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**Citation for published version:**

Cornford, A 2011, Resultant Luck and Criminal Liability. in RA Duff, L Farmer, SE Marshall, M Renzo & V Tadros (eds), *The Structures of the Criminal Law*. Criminalization, Oxford University Press, pp. 36-58.  
<https://doi.org/10.1093/acprof:oso/9780199644315.003.0003>

**Digital Object Identifier (DOI):**

[10.1093/acprof:oso/9780199644315.003.0003](https://doi.org/10.1093/acprof:oso/9780199644315.003.0003)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Peer reviewed version

**Published In:**

The Structures of the Criminal Law

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## ***Resultant Luck and Criminal Liability***

Andrew Cornford\*

### **Introduction**

The causation of harm is an important factor in criminal liability, both as a ground for and as an object of it. That a person has acted in a certain way, or omitted to act in certain circumstances, is important in how the state will treat them as an offender, but it is not conclusive. The nature and extent of criminal conviction and punishment often rest on the harms that these actions and omissions bring about. Thus, in English law, the person who intentionally punches another and bruises his cheek will be guilty of assault, whilst the person who intentionally punches another and kills him, no matter how unwillingly, will be guilty of manslaughter.<sup>1</sup> This practice is so familiar that we rarely stop to question it. Indeed, in informal discussions of crimes, it is likely to be harm that predominates. For example, we would tend to say that the alleged manslaughterer is on trial for killing his victim, rather than for intentionally performing some unlawful and dangerous act that happened to cause the victim's death.

However, on reflection, criminal liability for resulting harm raises some troubling philosophical questions. In particular, it seems to be an instance of the problematic phenomenon known to moral philosophers as *moral luck*. Formally, moral luck occurs when the moral blame or judgement that is due to an agent can be influenced by factors outside of that agent's full control. If moral luck is ever 'true' – that is, if it ever occurs legitimately – then, as Thomas Nagel points out, it seems to present us with a paradox in our conception of morality. This is because morality is often thought, for reasons of fairness, to be subject to a *control principle*: that is, that the moral judgement or blame that is due to agents ought only to be influenced by factors that are *within* those agents' control.<sup>2</sup>

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\* School of Law, University of Warwick. I am grateful to the editors and to the participants in the Stirling workshop for all their input. Particular thanks are due to Alan Norrie, Dan Priel, Massimo Renzo and Victor Tadros for their more detailed comments, and to Vera Bergelson for her comments as my respondent.

<sup>1</sup> *Newbury and Jones* [1977] AC 500 HL.

<sup>2</sup> See generally 'Moral Luck' in T Nagel, *Mortal Questions* (Cambridge: CUP, 1979).

To illustrate the significance of this problem, consider the following example. Imagine first that a person is driving her car at 60 miles per hour through a residential area with narrow streets. This driver approaches a blind corner. She fails to slow down sufficiently and, as a result, mounts the kerb on the outside of the corner as she goes round it. Unfortunately, a pedestrian is walking down the footpath just as the driver goes round the corner. The car is travelling fast enough to kill the pedestrian instantly. Now imagine a variation of this case in which the same driver acts in exactly the same way: she drives through the same area at the same speed, fails to slow down in time for the same corner and mounts the same kerb. However, this time there is nobody on the footpath. Nobody is hurt and the driver reaches her destination safely.

Resulting harm would influence this driver's criminal liability in English law. In the first place, she would be liable for different offences depending on the harm that she causes. Whilst she would be guilty of dangerous driving in the harmless second case, she would be guilty of *causing death by dangerous driving* in the first.<sup>3</sup> In turn, since the driver would be liable for different criminal offences, she would also be liable to different levels of punishment. Dangerous driving carries a maximum penalty of two years imprisonment, whilst the maximum penalty for causing death by dangerous driving is 14 years.<sup>4</sup>

The element of moral luck in this example consists in the fact that the driver lacks full control over the results of her actions. Certainly, as Nagel points out, it is intuitively plausible that whether or not the driver kills should influence the moral blame that is due to her.<sup>5</sup> However, the control principle is also plausible: we tend to adjust our moral judgements as we learn the various ways in which they are incompatible with it.<sup>6</sup> From the driver's internal perspective, the above cases are identical: her deliberations and volitions are the same whether or not she does harm. The fact that she encounters a pedestrian is (one might think) purely a matter of luck.<sup>7</sup> Thus, if one subscribes to the control principle, one will think it unfair that harm should influence her criminal liability.

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<sup>3</sup> Road Traffic Act 1988 ss 1 and 2, as amended.

<sup>4</sup> Road Traffic Offenders Act 1988 sch 2 part 1, as amended.

<sup>5</sup> Nagel (n 2 above) 29-31.

<sup>6</sup> Ibid 27.

<sup>7</sup> Some dispute the use of the word 'luck' in this context, since its ordinary usage implies abnormality as well as a lack of control: see e.g. MU Coyne, 'Moral Luck?' (1985) 19 *Journal of Value Inquiry* 319, 321-322; K Levy, 'The Solution to the Problem of Outcome Luck: Why Harm is Just as Punishable as the Wrongful Action that Causes It' (2005) 24 *Law and Philosophy* 263, 278-279; M Moore, 'The Independent Moral Significance of

The type of moral luck on display in this case is often called *resultant luck*, because it is the results of the agent's actions that make the (putative) difference to the moral blame or judgement that is due to her. Whilst there are other forms of moral luck, I will only discuss resultant luck in this paper.<sup>8</sup> Since criminal conviction and punishment are public forms of blame and censure, we should expect them to be subject, in at least some degree, to the ordinary conditions of moral judgement. However, as we have already seen, it can seem unfair on reflection that results should affect moral judgement or blame, because agents lack full control over their occurrence. Thus, criminal law incorporates the problem of resultant moral luck. Given the importance of resulting harm as a factor in criminal liability, this potentially poses a significant problem for the justice of the criminal law.

