Versari Crimes

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Introduction

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

Stamp ushered Honeymoon out of his office, holding him by the elbow. He told Honeymoon to lie down on the floor, along with the other employees. Within 10 to 15 minutes after they’d arrived, Stamp and Koory found what they were looking for. They took the money and fled, telling Honeymoon and the others to stay on the floor for five minutes “so that no one would ‘get hurt.’”² Fifteen to 20 minutes later, Honeymoon was dead from a heart attack.

Assume Stamp was guilty of robbery. He took “personal property . . . in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.”³ Next, assume the robbery was the but for and proximate cause of Honeymoon’s death. Last, assume Stamp never realized he was risking anyone’s death, nor would a reasonable person in his situation

² Id.
³ Id. at 212 n.5.
have so realized. These last two stipulations might raise some eyebrows, but make them anyway. The case is more interesting that way.

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

Steven Benniefield was no stranger to the local police. Around 11 p.m. on December 17, 2001, an officer noticed Benniefield at the corner of 7th Avenue and 6th Street, in Rochester, Minnesota, about 61 feet from the Riverside Central Elementary School. The officer asked dispatch about outstanding arrest warrants. Benniefield, he discovered, had one. After being arrested and transferred to the city's Adult Detention Center, the police found a baggie in the back seat of the patrol car in which Benniefield had been transported. Inside was 1.10 grams of cocaine.

Assume Benniefield was guilty of possessing a controlled substance (cocaine). He knew he had something on his person and knew the something was cocaine. He also happened to possess it “in a school zone.” Next, assume Benniefield never realized he was anywhere near

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4 For reasons not altogether clear, Stamp apparently raised no challenge to the sufficiency of the evidence on proximate cause. He did raise a challenge to the adequacy of the trial court’s jury instruction on proximate cause, which the appellate court rejected. See id. at 211. For what it’s worth, Stamp’s best chance for an acquittal at trial would probably have been to persuade the jury that his actions instantiating the conduct element of the robbery conviction were not the proximate cause of Honeymoon’s death.

5 See State v. Benniefield, 678 N.W.2d 42, 44 (Minn. 2004).
a school when he possessed, nor would a reasonable person in his situation have so realized. Under Minnesota law, Benniefield was nonetheless guilty of possessing cocaine in a school zone. If a person possesses drugs in a school zone, Minnesota doesn’t care if he realized he was possessing there or not. Minnesota law thus puts the knowing school-zone possessor and the unwitting school-zone possessor in the same statutory category.

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

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

People disagree. An impressive lineup of prominent criminal law theorists believe morality permits a state to punish someone for

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causing the objective elements of a crime only inasmuch as he deserves to be punished for them, and he deserves to be punished for them only inasmuch as the was culpable toward them. Conversely, they believe morality doesn’t permit the state to punish anyone for an objective element of a crime unless he deserves to be punished for it, and no one deserves to be punished for an objective element unless he was in some way culpable toward it (setting aside elements making no contribution to a crime’s wrongfulness, like elements conferring jurisdiction).

Following this line of thought, morality permits California to punish Stamp for robbing Honeymoon, but not to add more time for killing Honeymoon in the process. Stamp killed Honeymoon without a whiff of culpability (we’re assuming), let alone with the culpability associated with willful and deliberate homicide. Any surcharge for Honeymoon’s death would thus be to punish Stamp beyond what he deserves. It would be disproportionate, and morality doesn’t permit disproportionate state punishment, save perhaps in extraordinary circumstances. Much the same would go for Bennefield. He deserved punishment for possession, but any extra for innocently possessing in a school zone would be excessive.

A very different answer comes, believe it or not, from an obscure medieval canon lawyer. Between 1222 and 1226, Raymond of Penafort (later Saint Raymond) was at work on his Summa de casibus poenitentiae (Summary Concerning the Cases of Penance), a statement of canon law for confessors. From Raymond’s analysis of homicide, a general principle has since been extracted; to wit: Versari in

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7 According to Gordley, when Raymond relied on the versari principle, in his analysis of homicide, he was “simply stating the opinion generally accepted among canon lawyers of the day.” James Gordley, Responsibility in Crime, Tort, and Contract for the Unforeseeable Consequences of an Intentional Wrong: A Once and Future Rule, in The Law of Obligations: Essays in Celebration of John Fleming 175, 183 (Peter Cane & Jane Stapleton eds., 1998).
One who traffics in the illicit (unlawful, improper, illegitimate) is responsible for all wrongs (consequences) that ensue. Christen this the versari principle. Someone who traffics in the illicit, the principle tells us, isn’t only responsible for whatever wrongs (consequences) result, he’s responsible for them strictly. No culpability required: no purpose, no knowledge, no recklessness, no negligence (to use the Model Penal Code’s nomenclature).

Stamp could easily have avoided the extra time he got for accidentally killing Honeymoon: No one forced him to rob in the first place. Likewise, Benniefield could easily have avoided the extra time he got for possessing in a school zone: No one forced him to possess cocaine in the first place. When Stamp chose to rob, and Benniefield chose to possess, they no doubt realized they were crossing the line.

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

The versari principle is sometimes labeled the “lesser-crime” or the “unlawful act” doctrine. The principle is also sometimes thought to be equivalent to the tort doctrine known as “assumption of risk.” For now, we’ll ignore how the criminal law’s versari principle relates to tort law’s assumption-of-risk doctrine to focus on the merits of the versari principle itself. For some thoughts on the conceptual relationship between the two doctrines, see Kimberly Kessler Ferzan, Forfeiture and Self-Defense, in The Ethics of Self-Defense 233, 236 (Christian Coons & Michael Weber eds., 2016) (arguing that while forfeiture and assumption of risk have a common “structure,” they’re not the same thing).
into crime. If the state decides to hold them accountable, not only for the crime they thought they were committing but for the one they actually committed, why should they complain? Want to avoid punishment for killing while robbing? Don't rob. Want to avoid punishment possessing in a school zone? Don't possess.

Most criminal law theorists today probably won't care much for Saint Raymond's answer, nor for the versari principle it reflects. They'll see in it nothing more than an illicit license for disproportionate punishment. The medieval saint's answer, and the versari principle more generally, nonetheless deserve a closer look.

I.

Forty years after Saint Raymond wrote his Summa, Thomas Aquinas wrote his. In it, he asks: Is somebody who kills another by accident guilty of homicide? His relatively lengthy reply concluded: "[I]f a man engages in legitimate activities and uses due care, he is not guilty of any homicide that may ensue; if, on the other hand, he engages in illicit activities, . . . he is guilty of any homicide that may occur." In other words, if someone causes another's death because he was doing something illegitimate, he's guilty of homicide, even if he used all due care while doing it. The little-known Saint Raymond thus wasn't the only one to endorse the versari principle. The better-known Saint Thomas did too.

