

Versari Crimes

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INTRODUCTION

Jonathan Stamp had a gun and a blackjack.¹ Around a quarter to eleven a.m. on October 26, 1965, he entered the rear of the building housing the General Amusement Company's offices.² Together with Michael Koory, he was looking for cash.³ The employees were told to go to the front.⁴ Stamp then went to the office of Carl Honeyman, the company's owner and general manager.⁵ Honeyman was sixty years old and overweight, with a history of heart disease.⁶ The amusement business, intensely competitive, added to the stress.⁷

Stamp ushered Honeyman out of his office, holding him by the elbow.⁸ He told Honeyman to lie down on the floor, along with the others.⁹ Within ten to fifteen minutes after they'd arrived, Stamp and Koory found what they were looking for.¹⁰ They took the money and fled, telling Honeyman and the others to stay on the floor for five minutes "so that no one would 'get hurt.'"¹¹ Fifteen to twenty minutes later, Honeyman was dead from a heart attack.¹²

Assume Stamp was guilty of robbery. He took "personal property . . . in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."¹³ Next, assume the robbery was the but for and proximate cause of Honeyman's death. Last, assume Stamp never realized he was risking anyone's death nor would a reasonable person in his situation have so realized. These last two stipulations might

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1. People v. Stamp, 82 Cal. Rptr. 598, 601 (Ct. App. 1969).
 2. *Id.* at 600–01.
 3. *Id.* at 601.
 4. *Id.*
 5. *Id.*
 6. *Id.*
 7. *Id.*
 8. *Id.*
 9. *Id.*
 10. *Id.*
 11. *Id.*
 12. *Id.*
 13. *Id.* at 604 n.5.

raise some eyebrows¹⁴—but make them anyway. The case is more interesting that way.

Under California law, Stamp was guilty of murder,¹⁵ not because he wanted to kill Honeyman, nor even because he culpably risked killing him or anyone else. He was guilty of murder thanks to California’s felony-murder rule: if a person causes a death in the course of committing an enumerated felony, including robbery, California will hold him strictly liable for any death resulting.¹⁶ California law thus puts felony murderers and intentional murderers in the same statutory category.

Steven Benniefield was no stranger to the local police.¹⁷ Around eleven p.m. on December 17, 2001, an officer noticed Benniefield at the corner of Seventh Avenue and Sixth Street in Rochester, Minnesota, about sixty-one feet from the Riverside Central Elementary School.¹⁸ The officer asked dispatch about outstanding arrest warrants. Benniefield, he discovered, had one.¹⁹ After being arrested and transferred to the city’s adult detention center, the police found a baggie in the back seat of the patrol car in which Benniefield had been transported.²⁰ Inside was 1.10 grams of cocaine.²¹

Assume Benniefield was guilty of possessing a controlled substance (cocaine). He knew he had something on his person and knew the something was cocaine. He also happened to possess it “in a school zone.”²² Next, assume Benniefield never realized he was anywhere near a school when he possessed nor would a reasonable person in his situation have so realized. Under Minnesota law, Benniefield was nonetheless guilty of possessing

14. For reasons not altogether clear, Stamp apparently raised no challenge to the sufficiency of the evidence on proximate cause. He did raise a challenge to the adequacy of the trial court’s jury instruction on proximate cause, which the appellate court rejected. *See id.* at 603. For what it’s worth, Stamp’s best chance for an acquittal at trial would probably have been to persuade the jury that his actions instantiating the conduct element of the robbery conviction were not the proximate cause of Honeyman’s death. For another case involving a charge of felony murder in which the victim suffered a heart attack, see *People v. Davis*, 6 N.Y.S.3d 365 (App. Div. 2015). In that case, the appellate division (New York’s intermediate appellate court) held that the evidence was insufficient as a matter of law to establish proximate cause between the defendant’s felonious conduct and the victim’s death, but that holding was reversed (over a dissent) on further appeal to the New York Court of Appeals (New York’s highest court). *See People v. Davis*, 66 N.E.3d 1076 (N.Y. 2016). Thanks to Guyora Binder for the reference to the *Davis* case.

15. In fact, Stamp was guilty of *first-degree* felony murder. I’ll be ignoring that feature of California’s felony murder for present purposes.

16. *See Stamp*, 82 Cal. Rptr. at 601–03.

17. *State v. Benniefield*, 678 N.W.2d 42, 44 (Minn. 2004).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

cocaine in a school zone.²³ If a person possesses drugs in a school zone, Minnesota doesn't care if he realized he was possessing there or not.²⁴ Minnesota law thus puts the unwitting school zone possessor and the knowing school zone possessor in the same statutory category.²⁵

The crimes Stamp and Benniefield committed are strict-liability crimes: among their elements is one to which the state has attached no culpability (not even negligence). The strict-liability fact makes the crime worse than it otherwise would have been (or so the state says) and results in more punishment (beyond the punishment for the other elements).²⁶ Stamp's robbery was worse (according to California) because Honeyman died as a result.²⁷ Benniefield's cocaine possession was worse (according to Minnesota) because he possessed in a school zone.²⁸

Assume California sent Stamp to prison for as long as it would send to prison someone who (like Stamp) killed, but who (unlike Stamp) wanted to kill. Is California permitted, morally speaking, to do that? Assume Minnesota sent Benniefield to prison for as long as it would send to prison someone who (like Benniefield) possessed as much cocaine as he did, but who (unlike Benniefield) knew he was possessing, or maybe even wanted to possess, in a school zone. Is Minnesota permitted, morally speaking, to do that? People disagree.

On one side stand many modern-day theorists, who believe morality permits a state to punish someone for causing the objective elements of a crime only inasmuch as he deserves to be punished for them, and he deserves to be punished for them only inasmuch as he was culpable toward them. These modern-day theorists also believe morality doesn't permit the state to punish anyone for an objective element of a crime unless he deserves to be punished for it, and no one deserves to be punished for an objective element unless he was in some way culpable toward it (setting aside elements making no contribution to a crime's wrongfulness, like elements conferring jurisdiction).

Following this line of thought, these theorists believe morality would permit California to punish Stamp for robbing Honeyman but not to add more

23. *See id.* at 44–45.

24. *See id.* at 49.

25. *See id.*

26. The phrase "strict liability" can mean different things. For efforts to differentiate these meanings one from the other, see, for example, Stuart P. Green, *Six Senses of Strict Liability: A Plea for Formalism*, in APPRAISING STRICT LIABILITY 1, 2–9 (A.P. Simester ed., 2004); Douglas N. Husak, *Varieties of Strict Liability*, 8 CAN. J.L. & JURIS. 189 (1995); Michael S. Moore, *The Strictness of Strict Liability*, 12 CRIM. L. & PHIL. 513, 513–21 (2018).

27. *See People v. Stamp*, 82 Cal. Rptr. 598, 601–02 (Ct. App. 1969).

28. *See Benniefield*, 678 N.W.2d at 48.

time for killing Honeyman in the process. Stamp killed Honeyman without a trace of culpability (I'm assuming), let alone with the culpability associated with intentional homicide. Any surcharge for Honeyman's death would thus be to punish Stamp beyond what he deserves. It would be disproportionate, and morality doesn't permit disproportionate state punishment, save perhaps in extraordinary circumstances. Much the same would go for Benniefield, according to the theorists. He deserved punishment for possession, but any extra for innocently possessing in a school zone would be excessive.

On the other side, believe it or not, stands an obscure thirteenth-century canon lawyer. Beginning around 1222, Raymond of Penyafort (later Saint Raymond) was at work on his *Summa de casibus poenitentiae* (Summary Concerning the Cases of Penance), a statement of canon law for confessors.²⁹ From Raymond's analysis of homicide, a general principle has since been extracted: *versari in re illicita imputantur omnia quae sequuntur ex delicto*.³⁰ Translated (roughly): one who traffics in the illicit (unlawful, improper, illegitimate) is responsible for all wrongs (consequences) that ensue. Christen this the *versari* principle, which is usually read to say: someone who traffics in the illicit isn't only responsible for whatever wrongs (consequences) result, he's responsible for them strictly.³¹ No culpability required: no purpose, no knowledge, no recklessness, no negligence (to use the Model Penal Code's nomenclature).

Stamp could easily have avoided the extra time for accidentally killing Honeyman: no one forced him to rob in the first place. Likewise, Benniefield

29. See BERT GHEZZI, VOICES OF THE SAINTS 380 (Loyola Press 2009) (2000).

30. According to James Gordley, Raymond was "simply stating the opinion generally accepted among canon lawyers of the day." James Gordley, *Responsibility in Crime, Tort, and Contract for the Unforeseeable Consequences of an Intentional Wrong: A Once and Future Rule*, in THE LAW OF OBLIGATIONS: ESSAYS IN CELEBRATION OF JOHN FLEMING 175, 183 (Peter Cane & Jane Stapleton eds., 1998).

31. This statement of the *versari* principle and its translation comes from Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 376 n.19 (1997). Different sources articulate the doctrine in slightly different ways. For example, Gardner states the maxim in Latin as "*versanti in re illicitae imputantur omnia quae sequuntur ex delicto*," which he translates as: one acting unlawfully is held responsible for all the consequences of his conduct. See Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 705. I assume those differences aren't especially material or important for present purposes.

