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FORFEITURE, CHANGE OF NORMATIVE POSITION, OR MORAL LUCK?**

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Strict Criminal Liability in the Grading of Offenses: Forfeiture, Change of Normative Position, or Moral Luck?

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by

Kenneth W. Simons¹

Abstract—Notwithstanding the demands of retributive desert, strict criminal liability is sometimes defensible when the strict liability pertains, not to whether conduct is to be criminalized at all, but to the seriousness of the actor's crime. Suppose an actor commits an intentional assault or rape, and accidentally brings about a death. Punishing the actor more seriously because the death resulted is sometimes justifiable, even absent proof of his independent culpability as to the death. But what punishment is proportionate for such an actor? Should he be punished as harshly as an intentional or knowing killer?

This paper offers a framework for analyzing these difficult questions. After rejecting a broad forfeiture justification for strict liability in grading, it articulates a more promising set of arguments, premised on the actor's "change of normative position" by choosing to commit a crime. Three principles of culpability sometimes justify strict liability in grading: holistic culpability, attention to the degree of unjustifiability of the risk, and rough comparability in culpability. Strict liability in grading can be appropriate when the risk of committing the more serious crime (a) is a risk intrinsic to the less serious crime or (b) is minimally foreseeable. The article also addresses the relevance of moral luck, i.e. the principle that the fortuitous occurrence of a result or circumstance increases the actor's just deserts. Even if moral luck is recognized, it cannot fully justify strict liability in grading.

Keywords: strict liability, mens rea, culpability, grading, moral luck

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¹ Professor of Law, and The Honorable Frank R. Kenison Distinguished Scholar, Boston University School of Law. © 2011 by the author. All rights reserved. For helpful comments, I thank Andrew Ashworth, Stan Fisher, Jeremy Horder, Doug Husak, Andrew Simester, and Peter Westen; participants at the Criminalization Conference, University of Stirling, Scotland; and participants at a faculty workshop at Boston University School of Law.

1. Introduction

Strict criminal liability is often criticized as inconsistent with retributive desert. The criticism is often justified. But not always.

One context in which strict liability is sometimes defensible is when the strict liability pertains, not to whether conduct is to be criminalized at all, but to the seriousness of the actor's crime. Andrew intentionally strikes his victim, intending to hurt him; the victim falls to the ground, hits his head against a rock, and dies. Punishing Andrew more severely because the death resulted might be legitimate, I will argue, even in the absence of any proof of his independent culpability or *mens rea* as to the death.² Boris, in the course of raping his victim, puts his hands around her throat in order to prevent her resistance, and accidentally causes her death.³ Punishing him for the death as well as the rape might also be legitimate, even in the absence of any proof of a separate *mens rea* as to the death.

And yet, concluding that strict liability in grading is sometimes legitimate does not resolve the question of what punishment is proportionate in such a case. Should Andrew be punished as harshly as another actor who was grossly negligent as to the death he caused? As harshly as one who recklessly kills? Intentionally kills? Should Boris be punished as harshly as someone who intentionally or knowingly kills?

These questions are difficult to answer—in no small part because it is difficult to elucidate with any confidence the principles of proportionality that the most defensible retributive theory requires. In this paper, I will offer a framework of analysis, and hazard some tentative answers, while remaining largely agnostic about the particular retributive foundation for those answers.⁴ An impossible task? Perhaps. But sometimes bottom-up analysis, of the branches and trees, can reveal some of the shape of the forest.

After setting forth the background to the problem, the paper discusses and rejects a broad forfeiture justification for strict liability in grading. The next section spells out a more promising set of arguments, premised on the actor's "change of normative position" by choosing to commit a crime. Three principles of culpability are identified that sometimes justify strict liability in grading: holistic culpability, attention to the degree of unjustifiability of the risk, and rough comparability in culpability. And strict liability in grading can be appropriate when the risk of committing the more serious crime (a) is a risk intrinsic to the less serious crime or (b) is minimally foreseeable. The following section addresses the relevance of moral luck, i.e. the principle that the fortuitous occurrence of a result or circumstance increases the actor's just deserts. Even if moral luck is recognized, it cannot fully justify strict liability in grading. The next section applies the analysis to strict liability with respect to circumstance elements of a crime. A conclusion follows.

2. Background

Let us formalize the problem of strict liability in grading as follows.⁵ Suppose it is a crime to do X, and culpability or *mens rea* is required as to all the material elements of X. Now

² For simplicity, I use the terms "culpability" and "mens rea" broadly to refer to any fault requirement, including negligence.

³ The example is a famous illustration from *Regina v. Serne*, 16 Cox Crim. Cas. 311 (1887) (Central Criminal Court) (James Fitzjames Stephen, J.).

⁴ The paper does presuppose a retributivist rationale for punishment. How its analysis would change under a mixture of retributivist and consequentialist rationales, I do not pursue here.

⁵ This analysis is drawn from my own earlier account, Simons, *When is Strict Criminal Liability Unjust?*, 87 J. Crim. L. & Criminol. 1075, 1121 (1997); and from the account of Andrew Simester, *Is Strict Liability Always Wrong?*, in *Appraising Strict Liability* 21, 44 (A.P. Simester ed. OUP 2005).

suppose it is a more serious crime to do X + Y, where result Y or circumstance Y is an additional (or more serious) material actus reus element; but no mens rea is required as to Y. Some examples:

- X: intentionally assaulting a person. Y: thereby causing his death.
- X: committing an armed robbery. Y: thereby causing a death.
- X: knowingly possessing a small amount of drugs. Y: possessing a larger amount.
- X: sexual intercourse with a victim known to be between ages 13 and 16. Y: intercourse with a victim younger than 13.

Two questions then arise. First, is formal strict liability as to Y—that is, the absence of an explicit culpability or mens requirement as to Y—nevertheless sometimes legitimate, because it does not really amount to substantive strict liability?⁶ Second, even if the answer is yes, how much more can the actor properly be punished for Y? At what point does censure or hard treatment for Y become disproportionate?⁷

Some scholars have defended an affirmative answer to the first question by arguing that an actor who commits crime X thereby “changes his normative position” and thus makes himself amenable to punishment for Y as well.⁸ This argument, while initially

The term “strict liability in grading” is mine. The term “constructive” liability is often used to capture a similar concept. See A.P. Simester & G.R. Sullivan, *Criminal Law: Theory and Doctrine* 166, 186-191, 372-379 (3rd ed. 2007) (discussing “constructive liability” generally and “constructive manslaughter” committed by an unlawful act); R.A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* 235, 253-255 (Hart 2007).

⁶ In Simester’s words, “an offence imposes substantive strict liability when it contemplates the conviction of persons who are blameless for committing that particular offence.” *Id.* at 23. See also Simons, *Strict Liability*, at 1085-1093.

As Duff points out in *Answering Crime*, *supra* at 233-235, there are four possible permutations of formal and substantive strict liability: (a) formally non-strict and substantively non-strict, (b) formally strict and substantively strict, (c) formally non-strict and substantively strict, or (d) formally strict and substantively non-strict. I agree with Duff that (a) is unproblematic, and (b) and (c) are clearly unacceptable to a retributivist, so that the proper focus of analysis is whether and when (d) is acceptable.