In this paper, I do not pretend to offer another attempted 'solution' to the moral luck problem. Given the troubling questions that this phenomenon raises about moral agency and responsibility, their objects and conditions, I am sceptical that the problem can satisfactorily be solved.<sup>9</sup> However, I believe that it can be made much less daunting – at least in the context of resultant luck – if we identify more precisely wherein the problem lies. That is my aim in the first part of this paper. I will argue that, by distinguishing different senses of moral judgement and blame and the various ways in which results might affect these, the scope of the resultant luck problem is significantly narrowed. I will further argue that our intuitive reactions in resultant luck cases – which are often used to support the existence of true resultant moral luck – in fact only support, on their most plausible construction, a very different kind of resultant luck to the one that Nagel imagines.

In the second and third parts of the paper, I turn to the question of what influence resultant luck should have in the specific institutional context of the criminal law. I begin in part two by arguing that harm can properly be a part of what the state communicates about specific criminal acts. To illustrate this, I consider the significance of resulting harm from three

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Wrongdoing' (1994) 5 *Journal of Contemporary Legal Issues* 237, 254-256. Nothing in this paper turns on the use of the word 'luck'.

<sup>8</sup> The other kinds of moral luck that Nagel identifies are constitutive luck, circumstantial luck and 'luck in how one is determined by antecedent causes': (n 2 above) 32-35. The problems presented by these forms of moral luck are distinct from those presented by resultant luck, mostly reflecting more familiar problems of the compatibility of causal determinism with traditional conceptions of moral responsibility.

<sup>9</sup> For example, what kind or level of control is required for moral agency? And why should we judge that people are morally responsible for consequences at all? In this paper, I assume (justifiably or otherwise) that there is some satisfactory answer to this second question. Suffice it to say for now that our morality (and, indeed, our self-understanding more generally) would look very different without this practice.

perspectives: those of offenders, victims and the general public. I then go on in part three to provisionally explore the practical consequences of this significance for particular determinants of criminal liability. I argue that resulting harm might properly influence how criminal offences are defined and conceivably even decisions to criminalise conduct in the first instance. However, the legitimate extent of its influence will depend on a number of variable countervailing factors.

## 1. Clarifying the Problem

Resultant moral luck is problematic because it reveals the apparent incompatibility of two intuitively appealing principles in our conception of morality. On the one hand, it seems plausible that harm should affect moral judgement and blame. On the other, it seems plausible that these should only be sensitive to factors that are within agents' full control. To resolve this paradox, it may seem necessary to jettison one principle or the other. However, the simple statement of the problem introduced above conceals several important ambiguities. For example, what do we mean by 'moral judgement and blame'? And precisely what kind of influence over these do we intuitively allow to resulting harm? Detailed answers to these questions will help us to better understand the resultant luck problem.

### A. Moral Judgement and Blame

There are many different kinds of moral judgement that we might make about agents or their actions, including judgements about their blameworthiness. Despite employing similar terminology, such judgements can have quite distinct targets. For instance, consider two judgements that we might make about the case of the reckless drivers, introduced above. On the one hand, it seems that the driver who kills and the driver who is merely reckless are equally morally blameworthy. As we saw, these agents' actions are the same from their internal point of view; thus, it seems absurd to regard one as more morally culpable than the other. On the other hand, however, it seems that greater blame is appropriate in the case of the driver who kills. Unlike the merely reckless driver, the driver who kills is responsible for a death. As such, we might say that she is more blameworthy, because she is *to blame for more*.

Judith Thomson shows how we can explain these kinds of apparently paradoxical statements about resultant luck cases by distinguishing different meanings of the word ‘blame’ in moral discussion.<sup>10</sup> The first meaning Thomson identifies can be seen in the thought that the two drivers are equally blameworthy, because they are equally morally culpable. We might call this the *culpability* sense of blameworthiness. A person is blameworthy in the culpability sense when some action of his gives us reason to think badly of him. It is this sense of moral blameworthiness that informs the thought that there is no material difference between the two drivers: since their deliberations and volitions are identical, the fact that one driver has caused harm gives us no extra reason to think badly *of her*.<sup>11</sup> Indeed, it would be absurd if resultant luck were to influence judgements of this kind. The mere causation of harm gives us no reason to think badly *of agents*, other than as evidence of why their actions might have been wrongful in the first instance.

The second meaning of ‘blame’ that Thomson identifies can be seen in the thought that the two drivers are differently blameworthy, because only one is responsible for causing harm. We might call this the *attribution* sense of blameworthiness. A person is blameworthy in the attribution sense to the extent they are responsible for bringing about some unwelcome outcome, or are responsible for doing something which is unwelcome in itself. In this sense, the driver who kills is more blameworthy than the merely reckless driver because only she is *to blame for a death*.<sup>12</sup> By contrast to judgements of blameworthiness in the culpability sense, we would obviously expect judgements of attribution blameworthiness to be sensitive to resultant luck. We clearly cannot judge which outcomes agents are responsible for without asking what the results of those agents’ actions were.

An important feature of both the attribution and culpability senses of blameworthiness is that they are simply a function of moral facts about agents and their actions. It is unsurprising that harm only influences judgements of attribution, for harm does not make a difference to how we should judge agents *qua* agents. Indeed, hardly anyone

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<sup>10</sup> ‘Morality and Bad Luck’ (1989) 20 *Metaphilosophy* 203. Others make similar distinctions: for example, between ‘scope’ and ‘degree’ of responsibility (M Zimmerman, ‘Taking Luck Seriously’ (2002) 99 *Journal of Philosophy* 553); between liability to blame and ‘being responsible’ for one’s actions (J Andre, ‘Nagel, Williams and Moral Luck’ (1983) 43 *Analysis* 202, 205); between ‘verdictive’ judgements of blameworthiness and the appropriateness of blaming actions (H Jensen, ‘Morality and Luck’ (1984) 59 *Philosophy* 323).

<sup>11</sup> ‘Morality and Bad Luck’ (ibid) 209-211.

<sup>12</sup> Ibid 208-209.

argues directly against *this* position.<sup>13</sup> However, the idea that some kind of control principle should apply to judgements of culpability is entirely compatible with the idea that harm should influence judgements of attribution. That some consequence is attributable to an agent is, again, simply a judgement about another kind of moral fact. There is thus nothing paradoxical in claiming that more bad consequences are attributable to the driver who kills, whilst also claiming that the two drivers are equally morally culpable.

