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## When is Strict Criminal Liability Just

Kenneth W. Simons

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# CRIMINAL LAW

## WHEN IS STRICT CRIMINAL LIABILITY JUST?

KENNETH W. SIMONS\*

### TABLE OF CONTENTS

I. Introduction.....	1075
II. Some Preliminaries.....	1079
III. Formal Versus Substantive Strict Liability (and fault) ...	1085
IV. Substantive Retributive Theory: A Closer Look.....	1093
A. Mens rea, actus reus, and the structure of offenses .....	1093
B. Strict liability in criminalization: wrongdoing, culpability, and deficiency .....	1095
C. Strict liability in grading .....	1103
V. Moral Luck.....	1105
VI. Strict Liability as a Disguised Form of Negligence.....	1120
A. Is strict liability in grading a form of negligence? ...	1121
B. Is strict liability a rule-like form of negligence? .....	1125
C. Is strict liability simply a duty to use "extraordinary care"? .....	1131
VII. Objection: Why Not Permit a Defense of Non-negligence?.....	1133
VIII. Conclusion .....	1136

### I. INTRODUCTION

The most vigorous condemnation of strict liability in criminal law comes from retributivists, not from utilitarians. Strict liability appears

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\* Professor of Law, Boston University School of Law. All rights reserved, ©1997. Participants at workshops at Tel Aviv University and the University of Virginia School of Law provided very useful advice. Larry Alexander, Eric Blumenson, Stan Fisher, and Chris Marx deserve special thanks for their extremely helpful criticism. Jared Levy and John Mills provided valuable research assistance.

to be a straightforward case of punishing the blameless, an approach that might have consequential benefits but is unfair on any retrospective theory of just deserts.<sup>1</sup> More precisely, strict liability is condemned by culpability-based rather than harm-based retributivists.<sup>2</sup> If retributive desert depends only on harm caused, then strict criminal liability is hardly problematic. But if desert instead depends on culpability in bringing about a harm or wrong, then strict criminal liability seems flatly inconsistent with retributive theory.

It might seem obvious that strict liability is inconsistent with culpability-based retributivism. But what, exactly, do such retributivists condemn? Is their condemnation always justified? I will suggest that it is not.

To give an adequate answer to these last questions, we need to examine more carefully a number of issues: different categories of strict liability; the way in which criminal offenses are structured; the scope of the moral luck principle; negligence in grading; and the distinction between rules and standards. I will conclude, perhaps unsurprisingly, that strict liability is a genuine problem for retributive theory. But I also reach a more interesting conclusion: Strict liability is a different and more subtle problem, and in certain ways both a less

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<sup>1</sup> See, e.g., SANFORD H. KADISH, *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 89-91 (1987); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109.

<sup>2</sup> For the distinction between culpability-based (or intent-based) and harm-based retributivism, see Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 74-76 (1991); Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES, 237 (1994) (distinguishing culpability and wrongdoing as independent bases of desert); see also JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 355-56 (2d ed. 1995) (distinguishing "subjective" from "objective" retributivism).

Another important distinction within retributivism is the distinction between retributivism as a limitation on otherwise permissible goals of punishment (such as deterrence) and as a positive goal of or reason for punishment. See Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES 1, 27 (1994); Cole, *supra*, at 74 n.6; R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, in 20 CRIME & JUSTICE: A REVIEW OF RESEARCH 1, 7 (Michael Tonry ed., 1996). For an endorsement of a positive conception of retributivism, see generally Michael S. Moore, *The Moral Worth of Retributivism*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS 179-219 (Ferdinand Schoeman ed. 1987). A rather different distinction is between the goal or "rational justification" of the actual practice of punishment and a moral justification of that practice. See David Dolinko, *Some Thoughts about Retributivism*, 101 ETHICS 537, 539-43 (1991).

Those who endorse certain versions of "limiting" retributivism might condemn strict liability in criminalizing, but not in grading. Some view limiting retributivism as requiring only that defendant culpably break a rule as a condition of criminal punishment, not as providing any affirmative reason for punishment. See NIGEL WALKER, *PUNISHMENT, DANGER, AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE* 25-26 (1980). On this view, retributivism could condemn strict liability in criminalizing but permit justification of strict liability in grading on nonretributive grounds.

serious and a more serious problem, than it is generally believed to be.

Let me begin with two examples to set the stage. First, suppose that a rash of forest fires prompts a legislature to consider enacting a law prohibiting any person from causing a forest fire, with a penalty of five years imprisonment. The powerful lobby of culpability-based retributivist law professors raises a public alarm about this "strict liability" proposal. So the legislature responds by enacting a law prohibiting any person from knowingly carrying a match in or near a forest, with a penalty of five years imprisonment if any person who knowingly carries a match thereby causes a forest fire. Should the law professors be appeased? We will see that they should not be, since the modified proposal expresses a formal rather than substantive kind of fault. In substance, that is, the proposal imposes strict liability, by failing to require a degree or type of culpability sufficient to justify punishment on a retributive theory. Should the law professors be appeased if the government instead passes a law setting a smaller penalty simply for knowingly carrying a match in or near a forest? This, I will argue, raises similar concerns, though it might be consistent with retributive blame.

Second, consider the crime of felony-murder. Notwithstanding the vigorous criticism of retributivists (among others), many American state legislatures continue to treat very harshly defendants who commit felonies that cause a death, even if the defendant displays little or no culpability as to the death itself.<sup>3</sup> Utilitarian and harm-based retributivist justifications have been offered for felony-murder statutes. But this article will suggest that culpability-based retributivism can partially justify such statutes, as partially expressing both a more substantive conception of fault, and a familiar principle of moral luck. It will also conclude, however, that retributivism cannot fully justify the severity of many felony-murder statutes.

The scope of the article is broad, but not unlimited. The article does not separately examine the voluntary act requirement,<sup>4</sup> nor the minimum culpability that retributive theory requires. In a previous essay, I have argued that a form of culpable indifference is the necessary minimum,<sup>5</sup> but the arguments in this article would remain essen-

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<sup>3</sup> See DRESSLER, *supra* note 2, at 479-80. Nearly every American state recognizes the doctrine in some form. Moreover, many states not only treat felony-murders as harshly as intentional murders; they also treat certain felony-murders as murders of the first-degree, comparable in punishment to premeditated murder or murder by torture. See *id.* at 479.

<sup>4</sup> See *infra* note 15.

<sup>5</sup> See generally Kenneth W. Simons, *Culpability and Retributive Theory: the Problem of Criminal Negligence*, 5 J. CONTEMP. LEGAL ISSUES 365 (1994) [hereinafter *Criminal Negligence*].

tially the same if one reached a different conclusion about the requisite minimum—e.g., if one concluded that tort negligence, gross negligence, or some form of recklessness is the required minimum culpability. For simplicity, the article refers throughout to “negligence” as a minimally acceptable form of fault.

Moreover, the article presents these arguments as ideal justifications, i.e., as constraints that a legislature would accept if it chose to rely on culpability-based retribution as its exclusive theory of punishment. In fact, of course, arguments of harm-based retribution and deterrence often play a major role in shaping criminal legislation. Although culpability-based retributivism does find some doctrinal expression in the state and federal constitutional limits on criminal legislation,<sup>6</sup> and in some judicial interpretive practices,<sup>7</sup> that doctrinal expression will not be my focus.

Most crucially, perhaps, the article says little about which particular version of retributive theory is most attractive (or most consistent with legal doctrine). As a consequence, some important questions will not be fully resolved. My apparent diffidence is for a reason: to enable the arguments in this article to have force for a variety of retributive views. For example, the article accepts the possibility that retributive theory countenances moral luck (i.e., that an actor deserves greater moral blame if his culpable conduct fortuitously results in harm than if it does not).

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<sup>6</sup> Thus, in *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987), the Supreme Court interpreted the Eighth Amendment as limiting the power of states to impose the death penalty on a defendant who lacked sufficient culpability. (In *Tison*, however, the Court concluded that defendants who are major participants in the felony underlying a felony-murder and who show “reckless indifference to human life” satisfy both the retributive and deterrent purposes of the state). In *Booth v. Maryland*, 482 U.S. 496 (1987), the Court ruled that the use of victim impact statements in death penalty cases violated the Eighth Amendment, reasoning in part that the sentencer should focus on the blameworthiness of the defendant, not on the effect of the killing on the victim’s family. However, in *Payne v. Tennessee*, 501 U.S. 808 (1991), the Court overruled *Booth* and endorsed harm-based retributivism as a permissible justification for admitting victim impact statements.

On the broader question of the constitutionality of strict liability, Professor Richard Singer reviews the ambiguous Supreme Court case law and concludes that Herbert Packer had it right many years ago when Packer stated: “*Mens rea* is . . . not a constitutional requirement, except sometimes.” Packer, *supra* note 1, cited in Richard Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C.L. REV. 337, 403 (1989). For a general discussion of the constitutional cases, see Singer, *supra*, at 397-403.

<sup>7</sup> Many courts apply the interpretive presumption that *mens rea* is required in all criminal statutes unless a contrary legislative intent appears. See *Staples v. United States*, 114 S. Ct. 1793 (1994); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); DRESSLER, *supra* note 2, at 126. The Model Penal Code includes a presumption that recklessness, and not merely negligence, is required when no other *mens rea* term is included. MODEL PENAL CODE § 2.02(3) (1985).

Section II sets forth some preliminary distinctions, including the distinction between pure and impure strict liability, and between strict liability in criminalizing and strict liability in grading. Section III demonstrates that conventional analysis expresses a formal conception of strict liability (and fault), a conception that is both too weak and too strong relative to a substantive conception of strict liability (and fault). Section IV examines more closely how *mens rea* and *actus reus*, separately and in combination, express culpability under a substantive retributive theory. I examine in some detail and partially criticize the view that retributive theory supports a sharp distinction between wrongdoing (the ultimate harm) and culpability (in the sense of the actor's mental state). Section V, addressing moral luck, suggests that strict liability is unacceptable when it amounts to a broad principle of substitute culpability, but might be acceptable when it simply expresses the principle of moral luck.

The next part, Section VI, examines cases in which formal strict liability in grading actually expresses culpability (especially negligence). Subsections A and B set forth two very different ways in which this can be true—when formal strict liability in grading represents substantive negligence, and when strict liability is a rule-like form of negligence. A third subsection examines a less persuasive argument—that strict liability can be defended as a form of genuine fault in the sense of a requirement of “extraordinary care.”

Section VII responds to a natural objection to the thesis. Why not permit a defense of non-negligence in all cases, even if it would be gratuitous in many? The answer builds on earlier analysis: Such a defense would undermine retributive desert when strict liability expresses no more than the moral luck principle, when strict liability is a (justifiable) rule-like form of negligence, and when the comparable culpability principle applies.

## II. SOME PRELIMINARIES

Before exploring the substantive arguments about the proper scope of strict criminal liability, it is important to clarify some relevant concepts. We need to differentiate strict liability with respect to results, circumstances, and conduct; to distinguish pure from impure strict liability; and to distinguish strict liability in criminalizing from strict liability in grading.

Strict criminal liability is conventionally understood as criminal liability that does not require the defendant to possess a culpable state of mind.<sup>8</sup> Modern criminal codes typically include as possible culpa-

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<sup>8</sup> See, e.g., Philip E. Johnson, *Strict Liability: The Prevalent View*, in 4 *ENCYCLOPEDIA OF*

ble states of mind the defendant's intention to bring about a prohibited result, her belief that such a result will follow or that a prohibited circumstance will exist, her recklessness as to such a result or circumstance, or her negligence with respect to such a result or circumstance.<sup>9</sup> Strict criminal liability, then, is simply liability in the absence of intention, belief, recklessness, or negligence.

We must also distinguish between strict liability with respect to a *result* element of an offense and strict liability with respect to a *circumstance* element.<sup>10</sup> Felony-murder, in its most severe form, is an example of strict liability with respect to a result—specifically, a death resulting from commission of the felony. That is, the felon will be liable for the resulting death as if he had intended it, even if there is no proof of intent, or (perhaps) of any culpability, as to that result.

Statutory rape is a common example of strict liability with respect to a circumstance—specifically, the circumstance of whether the female victim is below the statutory age. A defendant can be guilty of statutory rape even if there is no proof that he believed, or reasonably should have believed, that she was below the statutory age. Thus, strict liability encompasses both liability for faultless accidents (in bringing about a prohibited result) and for faultless mistakes (in assessing whether a prohibited circumstance exists).<sup>11</sup>

Strict liability can also refer, not to lack of culpability with respect to a result or a circumstance, but to lack of culpable *conduct*. That is, the *actus reus* of the crime might specify and prohibit certain conduct (whether action or omission) by the defendant. For example, a prohibition on driving an automobile above the statutory speed limit can be understood as imposing strict liability, insofar as it is irrelevant that

CRIME AND JUST. 1518 (Sanford Kadish ed., 1983); DRESSLER, *supra* note 2, at 125 (defining strict liability offenses as “crimes that, by definition, do not contain a *mens rea* requirement regarding one or more elements of the *actus reus*”). *But cf.* Douglas N. Husak, *Varieties of Strict Liability*, 8 CAN. J.L. & JURISPRUDENCE 189 (1995) (asserting that criminal law employs a wide variety of conceptions of strict liability).

<sup>9</sup> See, e.g., MODEL PENAL CODE § 2.02 (1985). Negligence is not, strictly speaking, a state of mind. With respect to belief, it is the failure to have a belief that a reasonable person would have. With respect to the defendant's conduct, it is the failure to act as a reasonable person would act. Nevertheless, classifying negligence as a “culpable state of mind” is appropriate for our purposes insofar as strict liability, on the conventional understanding, requires the absence of either negligence or any genuine (and culpable) states of mind.

<sup>10</sup> Following the Model Penal Code, I view “results” as circumstances that the actor changes or has power to change, and “circumstances” as all other conditions, other than the actor's own conduct. For a more detailed discussion, see Kenneth W. Simons, *Rethinking Mental States*, 72 B.U.L. REV. 463, 535-38 (1992).

<sup>11</sup> For further discussion of mistake and accident, see Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447, 504-07 (1990).

the defendant did not have reason to know that she was traveling at that speed.<sup>12</sup> (Although there is something to be said for assimilating the "conduct" category to the other two categories,<sup>13</sup> this article follows the Model Penal Code approach and treats it as a separate category.)

A further distinction exists between "pure" and "impure" strict liability.<sup>14</sup> In "pure" strict liability, no culpability is required as to any of the material elements of the offense. In "impure" strict liability, culpability is required as to at least one material element, but it is not required with respect to at least one other element.<sup>15</sup> The distinction underscores the point that the strict liability issue can arise with respect to any of the material elements of an offense.<sup>16</sup> Thus, statutory rape is typically understood to involve "impure" strict liability, inas-

<sup>12</sup> For example, suppose she sped because the automobile's speedometer was unforeseeably inaccurate. See DRESSLER, *supra* note 2, at 118-19.

<sup>13</sup> At the doctrinal level, the "nature of one's conduct" is often better conceived of as either a circumstance or result of one's conduct. And, so long as one performs a voluntary act, normally one needs no separate culpability as to the "nature of one's conduct." If a burglar acts voluntarily, normally no other question arises as to his culpability for the conduct element of "breaking and entering" into a dwelling. See Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 721-23 (1983).

At a deeper level, perhaps retributive theory requires only that the actor perform a basic act (e.g., raising one's arm, moving one's finger), and that he show appropriate culpability as to the elements of the actus reus (breaking into a house, inflicting a blow). That is, actus reus elements (such as "breaking and entering") invariably describe, not simply a basic act, but instead causal consequences of the basic act or its attendant circumstances. See MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 169-70, 191-238 (1993).

<sup>14</sup> See Moore, *The Independent Moral Significance of Wrongdoing*, *supra* note 2, at 280.

<sup>15</sup> To the extent that the voluntary act requirement considers culpability, strict liability is never "pure." But I believe that culpability enters into the analysis of voluntariness in a different way than it enters into the analysis of whether the actor has culpably committed the actus reus of an offense. I do not separately examine this issue here. For some discussions, see generally Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, SOC. PHIL. & POL'Y 84 (1990); MOORE, *supra* note 13, at 35-37 (discussing the views of Mark Kelman); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 618-20 (1981). See also *infra* notes 163-64 and accompanying text (discussing Miller).

<sup>16</sup> Culpability requirements apply only to material elements of criminal offenses. See MODEL PENAL CODE § 1.13 (1985) (explanatory note). Section 1.13(10) of the Model Penal Code provides that a material element is one "that does not relate exclusively to the statute of limitations, jurisdiction, venue, or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) existence of a justification or excuse for such conduct." See also Jeremy Horder, *A Critique of the Correspondence Principle in Criminal Law*, 1995 CRIM. L. REV. 759, 767-68 (discussing the murder requirement that death occur within "one year and a day").

The limitation of culpability requirements to material elements underscores the point that strict liability is problematic on a retributive theory only when the actor is liable despite lack of culpability as to the substantive harm that the legislature may justifiably punish.



much as the offender must intentionally have intercourse, even if he need not be culpable as to the age of the victim. By contrast, certain environmental crimes exemplify "pure" strict liability, inasmuch as the offender need only cause defined forms of environmental risks or harms (such as exposing the public to certain pollutants or toxins in excess of a specified level), and it is irrelevant that she lacked negligence, knowledge, or any other culpability in causing those risks or harms. The existence of impure strict liability reveals that strict liability can be a worry even when the offense contains explicit culpability requirements (for example, such offenses as felony-murder or statutory rape).

Finally, we can distinguish strict liability in *criminalizing* from strict liability in *grading*. Strict liability in criminalizing is liability (in the absence of culpability) that criminalizes conduct that is otherwise not subject to any criminal sanction. Strict liability in grading is liability (in the absence of culpability) that increases the criminal penalty that the offender would otherwise suffer.<sup>17</sup> Many environmental crimes and traffic offenses are instances of strict liability in criminalizing: one who produces an excessive quantity of a toxic chemical or drives at an excessive speed might not be liable for any other crime if he did not bring about that result or engage in that conduct. By contrast, felony-murder is an instance of strict liability in grading, because the underlying felony is already a crime, and the causation of death increases the penalty. Strict liability in grading tends to be of the impure form, and strict liability in criminalization is often pure, but this correlation is only approximate.<sup>18</sup>

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<sup>17</sup> See Johnson, *supra* note 8, at 1519 (discussing felony-murder and the distinction between petty and grand theft).

Peter Low asserts that there is no instance (apart from the distinct category of public welfare offenses) when the criminal law uses strict liability for one element of an offense without any inquiry into fault on other elements. Thus, "the culpability required for a given offense should be considered as a whole." Peter W. Low, *The Model Penal Code, the Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?*, 19 RUTG. L. J. 539, 551 (1988). Low therefore supports some strict liability in grading. Below, I endorse and elaborate the view that the culpability for an offense should be considered as a whole.

<sup>18</sup> Generally speaking, strict liability in grading is an impure form of strict liability, because the other, less serious crime of which the offender would be guilty will usually require culpability. For example, felony-murder typically requires a serious felony, such as arson or bank robbery, which itself requires serious culpability. But it is theoretically possible for strict liability in grading to be a pure form of strict liability. For example, the underlying felonies that trigger the felony-murder doctrine could include an environmental crime that requires no culpability. Similarly, strict liability in criminalizing will often, but not necessarily, be a pure form of strict liability. An example is strict liability for exceeding the speed limit. Counter-examples include both statutory rape and rape, in those jurisdictions requiring no culpability as to the woman's lack of consent. See *Commonwealth v. Simcock*, 575 N.E.2d 1137, 1142 (Mass. App. Ct. 1991); *State v. Reed*, 479 A.2d 1291, 1296 (Me. 1984). In both instances, the defendant must engage in intentional inter-

With these concepts in mind, consider some examples of strict liability in the following categories: results; circumstances; conduct; and criminalization vs. grading.<sup>19</sup>

1. *Strict liability as to result element*

a. Criminalization

Causing the public distribution of environmental toxins in excess of a specified level.

b. Grading

Felony-murder.<sup>20</sup>

Misdemeanor-manslaughter.<sup>21</sup>

Causing a death with the intent to inflict great bodily injury. The penalty is often the same as for causing a death with the intent to cause death.<sup>22</sup>

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course, so the strict liability is impure; but, absent the element of the victim being underage (in statutory rape) or of nonconsent (in rape), intentional intercourse with another is not a crime. Accordingly, these are examples of both impure strict liability and strict liability in criminalization.

<sup>19</sup> Douglas Husak has recently offered a very different classification and analysis of strict criminal liability. He argues that no single concept of strict liability exists; rather, strict liability describes the conclusion, in any of a number of quite dissimilar contexts, that the defendant is substantially less culpable than the paradigm perpetrator of the offense. See Husak, *supra* note 8.

