

1

Crime and Culpability

Recounting the Basic Picture

In our prior book, *Crime and Culpability: A Theory of Criminal Law*,¹ we set forth a basic thesis about the form that criminal law should take. That thesis was that criminal liability should be based solely on the defendant's culpability, and the degree of culpability should be the measure of the punishment the defendant deserves. Because we are moderate retributivists and believe that imposing deserved punishment is good in itself, irrespective of any instrumental benefits it might produce, the defendant's desert, as measured by his culpability, is not only a necessary but also a sufficient condition for justified punishment. At the same time, because there are goods other than deserved punishment, there can be reasons not to impose deserved punishment that outweigh the reasons in favor of doing so.

Moderate retributivism of the type we endorse is a fairly commonly held position among criminal law theorists, and our book was not written to advance the case for moderate retributivism. Rather, we wrote the book to determine what criminal law should look like if one believes that criminal punishment should track desert (retributivism) and that desert tracks culpability.

When we wrote the book, we believed that we had produced a complete account of what culpability-based criminal law should look like. In the time since the book's publication, however, we have become convinced that we gave some topics too short shrift and ignored some theoretical problems and puzzles about aspects of our account that should not be ignored. The purpose of this book is to remedy those shortcomings. Moreover, many of those problems and puzzles are not just problems and puzzles for us. Some are problems and puzzles for other retributivists, and some are problems and puzzles for all punishment theorists.

¹ LARRY ALEXANDER AND KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* (2009) (hereinafter ALEXANDER AND FERZAN).

Introducing and grappling with those problems and puzzles is the purpose of this book. The purpose of this chapter is to introduce our basic framework, or to refresh the memory of that framework for those who read the prior book.

I THE CENTRAL CLAIM: THE DETERMINANTS OF CULPABILITY

Our position is that the culpability that grounds retributive desert is constituted by two things.² The first is the risks of various harms to the morally (and we will assume legally) protectable interests of others the defendant believes his act endangers – that is, the risks of harms that he believes his act unleashes and places out of his control to affect.³ The second is the defendant’s belief as to the existence of any facts at the time of his act that might justify or excuse the act, mitigate its culpability, or aggravate its culpability – all discounted by the defendant’s estimate of the probability that those facts do or do not exist.

Our conception of risk as it functions in both elements of culpability is that it is wholly subjective and epistemic, not objective and ontic.⁴ The harms the risks of which the defendant believes exist will or will not eventuate. That is, their “true” risk, their “God’s-eye” risk, is either one or zero. The same is true of the justifying, mitigating, or aggravating facts – they either do or do not exist. Our argument was and is that in determining the defendant’s culpability, it is his perspective and estimates that matter, no matter what someone else with a different perspective, information, or reasoning ability would have estimated, and no matter what is in fact the case (the God’s-eye perspective).

One confusion that our earlier book might have produced is that we sometimes loosely referred to the defendant’s culpability as a product of risks and reasons.⁵ The latter term might have suggested that we should be interested in whether potentially justifying or excusing facts motivated the defendant. If, however, the defendant’s estimate of the probability of facts that would justify or excuse the risks of harms (he

² *Id.* ch. 2.

³ We are concerned with risks to life, limb, and property. Our work only briefly engages with the legitimacy of criminalizing offensive conduct, harmless immoralities, or conduct harmful to the actor (paternalism) – the so-called limits of the criminal law questions. *Id.* at 269–75. Nor do we take a position on whether engaging in certain vices may constitute culpable risking of future wrongdoing – although we are skeptical that it may. For a very brief exploration, see *id.* at 85 and n.37.

In conversation, Mitch Berman has suggested to us that morality does not protect interests but instead comes with rules of conduct, such as “do not rape.” This is an objection he has raised previously and to which we have responded. Larry Alexander and Kimberly Kessler Ferzan, *Beyond the Special Part*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* (R. A. Duff and S. P. Green, eds., 2011): 253–78, 262. We stand by our earlier response, as we continue to believe that “do not rape” can be unpacked into our interest not to have sexual intercourse without our consent.

⁴ ALEXANDER AND FERZAN, 27–31.

