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Eric A. Johnson
University of Illinois College of Law

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When Provocation Is No Excuse: Making Gun Owners Bear the Risks of Carrying in Public

ERIC A. JOHNSON†

Markeis McGlockton, an unarmed 28-year-old African-American father of three, was shot to death in front of his five-year-old son by "wannabe police officer" Michael Drejka during an argument over parking. Because McGlockton had shoved Drejka before Drejka shot him, Drejka was convicted only of heat-of-passion manslaughter, not murder. This Article argues that the heat-of-passion defense shouldn't be available in cases like Drejka's—cases where the defendant was carrying a loaded gun in public at the time of the provocation and used the gun to kill his provoker. The heat-of-passion defense is a concession to the difficulty of complying with the law's demands in moments of passion. In cases like Drejka's, however, the defendant's difficulty in complying with the homicide law is of his own making. If he had taken the same precaution that most people take against such difficulties—namely, not carrying a loaded gun in public—he wouldn't have had any trouble not killing his provoker.

In defending the proposed limit on the heat-of-passion

†Professor of Law, University of Illinois College of Law. I am grateful to Ernest Johnson for his comments on an earlier version of this paper and to the editors of the *Buffalo Law Review* for their excellent editorial assistance.

defense, this Article will advance three novel claims about the criminal law: (1) that self-mediated risk—risk that is mediated by the actor's own future volitional conduct—sometimes suffices to make conduct morally blameworthy; (2) that even decisions by an actor that appear to represent core exercises of protected individual liberties—the decision to form racist beliefs, for example, or the decision to carry a gun outside the home—sometimes can supply the locus of moral blame in criminal prosecutions; and (3) that in cases where the actor's fault inheres in self-mediated risk, the law's usual reluctance to impute moral blame doesn't apply.

INTRODUCTION

Nowadays, laws that prohibit individuals from carrying loaded guns outside the home are thought to be constitutionally suspect.[1] The trouble with these laws is not, presumably, that carrying a firearm outside the home doesn't pose risks. It obviously does.[2] For one thing, it poses a risk that the person carrying the gun will use it unlawfully to kill another person "in a sudden heat of passion."[3] The trouble with laws that prohibit public carry, rather, is that under the Second Amendment the responsibility for evaluating these sorts of risks belongs to the individual gun

1. *See, e.g.*, Wrenn v. D.C., 864 F.3d 650, 655 (D.C. Cir. 2017) (striking down, as violative of the Second Amendment, a District of Columbia statute that "confine[d] carrying a handgun in public to those with a special need for self-defense"); Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) (striking down, as violative of the Second Amendment, Illinois's blanket prohibition on public carry).

2. *Moore*, 702 F.3d at 937 ("A gun is a potential danger to more people if carried in public than just kept in the home."); OLIVER WENDELL HOLMES JR., THE COMMON LAW 116 (Dover 1991) (1881) (commenting on "the danger to the public of the growing habit of carrying deadly weapons").

3. State v. Moerman, 895 P.2d 1018, 1021 (Ariz. Ct. App. 1994) (quoting Dano v. Collins, 802 P.2d 1021, 1023 (Ariz. Ct. App. 1990)); *see also* Gould v. Morgan, 907 F.3d 659, 673 (1st Cir. 2018) (observing that Massachusetts scheme regulating public carry "endeavored 'to prevent the temptation and the ability to use firearms to inflict harm, be it negligently or intentionally, on another or on oneself.'" (internal citation omitted)).

owner, not the government.[4] The individual gun owner is responsible for deciding, among other things, whether the risk that he will kill someone else in the heat of passion is great enough to outweigh the benefits of carrying the gun.[5]

That's the theory, anyway. In practice, when an individual gets this decision wrong—when he decides to carry a gun and then winds up using the gun to kill someone else unlawfully in the heat of passion—he isn't really held responsible for his decision to carry the gun. True, he'll usually be convicted of manslaughter. But this conviction will be based exclusively on his conduct in the moment when he pulled the trigger—when his self-control was impaired by passion. The earlier moment, when he decided—dispassionately—to carry a loaded gun in public in spite of the risk that he would later use it to kill someone unlawfully, won't figure at all. In short: the seriousness of his crime will be adjusted *downward* from murder to manslaughter to reflect the difficulty for him, in the moment of the crime, of complying with the law. But his crime won't be adjusted *upward* to reflect the fact that he was responsible for creating that very difficulty—for creating a situation where he had ready access to a loaded gun while in a state of extreme passion.

Consider the circumstances surrounding the 2018 death of Markeis McGlockton. On the afternoon of July 19, 2018, McGlockton's girlfriend, Britany Jacobs, drove McGlockton and their three children to a Clearwater, Florida convenience store.[6] Jacobs parked the car illegally in a handicapped spot,

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4. *Wrenn*, 864 F.3d at 668 ("[T]he law-abiding citizen's right to bear common arms must enable the typical citizen to carry a gun.").

5. *Cf.* Transcript of Sentencing Hearing at 41–42, Florida v. Drejka, No. 18-09851-CF (Fla. Cir. Ct. Oct. 10, 2019) (sentencing remarks of Judge Bulone) ("Under the law, the people of the State of Florida, at least under certain circumstances, have the right to possess and carry firearms. However, with those rights come responsibilities.").

6. *Id.* at 48; *see also* Julia Jacobs, *"Stand Your Ground" Cited by Florida Sheriff Who Declined to Arrest Suspect in Killing*, N.Y. TIMES (July 21, 2018), https://www.nytimes.com/2018/07/21/us/florida-stand-your-ground.html.

then waited in the car with two of her children while McGlockton and the third child went into the store to buy snacks.[7] As Jacobs waited in the car, she was approached by Michael Drejka, who confronted her about where she had parked.[8] Drejka told Jacobs that he had handicapped family members, and he instructed her to move her car.[9] She told him to leave her alone.[10] McGlockton was still in the store when he overheard someone telling the clerk about the confrontation in the parking lot.[11] When McGlockton left the store and found Drejka yelling at Jacobs, he shoved Drejka, causing him to fall over backward.[12] Without getting up, Drejka removed his .40 caliber handgun from its holster and shot McGlockton once in the side.[13] As a surveillance video of the convenience store parking lot showed, McGlockton was backing away when Drejka shot him.[14] Paramedics rushed McGlockton to a nearby hospital, where he died a few hours later.[15]

The county sheriff's office at first refused to arrest or charge Drejka, citing Florida's stand-your-ground law.[16] Two weeks later, though, prosecutors charged Drejka with

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7. Transcript of Sentencing Hearing at 48, State v. Drejka, No. 18-09851-CF (Fla. Cir. Ct. Oct. 10, 2019).

8. Tamara Lush, *Newly Released Records Show Lead-Up to Parking Lot Shooting*, AP NEWS (Sept. 24, 2018), https://apnews.com/406e79bcdef44b428c3956d082329981/Newly-released-records-show-lead-up-to-parking-lot-shooting.

9. *Id.*

10. *Id.*

11. Transcript of Sentencing Hearing at 49, State v. Drejka, No. 18-09851-CF (Fla. Cir. Ct. Oct. 10, 2019).

12. *Id.* at 50.

13. Enjoli Francis, *Gunman in Parking Space Shooting Not Charged Because of "Stand Your Ground" Law*, ABC NEWS (July 20, 2018, 5:34 PM), https://abcnews.go.com/US/gunman-parking-space-shooting-charged-stand-ground-law/story?id=56715356.

14. *Id.*; Transcript of Sentencing Hearing at 50–51, State v. Drejka, No. 18-09851-CF (Fla. Cir. Ct. Oct. 10, 2019).

15. Jacobs, *supra* note 6.

16. *Id.*

manslaughter.[17] In part because McGlockton and Jacobs were African-American and Drejka was white, the case attracted substantial attention in the national media. Among the questions posed by the national media was why Drejka hadn't been charged with murder.[18] The answer, basically, was that he was thought to have been acting in the heat of passion when he killed McGlockton.

Florida's homicide statutes are somewhat idiosyncratic, but their treatment of intentional homicides roughly tracks the treatment of intentional homicides in other jurisdictions. An intentional killing will count as first-degree murder if it was premeditated—if enough time passed between the formation of the intent to kill and the killing itself to "allow reflection by the defendant."[19] If an intentional killing wasn't premeditated but still was "done from ill will, hatred, spite, or an evil intent," it will be treated as second-degree murder.[20] Finally, if an intentional killing was committed "in the heat of passion based on adequate provocation," the killing will qualify as manslaughter.[21] Drejka was charged

17. Lush, *supra* note 8.

18. Erik Ortiz, *Michael Drejka Charged in Florida "Stand Your Ground" Killing. But Why Wasn't It Murder?*, NBC NEWS (Aug. 14, 2018), https://www.nbcnews.com/news/nbcblk/michael-drejka-charged-florida-stand-your-ground-killing-why-wasn-n900406.

19. FLA. STANDARD CRIM. JURY INSTRUCTIONS 7.2 (FLA. SUP. CT. STANDARD JURY INSTRUCTIONS COMMS. 2018).

20. Bellamy v. State, 977 So. 2d 682, 683 (Fla. Dist. Ct. App. 2008) ("An act is one 'imminently dangerous to another and evincing a depraved mind' if it is an act or series of acts that: (1) a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, and (2) is done from ill will, hatred, spite or an evil intent, and (3) is of such a nature that the act itself indicates an indifference to human life."); *see also* FLA. STAT. § 782.04(2) (2019) (defining second-degree murder as "[t]he unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual").

21. FLA. STANDARD CRIM. JURY INSTRUCTIONS 7.4 (FLA. SUP. CT. STANDARD JURY INSTRUCTIONS COMMS. 2018) (requiring jury to acquit the defendant of second-degree murder if he or she "acted in the heat of passion based on adequate provocation").

with manslaughter because Florida courts consistently have said that any killing as impulsive as Drejka's—any killing that originates in "[a]n impulsive overreaction to an attack or injury"—is insufficient as a matter of law to count as second-degree murder.[22]

In short, the reason Drejka avoided prosecution for murder was that he was able to avail himself of the partial defense of "heat of passion." The basic idea behind this defense, as every first-year law student learns, is that the defendant's extreme emotional state in the moments after a "sudden provocation," though it doesn't rob him entirely of his ability to control his actions, does *impair* his ability to control his actions.[23] This impairment, in turn, partly excuses his conduct.[24] In Drejka's case, the "sudden provocation" took the form, as it often does, of an attack or injury inflicted by the homicide victim.[25] It's plausible to suppose, as Florida prosecutors evidently did, that this sudden provocation—being shoved to the ground by the larger, stronger McGlockton—left Drejka in a state of passion, which impaired his ability to control himself in the moment that he pulled the trigger.[26] So far, so good.

The trouble with this analysis is that pulling the trigger wasn't the only thing, or even the worst thing,[27] Drejka did

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22. Sandhaus v. State, 200 So. 3d 112, 114–15 (Fla. Dist. Ct. App. 2016).

23. *See* Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 974 (2002) ("The modern defense is . . . about the excusable loss of self-control.").

24. *Id.*

25. *See* People v. Curwick, 338 N.E.2d 468, 470 (Ill. App. Ct. 1975) ("Provocation is usually restricted to physical assaults, mutual quarrel or combat, adultery and similar situations.").

26. Transcript of Sentencing Hearing at 54, State v. Drejka, No. 18-09851-CF (Fla. Cir. Ct. Oct. 10, 2019) ("The defendant was blindsided. He was pushed down rather violently. I don't think there's any doubt about that.").

27. *See* Daniel Peabody, *Target Discrimination: Protecting the Second Amendment Rights of Women and Minorities*, 48 ARIZ. ST. L.J. 883, 891 (2016) ("The Richmond Grand Jury provided: 'We consider the practice of carrying arms secreted, in cases where no personal attack can reasonably be apprehended, to be

that day to cause McGlockton's death. Drejka also caused McGlockton's death by arming himself with a loaded .40 caliber Glock handgun when he left home on the day of McGlockton's death. If Drejka hadn't armed himself that day, it's extremely unlikely McGlockton would've ended up dead.[28] McGlockton appears to have been the stronger of the two men, which is why Drejka wound up on the ground in the wake of the initial confrontation.[29] Even if he hadn't been, moreover, it seems likely that bystanders would have intervened if Drejka had tried, say, to beat or strangle McGlockton to death. Drejka's decision to arm himself appears to have been a cause-in-fact of McGlockton's death, then.[30] Drejka's decision to arm himself also was a proximate cause of McGlockton's death. It was very far from "unforeseeable" that Drejka, by arming himself with a loaded gun, would cause someone's death unlawfully. The world is full of provocations, as everybody knows.

Drejka's decision to carry a gun that day wasn't just a cause of McGlockton's death, moreover. It also was culpable. As it happens, Drejka had particular reason to know that his decision to carry a gun posed an unjustified risk to others. He had on other occasions responded to perceived slights by threatening to shoot other people.[31] He also had confronted

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infinitely more reprehensible than even the act of stabbing, if committed during a sudden affray, in the heat of passion, where the party was not previously armed for the purpose.'").

28. *But see* Nicholas Moeller, *The Second Amendment Beyond the Doorstep: Concealed Carry Post*-Heller, 2014 U. ILL. L. REV. 1401, 1423 (2014) (attributing to opponents of stricter concealed carry laws the argument that "the spontaneous murders using a firearm might have been committed with another implement in the absence of a weapon").

29. Transcript of Sentencing Hearing at 54, State v. Drejka, No. 18-09851-CF (Fla. Cir. Ct. Oct. 10, 2019).

30. *See* Velazquez v. State, 561 So. 2d 347, 350 (Fla. Dist. Ct. App. 1990) (explaining that Florida criminal law generally requires the government to prove, by way of cause-in-fact, that the "result would not have occurred 'but for' the defendant's conduct").

31. Transcript of Sentencing Hearing at 43–45, State v. Drejka, No. 18-09851-CF (Fla. Cir. Ct. Oct. 10, 2019); Lush, *supra* note 8.

others about parking in handicapped spots on prior occasions.[32] (These confrontations were the reason why the trial judge, in his sentencing remarks, repeatedly described Drejka as a "wannabe police officer."[33]) Moreover, Drejka was aware, as he acknowledged to the police, that these confrontations had the potential to "go sideways."[34] His decision to arm himself, knowing that he might misuse the gun, made his eventual misuse of the gun to kill McGlockton entirely foreseeable.[35] And his conscious awareness of this risk made his decision to arm himself at least reckless.[36] In theory, then, given the culpability of Drejka's decision to arm himself, and given the causal relationship between this culpable choice and McGlockton's death, Drejka's decision to arm himself that day amounted to a separate, stand-alone basis for convicting him of reckless homicide.[37]

Of course, it wouldn't really make sense to convict Drejka of two separate forms of homicide for causing a single person's death. Courts have long held that the law generally precludes the imposition of "multiple convictions and sentences for variations of murder [or manslaughter] when only one person was killed."[38] Some courts have treated this

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32. Transcript of Sentencing Hearing at 43–45, State v. Drejka, No. 18-09851-CF (Fla. Cir. Ct. Oct. 10, 2019).

33. *Id.* at 43, 49.

34. *Id.* at 47.

35. *See id.* at 46 (recounting prior incident at same convenience store where Drejka shot McGlockton, after which Drejka acknowledged both (1) "If I had a gun, I would have shot him," referring to the person he had confronted; and (2) "I cannot help it. I get myself in trouble.").

36. *See* MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1985) (defining "recklessly" to require "conscious[] disregard[]" of a substantial and unjustifiable risk).

37. *See* MICHAEL S. MOORE, ACT AND CRIME 35 (1993) ("[I]f, from the big bang that apparently began this show to the heat death of the universe that will end it, the court can find a voluntary act by the defendant, accompanied *at that time* by whatever culpable *mens rea* that is required, which act in fact and proximately causes some legally prohibited state of affairs, then the defendant is prima facie liable for that legal harm.").

38. Ervin v. State, 991 S.W.2d 804, 807 (Tex. Crim. App. 1999) ("[A] decisive

prohibition as rooted in double jeopardy.[39] Others have treated the prohibition as rooted simply in legislative intent.[40] Whether rooted in double jeopardy or just in legislative intent, though, the view that a defendant may be convicted only of a single count of homicide for killing a single victim enjoys nearly universal support.[41] As one Maryland court nicely put it: "In homicide cases, the units of prosecution are dead bodies, not theories of aggravation."[42]

One possible alternative to the imposition of separate convictions for homicide would be to punish defendants like Drejka for a separate *non*-homicide offense that reflects the culpability associated with the decision to carry or use a firearm. Several state legislatures, including Florida's,[43] have adopted statutes that impose additional punishment—either in the form of a separate conviction or in the form of a sentence enhancement—where a defendant uses a firearm in

majority of jurisdictions that have addressed the issue have held that a trial court cannot impose multiple convictions and sentences for variations of murder when only one person was killed."); *but see* Johnson v. State, 709 A.2d 1158, 1159 (Del. 1998) ("This Court has previously interpreted 11 Del. C. § 636(a) as permitting the imposition of multiple punishments for separate convictions of felony murder and intentional murder, based on the same death.").

39. *Ervin*, 991 S.W.2d at 809 ("Many of these jurisdictions have expressly characterized punishment for two or more murder variations for a single death as a double jeopardy violation.").

40. *See* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 17.4(b) (4th ed. 2015) (explaining that the Supreme Court appears to have concluded that double jeopardy protection where multiple punishments (rather than multiple prosecutions) are at issue can be made contingent on legislative intent).

41. *Ervin*, 991 S.W.2d at 807.

42. Burroughs v. State, 594 A.2d 625, 633 (Md. Ct. Spec. App. 1991).

43. *See* Lewis v. State, 952 So. 2d 1271, 1272 (Fla. Dist. Ct. App. 2007) ("Here, it is undisputed that Mr. Lewis used a firearm when committing a felony. Therefore, the trial court properly reclassified his charge of manslaughter, a level 7, second-degree felony to a level 8, first-degree felony.").

the commission of a violent felony.[44] So has Congress.[45] But statutes like these generally are designed to reflect the enhanced "risk of harm resulting from the manner in which the crime is carried out," as the Supreme Court has said.[46] They're designed, that is, to reflect the inchoate risk associated with the defendant's use of a gun in connection with the felony.[47] They're not designed to reflect the defendant's culpability in relation to the risk that came to fruition in the victim's death. And, accordingly, they don't require any causal connection between the use of the firearm and the occurrence of harm.