⁷ See Andrew Ashworth, ‘A Change of Normative Position: Determining the Contours of Culpability in Criminal Law,’ 11 *New Crim L Rev* 232, 252 (2008) (noting that proportionality principles must address both fair labeling and the length of a sentence); Douglas Husak, *Strict Liability, Justice, and Proportionality*, in *Appraising Strict Liability*, *supra* at 94-98 (distinguishing two problems of proportionality, proportionality in censuring (expressive) and in hard treatment).

Simester perhaps overstates when he suggests that the main proportionality objection is the undeserved censuring and labeling of the offender, rather than the undeservingly harsh treatment. Simester, at 33-35. Rather, which objection is more serious would seem to depend on the particular criminal label and the particular mode and degree of punishment. To be unjustifiably labeled a murderer or rapist is indeed highly stigmatic, and much more stigmatic than to be unjustifiably branded a manslaughterer or a perpetrator of sexual assault. And of course if the severity of the sentence is seriously disproportionate, that will be most important to most offenders. Few offenders would prefer a fifteen year actual term in prison for manslaughter to a ten year term for murder. Similarly, reclassifying a strict liability in grading element (for example, a homicide offense of “intentional drug distribution causing death”) as a sentencing element (“intentional drug distribution, with a harsh sentence authorized when a death results”) hardly solves the proportionality problem. See Husak, at 101-102.

⁸ The most prominent advocates of the argument are John Gardner and Jeremy Horder. John Gardner, *Rationality and the Rule of Law in Offences against the Person*, 53 *Camb L J* 502 (1994); Jeremy Horder, *A Critique of the Correspondence Principle*, 1995 *Crim L Rev* 759.

appealing,⁹ is both of ambiguous scope and seriously under-theorized, as Andrew Ashworth has recently pointed out.¹⁰ This article attempts to clarify and deepen the argument, distinguishing its different senses and explaining which are most justifiable. It also attempts some tentative answers to, or at least a framework of analysis for, the second question.

The problem addressed in this paper is overpunishment, rather than overcriminalization. Even if it is legitimate for the state to punish the felony or misdemeanor that underlies the more serious crime with which defendant is charged, questions remain. May the state punish for the more serious crime? How harshly may it punish that crime? Are existing punishment schemes consistent with the answers to these questions? Overcriminalization is certainly a monumental problem in the 21st century. But so is severe overpunishment of behavior that does deserve some punishment.¹¹

Anglo-American criminal law contains numerous examples of offenses that, in the terminology employed above, require culpability with respect to X, yet do not require explicit culpability as to Y, and nevertheless punish the actor as if he had some culpability as to Y—that is, they punish him at the same level that they punish actors who are negligent, or reckless, or even knowing or intentional as to Y. Examples include unlawful act manslaughter in England, misdemeanor manslaughter in many American jurisdictions, and, most notoriously, felony murder in many American jurisdictions. Also, most American states, when they grade drug possession offenses according to the amount possessed, or theft offenses according to the amount stolen, do not require mens rea as to amount. They permit conviction of the more serious offense even if the defendant reasonably believed that the amount at issue was less (and thus would constitute only the less serious offense).¹² The questions addressed in this paper therefore have critical implications for contemporary criminal legislation.

3. Forfeiture: an Overly Broad Principle

As a descriptive matter, a broad forfeiture or assumption of risk principle might well explain the prevalence of offenses imposing strict liability in grading. Having knowingly or intentionally crossed the line into criminality, how can the criminal complain if the results or circumstances are worse than he believed them to be, and if he is punished accordingly? There is a widespread contemporary public attitude of contempt and loathing towards perpetrators of serious crimes, fueled by inflammatory media coverage of especially grisly or horrific acts of violence. Serious criminals are often viewed as outlaws, who deserve extraordinarily harsh treatment, and who deserve to forfeit civil protections such as privacy, voting rights, and other civil protections. Consistent with this “outlaw” perspective is the position that proportionality principles within the criminal law itself should not be rigorously applied to those who choose to violate the law.

⁹ I confess to having invoked it myself, without sufficient explanation. Simons, *Strict Liability*, at 1124.

¹⁰ Ashworth, *supra*.

¹¹ A distressing, and constantly expanding, list of cases of overpunishment is available here: http://sentencing.typepad.com/sentencing_law_and_policy/examples_of_overpunishment/

¹² To my knowledge, English law is relevantly similar: although amount of property stolen or drugs possessed is a sentencing factor, not a factor differentiating the degree of the crime, no mens rea is required as to that sentencing factor.

In this extreme form, the forfeiture principle must be rejected. Under such a “thin ice” principle¹³ or “outlaw” theory,¹⁴ commission of a very minor crime X would justify punishment of a very serious crime Y if X happened to lead to Y. (You vandalize a parking meter to avoid having to pay. An hour later, Rita, the meter maid, notices the problem, becomes very upset, and suffers a fatal heart attack. You should not be guilty of murdering Rita, lovely as she was.)

It is not justifiable to deny a defendant the right to complain of disproportionate punishment simply because he has already committed a wrong, even a serious wrong. Principles of justice dictate what counts as deserved, proportionate punishment. To be sure, defendants sometimes can waive their rights, e.g. in plea-bargaining. But it is empirically absurd and normatively unacceptable to interpret every decision to commit a serious crime as an intentional waiver, or even a knowing forfeiture, of the right to proportional treatment.

The mere fact that the government provides advance notice of a disproportionate punishment does not by itself justify imposing such a punishment.¹⁵ Granted, when the defendant has made a relevantly unconstrained, “free” choice to commit a crime, that choice usually justifies denying him tort recovery under contributory negligence, assumption of risk, or cognate tort doctrines. However, the issue here is not his entitlement to obtain recovery from a wrongdoer, but the relevance of his own wrongdoing to the state’s right to punish him, and punish him in a particular way, for that wrong. And even though the “consent” of the defendant to a particular punishment is, in very limited circumstances, relevant to whether the punishment may be imposed,¹⁶ it is assuredly not the case that a defendant who commits crime X and thereby brings about crime Y “consents” in any relevant and meaningful sense to the greater punishment authorized for Y.

Nevertheless, although a principled retributive theory should reject the broad version of the forfeiture argument, it should not ignore the possible relevance of an actor’s choice to violate the criminal law. We now turn to some more plausible explanations of how the choice to commit crime X might justify punishment for additional crime Y.

4. Change of Normative Position: a Defensible Principle if Qualified

Is it persuasive to claim that an actor, by committing crime X, “changes his normative position” so that ensuing result Y or accompanying circumstance Y must now count on his “just deserts” ledger? Not every result or circumstance Y should count in this way, as we have just seen.

Let us start with the most plausible instances of the claim: where the actor commits a serious, intentional wrong in committing crime X, and where he is at least negligent or reckless as to result Y or circumstance Y.¹⁷

Suppose D3 commits an armed bank robbery, aware of a significant chance that his gun might accidentally discharge and kill another, which indeed occurs when the gun falls to the ground in a struggle with police. Clearly he is guilty of armed robbery and of

¹³ See Stephen Garvey, *When Should a Mistake of Fact Excuse?*, 42 *Tex. Tech L. Rev.* 359, 370-371 (2009); Husak, at 98-99; Duff, at 256; George Fletcher, *Rethinking Criminal Law* 723-730 (LB 1978).