This distinction between different senses of blameworthiness may help to alleviate some of the perplexity that the resultant luck problem has caused to criminal lawyers. The debate over whether harm ought to influence criminal liability often seems irresolvable because it is framed as an argument about 'desert'.<sup>14</sup> Since the entire substance of this disagreement is whether or not harm affects desert, there seems to be little possibility of progress if the various parties simply base their positions on contrary intuitions. However, progress would be enabled if reflection were invited on the different kinds of moral blame that might influence legal liability. For example, one might reconstruct the belief that harm should not affect desert as a belief that criminal liability should only track culpability. Against this, one might argue that criminal conviction could properly reflect resulting harm without violating the control principle, for whilst it gives an account of attributable harms, it does not carry any implication that the person whose actions cause harm is more culpable than the person whose actions do not.

Such a relocation of the debate about the proper place of harm within criminal liability also highlights the truly problematic aspect of resultant moral luck. Judgements of culpability and attribution are simply judgements about moral facts. By contrast, the practices of criminal liability are blaming *actions* with potential negative consequences for those to whom they are directed. As such, they call for independent justification. Of course, one might still think that there are simple cases here. For example, one might think that the occurrence of harm entails an entitlement to act indignantly towards those who cause it, simply as a corollary of the fact that the harm is attributable to them.<sup>15</sup> Whether or not we accept this, however, the cases of

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<sup>13</sup> Margaret Urban Walker at least appears to: see 'Moral Luck and the Virtues of Impure Agency' (1991) 22 *Metaphilosophy* 14. However, she does not distinguish between different senses of moral blameworthiness as I suggest here that we should.

<sup>14</sup> For example, Michael Moore believes that harm affects desert ('The Independent Moral Significance of Wrongdoing' (1994) 5 *Journal of Contemporary Legal Issues* 237), whilst Larry Alexander and Kimberley Ferzan believe that it does not (*Crime and Culpability* (Cambridge: CUP, 2009) chs 2 and 5).

<sup>15</sup> See e.g. M Otsuka, 'Moral Luck: Optional, Not Brute' (2009) 23 *Philosophical Perspectives* 373.

criminal conviction and punishment are surely not this simple. Criminal conviction involves public stigmatisation, whilst punishment involves the deliberate infliction of substantial deprivations. We should seek positive reasons for allowing the occurrence of harm to influence these practices.

I return to this issue in part 2 below. For now, we need only note that defining blame more clearly locates the resultant luck problem more precisely. In particular, we should note that there can be no inherent objection to attributing harms to people who cause them, for we have no reason to apply a control principle to this kind of judgement. It follows from this that there can be no inherent objection to the state convicting harm-doers of different offences to similarly culpable non-harm-doers. The material question is instead whether, all things considered, the state is justified in doing so.

## **B. The Intuitive Significance of Harm**

Since the blaming practices of the criminal law potentially have negative consequences for those to whom they are directed, they require independent justification. As we have already seen, it seems intuitively plausible that the occurrence of harm should have at least some influence in this context. This intuitive response may be seen to provide compelling evidence of the existence of true resultant moral luck. However, as is so often the case with such intuitive responses, the precise content and motivation of this feeling is ambiguous. Must it really be construed as a feeling about the appropriateness of greater punishment or resentment? Or is it best understood as a feeling about something else entirely?<sup>16</sup>

Some obvious but important points are worth making about the psychological pressures that act on our intuitive responses to resultant luck cases. First, consider the motivation for anger that the occurrence of harm gives us. This motivation is quite independent from that generated by wrongful action alone. Certainly, we could probably expect to feel some kind of anger when we hear about the actions of the merely reckless driver. However, the driver who hits and kills a pedestrian has actually brought an undesirable

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<sup>16</sup> I assume here that the best explanation of particular intuitive judgements is the one that can best be reconciled with our other, rational judgements and with our intuitive commitments as a whole. For an alternative approach – deriving a set of moral ‘first principles’ from our intuitive judgements about resultant luck cases – see Moore (n 14 above).

circumstance into being. Given this, we are more likely to feel angry with this driver, and to a greater degree. Doubtless this will often be accompanied by a greater urge for retribution, especially if we have any kind of emotional attachment to the victim.

However, these retributive urges that the occurrence of harm tends to activate surely should not be taken to express any intuitions about justice or the appropriateness of moral blame. To illustrate this, consider first how these retributive urges are altered by emotional *detachment* from a case. If we have no attachment to the victim, any desire for retribution will likely be less strong and may not even be present at all.<sup>17</sup> Conversely, consider how we would react to those cases where we have an attachment to a specific person, who narrowly *avoids* being harmed by another person. For instance, say that our reckless driver mounts the kerb and misses a close friend of yours by a matter of inches. Here your reaction will more closely resemble your reaction to the case in which your friend is hit and harmed.<sup>18</sup>

Additionally, those retributive urges that we retain are often mitigated on reflection. As we acquire greater appreciation of the facts of a given case, our attitudes towards it are likely to change. For instance, the culpability of the driver who kills will be immediately obvious; by contrast, we may not appreciate how dangerous the merely reckless driver's actions were until it is pointed out to us. Once we learn how fast she was driving and where, that she took a blind corner without slowing down sufficiently and so forth, we will appreciate how easily someone *could* have been hurt and adjust our judgements accordingly. Again, the converse case illustrates the same point: imagine how we would react if we found out that the driver who killed the pedestrian did nothing more dangerous than travel a few miles per hour too fast through a residential area, as many drivers do every day. Then we may be inclined to think that 'it could have happened to anyone'.<sup>19</sup>

These observations suggest that our intuitions about how we should react to people who do wrong are not related to the harm that they cause in any simple way. Such a relationship, if it exists, is likely to be more complex. One famous attempt to explain it can be found in Bernard Williams' essay on moral luck.<sup>20</sup> Williams argues that people can be expected to feel a special kind of remorse for those harms that they cause, even when they cause them

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<sup>17</sup> R Parker, 'Blame, Punishment and the Role of Result' (1984) 21 *American Philosophical Quarterly* 269, 273.

<sup>18</sup> *Ibid* 274.