There's a better approach to cases like Drejka's, as I'll argue in this Article. Where an individual decides to carry a loaded firearm in public and then, after being provoked, uses the firearm to kill another person unlawfully in the heat of passion, he should be denied the benefit of the heat-of-passion defense. He should be convicted of murder, in other words, not manslaughter. This approach takes seriously the idea that, in the post-*Heller* world,[48] individuals are

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44. *See, e.g.*, CAL. PENAL CODE § 12022.53(c) (West 2019) ("Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally and intentionally discharges a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 20 years."); CONN. GEN. STAT. ANN. § 53a-55a (West 2007) ("A person is guilty of manslaughter in the first degree with a firearm when he commits manslaughter in the first degree as provided in section 53a-55, and in the commission of such offense he uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a pistol, revolver, shotgun, machine gun, rifle or other firearm.").

45. 18 U.S.C. § 924(c)(1)(A) (specifying mandatory sentence enhancements for defendants, who in the course of a crime of violence or a drug-trafficking crime, carry, brandish, or discharge a firearm).

46. Dean v. United States, 556 U.S. 568, 576 (2009).

47. *See id. But cf.* United States v. Cuff, 38 F. Supp. 2d 282, 288–89 (S.D.N.Y. 1999) (arguing that use of a firearm shouldn't aggravate a homicide offense: "[I]f the crime is a homicide to start with, likely success and loss of life are moot; to the extent that use of a firearm might endanger additional lives, the factor of grave risk of death to additional persons is covered by statute.").

48. D.C. v. Heller, 554 U.S. 570, 595 (2008) (holding that the Second Amendment protects the right of an individual to keep and bear arms).

responsible for deciding for themselves whether the benefits of carrying a firearm outweigh the risk that they'll kill someone in the heat of passion. If the defendant decides dispassionately to carry a loaded firearm in public and later uses the gun to kill someone else in the heat of passion, the law is justified in ascribing fault not just to the killing itself but to the defendant's earlier decision to arm himself. This fault in the earlier moment is more than sufficient to offset the mitigating effects of the defendant's impaired self-control in the moment of the killing. Cumulatively, then, the defendant's fault in arming himself and his fault in killing the victim justify liability for murder.

This cumulation of the defendant's fault in arming himself and his fault in killing the victim might, at first glance, seem arbitrary and improvised. It isn't. The defendant's fault in arming himself directly undercuts the rationale for the heat-of-passion defense. The idea behind the heat-of-passion defense is, roughly, that the passion's impairment of the defendant's self-control made it difficult for him to comply with the law's commands in the moment when he pulled the trigger.[49] In cases like Drejka's, though, the difficulty faced by the impassioned defendant isn't attributable just to his anger. It also is attributable in part to the ready availability of a loaded firearm. If Drejka hadn't had a gun when McGlockton shoved him, he wouldn't have found it difficult at all to comply with the homicide statute's commands. Indeed, he probably would have found it difficult, if not impossible, *not* to comply with the homicide laws. Denying defendants like Drejka the benefit of the heat-of-passion defense makes perfect sense, then, since they're responsible—by virtue of their decision to arm themselves—for the very difficulty that supposedly excuses their subsequent conduct.

In the first four Parts of this Article, I'll lay out the basic

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49. Sarah Sorial, *Anger, Provocation and Loss of Self-Control: What Does "Losing It" Really Mean?*, 13 CRIM. L. & PHIL. 247, 247 (2018).

argument for the proposed limit on the heat-of-passion defense. My strategy in these Parts will be to argue that the problem posed by cases like Drejka's is really just one facet of a much broader problem, which I'll refer to as the criminal law's moral-hazard problem. The phrase "moral hazard" originally was used to refer to the danger than an insured, after purchasing insurance, would have less incentive than before to take precautions against the insured losses.[50] Nowadays the term is used more broadly to refer, as Paul Krugman has said, to "any situation in which one person makes the decision about how much risk to take, while someone else bears the cost if things go badly."[51] This broader sense captures the problem posed by Drejka's decision to carry a gun, as I'll argue in Part I. In Parts II and III, I'll explore the criminal law's general strategy for resolving its moral-hazard problem. In Part IV, I'll argue that my proposed limit on the heat-of-passion defense is in keeping with this general strategy.

After laying out the basic argument in Parts I through IV, I'll then explain how this argument, despite its seeming inevitability, departs dramatically from the presuppositions of orthodox criminal law theory. First, in Part V, I'll explain why self-mediated risk—risk that is mediated by the actor's own future volitional acts—really can make the actor's present conduct morally wrongful, contrary to what the theorists appear to have assumed. In Part VI, I'll explain why even choices that appear to represent core exercises of individual liberties—like the individual's decision to carry a gun outside the home—nevertheless can, after they come to fruition in conduct harmful to others, provide the loci of

50. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 48 (6th ed. 2012) ("*Moral hazard* arises when the behavior of the insured person or entity changes after the purchase of insurance so that the probability of loss or the size of the loss increases."); *see also Hazard*, BLACK'S LAW DICTIONARY (11th ed. 2019) (identifying the term "moral hazard" as belonging to the subject of insurance and as having originated around 1881).

51. PAUL KRUGMAN, THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008, at 63 (2009).

blame in criminal prosecutions. Finally, in Part VII, I'll explain why, in cases where the locus of fault is temporally removed from the conduct that triggers the imposition of liability, imputed fault is the norm, rather than a disfavored departure from the norm.

I. THE CRIMINAL LAW'S MORAL-HAZARD PROBLEM

Herbert Morris nicely described the criminal law as a "system . . . in which the rules establish a mutuality of benefit and burden."[52] Community members derive benefits from the criminal law in the form of "noninterference by others with what each person values, such matters as continuance of life and bodily security."[53] What makes these benefits possible, though, is the assumption by community members of a mutual burden, namely, the burden of "exercis[ing] self-restraint . . . over inclinations that would, if satisfied, directly interfere or create a substantial risk of interference with others in proscribed ways."[54] Individuals differ, of course, in how they go about satisfying this burden.[55] Some cultivate virtuous dispositions, so as to moderate those "inclinations" that would, if satisfied, interfere with other people's safety or security.[56] Others rely instead on their powers of self-control.[57] Still others avoid

52. Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 477 (1968).

53. *Id.*

54. *Id.*

55. *See* R.A. Duff, *Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 BUFF. CRIM. L. REV. 147, 168 (2003) ("[S]o long as we do not commit what the law defines as crimes, the law has no interest in why we do not commit them—in whether our non-criminal conduct expresses virtue, self-control, a self-interested concern to avoid sanctions, or whatever.").

56. *See id.* at 163 (explaining that the virtuous individual "does not have to resist temptation, or overcome contrary feeling or inclination, in order to act as she sees she should, since there is nothing in her character that would motivate her against what is appropriate").

57. *Id.* at 164; *see also* THOMAS NAGEL, MORTAL QUESTIONS 32–33 (1979) ("A person may be greedy, envious, cowardly, cold, ungenerous, unkind, vain, or conceited, but behave perfectly by a monumental effort of will.").

situations where they might be tempted to act on antisocial inclinations.[58] By whatever means they go about satisfying the burden imposed by the criminal law, though, the burden is the same for everyone, at least in theory. The criminal law is, as Holmes said, "of general application."[59] It requires each of us to "come up to a certain height."[60]

When an individual fails to come up to that certain height—when he "renounces a burden that others have voluntarily assumed," in Morris's words—he is subject to punishment.[61] Different sorts of crimes justify different degrees of punishment, of course. But even where the same statutory proscription is concerned, not every violation justifies the same degree of punishment. One reason for these variations in punishment is that sometimes individuals find themselves in situations where complying with the criminal law's demands isn't possible, or at least is much more difficult than it usually would be.[62] An individual who violates the proscription on criminal trespass, for example, might do so only because the alternative is freezing to death in a blizzard.[63] Or he might trespass only because someone has threatened to injure him physically if he doesn't.[64] Or he might trespass because a mental disease or defect has left him unable to understand that the property

58. *See* REPO MAN (Edge City Prods. 1984) ("An ordinary person spends his life avoiding tense situations. A repo man spends his life getting into tense situations.").

59. HOLMES, *supra* note 2, at 50.

60. *Id.*

61. Morris, *supra* note 52, at 477.

62. *See* JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 183 (1992) (observing that excusing conditions reflect "the existence of empirical conditions making conformity with the law exceptionally difficult").

63. *See* State v. Zuidema, 552 S.W.3d 186, 189 (Mo. Ct. App. 2018) (addressing defendant's claim that she was justified in breaking into a stranger's unoccupied home because "she was facing the risk of imminent injury due to hypothermia").

64. *See* State v. Peters, 737 P.2d 693, 694 (Wash. Ct. App. 1987) (addressing defendant's claim that his companion "told him to break into Ryder's house and steal some things for him or [the companion] would kill him").

doesn't belong to him.[65] Circumstances like these affect the degree of punishment that's justified, and sometimes even absolve the individual of moral blame entirely. That's why the criminal law requires not just conduct that's violative of the law's external standards but a "guilty mind" as well.[66] It's also why the criminal law recognizes a variety of defenses—necessity, duress, insanity, heat of passion, etc.[67]

Because the criminal law differentiates offenders on the basis of circumstances like these, however, a kind of moral-hazard problem arises.[68] The trouble, basically, is that circumstances that make compliance with the criminal law more difficult sometimes are of the offender's own making. The person who faces the choice between freezing to death in a blizzard and breaking into someone else's vacant cabin might face that choice only because she decided stupidly to go four-wheeling in a blizzard. The person who is threatened with violence if he doesn't trespass might face that threat only because he joined a gang that regularly coerces its members to commit crimes. The person whose mental disease leaves him unable to understand that a cabin doesn't belong to him might be afflicted by that mental disease only because he chose, sadly, to abuse illegal drugs over an extended period.

If the criminal law routinely permitted offenders to invoke circumstances of their own creation as a basis for mitigation, then the whole idea of requiring everyone to

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65. *See* People v. Wetmore, 583 P.2d 1308, 1310 (Cal. 1978) (addressing defendant's claim that "as a result of mental illness he lacked the specific intent required for [burglary]").

66. *See* Elonis v. United States, 575 U.S. 723, 734 (2015) ("Although there are exceptions, the 'general rule' is that a guilty mind is 'a necessary element in the indictment and proof of every crime.'").

67. *See* HORDER, *supra* note 62, at 183 (describing how empirical conditions associated with typical excuse defenses make "conformity with the law exceptionally difficult").

68. *See* KRUGMAN, *supra* note 51, at 63 (defining moral hazard as "any situation in which one person makes the decision about how much risk to take, while someone else bears the cost if things go badly").

"come up to a certain height" would break down, as would the idea of permitting individuals to decide for themselves how to satisfy the criminal law's demands. When we say that individuals "decide for themselves" how to bring their conduct up to a certain height, we mean in part that individuals get to choose between (1) bearing the costs of compliance *earlier*—by, say, cultivating habits of concern for other people, or (2) bearing the costs of compliance *later*—by, say, exercising exceptional self-control.[69] If the law simply were to judge the offender on the basis of the difficulty for him of complying with the law's demands in the moment of the offense, without regard to the offender's responsibility for bringing about the circumstances that make compliance more difficult, then the offender's choices in the earlier moments wouldn't just be choices about *how* to comply with the law's demands. Rather, those earlier choices would determine *what* the law demands of the individual. The law would end up demanding less of some individuals than of others.

Take the individual who, as a result of her earlier decision to go four-wheeling in a blizzard, later faced a choice between freezing to death and breaking into a vacant cabin. Trish, let's call her.[70] Is Trish guilty of criminal trespass? It's hard to quarrel with the conclusion that her trespass is justified by necessity.[71] At the same time, though, if we allow her to invoke the necessity defense in spite of her

69. *See* Duff, *supra* note 55, at 163–64 (observing that individual can avoid committing crimes either by cultivating a virtuous disposition or by exercising exceptional self-control); HORDER, *supra* note 62, at 128 (explaining that it "is not a matter of concern to the criminal law" whether people manage to avoid committing crimes by cultivating virtuous dispositions or instead manage to avoid committing crimes by exercising self-restraint).

70. The "Trish" hypothetical is developed and explored in Eric A. Johnson, *Self-Mediated Risk in Criminal Law*, 35 L. & PHIL. 537, 547–49 (2016). *See also* LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, REFLECTIONS ON CRIME AND CULPABILITY: PROBLEMS AND PUZZLES 39–40 (2018) (discussing Trish problem); Larry Alexander, *Culpably Creating the Conditions of Justified Acts: Another Look*, 49 PHILOSOPHIA 107, 107–09 (2020), (discussing Trish problem).

71. Johnson, *supra* note 70, at 547.

carelessness in going four-wheeling in a blizzard, aren't we demanding less of her, on balance, than we demand of others? Suppose another individual from Trish's town, Todd we'll call him, also thought about going four-wheeling on the day of the blizzard, but ultimately decided not to, for the sake avoiding just the sort of necessitous situation that eventually confronted Trish. Todd, in other words, took account of the risk that going four-wheeling would cause him to commit a trespass, and decided that this risk outweighed the benefits to him. By contrast, Trish decided to accept that risk. If Trish isn't punished—if she succeeds in forcing the cabin's owner to bear the risk she created—is it really accurate to say that law made the same demands of Trish and Todd?

Choices that make the individual's later compliance with the law more difficult aren't always, or usually, as concrete and easily analyzed as Trish's decision to go four-wheeling in a blizzard. Most of the difficulties we create for ourselves we create gradually over time by "habitually fashioning our characters in the wrong way," as William James said.[72] Aristotle likewise identified bad character, or bad habits, as the source of most blameworthy conduct.[73] "It makes no small difference," he said, "whether we form habits of one kind or of another from our very youth; it makes a very great difference, or rather *all* the difference."[74] As Aristotle and James both would have acknowledged, habits that make compliance with the criminal law more difficult include not just habitual patterns of behavior but habitual ways of thinking as well.[75] Habitual "insensitivity to the interests of

72. WILLIAM JAMES, PRINCIPLES OF PSYCHOLOGY 83 (1890) (Encyclopedia Britannica ed. 1952) ("The hell to be ensured hereafter, of which theology tells, is no worse than the hell we make for ourselves in this world by habitually fashioning our characters in the wrong way.").

73. ARISTOTLE, NICOMACHEAN ETHICS, bk. I, ch. 1 (W.D. Ross transl. 1958) (c. 350 B.C.E.).

74. *Id.*

75. Duff, *supra* note 55, at 163 (recounting Aristotle's view that "true virtue also involves appropriate dispositions of thought, of attention, of observation"); WILLIAM JAMES, PSYCHOLOGY: THE BRIEFER COURSE 172 (1892) ("What is called

other people," for example, makes compliance with the criminal law more difficult, in part by causing the individual to fail to advert to the risks posed by his conduct.[76] As Alec Walen has said, criminal conduct less often is the result of contemporaneous moral fault than of "a series of earlier choices . . . not to cultivate a responsible concern for others."[77]

The kinds of difficulties we make for ourselves by "fashioning our characters the wrong way" often provide colorable legal bases for mitigation or even outright absolution. Suppose, for example, that an individual who has cultivated an insensitivity to the interests of others fails, as a consequence of this insensitivity, to advert to the risk of death posed by his conduct to others.[78] This failure to advert, because it makes compliance with the law more difficult,[79]

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our 'experience' is almost entirely determined by our habits of attention.").

76. MODEL PENAL CODE § 2.02 cmt. 4 (AM. L. INST. 1985) (explaining that "moral defect can properly be imputed [in cases of criminal negligence] to instances where the defendant acts out of insensitivity to the interests of other people, and not merely out of an intellectual failure to grasp them").

77. Alec Walen, *Crime, Culpability and Moral Luck*, 29 L. & PHIL. 373, 383 (2010); *see also* Paul J. Heald, *Mindlessness and Nondurable Precautions*, 27 GA. L. REV. 673, 677 (1993) (summarizing recent psychological research, which shows that "much of our behavior is mindless in the sense that we respond [to previously encountered stimuli] without consciously making a decision."); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 358 (1996) (defending evaluative conception of emotion, under which "a person is responsible not only for making good choices but for having good character").

78. H.L.A. Hart, *Negligence, Mens Rea and Criminal Responsibility*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 136, 146 (1968) ("[I]f anything is blameworthy [about negligence] it is not the 'state of mind' but the agent's failure to inform himself of the facts and so *getting into* this 'state of mind.'").

79. It would be wrong to suppose that the individual's failure to advert to the risk makes compliance with the law not just more difficult but impossible. The law imposes liability for criminal negligence only when the risk posed by the defendant's conduct was substantial and unjustifiable under "the circumstances known to him." MODEL PENAL CODE § 2.02(2)(c), (d) (AM. L. INST. 1985); *see also* HOLMES, *supra* note 2, at 75. So it imposes liability only in cases where the defendant, in "the moment of choosing," has at least the raw capacity to foresee the risk posed by his conduct. *See id.* at 54 ("But the choice must be made with a

will shield him from liability for both depraved-heart murder and reckless homicide, which require the government to prove that the defendant was consciously aware of the risk to others when he acted.[80] Likewise, a defendant who cultivates a violent, jealous temperament, or a powerful hatred of others, might as a consequence find himself in a state of extreme anger or passion. This extreme emotional state will, naturally, make compliance with the criminal law more difficult. The heat-of-passion defense makes allowances, in some circumstances, for people who face just this difficulty—who, by virtue of their extreme anger, find it difficult not to kill the person who has provoked them.[81]

In short, the criminal law frequently has to decide what to do with defendants who: (1) find compliance with the criminal law unusually difficult for reasons either external (blizzards, threats, etc.) or internal (passion, unawareness of risk to others, etc.); but (2) are themselves responsible for the very circumstances that make compliance with the criminal law more difficult. It's probably obvious why this class of cases is of interest to us here. Drejka's heat-of-passion defense to murder was, in effect, a claim that his anger at McGlockton made it difficult for him to comply with the law's proscription on intentional homicide. At the same time, the difficulty Drejka faced was of his own making. If Drejka hadn't been armed, complying with the law wouldn't have been difficult at all. It would've been easy, since Drejka probably lacked the physical wherewithal to kill the McGlockton with his bare hands. Lots of people refrain from carrying guns for just this reason, in fact. Instead of cultivating virtuous dispositions or exceptional self-control,

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chance of contemplating the consequence complained of, or else it has no bearing on responsibility for consequence.").

80. MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1985) (defining "recklessly" to require conscious disregard of the risk); People v. Knoller, 158 P.3d 731, 741 (Cal. 2007) (holding that the "subjective component" of depraved-heart murder requires subjective awareness of a "risk of death").

