THE ROLE OF LUCK IN THE CRIMINAL LAW

KIMBERLY D. KESSLER†

INTRODUCTION

Tessie Hutchinson held a slip of paper in her hand, and that paper had a black spot on it. While she stood in the center of the crowd and screamed, "It isn't fair, it isn't right," the villagers stoned her to death. Of what, you ask, was Tessie guilty? Nothing. She was selected by lottery to be the recipient of this punishment. She had done nothing wrong.

Tessie Hutchinson is merely a character in Shirley Jackson’s “The Lottery." In this story, luck is the determining factor for liability. “Well,” we may sigh and say, “at least our criminal justice system is not based on such a premise.” We would be wrong, however. Luck does currently play a role in our legal system. For example, imagine that Alice is shooting at Bob with intent to kill him. The following situations are possible:

1) The bullet hits Bob and kills him. Alice is guilty of murder.

2) The bullet hits Bob at exactly the same time Carla’s bullet hits Bob, thus frustrating but-for causation. The court will most likely still hold Alice guilty of murder.

3) A large bird flies in the bullet’s path. Thus, the bullet misses Bob completely. Alice is only guilty of attempted murder.

4) The same large bird flies in the bullet's path and deflects the bullet. The bullet misses Bob but hits Carla. Alice is guilty of Carla’s murder.

† B.A. 1991, University of North Carolina at Chapel Hill; J.D. Candidate 1995, University of Pennsylvania. I would like to thank Professors Michael Moore and Heidi Hurd for their insightful comments and suggestions. I am also indebted to Andy Lelling and Chad Eisenberger for their comments on earlier drafts. Further thanks are due to Tony Klapper, Rhonda Kessler, Deborah Pober, and Regina Dodge for their time and concern, as well as to Professor Leo Katz, whose initial advice led me down this path.

I would like to dedicate this Comment to the memory of Alice Ticknor.


2 But-for is the typical test used to prove that the defendant, in fact, caused the victim’s injuries. Here, however, if one asks, “But for Alice’s actions would Bob have died?” the answer is yes; Carla still would have killed him. See infra part III (discussing the problem cases such as this pose for proving causation).
Although in each of these cases Alice has performed the same action with the same intention, she may be guilty of a number of different crimes: attempting to murder Bob, murdering Bob, or murdering Carla. This is all because of the “chance” influence of another actor or some act of fate. Perhaps our world is not any safer for Tessie.

But there is a difference between our world and Tessie’s world. Tessie did nothing wrong, whereas Alice is someone who chose to be a murderer. The problem is not that Alice is being punished for nothing, but rather that sometimes she is not being punished for what she is—a person who intended to bring about the death of Bob. Faced with fortuities, courts either have allowed luck to have relevance, as in the case of attempts, or have twisted legal doctrines to undermine the role of chance.3

In Part I of this Comment, I will discuss what “luck” is and why it has no moral or legal relevance. Part II will address the few cases in which courts have correctly ruled out the role of luck. Parts III and IV will proceed to discuss two instances, causal overdetermination and transferred intent, in which courts have been forced to contort legal concepts in attempting to rule out fortuities. Part V will address an area of the law that still gives credence to chance happenings—attempts. Part VI then will discuss what role, if any, causation, the element principally responsible for the role luck currently plays, should still have in the law. Finally, Part VII will offer possible solutions for excluding the role of chance.

I. WHAT IS LUCK AND HOW DOES IT INTERFERE WITH OUR IDEA OF CRIMINAL RESPONSIBILITY?

A. Luck

Life necessarily includes a degree of luck. We do not have any voice in selecting our athletic strength, our intelligence, the socioeconomic status into which we are born, our gender, or our race. Thomas Nagel has labeled this type of luck “constitutive luck.”4 Luck can also be involved in the results of our actions.5 Whether we catch the football, miss the train, or hit the target all involve a

---

3 As in cases of the defendant hitting an unintended victim or of another independent actor, as well as the defendant, both inflicting injury upon the victim.
4 Thomas Nagel, Moral Luck, in MORAL LUCK 57, 60 (Daniel Statman ed., 1993).
5 See id.
degree of luck.

But what do we count as luck in comparison to, say, skill or effort? Social psychology has revealed that we tend to attribute an actor's achievement of a goal (for instance, catching a football) to luck when the locus of control is external and the likelihood of success is minimal or the achievement of the goal is infrequent.\(^6\) That is, if the actor is not in control of his success and the frequency of this type of success is unpredictable, the actor's achievement can be attributed to luck. For example, if the wind picks up the football (an external control) and magically delivers it into a player's hands (a very infrequent occurrence), we will decide he was lucky in catching the ball. Clearly, however, the lucky receiver's team would not have to surrender its victory because of this unlikely occurrence. Why, then, does luck pose a problem for the criminal law?

**B. The Moral Argument That Luck Is Irrelevant**

Although this Comment is primarily concerned with the legal argument that luck should not have any place in our criminal justice system, I believe I should take a moment to address the moral argument that I will presuppose—that results do not matter morally. Professor Michael Moore has recently argued to the contrary.\(^7\) His argument, however, contains several flaws.

1. **Is There a Problem of Moral Luck?**

   After reviewing unsatisfactory arguments for his position, Moore takes issue with Nagel's argument that there is such a thing as moral luck:\(^8\)

   > [T]here is [not] any luck involved in being held more responsible for successful wrongdoing than for intended or risked wrongdoing that does not materialize. There undoubtedly is some luck involved in whether we cause the harms we intend or risk, but there will be moral luck only vis-a-vis some moral baseline of the normal that places all such luck on the side of the extraordinary.\(^9\)

---


\(^8\) See id. (manuscript at 31).

\(^9\) Id. at 32.
Although I disagree with Nagel based on what Moore denotes as the Kantian position—that wrongdoing does not have any independent moral significance\(^{10}\)—Moore’s method of attacking Nagel’s conception of moral luck is still of great interest to this discussion.

Moore argues that proximate causation is the arbiter of luck.\(^{11}\) Proximate causation limits liability to only those things caused in the normal routine while absolving defendants of liability in cases where the causal link is too freakish to bear on the actor’s responsibility.\(^{12}\) Moore explores the proximate causation test using four examples of H.L.A. Hart and A.M. Honoré: the defendant who culpably throws a lit cigarette into bushes that ignite and (1) burn down a whole forest because of a normal evening breeze, (2) burn down the whole forest because of an unusual gale force wind, (3) burn down the whole forest because a would-be extinguisher catches fire and runs into the forest, and (4) would have burned out except that another culpable defendant pours a gasoline trail from the bushes to the forest.\(^ {13}\) Moore maintains that since in all four cases the defendant was equally out of control of the situation, but liability is imposed only in (1) and (3), control cannot be the baseline by which moral luck is measured—rather it is freakishness of the causal route.\(^{14}\) In none of the four cases did the actor control what happened after she threw away the lit cigarette, but we only hold her responsible for those actions that seem bizarre and unforeseeable—gale force winds and evildoers who throw gasoline on lit cigarettes.

Proximate causation, however, may not serve as a baseline for moral blameworthiness in the way that Moore contends. As he does note at one point, the foreseeability test,\(^{15}\) one of our tests for proximate causation, “seems to be aimed at an actor’s culpability.”\(^{16}\) Indeed, isn’t this what all proximate causation tests do? They determine how culpable the actor was and blame her for the harm equal to that culpability. She is not blamed for those fortu-

\(^{10}\) See id.

\(^{11}\) See id. at 33.

\(^{12}\) See id.

\(^{13}\) See id. at 33-34 (citing H.L.A. Hart & A.M. Honoré, Causation in the Law (1959)).

\(^{14}\) See id. at 34-35.

\(^{15}\) Moore rejects foreseeability as a test for proximate causation. See Michael S. Moore, Foreseeing Harm Opaquely, in Action and Value in Criminal Law 125, 125-26 (Stephen Shute et al. eds., 1993).

\(^{16}\) Moore, supra note 7, at 33.
itous results that she could not choose or control, but that actually occurred.

Consider, for example, the reckless driver who consciously disregards the risk that by driving at ninety miles per hour she may hit another car. If she hits another car, we find it just and fair to punish her for the risk that she has imposed upon others. If she hits an airplane that was forced to land on the highway, however, and the impact results in an explosion killing three hundred people, we say that this was too freakish, too absurd, to reasonably blame her for causing. We want to punish the reckless driver for the risk she chose to consciously disregard and not for the risk she did not. Proximate causation thus serves to limit her culpability.

Proximate causation proves particularly important in cases of negligence. Negligence by its very definition deals with an actor who is not aware of what risk she is imposing. Take J.C. Smith's example of the father who has children who love lemonade and who leaves weed killer that looks like lemonade in a lemonade bottle. He did this not to kill his children, but because he is unreasonably unaware of the fact that they might see it and drink it. Using the proximate causation test, we limit the father's culpability to what we as a society feel he should have been aware of and do not punish him for things he would not have foreseen. Thus, if his two children and their two friends drink it, we will punish him for the manslaughter (or negligent homicide) of the four children. If, on the other hand, his children decide to sell this lemonade on the street, and an airplane pilot buys it on her way to work, in turn making the pilot so sick she has to land the plane on the highway, next causing the plane to be hit by a reckless driver, resulting in an explosion which kills three hundred people, we do not want to say the father is responsible for all of those deaths.

\[17\] See Model Penal Code § 2.02(2)(c) (1962) (defining recklessness).

I argue later that causation and results do not matter. When determining how to punish someone who has acted negligently or recklessly but whose actions have not caused a harm, the fair statutory solution would be to impose the type of punishment for what we might expect to happen—what we would hold the actor to proximately cause. Hence, we can learn from the proximate causation doctrine and our intuitions about it, even if we abandon the causal element.


\[20\] If causation were eliminated as a part of the prima facie case in this example, we would impose a sentence on the father that would reflect what he should have been aware of, but not the freakish incident concerning the airplane pilot. See also infra notes 221-26 and accompanying text (discussing how reckless and negligent acts
causation thus bears on the choice made, or the culpability of the actor for not being aware he was making a choice, but not as an arbiter of what counts as being caused by the actor.

2. The Argument from Common Experience

Moore then continues to argue that causing a harm matters morally on both foundationalist and nonfoundationalist views. Addressing the nonfoundationalist view that Moore endorses, he relies on our common experiences to show that wrongdoing matters for retribution. He argues, in part, that we react differently to those who cause harms, that we feel greater guilt when we cause harms, and that in choosing, we believe that the results of our choices, and not just that we made a good choice, matter to us.

Moore contends that our emotions are our “main heuristics” to discovering what is morally good or bad. I contend, however, that we often have emotions about things that matter to us, but do not necessarily matter to us morally—such is the case with results.

a. Resentment

Results do have their effect on the world. Whether a killer succeeds in shooting her victim has a significant impact on the victim and the victim’s family. Surely, we resent people who make this world a worse place to live in by causing harm to others. This does not mean, however, that they are the only people we think deserve to be punished for their actions. For example, imagine that Leigh is recklessly driving in a school zone. She does not hit anyone. Patty, on the other hand, recklessly drives through the school zone and hits three children. When Leigh passes by a group of bystanders, they may think that she is a bad driver and should be arrested before she kills someone. When Patty hits the children, they can point to the results of her actions as an indicator of how culpable she is, whereas they can only imagine what Leigh would have done. Such an indicator of culpability (having caused a harm)

---

21 See Moore, supra note 7, at 41-43.
22 See id. at 49-78.
23 See id. at 56-63.
24 See id. at 56-58.
25 See id. at 58-60.
26 See id. at 60-63.
27 Id. at 57.
causes people to recognize that Patty is a bad person. Should people rationally think about the harm that Leigh might have caused, however, they will conclude that there is no distinction to be made between the two women’s culpability.

b. Guilt

Patty may also feel greater guilt than Leigh does (as Moore contends). Many times, however, people make morally correct decisions that also cause harm. Such people may feel just as guilty. For example, the woman forced to kill her attacker in self-defense may feel great guilt at ending the life of another human being, even if she is morally justified in doing so. Furthermore, consider a tragic-choice situation such as a person being forced to decide whether to switch a runaway trolley from its current track, which will lead it to hit five people, to a second track, where it will run over only one person. Although I do not wish to join the debate over which is the “right” choice, the person who makes this decision may feel guilty no matter what she decides, even if it is “right.” Thus, our emotions may reflect the fact that no one wants to cause a harm, independent of whether the harm is morally condemned.

Indeed, in the case of a negligent actor (or the reckless actor who does not believe the risk is that great), the actor’s first clue that she has been culpable may be the materialization of a harm. She will then feel very guilty about the risk she has imposed on others in a way that a negligent actor who does not cause a harm may not.

c. Choice

Moore further contends that, since we care very much about the results of our choices and not just about how we made them, results must matter morally. Imagine, however, that I am going to a

---

28 See id. at 58-60.
29 On the other hand, those people who intend to murder another voluntarily may feel no guilt about ending the life of another.
32 See also Herbert Morris, Nonmoral Guilt, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 220, 221 (Ferdinand Schoeman ed., 1989) (discussing various situations in which guilt may be appropriate despite the absence of wrongdoing).
33 See Moore, supra note 7, at 60-63.
party and, wishing to be the most beautiful woman there, must decide whether to wear a red dress or a blue dress. I ask all my friends, model the dress for my parents, and refer to fashion magazines before finally deciding to wear the red dress. Suppose, however, that when I get to the party the greatest fashion tragedy occurs—another woman is wearing the same dress. I will deeply regret the fact that I did not wear the blue one. Although I may try to calm myself down and tell myself that I made the best decision given the circumstances, the results of my choice will still matter to me. This is true even though the color of my dress clearly has no moral significance.