¹⁴ See Simester at 45.

¹⁵ See Ashworth, at 245-247; Simons, *Strict Liability*, at 1104 n. 93.

¹⁶ Defendants are entitled, for example, not to appeal a sentence, even a sentence of death.

¹⁷ Ashworth briefly concedes that some “change of normative position” cases properly fall within the categories of gross negligence manslaughter or reckless manslaughter, but he declines to discuss the point further. Ashworth, at 234, n. 12. In my view, whether and when they can be so categorized is a critical part of understanding when “change of normative position” is a defensible approach.

reckless manslaughter. Suppose (for simplicity's sake) that a typical armed robbery deserves a ten-year sentence, and reckless manslaughter a one-year sentence. Is there a plausible argument that D3 deserves a greater combined sentence than eleven years?

Yes, for two reasons. First, we should analyze his culpability holistically. The most plausible general conception of culpability treats it as an integrated phenomenon, not reducible to the sum of the culpability of its atomized elements. Compare (A) the culpability of a driver who unknowingly endangers a pedestrian because he becomes enraged at a comment made by a passenger, with the combined fault of (B) a driver who unknowingly endangers a pedestrian for an entirely nonculpable reason, and (C) an actor who becomes enraged at another person's comment at the dinner table. Clearly enough, (A) is greater than the sum of (B) and (C). In D3's case, the two dimensions of his conduct are integrally connected. It is only because he was robbing a bank that he was carrying a gun. So we are justified in punishing the "whole," the combination of armed robbery and reckless causation of death, more than the sum of the separate parts—more, for example, than D3 would deserve if he had (1) committed an armed robbery a year ago and also (2) recklessly caused death in a completely separate, unrelated act today.¹⁸ Thus, perhaps the combined punishment that D3 deserves is 20 years, not eleven. (With respect to offense category, perhaps D3 should be guilty of an aggravated form of reckless manslaughter, or of a lower degree of murder.¹⁹)

The close connection between the bank robbery and the reckless causation of death in this scenario also provides a second reason for treating the choice to rob a bank as increasing D3's deserved punishment for the homicide. To be criminally reckless, D3's conscious risk-taking must have been unjustifiable in the circumstances.²⁰ Yet the criminal law ordinarily treats unjustifiability as a simple threshold concept: if the defendant exceeds the threshold,²¹ and acts unjustifiably, and if he is sufficiently aware of a sufficiently significant risk, he is reckless, period.²² No consideration is usually given to whether the defendant's conduct (in light of his particular beliefs, desires, and reasons for action) only slightly, or instead very greatly, exceeded the threshold of unjustifiability.²³ This lack of concern for the degree of unjustifiability is unwarranted. Compare D3 with an actor (D4) who knowingly creates a risk of death for a much less unjustifiable reason: she takes her loaded gun from a secure lockbox in her home and carries it in public to the firing range, because she would rather not bother unloading then reloading the gun. D4 also acts unjustifiably, and might subjectively perceive as great a risk of death from her action as D3 perceives. Yet the enormous difference in the weight and social value of the interests

¹⁸ See Simons, *Strict Liability*, at 1121-1122.

¹⁹ The appropriate offense category depends on other factors, including fair notice and fair labeling. In this paper, I focus more on the appropriate severity of the sentence, not the appropriate offense category.

²⁰ See Model Penal Code §2.02(2)(c). English law is in accord: "Not every case of foresight amounts to recklessness. In order for a defendant to be reckless, the risk that she chooses to run must also be an unreasonable one." Simester & Sullivan, at 134.

²¹ To be sure, the threshold itself could be higher or lower: it could demand a gross or instead merely an ordinary deviation from the standard of reasonable conduct; and it could be understood more objectively or more subjectively, taking into account more of the defendant's personal attributes and circumstances.

²² A similarly impoverished understanding of unjustifiability is typical of contemporary accounts of criminal negligence: we are to look simply at whether the actor was unjustifiable in lacking awareness of the risk, but not at how unjustifiable or culpable he was for being unaware.

²³ But compare the doctrine of extreme indifference murder, which, in many instances, represents a form of reckless homicide in which the actor's reason for running the risk is especially unjustifiable.

pursued by D3 and by D4 provides ample reason for punishing D3 more harshly for the death he causes.²⁴

Each of these reasons involves a “change of normative position,” but each (unlike the broad forfeiture principle) is a qualified and sensible instance of that principle. The holistic culpability explanation provides a more richly textured, fact-sensitive, and comprehensive account of culpability than does the more conventional atomistic account of culpability. Compare two actors: D*, who intentionally does X, an act or series of acts that brings about result Y (or satisfies circumstance Y) with culpability C; and D**, who commits the completely separate and independent acts of (1) intentionally doing X, and (2) causing or satisfying Y with culpability C. Under the holistic culpability principle, D* deserves more punishment than D**. Indeed, this explanation offers a powerful reason not to adhere slavishly to the widely defended “correspondence principle.”²⁵ That principle demands a distinct mens rea for each material element of an offense, but it does not, at least in its usual formulation, address the cumulative significance of an actor’s mens rea with respect to multiple result or circumstance elements.

The highly unjustifiable risk explanation is also a plausible understanding of criminal culpability. Creating a particular level of risk of Y for heinous or especially bad or socially unacceptable reasons is more culpable than creating an equivalent level of that risk for reasons that are unjustifiable but not as bad. To be sure, considering degree of justifiability complicates the analysis, relative to a simple threshold analysis of whether a risk was or was not unjustifiable to take, just as the holistic perspective is less straightforward than the atomistic one. But here, as with holistic culpability, it might be worth sacrificing the benefits of a simpler rule (including greater uniformity and consistency in applying the rule) in order to achieve a more nuanced, realistic, morally defensible account of culpability. Of course, in any analysis of negligence, and any analysis of recklessness that requires consideration of the justifiability, weight, and nature of the risk, the fact-finder should take into account the actor’s reasons for taking the risk.²⁶ The present context, in which the actor’s reasons include the goal of successfully committing a serious crime, is just one illustration of this more general point.

Now imagine a variation of the D3 bank robbery example, identical in all respects except that this actor, D5, is negligent rather than reckless with respect to the risk of death posed by his carrying a loaded gun: he is not aware, but should be aware, that carrying the gun poses a substantial risk of death.²⁷ (Suppose D5 is not cognizant of the risk he is posing because he is so preoccupied with successfully robbing the bank and escaping.) Once again, it is plausible to impose a harsher punishment for homicide on D5 than on D6, a counterpart to D5 who is negligent as to the risk but who is not also committing a crime. Thus, suppose D6 unknowingly and unjustifiably creates a risk of death by taking her loaded gun from a secure lockbox in her home and carrying it in public to the firing range,

²⁴ See also Guyora Binder, *The Culpability of Felony Murder*, 83 *Notre Dame L Rev* 963 (2008) (providing this type of rationale for a qualified felony-murder rule); Larry Alexander & Kimberly Ferzan, *Crime and Culpability: A Theory of Criminal Law*, ch. 2 (CUP 2009) (endorsing a unified formula for culpability in which the reason for taking the risk is a critical factor).