81. Dressler, *supra* note 23, at 972.

and instead of avoiding tense situations, they comply with the homicide law's demands simply by not carrying guns.

Bear in mind: Drejka's isn't a case where the defendant "caused the conditions of his [own] defense," in Paul Robinson's formulation.[82] The elements of Drejka's heat-of-passion defense were just that he had acted in a "blind and unreasoning fury" as the result of a "a sudden event that would have suspended the exercise of judgment in an ordinary reasonable person."[83] Nobody would argue, presumably, that Drejka's possession of a firearm caused the "sudden event" that provoked him into killing McGlockton—the shove by McGlockton. Nor would they argue that Drejka's possession of the firearm caused his "blind and unreasoning fury." In the narrow, Robinsonian sense, then, Drejka didn't cause the conditions of his defense.

Still, Drejka's case shares the features that make the "causing conditions" cases problematic for criminal law: a defense that hinges on the difficulty for the defendant of complying with the criminal law's demands under the circumstances in which he found himself; and a decision by the defendant that contributed to the very difficulty he asserts as the basis for his defense. If Drejka only had taken the same precaution that most other individuals take—leaving his gun at home—he never would have faced the difficulty that he later invoked as the basis for reducing his conviction from murder to manslaughter. Like the causing-conditions cases, then, Drejka's case requires the law to resolve the tension between (1) the law's concern for taking into account variations in degrees of culpability, and its concomitant concern for taking account of circumstances that make the defendant's compliance with the law's demands more difficult; and (2) the law's concern for

82. *See* Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 25 (1985).

83. FLA. STANDARD CRIM. JURY INSTRUCTIONS 7.4 (FLA. SUP. CT. STANDARD JURY INSTRUCTIONS COMMS. 2018).

applying the same standard to everyone, and its concomitant concern for denying defenses to defendants who, like Drejka, make compliance with the criminal law more difficult for themselves.

II. HOW CRIMINAL LAW ADDRESSES THE MORAL-HAZARD PROBLEM

In resolving the tension between these two competing demands, the criminal law naturally is constrained, as it always is, by the fact that criminal judgments express moral condemnation of the offender.[84] Our problem, then, has a different complexion than it would have if it arose in, say, the law of contracts.

As it happens, a similar problem *does* arise in the law of contracts.[85] Parties to contracts sometimes find themselves in situations where discharging their obligations under the contract would prove unexpectedly difficult or even impossible. Courts traditionally have been inclined to treat this sort of "impossibility" or "impracticability" as a defense to an action for breach,[86] particularly in cases where holding the promisor liable for expectation damages would lead to inefficient behavior.[87] Recognizing a defense of impossibility or impracticality creates difficulties of its own, however.[88]

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84. *See* Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROB. 401, 402–06 (1958) (explaining centrality of community condemnation to our conception of criminal law).

85. *See generally* RESTATEMENT (SECOND) OF CONTS. § 261 (AM. L. INST. 1981).

86. *See id.* ("Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary."); COOTER & ULEN, *supra* note 50, at 350 ("In some circumstances . . . physical impossibility of performance excuses non-performance.").

87. Christopher J. Bruce, *An Economic Analysis of the Impossibility Doctrine*, 11 J. LEGAL STUD. 311, 311 (1982); COOTER & ULEN, *supra* note 50, at 351.

88. Gerhard Wagner, *In Defense of the Impossibility Doctrine*, 27 LOYOLA U. CHI. L.J. 55, 78 (1995) ("A drawback to any exceptions to the expectation damages

Sometimes the circumstances that make the promisor's performance difficult or impossible are attributable, directly or indirectly, to earlier choices by promisor himself. If the promisor can invoke circumstances that were within his control as a basis for a reduction in damages, then he will have little incentive to take cost-efficient precautions against the advent of those circumstances.[89]

In addressing this contract-law counterpart to our moral-hazard problem, the courts naturally aren't constrained by concerns about the parties' moral blameworthiness.[90] They can, if they want, make the availability of the impossibility defense depend on something like the promisor's moral probity—on whether the promisor can show that he hadn't brought the difficulties on himself by "tak[ing] inadequate precautions to ensure performance."[91] But the courts might equally decide to do away with the impossibility defense entirely, on the theory that "hold[ing] the promisor liable for expectation damages [will] encourage the promisor to take efficient precautions against obstacles to performance."[92]

In criminal law, by contrast, legislatures couldn't really decide, for the sake of encouraging individuals to "take efficient precautions" against future obstacles to compliance with the criminal law's demands, just to foreclose entirely the consideration of circumstances that, in the moment of the criminal act, make compliance with the criminal law's

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rule, under economic analysis, is that any reduction in damages tends to yield inefficient outcomes because it raises the problem of moral hazards.").

89. *See id.* at 78–79 ("If, by raising a defense, the promisor can avoid liability, externalities result, and the promisor's incentives to take cost-efficient precautions weaken.").

90. *See* RESTATEMENT (SECOND) OF CONTS. ch. 11, introductory note (AM. L. INST. 1981) ("Contract liability is strict liability.").

91. Bruce, *supra* note 87, at 322; *see also* RESTATEMENT (SECOND) OF CONTS. § 261 (AM. L. INST. 1981) (limiting impossibility to cases where the "party's performance is made impracticable without his fault").

92. Wagner, *supra* note 88, at 78.

external demands difficult or impossible.[93] Disregarding the kinds of circumstances that sometimes make compliance with the criminal law difficult or impossible—insanity, necessity, duress, unawareness of risk—would mean dispensing with the requirement of moral blameworthiness. Moral blameworthiness is central to criminal law, even for those who believe, as Holmes did, that "[t]he purpose of the criminal law is to induce external conformity to rule."[94] After all, probably the most important of the various ways in which the criminal law "induce[s] external conformity to rule" is by expressing judgments of moral blameworthiness.[95] This "moral rhetoric of the criminal law" obviously would be undercut if law were to impose punishment in cases where, as a result of circumstances outside the actor's control, compliance with the criminal law was impossible or nearly impossible.[96]

In the end, only one strategy for addressing the moral-hazard problem really is consistent with the criminal law's

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93. *See* THOMAS M. SCANLON, WHAT WE OWE TO EACH OTHER 266 (1998) ("Punishment is . . . an expression of legal blame. Insofar as this is so, it will seem inappropriate, and thus to condemn, someone whose conduct is admitted to be blameless . . . .").

94. HOLMES, *supra* note 2, at 49.

95. *See* MODEL PENAL CODE § 1.02 cmt. 3 (AM L. INST. 1985) (acknowledging that penal sanctions are designed in part to "advance preventative ends . . . by fortifying normal instincts to refrain from injurious behavior"); Johs Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 176, 180 (1952) (arguing that penal sanctions are designed in part to "strengthen moral inhibitions" and to "stimulate habitual law-abiding conduct" and that "[t]o the lawmaker, the achievement of inhibition and habit is of greater value than mere deterrence"); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 225 (1991) ("In effect [criminal statutes] shape the citizens' unconscious perceptions of the opportunities before them so that occasions for unlawful, but profitable, behavior that would be apparent to the amoral citizen are never truly apprehended by the law-abiding citizen.").

96. Coffee, *supra* note 95, at 194; *see also* MODEL PENAL CODE § 2.09 cmt. 2 (AM. L. INST. 1985) ("Law is ineffective in the deepest sense, indeed . . . it is hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise.").

requirement of moral blameworthiness, namely, identifying a substitute or supplemental locus of blame.[97] In the cases that concern us, the moment of the crime itself won't suffice as a locus of blame, since the defendant's conduct in that moment was excused or justified (or partly excused, in the heat-of-passion cases) by circumstances that made compliance with the law impossible or at least very difficult. If we decide to punish the defendant for his crime anyway, it can only be because we're justified in ascribing or imputing fault to the defendant on the basis of what happened in some earlier moment,[98] when he failed to take adequate "precautions against obstacles to performance."[99] This substitute or supplemental locus of blame must, moreover—if it's to justify conviction for the very offense whose later commission ostensibly was justified or excused—bear the right kind of causal connection to his commission of this offense.

This strategy—of identifying a substitute or supplemental locus of blame—pervades the criminal law. The strategy is easiest to spot in causing-conditions cases, like the case where Trish went four-wheeling in a blizzard, then wound up breaking into another person's cabin to keep warm.[100] Under the law of necessity, Trish's conviction for criminal trespass would hinge on whether she was at "fault" in bringing about the necessitous situation in which she eventually found herself.[101] In most jurisdictions, her fault in this earlier moment, once proved, would trigger a forfeiture

97. *See* Robinson, *supra* note 82, at 31 (arguing that the actor's liability in the "causing conditions" cases must be "based on his initial conduct in causing the defense conditions with the accompanying [mental state], not on the justified or excused conduct that he subsequently performs").

98. *See* Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 623 (1984) (explaining how a hidden element of imputed fault "may explain the use of an otherwise unjustifiable form of liability").

99. Wagner, *supra* note 88, at 78.

100. *See supra* text accompanying notes 70–71.

101. Johnson, *supra* note 70, at 548.

of the necessity defense, which would leave her exposed to conviction for criminal trespass on the basis of her subsequent, admittedly justified conduct.[102] In a few other jurisdictions—namely, the six or so states that have adopted the Model Penal Code's alternative approach[103]—the jury actually would decide whether Trish's fault in this earlier moment sufficed to satisfy the mental state requirements of the very offense with which she was charged.[104] In either sort of jurisdiction, though, the same basic strategy is at work: The defendant's liability hinges on the identification, in the earlier moment, of a substitute locus of moral blame.[105]

The same strategy is at work, though somewhat less explicitly, in the voluntary intoxication cases. Everybody agrees that extreme intoxication, voluntary or involuntary, can make compliance with the criminal law very difficult, either by impairing the defendant's ability to control his conduct or by impairing his capacity for awareness.[106] In cases where the defendant's intoxication is voluntary, though, courts usually deny any mitigating effect to the defendant's intoxication. They deny him the opportunity to invoke the excuse defense that's available to *involuntarily*

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102. *See, e.g.*, N.Y. PENAL LAW § 35.05 (McKinney 2011) (providing that necessity defense is not available unless the necessitous situation was "developed through no fault of the actor"); Marc O. DeGirolami, *Culpability in Creating the Choice of Evils*, 60 ALA. L. REV. 597, 599–600 (2009) ("[M]any American jurisdictions . . . bar[] the [necessity] defense when the actor was at all culpable in creating the necessity.").

103. *See* ARK. CODE ANN. § 5-2-604(c) (West 1975); HAW. REV. STAT. § 703-302(2) (1986); ME. REV. STAT. ANN. tit. 17-A, § 103(2) (West 2007); NEB. REV. STAT. ANN. § 28-1407(2) (West 1975); N.H. REV. STAT. ANN. § 627:3(II) (1973); 18 PA. CONS. STAT. § 503(b) (1973).

104. MODEL PENAL CODE § 3.02(2) (AM. L. INST. 1985); Robinson, *supra* note 82, at 31.

105. Johnson, *supra* note 70, at 548.

106. *See* MODEL PENAL CODE § 2.08(4) (AM. L. INST. 1985) (providing that *involuntary* intoxication, whose effect on the actor's mental processes in the moment of the criminal act is the same as voluntary intoxication, will absolve the actor of liability if "by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of the law").

intoxicated actors.[107] What's more, they often deny him as well the opportunity even to rely on evidence of his intoxication to negate the required mental state for the offense.[108] The basic rationale for this approach is that, in cases where the defendant's intoxication is so extreme as to rob him of awareness or self-control, the defendant's fault in "the moment when he imbibes" supplies a substitute locus of blame.[109] In effect, the law "postulate[s] a general equivalence" between the actor's culpability in becoming extremely intoxicated and the culpability required for the charged offense.[110] The Model Penal Code commentary makes this substitution explicit: "Becoming so drunk as to destroy temporarily the actor's powers of perception is conduct that plainly has no affirmative social value to counterbalance the potential danger. *The actor's moral culpability lies in engaging in such conduct*."[111]

The same strategy is at work in the law of criminal negligence, too, though its workings are mostly hidden. Criminal negligence is distinguished from recklessness by the fact that the actor isn't consciously aware of the risk posed by his conduct.[112] Whereas the fault of recklessness

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107. *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 9.5(g) (3d ed. 2017) ("[Voluntary] intoxication is a defense only if it negatives some required element of the crime in question. It is not enough that it puts the defendant in a state of mind which resembles insanity. Involuntary intoxication, on the other hand, does constitute a defense if it puts the defendant in such a state of mind, e.g., so that he does not know the nature and quality of his act or know that his act is wrong, in a jurisdiction which has adopted the *M'Naghten* test for insanity.").

108. *See* MODEL PENAL CODE § 2.08 cmt. 1 (AM. L. INST. 1985) ("[T]he usual formulation of the rule prior to the Model Code was that intoxication is admissible to disprove a 'specific intent' that is an element of the crime charged, but not to disprove a 'general intent' when that is the required mental element."); *id.* (explaining alternative Model Penal Code approach, under which voluntary intoxication can negate the mental states of purposely and knowingly but not the mental states of recklessly or negligently").

109. *Id.* (emphasis added).

110. *Id.*

111. *Id.* (emphasis added).

112. *See* State v. Boss, 127 P.3d 1236, 1239 n.2 (Utah Ct. App. 2005) ("The risk

inheres in the actor's conscious acceptance of an unjustified risk, the fault of negligence inheres in the actor's failure to be aware, in the moment of the "negligent act," of a risk of which the actor "should be aware."[113] To say that the actor "should be aware" of the risk posed by his conduct, however, is to say something about the past, not about the present. As Herbert Hart said, "if anything is blameworthy [about negligence,] it is not the 'state of mind' but the agent's failure to inform himself of the facts and so *getting into* this 'state of mind.'"[114] To decide whether the defendant really deserves blame, then, the jury has to decide exactly *how* he got into this state of unawareness. The jury has to decide, in the words of the Model Penal Code commentary, whether the defendant's failure to advert to the risk was attributable to "insensitivity to the interests of other people" or instead was attributable merely to a non-culpable "failure to grasp them."[115] If it was attributable to insensitivity to the interests of other people, then presumably the defendant deserves blame for "a series of earlier choices . . . not to cultivate a responsible concern for others."[116]

The jury instructions don't say this, of course. They don't actually ask the jury to decide whether the defendant's failure to advert to the risk betrayed "insensitivity to the interests of other people." Rather, they frame the question, as the criminal law so often does, in terms of the "reasonable person." The question, as framed for the jury, is whether the defendant's "failure to perceive" the risk created by his conduct "involves a gross deviation from the standard of care

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of death required for recklessness and criminally negligent conduct is the same; the only difference between the two is whether the defendant was aware of that risk.").

113. MODEL PENAL CODE § 2.02(2)(d) (AM. L. INST. 1985).

114. Hart, *supra* note 78, at 146; *see also* SCANLON, *supra* note 93, at 279 (explaining that actor's unawareness of the risk posed by his conduct undercuts the inference that his conduct in the moment "indicate[s] a blameworthy attitude on [the actor's] part").

115. MODEL PENAL CODE § 2.02 cmt. 4 (AM. L. INST. 1985).

116. Walen, *supra* note 77, at 383.

that a reasonable person would observe in the [defendant's] situation."[117] But this question, though it appears to situate the locus of blame in the moment of the ostensibly negligent act, doesn't really do so. When the law asks the jury to compare what the defendant perceived,[118] or believed,[119] or felt[120] in the moment of the crime to what a reasonable person would have perceived, or believed, or felt under the circumstances, the law really is asking the jury to decide whether the defendant was blameworthy in the past, perhaps the remote past.

To explain: in the moment of the crime itself, the defendant chooses what to *do*, but he doesn't (or doesn't usually) choose what to perceive, or believe, or feel. What the defendant perceives, believes, or feels in the moment of the crime is mostly, if not entirely, a product of choices he made long before. Past choices about what sort of habits of attention to develop, for example, will mostly determine what he perceives in the moment of the crime.[121] Past choices about what sort of dispositions to develop will mostly determine what he feels.[122] And background beliefs and

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117. MODEL PENAL CODE § 2.02(2)(d) (AM. L. INST. 1985).

118. *See id.* (requiring jury to decide whether the defendant's "failure to perceive" the risk represented a gross deviation from the standard of care that a reasonable person would have observed).

119. *See* People v. Goetz, 497 N.E.2d 41, 52 (N.Y. 1986) (requiring jury to decide, in resolving defendant's claim of self-defense, whether defendant's belief in the necessity of force was "reasonable").

120. *See* People v. Luther, 232 N.W.2d 184, 187 (Mich. 1975) (holding that duress defense applies only where the "threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm"); Girouard v. State, 583 A.2d 718, 722 (Md. 1991) (requiring, as an element of the heat-of-passion defense, that the provocative event be sufficient to cause a "reasonable man" to "act for the moment from passion rather than reason").

121. *See* JAMES, *supra* note 75, at 172 ("What is called our 'experience' is almost entirely determined by our habits of attention.").

122. *See* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 356 (1996) ("To avoid the discomfort or dissonance associated with holding [anti-social] desires, individuals internalize dispositions, outlooks, and tastes that conform to the social norms expressed in criminal prohibitions.").

assumptions, developed gradually and long before the moment of the crime, will mostly determine what he believes in the moment of the crime itself.[123] So when the law holds the defendant liable because what he perceives, believes, or feels at the moment of the crime isn't what a reasonable person would have perceived, believed, or felt under the circumstances, the law is really holding him responsible for the past choices by which he fashioned his habits, dispositions, and background beliefs.

This probably sounds like a radical or at least revisionary point. It's not. The Model Penal Code's drafters made this very point in explaining why their version of the duress defense, like the common law version, included an objective component—why it required the defendant to show that "a person of reasonable firmness in his situation would have been unable to resist" the coercer's threat.[124] The drafters acknowledged that this requirement would have the effect of denying the defense to a person (1) whose subjective fear was severe enough to impair his self-control but (2) whose fear was attributable to his exceptional timidity rather than to the objective gravity of the threat.[125] One reason for imposing liability in this setting, the drafters said, was that "legal norms and sanctions operate not only at the moment of the climactic choice, but also in the fashioning of values and character."[126] The fault of the exceptionally timid actor, who commits a crime in response to a threat that wouldn't so have affected a person of reasonable firmness, lies mostly in the past, when he fashioned his values and

123. *See* Stephen P. Garvey, *Self-Defense and the Mistaken Racist*, 11 NEW CRIM. L. REV. 119, 126 (2008) ("[T]he beliefs we possess at any moment are *not* up to us. We can choose to act or not act on our beliefs, but we cannot choose our beliefs."); A.C. GRAYLING, THE HISTORY OF PHILOSOPHY 496 (2019) (summarizing the views of Hans-Georg Gadamer: "Behind every thought . . . lies a whole body of assumptions and background beliefs . . . .").