The *versari* principle is sometimes labeled the "lesser-crime" or the "unlawful act" doctrine. The principle is also sometimes thought to be equivalent to the tort doctrine known as "assumption of risk." For now, I'll ignore how the criminal law's *versari* principle relates to tort law's assumption-of-risk doctrine to focus on the merits of the *versari* principle itself. For some thoughts on the conceptual relationship between the two doctrines, see Kimberly Kessler Ferzan, *Forfeiture and Self-Defense*, in THE ETHICS OF SELF-DEFENSE 233, 236 (Christian Coons & Michael Weber eds., 2016) (arguing that while forfeiture and assumption of risk have a common "structure," they're not the same thing).

could easily have avoided the extra time for being in a school zone when possessing: no one forced him to possess in the first place. When Stamp chose to rob, and Benniefield chose to possess, each no doubt realized he was crossing the line into crime. If the state decides to hold them accountable not only for the crime they thought they were committing, but also for the one they actually committed, on what ground can they complain? Want to avoid punishment for killing while robbing? Don't rob. Want to avoid punishment possessing in a school zone? Don't possess. That's roughly Saint Raymond's answer.

Most criminal law theorists today probably won't care much that answer, nor for the *versari* principle motivating it. They'll see in it nothing more than an illicit license for disproportionate punishment. Nonetheless, the medieval saint's answer, along with the *versari* principle underwriting it, deserves a closer look, if only because it can still be found loitering in various precincts of the criminal law.³² If reformers hope to move it along, perhaps some sense as to why it hasn't moved along already would be useful to have.

I.

Some forty years after Saint Raymond wrote his *Summa*, Thomas Aquinas wrote his. In it, he asks: is somebody who kills another by accident guilty of homicide?³³ His lengthy reply concluded: “[I]f a man pursue a lawful occupation and take due care, the result being that a person loses his life, he is not guilty of that person's death: whereas if he be occupied with something unlawful . . . he does not escape being guilty of murder.”³⁴ In other words, if someone causes another's death because he was doing something unlawful, he's guilty of murder, even if he used all due care while doing it. The little-known Saint Raymond thus wasn't the only one to endorse the *versari* principle. The better-known Saint Thomas did too.

The *versari* principle soon enough found its way from canonists on the continent to treatise writers in England. Around 1235, in London, Henry de Bracton was busy composing *On the Laws and Customs of England*, which

32. See *infra* text accompanying notes 44–51.

33. SAINT THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. II-II, q. 64, art. 8 (Fathers of the English Dominican Province trans., Beniger Brothers 1920) (1485).

34. *Id.* For a brief exegesis of this text from Aquinas's *Summa*, see J.M.B. CRAWFORD & J.F. QUINN, *THE CHRISTIAN FOUNDATIONS OF CRIMINAL RESPONSIBILITY: A PHILOSOPHICAL STUDY OF LEGAL REASONING* 136–39 (1991).

included a chapter on homicide.³⁵ Bracton was a lawyer.³⁶ He was also a cleric familiar with canon law.³⁷ Like Raymond before him, Bracton distinguished between deaths resulting from “proper” and “improper” acts.³⁸ “[L]iability,” he wrote, “is imputed” when a person has engaged in an “[i]mproper [act] . . . as where one has thrown a stone toward a place where men are accustomed to pass, or while one is chasing a horse or ox someone is trampled by the horse or ox and the like.”³⁹ As others have noted, this passage is “full of . . . uncertainties and doubts[,]”⁴⁰ but its debt to Raymond’s *Summa*, historians tell us, is plain to see.⁴¹

Having thus cribbed from Raymond’s *Summa*, Bracton is the jurist most likely to blame for having imported the canon law’s *versari* principle into English criminal law (even if Bracton’s text is best read not to have endorsed the *versari* principle as understood here).⁴² Of course, Raymond’s *Summa* was describing rules for Church discipline, whereas Bracton’s treatise was describing (or prescribing) rules for state punishment. Yet for Bracton, what was good enough for the Pope was apparently good enough for the King. Bracton then passed the doctrine down to Coke, who passed it down to

35. 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 341 (Samuel E. Thorne trans., Belknap Press 1968) (1235) (containing a chapter titled “The crime of homicide and the divisions into which it falls”). Some writers believe Bracton’s account wasn’t an accurate statement of English law at the time: it was a misstatement made under the undue influence of the canonists. For present purposes, I set aside this and other historical questions to focus on the merits of the *versari* principle itself.

36. *Henry de Bracton*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/people/social-sciences-and-law/law-biographies/henry-de-bracton> [<https://perma.cc/4LUX-BVEN>].

37. *Id.*

38. 2 BRACTON, *supra* note 35.

39. *Id.*

40. I. Wilner, *Unintentional Homicide in the Commission of an Unlawful Act*, 87 U. PA. L. REV. 811, 811 (1939).

41. Fritz Schulz, *Bracton and Raymond De Peñafort*, 61 L.Q. REV. 286, 286 (1945) (“Bracton’s well-known chapter *de homicidio* is obviously dependent on Raymond’s *Summa*”). According to some writers, however, Bracton relied not on the writings of Raymond of Penafort, but on those of another canonist named Bernard of Pavia. *See, e.g.*, Emilio S. Binavince, *The Ethical Foundation of Criminal Liability*, 33 FORDHAM L. REV. 1, 16 (1964); Stanislaw Frankowski, *Mens Rea and Punishment in England: In Search of Interdependence of the Two Basic Components of Criminal Liability (a Historical Perspective)*, 63 U. DETROIT L. REV. 393, 411 (1986); Hermann Mannheim, *Mens Rea in German and English Law—III*, 18 J. COMPAR. LEGIS. & INT’L L. 78, 83 (1936). Schulz is nonetheless emphatic that “Bracton’s dependence on Raymond (and *not* on Bernhard) is quite certain.” *See* Schulz, *supra* note 41, at 289.

42. For example, Guyora Binder believes that “Bracton should be understood as urging that a criminal motive should preclude the purchase of a pardon for a careless killing.” GUYORA BINDER, *FELONY MURDER* 101 (Markus D. Dubber ed., 2012).

Hale, who passed it down to Blackstone, who at last passed it down to the judges in charge of the American common law of crimes.⁴³

Once inserted into the criminal law's circulatory system, the *versari* principle appears to have spread, as general principles sometimes do. As a number of commentators have recognized, the *versari* principle's influence has been impressive.⁴⁴ It has sustained or succored several criminal law rules and doctrines still found in today's criminal law. The felony-murder doctrine (at work in *Stamp*) is no doubt the most prominent and notorious. Another, less prominent but no less notorious, at least among theorists, is commonly known as the legal-wrong doctrine (at work in *Benniefield*).

Other often-disparaged doctrines can likewise be seen to bear the *versari* mark. Among them are the misdemeanor-manslaughter rule,⁴⁵ along with the doctrine of constructive or implied malice (according to which an intent to cause death is imputed to someone who intended only to cause serious bodily injury).⁴⁶ Another is the "transferred intent" doctrine, at least when the doctrine tells us that "intent follows the bullet"⁴⁷: when it imputes to an actor who intended to kill one person an intent also to kill anyone else whose death he accidentally caused in the process.⁴⁸ Rounding out the list (at least

43. For the much more complicated history behind this breezy summary, see, for example, BINDER, *supra* note 42, at 99–116; GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 4.4.1, at 276–85 (1978).

44. See, e.g., Craig A. Stern, *Torah and Murder: The Cities of Refuge and Anglo-American Law*, 35 VALPARAISO U. L. REV. 461, 491 (2001).

45. See, e.g., JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 31.09, at 536 (6th ed. 2012).

46. See, e.g., *id.* § 31.04, at 507–08.

47. *Harvey v. State*, 681 A.2d 628, 630 (Md. Ct. Spec. App. 1996). The transferred intent doctrine works most like the felony-murder rule when it permits a defendant who intentionally causes one death and accidentally causes another to be liable for two counts of intent-to-kill murder. See *id.* at 634 ("The doctrine of transferred intent operates with full force whenever the unintended victim is hit and killed. It makes no difference whether the intended victim is 1) missed, 2) hit and killed, or 3) hit and only wounded. It makes no difference whether the defendant is charged with a crime against the intended victim or not."); *Henry v. State*, 964 A.2d 678, 687 (Md. Ct. Spec. App. 2009) (finding no error when trial court instructed "the jury on the doctrine of transferred intent where both the intended and the unintended victims were killed"). The transferred intent doctrine has been specifically analogized to the felony-murder doctrine. See, e.g., *Poe v. State*, 671 A.2d 501, 504 (Md. 1996) ("The doctrine of transferred intent is, of course, pure legal fiction. It is analogous to the doctrine of felony murder which is also a legal fiction. Both doctrines are used to impose criminal liability for unintended deaths." (citation omitted)). Anthony Dillof and Martin Gardner have also noted the relationship between the transferred intent doctrine and the *versari* principle. See Anthony M. Dillof, *Transferred Intent: An Inquiry into the Nature of Criminal Culpability*, 1 BUFF. CRIM. L. REV. 501, 508–09 (1998); Gardner, *supra* note 31, at 708 ("The transferred intent doctrine is related to the felony-murder and unlawful act manslaughter rules, and shares their *versanti in re illicitae* pedigree.").