The versari principle soon enough found its way from canonists on the continent to treatise writers in England. Around 1235, in

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

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10 2 *HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND* 341 (Samuel E. Thorne ed., 1968) (1235) (“The crime of homicide and the divisions into which it falls”). Some writers believe Bracton’s account wasn’t an accurate statement of English law at the time: it was a misstatement made under the undue influence of the canonists. Others believe “Bracton should be understood as urging that a criminal motive should preclude the purchase of a pardon for a careless killing,” GUYORA BINDER, *FELONY MURDER* 99-116 (2012). For present purposes, we set these historical questions aside. The focus here is on the merits of the *versari* principle itself.

11 *BRACTON*, supra note 10, at 341.


Having thus cribbed from Raymond’s *Summa*, Bracton is the jurisprude most likely to blame for having imported the canon law’s *versari* principle into English criminal law. Of course, Raymond’s *Summa* was describing rules for Church discipline, whereas Bracton’s treatise was describing (or prescribing) rules for state punishment. Yet for Bracton, what was good enough for the Pope was apparently good enough for the King. Bracton then passed the doctrine down to Coke, who passed it down to Hale, who passed it down to Blackstone, who at last passed it down to the judges in charge of the American common law of crimes.\(^{14}\)

Once inserted into the criminal law’s circulatory system, the *versari* principle appears to have spread, as principles tend to do. As many commentators have recognized, the *versari* principle’s influence has been considerable. It has sustained or succored several criminal-law rules and doctrines still to be found in today’s criminal law. The felony-murder doctrine (at work in *Stamp*) is no doubt the most prominent and notorious example. Another, less prominent but no less notorious, at least among theorists, is called the legal wrong doctrine (at work in *Benniefield*).\(^{15}\)

\(^{14}\) For the much more complicated history behind this breezy summary, see, for example, *Binder*, supra note 10, at 99-116; GEORGE FLETCHER, RETHINKING CRIMINAL LAW § 4.4.1, at 276-285 (1978).

\(^{15}\) See *Benniefield*, 678 N.W.2d at 48 (“The possessor of the illegal drug who is already on notice that his conduct is criminal can reasonably be expected to assume the risk that he might enter a location that will make the consequences of his crime more severe.”). The legal wrong doctrine is capable of doing double duty. It can give legislatures a reason to will into being crimes with a strict-liability attendant circumstance, and it can give courts a court to believe the legislature intended to do just that. The legal wrong doctrine’s moral counterpart—known as the moral wrong doctrine—can perform similar duties, but its use raises problems not associated with the legal
Other often-disparaged doctrines likewise bear the mark of the \textit{versari} principle. Among them are the misdemeanor-manslaughter rule,\footnote{See, e.g., \textit{Joshua Dressler, Understanding Criminal Law} \S\ 31.09, at 536-37 (6th ed. 2012).} along with the doctrine of constructive or implied malice (according to which an intent to cause death is imputed to someone who intended only to cause serious bodily injury).\footnote{See, e.g., \textit{id.} at \S\ 31.04, at 507-08.} The “transferred intent” doctrine is another, at least when the doctrine tells us that “intent follows the bullet,” or more precisely, when it imputes to an actor who intended to kill one person an intent also to kill anyone else who’s death he accidentally caused in the process.\footnote{Harvey v. State, 681 A.2d 628,630 (Md. Ct. App. 1996). The transferred intent doctrine works most like the felony murder rule when it permits a defendant who intentionally causes one death and accidentally causes another to be liable for two counts of intent-to-kill murder. \textit{See id.} at 634 (“The doctrine of transferred intent operates with full force whenever the unintended victim is hit and killed. It makes no difference whether the intended victim is 1) missed, 2) hit and killed, or 3) hit and only wounded. It makes no difference whether the defendant is charged with a crime against the intended victim or not”); Henry v. State, 964 A.2d 678, 687 (Md. Ct. App. 2009) (finding no error when trial court instructed “jury on the doctrine of transferred intent where both the intended and the unintended victims were killed”). The transferred intent doctrine has been specifically analogized to the felony-murder doctrine. \textit{See, e.g., Poe v. State, 671 A.2d 501 504 (Md. 1995) (“The doctrine of transferred intent is, of course, pure legal fiction. . . . It is analogous to the doctrine of felony murder which is also a legal fiction. Both doctrines are used to impose criminal liability for unintended deaths.”).}} Rounding out the list (at wrong doctrine. Those problems have mainly to do with the principle of legality. Not wanting to deal with those problems, we’ll ignore the moral wrong doctrine for now.
least arguably) is the natural-and-probable-consequences doctrine,\(^{19}\) usually associated with complicity, together with the *Pinkerton* doctrine,\(^{20}\) which (in the U.S.) is the name the natural-and-probable-consequences assumes in connection with the conspiracy.\(^{21}\)

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*Culpability*, 1 *Buff. Crim. L. Rev.* 501, 509 (1998); Gardner, *supra* note 8, at 708 (“The transferred intent doctrine is related to the felony murder and unlawful act manslaughter rules, and shares their *versari in re illicitae* pedigree.”)

\(^{19}\) See, *e.g.*, Dressler, *supra* note 16, § 30.05[B][5], at 475-76.


\(^{21}\) The natural and probable consequences doctrine and the *Pinkerton* doctrine ascribe liability to a secondary party (accomplice or co-conspirator) for a crime committed by a primary party (principal or co-conspirator), provided the primary party’s crime was “foreseeable” to the secondary party. There’s more to both doctrines, but that’s the gist.

The reference to foreseeability is usually interpreted to mean the secondary party is liable for the primary party’s crime, provided he should have foreseen its commission, where foreseeability is equated with negligence. Another reading interprets the reference to foreseeability to mean the primary party’s crime was a proximate result of the crime to which the secondary party provided aid or to which he agreed. This alternative interpretation would make the *Pinkerton* doctrine and the natural and probable consequences doctrine instantiations of the *versari* principle. The usual interpretation uses culpability (negligence) to link the secondary party’s liability to the primary party’s crime, whereas the alternative, consistent with the *versari* principle, uses causation (proximate cause).
All these doctrines reflect the logic of the versari principle.\textsuperscript{22} For many criminal law theorists, they’re also a continuing source of embarrassment. They represent remnants or residues of darker, primitive, and “unrefined ways of thinking about criminal responsibility,”\textsuperscript{23} in which punishment ought to reflect the full measure of the wrong caused, whether the wrongdoer was culpability for each of its wrong-making features or not. The versari principle and its doctrinal instantiations have no place, according to this line of thought, in a modern, enlightened criminal code, wherein the importance of wrongdoing in the mind has marched long and steadily toward displacing the importance of wrongdoing in the world.\textsuperscript{24}