⁵ *Id.* at 41; *cf. id.* at 59–63.

believes he is imposing) is high enough to render him nonculpable, it does not matter to his culpability that those justifying or excusing facts did not motivate him, or even that he was motivated by the prospect of harming others.⁶ An otherwise nonculpable act cannot be rendered culpable by a bad purpose. So, when we referred to culpability as being constituted by risks and reasons, we meant by “reasons” those justifying, excusing, mitigating, or aggravating facts of which the defendant is aware (probabilistically) at the time he acts, not the facts that are his motivation for so acting, at least if his act is otherwise nonculpable.

If his act is culpable, however, then his motivating reasons do become relevant.⁷ A culpable act that is motivated by the aspects of the act that make it culpable is a more culpable act than a culpable act not so motivated. The defendant’s purpose cannot make a nonculpable act culpable, but it can make a culpable act more culpable. The same is true of the defendant’s awareness that he could achieve his goal through a path or at a time less risky to others.⁸

II IMPLICATIONS OF THE CENTRAL CLAIM

A Negligence – Inadvertence to Risks – Is Not Culpable

One controversial implication of our analysis of culpability is that negligence is not culpable. The negligent actor is someone who fails to recognize a risk that his act creates and that the so-called reasonable person would perceive. Our earlier book devoted an entire chapter to arguments for why inadvertence to risks is not itself culpable.⁹ We shall not repeat those arguments here. We merely inform the reader that in discussing the problems and puzzles we raise in the chapters that follow, culpability for negligence is off the table. We deny its existence.

We should point out, however, that although our position on negligence is controversial, it does have distinguished adherents.¹⁰ Indeed, although the drafters of the Model Penal Code provided for criminal liability based on negligence, they clearly disfavored it and thought recklessness – our form of culpability – was the

⁶ *Id.* at 96–103.

⁷ See Larry Alexander, *The Means Principle*, in *LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL S. MOORE* (K. K. Ferzan and S. J. Morse, eds., 2016): 251–64, 258–62. For a more complete version of *The Means Principle*, see <<http://ssrn.com/abstract=2378608>>.

⁸ See Kenneth W. Simons, *Punishment and Blame for Culpable Indifference*, 58 *INQUIRY* 143, 158–61 (2015).

⁹ ALEXANDER AND FERZAN, ch. 3.

¹⁰ See, e.g., NEIL LEVY, *CONSCIOUSNESS AND MORAL RESPONSIBILITY* (2014), ch. 6; Michael S. Moore and Heidi M. Hurd, *Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence*, 5 *CRIM. L. & PHIL.* 147 (2011); Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 *COLUM. L. REV.* 632 (1963).

form of culpability that the criminal law should require.¹¹ Even the United States Supreme Court recently defaulted to recklessness, as opposed to negligence, when interpreting a federal statute.¹²

Here is a final point about negligence. Although negligence itself is not culpable, negligence can be the product of an earlier culpable act. If someone has an important matter to attend to, and she is aware that she is apt to forget it if she does not take precautions against doing so, then she might be culpable for not taking those precautions.¹³ For instance, if Sarah is going to leave her infant in the car on a hot day while she goes into the store to buy an item, and she realizes the grave danger of becoming distracted by other items or by friends and spending too much time in the store, she will be culpable if she does not take some easy precaution against becoming distracted, such as setting an alarm on her phone. And if she does fail to take the precaution, she is culpable *whether or not she becomes distracted and forgets the infant in the car*. Results of culpable acts, good or bad, do not affect culpability. That is the next implication of our central claim.

B Results Do Not Affect Culpability¹⁴

This implication of our analysis of culpability – our denial of what is often called “result luck” – is also controversial, although it has more adherents than our denial of culpability for negligence.¹⁵ And again, the drafters of the Model Penal Code were sympathetic to the “results don’t matter” position, although they did not fully commit to it.¹⁶

Thus, for us, when the defendant acts believing that he has unleashed risk of harm to others’ interests of sufficient magnitude to render his act culpable given his assessment of all the relevant circumstances, then his culpability is unaffected by whether the risk turns out to be one, and harm occurs, or zero. (Nor do justifying facts that he was unaware of, or deemed sufficiently unlikely to occur, affect his culpability.) How things turn out in terms of harms and circumstances is immaterial to culpability. Culpability is a completely subjective matter and is gauged at the

¹¹ See Model Penal Code, §2.02(3) (making recklessness the presumptive minimum level of culpability required for criminal liability).

