

NOTE

ON STRICT LIABILITY CRIMES: PRESERVING A MORAL FRAMEWORK FOR CRIMINAL INTENT IN AN INTENT-FREE MORAL WORLD

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The law has long recognized a presumption against criminal strict liability. This Note situates that presumption in terms of moral intuitions about the role of intention and the unique nature of criminal punishment. Two sources—recent laws from state legislatures and recent advances in moral philosophy—pose distinct challenges to the presumption against strict liability crimes. This Note offers a solution to the philosophical problem that informs how courts could address the legislative problem. First, it argues that the purported problem from philosophy stems from a mistaken relationship drawn between criminal law and morality. Second, it outlines a slightly more nuanced moral framework that both accommodates recent thinking in philosophy and preserves the correspondence between moral theory and criminal law that underwrites the presumption against criminal strict liability. Finally, it considers how the contours of this moral framework could inform judicial efforts to accommodate and constrain new criminal strict liability laws.

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INTRODUCTION

In 2003, Stacey Bettcher merged too slowly into an adjacent lane while entering a poorly marked highway work zone in Michigan. Her car clipped a construction sign, and the resulting impact killed an unseen construction worker.¹ Had this tragedy occurred ten years earlier, or ten feet farther up the highway, it would have been resolved largely through a private cause of action. A jury would have considered whether Bettcher was negligent in failing to merge and whether her negligence proximately caused the death.²

1. *State's Get-Tough Law on Work-Zone Speeders Gets First Court Review*, BUILDING TRADESMAN, May 2, 2003, available at <http://www.detroitbuildingtrades.org/newspapr/may22003.html#anchor88383>; see also David A. Moran, Editorial, *Solid Evidence: Law Is Faulty on Construction-Zone Killings*, DETROIT FREE PRESS, May 7, 2003, at A11.

2. There was disagreement at trial about whether Bettcher swerved to avoid a truck that suddenly stopped. Compare *Michigan Jury Finds Woman Not Guilty in Death of Canadian Highway Worker*, CANADIAN PRESS, May 2, 2003, with Moran, *supra* note 1. As circumstantial evidence of Bettcher's negligence, a parallel civil suit brought by a separate, injured worker determined Bettcher to be 20 percent liable, and found C.A. Hull—the general contractor overseeing the construction—80 percent liable for failing to correctly post

Instead, Bettcher became the first Michigander prosecuted under Andy's Law, which holds drivers strictly liable for a death in a work zone that occurs concurrently with a "moving violation that has criminal penalties."³ Bettcher's underlying crime was violating a license restriction: she was driving a friend's car, rather than her own.⁴ The state sought to convince a jury of her peers that, even if her conduct was neither reckless nor criminally negligent, the law nevertheless required a felony conviction with up to fifteen years in prison.⁵

The law has long recognized a presumption against criminal strict liability—the Supreme Court describes it as a "generally disfavored status"⁶—that appears to be rooted in intuitions about the role played by defendants' intentions in light of the uniquely stigmatic nature of criminal punishment. Lately, that presumption has faced two seemingly unrelated challenges. Andy's Law exemplifies the first: states are creating new strict liability crimes that are unwarranted under the naïve moral framework that justifies the presumption. Second, prominent moral philosophers have called into question one foundation of that framework: the role that agents' intentions play in evaluating moral permissibility. In response, prominent criminal theorist Douglas Husak⁷ has argued that rejecting the role of intention in evaluating moral permissibility threatens criminal law at a fundamental level.⁸

This Note rejects the view that moral philosophy threatens to undermine criminal law. In doing so, it suggests that courts adopt a method of interpreting criminal strict liability laws that would be justifiable under, or at least consistent with, the traditional moral presumption. In particular, it argues that Husak's worry conflates the existence of *some* moral–criminal correspondence with a *particular* moral–criminal correspondence. While moral theory informs criminal law, the correct correspondence does not lie between criminal wrongdoing and moral permissibility. Rather, a connection between criminal wrongdoing and moral blameworthiness—specifically, Thomas Scanlon's recent account of blame—accommodates both the moral philosopher's claim that intention is irrelevant to moral permissibility and the criminal theorist's claim that intent is essential to criminal wrongdoing.

Part I outlines a moral framework consisting of generally accepted intuitions about criminal law, which underwrites a presumption against criminal

signs notifying drivers of construction. *Hattan v. C.A. Hull, Inc.*, No. 04-11376-NI, 2005 WL 4189434, at *1 (Mich. Cir. Ct. Oct. 28, 2005) (verdict and settlement summary).

3. MICH. COMP. LAWS ANN. § 257.601c(2) (West 2006).

4. *Bitterness, Relief Follow Road Death Trial: Accused, Victim Share Nightmare That Began with Fatal Crash*, DETROIT NEWS, July 8, 2003, at A1.

5. *See Woman Found Innocent in Highway Worker's Death*, CHARLESTON GAZETTE & DAILY MAIL, May 3, 2003, at 9A.

6. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978) (citations omitted).

7. *See generally* Douglas N. Husak Home Page, DOUGLAS N. HUSAK, <http://fas-philosophy.rutgers.edu/husak/index.html> (last visited Oct. 8, 2011).

8. Douglas Husak, *The Costs to Criminal Theory of Supposing That Intentions Are Irrelevant to Permissibility*, 3 CRIM. L. & PHIL. 51, 54 (2009).

strict liability. It then demonstrates how the Supreme Court's criminal jurisprudence embodies this framework. Part II introduces two challenges for this framework. It looks first at recent state action and notices its incompatibility with the moral framework. It then considers—by way of the long-recognized doctrine of double effect—recent views that divorce intention from evaluations of moral permissibility, which give rise to Husak's worry for criminal law. Part III first disarms the challenge posed by moral philosophy. It then buttresses its defense of modern moral philosophy by introducing a slightly more nuanced moral framework that incorporates Thomas Scanlon's recent work on moral blame.⁹ Scanlon's account of blame demonstrates how seemingly disparate attitudes towards intent, held by philosophers on the one hand and criminal theorists on the other, are in fact compatible with one another. A final Section employs this nuanced moral framework to identify a class of strict liability crimes that are, perhaps surprisingly, morally justifiable. Ultimately, this analysis suggests one way courts can reconcile new strict liability crimes with the original, naïve moral framework.

I. A (NAÏVE) MORAL FRAMEWORK FOR ADDRESSING CRIMINAL STRICT LIABILITY

There is a longstanding presumption against strict liability in the arena of criminal law.¹⁰ A strict liability crime is one in which the mental state of the accused is irrelevant as to part or all of the crime; the state need only show that the accused “engaged in a voluntary act, or an omission to perform an act or duty which the accused was capable of performing.”¹¹ The term “strict liability” encompasses both offenses for which no mental state is required generally and offenses for which no mental state is required as to a particular element of the crime.¹² An example of the latter is statutory rape—an archetypal strict liability crime that requires a showing of some mental state as to the sex act itself but treats as irrelevant whether the perpetrator knew or should have known about the minority of the victim.¹³

9. T. M. SCANLON, *MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME* (2008).

10. *Staples v. United States*, 511 U.S. 600, 606 (1994) (“[O]ffenses that require no mens rea generally are disfavored” (citing *Liparota v. United States*, 471 U.S. 419, 426 (1985))); *Gypsum*, 438 U.S. at 437 (“[I]ntent generally remains an indispensable element of a criminal offense.”).

11. 21 AM. JUR. 2D *Criminal Law* § 132 (2008). Volition, which might have been thought to be a mental state, is nevertheless treated as part of a crime's actus reus. *E.g.*, *State v. Utter*, 479 P.2d 946, 951 (Wash. Ct. App. 1971).

12. See WAYNE R. LAFAVE, 1 *SUBSTANTIVE CRIMINAL LAW* § 5.5 (2d ed. 2003). The Model Penal Code identifies four types of culpable mental states: purpose, knowledge, recklessness, and negligence. MODEL PENAL CODE § 2.02 (1962).

13. See LAFAVE, *supra* note 12, § 5.5. To avoid the fuzzy margins of statutory rape doctrine and the line-drawing problems they engender, this Note uses as an illustration statutory rape only of victims of obvious minority. By way of example, the Model Penal Code suggests victims under the age of ten would fall into this category. See, *e.g.*, MODEL PENAL CODE § 213.1(d).

Admittedly, strict liability has its place in modern law—indeed, it even has a narrowly delimited place in criminal law.¹⁴ Proof problems, for example, motivate the creation of strict liability laws.¹⁵ In these settings courts and legislatures worry that a significant number of innocent parties will suffer unless a class of actors is made strictly liable for certain actions.¹⁶ In addition, strict liability is employed—particularly in tort law—to constrain behavior vicariously or to deter particularly dangerous conduct.¹⁷ Nevertheless, the law has long recognized a general presumption, albeit not without exception, against strict liability in criminal law.¹⁸

Section I.A introduces, by way of background, terminology that will appear throughout this Note. As the remainder of the Part argues, the presumption against criminal strict liability can be grounded in what this Note refers to as a *moral framework* that considers both the moral importance of agents' intentions and the justifications underlying state-sponsored social stigmatization. After introducing a naïve moral framework based on these two intuitions about criminal law, this Part reviews the Supreme Court's strict liability jurisprudence. It concludes that the Court's decisions are consistent with the presumption emerging from the naïve moral framework, while several exceptions to the Court's default presumption can be understood to be nevertheless consistent with the presumption's underlying rationales.