Husak claims that the different types of strict liability are incommensurable; that the strictness of liability is a matter of degree; and that no actual imposition of liability has been strict to the maximal extent. Examples of the different types of strict liability include strict procedural liability, liability without *mens rea*, liability that is not fully defeasible by justifications, liability that is not fully defeasible by excuses, vicarious liability, liability for nonvoluntary conduct that "includes" a voluntary act, and liability for innocent activity.

Husak's argument is not fully persuasive, but it does contain many kernels of truth. I agree that strict liability, properly understood, encompasses more doctrinal issues than it is ordinarily understood to cover.

Unfortunately, Husak does not connect his view of strict liability to retributive (or utilitarian) purposes of the criminal law. When we approach strict liability from a retributivist perspective, a narrower, less skeptical conception of strict liability becomes meaningful.

Also, Husak doesn't adequately distinguish strict liability in criminalizing from strict liability in grading. In a sense, all strict liability in grading cases are merely cases of "relative" fault, fitting Husak's paradigm. For the offender showed at least minimal fault sufficient to warrant some criminal liability. But grading, as much as criminalization, is subject to retributive principles of proportionality.

<sup>20</sup> See generally Lloyd L. Weinreb, *Homicide: Legal Aspects*, in 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 855, 859-61 (Sanford Kadish ed., 1983).

<sup>21</sup> Under the misdemeanor-manslaughter rule, "[a]n accidental homicide that occurs during the commission of an unlawful act not amounting to a felony . . . constitutes involuntary manslaughter." DRESSLER, *supra* note 2, at 499.

<sup>22</sup> *Id.* at 470, 475-76; Weinreb, *supra* note 20, at 858-59.

## 2. *Strict liability as to circumstance element*

### a. Criminalization

Statutory rape: no culpability required as to the girl's being under age—if the female is not under age, the conduct might not be criminal.

### b. Grading

Grand larceny v. petty larceny: Unlawfully taking property in excess of a specified amount is grand larceny, while unlawfully taking property of less than that amount is petty larceny. Thus, no culpability is required as to the risk that the property will exceed the specified amount.<sup>23</sup>

## 3. *Strict liability as to conduct element*

### a. Criminalization

Driving at a speed in excess of the speed limit.<sup>24</sup>

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<sup>23</sup> See Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057, 1066 n.24 (1992) (asserting that New York law permits a fifty-fold differential in punishment for theft offenses depending on the amount stolen, without regard to the offender's culpability as to amount). *But see* People v. Ryan, 626 N.E.2d 51, 56 (N.Y. 1993) (requiring proof of culpability as to quantity of drugs possessed in order to permit conviction of more serious offense). *Ryan* was decided after Crocker published his article.

The Model Penal Code does require culpability as to such grading elements. See MODEL PENAL CODE § 223.1, cmt. (c) (1980) (mistake as to valuation).

<sup>24</sup> Strictly speaking, this is not a *pure* conduct offense, if conduct is understood as a basic act. See *supra* note 15. "Driving" involves more than the basic act of moving one's foot; it requires moving one's foot or engaging in other basic acts in order to cause the movement of a vehicle. And exceeding the speed limit is certainly either a circumstance or result of driving. If the criminal law directly regulated basic acts, then a pure conduct offense would be possible; but it does not. See MOORE, *supra* note 13, at 169. (E.g., suppose it were a crime to point your finger, or to move while standing military guard; but even these examples are circumstantially complex.)

I nevertheless refer to "conduct" elements in the looser sense intended by the Model Penal Code and other criminal laws. In that looser sense, "conduct" refers to causally and circumstantially complex actions in which the complexity is not explicit. That is, "breaking and entering into a building" is a complex action involving a conduct element in this looser sense because the formulation does not make explicit that the agent must perform some basic act that causes a "breaking in" under the circumstance that he is "entering" the building. By contrast, "causing the death of another person" is not normally understood as a simple conduct element, because the causal complexity of the action is explicit. But if that complexity were not explicit, then "causing the death of another person" could indeed be understood as a conduct element. A criminal prohibition on intentionally "killing" another (as opposed to "causing another's death") describes a conduct element in the same conventional sense as a prohibition on intentionally "breaking and entering" into a dwelling.

## b. Grading

[A hypothetical crime]: Causing a death as a result of exceeding the speed limit while driving (a more serious offense than speeding).

## III. FORMAL VERSUS SUBSTANTIVE STRICT LIABILITY

Reconsider the example from the introduction. Imagine that a legislature considers adopting a strict liability statute that punished any person who causes a forest fire, with or without fault. Instead, the legislature actually enacts a law prohibiting any person from knowingly carrying a match in or near a forest, with a penalty of five years imprisonment if that conduct causes a forest fire. Does such a law cure the retributive defects of strict liability, by adding a mens rea requirement? In a formal sense it does. But the cure hardly suffices. In substance, the law is similar to a law simply prohibiting a person from causing a forest fire. One might handle a match carefully, without any fault, and still, unfortunately, thereby contribute to a forest fire.<sup>25</sup> Indeed, imagine a catalogue of the ways in which persons are most likely to cause forest fires, with or without fault—possessing matches or combustible materials, driving an automobile or other gas-powered vehicle or device, and the like. We could then simply impose a criminal penalty on those who possess such causal implements, and then require that the actor be aware (or merely require that he should be aware) that he possesses them. The narrower prohibitions would largely substitute for the strict liability statute.<sup>26</sup>

Of course, this strategy of prohibiting possession of particular items that could contribute to the ultimate harm, rather than simply regulating the ultimate harm, is hardly unknown to legislatures. In a variety of ways, the criminal law regulates conduct or nonconsummate harms, or increases the penalty over what it would otherwise be, precisely because of the risk that these might contribute to an ultimate harm.<sup>27</sup> Thus, we criminalize attempt, conspiracy, and accomplice lia-

<sup>25</sup> Suppose that an arsonist steals your matches, for example.

<sup>26</sup> I say "largely" because some differences might remain. The strictest form of liability for causing a fire is liability even if it is not the case that the actor should be aware that he has in his possession an implement that might cause a fire. Still, the substitution proposed in the text could largely coincide with the strictest form of liability.

<sup>27</sup> Stephen J. Schulhofer has distinguished between "statutory" and "ultimate" harm. Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1505-06 (1974).

I use the term "harm" in the broad sense, as the undesirable state of affairs that the criminal prohibition ultimately addresses. For a more careful distinction between harms and wrongs, with the plausible suggestion that criminal law is concerned with harmless wrongs as well as with wrongful harms, see Heidi M. Hurd, *What in the World is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157, 209-15 (1994).

bility; possession of burglars' tools; driving negligently; driving under the influence of alcohol; and reckless endangerment.<sup>28</sup> We also punish burglary (breaking and entering into a home with the intent to commit a crime) more seriously than simple breaking and entering.<sup>29</sup> The criminal penalty for each of these offenses reflects the risk that the criminal conduct might lead to an ultimate harm. If we were certain that the conduct could not lead to such harm, and if the offender were similarly confident, then the penalty could not be justified on retributive grounds.<sup>30</sup>

These nonconsummate offenses are not ordinarily considered to raise a strict liability problem, but, in substance, they do.<sup>31</sup> For if there is no assurance that a nonconsummate offense reflects sufficient culpability to warrant any criminal punishment, or to warrant criminal punishment proportional to the ultimate harm culpably risked, then a legislature could avoid the strict liability problem simply by gerrymandering the structure of a criminal statute.

What retributive theory permits in this context depends crucially on the ultimate harm or wrong being addressed. Consider the variation on the hypothetical suggested in the introduction: Would it be more acceptable if the government instead passed a law setting a small penalty simply for knowingly carrying a match in or near a forest, apart from whether that conduct contributed to a forest fire? Here, the analysis is more complex. Insofar as the crime addresses the harm of apprehension to others, a small penalty may be acceptable.<sup>32</sup> But if the concern of the legislature is to prevent fire, the criminal penalty should bear some relation to: (a) the degree to which the conduct of carrying a match actually creates a risk of that harm; and (b) the actor's culpability as to that risk. And, of course, the relation of the nonconsummate conduct to the ultimate harm is not the only relevant consideration in determining the just penalty for the conduct. For example, a thorough retributive theory might also consider whether criminalizing nonconsummate conduct would unjustifiably burden citizens who have legitimate reasons for engaging in the

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<sup>28</sup> For a much fuller discussion of nonconsummate offenses, see Douglas N. Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 ARIZ. L. REV. 151 (1995).

<sup>29</sup> See Schulhofer, *supra* note 27, at 1505-06.

<sup>30</sup> Of course, a more modest penalty for the underlying conduct might be justified in light of other harms that it causes, such as apprehension to bystanders. Note, however, that offenses such as negligent driving or driving under the influence of alcohol do not ordinarily require apprehension to others as an element of the offense.

<sup>31</sup> For an appreciation of the "strict liability" feature of such offenses, see Husak, *supra* note 8, at 223-25. See also *supra* note 19 and accompanying text.

<sup>32</sup> A more dramatic example is a crime of brandishing a weapon, even an unloaded one.

conduct.<sup>33</sup>

Conventional analysis expresses a *formal* conception of strict liability and fault. This conception accepts offense elements as given, requires an analysis of culpability as to each of these elements considered separately,<sup>34</sup> and assumes that if some minimally acceptable form of culpability as to each of those elements is shown, then criminal liability expresses some genuine form of fault.<sup>35</sup> The conventional analysis also tends to assume that retributivism requires a *uniform* minimum standard of culpability (e.g., negligence or recklessness) without regard to the offense or the offense element.<sup>36</sup>

By contrast, a *substantive* conception of strict liability and fault examines the offense elements themselves, considers the interrelationship between offense elements, culpability terms, and the relevant ultimate harm, and requires a substantive criterion of fault that might not correspond simply and directly to formal culpability requirements. Knowing possession of firearms, or of burglar's tools, or of matches, or knowing possession of matches as a result of which a fire is caused, or knowing operation of a gas-powered vehicle near a forest, are instances of formal fault, but not necessarily substantive fault, since the legislature<sup>37</sup> might only be interested in these forms of

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<sup>33</sup> See, e.g., Crocker, *supra* note 23, at 1075-92. (emphasizing the autonomy value served by a narrow definition of criminal attempt).

<sup>34</sup> British criminal law theorists describe this last feature as "the correspondence principle." See generally Horder, *supra* note 16. The Model Penal Code denominates it "element analysis." See generally Robinson & Grall, *supra* note 13.

<sup>35</sup> The conventional analysis also typically is concerned only with strict liability as to fact, not strict liability as to governing law. See Johnson, *supra* note 8, at 1518. But retributivism does not support a sharp distinction between fact and law. A substantive conception of strict liability also considers strict liability as to *law* to be problematical, not just strict liability as to fact. See Low, *supra* note 17, at 550-51 (arguing that we implicitly impose an objective standard as to mistake or ignorance of law).

Perhaps retributive theory permits lesser culpability to suffice for a legal issue than for a factual issue. But it should still require some such culpability. The fact/law distinction is difficult to draw, in any event. Note especially the difficulty of distinguishing legal elements of an offense (e.g., "knowing that the prior divorce is invalid," where validity is a legal question relevant to culpability for bigamy) from the governing law itself (e.g., knowing that bigamy is itself a crime). For general discussions, see Simons, *supra* note 11, and the critique in Larry Alexander, *Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Myke Balyes*, 12 LAW & PHIL. 33 (1993).

<sup>36</sup> See, e.g., MODEL PENAL CODE § 2.02(1) (1985) (requiring negligence as the minimal culpability for virtually all elements of all criminal offenses); see also *id.* § 2.02(3) (presuming that recklessness is the minimum required culpability if the culpability is not otherwise specified). These requirements or presumptions of identical forms of culpability across offenses and offense elements are also problematic, for similar reasons that a formal perspective on strict liability is problematic. See Simons, *Criminal Negligence*, *supra* note 5, at 394-96.

<sup>37</sup> For purposes of this article, I assume that the legislature largely defines crimes, and that the judge may have discretion at sentencing within statutory limits. Both actors are

“knowing” (and, in the formal sense, culpable) conduct insofar as they create a significant risk of other harms. And they might not. Or, even if they do, the level of punishment for these nonconsummate offenses might be excessive in light of the modest degree to which the conduct poses the risk.

Accordingly, the formal approach will reject both pure and impure strict liability as inconsistent with retributive blame, though it might find impure strict liability more acceptable insofar as the legislature requires culpability as to at least *some* elements of the crime.<sup>38</sup> The Model Penal Code is, in part, a formal approach.<sup>39</sup> By contrast, a substantive approach might accept impure, or even pure, strict liability, if the criminal offense expresses substantive fault despite the formal absence of a culpability term.<sup>40</sup>

Now this substantive approach creates some difficulties. The first problem is impracticality. In order to characterize a statute as raising genuine strict liability problems, it seems that a court must have a comprehensive substantive account of what ultimate harms the legislature cares about.<sup>41</sup>

The impracticability problem is real but not insurmountable. Courts do indeed inquire into legislative intent in evaluating possession statutes and other nonconsummate offenses.<sup>42</sup> The point is sim-

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subject to retributive constraints. Whether the judge's decision about punishment within a statutory range should be subject to retributive limits of the same kind and degree as the legislature's decision to define the crime is beyond the scope of this essay.

<sup>38</sup> See Johnson, *supra* note 8, at 1519 (asserting that the strict liability problem is overstated insofar as a defendant usually must have *mens rea* as to some element, e.g., the actor must intentionally engage in the prohibited conduct).

<sup>39</sup> See MODEL PENAL CODE § 2.02(1) (1985) (requiring *mens rea* as to each material element of offense). The only exception to this requirement that the MPC recognizes in Part II, its definitions of specific offenses, is statutory rape of a very young victim. See *infra* notes 51-52 and accompanying text. See also MODEL PENAL CODE § 2.05 (1985) (permitting strict liability for noncriminal “violations”).

The Code couples this formal culpability requirement with a substantive opposition to criminalizing faultless behavior. *Id.* § 1.02(1)(c) (listing as one general criminal law objective the purpose “to safeguard conduct that is without fault from condemnation as criminal”).

<sup>40</sup> As we shall see, this condition is satisfied when the criminal offense expresses either the principle of comparable culpability, the rule-like form of negligence, or (perhaps) a defensible dimension of moral luck. See *infra* text accompanying notes 51-56, Part VI.B and Part V.

<sup>41</sup> Similarly, from the perspective of the ideal legislature itself, the legislature's determination of the seriousness of punishment for nonconsummate harms must be proportional to the seriousness of the ultimate social harm, for all of the legislature's judgments of retributive desert expressed in its different criminal statutes should be proportional, consistent, and coherent.

<sup>42</sup> See, e.g., *State v. Saiez*, 489 So. 2d 1125 (Fla. 1986) (finding unconstitutional on state and federal grounds a possession statute that was designed to reduce credit card fraud, but that unreasonably interfered with the legitimate rights of persons to use embossing ma-

ply this: A court that wishes to be diligent in subjecting criminal prohibitions to retributive constraints must evaluate the nature of the harm being addressed as well as whether the offense includes culpability terms as formal elements.

A second objection is that even *formal* strict liability poses a genuine problem for retributive theory. Specifically, the claim is that we should abstract away from the particular harm or actus reus and require, with respect to any harm or any actus reus, that the offender *culpably* risked the harm. For the offender displays a genuine form of fault by culpably acting in the prohibited way or culpably causing the prohibited result. The legislature (so the argument goes) has the power to define the wrong; citizens are properly expected to learn what wrongs the legislature has proscribed; but retributivism demands culpability as to any such wrong.<sup>43</sup>

On this “freestanding culpability” view, if the legislature makes it a crime to possess a match,<sup>44</sup> then knowing possession of a match reflects at least some genuine fault, while unknowing (and otherwise nonculpable) possession does not. And knowing possession deserves retributive blame even if the act has no tendency to bring about a social evil, and even if there are affirmative reasons (such as legitimate uses for matches) not to criminalize the act. Requiring formal culpability terms for all material elements of an offense is necessary but also sufficient to satisfy retributive requirements.

The freestanding culpability view is unpersuasive. That citizens are on notice of the existence of such criminal statutes hardly shows that the content of any such statute will be consistent with principles of retributive blame. To be sure, a court in the posture of reviewing the legality of a criminal prohibition has reasons for deferring to the legislature’s own definition of the seriousness of ultimate harms and

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chines for noncriminal purposes); *Dawkins v. State*, 547 A.2d 1041, 1046 (Md. 1988) (holding that knowledge is an element of offenses of possession of controlled dangerous substance and controlled paraphernalia because legislature desired to prevent persons from using these objects, and a person without knowledge of object’s presence ordinarily cannot intend to use object).

<sup>43</sup> Proponents of this argument might concede that the strict “ignorance of law is no excuse” maxim should be relaxed to accommodate reasonable ignorance or mistake. But once it has been so relaxed, proponents could argue, culpable violation of the norm reflects one type of substantive fault.

<sup>44</sup> Compare Husak’s example of criminalizing scratching your head. Husak, *supra* note 8, at 224. Husak characterizes this as an example of purely innocent conduct. One special feature of this example is that scratching your head might be a basic act, so that it might not be possible to scratch your head unknowingly. *Id.*; see also MOORE, *supra* note 13, at 113-55. The question of strict liability for scratching your head then could not arise. But one need not go far beyond the basic act to make a culpability distinction possible. If the law prohibited scratching your head in the sight of another person, then it would be possible to commit the crime either knowingly or unknowingly.



mental states. But if the court or a principled legislator (or any observer) wishes to gauge whether a criminal prohibition satisfies ideal retributive constraints, the simple fact that an act has been prohibited can hardly be conclusive.

Moreover, the "notice" argument that purportedly justifies the freestanding culpability view proves too much. If the state has indeed put on the books a *strict liability* statute, it seems to follow that a "reasonable person" should ordinarily know of *its* existence and avoid violating the norm. To be sure, in one sense, the person cannot by "reasonable care" avoid violating the strict liability norm. But in a broader sense, it is possible to comply with virtually any<sup>45</sup> strict liability prohibition: the citizen can avoid manufacturing chemicals, or possessing a gun, or committing a felony—or possessing a match. If, as this "notice" argument asserts, we should not look behind a criminal prohibition that contains formal *mens rea* requirements to see whether it indeed protects some other more substantive social harm whose protection is consistent with retributive theory, then it seems we should similarly be unwilling to look behind a formal *strict liability* prohibition with which the actor could comply by avoiding the activity altogether.

The freestanding view demonstrates an important problem with "limiting" or "weak" retributivism, a form of retributivism that might initially appear attractive. This form of retributivism operates as a side-constraint<sup>46</sup> on the pursuit of utilitarian or other goals. In particular, weak retributivism insists that whatever goals the legislature is permitted to pursue for other reasons, it may not punish the "innocent," understood as those who are not culpable. The problem, however, is that lack of culpability cannot be understood in the abstract, apart from the substance of the criminal prohibition. If the state can define the substantive wrong any way it wishes, then the distinction between innocence and guilt is meaningless. To return to our example, if the state cannot legitimately punish an "innocent" or "nonculpable" person whose actions merely causally contribute to starting a fire unless she is culpable for starting a fire, why can the state treat as "guilty" or "culpable" someone who knowingly lights a match simply because this crime contains a formal fault element?<sup>47</sup>

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<sup>45</sup> This (unacceptable) analysis still does permit an objection to even broader forms of strict liability in which liability is completely unavoidable (e.g., strict liability for any harm that you affirmatively caused or could have prevented). But if retributive theory had no more bite than this, it would tolerate a disturbingly wide range of strict liability measures.

<sup>46</sup> See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 26-35 (1974) (discussing rights as side-constraints).

<sup>47</sup> Moreover, limiting retributivism becomes trivial if it does not constrain strict liability in grading. For example, limiting retributivism would permit punishing any trivial crime

The formal strict liability approach does have the virtue of simplicity, for the approach largely abstracts away from underlying purposes and ultimate harms. Moreover, it is often quite desirable that legislatures drafting criminal codes work with a straightforward, limited, clearly defined set of culpability terms; consider applying different culpability terms to different elements of an offense; and presume that some culpability term should apply to each element of an offense. Nevertheless, these virtues are not always paramount.

Insofar as strict liability is objectionable because it is inconsistent with retributive blame, a formal view of strict liability may result in two sorts of error. First, the formal view might inappropriately *approve* a criminal prohibition (as being consistent with retributive theory) when the substantive approach would disfavor the prohibition. Examples include “knowing” possession of a match and other instances of gerrymandered statutes noted above.