Further, imagine that Danielle's friend, Stacy, is drowning in a lake. In her mind, Danielle runs through the possible ways to save Stacy and decides the best method of rescue is to hold out a nearby tree branch to her. When the branch snaps in half and Stacy dies, Danielle will feel great guilt in having failed to save her friend. Clearly the difference between success and failure is very important to Danielle (alive versus dead friend). Danielle will feel guilty even if rescue experts tell her she made the best choice. Here, Danielle is a good person who made a good choice that yielded a bad result. The fact that Stacy is dead does not make Danielle a bad person.

While we tell our children that "it isn't whether you win or lose, it's how you play the game," we all know that we care very much about who wins. Results matter because they affect our lives and those of other people—we do want to do the best, not just try to do the best. This does not mean, however, that we should be blamed for our failures to do so.

3. Moore's Reductio

Finally, Moore presents a reductio argument, which contends that if we do not hold people responsible for things that they cannot control, people could not be held responsible for anything since volitions, intentions, and character are caused by factors beyond one's control. For example, Moore employs Joel Feinberg's argument that our intentions are sometimes due to factors beyond our control. If, for example, Jane is about to form the intention to shoot Paul, but just before she does so she sees her best friend

---

34 See id. at 64-70.
35 See id. at 71 (discussing JOEL FEINBERG, Problematic Responsibility in Law and Morals, in DOING AND DESERVING 25, 35 (1970)).
and forgets all about Paul, her intentions, or lack thereof, are just as much products of fate.

The slide on this slippery slope stops, however, when we choose to act on our intentions. All of us are victims of fate to the extent that we are born into certain families, possess certain talents, and are presented with certain opportunities. Jane may have gotten lucky when fate saved her from a position in which she would have formed the intention to kill Paul. It is also true, however, that the vast majority of us are lucky that we are not starving in a third-world country where we might be willing to kill for food. The important question is whether or not Jane is a rational person who knows that killing is wrong. Once she decides to act upon her intention and does so, she has shown herself to be a person worthy of punishment. In this sense, Sanford Kadish is correct that “what you deserve is a function of what you choose.” Indeed, as Moore has previously argued, “we are in control . . . of our choices because they are our choices—even though causally dependent on factors that are themselves unchosen.”

As rational beings we make decisions in light of our ability to self-reflect, and we deserve to be held responsible for those decisions. When our decision does not factor in a change in wind speed or our victim ducking, however, it makes our decision no less morally relevant and morally culpable. This is not a “line in the sand” as Moore contends, but rather the fundamental principle upon which we are held responsible to begin with.

C. How Luck Conflicts with Criminal Responsibility

The law presupposes that people are “[rational] being[s] who act[] for intelligible ends in light of rational beliefs.” Unless one’s practical reason—the ability to rationalize what one should do based on what one knows and desires—is somehow impaired (such as by insanity or childhood), we expect that she is capable of conforming her conduct to fall within the boundaries of the law.

---

56 Id. at 73 (quoting Sanford Kadish, Tracking the Irrational in the Criminal Law 17-18 (1993) (unpublished Faculty Research Lecture, University of California, Berkeley, on file with author)).
57 Id. at 75 (citing Michael S. Moore, Causation and the Excuses, 73 CALIF. L. REV. 201 (1985)).
58 Id. at 73.
60 For a thorough analysis of the practical reasoning process, see id. at 9-14.
For example, Tony wants one hundred dollars. Tony knows that he can either work to earn the hundred dollars or he can steal the money from Andy. Tony knows that stealing is illegal. Tony does not want to go to jail. Therefore, Tony will get a job.\(^4\) Unless Tony's constitutive luck rises to the level of rationality impairment, the criminal law expects him to conform his conduct to the law because he is able to; the fact that Tony is born poor does not prevent him from understanding the law and abiding by it.\(^4\)

Capable of acting on our own beliefs and desires, we expect to be held criminally responsible only for our decisions to disobey the law\(^4\) and not for the workings of fate. This assumption is manifested in the criminal law in the prima facie case, which requires a voluntary action and a guilty mind in order to hold someone criminally responsible.

The actus reus, or act requirement, is essential to the prima facie case.\(^4\) You can wish that Alice would die, intend to kill her, and she can drop dead, but if you did not do something—act upon your intentions in any way—then you are not guilty of murder. You are also not guilty, according to the criminal law, unless you engage in the action voluntarily.\(^4\) Thus, when Al moves Betty's finger,

\(^4\) Tony could conceivably decide that he would rather risk going to jail than have to work. This is a decision that, as a rational agent, Tony could make. If, however, Tony gets caught, we can punish him because he knew what he was doing was wrong, he could conform his conduct, and yet he chose to break the law.

\(^4\) This Comment does not attempt to undertake the determinism debate beyond what is implicit in my discussion of Moore's moral argument. See supra notes 34-38 and accompanying text; see also Andrew Ashworth, Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law, 19 RUTGERS L.J. 725, 742-43 (1988) (noting the interplay of moral luck and determinism in arguments about the culpability of attempters as compared to those who have succeeded in completing their crimes). Determinism is the strain of philosophy that believes that everything is caused. While hard determinists believe that free will and determinism are not compatible, soft determinists believe that there is still room for responsibility in a determined world despite the absence of free will if one is capable of acting on one's practical reason. See DANIEL C. DENNETT, ELBOW ROOM 83 (1984).

\(^4\) Although most crimes require at least a conscious decision to disregard a risk (recklessness), sometimes the criminal law will hold us responsible when we were unreasonably unaware of the risk or harm we caused. See MODEL PENAL CODE §§ 2.02(2)(c), 210.4 (defining recklessness and negligent homicide respectively).

\(^4\) For the rationale behind the act requirement, see MICHAEL S. MOORE, ACT AND CRIME 46-59 (1993); see also JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.01[B], at 63-65 (1987) (arguing against punishing for thoughts); Ashworth, supra note 42, at 733 (explaining the rationale for both the actus reus and mens rea).

\(^4\) See MODEL PENAL CODE § 2.01 (requiring voluntary act); DOUGLAS N. HUSAK, PHILOSOPHY OF CRIMINAL LAW 90-93 (1987) (discussing involuntary conduct); see also People v. Newton, 8 Cal. App. 3d 359, 376 (1970) (holding unconsciousness, even if
forcing it (her) to pull the trigger, Betty does not murder Carla.

The criminal law further requires a mental state, or mens rea. Although some crimes are strict liability crimes,\(^4\) we believe that people should only be punished for those actions for which they have a guilty mind. This element is justified on both utilitarian\(^4\) and retributivist\(^4\) grounds: these people are both deserving of punishment and deterrable.\(^4\) They are deserving of punishment because they have rationally decided to break the law, and they are deterrable because they chose to engage in an illegal activity after weighing the benefits and costs of abiding by the law. Since they reason through their actions, people with guilty minds will be

the defendant physically acts, "a complete defense to a charge of criminal homicide").\(^4\) Strict liability imposes liability without regard to whether the defendant made a mistake or the act (or harm) was accidental. See GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 9.3.2, at 716 (1978). Impure food and drug regulations are one category of this type of prohibited conduct. See id. Because such regulations are not typically based on those things that are bad in and of themselves (malum in se) but rather those that are bad because the law says they are (malum prohibitum), strict liability does not carry with it the same moral force.

The Model Penal Code makes a "frontal attack" on strict liability: "Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare the defendant's act was culpable. This is too fundamental to be compromised." MODEL PENAL CODE § 2.05 cmt. 1, at 283 (1985) (footnote omitted); see also Steven J. Schulhofer, Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law, 122 U. PA. L. REV. 1497, 1513 (1974) ("If... there ever was a feeling that those who commit strict liability crimes were somehow morally responsible for the harm they caused, that feeling has probably been dispelled today: if anything, punishment of these crimes may tend to weaken respect for law and must be justified on other grounds." (footnote omitted)).

Utilitarians are concerned with net social gain. We punish people (which is an evil because it makes the person being punished unhappy) because punishment will deter others (a good) and it will rehabilitate the wrongdoer (another good). These goods outweigh the unhappiness of the wrongdoer. See JAMES RACHELS, THE ELEMENTS OF MORAL PHILOSOPHY 117-19 (1986).

Rachels explains the idea of retributivism as the only proper way to hold rational beings accountable for their actions:

[R]ational beings are responsible for their behavior and so may properly be "held accountable" for what they do. We may feel gratitude when they behave well, and resentment when they behave badly. Reward and punishment—not "training" or other manipulation—are the natural expression of this gratitude and resentment. Thus in punishing people, we are holding them responsible for their actions, in a way in which we cannot hold mere animals responsible. We are responding to them not as people who are "sick" or who have no control over themselves, but as people who have freely chosen their evil deeds.

Id. at 123.

\(^{48}\) See DRESSLER, supra note 44, § 10.03, at 97-98 (discussing the rationale of the mens rea requirement).
influenced by sanctions which increase the risk of detection or the punishment inflicted upon them if they get caught.\textsuperscript{50}

Luck is not involved in either of the previous elements. You do not “luck out” and find yourself intending to shoot someone,\textsuperscript{51} and if you fire a gun accidentally, the criminal law will not punish you more than your mental state deserves.\textsuperscript{52} Luck plays no role in whether one forms the intention and then engages in the action; one is punished solely as a rational agent, not as a victim of fate.

Some crimes require the additional element of causation. The causal/result requirement differs from the requirements of an actus reus and a mens rea. The actor has very little control over whether her actions will ultimately end in their intended result. After John shoots at Mary, he has no control over whether the bullet will hit her, she will duck, a large gust of wind will blow the bullet away, Mary will be wearing a bullet-proof vest, or a large bird will deflect the bullet.\textsuperscript{53} Hence, the causal/result requirement conflicts with

\textsuperscript{50}Steven Shavell, however, argues that people who intend their actions are more difficult to deter for two reasons. First, because they intend their actions, they obviously have a goal in mind and thus have more to gain from breaking the law. Second, those who intend their actions will plan against detection and will thereby be more difficult to catch. \textit{See} Steven Shavell, \textit{Deterrence and the Punishment of Attempts}, 19 J. LEGAL STUD. 435, 449 (1990).

But is this really so? Consider the case of Darcy who kills Judy. If Darcy does so by accident (addressing Shavell’s latter point), it is true that we are more likely to find out about it. But why does this matter? Darcy is not guilty of a crime, and her detection is insignificant. Further, how can we deter Darcy with harsher punishments if she did not intend to kill Judy in the first place? Even if the death penalty was mandatory for all murders, how would this deter Darcy from accidentally (it could have happened to the most careful person) killing Judy?

On the other hand, if Debbie wants to kill Julie, she will also know the punishment involved and will then weigh whether it is worth it to dispose of Julie. The consequences that might follow will have a greater influence on whether Debbie engages in her intentional murder than whether Darcy engages in her accidental killing.\textsuperscript{51} \textit{But see supra} note 35 and accompanying text.

\textsuperscript{52}Depending upon the facts, such a firing might be negligent, a sufficient mental state for some crimes. \textit{See}, e.g., \textit{MODEL PENAL CODE} § 210.4 (defining negligent homicide).

\textsuperscript{53}John only has control over these factors to the extent that he takes preparatory steps towards their prevention: spying on Mary to make sure her bullet-proof vest is at the cleaners, taking shooting lessons, checking the weather conditions to ensure it is not an incredibly windy day, or shooting at her somewhere where large birds will not come within the path of the bullet. To this extent, luck will be the residue of good design. Note, though, that the person who plans less has the same murderous intention as the person who takes these extra steps. The point is that the person who allows more room for luck should not receive less punishment because her plan failed. John’s extreme preparations will clearly be evidence of his premeditation about killing Mary, but if Paul has also planned to kill Laura for weeks, the fact that
our view that rational agents should be held accountable for their actions: it allows fortuity to determine their crime. This is something upon which criminal responsibility should not depend.

II. RULING OUT LUCK: WHEN COURTS HAVE GOTTEN IT RIGHT

A. Justificatory Intent

Marie is about to shoot Chad. Chad, unaware of Marie’s plan, throws a kitchen knife at Marie and kills her. Did Chad murder Marie or did he act in self-defense? In this case, “the actor is unaware of the exculpating fact . . . . His act is objectively right, but subjectively wrong. It is the converse of the problem to be treated in the theory of mistake, in which the conduct is objectively wrong, but subjectively right.” Chad intended to murder Marie, but, in reality, he acted in self-defense. What should the law do with him?

Since his claim does not go to the nature of the offense but rather to his justification, courts have held that he must believe that he is in danger in order to claim that he acted in self-defense. As Kent Greenawalt maintains, “[o]ne subjective characteristic of the actor is crucial . . . for justification in both ordinary usage and in the law: his belief in the presence of justifying circumstances. If, unknown . . . [the actor’s] claim of self-defense is unavailing.” Hence, in this case, courts are getting the answer right. Chad is someone who decided to kill another human being. He should not “luck out” just because, as it turns out, Marie was going to kill him.

he did not take as many precautions does not lessen his intent to commit murder.

54 FLETCHER, supra note 46, § 7.4.1, at 556.

55 If, however, Dick, thinking he is already married, marries Jane in order to be a bigamist, but in reality his first marriage is not valid, Dick is not guilty of bigamy no matter what his intent is. See id. at 555-57. Dick will be guilty of attempted bigamy, and as I maintain in this Comment, should be punished as if he had succeeded. See generally infra part V.

56 See FLETCHER, supra note 46, § 7.4.1, at 557.


58 For a contrary view, see MOORE, supra note 39, at 180-82 (“D no more murdered anyone than does the person who tries to shoot another to death but whose bullet misses. Both are very culpable, but neither has done the wrong of murder because neither has killed a human being who was not about to kill an innocent party.” (footnote omitted)); see also Paul H. Robinson, A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability, 23 UCLA L. REV. 266, 289 (1975) (“One’s mental state simply cannot convert otherwise harmless conduct into a crime . . . .” (footnote omitted)).
B. California and Spring Guns

In *People v. Ceballos*, the defendant, Don Ceballos, set a spring gun in his garage/dwelling after noticing that someone had attempted to break into it. When sixteen-year-old Stephen broke into Ceballos’s garage, he was shot in the face with the .22 caliber pistol Ceballos had rigged. Ceballos contended that since he would have been allowed to use deadly force had he been there, he should be allowed to use deadly force when he was not—thereby doing indirectly what could have been done directly.