These modern-day theorists, for whom the versari principle has little intuitive appeal, aren’t alone. They have several historical forebearers. Some common law treatise writers coming after Bracton rejected the principle, including the venerable James Fitzjames Stephen.\textsuperscript{25} Likewise, some canonists coming after Raymond also rejected it, \textsuperscript{26} despite the stature of some who affirmed it, not least of whom

\begin{itemize}
\item \textsuperscript{22} These doctrines are consistent with the versari principle. Excavating the historical record to connect the dots between their presence in existing law and the versari principle is a job best left to legal historians.
\item \textsuperscript{23} George Fletcher, Reflections on Felony Murder, 12 SW. L. REV. 413, 426 (1981).
\item \textsuperscript{24} For an account of this long and steady march, and an expression of hope for future progress, see Dennis J. Baker, Tracing a Thousand Years of Subjective Fault as the Fulcrum of Criminal Responsibility in Common Law, 56 CRIM. L. BULL. 1 (2020).
\item \textsuperscript{25} JAMES FITZJAMES STEPHEN, 3 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 57 (1883).
\item \textsuperscript{26} Gordley identifies several sixteenth and seventeenth-century jurists, belonging to a “group known to historians as the Late Scholastics or the Spanish Natural Law School,” who “reconsidered and finally abandoned the
was Thomas Aquinas. These dissenting canonists believed the **versari** principle was logically inconsistent with other doctrines Aquinas affirmed, which left them only one conclusion: anyone can make a mistake, even Aquinas.

A.

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

Start with the canonists. According to one commentator, well versed in scholastic scholarship, the medieval canonists who accepted the doctrine did so, “not because it was found in texts they regarded doctrine,” because they "could not see why someone should be liable for chance consequences.” *See* Gordley, *supra* note 7, at 190.

27 *See* Gordley, *supra* note 7, at 192. Of course, if "Thomas Aquinas had violated his own principles by accepting the doctrine . . . one wonders why he didn’t see the difficulty himself." *Id.* at 193.

28 Douglas Husak, for example, describes a New Jersey statute, enacted as part of New Jersey’s Comprehensive Drug Reform Act of 1986, which “created a new species of homicide,” graded as a crime in the first degree, making “any person who manufactures, distributes, or dispenses . . . any . . . controlled dangerous substance . . . strictly liable for any death which results from the injection, inhalation or ingestion of that substance.” Douglas Husak, *Strict Liability, Justice, and Proportionality*, in *APPRASING STRICT LIABILITY* 81 (A.P. Simester ed., 2005). New Jersey also makes it an offense to possess a controlled substance within 1,000 feet of a school zone, with no culpability attached to that fact, much like the statute in Benniefield.
as authoritative, but because it seemed to give the right result in a number of hypothetical cases.” 29 In other words, the canonists who accepted the doctrine accepted it insofar as it stated a general principle enabling them to make sense of intuitive responses they had about the guilt of an imagined wrongdoer in a range of hypotheticals. 30

Does that premodern intuition survive in the modern mind? Writing in 1997, Sanford Kadish noted in passing that the versari principle “plainly responds to a widely shared moral viewpoint.” 31 He didn’t offer any sociological evidence supporting that claim, nor will we. But perhaps we can each test our own moral viewpoints in light of the following variations on the facts in Stamp.

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

Stamp-2 — Stamp enters the General Amusement Company building intent on robbing it, which he does. He leaves the building. Fifteen to 20 minutes later, Honeymoon dies from a heart attack. At no time did Stamp harbor any culpable mental state toward the death of Honeymoon or anyone else.

Stamp-3 — Stamp enters the General Amusement Company building intent on robbing it, which he

29 Gordley, supra note 7, at 184.
30 Since intuitions can sometimes change with small changes in the facts, these hypothetical cases were, we should note, were pretty thinly described.
31 Kadish, supra note 8, at 376 n.19.
does. He leaves the building. No one is injured as a result of the robbery. At no time did Stamp harbor any culpable mental state toward the death of anyone.

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

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

Without a felony murder rule in place, Stamp-1 would still be convicted of murder, but Stamp-2 wouldn’t. That fixes the first problem, but might produce another. Without the rule, Stamp-2 and Stamp-3 would each be convicted of robbery, but nothing more. True, Stamp-2 caused Honeymoon’s death while busy robbing him, but without the felony murder rule, he won’t answer for it criminally. For some, that also gets Stamp-2’s liability wrong, intuitively speaking: Stamp-2 doesn’t belong in the same category as Stamp-3. Stamp-2, who caused Honeymoon’s death only because he freely chose to rob

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32 We ignore all the various permutations on the felony murder rule one can find in existing law, such as the distinction between first- and second-degree murder and between enumerated and unenumerated felonies, along with all the limitations on the scope of the rule. We assume robbery is an enumerated felony and the felony murder rule works to secure a murder conviction.
him, has more to answer for (and not just by way of compensatory damages) than does Stamp-3, who didn’t kill anyone.

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

The aim here is mainly diagnostic: to understand why the versari principle appeals (if it does) and why it endures (as it does). At the end of the day, the best explanation we can find concedes what its critics have long alleged: that the principle rests on an “unrefined” way of thinking about criminal responsibility. Having said that, it would be nice to know more. In what way is the principle’s way of thinking about responsibility “unrefined”? Moreover, unrefined or not, can anything to be said in the principle’s defense?

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

B.

A versari crime has three parts: A crime (the predicate crime), a consequence (the versari element), and a causal connection between them. The predicate crime describes various objective elements together with various forms of culpability attached to some or

33 We assume for now that this causal connection is run-of-the-mill but-for and proximate cause. We should nonetheless highlight how the
all of those elements. The **versari** element, to which no culpability has been assigned, describes a consequence resulting from the commission of the predicate crime. These consequences can be broadly understood to include what a criminal lawyer would refer to as a result element or an attendant circumstance element.