48. See cases cited *supra* note 47.

arguably) is the natural-and-probable-consequences doctrine,⁴⁹ usually associated with complicity, together with the *Pinkerton* doctrine,⁵⁰ which (in the United States) is the name the natural-and-probable-consequences assumes in connection with the conspiracy.⁵¹

All these doctrines reflect the *versari* principle's strict-liability logic.⁵² For many criminal law theorists, they're also a continuing source of embarrassment. They represent, some say, the remnants or residues of darker, primitive, and "unrefined ways of thinking about criminal responsibility[,]”⁵³ according to which punishment rightly reflects the full measure of the wrong caused, whether the wrongdoer was culpable toward each of its wrong-making elements or not. The *versari* principle and its doctrinal instantiations have no place, according to this line of thought, in a modern, enlightened criminal code, wherein the importance of wrongdoing in the mind has marched long and steadily toward displacing the importance of wrongdoing in the world.⁵⁴

Modern-day theorists, for whom the *versari* principle has little intuitive appeal, aren't alone. Dissenters can be found throughout the historical record. For example, some common law treatise writers postdating Bracton rejected

49. See, e.g., DRESSLER, *supra* note 45, § 30.05[B][5], at 475–76.

50. See, e.g., *id.* § 30.08[A]-[C], at 484–87. John Hasnas notes the structural similarity between the *Pinkerton* doctrine and the legal-wrong doctrine, which he calls the *Prince* rule (after *Regina v. Prince*, since repudiated in English law), in John Hasnas, *Reflections on Prince, Public Welfare Offenses, American Cyanamid, and the Wisdom of the Common Law*, 12 CRIM. L. & PHIL. 427, 430–31 (2018).

51. The natural-and-probable-consequences doctrine and the *Pinkerton* doctrine ascribe liability to a secondary party (accomplice or co-conspirator) for a crime committed by a primary party (principal or co-conspirator), provided the primary party's crime was "foreseeable" to the secondary party. See DRESSLER, *supra* note 45, § 30.05[B][5], at 475–76, § 30.08[A]-[C], at 484–87. There's more to both doctrines, but that's the gist. The reference to "foreseeability" is usually interpreted to mean the secondary party is liable for the primary party's crime, provided he should have foreseen its commission, where foreseeability is equated with negligence, understood as a kind of culpability. See *id.* § 30.05[B][5], at 475–76. Another reading interprets the reference to "foreseeability" to mean the primary party's crime was a proximate result of the crime to which the secondary party provided aid or to which he agreed. This alternative interpretation would arguably make the *Pinkerton* doctrine and the natural-and-probable-consequences doctrine instantiations of the *versari* principle. The usual interpretation uses culpability (negligence) to link the secondary party's liability to the primary party's crime, whereas the alternative, consistent with the *versari* principle, uses causation (proximate cause).

52. These doctrines are consistent with the *versari* principle. Excavating the historical record to connect the dots between their presence in existing law and the *versari* principle (assuming such connections exist) is a job better left to legal historians.

53. George P. Fletcher, *Reflections on Felony Murder*, 12 SW. U. L. REV. 413, 426 (1981).

54. For an account of this long and steady march, and an expression of hope for future progress in the same direction, see generally Dennis J. Baker, *Tracing a Thousand Years of Subjective Fault as the Fulcrum of Criminal Responsibility in Common Law*, 56 CRIM. L. BULL. 1 (2020).

the principle, including the venerable James Fitzjames Stephen.⁵⁵ Some canonists postdating Raymond likewise rejected it,⁵⁶ despite the stature of others who affirmed it, not least of whom was Thomas Aquinas. These dissenting canonists believed the *versari* principle was logically inconsistent with other doctrines Aquinas affirmed,⁵⁷ which left them only one conclusion: anyone can make a mistake, even Aquinas.

A.

The *versari* principle and its multiple doctrinal expressions nonetheless endure. Indeed, lawmakers sometimes add new crimes consistent with the principle's logic.⁵⁸ Friendless as it is among so many theoreticians, how is it that these manifestations of a medieval canon-law doctrine have refused to be good soldiers? Why haven't they just faded away?

Start with the canonists. According to one commentator, well versed in scholastic scholarship, the medieval canonists who accepted the doctrine did so, "not because it was found in texts they regarded as authoritative, but because it seemed to give the right result in a number of hypothetical cases."⁵⁹ In other words, the canonists who accepted the doctrine accepted it insofar as it stated a general principle enabling them to make sense of intuitive responses they had about the guilt of an imagined wrongdoer in a range of hypotheticals.⁶⁰ Or perhaps they were trying to make sense of what they took

55. 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 57 (1883).

56. Gordley identifies several sixteenth- and seventeenth-century jurists belonging to a "group known to historians as the Late Scholastics or the Spanish Natural Law School," who "reconsidered and finally abandoned the doctrine" because they "could not see why someone should be liable for chance consequences." See Gordley, *supra* note 30, at 190.

57. See Gordley, *supra* note 30, at 192. Of course, if "Thomas Aquinas had violated his own principles by accepting the doctrine . . . one wonders why he didn't see the difficulty himself." *Id.* at 193.

58. Douglas Husak, for example, describes a New Jersey statute, enacted as part of New Jersey's Comprehensive Drug Reform Act of 1986, that created a "wholly new kind of homicide," graded as a crime in the first degree, making "any person who manufactures, distributes, or dispenses . . . any . . . controlled dangerous substance . . . strictly liable for a death which results from the injection, inhalation or ingestion of that substance[.]" Douglas N. Husak, *Strict Liability, Justice, and Proportionality*, in APPRAISING STRICT LIABILITY, *supra* note 26, at 81, 82. New Jersey also makes it an offense to possess a controlled substance within 1,000 feet of a school zone, with no culpability attached to that fact, much like the statute in *Benniefield*. N.J. STAT. ANN. § 2C:35-7 (West 2021).

59. Gordley, *supra* note 30, at 184.

60. Insofar as intuitions can sometimes change in response to small changes in the facts, I should note that these hypothetical cases were (so far as I can tell) pretty thinly described.

to be the intuitive responses to these hypotheticals among the laity for whom they were writing.

Does that premodern intuition survive in the modern mind? Writing in 1997, Sanford Kadish noted in passing that the *versari* principle “plainly responds to a widely shared moral viewpoint.”⁶¹ He offered no sociological evidence to buttress that claim, nor will I. But perhaps the reader can test his or her intuitions against the following variations on the facts in *Stamp*.

Stamp-1—Stamp enters the General Amusement Company building intent on robbing it, which he does. When Honeyman gets in the way, Stamp shoots and kills him, intending to kill him.

Stamp-2—Stamp enters the General Amusement Company building intent on robbing it, which he does. He leaves the building. Fifteen to twenty minutes later, Honeyman dies from a heart attack. At no time did Stamp harbor any culpable mental state toward the death of Honeyman or anyone else.

Stamp-3—Stamp enters the General Amusement Company building intent on robbing it, which he does. He leaves the building. No one is injured as a result of the robbery. At no time did Stamp harbor any culpable mental state toward the death of anyone.

How does Stamp-2, which reflects the facts in the actual case, compare to Stamp-1 and Stamp-3? One way to answer that question is to elicit an intuitive reaction to the liability the law would impose on Stamp in each of the three cases, and the liability the law would impose depends on the felony-murder rule. Is it available or not?

If a standard felony-murder rule is available, Stamp-1 and Stamp-2 would each be convicted of murder: Stamp-1 would be convicted of murder because he caused another’s death with the intent to do so (express malice).⁶² Stamp-2 would be convicted of murder thanks to the felony-murder rule (implied malice).⁶³ For some, that gets Stamp-2’s liability wrong, intuitively speaking: Stamp-2 doesn’t belong in the same category as Stamp-1. Stamp-1, who wanted to kill, has more to answer for than does Stamp-2, who killed but didn’t want to.

If the felony-murder rule isn’t available, Stamp-1 would still be convicted of murder, but Stamp-2 wouldn’t. That fixes the first problem but might

61. Kadish, *supra* note 31.

62. I ignore all the various permutations on the felony-murder rule one can find in existing law, such as the distinction between first- and second-degree felony murder and between enumerated and unenumerated felonies, along with all the limitations on the scope of the rule. I assume robbery is an enumerated felony and the felony murder rule works to secure a murder conviction.

63. *See supra* note 62.

produce another. Without the felony-murder rule, Stamp-2 and Stamp-3 would each be convicted of robbery, but nothing more. True, Stamp-2 caused Honeyman's death while busy robbing him, but without the felony-murder rule, he won't answer for it criminally. For some, that still gets Stamp-2's liability wrong, intuitively speaking: Stamp-2 doesn't belong in the same category as Stamp-3. Stamp-2, who caused Honeyman's death only because he freely chose to rob him, has more to answer for (and not just by way of compensatory damages) than does Stamp-3, who didn't kill anyone.

If you don't find yourself thinking Stamp-2 has more to answer for criminally than does Stamp-3, then you probably won't like the *versari* principle. Conversely, if you believe Stamp-2 does indeed have more to answer for criminally, then maybe you share Saint Raymond's *versari* intuition. If so, the next question is why? What drives an intuition that Stamp-2 has more to answer for criminally than does Stamp-3?