<sup>19</sup> J Andre, 'Nagel, Williams and Moral Luck' (1983) 43 *Analysis* 202, 203-204.

<sup>20</sup> 'Moral Luck' in B Williams, *Moral Luck* (Cambridge: CUP, 1981).

entirely non-culpably.<sup>21</sup> As we have seen, we can expect people to develop a degree of critical detachment from such cases. However, surely even the most reflective and dispassionate observer would think something amiss if a driver who killed a pedestrian, even quite accidentally, simply shrugged it off as ‘a matter of luck’.<sup>22</sup> Rather, since this driver brought the harm about, we would expect them to feel remorseful about what they have done.

Williams calls this special kind of remorse *agent-regret*. Whilst agent-regret is a notoriously difficult idea to pin down precisely, Williams is clear about some aspects of it. For instance, he is clear that it is distinguishable from both general regret and the desire to have done otherwise than one did. Indeed, it is compatible with being *glad*, all things considered, to have done as one did. Rather, Williams eventually seems to settle on the idea that agent-regret is characterised by a desire to *think* better next time: to learn something from the experience that can inform future deliberations.<sup>23</sup> He is not clear on exactly how the appearance of agent-regret supports his conclusion that resultant moral luck is probably unavoidable. However, the clearest route to this conclusion seems to be that agent-regret is somehow uniquely obligatory for those who cause harm, and that we are justified in reacting differently towards harm-doers as a result of this.

There are several problems with using agent-regret as a way of linking resultant luck to our intuitive beliefs about the appropriateness of moral blame or judgement. First, why should those harms that are brought about entirely non-culpably prompt a resolution to ‘think better next time’? Certainly, one might properly feel remorseful for having been in a position (albeit unwittingly) to avoid causing the relevant harm. However, this simply follows from the fact that it is good to be compassionate: to care about others’ wellbeing and to feel bad when one avoidably harms them. It would be irrational to think that one’s deliberations should have been better than they were if they were not faulty.<sup>24</sup> Indeed, one surely cannot be culpable in any degree for causing harm unless one had reason to know that one’s actions carried a risk of causing that harm. As Nagel points out, there is nothing truly ‘moral’ about resultant luck unless it has this dimension.<sup>25</sup>

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<sup>21</sup> Ibid 28.

<sup>22</sup> MU Walker, ‘Moral Luck and the Virtues of Impure Agency’ (1991) 22 *Metaphilosophy* 14, 19.

<sup>23</sup> Williams (n 20 above) 28-33.

<sup>24</sup> D Enoch and A Marmor, ‘The Case against Moral Luck’ (2007) 26 *Law and Philosophy* 405, 420.

<sup>25</sup> ‘Moral Luck’ in his *Mortal Questions* (Cambridge: CUP, 1979) 19.

Moreover, if deliberative failure is the object of agent-regret, then it would be appropriate even when no harm is caused. 'Thinking better next time' is a fitting resolution in respect of any morally faulty action, whatever its consequences.<sup>26</sup> Doubtless, it is true that the occurrence of harm is *in fact* more likely to prompt such a resolution than its non-occurrence. However, this is insufficient to prove a *necessary* connection between harm and agent-regret. To illustrate, consider again the case of the reckless driver who narrowly misses a specific pedestrian. In this situation, the risks of harm associated with that driver's actions are clearly revealed. Thus, she is likely to revise her plans about how to drive in future, even though she has done no harm.

Additionally, the examples that Williams uses to support his argument are defective, because they leave open how far the agents concerned can justifiably regard themselves as being non-culpable for the harms that their actions caused.<sup>27</sup> For instance, one important case for Williams' argument concerns a truck driver who kills a child that jumps out in front of his vehicle.<sup>28</sup> Perhaps we might expect this truck driver to question his own fallibility: did he really do everything that he could reasonably have done to avoid hitting the child? However, this feeling is not related to the appropriateness of blame, of whatever kind. If we ourselves are convinced of the truck driver's moral innocence, we surely would not oblige him to feel regret simply because he happened to have a certain kind of causal connection to the child's death.<sup>29</sup>

All of this suggests that our intuitions about the appropriateness of agent-regret are insufficient to support any commitment to resultant luck in our blaming practices. However, perhaps they are sufficient to support another kind of moral luck. After all, we surely retain the intuition that even the completely non-culpable actor who causes harm has a certain kind of special relationship with their victim after the fact. They are not like a mere bystander, even a bystander who was particularly proximate to the event: they *caused* the harm, however innocently. As we have already pointed out, we might think such a person callous if they felt no regret at all. More than this, however, many will think that they now owe certain duties to the person that they harmed that they did not owe before. For example, it is

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<sup>26</sup> Joel Feinberg makes a similar point to this. We can rightly feel morally guilty *whenever* we do wrong, including in those cases where our wrongful conduct makes no mark on the world: see 'Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It' (1995) 37 Arizona L Rev 117, 128.

<sup>27</sup> Enoch and Marmor (n 24 above) 418-419.

<sup>28</sup> Williams (n 20 above) 28.

<sup>29</sup> B Rosebury, 'Moral Responsibility and "Moral Luck"' (1995) 104 Philosophical Review 499, 515-516.

plausible that they have a duty to apologise for causing that harm.<sup>30</sup> Additionally, we might think that, all else being equal, those who cause harm should compensate their victims for the damage that is attributable to them.

The plausibility of such duties as apology and compensation suggests that we do have an intuitive commitment to a certain kind of resultant moral luck: namely, that the results of our actions can influence our moral obligations. However, we should not overestimate the significance of this finding. In the first instance, we should not be too surprised that the appearance of these duties is a matter of luck, since our everyday moral duties often arise in ways that are outside of our full control. For example, we cannot determine when our friends might need our help, or whether our unborn children might have medical conditions that will generate particularly stringent duties to provide for them.<sup>31</sup>

Moreover, this kind of resultant luck is not ‘moral’ luck as defined by Nagel and Williams. Whilst it is plausible that resultant luck might influence our moral obligations, this says nothing of any intuitive commitments about the appropriateness of moral judgement or blame. Neither does it say anything about the appropriateness of agent-regret. Certainly, the person who causes harm, no matter how innocently, may properly regret acting as they did. However, the occurrence of harm by itself gives them no cause to regret *deliberating* as they did, unless that harm was itself the result of faulty deliberation. Indeed, in many cases of innocently-caused harm – Williams’ truck driver case is probably one – it will scarcely be appropriate to say that the actor is an *agent* of that harm at all. Rather, one is more like an instrument through which the harm was brought about.<sup>32</sup> Doubtless it is a deeply unpleasant feeling to have been instrumental in the occurrence of some terrible harm. However, this again reveals no intuitive commitment to using resulting harm as a basis of moral judgement or blame.