124. MODEL PENAL CODE. § 2.09(1) (AM. L. INST. 1985).

125. *Id.* § 2.09 cmt. 2.

126. *Id.*

character, not in the moment when he committed the crime.

III. HEAT OF PASSION AND MORAL HAZARD

So far, in exploring the criminal law's strategy for resolving its moral-hazard problem, I've focused on cases where the difficulty for the defendant of complying with the criminal law's demands would, if not for his role in bringing about that very difficulty, wholly absolve him of liability—and where his role in bringing about the difficulty therefore must, if he's to be held liable, provide a self-sufficient *substitute* locus of blame. Sometimes, though, the difficulties faced by the defendant only partly absolve him of liability. These *partly* exculpating difficulties, like the wholly exculpating kind, sometimes are of the defendant's own creation. And so the question arises whether the defendant's fault in creating these difficulties sometimes can supply a *supplemental* locus of blame, which offsets the mitigating effect of the partial defense.

This question brings us to the defense that is the principal focus of this Article, namely, the heat-of-passion defense. In its traditional form, the heat-of-passion defense requires the defendant to show that he killed the victim in an extreme emotional state—a "heat of passion"—triggered by a sudden provocation.[127] The basic rationale for the defense is that the defendant's extreme emotional state causes volitional impairment, though not in a degree sufficient to provide a complete defense.[128] This volitional impairment excuses the defendant's conduct just enough to justify reducing the offense of conviction from murder to

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127. *See* State v. Smith, 806 N.W.2d 383, 393 (Neb. 2011) ("At common law, 'homicide, even if intentional, was said to be without malice and hence manslaughter if committed in the heat of passion upon adequate provocation.'" (citation omitted)).

128. *See* LAFAVE, *supra* note 107, § 15.2(a) ("The usual type of voluntary manslaughter involves the intentional killing of another while under the influence of a reasonably-induced emotional disturbance (in earlier terminology, while in a 'heat of passion') causing a temporary loss of normal self-control.")

manslaughter.[129]

Subjective volitional impairment isn't the whole story, of course. The heat-of-passion defense doesn't just require that, as a subjective matter, the defendant's self-control be impaired by an extreme emotional state in the moment of the homicidal act. The defense also has, somewhat confusingly, an objective component.[130] Under this objective, reasonable-person component, the provocative event that engendered the defendant's extreme emotional state must be of a kind that would have engendered an extreme emotional state in a "reasonable person," too.[131] If it isn't, then the defendant will be denied the partial defense, and so, if convicted, he will be convicted of murder rather than manslaughter, regardless of whether his self-control actually was subjectively impaired at the moment when he killed his provoker.

Scholars generally have been at a loss to explain why the heat-of-passion defense includes this objective component.[132] After all, if what excuses the emotionally disturbed actor is the volitional impairment that accompanies extreme emotional states, why would not the defense be available to any actor who can show the requisite degree of volitional impairment?[133] One popular answer to this question is that

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129. *See* Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1047 (2011) ("The central idea is that heat of passion impairs a person's agency. A person affected by extreme anger finds it more difficult to exercise self-control than a person in a cooler emotional state."); Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 463–64 (1982) ("[P]rovocation is an excuse premised upon involuntariness based upon reduced choice-capabilities.").

130. LAFAVE, *supra* note 107, § 15.2(b).

131. *Id.*

132. *See* Berman & Farrell, *supra* note 129, at 1033 ("Although the doctrine of provocation is acknowledged to exhibit the *appearance* of both justificatory and excusatory characteristics, most scholars treat this as the puzzle to be resolved, not the key to understanding the doctrine's rationale."); Dressler, *supra* note 129, at 438 (commenting on the prevalent "uncertainty [about] whether the [provocation] defense is a sub-species of justification or of excuse").

133. *See* HORDER, *supra* note 62, at 95 ("The logic of holding a theory centered

the heat-of-passion defense, though it operates primarily as an excuse defense, also has a justificatory component. Mitch Berman and Ian Farrell, for example, have argued that the heat-of-passion defense is both a partial excuse defense and a partial justification defense.[134] What makes a heat-of-passion homicide partly justified, on this view, is the defendant's punitive aim.[135] The objective component of the heat-of-passion defense is designed, on this view, to identify just those cases where the victim's provocative conduct is deserving of sanction. Though the defendant's resort to self-help in the infliction of "punishment" obviously is misguided, the "partially warranting reasons" afforded by his punitive aim mitigate his offense.[136]

The partial-justification theory doesn't work. For one thing, as even Berman and Farrell appear to acknowledge, it fails to explain the requirement of a causal connection between (1) the facts that "partly justify" the defendant's conduct and (2) the emotional impairment that partly excuses his conduct.[137] For another thing, the partial-justification theory fails entirely to account for a central feature of the traditional heat-of-passion defense, namely, the requirement that the killing occur before a reasonable

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on loss of self-control dictates, in effect, that mitigation should be offered to the bad-tempered person who kills upon a punctilio for the same reason as it is offered to the even-tempered person who loses self-control in the face of a serious provocation.").

134. Berman & Farrell, *supra* note 129, at 1065.

135. *See id.* at 1088 (arguing that one "factor that affects the gravity of a right violation is a worthy motive, such as retaliation for the murder or sexual assault of a loved one"); *id.* at 1093–94 (arguing that retaliatory violence is partly justified by the same "reasons customarily invoked to justify state punishment," including "to give [the provoker] what he deserves"; "to prevent [the provoker] from victimizing other innocent persons"; "to deter similar acts of aggression by others"; and "to express the appropriate degree of moral outrage toward [the provoker's] actions").

136. *Id.* at 1090.

137. *See id.* at 1104 (acknowledging that their account of the defense would not, by itself, preclude assertion of the defense in the absence of a causal connection, but asserting that "there are good reasons, consistent with our theory, to retain the causation requirement").

person would have cooled off.[138] If the killing of the defendant's provoker is partly justified, as Berman and Farrell claim, this partial justification endures long after the original provocative event. On their view, then, it wouldn't make sense to deny the defense to defendants whose anger outlasts the reasonable cooling-off period. Indeed, Berman and Farrell tacitly acknowledge as much. Instead of trying to account for the defense's objective cooling-off component, they dismiss it in a footnote as not "a central feature of the doctrine" and claim, on doubtful authority, that "[n]ot all jurisdictions" apply the objective cooling-off component anyway.[139]

A third, and even more fundamental flaw in the partial-justification account of the defense's objective component is that the actor's punitive aims don't actually provide a partial justification, or a "partially warranting reason," for killing another person in anger. In modern societies, as Jeremy Horder observes, "it is the state that claims an all-embracing authority to act on . . . moral reasons relating to the justification for the deliberate infliction of considered punishment and retribution."[140] Not only does privately inflicted retribution not *advance* the public interest; it

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138. *See* MODEL PENAL CODE § 210.3 cmt. 5(a) (AM. L. INST. 1985) (identifying as an essential component of the common law defense the "inquiry . . . as to whether there intervened between the provocation and the resulting homicide a cooling-off period of sufficient duration that the provocation should no longer be regarded as 'adequate'").

139. Berman & Farrell, *supra* 129, at 1042 n.56 ("To the extent that a reasonable cooling-off period is a separate requirement of provocation, it nonetheless ought not be treated as a central feature of the doctrine. Not all jurisdictions limit provocation to circumstances in which a reasonable person would not have had time to 'cool down.'"). For the proposition "[n]ot all jurisdictions" apply this limitation, they rely only on a citation to LaFave. Though LaFave does, admittedly, cite three outdated cases for the supposed "minority view" on the cooling-off period, even he thinks they're aberrations inconsistent with the underlying rationale for the defense: "It would seem that, on principle, if a reasonable-man standard (without regard to defendant's mental and physical peculiarities) is required for provocation . . . , the same standard is equally applicable for cooling-off purposes." LAFAVE, *supra* note 107, § 15.2(d).

140. HORDER, *supra* note 62, at 176.

affirmatively undercuts the public interest by invading the state's monopoly on the infliction of retributive punishment and thereby subverting respect for the rule of law. To this point, defenders of the partial-justification theory presumably would respond that the defendant who acts in response to adequate provocation at least *believes* he's justified. But his beliefs are beside the point. Though the law defers to the defendant's view of the *facts* in deciding whether his actions are justified, it doesn't defer to his *values*.[141] Under the values embodied in the legal systems of modern societies, the desire to inflict private moral retribution can't justify physical violence, even partly.

If heat of passion isn't really a partial-justification defense, though, what explains the defense's objective component? The short answer is that the objective component is designed to exclude from the defense's scope those defendants whose extreme emotional reactions were attributable to their own blameworthy character traits, values, or beliefs.[142] If the reasonable person would not have been provoked to extreme anger by the supposedly provocative event, then we're justified in inferring that the defendant's anger was attributable to some feature of his own psyche—a character trait, perhaps, or a belief—that the defendant *doesn't* share with the normatively reasonable person.[143] The defendant deserves blame, then, for the past actions by which he fashioned the blameworthy values or

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141. *See* MODEL PENAL CODE § 3.02 cmt. 2 (AM. L. INST. 1985) ("[T]he balancing of evils [under the choice-of-evils justification defense] is not committed to the private judgment of the actor.").

142. Jonathan Witmer-Rich, *The Heat of Passion and Blameworthy Reasons to Be Angry*, 55 AM. CRIM. L. REV. 409, 409 (2018).

143. *See* Kahan & Nussbaum, *supra* note 122, at 320 ("The [adequately provoked defendant] is entitled to the mitigating consequences of the doctrine not because her act produced the best state of affairs or because her anger deprived her of control, but rather because her anger was appropriate for someone in her situation. The appropriateness of her emotional motivations, moreover, distinguish her from a person who kills on the basis of less appropriate or fully inappropriate motives.").

dispositions that distinguish him from the reasonable person. This past fault offsets the mitigating effects of the person's volitional impairment in the moment of the homicidal act. Which means he loses the defense.

This isn't a novel idea. When the drafters of the Model Penal Code first explained their extreme emotional disturbance variant of the heat-of-passion defense, they appeared to assume that the point of the defense's objective component was to identify defendants whose extreme emotional state was attributable to their deficient or blameworthy character traits.[144] What's distinctive about the Code variant, as every law student learns, is that it permits the jury to consider some, but not all, of the features of the defendant's own psyche in deciding whether the defendant's extreme emotional reaction had a "reasonable explanation."[145] Under the Code, the jury is permitted to consider, for example, whether the defendant, at the moment of the homicidal act, "had just suffered a traumatic injury," whether he was "blind or distraught with grief," or whether he was "experiencing an unanticipated reaction to a therapeutic drug."[146] In defense of this approach, the drafters explained that the jury first has to exclude all *non*-blameworthy explanations for the defendant's extreme emotional state before it can validly infer that his emotional state was attributable to shortcomings in his moral character. In the drafters' words, factors like the defendant's grief or drug-impairment "are material" to the objective component "because they bear upon the inference as to the actor's character that it is fair to draw upon the basis of his act."[147]

Present-day scholars, too, have recognized that the

144. *See* State v. Dumlao, 715 P.2d 822, 829 (Haw. Ct. App. 1986) (quoting MODEL PENAL CODE § 201.3 cmt. 5 (AM. L. INST., Tentative Draft No. 9, 1959)).

145. *Id.*

146. *Id.*

147. *Id.*

objective component of the heat-of-passion defense is designed, at least in part, to punish defendants whose characters are deficient.[148] Jeremy Horder, for example, has argued that the objective component functions in part by distinguishing (1) defendants whose anger is rooted in correct "judgments of wrongdoing" from (2) defendants whose anger is rooted in incorrect or excessive judgments of wrongdoing. Judgments of wrongdoing are "products of our sets and hierarchies of values, and hence of our moral characters and personalities, for which we are . . . responsible."[149] So the defendant whose anger is rooted in an incorrect or excessive judgment of wrongdoing ultimately is, on Horder's view, "to blame for his moral character."[150] Another scholar, Jonathan Witmer-Rich, likewise has argued that the point of the heat of passion's objective component is to identify cases where "the reason the defendant became extremely angry is blameworthy."[151] On Witmer-Rich's account, this "reason the defendant became extremely angry" might take the form of a character "trait,"[152] as in Horder's account.[153] Or it might take the form of a "belief"[154] or an "attitude."[155]

In the end, though, it doesn't matter whether the root of the defendant's anger is a belief, an attitude, or a character

148. *See* HORDER, *supra* note 62, at 125–26; *see also* Kahan & Nussbaum, *supra* note 122, at 320 ("The appropriateness of [adequately provoked defendant's] emotional motivations . . . distinguish her from a person who kills on the basis of less appropriate or fully inappropriate motives."); Witmer-Rich, *supra* note 142, at 409.

149. HORDER, *supra* note 62, at 125.

150. *Id.* at 126.

151. Witmer-Rich, *supra* note 142, at 414.

152. *Id.* at 451.

153. HORDER, *supra* note 62, at 125–27.

154. Witmer-Rich, *supra* note 142, at 438. Witmer-Rich's draft jury instructions make it clear that the jury is to evaluate the belief or attitude in which the anger originated: "A defendant's extreme anger is not 'reasonable' if it is based on some blameworthy belief, attitude, or trait." *Id.*

155. *Id.*

trait, or for that matter a disposition, a habit, or a value. What matters is just that the objective component of the heat-of-passion defense imposes blame for the defendant's past choices—the choices by which he fashioned his character, habits, beliefs, etc.—not for the defendant's choice in the moment when he committed the crime. Again, in the moment of the crime itself, the defendant chooses what to *do*; he doesn't choose what to believe, or what to feel, or who he is. Accordingly, when the law imposes liability on the basis of what the defendant believes or feels or who he is, rather than on the basis of what he *does*, it necessarily is ascribing or imputing blame to the defendant for his past choices. What the Model Penal Code's drafters said about the duress defense is true of the heat-of-passion defense too: the defense doesn't concern itself exclusively with the defendant's culpability in the moment of the climactic act. It concerns itself too with the defendant's culpability in "the fashioning of [his] values and character."[156]

Finally, it's important to be clear, because the scholars sometimes aren't, about what it means for a defendant's character or beliefs or dispositions to be worthy of blame. Fortunately, the jury isn't really required to decide whether the defendant's character or beliefs "contradict[] the fundamental values of the political community," as some scholars have supposed.[157] All that matters is whether the defendant's choices about how to constitute himself—about how to fashion his values and character—create an unjustifiable risk that he eventually will find himself unable to comply with the criminal law's external rules.[158] After all,

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156. MODEL PENAL CODE § 2.09 cmt. 2 (AM. L. INST. 1985).

157. *See* Witmer-Rich, *supra* note 142, at 414 ("[P]rovocation is not adequate if the reason the defendant became extremely angry is blameworthy. A belief is blameworthy if it contradicts the fundamental values of the political community. The blameworthiness principle distinguishes those features of a defendant that *cannot* form a basis for him to argue he was reasonably provoked from those features that *can* properly form the basis of a provocation claim.").

158. *Cf.* MODEL PENAL CODE § 3.09(2) (AM. L. INST. 1985), which provides that where a defendant believes he is justified in using defensive force but is "reckless

the heat-of-passion defense's objective component is a strategy for addressing the criminal law's moral-hazard problem. Like other such strategies, it ultimately is designed only to ensure that the defendant will be able to live up to his obligations under the criminal law when the climactic moment arrives. It's not designed to make him good for goodness's sake.[159]

In summary, the heat-of-passion defense doesn't concern itself exclusively with the defendant's degree of fault in the moment when he killed his provoker. The defense's objective component—its requirement that the provocation be sufficient to stir even a reasonable person to great anger—is designed to identify defendants whose anger was attributable to their deficient character, beliefs, or values. In cases where the defendant's anger was attributable to deficient character, beliefs, or values, the defendant's culpability in fashioning his character, beliefs, or values provides a kind of supplemental locus of blame. The defendant's blameworthiness in these earlier choices supplements the blameworthiness associated with the killing itself. It offsets the mitigating effect of the defendant's anger. So the culpability associated with the killing itself and the culpability associated with the failure to take adequate precautions against the killing, together, justify liability for murder.

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or negligent in having such belief," the justification afforded by section 3.04 "is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability." This section implies, of course, that the formation of a belief is blameworthy only when the belief poses a "substantial and unjustified risk," as the Code's definitions of recklessness and negligence provide.

159. *Cf.* Lawrence v. Texas, 539 U.S. 558, 577 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.")).

IV. CARRYING A GUN IN PUBLIC AS A SUPPLEMENTAL LOCUS OF BLAME

Of course, cultivating a virtuous disposition isn't the only way that you can reduce the risk that you'll wind up killing another person in anger. Another popular and very effective way of reducing this risk is by not carrying a loaded gun in public. If you don't have a weapon in your immediate possession—in a shoulder holster, say, or under the seat of your car—you're unlikely to have access to a weapon in the moments after you're provoked. You won't usually find guns or knives or bludgeons just lying around in convenience store parking lots, for example. And if you don't have ready access to a weapon in the moments after you're provoked, you're not very likely even to try to kill your provoker, much less to succeed.[160] Killing someone with your bare hands is difficult, as lots of would-be killers have learned.[161] Even when it's possible, moreover, it's usually very gruesome. The gruesomeness of, say, slowly and methodically strangling another person to death over the course of several minutes is likely to dissuade all but the most committed of would-be killers.[162]

Like the cultivation of a virtuous disposition, then, the simple expedient of not carrying a loaded gun dramatically reduces the risk that you'll wind up killing another person in anger. So the question arises: Should the failure to avail

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160. *See* KONRAD LORENZ, ON AGGRESSION 241 (Marjorie Kerr Wilson trans., 1966) ("In human evolution, no inhibitory mechanisms preventing sudden manslaughter were necessary, because quick killing was impossible anyhow . . . .").

161. *See id.*; *see also* John Larson, *Teen Blogger Murder Trial*, NBC NEWS (July 23, 2013), http://www.nbcnews.com/id/13962555/ns/dateline_nbc/t/teen-blogger-murder-trial/#.XxYIJihKg2w (recounting killer's description of Lauri Waterman's death).