The Supreme Court of California disagreed. In doing so, it departed from the traditional rule that such devices are acceptable in cases in which the defendant would have been justified in using deadly force had she been there. The court held that “whatever may be thought in torts, the foregoing rule setting forth an exception to liability for death or injury inflicted by such devices ‘is inappropriate in penal law for it is obvious that it does not prescribe a workable standard of conduct; liability depends upon fortuitous results.’” California has decisively ruled out the ability for chance to determine liability in this case—setting up a spring gun is wrong no matter who it happens to hit or what the circumstances are. Thus, one is not absolved of guilt because the spring gun hits a would-be murderer (and one would have been able to shoot her had one been there) rather than a small child attempting to retrieve her basketball (in which case one could not have shot the child had one been present).

C. California and Felony-Murder

In *People v. Washington*, the defendant and his accomplice, James Ball, tried to rob a gasoline station. In the course of the robbery a victim, John Carpenter, shot and killed Ball. Defendant was convicted of the murder of his accomplice under a felony-murder statute. The defendant, on appeal before the Supreme Court of California, was found guilty of first-degree murder. As Judge Clark wrote:

> "People v. Washington: a cautionary tale of when a gun goes off by itself..."

526 P.2d 241 (Cal. 1974) (en banc).

See id. at 243.

See id. at 244 (listing numerous cases endorsing the traditional rule).

Id. at 244-45 (emphasis added) (quoting MODEL PENAL CODE § 3.06 cmt. 15 (Tentative Draft No. 8, 1958)).

402 P.2d 130 (Cal. 1965) (en banc).

See id. at 132.

See id.

See id. at 133.
Court of California en banc, argued that he should not be charged with this murder because (1) a robber and not a victim was killed and (2) a victim and not a robber did the killing.

The court decided not to reverse his conviction on the first ground. It reasoned that "[a] distinction based on the person killed ... would make the defendant's criminal liability turn upon the marksmanship of victims and policemen. A rule of law cannot reasonably be based on such a fortuitous circumstance." Hence, the court was unwilling to allow a defendant's responsibility to be determined by what target the bullet found. A nervous victim's aim would not decide whether the felon had caused a murder.

On the second issue, the Supreme Court of California held that the defendant could not be held responsible for a killing not in the perpetration of the robbery (that is, not by one of the robbers). It reasoned that the purpose of the felony-murder rule, to deter felons from accidental and negligent killings, would not be served by holding them responsible for their victim's actions. The court further noted how chance could play a role if they allowed liability for victim's killings: "To impose an additional penalty for the killing would discriminate between robbers, not on the basis of any difference in their own conduct, but solely on the basis of the response by others that the robber's conduct happened to induce." Thus, the court recognized that the robbers should only be punished for what was in their control and not for the chance occurrence that some victims might retaliate.

III. COURTS AND CAUSAL OVERDETERMINATION: CONTORTING FACTUAL CAUSATION TO RULE OUT LUCK

Causal questions are typically bifurcated. We first ask whether the result Y would have occurred without the act or omission X, and we then apply a limiting principle to those Xs that satisfy the first test. For example, John would not have hit Mary's

---

67 Id. at 132 (emphasis added).
68 See id. at 133.
69 See id.
70 Id.
71 See H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 104 (2nd ed. 1985) (discussing the division of the question of causation into elements of fact and legal policy).
72 See id.
car if he had never been born. Hence, John's mother and father are causes of the accident according to the first half of the test. Their legal responsibility, however, is limited by the proximate cause requirement: the car accident was not part of the risk of having a child, the accident was not foreseeable, and John was a voluntary intervening actor.

The first question is a factual one: Did the defendant actually cause the harm? The second part of the question is one of policy: Should we hold the defendant responsible for that which she caused? Causation-in-fact is thus simply that—a factual question. To determine whether X caused Y we typically employ the but-for test: But-for the alarm clock going off, would Tom have gotten out of bed? If Tom would have overslept and missed his criminal law class discussing causation, then Tom's alarm clock is the cause of Tom's getting up and going to class.

Sometimes, however, it is difficult to determine whether an act satisfies the but-for test. Jane's alarm clock also went off this morning. At the same time Jane's alarm clock went off, her phone rang. Jane turned off her alarm and answered the phone. But-for Jane's alarm clock going off would Jane still be sleeping? Perhaps not. She might have gotten up anyway to answer her phone. Jane's case is an example of causal overdetermination: even if X did not happen, Y would have occurred because of Z.

There are two possible approaches to take towards these cases. We may declare that but-for is not an appropriate test for causation.

---


74 The Model Penal Code uses but-for as the test for cause-in-fact. See MODEL PENAL CODE § 2.08(1)(a).

75 Cases such as the one of Jane's phone and alarm clock are labeled as problems of causal overdetermination. The result is overdetermined because either of the events (the phone or the alarm) might have been sufficient by itself. Causal overdetermination may occur in two types of cases. The first is preemption—where one defendant's actions cause harm before the other's can. For example, if Jane puts slow-acting poison in John's soup and then Kelly shoots John in the heart, causing his immediate demise, Kelly has preempted Jane's actions. The defendant may also combine with or duplicate the injury caused by another. For example, both Jane and Kelly may put poison in John's soup. See Wright, supra note 73, at 1775.
Thus, causation does exist in these cases: it is just that running counterfactuals—relying on a world of "what ifs"—is an unsatisfactory way of discovering it.\textsuperscript{76} We may then attempt to redefine the test so that the act does satisfy the causation-in-fact test (and at times still continue to rely on but-for in ordinary cases). These redefinitions of causation-in-fact, however, are either easily manipulable or are not employed by the courts. The second approach is to admit that we cannot prove causation in this case but then still attribute responsibility on policy grounds. Since neither solution is acceptable, the correct solution is to eliminate the causal requirement altogether.

A. Altering the Test

1. Specifying the Harm

But-for causation necessarily includes the use of counterfactuals. But-for John's actions would Bob have been killed? But against what baseline are we to compare John's actions?

When we say, contrary to fact, that "but for $x$, $y$ would not have occurred," there is a lot that we have left unsaid. Two items we have not mentioned are, first, what are we to imagine happened in place of $x$? If the statement in question is, "if Smith had not set foot on the steps, the rotten beams under them would not have collapsed," what replaces "Smith setting foot on the steps" to test the truth of this counterfactual? If we replace it with "Smith using a different stairway," the counterfactual may well be true; if we replace it with, "Smith bounding up the steps at just the time he

\textsuperscript{76} See Robert N. Strassfield, \textit{If...: Counterfactuals in the Law}, 60 GEO. WASH. L. REV. 339, 404 (1992) ("It is not clear whether we see uncertainty or overdetermination as a result of asking the counterfactual question, or whether we merely use the counterfactual to articulate an already drawn conclusion."); see also LEO KATZ, \textit{BAD ACTS AND GUILTY MINDS} 233-36 (1987) (arguing that but-for is not the same as causation); MOORE, supra note 39, at 269-74 (discussing various problems with the but-for test).

The current use of but-for might be likened to the approach of testing whether the Earth has gravity by dropping helium balloons from the Empire State Building. It is not the Earth's lack of gravity that makes the test fail, but the fact that helium, which is lighter than air, causes the balloons to rise rather than fall. Dropping bowling balls would yield the correct results.

The problem here may be similar. Perhaps but-for as a test for causation is comparable to the helium balloon as a test for gravity—something about the but-for test makes it an unwise measuring stick. However, the failure of the but-for test does not prove the absence of causation any more than the failure of a dropped helium balloon to fall proves the absence of gravity.
actually walked up the steps," it may seem to be false. Second, even once we choose, say, "Smith using a different stairway" as the replacement, how many other things in the world are we to imagine having also changed along with Smith's change of entrance? . . . Perhaps Jones, who is Smith's chauffeur and who is heavier than Smith, dropped Smith off at the safe entrance only to run Smith's forgotten briefcase up the rotten one. If this is what we vary, then the counterfactual may seem to be false; other events, neutral to weight equal to or greater than Smith's being on the stairs at the relevant time, would leave the counterfactual true.77

Professor Moore presents a solution to this problem of which possible world to pick for causation questions. First, he notes that $X$ and $Y$ are not event-types but rather event-tokens.78 That is, the $X$ does not stand for all the possible types of events that might have occurred (thus leading to the problem of incompleteness about what should be in place of Smith bounding up the stairs).79 Rather, the question is whether "Smith walking up the steps did cause the collapse of the stairs . . . if Smith had not walked just as he did, the stairs would not have collapsed just as they did."80 Therefore, by this analysis, the solution to the problem of counterfactuals in but-for causation is to ask: but-for the defendant's action would the injury occur as it did?

This solution, however, has been subject to criticism. Richard Wright argues that such a solution begs the question: "To include how the result came about in the description of the result is to assume an answer to the causal issue before it is posed."81 The solution further fails to address the problem of causation in cases where two bullets, shot simultaneously, kill a person; but-for either party's action, the defendant still would have died by shooting.82

78 See id. at 510.
79 See id.
80 Id. at 510-11; see also People v. Lewis, 57 P. 470 (Cal. 1899). The victim in Lewis cut his own throat after the defendant shot him. The court viewed the harm as resulting from both actions: "[A]fter the throat was cut [the victim] continued to languish from both wounds. Drop by drop the life current went out from both wounds, and at the very instant of death the gunshot wound was contributing to the event." Id. at 473.
82 See id. at 1026.
Finally, such a test extends causation to clearly extraneous factors: but-for Smith's actions would the stairs have broken with Smith walking on them, wearing his new blue silk tie, on the third Tuesday in June? Indeed, Moore himself has recognized the problems inherent in this analysis:

Far from rescuing the counterfactual analysis of causation, this defence reveals the incompatibility of that analysis with the idea that it is particular events that stand in causal relations. For no reason is given for why we should prefer a more detailed description of a harm-token to a less detailed one. And without some criterion for selecting the appropriate level of description, the causal relation (as analysed counterfactualy) is completely indeterminate in all cases.

2. The Substantial Factor Test

In cases of causal overdetermination some courts will rely on the substantial factor test as a substitute for the but-for test. For example, in J.N. v. United States the court addressed the defendant's argument that the termination of heroic life support measures broke the causal chain and thus the defendant did not cause the victim's death. The court stated that the defendant must prove that: (1) the two actions were distinct and (2) that the defendant's actions were "not a 'substantial factor' contributing to the victim's death." Although the court never reached the second question, since it concluded that the termination of medical treatment was linked to the victim's act, the court did pose the

---

83 See id. at 1025-27. One could accept this argument and concede that any condition could be a cause-in-fact. Responsibility would then still be limited by proximate causation tests. Yet how, by any definition of causation, could Smith's wearing a blue silk tie cause the collapse of the stairs?

84 Moore, supra note 15, at 144.

85 406 A.2d 1275 (D.C. 1979). In this case, the defendant and his cohorts attempted to steal an elderly woman's purse. See id. at 1278. One of the robbers hit the woman on the back of the head, causing her to fall on the sidewalk. See id. The defendant, who was convicted of attempted robbery and felony murder, argued that when the victim's doctor terminated life support, the doctor broke the causal chain and thereby insulated the defendant from liability. See id. at 1284.

86 That is, the defendant must prove that his action did not cause the further action. For example, if Jake's alarm clock goes off for several minutes without waking Jake up, and then Jake's slightly perturbed roommate, Alex, dumps a bucket of water on Jake's head, the actions are not distinct. Jake's alarm clock going off caused Alex to dump the water on Jake's head. Alex would not have done so otherwise.

87 406 A.2d at 1286.

88 See id. at 1286-87.
substantial factor question in a footnote:

[A] defendant may persuade the fact finder that, subsequent to his shooting the victim, the victim was fortuitously shot again by an unknown and unrelated assailant, and that the victim died from the loss of blood from both wounds. Although the defendant may have demonstrated that he is not liable for the consequences of the acts of the second assailant, his defense of intervening cause will nevertheless fail if the wound inflicted by the defendant \textit{substantially contributed} to the decedent's death.\footnote{\textit{Id.} at 1286 n.10 (emphasis added).}

The substantial factor test has several problems. First, the test itself combines both causation-in-fact and proximate causation since jurors will determine whether a factor is substantial enough to count as a cause.\footnote{See David A. Fischer, \textit{Causation in Fact in Omission Cases}, 1992 \textit{UTAH L. REV.} 1335, 1347; Strassfield, \textit{supra} note 76, at 355; Wright, \textit{supra} note 73, at 1782.} Thus, a purely factual question becomes one of policy. It is as if we were to say that plants grow toward sunlight because they need it to live. Furthermore, the test is circular: it says that if $X$ is a substantial factor in causing $Y$, then $X$ caused $Y$. The test does not tell us what it means "to cause" in the first place. Finally, as Strassfield indicates, the test is "contentless, or it reintroduces and complicates counterfactual inquiry. It directs the fact finder to measure the significance or substantiality of a particular cause against an unspecified yardstick."\footnote{Strassfield, \textit{supra} note 76, at 355. It may be argued that the jury's subjective feelings of justice as to what is or is not a cause is the yardstick. This, however, inevitably introduces juror's feelings about what should count as a cause. Thus, it is inconsistent with the nature of the cause-in-fact inquiry, which should be a factual and not a policy decision.} Hence, avoiding fortuity in this way leads to an unworkable causation test.