²⁵ For defenses of the principle, see Andrew Ashworth, *Principles of Criminal Law* 76-78 (6th ed. OUP 2009); B. Mitchell, *In Defence of a Principle of Correspondence*, 1999 *Crim L R* 195; for criticism, see Horder, *A Critique of the Correspondence Principle*, *supra*; Jeremy Horder, *Questioning the Corresponding Principle—A Reply*, 199 *Crim L R* 206.

²⁶ If those reasons are immoral or blameworthy, that quality is quite relevant to the justifiability of the risk taken. This is the germ of truth within the (unduly broad) traditional doctrine that one who commits a “moral wrong” cannot complain if the wrong leads to greater (but unforeseen) harm.

²⁷ I am invoking the Model Penal Code definition of negligence, §2.02(2)(d), but many other definitions of negligence are consistent with this analysis.

forgetting that the gun is loaded. She accidentally drops the gun, which discharges, causing a death. Both D5 and D6 are unjustifiably and culpably unaware of the risk. But the holistic culpability and highly unjustifiable risk arguments warrant punishing D5 more severely.

Another illustrative example is the practice, in jurisdictions on both sides of the Atlantic, of imposing murder liability in cases where the actor intends to cause great bodily injury, and thereby causes death. (For example, a gang member viciously beats a member of a rival gang in order to teach him a lesson.) In almost all of these cases, it is clear that the actor was at least negligent as to the risk of death. Two questions then arise. (1) Is it justifiable to punish the negligent causation of death arising from a very serious intentional beating more harshly than the negligent causation of death arising from a more innocent act? (2) Is it justifiable to punish this as murder?

My answers are: (1) yes and (2) sometimes. The first answer follows from the analysis above. By intending to cause serious bodily injury, the actor creates a significant risk of death, a risk of which he is almost always actually aware, and of which he certainly should be aware. On a holistic understanding, his overall culpability is much greater than that of someone who recklessly or negligently causes a death in the course of a legitimate activity (such as driving a motor vehicle to work or for pleasure). And the reason he is running the risk is extremely unjustifiable. The answer to the second question must be more tentative. It will often be affirmative in those jurisdictions that permit murder liability when the actor causes death either purposely or knowingly. To commit an intentional extremely violent assault that one should foresee might cause death is no less heinous than many instances of knowingly causing a death, i.e., instances in which the actor knows to a practical certainty that he will cause death, but by virtue of acts and motives that are much less unjustifiable.²⁸ These two types of culpability culminating in death are each especially egregious. Now, it must be conceded that they also seem incommensurable: they are different in kind, and thus very difficult to compare. But this difficulty is inescapable. For these two categories of culpability are instances of a comparability problem that pervades the criminal law, a problem that becomes vivid whenever we must rank our judgments of just deserts (or for that matter, of utility or human welfare) across quite disparate contexts.²⁹ In short, the “intent to cause great bodily injury” cases often exemplify roughly comparable culpability³⁰ to knowing killings. This is the third (and last) culpability principle invoked in

²⁸ Suppose an impatient driver runs over a drunk lying asleep in the middle of a narrow mountain road; or a panicky swimmer who unreasonably fears he is about to drown grabs the only available life preserver from a child.

²⁹ For example, which is worse or more culpable, treason or murder? Raping one person or wounding fifty? Stealing \$1 million from a bank or forcibly robbing someone of his wallet? The need to address this comparability problem reveals the inadequacy of the correspondence principle as a complete theory of culpability:

We cannot simply rank all harms and wrongs in one scale of significance, then rank all mens rea or culpability criteria in a second scale, then multiply the values to arrive at a composite measure of the actor's just deserts.

Simons, Understanding the Topography of Moral and Criminal Law Norms, in *Philosophical Foundations of Criminal Law* 228, 241 (R. A. Duff & S. P. Green, eds., OUP 2011).

³⁰ See Simons, *Topography*, at 231; Simons, *Strict Liability*, at 1091-1092. An extensive philosophical literature discusses comparability, commensurability, rough comparisons, and values that are “on a par.” For an introduction, see Hsieh, Nien-hê, “Incommensurable Values”, *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2008/entries/value-incommensurable/>>. =.

this paper to explain why strict liability in grading can be consistent with substantive fault.³¹

These last examples presupposed that the state could prove the actors' negligence with respect to the risk of Y. Let us now turn to a genuine case of strict liability in grading, in which the state need not offer such proof. Consider a case that Andrew Simester characterizes as one of "intrinsic risk": the risk that Y might result from X is one of the reasons that X is criminalized (and graded as it is) in the first instance.³² Suppose dangerous driving ("DD") is a crime, and dangerous driving causing death ("DDCD") is a more serious crime. Simester correctly observes that DD is punished, and punished as harshly as it is, in part because it often creates a risk of death. Accordingly, he argues, it is not problematic that the state need not prove negligence or recklessness or some other form of fault with respect to death in order to obtain a DDCD conviction. Such formal strict liability is consistent with substantive fault.

By contrast, Simester argues, when the risk of Y is "extrinsic," i.e., when it is not one of the reasons why X is criminalized, formal strict liability with respect to Y is not justified. His example:

Jane bears a grudge against Daniel. She throws a stone at him while in an open field, intending to injure him. Daniel ducks and she misses. The stone damages Daniel's binoculars, which were lying concealed in the long grass.³³

Because the risk of property damage is not, in Simester's view, part of the reason that Jane's assault is wrongful, that risk is extrinsic. Thus, punishing Jane for the property damage is unjustifiable.

Simester's analysis is enlightening. However, I would supplement and revise it in the following ways.

(1) "Intrinsic risk" cases are indeed instances of substantive fault, and are properly subject to increased punishment,³⁴ but more should be said about why. In intrinsic risk

³¹ These three principles also apply outside the strict liability in grading context, as we have seen; they explain why committing crime X with a lesser mens rea as to Y often deserves to be punished as harshly as if the actor had brought about Y with a higher mens rea (but not as a byproduct of committing X).

One other principle helps explain why some instances of formal strict liability amount to genuine fault: the principle that some strict liability criteria are really negligence criteria in rule-like form. An example is a strict liability rule that one may not sell alcohol to a person unless she shows two forms of identification indicating that she is of legal age. See Simons, *Strict Liability*, at 1125-1131. This principle is unlikely to apply, however, to the types of cases discussed in this paper.

³² Simester, at 44-45. See also Simester & Sullivan, *Criminal Law*, at 197-198. I suggested a very similar approach in an earlier article. Simons, *Strict Liability*, at 1125.

Simester characterizes intrinsic risks as risks that form part of the reason why, even *ex ante*, the actor's conduct was wrong. *Id.* at 45. He does not make clear however, whether intrinsic risks include risks that explain how wrong the conduct is, even if they are not relevant to making the conduct wrong. For purposes of analyzing strict liability in grading, I believe that we must identify a conception of relevant risks that also explains the extent of the wrong or of the actor's culpability, not simply whether the act was wrong or culpable *vel non*.

See also Ashworth, at 252-253, advocating a restriction of constructive liability to cases in which Y is within the scope of the foreseeable risks posed by X. It is not clear whether, by "foreseeable risks," Ashworth means to include a broader range of risks than Simester's "intrinsic" risks. See discussion of "minimally foreseeable" risks in the text, *infra*.