My aim is mainly diagnostic: to understand why the *versari* principle appeals (if it does) and why its doctrinal manifestations endure (as they do) insofar as they endure as a result of its appeal (and not, say, as a result of the political clout prosecutors have in the legislative process whereby the criminal law gets made). At the end of the day, the best explanation I can find concedes what its critics have long alleged: the principle rests on an "unrefined" way of thinking about criminal responsibility.⁶⁴ Having said that, it would be nice to know more. How is the principle's way of thinking about responsibility "unrefined"? Unrefined or not, what, if anything, can be said to try to make sense of the intuitions the *versari* principle captures or embodies?

As noted above, the *versari* principle shows up in a number of different criminal law doctrines. But for now I focus on only one: crimes like those in *Stamp* and *Benniefield*, which might be called *versari* crimes. I put these crimes in the spotlight because they represent the most transparent manifestation in today's criminal law of Raymond's medieval maxim.

B.

A *versari* crime, on my rendering, has three parts: a crime (the predicate crime), a consequence (the *versari* element), and a causal connection between them.⁶⁵ The predicate crime describes various objective elements together

64. See Fletcher, *supra* note 53, at 426.

65. I assume this causal connection is run-of-the-mill but-for and proximate cause. I should nonetheless highlight how the Model Penal Code settles questions of proximate cause when no culpability is associated with a material element. The Code generally conceptualizes proximate

with various inculpatory mental states attached to some or all of them. The *versari* element, to which the state has assigned no culpability, describes a consequence resulting when a person commits the predicate crime. This consequence can be broadly understood to include what a criminal lawyer would refer to as a result element or an attendant circumstance element.

Go back to *Stamp* and *Benniefield*. In *Stamp*, the predicate crime was robbery, the *versari* element (a result element) was Honeyman's death, and the latter resulted from the former: Honeyman wouldn't have died if Stamp hadn't robbed him in the first place. In *Benniefield*, the predicate crime was the possession of a controlled substance, the *versari* element (an attendant circumstance) was "in a school zone," and the latter resulted from the former: Benniefield wouldn't have possessed in a school zone if he hadn't been possessing in the first place.

As I see it, the *versari* principle makes the following allegation: when someone commits a predicate crime, his normative relationship with the state changes. Before the predicate, he had a right not to be punished and the state was duty-bound not to punish him. After the predicate, his position changes. He loses his right not to be punished, and the state gains permission to punish him. This interpretation makes the *versari* principle a forfeiture doctrine.⁶⁶ When someone commits a predicate crime, he crosses a relationship-changing line. He gives the state permission to punish him for the predicate crime itself *and* for any consequence resulting from it, even if he was in no way culpable with respect to it.⁶⁷

cause as a problem of imputed culpability: when should culpability for how a result came about (or the manner in which a result came about) be imputed to an accused whose conduct was the but-for cause of that result? See MODEL PENAL CODE § 2.03(1) (AM. L. INST. 1985). That conceptualization of proximate cause doesn't work when no culpability is associated with an offense element. The Code therefore includes a special provision designed to deal with such offense elements. See *id.* § 2.03(4) ("When causing a particular result is a material element of an offense for which absolute [strict] liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor's conduct.").

66. Other commentators have also characterized the *versari* principle as a forfeiture doctrine. See, e.g., MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 471, 473–74 (1997) (explaining that the *versari* principle's "outcroppings" in positive law "operate with a kind of crude forfeiture theory, whereby once a defendant has crossed some threshold of culpability we should not care about making any further discriminations in the degree of culpability").

67. Any forfeiture doctrine describes some change in the normative relationship or relationships between or among the parties forming the relationship. For present purposes, I've described the relevant relationships between the defendant and the state using the first-order Hohfeldian language of right, duty, no-right, and permission, not the second-order language of immunity, disability, liability, and power. See WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1919).

Before moving on, more needs to be said about the predicate crime. The predicate crime is a *sine qua non*: it triggers the forfeiture. Its commission causes a perpetrator to lose his right not to be punished and the state to gain permission to punish him. All that being so, not just any crime should be able to qualify as a predicate. To pull off its dual transformations—causing the defendant to lose his right not to be punished and giving the state permission to punish him—the predicate crime should, as a matter of simple fairness, be such that (at least) any reasonable person who commits it—who satisfies all the elements of the predicate crime—would thereby realize he was committing a crime. A predicate crime shouldn't qualify as a predicate crime unless a reasonable person whose conduct satisfies its elements would realize he's thereby crossed the line into crime.⁶⁸

Suppose a reasonable person commits a crime but wouldn't have realized he'd done anything criminal. He wouldn't have realized he'd crossed the line. Under those circumstances, the *versari* principle should be understood to deny the state permission to hold him strictly responsible for causing any *versari* element. A person crosses the line into criminality, thereby forfeiting his right against being punished (for both the *versari* element and the predicate crime itself), only if he freely chooses to cross the line, which he does only if he knows or should know he's crossing the line and only if he makes that choice free from duress. Or, as the canonists might have put it, only if he chooses to cross the line with full knowledge and complete consent of the will.

Stamp and Benniefield crossed the line. Neither acted under duress, and a reasonable person who satisfies the elements of robbery, or possessing a

Inasmuch as the *versari* principle is a forfeiture doctrine, it raises all the questions surrounding what the literature refers to as the “forfeiture theory of punishment.” The most extended discussion of the forfeiture theory, which references the relevant literature and raises the relevant questions, is CHRISTOPHER HEALTH WELLMAN, RIGHTS FORFEITURE AND PUNISHMENT (2017). Among the questions a forfeiture theory of punishment raises, I highlight only one: is the fact that a person has forfeited his right against punishment (against being used as a means to some end the state believes is worth pursuing) sufficient to render state punishment non-wrongful, or is it (merely) necessary?

Wellman believes the former: a state doesn't wrong a person who's forfeited his right against being punished when it punishes him for any reason or no reason at all. *See id.* at 4. The text assumes the latter: the state doesn't wrong a person who's forfeited his right against being punished only if the balance of justificatory reasons tips in favor of exercising its permission to punish him. Of course, which way the justificatory reasons tip, and under which conditions, is a matter on which reasonable minds will disagree. Other questions about the forfeiture theory I leave open.

68. This feature of *versari* crimes distinguishes them from so-called public welfare offenses. *See, e.g.,* Hasnas, *supra* note 50 (noting this distinction).

controlled substance,⁶⁹ would ordinarily realize the criminal law prohibits such conduct. That may not be true of everyone who commits a would-be predicate crime. If not, then committing the predicate crime shouldn't suffice to carry its perpetrator across the line. Having toed the line, he remains on the right side of the law. His right not to be punished remains intact, and the state remains duty-bound not to punish him. Whether a state honors that duty is another question.

When a person commits a qualifying predicate crime, he forfeits his right not to be held strictly responsible for (punished for) all its consequences, and the state is permitted to hold him strictly responsible for (punish him for) all its consequences. Or so, on my rendering, the *versari* principle alleges. The next question is this: should a state exercise this permission and assign punishment without regard to fault to some consequence or consequences resulting from some predicate crime? The *versari* principle itself doesn't say. I'll zero in on two reasons the state might offer to explain (and perhaps purport to justify) its decision to punish a person for a faultlessly-caused *versari* element.

But first I should explain why many criminal law theorists—namely those who embrace principles of retributive justice—believe the state always or almost always has a dispositive reason not to exercise its permission. As these theorists see it, if a state exercises its permission to enact a *versari* crime and punish a person for causing its *versari* element, the state itself would be guilty of wrongdoing.⁷⁰ They believe the balance of justificatory reasons always or almost always tips decisively against the state exercising its permission to punish a person for causing a *versari* element, even if the person would not have caused that element had he not chosen to commit the predicate crime in the first place.⁷¹

When some writers encounter the *versari* principle, they sometimes explain how it works using metaphors like “taint” or “stain.”⁷² As they see it, the *versari* principle would have us imagine that, when a person culpably commits a predicate crime, he becomes “tainted” or “stained” as a result.⁷³ This taint or stain mysteriously extends to all of the predicate crime's consequences, consequences toward which the person was otherwise entirely innocent.⁷⁴ Other writers deploy an even more alarming metaphor: the *versari*

69. Assuming the possession statute requires the state to prove the person realized the thing he possessed was a “controlled substance.”

70. See MOORE, *supra* note 66, at 203, 209.

71. See *id.*

72. Fletcher, *supra* note 53, at 428 (“taint and expiation”); DOUGLAS N. HUSAK, PHILOSOPHY OF CRIMINAL LAW 69–72 (1987) (“taint”); Husak, *supra* note 58, at 99 (“taint”).

73. See, e.g., Fletcher, *supra* note 53, at 426–27.

74. *Id.* at 427.

principle, they say, would have us imagine that a person who culpably commits a predicate crime becomes not only tainted or stained as to its consequences—he becomes an “outlaw” with respect to them.⁷⁵

Such talk is colorful and provocative, but so far as I can tell it amounts to little more than another way of saying what the *versari* principle readily admits and affirms: a person who commits a predicate crime forfeits his right against being punished for all of the consequences embodied in a *versari* element (toward which he lacks any culpability), and the state acquires permission to punish him for them (despite his lack of culpability toward them). Of course, the language of tainting, staining, outlawry, and so forth might be meant to convey an implicit admonition: the state ought not exercise its permission. The balance of reasons, according to this implicit admonition, always or almost always tips against its exercise.