3. NESS and Becht and Miller

The Necessary Element of a Sufficient Set ("NESS") test states that "a particular condition was a cause of (condition contributing to) a specific consequence if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence."\footnote{Wright, \textit{supra} note 73, at 1790 (emphasis omitted).} To understand NESS, consider the following hypothetical situations presented by Wright:

1) Fire $X$ reaches a house but Fire $Y$ does not. Since there is only one sufficient set of fires that burned down the house and $X$ was
a necessary element of that set, X caused the house to be burned down.

2) Fires X and Y both reach the house at the same time. Since X was a necessary element of one set, not containing Y and vice versa, both fires can be held to cause the burning of the house despite the fact that but-for causation is not satisfied.

3) Fire Y only reaches the house after Fire X has burned it down. The set containing Fire Y did not actually cause any damage, and thus, only Fire X destroyed the house.93

In the case of Smith, his walking on the stairs was necessary to the stairs’ collapse (what actually happened). His blue silk tie, on the other hand, was not a necessary element of that set.94 Arno Brecht and Frank Miller’s test is similar; it requires, however, that the condition be a necessary element of the set of antecedent conditions, not simply any set of antecedent conditions as NESS requires.95 Wright demonstrates how this test fails to solve overdetermination cases by posing the hypothetical of a cable, capable of holding one ton, that is negligently weakened by C, thus reducing how much weight the cable can withstand.96 D then negligently places two tons of weight on the cable; thus, even if the cable were in perfect condition, it would break.97 The cable does break and the weight injures P. Both C and D are part of the causal sequence that produced the injury, but neither is necessary because the harm would have occurred anyway.98 Thus, Becht and Miller’s test does not solve the problem of overdetermination in all cases.99

93 See Wright, supra note 81, at 1022. Here, though, the person who created Fire Y is benefitting from the fortuity of the earlier arrival of Fire X. If causation were treated as irrelevant, Fire Y, which created the same risk as Fire X, would not benefit from this working of chance. Rather, both fire creators would be subjected to the same degree of punishment. (I do not, however, advocate the abandonment of causation for torts. See supra notes 195-97 and accompanying text.)

94 If Smith had a stone in his pocket or was wearing a heavy jacket, these factors would be a cause to the extent that they were elements necessary for the collapse of the stairs.

95 See Wright, supra note 73, at 1787 (discussing ARNO C. BRECHT & FRANK W. MILLER, THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES 32 (1961)).

96 See id. at 1787-88.

97 See id. at 1788.

98 See id.

99 See id. at 1787. Such a hypothetical would survive NESS analysis because C’s actions are necessary as part of a set where D applies the correct amount of weight to the cable, and D’s actions are necessary to the set of antecedent conditions where C behaves nonnegligently.
Brecht and Miller conclude that they would still hold the defendants liable for policy reasons.\(^{100}\)

While Brecht and Miller's test is unworkable because of its inability to solve overdetermination problems, NESS is able to solve counterfactual problems.\(^{101}\) Courts, however, do not apply it. In fact, neither the Model Penal Code nor the Restatement of Torts endorse it either.\(^{102}\) As Wright points out, in cases such as *Corey v. Havener*,\(^{103}\) where two motorcycles were alleged to have frightened the plaintiff's horse, the court simply did not require the plaintiff to prove that either was sufficient to scare the horse.\(^{104}\) Hence, despite the evolution of a test that may actually determine factual causation, courts have yet to engage in NESS analysis to determine causation-in-fact.

**B. Relying on Policy**

Some courts and commentators are unwilling to twist causation into the previously described contortions. Recognizing the problem involved in defining but-for causation, they simply concede that they cannot define, or therefore even attempt to prove, but-for causation. "Okay," they say, "we can't prove she caused it, but who cares?" Feinberg presents the most common argument for this position by discussing the liability of a cab driver who seriously injures his passenger in an accident and thereby prevents the passenger from catching his plane, which explodes without him on board:

> [I]t is perfectly just to hold [the taxicab driver] liable for the full damages, including those beyond what he actually caused, because only an unforseeable [sic] fluke of chance (e.g. a plane crash) accounts for the brevity of the period during which the counterfactual condition continued to be satisfied. In short, [the cab driver] harmed [the passenger] because there was some period, however brief, during which the counterfactual condition was satisfied, and he is justly answerable for the effects of the harm he originally caused, *since it was only a fluke of chance*, not anything he can claim credit for, that limited the scope of his harming. The harmful

\(^{100}\) See *id.*

\(^{101}\) See *id.* at 1788 (describing NESS as a "test for causal contribution that is applicable to the entire spectrum of causation cases").

\(^{102}\) See MODEL PENAL CODE § 2.03(1)(a) (adopting the but-for test of causation); RESTATEMENT (SECOND) OF TORTS § 431 (1977) (adopting the substantial factor test of causation).

\(^{103}\) 65 N.E. 69 (Mass. 1902).

\(^{104}\) See *id.* at 69; Wright, *supra* note 73, at 1792.
residue has to be paid for by someone, and it seems less unfair to charge it to the original wrongdoer than to the hapless victim.105 Although Feinberg addresses the liability of the first actor of alternative causes,106 Dressler’s approach to questions of alternative causes is to ask simply “what caused a result rather than what might have caused it if the circumstances had been different.”107 Dressler also employs policy considerations but only in the situation where there are concurrent sufficient causes. Where $D_1$ shoots $V$ in the heart at the same moment that $D_2$ shoots $V$ in the head and either attack alone would have immediately killed $V$, Dressler addresses the result that neither can be guilty of the murder if the but-for test is applied:108

Why should we not give the actors the benefit of the fortuity here? The reason why we balk at this is that in the other case [preemptive causation] there is a party—X—who can be convicted of murder; here, use of the but-for test results in nobody being convicted of murder.109

The policy at issue here is very clear. The defendant is a “bad” person. She has shown she is a bad person by both her actions and her mental state.110 She may not “luck out” and be absolved of responsibility because the result would have occurred even without her acting. She has done all that is necessary to complete the crime; we will not let sheer coincidence free her from responsibility.111


106 This type of overdetermination is similar to L.E. Loeb’s example of Harry who decides to use only one color of poisonous mushrooms (not both brown and white) to kill Harriet. He flips a coin and only uses the white ones. Had he not, he would have used the brown ones, which also would have killed Harriet. See Charles B. Cross, Counterfactuals and Event Causation, 70 Austl. J. Phil. 307, 310 (1992) (citing L.E. Loeb, Causal Theories and Causal Overdetermination, 71 J. Phil. 525-44 (1974)).

107 DRESSLER, supra note 44, at 162.

108 See id. at 161. Neither will be guilty because but-for $D_1$’s actions, $V$ would still have died because of $D_2$. But-for $D_2$’s actions $V$ would still have died because of $D_1$.

109 Id. at 161 n.9; see also Charles E. Carpenter, Concurrent Causation, 83 U. PA. L. Rev. 941, 951 (1935) (“The real policy behind imposing liability in such cases . . . is that wrongdoers should not be permitted to escape the consequences of their wrongful acts.”); James A. McLaughlin, Note, Proximate Cause, 39 Harv. L. Rev. 149, 153 (1925) (“Faced with the dilemma of saying each caused it or neither caused it, we say that each caused it rather than let each actor escape if the other elements of liability are present.”).

110 Obviously, “bad” is defined as being only negligent in the case of the cab driver.

111 Note, however, that when we do this, we accept that the defendant fails to be the cause-in-fact of the harm. Even though one of the elements of the prima facie
C. Conclusions

To determine whether a defendant actually caused an injury, courts either employ inadequate causal tests or turn to policy to solve cause-in-fact inquiries. Hence what was meant to be a scientific, objective analysis of what actually happened has become instead a means for courts to make decisions about which “bad” people deserve to be punished. Courts have thus manipulated causation-in-fact into another proximate causation test. Such manipulation in order to avoid the role of chance is inappropriate. Courts should dispense with the causal question altogether (which they have essentially done) and punish those who are morally blameworthy rather than those whom can be proven to be the cause of the harm.

IV. TRANSFERRED INTENT: FURTHER CONTORTIONS TO RULE OUT LUCK

A. Definition and Rationale

John shoots at Mary, intending to kill her. A strong gust of wind causes the bullet to hit not Mary, but Jane. Is John guilty of murdering Jane?

The answer is “yes” under the doctrine of transferred intent. The doctrine of transferred intent, or the theory that the intention “follows the bullet,” allows courts to hold criminals liable in cases in which they miss their victim and hit another person or in which they mistake someone for their victim. The Model Penal Code adopts this doctrine:

(2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:

(a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused...
The rationale for the transferred intent doctrine was clearly expressed by the court in *People v. Birreuta*:

The function of the transferred intent doctrine is to insure the adequate punishment of those who accidentally kill innocent bystanders, while failing to kill their intended victims. But for the transferred intent doctrine, such people could escape punishment for murder, even though they deliberately and premeditatedly killed—because of their “lucky” mistake. The transferred intent doctrine is born of the sound judicial intuition that such a defendant is no less culpable than a murderer whose aim is good. It assures that such a defendant will not be allowed to defend against a murder charge by claiming to have made a mistake of identity, a poor aim or the like.

**B. Real Consequences of the Legal Fiction**

Courts have recognized that “[t]ransferred intent is a legal fiction, used to reach what is regarded with virtual unanimity as a just result.” What the courts have essentially done in these cases is to rule out the role of luck. William Prosser notes that early criminal cases were primarily concerned with wanting to hold someone guilty for the crime. After all, if the defendant did not intend to kill the victim then the defendant is not guilty of murder. Someone, however, clearly did murder the victim, and if not the defendant, who? In seeking to avoid this conundrum, courts fashioned the rule of transferred intent whereby the defendant is not absolved of responsibility solely because she has bad aim. Courts, however, have sacrificed a degree of intellectual coherence in order to achieve this result.

---

115 208 Cal. Rptr. 635 (Ct. App. 1984).
116 Id. at 638-39.
117 People v. Czahara, 250 Cal. Rptr. 836, 839 (Ct. App. 1988); see also William L. Prosser, Transferred Intent, 45 Tex. L. Rev. 650, 650 (1967) (stating that transferred intent is a “bare-faced fiction”). For a different approach to this problem, see DRESSLER, supra note 44, at 108. Dressler argues that the mens rea element exists even when John shoots Jane, rather than Mary as he intended, because John shoots intending to kill a person and does so. Since the statute will only require that John shoot with intent to kill another person, and not a specific person, John has satisfied the mens rea element for the murder; no transference is really necessary. Since courts do not use this rationale, however, they are still contorting intentions in order to rule out luck. This is similar to the problem previously presented with but-for causation: NESS may be the method to prove actual causation but the courts do not use it. See supra notes 101-04 and accompanying text.
118 See Prosser, supra note 117, at 653.
1. Does Intent Transfer When the Intended Victim Is Killed?

In *Birreuta*, the defendant intended to kill only one woman, but accidently killed his wife also.\(^{119}\) The question before the court was whether the doctrine of transferred intent applies to unintended victims when the defendant succeeds in killing his intended victim.\(^{120}\) The court concluded that the defendant was guilty of murder with respect to the intended victim but only of manslaughter with respect to the unintended victim:\(^{121}\)

> The interests of justice are best served by differentiating between killers who premeditatedly and deliberately kill two people, and killers who only intend to kill one person, and accidently kill another. Both types should be punished for both killings, but the former type is clearly more culpable. . . . If the transferred intent doctrine is applicable when the intended victim is killed, this difference disappears.\(^{122}\)

Hence, whether or not the defendant completes her crime against her intended victim determines what crime she will be punished for with regard to her unintended victim. It should be noted here that courts are twisting the mental state of the defendant upon a mere fortuity. Mental states—internal, pre-action dispositions—are being determined after the fact based upon how good the defendant’s aim was.

We might decide that this is a small price to pay for the right result. When a criminal tries to purposefully kill someone and succeeds, she should be charged with murder. But what if the defendant enters a shopping mall with the intent of killing her ex-husband and, in order to accomplish this result, sprays machine-gun fire throughout the mall and kills fifty people? If her ex-husband is not included in this group, is she guilty of fifty murders? Or does she only intend one murder, making her guilty of one murder and forty-nine manslaughters?

Further, other courts have disagreed with *Bireutta* and have held that the defendant’s intent does transfer even when the intended victim is also injured.\(^{123}\) According to such logic, the

\(^{119}\) 208 Cal. Rptr. at 637.
\(^{120}\) See id.
\(^{121}\) See id. at 639.
\(^{122}\) Id.
\(^{123}\) See Mordica v. State, 618 So. 2d 301, 303 (Fla. Dist. Ct. App. 1993); see also State v. Rodriguez-Gonzalez 790 P.2d 287, 288 (Ariz. Ct. App. 1990) ("Intent to murder is transferable to each unintended victim once there is an attempt to kill
woman in the previous example would be guilty of fifty murders. In *Mordica v. State*, a Florida court agreed with the United States Court of Appeals for the District of Columbia that “[t]here are even stronger grounds for applying the principle [doctrine of transferred intent] where the intended victim is killed by the same act that kills the unintended victim.” What are these grounds? Why, when our mall gunwoman is reckless as to fifty deaths, does she suddenly become an intentional murderer of fifty people just because she intends to kill one specific person? As *Birreuta* points out, isn’t there a moral difference between someone who intends to kill fifty people and someone who intends to kill one—a distinction that *Mordica* obscures?

2. When the Unintended Victim Is a Member of a Protected Class

Transferred intent causes further problems when the unintended victim is in a protected class. What if A shoots at B, a regular person, but misses and accidentally kills C, a law enforcement officer? If there is a statute that makes killing a law enforcement officer a greater crime than killing a regular person, is A guilty of killing C as a federal officer or killing C as a regular person? In *Mordica*, the court opted for the latter alternative and held that the defendant’s intention to strike another inmate was all that was transferred when the defendant’s unintended victim was a law enforcement officer. The same holding was reached by *United States v. Montoya* where the defendant accidentally hit a federal officer on the head with his crutch while trying to knock a can of beer from the hand of a companion. The court reasoned that “[i]f the theory of transferred intent were applied under section 111, an assault not intentionally directed at a federal officer would become subject to the augmented penalties merely because the blow happened by chance to strike a federal officer.” The defendant, therefore,
is not found innocent by virtue of missing her intended victim, but neither is she subjected to the misfortune of additional punishment for having assaulted a member of a protected class.