³³ Simester, at 44.

³⁴ It is implicit in Simester's account that committing crime X and causing result Y (where Y is an intrinsic risk of X) justifies more severe punishment than simply committing crime X.

cases, the actor has unjustifiably committed crime X, and has thereby unjustifiably created a substantial risk of result or circumstance Y. There is no need to require the state to prove negligence with respect to Y, because we already know: (a) it was wrong for the actor to commit crime X, and (b) the risk of Y was one reason that that was wrong. Indeed, Simester's approach also would support punishing, as automatic instances of negligent homicide, acts that are intended to cause serious bodily injury and that result in death. For the risk of death is an intrinsic risk of such a serious intentional assault: it is one of the reasons for criminalizing such conduct and for punishing it harshly.³⁵

Simester's analysis is incomplete, however, because it does not fully address the proportionality issue, i.e., the question of how severely to punish an actor who commits crime X and thereby also commits crime Y. Thus, suppose:

- (a) Dangerous driving deserves a six-month sentence, and
- (b) Negligently causing death (whether by dangerous driving or by any other act or by an omission when one has a duty to act) deserves a two-year sentence.

How severe a sentence does one deserve for (c) dangerous driving causing death? Two and a half years? More? Less? Notice that the holistic culpability and highly unjustifiable risk arguments are less potent here. Holistic culpability should make little difference, because the punishment for X already takes into account a significant risk of Y. Perhaps it is still defensible to treat the culpability of the whole ("X bringing about Y") as somewhat greater than the sum of the culpability of part one ("committing X") and of part two ("bringing about Y"). But it is not that much greater, at least compared to a case in which the culpability exhibited by committing X is not largely explained by the risk that X creates of bringing about Y. Moreover, in many intrinsic risk cases, although X poses an unjustifiable risk of Y, it does not pose a highly unjustifiable risk. (This is true, for example, of most dangerous driving cases.)

(2) Simester's analysis of the Jane (assault/property damage) hypothetical raises some doubts. First, it is not entirely clear that the risk of property damage is an extrinsic rather than intrinsic risk of the crime of assault. In general, isn't the risk of property damage one reason for punishing assaults? To be sure, it is not the main reason, nor a sufficient reason by itself. And in the actual hypothetical, it has virtually no bearing on the justifiability of Jane's act or on the sanction she justly deserves. Nevertheless, a legislature could plausibly conclude that the reason to punish assault, and certainly to punish it at a certain level, is sensitive to the risk that an assault can cause property damage as well as personal injury and emotional harm.

And, even though the risk of property damage is ordinarily not a reason that we should expect an actor throwing a projectile at another to consider as counting against performing such an act, that risk is nevertheless what I shall call "minimally foreseeable"; and, in my view, posing a risk of this magnitude justifies treating the actor as criminally culpable with respect to that harm.³⁶ The term "foreseeable" is notoriously slippery. For present purposes, a "minimally foreseeable" risk is a risk:

³⁵ Note that, on this account, the state should still have to prove that the risk of Y was an intrinsic rather than extrinsic risk of X, or else the court must be prepared to take judicial notice of this. An analogous issue arises in the American felony-murder doctrine: when a court requires that an eligible felony be "inherently dangerous," does this require (1) proof that in the particular case, the felon's acts posed a sufficient risk of death, or instead (2) proof that the felony "in the abstract" tends to pose sufficient risks of death?

³⁶ In my prior analysis of this issue, I made a similar claim, but less precisely. See Simons, *Strict Liability*, at 1123-1125 (arguing that if the foreseeability of the risk is just below the threshold that would be required for negligence liability in a case where the underlying activity was innocent, this

- (a) that is more than trivial, i.e., more than extraordinarily unlikely, and
- (b) whose probability is significantly increased by the defendant's act.³⁷

The category of minimally foreseeable risk captures a wider swath of risks than “intrinsic” risk, because it includes risks that are quite unlikely—specifically, sufficiently unlikely that a conscientiously law-abiding defendant need not count them as a reason not to engage in the conduct that created the risk. Nevertheless, in my view, “minimally foreseeable” risks in this sense, if created by a culpable criminal act, are serious enough that they do count on defendant's moral ledger, and thus do justify greater punishment when they culminate in a harm or wrong.³⁸

However, although the fact that an actor has committed crime X under circumstances in which Y is minimally foreseeable makes the actor eligible for punishment for Y, it does not follow that punishing him for Y is always consistent with the demands of proportionality. If X is a trivial crime, for example, or if the authorized punishment for Y is as severe as the authorized punishment for knowingly or intentionally bringing about Y, then punishing for the minimally foreseeable risk of Y is likely to be unduly harsh. (Suppose the actor gives the victim a very slight push, the victim trips awkwardly and falls down a flight of stairs to his death, and the authorized punishment is the same as for reckless manslaughter.³⁹) Very often, in short, the three principles that I have defended (holistic culpability, attention to degree of unjustifiability, and rough comparability of culpability) do not go so far as to justify punishing “committing X and thus bringing about Y (the risk of which is minimally foreseeable)” as harshly as “committing X and recklessly, knowingly or purposely bringing about Y.” Many real-world instances of misdemeanor-manslaughter, unlawful act manslaughter, and felony murder seem explicable only as fictitious attributions of culpability—false imputations of recklessness in the first two cases, and of knowledge or purpose in the third.⁴⁰ Whether the actors in these cases deserve to be punished at the same level as a reckless, knowing, or purposeful actor demands careful analysis, and should not be settled by stipulation.

level or risk should nevertheless suffice for negligence liability if the underlying activity was a serious felony).

³⁷ The determination that the risk is more than trivial and is made more probable by the defendant's act should be from the perspective of a reasonable person.

Simester's “Jane” hypothetical involves such a tiny risk of property damage that it might well flunk part (a) of this test.

³⁸ Relevant here is Judge Henry Friendly's argument, albeit in a tort case, against a requirement that every category of damages be foreseeable. So long as the defendant created a foreseeable risk of certain types of harm, he argued, “the existence of a less likely [and unforeseeable] additional risk ... should inculcate him further rather than limit his liability.” *Petition of Kinsman Transit Co.*, 338 F.2d 708, 725 (2d Cir. 1964).

³⁹ For a similar example, see Ashworth, at 250-253.

How does this analysis differ from proximate cause analysis? There is some overlap, insofar as foreseeability is an element of both. However, other aspects of proximate cause analysis, e.g. those focusing on physical and temporal proximity, are quite distinct. For example, suppose that D holds up V1 and V2 in an armed robbery. V1 immediately dies of a heart attack. V2 dies 20 years later of a heart attack, caused by V2's memory of the robbery together with other contemporary stressful events. D is properly considered culpable for the death of both, given that their deaths are at least minimally foreseeable. But proximate cause principles might preclude criminal liability for the death of V2.

⁴⁰ See Simons, *Strict Liability*, at 1110.

