Social Philosophy & Policy Vol. 7 Issue 2, ISSN 0265-0525

RECONSIDERING THE RELATIONSHIP AMONG VOLUNTARY ACTS, STRICT LIABILITY, AND NEGLIGENCE IN CRIMINAL LAW

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Introduction

This essay, as will become obvious, owes a huge debt to Mark Kelman, particularly to his article "Interpretative Construction in the Substantive Criminal Law."[1] That debt is one of both concept and content. There is rich irony in my aping Kelman's deconstructionist enterprise, for I do not share his enthusiasm for either the "insights" or the political agenda of the Critical Legal Studies movement. I do not believe that either the law in general or the criminal law in particular is radically indeterminate, rife with internal contradictions, or an expression of the interests of a dominant economic class. And although, like Kelman, I believe that the freedom/determinism, act/character, and rule/principle dichotomies must ultimately be dealt with in order to have a completely satisfactory account of criminal law, I also believe that these dichotomies loom just as large in other areas of law and in normative theory generally.[2] They are problems for Crits as well as for liberal-legalists.

In any event, my intentions in undertaking this deconstructionist enterprise are *modestly reformist, not revolutionary. I do not intend to shift any paradigms,* but to work with well-established ones. I will assume that criminal law seeks to accomplish some blend of retributive response to and deterrence of culpable choices, choices to defy moral norms that are also legal norms.[3] (I omit consideration of criminal laws premised on immoral norms.) I will also assume that a culpable choice is one that reflects negatively on the values held by the chooser. Beyond these quite modest assumptions, I need not and will not venture in this paper, realizing, of course, that much has and can be written about the proper aims of punishment and the proper account of culpability.

[1] *Stanford Law Review*, vol. 33 (April 1981), pp. 591–673. See also Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987), pp. 15–185.

[2] See Mark Hager, "Against Liberal Ideology," *American University Law Review*, vol. 37 (Summer 1988), pp. 1051, 1057–58.

Briefly, the freedom/determinism dichotomy refers to the philosophical issue of whether determinism prevails throughout nature, including the realm of human action, or whether human action is indeterministic is some sense, and what resolution of these questions entails for moral responsibility. The act/character dichotomy refers to the issue of whether moral responsibility is ultimately a function of how we act or a function of what kind of character we have. The rule/principle dichotomy refers to the issue of whether we should be guided in each of our acts by our ultimate moral principles, or whether we should be guided by rules that are more determinate than those principles but that lead to some acts that from the standpoint of the principles would be judged to be morally wrong.

[3] See Jean Hampton, "*Mens Rea*," *Social Philosophy & Policy*, vol. 7, no. 2 (Spring 1990).

My focus will be on three principles of Anglo-American criminal law. The principles are:

(1) The "voluntary act principle": there can be no criminal liability in the absence of a voluntary act. (For example, if one is blown by a hurricane into another person, one cannot be convicted of criminal battery because one did not "batter" the other "voluntarily.")

(2) The "strict liability principle": criminal liability can be predicated solely on a voluntary act and need not be predicated additionally on a showing of a culpable mental state or negligence (though whether it should be so predicated is controversial). (For example, in many jurisdictions, exceeding the speed limit is an offense regardless of the care taken by the driver to avoid doing so.)

(3) The "negligence principle": as an alternative to strict liability, criminal liability can be predicated solely on a voluntary act plus negligence (though whether it should be so predicated is controversial). (For example, in all jurisdictions, if one causes another's death by acting without adverting to a risk to others that a reasonable person would not impose, one is criminally liable for negligent homicide.)

My purpose in this paper is to explore the relationship among these three principles. I will conclude that principles (1) and (2) – the voluntary act principle and the strict liability principle – are in tension with one another. Construing the voluntary act principle to reflect its most promising normative rationale results in a direct conflict with the strict liability principle. Conversely, construing the voluntary act principle so as to render it consistent with the strict liability principle renders the former principle virtually empty. I will also conclude that principles (2) and (3) – the strict liability principle and the negligence principle – cannot be differentiated non-arbitrarily and that they therefore collapse into each other. Ultimately, the conclusion I am led to is that the voluntary act principle, taken to the fullest extent that its rationale suggests, requires us to reject the other two principles: that is, principles that envision crimes predicated on strict liability and negligence. On the other hand, the considerations behind the strict liability and negligence principles are valid and probably should limit the application of the voluntary act principle.

I. The Standard Account of the Voluntary Act, Strict Liability, and Negligence Principles

A. The Voluntary Act Principle

According to the commentators, it is the law in all Anglo-American jurisdictions that "no person is guilty of a crime unless she commits a voluntary act."[4] The voluntary act principle is usually treated by courts as implicit in criminal statutes, though several states have followed the Model Penal Code and made the principle an explicit part of their criminal codes.[5]

[4] Joshua Dressler, *Understanding Criminal Law* (New York, Oakland, and Albany: Matthew Bender, 1987), p. 65.

[5] *ibid.*

The voluntary act principle, as illustrated by § 2.01 of the Model Penal Code, requires that the criminal defendant have engaged in a willed bodily movement[6] (or, in the case of criminal omissions, to have failed to perform certain bodily movements which defendant could have performed had she so willed[7]). The Model Penal Code states that "a person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act [or omission]."[8] An "act" is defined as a "bodily movement."[9] "Voluntary" is defined negatively by examples of involuntary conduct, including external physical compulsion (a push, for example), reflexes, convulsions, unconscious behavior, and behavior undertaken in a state of altered consciousness.[10] As H. L. A. Hart concludes:

> We know now what the general doctrine [that all criminal responsibility must be voluntary] means: It defines an act in terms of the simplest thing we can do: this is the minimum feat of contracting our muscles. Conduct is "voluntary" or "the expression of an act of will" if the muscular contraction which, on the physical side, is the initiating element in what are loosely thought of as simple actions, is caused by a desire for those same contractions. This is all the mysterious element of the "will" amounts to: It is this which is the minimum indispensable link between mind and body required for responsibility even where responsibility is strict.[11]

If the requirement of a voluntary act, defined as a willed bodily movement, is a fundamental principle of Anglo-American criminal law – and, indeed, in the United States, arguably a constitutional requirement[12] – what is its rationale? Put differently, what fundamental value does the voluntary act principle serve?

Douglas Husak has examined the voluntary act principle in terms of what it exempts from criminal liability (e.g., forced and reflex movements, unconscious movements, thoughts, and status offenses) and what it does not (e.g., omissions), and he concludes that the principle is an expression of the judgment that it is unfair to blame or punish one for conduct that is not fairly subject to one's control.[13] I believe Husak is correct. The above examples of things exempted from liability have very little in common except that their exemption is appropriate according to this judgment. In any event, I shall accept but not defend this view of what value the

[6] Performance of a mental ritual might also qualify. See Leo Katz, *Bad Acts and Guilty Minds: Conundrums of the Criminal Law* (Chicago and London: University of Chicago Press, 1987).

[7] Dressler, *Understanding Criminal Law*, pp. 67–68; H.L.A. Hart, *Punishment and Responsibility* (New York: Oxford University Press, 1968), pp. 95–96, 150–51; Rollin Perkins and Ronald Boyce, *Criminal Law* (Mineola: Foundation Press, 3rd ed. 1982), p. 837.

[8] *Model Penal Code*, § 2.01 (Proposed Official Draft 1962).

[9] *ibid.*, § 1.13(2).

[10] *ibid*, § 2.01.

[11] Hart, *Punishment and Responsibility*, p. 99.

[12] The United States Supreme Court held that the federal constitutional prohibition of "cruel and unusual punishments" prevented criminalizing the status of narcotics addiction. Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1966). The orthodox interpretation of the *Robinson* decision is that it rests on the distinction between punishing statuses and punishing acts. See, e.g., Dressler, *Understanding Criminal Law*, pp. 73–77.