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

According to one reading of the **versari** principle, when someone commits a predicate crime, he changes his normative relationship with the state. Before the predicate, he had a right not to be punished, and the state was duty-bound not to punish him. After the predicate, his position changes. He loses his right not to be punished and the state gains permission to punish him. On this rendering, the **versari**

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Model Penal Code settles questions of proximate cause when no culpability is associated with a material element. The Code generally conceptualizes proximate cause as a problem of imputed culpability: When should culpability for how a result came about (or the manner in which a result came about) be imputed to an accused whose conduct was the but-for cause of that result? That conceptualization of proximate cause doesn’t work when no culpability is associated with an offense element. The Code therefore includes a special provision designed to deal with such offense elements. **See Model Penal Code § 2.03(4)** (“When causing a particular result is a material element of an offense for which absolute [strict] liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor’s conduct.”).
principle operates as a forfeiture doctrine.\textsuperscript{34} When someone commits a predicate crime he crosses a relationship-changing line: he gives the state permission to punish him for the predicate crime itself and for any consequence resulting from it but for which he was in no way culpable.\textsuperscript{35}

\begin{quote}
\textsuperscript{34} Others have also characterized the \textit{versari} principle as a forfeiture doctrine. \textit{See} Michael S. Moore, \textit{Placing Blame: A Theory of Criminal Law} 471, 473-74 (1997) (The \textit{versari} principle’s “outcroppings” in positive law “operate with a kind of crude forfeiture theory, whereby once a defendant has crossed some threshold of culpability, we should not care about making any further discriminations in the degree of culpability.”).

\textsuperscript{35} Any forfeiture doctrine describes some change in the normative relationship or relationships between or among the parties forming the relationship. For present purposes, we’ve described the relevant relationships between the defendant and the state using the first-order Hofheldian language of right, duty, no-right, and permission, not the second-order language of immunity, disability, liability, and power.

Inasmuch as the \textit{versari} principle is a forfeiture doctrine, it raises all the questions surrounding what the literature refers to as the “forfeiture theory of punishment.” The most extended discussion of the forfeiture theory, which references the relevant literature and raises the relevant questions, is Christopher Heath Wellman, \textit{Rights Forfeiture and Punishment} (2017). Among the questions a forfeiture theory of punishment raises, we highlight only one: Is the fact that a person has forfeited his right against punishment (against being used as a means to some end the state believes worth pursuing) sufficient to render state punishment non-wrongful, or is it (merely) necessary? Wellman believes the former: A state doesn’t wrong a person who’s forfeited his right against being punished when it punishes him for any reason or no reason at all. The text assumes latter: The state doesn’t wrong a person who’s forfeited his right against being punished only if the balance of justificatory reasons tips in favor of exercising its permission to punish him. Of course, which way the justificatory reasons tip, and under which conditions, is a matter on which reasonable minds will disagree. Other questions about the forfeiture theory we leave open.
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Before moving on more needs to be said about the predicate crime. The predicate crime is a sine qua non: it triggers the forfeiture. Its commission causes a perpetrator to lose his right not to be punished and the state to gain permission to punish him. All that being so, not just any crime should be able to qualify as a predicate. To pull off its dual transformations—causing the defendant to lose his right not to be punished and giving the state a right to punish him—the predicate crime should, as a matter of simple fairness, be such that (at least) any reasonable person who commits it—who satisfies all the elements of the predicate crime—would thereby realize he was committing a crime. It should be such that a reasonable person who commits it would realize he’s crossed the line into criminality.36

Suppose a reasonable person commits a crime but wouldn’t realize he’d done anything criminal. Under those circumstances, the versari principle would deny the state permission to hold him strictly responsible for causing any versari element. A person crosses the line into criminality, thereby forfeiting his right against being punished (for both the versari element and the predicate crime itself), only if he freely chooses to cross the line, which he does only if he knows or should know he’s crossing the line and only if he makes that choice without duress. Or, as the canonists might have put it, only if he chooses with full knowledge and complete consent of the will.

Stamp and Benniefield freely crossed the line. Neither case involved any hint of duress, and a reasonable person who satisfies the elements of robbery, or possessing a controlled substance,37 would ordinarily realize the criminal law prohibits such conduct. That may not be true of everyone who commits a would-be predicate crime. If

36 This feature of versari crimes distinguishes them from so-called public welfare offenses. See, e.g., Hasnas, supra note 20 (noting this distinction).

37 Assuming the possession statute requires the state to prove the person realized the thing he possessed was a “controlled substance.”
not, then committing the predicate crime won’t suffice to carry its perpetrator across the line. Having toed the line, he remains on the right side of the law. His right not to be punished will remain intact and the state will remain duty-bound not to punish him. Whether or not the state honors that duty is another question.

When a person commits a qualifying predicate crime, the versari principle tells us he forfeits his right not to be held strictly responsible for (punished for) all its consequences, and the state is permitted to hold him strictly responsible for (punish him for) all its consequences. A state exercises this permission when it wills a versari crime into existence, thereby assigning punishment without regard to fault to some consequence or consequences resulting from some predicate crime. The versari principle itself, however, says nothing about the reasons why a state might decide (or not) to exercise its permission. It doesn’t tell us anything about what good or end the state might hope to achieve if it decides to hold a person strictly liable for causing a versari element.

We’ll zero in on two reasons the state might offer to explain (and perhaps justify) its decision to punish a person for a versari element. But first we need to explain why many criminal law theorists, who embrace principles of retributive justice, believe the state always or almost always has a dispositive reason not to exercise its permission. As these theorists see it, if a state exercises its permission to enact a versari crime and punish a person for causing its versari element, the state itself would be guilty of wrongdoing because, as they see it, the balance of justificatory reasons always or almost always tips decisively against any punishment above and beyond whatever punishment the predicate crime itself deserves.

When some writers encounter the versari principle, they sometimes explain how it works using metaphors like “taint” or
“stain.” As they see it, the versari principle would have us imagine, when a person culpably commits a predicate crime, he becomes “tainted” or “stained” as a result. This taint or stain then mysteriously rubs off on all the predicate crime’s consequences, causing him to lose his right against being punished, not only for the predicate crime, but also for whatever consequences are statutorily embodied in a versari element, for which he was otherwise entirely innocent. Other writers deploy an even more alarming metaphor: The versari principle, they say, would have us imagine a person who culpably commits a predicate crime becomes not only tainted or stained as to its consequences, he becomes an “outlaw” with respect to them.

Such talk is colorful and provocative, but it amounts to little more than another way of saying what the versari principle readily admits and affirms: a person who commits a predicate crime forfeits his right against being punished for all the consequences embodied in a versari element (toward which he lacks any culpability), and the

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38 Fletcher, supra note 23, at 428 (“taint and expiation”); Douglas N. Husak, Philosophy of Criminal Law 69-72 (1987) (“taint”); Husak, supra note 28, at 99 (“taint”). The taint principle resembles what’s sometimes called the thin-ice principle. These two principles can fairly be treated as different names for the same proposition, but they can also be treated as different names for different propositions. The thin-ice principle, insofar as it differs from the taint principle, says: If a person suspects an attendant circumstance exists, then he shouldn’t complain if he’s held responsible for it as if he’d known it existed; likewise, if a person realized his conduct carried some unjustifiable risk of causing a result, then he shouldn’t complain if he’s held responsible for it as if he knew or wanted to cause it. In contrast, the taint principle (consistent with the versari principle) says: If a person realized or should have realized he was committing a predicate crime, he shouldn’t complain if he’s held strictly responsible for any wrong-making consequences of which he was reasonably unaware when he committed it. Both principles are forfeiture principles, but their content differs.

state acquires a permission to punish him for them (despite his lack of culpability toward them). The language of tainting, staining, outlawry and so forth might be meant as an implicit admonition: The state ought not exercise its permission, for it has no good reason to do so. On the contrary, the balance of reasons always and nearly always tips decisively in the other direction.