The court in Montoya then attempted to distinguish United States v. Feola by stating that "Feola intended to assault the officer even though he (Feola) did not know that the victim was a federal agent. Intent was not transferred from one victim to another." Hence, when A shoots at B and hits C, the fact that C is a federal officer is irrelevant because A did not know she was going to hit C. Isn't the entire point of transferred intent, however, to hold defendants responsible for victims they did not foresee? Furthermore, if transferred intent makes intending to kill B the same as intending to kill C, doesn't Feola apply when C happens to be a federal officer?

Additionally, what if B is the federal officer? If intent transfers and knowledge does not count according to Feola, then is A guilty of killing a federal officer when she kills C? Here, the answer gets confusing because: (1) A did not kill a federal officer; (2) under mistake-of-fact rules she would be held to what she believed to be the truth; but (3) Feola says the defendant did not need to know that B was a federal agent to be guilty of killing one. Indeed, "the severity of the offense predicated on the doctrine of transferred intent is that applicable had the intended victim been the one injured." Under such reasoning, when A misses federal agent B and kills C, A is guilty of murdering a federal officer. Thus, the confusion created by the combination of Feola with the doctrine of transferred intent is apparent.

Further, some courts are willing to charge the defendant with a greater crime than the one the defendant intended to commit. In State v. Cantua-Ramirez, the defendant intended to hit his girlfriend but missed and hit their child, whom the girlfriend was holding. The court held that since the injury intended and the

---

130 420 U.S. 671 (1975) (holding that the defendant, although unaware that the man he assaulted was an undercover federal agent, was responsible for violating the federal statute).
131 739 F.2d at 1439.
132 If there is a problem with holding A guilty of murdering a federal officer, the glitch lies in the rationale behind Feola, not that behind the doctrine of transferred intent. Any further discussion, however, is beyond the scope of this Comment.
135 See id. at 1032-33.
injury received were the same, and the sole difference was the grading of the offense, the defendant was guilty of the greater offense.\textsuperscript{156} This holding clearly conflicts with the rationale behind the doctrine of transferred intent. Transferred intent was to prevent culpable defendants from being charged with lesser crimes or no crime at all. Offenders are supposed to be held guilty for the degree of culpability that they manifest toward their intended victims. A classification of a crime as a felony rather than as a misdemeanor reflects the societal decision that a person who hits a child is a worse person than a one who causes the same injury to an adult. By convicting the defendant of child abuse, the court in \textit{Cantua-Ramirez} attributed to the defendant a culpability that he did not have.

\textbf{C. Conclusions}

Legal fictions are occasionally needed for the law to reach the correct result. The doctrine of transferred intent, however, undermines logical coherence in its attempt to limit the role of chance. Its purpose cannot be served when the intended victim is actually injured or when the defendant is punished for a crime greater than that which she committed. Further, unlike causal overdetermination cases where policy decisions about causation are affecting the causal question itself, here, problems with causation are forcing twists in the concept of intention—a step courts should be unwilling to take. Instead, the solution to evading fortuity lies in getting rid of the problem, causation, and not in contorting other legal concepts.

\textbf{V. ATTEMPTS AND COMPLETED CRIMES: THE CONTINUING ROLE OF LUCK IN THE CRIMINAL LAW}

Edith shoots at Frank intending to kill him, but Frank ducks. Edith will be guilty of attempted murder. She is just as morally blameworthy\textsuperscript{157} as if she had succeeded, yet the criminal law continues to maintain a distinction between attempts and completed crimes.\textsuperscript{158}

\textsuperscript{156} See \textit{id.} at 1033. The defendant was found guilty of intentional child abuse, a class-four felony, rather than assault on an adult, a class-one misdemeanor.

\textsuperscript{157} See \textit{supra} part I.B.

\textsuperscript{158} Even the Model Penal Code distinguishes between first degree felonies and attempts to commit them. See \textit{MODEL PENAL CODE} § 5.05(1) (grading such attempts
A. Defining Attempts and Justifying Their Punishment

According to the Model Penal Code, a person attempts a crime if, acting with the culpability otherwise required for the commission of the crime, he:

... 
(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
(c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.\(^3\)

At common law, the definition of an attempt is an act coming close to completion with the intent to complete the crime.\(^4\) Most states punish attempts less severely than completed crimes.\(^1\)

We punish attempts for two reasons. The first is that attempts are sometimes seen as a harm in themselves since they may disrupt society and create unrest.\(^2\) Hence, these are activities which deserve to be punished in their own right.\(^3\) The second rationale is that if we want to prevent the harm that will result from a successful attempt, we may want to intervene before the harm is caused.\(^4\)

Although intervention does not necessarily entail punishment,\(^5\) retributivists will justify punishing attempters on the grounds that once the actor has formed the intention to commit the

\(^3\) See Commonwealth v. Peaslee 59 N.E. 55, 56 (Mass. 1901) (focusing on "whether the defendant's acts [came] near enough to the accomplishment of the substantive offense to be punishable").

\(^4\) See Dressler, supra note 44, at 331; Schulhofer, supra note 46, at 1498.

\(^5\) See Schulhofer, supra note 46, at 1506 (arguing that "attempt itself upsets the social equilibrium, giving rise to a certain tension or disorder").

This type of harm, however, may be seen as a free-floating evil that does not create a setback to any individual's interest. See, e.g., Joel Feinberg, Harmless Wrongdoing 20-25 (1988) (presenting various examples of free-floating evils).
crime and has completed a substantial enough step to manifest her culpability, she is just as culpable as if she had completed the crime.\textsuperscript{146} Utilitarians will also want to punish before completion because it will increase deterrence\textsuperscript{147} while decreasing the disutility caused by the harmful result.

B. The Argument in Favor of Equivalence\textsuperscript{148}

1. Some Preliminaries

Before beginning an analysis of the arguments in favor of treating attempts and completed crimes the same, it is helpful to set some ground rules. We should first distinguish attempts from completed crimes.\textsuperscript{149} A completed crime is a successful attempt: John, with intent to kill, shot at Mary; the bullet hit Mary; Mary died. There are then both completed attempts and incomplete attempts. A completed attempt is where the actor has done everything in his power to effectuate his desired results: John, with intent to kill, shot at Mary; the bullet missed Mary; Mary lived. An incomplete attempt is where the actor has not done the last act necessary to complete the crime: John pointed the gun at Mary and shouted, "I am going to kill you"; the police then burst through the door. For the moment, let us address only the difference between a completed crime and a completed attempt.

Sverdlik set some other guidelines that would also be helpful to follow here. First, we are evaluating the difference between an attempt and a success "other things being equal."\textsuperscript{150} Otherwise, if we allowed other variables to change, we would not be sure what

\textsuperscript{146} See, e.g., H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 131 (1968); Ashworth, \textit{supra} note 42, at 736 (discussing the "intent principle" under which "individuals should be held criminally liable for what they intended to do" regardless of the result).

\textsuperscript{147} See Shavell, \textit{supra} note 50, at 457 ("If punishment were restricted to those who actually did harm, deterrence would be inadequate.").

\textsuperscript{148} I have borrowed this term from Steven Sverdlik, \textit{Crime and Moral Luck}, in \textit{MORAL LUCK} 181, 182 (Daniel Statman ed., 1993). Although Sverdlik is using "equivalence theory" to address the similarity of moral culpability despite different results, I am applying the similarity to the treatment of attempts versus completed crimes in law.

\textsuperscript{149} See R.A. DUFF, INTENTION, AGENCY & CRIMINAL LIABILITY 185-86 (1990) (discussing differences between different types of attempts); Schulhofer, \textit{supra} note 46, at 1506 (distinguishing completed crimes, completed attempts, and incomplete attempts).

\textsuperscript{150} Sverdlik, \textit{supra} note 148, at 182.
is doing the moral work, the difference between attempts and successes or the other altered variables. Next, we are assuming that a success produces more harm than an attempt although attempts may produce some harm. If attempts and completed crimes were assumed to cause the same amount of harm, the distinction between the two, based on the occurrence of a harm, would disappear. Finally, the only harm we are talking about for the time being is death.

2. Results Do Not Matter

In arguing that our intuitive judgments do not necessarily yield the conclusion that completers are worse than attempters, Steven Schulhofer presents the following hypothetical:

Suppose that $A$, who intended to kill at the time he shot, suddenly decides he has done a terrible thing, immediately calls a hospital for help, has the country's best neurosurgeon flown in from a great distance to perform the operation, and does all else in his power to save his wife. In spite of everything, she dies. $B$ meanwhile does everything possible to prevent his wounded wife from being discovered or treated. But neighbors have heard the shot, the police get her to the hospital in time, and she recovers. Is $A$ still more culpable than $B$?

One might argue that Schulhofer is stacking the deck. Assuming evaluating moral culpability is an additive process, the difference in intent may be doing the work in this hypothetical. For instance, $B$'s culpability could be measured as $-1$ (for the small amount of harm resulting) + (plus) $-30$ (for his incredibly evil intentions) = $-31$. $A$, on the other hand, may have caused a great evil, $-20$, but his intentions were eventually good $+3 = -17$. Hence, the amount of harm caused could still be relevant, it is just because the intentions of $A$ so outweigh any other considerations that the result seems unfair. Schulhofer is violating the preliminaries Sverdlik set out by not holding other things equal in order to show that at times the harm resulting does not matter.

---

151 Variables that might be altered include motive and provocation, both of which pull moral strings. See id.

152 See id. at 182-83.

153 See id. at 183.

154 Schulhofer, supra note 46, at 1515.
A simpler, less contrived hypothetical is presented by R.A. Duff: Pat and Jill each fire a shot at an intended victim, intending to kill her: Jill succeeds in killing her victim, but Pat does not (her victim moves and the shot misses). Is there any difference between their two cases which can justify the distinction which the law draws between them, such that Jill is sentenced to life imprisonment for murder, whereas Pat receives a lighter sentence for attempted murder?\(^{155}\)

The answer should be "no." After all, the difference between Pat and Jill is luck. And luck is something upon which true responsibility should not depend.\(^{156}\) Both Pat and Jill intended to kill their victims, and thus, the mens rea element for murder is met. Both also put their intentions into action when they fired their guns, and hence the actus reus element is met. Why should criminal liability then rely on matters out of the agents’ control?\(^{157}\)

\(^{155}\) DUFF, supra note 149, at 184.

\(^{156}\) See JOEL FEINBERG, Problematic Responsibility in Law and Morals, in DOING AND DESERVING 25, 33 (1970) (arguing that "moral responsibility is ... restricted to the inner world of the mind, where ... luck has no place"); HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 423-24 (1979) (arguing that when "the nonoccurrence of harm is purely fortuitous" the punishment should not be lessened); Lawrence C. Becker, Criminal Attempt and the Theory of the Law of Crimes, 3 PHIL. & PUB. AFFAIRS 262-76 (1974) (arguing that the person who accidentally misses her target is "no less a social menace"); Richard Parker, Blame, Punishment, and the Role of Result, 21 AM. PHIL. Q. 269-70 (1984) (arguing that "it is false that results are generally relevant to either one's blameworthiness or his punishability"); Michael Zimmerman, Luck and Moral Responsibility, 97 ETHICS 374, 385 (1987) (arguing that "[i]nsofar as what happens after one has made a free decision is ... up to nature, then these events are strictly dispensable in the assessment of moral responsibility").

\(^{157}\) There are other instances, besides attempts, where luck plays a part in the criminal law. James Gobert points to the fact that if there is an intervening cause, the defendant will not be held guilty although she has manifested her culpability. See James J. Gobert, The Fortuity of Consequence, 4 CRIM. L.F. 1, 7 (1993). Further, medical negligence in the treatment of the victim should not affect the culpability of the defendant. See id. at 9. The year-and-a-day rule (that the victim must die within a year and a day of the defendant’s commission of the actus reus) allows chance to determine the defendant’s crime. If the victim dies a year later, the defendant is a murderer; if the victim dies a year and two days later, the defendant is merely an attempted murderer. See id. at 18. Luck may also work unfairly against a defendant. Under the thin-skull rule, the defendant takes her victim as she finds her. Hence, a defendant might find herself guilty for more than she intended. See id. at 8-9. This poses the same problem as transferred intent: it holds defendants guilty for outcomes toward which they did not have a guilty mind. These problems are also presented in cases of felony-murder where the defendant is held accountable for murder for any death which occurs while she is committing a felony. See id. at 18-19.
C. The Argument That Results Do Matter

Despite the prevalence of fortuity in attempt law, some commentators continue to argue that the fortuitous result of the creation of a harm is relevant.

1. No Harm, No Reason to Punish

One possible argument in favor of results is that no harm has occurred and thus we do not have a reason to punish the defendant. The rationale, however, for punishing may be different than the rationale for initially criminalizing the conduct. Although the original justification for criminalizing murder is that it causes a harm to others, we do criminalize and punish inchoate crimes also. We, as a society, have made the decision to punish acts that will eventually cause a harm even though the harm does not result in that particular case.

2. Fear of Jury Nullification

Another argument in favor of nonequivalence is that if we punish attempts the same as completed crimes, juries will not convict. Schulhofer extensively addresses the research in this area and concludes that such a fear is unfounded. Ashworth, on the other hand, still maintains that this is a practical possibility which should be kept in mind.