A. Precursors: Moral–Criminal Correspondence, Frameworks, and Two Moral Bases

The following paragraphs sketch the overarching dialectic and define some jargon appearing in this Note. This Note assumes that there exists some correspondence between morality and criminal law such that moral principles underlie classic, deep-rooted principles of criminal law. To be clear, this Note does not endorse a strong view that all criminal laws are

14. See generally Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337 (1989) (discussing justifications for instances of criminal strict liability).

15. LAFAVE, *supra* note 12, § 5.5.

16. For a classic statement of the motivations for strict products liability, see *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 440–44 (Cal. 1944) (Traynor, J., concurring). But see Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 739–40 (1960) (complicating justifications of strict liability as a deterrent in the context of criminal law). For an analysis of the burden-shifting effect strict liability rules have on prosecutors, see Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 421 (1993).

17. E.g., *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968) (respondent superior); *Spano v. Perini Corp.*, 250 N.E.2d 31, 32–34 (N.Y. 1969) (ultrahazardous activities).

18. See *Staples v. United States*, 511 U.S. 600, 605–06 (1994) (“[W]e must construe [statutes] in light of the background rules of the common law . . . in which the requirement of some *mens rea* for a crime is firmly embedded.” (citing *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436–37 (1978))).

grounded on and explained by particular corresponding moral edicts; the correspondence between criminal law and moral theory need not be one-to-one or even especially tight.¹⁹ However, the weaker and decidedly more modest claim is that moral principles underlie classic, deep-rooted intuitions about the retributive nature of criminal law.²⁰ That is, some functions map from moral theory's domain to criminal law such that principles in the latter—deep-seated intuitions without which our discourse about criminal theory would suffer greatly²¹—can be justified by principles in the former. As will be shown, the presumption against criminal strict liability is rooted in just such intuitions.²²

In order to map from the moral to the legal, there must be some moral basis from which to begin. This Note contrasts two possible candidates for the class of moral bases that justify criminal law; these moral concepts produce very different outcomes for the moral–criminal correspondence. The first concept, *moral permissibility*, is discussed by modern philosophers in the context of intent and by Douglas Husak in the context of philosophical challenges to criminal theory; discussions of moral permissibility feature prominently in Sections II.B and III.A. The second moral basis is that of *Scanlonian blame*, which is a particular understanding of blameworthiness rooted in the meaning of one's actions as it affects the relationship between the actor and the offended party. Because Scanlon develops his account of blame to contrast moral permissibility, discussion of moral blame will be the focus of Section III.B.

This Note further tries to identify an appropriate moral–criminal correspondence by looking at two distinct *moral frameworks* upon which criminal principles are justifiable.²³ These moral frameworks are meant to show how the moral domain maps onto criminal law; they illustrate a causal pathway from an abstract moral concept to its corresponding criminal theory considerations. This Part first considers a *naïve moral framework*, which consists of common and oft-discussed normative intuitions underlying and motivating criminal law. The remainder of this Part outlines the naïve moral framework and describes how that framework—or something like it—underwrites the Supreme Court's jurisprudence on criminal strict liability. Only when the naïve moral framework is found to be too underdeveloped to

19. See, e.g., Alec Walen, *Comments on Doug Husak: The Low Cost of Recognizing (and of Ignoring) the Limited Relevance of Intentions to Permissibility*, 3 CRIM. L. & PHIL. 71, 72–73 (2009) (pointing out that legal norms are less particularized than are moral norms). Walen raises separate objections to Husak's critique of modern moral philosophy; his particular objections are not the subject of this Note.

20. LaFave calls these “basic premises.” See generally LAFAVE, *supra* note 12, § 1.2(b).

21. Consider the view that prominent criticism of criminal practice falls flat without some reference to normative bases.

22. See *infra* Section I.B.

23. The term *moral framework* is not meant to import technical meaning or do any special conceptual work; rather, the term serves as a placeholder for the set of relevant moral principles that correspond with and motivate criminal law.

allow for meaningful distinctions does this Note introduce an alternative framework called the *nuanced moral framework*. Part III explores this nuanced moral framework, which is compatible with the naïve framework but allows for more subtle distinctions when seeking a moral–criminal correspondence.

B. *Two Intuitions Motivating the Presumption
against Criminal Strict Liability*

Accepting that some moral principles generally underlie classic, deep-rooted principles of criminal law, this Section introduces two normative intuitions that are commonly referred to as core aspects of criminal law and that underlie the presumption against criminal strict liability in particular. Together, these two principles represent the naïve moral framework, as contrasted with the nuanced moral framework sketched in Section III.A.2. Consider each element of the naïve moral framework below.

First is the role played by intention, broadly understood,²⁴ in explaining when and to what degree state action is appropriate. The importance of intention to law is nothing new; that a party should not be punished because of actions beyond his control is a broad claim that has purchase on all laws—or, at least, the common law and historical criminal law²⁵—and is rooted in Western conceptions of free will. Of course, this is not an absolute claim, since the benefits of strict liability can and do sometimes outweigh the tendency to require the showing of an agent’s mental state.²⁶ Nevertheless, the underlying notion of free will remains fundamental to criminal law, and the law has treated this moral standard as a presumption that needs to be overcome.²⁷

Second—and accompanying the role of intention—is the claim that the criminal law uniquely empowers state-sponsored sanctions intended to stigmatize and punish. Beyond the importance of intent generally, the uniquely stigmatic nature of criminal punishment makes it unlikely that the benefits of strict liability would ever be taken to outweigh the importance of

24. This Note focuses on a broad notion of intent, viz., intentions as an individual’s reasons for action. Criminal law also considers intention as a subset of *mens rea*, to be distinguished from knowledge, recklessness, and negligence. See MODEL PENAL CODE § 2.02 (1962). This Note does not consider this latter sense of intention. The broader notion of intent fits with the Supreme Court’s sweeping pronouncements. See *infra* Section I.C. It also jibes with what moral philosophers have in mind. See generally G.E.M. ANSCOMBE, INTENTION 9 (Harvard Univ. Press 2d ed. 2000) (1957) (distinguishing between “intention of doing [an act]” and “intention *in* doing it”).

25. E.g., *Lambert v. California*, 355 U.S. 225, 228–29 (1957) (striking down a law that penalized convicts without notice); see also MODEL PENAL CODE § 2.05 cmt. 1 (1962) (“This position [against strict liability] . . . is superimposed on the entire corpus of the law . . .”). See generally H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4–6 (2d ed. 2008).

26. See *supra* notes 14–18 and accompanying text.

27. It is far beyond the scope of this Note to consider whether and to what extent the centrality of free will in criminal theory—much less in Western thought—is well-founded.

free will in the forum of criminal law.²⁸ A common view is that criminal punishment (especially incarceration) is justified—indeed, even defined—by the particular quality of stigma it imposes on felons.²⁹ The Model Penal Code, in launching a “frontal attack” on strict liability crimes, claims that any case of criminal strict liability would be “indefensible, unless reduced to terms that insulate conviction from the type of moral condemnation that is and ought to be implicit when a sentence of probation or imprisonment may be imposed.”³⁰ The notion of desert—of punishment earned—demarcates criminal punishment from the rest of law.³¹

At issue are two normative principles: a deep-rooted respect for Western notions of free will and intention and an understanding of criminal punishment as uniquely stigmatizing or condemnatory relative to other state sanctions. Working together, these principles constitute a moral framework—which this Note identifies as the naïve moral framework—that bars, or at least strongly disfavors, the incorporation of strict liability into the practice of criminal law.

C. The Supreme Court’s Interpretive Presumption against Criminal Strict Liability

The Supreme Court’s criminal strict liability jurisprudence supports and reinforces the naïve moral framework’s normative presumption against criminal strict liability. First, this Section outlines what can best be described as the Court’s interpretive jurisprudence. Because the Court must balance its own intuitions about the nature of criminal law against the clear intent of Congress, it interprets statutes to avoid creating strict liability crimes in a variety of cases. After outlining this interpretive jurisprudence, this Section suggests that the majority of exceptions recognized by the Court can be understood as compatible with the naïve moral framework; no

28. MODEL PENAL CODE § 2.05 cmt. 1 (“[I]f practical enforcement precludes litigation of the culpability of alleged deviation from legal requirements, the enforcers cannot rightly demand the use of penal sanctions for the purpose. . . . This is too fundamental to be compromised.”).

29. For a small sampling of scholars echoing this sentiment, see DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 12 (2008) (“[P]unishments deter partly through the stigmatizing effects of a criminal conviction.”); Gordon Hawkins, *Punishment and Deterrence: The Educative, Moralizing, and Habitative Effects*, in *THEORIES OF PUNISHMENT* 163, 168 (Stanley E. Grupp ed., 1971) (“That punishment is effective in conveying social reprobation is clearly reflected in the stigmatization and the loss of social status commonly involved in criminal punishment.”); and Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 404 (1958) (“What distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies and justifies its imposition.”).

30. MODEL PENAL CODE § 2.05 cmt. 1.

31. Take the classic distinction between incarceration and commitment to illustrate the uniquely condemnatory quality of criminal sanction. *See, e.g.*, ELYN R. SAKS WITH STEPHEN H. BEHNKE, *JEKYLL ON TRIAL: MULTIPLE PERSONALITY DISORDER AND CRIMINAL LAW* 158 (1997) (identifying the stigma of criminal wrongdoing as more obvious than the stigma of mental illness, even where mental illness suggests a danger to society).

class of exceptions involves situations that activate both of the moral intuitions that made strict liability crimes unjustifiable in the first place.