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<sup>30</sup> Of course, such an apology would amount to a mere expression of regret, without the usual acknowledgement of moral culpability.

<sup>31</sup> MU Walker, ‘Moral Luck and the Virtues of Impure Agency’ (1991) 22 *Metaphilosophy* 14, 24.

<sup>32</sup> Rosebury (n 29 above).

## 2. The Significance of Harm

We can draw two conclusions from this clarification of the resultant luck problem. First, whilst our blaming actions and their potential negative consequences stand in need of independent justification, there is nothing inherently wrong with attributing to agents the harms that they have caused. Second, whilst it is plausible that agents' moral obligations are altered by their having caused harm, the best construction of our intuitions does not support the subjection of our blaming practices to resultant luck. I turn now to consider whether, in light of these conclusions, the state has good reason to make resulting harm a target of criminal liability. I will argue that recognising the communicative function of the criminal law leads to a positive answer to this question. However, before I turn to this argument, I wish to briefly dismiss two alternative lines of thought that have also been thought to justify criminal liability for resulting harm.<sup>33</sup>

The first of these is the *epistemic limitations* view. According to this view, the limited nature of the state's knowledge about offenders' mental states – and thus also their moral culpability – justifies treating harm-doers differently from non-harm-doers. Given such limitations, the occurrence of harm provides *prima facie* evidence of moral culpability of a kind that is not available when no harm is done.<sup>34</sup> This argument also has a normative dimension: acquiring further evidence about offenders' mental states would require undesirable levels of scrutiny, amounting to an unjust invasion of privacy. According to some advocates of this view, our moral integrity as a whole would be damaged if such interference were permitted, given the excessive blaming that would occur if all culpable people were punished to the full extent of their desert.<sup>35</sup> In light of these concerns, the epistemic limitations view holds that it is preferable for a system of 'social morality' such as the criminal law to be grounded in resulting harm, as a 'proxy' for moral culpability.<sup>36</sup>

This first line of argument fails because its premises are false. In the first place, whilst it is true that the occurrence of harm provides evidence of culpability, it is only one kind of

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<sup>33</sup> Moore convincingly rejects a number of less well-developed arguments: see 'The Independent Moral Significance of Wrongdoing' (1994) 5 *Journal of Contemporary Legal Issues* 237, 241-252.

<sup>34</sup> See e.g. N Richards, 'Luck and Desert' (1986) 65 *Mind* 198; D Enoch and A Marmor, 'The Case against Moral Luck' (2007) 26 *Law and Philosophy* 405, 415.

<sup>35</sup> See e.g. H Jensen, 'Morality and Luck' (1984) 59 *Philosophy* 323.

<sup>36</sup> Rosebury (n 29 above) 522. 'Social morality' is Moore's phrase (n 33 above).

available evidence. Others will often be present. For instance, consider again the case of the two reckless drivers: here, the culpability of the merely reckless driver can be inferred from clearly visible aspects of her conduct, even though she has not caused harm. The concern that the investigation of culpability would create unjust invasions of privacy is also unjustified. The ascription of *mens rea* (or 'guilty mind') is already an established part of criminal law; it is a long way from holding people responsible for 'thought crimes'.<sup>37</sup> Correspondingly, applying the same blaming practices to non-harm-doers as to harm-doers does not seem likely to damage our moral integrity. Certainly, it would be excessive if the state were to subject people to blame every time they did wrong. However, the same is surely not true if the state takes blaming action only against those whose conduct may legitimately be criminalised in the first instance.

A second common way of justifying the imposition of criminal liability for resulting harm is the *voluntary assumption of responsibility* view. This line of argument holds that, in acting wrongfully, we voluntarily accept liability for any negative consequences that result. There have been various expressions of this argument, all couched in diverse terminology. However, they rely on a common idea: namely, that there is something significant about voluntary wrongful action such that, when we engage in it, we change our own moral position in a way that leaves our liability open to the effects of resultant luck.<sup>38</sup> This argument is often supported by an analogy with gambling. When we act wrongfully, it is like spinning a roulette wheel at a casino. By voluntarily performing such an act, we subject our desert to luck: we are licensed to act in our uncertain world and to reap the rewards when we 'win', but only on the condition that we accept the burdens when we 'lose'.<sup>39</sup>

This line of argument is also unsuccessful, because it begs the question. The conclusion that resultant luck can properly influence criminal liability only follows because it is assumed that voluntary wrongful action entails accepting responsibility for those consequences that flow from it. No advocate of this view offers any reason to accept this assumption. The

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<sup>37</sup> Moore (n 33 above) 247.

<sup>38</sup> See e.g. J Gardner, 'On the General Part of the Criminal Law' in his *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: OUP, 2007); B Herman, 'Feinberg on Luck and Failed Attempts' (1995) 37 *Arizona L Rev* 143; J Horder, 'A Critique of the Correspondence Principle in Criminal Law' [1995] *Crim LR* 759; K Levy, 'The Solution to the Problem of Outcome Luck: Why Harm is Just as Punishable as the Wrongful Action that Causes It' (2005) 24 *Law and Philosophy* 263; M Otsuka, 'Moral Luck: Optional, Not Brute' (2009) 23 *Philosophical Perspectives* 373.

<sup>39</sup> AM Honoré, 'Responsibility and Luck: the Moral Basis of Strict Liability' in his *Responsibility and Fault* (Oxford: Hart, 1999).

gambling analogy is also a distraction. Certainly, acting wrongly is like placing a bet, in that the outcome of such actions is *in fact* a matter of luck. However, it is only *like* placing a bet. All else being equal, gamblers freely consent to subject their desert to luck. What is more, the element of luck provides part of the putative value of gambling. Neither of these statements is true of criminal liability, whose practices cannot be 'opted into'. This is not to deny that we may nevertheless be able to find some independent reason to impose criminal liability for resulting harm: indeed, I will argue below that we can. However, if we are to take this path, then there is no need for the 'voluntary assumption of responsibility' device in the first place.