¹² *Elonis v. United States*, 135 S. Ct. 2001, 2013 (2015).

¹³ See ALEXANDER AND FERZAN, 80.

¹⁴ See *id.* at ch. 5.

¹⁵ See, e.g., Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It*, 37 ARIZ. L. REV. 117 (1995); Sanford H Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994).

¹⁶ Under the Model Penal Code, attempts are punished less than the crimes attempted only when the crimes are felonies of the first degree. Model Penal Code, § 5.05(1).

moment the defendant believes he has unleashed risks beyond his ability to recall. Negative desert turns on state of mind, not the state of the world.

Not only do we reject “result luck,” but we also reject what is called “circumstantial luck.” The latter refers to the thesis that whether one commits a culpable act can depend on what circumstances one finds oneself in, which is a matter of luck. (Al would have murdered Mary had a priest not walked by just as Al was about to pull the trigger and reminded him of his vow to his departed mother to live an upright life. Sarah would have become a thief had she not inherited great wealth. Sam would not have become a drug dealer had he not lived in his neighborhood. And so on.) We reject circumstantial luck because we are skeptical that there is a truth value to the answers the counterfactuals seek.¹⁷

The third form of luck that is thought to bear on culpability because it is thought to bear on moral responsibility is “constitutive luck.” Constitutive luck refers to the fact that our character is the product of our genes and environment, about which we are either lucky or unlucky. The topic here is the familiar free will/determinism/moral responsibility topic.

We more or less stipulated that moral responsibility and thus culpability can exist in our world and sidestepped this huge philosophical debate.¹⁸ And we shall do so again here, with this exception: In Chapter 6, “Moral Ignorance,” we take up the question of whether our position denying that negligence regarding factual matters is culpable entails that negligence regarding moral matters, including the strength of moral reasons, is also nonculpable. In some ways, we believe that this issue is a more profound threat to moral responsibility than determinism, for it is present even if one is a free will libertarian or a compatibilist.¹⁹

C Acts Preparatory to Unleashing Risks Are Not Culpable

One of the most controversial implications of our central claim is that nothing can be culpable prior to culpably unleashing risks. To put this point in the language of the criminal law, we reject the culpability of so-called incomplete attempts.²⁰

¹⁷ See ALEXANDER AND FERZAN, 190. See also Eduardo Rivera-López, *How to Reject Resultant Moral Luck Alone*, 50 J. VALUE INQ. 415 (2016); Peter A. Graham, *A Sketch of a Theory of Moral Blameworthiness*, 88 PHIL. & PHENOM. RES. 388, 404 n.25 (2012); Andrew C. Khoury, *Responsibility, Tracing, and Consequences*, 42 CANAD. J. PHIL. 187, 203–04 (2012); Nathan Hanna, *Moral Luck Defended*, 48 NOUS 683 (2014). Cf. Robert J. Hartman, *Against Luck-Free Moral Responsibility*, 173 PHIL. STUD. 2845 (2016).

¹⁸ See ALEXANDER AND FERZAN, 13–16, 188–91.

¹⁹ See *id.* at 153 n.76; DOUGLAS HUSAK, *IGNORANCE OF LAW* (2016); Larry Alexander, *The Most Persuasive Frankfurt Example, and What It Shows: Or Why Determinism Is Not the Greatest Threat to Moral Responsibility*, 4 OPEN J. PHIL. 141 (2014); Gideon Rosen, *Skepticism About Moral Responsibility*, 18 PHIL. PERSP., ETHICS 295 (2004). We deal with this issue more fully in Chapter 6.

²⁰ See ALEXANDER AND FERZAN, ch. 6.

Most criminal law theorists, and all current criminal codes, treat incomplete attempts as culpable.²¹ An incomplete attempt is a step leading to what the actor intends will culminate in an act that he believes will be culpable. (One never intends a future *culpable* act, but only an act that one believes will likely be culpable; for at the future time of the act, the actor may believe that facts exist that will justify the act.²² Frankie intends to kill two-timing Johnny in an hour, but an hour later Frankie may come to believe Johnny is a terrorist about to set off a bomb.)