1. A General Judicial Presumption against Criminal Strict Liability

The Supreme Court has identified a morally laden, historical disfavor of strict liability crimes that continues to influence its jurisprudence, particularly with respect to crimes that derive from or look like traditional crimes.³² The Court famously described the requirement of a mens rea as follows:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.³³

In the same context, the Court referred to the showing of a culpable state of mind as an “ancient requirement.”³⁴ By at least the time of Blackstone, it was seen as essential that criminal convictions reflect the presence of “a vicious will” in the accused.³⁵ This view “took deep and early root in American soil,”³⁶ with the result that strict liability remained virtually nonexistent at common law.³⁷ The sentiment expressed in *Morissette v. United States* that intention is “no provincial or transient notion”³⁸ continues to guide the Court’s criminal strict liability jurisprudence.³⁹

Yet notwithstanding this strong language, the Court has never recognized an all-out ban on criminal strict liability. Far from it, the Court has repeatedly affirmed that strict liability crimes are not per se unconstitutional.⁴⁰ This is because, though the Court has expressed its suspicion of criminal strict liability, it must weigh its reluctance against its constitutional responsibility to effectuate the will of Congress.⁴¹ Barring some finding of a

32. See, e.g., *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) (“We start with the familiar proposition that “[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.” (alteration in original) (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951))).

33. *Morissette v. United States*, 342 U.S. 246, 250 (1952).

34. *Id.*

35. See 4 WILLIAM BLACKSTONE, COMMENTARIES *21 (explaining that all excuses to crimes reduce to a want or defect of will).

36. *Morissette*, 342 U.S. at 252.

37. See *United States v. Balint*, 258 U.S. 250, 251 (1922) (“[T]he general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime . . .”).

38. *Morissette*, 342 U.S. at 250.

39. E.g., *Staples v. United States*, 511 U.S. 600, 605 (1994); *Liparota v. United States*, 471 U.S. 419, 425–26 (1985); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978).

40. See *Morissette*, 342 U.S. at 256–57; *Balint*, 258 U.S. at 250.

41. *Lambert v. California*, 355 U.S. 225, 228 (1957) (“There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition.”). The same holds for state legislatures. *Powell v. Texas*, 392 U.S. 514, 545

constitutional violation, the Court must uphold the will of the legislature in creating strict liability crimes.⁴² Rather than adopt a substantive jurisprudence that bars the expansion of strict liability crimes, the Court has instead created and relied upon an interpretive jurisprudence, according to which it presumes that the legislature shares its belief in some type of moral–criminal correspondence.⁴³ The Court routinely interprets statutes to avoid finding an actual strict liability crime,⁴⁴ often reading into statutes a mens rea requirement where none existed previously.⁴⁵ One particularly clear example occurred in *United States v. X-Citement Video, Inc.*,⁴⁶ where the Court found a statutory mens rea requirement even when doing so required repeatedly violating basic rules of grammar.⁴⁷ The Court, it seems, is willing to apply its interpretive presumption as necessary to obviate criminal strict liability.

2. The Court’s Principled Exception for Public Welfare Offenses

Notwithstanding its general efforts to construe statutes to find a mens rea requirement, the Court recognizes in its interpretive jurisprudence two classes of exceptions to its presumptive disfavor of criminal strict liability. The first class is for regulatory offenses. The second is for offenses involving inherently dangerous items or conduct. Together, these exceptions fall under the broader term *public welfare offenses*.⁴⁸ Insofar as these exceptions

(1968) (Black, J., concurring) (“[L]egislatures have always been allowed wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of a crime.”).

42. According to LaFave, only in *Lambert* has the Supreme Court found a lack of a statutory mens rea requirement to violate constitutional due process. LAFAVE, *supra* note 12, § 5.5, at 388–89 & n.25.

43. See *Staples*, 511 U.S. at 607 n.3 (“By interpreting such public welfare offenses to require at least that the defendant know that he is dealing with some dangerous or deleterious substance, we have avoided construing criminal statutes to impose a rigorous form of strict liability.” (citing *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 563–64 (1971))); *Gypsum*, 438 U.S. at 437 (holding that *Morissette* established “an interpretative presumption that *mens rea* is required”).

44. See, e.g., *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994); *Staples*, 511 U.S. 600; *Morissette*, 342 U.S. 246.

45. See, e.g., *Staples*, 511 U.S. at 605 (explaining that congressional silence as to mens rea does not preclude the Court from finding such a requirement).

46. 513 U.S. 64.

47. See *X-Citement Video*, 513 U.S. at 76–78. For a flavor, see *id.* at 83 (Scalia, J., dissenting) (“It is really quite extraordinary for the Court, fresh from having, as it says, ‘emancipated’ the adverb from the grammatical restriction . . . , to insist that the demands of syntax must prevail over legislative intent—thus producing an end result that accords *neither* with syntax *nor* with supposed intent.” (citation omitted)).

48. While the Court prefers the blanket term “public welfare offenses,” it is analytically useful to split the two apart. Cf. Wasserstrom, *supra* note 16, at 732 (“[S]trict liability offenses [ought] not be confused with Sayre’s ‘public welfare’ offenses, *i.e.*, those which he defines as essentially regulative in function and punishable by fine rather than imprisonment. This inquiry is concerned with . . . cases in which the prescribed sentences are surely not minimal in degree or merely regulative in function.”).

do not activate at least one of the two moral bases that make strict liability unjustifiable,⁴⁹ these classes represent caveats to the general presumption of the naïve moral framework.

Consider first regulatory offenses. Because they do not stigmatize guilty parties, regulatory offenses are no more of a concern in the context of strict liability than other noncriminal offenses. As may be divined from the name, regulatory offenses are acts in which criminalization serves a regulatory function.⁵⁰ These offenses are distinguished by the fact that serious punishment generally does not accompany them—fines are common, while jail time is rare and very limited—and as such they lack a heavy notion of social stigma.⁵¹ This amounts to saying that regulatory offenses lack a defining element of the moral framework that distinguishes criminal laws in the first place.⁵² Without the serious stigma, there is little reason to worry that regulatory offenses fail to violate moral intuitions about what makes a crime culpable; they do not carry the special burden that makes strict liability presumptively off limits to criminal law. Regulatory offenses, then, are a consistent departure from the naïve moral framework's *mens rea* requirement for criminal law.

The Court also recognizes the regulation of activities that are inherently dangerous as an exception to a criminal *mens rea* requirement.⁵³ Inherently dangerous offenses defy the claim that an agent could not have known his actions were ones for which state punishment was a likely outcome.⁵⁴ The guiding intuition here is that sometimes a party is presumptively on notice of his potential culpability simply by choosing to undergo certain dangerous activities.⁵⁵ In essence, society denies that a functioning individual could in

49. See *supra* Section I.A.

50. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 442 (1978) (“The criminal sanctions [under regulatory offenses] would be used, not to punish conscious and calculated wrongdoing at odds with statutory proscriptions, but instead simply to *regulate* business practices regardless of the intent with which they were undertaken.”).

51. *Morissette v. United States*, 342 U.S. 246, 256 (1952) (“[Strict liability] penalties commonly are relatively small, and conviction does no grave damage to an offender’s reputation.”); see *Staples v. United States*, 511 U.S. 600, 616 (1994) (“[T]he penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*.”).

52. One could hold that these aren’t really crimes in some important sense. This Note takes a softer view—namely, that the lack of a *mens rea* for public welfare offenses doesn’t violate core notions of criminal desert because the lack of stigma means that the generally high standards for what constitutes criminal punishment aren’t activated.

53. *E.g.*, *United States v. Freed*, 401 U.S. 601, 607 (1971) (hand grenades); *United States v. Balint*, 258 U.S. 250, 252–53 (1922) (illegal narcotics).

54. *Staples*, 511 U.S. at 611 (“[C]oncern for criminalizing ostensibly innocuous conduct is inapplicable whenever an item is sufficiently dangerous—that is, dangerousness alone should alert an individual to probable regulation and justify treating a statute that regulates the dangerous device as dispensing with *mens rea*.”).

55. *Liparota v. United States*, 471 U.S. 419, 433 (1985) (upholding strict liability crimes for conduct that “a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety”).

principle be acting accidentally (even if, in fact, they were) in cases involving inherently dangerous activities. The possession of unregistered hand grenades, for example, is an inherently dangerous activity.⁵⁶ Statutory rape of someone of obvious minority, long held to be a strict liability offense,⁵⁷ is also a classic example of inherently dangerous activity. Defendants are on notice when engaging in sexual activity with young people.⁵⁸ In that setting, the Court is willing to impute some degree of intentional conduct to actors.

To summarize, the Court has recognized a class of clearly delineated exceptions to its presumption against criminal strict liability. Both of these exceptions—what this Note calls regulatory offenses and inherently dangerous actions—are brought together under the broad umbrella of public welfare offense doctrine. By addressing the two separately, it becomes clear why both constitute principled exceptions to the presumption against strict liability: each fails to satisfy one of the two crucial moral intuitions that speak against criminal strict liability. Despite being strict liability crimes, public welfare offenses are nevertheless compatible with the naïve moral framework's presumption against criminal strict liability.