II.

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

The good retribution aims to achieve is, according to its patrons, an intrinsic good: good in itself, and not just good as a means to some other good, which is good in itself. The good at which retribution aims, we’re told, is the suffering of those who deserve to suffer for the criminal wrong they’ve freely committed. Their suffering, without more, somehow makes the world a better place. But it makes the world better only insofar as it’s deserved, and it’s deserved only insofar as it relates proportionately to the gravity of the crime (reflected in the statute’s objective elements) and the culpability of the criminal (reflected in its culpability elements).40

40 Some retributivists believe causing or instantiating the objective elements of a crime, once some measure of culpability has been established for those elements, can add to the punishment an offender deserves. See, e.g., Moore, supra note 34, at 193 (“[W]hen culpability is present, wrongdoing independently influences how much punishment is deserved.”). Others believe
When the state wants to know if it should exercise its permission to punish, retribution tells it to go ahead, but only if and when punishment will bring into the world the degree of suffering a criminal wrongdoer deserve. Deserved suffering makes the world is a better place, all else being equal. Of course, many theorists adopt alternative theories of punishment because they find this supposed end unintelligible or repugnant: they can’t understand how human suffering can ever be a good in itself. All they see when they see human suffering is an intrinsic bad: something to be avoided, if at all possible, not something to foster in the name of retributive justice. Indeed, for these theorists, the idea of desert has no place whatsoever in a theory of punishment.

Other theorists don’t go so far. They’re willing to embrace desert, but not as a reason in favor of punishing. They’re willing to embrace it only as a limit on the state’s permission to pursue other goods or ends through punishment. For them, deserved suffering isn’t an add nothing. See, e.g., LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, WITH STEPHEN MORSE, CRIME AND CULPABILITY 171-96 (2009). The difference between these two camps is usually framed in terms of the question: Do results matter? The first camp believes they do; the second believes they don’t. We won’t enter that long-standing and on-going debate here.

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

42 Theorists who reject the concept of desert altogether are left to find some other way to limit state punishment and to defend those limits in a way consistent with their other theoretical commitments. One such theory, which has been quite popular through the years, sees state punishment as a permissible means of societal self-defense analogous to private force as a permissible means of individual self-defense. See, e.g., TADROS, supra note 41; Warren Quinn, The
intrinsic good, but underserved suffering is plainly an intrinsic bad, not to be endured no matter what good it might bring. The intrinsic badness of underserved suffering is said to give the state always or nearly always a dispositive reason not to exercise its permission to legislate *versari* crimes, inasmuch as *versari* crimes assign undeserved punishment for their *versari* element.

Retribution’s initial reaction when it encounters a *versari* crime is simple: repeal them, or at least delete their *versari* element or append some culpability (and matching punishment) to it. The aim in the end is to restructure existing *versari* crimes to prevent them from being used as a warrant for disproportionate punishment. Whatever fix is used, retribution tells us the *versari* principle and its doctrinal blemishes should at long last be excised from the criminal law.

Having said that, not all convictions for *versari* crimes will offend retributive sensibilities. Sometimes, when a person commits a *versari* crime, he just so happens to deserve to be punished for causing its *versari* element. That’s because sometimes the facts sufficient to prove the predicate crime will also suffice to prove some measure of culpability toward its *versari* element. When that’s true, assigning additional punishment for the *versari* element, without formally requiring independent proof of any culpability toward it, wouldn’t produce undeserved and disproportionate punishment after all, provided the additional punishment assigned to the *versari* element matches the offender’s implicit culpability toward it. In other words, although *versari* crimes are always be strict in form (with respect to their *versari* elements), they won’t always be strict in substance.43

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43 See, e.g., Simester, *supra* note 39, at 49 (“Where luck . . . [with respect to consequences] is intrinsic and forms part of the reasons why . . . [and agent’s] antecedent behavior . . . is wrong, there seems no difficulty about blaming the agent for the outcome.”); Kenneth W. Simons, *Is Strict Liability*
This strategy can domesticate some versari crimes some of the time, but not all versari crimes all of the time. For example, suppose Stamp had entered the premises of the General Amusement Company without a gun. Instead, suppose he threatened Honeymoon with a punch in the nose unless he turned over the company’s cash. Assuming Stamp had no reason to know of Honeymoon’s excitable nature or compromised cardiovascular muscle, and thus no reason to believe his threatened punch might cause Honeymoon’s death, Stamp would presumably have satisfied all the elements of the predicate crime (robbery). Nonetheless, inferring or constructing from them any measure of culpability for anyone’s death would be a stretch.

If this domestication strategy fails, retribution’s adherents might consider two fall-back options: self-control and self-deception. The first option is a good one; the second, not so much.

in Grading of Offenses Consistent with Retributive Desert?, 32 Oxford J. Leg. Stud. 445, 446 (2012) ("[S]trict liability in grading can be appropriate when the risk of committing the more serious crime (i) is a risk intrinsic to the less serious crime or (ii) minimally foreseeable."); Kenneth W. Simons, When Is Strict Liability Just?, 87 J. Crim. L. & Criminology 1075, 1079 (1997) (examining "cases in which formal strict liability in grading actually expresses culpability (especially negligence)."

The evolution of the felony murder doctrine, taken in broad strokes and reflected in writings of early English commentators and then again later in American caselaw, can also be seen as a reflection of this domestication strategy. At the start, the rule’s scope was broad, encompassing offenders who on the facts would likely have been highly culpable toward the resulting death as well as those likely not to have been culpable at all. Then, over time, the predicate offenses available to support murder liability were in one way or another gradually circumscribed, such that in the end the chances of any particular offender being subject to wildly disproportionate punishment would be more or less reduced, depending on the exact nature of the limitations adopted.
The first option is self-control. A state wanting not to punish anyone disproportionately might foresee itself being tempted down that primrose path, despite its best intentions to conform to the retributive principle of proportionality. What to do to avoid temptation? One strategy is diachronic self-control. Like Ulysses, the state might decide to tie itself to the mast, thereby helping itself resist any Siren call to impose disproportionate punishments.