These brief remarks suggest that we will need to improve on previous efforts if we wish to justify imposing criminal liability for resulting harm. As I have already stated, my preferred alternative is a justification based on the communicative function of the criminal law. It is familiar enough that the criminal law has this function.<sup>40</sup> Besides aiming to prevent future harms, it plays an important expressive role: it provides the moral voice of the political community, reinforcing that community's norms and condemning infringements of them. I suggest, however, that the communicative content of the criminal law can legitimately go beyond these familiar terms. Because of its role as the political community's principal moral institution, the criminal law has reason to account for a range of morally significant facts about the events that it deals with, including resulting harm. To illustrate this, I will consider three groups for whom communications about harm may properly be morally significant: offenders, victims and the general public.

Consider first the significance of harm for offenders. Antony Duff has sought to explain criminal liability for resulting harm from this perspective, particularly as a way of communicating the appropriateness of either relief or regret on an offender's part.<sup>41</sup> Duff observes that only those offenders who have caused harm have actually brought some tangible evil into being and thus fully made their mark on the world as 'criminal agents'. Those offenders who have not caused harm correspondingly lack this status, which generates a reason for relief.<sup>42</sup> By contrast, where an offender's actions result in harm, he has no grounds for feeling relieved. Instead, regret and remorse are appropriate: both for having brought the harm about and for the faulty deliberations that led him to act as he did. By making criminal

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<sup>40</sup> V Tadros, *Criminal Responsibility* (Oxford: OUP, 2005) ch 3.

<sup>41</sup> 'Auctions, Lotteries and the Punishment of Attempts' (1990) 9 *Law and Philosophy* 1.

<sup>42</sup> *Ibid* 35.

liability sensitive to harm, the state communicates these facts to offenders. It reminds those offenders who have caused harm of the regrettable consequences of their wrongful actions, whilst those offenders who have not caused harm are reminded of the consequences that their actions *could* have had.<sup>43</sup>

One might doubt that this line of thought provides a particularly strong reason to impose criminal liability for resulting harm. Ultimately, the aim of inducing either relief or regret is surely the same: namely, to produce an emotional response in offenders that will prompt them to realise the error of their ways. However, as we saw in part 1 above, it is plausible that causing harm has more significant moral implications for offenders than this. In particular, it might entail that their moral duties are altered: for example, they may acquire duties to apologise to or compensate their victims. This is not to say that the state should enforce such duties (at least through the criminal law): indeed, there may be persuasive reasons against this.<sup>44</sup> However, such duties are surely morally significant, and by imposing criminal liability for resulting harm, the state can at least confirm that they are owed.

These claims are admittedly open to disagreement. After all, I merely demonstrated above that the idea that harm alters our moral duties is *intuitively* plausible; I did not present an argument for this conclusion. Indeed, advocates of the control principle will probably argue that this intuition simply provides further evidence of the unthinking, retributive tendency to attach too great an importance to harm in our moral judgements of agents and their actions. These duties could instead be more sensitive to culpability: for example, we might demand that all culpable people contribute to compensating the injured. Given the uncertain foundations of the duty to compensate, it will be best to avoid this controversy for the moment.<sup>45</sup> It will suffice to note that these revisionist arguments are not currently widely accepted. Many will still be receptive to the idea that causing harm alters our moral duties, and thus also to the idea that criminal liability for resulting harm communicates something of moral significance for offenders.

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<sup>43</sup> As Duff puts it: 'you tried to harm this person but, thank God, you failed' (ibid 36-37). We might equally put it: 'you endangered this person but, thank God, you did not harm them'.

<sup>44</sup> For example, it may be that forced apologies are of less value than those freely given.

<sup>45</sup> To illustrate, see the following for three very different perspectives on the philosophical foundations of compensation: Honoré (n 39 above); N McCormick, 'The Obligation of Reparation' in his *Legal Right and Social Democracy* (Oxford: Clarendon Press, 1982); EJ Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995) chs 3-5.

Nevertheless, it will be worthwhile to devote greater attention to the significance of harm for victims and the public, for there is greater potential for convergence in these areas. Let us turn first to the significance of harm for victims. To state that resulting harm is significant for victims of crime is obvious; however, it is also important, for it highlights the way in which those cases in which harm is caused are most dramatically different from those in which no harm is caused. In contrast to the offender context, an advocate of the control principle could not reasonably expect to tell a victim who has suffered harm that they should care only about culpability. Whilst a system of criminal prohibitions generally serves to protect that victim's interests, those interests have only been interfered with *in fact* if the victim has suffered harm.<sup>46</sup> Indeed, from the victim's perspective, that they have suffered harm is probably the most significant fact that the criminal law *could* communicate about 'their' case.

Does the significance of harm for victims give the state good reason to account for that harm in its communications? Here is a strong reason to think that it does. As we just noted, the substantive criminal law generally serves to affirm the moral claims of citizens. However, the state has an additional reason to *re-affirm* the moral claims of those who have actually become victims of crime. This arises from the moral humiliation that is characteristic of feelings of victimhood: the demeaning of one's moral worth that is inherent in unjustified injury to one's interests. Because those who experience this feeling have been made to doubt the value of their moral claims, the state has a reason to confirm publicly the significance of *their* interests specifically. Making harm an object of criminal liability is one way in which the state can achieve this, because doing so acknowledges that the harm that the victim has suffered is worth reporting, as well as the culpable behaviour of the offender.