[13] Douglas Husak, *Philosophy of Criminal Law* (Totowa: Rowman and Littlefield, 1987), ch. 4.

voluntary act principle is meant to express, and I shall also accept but not defend the value itself. I am primarily interested in what acceptance of the voluntary act principle as glossed by this value entails as regards the strict liability and negligence principles.

B. The Strict Liability Principle

Although most criminal offenses require some form of culpable mental state or negligence with respect to the proscribed conduct or results, some do not.[14] Usually, though not always, these "strict liability crimes" carry light penalties.[15]

Strict liability crimes, which are my concern in this paper, must be distinguished from ordinary crimes, the seriousness of which can be enhanced by strict liability elements – that is, elements the defendant does not intend to bring about and is unaware exist. (For example, assault upon a peace officer is frequently treated as an aggravated form of criminal assault, even where the actor is completely unaware that her victim is a peace officer.) These strict liability punishment-enhancing elements raise interesting problems in the theory of punishment, particularly the problem of whether one who is culpable to some extent can fairly be subjected to a "lottery" that will determine his level of punishment. (In other words, the presence or absence of the punishment-enhancing strict liability element can be viewed as a matter of chance from the standpoint of the culpable actor: hence, the notion of a punishment "lottery.") This problem is one that runs through large areas of criminal law, particularly the distinction between attempted crimes, where the actor tries but fails to bring about the criminal harm, and crimes where the criminal harm does result.[16]

I am also not dealing with the strict liability element regarding the existence of the various criminal offenses themselves. The general rule is that one is strictly liable for acting in ignorance of, the criminal law,[17] though at its boundaries the rule is subject to constitutional limitations.[18] The rule permits the punishment of some defendants who, though they intended, or knew, or were reckless or negligent with respect to the conduct they engaged in or the results they brought about, were faultless with respect to their ignorance that such conduct or results were forbidden. I deal here only with strict liability offenses where the strict liability is

[14] Perkins and Boyce, *Criminal Law*, pp. 896, 899.

[15] Wayne LaFave and Austin Scott, *Criminal Law* (St. Paul: West Publishing, 3rd ed. 1986), p. 242.

[16] David Lewis, "The Punishment That Leaves Something to Chance," *Philosophy & Public Affairs*, vol. 18, no. 1 (Winter 1988), pp. 53–67; Steven Sverdlik, "Crime and Moral Luck," *American Philosophical Quarterly*, vol. 25, no. 1 (January 1988), pp. 79–85; Andrew Ashworth, "Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law," *Rutgers Law Journal*, vol. 19, no. 3 (Spring 1988), pp. 725–810; Yoram Shachar, "The Fortuitous Gap in Law and Morality," *Criminal Justice Ethics*, vol. 6, no. 2 (Summer/Fall 1987), pp. 12–36; Note, "Chance, Freedom, and Criminal Liability," *Columbia Law Review*, vol. 87, no. 1 (January 1987), pp. 125–41; Judith Thomson, "The Decline of Cause," *The Georgetown Law Journal*, vol. 76 (1987), pp. 137–50; Paul Rothstein, "Causation in Torts, Crimes, and Moral Philosophy: A Reply to Professor Thomson," *The Georgetown Law Journal*, vol. 76 (1987), pp. 150–67; Stephen Schulhofer, "Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law," *University of Pennsylvania Law Review*, vol. 122 (January 1974), pp. 1497–1607; Andrew Ashworth, "Belief, Intent, and Criminal Liability," eds. J. Eekelan and J. Bell, *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press, 3rd ed. 1987).

[17] See *Model Penal Code*, § 2.04(3).

[18] See Lambert v. California, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957).

with respect to the conduct or result, and not with respect to the law itself. My conclusions, however, will have some bearing on the issue of ignorance of the law.

Strict liability crimes such as speeding, which are punishable despite lack of intent, knowledge, or negligence, though relatively common, are quite controversial among jurists and commentators.[19] They are surely inconsistent with any version of retributivism that absolutely condemns punishment of the non-culpable. Of course, such a strong version of retributivism is arguably inconsistent with any system for imposing punishment based upon an ascertainment of culpability that is subject to error – i.e., any system for imposing punishment.[20] What is distinctly problematic about strict liability crimes is that even when they are enforced without error, they still may result in punishment of the nonculpable: those who have not chosen to defy the governing norms.

Nonetheless, strict liability crimes do serve some retributive and consequentialist values at the same time that they disserve other retributive values. Strict liability crimes serve the retributive value of seeing that the culpable do not go unpunished in that by omitting the necessity to prove culpability beyond a reasonable doubt, they make it easier to convict the culpable.[21] In addition, strict liability crimes deter unwanted conduct (which produces undeserved suffering, arguably a desert-based value if not a retributive one[22]) in two ways: first, they deter would-be culpable actors who might otherwise engage in harmful conduct believing, whether correctly or incorrectly, that the prosecution will be unable to prove their culpability;[23] second, they deter the innocent by creating incentives to take extraordinary care to avoid harmful conduct. Finally, strict liability crimes cost less to investigate and prosecute.[24]

Although strict liability crimes are controversial, their existence is generally considered to be consistent with the voluntary act principle. And they are also generally regarded as distinguishable from crimes on negligence with respect to conduct or result.

C. *The Negligence Principle*

Criminal liability is frequently predicated on negligence, which is conduct that creates an unreasonable risk of harm to an interest protected by the criminal law (negligence as to result), or an unreasonable though sincere belief that one's

[19] See M. Bayles, *Principles of Law: A Normative Analysis* (Dordrecht, Boston, Lancaster and Tokyo: D. Reidel Publishing, 1987), pp. 295–300; Jerome Hall, *General Principles of Criminal Law* (Indianapolis: Bobbs-Merrill, 1960) pp. 342–51; LaFave and Scott, *Criminal Law*, p. 248; Perkins and Boyce, *Criminal Law*, p. 905; Henry M. Hart, "The Aims of the Criminal Law," *Law and Contemporary Problems*, vol. 23 (Summer 1958), pp. 401, 422–25; Frances B. Sayre, "Public Welfare Offenses," *Columbia Law Review*, vol. 33, no. 1 (January 1933) pp. 52, 82; Richard Singer, "The Resurgence of *Mens Rea*: The Rise and Fall of Strict Criminal Liability," *Boston College Law Review*, vol. 30, no. 2 (March 1989), pp. 337, 403–8.

[20] See Larry Alexander, "Retributivism and the Inadvertent Punishment of the Innocent," *Law and Philosophy*, vol. 2, no. 2 (August 1983), pp. 233–46.

[21] LaFave & Scott, *Criminal Law*, p. 247.

[22] See Note, "Criminal Liability Without Fault: A Philosophical Perspective," *Columbia Law Review*, vol. 75, no. 8 (December 1975), pp. 1517, 1564.

[23] *ibid.*, p. 1537.