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

When all else fails, option two is self-deception. A state embracing this option tells itself (and those it punishes) that the punish-

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ment imposed for a versari element really isn’t undeserved or disproportionate. It only looks that way. It’s not really undeserved or disproportionate because whatever culpability is required to prove the predicate crime magically “transfers” to the versari element, retributively underwriting the additional punishment assigned to it. Voila. No undeserved or disproportionate punishment after all. That’s the move, and it might help the state assuage a guilty conscience, insofar as it wants not to punish disproportionately, but no one should be fooled. It won’t fool the person punished, and it shouldn’t fool the state.

III.

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

Not all theories of punishment agree with retribution’s rejection of versari crimes. Bracketing for a moment whether these alternative theories are theories of punishment properly so-called, they differ from retribution because they embrace goods, other than the putative good of deserved suffering, the state might aim to bring into existence when it intentionally burdens those who freely commit crimes. More to the point: securing those goods doesn’t demand culpability for each and every element of the crime committed. We’ll look at two such theories. The first imposes a burden for a versari element to prevent future crimes. The second imposes a burden for a versari element to prevent private retaliation for a past crime. But first we should say more about what we mean when we talk about punishment.
People disagree on how to analyze the concept of punishment.\footnote{For a recent entry in a very long line of literature debating what the word “punishment” means or should be taken to mean, see, for example, Vincent Geeraets, \textit{Two Mistakes about the Concept of Punishment}, 37 \textsc{Crim. Just. Ethics} 21 (2018).} They disagree on what it means, at least in marginal cases, to say this or that action does or doesn’t amount to punishment. For now, we’ll just say that punishment constitutes a condemnation-expressing burden which the state intentionally imposes.\footnote{The usual citation for the thesis that punishment is necessarily condemnation-expressing is Joel Feinberg, \textit{The Expressive Function of Punishment}, \textit{in Doing and Deserving} 95, 98 (1970).} A state is permitted to burden one of its citizens in this way if it turns out to be true that he forfeits his pre-existing right against being so burdened if and when he freely chooses to commit that which the state has denominated a crime. A theory of punishment purports to identify the reasons for and against any decision to exercise this permission. If a state decides to exercise this permission to cause a criminal wrongdoer to suffer as he deserves, that would yield what might be called an instance of retributive punishment.

Now suppose a state decides to hold a person strictly responsible for a \textit{versari} element in the following way. It intentionally imposes a condemnation-expressing burden on him, but it doesn’t intend thereby to bring about deserved suffering. It sees no need: He wasn’t at fault for causing the \textit{versari} element, so doesn’t deserve to suffer for it. It wants to burden and condemn him for the crime he freely committed but could care less about deserved suffering. Has the state punished him? Some might say yes; others might say no. For now, call such a burden whatever you like. Just keep in mind that the state’s reason for imposing it isn’t to bring about the intrinsic good in
which retribution alleges deserved suffering consists.

When a state intentionally imposes such a burden on a person for causing a *versari* element, above and beyond any retributive punishment imposed for the predicate crime, it might intend to make good on a threat: If you culpably commit a predicate crime and thereby cause a *versari* element, we'll add a surcharge or kicker to the burden you will be forced to bear just because you caused it. This surcharge isn’t added to your bill to make you suffer as retribution alleges you deserve to suffer. The reason is more straightforward: to protect others through deterrence, not to make the culprit suffer as he deserves.

To help keep things straight, call this additional burden a penalty. Deterrence (through penalty) gives the state a reason to exercise its permission to hold a person strictly responsible for causing a *versari* element. With any luck, this penalty kicker will with reduce the number of future crimes committed, which isn’t a bad reason for using a person as a means if he no longer has any right against being so used. More to the point: because a state is penalizing him to deter, and not punishing him to cause his deserved suffering, retributive worries about disproportionate punishment are no longer germane. They would no longer enter into the balance of reasons for and against the state’s on-balance decision to exercise its permission to hold someone strictly responsible for a *versari* element.

Of course, removing one reason from the balance doesn’t mean one can confidently say which way the remaining reasons tip. Reasonable minds are apt to disagree. Deterrence involves predicting what the future will be if the present is changed in some way, and then deciding if on balance the predicted change makes the world better

47 The law should probably find some way to make clear which part of a sentence is imposed as punishment and which part is imposed as penalty. These problems of institutional expression are important, but won’t be addressed here.
off or worse off compared to the status quo. The state issues a threat: if you commit a predicate crime, you’ll be penalized to some degree—assuming we catch you and so on—if you happen to cause its versari element (above and beyond any punishment you get for the predicate crime itself). Is the world better off all things considered with the threat or without it?

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

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

It would be unwise to underestimate the power of clever minds, schooled in the complexity of deterrence, to supply an answer to this question. Such an answer would probably involve a story with an unexpected twist, involving some subplot according to which versari crimes and the penal lotteries they create actually end up striking a better balance among all the various anticipated costs and benefits at stake compared to the simple expedient of attaching a kicker to the
predicate crime no matter what its consequences.48

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

Next, suppose the kicker is intended to deter, not the predicate crime itself, but conduct during its commission that might cause the versari element. Again, without underestimating the ingenuity of deterrence theorists, how does threatening someone busy committing a predicate crime cause him to do anything different to avoid the risk of causing a versari element,49 when ex hypothesi he neither saw nor should have foreseen any such risk, at least not at the moment he unleashed it? Threatening to send a blind man up the river if he falls into a deep hole won’t give him any more reason than he already had to avoid the fall. The easiest way for a person to avoid causing a versari element while committing a predicate crime, when he neither saw nor should have foreseen any risk he’d cause it, is to steer clear of the predicate crime altogether. But that just brings us back to where we


49 See, e.g., id. at 87-110.
All these observations are familiar. The claims and rebuttals and surrebuttals (and buttals beyond that) can all be found in the caselaw and literature, especially in connection with the felony murder rule. But set aside all that and assume deterrence gives the state a sensible reason to exercise its permission to penalize a person for causing a *versari* element. That assumption doesn’t get *versari* crimes out of the normative woods just yet. Leaning on deterrence as a reason to add a penalty to a predicate crime (but only when its *versari* element results) has another problem.

Retribution has one cardinal virtue: it limits how much punishment a state is permitted to impose to achieve the intrinsic good in which deserved suffering ostensibly consists. Retribution (for all practical purposes) prohibits any punishment beyond what’s deserved. Deterrence is oblivious to this retributive constraint because desired suffering isn’t the good at which it takes aim when it penalizes.50 The good at which it aims is to make the world on balance an otherwise better place using threatened and imposed penalties. Does


One might believe the right a person forfeits when he crosses the line into crime is the right against being punished proportionality (in a retributive sense of proportionality). The right against disproportionate punishment remains intact. See, e.g., Wellman, *supra* note 35, at 179. That, however, would bring one back to the belief that *versari* crimes ought to be repealed insofar as the burden associated with their *versari* elements invariably amount to disproportionate punishment.
that mean any penalty kicker, no matter how large, is permissible as long as the state believes the world is or will on balance be a better place with it than without it? Does deterrence know no bounds?