A second sort of error is the converse of the first: The formal view might inappropriately *disfavor* a criminal prohibition when the substantive approach would *not* disfavor the prohibition. Here, the substantive approach is *more* tolerant of certain forms of “strict liability,” as the following two examples illustrate. First, consider the common approach treating James, who intends to cause great bodily injury, and thereby causes death, just as harshly as Kareem, who intends to (and does) cause death.<sup>48</sup> The formal view would support some differentiation in grading. But the substantive view would ordinarily<sup>49</sup> treat the two mental states as sufficiently close in culpability that the marginally less culpable intent can justifiably substitute for the marginally more culpable one.<sup>50</sup>

Under what we might call the principle of *comparable culpability*, there is *no* legally significant difference in culpability between James and Kareem. That is, retributivists can support coarser grading of offenses than the fine-grained approach that the formal view dictates,

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(involving formal “fault”) that happens to result in death as seriously as murder. To be sure, the problem can be addressed by adding a proportionality principle. But if the proportionality principle takes into account the defendant’s culpability, not just the harm caused, then the proportionality principle could turn the ostensibly “limited” retributivism into a full-fledged affirmative form of retributivism.

<sup>48</sup> See *supra* note 22 and accompanying text.

<sup>49</sup> A possible qualification is one noted by Weinreb, *supra* note 20, at 858-59. Ordinarily, he points out, intent to inflict great bodily injury is tantamount to either intent to kill or extreme recklessness as to death. *Id.* But if the defendant who intends to inflict great bodily injury also takes express precautions to avoid causing the death, then his culpability might be considered to be less than the culpability of one who intends to kill. *Id.* at 859.

<sup>50</sup> See Horder, *supra* note 16, at 770 (asserting that, for the reasons noted in the text, the “correspondence principle” that I have linked to the formal approach is better reinterpreted as a “proximity principle”).

for the formal view attaches undue significance to differential culpability as to each distinct actus reus element. At sentencing, for example, other features of the offender's conduct, background, motivation, and the like will be more important to retributive blame than whether the offender intended to inflict great bodily injury or instead intended to cause death.

The second example is the question whether a "reasonable" mistake as to the victim's age should be a defense to a statutory rape prosecution. Here, even the Model Penal Code, which strongly disapproves of strict liability, makes an exception to its usual requirement of formal fault, when the crime requires that the victim be less than the age of ten.<sup>51</sup> In other words, even a reasonable mistake by the actor that the victim is above the age of ten is no defense;<sup>52</sup> strict liability is imposed as to that element.

The substantive approach might support this result as follows. Even if the offender reasonably believes that the victim is above age ten, he displays substantial fault merely by *risking* that the victim might be under age ten. At least, this is so if he believes or should believe that the victim is not much older than ten, for he then should know that he is at least committing a lesser legal wrong and that he is therefore creating a significant risk of committing the greater legal wrong.<sup>53</sup>

Thus, in the statutory rape example, the offender does ordinarily display substantive fault, even if that fault is not an explicit formal culpability element of the offense. Moreover, the substantive fault in risking the harm of statutory rape of a young girl for insufficient reason is ordinarily sufficiently serious, and sufficiently close to the substantive fault exhibited by *formal* culpability (intercourse with a person who the offenders knows or should know is below the age of ten), that the principle of comparable culpability justifies an equally harsh punishment.<sup>54</sup>

The substantive approach also explains why the actor is at fault in risking intercourse with the victim despite his lack of negligence as to

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<sup>51</sup> MODEL PENAL CODE §§ 213.4(4), 213.6(1) (1980). The Code does except minor offenses, termed "violations," from its general prohibition on strict liability. MODEL PENAL CODE § 2.05 (1985).

<sup>52</sup> *Id.* at § 213.6(1).

<sup>53</sup> See also LOW, *supra* note 17, at 561-62 (defending this strict liability provision on both deterrence and retributive grounds). The counterexample here would be the extraordinary case in which a nine year old reasonably appeared to be above the legal age of consent. For a discussion of the "lesser legal wrong" theory enunciated in Judge Brett's opinion in *Regina v. Prince*, L.R. 2 Cr. Cas. Res. 154 (1875), see DRESSLER, *supra* note 2, at 141-42.

<sup>54</sup> See *infra* text accompanying notes 90-94.

the victim's age. An actor who is not negligent as to a circumstance element such as the age of a victim might nonetheless be negligent or otherwise at fault for engaging in conduct that creates a risk of violating the criminal norm (including the prohibited circumstance). Thus, considered separately from other aspects of the crime of statutory rape, the offender might reasonably believe that the age of a girl is eleven, not nine. (Suppose the girl is the daughter of casual acquaintances, who ask him to guess her age.) But it is still grossly unreasonable for him to take the risk of intercourse with her. Modern "element analysis" focuses on culpability as to each element, considered separately.<sup>55</sup> The more holistic substantive approach asks whether the actor is justified even in creating a risk that the prohibited circumstance might exist, in light of the wrong inherent in the rest of his conduct. It thus properly emphasizes that the actor's wrong consists not simply in his mistake as to her age, but in his choosing to engage in intercourse notwithstanding the risks of making such a mistake.

#### IV. SUBSTANTIVE RETRIBUTIVE THEORY: A CLOSER LOOK

A substantive retributive theory must examine more than the presence or absence of explicit culpability terms in an offense. This section considers what such a theory should, and should not, explore.

##### A. MENS REA, ACTUS REUS, AND THE STRUCTURE OF OFFENSES

Retributive desert depends on both mens rea (including negligence) and actus reus elements, and on the interplay between them. Now it might appear natural to describe the relevance of mens rea and actus reus to retributive desert as follows: one simply ranks actus reus elements in terms of their relative seriousness, and then ranks mens rea terms in terms of relative seriousness, and finally measures retributive desert with this two-part scale. But this approach is inadequate, for reasons that we have already seen. Although it permits us to classify death as worse than injury, or intending to cause death as worse than recklessly causing death,<sup>56</sup> it does not permit us to compare, say, recklessly causing death with intentionally causing injury.

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<sup>55</sup> Notice that MODEL PENAL CODE § 2.02(2)(c) (1985) provides that one is negligent as to a circumstance if one should have been aware that the circumstance exists and not that one is negligent if one should have acted differently in light of foreseeable risks that the prohibited circumstance might exist.

<sup>56</sup> Even the relative comparison of mental states such as intention and recklessness is highly problematic, because of the different possible meanings of some mental state categories (such as recklessness) and because some of the mental state categories that are typically used are incommensurable. For an extended analysis, see Simons, *supra* note 10.

And this incommensurability is pervasive, in light of the various ways that legislatures can and do structure offenses.<sup>57</sup>

For example, under the Model Penal Code, simple assault includes purposely, knowingly, or recklessly causing bodily injury.<sup>58</sup> But it also includes negligently causing bodily injury with a deadly weapon.<sup>59</sup> The latter category could be thought of as an instance of recklessness, inasmuch as a person who *should* be aware of a substantial risk of causing bodily injury (under the MPC definition of negligence<sup>60</sup>) and who actually uses a deadly weapon often *is* aware of a substantial risk of causing bodily injury (under the MPC definition of recklessness<sup>61</sup>). But it is also an instance in which causing a result with lesser culpability, conjoined with the culpable conduct of employing a deadly weapon, is plausibly viewed as deserving similar punishment to causing the same result with greater culpability.

Moreover, a legislature can often further important values, such as better notice to offenders and less arbitrary administration of legal standards, by specifying the criminal norm more clearly with a combination of lower mens rea and additional actus reus. Indeed, in a broader sense, one could view the entirety of the criminal law as exemplifying this principle. The criminal law *could* simply and literally forbid the "purposeful, knowing, reckless, or negligent creation of unjustified and significant harm to personal interests." The actual codes give just a *bit* more detail, in order to avoid the obvious problems of lack of notice and unbridled discretion. But the detailed specifications of criminal offenses remain subject to retributive constraints with respect to consistency, proportionality, and what can be criminalized at all.<sup>62</sup> These constraints must, however, be more complex than

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<sup>57</sup> An even broader issue is how retributive theory should comparatively rank offenses which express radically different types of harm. For example, which should receive the greatest punishment: armed robbery; rape; or an intentional killing in the heat of passion? I agree with Antony Duff's pluralist position here: "Only someone gripped by the utterly implausible idea that all values are reducible to some single final (and measurable) good could suppose that . . . a unitary ranking of wrongdoings is even in principle possible." Duff, *supra* note 2, at 61.

Here, I address a more limited, but still daunting, problem: How should retributive theory rank: (a) causing a harm of a particular type with a more culpable mental state, as compared with (b) causing a greater harm of that type with a less culpable mental state?

<sup>58</sup> MODEL PENAL CODE § 211.1(1)(a) (1980).

<sup>59</sup> *Id.* § 211.1(1)(b) (1980).

<sup>60</sup> MODEL PENAL CODE § 2.02(2)(d) (1985).

<sup>61</sup> *Id.* § 2.02(2)(c).

<sup>62</sup> Any retributive theory should have some account of the limits of the criminal sanction—i.e., a minimum type or degree of social harm that can properly be criminalized (quite apart from the actor's culpability as to that harm). For additional discussion, see JOEL FEINBERG, HARM TO OTHERS (1984); Michael S. Moore, *Justifying Retributivism*, 27 ISRAEL L. REV. 15, 48-49 (1993).

a simple dual set of mens rea and actus reus rankings.

Offenses can be structured in many different ways, consistent with retributive theory. This plasticity reveals that the question whether retributive theory condemns strict liability is more complex than first appears.<sup>63</sup> The impermissibility of pure strict liability, for example, does not imply the impermissibility of impure strict liability. And even pure strict liability is not always impermissible, if such criminal liability expresses the rule-like form of negligence, as we will see.

#### B. STRICT LIABILITY IN CRIMINALIZATION: WRONGDOING, CULPABILITY, AND DEFICIENCY

This section will examine more carefully strict liability in criminalizing. I will first review what might be called the "binary view" of retributive blame, which distinguishes wrongdoing (essentially, the ultimate harm) from culpability (essentially, the actor's mental state). The binary view, I will suggest, is helpful in distinguishing strict liability in the sense of no wrongdoing from strict liability in the sense of wrongdoing but no culpability. It also underscores our earlier conclusion that not any form of culpability will satisfy retributivism; rather, the culpability must be with respect to an ultimate harm or wrong. But I will also conclude that the binary view should be supplemented or even supplanted, in some cases, by a "deficiency view," which takes a more unitary, and more ex ante, perspective in measuring an offender's just deserts.

One appealing way to analyze retributive desert is to draw a sharp distinction between culpability and wrongdoing. Culpability essentially corresponds to mens rea, and wrongdoing essentially corresponds to actus reus; however, if the actus reus is wrongful only because of its relationship to a more ultimate harm, wrongdoing corresponds to that more ultimate harm. George Fletcher, Heidi Hurd and Michael Moore have carefully articulated this view, which we might call the "binary" view of retributive desert.<sup>64</sup> On the binary

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However, even when it is clear that the state has surpassed any required criminalization threshold, the strict liability problem remains, including the problem of distinguishing formal from substantive strict liability.

<sup>63</sup> For fuller analysis, see Simons, *Criminal Negligence*, *supra* note 5, at 373-80.

<sup>64</sup> See GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 454-91 (1978); Hurd, *supra* note 27; Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. Rev. 319 (1996); Moore, *supra* note 2.

Fletcher distinguishes between wrongdoing and attribution (or accountability), and suggests that "culpability," unlike attribution, is limited to being accountable for a *wrongful* act. FLETCHER, *supra*, at 459. Thus, if the act for which one is accountable is a justified act, then the actor cannot be "culpable" for it. *Id.* at 454-91. There are other differences between Fletcher's view and the views of Hurd and Moore, which I do not explore here.

view, culpability is a necessary condition of criminal liability, but the culpability must be with respect to wrongdoing. Wrongdoing means the violation of a deontological norm, that is, conduct or a result that makes the world "worse" in a nonconsequentialist sense.<sup>65</sup> Moreover, the extent of punishment that retributive desert justifies depends on the type of culpability, on the seriousness of the wrongdoing with respect to which the offender is culpable, and, perhaps, on whether wrongdoing has actually occurred.<sup>66</sup>

Thus, murder justly deserves a serious penalty because it requires an unjustified killing (a type of wrongdoing) with an intention to bring about that consequence (a type of culpability). Manslaughter deserves a less serious penalty because the culpability of negligence or recklessness is less, though the wrongdoing is the same. A nonnegligent killing (e.g., when a cautious driver accidentally kills a pedestrian) can also be seen as an instance of wrongdoing, because it might be viewed as factually unjustified.<sup>67</sup> However, it is not subject to criminal liability, because retributive blame always requires culpability.

The notion of "wrongdoing"<sup>68</sup> is a useful concept, because it permits us to identify the ultimate harm or wrong with which the criminal statute is concerned, even if the *actus reus* in the statute itself is more limited and does not directly correspond to that wrong. For example, attempt can be criminalized, not because taking substantial steps towards a crime is itself a form of wrongdoing, but because those steps (and the accompanying *mens rea*) display the actor's significant cul-

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<sup>65</sup> Moore characterizes norms of wrongdoing as forward-looking in that they direct us to engage in or refrain from certain actions, while he characterizes norms of culpability as backward-looking because they assess responsibility for action already done. Moore, *supra* note 64, at 320-21. This temporal characterization can be misleading, I fear, in suggesting that the ground of our objection to wrongdoing is consequentialist. I would prefer to say that wrongdoing and culpability together describe what, on a deontological theory, one should not do, and how seriously one is to blame for doing what one should not do. Moreover, I believe that a certain type of *ex ante* (but not consequentialist) perspective is appropriate, as I will explain below.

<sup>66</sup> The last point is more controversial. One could accept the binary view as an analytic matter but reject moral luck as inconsistent with just deserts. Some retributivists, however, believe that moral luck is consistent with just deserts, as we shall see. See *infra* note 105-06 and accompanying text.

<sup>67</sup> The driver should feel regret, reflecting an outcome that is very unfortunate, and that may, *ex post*, seem unjustified. However, I will question whether a nonnegligent killing should be viewed as an instance of wrongdoing. See *infra* text accompanying notes 86-89.

<sup>68</sup> The term "wrongdoing" is idiomatic, however, and potentially misleading. It does not denote culpability. A nonnegligent driver is a "wrongdoer" if he causes harm, and a malicious killer who is unknowingly justified (because the victim was about to attack him, although the killer is unaware of this fact) is not a "wrongdoer." But the driver does not deserve criminal punishment while the killer does. See Kenneth W. Simons, *Deontology, Negligence, Tort, and Crime*, 76 B.U. L. Rev. 273, 288-89 (1996).

pability towards committing the completed crime, which is itself the relevant harm or wrong.<sup>69</sup>

Thus, the binary view helps explain why retributive blame should be less concerned with how offenses are structured than with the defendant's culpability concerning wrongdoing and (perhaps) with the extent to which the defendant has in fact brought about wrongdoing. It also clarifies the distinction between justification and excuse: justification is a modification of the primary norm of wrongdoing, while excuse diminishes or eliminates the actor's culpability.<sup>70</sup> Thus, if the privilege to use self-defense is a genuine justification, then it modifies the primary norm against killing, such that a killing in self-defense is not an instance of wrongdoing. And an agent who is entitled to claim the excuse of duress is not culpable for the wrongdoing, though he has indeed brought about a wrong.<sup>71</sup>

But the binary view provides an inadequate account of retributive blame. To see why, let us begin at a tangent. The binary view has been used to distinguish between strict *criminal* liability and strict *tort* liability. As Fletcher explains, "the fault that need not be proved in cases of strict [criminal] liability is not the fault of wrongdoing, but the fault of culpability."<sup>72</sup> Strict tort liability is sometimes imposed as a form of taxation on dangerous enterprises, requiring enterprises to treat the harms they cause as a cost of doing business. But a criminal penalty "cannot be thought of as a tax or as a risk of running a pharmaceutical house."<sup>73</sup> Fletcher gives this example: When strict criminal liability is imposed on a corporate officer for introducing adulterated drugs into interstate commerce, the wrongful act is the distribution of the dangerous drugs. What makes the liability "strict" is that the defendant's culpability need not be proven at trial. It is presumed from the violation of the norm prohibiting the distribution

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<sup>69</sup> This feature of nonconsummate offenses such as attempt or possession, that their seriousness depends on the risk that they will result in the ultimate wrong, might appear to express a consequentialist form of reasoning. But this appearance is deceiving. See *id.* at 285-95; see also *infra* note 82.

<sup>70</sup> Michael Moore argues that, apart from burdens of persuasion and other procedural issues, in principle lack of justification is part of the criminal law norm (as are all other exceptions and limits to the norm), while excuse is akin to mental states in relating to culpability, not wrongfulness. See Moore, *supra* note 13, at 178-83; see also Fletcher, *supra* note 64, at 458-59. For a careful analysis and partial critique of this view, see Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984).

<sup>71</sup> See FLETCHER, *supra* note 64, at 458-59. Moore classifies mens rea requirements as prima facie culpability, and excuses as negating prima facie culpability, but he views both as addressing culpability. Moore, *Prima Facie Moral Culpability*, *supra* note 64, at 320.

<sup>72</sup> FLETCHER, *supra* note 64, at 469.

<sup>73</sup> *Id.* at 469; see also JOHN RAWLS, A THEORY OF JUSTICE 314-15 (1971); NOZICK, *supra* note 46, at 54-87.



of adulterated drugs.

Fletcher's example is instructive, for it reveals problems both with the descriptive claim that strict criminal liability is imposed only on wrongdoers (albeit on wrongdoers who are not culpable), and with the binary view itself.<sup>74</sup>

First, consider the descriptive claim that strict criminal liability is only imposed on nonculpable wrongdoers, not (as in tort law) on persons who have not engaged in any wrongdoing at all. In one important category of cases, Fletcher is correct that strict criminal liability is not imposed, while strict tort liability sometimes is. These are cases in which, viewed retrospectively as well as prospectively, the defendant has acted permissibly, or even commendably, in harming the victim, but the victim nevertheless has a claim in justice to compensation. Private takings, exemplified by *Vincent v. Lake Erie Transp. Co.*,<sup>75</sup> may be such cases.<sup>76</sup> A boat owner who saves his boat at the expense of a dock in the midst of a storm has acted justifiably, even viewed in retrospect, but he still may owe tort compensation.<sup>77</sup> Yet it would be unthinkable even to the most fervent proponents of strict criminal liability to impose criminal liability on the boat owner in such a case.

But Fletcher's example of the distribution of dangerous drugs is far more problematic. To be sure, it is possible that anyone who causes such distribution is negligent.<sup>78</sup> But assume that this is a genuine case of strict liability: The actor does not know that any particular shipment contains dangerous drugs, and the cost of acquiring that knowledge or of preventing the initial production of any adulterated drugs is so high that it is reasonable not to incur that cost.<sup>79</sup>

If strict criminal liability attaches to such an actor's decision to market drugs, should we characterize it as strict liability with respect to culpability or instead with respect to wrongfulness? Fletcher assumes

<sup>74</sup> See also FLETCHER, *supra* note 64, at 469 (arguing that it is a conceptual truth that punishment can only be inflicted for wrongdoing, while it is a normative claim that punishment absent culpability is unjust).

<sup>75</sup> 124 N.W. 221 (Minn. 1910).

<sup>76</sup> See Alexander, *supra* note 2, at 7 n.23 ("Cases of justified harm that result in liability are really cases of private takings for which just compensation is owed.")

<sup>77</sup> At least this is the situation in American law. British law might differ. See JOHN G. FLEMING, *THE LAW OF TORTS* 88-89 (7th ed. 1987).

<sup>78</sup> It is also possible (though I believe unlikely) that the law against distributing dangerous drugs is a rule-like form of negligence. The law might then be acceptable even under retributive theory because it is likely to reach more culpable offenders than the standard-like negligence prohibition. See *infra* Part VI.B.

<sup>79</sup> For simplicity of exposition, I analyze the actor's negligence by a straightforward, unqualified cost-benefit criterion. I do not mean to suggest, however, that either criminal or tort negligence does (or should) employ such a criterion. See Simons, *supra* note 68, at 277-85.

that it is strict liability with respect to culpability, not wrongfulness, but this is doubtful. The actor's decision seems similar to a manufacturer's decision to produce and distribute a consumer product that will inevitably contain manufacturing flaws, flaws that cannot be eliminated at reasonable cost or discovered by reasonable inspection.<sup>80</sup> In either case, the company has developed a reasonable system of production and inspection that, unfortunately, will cause some incidents of harm. And it appears that neither company has done anything that we now wish it had done differently.