We spent a lot of time in our earlier book explaining why incomplete attempts are not culpable and thus not properly the basis for criminal liability and punishment. In articles written after the book's publication, we repeated and embellished the arguments we made in the book.²³ We also explained, however, that although incomplete attempts (and steps toward but not amounting to reckless acts) are not culpable, the intention to commit an act that one believes will be culpable when taken can render one liable to a preemptive preventive response, such as self- or other defense or preventive detention.²⁴

In rejecting liability and punishment for incomplete attempts, we also turned our gaze briefly to the so-called inchoate crimes of solicitation and conspiracy and to the forms of criminality that consist of aiding or attempting to aid another's crime.²⁵ Unlike incomplete attempts, in which the actor is taking a step toward his own future act, solicitation, conspiracy, and complicity all deal with the relation between the actor's acts and someone else's future acts. And we briefly suggested that the actor can be culpable if he believes his act increases the risk of another's culpable act and he perceives no likely facts that would justify his doing so.²⁶

The issue raised by our earlier book's treatment of solicitation, conspiracy, and the like is a much larger one than we realized. It can be summarized by the question: When is an act culpable for raising the probability (as the actor estimates it) of others' wrongful acts both culpable and nonculpable? That large and very difficult issue is here the sole focus of Chapter 2.

²¹ See, e.g., Model Penal Code, § 5.01(1)(c); GIDEON YAFFE, *ATTEMPTS* (2010), 25–27.

²² See ALEXANDER AND FERZAN, 205–06.

²³ See Larry Alexander and Kimberly Kessler Ferzan, *Danger: The Ethics of Preemptive Action*, 9 OHIO STATE J. CRIM. L. 637 (2012); *Risk and Inchoate Crimes: Retribution or Prevention?*, in SEEKING SECURITY: PRE-EMPTING THE COMMISSION OF CRIMINAL HARMS (G. R. Sullivan and I. Dennis, eds., 2012): 103–20; Kimberly Kessler Ferzan, *Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible*, 96 MINN. L. REV. 141 (2011); Kimberly Kessler Ferzan, *Inchoate Crimes at the Prevention/Punishment Divide*, 48 SAN DIEGO L. REV. 1273 (2011).

²⁴ See Alexander and Ferzan, *Danger*, *supra* note 23; Ferzan, *Beyond Crime and Commitment*, *supra* note 23.

²⁵ See ALEXANDER AND FERZAN, 223–24.

²⁶ *Id.* at 223.

*D There Is Only One Crime, Albeit One with Varying
 Magnitudes of Culpability*

Surely one of the most controversial aspects of our proposal is that we do away with specific crimes, such as murder, battery, theft, arson, and rape.²⁷ Legally protected interests are multiple, but crimes that threaten those interests are just different manifestations of a single crime: any act that demonstrates the actor's insufficient concern for those interests. For us, the culpability of an act is a product of all the harms the defendant believes he is risking.²⁸ For example, if the defendant lights a fire that he believes creates risk X of destroying another's property, he may also believe it creates risk Y of injuring someone and risk Z of killing someone. It is the entire basket of risks and their magnitude that the defendant believes his act unleashes that goes into the culpability calculus. And because on our account results do not matter, there is really no place for specific crimes. It does not matter whether, in the example above, the fire destroys property, injures someone, kills someone, does all three things, or does none of them, so long as the actor believes his act risks these things.

Our proposal has two huge advantages over the current regime of specific crimes. First, if the risks the defendant perceives are disaggregated, it may turn out that none of those risks is sufficiently large to render him reckless with respect to any of them, *even though when they are aggregated we can correctly conclude that his act is culpable*. Our proposal avoids this prospect of a culpable actor's escaping punishment.

Second, our proposal avoids the knotty conceptual problem that arises under the current regime of determining when a defendant has received multiple punishments for a single act. Because any culpable act can threaten multiple legally protected interests, the current regime of multiple crimes creates the potential for multiple punishments for a single act. Under our proposal, with only one crime, and one that is independent of results, multiple punishments for a single culpable act is an impossibility.²⁹

Finally, because our proposal dispenses with specific primary crimes, we necessarily also get rid of proxy crimes – crimes that are prophylactic in nature and one step removed from primary crimes.³⁰ Proxy crimes criminalize acts that are frequently, but not always, associated with the commission of primary crimes, either as

²⁷ *Id.* at 46–51, 246–50.