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

Take Stamp as an example. Stamp was convicted of felony murder. For argument’s sake, assume the punishment for felony murder with a robbery predicate is 50 years, and assume 50 years is a proportionate punishment for someone convicted of felony murder but who in fact intended to cause death: 10 years for the robbery and 40 years for the intent-to-kill killing. That would mean the total time Stamp got would represent a 10-year condemnatory punishment for the robbery and a 40-year non-condemnatory penalty for accidentally killing Honeymoon during its commission. 51

Now, 40 years is quite a hit for team deterrence. Which is where the second limit comes in. When a person commits a predicate crime, thereby choosing to do something he knows the state has categorically forbidden, the versari principle tells us he forfeits his right

51 In the actual case, Stamp received a “life sentence on the murder charge together with the time prescribed by the law on robbery.” People v. Stamp, 2 Cal. App.3d 203, 207 (1969).
not to be held strictly responsible for all its consequences. But that doesn't necessarily mean he forfeits all his rights. The state, we should suppose, isn't free to use him however it might want. He doesn't forfeit his right to be free from torture, for example. Although some uncompromising libertarians might believe otherwise, some rights, we'll assume, are indeed inalienable.

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

Go back to the example above. Is a 40-year non-condemnatory penalty for accidentally causing a death in the commission of a robbery a cruel burden? Without saying more about the nature of cruelty, degradation, and so on, any answer to that question will need to remain in limbo. Still, one wants to say that 40 years of lost liberty for an accidental death—even one Stamp wouldn't have caused had he not freely chosen to use force or the threat of force to get his hands on Honeymoon's property—must come close to the cruelty border. Some will believe it obviously crosses the border, but if so, then it should be easy for them to show anyone who thinks otherwise the plain error of his ways.

Deterrence is a reason a state might give if asked to explain its decision to enact a versari crime and attach a penalty kicker to its ver-
sari element. But aiming to deter predicate crimes or their versari elements through a chancy penalty no reasonable person would see coming looks like an awkward and ill-fitting way to go about optimizing the relevant costs and benefits.\footnote{Those who spend their time thinking about deterrence usually tell a simple story about how best to go about the task, in which a punishment’s certainty dominates its severity. \textit{See, e.g.}, Daniel Nagin, \textit{Deterrence in the Twenty-First Century}, in \textit{42 Crime and Justice: A Review of Research} 199, 199 (Michael Toney ed., 2013) (“The evidence in support of the deterrent effect of the certainty of punishment is far more important than that for the severity of punishment.”). The simplicity of this story strikes one as quite far removed from the complex stories told in an effort to make sense of versari crimes as tools intended to achieve cost-effective deterrence.} If so, it makes one wonder. Is deterrence, at least sometimes, nothing more than pretext?\footnote{Deterrence might plausibly be the goal lawmakers have in mind when they include versari elements in statutory offenses involving the sale and distribution of drugs, as they did when they enacted the statute under which Benniefield was convicted and the statute referenced \textit{infra} note 28. But without looking more closely at legislative history, that’s just speculation; indeed, it would to some extent be speculation even with looking at legislative history.} Is the state’s real (and perhaps unwitting or at least unacknowledged) motivation for enacting versari crimes perhaps something else? In particular, might the state’s motivating reason have to do, as others have suggested,\footnote{James Tomkovicz speculated over 25 years ago that the “public view of the relative significance of harm and mental attitude is different from that of the scholarly community,” James J. Tomkovicz, \textit{The Endurance of the Felony Murder Rule: A Study of the Forces that Shape Our Criminal Law}, 51 \textit{Wash. & Lee L. Rev.} 1429, 1471 (1994), and in particular that “popular notions of proportionality are concerned much less about precise correspondence between culpability and liability—especially in cases of killings by felons.” \textit{Id.} at 1477. The point Tomkovicz was then making about the intuitive appeal of the felony murder rule among the} with dark things not countenanced nowadays in polite
company, like vengeance?

IV.

Retribution responds to criminal wrongdoing with punishment. Deterrence responds with penalties. Vengeance responds with retaliation, and when a state retaliates its aim isn’t to cause the wrongdoer the suffering he deserves, nor is it use him as an example to set others on the straight and narrow. Its aim is to satisfy a victim’s desire to get even.

Although vengeance and retribution are often thought to share a family resemblance, vengeance turns out to have features in common with deterrence, too. Like deterrence, the burden revenge intentionally imposes is imposed to achieve an end extrinsic to itself. Deterrence aims for less crime. Revenge aims for satisfied victims. More important: retaliation shares with deterrence its refusal to respect retributive proportionality. Whereas deterrence goes as far as needed to achieve an optimal balance between specified costs and benefits, revenge goes as far as needed to satisfy the victim’s desire to get even.55

Trying to sell a theory of punishment with revenge as its sponsor isn’t a very good marketing strategy. Payback isn’t likely to be a

“public” is more or less the same point being made here about the versari principle more generally.

55 The unrestrained nature of revenge was one feature Nozick identified among others serving to distinguish revenge from retribution. It goes without saying, but for the record, Nozick’s analysis of revenge hasn’t gone unquestioned. See, e.g., Leo Zaibert, Retribution and Revenge, 25 LAW & Phil. 81 (2006). Even the principle of lex talionis, often rejected because it would permit more punishment than (in some sense) it should, was initially understood, so it’s been said, as a limit on revenge. For a sympathetic appraisal of lex talionis as a
very attractive pitch. A smarter pitch might take a cue from the late John Gardner, when he reminded us that the criminal law’s first function was what he called displacement.56 The criminal law first came on the scene, side-by-side with the state, to displace and civilize private vengeance and all the nasty consequences potentially attending it: feuds, disorder, tit-for-tat and so on. Seen in this way, retaliation turns deterrence on its head: Deterrence tries to stop criminals from doing bad things to victims; retaliation tries to stop victims from doing bad things to criminals.