But perhaps the point of classifying these cases as instances of nonculpable wrongdoing is to identify the distribution of a *particular* misbranded drug or a *particular* defective product as an instance of wrongdoing. The world would be better off if *that* drug or *that* product had not been distributed. Presumably, if we knew then what we know now, we might have instructed a worker not to pack the particular flawed product.<sup>81</sup> Yet this response is unpersuasive. For there is, by hypothesis, no reasonable way *ex ante* to prevent that drug or that product from being distributed, without preventing any (reasonable cost) distribution of beneficial drugs or beneficial consumer products. The harm, it appears, is both justifiable and unavoidable.<sup>82</sup>

If I am right that these cases should be classified as instances of no wrongdoing, then it appears that the criminal law sometimes imposes genuine strict liability even when the actor has not brought about (nor culpably risked bringing about) any wrongdoing at all. Moreover, a stronger conclusion is warranted: Whenever criminal law imposes strict liability even though the offender acted as a reasonable person would have acted *ex ante*, the offender is convicted despite not having committed a wrong. In short, (genuine) strict criminal liability always involves the absence of wrongdoing, not simply the absence of culpability!

This surprising conclusion follows because an actor's reasonable (but mistaken) belief that she will not cause a harm or that a prohibited circumstance does not exist (e.g., that the items in her possession are not illegal drugs) is conceptually no different from a company's reasonable decision to market a drug or product that it cannot reason-

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<sup>80</sup> See RESTATEMENT (SECOND) OF TORTS § 402A (1994). Strict *criminal* liability has not been imposed for such manufacturing defects.

<sup>81</sup> See Larry Alexander, *Foreword: Coleman and Corrective Justice*, 15 HARV. J.L. & PUB. POL'Y 621, 631-32 (1992) (using a similar example to argue that the distinction between negligence and strict liability is arbitrary and incoherent).

<sup>82</sup> To the extent that one finds it more palatable to impose strict criminal liability for producing a justified harm than for producing no harm at all, I suppose this conclusion is less troubling. But strict liability for justified harms certainly remains problematic—e.g., strict liability for cases of justified self-defense.

ably prevent from causing harm. The reasonably mistaken actor has, in effect, adopted an epistemic "system" analogous to the production system of the company. The epistemic system will predictably lead to some errors, but it is, by hypothesis, a reasonable system for which no better alternative exists. Making decisions based on reasonable information and reasonable inferences is justifiable conduct; imposing liability for the unfortunate bad results of such an epistemic system is imposing strict liability in the absence of wrongdoing. (It follows from this analysis that reasonable mistake should be categorized as a case of justification, not excuse.)<sup>83</sup>

An advocate of the binary view, and of the view that these last examples illustrate nonculpable wrongdoing, is likely to reply by emphasizing the distinction between *ex ante* and *ex post* perspectives. Private takings are not cases of wrongdoing because, from *either* the *ex ante* or *ex post* perspective, it is better to destroy a dock than to lose a more valuable boat. But from an *ex post* perspective, it would be better if the defective or adulterated product had never been produced and distributed. To be sure, from an *ex ante* perspective, it is better to permit the distribution of products even though some of them will prove to be defective or adulterated. But the *ex post*, particularized perspective allows us to characterize the distribution of the flawed product as an instance of wrongdoing. And then we can avoid the broad conclusion that all instances of criminal strict liability are instances of no wrongdoing, insofar as lack of negligence is irrelevant. For the nonnegligent, mistaken actor also has, *ex post*, committed a wrong: *ex post*, it would be better if the actor had not made a mistake (albeit a reasonable mistake) in believing that the prohibited result would not follow or that the prohibited circumstance did not exist.

This reply is tempting, but the argument proves too much. It could prove that even private takings are cases of wrongdoing. That is, *ex post*, it would be better if sacrificing the dock had not been necessary in order to save the boat. Yet the sacrifice was necessary. So the question remains why a reasonable decision to destroy the dock should be considered an instance of wrongdoing. Similarly, it would be better if we could produce flawless goods at reasonable cost, or if we could develop an epistemic strategy producing no mistakes. Yet we cannot. So the question remains why the adoption of a reasonable but imperfect system is considered an instance of wrongdoing.

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<sup>83</sup> Thus, I agree with the analysis by Greenawalt, *supra* note 70, at 1907-11. For the opposing view, see Paul Robinson, *Competing Theories of Justification: Deeds v. Reasons*, in HARM AND CULPABILITY 45 (A. P. Simester & A.T.H. Smith eds., Oxford 1996); Terry L. Price, *Faultless Mistake of Fact: Justification or Excuse?*, 12 CRIM. JUST. ETHICS 14, 14-15 (1993); see generally DRESSLER, *supra* note 2, at 193-95; FLETCHER, *supra* note 64, at 762-69.

But perhaps I have not been careful enough in specifying how the binary view would analyze negligence. Negligence, when used as a culpability term in a criminal statute, typically incorporates lack of justification into its definition.<sup>84</sup> In principle, then, we might divide the analysis of negligence into its two components: (1) *wrongdoing*, i.e., an unjustified harm; and (2) some form of *culpability* as to that wrongdoing. (In the following sentence, the wrongdoing is italicized, while the culpability is underlined.) Thus, negligent driving is driving that *the actor knows or should know creates a substantial ex ante risk of producing an unjustified injury.*

To clarify these two categories, contrast two cases. Xavier speeds to bring his child, who reasonably appears to be deathly ill, to the hospital. As it turns out, bringing the child to the hospital so quickly was not medically necessary. Xavier is a wrongdoer, in the sense that he actually created unjustifiable risks of injury to others.<sup>85</sup> But he is not culpable, because he reasonably believed that the risks were justifiable. Yolanda speeds to the hospital as part of a drag race with a reckless friend. As it turns out, she suffers a heart attack (unrelated to the speeding) just as she reaches the hospital, and her close proximity to the hospital permits her life to be saved. Yolanda might not be a wrongdoer, because the risks of injury to others that she created turn out to have been justified. But she is culpable, because the reasons that actually motivated her behavior were immoral.

Can we analyze similarly the earlier examples of the reasonable (ex ante) distribution of drugs, some of which turn out to be adulterated, and the reasonable (ex ante) adoption of an epistemic system, which sometimes leads to mistakes? Xavier, of course, made a reasonable mistake. And perhaps we should say that the drug manufacturer unjustifiably harmed the individual user of the adulterated drug, whose use of the drug made him worse off. From this perspective, both of these earlier examples are instances of nonculpable wrongdoing.

Yet we are no further along than before. For the manufacturer

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<sup>84</sup> This feature also characterizes some definitions of recklessness. See MODEL PENAL CODE § 2.02(2)(c) (1985).

<sup>85</sup> However, one might object that risk-imposition alone cannot count as wrongdoing, since the ultimate harm we are concerned about is the actual imposition of unjustified harm on others. As Heidi Hurd points out, negligence is only wrongful insofar as it risks creating a wrong. See Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 262-65 (1996). But Hurd overstates the case by arguing that negligence is neither deontologically wrongful nor deontologically culpable. See *id.* For a critique, see Simons, *supra* note 68, at 285-95.

To avoid this complication in the examples, imagine that both Xavier and Yolanda actually caused some harm, e.g., frightening others, or causing very minor injuries.

and the reasonably mistaken actor *have* acted justifiably. We would want them, or any similarly situated person, to act the same way in the future. Xavier's case might seem different, but only because the narrative focuses our attention narrowly on how that single automobile trip turned out. If he (or similar people) were to take similar trips numerous times, most of the time the world would be better off for his (and their) reasonable decisions.

To be sure, Xavier might regret how things turned out, and wish that he had known the true facts, so that he would not have had to endanger or frighten people on the way to the hospital. But there was nothing he could actually (and reasonably) have done. Similarly, the manufacturer might regret that someone was harmed, and wish that he had known which shipment contained that article, so that he could have instructed an employee to discard the article. But again, there was nothing he could actually (and reasonably) have done.

Thus, the binary view serves a clarifying function in some contexts,<sup>86</sup> but it cannot account for negligence, or indeed for any culpability requirement that examines what actions are justifiable to take *ex ante*. Retributive theory therefore needs an additional or broader account of culpability and wrongdoing, one that emphasizes the justifiability of acting from an *ex ante* perspective.

Another problem with the binary view is its assumption that the deontologically wrongful state of affairs can always be clearly distinguished from the culpability with which one brings about that state of affairs. But consider a wrong such as torture. The essence of the wrong seems to be the malicious intent, not the pain caused to the victim. (A dentist can justifiably cause pain; and it seems odd to characterize the wrong committed by a torturer as the unjustifiable infliction of pain, as if it is the same wrong committed by an inexperienced dentist who unknowingly causes unnecessary pain.)

In a different context, the context of differentiating tort negligence from tort strict liability, I have spelled out what I call the "deficiency view." Retributive theory in criminal law shares with a corrective justice perspective on tort negligence the following feature: the defendant is not to blame or at fault unless he has acted "defi-

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<sup>86</sup> For example, the distinction between culpability and wrongdoing helps distinguish justification and excuse. The view of justification as "no wrongdoing" lets us decide what set of actions by third parties (e.g., accomplices or defenders) is best from a certain *ex post* perspective. (If I am justified in killing you, you have no right of self-defense, no one else has the right to defend you, and so forth.) But this function cannot tell us what actions are best (and not deserving of criminal liability) in our actual world, containing much *ex ante* epistemic confusion. In the actual world, both an aggressor and a defender might, based on their different reasonable views, be justified in inflicting harm on the other. See Greenawalt, *supra* note 70, at 1919-20.

ciently," i.e., as he should not have acted, judged *ex ante*, such that society would prevent the conduct *ex ante*, if that were feasible.<sup>87</sup> The deficiency of the actor's conduct in this sense should certainly be a minimal retributive requirement of *criminal* liability.

Deficiency can be a more holistic view than the binary view; it need not break down just deserts into "culpability" and "wrongdoing" in every case.<sup>88</sup> The deficiency view can specify both deficient conduct, by reference to how the offender should have acted differently (*ex ante*), and deficient belief, by reference to what the offender should have come to believe (*ex ante*). Of course, a full-fledged retributive theory must say much more about what types of acts and states of mind are deficient, and to what degree.<sup>89</sup>

### C. STRICT LIABILITY IN GRADING

The discussion in the last section focused on strict liability in criminalizing. But how do the binary and deficiency views apply to strict liability in grading? Strict liability in grading is a serious and pervasive problem.<sup>90</sup> For example, the penalty for theft and drug offenses often depends only on the amount stolen or possessed, not (or at least not explicitly) on differential culpability as to that amount.<sup>91</sup> The degree of physical harm caused may also be an important penalty criterion, again without regard to differential culpability.<sup>92</sup> Felony-

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<sup>87</sup> Kenneth W. Simons, *The Puzzling Doctrine of Contributory Negligence*, 16 CARDOZO L. REV. 1693, 1698-1701 (1995); Kenneth W. Simons, *Jules Coleman and Corrective Justice in Tort Law: A Critique and Reformulation*, 15 HARV. J.L. & PUB. POL'Y 849, 867-70 (1992).

<sup>88</sup> For a somewhat similar view, see Alexander, *supra* note 2, at 3-7, arguing that culpability reflects both the actor's subjective beliefs and whether he has good and important reasons for action. Lack of justification, in short, is part of the definition of culpability. I differ from Alexander, however, insofar as I accept a reasonable person criterion. Alexander believes such a criterion to be incoherent, because he believes it asks an incoherent question, namely, to what risks a reasonable person would have adverted. *Id.* at 6-7. I do not find the question incoherent, but I cannot pursue the argument here.

<sup>89</sup> One curious feature of the *ex ante* deficiency view is that it seems in tension with the retrospective orientation of retributive theory, as opposed to other theories of punishment, including utilitarianism (emphasizing future deterrence) and rehabilitation. But this tension is only apparent. Retributive theory should, in my view, take the *ex ante* perspective in identifying the actions and states of mind that properly *earn* punishment. However, it does take a retrospective perspective on the *point* of punishment. For a retributivist, the reason for punishment is not to change the world prospectively, but to punish past conduct according to the principle of just deserts, without regard to possible beneficial or detrimental future consequences.

<sup>90</sup> See Low, *supra* note 17, at 546-47.

<sup>91</sup> See Johnson, *supra* note 8, at 1519. *But cf.* *People v. Ryan*, 626 N.E.2d 51, 54-55 (N.Y. 1993) (construing a drug possession statute as requiring knowledge of the weight of the drug). The *Ryan* court based its decision, in part, on the dramatic difference in penalties for possessing different amounts. *Id.* at 55.

<sup>92</sup> For example, in the State of New York, one who intends to cause serious physical injury to another is guilty of either a misdemeanor, a class D felony or a class B felony for

murder is perhaps the most notorious example of this phenomenon.

When we condemn a punishment as excessive or disproportionate on retributive grounds, can we somehow invoke either the binary or deficiency view? Both views will, of course, justify punishing a person who attempts to steal what he believes will be a small amount of money, or a person who commits a felony, for these are clear instances of culpable wrongdoing. But do they condemn a *strict liability* differential in punishment if the thief happens to obtain a much larger sum of money (e.g., the contents of the wallet are more valuable than one would ordinarily expect), or if the felony happens to cause a death?

From one perspective, such strict liability in grading seems justifiable. For the thief clearly should not have attempted even a minor theft, and the felon should not have committed the felony; and if they had not, they would not have received a greater punishment. But the focus of a retributive lens can and should be sharper than that. Absent any retributive constraints, the commission of the most minor crime that happens to cause any other punishable result, or that happens to occur in the context of any other punishable circumstance, could trigger virtually unlimited punishment.<sup>93</sup>

Under the binary view, genuine strict liability in grading expresses greater wrongdoing but no greater culpability. Under the de-

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identical blows leading respectively to physical injury, serious physical injury, or death. Crocker, *supra* note 23, at 1065.

<sup>93</sup> One variation of this argument is often asserted: the wrongdoer assumes the risk, and cannot justifiably complain if his wrong happens to bring about an even greater harm than he expected or culpably risked. But this claim is unpersuasive.

As an argument that wrongdoers forfeit their rights, the claim clearly proves too much. It could justify imposing the death penalty for illegal parking. As a subjective, intentional waiver argument, it is factually inapt. Offenders rarely consent in this full sense. For some powerful critiques of the claim, see FLETCHER, *supra* note 64, at 723-30; George Fletcher, *Reflections on Felony Murder*, 12 Sw. U. L. Rev. 413, 427-29 (1981); KADISH, *supra* note 1, at 90-91; Laurie Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORN. L. REV. 401, 424-25 (1993); Singer, *supra* note 6, at 406.

This argument could also, however, be one way of asserting the relevance of moral luck, an assertion that is more persuasive. The explanation of moral luck as justifiably effectuating a natural "lottery" seems to capture this theme. One who attempts a crime (the argument goes) cannot complain if he suffers a greater penalty when he fortuitously succeeds than when he fortuitously fails; for the "attempter" runs the risk of "losing" the lottery. See David Lewis, *The Punishment that Leaves Something to Chance*, 18 Phil. & Pub. Affairs 53 (1989); Tony Honore, *Responsibility and Luck*, 104 Law Q. Rev. 530 (1988); see also Cole, *supra* note 2, at 110-20 (examining whether lottery approach furthers deterrent objectives). For critiques of the lottery explanation, see Alexander, *supra* note 2, at 28; Andrew Ashworth, *Taking the Consequences, in Action and Value in the Criminal Law* 107, 110-12 (Stephen Shute et al. eds., 1993); R.A. Duff, *Auctions, Lotteries, and the Punishment of Attempt*, 9 L. & PHIL. 1 (1990); Moore, *The Independent Moral Worth of Wrongdoing*, *supra* note 2, at 251-52.

iciency view, genuine strict liability in grading expresses no deficiency with respect to that grading differential considered in isolation. It seems that, on either view, a culpability-based retributive theory cannot accommodate genuine strict liability. For it is implausible that retributive theory would condemn strict liability in criminalizing without paying any heed to strict liability in grading.

Yet, strict liability in grading raises distinct problems from strict liability in criminalizing. In some cases, it is easier to justify. The sections that follow offer two justifications that sometimes support apparent strict liability in grading. One justification is moral luck, the topic of the next section. A second is the claim that formal strict liability with respect to some offense elements is sometimes acceptable on a more holistic view of the culpability of offenses. In particular, a person who wrongfully (and criminally) commits act X and thereby causes harmful result Y is ordinarily at least negligent as to Y. Thus, formal strict liability as to Y may nonetheless reflect sufficient culpability to satisfy retributive principles. A version of this argument is presented below, in the section on negligence in grading.<sup>94</sup>

#### V. MORAL LUCK

One important question about the acceptability of strict criminal liability is whether such liability exemplifies moral luck—namely, the principle that an offender is justly to blame if his conduct causes harm, even if the occurrence of that harm is fortuitous. (I will further clarify the concept of moral luck shortly.) Insofar as strict liability is indeed an instance of moral luck, strict liability's acceptability might depend on the acceptability of moral luck. That might be bad news, rather than good news, for critics of strict criminal liability, if moral luck is sometimes acceptable; for then some forms of strict liability might be acceptable, too.

Whether moral luck itself is consistent with retributivism is a matter of some controversy. For purposes of this paper, I will assume that it is, though I lean more to the negative view on the question.<sup>95</sup> This

<sup>94</sup> A third justification is the principle of comparable culpability, noted earlier. See *supra* text accompanying note 54.

<sup>95</sup> Insofar as the moral luck principle might be consistent with retributivism, the arguments that I find most persuasive are Moore's arguments in *The Independent Moral Significance of Wrongdoing*, *supra* note 2, at 264-80, and the frugality argument.

Moore's argument relies on the greater resentment that third parties feel towards wrongdoing than towards attempting or risking, the greater guilt that the actor feels, the actor's experience while choosing that wrongdoing matters, and also on a *reductio ad absurdum* claim. The last claim is that denying effect to the moral luck principle as to consequences requires us to draw the unacceptable conclusion that no one is responsible for anything, because it can similarly be a fortuity (over which I lack control) whether my



assumption is a prudent one both because significant portions of virtually all criminal codes do reflect moral luck,<sup>96</sup> and because this assumption permits us to examine more closely the extent to which strict criminal liability presents a *special* problem for retributive theory, beyond any problem intrinsic to moral luck.

In the end, we shall see that many instances of strict liability do exemplify moral luck. Accordingly, deciding whether strict liability is consistent with retributivism often requires deciding both whether moral luck is consistent, and how much differential in penalty the moral luck principle permits.

To understand the moral luck problem, consider four examples.

First, Arnold fires a gun with the intention of killing his victim. If he succeeds, he is guilty of murder. If he fails,<sup>97</sup> he is guilty only of attempt, which is ordinarily punished much less severely than the completed crime.<sup>98</sup> He will receive a lesser punishment even if he has committed what we might call a "completed attempt" (i.e., he has taken every step he believes is necessary to bring about the death),<sup>99</sup>

intention to cause harm results in my bodily conduct, whether my character happens to produce a criminal intention, or whether I have an antisocial character in the first place.

The frugality argument, in the context of retributive theory, assumes that a range of punishments is permissible for any specified culpable conduct and asserts that it is permissible to set the criminal penalty within the lower part of that range when the harm fortuitously does not occur. For critiques of the frugality argument, see Moore, *The Independent Moral Significance of Wrongdoing*, *supra* note 2, at 251; Schulhofer, *supra* note 27, at 1562-85; Yoram Shachar, *The Fortuitous Gap in Law and Morality*, 6 CRIM. JUST. ETHICS 12, 14-15 (1987). In this paper, I am agnostic between the frugality argument and what Moore claims to be a genuine retributive argument for giving effect to moral luck. Each permits criminal law to give some effect to moral luck, but each also imposes some limits.

<sup>96</sup> The clearest example is the differential between completed crimes and attempts. Completed crimes in which the actor causes the proscribed harm are almost universally punished more harshly than attempts—even if the attempt is "complete," i.e., the actor has done all he believes necessary to bring about the harm. See DRESSLER, *supra* note 2, at 348-49, 356-57.

The Model Penal Code achieves greater parity in punishment, but still retains a grading differential for the most serious crimes. See MODEL PENAL CODE § 5.05(1) (1985); DRESSLER, *supra* note 2, at 384.

Israeli law is strikingly different. Israel has abolished the statutory differential in punishment between attempts and completed crimes, authorizing judges to impose the same penalties. Article 34D, Penal Law 1977, amended 1995 (translated by Professor Yoram Shachar, Tel Aviv University, e-mail to author dated July 23, 1996). However, judges retain substantial discretion to recognize a differential at sentencing.

<sup>97</sup> Suppose that the victim unexpectedly leaps aside or is wearing a bulletproof vest.

<sup>98</sup> See *supra* note 9 and accompanying text.