Of course, the category of people who have suffered such moral humiliation does not coincide perfectly with the category of those who have suffered harm. As I will explore further in part three below, criminal acts can have specific victims even when they do not result in harm, thus giving the state a similar reason to re-affirm the moral claims of specific persons. However, as a matter of psychological fact, the characteristic feelings of victimhood are inevitably at their strongest when a victim's primary interests have actually been interfered with. Thus, even if one does not agree that the need to re-affirm specific moral claims

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<sup>46</sup> This is not to deny that we have an interest in our primary interests not being endangered; however, the value of this interest derives from the value of the relevant primary interests.

militates strongly in favour of criminal liability for resulting harm, one can still agree that harm is a worthy object of state communication. By acknowledging the significance of harm, the state acknowledges the significance of *victims*, because what matters to them is seen to matter to the political community as a whole.

Approached from this perspective, one can see that taking account of harm in the practices of the criminal law is plausibly even a matter of justice. Certainly, the primary role of the criminal justice system lies in what it does to offenders: catching them, calling them to account for their actions, condemning and punishing them for what they have done wrong, attempting to prevent them from doing wrong again. However, as a social institution – especially one with a role as the moral voice of the political community – the criminal justice system owes a duty of fair treatment to *all* citizens.<sup>47</sup> A criminal law grounded only in volition, of the kind that some commentators propose,<sup>48</sup> may do best at accounting for the offender perspective, but it would leave little room for other important facts about criminal cases. Given that there is no inherent moral restriction on attributing harm to offenders, the state thus has good reason to acknowledge harm. As we will see below, other considerations might sometimes defeat this. However, not accounting for the victim perspective at all is unfair and thus – in the context of a public system with this unique moral role – unjust.

I appreciate that this line of argument may prove troublesome for criminal law theory, given its traditional focus on criminal law's 'general part' – the doctrines of which serve almost entirely to make sense of the offender perspective on criminal action. Given the primary function of the criminal justice system as outlined above, doubters may wonder whether the victim perspective has any proper role within it, save an evidential one. They may worry that, by adopting this perspective, we risk going too far: say, by giving victims a say in the fate of offenders.<sup>49</sup> Certainly we should guard against such a possibility. However, we can distinguish (at least in principle) between the objective moral significance of harm to victims and those same victims' unreasoned retributive desires. 'Justice for victims' of the kind that I am urging here need not involve giving effect to the latter. Rather, I simply argue that we are morally

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<sup>47</sup> As Rawls famously opined, justice is 'the first virtue of social institutions': *A Theory of Justice* (rev edn, Oxford: OUP, 1999) 3.

<sup>48</sup> See e.g. L Alexander and K Ferzan, *Crime and Culpability* (Cambridge: CUP, 2009).

<sup>49</sup> The controversy surrounding the use of victim impact statements in sentencing decisions illustrates these concerns: see A Ashworth, 'Victim Impact Statements and Sentencing' [1993] Crim LR 498.

entitled to attribute harms to offenders, and that the significance of harm to victims gives us reason to do so.

Similar things can be said about the significance of harm in the criminal law's communications to the general public. To illustrate, consider how harm might influence our reaction to the case of the dangerous driver. Whilst we will be angry upon hearing of the case in which no harm is caused, the case in which the pedestrian is killed will provoke additional responses: for example, sympathy for the victim's family, indignation at his undeserved suffering or sadness at the loss of his future. Such reactions are uniquely appropriate to the case in which harm occurs. We may even wish to encourage them as expressions of fellow feeling, and therefore important foundational elements of our sense of justice.<sup>50</sup> Again, this is not to deny that there might also be undesirable reactions that we ought not to give effect to; the negative influence of retributive public sentiment on criminal justice policy is familiar enough. However, recognising the ways in which harm is reasonably a matter of public importance need not involve this.

To understand why the public has a legitimate interest in communications of this kind, we must once again look to the moral role of the criminal law in public life. Crimes are often distinguished as public wrongs: they interfere with values which are shared or protected by the political community.<sup>51</sup> However, the criminal law is also public in nature because its *practices* are public. When people are charged with a criminal offence, they are called to answer to their fellow citizens, in the name of their fellow citizens.<sup>52</sup> In systems where criminal cases are tried by jury, it may also be their fellow citizens who pass judgement on them. Crimes are thus 'public' in the sense that their prosecution and punishment is carried out by the state, in our name. Because of this, we have a stake in how the practices of criminal justice are carried out, as well as the substantive contents of the criminal law. Again, this suggests that the state has reason to look beyond the culpability of offenders in determining what and how to communicate through the criminal justice process. So long as we are morally permitted to attribute harms to offenders, the demands of fairness to each citizen suggest that we may also be justified in doing so.

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<sup>50</sup> Rawls (n 47 above) s 71.

<sup>51</sup> Compare RA Duff and SE Marshall, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7; G Lamond, 'What is a Crime?' (2007) 27 *OJLS* 609.

<sup>52</sup> RA Duff, *Answering for Crime* (Oxford: Hart, 2007) ch 2.

This further contributes to explaining what would be absurd about a criminal law that imposed liability only for volitions. It would seem odd – perhaps even offensive – for the state to act as if there were nothing materially different about cases in which harm occurs from cases in which it does not. To better understand this, we can consider a specific aspect of criminal law that would be different under a volition-based system. For example, imagine that the state began convicting people who kill intentionally not of murder but of ‘acting with intent to kill’. Imagine further the trial of a person accused of this offence, when that person had succeeded in killing. Part of what we would find odd about such a spectacle is doubtless that it would differ greatly from what we are accustomed to. However, the greater part of the absurdity lies in the use of a criminal court – the foremost moral forum of our political community – to discuss a series of events whilst deliberately ignoring a morally significant aspect of them. Given the public nature of criminal justice, this would effectively amount to a wrongful denial of the significance of harm *to us*.

### 3. How Harm Should Influence Criminal Liability

All of this suggests that the state has good reason to make criminal liability sensitive to resulting harm. Given that there can be no inherent moral objection to attributing harm to those who have caused it, criminal liability for resulting harm is therefore justifiable in the absence of competing considerations. In this final section, I will discuss precisely *how* harm should influence criminal liability. Due to constraints of space, this discussion will be generalised and undesirably brief. What follows should therefore be understood as preliminary and exploratory, open to further comment and expansion. Nevertheless, I hope that it will prove worthwhile to at least begin contemplating the practical implications of the above theoretical analysis. In this spirit, I will consider the proper impact of resulting harm in two areas: namely, offence definitions and decisions to criminalise.