II. TWO CHALLENGES FOR THE PRESUMPTION AGAINST CRIMINAL STRICT LIABILITY

The presumption against criminal strict liability is a moral principle. Or better put, it is a principle of law that depends largely on its correspondence with an underlying moral theory, as embodied for now by the naïve moral framework. However, the presumption against strict liability faces two challenges. First, state legislatures are creating new strict liability crimes that are incongruent with the naïve moral framework and that cannot be readily classified within one of the Court's principled exceptions. At the same time and in a different arena, moral philosophers are calling into question a particular relationship between intention and moral permissibility, which has the potential to undermine one plank of the naïve moral framework that justifies the presumption against criminal strict liability. This Part introduces the tensions arising from state legislation on the one hand and moral philosophy on the other. Section II.A introduces several examples that highlight two types of recently created strict liability crimes that are inconsistent with the naïve moral framework. Section II.B introduces a recent critique in moral philosophy of the relationship between intention and moral permissibility.

56. See *Freed*, 401 U.S. 601. The *Freed* Court held there was no need to prove whether a defendant knew his hand grenades were unregistered because “one would hardly be surprised to learn that possession of hand grenades is not an innocent act.” *Id.* at 609.

57. *Morrisette v. United States*, 342 U.S. 246, 251 n.8 (1952).

58. For a view that statutory rape is instead actually a regulatory offense exception, see Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 332–33 (2003) (arguing that statutory rape made sense as a public welfare offense when a large number of sexual activities were criminalized).

The critique is especially troubling because, on Husak's account, it threatens to critically undermine the moral framework justifying criminal punishment.

A. *The Challenge Posed by State Legislatures*

State legislatures have, in recent years, shown an eagerness to create new strict liability crimes that are neither consistent with the naïve moral framework nor easily classifiable as public welfare offenses. Frequently, legislators are motivated by the perceived need to respond to some particular injustice; as discussed earlier,⁵⁹ often the goal is to make punishment more easily available to prosecutors in hard cases.⁶⁰ Strict liability crimes, once in place, can be difficult to repeal. Though some state judiciaries adopt an approach to criminal strict liability similar to that of the Supreme Court,⁶¹ others are more willing to allow strict liability crimes.⁶² Still other courts—as seen in the following Sections—are unwilling to stretch interpretations as far as the Supreme Court does. The effect of this is to limit the judiciary's ability to reinterpret a given rule in a way that accommodates a mens rea requirement.

The expansion of criminal strict liability is especially prevalent in two settings. First, states have expanded strict liability in cases in which there is some underlying conduct that, though incidental to the criminal act facing prosecution, is nevertheless deemed socially unacceptable. In this setting, states are making the accused strictly liable for one offense because he committed a second, unrelated crime. Second, states have made felons strictly liable for enhanced punishments when the underlying crime is minor but the outcome happens to be unexpectedly obvious. In particular, legislatures have targeted offenses that are in and of themselves relatively harmless but nonetheless result in death. In this second setting, states are creating an enhanced punishment for the same offense because of an unusually bad outcome. The following Sections provide real-world examples of each type of strict liability crime.⁶³

1. Unrelated Conduct Crimes

Strict liability is increasingly popular in situations involving unwanted conduct that connects to an underlying bad outcome (again, usually death). The felony murder rule is the paradigmatic case of punishing related conduct: it holds that a party to certain crimes is strictly liable for deaths

59. See *supra* notes 14–16 and accompanying text.

60. See, e.g., *Bitterness, Relief Follow Road Death Trial: Accused, Victim Share Nightmare That Began with Fatal Crash*, *supra* note 4. Andy's Law was created in response to a drunk driver's crash into a construction zone; despite paralyzing a worker, the driver served a forty-five day sentence. *Id.*

61. See, e.g., *In re Jorge M.*, 4 P.3d 297 (Cal. 2000).

62. See *infra* notes 76, 80–81 and accompanying text.

63. Discussion of whether, in practice, courts can reliably identify laws as either unrelated conduct crimes or enhanced punishment crimes is reserved for Section III.B.

occurring during or as a result of those crimes.⁶⁴ Long the *bête noir* of criminal theorists,⁶⁵ felony murder has shown resistance to reform in a majority of jurisdictions.⁶⁶ Perhaps as a compromise, most states recognize a variety of either legislative or judicial limitations. For example, most felony murder laws only attach to certain “inherently dangerous” crimes,⁶⁷ and cannot be applied where homicide merges with the underlying crime.⁶⁸

But punishing individuals for unrelated bad conduct is not exclusive to felony murder. As seen, Andy’s Law makes drivers strictly liable for any vehicle-related death that occurs inside a work zone, provided the driver concomitantly committed another driving offense with criminal penalties.⁶⁹ Insofar as many such driving offenses—for example, driving with a restricted license—are themselves strict liability offenses, Andy’s Law has the effect of making drivers strictly liable for the crime of killing a worker inside a construction zone.⁷⁰ Moreover, it does not seem possible to categorize this law as one of the established exceptions to criminal strict liability. Andy’s Law is certainly not regulatory in nature; the harsh punishment it imposes strongly suggests the opposite. Nor does it seem accurate to describe driving a car as an inherently dangerous activity akin to handling hand grenades.⁷¹

Beyond driving accidents, drug-related accidents too are a popular target for criminal strict liability.⁷² This is true even in cases where the connection to drug use (or production) seems, at best, tenuously connected to the underlying wrongful act. New Jersey has for the past two decades held parties

64. 40 AM. JUR. 2D *Homicide* § 65 (2008).

65. Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 966 & n.3 (2008) (setting forth an extensive list of recent criticisms of the felony murder rule). However, at least one criminal theorist has argued in favor of the felony murder rule. Kenneth W. Simons, *When Is Strict Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1121–24 (1997) (defending the rule as negligence for inherently dangerous felonies).

66. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.06[A], at 521–22 (5th ed. 2009).

67. See *State v. Kyles*, 607 A.2d 355, 367 (Conn. 1992). For example, the Supreme Court of California has placed substantial limitations on its judge-made felony murder doctrine. *People v. Howard*, 104 P.3d 107, 113–14 (Cal. 2005).

68. See, e.g., *People v. Smith*, 678 P.2d 886, 891 (Cal. 1984). The fact that felony murder can’t merge with the underlying crime confirms that it is a case of punishing actors for an unrelated offense.

69. See *supra* notes 1–3 and accompanying text; MICH. COMP. LAWS ANN. § 257.601c (West 2006).

70. See Moran, *supra* note 1.

71. In *United States v. Staples*, the Court distinguished gun ownership from the possession of grenades. 511 U.S. 600, 611–12 (1994). Instead, the Court analogized gun ownership to car ownership precisely because it thought that car ownership was not inherently dangerous. See *id.* at 614.

72. There is some reason to think that drugs are inherently dangerous objects under the Court’s jurisprudence. See *id.* at 610 (suggesting that the Court’s decision *Balint* was motivated by the fact that drugs are dangerous). Nevertheless, this is no objection in this particular setting; the issue here is the possession or sale of drugs per se, but rather conduct concurrent with—but substantially unrelated to—drug use.

strictly liable for drug-related deaths.⁷³ Any party involved in manufacturing, distributing, or dispensing Class I or Class II substances is strictly and criminally liable for any death the proximate cause of which is the drug in question.⁷⁴ The law has come under scrutiny for punishing drug dealers, whose underlying crime of providing drugs is entirely disconnected from the death that results.⁷⁵ Nevertheless, the Supreme Court of New Jersey has declined to read in a mens rea requirement; instead, it has upheld the strict liability status of the law.⁷⁶

Likewise, Michigan is one of several states to have criminalized operating a vehicle with the presence of any illicit substances.⁷⁷ In Michigan, any detectable level of a number of Schedule 1 drugs is sufficient to commit this strict liability crime, which comes with a fifteen-year prison sentence.⁷⁸ Until June of 2010, a positive test for marijuana metabolites alone established liability for this crime, notwithstanding the fact that metabolites remain present in the human body for weeks following ingestion.⁷⁹ While Michigan's Supreme Court rolled back this particularly abusive application of the law, in doing so it upheld the strict liability elements of the law itself.⁸⁰ As a result, Michigan law continues to punish parties, even where those individuals are not legally impaired as drivers.⁸¹

2. Enhanced Punishment Crimes

Punishing unrelated conduct is only one way that states enshrine strict liability. While the application of Andy's Law allows for extreme outcomes in some cases—even purely accidental outcomes are criminalized—states frequently use strict liability to bootstrap serious crimes for which a substantially higher mens rea would otherwise be required into minor misconduct. Often, these cases involve underlying crimes in which death results.

Texas, for example, created an enhanced penalty for nonforceful evasion of arrest that results in a police officer's death.⁸² Prior to the enhanced

73. N.J. STAT. ANN. § 2C:35-9 (West 2005).

74. *Id.*

75. See Laurie L. Levenson, *Are Drug Dealers Killers?*, NAT'L L.J. (Nov. 21, 2005), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=900005441517>.

76. See *State v. Maldonado*, 645 A.2d 1165, 1170–77 (N.J. 1994).

77. MICH. COMP. LAWS ANN. § 257.625(8) (West 2006). Other states include Arizona, Georgia, Illinois, Indiana, Iowa, Minnesota, Pennsylvania, Rhode Island, Utah, and Wisconsin. See Donna Leinwand, *Growing Danger: Drugged Driving*, USA TODAY, Oct. 22, 2004, at A1.