²⁸ *Id.* at 46–51. We should correct a misimpression, created by an infelicitous passage, that we would not criminalize threats. *See id.* at 270. We would indeed criminalize the reckless creation of fear of an attack on one's person, a family member, or one's property – which obviously covers threats. For further disambiguation of two senses of “threats,” see Kimberly Kessler Ferzan, *The Bluff: The Power of Insincere Actions*, 23 *LEGAL THEORY* 168, 193–94 (2017).

²⁹ ALEXANDER AND FERZAN, 246–50.

³⁰ *See id.* at 288–306. We discuss this issue again in Chapter 5.

the means of their commission or as evidence of their anticipated commission. Driving above a certain speed may often, but not always, be a form of reckless endangerment. Possession of burglar tools may be evidence of an intention to burglarize. We reject proxy crimes, just as we reject multiple primary crimes. (In our earlier book, however, we did discuss how the information that proxy crimes provide – for example, that driving above a certain speed on a certain road is likely to be dangerous – might be conveyed to the public through other means.)³¹ Here, in Chapter 5, we give some additional reasons why proxy crimes are a bad idea.

*E Justifications and Some Excuses Are Part of the Culpability
 Calculus and Are Not Affirmative Defenses*

Two other aspects of our basic thesis are worth mentioning. One is that justification is built into the culpability determination.³² If the defendant is aware of facts that, given their probability, would justify his risk imposition, then the defendant's act is not culpable. The two basic kinds of justification are defense of self, others, or property – at least if the attacker is culpable – and the more general lesser evils defense. Both of us have written more about self- and other defense (and, by implication, defense of property) since our book was published.³³ And Alexander has elaborated on the lesser evils justification that appears more embryonically in the book.³⁴ (Basically, we endorse a consequentialist approach to justification, but one with a deontological constraint against using others as means in pursuit of the optimal consequences.)³⁵

³¹ See *id.* at 306–09.

³² See *id.* at 88–92.

³³ See Larry Alexander, *Recipe for a Theory of Self-Defense: The Ingredients and Some Cooking Suggestions*, in *THE ETHICS OF SELF-DEFENSE* (C. Coons and M. Weber, eds., 2016): 20–50; *Self-Defense*, in *THE ROUTLEDGE COMPANION TO THE PHILOSOPHY OF LAW* (A. Marmor, ed., 2012): 222–37; Kimberly Kessler Ferzan, *Self-Defense and Forfeiture*, in *THE ETHICS OF SELF-DEFENSE*, *supra*, at 233–53; Kimberly Kessler Ferzan, *Self-Defense: Tell Me Moore*, in *LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL MOORE*, *supra* note 7, at 219–32; Kimberly Kessler Ferzan, *Provocateurs*, 7 *CRIM. L. AND PHIL.* 597 (2013); Kimberly Kessler Ferzan, *Culpable Aggression: The Basis for Moral Liability to Defensive Killing*, 9 *OHIO ST. J. CRIM. L.* 669 (2012).

³⁴ See Alexander, *The Means Principle*, *supra* note 7.

³⁵ See ALEXANDER AND FERZAN, 93–103. We address this deontological constraint in Chapter 7. For how to deal with risking violation of a deontological constraint, see Alexander, *The Means Principle*, *supra* note 7, at 262–63.

Although we do not deal with the question of the proper burden of proof for a retributivist, we suspect that our approach to risks of violating deontological constraints can be applied to answering that question. For other approaches to the burden of proof issue, see LARRY LAUDAN, *TRUTH, ERROR, AND THE CRIMINAL LAW* (2006); Alec Walen, *Proof Beyond a Reasonable Doubt: A Balanced Retributive Account*, 76 *LA. L. REV.* 355 (2015).

One issue our “single crime” avoids is that of the standard and burden of proof for proving the law. On that issue, see GARY LAWSON, *EVIDENCE OF THE LAW* (2017).