Several things about jury nullification should be noted. First, Ashworth's concern about the practical possibility is just that—a practical question. To a retributivist, the possibility of disutility is not a reason not to punish (although the answer might be different if jury nullification threatened our ability ever to punish such wrongdoers.) Further, jurors are not addressing the fairness of the range of sentencing. Before them is one criminal, and jurors will

---

158 See HUSAK, supra note 45, at 15 (explaining that some theorists find conduct which does not cause harm to be preparation and thus not punishable). For a comprehensive definition of harm, see generally JOEL FEINBERG, HARM TO OTHERS (1984). But see Heidi M. Hurd, What in the World is Wrong?, 5 J. CONTEMP. LEGAL ISSUES (forthcoming 1994) (manuscript at 104-13, on file with the author) (critiquing Feinberg's conception of harm).

159 See supra notes 142-47 and accompanying text (discussing the rationale for punishing attempts).

160 See Schulhofer, supra note 46, at 1522-33, 1554-57.

161 See Ashworth, supra note 42, at 749 (arguing that jury nullification is a "practical possibility which must be borne in mind").
react to the culpability of that person. Unlike cases of strict liability which jurors may feel are unfair, the culpability of the actor will be sufficient to sway the typical juror. 162

3. With Attempts, Less Punishment Suffices to Satisfy the Retaliatory Urge

Another argument that results should matter is that our retaliatory urge is greater when harm occurs. 163 After all, how does one apply "an eye for an eye and a tooth for a tooth" if all John did was make an attempt at the eye? This argument presupposes a system of punishment based on retaliation. As Schulhofer notes, however, most jurisdictions do not invoke retaliation as a reason to punish, and "legal theorists are virtually unanimous in applauding the judgment." 164

4. We Want Society to Take Murders Seriously

Society, it is argued, learns what is good and bad by looking at the law. 165 If we teach people that murder and attempted murder are equally wrong, then people will not take a murder as seriously when it happens. 166

This argument rests on two faulty assumptions. The first is that punishing people equally for trying to kill and killing means the world is no different when someone lives as opposed to when someone dies. This is simply not true. The actor whom we punish is no different, but the death of a human being necessarily takes its toll. Society is intelligent enough to recognize the difference between (1) equating people who try and people who succeed in doing a bad thing (punishing attempts the same as completions) and (2) equating the gravity of the harm that occurs when a murderer does succeed to the absence of harm when she does not (recognizing the difference when a harm occurs and when it does not).

The second faulty assumption is that by punishing attempts and

162 On these points, see Schulhofer, supra note 46, at 1526 (suggesting that moral fault may be enough for juries in most cases).

163 See ADAM SMITH, THEORY OF MORAL SENTIMENTS 100 (A. Macfie & D. Raphael eds., 1976).

164 Schulhofer, supra note 46, at 1510-11. But see DRESSLER, supra note 44, at 338 (using severity of the harm as an indicator for the degree of punishment necessary under retributive theory).

165 For an analysis of law's educative role, see FEINBERG, supra note 143, 294-300.

166 See DUFF, supra note 149, at 191.
murders the same, society will begin to feel that murders are not as bad—that they are just like attempts. To understand the crux of this argument, imagine two people, Lady and Loser. Lady is a member of high society and everyone in town loves and respects her. Loser, on the other hand, is uncultured and despised. If Lady and Loser were seen around town together, what would happen? The argument that associating attempted murders with murders will undermine the gravity with which murder is perceived is the equivalent of assuming that Lady will be compromised by her association with Loser. This argument ignores the possibility that Loser's reputation might be enhanced by her association with Lady. Indeed, if society truly respected Lady, it might conclude that perhaps Loser was not such a loser after all.

Murder is condemned by all of society. If attempt begins to be associated with murder, people will not necessarily think that murder is somehow less grave because it is only punished as an attempt. Rather, people will respect that attempt, too, is a serious crime because it is being punished to the same degree as murder.

5. Deterrence: Differential Punishments Create an Incentive to Stop After Attempters Have Already Begun the Act

Another argument advanced for treating completions differently from attempts is that otherwise, once the actor has taken a substantial step, she has no reason not to finish the intended conduct. Indeed, imagine the case of Cara who shoots at David. Cara misses. If she is going to be held guilty of murder, what incentive does she have not to shoot again and finish him off? As noted by Schulhofer and Ashworth, however, abandonment is a defense to attempt under the Model Penal Code. Further, the actor's wavering over whether to complete the crime will call into question whether she has the sufficient mens rea. Evidence concerning mens rea becomes more necessary the more remote the conduct is from its

---

167 Note that the same punishment for completed unsuccessful attempters and successful attempters will do very little to decrease deterrence since most completed attempters were planning to succeed. See MODEL PENAL CODE § 2.03 cmt. 4, at 134 (Tentative Draft No. 4, 1955).
168 See Ashworth, supra note 42, at 740; Schulhofer, supra note 46, at 1520.
169 See MODEL PENAL CODE § 5.01(4).
Finally, how far the actor was willing to go may mitigate or enhance the severity of the punishment.  

6. Attempters Do Not Benefit in the Same Way

Some theorists have argued that when the criminal only attempts the crime, she does not receive the fruits of her activities. This argument amounts to one of unjust enrichment. When a criminal succeeds, she is unjustly enriched, which must be rectified; when she fails, this added element of punishment is unnecessary. Ashworth finds this argument unsatisfactory: "At bottom, it must be said that the principles of profit deprivation and vindicative satisfaction belong to a separate realm of principles ancillary to punishment—chiefly principles of compensation." Indeed, whether someone benefits from a crime is not the criminal law's concern. The criminal law's focus is only on deterring others and punishing violators. Thus, if Ken kills Renee and afterward feels no happiness, he cannot argue that since he derived no pleasure from the murder, he should not be punished. Others will still be deterred from committing the crime by looking at the example of his punishment, Ken will be less likely to kill again (specific deterrence), and Ken is a bad person who chose to violate the law and thus deserves to be punished.

7. Attempters Are Not As Dangerous

Nonequivalence theorists also maintain that attempters are not as dangerous as completers. The failure to complete the act may be due to a lack of fixity of purpose; however, even if attempters and completers were punished equally, this lack of success could then have evidentiary weight as to mens rea. Further, only a small minority of people would truly be less dangerous, evinced by

---

171 We need this evidence because the act itself may be equivocal.
172 See Shavell, supra note 50, at 455 (discussing how varying sanctions for the second attempt can create incentives not to try again if the first attempt has failed).
173 See Ashworth, supra note 42, at 744-45; Michael Davis, Why Attempts Deserve Less Punishment than Completed Crimes, 5 LAW & PHIL. 1, 28-29 (1986).
174 Ashworth, supra note 42, at 746.
175 See id. at 743-44.
176 But see infra part VI.B (arguing that results have little evidentiary weight in determining intent).
their continual failure.177

Paul Rothstein maintains that results are necessary to show dangerousness. He argues that there are differences between (1) a gunman who buys a gun but never gets near his intended victim, (2) the gunman who pulls the trigger but death is prevented by the gun's malfunctioning or the victim's wearing a bulletproof vest, and (3) the gunman who kills his victim.178 The first gunman's mens rea, according to Rothstein, is uncertain.179 Although this statement may be true, the criminal law already accommodates this reality by imposing a "substantial step" definition of an act and by requiring the prosecution to prove the mens rea of purpose.

Rothstein further argues the second gunman may have taken the gun's misfiring or the victim's vest into account and so "he can take credit for these 'chance' circumstances in the world that are supposedly 'outside his control.'"180 But doesn't any credit he takes serve as evidence of mens rea? If I fire a gun at Dick, knowing he is wearing a bulletproof vest or knowing my gun misfires, do (can?) I have the purpose of killing him? What if I know there is about a seventy-five percent chance that Dick is wearing his vest or that the gun will misfire? Doesn't my knowledge of these factors and how I attempt to accommodate them go to my intentions and not to causation? What I knew beforehand has no influence on the world as we know it once I have acted, and what I did to prepare for what I knew is part of my action and mental state.

8. No Harm, No Foul

One response to the equivalence argument is the intuitive sense that a person deserves less punishment when no harm occurs. Smith argues that if one of his sons throws a stone at the dining room window and misses, he will be angry, but if the window is broken, he will be furious.181 Rothstein discusses this "feeling" in addressing a hypothetical presented by Judith Thomson:182

177 See Ashworth supra note 42, at 743 (citing Schulhofer, supra note 46, at 1586-93).
179 See id. at 161.
180 Id. (emphasis omitted).
181 See Smith, supra note 19, at 71.
She sets out the example of the person who, by idly tapping his foot on the sidewalk, saves three lives through some freak of nature unknown to him. Professor Thomson says that our judgment of the morality of the foot tapping—neutral morality—is unaffected by the good result. I would say that people, particularly those saved, would feel very kindly disposed toward such a person, at least more so than toward a foot tapper who did not wind up saving anyone.\textsuperscript{183}

If Rothstein proves anything with this assertion, it is just how different feelings can be. How can we base a criminal justice system on feelings that vary from person to person?\textsuperscript{184}

Further, the reason "it just matters" may be socially trained, and therefore reversible in future generations. Imagine a young child, Johnny, who has taken a crayon and written on the walls of his house. When his parents discover this defacement, a typical parental response is going to be "LOOK AT WHAT YOU HAVE DONE!" (Note the emphasis on results.) The parents may only secondarily inquire into "what were you thinking?" Johnny associates the reasons for his punishment with the harm he has caused.\textsuperscript{185}

The situation might be different for Johnny if he only attempted to write on the walls. If his little sister, Mary, ran up and took the crayon from him right before he started writing, Johnny would never get to write on the walls.\textsuperscript{186} Johnny would first learn that results are the key to discovery. Chances are, Johnny's parents will never even discover his culpable intentions. Even if Johnny is discovered, however, the punishment inflicted will typically not be as severe as if he had written on the wall.\textsuperscript{187} Johnny will not learn

\textsuperscript{183} Rothstein, \textit{supra} note 178, at 159-60.


\textsuperscript{185} See RICHARD E. PETTY & JOHN T. CACIOPPO, ATTITUDES AND PERSUASION: CLASSIC AND CONTEMPORARY APPROACHES 40-52 (1981) (discussing how attitudes can be conditioned).

\textsuperscript{186} Indeed, is Johnny less of a "bad boy" if he is somehow prevented from writing on the walls? What if he cannot find his crayons, but he is just dying to color the living room wall blue? What if he meant to write on the bedroom wall, but writes on the kitchen wall? What if the walls have crayon-proof paint? What if he meant to use a green crayon but accidently grabbed a blue one? Isn't Johnny just as culpable as if he had achieved his desired goal?

\textsuperscript{187} The parents will distinguish between the two acts because they were taught that results matter. Further, in reply to Smith, when a harm is caused by a child, the parents are reacting not only in response to society's decision that a bad action has occurred, but also as individuals who will now have to spend time and money to
until much later, when he goes to law school (and by then he will be John), that we punish because of the culpable intentions of the actor and the choice the actor has made to act on those intentions. In both the crayon-interception case and the successful-writing case, Johnny is the same child who decided to disobey his parents and do a bad thing. If his parents emphasized those factors to him at an early age, the societal emphasis on results could disappear.

9. An Alternative Descriptive Theory

Some commentators have argued not only that fortuity does play a role in the law but also that it should. In his Note, Daniel Mandil argues that chance separates paradigmatic from nonparadigmatic crimes. The paradigmatic crime involves an intentional act and the creation of a harm (such as a death). A crime is nonparadigmatic if one of the elements is missing: an attempt is an intended crime without a harm and criminal negligence is a negligent (nonintended) act with harm. Mandil further notes that no liability is created by a negligent act that does not result in harm. Mandil sees these separations as a balance struck between an individual's freedom of action and the sphere in which the state must necessarily interfere. He argues that:

In the context of harm without intent, the uncontroversial absence of tort liability for uneventful acts of negligence demonstrates the complete dominance of the value of freedom of action over competing social values. . . .

Like tort law, in cases of criminal negligence, the criminal law generally preserves the supremacy of freedom over other social values—only the existence of isolated reckless endangerment statutes disturbs the congruence.

remedy the problem. Results may matter more in an individual case than in the case of societal decisions. We still incur the costs and inconvenience of putting the attempter through the criminal justice system. The parents of the victim, however, may see a distinct difference between someone who succeeds in killing their daughter and someone who tries and misses. They may feel both are bad people and should be punished to the full extent of the law, but the results of a near miss are very relevant to them.


189 See id. at 137.

190 See id.

191 See id. at 138.

192 See id. at 140.

193 Id. at 139-40 (citation omitted).
Mandil, however, is missing the point. He sees the scarcity of criminal-negligence-without-resulting-harm statutes as defeating the arguments suggesting that the resulting harm should not matter in the criminal law. A descriptive theory may show what the law is currently doing, but it fails to show why this is what the law should be doing. The lack of endangerment laws only illustrates that the criminal law is failing to realize that it is taking fortuity into account—it does not justify doing so.

VI. SHOULD CAUSATION PLAY ANY ROLE?

A. Yes, in Tort Law

In arguing that results matter, Rothstein presents the example that supposes that all truckers fail to maintain their brakes. A child runs out in front of two trucks and is hit by one of them. Does it matter which one hit the child? Indeed, if results do not matter, Rothstein argues, then it does not matter if we can prove which trucker hit the child.

Results do matter here, however, and the reason is simple. One goal of tort law, unlike criminal law, is corrective justice, redressing the injury inflicted upon the victim by the faulty defendant. Hence, who is injured is very relevant, as is who did the injuring.

---

194 Further, the rationale for according liability in tort law is not necessarily congruent with the rationale for criminal law; hence, not holding people criminally liable does not necessarily follow from arguments that they are not liable under tort law. See also infra notes 195-97 (arguing that resulting harm should still play a role in tort liability).

195 See Rothstein, supra note 178, at 165.

196 But see Emily Sherwin, Why Is Corrective Justice Just?, 15 HARV. J.L. & PUB. POL`Y 839, 847-48 (1992) (arguing that corrective justice, itself, can only be justified on consequential grounds and that it, too, presents problems of moral luck).