162. *See* LORENZ, *supra* note 160, at 242 ("The distance at which all shooting weapons take effect screens the killer against the stimulus situation which would otherwise activate his killing inhibitions . . . . No sane man would even go rabbit hunting if the necessity of killing his prey with his natural weapons brought home to him the full, emotional realization of what he is actually doing.").

oneself of this expedient have the same legal effect as the failure to cultivate a virtuous disposition? As we've seen, the law of homicide denies the heat-of-passion defense to killers whose anger at their provoker was rooted in a character trait or habit that isn't shared by the reasonable person.[163] In effect, the law treats the defendant's failure to cultivate a virtuous character—his failure to avail himself of this opportunity to reduce the risk that he'll later kill someone else in anger—as a supplemental locus of blame, which offsets the mitigating effect of the defendant's anger in the moment of the killing itself. Should the law likewise treat the decision to carry a loaded gun—that is, the failure to avail oneself of this simple alternative method of dramatically reducing the risk that one will later kill someone in anger—as a supplemental locus of blame?

It probably should. When an individual carries a loaded gun in public and then, after being provoked, uses the gun to kill another person unlawfully in the heat of passion, the law is justified in imputing blame to him on the basis of his earlier decision to carry the gun, no less than the law is justified imputing blame to an individual who fails to cultivate a reasonably virtuous disposition. Moreover, this imputation is justified in every case where the defendant lacks a compelling justification for carrying a gun. The government shouldn't be required to make a case-specific showing that the defendant was, say, reckless or criminally negligent in arming himself in the first place. Nor should the government be required to make a case-specific showing of causation. It shouldn't be required, that is, to show that the defendant's decision to carry a gun was a cause of the subsequent killing. It is enough that the defendant, when he committed the homicide, used the gun he was carrying.

As a preliminary matter, it's important to acknowledge the limitations of the analogy between not carrying a gun, on the one hand, and cultivating a virtuous disposition, on the

163. *See supra* text accompanying notes 130–59.

other. The decision not to carry a gun is different in lots of respects from the "decision" not to cultivate a virtuous disposition. No one just "decides" not to cultivate a virtuous disposition. Dispositions good and bad are developed gradually over time and "from our very youth," as Aristotle says.[164] When the law imputes blame to the defendant for his failure to cultivate a virtuous disposition, then, it doesn't and can't identify a specific choice or series of choices as a locus of blame. In stark contrast, the decision to leave one's home with a loaded gun, in the minutes or hours before the provocation, is discrete and easily identified. If the law is justified in imputing fault to the defendant on the basis of his decision to carry a loaded gun, then, this imputation probably is justified by factors different than those that justify imputing fault to the defendant who fails to cultivate a virtuous disposition.

Voluntary intoxication is a more instructive analogy. Again, courts generally deny mitigating effect to voluntary intoxication, on the theory that the defendant's blameworthiness in becoming voluntarily intoxicated offsets the mitigating effect of any impairment engendered by the intoxication.[165] As it happens, this general rule has specific application in the heat-of-passion context. According to Professor LaFave, a voluntarily intoxicated actor who kills "does not qualify for the voluntary manslaughter treatment where, because of intoxication, he easily loses his self-control; that is to say, he is to be judged by the standard of the reasonable sober man."[166] In other words, voluntary intoxication plays the same role in the heat-of-passion homicide cases as does a less-than-virtuous disposition: lack of self-control that's attributable to one's earlier decision to become intoxicated won't exculpate, any more than will lack of self-control that's attributable to the failure to cultivate a

164. ARISTOTLE, *supra* note 73, bk. II, ch. 1.

165. *See supra* text accompanying notes 106–11.

166. LAFAVE, *supra* note 107, § 15.2(b)(10).

virtuous disposition. In this setting, as in others, the voluntary decision to become intoxicated provides a supplemental locus of blame, which offsets the mitigating effects of the impairment.

As it happens, roughly the same factors that justify imputing fault to the voluntarily intoxicated actor also justify imputing fault to the actor who carries a loaded gun in public. First, just as everyone knows about the risks associated with extreme intoxication,[167] everyone knows about the risks posed by firearms. The potential of loaded guns to cause fatal injuries to human beings isn't hidden, as it is with some dangerous instrumentalities.[168] On the contrary, in the usual case this potential to inflict fatal injuries is exactly what makes the thought of carrying a gun so attractive to the individuals who do so. Moreover, just as it makes sense to assume that the defendant was aware generally of the risks posed by carrying a loaded firearm in public, it also makes sense to suppose that the defendant was aware that the risk of shooting somebody in anger was among these risks. Knowledge of human nature, like knowledge of firearms, is well-dispersed.

Second, and again like intoxication, carrying a gun usually, if not always, has little or no "affirmative social value to counterbalance the potential danger."[169] This

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167. *See* MODEL PENAL CODE § 2.08 cmt. 1 (AM. L. INST. 1985) (observing that awareness of the risks posed by extreme intoxication are "by now so dispersed in our culture" that it makes sense, purely as a factual matter, to suppose that everybody shares in this awareness); *see also* Regina v. Majewski, [1975] 3 All ER 296, 299, *aff'd sub nom.* DPP v. Majewski, [1976] 2 All ER 142 (UK) ("The facts are common-place—indeed so commonplace that their very nature reveals how serious from a social and public standpoint the consequences would be if men could behave as the appellant did and then claim that they were not guilty of any offence.").

168. *See* Commonwealth v. Pierce, 138 Mass. 165, 179 (1884) (Holmes, J.) ("[I]f the danger is due to the specific tendencies of the individual thing, and is not characteristic of the class to which it belongs, . . . a person to be made liable must have notice of some past experience . . . .").

169. MODEL PENAL CODE § 2.08 cmt. 1 (AM. L. INST. 1985) (discussing intoxication).

presumably is why, before the Supreme Court decided *District of Columbia v. Heller*,[170] some state and local governments either proscribed entirely the carrying of loaded guns in public or strictly regulated it.[171] They balanced the risks and benefits of carrying a loaded gun and on that basis concluded that the risks posed by the conduct so outweighed the benefits as to justify the imposition of criminal liability per se.[172] This relative lack of "affirmative social value" also is why, presumably, even after the courts began striking down statutes that prohibited or strictly regulated the carrying of loaded firearms in public, very few people—around one in every hundred—actually took advantage of their new freedom.[173] If carrying a gun had as much utility as, say, driving a car—another dangerous activity—more people would do it.

Carrying a gun sometimes does have substantial social utility, of course. Some peace officers, for example, have good reason for carrying guns. So would a victim of domestic

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170. 554 U.S. 570 (2008).

171. *See, e.g.*, Peruta v. California, 137 S. Ct. 1995, 1996 (2017) (Thomas, J., dissenting from the denial of certiorari) ("California generally prohibits the average citizen from carrying a firearm in public spaces, either openly or concealed. With a few limited exceptions, the State prohibits open carry altogether."); Wrenn v. D.C., 864 F.3d 650, 655 (D.C. Cir. 2017) (striking down, as violative of the Second Amendment, a District of Columbia statute that "confine[d] carrying a handgun in public to those with a special need for self-defense"); Moore v. Madigan, 702 F.3d 933, 934 (7th Cir. 2012) (striking down, as violative of the Second Amendment, Illinois's blanket prohibition on public carry).

172. *See* Gould v. Morgan, 907 F.3d 659, 673 (1st Cir. 2018) (acknowledging that Massachusetts, in fashioning its regime for the regulation of public carry, "endeavored 'to prevent the temptation and the ability to use firearms to inflict harm, be it negligently or intentionally, on another or on oneself.'"); *see also* Christopher Ingraham, *3 Million Americans Carry Loaded Handguns with Them Every Single Day, Study Finds*, WASH. POST (Oct. 19, 2017, 4:19 PM) https://www.washingtonpost.com/news/wonk/wp/2017/10/19/3-million-americans-carry-loaded-handguns-with-them-every-single-day-study-finds/ ("[In 2017] a comprehensive analysis of decades of crime data found that states that made it easier to obtain concealed-carry permits saw a 10 percent to 15 percent increase in violent crime in the decade following the change.").

173. *See* Ingraham, *supra* note 172.

violence who recently had left her abuser and who subsequently had received threats on her life.[174] But the legislature easily can make accommodations for cases like these. It can create an exception to the forfeiture rule for cases where, say, the defendant reasonably believed that he was in grave danger when he armed himself. Some states already use similar provisions to limit the scope of existing firearms statutes. Massachusetts, for example, makes public-carry licenses available to applicants who have "good reason to fear injury to the applicant."[175] The existence of a few narrow exceptions wouldn't undercut the value of the forfeiture rule, since few homicide defendants would satisfy the exceptions. Certainly not Drejka, whose reason for carrying a gun apparently was to enable him to hector other people without fear of reprisal.

If the known risks of carrying a loaded gun far outweigh the benefits, does that mean everybody who carries a loaded gun is blameworthy? Of course not. In this respect, too, carrying a gun is like getting intoxicated. Lots of people get intoxicated, just as lots of people carry guns. But we don't, nor could we probably, punish everyone who gets intoxicated or carries a gun. Rather, where both intoxication and guns are concerned, the blame we impute for the *earlier* decision—the decision to get drunk, the decision to arm oneself—is based in part on what happens *later*.[176] This is a third respect

174. *See* CAL. PENAL CODE § 25600 (West 2012) (creating a defense to a charge of "carrying a concealed firearm" under Cal. Penal Code § 25400 "when a person who possesses a firearm reasonably believes that person is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person who has been found to pose a threat to the life or safety of the person who possesses the firearm").

175. MASS. GEN. LAWS ANN. ch. 140, § 131(d) (West 2021); *see also, e.g.*, CAL. PENAL CODE § 26045 (West 2012) ("Nothing in Section 25850 is intended to preclude the carrying of any loaded firearm, under circumstances where it would otherwise be lawful, by a person who reasonably believes that any person or the property of any person is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property.").

176. *Cf.* Norvin Richards, *Luck and Desert*, 95 MIND 198, 201 (1986) (arguing that the results of a defendant's conduct—the fact that his driving causes an

in which carrying a gun is akin to voluntary intoxication: From the fact that the intoxicated person wound up committing a crime under the influence of alcohol, we infer that his decision to imbibe was culpable. Likewise, from the fact that the person who armed himself later wound up using the gun to kill another person unlawfully, it makes sense to infer that his decision to carry a gun was culpable.

This backwards-looking inference—from the homicide to the defendant's culpability in arming himself—isn't perfect, of course. But it's probably the best the law can do under the circumstances. Because the defendant's fault in this setting will depend on what he knows from personal experience about, say, his powers of self-control and his vulnerability to anger, it wouldn't be realistic to require the government affirmatively to prove the defendant's fault; it wouldn't be realistic to require the government to prove that the defendant was, say, reckless or negligent in overlooking the risk that he would use the firearm to kill someone in anger.[177] In this fourth respect, too, the imputation of blame for carrying a firearm is justified for the same reasons as the imputation of blame for intoxication: The knowledge that bears on the risks associated with intoxication, like the knowledge that bears on the risks associated with carrying a gun, is mostly *self*-knowledge. And so, as the drafters of the Model Penal Code observed, "litigating the foresight of a particular actor at the time when he imbibes" would pose

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accident, for example—sometimes justify an inference that the conduct was culpable); Gayle Heriot, *The Practical Role of Harm in the Criminal Law and the Law of Tort*, 5 J. CONTEMP. LEGAL ISSUES 145, 151 (1994) (same); *but see* Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 IOWA L. REV. 59, 123–25 (2005) (criticizing both Richards and Heriot and arguing that the results of a defendant's conduct "take[] us only a tiny step toward proof of fault").

177. *Cf.* Wagner, *supra* note 88, at 79–80 ("Because of the court's informational restraints, it seems impossible [in a fault-based regime] to preserve the promisor's incentives to take efficient precautions against non-performance."); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 20 cmt. b (AM. L. INST., Tentative Draft No. 1, 2001) ("Claims that a defendant's entire activity is negligent are difficult to bring, [in part] because of problems involved in gathering all the relevant information . . . .").

"impressive difficulties."[178] Both where intoxication and where arming oneself are concerned, then, the only alternative to imputing fault on the basis of how things turned out is conferring impunity on defendants for their role in creating the very difficulties that supposedly excuse their crimes.

The defendant's fault in the earlier moment when he armed himself, whether imputed or proved, probably wouldn't justify enhancing his punishment for the homicide unless his fault in this earlier moment was connected causally to the victim's death. So, is proof that the defendant *used* the gun to kill the victim sufficient to prove that his decision to carry a gun caused the victim's death? It is. Granted, it isn't sufficient to prove *but-for* causation. In rare cases, the defendant might be able to argue plausibly that if he hadn't used the gun to kill the victim, he would have found another way. But it wouldn't make sense to require but-for causation in this context, any more than it would make sense in the accomplice liability context. When an accomplice is charged with murder for supplying the murder weapon to the principal, the government isn't, and realistically couldn't be, required to prove that the principal wouldn't have succeeded in carrying out the murder without the accomplice's help.[179] It is enough to show, rather, that the accomplice's aid "contributed" to the result.[180] It is enough that the aid "be shown to have put the deceased at a disadvantage, to have

178. MODEL PENAL CODE § 2.08 cmt. 1 (AM. L. INST. 1985).

179. *See* Commonwealth v. Smith, 391 A.2d 1009, 1011 (Pa. 1978) ("Once it has been determined that [the defendant] was an accomplice, proof that the principal caused the death satisfies the requirement of establishing the causal relationship of the accomplice."); Eric A. Johnson, *Cause-in-Fact After* Burrage v. United States, 68 FLA. L. REV. 1727, 1761 (2016) (explaining why "courts consistently have taken the view that an accomplice's conduct need not be a but-for cause").

180. *See* State v. Davis, 356 S.E.2d 340, 343 (N.C. 1987) ("In cases where a defendant is prosecuted as an accessory before the fact to murder, the state must prove beyond a reasonable doubt that the actions or statements of the defendant somehow caused or contributed to the actions of the principal, which in turn caused the victim's death.").

deprived him of a single chance at life."[181] This contribution test always will be satisfied where the defendant uses the gun he is carrying to kill the victim. He'll always be his own accomplice, in other words.[182]

So far, I've really only sketched a possible answer to the question whether we'd be justified, as a society, in treating the defendant's decision to carry a loaded gun in public as a supplemental locus of blame, sufficient to offset the mitigating effect of the heat-of-passion defense. In the three Parts that follow, I'll fill in a lot of what's missing from this crude sketch. I'll focus in particular on three questions: (1) Does risk of the kind that's posed by an actor's decision to carry a gun—self-mediated risk, as I'll call it— ever really justify the ascription of moral blame? (2) If we're justified in imputing blame to decisions like Drejka's decision to carry a firearm, why doesn't the law ever treat decisions like these as freestanding bases for criminal liability? (3) Does an imputation of fault, like the one I'm urging, really provide an adequate substitute for proof beyond a reasonable doubt of offense-specific culpability?

V. CAN SELF-MEDIATED RISK MAKE CONDUCT MORALLY WRONGFUL?

In the usual criminal case, what makes conduct wrongful is the risk it creates. In Holmes's words: "In the characteristic type of substantive crime acts are rendered criminal because they are done under circumstances in which they will probably cause some harm which the law seeks to prevent."[183] As we've described it, the moral

181. State *ex rel.* Martin v. Tally, 15 So. 722, 738–39 (Ala. 1894).

182. *Cf.* MODEL PENAL CODE § 2.06(4) (AM. L. INST. 1985) ("When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.").

183. HOLMES, *supra* note 2, at 75.

wrongfulness of carrying a loaded gun is of just this kind. What makes carrying a loaded gun wrong, I've argued, is the risk that someone will die.

But the risk posed by carrying a gun also is different, in a way, from the risks that usually provide the bases for criminal prosecutions. In the usual case, the risks that provide the bases for a criminal prosecution are mediated either (1) by the "working of natural causes,"[184] as where the defendant causes a sleeping homeowner's death by setting fire to his residence; or (2) by the actions of other people, as where the defendant causes another person's death by lending his car keys to a drunk friend. By contrast, most or all of the risks posed by the defendant's decision to carry a gun are mediated by the defendant's own future volitional actions. Unless the defendant himself later decides, volitionally, to remove the gun from its holster and fire it, his decision to carry the gun almost certainly won't wind up causing harm to anybody. The only risks posed by the decision to carry the gun are *self-mediated* risks, then.[185]

Do self-mediated risks bear on the wrongfulness of an actor's conduct in the same way that other sorts of risk do? As it happens, this question has been the subject of disagreement among moral philosophers since the 1970s.[186] The philosophers are divided into two camps. "Actualists" take the view that predictions about an actor's future conduct—about the actor's "own future moral mistakes"—are among the circumstances that bear on the wrongfulness of his present conduct.[187] "Possibilists," by contrast, take the

184. *Id.* at 67.

185. *See generally* Johnson, *supra* note 70, at 537–65.

186. *See* Derek Baker, *Knowing Yourself—And Giving Up on Your Own Agency in the Process*, 90 AUSTRALASIAN J. PHIL. 641, 642 (2012) (recounting debate between "actualists" and "possibilists"); MICHAEL J. ZIMMERMAN, THE CONCEPT OF MORAL OBLIGATION 189 (1996) (explaining that the question whether self-mediated risk bears on moral obligations "can be couched in terms of two broad doctrines, which have come to be called 'actualism' and 'possibilism'").

187. Torbjörn Tännsjö, *Moral Conflict and Moral Realism*, 82 J. PHIL. 113, 115

view that an actor's present moral obligations are defined not by what the actor *would* or *might* do in the future but by what he has the *capacity* to do in the future—by "what is *possible* for the agent."[188] For the possibilist, then, the risk that Michael Drejka would use his .40 caliber Glock handgun to kill another person unlawfully in anger did not bear on the wrongfulness of his decision to carry the gun with him when he ventured into public on the day he killed McGlockton, since Drejka had the capacity all along to control his later conduct.

