. In other words, Jack's mistake is reckless and Jill's is negligent. If they are both mistaken about the same element of the offense, Jack is more broadly culpable than Jill. But if they are mistaken about different elements, their relative culpability remains an open question. Further normative thought is required to decide whether persons who make mistakes about some elements of

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<sup>146</sup> MODEL PENAL CODE § 230.4 (1962).

statutes are more blameworthy than persons who make mistakes about other elements.

At least two important lessons are learned by drawing from a theory of narrow culpability to better understand how we might preserve the desideratum of conceptualizing blame in shades of grey when defendants are ignorant of law. First, it is clear that defendants need not either know they are violating the law or have no idea that they might be doing so. An adequate theory of culpability and mistake should not suppose that persons must either believe a law proscribes their conduct or that it does not, without the need to draw further distinctions. Mistakes may be of different kinds: some are reckless, others are negligent, and still others involve willful ignorance. If so, the very name typically given to the inquiry—ignorance of law—is somewhat misleading. Oftentimes, the epistemic state of a defendant with respect to the law is better captured by the term *uncertainty* than by ignorance. Second, most commentary about mistake of law seems to presuppose that defendants must be knowledgeable or ignorant of entire statutes. But mistakes of law, like mistakes of fact, may be about different elements of an offense, and not about the existence of the crime as a whole. In other words, a defendant may be mistaken that a law proscribes some aspect of his conduct rather than another. With these two lessons in mind, we can begin to represent the blame of legally uncertain defendants along a spectrum. Although a great deal of normative work remains to be done, this area of the law, no less than its predecessors, is capable of depicting blame in shades of grey.

### CONCLUSION

Despite considerable dissent, many commentators share the retributivist dream. They aspire to create a penal law that makes the imposition of liability and punishment correspond to judgments of blame and desert. To this end, they have devoted enormous attention to narrow culpability—to the mental conditions a statute requires before a defendant is liable. They have paid far less attention, however, to broad culpability—to the more general mental conditions that must be satisfied before a defendant is blameworthy and deserving of punishment. I have sought to rectify this imbalance. Although I do not pretend to have produced a whole theory of broad culpability, I have described several of the difficulties confronting commentators who attempt to do so. In particular, a theorist must first compile a list of the conditions that preclude or reduce blame. Next, he must provide a reason to categorize these conditions as part of *mens rea* rather than *actus reus*. Finally, he must sort these conditions into types in order to avoid inelegance and redundancy. I have taken modest steps to address some of these difficulties in the context of discussing four familiar areas of the substantive penal law: the exculpatory force of justification and excuse, the capacities required for criminal responsibility, the supposed requirement of a voluntary act, and the significance of motive. I have made special efforts to show how ignorance of law might become a more respectable part of a theory of culpability by departing from existing doctrine

and conceptualizing this plea in shades of grey rather than in black or white. Of course, my sketch has been cursory and reveals the enormous amount of work that remains to be done. Once each particular domain of broad culpability has been theorized, it must be integrated with other domains to form a general theory of broad culpability. Next, broad culpability must be integrated with narrow culpability (and perhaps with other elements) to form an overall theory of blame. But without greater progress in developing the details of a theory of broad culpability, the retributivist aspiration is destined to remain a dream.