197 See OLIVER W. HOLMES, JR., THE COMMON LAW 79-81 (1946) (stating that a defendant would have to redress the injury because of the consequences of the defendant's act); Wright, supra note 81, at 1004. Wright states:

[T]ort law traditionally has been viewed as a system of corrective justice based on individual autonomy and individual responsibility. Individuals who tortiously expose the person or property of others to injury ordinarily are required to compensate those others if and only if injury actually occurs as a result of the tortious behavior.

Id. (citations omitted).
B. As Evidence of Mens Rea?

Practically, results serve a number of functions. First, without them, we will not know about some attempts.\textsuperscript{198} They may further serve as more evidence of mens rea. Thomson's foot tapper, according to Rothstein, will be praised for his conduct because the results are viewed as a good heuristic guide to his intentions.\textsuperscript{199} Results serve as confirmation that criminals purposely committed their crimes.

Is this really true? Suppose that I am drinking a glass of red wine at Sue's party. Lisa, my arch-enemy, dressed in all white, is about to come over and say hello. When I spill the wine on her, is her new red dress indicative of my intentions? You may infer that I intended to ruin her dress from two facts: (1) you know I dislike her and (2) I spilled my wine when she approached me. How much of your decision is based on the fact that her white dress is now red?

If, instead, I spilled wine on the floor only inches away from Lisa, would you think I intended to spill it any less because it did not hit her? Clearly, the result is not indicative of my intentions.\textsuperscript{200}

C. Cases Where Otherwise We May Be Punishing for Thoughts?

1. Completed Versus Incomplete Attempts

Continuing with Lisa and her "new" red dress, what if out of the corner of your eye you saw my hand start to tip, as if I were going to spill the wine, but then Joe, another guest, alerts me to the tip, and I then return my glass to an upright position? What were my intentions at the point where my hand started to turn? Should I be held responsible as if I had stained her dress?

Ashworth argues that incomplete attempts should be punished

\textsuperscript{198} See Rothstein, \textit{supra} note 178, at 157.

\textsuperscript{199} See \textit{id.} at 160 (stating that lives saved by one foot tapper make it more probable that the tapper took into account the possibility of saving lives).

\textsuperscript{200} Another example is that of my firing a gun at Lisa. First, assume that I fire the gun directly at her, but the bullet misses and lands in a tree. Next, assume I point the gun in the air and the bullet bounces off the tree and into Lisa. Which indicates my intentions: the result (where the bullet lands) or the act (where I point the gun)? \textit{But see} People v. Anderson, 447 P.2d 942, 949 (Cal. 1968) (noting that manner of killing may be evidence of premeditation); Gobert, \textit{supra} note 157, at 20-21 (arguing that when a gun is fired at point-blank range, where it lands (such as the victim's arm or the victim's heart) is indicative of the defendant's intentions).
less severely than completed attempts for this very reason:

We cannot tell whether he would have abandoned his attempt of his own accord, if he had been left undisturbed. Bearing in mind Blackstone's view that it takes greater "nerve" to carry a plan through to its final stage, this argument strengthens the general case for reduced punishments for incomplete attempts.\textsuperscript{201}

Currently, however, we punish completed and incomplete attempts equally. Further, the question here is simply one of actus reus. We want to ensure that the act requirement is sufficiently proximate to the harm. Buying a gun may not be a substantial enough step to show fixity of purpose, but loading it and waiting for the victim to return home is.\textsuperscript{202} Where cases are close enough, jurors may be unable to find that the defendant had the mens rea to commit the crime. On the other hand, once we have determined what a substantial step is, the same reasons which support punishing attempts the same as completed crimes apply to these cases.\textsuperscript{203}

\section{Inherently Impossible Attempts}

Jane hates Barbie and believes that if she tears the head off a Barbie doll, it will kill Barbie. Is Jane guilty of attempted murder? The Model Penal Code allows for mitigation where the conduct "is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense."\textsuperscript{204}

While some commentators view this as just, others worry about whether the defendant's actions still manifest a criminality about which we should be concerned.\textsuperscript{205} Several points should be made. First, without this provision in the Model Penal Code, the possibility of jury nullification is increased. How many jurors are willing to give Jane a life sentence? Moreover, Jane's rationality may be impaired if she believes that her actions will actually kill Barbie.

We also fear that punishing for a mistake of fact is too close to

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{201}] Ashworth, \textit{supra} note 42, at 741.
\item[\textsuperscript{202}] See \textsc{Model Penal Code} \textsection{5.01(2)(a)} (stating that lying in wait may be a substantial step).
\item[\textsuperscript{203}] See Ashworth, \textit{supra} note 42, at 735-38 (discussing intent-based retributive and consequentialist theory as supporting the punishment of completed and incomplete crimes equally).
\item[\textsuperscript{204}] \textsc{Model Penal Code} \textsection{5.05(2)}.
\item[\textsuperscript{205}] See Ashworth, \textit{supra} note 42, at 763 (discussing J.C. Smith, \textit{Attempts, Impossibility and the Test of Rational Motivation}, 1984 Auckland L. Rev. 25, 37).
\end{itemize}
\end{footnotesize}
punishing for thoughts. If I shoot at a tree stump, how will anyone know whether I thought it was a person or not? Ashworth discusses the fear that the police and prosecutors will create crimes based on intent with no foundation in acts.\textsuperscript{206} But he concludes that this practical concern may be met with practical remedies: better supervision of the police and prosecutors, taped interviews, and better definitions of the act requirement.\textsuperscript{207}

Despite these concerns, when someone has manifested that she is willing to act on her evil intentions, she is morally blameworthy. The fact that it is inherently impossible for her actions to yield her desired results makes her no less blameworthy, no less deterrable,\textsuperscript{208} and no less of an example to deter others.

D. Crimes That Require a Mens Rea of Only Negligence or Recklessness?

The argument for treating attempted murder and murder equally may be compelling. But are we prepared to extend this rationale so as to punish every negligent driver for manslaughter? Recall Smith's hypothetical where the father keeps weedkiller in a lemonade bottle. This weedkiller looks like lemonade, and the lemonade label is still on the bottle. He leaves it within the easy reach of his young children who love lemonade.\textsuperscript{209} Depending upon whether the children see it or not, he may or may not be guilty of manslaughter. Once again, luck has entered into the picture.

\textsuperscript{206} See Ashworth, supra note 42, at 759.
\textsuperscript{207} See id. at 760.
\textsuperscript{208} See David D. Friedman, Impossibility, Subjective Probability, and Punishment for Attempts, 20 J. LEGAL STUD. 179, 180-83 (1991) (arguing that punishing for impossible attempts does serve as a deterrent). But see Shavell, supra note 50, at 451 (arguing that when the probability of social harm is zero, there is no reason for society to bear the costs of punishing someone whose act could never cause a harm).

Further, there is no evidence that the next time Jane tries to kill Barbie it will not be by a more effective method: "If at first you don't succeed . . . ." Friedman notes that

One of the things we learn from a correct knowledge of causality (at least under an efficient legal system) is that killing people may well cause us to be punished. People who do not understand causality may fail to perceive that relation. If so, they will attempt more murders than would more rational people—and eventually they may give up on voodoo and use poison instead.

\textit{Id.} at 185; see also Shavell, supra note 50, at 451 (noting the same possibility of escalation).
\textsuperscript{209} See Smith, supra note 19, at 65-66.
According to the previously presented argument, the father should be punished for the harm he negligently risked because fate should not determine his culpability. He committed a negligent act; he should pay for it. Smith, however, hesitates to convict for manslaughter, even in cases where the defendant was reckless:

Suppose that a driver, X, overtakes on the brow of a hill when he cannot see whether anything is coming in the opposite direction. If anything were coming, there certainly would be a crash and, obviously, someone might be killed. But nothing is coming and no harm is done. Certainly X ought to be convicted of dangerous driving; but to convict him of attempted murder would be rather startling. Yet there is evidence that he was reckless as to whether he caused the death and if recklessness is indistinguishable in law from intention, there is equally evidence that he was guilty of attempted murder.210

What Smith fails to realize is that attempt is a crime of true purpose.211 How can one purposely try to be reckless as to someone’s death? What X is guilty of is reckless driving and that is the crime for which he will be convicted. Reckless driving, however, will have the same degree of punishment as manslaughter and, if the driving were extremely reckless, murder.212 We are not attributing to the defendant a mental state he does not have. We are merely punishing him for the results that he has risked causing.

---

210 Id. at 73.
211 See MODEL PENAL CODE § 5.01(1) (defining three types of attempts, all requiring a purposeful mental state).
212 Where the actor manifests “extreme indifference to the value of human life,” he may also be held guilty of murder. Id. § 210.2(1)(b). Because this person cares so little about human life, we hold him guilty of the greater crime. If the defendant engages in such conduct, for example, driving a car at 120 miles per hour, and is arrested, his charge is still reckless driving, although had he hit someone he would be charged with murder. We cannot say he attempted to murder someone because to do so is to say that his conscious object was to be extremely indifferent to human life.

Glanville Williams presents the example of a defendant who is throwing stones at a window in hopes of breaking it. See Glanville Williams, The Problem of Reckless Attempts, 1983 CRIM. L. REV. 365, 366. The defendant knows that there are people nearby, and that he might accidentally hit one of them. See id. He is thus reckless as to hitting a person. See id. We would not say, however, that he is attempting to hit a person because what he is attempting to do is break the window. “Attempts go with objects, aims and purposes, not with collateral risks.” Id.; cf. Joshua Sachs, Is Attempt to Commit Voluntary Manslaughter a Possible Crime?, 71 ILL. B.J. 166, 170 (1982) (arguing that one can attempt to commit manslaughter in cases of provocation by noting that “[i]t is the inability to restrain an unlawful intent, not inability to form the intent in the first place, which is the true hallmark of heat-of-passion manslaughter”).
VII. POSSIBLE SOLUTIONS

A. Leave the Crimes, Alter the Punishment

One solution to the problems discussed above would be to leave the definitions of the crimes alone, but arrange for the punishments to be the same for attempts (or reckless and negligent endangerments) as for their completed counterparts. Thus, someone who purposefully engaged in an act that resulted in death would be punished for murder, and someone who purposefully engaged in an act which, by mere chance, did not result in a death would be punished for attempted murder. Both, however, would serve the same sentence. Would this solution resolve any of the problems that exist under the current regime? Applying the solution to these problems would yield the following results.

1. Causal Overdetermination

Betty and Carla both shoot at Alex at the same time. Alex dies. In such a case, the court will have to make a decision as to what test it will use to determine causation-in-fact. Under the but-for test, neither Betty nor Carla is the cause-in-fact (an odd result) but both will be guilty of attempted murder and punished to the same degree as if they had succeeded. Under NESS, both would be necessary elements of a sufficient set of what actually happened—Betty was a necessary element of the set that includes only Betty and vice versa. Thus, both are guilty of murder.

2. Transferred Intent

Alice shoots at Betty but hits Carla. Carla dies. Alice is guilty of manslaughter for killing Carla as well as attempted murder as toward Betty. The attempted crime would be punished more severely than the manslaughter charge. If Betty is a law enforcement officer, Alice is liable for attempting to kill a law enforcement officer (a greater crime than regular murder) and for manslaughter as to Carla. If Carla is a law enforcement officer, Alice is liable

\[218 \text{ See supra parts III-VI (analyzing hypotheticals that illustrate current problems of causal overdetermination, transferred intent, attempts, intervening acts, the thin-skull rule, and recklessness).} \]

\[219 \text{ See United States v. Feola, 420 U.S. 671 (1975) (holding that a defendant could be charged for assaulting a federal agent even though he did not know his intended victim was a federal agent). Feola would yield the result that Alice is liable for} \]
for attempting to murder Betty and for the manslaughter of a law enforcement officer.²¹⁵ Further, if Alice hits both Betty and Carla, Alice is guilty of murder as to Betty and manslaughter as to Carla.

3. Attempts

Alice shoots at Betty but misses. Alice is guilty of attempted murder and is punished to the same degree as if she had completed the crime.

4. Intervening Actors

Alice is about to pull the trigger when Carla grabs the gun and shoots Betty herself. Carla is guilty of murder. Alice is guilty of attempted murder. Both are punished equally.

5. Thin-Skull Rule

Alice punches Betty. Because of a preexisting head injury, Betty dies. Assuming no reasonable person would expect such a reaction, since Alice only intended to assault Betty, she is guilty solely of assault.

6. Recklessness

Alex, Bob, Carl, and Dave all bring their machine guns to the mall and open fire in the middle of Bloomingdale's. Alex hits only one person in the arm, causing minor injuries. Bob kills one person. Carl kills fifty people. Dave hits no one. Alex would be guilty of assault as to the person he hit as well as reckless endangerment for the many lives he risked. Bob is guilty of manslaughter. Carl is guilty of fifty counts of manslaughter. Dave is guilty of reckless endangerment.

The difficulty here is how to punish them. They have all done the same bad act with the same evil intention. But how can a

²¹⁵ This assumes that Feola still applies. Ultimately, it will be a legislative decision how to punish the manslaughter of a law enforcement officer. Note, however, that Alice's conviction for attempting to murder Betty as a law enforcement officer would be punished to the same degree as a conviction for murdering Betty, a law enforcement officer.
charge of manslaughter, a charge of reckless endangerment, and fifty counts of manslaughter all receive the same degree of punishment?

This question may have an answer. First, note that Alex, Bob, Carl, and Dave are not engaging in this activity together (assuming they were would bring in complicated issues of conspiracy and accomplice liability). Alex will go before a judge and jury, and they will see a person who is willing to open fire in the middle of a mall, not someone who caused minor injuries, and he will be punished severely for doing so. Carl will also go before a judge and jury, and he too will be punished severely for his actions. Alex and Carl will not be tried at the same time and compared. The problem is that once the two are juxtaposed, it seems that the harm Carl caused somehow distinguishes his case from Alex's. We must remember, however, that Carl is no more or less culpable than Dave. Indeed, even if Alex and Carl were presented before the same judge and jury, there is no reason why Alex's reckless endangerment would receive a less severe penalty than Carl's manslaughter—the jury would see two very dangerous people and react accordingly.