<sup>99</sup> See MODEL PENAL CODE § 5.01(1)(a) (1985) (describing attempt in which actor "purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be"); *id.* § 501(1)(b) (describing attempt in which actor engages in conduct "with the purpose of causing or with the belief that it will cause [a prohibited] result without further conduct on his part"). For a slightly different definition of "complete" attempts, see DRESSLER, *supra* note 2, at 347 (attempt is complete "when the

and even if it is fortuitous (i.e., unrelated to his state of mind or the nature of the acts he has taken) whether the result occurs or not.

Second, Bernard commits a bank robbery with a confederate. During the robbery, the confederate shoots a gun at a bank teller. If the victim dies, Bernard is guilty of felony-murder. If the victim survives, Bernard is only guilty of the felony of bank robbery, which is punished much less severely than felony-murder.<sup>100</sup>

Third, Clara picks the pocket of a passenger on a train and pulls out a wallet. She returns home and checks the contents. If the wallet contains \$1,000, she is guilty of a serious felony. If it contains \$10, she is guilty of a misdemeanor, which may be punished much less severely.<sup>101</sup>

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actor performs all of the acts that she set out to do, but fails to attain her criminal goal").

<sup>100</sup> *But see infra* text accompanying notes 122-24 (noting that a few courts have recognized a crime of *attempted* felony-murder. Still, that crime would ordinarily be punished less harshly than felony-murder).

<sup>101</sup> Some examples:

In Arkansas, theft of property is a class B felony, subject to 5-20 years imprisonment, if the value of the property is \$2500 or more; a class G felony, subject to 3-10 years imprisonment, if the value is between \$500 and \$2500; and a class A misdemeanor, subject to a maximum one year imprisonment, if the value is \$500 or less. ARK. CODE ANN. §§ 5-36-103(b)(1)(A), (b)(2)(A), (b)(4)(A) (Michie 1995); ARK. CODE ANN. §§ 5-4-401(a)(3), (a)(4), (b)(1) (Michie 1995).

In Colorado, theft of property is a class 4 felony, presumptively subject to 2-6 years imprisonment, if the value of the property is between \$400 and \$15,000; and a class 3 misdemeanor, subject to maximum imprisonment of 6 months (and/or a fine of \$750), if the value is less than \$100. COLO. REV. STAT. §§ 18-1-105(V)(A), 18-1-106(1), 18-4-401(2)(a), (2)(c) (1996).

In Oregon, theft of property is first degree theft, subject to a maximum five years imprisonment, if the value of the property is between \$750 or more; second degree theft, subject to a maximum one year imprisonment, if the value is between \$50 and \$750; and third degree theft, subject to a maximum 30 days imprisonment, if the value is less than \$50. OR. REV. STAT. §§ 161.605(3), 161.615(1), 161.615(3), 164.043(1)(b), 164.045(1)(b), 164.055(1)(a) (1995).

In Tennessee, theft of property is a class B felony, subject to 8-30 years imprisonment, if the value of the property is \$60,000 or more; a class C felony, subject to 3-15 years imprisonment, if the value is between \$10,000 and \$60,000; a class D felony, subject to 2-12 years imprisonment, if the value is between \$1000 and \$10,000; a class E felony, subject to 1-6 years imprisonment, if the value is between \$500 and \$1000; and a class A misdemeanor, subject to a maximum imprisonment of 11 months and 29 days if the value is \$500 or less. TENN. CODE ANN. §§ 39-14-105, 40-35-111(b), 40-35-111(e)(1) (1991).

Under the United States Sentencing Guidelines, the offense level increases according to the amount of the loss. Some selected examples: no increase is authorized if the loss is \$100 or less; the offense level increases by 3 if the loss is more than \$2000, by 5 if the loss is more than \$10,000, by 10 if it is more than \$200,000, and by 20 if it is more than \$80,000,000. UNITED STATES SENTENCING GUIDELINES § 2b1.1(b)(1) (1995). Given a base offense level of 6 for theft from the person of another, and assuming no criminal history, the above increases of 3, 5, 10, or 20 offense levels require increases from 0-6 months to 4-10 months, 8-14 months, 21-27 months, and 63-78 months, respectively. UNITED STATES SENTENCING GUIDELINES TBL. (1995).

The Model Penal Code, as noted earlier, does require culpability as to such grading

Fourth, Doris owns a liquor store and sells liquor to Edward after carefully examining his identification card. The card appears to be valid and shows him to be above the legal age for purchasing liquor. It is a strict liability crime to sell liquor to a minor. If the card turns out to be an exquisite forgery, Doris is guilty of the crime. If it is valid, she is not.

Distinguished moral philosophers have argued that "moral luck" exists. If a harmful result fortuitously occurs,<sup>102</sup> they argue, then that result is to the moral discredit of a culpable actor; while if the harmful result does not occur, the failure to have caused that result is to the actor's moral credit.<sup>103</sup> Others have argued to the contrary.<sup>104</sup> Moreover, in the field of criminal law, some retributivist theorists endorse moral luck, believing that the fortuitous occurrence of harm increases the offender's just deserts,<sup>105</sup> while other retributivist theorists disagree.<sup>106</sup>

Most discussions of moral luck address cases such as Arnold's, in

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elements as the amount of property stolen. See MODEL PENAL CODE § 223.1 cmt. (3) (c) (1980). The Code's rationale is precisely the unfairness of allowing luck to determine the outcome:

The amount involved in a theft has criminological significance only if it corresponds with what the thief hoped or expected 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. It is the general premise of the Model Code that fortuity should be replaced as a measure of grading by an examination of the individual characteristics of the offender and by an evaluation of the culpability actually manifested by his conduct.

*Id.*

<sup>102</sup> In an important sense, of course, it is hardly fortuitous when a harmful result occurs as a result of a culpable act. The act is culpable in significant part precisely because it creates an unjustifiable *ex ante* risk of causing the harm. But in any given case, after the actor's own effort or culpable conduct has ended, it is outside of his control whether the harm occurs or not. That is the sense in which moral luck gives effect to a fortuity. For a criticism of the notion of "moral luck," and the suggestion that the inquiry be reframed as whether the causation of bad results matters to moral responsibility, see Moore, *supra* note 2, at 253-58.

<sup>103</sup> See generally Thomas Nagel, *Moral Luck*, in THOMAS NAGEL, *MORTAL QUESTIONS* (1979); Bernard Williams, *Moral Luck*, in BERNARD WILLIAMS, *MORAL LUCK: PHILOSOPHICAL PAPERS, 1973-1980* (1981); Honore, *supra* note 93. See also Michael Zimmerman, *Rights, Compensation and Culpability*, 13 *LAW & PHIL.* 419, 441-44 (1994) (discussing Honore).

<sup>104</sup> See JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 30-33 (1970); see generally Steven Sverdlik, *Crime and Moral Luck*, 25 *AM. PHIL. Q.* 79 (1988); Judith J. Thomson, *Morality and Bad Luck*, 20 *METAPHILOSOPHY* 203 (1989).

<sup>105</sup> See R.A. DUFF, *INTENTION, AGENCY, AND CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW* 189-92 (1990); Moore, *The Independent Moral Significance of Wrongdoing*, *supra* note 2, at 258-80; Fletcher, *supra* note 64, at 481-83.

<sup>106</sup> See Alexander, *supra* note 2; Schulhofer, *supra* note 27, at 1506; Shachar, *supra* note 95, at 13 (observing that when the law relies on the widely shared intuition that the fortuitous occurrence of harm is morally relevant, the law might simply be relying on its own reflection, i.e., on an intuition that the law itself has created); see also H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 129-31 (1968); see generally Ashworth, *supra* note 93.

which the occurrence of the resulting harm is fortuitous, holding constant the actor's culpability and acts. But, on first impression, the issue of strict criminal liability seems to raise the problem of moral luck as well. For it also appears that fortuity or luck is the basis for Bernard's conviction of the more serious crime of felony-murder (if a death happens to occur), for Clara's conviction of the more serious crime of grand larceny (if the wallet happens to contain \$1000), and for Doris's criminal conviction of selling liquor to a minor (if the identification card happens to be forged). Moreover, these examples seem to show that all forms of strict liability raise the problem of moral luck. Bernard's and Clara's convictions are instances of strict liability in grading (with Bernard, as to a result; with Clara, as to a circumstance). The conviction of Doris is an instance of strict liability in criminalization, and as to conduct.<sup>107</sup>

Let us examine more closely whether the crimes of Bernard, Clara, and Doris are indeed instances of moral luck in the same sense that Arnold's crime is. First, consider Bernard, the felony-murderer.<sup>108</sup> With both Arnold and Bernard, fortuity plays a role in increasing criminal punishment. But Bernard is different from Arnold in a very important respect. Arnold intended to kill. Bernard did not. Yet, under the felony-murder doctrine, Bernard's crime is graded as seriously as the crime of intentional murder. Thus, the legal effect of the fortuitous turn of events in Bernard's case is much more dramatic than in Arnold's: it not only increases punishment based on a causal chain over which the actor has no control, but also treats Bernard as having a more serious culpability as to the result than he in fact has.<sup>109</sup>

This "substitute culpability" feature of felony-murder is a dramatic expansion of the concept of moral luck. It could justify enormous disparities in penalty, depending on the breadth of the

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<sup>107</sup> Doris's crime contains both a circumstance element (the age of the minor) and what would conventionally be understood as a conduct element (selling liquor). *But see supra* note 13 and accompanying text. A somewhat purer "conduct" example would be the following. Unknown to Dylan, his new car's speedometer is broken. While driving, Dylan exceeds the speed limit because of his reliance on the speedometer. A reasonable person in his shoes would not know that he was exceeding the speed limit. Whether Dylan does or does not violate a strict liability prohibition against exceeding the speed limit is a fortuity.

<sup>108</sup> Crump and Crump explicitly draw the moral luck analogy, arguing that the relevance of harm to retributive blame in such contexts as the greater punishment for completed crimes than for attempts militates in favor of strict liability for felony-murder. David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 360 n.7 (1985).

<sup>109</sup> I put off for now the question of the degree of culpability that Bernard shows as to the resulting death. One might view him as not culpable for that result, or one might conclude that he is at least negligent as to the resulting death, since he should know that the felony could lead to death and, of course, he should not have committed the felony. For further discussion, see *infra* Part VI. A.

principle of substitute culpability adopted. The principle underlying felony-murder is that an offender can be treated as intending result Y whenever he intends a serious crime X and X fortuitously brings about Y. But the principle could be much broader still, e.g., that the offender can be treated as intending result Y whenever he intentionally does any moral wrong that fortuitously brings about Y.<sup>110</sup>

The substitute culpability principle is not a genuine instance of moral luck at all. In its classic exposition, at least, the principle of moral luck asserts that equally culpable individuals can deserve different punishments in light of the difference they actually make in the world. It is a principle of responsibility for actual outcomes. But that principle does not justify a form of *constructive* culpability, in which the difference an offender actually makes in the world is the trigger for conclusively treating an individual as if he possessed a higher level of culpability than he actually possessed.<sup>111</sup>

To be sure, a moral luck principle might conceivably create a greater differential in punishment than a substitute culpability principle creates. For example, suppose the penalties are (in the case of Arnold) five years for attempted (intentional) murder, or twenty years for (intentional) murder; and (in the case of Bernard) ten years for bank robbery, or twenty years for felony-murder. However, even if the differential in punishment based on success or failure is justifiable in each case, considered separately, treating "successful" Bernard as seriously as "successful" Arnold remains disturbing. For although both have caused a death, Bernard's culpability could be much less.<sup>112</sup>

We should reject the substitute culpability principle in this extreme form.<sup>113</sup> Can a more modest form of felony-murder, with lesser penalties than for intentional murder, be justified as an instance of moral luck? This depends in part on whether the moral luck principle properly applies at all when the actor has *no* culpability as to some

<sup>110</sup> At the limit, the substitute culpability principle could treat an offender as intending result Y whenever he intentionally does *any act* that fortuitously brings about Y. This extreme version of the principle essentially collapses the distinction between culpability-based and harm-based retributivism. I thank Stan Fisher for clarifying this point.

<sup>111</sup> The substitute culpability principle might be a clumsy way to express a more subtle form of negligence culpability. On the latter, see discussion *infra* Part VI. A.

<sup>112</sup> One might well conclude that Bernard normally displays some culpability, at least negligence, as to the risk of death, whenever he engages in a serious felony, for a reasonable person should know that serious felonies create unreasonable risks of death. Still, the punishment for felony-murder usually greatly exceeds the combined punishment that is imposed (and that retributive theory would permit) for the felony and for negligent homicide.

<sup>113</sup> However, the different and less extreme principle of comparable culpability is defensible. See *supra* text accompanying notes 51-56 (discussing intent-to-inflict-great-bodily-injury murder and statutory rape).

element of the crime (here, the element of resulting death).<sup>114</sup> Let us put aside that complication for now. Assume that any felon who commits a bank robbery is at least negligent as to the risk of death. Then moral luck principles do appear to justify treating Bernard more harshly if he causally contributes to a death than if he does not, holding constant his negligence as to that death.<sup>115</sup> To this extent, then, felony-murder can be consistent with widely accepted principles of moral luck.

Another potential difference between Arnold and Bernard concerns the proximity or directness of the causal relation. Bernard, like many felony-murderers, contributes to the resulting death much less proximately or directly than Arnold. But this possible difference does not persuasively distinguish the cases. For the causation question is independent of the basic moral luck principle that appropriately caused harms (e.g., harms that are sufficiently direct, proximate or foreseeable) can make a difference to just deserts.<sup>116</sup> It might indeed be the case that many felony-murders are not appropriately caused, a fact that justifies limiting the scope of any felony-murder doctrine. But for those felony-murders that *are* appropriately caused, the moral luck principle applies. (Thus, if you doubt that Bernard should be causally responsible for his confederate's actions, suppose instead that Bernard carried a loaded gun on his belt, and the gun accidentally discharged as he was running out of the bank.)

The question still remains whether the moral luck differential in Bernard's case is consistent with the moral luck differential in Arnold's. We have been assuming that some moral luck differential is consistent with retributive theory. But identifying the most justifiable proportionality requirement here is elusive. If, for example, retributive theory warrants increasing Arnold's penalty from ten to twenty years if death occurs, and if Bernard's commission of a serious felony and negligence in risking (but not causing) the victim's death warrants a penalty of, say, fifteen years, what is the appropriate penalty increase if the death does occur?

Felony-murder would be consistent with the basic moral luck principle, it seems, only if the differential in punishment between felony and felony-resulting-in-death (holding constant the required culpability as to the felony and as to the death) is consistent with the

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<sup>114</sup> See *infra* text accompanying notes 134-41 (discussing the case of Doris).

<sup>115</sup> Similarly, if a negligent driver happens to kill a pedestrian rather than injure him, it might be fortuitous whether the death occurs.

<sup>116</sup> Cf. Moore, *The Independent Moral Significance of Wrongdoing*, *supra* note 2, at 253-57 (suggesting that principles of moral responsibility include a proximate cause requirement).

differential between a completed attempt and a completed crime. But given the very wide punishment differential in actual legal practice between the felony and felony-murder, it is doubtful that the moral luck principle can justify the severe punishment of felony-murder.<sup>117</sup> Unfortunately, retributivists have yet to give an account of the acceptable *dimensions* of the moral luck "differential."<sup>118</sup> (One can be punished more if the harm occurs; but how much more?) So it is difficult to reach a firm conclusion.

Another reason for the difficulty here is that with lower levels of culpability, including recklessness and negligence, it is difficult even to identify unambiguous cases in which the moral luck principle is the *only* explanation for differential desert. Once Arnold pulls the trigger, it is easy to see that the result is outside his control, and that only luck explains whether he is liable for murder or instead attempted murder. By contrast, if Arnold has taken substantial steps towards the murder, but has yet to take the last step, then it is not only the moral luck principle that explains a lesser penalty. His commitment to the result might be less than firm; he has an opportunity to change his mind; and so on.<sup>119</sup> But now compare Alice, who drives her car negligently. What counts as a pure application of the moral luck principle? We tend to hypothesize cases in which, say, the car is out of her control due to her negligence, and she either runs over a child or barely misses the child. But imagine a case in which she is simply driving much too fast. If someone had been in the way, she could not have stopped in time. As it turns out, and unknown to her, no one was in the way, or even close by. Unlike the situation with Arnold, there

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<sup>117</sup> Under early English law, felonies as well as murders were generally punished by death. Thus, it made little difference whether the felon was put to death for the unintended murder or for the underlying felony. 2 CHARLES E. TOCIA, *WHARTON'S CRIMINAL LAW* § 149 (15th ed. 1994); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 622 (2d ed. 1986). In its earliest incarnation, the "felony-murder" rule was even broader, and better characterized as an "unlawful act-murder" rule, because any death arising from an unlawful act (not limited to felonious acts) was treated as murder. See 2 TOCIA, *supra*, § 147 (citing 3 STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 52-57 (1883)). Later, when most felonies were no longer punishable by death, the felony-murder rule came under closer scrutiny. *Id.* Eventually, England abolished the rule with the adoption of the Homicide Act of 1957. DRESSLER, *supra* note 2, at 479. See also Crump & Crump, *supra* note 108, at n.7 (discussing other historical reasons for a felony-murder rule even when felonies were harshly punished). I thank John Jeffries for this point.

<sup>118</sup> Moore does not separately discuss the acceptable differential in punishment that one deserves for bringing about the harm, though he seems comfortable with the differentials provided in existing American law, for he asserts that "when we intentionally kill, we deserve the extra punishment we typically receive over that which we would have received had we only tried or intended to kill." Moore, *The Independent Moral Significance of Wrongdoing*, *supra* note 2, at 280. Nor does Duff discuss the issue. DUFF, *supra* note 105, at 189-92.

<sup>119</sup> See DRESSLER, *supra* note 2, at 356-57 (discussing some rationales for punishing attempts less harshly than completed crimes).

seems to be no conceptually sound description of Alice's situation that can isolate, out of the broad category of all negligent acts, those proximate or final acts of negligence that "barely miss" causing the result but for a fortuity.<sup>120</sup> And we are then left with a counterintuitive and apparently perverse conclusion: If the requisite culpability is intent, then the moral luck principle extends criminal liability only to a limited degree, while if the culpability is less (e.g., negligence), the extension of liability is virtually unlimited.<sup>121</sup>

This conundrum has bothered courts in a specific doctrinal context: Is it possible to convict a person of *attempted* felony-murder?<sup>122</sup> Note that if this were possible, then Bernard's case would, in one respect, become more analogous to Arnold's. If attempted felony-murder were possible, then we could apply a consistent "no harm" penalty discount to Arnold (who intends to kill) and to Bernard (who is at most negligent as to the risk of death) in those cases in which death does not occur.<sup>123</sup> But most courts have rejected attempted felony-murder, just as they have rejected attempted involuntary manslaughter, in part because of this conundrum.<sup>124</sup>

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<sup>120</sup> An exception would be negligent conduct that the actor knows cannot result in harm until the actor engages in further conduct. Suppose Alice knows that her brakes are in bad shape, and plans to drive the car anyway, but does not plan to drive until tomorrow. That her negligence has not yet caused a harm today is not *simply* a matter of moral luck.

<sup>121</sup> Contrast the rule in tort law, where courts are more willing to find a causal connection between the tort and the resulting harm if the tort is intentional than if the tort is one of negligence. See RESTATEMENT (SECOND) OF TORTS § 431 cmt. e (1965).

At a deeper level, characterizing moral luck in cases of lower culpability might be problematic for similar reasons that impossible attempts (in cases of higher culpability) have struck some observers as problematic. If Arnold shoots at what he believes to be a human being, but the target is actually a mannequin or a tree stump, he might be guilty of attempt. Is this the same sort of moral luck case as that in which the bullet wounds but does not kill, or in which the victim happens to be wearing a bulletproof vest? It might seem a more complex case, but on closer analysis, I believe it to be the same. In both cases, the culpability is the same whether or not the harm occurs; and whether the harm occurs depends on circumstances outside the control of the defendant.

Interestingly, the attempted murder/tree stump case is similar to the case in which a driver speeds and pays no attention to her surroundings; someone could have been nearby, but in fact no one was. We can properly characterize the tree stump case as one of moral luck insofar as the offender did intend to kill another person whether or not the victim (for reasons outside the control of the offender) was actually present. Similarly, it seems, we should characterize the speeding driver case as one of moral luck insofar as she can unreasonably risk injuring foreseeable victims whether or not a victim was actually in the vicinity.

<sup>122</sup> DRESSLER, *supra* note 2, at 360-61.

<sup>123</sup> In other respects, the cases remain disanalogous; only a (dubious) substitute culpability principle seems to justify treating successful Bernard as harshly as successful Arnold.