II.

Retribution is a theory of punishment, by which I mean it singles out or privileges a good or end the state hopes or aims to bring into being when it burdens or coerces a person in the special way punishment burdens or coerces. This good or end provides the state with a reason to exercise its permission to punish a person who’s forfeited his right against being used in the distinctive way punishment uses a person. Other theories of punishment single out or privilege different goods or ends, which in turn give the state different reasons for exercising its permission to punish.⁷⁶

The good retribution aims to achieve, according to some (but not all) of its patrons, is an intrinsic good: good in itself, and not just good as a means to some other intrinsic good. The good at which retribution aims, we’re told, is the suffering of those who deserve to suffer for the criminal wrong they’ve freely committed. Their suffering, without more, somehow makes the world a better place. But it makes the world better only insofar as it’s deserved, and it’s deserved only insofar as it relates proportionately to the gravity of the crime (reflected in a criminal statute’s objective elements) and the culpability of the criminal (reflected in its culpability elements).⁷⁷

75. See, e.g., A.P. Simester, *Is Strict Liability Always Wrong?*, in APPRAISING STRICT LIABILITY, *supra* note 26, at 21, 45 n.75.

76. See WELLMAN, *supra* note 67, at 4 (“Advocates of . . . [forfeiture theory in its weak form] insist that forfeiture alone is insufficient; in order to be permissible, punishment must also promote some important (deterrent, retributive, or other) aim.”).

77. Some retributivists believe causing or instantiating the objective elements of a crime, once some measure of culpability has been established for those elements, can add to the

When the state wants to know if it should exercise its permission to punish, retribution tells it to go ahead, but only if and when punishment will bring into the world the degree of suffering a criminal wrongdoer deserves. For, retributivists believe, deserved suffering somehow makes the world a better place, all else being equal. Of course, many theorists adopt alternative theories of punishment because they find retribution's supposed end unintelligible, or worse, unintelligible and repugnant. They can't understand how human suffering can ever be a good in itself. All they see when they see human suffering is an intrinsic bad: something to be avoided, if at all possible, not something the state should foster, ostensibly in the name of something called retributive justice.⁷⁸ Indeed, for these theorists, the idea of desert has no place whatsoever in a theory of punishment.

Other theorists don't go so far. They're willing to embrace desert, but not as a reason in favor of punishing. They're willing to embrace it only as a limit on the state's permission to pursue other goods or ends through punishment.⁷⁹ For them, deserved suffering isn't an intrinsic good, but undeserved suffering is plainly an intrinsic bad, almost always to be avoided no matter what good it might bring.⁸⁰ The intrinsic badness of undeserved suffering is said to give the state always or nearly always a dispositive reason not to exercise its

punishment an offender deserves. *See, e.g.*, MOORE, *supra* note 66, at 193 (“[W]hen culpability is present, wrongdoing independently influences how much punishment is deserved.”). Others believe it adds nothing. *See, e.g.*, LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, WITH STEPHEN MORSE, *CRIME AND CULPABILITY* 171–96 (2009). The difference between these two camps is usually framed in terms of the question: do results matter? The first camp believes they do; the second believes they don't. I won't enter that long-standing and on-going debate here.

78. *See, e.g.*, VICTOR TADROS, *THE ENDS OF HARM* 73 (2011) (“Retributivists claim that when suffering is deserved for wrongdoing it becomes good This idea . . . is demonstrably false.”); R.A. Duff, *Punishment and the Duties of Offenders*, 32 *LAW & PHIL.* 109, 109 (2013) (“[The] supposed intrinsic value [of deserved suffering] is hard for any but a worryingly vengeful eye to discern”).

79. Theorists who reject the concept of desert altogether are left to find some other way to limit state punishment and to defend those limits in a way consistent with their other theoretical commitments. One such theory, popular through the years, sees state punishment as a permissible means of societal self-defense analogous to private force as a permissible means of individual self-defense. *See, e.g.*, TADROS, *supra* note 78; Warren Quinn, *The Right To Threaten and the Right To Punish*, 14 *PHIL. & PUB. AFFS.* 327 (1985); Daniel M. Farrell, *The Justification of Deterrent Violence*, 100 *ETHICS* 301 (1990).

80. *See, e.g.*, Douglas Husak, *Retributivism in Extremis*, 32 *Law & Phil.* 3, 15 (2013) (“[T]he reason *not* to punish that applies to those who do not deserve to be punished is much more stringent than the reason to punish them that applies to those who *do* deserve to be punished.”). Husak's version of retributivism, unlike the version described in the text, is meant to rely on the claim that imposing on culpable wrongdoers the punishment they deserve is one reason for the state to punish them. Husak's version of retributivism is meant not to rely on the further claim that imposing on culpable wrongdoers the punishment they deserve is an intrinsic good.

permission to legislate *versari* crimes, inasmuch as *versari* crimes assign undeserved punishment for their *versari* element.

Retribution's initial reaction when it encounters a *versari* crime is one of the following: repeal them, delete their *versari* element, or append some culpability (and matching punishment) to it. The aim in the end is to eliminate *versari* crimes altogether or to neuter them such that they can no longer be used as a warrant for disproportionate punishment. Whatever fix is used, retribution tells us that the *versari* principle and its doctrinal blemishes should at long last be excised from the criminal law.

Having said that, not all convictions for *versari* crimes will offend retributive sensibilities. Sometimes, when a person commits a *versari* crime, he just so happens to deserve to be punished for causing its *versari* element. That's because sometimes the facts sufficient to prove the predicate crime will also suffice to prove some measure of culpability toward its *versari* element. When that's true, assigning additional punishment for the *versari* element, without formally requiring independent proof of any culpability toward it, wouldn't produce undeserved and disproportionate punishment after all, provided the additional punishment assigned to the *versari* element matches the offender's implicit culpability toward it. In other words, although *versari* crimes are always strict in form (with respect to their *versari* elements), they won't always be strict in substance.⁸¹

This strategy can domesticate some *versari* crimes some of the time, but not all *versari* crimes all of the time. For example, suppose Stamp had entered the premises of the General Amusement Company without a gun. Instead, suppose he threatened Honeyman with a punch in the nose unless he turned over the company's cash. Assuming Stamp had no reason to know of

81. See, e.g., Simester, *supra* note 75, at 49 ("Where luck . . . [with respect to consequences] is intrinsic and forms part of the reasons why . . . [an agent's] antecedent behavior . . . is wrong, there seems no difficulty about blaming the agent for the outcome."); Kenneth W. Simons, *Is Strict Liability in Grading of Offenses Consistent with Retributive Desert?*, 32 OXFORD J. LEGAL STUDS. 445, 446 (2012) ("[S]trict liability in grading can be appropriate when the risk of committing the more serious crime (i) is a risk intrinsic to the less serious crime or (ii) minimally foreseeable."); Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1079 (1997) (examining "cases in which formal strict liability in grading actually expresses culpability (especially negligence)").

The evolution of the felony-murder doctrine, taken in broad strokes and reflected in writings of early English commentators and then again later in American caselaw, can also be seen as a reflection of this domestication strategy. At the start, the rule's scope was broad, encompassing offenders who on the facts would likely have been highly culpable toward the resulting death as well as those likely not to have been culpable at all. Then, over time, the predicate offenses available to support murder liability were in one way or another gradually circumscribed, such that in the end the chances of any particular offender being subject to wildly disproportionate punishment would be more or less reduced, depending on the exact nature of the limitations adopted.

Honeyman's excitable nature or compromised cardiovascular muscle, and thus no reason to believe his threatened punch might cause Honeyman's death, Stamp would presumably have satisfied all the elements of the predicate crime (robbery). Nonetheless, inferring or constructing from them any measure of culpability for anyone's death would be a stretch.

If this domestication strategy fails, retribution's adherents might consider two fallback options: self-control and self-deception. The first option is sensible; the second, not so much.

The first option is self-control. A state wanting not to punish anyone disproportionately might foresee itself being tempted down that primrose path, despite its best intentions to conform to the retributive principle of proportionality. What to do to avoid temptation? One strategy is diachronic self-control: doing something at an earlier time to prevent temptation from getting the upper hand at a later time. Like Ulysses, the state might decide to tie itself to the mast, thereby helping itself resist any Siren call to impose disproportionate punishments.

The Model Penal Code (MPC) illustrates how a state might try to pull this off. Dispensing with the details, the MPC contains provisions designed to force the state to think long and hard before enacting into law any crime with a strict-liability element.⁸² If the state truly wishes to punish someone strictly, these provisions force it to make its intention plain.⁸³ Otherwise, MPC-guided courts will assume the state's intent was to attach culpability to each and every material element of any crime it creates.⁸⁴ Moreover, even when the state's intention to dispense with culpability is as plain as plain can be, its MPC-guided courts will assume its intention, unless plainly told otherwise, was never to create a crime (properly so-called) in the first place.⁸⁵ Instead, the courts will assume the state intended to create a crime manqué (which the MPC dubs a "violation"): a prohibition the breach of which results in a condemnation-free sanction, not a condemnatory punishment.⁸⁶

82. See MODEL PENAL CODE §§ 2.02(4), 2.05(1) (AM. L. INST. 1985). Model Penal Code § 2.02(4) reflects what English commentators call the "correspondence principle." For a well-known exchange debating the wisdom of the correspondence principle in the context of unlawful act manslaughter, compare JOHN GARDNER, *Rationality and the Rule of Law*, in OFFENSES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 33, 40–41 (2007), and JOHN GARDNER, *Reply to Critics*, in OFFENSES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW, *supra*, at 246–48, with Andrew Ashworth, *A Change of Normative Position: Determining the Contours of Culpability in Criminal Law*, 11 NEW CRIM. L. REV. 232, 256 (2008).