Though criminal-law theorists generally have ignored this philosophical debate, most appear to have assumed, albeit without putting it this way, that the morality at work in the criminal law is possibilist, rather than actualist.[189]

(1985) ("[A]n action of ours is wrong if, instead of performing it, we could have acted otherwise so that the consequences in the circumstances would have been better; my own future moral mistakes as well as the moral mistakes made by others are then taken to be part of the circumstances."); *see also* Holly S. Goldman, *Dated Rightness and Moral Imperfection*, 85 PHIL. REV. 449, 486 (1976) (arguing that the moral status of a current act depends partly on "the nature of the subsequent acts it would in fact lead the agent to perform"); Frank Jackson & Robert Pargetter, *Oughts, Options, and Actualism*, 95 PHIL. REV. 233, 233, 255 (1986) (defending "actualism," which the authors define as "the view that the values that should figure in determining which option is the best and so ought to be done out of a set of options are the values of what *would* be the case were the agent to adopt or carry out that option"); Jennie Louise, *I Won't Do It! Self-Prediction, Moral Obligation and Moral Deliberation*, 146 PHIL. STUD. 327, 327 (2009) (arguing that "predictions of wrongdoing affect our objective moral obligations").

188. Louise, *supra* note 187, at 328 ("'Possibilism'[] holds that predictions of wrongdoing are not relevant, and that we should evaluate each option according to what is *possible* for the agent were that option to be chosen."); *see also* Holly S. Goldman, *Doing the Best One Can*, *in* VALUES AND MORALS 209 (Alvin Goldman & Jaegwon Kim eds., 1978) ("[W]e must conclude that the acts an agent would perform if he performed a given act are not to be counted as relevant circumstances in assessing the moral status of a given act."); ZIMMERMAN, *supra* note 186, at 190 (defining possibilism as the view that "*S* ought (overall) to do *A* if what *could* happen if *S* did *A* is deontically superior to what *could* happen if *S* performed any alternative action"); *id.* at 206 ("[A]ctualism has unacceptable implications, whereas possibilism does not. It is clear which is preferable.").

189. *See* Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1169 (1997) ("[F]or an *act* to be culpable, the act must appear to the defendant to increase the risks to others in

David Luban has said, for example, that an actor's conduct can't qualify as morally wrongful if the actor's "later self [will have] an opportunity to reconsider and abandon a course of action that might turn out to be [criminal]."[190] Larry Alexander and Kim Ferzan have articulated the underlying intuition still more clearly: "[F]or an act to be culpable, the act must appear to the defendant to increase the risks to others in a way that is not dependent on [the] defendant's future choices. In other words, [a] defendant cannot view his own future choices as matters subject to his prediction."[191]

At first glance anyway, the case law too appears to support this conventional, possibilist view. If self-mediated risk really could make a defendant's conduct wrongful, then one would expect to find cases where the courts had imposed liability for, say, reckless endangerment on the basis of risks that were mediated by the defendant's own future conduct.[192] One doesn't. For example, in cases where a defendant is prosecuted for reckless endangerment on the basis of his possession of a firearm, courts always assume that the

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a way that is not dependent on defendant's future choices. In other words, [a] defendant cannot view his own future choices as matters subject to his prediction."); Andrew Ashworth, *The Unfairness of Risk-Based Possession Offenses*, 5 CRIM. L. & PHIL. 237, 250–51 (2011) (arguing that the risk mediated by the actor's own future conduct cannot make his present conduct wrongful, since he or she "may undergo a change of mind"); R.A. Duff, *Criminalizing Endangerment*, 65 LA. L. REV. 941, 964 (2005) ("[T]he law should not prohibit intrinsically harmless conduct on the mere grounds that the agent might go on to create a risk of harm . . . . "); David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957, 972 (1999) (arguing that an actor's conduct cannot qualify as wrongful if the actor's "later self [will have] an opportunity to reconsider and abandon a course of action that might turn out to be [criminal]"); A.P. Simester & Andrew Von Hirsch, *Remote Harms and Non-Constitutive Crimes*, 28 CRIM. JUST. ETHICS 89, 97–98 (2009) (arguing that risks mediated by the actor's own future conduct cannot make his present conduct wrongful).

190. *See* Luban, *supra* note 189, at 972.

191. Alexander & Kessler, *supra* note 189, at 1169; *see also* Duff, *supra* note 189, at 964 ("[T]he law should not prohibit intrinsically harmless conduct on the mere grounds that the agent might go on to create a risk of harm . . . .").

192. *See* MODEL PENAL CODE § 211.2 cmt. 1 (AM. L. INST. 1985) ("Virtually every modern [criminal code] revision effort follows the Model Code in including a [reckless endangerment offense].").

conviction must be grounded either (1) on risks mediated by "the working of natural causes," like the risk that the gun will go off accidentally;[193] or (2) on risks mediated by the actions of other people, like the risk that somebody else will react violently.[194] Courts don't ever invoke the risk that the defendant himself will wind up firing the gun deliberately.

Does that mean that, as the possibilists claim, self-mediated risk can't make an actor's conduct wrongful? Actually, no. First of all, self-mediated risk plays an indispensable role in lots of perfectly uncontroversial criminal law doctrines. Consider, for example, how the criminal law handles cases like Trish's. Trish, as you will recall, stupidly went four-wheeling in a blizzard and then, after she got stuck, broke into an unoccupied cabin to keep from freezing to death. In Trish's case, as most would agree, her conduct in breaking into the cabin was justified by necessity.[195] At the same time, however, just about everybody also would agree that Trish should be criminally liable for breaking into the hunting lodge.[196] Since Trish's

193. *See, e.g.*, People v. Malcolm, 902 N.Y.S.2d 264 (App. Div. 2010), where the defendant's conviction for reckless endangerment was based on evidence that he had reloaded his rifle while aiming it at another man and then had struggled with the other man for control of the rifle. In concluding that this conduct had created a "grave risk of death," the appellate court relied only on the possibility that the loaded rifle might have discharged accidentally. *Id.* at 268. The court did not rely on several facts that suggested Malcolm wanted to kill the other man and probably would have done so if only he had succeeded in regaining control of the rifle. The court did not rely, for example, on the fact that Malcolm had tried to shoot the same man just seconds before—an act for which he was convicted separately of attempted murder. *Id.* at 266. Nor did it rely on the fact that Malcolm, as he struggled with the other man for control of the rifle, repeatedly said to him, "You ruined my life." *Id.* at 267. Nor, finally, did the court rely on the fact that Malcolm had brought more than 60 rounds of ammunition with him to the scene of the confrontation. *Id.*

194. *See, e.g.*, Commonwealth v. Baker, 429 A.2d 709, 710 (Pa. Super. Ct. 1981) ("Another circumstance in which a reaction to the accused's conduct could supply the element of actual danger of harm is where the pointing of an unloaded gun could trigger retaliatory gunfire.").

195. *See* LAFAVE, *supra* note 107, § 10.1(d)(1) (explaining elements of necessity defense).

196. *See* ALEXANDER & FERZAN, *supra* note 70, at 39 (acknowledging Trish's

justified conduct in breaking into the cabin wasn't wrongful, her fault must instead inhere in her decision to go four-wheeling in a blizzard.[197] If this earlier moment is the locus of Trish's fault, however, then it follows that her fault is predicated on self-mediated risk. After all, the only risks posed by Trish's earlier decision to go four-wheeling, apart from the risk to Trish herself, were risks mediated by her own future conduct—by the possibility that Trish would, say, break into an unoccupied cabin.[198] In cases like Trish's, then, the criminal law necessarily assumes that self-mediated risk bears on wrongfulness.

Self-mediated risk plays an indispensable role in lots of other cases, too. Among these are the many and varied cases where the law requires the jury to compare what the defendant perceived, believed, or felt in the moment of the criminal act to what a reasonable person would have perceived, believed, or felt.[199] In these cases, as we've seen, the real locus of blame is the past decisions by which the defendant cultivated the wrong dispositions, habits, or beliefs—that is, the dispositions, habits, or beliefs that

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culpability).

197. Robinson, *supra* note 82, at 31 (arguing that the actor's liability in the "causing conditions" cases must be "based on his initial conduct in causing the defense conditions with the accompanying [mental state], not on the justified or excused conduct that he subsequently performs"); Garvey, *supra* note 123, at 165 (acknowledging that in causing-conditions cases like Trish's "the only thing the actor has chosen to do that he should not have done is risk exposing himself to a threat he ought instead have chosen to avoid").

198. Of course, the risk to Trish herself from this earlier conduct wasn't mediated by her own later conduct. She might have frozen to death even without doing anything further. But risk to the safety of the defendant herself, though it might make her conduct in the earlier moment imprudent, would not make her conduct wrongful. What makes conduct wrongful is danger to another person's life, limb, or property. *See* W. PAGE KEETON, PROSSER ON TORTS § 65, at 453 (5th ed. 1984) (explaining that "contributory negligence," whereby the actor creates a risk of harm to himself, isn't really negligence at all, since negligence is conduct that "creates an undue risk of harm to others"); *cf.* JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 35–36 (1987) (asserting that no wrong has occurred if the actor voluntarily inflicts harm upon himself or freely assumes the risk of harm-causing activity).

199. *See supra* text accompanying notes 117–26.

distinguish him from the reasonable person. What makes these past decisions blameworthy, though, can only be self-mediated risk. An individual's dispositions, habits, and beliefs can't cause cognizable harm to others except through the medium of the individual's own future actions. Thus, when the law denies the duress defense to a defendant whose fear was attributable to his exceptional timidity, and so imputes blame to the defendant for his earlier "fashioning of values and character,"[200] this blame is justified only by self-mediated risk—only by the risk that the defendant's timidity will cause him to harm another person by act or omission.

So the first reason why the criminal law can't be possibilist is that the criminal law frequently assigns weight to self-mediated risk. The second reason is even more compelling: possibilism doesn't make any sense. According to possibilists, again, the reason why we can't assign weight to predictions about the defendant's own future conduct is that the defendant himself controls what he does in that future moment.[201] Depending on what they mean by this claim, though, the claim either is inconsequential or utterly false. If possibilists mean by this that the defendant has the power in the future moment, T_2, to control what he does in that moment, then their claim is true but inconsequential, since the decision we're evaluating is the decision at T_1. If instead possibilists mean that the defendant has the power in the earlier moment, T_1, to control what he does at T_2, then their claim is just false. Of course, an individual has the power to influence his own future conduct by forming plans or making resolutions. Human beings are, as Michael Bratman has said, "planning creatures."[202] Because human beings have the ability to plan for the future, and to resolve to follow through, an actor's orientation to his future conduct is never

200. MODEL PENAL CODE § 2.09 cmt. 2 (AM. L. INST. 1985).

201. *See* authorities cited *supra* note 187.

202. Michael Bratman, *Taking Plans Seriously*, 9 SOC. THEORY & PRAC. 271, 271 (1983).

exclusively predictive. But that doesn't mean, of course, that the actor exercises volitional control at T_1 over what he'll do later, at T_2. Plans and resolutions sometimes prove ineffectual.[203]

In this respect, the actor's present self—his self at T_1—bears a relationship to the actions of his future self, at T_2, that is not fundamentally different from his relationship to the actions of other people.[204] He has the power to exert influence over his future self by making plans and resolutions, much as he has power to exert influence over other people by making arguments and exhortations. But both powers are way less than perfect.[205] And both powers are, moreover, different in kind from the actor's *volitional* control over what he does at T_1. Because the actor's power at T_1 to control what he does later, at T_2, is less than perfect, he sometimes is morally obligated to consider at T_1 the probabilities associated with his future conduct at T_2. As Torbjörn Tännsjö has rightly argued: "We ought not to lend our friend our car if we suspect that he *will* drive heavily drunk, even if he *could* make good use of it. But, by the same

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203. *See* Baker, *supra* note 186, at 644 ("I am in control of what I will do in the future. But the control seems imperfect. Years of experience with my future self have taught me that, despite the intimacy of our relationship, he frequently lets me down."); David Brooks, *The Machiavellian Temptation*, N.Y. TIMES, (Mar. 2, 2012), https://www.nytimes.com/2012/03/02/opinion/brooks-the-machiavellian-temptation.html ("You usually can't change your behavior simply by resolving to do something. If that were true, New Year's resolutions would actually work. Knowing what to do is not the same as being able to do it. If [it were], people would find it easier to lose weight."); DUA LIPA, NEW RULES (Universal Music Grp. 2017) ("Don't be his friend, you know you'll only wake up in his bed in the morning.").

204. Johnson, *supra* note 70, at 553; *cf.* Derek Parfit, *Personal Identity*, 80 PHIL. REV. 3, 17, 26 (1971) (arguing that "what matters in the continued existence of a person are, for the most part, relations of degree" and that among the relations of degree that define the continued existence of a person is "the relation between an intention and a later action").

205. *See* MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY 25 (2009) ("[I]t is an illusion to think that the surface of our skin marks any break in the degree of our control, that we lack control over what happens in the outside world while we have control of what goes on inside.").

token, we must take our own future mistakes into account. *Both* kinds of mistakes determine what the consequences of our [present] actions will be."[206]

It's hard to imagine a clearer illustration of this point than Michael Drejka's case. When Drejka left his home on the day of Marquis McGlockton's death, Drejka knew that he was short-tempered and that he had threatened other people with guns at least once before.[207] He also knew that he had a tendency to confront other people over their perceived moral transgressions—in particular, people who park in handicapped spots had "always touched a nerve" with him, he said.[208] He knew, moreover, that these confrontations had the potential to "go sideways."[209] He even told a convenience store owner who confronted him about his conduct, "I cannot help it. I get myself in trouble."[210] Finally, he knew that he had at his disposal a wholly effective expedient for preventing his temper from causing anybody serious harm, namely, leaving his gun at home. To argue that Drejka, when he left his home with a loaded gun on the day of McGlockton's death, had no moral obligation to consider the probabilities associated with his future conduct isn't just wrong. It's irresponsible.

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206. Tännsjö, *supra* note 187, at 115.

207. Transcript of Sentencing Hearing at 45, State v. Drejka, No. 18-09851-CF (Fla. Cir. Ct. Oct. 10, 2019).

208. Tamara Lush, *Newly Released Records Show Lead-Up to Parking Lot Shooting*, AP NEWS (Sept. 24, 2018), https://apnews.com/406e79bcdef44b428c3956d082329981/Newly-released-records-show-lead-up-to-parking-lot-shooting.

209. Transcript of Sentencing Hearing at 47, State v. Drejka, No. 18-09851-CF (Fla. Cir. Ct. Oct. 10, 2019).

210. *Id.* at 46.

VI. WHY THE LAW IMPOSES LIABILITY FOR SELF-MEDIATED RISK ONLY AFTER THE RISK COMES TO FRUITION IN HARMFUL (OR RISK-UNLEASHING) CONDUCT

One difficulty with the argument in the preceding Part is that the choices it identifies as bases for imposing or enhancing punishment—choices about what to believe, for example, and choices about what kinds of character traits to develop—aren't the kinds of choices we ordinarily think of as suitable bases for punishment. To the contrary, these are the sorts of choices we usually think of as fundamental to individual liberty and therefore beyond the government's reach in a liberal society. The same thing is true, moreover, of a person's decision to carry a firearm, which is protected by the Second Amendment.[211] So we've got a kind of paradox: On the one hand, legislatures don't and probably couldn't create freestanding criminal offenses that require the government merely to prove that the defendant made bad choices about, say, what to believe or what sort of character to develop. On the other hand, these very same choices appear sometimes to serve as substitute or supplemental loci of blame in prosecutions for *other* offenses. Isn't that inconsistent?

Notice first that this same paradox is present, albeit in a less troubling form, even in the Trish hypothetical.[212] Everybody agrees that Trish would be subject to prosecution for breaking into the boarded-up cabin. And everybody agrees too, I hope, that the real locus of culpability in this prosecution is Trish's decision to go four-wheeling in a blizzard, rather than her decision to break in. What's paradoxical about this conclusion is that Trish clearly *wouldn't* have been subject to prosecution if the risk posed by her decision to go four-wheeling hadn't come to fruition. Some states have inchoate property-endangerment offenses

211. D.C. v. Heller, 554 U.S. 570, 595 (2008) (holding that the Second Amendment protects the right of an individual to keep and bear arms).

212. *See supra* text accompanying notes 70–71.

that prohibit recklessly creating a risk of harm to another person's property.[213] As we've seen, though, self-mediated risk—the kind of risk posed by Trish's decision to go four-wheeling—doesn't figure in prosecutions for inchoate endangerment offenses.[214] So there's a paradox: Trish's fault supposedly inheres in her decision to go four-wheeling, but her decision to go four-wheeling wouldn't provide a freestanding basis for prosecution.

In Trish's case at least, the legislature probably *could* decide to criminalize, if it wanted to, the choice that provides the substitute locus of fault. If it wanted to, the legislature could decide to create, say, a misdemeanor offense of "four-wheeling in a blizzard," on the theory that people who go four-wheeling in blizzards too often wind up breaking into other people's property to avoid freezing to death. In fact, legislatures occasionally do adopt criminal statutes that, in substance if not in form, punish the inchoate creation of self-mediated risk. Statutes that prohibit possession of firearms by convicted felons appear to be of this kind: They appear to be addressed to the risk that the felon will later misuse the firearm volitionally.[215]

It seems doubtful, though, whether the legislature also could decide to create offenses that criminalize, say, the formation of certain beliefs or the cultivation of certain character traits, even if the beliefs and character traits

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213. *See, e.g.*, N.Y. PENAL LAW § 145.25 (McKinney 2009) ("A person is guilty of reckless endangerment of property when he recklessly engages in conduct which creates a substantial risk of damage to the property of another person in an amount exceeding two hundred fifty dollars.").

214. *See supra* text accompanying notes 192–94.

215. *See* Alexander C. Barrett, *Taking Aim at Felony Possession*, 93 B.U. L. REV. 163, 197 (2013); MOORE, *supra* note 37, at 21; United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010). The Supreme Court relied in part on a similar rationale in upholding the federal law criminalizing so-called "partial-birth abortion" in *Gonzales v. Carhart*. 550 U.S. 124 (2007). The Court said that the statute advanced the government's legitimate interest in cultivating "respect for life" in physicians who perform abortions. *Id.* at 158. The risk posed by physicians who lack respect for human life is, of course, self-mediated.

enhance the long-term risk that the individual will wind up harming someone else. In a free society, as the Supreme Court frequently has said, the thoughts and dispositions of the individual aren't really the government's business: "The government 'cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.'"[216] So the question naturally arises: If the government can't adopt statutes that punish the formation of beliefs or the cultivation of dispositions *directly,* as freestanding criminal offenses, doesn't it follow that the government also can't punish the formation of beliefs or the cultivation of dispositions *indirectly*, by treating them as substitute or supplemental loci of blame in prosecutions for other offenses? More to the point, isn't the same true of the individual's protected decision to carry a gun in public?