5. Moral Luck: Only a Partial Explanation

Strict liability in grading raises important questions about proportionality of punishment. As we have seen, such strict liability often, but not always, inflicts punishment that is disproportionate to the actor's just deserts. But we have yet to address one principle of proportionality that might seem to preempt or make irrelevant much of the prior analysis: the significance of moral luck to criminal liability. This section disentangles these issues, and explains why moral luck, even if a valid principle of proportionality, cannot fully justify strict liability in grading.

What could justify punishing an actor (A1) who culpably commits crime X and thereby causes result Y or satisfies circumstance Y, more than an actor (A2) who culpably commits crime X but does not thereby cause or satisfy Y? One obvious possible explanation is moral luck. Many retributivist theorists, and almost all real-world legislators, believe that it is proper for the criminal law to punish A1 more than A2, even if the only difference between them is the fortuitous occurrence of the result Y or of circumstance Y.⁴¹ On this view, we are justified imposing on A1 a moral luck supplement (in the form either of greater censure or harsher punishment, or both). So if M1 intends to kill a victim, fires his gun, and succeeds in killing, while M2 intends to kill, fires his gun, but fails to kill because the victim fortuitously sneezed at the last moment, arguably it is proper to convict M1 of a more serious crime or to punish M1 more harshly. Similarly, suppose M3 commits an armed robbery, aware of a significant chance that his gun might discharge and kill another, which indeed occurs when the gun falls to the ground in a struggle with police; while M4 commits an armed robbery in an identical fashion, and is similarly aware of a significant chance that his gun will discharge and kill another, but fortuitously, when his gun discharges in the struggle with police, the bullet causes no harm. If moral luck matters to criminal punishment, then it is proper to punish M3 more harshly.

Indeed, on first impression, moral luck might seem to be both a necessary and sufficient explanation of when and why greater punishment is justified for strict liability in grading. But this appearance is misleading. Let me explain why moral luck can only be a partial justification for greater punishment in this context.⁴²

⁴¹ See, e.g., Antony Duff, *Criminal Attempts* (Clarendon 1996); Michael Moore, *Placing Blame: A General Theory of the Criminal Law*, ch. 5 (OUP 1997). Peter Westen defends a non-desert justification for punishing more harshly when harm occurs. *Why Criminal Harms Matter: Plato's Abiding Insight in the Laws*, 1 *Crim. L. & Phil.* 307 (2007). In Westen's view, although the occurrence of the harm does not increase the actor's desert, its non-occurrence provides the state with a justifiable reason to be merciful. Of course, many retributivists deny the relevance of moral luck. See, e.g., Alexander & Ferzan, ch. 5; Andrew Ashworth, *Taking the Consequences*, in *Action and Value in Criminal Law* 107 (S Shute et al. eds., 1993); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 *J. Crim L & Criminol* 679 (1994).

What counts as the "merely fortuitous occurrence of Y," triggering the moral luck principle, is a matter of some controversy, which I do not explore here. Cf. note 42 below. Note, however, that moral luck principles seem equally plausible whether Y is a circumstance element or a result element. See Simons, *Strict Liability*, at 1115-1116.

⁴² One additional reason, not discussed in the text, is that not all strict liability in grading cases involve "last act" attempts or endangerments; and it is doubtful that moral luck principles should apply outside of such "last acts." However, quite a few "strict liability in grading" cases do involve "last acts," so I do not place primary reliance on this argument. Let me explain.

The issue of whether we should add a moral luck supplement arises in pure form only in such "last act" cases, not in cases where the actor has not yet taken the last step towards his intended goal or has not yet irrevocably unleashed a risk of harm. See Simons, at 1112-1113, 1115-1116. It arises in pure form, for example, as a reason to increase the punishment of M2 relative to M1 (see text above), but not if the actor intends to fire the gun but has not yet done so. In the latter case, it is

The moral luck principle is a distinct and freestanding principle of desert. In its broadest form, it provides that whatever culpability an actor displays in act A—intention, knowledge, recklessness, negligence, strict liability—the actor deserves greater censure or punishment if A results in consequence B or occurs in circumstance C (even though whether B or C occurs is “fortuitous” in the relevant sense). But the moral luck principle does not otherwise speak to an actor’s culpability. For example, it does not tell us how culpable Andrew (from the introduction) is for intentionally harming someone, negligent as to the risk of death. So it cannot, by itself, tell us how much, if at all, Andrew should be punished, either when the death results or when it does not.

To fully grasp the point, consider this highly stylized example, evaluating the culpability of someone like Andrew. Retributivists who support increased punishment due to moral luck have said very little about how large that increase should be, but suppose the proper moral luck supplement for any crime is a 100% increase in the severity of punishment for that crime.⁴³ And suppose that 50% is the appropriate holistic culpability “punishment supplement” for an actor, such as Andrew, who intentionally assaults someone, negligent as to the risk of death. (That is, such an actor deserves a punishment 50% more severe than the separate punishments he would deserve if he had committed two entirely distinct acts, (1) an intentional assault, and (2) an act that negligently created a risk of death.)

These two proportionality principles are clearly independent. Thus, the 100% moral luck supplement should be added to the 50% holistic supplement if the intentional assault causes death. And, more generally, the difficult question whether we should recognize moral luck (and if so, whether this should translate into a 1%, 10%, 100% or greater punishment supplement), is quite distinct from the question whether we should recognize holistic culpability (and if so, whether it should translate into a 1%, 10%, 100%, or greater supplement).⁴⁴

Of course, many retributivists take a very different view of culpability than I have argued for in this paper. Consider a retributivist who rejects the three principles I have defended (holism; attention to degree of justifiability; rough comparability). Instead, she endorses the correspondence principle and a cognitivist conception of culpability, and thus she would require at least recklessness as to each material element of an offense. Then, in the type of case just mentioned, and many others discussed earlier, she will reject criminal liability simply because, on her view, the actor is insufficiently culpable. Notice, however,

still up to the actor whether to fire the gun, and the criminal law might have good reason to punish an actor who has not yet finally irrevocably unleashed the risk less harshly than one who has. Although many “strict liability in grading” cases involve a last act or the irrevocable unleashing of risk, not all do. Suppose D believes that V is 13, when she is actually 9, and he is arrested just prior to having intercourse with her; and suppose negligence is required as to her being under the age of 16, but no mens rea is required as to whether she is under age 10. See Model Penal Code §§213.4(4), 213.6(1). Or consider Andrew, from the introduction. Suppose he walks up to his victim and pulls back his fist menacingly, but is restrained before he can strike the victim.

⁴³ This might roughly translate into a 100% increase in the length of imprisonment, though I concede that the equivalence is at best rough. For discussion of the difficulties of translating just desert principles into actual conditions of punishment, see Adam Kolber, *The Subjective Experience of Punishment*, 109 Colum L Rev 182 (2009); Kenneth W. Simons, *Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment*, 109 Colum. L. Rev. Sidebar 1 (2009).

The moral luck supplement could also be sensitive to the nature of the result; perhaps a 150% supplement is warranted for death, but only a 10% supplement for bodily injury. And, perhaps the supplement should take the form of an absolute rather than a relative (e.g., percentage) increase in the severity of the punishment for the original attempt or endangerment.