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

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


56 See John Gardner, Crime: In Proportion and in Perspective, supra note 44, at 211, 214 (“Indeed, it seems to me, this displacement function of the criminal law always was and remains today one of the central pillars of its justification.”). See also Emily Sherwin, Compensation and Revenge, 40 San Diego L. Rev. 1387, 1413 (2003) (“If private vengeance is a strong taste, a legal system that provides outlets for it will be more authoritative and therefore more successful at maintaining good order than one that does not.”).
believes it has reason to punish squares with that for which victims believe retaliation is in order. Unfortunately, those stars might not always align, and when they don’t, victims might want criminal wrongdoers to bear a greater burden than a retributive state will allow itself to deliver. The state can tell victims justice has been done, but they might not agree. This potential for misalignment exists because the logic of retribution and the logic of retaliation have different starting points. Retribution begins with culpability; retaliation begins with wrongdoing.

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

Retaliation starts from the other end. It takes wrongdoing to be basic or primary. Culpability can increase the desire for revenge (and thus the retaliation needed to satisfy it), but the absence of culpability can never eliminate it completely. Culpability can add to the

57 Believing that some number of victims might be left wanting more is different from believing that without versari crimes one should expect a rise in vigilante violence, which seems unlikely. See, e.g., Stephen J. Schulhofer, Harm and Punishment: A Critique of the Emphasis on the Results of Conduct in the Criminal Law, 122 U. Pa. L. Rev. 1497, 1511-12 (1974) (“Penalties we consider appropriate for other reasons would almost certainly satisfy enough of the appetite for vengeance to forestall private retaliation. Indeed the ‘breaking-point’ level of punishment, below which mob violence could become a problem, is probably rather low.”).
retaliation a victim wants, but a victim might well want retaliation for the full measure of the wrong done to him, even if no culpability traveled with it. Retribution tells us a criminal wrongdoer discharges in full any debt he owes whenever his punishment matches the wrong he culpably caused. Retaliation begs to differ: his debt is only fully discharged once a price has been paid for all the wrong he caused, not just those parts with some measure of culpability at their side.58

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

58 One objection to retaliation qua putative justificatory reason goes like this. Being causally responsible for something isn’t sufficient for being morally responsible for it, and being morally responsible for something is a necessary condition for holding someone morally responsible for it. That objection, though common, probably won’t convince anyone not already convinced. The objection presupposes that moral responsibility can sensibly be ascribed to a person for something only if that something is within a person’s “control,” where the only thing within a person’s “control” is the movement of his “will.” If so, the objection presupposes a specific and contestable conception about the proper scope or boundaries of the self: one in which the self is co-extensive with the “will.” Retaliation happens to presuppose a different and broader conception of the self, according to which moral responsibility can sensibly be ascribed to a person not only for that which he wills, but for that which he causes, whether he wills it or not. See, e.g., Michael Zhao, Guilt Without Perceived Wrongdoing, 48 Phil. & Pub. Aff. 285, 307 (2020); Meir Dan-Cohen, Responsibility and the Boundaries of the Self, 105 Harv. L. Rev. 966, 982-85 (1992).
forth, just as it needs to tread carefully when it imposes deterrent penalties.

Of course, even if vengeance is an intelligible reason to assign a retaliatory sanction to a \textit{versari} element, it might not be a good reason. On that question, reasonable minds are apt to disagree. Some commentators write as if revenge and so forth should self-evidently form no part of the modern state’s portfolio, often dismissing it out of hand as an older and less civilized form of retribution known as harm retribution, in contrast to its more modern and putatively more civilized forms in which culpability is king. That might well be the reigning orthodoxy, but the literature nonetheless continues to be dotted with heterodoxy, wherein arguments can be found defending revenge, or at least making it the best it can be.\footnote{Jeffrie Murphy’s work offers the best and most sympathetic case in favor of giving “hatred and revenge” an “impartial re-hearing” on their motion for some role in today’s criminal law. \textit{See, e.g.,} Jeffrie G. Murphy, \textit{Getting Even: The Role of the Victim}, 7 SOC. PHIL. & POL’Y 209, 224 (1990). One might also consult \textit{Peter A. French, The Virtues of Vengeance} (2001). Revenge is also sometimes offered as that which explains and (for some) justifies why results matter to criminal liability as a matter of positive law. \textit{See, e.g.,} Guyora Binder, \textit{Victims and the Significance of Causing Harm}, 28 PACE L. REV. 713, 731 (2008) (”[T]he obligation to punish harm seems to derive from the political duty to vindicate victims rather than the moral duty to give offenders what they deserve.”); Jack Boeglin & Zachary Shapiro, \textit{A Theory of Differential Punishment}, 70 VAND. L. REV. 1499, 1530 (2017) (”[I]f one accepts … that the state should channel victims’ vengeance, it, too, can serve as a justification for engaging in differential punishment.”).} Like the \textit{versari} principle itself, revenge refuses to go gentle into the night.

We could try to adjudicate the dispute between revenge’s detractors and its defenders. We could try to get to the bottom of it: Is

\footnote{If the state wanted to make revenge its aim when it burdens or coerces someone in response to their having committed a crime, it would face a raft of follow-on questions: What if no identifiable person is victimized when the accused causes the \textit{versari} element, such that no one in particular

revenge redeemable or not? That might be worth a try, but we won’t make the effort here. When all’s said and done, no minds on either side are apt to budge very much, if at all. So for now we’ll say no more.

Conclusion

The versari principle and the various criminal-law doctrines it sponsors, including versari crimes, are betwixt and between. Modern-day retribution tells us we have good, if not compelling, reason to reject them. Deterrence tells us we might sometimes have good reason to accept them, but one suspects those reasons are an alibi, at least sometimes. Revenge might credibly explain why versari crimes endure, but whether revenge has any justificatory force is debatable, never mind if any force it has is strong enough to keep versari crimes on the books all things considered.

If the versari principle is in fact grounded in vengeance, it reflects what many doubtless believe is our worst selves. Indeed, some of us, approaching sainthood, may believe they’ve managed to overcome that dark part of the soul. Yet insofar as the versari principle is a testament to our fallen nature, and insofar as versari crimes constitute a concession to it, then perhaps it should come as no great wonder to learn the doctrine’s provenance is the work of Catholic canonists, some of whom would become saints. Presumably all too familiar with our dark side (as well as the light), they may have been willing to allow some room for its institutionalized (and thus tamed) expression.60 Or, insofar as they harbored the versari intuition themselves,

wants revenge? What if a victim is a merciful soul and doesn’t want revenge? And so on.

60 One this point, H.D.H. Bodenstein observed many years ago: The part of the versari principle that

did not require specifically a blameworthy connection between the state of mind of the offender and the forbidden
maybe they weren’t so saintly after all. Even saints are human.

consequences . . . maintained the old principle of liability for the consequences merely. This part of the rule is commonly explained as a concession of the church to the popular opinion at a time when people were inclined to attach more importance to the effect caused than to the state of mind of the wrongdoer towards the effect.