As it turns out, some scholars would make just this argument. Stephen Garvey, for example, makes this argument in relation to the reasonable-person component of self-defense.[217] As Garvey astutely observes, this reasonable-person component *does* punish individuals for what they believe.[218] After all, if an individual's belief that he is justified in using force is unreasonable, and if he is denied the defense on this basis, then he really is being punished not for what he did in the moment of the killing itself, but rather for the earlier choices by which he acquired his

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216. Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002) (quoting Stanley v. Georgia, 394 U.S. 557, 565 (1969); *see also, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977) (stating that "in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State"); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973) (stating that "[t]he fantasies of a drug addict are his own and beyond the reach of government"); Stanley v. Georgia, 394 U.S. 557, 565 (1969) (noting that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds").

217. Garvey, *supra* note 123, at 170.

218. *See id.* at 135–40 (identifying the reasonable-belief requirement as a forfeiture rule, which—like other forfeiture rules—punishes the defendant for his choice at an earlier moment in time).

belief.[219] For Garvey, however, this makes the reasonable-person component problematic. According to Garvey, if it were permissible to punish individuals for their unreasonable beliefs *after* these beliefs come to fruition in harm to others, then it also would be permissible to punish individuals for their unreasonable beliefs *before* they come to fruition in harm to others.[220] Which it obviously isn't, at least in a liberal society.[221] So, according to Garvey, the reasonable-person component of self-defense is illegitimate.[222]

Garvey makes roughly the same argument in relation to the objective component of the heat-of-passion defense. According to Garvey, if the defense's objective component—its requirement that the provocation be sufficient to stir even a reasonable person to great anger—really is designed to punish defendants whose anger is attributable to deficient

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219. *Id.* The Model Penal Code makes this aspect of the reasonable-belief standard explicit by replacing it with a requirement that the government, to defeat the defendant's self-defense claim, prove that the defendant was reckless or negligent in forming the belief that he was under attack or that force was necessary to repel the attack. MODEL PENAL CODE § 3.09(2) (AM. L. INST. 1985).

220. Garvey, *supra* note 123, at 165, 169.

221. *Id.* at 155 ("Any recognizably liberal society has no authority to punish its citizens for who they are, no matter the content of their character.").

222. To roughly the same end, Garvey also argues that individuals don't choose their beliefs and that "a liberal state cannot punish an actor for a choice he never made." *Id.* at 162. He acknowledges that an individual's beliefs are influenced *indirectly* by his choices—choices about what sorts of information to gather or expose himself to, for example. *Id.* at 161–62. But the relationship between these choices and the individual's beliefs is, Garvey says, "too weak" to support punishing him on the basis of his beliefs. *Id.* at 162. Beliefs would justify punishment only if individuals chose their beliefs "directly"—only, that is, if they had direct volitional control over what they believe. *Id.* at 160. He makes roughly the same argument in relation to character. *Id.* at 155–56. Garvey doesn't really defend his decision to assign dispositive weight to the distinction between choices that influence beliefs and character traits *directly* and choices that influence beliefs and character traits *indirectly*. And it's obviously problematic. Consider intoxication. It's true that nobody has the ability just to *decide* in the moment whether to be intoxicated or impaired; we influence our intoxication only indirectly, by taking drinks of alcoholic beverages. But nobody would argue on this basis that we're not accountable for our voluntary intoxication.

character, then this objective component is illegitimate.[223] The major premise of his argument appears to be the same as it was with respect to the reasonable-person component of self-defense: If it were permissible to punish individuals for their vicious dispositions *after* these dispositions come to fruition in harm to others, then it also would be permissible to punish individuals for their vicious dispositions *before* they come to fruition.[224] It's obviously not permissible to punish individuals for their vicious dispositions before these dispositions come to fruition in harm to others, at least in a liberal society.[225] It follows, then, that it's also not permissible to punish individuals for their vicious dispositions after they come to fruition in harm to others, as the heat-of-passion defense does.

Garvey doesn't really defend the shared major premise of these two arguments, namely, that the government's power to punish beliefs and dispositions necessarily is the same *after* the beliefs and dispositions cause harm as *before*.[226] But the premise appears to be rooted in his conception of liberal society. If freedom of thought really is fundamental to liberal society, as it appears to be, then it can't be something that gets cast aside whenever it proves inexpedient—whenever other practical concerns are arrayed against it. In other words: the protection the law affords under ordinary circumstances to choices about what to believe, and about how to constitute one's character, *can't* just be the product of a balancing of interests. So it can't be contingent on the harmlessness of the individual's beliefs and character choices. It's absolute. As Garvey says: "[A] liberal state worthy of the name cannot take character"—or for that matter belief— "to be the ultimate target of state

223. Stephen P. Garvey, *Passion's Puzzle*, 90 IOWA L. REV. 1677, 1716 (2005).

224. *Id.*

225. *Id.*

226. *See* Garvey, *supra* note 123, at 165, 169; Garvey, *supra* note 223, at 1716.

punishment."[227]

Despite its seeming logic, this is a bad argument. For starters, the argument would lead to case outcomes that are, to say the least, counterintuitive. Consider, for example, the case of Stephen Carr, who killed two lesbian hikers on the Appalachian Trail after becoming enraged by the "'show' put on by the women."[228] Of the Carr case, Garvey argues both that Carr was free to cultivate an overpowering hatred of homosexuals and, at the same time, that Carr ought to have been afforded an opportunity to invoke the rage generated by this hatred to partly excuse his crime.[229] To deny Carr the benefit of the heat-of-passion defense, Garvey argues, would be to punish Carr for his disposition rather than his conduct.[230] And to punish Carr for his disposition rather than his conduct would be "illiberal," according to Garvey.

The consequences of Garvey's views are even more troubling where self-defense is concerned. Garvey himself illustrates these consequences by constructing a hypothetical "mistaken racist," who mistakenly becomes convinced, as a consequence of his racist beliefs and dispositions,[231] that an African-American young man on the subway is about to kill him, and who subsequently shoots and kills the young man in self-defense.[232] On Garvey's view, the mistaken racist would be entitled to a complete defense, since to deny him the defense would be to punish him not for the shooting itself but, rather, for the earlier choices that made him a racist—for "choos[ing] to act in ways likely to cause him to become or remain a racist."[233] A liberal society doesn't punish choices like these *before* they cause another person's death— "a

227. Garvey, *supra* note 123, at 156–57.

228. Commonwealth v. Carr, 580 A.2d 1362, 1363–64 (Pa. Super. Ct. 1990).

229. Garvey, *supra* note 223, at 1716.

230. *Id.*

231. Garvey, *supra* note 123, at 128.

232. *Id.* at 123–24.

233. *Id.* at 169.

liberal state cannot make it a crime to be a racist,"[234] Garvey says. So neither can it punish choices like these *after* they cause another person's death.

The trouble with Garvey's argument is simple. The fact that a principle is very important—like the general principle that "one's beliefs should be shaped by his mind and his conscience rather than coerced by the State"[235]—doesn't mean that it's not, at bottom, the product of a balancing of interests. At least where the criminal law is concerned, lots of fundamental principles are the outcome of balancings of interests. Take the criminal law's fundamental distinction between acts and omissions, for example. As Michael Moore has argued, the reason why the criminal law doesn't ordinarily punish omissions probably is just that the state's interest in punishing wrongful omissions is outweighed, in the usual case, by the defendant's liberty interests.[236] For one thing, omissions generally are *less wrongful* than acts.[237] For another, laws requiring us to act in a particular way are *more oppressive* than laws that merely forbid us to act in a particular way.[238] So the balance of interests comes out differently where failures to act are concerned than where voluntary acts are concerned.

In just the same way, where the choices by which individuals fashion their beliefs and characters are concerned, the balance comes out differently *after* these choices cause the individual to violate the criminal law than

234. *Id.* at 155.

235. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977).

236. MOORE, *supra* note 37, at 58; *see also* ALAN BRUDNER, PUNISHMENT AND RESPONSIBILITY: A LIBERAL THEORY OF PENAL JUSTICE 109–114 (2009) (summarizing Moore's view).

237. MOORE, *supra* note 37, at 58 (explaining that there is a "very real difference . . . in the moral force of our negative versus our positive duties").

238. MICHAEL S. MOORE, PLACING BLAME 278 (1997) (explaining that "a law that (positively) coerces me to do some action takes away more of my liberty than does a law that (negatively) coerces me from doing some action" since there are lots of ways of conforming with a negative duty and only one way of conforming with a positive duty).

before. Before the individual violates the criminal law, the law rightly forestalls intervention for the sake of permitting the individual to decide for himself how to conform his conduct to the law. Though a free society has a legitimate interest in making its citizens conform their conduct to the law, as Antony Duff argues, it has no legitimate interest in monitoring exactly *how* they manage to conform their conduct to the law.[239] A person might conform his conduct to the law by cultivating the right "dispositions of feeling and appetite."[240] On the other hand, a person who was not virtuous in her disposition might nevertheless manage to conform her conduct to the criminal law by exercising self-control—by successfully struggling "to overcome her own feelings."[241] In either event, though, the result is the same. Therefore, a free society ought not, Duff argues, to "attend to the distinctions between virtue and self-control, and between weakness of will and vice."[242] "[S]o long as we do not commit what the law defines as crimes," Duff says, "the law has no interest in why we do not commit them."[243]

After the individual violates the criminal law's external rules, however, the balance changes. The reason, basically, is that criminal law defenses, and some offense definitions too, assign weight to the difficulty for the individual of complying with the law's demands in the moment of the criminal act.[244] If the law assigns weight to the difficulty for the defendant of complying with the law's demands, it can't

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239. Duff, *supra* note 55, at 168; *see also* HORDER, *supra* note 62, at 128 (explaining that it "is not a matter of concern to the criminal law" whether people manage to avoid committing crimes by cultivating virtuous dispositions or instead manage to avoid committing crimes by exercising self-restraint).

240. Duff, *supra* note 55, at 163.

241. *Id.* at 164.

242. *Id.* at 168 ("[N]ot even the most aspirational perfectionist is likely to want to give the criminal law this kind of interest in its citizens' virtues or vices.").

243. *Id.* at 168; *see also* MOORE, *supra* note 37, at 54 (observing that the criminal law "rightly shies away from punishing bad character").

244. *See supra* text accompanying notes 62–67.

also forego scrutiny of the choices that led the defendant to that pass. It can't really refuse to distinguish (1) the individual who took every precaution against violating the criminal law but still found himself in circumstances that made compliance with the law impossible or very difficult; and (2) the individual who faced similar circumstances but only because he neglected to take precautions—only because he allowed himself to become violently homophobic, for example, or violently racist. If the law doesn't distinguish these individuals, then it will leave individuals with no incentive to take precautions against violating the law. It will, for example, leave them with no incentive to cultivate either virtue or self-control, as Dan Kahan and Martha Nussbaum have observed.[245] And so, over the long run, the criminal law will be less effective than it should be in "induc[ing] external conformity to rule."[246]

In the final analysis, this is why the law treats self-mediated risk differently than other risks: not because self-mediated risks can't make choices wrongful, but because the balance of interests—the balance of the government's interest in punishing wrongdoing and the defendant's interest in liberty—comes out differently where self-mediated risks are concerned. As long as the risks posed by the defendant's conduct are self-mediated—as long as the defendant's "later self [will have] an opportunity to reconsider and abandon a course of action that might turn out to be [criminal]"[247]—the individual's interest in deciding for himself how to bring his conduct into conformity with the law deserves to carry the day. Once the defendant "unleashes the risk," however, the balance changes. Even in a free society, the government's interest in maximizing the

245. Kahan & Nussbaum, *supra* note 122, at 360 (arguing that a criminal law crafted on Garvey's model would tell citizens, "Don't worry about making yourself into the sort of person who gets provoked only by events that are really grave, don't worry about schooling yourself not to lash out in unreasonable ways.").

246. HOLMES, *supra* note 2, at 49.

247. Luban, *supra* note 189, at 972.

individual citizen's opportunities for moral self-determination is counterbalanced by its interest in preventing conduct that is potentially harmful to other people. These two interests are accommodated best by a criminal law that intervenes—in the usual case—only after the actor has relinquished his last opportunity to control the effects of his conduct on other people.

Finally, just as the decisions by which a person fashions his character or beliefs aren't subject to protection *after* they cause him to commit a crime, nor is a person's decision to carry a firearm in public subject to protection *after* he uses the firearm to kill another person. Though the Second Amendment appears generally to protect an individual's right to carry a loaded gun in public,[248] lots of statutes uncontroversially enhance a defendant's punishment on the basis of the fact that he was carrying a firearm when he committed the crime.[249] "The right to keep and bear arms in lawful self-defense doesn't include the right to use those arms in a crime," as Eugene Volokh has said.[250] Where the defendant later uses a gun to kill another person unlawfully, then, nothing would prevent the law from assigning weight to his decision to carry the gun in public.

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248. *See* Wrenn v. D.C., 864 F.3d 650, 655 (D.C. Cir. 2017) (striking down, as violative of the Second Amendment, a District of Columbia statute that "confine[d] carrying a handgun in public to those with a special need for self-defense"); Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) (striking down, as violative of the Second Amendment, Illinois's blanket prohibition on public carry).

249. *See, e.g.*, 18 U.S.C. § 924(c)(1)(A) (2018) (specifying mandatory sentence enhancements for defendants, who in the course of a crime of violence or a drug-trafficking crime, carry, brandish, or discharge a firearm).

250. Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and A Research Agenda*, 56 UCLA L. REV. 1443, 1537 (2009).

VII. WHY WE'RE JUSTIFIED IN IMPUTING FAULT TO THE DEFENDANT

Even if the decision to carry a firearm can, in theory, serve as a supplemental locus of blame in a homicide prosecution, the question still remains under just what circumstances the law is justified in ascribing or imputing fault to the defendant for carrying a firearm. I've argued that the law should impute fault to the defendant on the basis merely of two facts: (1) that he was carrying a loaded gun in public when the provocative event occurred; and (2) that he later used the gun to kill the victim unlawfully and in anger. But, of course, imputed fault is disfavored in criminal law. In the ordinary case, the jury ought actually to decide, on the basis of case-specific evidence, whether the defendant was at fault. So the question naturally arises whether imputing fault can be justified here.

As every first-year law student learns, the law generally requires the government to prove that the defendant had a culpable mental state in relation at least to the "elements that make the conduct criminal."[251] In homicide prosecutions, for example, the law generally requires the government to prove that the defendant, when he engaged in the conduct that caused the victim's death, had a particular culpable mental state in relation to the death of a person—intentionally, perhaps, or recklessly or negligently.[252] The law doesn't always require this sort of jury determination, of course. Where offenses like drunk-driving homicide are concerned, for example, the law requires the government only to prove that the defendant knew of the circumstances

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251. Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019) ("In determining Congress' intent, we start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994))).

252. *See, e.g.*, MODEL PENAL CODE § 210.2 (AM. L. INST. 1985) (defining offense of murder); *id.* § 210.3 (defining offense of manslaughter).

in which the risk inhered—knew that he had been drinking, for example, and knew that he was operating a motor vehicle.[253] Where offenses like drunk-driving homicide are concerned, the circumstances known to the defendant in effect provide the basis for an antecedent legislative judgment that the conduct was reckless or negligent per se.[254]

There is a big difference, though, between imputing fault on the basis of the facts known to the defendant when he acted, as drunk-driving homicide statutes do,[255] and imputing fault on the basis of *how things turned out*. The law does sometimes impute fault on the basis of how things turned out. For example, in prosecutions for sexual abuse of a minor, the law of most jurisdictions imputes culpability to the defendant in relation to the critical age element purely on the basis of the fact that the victim turned out to be underage.[256] But criminal statutes that impute culpability on

253. *See, e.g.*, People v. Garner, 781 P.2d 87, 89 (Colo. 1989) (en banc); State v. Hubbard, 751 So. 2d 552, 563 (Fla. 1999); State v. Creamer, 996 P.2d 339, 343 (Kan. Ct. App. 2000); Reidweg v. State, 981 S.W.2d 399, 406–07 (Tex. Ct. App. 1998); Allen v. State, 43 P.3d 551, 569 (Wyo. 2002).

254. *See* Mark Kelman, *Strict Liability: An Unorthodox View*, *in* 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1512, 1516 (Sanford H. Kadish ed., 1983) ("[T]he key to seeing strict liability as less deviant in the criminal justice system is . . . to see the real policy fight as a rather balanced one over the relative merits and demerits of precise rules (conclusive presumptions) and vague, ad hoc standards (case-by-case determinations of negligence)."); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 744 (1960) (characterizing antecedent legislative judgments underlying statutes like these as "similar to a jury determination that conduct in a particular case was unreasonable").

255. The best indication that drunk-driving homicide statutes punish the defendant on the basis of the circumstances known to him when he acted, rather than on the basis of how things turned out, is that drunk-driving is a crime even when it doesn't cause someone's death.

256. *See* United States v. Wilson, 66 M.J. 39, 41 (C.A.A.F. 2008); Maxwell v. State, 895 A.2d 327, 336 n.7 (Md. Ct. Spec. App. 2006); State v. Holmes, 920 A.2d 632, 635 (N.H. 2007); State v. Browning, 629 S.E.2d 299, 303 (N.C. Ct. App. 2006); State v. Jadowski, 680 N.W.2d 810, 819 (Wis. 2004). For a helpful summary of the current law in all fifty states, *see* Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 385–

the basis of how things turned out *are* strongly disfavored, at least where the element in relation to which the statute imputes culpability is one that distinguishes criminal from innocent conduct. This disfavor is reflected in how courts interpret statutes. It is reflected in cases like *Rehaif v. United States*, for example, where the Supreme Court held that the statute defining the offense of being an undocumented immigrant in possession of a firearm actually required the government to prove that the defendant "knew he belonged to the relevant category of persons barred from possessing a firearm."[257] It was not enough that the defendant *turned out* to be an undocumented immigrant.

At least at first glance, my proposed limit on the heat-of-passion defense would appear to run afoul of these general principles. After all, it imputes fault to the defendant for his decision to carry a firearm, and this imputation of fault is based in part on how things turned out later—on the fact that the defendant eventually wound up using the firearm to kill someone in the heat of passion. On closer examination, though, the matter is less clear. Specifically, it's not clear whether the general principles reflected in cases like *Rehaif* actually bear on cases where the locus of fault is temporally removed from the act that triggers liability.

To explain: In the ordinary type of crime, the culpable mental state required of the defendant is one that coincides temporally with his performance of the voluntary act that triggers liability. When a defendant is prosecuted for reckless homicide, for example, what matters is whether he was reckless in the instant when he performed the voluntary act that eventually caused the victim's death.[258] The same is true of non-result-based offenses like being a convicted felon

91 (2003).