⁴⁴ Similarly, the “highly unjustifiable risk” and “roughly comparable culpability” arguments are independent in their weight and significance from the moral luck supplement.

that that position has nothing to do with whether she endorses or rejects the independent principle of moral luck. Even if she endorses moral luck, she is most unlikely to endorse using it to convert a case of insufficient culpability to a case of sufficient culpability.⁴⁵

To be sure, strict liability in grading is indeed intimately related to moral luck in the following way. Suppose that when an actor commits crime X, he always displays sufficient culpability with respect to Y to justify punishing him for Y when Y occurs. Or suppose his committing crime X in a particular manner (e.g. committing a robbery while carrying a loaded gun) always displays sufficient culpability in this sense. Now focus on the subset of cases in which it is fortuitous, i.e., a matter of moral luck, whether Y occurs or not. In these cases, the appropriate moral luck supplement should always be added to X, or to “X performed in a particular manner,” and this supplement will then fix the proper punishment for X+Y. So it may seem that moral luck is doing all the justificatory work in explaining why the actor is punished for the occurrence of Y.

But again, the appearance deceives. How much the actor should be punished for the occurrence of Y depends, even in these cases, not just on the size of the moral luck punishment supplement, but also on the culpability with respect to Y that he expresses in committing X (or in committing X in a particular way).⁴⁶ Moral luck is not, then, the only explanation for what an actor justly deserves in cases of strict liability in grading.

Another stylized set of examples may illuminate the point. Assume again that we employ both a 50% holistic culpability supplement and a 100% moral luck supplement. Consider D5, above, who committed a robbery with a loaded gun and negligently but accidentally caused a death; and D6, who negligently caused a death by carrying her loaded gun in public, accidentally shooting a victim, but not by virtue of committing another crime. We also should consider the variations of D5 and D6 in which no death results.

Suppose that:

10 = the deserved punishment for D6/ no death resulting.

Then: 15 = the deserved punishment for D5/ no death resulting.

And: 20 = the deserved punishment for D6/ death resulting.

And: 30 = the deserved punishment for D5/ death resulting.⁴⁷

The following is a graphic representation.

⁴⁵ See Simons, *Strict Liability*, at 1119.

⁴⁶ Yet another relevant factor is whether, and to what degree, the authorized punishment for X already takes into account (and should take into account) the extent to which X creates a risk of Y. Armed robbery is punished as harshly as it is in part because it creates a risk of death. For reasons of space, I have only briefly discussed this factor.

⁴⁷ In this stylized analysis, the numbers refer to abstract quantities of harsh treatment (or of censure). It is of course controversial how these should be translated into real-world punishment conditions, such as months or years in prison, fines, probation or parole, or other forms of loss of liberty, wealth, or other opportunities.

		100% moral luck supplement: →	
		No death results	Death results
50% holistic supplement: ↓	D6	10 (assumed)	20
	D5 (bank robber)	15	30

These examples show that the punishment (30) of “D5/death” depends both on the moral luck supplement and the holistic supplement. To arrive at that punishment, we must identify the moral luck supplement (here, the increase from the proper punishment (15) of “D5/no death”). But, to arrive at the latter punishment, we must identify the holistic supplement (here, the increase from the proper punishment (10) for “D6/no death,”⁴⁸ which the example assumed to be correctly determined).

A final question concerns the scope of the moral luck principle itself. Is it even coherent to add a “moral luck” supplement when the luck pertains to a strict liability element of an offense? Calling this a “moral” luck supplement seems a misnomer: if fault is not required as to the risk that the underlying act will cause a harm or wrong, then how can we characterize as “moral” the luck that influences whether that act does or does not cause harm? On the view I defend, however, formal strict liability is justifiable only when

⁴⁸ The examples in the text involve four actors who are negligent as to the risk of death. What if the four actors are not sufficiently culpable to be negligent with respect to that risk, but negligent should recognize that the risk of death is minimally foreseeable? On this assumption of lesser culpability, D6[^] (the counterpart to D6) would not be guilty of any crime, whether or not his conduct caused a death. After all, creating a minimally foreseeable risk in the context of a lawful activity does not justify criminal liability. For D6[^], then, the numbers for deserved punishment would fall to 0. But the analogous D5[^] would still be guilty, under the holistic culpability and highly unjustifiable risk principles. The numbers assigned to D5[^] would be lower than those assigned to D5, of course, reflecting D5[^]'s lesser mens rea as to Y. For example, they might be:

- 1.5 = the deserved punishment for D5[^]/ no death resulting.
- 3.0 = the deserved punishment for D5[^]/ death resulting.

Notice that, to explain these punishment levels, we no longer can refer to the corresponding punishment levels of D6[^], since these are 0. So it might seem that the moral luck supplement does, in this example, fully explain the punishment levels. But that is not the case. In order to evaluate the culpability of each D5[^], and to explain why each is culpable while each D6[^] is not, we still need to apply the holistic culpability or highly unjustifiable risk principle. However, applying those principles is more complex than before, for they can no longer be cashed out as a simple supplemental formula (e.g. as 50% more than analogous D6[^] would deserve).

it is an instance of substantive fault. And on the view that many other retributivists defend, formal strict liability is never justifiable; rather, mens rea should be required as to every material element of every offense. Thus, the “moral” luck characterization remains apt in a world where either conception of retributive principles is respected.⁴⁹

Consider a concrete question of criminal law policy in light of this analysis. Should felonies that result in death be treated as felony murder? Often, by committing a felony, the actor reveals that he is negligent or reckless as to the possibility that his conduct will cause someone’s death. And even more often, the resulting death is at least minimally foreseeable. Thus, even if punishing such an actor for the death is an instance of formal strict liability (because the jurisdiction requires no explicit mens rea as to the death), such punishment can be justified because of the substantive fault that he displays. But the question remains: how harshly may he justifiably be punished? If D5 accidentally drops a loaded gun during a bank robbery, thereby causing death, he should not be punished for murder. There is simply too much moral distance⁵⁰ between such an actor and one who knowingly or purposely kills. And even if we endorse a moral luck supplement for “dangerous felonies resulting in death,” I do not believe we can defend a supplement so large that we treat D5’s act as harshly as murder.⁵¹

However, in a few extreme cases, felony-murder liability is indeed appropriate. Recall Boris, from the introduction, who chokes his victim during a rape in order to prevent her resistance, and thereby accidentally kills her. Boris might honestly lack awareness of a risk that his conduct might kill the victim, focused as he is on gratifying his lust and dominating the victim. So he might be “merely” negligent as to the risk of death. But I believe that it is justifiable to punish Boris for murder, under the holistic culpability, extremely unjustifiable risk, and comparable culpability principles. The moral distance between Boris and an actor who knowingly or purposely kills is much less than the analogous distance between D5 and such an actor. (The question whether to treat misdemeanors or unlawful acts that result in death as manslaughter should be analyzed in analogous fashion.)

6. Strict Liability in Grading with respect to Circumstance Elements

Consider how the analysis would apply to two examples involving circumstance elements rather than results.

⁴⁹ In the real world, where formal strict liability very often does not instantiate substantive fault, the coherence and nomenclature issues remain. The question then is whether a (non-moral) luck principle can justify increasing the penalty when the act fortuitously causes harm or fortuitously satisfies a circumstance element. For example, suppose a jurisdiction recognizes a strict liability crime of speeding (e.g., it is no defense that the speedometer malfunctioned). And suppose it also recognizes a more serious crime of speeding causing death. Does the “luck” principle justify a higher punishment for the more serious crime? If a persuasive argument for the moral luck principle relies only on the actor’s causal responsibility for the effects he brings about in the world, without regard to his culpability, the answer could be yes.