78. See MICH. COMP. LAWS ANN. § 257.625(8)–(9).

79. *Drugs and Human Performance Fact Sheets: Cannabis/Marijuana* (Δ^9 -Tetrahydrocannabinol, THC), NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <http://www.nhtsa.gov/people/injury/research/job185drugs/cannabis.htm> (last visited Oct. 8, 2011).

80. *People v. Feezel*, 783 N.W.2d 67 (Mich. 2010).

81. *Id.* at 79–80 (citing *People v. Derror*, 715 N.W.2d 822, 832 (Mich. 2006)).

82. See TEX. PENAL CODE ANN. § 38.04(b) (West 2011).

penalty's enactment, "evading arrest" was a Class B misdemeanor with a maximum sentence of 180 days; the current law mandates 2 to 20 years of incarceration.⁸³ Meanwhile, Delaware holds drivers strictly liable for causing a death while committing a traffic offense.⁸⁴ Although the state identifies the crime as a misdemeanor, it nevertheless carries a maximum sentence of 30 months in prison.⁸⁵ Recent case law confirms that this crime of "operating a vehicle causing death" is indeed intended to be a strict liability crime.⁸⁶ And following *Apprendi v. New Jersey*,⁸⁷ Illinois began to convert several of its statutory presumptions into strict liability elements. For example, Illinois's new strict liability crime—aggravated DUI—replaced the reckless homicide presumption for drunk driving; drunk drivers are now automatically guilty, without a showing of fault in the underlying accident, if "great bodily harm" befalls a nondriver.⁸⁸

To be clear, objecting to state action here does not entail that agents who bring about death by their actions should walk away with impunity. The underlying preexisting offense will still be there for a jury to decide, and the relevant circumstances will inform the severity of civil punishment where appropriate. The concern with strict liability for enhanced punishments, however, is that the social stigma and physical suffering associated with criminal conviction and incarceration is excessive, and thus morally inappropriate, for a mild offense.⁸⁹

B. *The Challenge Posed by Moral Philosophy*

Thus far, the presumption against criminal strict liability is a principle of law that depends largely on its correspondence with an underlying moral theory, as embodied by a naïve moral framework consisting of intuitions about both the nature of criminal punishment and the intentions of agents.⁹⁰ It looks troubling, then, when recent work in moral philosophy takes the

83. Gerald S. Reamey, *The Growing Role of Fortuity in Texas Criminal Law*, 47 S. TEX. L. REV. 59, 87 (2005).

84. DEL. CODE ANN. tit. 21, § 4176A (West 2005).

85. *Id.* The length of incarceration belies the notion that this is a misdemeanor in any serious sense; misdemeanors are traditionally capped at a maximum sentence of one year. See MODEL PENAL CODE § 1.04(4) (1962).

86. *Hoover v. State*, 958 A.2d 816, 820 (Del. 2008).

87. 530 U.S. 466 (2000). In *Apprendi*, the Court held that any factual element that may affect sentencing must be decided by a jury.

88. 625 ILL. COMP. STAT. ANN. 5 / 11-501(d) (West 2008); Theodore A. Gottfried & Peter G. Baroni, *Presumptions, Inferences, and Strict Liability in Illinois Law: Preempting the Presumption of Innocence?*, 41 J. MARSHALL L. REV. 715, 738–39 (2008). Ironically, this statute was created because the Illinois Supreme Court worried that a statutory presumption that drunk drivers were criminally reckless would unconstitutionally deny those drivers their right to a presumption of innocence. *Id.* at 737; see *People v. Pomykala*, 784 N.E.2d 784, 791 (Ill. 2003).

89. *Cf. Dean v. United States*, 129 S. Ct. 1849, 1856 (2009) (Stevens, J., dissenting) ("Accidents happen, but they seldom give rise to criminal liability.").

90. See *supra* Section I.B.

position that agents' intentions are irrelevant to determining whether the underlying action was itself permissible. Indeed, Douglas Husak suggests that accepting the irrelevance of intention to moral permissibility would require reconceptualizing core elements of our criminal practice.

This Part introduces, by way of the *doctrine of double effect*, recent philosophical debate over the role played by intentions in assessing moral permissibility. It then considers Husak's concern: critics of double effect embrace a view of intention that fundamentally conflicts with one of the two intuitions underwriting criminal law generally and the naïve moral framework in particular.

1. The Doctrine of Double Effect and the Growing Irrelevance of Intentions

Appreciating the concern raised by moral philosophy requires considering the doctrine of double effect ("DDE"). DDE is a longstanding⁹¹ and widespread view in moral philosophy that "sometimes it is permissible to cause such a harm as a side effect (or "double effect") of bringing about a good result even though it would not be permissible to cause such a harm as a means to bringing about the same good end."⁹² To make this clear, consider an example drawn from the philosophical literature that reflects current reasoning in international humanitarian law.⁹³ Compare a terrorist bomber to a military pilot, both of whom release explosives that cause the death of civilians.⁹⁴ The pilot intends to blow up, say, a military base; nevertheless, collateral damage from this bombing will foreseeably kill innocent civilians. The terrorist, by contrast, intends to kill innocent civilians in order to sap his enemies' morale. While both bombers may end up killing the same number of civilians in completing their missions, DDE suggests the terrorist is the

91. Various formulations of DDE have been central to Catholic reasoning since the writings of Thomas Aquinas. 3 THOMAS AQUINAS, *Of Murder*, in THE SUMMA THEOLOGICA OF ST. THOMAS AQUINAS pt. II-II q. 64, art. 7 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1911); see also F.J. CONNELL, *Double Effect, Principle of*, in 4 NEW CATHOLIC ENCYCLOPEDIA 880, 880–81 (Berard L. Marthaler et al. eds., Gale 2d ed. 2003) (1967).

92. Alison McIntyre, *Doctrine of Double Effect*, STAN. ENCYCLOPEDIA PHIL. (Sept. 7, 2011), <http://plato.stanford.edu/entries/double-effect/>.

93. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict art. 48, *adopted on* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I].

94. One of many formulations of this example can be attributed to Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 292–93 (1991). For an excellent recap of the DDE debate, along with many of the standard examples in the literature, see T.A. CAVENAUGH, *DOUBLE-EFFECT REASONING: DOING GOOD AND AVOIDING EVIL* (Oliver O'Donovan ed., 2006).

morally worse of the two because he *intends* to kill civilians, whereas the military pilot does not intend admittedly foreseeable deaths.⁹⁵

DDE reasoning appears outside of the international law context. For example, the Supreme Court explicitly adopted a DDE-style approach in *Vacco v. Quill*, which took up the distinction between “terminal sedation” and “physician-assisted suicide.”⁹⁶ On the Court’s view, terminal sedation may be foreseeably fatal to the patient, but doctors administering such sedation intend to ease the patient’s suffering and do not intend to euthanize their patient.⁹⁷ By contrast, assisted suicide requires intent to cause death. Ultimately, the Court upheld the two actions as legally distinct, and found that while terminal sedation was legally permissible, assisted suicide was not. DDE-style justifications continue to prove popular in medical settings, where a single treatment may simultaneously produce a beneficial outcome and a destructive one.⁹⁸

2. Modern Skepticism to DDE

DDE has recently come under increasingly heavy fire from an intellectual position whose critique threatens to affect the naïve moral framework.⁹⁹ Critics have posed a barrage of thought experiments—most notably, Judith Jarvis Thomson’s “Loop Problem”—meant to show that the work done by the intent/foresight distinction, while appealing, is nevertheless wrong.¹⁰⁰ They argue that the intentions behind an agent’s actions do not determine whether that action is morally permissible.¹⁰¹ By one estimate, a majority of

95. *But see* Thomson, *supra* note 94, at 293 (“Can anyone really think that the pilot should decide whether he may drop the bombs by looking inward for the intention with which he would be dropping them if he dropped them?”).

96. 521 U.S. 793, 807 n.11 (1997).

97. Many of the scholars mentioned in this Note entered an amicus brief on the issue of DDE. Brief for Ronald Dworkin et al. as Amici Curiae in Support of Respondents, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (No. 95-1858), *Vacco v. Quill*, 521 U.S. 793 (1997) (No. 96-110), 1996 WL 708956. For further criticism of *Vacco* and a discussion of the implicit role played by DDE in American jurisprudence, see Edward C. Lyons, *In Incognito—the Principle of Double Effect in American Constitutional Law*, 57 FLA. L. REV. 469 (2005).

98. *E.g.*, Susan Anderson Fohr, *The Double Effect of Pain Medication: Separating Myth from Reality*, 1 J. PALLIATIVE MED. 315 (1998).

99. DDE has long been a target of criticism, most notably for what is referred to as the “closeness problem.” *E.g.*, JONATHAN BENNETT, *THE ACT ITSELF* (1995); Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, in *KILLING AND LETTING DIE* 266 (Bonnie Steinbock & Alastair Norcross eds., 2d ed. 1994); H.L.A. HART, *Intention and Punishment*, in *PUNISHMENT AND RESPONSIBILITY*, *supra* note 25, at 113. This Note does not consider discussions of DDE beyond the critique introduced in this Section.

100. This Note avoids the endless discussion of “trolley problem” hypotheticals. For those interested in the details of Thomson’s “looping variant” and its application to DDE, see Judith Jarvis Thomson, Comment, *The Trolley Problem*, 94 YALE L.J. 1395, 1401–03 (1985).