[24] *ibid.*, p. 1537. For a rejoinder to this student note's claims on behalf of strict liability, see Richard Singer, "The Resurgence of *Mens Rea*: The Rise and Fall of Strict Criminal Liability," pp. 403–8.

conduct is not conduct which, under another description, is proscribed by the criminal law (negligence as to conduct). Negligent homicide is an example of a crime based on negligence as to result – i.e., the creation of an unreasonable risk of death that in fact eventuates in a death. Bigamy is an example of a crime that can be based on negligence as to conduct, as (for example) in those cases where one unreasonably believes in the validity of a prior divorce. The Model Penal Code's definition of criminal negligence is representative:

> *Negligently.* A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation ....[25]

To be negligent, one need not advert to (in the sense of "be aware of") the unreasonable risk one is creating with respect either to proscribed result or to the proscribed nature of one's conduct. Indeed, adverting to such risks converts one's negligent conduct to recklessness. True negligence is inadvertent creation of unreasonable risks. What distinguishes negligence from strict liability is that the negligent actor's unawareness of the risk is a failure to meet the objective "reasonable person" standard.[26]

Criminal punishment of inadvertent negligence is just about as controversial as the existence of strict liability crimes.[27] All of the arguments in favor of strict liability crimes are available on behalf of making negligence a basis of criminal liability. In addition, many theorists contend that negligence, unlike strict liability, betokens culpability, especially when the "reasonable person" of the negligence standard is relativized to the reasonable person "in the actor's situation."[28] Essentially, those who deem negligence culpable argue that failure to advert to a risk that one had a fair chance to perceive (had one only tried) is culpable, even though it does not entail a conscious choice to produce or unreasonably to risk harm.[29]

[25] *Model Penal Code*, § 2.02(4)(d).

[26] See Note, "Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond," *Stanford Law Review*, vol. 35 (April 1983), pp. 681, 696.

[27] Bayles, *Principles of Law*, pp. 295–300; Hart, *Punishment and Responsibility*, pp. 132–40; James Brady, "Punishment for Negligence: A Reply to Professor Hall," *Buffalo Law Review*, vol. 22, no. 3 (Spring 1972), pp. 107–22; George Fletcher, "The Theory of Criminal Negligence: A Comparative Analysis," *University of Pennsylvania Law Review*, vol. 119, no. 3 (January 1971), pp. 401–38; Jerome Hall, "Negligent Behavior Should Be Excluded from Penal Liability," *Columbia Law Review*, vol. 63, no. 4 (April 1963), pp. 632–44; Richard Wasserstrom, "H.L.A. Hart and the Doctrine of Mens Rea and Criminal Responsibility," *University of Chicago Law Review*, vol. 35 (1967), pp. 92–126.

[28] See Hart, *Punishment and Responsibility*, pp. 147–149; Glanville Williams, *The Mental Element in Crime* (Jerusalem: Magnes Press, Hebrew University, 1965), pp. 54–60; Fletcher, "Theory of Criminal Negligence," p. 417; Hall, "Negligent Behavior," pp. 632–36; J.W.C. Turner, "The Mental Element in Crimes at Common Law," *Cambridge Law Journal*, vol. 6, no. 1 (1936), pp. 31, 44–48.

[29] See authorities in note 27; LaFave and Scott, *Criminal Law*, p. 234.

II. Deconstructing the Distinction between Strict Liability Crimes and Violations of the Voluntary Act Principle

A. A Case

In 1977, the Kansas Court of Appeals had before it the case of one Mr. Baker, who had been convicted at trial of driving 75 miles per hour in a 55 miles per hour zone.[30] The pertinent Kansas speeding law was conceded by all to be a strict liability offense. Mr. Baker did not deny that his car was going 75 in a 55 zone, or that he was driving it. Mr. Baker did deny, however, that his driving 75 was a voluntary act on his part.

What happened, apparently, is that Mr. Baker's cruise control stuck in the "accelerate" position, causing his car to accelerate beyond the posted speed limit. His attempts to deactivate the cruise control by hitting the "off" button and the brakes did not initially succeed. Because the speed of the car was temporarily out of his control, he argued that his speeding was not a voluntary act.

Although the Kansas court purported to accept the voluntary act principle, it nonetheless affirmed Baker's conviction. In the key passage of its opinion, the court argued:

> We have no doubt that if defendant were able to establish that his act of speeding was the result of an unforeseen occurrence or circumstance, which was not caused by him and which he could not prevent, that such would constitute a valid defense to the charge. But, the evidence proffered suggests a malfunction of a device attached to the motor vehicle operated by the defendant over which he had or should have had absolute control. Defendant does not suggest that the operation of the motor vehicle on the day of his arrest was anything but a voluntary act on his part, not that anyone other than himself activated the cruise control, which may have caused his excessive speed. . . .[31]

The court went on to distinguish cases from other jurisdictions in which the defendant was merely a passenger in the car,[32] in which the brakes failed without warning,[33] or in which the accelerator broke.[34] The court argued that

> Unexpected brake failure and unexpected malfunction of the throttle on an automobile, both being essential components to the operation of the vehicle, differ significantly from the malfunction of a cruise control device to which the driver has voluntarily delegated partial control of the automobile. We believe it must be said that defendant assumed the full operation of his motor vehicle and when he did so and activated the cruise control attached to that automobile, he clearly was the agent in causing the act of speeding. . . .[35]

[30] State v. Baker, 1 Kan. App. 2d 568, 571 P.2d 65 (1977).
[31] *ibid.*, pp. 570, 571 P.2d, pp., 67–68.
[32] People v. Shaughnessey, 66 Misc.2d 19, 319 N.Y.S.2d 626 (1971).
[33] State v. Kremer, 262 Minn. 190, 114 N.W.2d 88 (1962).
[34] State v. Weller, 4 Conn. Cir. 267, 230 A.2d 242 (1967).
[35] State v. Baker, 1 Kan. App. 2d, p. 573, 571 P.2d, p. 69.

B. What Baker Reveals: The Time-Framing Problem in Strict Liability Offenses

If you are not particularly satisfied by the Kansas court's explanation of why Mr. Baker's punishment does not violate the voluntary act principle, or the court's grounds for distinguishing other similar cases, there is a good reason: the voluntary act principle and the strict liability principle are in conflict with one another, and the resolution of that conflict depends on a quite arbitrary decision with respect to determining the relevant voluntary act. The problem is, to borrow Mark Kelman's useful term, one of "time-framing."[36]

Time-framing refers to the temporal boundaries of the criminal conduct: when that conduct can be said to begin and end. Turning to *Baker*, when did Baker's criminal conduct begin? (When it ended is of no concern here.) If it began when his car accelerated past 55 miles per hour, then it looks as though Mr. Baker's claim that he did not act voluntarily was correct. One of the paradigms of involuntary action is compulsion by an external force, such as a push. Being propelled by an out-of-control car surely looks like being pushed, insofar as the voluntary act principle is concerned. Undoubtedly, that is why the New York case cited by the *Baker* court deemed the defendant not to have acted voluntarily when he was but a passenger in the car.[37] If the criminal conduct that is the subject of the strict liability offense of speeding began at the time the speed passed 55 miles per hour – or, indeed, at any time after the defective cruise control was switched on – then Mr. Baker cannot be convicted without violating the voluntary act principle.

On the other hand, suppose we say Mr. Baker's criminal conduct began with his choice to activate the cruise control, or his choice to go driving – with any choice that preceded the cruise control's being activated. Surely his conduct at these earlier times was voluntary, and it led to his car's exceeding the speed limit.

Moreover, all strict liability crimes that are predicated on resulting harm will be involuntary if we time-frame narrowly – if we begin the story only after the defendant has acted, and all that remains is for the harmful results of that action to occur. Therefore, it makes sense, or so it seems, to time-frame more broadly and begin Mr. Baker's story early enough to find a voluntary act. Indeed, the same point holds true of strict liability crimes defined in terms of conduct, not results. For one can always claim that what one voluntarily chose was conduct X (say, marrying someone who is single), which is innocent conduct, and that the fact that conduct X was the same as conduct Y (say, marrying someone who is in fact already married), which is proscribed conduct, was a result out of one's control once one chose to engage in conduct X.