⁵⁰ See Ashworth, at 255; however, Ashworth seems to use the phrase to refer to a proximate cause limit.

⁵¹ See Simons, at 1111-1112:

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 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.

The first is strict liability with respect to age in statutory rape crimes. Suppose a jurisdiction requires recklessness as to the victim being under the age of 16 in order to convict for statutory rape, i.e., sexual intercourse with a person under 16; but it imposes no additional mens rea requirement for the much more serious crime of aggravated statutory rape, i.e., sexual intercourse with a person under the age of 10. Is this instance of strict liability justifiable?

Probably not. If the punishment for aggravated statutory rape were only slightly greater than for statutory rape, then this could well be justifiable. For, on a holistic view of culpability, one who actually realizes that he might be sleeping with someone under age 16 should ordinarily realize that there is also a risk, albeit a much smaller one, that the victim is under 10; and in both cases he should avoid intercourse altogether if a reasonable person would have any doubt whatsoever.⁵² Indeed, even if the risk that she is under 10 is only minimally foreseeable, the actor is culpable for taking that additional risk, given that he is culpable for the original risk that she is under 16. But if the punishment differential between the crimes is great, this argument is inadequate: for the argument at best suggests that the actor is modestly culpable for proceeding in light of a minimally foreseeable risk that he is committing the more serious crime.⁵³ Accordingly, if the state wants to punish aggravated statutory rape especially harshly, it should require a mens rea of recklessness or knowledge as to the victim being under age 10.⁵⁴

A second example is strict liability with respect to the amount stolen in a theft offense. In many jurisdictions, increases in the amount stolen result in punishment for a more serious grade of the crime. For example, in Oregon, one commits first-degree theft (subject to a maximum five years imprisonment) if the property is worth \$750 or more; second degree theft (a maximum one year imprisonment) if it is worth between \$50 and \$750; and third degree theft (a maximum 30 days) if it is worth less than \$50.⁵⁵ Suppose Clara sees that a distracted pedestrian has dropped his wallet, and she quickly removes the cash from the wallet and runs away. And suppose she believed that the wallet would contain at most a couple of hundred dollars. In a jurisdiction that imposes no mens requirement as to the amount stolen (so long as she knew she was stealing some amount), is it proper to convict her of first degree theft if it turns out that the wallet contained \$1000?

Yes, this would be consistent with retributive principles. Ordinarily she will be at least negligent as to the risk that the amount is more than she estimated it to be. Moreover, a holistic account of her culpability can properly consider her presumptive motive—to steal as much money as possible—and not just her estimate of the likely range in value of what she was stealing. (By way of contrast, consider a scheme of escalating punishments for possessing increasing amounts of illegal drugs; here, it will more often be the case that the actor does not want to possess as large a quantity of drugs as possible, since he might fear being punished at the extremely high level of a drug distributor rather than the much lower level of a casual user.) In Clara's case, it is also minimally foreseeable that the wallet

⁵² The “highly unjustifiable risk” and “roughly comparable culpability” arguments have less purchase in this example, at least if the actor believes the victim is just under the legal age and if statutory rape of a person just under the legal age is a minor crime.

⁵³ To be sure, if one both endorses moral luck and believes that the proper moral luck punishment supplement is very large, then it could be justifiable to impose a very harsh punishment on one who is not even negligent about the victim being under age 10. But those beliefs would also justify extremely draconian punishments across the board whenever tiny risks posed by criminal conduct eventuate in harm. I assume that this result is not consistent with the best retributive theory.

⁵⁴ See also Ashworth, at 254. My own prior analysis of this point too readily accepted strict liability in this scenario. Simons, *Strict Liability*, at 1092.

⁵⁵ Oregon Rev. Stat. §§161.605(3), 161.615(1), 161.615(3), 164.043(1)(b), 164.045(1)(b), 164.055(1)(a) (2009).

would contain an unusually large amount of cash. Moreover, the marginal penalty increases for possessing increasing amounts of cash are typically modest, and thus are plausibly viewed as proportionate. If, however, those penalty differentials are very substantial, then proportionality becomes more problematic, and it would then be more consistent with retributive principles to require at least recklessness with respect to the amount actually stolen.

7. Conclusion

The conceptual and normative approach in this paper is part of a broader critique, developed over a number of articles, of the excessively cognitive focus of much contemporary criminal law doctrine and theory.⁵⁶ The approach taken here is more pluralistic, more respectful of conative as well as cognitive mental states, and more sensitive to the varying ways in which criminal statutory criteria can express culpability.

More specifically, the paper helps demonstrate that criminal “negligence” is both more complex and more pervasive than is generally appreciated. I surround the term with quotation marks because, very often, negligence is the operative standard even when the purported standard is something less (strict liability) or something more (recklessness or knowledge). We have seen that strict liability in grading often actually expresses the actor’s negligence with respect to the grading element. But widely employed recklessness and knowledge criteria also often amount, in application, to negligence requirements, at least in part.⁵⁷

This essay’s modest defense of modest forms of strict liability in grading helps explains many of the patterns we actually see in contemporary criminal legislation. However, I assuredly do not endorse the highly disproportionate punishments that contemporary criminal laws often authorize. The felony-murder rule, in many of its applications, is quite objectionable on these grounds.⁵⁸ At the same time, retributive theorists should not content themselves with a simple rejection of all forms of strict liability, both formal and substantive, but should instead focus more attention on the contours of proportionality requirements, and on their justification.

⁵⁶ See, e.g., Kenneth W. Simons, *Rethinking Mental States*, 72 *B.U. L. Rev.* 463 (1992); Simons, *Does Punishment for “Culpable Indifference” Simply Punish for “Bad Character”?*, 6 *Buffalo Crim. L. Rev.* 219 (2002).

⁵⁷ Consider, for example, the question whether the defendant is sufficiently “aware” of a risk to be reckless. The answer is complex. We might want to treat readily available, latent knowledge about risks that the actor could easily access as sufficient to satisfy an “awareness” requirement; yet from one perspective, this seems to collapse the distinction between recklessness and negligence. Similarly, if an actor knows a legally relevant fact but later forgets it, should we treat him as “knowing” the fact at that later time? This essay is not the occasion for a full development of these points, however. For discussion, see Douglas Husak, *Negligence, Belief, Blame and Criminal Liability: The Special Case of Forgetting*, 5 *Crim L & Phil* 199 (2011); Kenneth W. Simons, *Book Review: Retributivism Refined—Or Run Amok?*, 77 *U Chi L Rev* 551, 568-579 (2010).

⁵⁸ For a disturbing litany of cases exhibiting the serious dangers of overpunishment under the felony-murder doctrine, see Guyora Binder, *Making the Best of Felony Murder*, 91 *BU L Rev* 403, 405-407 (2011). According to Binder, however, most jurisdictions would not permit felony-murder liability in these cases; and he suggests that a more qualified felony-murder doctrine can be consistent with retributive and consequentialist principles.