257. Rehaif v. United States, 139 S. Ct. 2191, 2200 (2019).

258. *See* MOORE, *supra* note 37, at 36 (explaining that the fact finder must, in the usual case, identify a single "point in time where the act and *mens rea* requirements are simultaneously satisfied, and from which the requisite causal relations exist to some legally prohibited state of affairs").

in possession of a firearm. In these cases, too, the required culpable mental states—knowledge of the prior felony conviction, for example, and knowledge that one is in possession of a firearm—must coincide temporally with the required conduct. In the ordinary sort of crime, then, "the act concur[s] with the mental fault."[259] This structural feature of ordinary crimes is reflected in the concurrence requirement: "With those crimes that require mental fault," as Professor LaFave has said, "it is a basic premise of Anglo-American criminal law that the physical conduct and the state of mind must concur."[260]

Not all crimes share this structural feature, though, as we've learned. In some criminal cases—specifically, in some cases where the defendant himself contributes to the difficulties that justify, excuse, or partly excuse his subsequent criminal conduct—the real locus of fault is temporally removed from the act that triggers liability.[261] When a defendant is denied the benefit of the duress defense on the ground that his fear was attributable to his exceptional timidity, for example, the real locus of fault is not "the moment of the climactic choice" but, rather, the much earlier moment or moments when the defendant "fashion[ed] [his] values and . . . character."[262] In cases like these, the law doesn't impose liability directly for the decisions by which the defendant fashioned his values and character. Rather, the

259. LAFAVE, *supra* note 107, § 6.3.

260. *Id.*; *see also* CAL. PENAL CODE § 20 (West 1872) ("In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence."); IDAHO CODE ANN. § 18-114 (West 1972) ("In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence."); NEV. REV. STAT. ANN. § 193.190 (West 1911) ("In every crime or public offense there must exist a union, or joint operation of act and intention, or criminal negligence."); MONT. CODE ANN. § 45-2-103(1) (West 1995) ("Except for deliberate homicide as defined in 45-5-102(1)(b) or an offense that involves absolute liability, a person is not guilty of an offense unless, with respect to each element described by the statute defining the offense, a person acts while having one of the mental states of knowingly, negligently, or purposely.").

261. *See supra* text accompanying notes 97–126.

262. MODEL PENAL CODE § 2.09 cmt. 2 (AM. L. INST. 1985).

law forestalls intervention until the purely self-mediated risk inherent in these earlier decisions comes to fruition in a violation by the defendant of the criminal law's external rules.[263] As a result, the real locus of fault—the substitute or supplemental locus of blame, as I've called it—winds up being temporally dislocated from the act that triggers liability.

Cases where courts express disfavor toward imputed fault generally are cases where the defendant's fault, imputed or proved, concurs with the act that triggers liability. Is imputed fault held in the same disfavor in cases where the defendant's fault is temporally removed from the act that triggers liability, as criminal law theorists sometimes suppose?[264] It doesn't appear to be.

Consider the Model Penal Code. The drafters of the Model Penal Code didn't take a backseat to anyone in their active dislike for imputed fault. This dislike is reflected, for example, in the Code's rejection of the felony-murder doctrine, which imputes fault to the defendant for homicide on the basis of his participation in the underlying predicate felony.[265] The drafters' dislike for imputed fault also is reflected in the way they formulated the *mens rea* principle. Unlike the traditional common law version of the principle, which presumes only that the legislature meant to require proof of culpability with respect to those offense elements that differentiate criminal from innocent conduct,[266] the

263. *See supra* text accompanying notes 97–126.

264. *See, e.g.*, Michael S. Moore, *Addiction, Responsibility, and Neuroscience*, 2020 U. ILL. L. REV. 375, 414–16 (2020) (arguing that the "tracing strategy," which imposes liability for conduct at T_2 on the basis of the defendant's culpability in an earlier moment T_1, doesn't work unless the government proves the defendant's culpability in the earlier moment on the same terms as would be required if the prosecution were based on his culpability at the later moment).

265. MODEL PENAL CODE § 210.2 cmt. 6 (AM. L. INST. 1985).

266. *See, e.g.*, Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019) ("[W]e start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" (citation

Code's version requires the government to prove culpable mental states with respect to *all* material elements, including elements that merely differentiate more from less serious versions of the same offense.[267]

Despite the disfavor in which they apparently held imputed fault, the drafters relied almost exclusively on imputed fault in settings where the locus of the defendant's fault was temporally removed from the act that triggered liability.[268] The drafters acknowledged that when a defendant is denied the benefit of the duress defense on the ground that his fear was attributable to exceptional timidity, he really is being blamed for how he "fashion[ed] [his] values and . . . character."[269] They did not, however, require the government to prove that the defendant, when he made the choices by which he fashioned his character and values, was

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omitted)).

267. MODEL PENAL CODE § 2.02(1) (AM. L. INST. 1985); *see also id.* § 223.1 cmt. 1 (explaining the rationale for applying this more-demanding variant of the *mens rea* principle in connection with the crime of aggravated theft: "The amount involved in a theft has criminological significance only if it corresponds with what the thief expected or hoped to get. To punish on the basis of actual harm rather than on the basis of foreseen or desired harm is to measure the extent of criminality by fortuity.").

268. There are exceptions. For example, *id.* § 3.02(2) provides that an actor who causes the conditions requiring "a choice of harms of evils" won't forfeit the choice-of-harms defense unless he actually was reckless or negligent in bringing about those conditions, and *id.* § 3.09(2) provides that a defendant who mistakenly believes that his conduct is justified in self-defense will forfeit the defense only if he was reckless or negligent in forming the mistaken belief. Unlike lots of other Code sections, these sections have proven unpopular with state legislatures, and with good reason. For one thing, it's not clear as to what, exactly, the defendant must be reckless or negligent. The logical answer would appear to be the offense element or elements as to which the offense requires recklessness or negligence. But the section doesn't say that. Nor do the pattern jury instructions. *See* HAW. CRIM. PATTERN JURY INSTRUCTIONS § 7.12 (HAW. SUP. CT. 2021) (requiring the jury simply to decide whether the "actor was reckless or negligent in bringing about the situation requiring a choice of harms"); PA. SUGGESTED STANDARD CRIM. JURY INSTRUCTIONS § 8.314 (PA. BAR INST. 2016) (requiring jury to decide whether "in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his or her conduct, the defendant was not reckless or criminally negligent").

269. MODEL PENAL CODE § 2.09 cmt. 2 (AM. L. INST. 1985).

aware of the risk that his character and values ultimately would cause harm to others. The Code's drafters acknowledged, too, that when a defendant is denied the benefit of the extreme emotional disturbance defense on the ground that his "explanation or excuse" for the disturbance is objectively unreasonable, he really is being blamed for his "character."[270] But they didn't require the government to prove that the defendant, when he made the choices by which he cultivated a particular character trait, was aware that this character trait would make him more dangerous to others. Finally, with respect to voluntary intoxication, the Code's drafters acknowledged that the voluntarily intoxicated defendant's culpability inheres partly in the moment "when he imbibes."[271] But they didn't require the government to prove that the defendant, when he imbibed, was aware that his intoxication might later cause him to commit an offense. Rather, they were content to impute fault to the defendant on the basis of (1) his voluntary consumption of an intoxicant and (2) how things turned out.[272]

No movement is underway among courts or legislatures to purge the law of these sorts of imputed fault elements. On the contrary, the trend appears to be in the other direction. Granted, in the 1970s and 1980s a number of courts and legislatures tried to eliminate the imputed fault element from the criminal law's treatment of intoxication.[273] The

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270. *See* State v. Dumlao, 715 P.2d 822, 829 (Haw. Ct. App. 1986) (quoting MODEL PENAL CODE § 201.3 (AM. L. INST., Tentative Draft No. 9, 1959)).

271. *See* MODEL PENAL CODE § 2.08 cmt. 1 (AM. L. INST. 1985) ("Becoming so drunk as to destroy temporarily the actor's powers of perception is conduct that plainly has no affirmative social value to counterbalance the potential danger. The actor's moral culpability lies in engaging in such conduct.").

272. *See supra* text accompanying notes 109–11.

273. *See, e.g.*, HAW. REV. STAT. § 702-230(1) (1976) (making evidence of intoxication admissible and relevant to negate any statutory mental state, not just "specific intent"); Commonwealth v. Graves, 334 A.2d 661, 663 (Pa. 1975) (holding that evidence of intoxication is admissible and relevant to negate any statutory mental state, not just "specific intent"). *See generally* Mitchell Keiter,

Hawaii Legislature, for example, did away entirely with traditional limits on the admissibility of intoxication evidence in 1976, making the defendant's intoxication admissible whenever it was relevant "to prove or negative . . . the state of mind sufficient to establish an element of the offense."[274] The effect of this provision was, of course, to do away with imputed fault: if, in the moment he committed the crime, the defendant lacked the statutory mental state as a result of his intoxication, the government would actually have to *prove*, to convict him, that he had the required mental state in the moment when he imbibed.[275] In Hawaii and elsewhere, not surprisingly, these changes eventually triggered a decisive countertrend.[276] In 1986, the Hawaii Legislature adopted a new statute that entirely "prohibits the jury from considering self-induced intoxication to negate the defendant's state of mind."[277] Other state legislatures have adopted similar measures.[278]

Just Say No Excuse: The Rise and Fall of the Intoxication Defense, 87 J. CRIM. L. & CRIMINOLOGY 482, 482 (1997) (discussing expansion of intoxication defense and the resulting countertrend).

274. State v. Freitas, 608 P.2d 408, 410 (Haw. 1980) (quoting HAW. REV. STAT. § 702-230(1) (1976)).

275. The legislative commentary to the Hawaii Penal Code says of this section: "If, as the Model Penal Code's commentary states, 'awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture,' then it hardly seems necessary to postulate a special rule of equivalence between intoxication and recklessness, or, as has been suggested, create a presumption of recklessness. All that is wisely required is to insure that evidence of intoxication will be admissible to either prove or rebut recklessness. This the Code does." HAW. REV. STAT. ANN. § 702-230 cmt. (West 2015).

276. JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW CASES AND MATERIALS 629 (8th ed. 2019) (commenting in relation to voluntary intoxication that "[a] strong countertrend is underway").

277. HAW. REV. STAT. ANN. § 702-230 (West 1986). The Hawaii Supreme Court later rejected a constitutional challenge to the statute, which is summarized as designed "to prevent defendants who willingly become intoxicated and then commit crimes from using self-induced intoxication as a defense." State v. Souza, 813 P.2d 1384, 1386 (Haw. 1991).

278. *See* Montana v. Egelhoff, 518 U.S. 37, 56 (1996) (upholding Montana statute that "disallow[ed] consideration of voluntary intoxication when a

Why, if imputed fault is so strongly disfavored in the ordinary run of criminal cases, is imputed fault the norm in cases where the fault element is temporally dislocated from the act that triggers liability? The answer might have something to do with *control*. In the class of cases we are discussing, the risk that makes the defendant's earlier choice wrongful is self-mediated risk, which can only come to fruition via a later voluntary act by the defendant. These cases differ from ordinary criminal cases, then, in that the defendant, after making the choice that provides the locus of moral blame, actually has control over whether the risk comes to fruition. This isn't to say, of course, that moral blame attaches to the exercise of volition by which the risk comes to fruition. The law doesn't really have any business demanding of, say, the extremely timid actor that he transcend his fear in the moment of the criminal act. Still, if his choice in the later moment isn't the locus of *moral* blame, it nevertheless is an indispensable condition of *legal* blame. And he controls it, if only barely.[279] So his legal duty, if not his moral duty, is disjunctive: He either can fashion his character aright *or* he can refuse later to act on his character-generated fear. The availability of this second, later opportunity to exercise control over his liability might explain, in part, why the law is not averse to imputing blame in relation to the earlier opportunity.

The better explanation, though, is that imputing fault in settings like these is indispensable to the functioning of the criminal law as a system defined by "a mutuality of benefit and burden."[280] In settings where the locus of blame is temporally removed from the act that triggers liability, the risks that make the defendant's conduct wrongful generally will be self-mediated risks. Unlike other risks, self-mediated risks depend mostly on the probabilities associated with the

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defendant's state of mind is at issue").

279. *See* Takacs v. Engle, 768 F.2d 122, 126 (6th Cir. 1985) ("We do not believe that proof of duress negates the voluntary act requirement.").

280. Morris, *supra* note 52, at 477.

individual's *own future conduct*. They might depend, for example, on the probability that the individual's decision to cultivate racist beliefs eventually—perhaps years later—will cause him to perceive threats of violence where they don't exist. Or they might depend on the probability that the individual's decision to become intoxicated eventually will cause him to commit a serious crime. Probabilities like these depend on facts uniquely within the defendant's knowledge.[281] Neither the government nor the jury usually will be in a position to reconstruct what the defendant knew in the earlier moment about his vulnerability to the effects of intoxication, say, or about his vulnerability to anger.

In settings where the defendant's fault hinges on self-mediated risk, then, imputed fault cannot really be denounced (as imputed fault usually is by scholars) as a "pragmatic, unprincipled device[] to make it easier for prosecutors to obtain convictions."[282] The alternative to imputing fault in these settings wouldn't be for prosecutors to work harder. The alternative would be to relieve individuals of accountability for choices that pose real, if self-mediated, risks to others—choices by which the individuals create the very difficulties they later invoke to justify, excuse, or partly excuse their later conduct. The alternative, in other words, would be to accept a criminal law that demands less of some individuals than others.[283] Worse even than the reality of this inequality, though, would be the *message* of inequality conveyed by conferring impunity on defendants like Drejka. When the criminal law works correctly, "it tells members of an audience who may identify

281. Naturally, the criminal law calculates self-mediated risk as it calculates other risks: according to "the circumstances known to [the defendant]" in the moment of the ostensibly culpable choice. HOLMES, *supra* note 2, at 75; MODEL PENAL CODE § 2.02(2)(c), (d) (AM. L. INST. 1985).

282. R.A. DUFF, ANSWERING FOR CRIME 261 (2009).

283. *Cf. Egelhoff*, 518 U.S. at 49–50 (explaining that the Montana statute disallowing consideration of voluntary intoxication "comports with and implements society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences").

themselves as belonging to very different communities (in terms of wealth, race, etc.) that each is a citizen of the same society, subject to the same duties and punishments."[284] Drejka's conviction for manslaughter rather than murder sends the opposite message. It tells the community that people like Drejka are free to shift the risk of their noncompliance with the criminal law to others—others like Markeis McGlockton and his three children.[285]

CONCLUSION

On the surface, the criminal law doesn't appear to accommodate rules like the one I've proposed. First of all, the kind of risk created by carrying a gun outside the home—self-mediated risk, in other words—appears not to make conduct wrongful in the way criminal law usually requires. Second, criminal law appears to treat some individual choices—choices about what to believe, for example, and about whether to carry a gun—as so deeply personal that they not only cannot supply a freestanding basis for criminal liability but, in addition, cannot supply a basis for assigning blame, either. Third, the criminal law appears to disfavor imputing fault to the defendant on the basis of how things turned out. It would appear to disfavor, for example, imputing fault to the "mistaken racist" merely on the basis of the fact that his racist beliefs wound up causing another person's death. And it would appear to disfavor imputing fault to a person who decides to carry a loaded gun outside the home merely on the basis of the fact that he eventually used the gun to kill someone in anger.

As we've seen, though, these surface features of the criminal law are deceptive. The reason why the criminal law

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284. Coffee, *supra* note 95, at 224.

285. *Cf.* Moore v. Madigan, 702 F.3d 933, 953 (7th Cir. 2012) (Williams, J., dissenting) ("Allowing public carry of ready-to-use guns means that [the risk posed by firearms] is borne by all in Illinois, including the vast majority of its citizens who choose not to have guns.").

doesn't punish the creation of self-mediated risk *directly*—why it doesn't treat the creation of self-mediated risk as a freestanding basis for liability—is not that the creation of self-mediated risk isn't wrong. The reason, rather, is that the government's interest in punishing this wrong usually is outweighed by the individual's liberty interest; it usually is outweighed by the individual's interest in deciding for himself exactly how to go about complying with the criminal law's external rules. Once the individual performs an act that represents the coming-to-fruition of the self-mediated risk, however, the balance changes. For the sake of treating everyone alike—for the sake, that is, of preserving criminal law's fundamental "mutuality of benefit and burden"[286]—the law really has to take account, sometimes, of how the individual found himself in the circumstances that caused him to violate the law's external rules. And since, as we've seen, the government couldn't really be expected to *prove* that the defendant was at fault in the earlier moment—was at fault in creating the self-mediated risk—the law imputes fault instead.

The proposed rule isn't just consistent with the deep structure of the criminal law, though. It's also urgently needed. In the old days, before *District of Columbia v. Heller*,[287] state and local governments were permitted to, and frequently did, address the self-mediated risks associated with public carry *directly*, by adopting statutes or ordinances that either prohibited outright the carrying of loaded guns in public or else strictly regulated it.[288] Statutes and ordinances like these communicated unambiguously the gravity, and

286. Morris, *supra* note 52, at 477.

287. D.C. v. Heller, 554 U.S. 570, 595 (2008).

288. *See* Wrenn v. D.C., 864 F.3d 650, 655 (D.C. Cir. 2017) (striking down, as violative of the Second Amendment, a District of Columbia statute that "confine[d] carrying a handgun in public to those with a special need for self-defense"); *Moore*, 702 F.3d at 742 (7th Cir. 2012) (striking down, as violative of the Second Amendment, Illinois's blanket prohibition on public carry); Moeller, *supra* note 28, at 1407–09 (describing history of concealed carry laws in the United States).

riskiness, of the decision to carry a loaded firearm in public. Most current laws don't, as Drejka's attorney complained at Drejka's sentencing.[289] "I think you can even go online now and get a concealed weapons permit. It's absurd," he argued.[290] As arguments for mitigation go, this isn't a very good one. But it gets one thing right. The law has to do a better job of communicating to gun owners that the responsibility for evaluating the risks associated with carrying in public, including the risk that they'll use the gun in anger, now belongs to them, not to the government. Holding gun owners accountable when they get this decision wrong—by denying them the benefit of the heat-of-passion defense—is a step in the right direction.

289. Transcript of Sentencing Hearing at 16, State v. Drejka, No. 18-09851-CF (Fla. Cir. Ct. Oct. 10, 2019).

290. *Id.*