101. This is not to say that DDE’s explanations of examples like terrorist/pilot, *see supra* Section II.B.1, are not appealing. Rather, recent critics have focused on giving ac-

moral philosophers subscribe to some variant of an account of moral action in which intent is irrelevant to the moral calculus of an agent's actions.¹⁰² The accuracy of this estimate notwithstanding, a surprising number of prominent philosophers agree that an agent's intentions are not, as DDE suggests, the determinate factor of moral permissibility.

Looking through the recent philosophical literature, one finds notable philosophers agreeing with this critique. Several critics trace their arguments back to a 1980 Tanner Lecture by philosopher of language Jonathan Bennett, who claimed as follows:

[I]t is a mistake to think of first-order morality—morality for the guidance of deliberating agents—as making any use of the concept of the deliberator's future intentions. The morality I consult as a guide to my conduct does also guide my intentions, but not by telling me what I may or may not intend. It speaks to me of what I may or may not do, and of what are or are not good reasons for various kinds of action¹⁰³

Extending Bennett's analysis, renowned moral philosopher Judith Jarvis Thomson claimed that "what an agent intends (as opposed to merely foreseeing) in acting is irrelevant to the moral permissibility or impermissibility of his action."¹⁰⁴ Ethicist Matthew Hanser has suggested that arguments against the role of intentions in DDE extend to analysis of moral permissibility broadly.¹⁰⁵ Finally, prominent moral and political philosopher Thomas Scanlon—whose distinction between permissibility and blame features prominently in Part III—recently described intentions as important "only in a derivative way."¹⁰⁶ Scanlon said further, "In explaining why certain actions are impermissible, people often refer to intent—to an agent's reasons for acting—when in fact what makes these actions wrong is the considerations that count against it, not the agent's view of those considerations."¹⁰⁷ Regardless if this is the majority position of moral philosophers, the rejection of the role played by intention—at least in the context of DDE—is supported by prominent figures in the moral philosophy community.

counts of why DDE *appears* appealing in these examples while at the same time rejecting it. See *infra* Section III.A.2 for one such account.

102. Husak, *supra* note 8, at 52–53. *But see* Walen, *supra* note 19, at 72–73 (arguing that few, if any, philosophers agree with Husak's characterization of the problem).

103. Jonathan Bennett, Keynote Address at the Oxford University's Tanner Lectures on Human Values: Morality and Consequences 97 (May 9, 16 & 23, 1980), *available at* <http://www.tannerlectures.utah.edu/lectures/documents/bennett81.pdf>.

104. Judith Jarvis Thomson, *Physician-Assisted Suicide: Two Moral Arguments*, 109 *ETHICS* 497, 516 n.18 (1999).

105. Matthew Hanser, *Permissibility and Practical Inference*, 115 *ETHICS* 443, 454 (2005) ("Although one cannot . . . refute the formal thesis that intentions are relevant to permissibility simply by refuting the principle of double effect, some of the familiar objections to the principle of double effect are also objections to the formal thesis.")

106. SCANLON, *supra* note 9, at 40.

107. *Id.* at 37.

3. How the Critique of DDE Threatens to Undermine Criminal Law

Rejecting a relationship between intent and moral permissibility may effectively disarm DDE. But as Husak points out, there is no easy way to cabin the rejection of intention in the DDE setting from the rejection of it in other conceptual analyses of moral wrongdoing.¹⁰⁸ Husak focuses particularly on the effect that divorcing intention from moral permissibility would have on theories of criminal law. For the purposes of this Note, if Husak's concern is correct, then modern moral philosophy threatens a core element of the naïve moral framework that serves as a normative basis for the Supreme Court's aversion to criminal strict liability.

Husak begins with the general idea—as does this Note—that there should be some correspondence between moral theory and criminal law. In particular, he claims that criminal law should be largely governed by a “wrongfulness constraint” that itself is derived largely from moral philosophy.¹⁰⁹ With that in mind, Husak has serious concerns for the consequences of extending irrelevance-of-intention reasoning to criminal practice; he claims that the disagreement among philosophers about “the role played by mental states generally, and by intentions in particular, in evaluating the permissibility or wrongfulness of actions” would have vast consequences for criminal practice.¹¹⁰ The law of criminal attempts, for one, would all but cease to exist.¹¹¹ Negligent homicide would be indistinguishable from premeditated, first-degree murder. In short, “the costs of accepting [the DDE critics' account] throughout the substantive penal law would be enormous, would echo throughout all of criminal law theory, and should not be paid lightly.”¹¹²

Husak raises the possibility that severing the relation between intention and moral permissibility would make irrelevant the moral–criminal correspondence theory. Without this correspondence, the presumption against strict liability would lose its normative justification,¹¹³ and the floodgates would open to a massive revision of criminal law. Yet, by Husak's account, this result is precisely what recent critics of DDE implicitly endorse.

III. A (SLIGHTLY MORE NUANCED) MORAL FRAMEWORK FOR ADDRESSING CRIMINAL STRICT LIABILITY

Part II introduced two challenges—one practical, one philosophical—for the naïve moral framework and its presumption against criminal strict

108. Husak, *supra* note 8, at 53 (“Exactly why these theorists are more interested in undermining something they characterize as DDE rather than in examining [the irrelevance of intentions] directly is a mystery I cannot resolve.”).

109. *Id.* at 52.

110. *Id.* at 52–53.

111. *Id.* at 62–64 (discussing the importance of intentions to attempt law, and questioning accounts of attempts that do not refer to agents' intentions).

112. *Id.* at 54.

113. *See supra* Part I.

liability. This Part considers a resolution of the philosophical worry Husak raises—a way to conceive of the naïve framework as compatible with modern thinking on intent. In doing so, it lays the groundwork for addressing the practical worry of creeping criminal strict liability. Section III.A argues that Husak has conflated a particular correspondence between law and morality with the need for a correspondence generally. It then considers a slightly more nuanced moral framework that accommodates modern philosophy while squaring it with intuitions about criminal law. Section III.B applies this new framework to the types of strict liability crimes from Section II.A. It finds that enhanced punishment crimes are justifiable, at least in principle, under the new framework, and suggests a revision to the Supreme Court’s jurisprudence. By resolving the philosophical worry, this Note suggests an interpretive approach to explaining, and hopefully avoiding, troubling situations arising under Andy’s Law and its analogues.

A. Saving Criminal Law from DDE’s Critics

Husak is right to worry about preserving a moral–criminal correspondence. However, this Section argues that the recent critics of DDE need not reject their assessment. In truth, the claim that intentions are generally irrelevant to an analysis of moral permissibility does not undermine criminal law in the way Husak suggests. This Section reconsiders Husak’s argument and unpacks a conflation of moral theory broadly and moral permissibility in particular. It then suggests an alternate framework that incorporates Scanlon’s analysis of moral blame and that provides a moral–criminal correspondence that avoids Husak’s troubling conclusion. This slightly more nuanced moral framework accommodates the critics of DDE, creates a plausible correspondence between moral philosophy and criminal law that is consistent with the naïve moral framework, and reinforces the central role of intentions in criminal law.

1. How the Critique of DDE Does Not Undermine Criminal Law

Reconsider the conclusion, labeled CN below, that recent critiques of DDE undermine the normative foundations that counsel against criminal strict liability. The conclusion relies on three premises developed throughout this Note. The first premise, labeled P1 below, is that there is some correspondence between moral philosophy and criminal theory such that the former justifies the latter’s presumption against criminal strict liability.¹¹⁴ The second premise, labeled P2 below, is that criminal law generally considers, and should continue to consider, the intentions of agents when asking whether some action merits criminal punishment.¹¹⁵ The third premise, labeled P3 below, states that modern moral philosophers—or some substantial or esteemed portion of them—believe that intent is irrelevant to determining

114. *See supra* Section I.A.

115. *See supra* Section I.A.

the moral permissibility of an agent's actions.¹¹⁶ This argument can be represented as follows:

- P1. There is a correspondence between moral theory and criminal wrongdoing.
- P2. Agents' intentions are essential to determine whether an action is criminal—that is, whether it amounts to criminal wrongdoing.
- P3. Modern moral philosophy denies that an agent's intentions determine the moral permissibility of his actions.
- CN. Rejecting intention's role in determining moral permissibility upends criminal law's practice of determining whether an action is criminal.¹¹⁷

Setting up the problem in this way makes one solution to the problem clear. Perhaps observers conflate moral theory (in P1) with moral permissibility (in P3); whereas P1 draws a connection between criminal wrongdoing and the entire domain of moral theory, P3 connects criminal wrongdoing to the particular concept of moral permissibility. The argument assumes that moral permissibility, rather than some other normative concept, corresponds with criminal wrongdoing.¹¹⁸ Of course, there could be some other moral concept for which intention is relevant, and that concept could be the moral principle to which criminal wrongdoing corresponds. Consider then the following additional premise:

- P4. There exists some correspondence between moral theory and criminal wrongdoing other than that between moral permissibility and criminal wrongdoing.

The mere possibility of P4 does not go far in defusing Husak's concerns; at best, it allows for the possibility that CN does not follow deductively from P1–P3. Logical possibility, however, is a low bar to clear.