On the other hand, if we time-frame too broadly we make the voluntary act principle vacuous. After all, all conduct engaged in by adults will be traceable to some voluntary act in their past (unless they have been incapable of acting voluntarily since infancy). If the voluntary act principle is to have any normative bite at all, criminal conduct cannot be time-framed too broadly.

[36] Kelman, "Interpretative Construction in the Substantive Criminal Law," p. 593.
[37] See People v. Shaughnessey.

How then do we choose the proper time-frame for strict liability crimes, given that too narrow a time-frame will threaten strict liability and too broad a time-frame will empty the voluntary act principle of its content?

The answer is that any choice is going to be completely arbitrary. Remember that we are dealing with strict liability crimes, which by definition do not require any culpability. Therefore, we cannot use a culpable choice as the touchstone of the commencement of the story. If Mr. Baker's choice to switch on the cruise control had been a culpable choice, no one would believe that the voluntary act principle was in issue in his case. (Consider the Jekyll-and-Hyde choice to render oneself an involuntary actor as part of a criminal scheme, for example, taking a potion that one knows will later induce homidical automatism: there is no question but that the culpable choice satisfies the voluntary act requirement despite involuntariness at the time of the homicidal conduct.) But culpability cannot be required to satisfy the voluntary act principle without at the same time undermining the strict liability principle.

How else can arbitrariness in time-framing be avoided? Perhaps by requiring that the defendant's earlier, voluntary choice be the "proximate cause" of the conduct or result in question. Causation-in-fact is always going to be present and thus cannot be used to distinguish proper and improper time-framing. But proximate causation is not a question of fact. To the extent it is meaningful at all, it represents a choice to ascribe responsibility for certain results of conduct to those whose choices were causes-in-fact of those results or that conduct.[38] But if it is such a choice, on what values will it be based? As I see it, the proximate cause determination can be based on either the values underlying having strict liability crimes or the values underlying the voluntary act principle. Since those values lead us to time-frame differently, building them into proximate causation as a basis for time-framing won't help us with our problem, but will just relabel it.

Let me amplify this point. The voluntary act principle reflects the belief that it is wrong to punish people for events not fairly subject to their control. The strict liability principle contemplates punishment of the nonculpable in order to achieve deterrence and other values. The more broadly we time-frame in searching for a voluntary act that is the proximate cause of the strict liability conduct or result, the more we trample on the value expressed by the voluntary act principle, but the more we serve deterrence and other values associated with strict liability. The truly guilty will not escape punishment through a failure to prove voluntariness, nor will anyone be tempted to commit a crime by the prospect of escaping punishment on that ground.

Of course, sometimes time-framing choices will be limited by the semantics of the criminal statutes. In other words, it may be impossible to stretch a statute that by its terms, say, proscribes "dangerous operation of a motor vehicle" to reach

[38] Perkins and Boyce define proximate cause as an actual cause which is not so remote in the causation chain that the court will not recognize it as a legal cause of the event in question. It is a question of "fact and degree." Perkins and Boyce, *Criminal Law*, pp. 774–77. LaFave and Scott add, "one might logically ... be harder on those who intended bad results which differ from what they intended, than on those (morally less at fault) whose conduct amounts only to reckless or negligent creation of risks of bad result." LaFave and Scott, *Criminal Law*, p. 283.

those who are merely passengers. But there will be lots of cases where the time-framing issue will not be resolvable on semantic grounds. In those cases, the time-framing problem will leave the voluntary act principle and strict liability in tension.

To see if I have fairly stated this dilemma, let us look at a sample of cases and see if the problem that surfaced in the *Baker* case is pervasive. In *State v. Kremer*[39] and *State v. Weller*,[40] the failed brake and failed accelerator cases cited by the *Baker* court, the difference in result between those cases and *Baker* is obviously the result of a difference in time-framing – at least if we absolve Mr. Baker of any culpability in activating the cruise control. In all three cases, the defendants voluntarily put their cars in operation. In all three cases, the cars had defects that caused harm. In all three cases, the defendants acted nonculpably. In *Baker*, however, the court chose to time-frame more broadly than did the courts in *Kremer* and *Weller*, with the inevitable result that it found a voluntary act to be subjected to strict liability where the other courts found none.

There have been a relatively large number of cases involving unconscious behavior. Sometimes the courts look to the voluntary acts that preceded and led to the unconscious behavior and convict the defendant. At other times they look only at the unconscious behavior itself and acquit. In *People v. Decina*,[41] for example, the New York appellate court upheld the conviction for negligent homicide of a driver who had an epileptic seizure while driving and killed four children. The court focused on defendant's decision to drive while knowing that he was subject to such seizures. That decision, unlike the speed and direction of the car at the fatal moment, was surely voluntary. Moreover, it was, at least in the eyes of the majority, a culpable decision as well.

In *Government of the Virgin Islands v. Smith*,[42] on the other hand, the Court of Appeals reversed defendant's conviction for involuntary manslaughter arising out of an automobile accident, because the trial court had failed to instruct the jury properly regarding the burden of proof on the issue of whether the defendant had an epileptic blackout at the time of the accident. The strong implication of the court's decision is that a reasonable doubt as to the defendant's consciousness would mandate acquittal.[43]

These two cases can perhaps be distinguished on the ground that Decina, but not Smith, was culpable in choosing to drive. Smith's seizure might have been his first, whereas Decina knew he was subject to seizures. But suppose the crimes charged in these cases had been strict liability crimes. Presumably, then, the culpability of the choice to drive would be immaterial to the charge. The only pertinent question according to the orthodox account would be whether Decina and Smith acted voluntarily. And it looks as though only a difference in time-framing could account for the opposite conclusions reached by the two courts.

[39] See State v. Kremer.
[40] See State v. Weller.
[41] 2 N.Y.2d 133, 157 N.Y.S.2d 558, 138 N.E. 2d 799 (1956).
[42] 278 F.2d 169 (3rd Cir. 1960).
[43] See also People v. Freeman, 61 Cal. App. 2d 110, 142 P.2d 435 (1943); People v. Hardy, 33 Cal. 2d 52, 198 P.2d 865 (1948); People v. Newton, 8 Cal. App. 3d 359, 87 Cal. Rptr. 394 (1970); Hill v. Baxter, 1 Q.B. 277 (1958).

Or consider the case Kelman uses to make this point, *Martin v. State*.[44] In that case, the appellate court reversed Martin's conviction for public intoxication because, while drunk, he had been taken out of his house and into public by the police. As Kelman demonstrates, the voluntariness of Martin's public intoxication depends upon whether his saga is broadly time-framed to begin with his decision to drink excessively or is narrowly time-framed to begin only with his being taken onto the street by the police. If we are not interested in Martin's culpability – that is, if being intoxicated in public is a strict liability crime – we are left completely without guidance in choosing the appropriate time-frame.

Finally, consider the strange case of *People v. Newton*.[45] There Newton, a passenger on a flight from the Bahamas to Luxembourg, was carrying a loaded .38 caliber revolver. The flight was diverted to New York City, where Newton was arrested for possessing a loaded firearm without a license. The court released Newton from custody, because it did not find his violation of the New York statute to have been voluntary. Yet there was no indication that Newton was not in voluntary possession of the gun when he got on the plane. Nor was it inconceivable, as opposed to improbable, that he would end up in New York, not Luxembourg. (It could hardly be inconceivable, since it happened.) Therefore, it we dismiss any concern with culpability, and focus on voluntariness, it is difficult to see why Newton acted more involuntarily then Decina. Moreover, we are entitled to suspect that the court would have found Newton to have acted voluntarily if, for example, Bahamas to Luxembourg flights frequently made unscheduled stops in New York City, a fact that might affect Newton's culpability but not the voluntariness of his act. In other words, the court made a time-framing choice in deeming Newton to have been an involuntary actor, but it appeared to do so on grounds relevant to culpability, presumably immaterial to strict liability.