B. Endangerment Statutes

As an alternate solution, James Gobert recommends the wholesale abolition of result crimes in favor of definitions that include only actions and mental states—murder statutes would thus become endangerment statutes. Such a statute would define the crime solely as the act of endangering life with either purposeful, knowing, reckless, or negligent intent. Gobert notes that such a statute is already in place in New Zealand. This solution would yield the following results.

---

216 See Gobert, supra note 157, at 16-17.
217 See id. at 16.
218 See id. at 17. New Zealand, however, has maintained a separate murder statute (called culpable homicide). See id. at 24. Gobert defends this statute, arguing that “[p]erhaps this concession to public opinion in the case of intentional killings is not only pragmatically but also theoretically justifiable. It is right that the criminal law signify the qualitative difference between murder and all other crimes.” Id. In making this argument, doesn't Gobert allow luck to enter into the criminal law? If the qualitative difference between murder and another crime (attempted murder, for example) is the presence of a dead body, aren't we giving credence and moral significance to the role of luck? Further, since the term “murder” was replaced with “culpable homicide,” can it even be said that the statute is adequately expressing public opinion? See infra text accompanying note 227 (suggesting the significance of labeling).
1. Causal Overdetermination

Betty and Carla both shoot at Alex at exactly the same time. Alex dies. Betty and Carla are both guilty of purposeful endangerment.

2. Transferred Intent

Alice shoots at Betty, but the bullet hits and kills Carla. Alice would be guilty of purposeful endangerment as toward Betty, and reckless or negligent endangerment as toward Carla. If either Betty or Carla were a law enforcement officer, Alice's crime toward either would be dependent upon the statute. Thus, if Feola\textsuperscript{219} applies, Alice would be subjected to greater penalties for endangering the one who was the officer. Finally, if both Betty and Carla were injured, Alice would be guilty of the reckless or negligent endangerment of Carla and the purposeful endangerment of Betty.

3. Attempts

Alice shoots at Betty but misses. Alice is guilty of purposeful endangerment.

4. Intervening Actors

Alice prepares to shoot Betty, but Carla grabs the gun and shoots Betty herself. Alice and Carla are both guilty of purposeful endangerment.

5. Thin-Skull Rule

Alice, attempting only a minor injury, punches Betty during gym class. Betty is a hemophiliac and bleeds to death. Here, Alice may not have suspected that Betty could die from the punch, and indeed, most reasonable people might not expect it either. Hence, Alice would not even be negligent as to the fact that she was endangering the life of another. Alice is guilty only of assaulting Betty (or the resultless crime equivalent) but will not be prosecuted under a life endangerment statute.\textsuperscript{220}

\textsuperscript{219} 420 U.S. 671 (1975). For a discussion of Feola, see supra notes 130-33, 214 and accompanying text.

\textsuperscript{220} If, on the other hand, Betty walked around in a T-shirt that read "Don't punch me, I'm a hemophiliac," Alice could be charged with knowledge, recklessness, or at
6. Recklessness

Alice, Betty, Carla, and Denise all get drunk and then go driving. Alice hits a car, but no one dies. Betty hits a car and kills one person. Carla hits a school bus and kills fifty children. Denise drives home and gets some sleep. Alice, Betty, Carla, and Denise are all guilty of reckless endangerment. Should Carla be prosecuted for fifty violations of the statute or perhaps subjected to greater sanctions? Doing so would allow her bad luck to penalize her. Betty, for instance, would have hit a school bus with seventy children in it were it not for the fact that she happened to get stuck at a red light. Hence, removing luck from the calculus, Carla is guilty of just one charge of reckless endangerment, as are the others.

C. Presume Causation and Results

A third option would be to create, through legal fiction, the causation or result the actor intended when by chance the result does not occur. Running through our various cases, such an approach would yield the following results.

1. Causal Overdetermination

Jack and Jill both shoot at Karen at the same time. Karen dies. If the court uses a test that holds them both to be causes, Jack and Jill are guilty of murder. If the court finds neither can be a cause, the court will legally imply a causal link and hold both guilty of murder.

2. Transferred Intent

Luke shoots at Laura but misses and hits Scotty. The court would hold Luke guilty of manslaughter for Scotty’s death and then assume that Laura had died. Since that is what Luke intended, he would be charged with murder. If Laura were a law enforcement officer, Luke would be guilty of murdering a law enforcement officer. And if Scotty were a law enforcement officer, Luke would be

the very least negligence depending upon whether she believed that Betty’s death was practically certain, whether she consciously disregarded the risk of Betty’s death, or whether she was unreasonably unaware that punching a hemophiliac could result in death. See MODEL PENAL CODE § 2.02(2) (defining the various mental states: purposely, knowingly, recklessly, and negligently).
guilty of the manslaughter of a law enforcement official (if such a statute existed). Finally, if Luke hit both Laura and Scotty, the court would not have to imply any causal connection or result: Luke would be guilty of manslaughter and murder.

3. Attempts

John shoots at Wayne but misses. The court finds a death where there is none and holds John guilty of murder.

4. Intervening Actors

Sam intends to shoot and kill Rhonda when Tom slits her throat. Tom is guilty of murder. Sam will also be held guilty of murder because the court will imply a causal link between Sam's actions and Rhonda's death.

5. Thin-Skull Rule

Martha stabs George in the arm, intending solely to injure him. George is a hemophiliac and dies from the wound. Here, the court would not need to find causation or a result—they are both present. What is missing is Martha's intention to kill George. Since even a reasonable person would not expect such a result (and thus Martha is not negligent), Martha will only be guilty of assault.

6. Recklessness

Erin, Fred, Greg, and Harry all decide it would be fun to drop bricks one by one from the top of the Empire State Building. (They do not aim at anyone. They just like the sound of the bricks hitting the concrete.) Erin breaks one person's toes. Fred kills one person. Greg kills fifty people. Harry does not hit anyone. Erin, Fred, and Harry are all guilty of manslaughter. Greg is guilty of fifty counts of manslaughter.

D. Weighing the Options

As evidenced by the above illustrations, most of the defendants would be punished to the same degree no matter which approach was taken. However, both the special problem posed by recklessness and the anticipated societal response to any of these solutions must be examined in order to determine which solution to adopt.
1. Recklessness Revisited

Recklessness\textsuperscript{221} involves uncertainties. Unlike purpose or knowledge, it is difficult to predict what harm the reckless defendant might cause or might intend to cause. Alice might open fire in the middle of a shopping mall at nine in the morning when hardly anyone is there but still kill twenty people. Betty might open fire at six in the evening on Christmas Eve yet kill no one. Betty, however, posed more of a danger than Alice. Betty is also more culpable than Alice because she consciously disregarded a greater risk. Thus, it seems any approach to recklessness will necessarily entail a prediction as to what harm would typically occur.\textsuperscript{222} We would expect Betty would kill a large number of people and Alice would kill very few. Therefore, Betty should be punished more severely than Alice.

The problem with recklessness seems to be that we all take risks in life. If we are having problems punishing perpetrators for the harms that materialize from their reckless acts, perhaps we should compromise and punish manslaughter and other reckless crimes less severely than we do. This would eliminate problems of jury nullification\textsuperscript{223} and reflect the fact that this is a society where we accept the occasional risks most people undertake.\textsuperscript{224}

This solution could be reached under any of the three options. When Alice and Betty are charged with manslaughter, the judge and jury can evaluate their actions and the potential harm they posed\textsuperscript{225} and punish them accordingly. And if both are arrested for reckless endangerment, they can be punished in light of the danger they presented.\textsuperscript{226}

\textsuperscript{221} For the sake of simplicity, I am not discussing negligence along with recklessness. The arguments and problems presented, however, also apply to negligence.

\textsuperscript{222} See supra note 18 (discussing the use of proximate causation in such determinations).

\textsuperscript{223} See Schulhofer, supra note 46, at 1529-30, 1532 ("[F]requently it was clear that refusal to convict resulted more from a more general jury hostility to condemning negligent conduct as criminal, in a case of death or serious injury." (footnote omitted)).

\textsuperscript{224} See id. at 1543-44 (noting the small chance of deterring reckless/negligent drivers because they consider the risk of causing harm to be very remote if they consider it at all).

\textsuperscript{225} Until society comes to understand the insignificance of the resulting harm, perhaps the results of crimes would be inadmissible as unduly prejudicial and irrelevant. Obviously, if the results were needed to prove the act occurred, the evidence would be admissible, but if the state's case were proven without the results, it would serve no purpose to reveal the results to the jury.

\textsuperscript{226} See Gobert, supra note 157, at 22 (arguing that sometimes results might be
2. Societal Response

a. Endangerment Statutes

Endangerment statutes do not carry with them the stigma attached to crimes such as murder, rape, or manslaughter, as Gobert recognizes.\textsuperscript{227} Indeed, even if people would eventually learn from the law the irrelevance of luck, the concept of murder is so ingrained in our language that endangerment could never replace it. Could there ever be a television show called “Purposeful Endangerment, She Wrote?” Although conceptually correct, the idea of endangerment runs contrary to our societal sentiments. While these should not prevail over logical and moral coherence, if other options are available, it may be best to use them.

b. Presuming Causation and Results

It may be argued that while presuming causation or a result prevents legal fictions such as transferred intent, it ultimately creates new ones. When John shoots at Mary and misses, how can we say John killed Mary when Mary is alive and well? Further, consider the case in which Tom puts slow-acting poison in Sandra’s soup, but then Doug shoots her while she is eating it. When the coroner’s report says that Sandra died from the bullet wound, how can we say that Tom caused Sandra’s demise?

To say that we do not care that this is a legal fiction puts us right back where we started—substituting logical coherence for correct results. But does this necessarily have to be a fiction? Aren’t Tom and John murderers in the sense that they intentionally set forth to bring about the death of another human being? Since they are cold-blooded killers whether or not their actions bring about their intended results, is there anything inconsistent with labeling them as such? Indeed, although this approach may take time to find acceptance, it attaches to wrongdoers the stigma that is rightly theirs.\textsuperscript{228}

A greater problem created by this solution is that it gives effect to that which is irrelevant. If we decide that results are the product

\textsuperscript{227} See id. at 24.
\textsuperscript{228} In such a case, a reckless driver would be convicted of manslaughter, not reckless driving; she would be punished to the degree that her driving (considering speed, time of night, and so forth) manifested a conscious disregard for human life.
of luck, we should eliminate them; we should not give them a primary role. For example, imagine that all crimes that happen on Tuesdays receive greater punishments than those occurring on other days. Laurel punches Eric on Tuesday, and she is punished with death. Carol, on the other hand, punches Judd on Wednesday and is punished with a jail sentence of five days. We suddenly realize that differences in punishments, like those between Laurel and Carol, are occurring solely because unfortunate people like Laurel are committing their crimes on Tuesday, and for some unknown reason we seem to be giving weight to that fact. We then determine that what day of the week a crime occurs does not contribute to the culpability of the perpetrator; hence, the fact that some crimes occurred on Tuesdays is irrelevant, and thus Laurel and Carol should be receiving the same amount of punishment. What this solution, presuming causation and results, tells us to do is to suppose that all crimes occur on Tuesdays (namely, that Carol committed the crime on Tuesday not Wednesday) rather than ignoring the day of the week.

c. Equating the Punishments

The third approach was to punish incomplete crimes the same as completed crimes. The problem presented is not that of public response, but rather the lack thereof. The average person is probably not aware of the extent of penalties for most crimes. She may be aware of the now increased penalties for drug-related offenses or whether the death penalty is available in her state. It is highly doubtful, however, that if you asked her what the range of sentencing available for attempted murder is, she would be able to tell you. Thus, rather than a response of public outrage at new sentencing guidelines, there may be no response at all.

While this may be initially helpful in passing the legislation, the public’s ambivalence toward the degree of punishment may prevent true equivalence. This prevention would be the result of the public maintaining a dichotomy between completed and incomplete crimes. Although our sense of justice would be served because both crimes would be punished equally, people would still cling to the harm distinction that plagues the criminal law today. Thus, only changing the sentencing guidelines might not allow the criminal law to reinforce the equal severity of both crimes.

If the public were educated about the change in sentencing, the problem remains that the completed and incomplete crimes will be
viewed as somehow distinct. Continuing to emphasize results while maintaining that they do not matter would make the criminal law contradictory at its core.

E. Conclusions

Endangerment statutes, presuming causation, and equal punishment will all yield the same, correct results. As all three solve the dilemmas herein posed, selection should be made with an eye toward practical consequences. Endangerment statutes abandon deeply ingrained conceptions of what one does when one takes a gun and fires it toward someone—they purposefully endanger; they do not murder. Legally implying the causation/result element may alleviate the distinction, but it does so at the risk of creating another legal fiction and giving weight to the irrelevant. Equal punishment but different definitions may fail to erase the arbitrary line drawn between completed and incomplete crimes. Each solution has its consequences, and any legislator must evaluate how society will react and how she wants society to be before choosing between them.

CONCLUSION

Although we cannot altogether avoid the role of chance in our lives, it should not be a part of the criminal law. Currently, courts are contorting the doctrine of causation and twisting the idea of intentions in order to avoid fortuity. Further, courts still give chance happenings moral weight in the realm of attempt liability. While no solution is without its problems, we must adopt a solution that takes a clear stance on luck—that it does not matter. Until we do so, our legal system may be no better than Tessie's.

---

229 Whether doing so will be a legal fiction will depend upon whether the public adopts the conception that one who attempts to kill is a murderer and one who attempts to steal is a thief. If the public maintains a distinction between the two—there are killers and attempters—this solution will create the same problem it attempts to solve: it will avoid the role of luck by contorting other legal concepts.