An alternative correspondence theory would bolster the argument that modern moral philosophy poses merely an apparent threat. Unfortunately, the naïve moral framework relied on throughout this Note is not robust enough to accomplish this purpose. While grounded on intuitions about the nature of punishment and the special status of criminal law,¹¹⁹ the naïve moral framework paints a story of the nature of intention that is simply too rudimentary to ameliorate Husak's worry. What is needed, then, is a more nuanced moral framework that corresponds with criminal wrongdoing even

116. See *supra* Section II.B.

117. This presentation is similar to, and inspired by, Walen's exposition of Husak. Walen, *supra* note 19, at 71–72.

118. Stuart Green suggests “[m]oral wrongfulness involves conduct that violates a moral norm or standard.” Stuart P. Green, *Why It's a Crime To Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1551 (1997). Further, he distinguishes wrongfulness from both harmfulness and culpability; the three moral concepts figure heavily into normative analyses of criminal law, and the concepts are both “analytically distinct,” *id.* at 1552, and not “entirely separable,” *id.* at 1553.

119. See *supra* Section I.A.

while preserving the important role played by intentions in determining some type of criminal wrongdoing.

As it turns out, Scanlon's recent work on moral blame suggests a viable alternative correspondence. Moreover, Scanlon introduces his account of blame at the same time that he refutes DDE in precisely the way Husak finds objectionable. As such, an appeal to Scanlonian blame is not ad hoc; the account is a natural candidate for an alternative correspondence theory.

2. Scanlonian Blame and a Slightly More Nuanced Moral Framework

A full exposition of Scanlon's project would exceed the scope of this Note. For these purposes the focus will be how Scanlon's account can both accommodate the criticisms of DDE and consider agents' intentions in moral philosophy. The key insight is as follows: intentions can be irrelevant to moral permissibility while still being relevant to some other moral calculus. As it turns out, intentions are highly relevant to analyses of moral blame, and moral blame is a more likely candidate for a normative foundation of criminal law.

Scanlon agrees with the critics of DDE: intentions do not fundamentally determine the permissibility of an action.¹²⁰ In inquiring why DDE nevertheless appears so appealing in certain contexts, Scanlon distinguishes permissibility from the closely related but distinct concept of *meaning*. Scanlon defines the meaning of an action as "the significance, for the agent and others, of the agent's willingness to perform that action for the reasons he or she does."¹²¹ Meaning and permissibility are not exclusive but rather independent. Scanlon states as follows:

The permissibility of an action and its meaning are interrelated. . . . But the meaning of an action can vary independently of its permissibility. Injuring you intentionally and negligently inflicting the same injury are both impermissible but have different meanings: the former reflects outright hostility to your interests, the latter only a lack of sufficient care.¹²²

To appreciate this distinction, imagine a hypothetical person named Fletcher, prosecuted under Andy's Law.¹²³ Fletcher's underlying criminal act is driving on the populated shoulder of a road under construction. Doing so is morally impermissible, independent of why Fletcher did so. That is, his intention—whether he swerved onto the shoulder in order to hit a worker or because he was being careless—is irrelevant to the question of whether the action itself is permissible. Unlike permissibility, the meaning of an action depends in large part on the agent's intentions (or, alternately, the

120. SCANLON, *supra* note 9, at 39 ("[A]lthough the idea of acting intentionally plays a role in characterizing a particular form of morally objectionable action, it does not in this case play a role in drawing the line between what is permissible and what is impermissible.").

121. *Id.* at 4.

122. *Id.* at 55.

123. The new name is meant to distinguish the hypotheticals used here from the real-world application of Andy's Law. See *supra* notes 1–3 and accompanying text.

agent's reasons for action).¹²⁴ For this example, whether Fletcher intended to hit a worker matters; however, on Scanlon's account, it matters because Fletcher's intentions says something about the *meaning* of his actions, or the significance of his actions to those affected and to others.¹²⁵

Scanlon's account of meaning lays the groundwork for a moral concept that is highly relevant to criminal law: *blame*.¹²⁶ For Scanlon, to deem an action as blameworthy "is to claim that the action shows something about the agent's attitudes toward others that impairs the relations that others can have with him or her."¹²⁷ On this account, the meaning of an action—and thus, the agent's reasons for acting—is highly influential in determining whether and to what degree an action is blameworthy.¹²⁸ By contrast, permissibility is independent of moral blame; says Scanlon, "[T]he blameworthiness of an action depends on the reasons for which a person acted, in ways that . . . impermissibility does not."¹²⁹

Returning to Fletcher, it would be morally relevant whether he intended to cause harm to a construction worker, but only because his intentions affect what that impermissible act means to the parties involved.¹³⁰ Attitudes of those affected, for example, would be entirely different if Fletcher were careless, malicious, or entirely blameless, even if the underlying action were consistently impermissible. The degree to which an act is blameworthy is determined by the impairment suffered by the parties' relationship.

Moral blame improves the naïve moral framework for assessing criminal wrongdoing. For one, notions of blameworthiness and culpability jibe with intuitions about criminal theory that guide the initial moral framework. The *Morissette* Court argued that mens rea requirements "protect those who

124. SCANLON, *supra* note 9, at 4 ("Although permissibility does not, in general, depend on an agent's reasons for action, meaning obviously does . . ."). Intentions are best understood as a subset of reasons for action, though the conflation here is appropriate. *See id.* at 10–11. Moreover, to the extent that intentions affect permissibility, Scanlon argues that in fact it is meaning that is determining permissibility. *See id.* at 4.

125. *See id.* at 4, 13 ("The difference between causing harm intentionally and doing so negligently, however, is not a difference in *permissibility*. Both are generally impermissible. The difference between them lies, rather, in the kind of fault that is involved when an agent acts impermissibly in these ways.").

126. Scanlon calls blame "a species of meaning." *Id.* at 7.

127. *Id.* at 128.

128. To connect more tightly Scanlon's attitudinal account of blame with intentions, consider the following statement: "The agent's reasons for acting . . . are what constitute his attitudes toward others, and what have the implications that blame involves . . ." *Id.* at 152–53.

129. *Id.* at 152.

130. It is beyond the scope of the Note to delve too deeply into the distinction between blameworthiness—an objective, impersonal analysis—and the act of blaming, which has a personal component based on how the meaning of an action impaired the relationship between parties. Suffice it to say, Scanlon's account creates space for a moral relationship that all actors hold with every other actor; this creates space for moral blameworthiness and makes sense of the idea of strangers having their relationships impaired.

were not *blameworthy* in mind.”¹³¹ Likewise, the Court in *Liparota* entertained whether through strict liability Congress “dispense[d] with the only morally blameworthy element in the definition of the crime.”¹³² Meanwhile, moral blameworthiness informs the idea that there is a uniquely stigmatic nature of criminal punishment; as Hart says, “[I]t is necessary to be able to say in good conscience in *each* instance [of a criminal sanction] that the violation was blameworthy and, hence, deserving of the moral condemnation of the community.”¹³³ At the very least, a correspondence between moral blame and criminal culpability fits better than moral permissibility and criminal wrongdoing. Admittedly, applying Scanlon’s account of moral blame to the criminal law could require further tinkering.¹³⁴ Still, this framework embraces criticism of DDE while simultaneously accommodating a plausible correspondence between moral philosophy and criminal law. Moreover, it is consistent with the naïve moral framework: intention remains a central element of criminal law, and it gives content to the unique character of criminal stigma. This slightly more nuanced moral framework preserves a moral–criminal correspondence that justifies a strong presumption against criminal strict liability.

The nuanced moral framework itself need not be accurate for that point to stand; that plausible grounds for an alternative moral–criminal correspondence exist is sufficient to make P4 a worthwhile objection to Husak’s concern.¹³⁵ Even if this particular account ultimately fails as a coherent correspondence, the nuanced moral framework nevertheless strongly suggests that alternate correspondences *can* exist. At a minimum, that alternative moral–criminal correspondence theories are plausible tempers the concern that recent critiques of DDE unwind the fundamentals of criminal law.

B. What Moral Philosophy Can Tell Us about State Action

The preceding Section gives a plausible reason to suspect that modern moral philosophy is compatible with criminal law. With that very modest thesis in place, it is worth considering whether to accept that the nuanced moral framework itself. This Section considers briefly how, in addition to resolving the philosophical worry, the nuanced moral framework can deter

131. *Morrisette v. United States*, 342 U.S. 246, 252 (1952) (emphasis added).

132. *Liparota v. United States*, 471 U.S. 419, 423 (1985).

133. Hart, *supra* note 29, at 412; *see also, e.g.*, Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1527 (1992) (“[C]riminal convictions for serious nonregulatory offenses convey the message that the offender was morally responsible for his crime and thus deserves moral blame for what he has done.”).

134. For example, Scanlon himself doubts that the State, as a collective agent, has the capacity to blame. SCANLON, *supra* note 9, at 162. Other scholars are more sympathetic to the idea of attributing such qualities to collective agents. *See, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1520–27 (2000); *see also infra* notes 144–147.

135. *See supra* Section III.A.1.

the other challenge for criminal strict liability: the creep of strict liability crimes by state legislatures. The Section compares one type of strict liability crimes—enhanced punishment crimes—with the problem of moral luck, a phenomenon noticed in philosophy. The nuanced moral framework offers some explanation for this phenomenon. It then argues that the analogy to moral luck suggests a qualified justification for enhanced punishment crimes. The upshot is twofold. For one, it explains prosecutions like that of Stacy Bettcher. Second, it suggests how the interpretive jurisprudence of criminal strict liability could be extended to handle Andy's Law and its counterparts.