My conclusion is that the voluntary act principle and the strict liability principle are completely opposed to one other. We can square strict liability crimes like Baker's with the voluntary act principle by broadening the time-frame, but in doing so we strip the voluntary act principle of its power to limit punishment. On the other hand, if we give the value behind the voluntary act principle full force, we are driven to find a choice the actor made that led to the harm and – most importantly – of which we disapprove. In other words, we are driven to find a culpable choice and thus to abandon strict liability.[46]

But before concluding this section, let us look more closely at this last point. Is finding a culpable choice really the only way to give expression the value behind the voluntary act principle? Jeffrie Murphy thinks not:

[44] 31 Ala. App. 334, 17 So. 2d 427 (1944).

[45] 72 Misc.2d 646, 340 N.Y.S. 2d 77 (1973).

[46] For earlier hints in the literature that strict liability and the voluntary act principle are strange bedfellows, see M. Budd and A. Lynch, "Voluntariness, Causation, and Strict Liability," *Criminal Law Review* (January 1978), pp. 74, 75, footnote 6. See also Husak, *Philosophy of Criminal Law*, p. 140 (obliquely making this point). And see Killbride v. Lake, 1972 N.Z.L.R. 590.

> Why do we feel a requirement to excuse the man whose actions are involuntary? Not merely for utilitarian reasons, surely.... A penal code so Draconian as to punish even epileptics might have high general deterrence and little disutility (as long as most of us could be fairly sure of not becoming epileptic). So another important reason against holding liable here is justice or fairness. And we always feel the pressure to take account of justice or fairness – even in strict liability cases. We may hold a man liable without fault in some areas and thus punish him even if he was not negligent – even if he took all reasonable care. But we would surely object to this on grounds of justice (no matter how high the general utility) if the man did not have fair warning that this was an area of conduct in which he might have to expect this sort of thing. A drug manufacturer is under danger of strict liability prosecution for any faultless adulteration in his product. But we do not object to this as much as we otherwise might as long as he is given fair warning to choose to do something else with his life if he is not willing to assume this kind of risk. If he does many things to protect his product and fails, then we can always say that he could have done more....
>
> But compare strokes, seizures, and the like. We do not have any capacities to exercise when these are operative. And thus, by no stretch of the imagination can we regard their punishment as fair. When one is suffering a seizure, normal capacities just do not enter the picture....[47]

Murphy needs a concept of "fair warning" that does not equate to culpability. I deny that there is such a concept. In one sense, we are all aware – we have been fairly warned – that whatever we voluntarily do at this moment may lead to further conduct or results that are out of our control once we act: consequences that we do not intend to bring about or do not believe have a substantial and unreasonable likelihood of occurring. If we are held liable for their occurrence, have we been "fairly warned"? If Murphy says yes, then he can have no objection to punishment of epileptics; after all, we are all aware when we drive of the possibility of heretofore undisclosed epilepsy. If Murphy says no, then where is the line to be drawn short of a choice that is culpable? If we don't want anyone to drive because of the remote risk of epilepsy or automatism, we should deem anyone's choice to drive to be culpable and punish it. On the other hand, if we want only those to refrain from driving who are aware of a risk of seizures that is higher than normal by a certain amount, then we will deem their choice to drive culpable and proscribe it. It is difficult to understand why one whose risk of seizures is higher than normal but lower than the level of culpability should be deemed to have had "fair warning" if he drives as permitted but suffers a seizure, whereas if someone whose risk is (prior to the occurrence) assessed as normal suffers a seizure and is punished, he lacks "fair warning." We have reasons for permitting the taking of certain risks and reasons for proscribing the taking of certain risks. A "fair warning" is one that

[47] Jeffrie Murphy, "Involuntary Acts and Criminal Liability," *Ethics*, vol. 81 (1971), pp. 332, 340–42.

acquaints actors with what risk-taking is proscribed and permitted. The lottery concept of fair warning which attaches to strict liability is too weak to rule out punishment of epileptics who are unaware of their epilepsy.[48] The only alternative concept of fair warning is one parasitic on standards of culpability: the voluntary act principle requires fair control, and fair control requires not just choice but a reason to choose the preferred conduct – i.e., a choice between the culpable and the nonculpable.

III. Deconstructing the Distinction between Negligence and Strict Liability

A. A Case

In *State v. Williams*,[49] the defendants, a husband and wife, were convicted of negligent homicide in the death of their infant son. As the Washington Court of Appeals described them, the defendants were full-blooded Indians, one of whom had a sixth-grade education and one of whom had an eleventh-grade education. Their infant son, William, died from gangrene caused by the failure to treat an abscessed tooth. The court summed up the evidence presented at trial as follows:

> Dr. Gale Wilson, the autopsy surgeon and pathologist for the King County Coroner, testified that the child died because an abscessed tooth had been allowed to develop into an infection of the mouth and cheeks, eventually becoming gangrenous. This condition, accompanied by the child's inability to eat, brought about malnutrition, lowering the child's resistance and eventually producing pneumonia, causing the death. Dr. Wilson testified that in his opinion the infection had lasted for approximately two weeks, and that the odor generally associated with gangrene would have been present for approximately 10 days before death. He also expressed the opinion that had medical care been first obtained in the last week before the baby's death, such care would have been obtained too late to have saved the baby's life. Accordingly, the baby's apparent condition between September 1 and September 5, 1968, became the critical period for the purpose of determining whether in the exercise of ordinary caution defendants should have provided medical care for the minor child.
>
> The testimony concerning the child's apparent condition during the critical period is not crystal clear, but is sufficient to warrant the following statement of the matter. The defendant husband testified that he noticed the baby was sick about two weeks before the baby died. The defendant's wife testified that she noticed the baby was ill about a week and a half or two weeks before the baby died. The evidence showed that in the critical period the baby was fussy; that he could not keep his food down; and that a cheek started swelling up. The swelling went up and down, but did not disappear. In that same period, the cheek turned "a bluish color like." The defendants, not realizing that the baby was as ill as it was or that the baby was in danger of dying, attempted to provide some relief to the baby by giving the baby aspirin during the critical period and continued to do so until the night before the baby died. The defendants thought the swelling would go down and were waiting for it to do so; and defendant husband testified that from what he had heard, neither doctors nor dentists pull out a tooth "when it's all swollen up like that." There was an additional explanation for not calling a doctor given by each defendant. Defendant husband testified that "the way the cheek looked, . . . and that stuff on his hair, they would think we were neglecting him and take him away from us and not given him back." Defendant wife testified that the defendants were "waiting for the swelling to go down." . . . The evidence showed that the defendants did not understand the significance or seriousness of the baby's symptoms. However, there is no evidence that the defendants were physically or financially unable to obtain a doctor, or that they did not know an available doctor, or that the symptoms did not continue to be a matter of concern during the critical period. Indeed, the evidence showed that in April 1968 defendant husband had taken the child to a doctor for medical attention.[50]

Based on this evidence, the trial court found:

> That both defendants were aware that William Joseph Tebafunda was ill during the period September 1, 1968 to September 12, 1968. The defendants were ignorant. They did not realize how sick the baby was. They thought that the baby had a toothache and no layman regards a toothache as dangerous to life. They loved the baby and gave it aspirin in hopes of improving its condition. . . . They knew that medical help was available because of previous experience. They had no excuse that the law will recognize for not taking the baby to a doctor.
>
> The defendants Walter L. Williams and Bernice J. Williams were negligent in not seeking medical attention for William Joseph Tabafunda.
>
> That as a proximate result of this negligence, William Joseph Tabafunda died.[51]

The Court of Appeals affirmed the conviction, stating:

> In our opinion, there is sufficient evidence from which the court could find, as it necessarily did, that applying the standard of ordinary caution, i.e., the caution exercisable by a man of reasonable prudence under the same or similar conditions, defendants were sufficiently put on notice concerning the symptoms of the baby's illness and lack of improvement in the baby's apparent condition in the period from September 1 to September 5, 1968 to have required them to have obtained medical care for the child. The failure so to do in this case is ordinary or simple negligence, and such negligence is sufficient to support a conviction of statutory manslaughter.[52]

[48] See discussion in text accompanying note 16 *supra*.
[49] 4 Wash. App. 908, 484 P.2d 1167 (1971).
[50] *ibid.*, p. 917–19, 484 P.2d, p. 1174.
[51] *ibid.*, p. 910–11, 484, P.2d, p. 1170.
[52] *ibid.*, p. 919, 484 P. 2d, p. 1174.