83. See Model Penal Code §§ 2.02(4), 2.05(1).

84. See *id.* § 2.02(4).

85. See *id.* §§ 1.04(5), 2.05.

86. See *id.* § 1.04(5).

When all else fails, option two is self-deception. A state (or its courts) embracing this option tells itself (and those it punishes) that the punishment imposed for a *versari* element really isn't undeserved or disproportionate. It may look that way, but it's not, because whatever culpability is required to prove the predicate crime magically "transfers" to the *versari* element, retributively underwriting the additional punishment assigned to it. Voila. No undeserved or disproportionate punishment after all. That's the move, and it might help the state assuage a guilty conscience, insofar as it wants not to punish disproportionately, but no one should be fooled. It won't fool the person punished, and it shouldn't fool the state.

III.

Someone who commits a predicate crime forfeits his right against being held strictly responsible for all its consequences. The state thereby gains permission to enact *versari* crimes: crimes with strict-liability elements. Or so the *versari* principle alleges. Retribution urges the state not to exercise this permission. Holding a person responsible for the elements of a crime means punishing him for them, punishment without culpability is undeserved punishment, and undeserved punishment is a special and distinctive kind of bad, always or almost always to be avoided. Or so retribution alleges.

Not all theories of punishment agree with retribution's rejection of *versari* crimes. Bracketing for a moment whether these alternative theories are theories of punishment properly so-called, they differ from retribution because they embrace goods, other than the putative good of deserved suffering, the state might aim to bring into existence when it intentionally burdens those who freely commit crimes. More to the point: securing those goods doesn't demand culpability for each and every element of the crime committed.

I'll look at two such theories. The first imposes a burden for a *versari* element to prevent future crimes.⁸⁷ The second imposes a burden for a *versari* element to prevent private retaliation for a past crime.⁸⁸ But first I should say more about what I mean when I talk about punishment.

People disagree about how to analyze the concept of punishment.⁸⁹ They disagree on what it means, at least in marginal cases, to say this or that state action, performed with this or that (corporate) mental state, does or doesn't

87. See *infra* text accompanying notes 89–91.

88. See *infra* text accompanying notes 103–16.

89. For a recent entry in a very long line of literature debating what the word "punishment" means or should be taken to mean, see, for example, Vincent Geeraets, *Two Mistakes About the Concept of Punishment*, 37 CRIM. JUST. ETHICS 21 (2018).

amount to punishment.⁹⁰ For now, I'll just assume the following. Punishment, strictly speaking, constitutes a condemnation-expressing burden, imposed with the intent to burden.⁹¹ A state is permitted to burden a citizen in this way if it turns out to be true that he forfeits his pre-existing right against being so burdened if and when he freely chooses to do that which the state has denominated a crime. If a state decides to exercise this permission with the intent to cause a criminal wrongdoer to suffer as much as he deserves, but no more, its decision would reflect an instance of retributive punishment.

Now suppose a state decides to hold a person strictly responsible for a *versari* element in the following way. It intentionally imposes a burden on him for causing a crime's *versari* element, but doesn't intend thereby to condemn him for having caused it. It sees no need. If he wasn't at fault for causing the *versari* element, he doesn't deserve to be condemned for it, nor to be made to suffer for it. Has the state nonetheless "punished" him for it? Some might say yes; others might say no. For now, call such a burden anything you like. Just keep in mind that the state's reason for imposing it isn't to condemn or bring about the intrinsic good in which retribution alleges deserved suffering consists.

When a state intentionally imposes a non-condemnatory burden on a person for causing a *versari* element, above and beyond any retributive punishment imposed for the predicate crime, it might intend to make good on a threat. The threat would be something like this: if you culpably commit a predicate crime and thereby cause a *versari* element, we'll add a surcharge or kicker to the overall burden you must bear, in order to account of the *versari* element you happen to have caused, albeit non-culpably. This threatened surcharge isn't added to your bill to make you suffer as retribution alleges you deserve to suffer. The state's reason is more straightforward. The surcharge helps protect others through deterrence.

Call this surcharge a penalty, thereby keeping it distinct from retributive punishment.⁹² Deterrence (through penalty) gives the state a reason to exercise its permission to hold a person strictly responsible for causing a *versari* element. This penalty kicker, the thought goes, will reduce the number of future crimes committed, which isn't a bad reason for using a person as a means if he no longer has any right against being so used. What's

90. *See id.*

91. The usual citation for the thesis that punishment is or should be conceptualized as condemnation-expressing is Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397, 400–04 (1965).

92. The law should probably find some way to make clear which part of a sentence is imposed as punishment and which part is imposed as penalty. These problems of institutional expression are important but won't be addressed here.

more, because a state is penalizing him to deter, and not punishing him to cause deserved suffering, retributive worries about disproportionate punishment would no longer figure into the balance of reasons for and against the state's on-balance decision to exercise its permission to hold someone strictly responsible for a *versari* element.

Of course, removing one reason from the balance doesn't mean one can confidently say which way the remaining reasons tip. Reasonable minds are apt to disagree. Deterrence involves predicting what the future will be if the status quo is changed in some way, and then deciding if on balance the predicted change makes the world better off or worse off compared to the status quo. The state issues a threat: if you commit a predicate crime, you'll be penalized to some degree—assuming we catch you and so on—if you happen to cause its *versari* element (above and beyond any punishment you get for the predicate crime itself). Is the world better off all things considered with the threat or without it?

Go back again to *Stamp* and *Benniefield*. Will adding a penalty kicker to robbery for and when death happens to result yield a better future world—perhaps because it contains less robberies or fewer deaths resulting from them—or not? Will adding a penalty kicker to cocaine possession for and when possession happens to occur in a school zone yield a better future world—perhaps because it contains less drug possession or fewer of whatever bad things happen when drugs get possessed in school zones—or not?

Here's one way to think about the penalty kicker in *Stamp*. Start with the theory that the kicker is intended to deter the predicate crime (robbery). Fewer robberies, the thought goes, will make the world a better place, all else being equal. Of course, the kicker will only kick in when someone like Stamp commits robbery and happens thereby to cause the *versari* element (death). Yet if the goal of the kicker is to bring down the number of robberies, why make its imposition entirely contingent on causation? Why not assign the kicker across the board to everyone and anyone who robs, and not just to those who innocently and unluckily happen to cause its *versari* element?

It would be unwise to underestimate the power of clever minds, schooled in the complexity of deterrence, to supply an answer to this question. Such an answer would probably involve a story with an unexpected twist, involving some subplot according to which *versari* crimes and the penal lotteries they create actually end up striking a better balance among all the various anticipated costs and benefits at stake compared to the simple

expedient of attaching a kicker to the predicate crime no matter what its consequences.⁹³

Such a story is likely to be contested. Deterrence depends on prediction. Any forecast telling us how the world will look if one piece of it changes requires any number of assumptions about the relevant costs and benefits and guesses about how the world works. Different theorists start with different assumptions or make different guesses and so end up predicting different worlds resulting from the very same change. If we turn to empiricists for help adjudicating whose theoretical predictions turned out to be more accurate, disagreement is apt to surface there as well. The world is complicated, both to predict and to explain. Add to that the tendency to see the world as we'd like it to be, and not necessarily as it is, and consensus on the value of this or that intervention to make the world better becomes even more elusive.

Next, suppose the kicker is intended to deter, not the predicate crime itself, but conduct during its commission that might cause the *versari* element. Again, without underestimating the ingenuity of deterrence theorists, how does threatening someone busy committing a predicate crime cause him to do anything differently to avoid the risk of causing a *versari* element,⁹⁴ when *ex hypothesi* he neither saw nor should have foreseen any such risk, at least not at the moment he unleashed it? Threatening to send a blind man up the river if he falls into a deep hole won't give him any more reason than he already had to avoid the fall. The easiest way for a person to avoid causing a *versari* element while committing a predicate crime, when he neither saw nor should have foreseen any risk he'd cause it, is to steer clear of the predicate crime altogether. But that just brings us back to where we started.

All these observations are familiar. The claims and rebuttals and surrebuttals (and buttals beyond that) can all be found in the caselaw and literature, especially in connection with the felony-murder rule.⁹⁵ But set aside all that and assume deterrence gives the state a sensible reason to exercise its permission to penalize a person for causing a *versari* element. That assumption doesn't get *versari* crimes out of the normative woods just yet. Leaning on deterrence as a reason to add a penalty to a predicate crime (but only when its *versari* element results) has another problem.