We conceptualize duress as either an excuse or a personal justification, one assertable only by the defendant.³⁶ Again, its basis is built into the culpability analysis, as it stems from the defendant's estimate of the probability that he or his family will suffer harms of various magnitudes if he does not impose risks that are unjustifiable (in the impersonal sense of unjustifiable).³⁷

Our culpability analysis does assume the defendant is a morally responsible agent at the time he acts. If he lacks that status, either because he is in an altered state of consciousness, such as somnambulism, automatism, or hypnosis, or because he suffers from psychosis, then his acts cannot be culpable and he cannot deserve punishment.³⁸

Finally, in our earlier book we discussed the controversial excuse of provocation, which the law treats as only a partial excuse and only applicable to homicide.³⁹ We considered whether this partial excuse is actually a partial justification when the defendant kills the person who provoked him, perhaps because the latter's interest in life and limb is given reduced weight. We ultimately rejected this partial justification analysis, both because it cannot explain the applicability of the defense in cases in which it is not the provocateur whom the defendant attacks, and because we were reluctant to accept the premise that the provocateur's right to bodily security is compromised by his provocative conduct. We concluded that the provocation defense is best explained as a recognition that the defendant's emotional turmoil can reduce his capacity to deliberate and weigh reasons correctly and thereby reduce his culpability.⁴⁰

We believe that our earlier book and subsequent articles have adequately dealt with justifications and excuses as elements of culpability. In any event, we shall not revisit them in this book.

F *The Duration of Culpable Acts Affects Their Culpability*

In our earlier book we pointed out that some culpable acts are continuous courses of conduct, like reckless driving, rather than discrete acts, like firing bullets.⁴¹ With respect to the latter, the culpability of each discrete act is assessed independently.⁴² With respect to continuous courses of conduct, however, one must somewhat artificially break them down into temporal units and then ask how culpable the

³⁶ ALEXANDER AND FERZAN, 134–44.

³⁷ *Id.* at 143–44.

³⁸ *Id.* at 156–62. See also LEVY, *supra* note 10, ch. 5 (arguing against the culpability of an act taken in an altered state of consciousness) and ch. 6 (comparing acts done habitually with altered states of consciousness and inadvertent negligence).

³⁹ ALEXANDER AND FERZAN, 162–68.

⁴⁰ *Id.* at 166–68.

⁴¹ *Id.* at 242–44, 257–60.

⁴² *Id.* at 250–57.

defendant was during each such unit.⁴³ His culpability for the entire course of conduct will be the sum calculated by adding together his culpability for each temporal unit. For in driving recklessly for five minutes, the defendant will believe that he has unleashed more risk to others' interests than if he had driven recklessly for only one minute and then ceased.

Does the same additive approach to culpability hold when we deal with liability for omissions? In our earlier book we discussed this only with respect to so-called lit fuse cases, cases in which the defendant has created what he believes is an unjustified risk but a risk he still believes he has the ability to lessen or eliminate.⁴⁴ For example, if the defendant lights the fuse leading to a flammable or explosive substance, thereby creating a risk to others' lives or property, he may believe that he has the ability for a certain period of time to stanch the lit fuse and eliminate the risk. Yet, because he realizes he may encounter obstacles to stanching it – he may, for example, slip and fall or become unconscious – the longer he waits, the riskier his lit fuse becomes.

In our earlier book, we argued that the defendant's culpability is not additive and cannot exceed his culpability were the lit fuse immediately beyond his ability to stanch.⁴⁵ We now have second thoughts. In Chapter 4, when we take up criminal liability for omissions more fully, we return to the "lit fuse" cases, which are really omission cases. And we look at the duration issue differently from how we did before.

G No Mistake of Law Problem

Scholars have long been critical of the criminal law's almost absolute position that the defendant's ignorance that his conduct is a crime does not lessen his culpability.⁴⁶ In the current world of bloated criminal codes, with hundreds of distinct crimes, that position is completely untenable.⁴⁷ Under our approach, however, the problem almost completely disappears. For with only one primary crime and no proxy crimes, the defendant need only be aware of others' legal interests.⁴⁸ For his culpability stems from the risks to those interests he believes he is unleashing. He need not believe that his act of unleashing those risks is culpable in order to be culpable for doing so. Likewise, his false beliefs about what facts will justify his imposing those risks will not render him nonculpable.

⁴³ *Id.* at 257–60.

⁴⁴ *Id.* at 242–44.

⁴⁵ *Id.* at 244.

⁴⁶ See, e.g., HUSAK, *supra* note 19.

⁴⁷ Some put the number of federal crimes at 4,500, although it is notoriously difficult to be precise about this because of the problem of individuating crimes. State criminal codes are similarly massive.

⁴⁸ See ALEXANDER AND FERZAN, 153.