<sup>124</sup> *But see* Amlotte v. State, 456 So. 2d 448 (Fla. 1984). In *Amlotte*, the court recognized attempted felony-murder and struggled to confine it to cases in which the felon commits "a specific overt act which could, but does not, cause the death of another." *Id.* at 450. This limitation seems essentially meaningless. See DRESSLER, *supra* note 2, at 361. *Amlotte* was



We see, then, that the question of whether Bernard's felony-murder conviction is an instance of moral luck is complex. The answer might be yes. But it is difficult to say whether the moral luck principle is being unreasonably extended here, because retributivists have yet to explain how great a differential in punishment is justified even in the more standard case (such as Arnold's). Moreover, an objectionable substitute culpability principle might be the actual explanation of the grading equivalence between felony-murder and intentional murder, and perhaps of some of the grading differential between the felony and felony-murder.

Now consider Clara. In evaluating her case, first suppose a simpler "moral luck" variation. If the pocket is empty, Clara could at most be liable for attempt.<sup>125</sup> If the pocket contains something of value, then Clara will have committed some form of theft. This is a straightforward instance of moral luck, insofar as factors outside Clara's control affect her punishment, holding constant her culpability and acts.<sup>126</sup> Here, the factors are circumstances, not causal consequences; but the principle seems equally apt.

If the distinction between an empty pocket and a pocket with a

overruled by *State v. Gray*, 654 So. 2d 552, 553 (Fla. 1995).

More generally, the law has not imposed attempt liability for crimes with a culpability less than intent (or, in some jurisdictions, knowledge), much less for strict liability crimes. If it were otherwise, then every act that negligently risked a death would be "attempted negligent homicide"! Other reasons for this significant limitation on attempt liability, apart from the moral luck principle itself, include the following: it is somewhat more difficult to prove negligence or recklessness when the actor has not brought about a harm; and the conventional meaning of "attempt" includes an intent to bring something about.

For further analysis of the complexities of attempt liability when the substantive crime requires a culpability less than intent or belief, or when the culpability relates to a circumstance element rather than a result, see Simons, *supra* note 11, at 478-83.

<sup>125</sup> Indeed, some jurisdictions might treat this as a "legally impossible" attempt, and permit no attempt liability at all, on the theory that it is "impossible" to steal from an empty pocket. See Dressler, *supra* note 2, at 373-75. English law so held, for a time. See Booth v. State, 398 P.2d 863, 869 (Okla. Crim. App. 1964) (citing Regina v. Collins, 9 Cox C.C. 497, 169 Eng. Rep. 1477 (1864)). Later, the English judges came to their senses and permitted an attempted larceny conviction. See *id.* (citing Regina v. Ring, 17 Cox C.C. 491, 66 L.T. (N.S.) 306 (1892)).

<sup>126</sup> I add a modest qualification insofar as the act of taking a wallet out of a pocket is marginally more culpable than the act of reaching into a pocket (and finding nothing there). There is always the possibility that the second actor, if he had felt a wallet in the pocket, would have changed his mind and would have chosen not to take it. (A closer parallel is taking a wallet out and later finding it empty. But I seek an example in which the conduct is at most an attempt; in this last variation, by contrast, the actor has committed the completed crime of theft.) I discuss this qualification below.

To be sure, if a thief confessed in advance that she would keep whatever she happened to find, then there is little difference in culpability between the empty pocket and wallet-in-the-pocket cases, or between the case where the wallet contains \$10 and the case where it contains \$1000.

wallet exemplifies moral luck, then so does the distinction between a pocket containing a wallet holding \$10 and a pocket containing a wallet holding \$1000. Thus, treating Clara more harshly based on the relative value of the contents of the pocket is in principle no different than treating her more harshly based on whether the pocket contained anything at all. This form of strict liability,<sup>127</sup> then, does seem to be an instance of moral luck.

Does it matter that the luck in Clara's case concerns a circumstance (the contents of a pocket or wallet), and not (as in Arnold and Bernard's cases) a result?<sup>128</sup> No, but the analysis is a bit complex, as we shall see.

Consider here Thomas Nagel's distinction between four types of moral luck: constitutive; circumstantial; causal conditions; and causal consequences.<sup>129</sup> Arnold and Bernard's cases involve causal consequences. By "circumstances," Nagel means opportunities for moral choice or for displaying moral qualities, such as facing a dangerous or politically oppressive situation in which one could either be a hero or a coward. One who never had to face the situation but who would have been a coward is "lucky" in the relevant sense.<sup>130</sup>

Is Clara's case an instance of circumstantial luck in Nagel's sense? Curiously enough, it is not. Consider another comparison—between Clara, who entered a train with the intention of stealing and found a pocket to pick, and Fred, who entered a train with the same intention

<sup>127</sup> Ordinarily, however, Clara will have some culpability as to the circumstance element; she should be aware that the wallet could contain \$10, \$1000, or even more. If she lacks such culpability—e.g., if the wallet contains much more money than any person would reasonably expect—then her situation more closely resembles that of Doris, considered below.

<sup>128</sup> These are circumstance elements, not results, because Clara has no power to affect the amount of money that is in the victim's pocket.

<sup>129</sup> As Nagel explains:

There are roughly four ways in which the natural objects of moral assessment are disturbingly subject to luck. One is the phenomenon of constitutive luck—the kind of person you are, where this is not just a question of what you deliberately do, but of your inclinations, capacities, and temperament. Another category is luck in one's circumstances—the kind of problem and situations one faces. The other two have to do with the causes and effects of action: luck in how one is determined by antecedent circumstances, and luck in the way one's actions and projects turn out.

Nagel, *supra* note 103, at 28.

<sup>130</sup> *Id.* at 33-34. The other two forms of moral luck are not usually considered to pose as serious a problem for retributive theory. We must tolerate a substantial degree of both constitutive and causal condition moral luck if we are to justifiably blame people for acts that are the product of character flaws (such as irascibility) or that are the product of such casual antecedents as peer pressure or one's upbringing. However, an important part of Moore's argument for moral responsibility for consequences is that such responsibility is no less justifiable than these other, more clearly acceptable, forms of moral responsibility that turn on fortuities. See Moore, *The Independent Moral Significance of Wrongdoing*, *supra* note 2, at 271-80.

but found no one there. In this case, the difference *could* be described as circumstantial luck in Nagel's sense. And, indeed, the actus reus requirement of attempt partly expresses the point that circumstantial luck does matter to desert; if you are fortuitously apprehended before you have taken very many steps towards the crime, or if you give up for reasons outside your control (such as the inability to obtain some necessary supply), you have nevertheless taken fewer steps toward the completed crime, and the steps that you *have* taken might be insufficient for attempt liability.

However, if Clara does all that she believes necessary to complete the crime (taking a wallet out of a pocket), then whether the wallet contains \$10 or \$1000 expresses a "luck as to circumstances" different from Nagel's sense of "circumstantial luck." It is a purer example of moral luck, one more analogous to the consequential luck of Arnold and Bernard. By contrast, Fred's luck differentiates him from Clara not only in what was stolen, but also in the actual steps he took toward stealing. For good reason, the criminal law focuses not just on intention, but also on what steps the offender has taken toward the ultimate criminal harm. The legal system cannot simply presume that Fred, notwithstanding having an intention similar to Clara, would, if given the opportunity, have actually *acted* just as she did so as to effectuate that intention.<sup>131</sup> A retributive theory that values personal autonomy<sup>132</sup> therefore properly treats an actor such as Fred as less blameworthy because of his (good) "circumstantial luck" (in Nagel's sense). And the case for giving effect to such "luck" is much easier than the case for giving effect either to consequential luck or to "luck as to circumstances" in cases where the actor's conduct is the same but the consequences or circumstances fortuitously differ.<sup>133</sup>

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<sup>131</sup> See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 75-76, 96 (1968) (arguing that an individual's capacity to live in reasonable freedom from socially imposed external constraints would be fatally impaired unless the law provided a "locus poenitentiae," a point of no return beyond which external constraints may be imposed but before which the individual is free); see also Alexander, *supra* note 2, at 24-25.

<sup>132</sup> Some might view this suggestion as mixing distinct principles. But I believe that retributivism can be understood in this wider sense. Alternatively, this suggestion could be viewed as supported by a pluralist theory encompassing both just deserts and autonomy principles.

<sup>133</sup> By this argument, I do not mean to endorse a "last act" test for attempt. I mean only to clarify that people who commit the last act necessary to bring about the harm present purer cases of moral luck, akin to consequential harm moral luck. In some cases, the acts of an offender short of a last act might be sufficiently unambiguous and culpable as to deserve a level of punishment almost as severe as for the completed crime.

To be sure, Clara's case is more troubling than Arnold's in one respect: It is more difficult to imagine how we would eliminate the effects of moral luck, if we believed that retributive theory so required. For the culpability in many grading contexts like this is difficult to determine. Was she willing to keep any amount of money that she found? If so,

Finally, consider Doris, who differs from the other actors in exemplifying strict liability in criminalizing, rather than in grading.<sup>134</sup> First, as a terminological matter, one might hesitate to call her liability a matter of “moral” luck, if she has done nothing wrong.<sup>135</sup> But the question remains whether retributive theory can justify imposing a criminal penalty on her if the harm occurs, and not imposing a penalty if the harm does not occur. It does seem that the moral luck principle, or at least a “nonmoral” analogue, applies. For it is fortuitous, from the perspective of her acts and her culpability, whether the identification card happens to be forged or not. This concern is indeed an important part of the rhetoric of judges and commentators who oppose strict liability: such liability is a “trap for the unwary,” and could affect any innocent person.<sup>136</sup>

Moreover, some of the limits that courts have engrafted onto strict liability statutes might be designed, if only implicitly, to address this concern about the fortuitous imposition of sanctions. Consider the so-called “impossibility” defense that the United States Supreme Court endorsed in *United States v. Park*.<sup>137</sup> One conventional explanation of the defense is that it represents a clumsy or imperfect effort to impose a negligence requirement, or a requirement of “extraordinary

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should we impose punishment based on the largest (or the smallest?) amount of money that she believed could have been in the wallet? That she reasonably *should have believed* could have been in the wallet? For the objection that subjective theories of criminal culpability are radically incomplete because of problems such as these, see Crocker, *supra* note 23, at 1067-69.

<sup>134</sup> Her case is also, in part, an instance of strict liability as to conduct. I will not separately analyze the “conduct” element of crimes, except for the following comments. In a few cases, the moral luck analysis explored here would become more complex if we were to treat “conduct” more carefully as a basic act that causes a prohibited result (or causes satisfaction of a “conduct” element of the actus reus). See *supra* note 13 (discussing Moore). Suppose a person is charged with speeding because he decides to push down the gas pedal, but after he makes that decision, his leg goes into a spasm. It is a matter of fortuity whether the spasm causes him to hit the gas pedal and speed. Similarly, a burglar who thrusts his arm forward to break into a house might, fortuitously, suffer sudden paralysis and thus be unable to satisfy the actus reus requirement of “breaking and entering.” This paper ignores the complications of fortuities in the chain of causation between decisions to act and basic acts (the speeding driver), or between basic acts and satisfaction of actus reus conduct elements (the paralyzed burglar).

<sup>135</sup> See Nagel, *supra* note 103, at 29 (arguing that we should not describe such a situation as involving *moral* luck).

<sup>136</sup> See, e.g., *Staples v. United States*, 511 U.S. 600 (1994) (expressing concern about penalizing “apparently innocent” acts); *Liparota v. United States*, 471 U.S. 419 (1985) (same); Schulhofer, *supra* note 27, at 1586-87 (expressing concern that strict liability crimes may have arbitrary and counterproductive effects, for they “may exclude a few accident-prone people from [an] activity” but may fail to exclude many who are overconfident that they can avoid harm).

<sup>137</sup> 421 U.S. 658, 673 (1975) (“the Act . . . does not require that which is objectively impossible”).

care.”<sup>138</sup> Perhaps a better explanation is that a defense of “impossibility” and a requirement that the offender be in a “responsible relation to prevent the harm” help assure that the incidence of strict liability is more predictable.

From the perspective of *critics* of the concept of moral luck, strict liability in criminalization is especially troubling. If criminal law should give no weight to the fortuitous occurrence of harm, and if strict liability in criminalization is assumed to be justifiable, then it should also be justifiable to punish behavior that “could have” resulted in harm but did not. Doris would then be strictly liable even if the customer was not a minor, because the customer provided evidence that could have been forged and that no reasonable merchant would have discovered to be a forgery!<sup>139</sup> Perhaps the best reply to this problem is that it is simply a more dramatic illustration of the characterization difficulty noted above; the less culpable the actor, the more difficult it is to differentiate an “incomplete” from a “complete” attempt,<sup>140</sup> and to identify with any coherence what would have happened if fortuity had been eliminated.

Still, the basic question remains: Should retributivists treat the fortuitous occurrence of harm differently when strict liability is a matter of criminalization (in Doris’s case), and not simply a matter of grading (as in the cases of Bernard and Clara)? Michael Moore has briefly suggested that strict liability is a distinct issue from moral luck as to consequences of otherwise culpable acts: culpability can be a necessary condition of any retributive punishment, yet the causation of a harm or wrong (via culpable conduct) that one intended or risked can *add* to one’s deserved punishment.<sup>141</sup> Is this a coherent position? I believe that it is, but it also poses some puzzles.

First, note that the above analysis treated the cases of Bernard and Clara not as instances of strict liability in grading, but as instances

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<sup>138</sup> See *United States v. New England Grocers Supply Co.*, 488 F. Supp. 230, 235 (D. Mass. 1980) (interpreting defense as exculpating only a defendant who can show “that he exercised extraordinary care and still could not prevent violations of the Act”); Levenson, *supra* note 93, at 461-62 (interpreting the defense as exculpating defendants who can prove they were reasonably unaware of the relevant facts). For a critique of the defense of strict liability as a requirement of extraordinary care, see *infra* text accompanying notes 180-83.

<sup>139</sup> See Simons, *supra* note 11, at 480 n.109.

<sup>140</sup> The word “attempt” must be understood here as a term of art for dangerous or culpable conduct arguably deserving punishment but falling short of the completed crime, without regard to whether the actor was “trying” or “attempting” the completed crime in the ordinary sense of these terms. For example, on this view, one can “attempt” reckless manslaughter by shooting a gun in such a manner that, if death did result, one would be liable for reckless manslaughter. See DRESSLER, *supra* note 2 at 355-56; Simons, *supra* note 2, at 512.

<sup>141</sup> Moore, *The Independent Significance of Wrongdoing*, *supra* note 2, at 281.

of lack of formal culpability in grading that nevertheless usually express at least minimal culpability. Bernard is likely to be at least negligent as to the risk of death; Clara is likely to be at least negligent as to the risk that she is stealing \$1000 rather than \$10. But in those few cases where they are genuinely not culpable as to the risk, their situations much more closely resemble Doris's. Then it is not clear why their cases should be treated any differently from Doris's with respect to the applicability of the moral luck principle. That is, moral luck seems problematic both for genuine strict liability in criminalizing and for genuine strict liability in grading.

Second, if the causation of harm allows a significant *increase* in punishment of an otherwise culpable offender, then why cannot the causation of harm by an otherwise *nonculpable* offender be subject to at least a minimal penalty? For example, suppose, on our most defensible retributive theory, that negligent distribution of an adulterated drug that causes a death can be subject to a two year prison term, while negligent distribution that does not cause death can be subject only to a six month term. Why is it unacceptable to impose a simple criminal fine upon someone who, with *no* negligence or other fault, distributes an adulterated drug?

In short, why does fortuity play this discontinuous role in justifying retributive punishment? Why does allowing a fortuity (the occurrence of a harmful result or circumstance) to increase a punishment seem more justifiable than allowing such a fortuity to turn a noncriminal act into a criminal act? Perhaps the basic answer is simply that a culpability-based retributive theory with any real bite must place some limits on moral luck in criminalization. And on either the binary or deficiency view, genuine strict liability as to criminalization is inconsistent with just deserts. Moreover, the decision to impose the stigma of a criminal conviction might seem more momentous than the decision to increase the penalty of a person who is sufficiently culpable to deserve *some* criminal sanction. (On the other hand, the latter decision is hardly a trivial one, given the possible size of the disparity in penalty.)

Our analysis of moral luck suggests the following conclusions. Many, but by no means all, instances of strict liability do indeed exemplify the principle of moral luck, and therefore do not create an *additional* problem for retributivists. And this is true not only when formal strict liability pertains to results of the actor's conduct, but also when it pertains to circumstance elements or to conduct. However, a potentially expansive "substitute culpability" principle also sometimes explains much of the differential in punishment in cases of strict liability in grading, and retributivism does not justify *that* principle. Moreover,

the extent to which strict liability is explained by moral luck is difficult to assess in light of the lack of a clear retributivist account of *how much* differential in punishment moral luck might justify. Finally, as the actor's culpability decreases, it becomes more difficult to identify instances of genuine moral luck—instances, that is, in which the *only* explanation for the occurrence of the result or the presence of the circumstance is a fortuity. In other words, it then becomes more likely that the actor's conduct is insufficiently proximate to the prohibited result or circumstance, and is, for *that* reason, less deserving of punishment.

## VI. STRICT LIABILITY AS A DISGUISED FORM OF NEGLIGENCE

Courts that accept strict liability often assume that the only alternative is a relatively serious form of culpability, perhaps even knowledge or belief. They often fail to consider the possibility of negligence liability.<sup>142</sup> This omission is especially surprising when strict liability pertains to grading, rather than criminalization.<sup>143</sup>

Whether negligence is always, or indeed ever, sufficient culpability for criminal punishment is beyond the scope of this essay. But if it is sometimes sufficient, then the analysis that follows is important. For some instances of formal strict liability can be understood as a subtle or disguised form of negligence liability (or, in some cases, as a disguised form of some other type of criminal culpability, such as recklessness or culpable indifference). The next two subsections examine two very different ways in which this can be true—when formal strict liability in grading represents substantive negligence, and when strict liability is a rule-like form of negligence. A third subsection examines a less persuasive argument—that strict liability can be defended as a form of genuine fault in the sense of a requirement of “extraordinary care.”<sup>144</sup>

<sup>142</sup> See Johnson, *supra* note 8, at 1519. See generally Levenson, *supra* note 93 (endorsing a general affirmative defense of good faith or non-negligence).

<sup>143</sup> Levenson's otherwise thorough analysis of strict liability devotes very little attention to strict liability in grading. See Levenson, *supra* note 93, at 418 n.90 (“[T]he strict liability crime is generally one for which knowledge of the key or ‘material’ elements of the offense is not required.”), 425 n.125 (treating the felony murder doctrine as distinct from the strict liability doctrine).

<sup>144</sup> A more radical critique claims, not that strict criminal liability is defensible insofar as it sometimes expresses negligence liability, but that criminal *negligence* liability is *indefensible* insofar as it is conceptually indistinguishable from strict liability. One important part of this critique argues that one cannot make sense of the reasonable person criterion, because the hypothetical construction of that person's capacities has no normative bearing on what an actual individual offender can and should do. See Alexander, *supra* note 2, at 6-7; Alexander, *supra* note 81, at 631-36; Alexander, *supra* note 15, at 98-103; Honore, *supra* note 93; see also HART, *supra* note 106, at 152-57, 262. A related issue is that the failure to

## A. IS STRICT LIABILITY IN GRADING A FORM OF NEGLIGENCE?

If an offender culpably commits a crime, and that crime causes a further harm, is he necessarily culpable with respect to that further harm? If he is, then almost all<sup>145</sup> supposed instances of strict liability in grading would be instances of genuine fault, after all. I will conclude that such an actor is often, though not always, culpable for the further harm, even if no formal culpability requirement applies to the statutory grading differential.

On first impression, any grading differential for which no formal culpability is required seems inconsistent with retributivism. Consider felony-murder as an example. We punish the felony at a certain level. We do not otherwise punish nonculpable homicide. Thus, adding a penalty to the felony because it resulted in death seems no more justifiable than punishing someone for an accidental, non-negligent homicide today simply because he committed a felony last year.

But this analysis is incorrect. Often, culpably doing X, which happens to cause Y, amounts to negligence (or to a higher culpability, such as recklessness) as to Y.<sup>146</sup> Consider a more specific felony-murder example. If armed robbery is the predicate felony,<sup>147</sup> then it is not difficult to conclude that an armed robber should foresee, and often does foresee, a significant risk that the robbery will result in a death.<sup>148</sup> Thus, the robber is ordinarily negligent and often reckless

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individuate the reasonable person test to make it conform to individual blame is sometimes understood as one form of strict liability. See Simons, *supra* note 10, at 554 n.310.

These issues are significant. My own views, which I do not have the space to defend fully here, are: (1) a hypothetical reasonable person test can be consistent with retributive blame, if it is sufficiently individuated to satisfy the criterion "ought implies can"; (2) sufficient individuation probably requires more individuation than tort standards provide, but does not require a purely subjective test.