B. Framing the Concept of the Reasonable Person: The Impossibility of Distinguishing Negligence and Strict Liability

Everyone would agree that if the Williamses would have been criminally liable solely upon proof that the baby died of a treatable disease while in their custody, the liability would be strict liability. On the other hand, had there been proof that the Williamses were aware of the presence of a substantial risk that William had a life-threatening illness, everyone would agree that they were culpable and that their culpability was greater than negligence. But if negligence is a form of culpability that, unlike strict liability, rests not on what actually was the case – that William was seriously ill – and, unlike recklessness and higher forms of culpability, rests not on what was sincerely believed, on what *does* negligence rest?

The standard answer is that negligence rests on what the defendant should have known, or, put differently, what a reasonable person in the actor's situation would have known.

I am going to argue in this section that the concept of the "reasonable person in the actor's situation" is indeterminate and, from the standpoint of the purposes of punishment, wholly arbitrary. There is no moral difference between punishing for inadvertent negligence and punishing on the basis of strict liability, and the lack of a moral difference evidences itself in the inability to draw a distinction between strict liability and negligence on any basis other than arbitrary stipulation.

To see this, consider how the standard of the "reasonable person in the actor's situation" – RPAS – might apply in the *Williams* case. There are two clear boundary lines for the concept. On the one hand, if the RPAS were someone appraised of all the facts about the world that bore on a correct moral decision – particularly, that William had an abscessed tooth and needed medical treatment to avert a life-threatening complication – then it is clear what the RPAS would do: take William to the doctor.

At the other possible conceptual boundary, if the RPAS were someone with all of the beliefs that the Williamses actually held, including the belief that medical treatment was unnecessary for William's condition, then it is also clear what the RPAS would do: exactly what the Williamses did. After all, if because of your education, acculturation, and experiences, you don't perceive the baby's problem as a "possible medical emergency," but only as a "toothache," you act as the Williamses acted. Put somewhat differently, where action falls below the standard of recklessness – the *conscious* disregarding of a substantial and unjustifiable risk – the action will appear reasonable to the defendant and thus to the RPAS if the RPAS has exactly the same beliefs as the defendant.

The two possible boundaries that provide the frame for characterizing the RPAS present us with this dilemma, then. If the RPAS knows all the facts, the RPAS will always choose the action that averts the harm (in the absence of a justification, of course). but if this is the standard of the RPAS, then every case of strict liability will also be a case of negligence as defined by the RPAS standard. If the RPAS knows that Baker's cruise control will malfunction, the RPAS will not activate it. On this version of RPAS, Baker is not strictly liable, but negligent.

If the RPAS knows only what the defendant knows, however, there is never any negligence either, only recklessness: The RPAS will always act as the defendant acted where the defendant is not conscious of the risk, and will act differently only where the defendant *is* conscious of the risk, i.e. reckless.

At either conceptual boundary, therefore, RPAS collapses negligence into either strict liability or recklessness. The question, then, is where between those boundaries the RPAS is to be located.

Any location will be morally arbitrary. Between the boundaries, any RPAS will be a construct that will include some beliefs of the actual defendant together with beliefs that the constructor inserts. Which beliefs are inserted other than the ones the defendant actually had will determine whether or not the RPAS would act as the defendant acted. But there is no standard that tells us which of the beliefs of the actual defendant should be left intact and which should be replaced by other (correct) beliefs. The RPAS standard, cut loose from the alternative moorings of the defendant's actual beliefs or of the world as it really was at the time defendant acted, is completely adrift in a sea of alternative constructions, none of which is more compelling than the others.[53]

Some commentators at this point assert the possibility that the RPAS is like the actual defendant in all material aspects, but that the RPAS "would have" adverted to and properly assessed the risks because the actual defendant "could have" averted to and properly assessed them.[54] But there is an equivocation here in the reference to what the defendant "could have" adverted to and assessed in the defendant's situation. If we take the defendant at the time of the "negligent" choice, with what he is conscious of and adverting to, his background beliefs, etc., then it is simply false that the defendant "could have" chosen differently in any sense that has normative bite. For while it may be true that the defendant "could have" chosen

[53] Consider the following defense of combining objective and subjective factors in determining negligence: "A second source of resistance to admitting negligence as a basis of criminal liability is the assumption that legal negligence determinations must remain wholly objective, i.e., exclusively determined by reference to what a reasonable or prudent person would have thought or done in the circumstances. Such fully objective tests have the weakness that they will not be sensitive to those respects in which an individual accused may be disadvantaged, through no fault of his own, as compared with a person or reasonable prudence. But in the absence of good arguments for retaining these objective tests, it seems reasonable to revise Canadian law so that the test of negligence combines an appeal to publicly accepted objective standards of reasonable care with an individualized test of fault or culpability, permitting evidence of the individual's lack of capacity or opportunity to meet those standards to tell against a verdict of negligence." Brenda Baker, "Mens Rea, Negligence, and Criminal Law Reform," *Law and Philosophy*, vol. 6, no. 1 (April 1987), pp. 53, 82.

This attempt to weld objective and individualized tests together demonstrates a basic confusion. There is either the accused as we find him, with whatever kinds of problems of memory, prior education, prior choice, etc., that explained the particular choice on the particular occasion – i.e., that explained the particular case of inadvertent negligence – or there are other people with other character traits that we might want to deem to be ordinary reasonable people, purely fictitious people who would or would not have made the choice that the defendant did. There is no way of combining the real defendant and some objective defendant. The only real question is: what is the explanation of why the person did not advert to the risk in the particular case? The relevance of any other question is hard to discern. For example, the relevance of what somebody else would have chosen had that person adverted to the risk is of dubious relevance to the question of what we should do with an individual who did not advert to the risk.

[54] Hart, *Punishment and Responsibility*, p. 148; Baker, "Mens Rea, Negligence, and Criminal Law," pp. 83–85; Fletcher, "Theory of Criminal Negligence," p. 417.

differently in a sense relevant to the free will/determinism issue, it is false that in that situation, defendant had any internal reason to choose differently from the way he chose.[55] The Williamses were free to take their baby to the doctor; however, they had no reason of which they were aware for doing so.

To have such a reason, a defendant will have to advert to that to which he is not adverting. But one has no control at such moments over what one is adverting to or is conscious of; try thinking of what you aren't thinking of, but should be.[56] The "could have adverted to the risk" position is directly at odds with the voluntary act principle as a reflection of the value of restricting punishment to choices over which defendant had fair control.

Finally, let us consider a hypothetical case that tests the conclusion that this section is heading toward – namely, that inadvertent negligence is not culpable action.[57] Suppose that the Williamses had not been poor and relatively uneducated, but had been well-to-do and well-educated. Suppose they were ambitious social climbers who were hosting a large party that they hoped would be the social event of the year. Preoccupied for several days with the preparations, they failed to get treatment for their infant, William, with the same result as in the actual case. Are we really willing to say that in such circumstances, the Williamses would be morally blameless merely because they never actually adverted to the risk that their baby needed medical attention?