Retribution has one cardinal virtue: it limits how much punishment a state is permitted to impose to achieve the intrinsic good in which deserved

93. See, e.g., Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 110–20 (1990).

94. See, e.g., *id.* at 87–110.

95. See generally James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429 (1994) (discussing in detail the history, theory, and shortcomings of the felony-murder rule).

suffering ostensibly consists. Adhering to retribution would mean (for all practical purposes) prohibiting any punishment beyond what's deserved. Deterrence is oblivious to this retributive constraint because deserved suffering isn't the good at which it takes aim when it penalizes.⁹⁶ The good at which it aims is to make the world on balance a better place using threatened and imposed penalties.⁹⁷ Does that mean any penalty kicker, no matter how large, is permissible as long as the state believes the world is or will on balance be a better place with it than without it? Does deterrence know no bounds?

With that worry in mind, the *versari* principle should charitably be understood to recognize two limits on how far the state can go when adding penalty kickers. First, *versari* crimes, when put into action, lump together two groups of people at opposite ends on the culpability spectrum. At one end are those who in fact commit the predicate crime with the most culpable state of mind toward its *versari* element. At the other are those who in fact commit the predicate crime with no culpability toward the *versari* element. If we assume the total burden assigned to a *versari* crime (predicate plus *versari* element) represents a retributively proportional punishment, then any penalty surcharge levied on those with no culpability toward the *versari* element will be equivalent to (but no greater than) the punishment surcharge imposed on the most culpable.

Take *Stamp* as an example. Stamp was convicted of felony murder.⁹⁸ For argument's sake, assume the punishment for felony murder with a robbery predicate is a mandatory fifty years, and assume fifty years is a proportionate punishment for someone convicted of felony murder but who in fact intended to cause death: ten years for the robbery and forty years for the intent-to-kill killing. Of course, Stamp, we're assuming, lacked any culpability with respect to Honeyman's death. That would mean the mandatory fifty years

96. The idea that proportionality necessarily or conceptually limits retributive punishments, but not deterrent penalties, isn't new. See, e.g., Larry Alexander, *The Doomsday Machine: Punishment, Proportionality and Prevention*, 63 *MONIST* 199, 199–200 (1980) [hereinafter Alexander, *The Doomsday Machine*]; Larry Alexander, *Consent, Punishment, and Proportionality*, 15 *PHIL. & PUB. AFFS.* 178, 179–80 (1986); Alec Walen, *Criminal Law and Penal Law: The Wrongness Constraint and a Complementary Forfeiture Model*, 14 *CRIM. L. & PHIL.* 431, 434 (2020).

One might believe the right a person forfeits when he crosses the line into crime is the right against being punished proportionally (in a retributive sense of proportionality). The right against disproportionate punishment would therefore remain intact, despite the line-crossing. See, e.g., WELLMAN, *supra* note 67, at 179. That, however, would bring one back to the belief that *versari* crimes ought to be repealed insofar as the burden associated with their *versari* elements invariably amounts to disproportionate punishment.

97. See Alexander, *The Doomsday Machine*, *supra* note 96, at 208–13.

98. *People v. Stamp*, 82 Cal. Rptr. 598, 600 (Ct. App. 1969).

Stamp gets would be divided up as follows: a ten-year condemnatory punishment for the robbery and a forty-year non-condemnatory penalty for accidentally killing Honeyman during its commission.⁹⁹

Now, forty years is quite a hit for team deterrence—which is where the second limit comes in. When a person commits a predicate crime, thereby choosing to do something he knows (or at the very least should know) the state has categorically forbidden, the *versari* principle tells us he forfeits his right not to be held strictly responsible for all its consequences. But that doesn't necessarily mean he forfeits all rights. The state, we should suppose, isn't free to use him however it might want. He doesn't forfeit his right to be free from torture, we can safely suppose. Although some uncompromising libertarians might believe otherwise, some rights, I'll assume, are inalienable.

One such postulated inalienable right limits how far the state is permitted to go when penalizing a person for causing a *versari* element. The challenge is how best to characterize this right. One possibility goes like this: when a penalty imposed in the name of deterrence and its hoped-for future goods would result in treatment one could variously characterize as cruel, degrading, inhuman, tyrannical, grossly disproportionate, shocking to the conscience, and so on (and on), the limit has been reached. A person's inalienable right against such treatment will block the way to any additional deterrence. Alas, the point at which a deterrent penalty, which would be disproportionate if imposed as a punishment, crosses the line into cruelty, degradation, and so forth, at least at some more or less wide margin, be in the eye of the beholder. Still, a blurry line, even if very blurry, is a line, and having a line at least provides a focal point around which debate can proceed.

Go back to the example above. Is a forty-year, non-condemnatory penalty for accidentally causing a death in the commission of a robbery a cruel burden? Without saying more about the nature of cruelty, degradation, and so on, any answer to that question will need to remain in limbo. Still, one wants to say that forty years of lost liberty for an accidental death—even one Stamp wouldn't have caused had he not freely chosen to use force or the threat of force to get his hands on Honeyman's property—must come close to the cruelty border. Some will believe it obviously crosses the border: if so, it should be easy to show anyone who thinks otherwise the plain error of his ways.

Deterrence is a reason a state might give if asked to explain its decision to enact a *versari* crime and attach a penalty kicker to its *versari* element. But aiming to deter predicate crimes or their *versari* elements through a chancy

99. In the actual case, Stamp received a "life sentence on the murder charge together with the time prescribed by law on the robbery count." *Id.*

penalty no reasonable person would see coming looks like an awkward and ill-fitting way to go about optimizing the relevant costs and benefits.¹⁰⁰ If so, one wonders: is deterrence, at least sometimes, nothing more than pretext?¹⁰¹ Is the state's (maybe unwitting or at least unacknowledged) motivation for enacting *versari* crimes perhaps something else? In particular, might the state's motivating reason have to do, as others can be understood to have suggested,¹⁰² with dark things not countenanced nowadays in polite company like vengeance, revenge, retaliation, and kindred unmentionables?

IV.

Retribution responds to criminal wrongdoing with punishment.¹⁰³ Deterrence responds with penalties.¹⁰⁴ Vengeance responds with retaliation, and when a state retaliates its aim isn't to cause the wrongdoer the suffering he deserves, nor to reduce the amount of crime in the world through the sundry mechanisms of deterrence. Its aim is to satisfy a victim's desire to "get even."¹⁰⁵

Although vengeance and retribution are often thought to share a family resemblance, vengeance turns out to have features in common with deterrence, too. Like deterrence, the burden revenge intentionally imposes is imposed to achieve an end extrinsic to itself. Deterrence aims for less crime. Revenge aims for satisfied victims. More importantly, retaliation shares with

100. Those who spend their time thinking about deterrence usually tell a simple story about how best to go about the task, in which a punishment's certainty dominates its severity. *See, e.g.*, Daniel S. Nagin, *Deterrence in the Twenty-First Century* ("The evidence in support of the deterrent effect of the certainty of punishment is far more consistent than that for the severity of punishment."), in 42 *CRIME AND JUSTICE: CRIME AND JUSTICE IN AMERICA 1975–2025*, at 199, 199 (Michael Tonry ed., 2013). The simplicity of this story strikes one as quite far removed from the complex stories told in an effort to make sense of *versari* crimes as tools intended to achieve cost-effective deterrence.

101. Deterrence might plausibly be the goal lawmakers have in mind when they include *versari* elements in statutory offenses involving the sale and distribution of drugs, as they did when they enacted the statute under which Benniefield was convicted and the statute referenced *supra* note 58. But without looking more closely at legislative history, that's just speculation; indeed, it would probably remain speculative even after a look at legislative history.

102. James Tomkovicz hypothesized over twenty-five years ago that the "public view of the relative significance of harm and mental attitude is different from that of the scholarly community," James J. Tomkovicz, *supra* note 95, at 1471, and in particular that "popular notions of proportionality are concerned much less about precise correspondence between culpability and liability—especially in cases of killings by felons." *Id.* at 1477. The point Tomkovicz was then making about the intuitive appeal of the felony-murder rule among the "public" is more or less the same point being made here about the *versari* principle more generally.

103. *See* discussion *supra* Part II.

104. *See* discussion *supra* Part III.

105. *See* Jeremy Waldron, *Lex Talionis*, 34 *ARIZ. L. REV.* 25, 26 (1992).

deterrence its refusal to respect retributive proportionality. Whereas deterrence goes as far as needed to achieve an optimal balance between specified costs and benefits, revenge goes as far as needed to satisfy the victim's desire to get even.¹⁰⁶

Trying to sell a theory of punishment with revenge as its sponsor isn't a very good marketing strategy. Payback isn't likely to be a winning pitch. A smarter pitch might take a cue from the late John Gardner, who reminded us that the criminal law's first function was what he called displacement.¹⁰⁷ A familiar story tells us the criminal law first came on the scene, side-by-side with the state, to displace and civilize private vengeance and all the nasty consequences potentially attending it: feuds, disorder, tit-for-tat, and so on.¹⁰⁸ Seen in this way, retaliation turns deterrence on its head: deterrence tries to stop criminals from doing bad things to victims; retaliation tries to stop victims from doing bad things to criminals.

Of course, that was then. One might fairly think or hope the criminal law has in its long march toward civilization thankfully matured well beyond the need to satisfy the mob. State-sponsored vicarious revenge for the sake of good order is a thing of the past, and good riddance. Besides, when the state exercises its permission to punish for more respectable reasons, the victim's desire for payback will with any luck get slaked in the process as an unintended side-effect.¹⁰⁹ When the state aims, for example, to impose deserved suffering to make the world retributively just, revenge can come along as a side effect. If so, the state can have its cake and eat it too. It can placate victims without getting its hands dirty.