<sup>145</sup> The only exception would be where strict liability in grading supplements a basic crime of strict liability. Recall the earlier example of felony-murder based on a strict liability environmental crime felony. See *supra* note 18.

<sup>146</sup> A similar principle could be formulated for circumstances rather than results. Replace "culpably doing X, which happens to cause Y" with "doing A with culpability as to circumstance X, when circumstance Y happens to exist."

<sup>147</sup> Some jurisdictions limit felony-murder to certain "dangerous" felonies; but such jurisdictions differ over whether courts should look to the dangerousness "inherent" in the statutory felony considered in the abstract, or instead to the dangerousness of the felonious conduct in the individual case. Dressler, *supra* note 2, at 483. In part, this disagreement is over the question whether legislatures (under the "abstract" approach) or courts (under the individual approach) are more competent to answer the empirical question whether the felon knew that his felonious conduct created substantial risks. But in part the disagreement seems to raise normative questions—whether persons who commit certain felonies should be aware of the risks of death, or whether they properly forfeit any right to complain about ensuing harms in light of the heinousness of their conduct.

<sup>148</sup> See Cole, *supra* note 2, at 122-32 (retributive objection to felony-murder is overstated, since most felony-murders do reflect some culpability as to death). In a recent empirical



as to the risk of death.

This analysis suggests that formal strict liability as to death (i.e., the lack of any explicit culpability requirement) can nevertheless be consistent with substantive culpability.<sup>149</sup> But the question remains: how much of a differential in punishment does such culpability justify? An armed robber who causes death has engaged in a serious felony, and has, let us assume, recklessly caused death. So his punishment for felony-murder can be at least as severe as the combined punishment that retributive principles permit for the felony and for reckless homicide. But can the punishment be more?

I believe that it can, insofar as knowingly creating a risk of death in the context of another criminal act is more culpable behavior than knowingly creating a risk of death<sup>150</sup> in the context of an innocent or less culpable act.<sup>151</sup> A reckless homicide growing out of a seriously wrongful activity is a much more culpable homicide on that account. Nor is this a case of impermissible double-counting, insofar as the offender might be subject to liability for the felony as well as for felony-murder.<sup>152</sup> For the felony exhibits a distinct level of culpability and

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survey of lay beliefs about the relative seriousness of crimes, Paul Robinson and John Darley discover that causing death in the course of a felony is generally viewed on a par with reckless manslaughter. In the popular mind, we should have a "felony-manslaughter" rule, not a felony-murder rule. See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 178 (1995).

<sup>149</sup> But, the reader might object, "can . . . be consistent" falls short of "is consistent." My response is that an explicit formal culpability requirement as to the result will make a difference in few cases, because of the principle of comparable culpability and because treating an armed robber as negligent normally reflects the rule-like form of negligence. See *supra* text accompanying notes 51-56; *infra* Part VI.B.

<sup>150</sup> Here I assume that recklessness has the same meaning across offenses, e.g., knowingly creating a substantial risk of a result. The comparison becomes more complex insofar as the meaning of recklessness itself depends on the type of risks one is taking and one's (good or bad) reasons for taking the risks. The analysis of negligence that I provide below is more complex in this way.

<sup>151</sup> Economists have supplied an analysis of this problem that is also relevant to retributive theory. They point out that "steering-clear" costs can be significant when the actor creates risks of harm as a side effect of a socially productive activity, but that those costs are small or nil when the activity "at the border" is itself unlawful. Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1221-22 (1985) ("In effect we introduce a degree of strict liability into criminal law as into tort law when a change in activity level is an efficient method for avoiding a social cost."). Of course, economists offer this argument to suggest that strict liability provides better incentives at lesser cost than in other contexts where the "steering-clear" costs are significant (e.g., the criminal prosecution of ordinary tort negligence). But the argument is also relevant to retrospective retributive blame, in identifying why the prohibited conduct has lower social value.

<sup>152</sup> In legal punishment, double-counting is limited by the rule that if a felony is not sufficiently independent of the homicide, the felony "merges" with the homicide and cannot be separately punished. DRESSLER, *supra* note 2, at 484-85. On the other hand, some double-counting still occurs to the extent that one factor affecting the severity of the punishment for the underlying felonies is the relative risk that the felony will result in death.

harm, quite apart from the resulting death.<sup>153</sup>

Now consider a more complex case than the armed robber (who ordinarily is aware of a substantial risk that he might cause death, or who at least should reasonably be aware of such a risk). Suppose instead that the foreseeability of death resulting from a particular felony is just below the threshold that we require for negligent homicide. For example, consider an unarmed bank robbery in which the risk of death (from a guard or police officer) is real but not sufficient to surpass that threshold.<sup>154</sup> Should we conclude that the bank robber has displayed no culpability as to the risk of death, so that liability for that death is genuinely strict?

We should not reach that conclusion, because the conclusion rests on too narrow a conception of negligence, one that applies the concept of negligence only to an isolated element of the offense, not to the offender's conduct more generally. To see this point, let us take a brief detour, and consider a different example: the reasonableness of a defendant's mistake about the victim's age in statutory rape.

On one view, the question whether a mistake as to age is reasonable is considered in isolation: Whenever a person seeks to determine the age of another person, the reasonableness of his belief depends on a uniform set of factors, such as the strength of the evidence, the extent of the person's efforts to obtain additional information, and the like. But that is not the most appropriate way to examine the reasonableness of mistake in the context of criminal offenses of varying severity. For example, the age of the victim could be relevant both in the minor crime of hiring an employee under the age of thirteen and in the more serious crime of having intercourse with a girl under the age of thirteen. In order to conclude that the actor's efforts to determine the victim's age were reasonable, we properly demand much more extensive efforts on the part of a person seeking to have intercourse with a person who might be under age thirteen than the

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<sup>153</sup> Can the felony-murderer's punishment justifiably equal or even exceed the punishment for the intentional murderer, as some jurisdictions provide? One needs a more detailed and determinate retributive theory than I have sketched here to answer the question. Note, however, that the category of "extreme indifference" or "depraved heart" murder exemplifies a general, though vague, criterion of serious culpability, and a blurring of *mens rea* categories that are usually more sharp. A torturer who is culpably indifferent to whether the harm he causes will kill the victim is substantially equal in culpability to someone who intends to kill. The "extreme indifference" category can include certain felony-murders, as the Model Penal Code recognizes by providing a presumption that death resulting from certain specified felonies satisfies the extreme indifference criterion. MODEL PENAL CODE § 210.2(1)(b) (1985).

<sup>154</sup> If you believe that this example exhibits foreseeable risks above the threshold, imagine a different example—e.g., a pickpocket who reaches into the victim's pocket and accidentally causes a loaded gun to discharge. See DRESSLER, *supra* note 2, at 480.

efforts we would demand of the employer. The upshot: To express genuine differentials in retributive blame, we should take a more subtle, holistic view of negligence, not an atomized view that examines culpability as to element Y in isolation from culpability as to element X.

As applied to the unarmed bank robber, this analysis suggests that he can properly be found negligent as to the risk of death even if the foreseeable risk of harm is less than would be required to find him negligent had he been engaged in an innocent or less culpable activity. As John Gardner has put the matter, his commission of a felony "changes" his "normative position."<sup>155</sup> Indeed, to generalize, a similar conclusion follows even if the situation is not that *crime* X caused criminal result Y, but instead that *civil wrong* X caused criminal result Y. (This analysis helps explain the attraction of the common law "moral wrong" doctrine.<sup>156</sup>)

Indeed, this argument has some force even if X is simply an unjustifiable or immoral act, and not one regulated by law at all. If losing your temper at a passenger in a car that you are driving causes you not to pay attention to a pedestrian and thus to cause his death, then you can be criminally liable for negligent manslaughter, even though it is hardly a crime to lose your temper, or even to lose your temper while driving; and even though, once you lose your temper, you cannot help not paying attention.

Should we then take the next step, and conclude that the likelihood that the felony will result in death is *completely* irrelevant? An analogy to tort liability could support such a conclusion. In tort, some courts hold that foreseeability of harm is not a necessary condition of liability. If a different type of harm occurs than was reasonably expected, the defendant might nevertheless be liable, on the theory that the harm was "directly" caused.<sup>157</sup> But the analogy should not be ac-

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<sup>155</sup> John Gardner, *Rationality and the Rule of Law in Offenses Against the Person*, 53 *CAMB. L. J.* 502, 509 (1994) (discussing a different grading differential, between assault and assault on a police officer). See also Horder, *supra* note 16, at 762; Cole, *supra* note 2, at 122. But Gardner does not clearly identify the limits to the constructive criminal liability that he would permit under this rationale.

<sup>156</sup> See *Regina v. Prince*, L.R. 2 Cr. Cas. Res. 154 (1875). The doctrine obviously raises a legality objection. See Dressler, *supra* note 2, at 140-41. The objection is overstated, insofar as the doctrine expresses a form of negligence; for a determination of negligence often relies in part upon the immorality or unjustifiability of an actor's conduct, even forms of conduct that are not subject to criminal or indeed any legal sanction. (See the "loss of temper" example in the text following.)

I do not mean to endorse fully the moral wrong doctrine. But the doctrine does underscore the point that immoral but noncriminal acts can be part of the reason why an actor is criminally culpable.

<sup>157</sup> See W. PAGE KEETON ET AL., *PROSSER & KEETON ON TORTS* 293-97 (5th ed. 1984).

cepted in the criminal context. Direct but unforeseeable causation may suffice to justify a significant differential in compensatory liability in tort, but something more should be required to justify a potentially significant differential in criminal punishment.

Because this article does not defend a specific, detailed retributive theory, it cannot give a definitive answer to what retributivism requires here. But I conjecture that any retributive theory should at least require that the risk of death (or, more generally, of the result Y with respect to which the actor is formally strictly liable) be significant enough that a reasonable person would count the risk as a reason against engaging in the original felony (or, more generally, as a reason against engaging in the original culpable conduct X). The deficiency view of retributive blame sketched above helps justify this minimum standard.

In conclusion, retributive theory does justify treating felony-murder more seriously than other, equally foreseeable killings not involving a felony. The argument does not, however, necessarily support treating felony-murder as severely as intentional murder. More generally, formal strict liability in grading is sometimes consistent with retributivism, insofar as such strict liability is often a form of negligence. And, even if a retributive theory finds negligence insufficient culpability for criminalizing conduct, it might well find negligence sufficient to justify a differential in grading. This distinction is defensible on a more holistic view of the culpability expressed by an offense.<sup>158</sup>

#### B. IS STRICT LIABILITY A RULE-LIKE FORM OF NEGLIGENCE?

In an important critique of liberal objections to strict criminal liability, Mark Kelman has argued that such strict liability is not genuinely distinct from a rule-like form of negligence, which liberals accept.<sup>159</sup> Accordingly, he concludes, strict liability is not really more problematic than negligence, and liberal objections to strict liability are an ideological rationalization.<sup>160</sup>

Some of Kelman's critique has real bite, but he vastly overstates the number of cases in which strict liability collapses into the rule-like form of negligence, and his radical conclusion does not follow from

<sup>158</sup> Notice, too, that criminal law doctrine similarly often permits forfeiture of a defense based only on negligence, even though a higher culpability might be required for conviction of the substantive offense.

<sup>159</sup> MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); Kelman, *supra* note 15, at 598, 652-59; Mark Kelman, *Strict Liability: An Unorthodox View*, in 4 ENC. CRIME & JUSTICE 1512, 1516-18 (S. Kadish ed., 1983).

<sup>160</sup> As Kelman concludes: "The ritual attack on strict-liability crime . . . is largely an exercise in mutual flattery of our moral solemnity and deflects attention from the serious charges of moral inadequacy." Kelman, *Strict Liability*, *supra* note 159, at 1518.

his premises. Still, the distinction between rules and standards is significant. Some (though not all) apparent instances of strict liability are indeed better understood as instances of negligence in a rule-like rather than standard-like form. Let us consider when such instances of rule-like negligence are consistent with retributive theory.

Consider a relatively straightforward example of the distinction between a rule and a standard in the context of criminal law.<sup>161</sup> A legislature could prohibit speeding, running red lights, driving under the influence of alcohol or drugs, operating a vehicle too close to another vehicle or to a pedestrian, and the like. Or it could simply prohibit negligent driving. (Of course, legislatures often do both.) The norm prohibiting negligent driving expresses the culpability of negligence as a standard, while the set of norms prohibiting speeding and the like express the culpability of negligence in a rule-like form.

Standards suffer some disadvantages, but also offer advantages, relative to rules. For example, standards are more vague, give less notice to offenders of what precise conduct is prohibited, and are more subject to the discretion of legal decision-makers (including juries), thus creating the risk of inconsistent (or even biased) treatment of similar fact patterns. But rules, by their nature, are more crude and inflexible. Therefore, they may fail to implement accurately their point. For purposes of a retributive theory, the application of a rule-like form of negligence can fail to match accurately an actor's culpability.

Thus, in our example, a simple prohibition on negligent driving (even when supplemented by some general criteria for negligence) suffers the defects of vagueness, unclear notice, and discretionary administration. But a prohibition on speeding or on driving too close to a pedestrian presents the difficulty that such conduct might, in unusual circumstances, be justifiable or excusable.<sup>162</sup>

Consider *State v. Miller*,<sup>163</sup> in which the defendant accidentally spilled hot coffee on himself while driving, causing his foot to hit the

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<sup>161</sup> For further discussions of the distinction between rules and standards, see Levenson, *supra* note 93, at 421, 424; see generally FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). See also Hurd, *supra* note 85, at 266-68; Michael Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POLICY 29, 56 n.88 (1990).

<sup>162</sup> The debate over the relative advantages of rules and standards of negligence has been extensively developed in the tort context of whether violation of a statutory standard should be considered negligence *per se*, *prima facie* negligence, or merely some evidence of negligence; and of the type of excuses that should be admitted for such violations. See generally KEETON ET AL., *supra* note 157, at 220-22, 229-31; RESTATEMENT (SECOND) OF TORTS §§ 286, 288, 288A (1962).

<sup>163</sup> 395 N.W.2d 431 (Minn. Ct. App. 1986).

accelerator and the car to exceed the speed limit. Miller was convicted of a (formal) strict liability crime of speeding. Although the court asserted that he was not negligent for bringing hot coffee into his car, it concluded that that conduct led to the violation, justifying strict liability.<sup>164</sup> The statute in *Miller* can be understood as a rule-like form of negligence. The rule-like prohibition on speeding is less flexible than a standard-like prohibition on negligent driving, under which the defendant should be acquitted if the state fails to show either that it is unreasonable to drive with hot coffee, or that he failed to use reasonable care in handling the coffee in this case.

Analyzing this rule/standard distinction, Kelman notes the risk that juries will fail to enforce a negligence standard uniformly; therefore, the legislature sometimes predefines reasonable care in the form of a rule.<sup>165</sup> But, he emphasizes, the rule-like form of negligence might not be fine-tuned to each defendant. "The defendant might know a cheaper, more effective way of averting harm. But, of course, it might be in the defendant's selfish interest to adopt the preordained non-negligent technique, even if it will cause more harm."<sup>166</sup>

Kelman spells out his objection rather abstractly.<sup>167</sup> Let me sug-

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<sup>164</sup> *Id.* at 433. Doctrinally, one might treat the case as raising the "no voluntary act" defense, rather than a "no culpability" defense. But in this context, the analysis is essentially the same. Miller undoubtedly performed a voluntary act when he brought coffee into the car and chose to drive. The involuntariness of one aspect of his course of conduct (the spilled coffee causing his foot to hit the pedal too hard) does not sufficiently differentiate the two "defenses."

The court distinguished a case in which a driver ran a red light because of bad brakes of which the driver had no notice, on the basis that lack of warning makes the situation "beyond the control of the driver" and criminal liability unwarranted. *Id.* at 432. The distinction is obscure. Just as no reasonable person would have discovered the bad brakes, no reasonable person, on the court's reasoning, would decline to bring coffee into a car just because of the small risk that it could cause speeding. And in either case, the actor could have avoided the harm by extraordinary care—by checking the brakes every morning, or by never drinking hot coffee while driving.

<sup>165</sup> Kelman, *Strict Liability*, *supra* note 159, at 1517.

<sup>166</sup> *Id.*

<sup>167</sup> Kelman states:

[I]f a liquor license holder faces a \$100 fine for each violation of [a] sale-to-minors proscription, under strict liability he would adopt the system best suited to his particular circumstances (System A), which costs \$400 to implement and which would result in five violations. (The net private *and* social cost is \$900.) In a regime of negligence, however, he might adopt instead the system the legislature has preordained as non-negligent (System B), although it costs \$600 to implement and will result in ten violations. If it is assumed that he is certain he will be found non-negligent using System B and that he is fairly certain that his System A (although in fact better in his circumstances at avoiding the socially feared result) will be judged negligent by juries, given a preordained description of reasonable care, then he will adopt B. Although B's social cost is \$1,600 rather than \$900, B's private cost will be only \$600, whereas System A will cost him \$900.

*Id.* at 1517.

gest an example that seems consistent with the essential spirit of his objection.<sup>168</sup> Suppose a state, concerned about the sale of liquor to minors, prohibits any liquor store owner from selling liquor to any person who has not provided any two of several specified forms of identification (driver's license, student registration card, voter registration card, etc.). A liquor store owner chooses to use another method of checking for age which she believes is more effective than the legislatively prescribed method. For example, the owner requires only a *single* form of identification, but it must contain a photograph.

The owner's method could, as Kelman points out, be a more effective way of achieving the legislative end.<sup>169</sup> Yet the owner's good faith, reasonable belief that her method is more effective is unlikely to be a defense to violating the statute.<sup>170</sup> But, Kelman continues, strict liability has similar costs: "Like all conclusive presumptions, it is bound to be inaccurate in particular situations: there will doubtless be cases where someone is blamed who, on closer analysis, society would not want to have blamed. But that is true in the 'rule-like' form of negligence too . . ." <sup>171</sup> Kelman seems to believe that this analysis shows the distinction between negligence and strict liability to be illusory in every case.<sup>172</sup>

Kelman's conclusion is too sweeping. If his analysis were correct, then we could characterize any strict liability prohibition as an acceptable rule-like form of negligence. But, to take an extreme case, it

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<sup>168</sup> I say "essential spirit" because Kelman's example assumes that the criterion of criminal law negligence is a straightforward cost-benefit balance. I find the assumption dubious, as both a descriptive and normative matter; but the assumption is not central to Kelman's larger point, that an actor might have incentives to comply with a legislative rule that purports to define socially reasonable conduct even though the actor could adopt an alternative that is socially preferable.

<sup>169</sup> Kelman's example assumed that, for some but not all owners, a method other than the legislative rule was more effective. So we might assume that in other parts of the city, photo ID's are less effective because less reliable. For example, this owner's store is near a college campus whose photo ID's are especially reliable.

<sup>170</sup> The criminal law defense of necessity is normally construed quite narrowly. See DRESSLER, *supra* note 2, at 261-65.

<sup>171</sup> Kelman, *Strict Liability*, *supra* note 159, at 1517.

<sup>172</sup> Kelman makes the following quite general assertion: "[T]he legislative decision whether to condemn a defendant only when negligence is shown, or to condemn wherever harm is caused, is nothing more than the outcome of a perfectly traditional balance of interests between strict, easily applied rules and vaguer, ad hoc standards." *Id.* at 1517.

Part of his argument is that genuine strict liability is actually preferable to the rule-like form of negligence in being a more effective deterrent. Forcing an actor to internalize all the costs—here, imposing a fine for any sale to a minor, period—often gives her better incentives to find an optimal solution. Kelman is undoubtedly correct on this point; but the strongest objection to strict liability has always been from retributivism, not utilitarian concerns about deterrence. Imposing a fine for all sales to minors will inevitably result in punishment in some cases in which the harm cannot be avoided by reasonable care. That is certainly a problem for retributivists, even if it is not a problem for utilitarians.

surely is not consistent with retributive blame to replace our current homicide statutes with a simple prohibition on causing the death of another person, on the theory that such a prohibition is merely the "rule-like" form of prohibitions against murder, manslaughter, and negligent homicide.

On the other hand, Kelman's challenge is an important one. Why is it permissible for a state to pass a law requiring two forms of identification before one sells liquor to any person, in lieu of a law simply prohibiting the sale of liquor to a person one should know is a minor? And why are these two laws (the rule-like and standard-like forms of negligence, respectively) justifiable on a retributive theory, while a prohibition on selling liquor to a minor without regard to fault is not so justifiable?