If we feel that the hypothetical Williamses are more deserving of moral censure than the actual Williamses, the feeling is probably the product of one of two possible inferences that we have made. One possible inference, a very natural one, is that the hypothetical Williamses are people with quite unadmirable character traits. Specifically, the hypothetical Williamses seem shallow and excessively self-centered. Nonetheless, if we believe that culpability rests on choice, not character,[58] then bad character traits are by themselves insufficient for deeming the Williamses culpable.[59]

The other possible inference supporting the hypothetical Williamses culpability is that their inadvertence to the risk to their child was the product of past culpable

[55] Bayles, *Principles of Law*, p. 299.

[56] See *ibid.*

[57] This hypothetical case is courtesy of Michael Moore.

[58] See Michael Moore, "Choice, Character, and Excuse," *Social Philosophy & Policy*, vol. 7, no. 2 (Spring 1990).

[59] Although I am assuming throughout this essay that culpability in the criminal law is and should be choice-based, not character-based, and I am thus agreeing with Michael Moore on this point – see *ibid.* – I believe that choice and character are two paradoxically-related sides of the same culpability coin. Choice, apart from what it reveals about character, seems inadequate as a basis for praise or blame. But character that has not been chosen – that is a matter of luck – likewise seems inadequate as a basis for praise or blame. See Thomas Nagel, "Moral Luck," in *Mortal Questions* (Cambridge: Cambridge University Press, 1979), pp. 24–38. And punishing someone for possessing a bad character, when, through luck, that person has never been in a circumstance in which his character would cause him to make a culpable choice, is also troubling. See *ibid.* I believe the inseverability of act and character in judgments of culpability is revealed in many of the examples in Moore's essay, despite Moore's conclusion that those examples favor choice-based judgments over character-based ones. Nevertheless, it seems evident from the standard categories of *mens rea* – purpose, knowledge, recklessness, and (though not a mental state) negligence – that Anglo-American criminal law rests on a choice-based notion of culpability, whether or not such a notion is independent of or intertwined with a character-based notion.

choices (past recklessness). The Williamses might have realized when deciding to throw this party that they would likely become preoccupied with it and oblivious to more important concerns. I deal with the general topic of negligence as the product of past culpable choices in the next section. For present purposes, it is sufficient to note that while this inference supports a negative moral judgment of the Williamses, it does not support a negative moral judgment of their present inadvertence to William's condition and failure to seek treatment. The negative moral judgment it supports is directed toward a past reckless choice, not the present negligence.

I conclude that inadvertent negligence does not denominate a category of culpable action distinguishable from the concededly nonculpable category of strict liability. The concept of the RPAS, if it falls between the defendant's beliefs and the actual facts, is a morally arbitrary and morally empty construct. To adjudge a defendant "negligent" by such a standard is not to say anything about her actual culpability. Recklessness is the lowest form of actual culpability,[60] whereas negligence is just an arbitrarily drawn subcategory of strict liability. It has the same time-framing problems that strict liability has, since at some point the harm is out of defendant's control, and prior to that time there will always be a voluntary act so long as we go back far enough and do not require culpability. And, therefore, as strict liability is in conflict with the voluntary act principle, so too is negligence.

C. Negligence as the Product of Past Culpable Choices

If negligent acts are themselves non-culpable and thus indistinguishable on that ground from acts that result in strict liability, at least some negligent acts might still be the products of *past culpable choices*. In other words, there may be a sizable subclass of negligent acts where the failure of the defendant to advert to the risk was caused by some prior culpable – and hence fully voluntary – choice of the defendant.[61]

For example, suppose that at some point before the baby became ill, the Williamses were invited to attend a free class for parents on how to recognize medical emergencies of children. Suppose that the Williamses realized that, given this class's importance relative to alternative uses of their time, they should attend this class, and that not to do so would be to take a substantial and unjustifiable risk

[60] See Richard Singer, "The Resurgence of *Mens Rea*: The Rise and Fall of Strict Criminal Liability," p. 406.

Recklessness in the Model Penal Code is defined as a conscious choice to disregard "a substantial and unjustifiable risk." *Model Penal Code*, § 2.02(2)(c). The most plausible interpretation of this provision is that to be reckless, the actor need only be aware of the magnitude of the risk; she need not be aware that it would be legally characterized as "substantial and unjustifiable." Failure to avoid the known or believed risk must, however, manifest culpability – in the language of the Code, "a gross deviation from the standard of conduct that a law-abiding person would observe." *ibid.*

Actually, the Code's definition of recklessness suggests conduct somewhat more culpable than the minimum possible degree of culpability. If an actor knowingly takes *any* unjustifiable risk, no matter how substantial, the actor may be culpable, depending upon whether the choice bespeaks callousness.

[61] Ronald Milo, *Immorality* (Princeton: Princeton University Press, 1984), p. 83; Michael Zimmerman, "Negligence and Moral Responsibility," *Nous*, vol. 20, no. 2 (June 1986), p. 199; Holly Smith, "Culpable Ignorance," *The Philosophical Review*, vol. 92, no. 4 (October 1983), p. 543.

of failing to perceive a medical emergency. Nonetheless, they do not attend the class, but watch television instead. And suppose that had they attended the class, they would have learned about abscessed teeth, gangrene, etc., and would likely have recognized the need to seek prompt medical treatment for William.

Given that scenario, the Williamses made a culpable choice that led to their fatal inadvertence to their baby's medical needs. Punishing them for the death of their baby is consistent with the voluntary act principle and is not really a form of strict liability, since it is their voluntary and culpable choice to watch television rather than go to the class on medical emergencies that led to the result for which they are punished.

There are all sorts of problems with this approach for squaring the punishment of negligence with the voluntary act principle. First, in tracing the negligent act to the prior choices that led to the crucial failure to advert to the risk, we may find a prior choice that was culpable – but we may not. Second, if we do find a prior choice that was culpable, it may be quite remote in the causal chain.[62] Third, and perhaps related to the second point, the degree of culpability displayed by that prior culpable choice may be quite disproportionate to the punishment specified for the negligent act. An act of very minor culpability, such as cutting language classes for soldiers stationed in a foreign country, might lead to a major harm, such as rape (through misunderstanding "no" and "yes").[63] On the other hand, many quite reckless choices will produce only minor harms. And, as I said, many prior acts will not be culpable at all.

Where does all this lead insofar as criminal liability for negligence is concerned? The present approach can be characterized as a conclusive presumption of a past culpable choice that proximately caused the pertinent inadvertence.[64] But underlying the presumption is the fact that negligence may not betoken any prior culpable choice at all, much less a prior choice exactly as culpable as the present offense.

Four other approaches more consistent with the voluntary act principle suggest themselves. First, we might extend the criminal codes to include many new crimes that identify specific types of culpable choices that unjustifiably risk producing harmful failures to advert to risk. For instance, we might make it a crime for new

[62] Holly Smith offers the hypothetical case of the secretary asked by her boss to survey the blood types of the office staff as part of an experiment and who culpably fails to do so. As a result, a worker dies from massive bleeding who would have been saved by a transfusion by the paramedics had they known his blood type in time, which they would have had the secretary conducted the survey. The secretary is culpable. Her culpable choice caused the death in fact. But the culpable choice did not "proximately" cause the death. Holly Smith "Culpable Ignorance," pp. 550–51.