That stratagem might work most of the time, but maybe not all the time. Maybe it only works insofar as that for which the state believes it has reason

106. The unrestrained nature of revenge was one feature Nozick identified (among others) to distinguish revenge from retribution. It goes without saying, but for the record, Nozick's analysis of revenge hasn't gone unquestioned. See, e.g., Leo Zaibert, *Punishment and Revenge*, 25 LAW & PHIL. 81 (2006). Even the principle of *lex talionis*, often rejected because it would permit more punishment than (in some sense) it should, was initially understood, so it's been said, as a limit on revenge. For a sympathetic appraisal of *lex talionis* as a principle "about what counts as an appropriate punishment," see Waldron, *supra* note 105, at 25.

107. See JOHN GARDNER, *Crime: In Proportion and in Perspective* ("Indeed, it seems to me, this displacement function of the criminal law always was and remains today one of the central pillars of its justification."), in OFFENSES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW, *supra* note 82, at 211, 214; see also Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1413 (2003) ("If private vengeance is a strong taste, a legal system that provides outlets for it will be more authoritative and therefore more successful at maintaining good order than one that does not.").

108. See GARDNER, *supra* note 107, at 1 ("The blood feud, the vendetta, the duel, the revenge, the lynching: for the elimination of these modes of retaliation, more than anything else, the criminal law as we know it today came into existence.").

109. See Zaibert, *supra* note 106, at 82.

to punish squares with that for which victims believe retaliation is in order. Unfortunately, those stars might not always align, and when they don't, victims might want criminal wrongdoers to bear a greater burden than a retributive state will allow itself to deliver. The state can tell victims justice has been done, but they might not agree, even if one believes they should.¹¹⁰ This potential for misalignment exists because the logic of retribution and the logic of retaliation have different starting points. Retribution begins with culpability; retaliation begins with wrongdoing.

Retribution begins with culpability because it takes culpability to be normatively basic or primary. Wrongdoing can add to the punishment a person deserves for a wrong he's culpably caused (though that's a much-disputed point), but no one deserves any punishment for any piece of a wrong he caused unless some form of culpability attended it. Proportioning punishment to culpable wrongdoing, with culpability in the point position, is retribution's golden rule.¹¹¹ Without culpability, no punishment is deserved. The only debts one needs to pay in the currency of punishment, according to retribution, are those culpably acquired.

Retaliation starts from the other end. It takes wrongdoing to be basic or primary. Culpability can increase the desire for revenge (and thus the retaliation needed to satisfy it), but the absence of culpability can never eliminate it completely. Culpability can add to the retaliation a victim wants, but a victim might well want retaliation for the full measure of the wrong done to him, even if no culpability traveled with it.¹¹² Retribution tells us a criminal wrongdoer discharges in full any debt he owes whenever his punishment matches the wrong he culpably caused. Retaliation begs to differ: his debt is only fully discharged once a price has been paid for all the wrong he caused, not just those parts with some measure of culpability at their side.¹¹³

110. Believing that some number of victims might be left wanting more is different from believing that without *versari* crimes one should expect a rise in vigilante violence, which seems far-fetched. See, e.g., Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1511–12 (1974) (“Penalties we consider appropriate for other reasons would almost certainly satisfy enough of the appetite for vengeance to forestall private retaliation. Indeed the ‘breaking-point’ level of punishment, below which mob violence could become a problem, is probably rather low.”).

111. See *id.* at 398–99.

112. *Id.* at 399.

113. One objection to believing that retaliation can provide a putative justificatory reason goes like this. Being causally responsible for something isn't sufficient for being morally responsible for it, and *being* morally responsible for something is a necessary condition for *holding* someone morally responsible for it. That objection, though common, probably won't convince anyone not already convinced. The objection presupposes that moral responsibility can

Any burden a state assigns to a *versari* element to try to satisfy and thereby displace a victim's desire for vindication will be retributively disproportionate: it will go beyond any punishment retribution would countenance for the predicate crime. But like deterrent penalties, which the state is permitted to pursue only so far, the state should be permitted to go only so far if and when it sets out to retaliate on a victim's behalf.¹¹⁴ Any retaliatory surcharge it adds for a *versari* element risks treating its citizens in a cruel or degrading fashion. If a state decides to impose retributively disproportionate retaliatory sanctions, it needs to tread carefully so as not to cross the line into cruelty and so forth, just as it needs to tread carefully when it imposes deterrent penalties.

Of course, even if vengeance is an intelligible reason to assign a retaliatory sanction to a *versari* element, it might not be a good reason. On that question, reasonable minds are apt to disagree. Some commentators write as if vengeance and so forth should self-evidently form no part of the modern state's portfolio, often dismissing it out of hand as an older and less civilized form of retribution, sometime called "harm retribution," in contrast to a more modern and more civilized form of retribution, in which culpability is king.¹¹⁵ That might well be the reigning orthodoxy, but the literature nonetheless continues to be dotted with heterodoxy arguments defending vengeance, or at least making it the best it can be.¹¹⁶ Like the *versari* principle itself, vengeance and its kin refuse to go gentle into the night.

sensibly be ascribed to a person for something only if that something is within a person's "control," where the only thing within a person's "control" is the movement of his "will." If so, the objection presupposes a specific and contestable conception about the proper scope or boundaries of the self: one in which the self is co-extensive with the "will." Retaliation happens to presuppose a different and broader conception of the self, according to which moral responsibility can sensibly be ascribed to a person not only for that which he wills, but for that which he causes, whether he wills to cause it or not. *See, e.g.,* Michael Zhao, *Guilt Without Perceived Wrongdoing*, 48 PHIL. & PUB. AFFS. 285, 307 (2020); Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 982–85 (1992).

114. *See* discussion *supra* Part III.

115. *See, e.g.,* sources cited *supra* notes 109–13.

116. Jeffrie Murphy's work offers the best and most sympathetic case in favor of giving "hatred and revenge" an "impartial re-hearing" on their motion for some role in today's criminal law. *See, e.g.,* Jeffrie G. Murphy, *Getting Even: The Role of the Victim*, 7 SOC. PHIL. & POL'Y 209, 224 (1990). One might also consult PETER A. FRENCH, *THE VIRTUES OF VENGEANCE* (2001). Revenge is also sometimes offered as that which explains and (for some) justifies why results matter to criminal liability as a matter of positive law. *See, e.g.,* Guyora Binder, *Victims and the Significance of Causing Harm*, 28 PACE L. REV. 713, 731 (2008) ("[T]he obligation to punish harm seems to derive from the political duty to vindicate victims rather than the moral duty to give offenders what they deserve."); Jack Boeglin & Zachary Shapiro, *A Theory of Differential Punishment*, 70 VAND. L. REV. 1499, 1530 (2017) ("[I]f one accepts . . . that the state should

I could try to adjudicate the dispute between vengeance's detractors and its defenders. Perhaps I could get to the bottom of it: is vengeance redeemable or not? That might be worth a try, but I won't make the effort here. When all's said and done, no minds on either side are apt to budge very much, if at all. So, for now, I'll say no more.

CONCLUSION

The *versari* principle and the various criminal-law doctrines it sponsors, including *versari* crimes, are betwixt and between. Modern-day retribution tells us we have good, and almost always compelling, reason to reject them. Deterrence tells us we might sometimes have good reason to accept them, but one suspects those reasons are an alibi, at least sometimes. Vengeance might credibly explain why *versari* crimes endure, but whether vengeance has any justificatory force is debatable, never mind if any force it has is strong enough to keep *versari* crimes on the books all things considered.

If human beings have a natural inclination toward retaliation, and if the *versari* principle reflects that inclination, then discovering the *versari* principle's provenance in the work of Catholic canonists, some of whom would be canonized, makes sense. Familiar with our darker inclinations, they may have been willing to allow some room for its institutionalized (and thus domesticated) expression.¹¹⁷ Or, if they harbored the *versari* intuition themselves, maybe they weren't so saintly after all. Even saints are human.

channel victims' vengeance, it, too, can serve as a justification for engaging in differential punishment.").

I add two remarks to avoid confusion. First, someone who believes revenge can explain why a result matters when the person who caused it was in some way culpable with respect to that result is not thereby committed to believing that a result matters when the person who caused it wasn't in any way culpable with respect to that result (which is what the *versari* principle avers). Second, retributivists who believe results matter can and do offer reasons other than revenge to support their belief.

If the state wanted to make revenge its aim when it burdens or coerces someone in response to their having committed a crime, it would face a raft of follow-on questions: what if no identifiable person is victimized when the accused causes the *versari* element, such that no one in particular wants revenge? What if a victim is a merciful soul and doesn't want revenge? And so on.

117. On this point, H.D.J. Bodenstein observed many years ago that the *versari* principle's endorsement of strict liability "is commonly explained as a concession of the church to popular opinion at a time when people were inclined to attach more importance to the effect caused than to the state of mind of the wrongdoer towards the effect." H.D.J. Bodenstein, *Phases in the Development of Criminal Mens Rea*, 36 S. AFR. L.J. 323, 337 (1919).