A first response is as follows. The rule-like form of negligence that is easiest to justify is a rule that, as applied, would (reasonably be expected to) be less overinclusive in burdening the nonculpable than the corresponding standard-like form of negligence. Thus, suppose that, of the persons actually punished pursuant to a prohibition on "speeding," the proportion who are nonculpable would be *smaller* than would be the case pursuant to a prohibition on "negligent driving." (This might occur if the negligence standard is so vaguely defined, or the decision-makers so biased or unpredictable in their application of the norm, that its application would be less accurate in punishing only the culpable.)<sup>173</sup>

But this argument only takes us a small distance. Many justifiable criminal prohibitions with a rule-like form will not be less overinclusive in this sense. (Note that it will often be possible for legislatures to reduce such overinclusiveness by adding some limited defenses; yet such rules are often upheld, and often seem justifiable, without regard to the availability of such defenses.)

A second argument is one from decisionmaking authority. The legislature is competent to define the relative seriousness of different forms of culpability and harm. It may properly claim exclusive author-

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<sup>173</sup> Or, to borrow a concept from Mark Grady, compare the rule "always keep a close lookout while driving" with the standard "keep a close lookout when that would be reasonable." See Mark F. Grady, *Why are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 Nw. U.L. Rev. 293 (1988). Grady is undoubtedly correct that the reasonable person cannot keep a close lookout all the time. But if a court were to apply the latter standard, the risk is great that many culpable person would escape punishment; while if a court applies the former rule, only a very few nonculpable people will be punished. (Grady distinguishes between "durable" and "nondurable" precautions; the latter include precautions such as paying attention, which contain a "strict liability" element within them, insofar as courts apply them in the form of exceptionless rules rather than standards. See *id.* at 302-10.)



ity to do so. The standard-like form of negligence, by contrast, cedes substantial authority to juries or judges to define the criminal norm, as a practical matter. On this view, rule-like and standard-like forms of negligence do not conflict in any *substantive* way; they conflict only with respect to the question of which decision-maker may specify the criminal norm.<sup>174</sup>

This argument is valid, but incomplete. As an ideal, retributivism still places some limits on the ability of the legislature to define culpability and harm. Although the legislature might properly have the ultimate authority to specify norms, relative to the jury or judge, the legislature's decisions will not satisfy retributive standards unless they are consistent and proportional on a defensible just deserts theory. The norm "do not cause a death" is not an acceptable rule-like form of culpability, quite independently of whether it is the legislature or the jury that defines the norm, because the norm will condemn far too many nonculpable persons.

In the end, I reach the following conclusions. To satisfy retributivist ideals fully, a legislature would indeed adopt a form of criminal legislation which, as foreseeably applied, would result in the conviction of a class of offenders only a very small proportion of whom would be nonculpable.<sup>175</sup> With respect to the choice between a rule-like and standard-like form of negligence, it would, all other things equal, adopt that form that would result in the punishment of a class of offenders of which a *smaller* proportion would be nonculpable. But all other things are not equal. Concerns about fair notice and about bias and inconsistency in the application of criminal norms by juries (and judges) are legitimate.<sup>176</sup> On a pluralist view of the permissible goals of legislation, these concerns properly constrain the full implementation of the retributivist ideal.

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<sup>174</sup> See Levenson, *supra* note 93, at 421, 424.

<sup>175</sup> Similarly, retributive theory does not condemn every system of criminal procedure that is imperfect and that convicts some persons who are innocent of the crime. On the other hand, not every system of criminal procedure satisfies retributivism. But I cannot defend these assertions here.

<sup>176</sup> See Kelman, *Strict Liability*, *supra* note 159, at 1517-18; see also Low, *supra* note 17, at 560-63 (noting that strict liability in grading is more defensible when required culpability as to other elements of the offense ensures that the defendant is on notice of the criminality of his conduct).

Consider the *reductio ad absurdum* of a "standard" approach. The legislature could simply, and vaguely, prohibit "unreasonable conduct that should have been otherwise," leaving to the jury or judge the more detailed specification of the norm and the punishment. In theory, this might appear consistent with retributive blame, since culpability is an explicit criterion. In practice, of course, the norm would be applied to a substantial number of nonculpable persons, would be inconsistently applied, and would fail to reflect retributive proportionality.

This approach does permit some compromise of retributive goals. But the compromise is not with another independent purpose of punishment, such as deterrence or rehabilitation.<sup>177</sup> Rather, it is with other important goals in the administration of criminal justice. Even a relatively pure retributivist should be able to accept such an accommodation. In any event, she has little practical choice.

Thus, to return to an earlier example, it is permissible for a state to pass a law requiring two forms of identification before one sells liquor to any person, in lieu of a law simply prohibiting the sale of liquor to a person one should know is a minor. The rule-like form of negligence here appears reasonably accurate in excluding those who should not know that the buyer is a minor,<sup>178</sup> provides much clearer notice than the standard-like form, and is relatively easy for the judge or jury to apply. By contrast, a prohibition on selling liquor to a minor without regard to fault is not justifiable, if (as likely) a substantial proportion of those whom the law would punish are not culpable.

### C. IS STRICT LIABILITY SIMPLY A DUTY TO USE "EXTRAORDINARY CARE"?

Some argue that strict liability means, or sometimes means, a duty to use "extraordinary care."<sup>179</sup> To that extent, strict liability might express a minimal degree of fault, after all. But the argument is unpersuasive.

In one sense, the duty to use "extraordinary care" is an unexceptional sense of negligence. The *level* of care that negligence demands—in the sense, for example, of attention or effort—obviously must increase as the risk that one encounters increases in likelihood or in social importance. One who drives at high speed on a busy highway must use "extraordinary care" in this sense (e.g., a heightened and more constant attention to traffic risks), as opposed to the "ordinary care" (in this sense) required of a person who drives more slowly on a deserted city street.

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<sup>177</sup> By contrast, a mixed theory of punishment that gave weight to deterrence would more often support a rule-like form of negligence on the ground that that form would be more effective in discouraging culpable conduct.

<sup>178</sup> Note that adding a culpability requirement to the rule-like form of negligence does not necessarily solve the retributive problem. Punishing a liquor store owner for knowingly selling liquor to any male with long hair does not solve the difficulty that this rule is highly overinclusive in serving the (assumed) goal of punishing highly culpable liquor sales to minors.

<sup>179</sup> The Supreme Court's decision upholding strict liability in *United States v. Park*, 421 U.S. 658 (1975), has been so interpreted. Norman Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses—A Comment on Dotterweich and Park*, 28 UCLA L. REV. 463, 470 (1981); *Developments in the Law—Corporate Crime*, 92 HARV. L. REV. 1227, 1264 (1979).

But those who advocate this position usually mean to require, not simply a higher *level* of care, but a higher *standard* of care, holding constant the precautionary efforts or costs, and the benefits from taking the precaution.<sup>180</sup> (Perhaps one could view the impossibility defense in *United States v. Park*<sup>181</sup> as reflecting this view.)

This argument fails. Essentially, it is an argument for liability for "slight" negligence, a concept that is problematic enough in tort law, and is even more problematic in criminal law. Although the notion of "gross" negligence is intelligible, as a serious departure from the standard of ordinary care, the notion of "slight" negligence is not intelligible. If one has departed from the standard of ordinary care at all, one is not "slightly" negligent, one is simply negligent. Any departure from ordinary care is conduct that should have been otherwise, under the deficiency view.<sup>182</sup> (Note, too, that modern criminal norms usually require at least gross negligence, not even ordinary tort negligence, as the minimal culpability.)

Perhaps this approach has some limited value, as a constraint on the possible harshness of strict liability. Such an approach makes strict liability less fortuitous, by limiting liability to when, by extraordi-

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<sup>180</sup> See Husak, *supra* note 8, at 205. The views of Hyman Gross on this issue are unclear; he says that defensible strict liability only requires "reasonable" precautions, yet he also says that strict liability imposes more stringent requirements than negligence. HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 357-61 (1979). For critiques, see MICHAEL DAVIS, TO MAKE THE PUNISHMENT FIT THE CRIME 155-57 (1992) (critiquing Gross); FLETCHER, *supra* note 64, at 717-22.

We can also symbolize the issue with the Learned Hand formula for negligence. That formula provides that an actor should be found negligent if the burden of taking a precaution (B) is less than the product of two factors, namely, the probability of the harm occurring absent the precaution (P) and the severity of the harm if it occurs (L). A higher *level* of care means that the actor must (on pain of negligence liability) increase his level of precaution when either the probability of harm or the severity of harm (if it occurs) increases. For the actor will be found negligent if B is less than  $P \times L$ . By contrast, a higher *standard* of care supposedly refers to something else—but what? A requirement that D take precaution even if B is not less than  $P \times L$ ? Or even if, although B is less than  $P \times L$ , a reasonable person would not realize that it was? It is easier to make algebraic sense of a *lower* standard of care, i.e., liability only if D is "grossly" negligent. Here, D is liable only if he deviates greatly from the standard of care, e.g., only if B is "much" less than  $P \times L$ .

<sup>181</sup> 421 U.S. 658, 673 (1975). See also *supra* notes 137-38 and accompanying text; Kelman, *Strict Liability*, *supra* note 159, at 1512, 1516 (quoting *Park's* statement that the duty is "no more stringent than the public has the right to expect"). Note that the statement is ambiguous; it might mean that defendant has acted culpably whenever he distributes adulterated drugs; or it might mean that the public has a right to "extraordinary care" or even perfection, even if the defendant can't reasonably be expected to do better. Kelman's "extended time-frame" argument also might be a form of the "duty to use extraordinary care" argument. For persuasive criticism, see Johnson, *supra* note 8, at 1521 (arguing that a defendant's capacity not to go into a business in the first place is hardly dispositive, because the law means to encourage productive activity and should not punish those who take all reasonable steps to comply with the law).

<sup>182</sup> See *supra* text accompanying notes 87-88.

nary foresight or extraordinary efforts, defendant at least could have avoided the harm. Thus, it mitigates the "moral luck" aspect of strict liability. Still, in the end, this argument seems to be a mere rationalization. If a reasonable person in the actor's shoes would not have acted differently, why should we care that a superhuman person in his shoes *would* have acted differently?

#### VII. OBJECTION: WHY NOT PERMIT A DEFENSE OF NON-NEGLIGENCE?

One important objection to this analysis is as follows. If we are genuinely concerned to ensure that the offender has acted culpably, and that differentials in punishment reflect differential culpability, why not simply require some degree of culpability as to each element of an offense, whether the element establishes criminality *vel non* or a difference in grading? At the very least, why not provide defendants with a defense of non-negligence, shifting the burden of production (or even persuasion) to the defendant?<sup>183</sup> Perhaps a non-negligence defense would rarely make a difference in certain categories of cases. But how would it *hurt* to allow such a defense? Why not err in the direction of ensuring that punishment (or a punishment differential) corresponds to genuine culpability (or a genuine culpability differential)?

I do agree that many, and probably most, instances of strict liability in current law are inconsistent with retributive principles, and that a formal culpability requirement (or a non-negligence or "not culpable" defense) would ordinarily help to remedy that problem. However, in some cases, formal strict liability is consistent with retributivism; and in others, the remedy of inserting a formal culpability requirement will not cure the disease.

Earlier analysis identified three situations in which formal strict liability can be consistent with retributivism: when strict liability expresses no more than the moral luck principle; when strict liability is a (justifiable) rule-like form of negligence; and when the comparable culpability principle applies.<sup>184</sup> The first situation is complex; as suggested above, the consistency of moral luck with retributivism is itself

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<sup>183</sup> See Levenson, *supra* note 93, at 462 n.304 (arguing that the defendant should have the burden of persuasion of nonnegligence *beyond a reasonable doubt*). Israel has recently adopted a general affirmative defense of reasonable care, placing upon the defendant the burden of persuasion. Under Article 22 of the Penal Law 1977, as amended in 1995, strict liability may be imposed, but "a person shall not be [strictly] liable . . . if he acted without mens rea and without negligence and did all that could be done to prevent the offense. He who makes the said claim must prove it." See Shachar, *supra* note 95, at 14-15; see also Mordechai Kremnitzer, *Criminal Law*, in INTRODUCTION TO THE CRIMINAL LAW IN ISRAEL 259 (A. Shapira & K. C. DeWitt-Arar eds., 1995).

<sup>184</sup> See *supra* Parts V, VI.B. and text accompanying notes 51-56.

controversial, and in any case many instances of strict liability cannot be explained by moral luck alone.

Now consider the second situation, the rule-like form of negligence. Suppose that, of those punished pursuant to a prohibition on exceeding the speed limit, running a red light, or violating any of a number of other specified strict liability rules, a smaller proportion will be "innocent" or nonculpable offenders than the analogous proportion pursuant to a prohibition on negligent driving. Then, by hypothesis, allowing a non-negligence defense to the rule-like form would, as applied, result in a larger proportion of "innocent" offenders among those punished. More realistically, suppose that the rule-like form would result in a somewhat larger proportion of those punished being innocent than would a negligence standard, but suppose that other benefits of the rule-like form justify employing it.<sup>185</sup> Then again, a "non-negligence" defense will often undermine those benefits.<sup>186</sup>

The third situation, the comparable culpability principle, deserves more analysis. Reconsider this homicide example: The actor who intends to cause great bodily injury, and who causes death, can be punished as harshly as an actor who intends to, and does, cause death. Retributive principles can properly be expressed in criminal legislation in a somewhat course-grained way. But, the objector complains, how would it *undermine* retributive principles to require that the actor who intends to cause serious bodily injury display at least some culpability (perhaps negligence or recklessness) as to death, if he is to be treated as harshly as one who intends to kill?

Note that the objection is curiously modest. Why be satisfied with requiring that a person who intends lesser harm X merely be negligent as to greater harm Y, in order to deserve the same punishment as a person who intends the greater harm Y? The objection reveals acceptance of a comparative culpability principle, albeit a narrower one. But it is still unclear why a broader principle is unacceptable.

But a more basic problem with the objection is this. The objection presupposes that the deep structure of moral blame is atomistic, consisting of a molecular combination of a limited number of moral "particles," if you will. On this view, mens rea and actus reus elements are to be combined in different ways, and ranked in a hierarchy; and every actus reus element requires a mens rea element.

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<sup>185</sup> See *supra* text accompanying notes 175-79.

<sup>186</sup> I do not wish to overstate the point, however. Sometimes a strict liability rule with an affirmative defense of non-negligence might be a desirable compromise, providing some of the benefits of a rule while avoiding some of the costs.

This atomistic account fails to reflect the subtlety of our moral judgments. Consider the law of murder more generally. Many states treat a killing as murder not only when it is accompanied by the intent to kill, but also when it is accompanied by the intent to cause serious bodily, or when it displays a "depraved heart" or "extreme indifference to the value of human life."<sup>187</sup> A person who *lacks* intent to kill might nevertheless display such callous indifference (e.g., a torturer who does not care whether or not the victim dies<sup>188</sup>); a person who *possesses* intent to kill might nevertheless lack such callous indifference (e.g., a mercy-killer). One might even view extreme indifference as the more general category, and "intent to kill" or "intent to seriously injure" as particular specifications.<sup>189</sup>

Now return to the person who intends to seriously injure but lacks independent, formal culpability as to the resulting death.<sup>190</sup> He nevertheless can be viewed as displaying extreme indifference to the value of human life. This mental state is a powerful example of the inadequacy of the formal culpability approach precisely because the mental state expresses a global judgment of the actor's culpability, rather than a local judgment of the actor's culpability with respect to a particular element of the offense.<sup>191</sup>

Of course, it does not follow that retributivism can tolerate formal strict liability with respect to any element of any offense. But formal strict liability, if carefully used, is consistent with and proportional to other acceptable retributive judgments. Formal strict liability for the killer who intends only to seriously wound is acceptable. An unconditional felony-murder rule is not.

Another way to understand this point is to examine what it would mean to permit an offender to show his lack of culpability as to an

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<sup>187</sup> See DRESSLER, *supra* note 2, at 476-78; Simons, *supra* note 11, at 488-90; MODEL PENAL CODE § 210.2(1)(b) (1980).

<sup>188</sup> This example is from the Court's opinion in *Tison v. Arizona*, 481 U.S. 137, 157 (1987).

<sup>189</sup> See Simons, *supra* note 11, at 488 n.89; see also MODEL PENAL CODE § 210.2 (commentaries) (1980) ("[t]he Code [provision on 'extreme indifference' murder] calls for the . . . judgment whether the actor's conscious disregard of the risk, under the circumstances, manifests extreme indifference to the value of human life. The significance of purpose or knowledge as a standard of culpability is that, cases of provocation or other mitigation apart, purposeful or knowing homicide demonstrates precisely such indifference to the value of human life.").

<sup>190</sup> The actor might not even be negligent as to the risk of death, if, for example, he cuts off the victim's leg in circumstances where the risk of resulting death seems extraordinarily unlikely.

<sup>191</sup> See Simons, *supra* note 11, at 488 n.89. To be sure, there are important practical reasons for eschewing vague standards such as "extreme" or "callous indifference" and employing instead more specific standards such as "intent to cause serious harm." But a more global normative standard might more directly express principles of just deserts.

element of an offense. Such a showing might not be significant, considered in isolation from his culpability displayed in the rest of the offense. As suggested earlier, the statutory rapist who can prove that he was reasonably mistaken in believing that the female victim was just above the statutory age is "not negligent" as to that element considered in isolation. But he might indeed be culpable in risking that she might be under age.<sup>192</sup>

### VIII. CONCLUSION

The question posed in the title of this article might seem to have a very simple answer: "Never." The burden of this article, and the justification for spilling so much ink, is to explain why that obvious answer is false. To be sure, many strict liability laws that are currently on the books are inconsistent with principle of culpability-based retributivism.<sup>193</sup> And the basic Model Penal Code position that strict liability should be excluded from criminal punishment<sup>194</sup> is correct as a matter of principle. But, to be faithful to retributive principles, we must view that position as a substantive prohibition on penalizing conduct that is not blameworthy, not as a formal requirement that an explicit mens rea or culpability term apply to every material element of every offense.

The requirement of formal culpability as to each element of an offense is both too weak and too strong. Its weakness becomes apparent when we examine nonconsummate offenses (such as possession statutes) more carefully. One who satisfies all elements of such offenses might nevertheless lack culpability with respect to the ultimate harm. But it is also too strong, inasmuch as offenses characterized by formal strict liability in grading might exhibit comparable culpability to offenses that contain explicit mens rea requirements.

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<sup>192</sup> See *supra* notes 51-55 and accompanying text. Alternatively, if the "non-negligence" defense permits the offender to prove that he lacked the culpability that the offense as a whole displays, the defense might be either gratuitous or too strong. It is gratuitous if the elements of the offense themselves conclusively express the retributive blaming judgment; for then the defense is simply that the offender has not satisfied the elements of the offense, such as they are. It is too strong if the offender is permitted to argue that the offense itself should have been radically reformulated to comport with the offender's own conception of just deserts. (Imagine a statutory rapist defending on the ground that the statutory elements of sexual intercourse with a minor do not express blameworthy conduct.) Of course, insofar as the substance of an offense fails to comport with objective retributive principles, this stronger defense is available.

<sup>193</sup> Examples include most instances of vicarious liability; most strict liability regulatory crimes, such as prohibitions on sales of adulterated or misbranded products; and felony-murder laws that automatically punish offenders who commit felonies as harshly as intentional murders.

<sup>194</sup> But see *supra* note 39 for a qualification of that position.

Both strict liability in criminalization and strict liability in grading can violate retributivist principles. Some would analyze strict liability in criminalization as instances in which the actor has committed a wrong, but has done so without culpability. However, closer examination reveals that this analysis is sometimes inadequate, and should be supplemented by a more holistic examination of whether the actor's conduct or belief was deficient, considered *ex ante*.

Another critical issue is whether moral luck is consistent with retributivism. If it is, many instances of strict liability would be justifiable. Whether a felon brings about a death, or whether the wallet that a pickpocket steals contains \$1000 rather than \$10, can be fortuitous. Many strict liability cases involve the fortuitous occurrence of harm in this sense, holding constant the offender's culpability (or lack of culpability). But even if moral luck can justify some instances of strict liability, the scope of this justification depends on how much differential in punishment moral luck permits, under a retributive theory, an issue that has yet to receive much attention.

Strict liability in grading is more often consistent with retributivism than is strict liability in criminalizing. One important reason is because formal strict liability in grading often displays negligence. At the same time, strict liability in criminalization is also sometimes consistent with retributivism, when it constitutes an acceptable rule-like form of negligence. Whether it is thus acceptable depends in part on the relative proportion of nonculpable offenders that a rule (e.g., "do not speed") rather than a standard (e.g., "do not drive negligently") is likely to burden.

In the end, the complexity of strict criminal liability reveals the complexity of our moral blaming judgements and of the legal structure in which those judgement are embedded. To determine a person's just deserts, we must look beyond the formal culpability with respect to each separate element of an offense, and must view his culpability in the context of the offense as a whole.