Actually, Holly Smith's example is just an illustration of the general problem of having liability turn on causation rather than solely on culpable choice. See authorities cited in note 16 *supra*. Of course, to the extent that we require that culpable choices be expressed in actions, there is always a "proximate cause" issue in relating the culpable choice to the action that expresses it. In other words, even if all criminal liability were to be based on "attempts" regardless of whether the attempts produced harm, we would still need some notion of proximate cause to distinguish "attempts" from mere intentions. I owe this point to Leo Katz.

[63] *Cf. United States v. Short*, 4 C.M.A. 437, 16 C.M.R. 11 (1954) (an assault with intent to commit rape case where an intoxicated soldier failed to understand a Japanese woman's "no," although we don't know if he skipped any language classes).

[64] Kelman, "Interpretive Construction in the Substantive Criminal Law," pp. 606–11.

parents to fail to take classes on children's medical emergencies. Obviously, this approach has the drawback of greatly proliferating the number of crimes while at the same time failing to reach all of the virtually limitless types of reckless choices.

The second approach is the one commonly taken with intoxication.[65] Intoxication itself is not criminalized. But when it leads people to engage in otherwise criminally reckless or harmful conduct unaware (because of the intoxication) of the risks they are creating, the criminal law treats the intoxication as a substitute for recklessly risking whatever harm was caused or put at risk. In other words, the choice to become intoxicated is treated as if it were an all-purpose reckless choice that enters the defendant in a form of punishment roulette. If his intoxication leads to no untoward consequences, he escapes punishment altogether. If it leads him to commit what, were he sober, would be a minor crime, he receives a small amount of punishment. And if it leads him to commit what, were he sober, would be a serious crime, he receives much more severe punishment.

This approach to intoxication could be extended to particular types of culpable conduct that frequently produce unwanted inadvertence to risk. We would specify these types of conduct in advance, and then state in the codes describing negligent crimes that inadvertence shall not negate criminal liability if it is caused by the prior voluntary choice to engage in one of these types of conduct. This approach has the problem of the first approach of having to specify the particular forms of conduct that lead to unwanted inadvertence to risk when the number of such forms is virtually limitless. It also raises the question of the justice of punishment lotteries that mete out unequal punishments to acts of equal culpability.[66]

A third approach one could take would be to authorize courts to look at all of the defendant's prior choices whenever the defendant claims that he failed to advert to a risk with which the criminal law is concerned, not just at specific, predefined culpable choices. If the court finds any culpable choice that "caused" the present inadvertence – no matter how serious or trivial the culpability – the court would impose the punishment prescribed for a negligent commission of the particular crime. This approach avoids the problem of specifying the culpable triggers in advance, but it replaces it with that of determining whether a past culpable choice "proximate caused" present inadvertence, and the related problem of how far back in time the court should go in looking for a pivotal culpable choice. The approach also has the "lottery justice" problem of the previous approach.

The final approach is the same as the third, except that it dispenses with a set level of punishment for inadvertence and scales the punishment to the degree of culpability of the causative culpable choice, perhaps limited upwards by the punishment specified for reckless commission of the crime involved. This approach has all of the problems of the third approach, except that the lottery is eliminated among those culpable acts that led to the inadvertence. The lottery is retained insofar as those who make culpable choices that produce no unwanted inadvertence still escape punishment altogether.

[65] See *Model Penal Code*, § 2.08(2).

[66] See Lewis, "The Punishment That Leaves Something to Chance."

Conclusion

Here are the final results of the previous analysis:

(1) The negligence principle collapses into the strict liability principle if the former is construed without reference to any prior culpable choice.
(2) If the negligence principle is construed without reference to any prior culpable choice, both it and the strict liability principle are inconsistent with any nonvacuous construction of the voluntary act principle.
(3) If the negligence principle is construed to require finding a prior culpable choice, it is consistent with the voluntary act principle.
(4) There are several approaches to dealing with negligence on this latter construction of the negligence principle. None preserves all the positive values of strict liability (or negligence construed as a form of strict liability). That is, all of the approaches will result in some culpable defendants escaping punishment who would not escape punishment under strict liability (or negligence construed as a form of strict liability). All of the approaches will be weaker deterrents than strict liability (or negligence construed as a form of strict liability), since, under these approaches, more culpable defendants will believe (rightly or wrongly) that they will escape punishment. And all of the approaches will be more expensive to operate than strict liability (or negligence construed as strict liability).[67]
(5) All of the approaches involve either lottery justice or a proliferation of crimes in the criminal codes.

I don't have any solution at hand for the conflict between the value of fair control that lies behind the full-bodied voluntary act principle – a value that requires some culpable choice before one can be criminally punished – and deterrence and the other values which are served by strict liability and negligence crimes.[68] The conflict between culpability-based punishment and consequence-based punishment pervades the criminal law, and this area is just one of many examples. I do proffer, however, one modest recommendation: that is that we bring the conflict between culpability and consequence-based punishment into the foreground and drop misleading references to the three principles regarding voluntary acts, strict liability, and negligence, as if they were all distinct from one another and harmonious. They are neither.*

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[67] See Kelman, "Strict Liability: An Unorthodox View," *Encyclopedia of Crime and Justice*, ed. S. Kadish (New York: The Free Press, 1983), vol. 4, p. 1517.

[68] I, of course, have completely omitted any discussion of the strict liability presented by the absence of a defense for nonculpable ignorance of the criminal law. See, e.g., *Model Penal Code*, § 2.04(3).

* My thanks to Elaine Alexander, Kevin Cole, Jean Hampton, Paul Horton, Leo Katz, Evan Lee, Michael Moore, and the editors of *Social Philosophy & Policy* for their helpful suggestions and insightful criticisms.

Social Philosophy & Policy Vol. 7 Issue 2, ISSN 0265-0525

THE GENDER QUESTION IN CRIMINAL LAW*

By Stephen J. Schulhofer

Over the past decade, both the doctrine and the practice of criminal law have come under intensely critical review by feminist scholars and reformers. The territory under reexamination by or because of feminists spans the problems of women as witnesses, defendants, and prisoners in the criminal justice system; it extends to the situation of women as potential victims and offenders in diverse offense circumstances. Crimes in which the defendant or victim is typically female (e.g., prostitution, rape) are predictable subjects of feminist concern, but attention has extended as well to the dynamics of women's experience (arguably distinctive and certainly neglected) in connection with such offenses as assault, shoplifting, drug offenses, and even armed robbery.

Feminist criticism and reform efforts have focused for the most part at the level of specific rules or particular areas of practice. In this paper I want to comment on the structure of the feminist critique and to compare its underlying assumptions to those of criminal law as it has been traditionally understood and practiced. In at least some of its prominent versions, feminism entails orientations and commitments incompatible with those of the received criminal law tradition. To the extent that this is true, criminal law, constructed and expounded almost exclusively by males, can fairly be characterized (descriptively) as "sexist" or at least "gendered" (that is, male-oriented) in its core assumptions. Moving to normative ground, I suggest that if the descriptive claims of the feminist movement are true to any substantial extent, then criminal law – conceived in terms seemingly uncongenial to a large part of our population – would require thorough reexamination. I offer some very tentative thoughts about where such a reexamination might lead, with a particular focus on the law of self-defense and rape.

1. Conceptions of Feminism

Before proceeding further, I need to be at least a little bit clear about what I mean by "feminism." While feminists are united by their interest in studying and remedying women's disadvantaged – or (more strongly) oppressed – condition, there are many distinct (and, in some ways, opposed) strands in feminist thought. I want to identify three different kinds of feminism. The first I will call the

* I presented portions of this paper at workshops at the University of Chicago and New York University Law School. I benefited from the reactions of participants on those occasions, and from comments on the manuscript by Mary Becker, Albert Alschuler, Sanford Kadish, Cass Sunstein, Michael Vitiello, and the contributors to this volume.