1. Moral Luck and Enhanced Punishment Crimes

Section II.A.2 identified enhanced punishment crimes as those for which a particularly bad outcome generated a harsher treatment than would otherwise be anticipated for the underlying crime. The claim was that the severity of the punishments could not be justified. But it avoided a stronger claim—that *no* enhanced punishments are justifiable, no matter how minor the enhancement—in part because the notion that outcomes should determine the punishment is both intuitively plausible and a well-established feature of criminal law.¹³⁶ This intuition reflects the puzzle—what philosophers Bernard Williams and Thomas Nagel refer to in a pair of articles as the problem of “moral luck”¹³⁷—that individuals are held culpable and punished as much for bad luck as for morally impermissible conduct. For example, though reckless driving that injures no one is wrong in some sense, most would agree that reckless driving resulting in a bad outcome—death—is somehow morally worse.¹³⁸ Our intuitions suggest that criminal law should distinguish these two cases. However, the culpable mental states held by the drivers, rather than features of the world beyond their control, are exactly identical.

Scanlon's account of moral blame gives some insight into this problem of moral luck. Recall that Scanlon's notion of blame adjusts the relationship between affected parties.¹³⁹ On his account, the actual wrongful outcome, as distinct from the mere possibility of wrongful outcome, plays “a special role in making blame . . . appropriate.”¹⁴⁰ Notwithstanding the fact that bad luck

136. For an obvious example, consider that the only distinction between certain instances of attempted homicide and homicide is the outcome.

137. T. Nagel, *Moral Luck*, in 50 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, SUPPLEMENTARY VOLUME 137, 140 (1976), reprinted in THOMAS NAGEL, MORTAL QUESTIONS 24, 38 (Canto ed. 1991) The focus of this Note is on a species of moral luck concerning moral assessments based, in part, on results beyond the control of the moral agent. *Id.*; B.A.O. Williams, *Moral Luck*, in 50 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, SUPPLEMENTARY VOLUME, *supra*, at 115, reprinted in Bernard Williams, MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980, at 20 (1981).

138. See generally Dana K. Nelkin, *Moral Luck*, STAN. ENCYCLOPEDIA PHIL. (June 3, 2008), <http://plato.stanford.edu/entries/moral-luck/>.

139. See *supra* note 126 and accompanying text.

140. SCANLON, *supra* note 9, at 158–59.

explains the different outcome between two otherwise identically reckless drivers, on Scanlon's account the bad outcome "multiplies the significance of his fault" for the relationship of those parties affected.¹⁴¹ A bad outcome is the base from which injured parties derive the meaning of an offender's act. It anchors the assessment of meaning¹⁴² and thus the determination of an action as blameworthy. The same action becomes more blameworthy where it produces a bad outcome; the unlucky reckless driver has done more than the lucky one has to negatively affect any relationship with the injured party.

The nuanced moral framework, then, has a possible justification for one of the two classes of strict liability crimes now popular with state legislatures. This approach suggests that, under the more nuanced moral framework, enhanced punishment crimes may be morally justifiable, at least in principle. At the very least, the nuanced moral framework creates space for some degree of justifiable enhanced punishment crimes.¹⁴³ By contrast, this account fails entirely for the examples of unrelated conduct crimes seen in Section II.A.1. It is not clear what it would be for the meaning of one action to be affected by the occurrence of an outcome that is, by definition, entirely unrelated. Accordingly, exactly one class of strict liability crimes is consistent with a strict liability moral framework.

2. An Updated Interpretive Presumption against Criminal Strict Liability

If the nuanced moral framework offers the basis of justification for an additional class of criminal strict liability, it can help explain what goes wrong in some prosecutions and how courts can respond in the future. Courts can limit strict liability crimes to be consistent with their interpretation of legislative intent. Specifically, courts should use the nuanced moral framework to inform the following rule of statutory interpretation: allow criminal strict liability for *statutes that create enhanced punishment crimes*, but require a mens rea element for *statutes that create unrelated conduct crimes*. The remainder of this Section sketches out this proposed rule, considers some objections, and refines the rule accordingly.

Recall the presumption against strict liability crimes. Central to the Supreme Court's practice of interpreting statutes to include a mens rea requirement was the notion that courts should not forgo a mens rea requirement unless some moral justification exists.¹⁴⁴ The nuanced moral framework does nothing to abandon this central insight. However, the nuanced moral framework gives new insight into a class of strict liability laws that are morally justifiable; such fine-grained distinctions were not clearly

141. *Id.* at 150.

142. *See id.* at 159.

143. That is not to say, of course, that all examples in Section II.A.2 are thereby morally right. *See infra* Section III.B.2.

144. *See supra* Part I.

accessible under the naïve framework. Insofar as enhanced punishment crimes are defensible under the presumption against criminal strict liability, courts should recognize strict liability for enhanced punishment crimes. By contrast, unrelated conduct crimes are not compatible with the Court's presumption, even under the nuanced moral framework; courts should not interpret such statutes to forgo a mens rea requirement.

Two objections come to mind. First, certain enhanced punishment crimes still seem unjustifiable as strict liability crimes. Second, the distinction between enhanced punishment crimes and unrelated conduct crimes is likely not as stark as assumed in its treatment here. These objections are considered in turn.

First, some will argue that not all enhanced punishment crimes seem to merit criminal strict liability. Even if enhanced punishment crimes are justifiable in principle, particular punitive enhancements required by statute exceed justifiable limits to additional punishment. Indeed, those examples from Section II.A.2 press the idea that strict liability is inappropriate for grossly enhanced punishments. That said, courts could employ the nuanced moral framework more deeply to consider whether crimes with *grossly* enhanced punishments are distinguishable from crimes with *mildly* enhanced punishments. Such a project is beyond the scope of this Note, but extending Scanlon's account of blame seems to be a relatively straightforward task.¹⁴⁵

Second, one would be forgiven for thinking that the distinction drawn between enhanced punishment and unrelated conduct is artificial. Recall Bettcher and Flettcher: Bettcher was prosecuted under Andy's Law for a death that resulted while she violated an unrelated driving restriction,¹⁴⁶ while Flettcher was prosecuted under Andy's Law for a death in a construction zone resulting from his negligence.¹⁴⁷ If punishment in the latter case is, in principle, morally defensible under the nuanced moral framework,¹⁴⁸ punishment in the former case is not: nothing about Bettcher's intention informs the *meaning* of her actions such that blame could be attributed. But as this comparison makes clear, Andy's Law doesn't distinguish between the types of strict liability. The statute covers both equally. Moreover, it is not obvious that Andy's Law is simply poorly drafted in this respect; fact patterns for enhanced punishment laws could be imagined to look more like unrelated conduct crimes, and vice versa. The distinction between classes of *laws* may better be understood merely as a way of distinguishing between particular *prosecutions*.¹⁴⁹

145. This response likely credits too much the extent to which courts engage with moral philosophy when considering criminal law. After all, this Note has already endorsed a modestly pragmatic view that the correspondence between moral philosophy and criminal law is a fuzzy one. See *supra* Section I.A.

146. See *supra* notes 1–5, 69–71 and accompanying text.

147. See *supra* notes 123–130 and accompanying text.

148. See *supra* Section III.B.1.

149. This insight might explain why prosecutions like Bettcher's occur. It is not simply that a law exists under which prosecution is possible; it is also the case that the difference between a morally justifiable prosecution and a morally unjustifiable one is subtle and not

This is a harder problem to address. To continue the example, courts could not interpret Andy's Law to contain a mens rea element for Bettcher but not for Fletcher. Nevertheless, something like this approach could still inform the interpretive presumption. In interpreting a criminal statute, courts should consider whether legislators had in mind enhanced punishment crimes or unrelated conduct crimes. That is, courts should consider whether the legislature intended either to curtail related activities with bad outcomes or to curtail unrelated activities. If they believe that a legislature aimed to enhance punishment for bad outcomes, they should be reluctant to read in a mens rea requirement where none exists. However, they should continue the Supreme Court's practice of finding a mens rea requirement where state legislatures seek to hold parties strictly liable for unrelated conduct. With this clarification in mind, the nuanced moral framework's rule of constructive interpretation can be restated: allow criminal strict liability for statutes that *can be understood to* create enhanced punishment crimes, but require a mens rea element for statutes that *can be understood to* create unrelated conduct crimes.

This new rule of statutory interpretation is consistent with courts' reading in nonexistent mens rea requirements.¹⁵⁰ The nuanced moral framework at once expands the scope of justifications for criminal strict liability and delineates relatively clear standards according to which strict liability could be expanded to cover new crimes. Courts following the framework could make sense of some recent state action, while offering a way to constrain those laws consistent with its longstanding interpretive moral presumption.

CONCLUSION

The law should continue to recognize its longstanding presumption against criminal strict liability. This Note suggests that this longstanding presumption is rooted in moral intuitions about intention and criminal punishment, and is tempered by the proper interpretive role of the judiciary. It argues that two seemingly unrelated challenges to this approach to criminal strict liability can be brought together to adopt a framework that is at once more robust and more sophisticated. A slightly more nuanced moral framework can both accommodate recent thinking about intention and preserve the relationship between moral theory and criminal law underwriting the presumption against criminal strict liability. Moreover, understanding the contours of that moral framework informs how judicial interpretive practice could simultaneously adapt to and constrain the expansion of criminal strict liability laws.

obvious from the statute itself. Prosecutions like those of Bettcher may simply be those of moral error. Of course, as this Note suggests elsewhere, pragmatic and (crassly) political motivations may equally inform why such prosecutions occur. *See supra* notes 15–17 and accompanying text; Section II.A.

150. *See supra* notes 40–47.