Of course, in considering these two areas I must inevitably neglect other contexts in which resulting harm can and does make a difference to criminal liability. Most obviously, I neglect to discuss liability to punishment.<sup>53</sup> This is regrettable, as punishment is the context in which the issues surrounding the justice of criminal liability for resulting harm are most

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<sup>53</sup> There are also other less obvious but nevertheless significant ways in which resulting harm might influence criminal liability: for example, through police and prosecutorial decision-making.

vividly illustrated. However, both the justification of punishment and the criteria for its apportionment are notoriously difficult and contested topics.<sup>54</sup> Because of this, it is difficult to say much about how resulting harm should affect punishment that readers of different theoretical inclinations would agree upon. Punishment is therefore a more apt question to leave aside here than offence definitions or criminalisation decisions. I take this option in the hope that doing so will not prejudice the remainder of this paper.

Bearing these caveats in mind, let us turn first to offence definitions. What conclusions can we draw from our discussion so far about how resulting harm might legitimately affect these? First, recall that there is no inherent moral objection to attributing harms to those agents that cause them. Second, we have just seen that the state also has good reason to impose liability for causing harm, because of what this communicates to offenders, victims and the public. One way in which the state can make liability sensitive to harm is to attribute that harm to offenders by convicting them of causing it, as well as of acting culpably. This requires including harm in the definition of offences. For example, the state might create distinct offences of dangerous driving and causing death by dangerous driving, or of assault and manslaughter.

As we saw in part two above, considerations of justice seem to militate in favour of such an approach. However, we have also encountered a potential *injustice* associated with it: namely, the unjust societal treatment to which the state may expose those who it convicts of causing harm. Following the observations made in part one, it may not trouble us that the driver who causes harm is labelled as a killer. As we saw there, this is simply a reflection of the consequences that are attributable to her; it does not entail any judgement about her culpability. However, the state cannot hope to educate citizens in such fine points of moral theory. Because of the independent motivation for anger that the occurrence of harm provides, citizens may therefore unreflectively judge that the driver who kills is more culpable because of the harm that she has caused, and treat her accordingly. By including harm within offence definitions, the state risks encouraging such behaviour.

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<sup>54</sup> For overviews of suggested principles of punishment, see RA Duff and D Garland (eds), *A Reader on Punishment* (Oxford: OUP, 1994); HLA Hart, 'Prolegomenon to the Principles of Punishment' in his *Punishment and Responsibility* (2nd edn, Oxford: OUP, 2008); N Lacey, *State Punishment: Political Principles and Community Values* (London: Routledge, 1988) ch 2.

In choosing whether or not to include harm in offence definitions, the state is therefore faced with a choice between two possible injustices. On the one hand, by excluding harm, it fails to include morally significant information in its communications about criminal cases. On the other, by including harm, it risks exposing those offenders who cause harm to unjust treatment by their peers. Which option the state should choose will thus depend on which injustice is the least grave. We can expect this to vary from case to case. For instance, the kind of treatment that an intentional killer will receive when convicted of murder may not seem gravely unjust, particularly when compared to the likely treatment of attempted murderers. By contrast, we will probably be concerned about the fate of the 'one-punch killer' who is convicted of a homicide offence, compared to those who are convicted of similarly culpable assaults.

How might we explain the intuitive difference between these two cases? One possible explanation concerns the extent to which the respective offenders had adequate opportunities to avoid the excessive blame that the attribution of harm precipitates. Liability to such negative consequences – and thus also the inclusion of harm within offence definitions – is more easily justifiable to the extent that one had such opportunities. Generally speaking, offenders who are guilty of *attacks* might easily have avoided having resulting harms attributed to them. This is because attacks are, by definition, intended to cause harm.<sup>55</sup> Assuming that we are generally capable of choosing autonomously, it is thus ordinarily easy to avoid liability for harmful attacks; one can simply choose not to act in this way. Murderers come into this category. They are successful attackers. We may therefore feel that exposing them to excessive blame by attributing harm to them is not gravely unjust, for they chose to bring that harm about.

We can contrast attacks with *endangerments*. Unlike attacks, endangerments merely expose people to risks of harm; they are not aimed at causing it. Indeed, one might conceivably endanger another whilst desiring not to harm that other. Because of this feature, an offender's chance to avoid liability for endangered harm will often be inadequate. For example, consider the one-punch killer. Although this offender attacks his victim's bodily integrity, he only endangers with respect to the victim's life. He may not even contemplate the possibility that death might result from his actions. As such, an offence that potentially

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<sup>55</sup> On the distinction between attacks and endangerments, see RA Duff, *Answering for Crime* (Oxford: Hart, 2007) ch 7.

imposes liability for death as a result of any endangerment of bodily integrity – such as the current English manslaughter offence – may not present a fair chance to avoid liability for that harm. Such provisions make offenders liable to be treated as culpable killers by their peers even when they choose only some less harmful course of action.

Several factors will make a difference to our judgements of the fairness of offences of harmful endangerment. For example, how foreseeable must the risks imposed by the prohibited conduct be? And to what extent are defendants required to be aware of these risks? In English law, one need only act in a way which a *reasonable person* would be aware carries a risk of *some* harm in order to be guilty of manslaughter, if that conduct is unlawful and results in death.<sup>56</sup> Most will agree that such an offence does not give actors a fair chance to avoid being treated as a culpable killer. However, the precise limits of this sentiment are unclear. Must all elements of harm in the definitions of endangerment offences be accompanied by culpability requirements in order to be fair? If so, what level of culpability should be required? I will not attempt to answer these questions here.<sup>57</sup> It will suffice to say for the moment that, in contrast to offences prohibiting attacks, offences prohibiting harmful endangerment will often raise concerns of fairness regarding the societal treatment to which they expose offenders.

We can turn now to criminalisation decisions. I argued above that the state has reason to make criminal liability sensitive to resulting harm. Given that the criminalisation of conduct is a necessary condition of criminal liability for that conduct, might resulting harm legitimately influence decisions to criminalise? Again, the discussion so far suggests that it might. In part two above, I argued that the class of cases in respect of which a re-affirmation of victims' claims may be due coincides – albeit not perfectly – with the class of cases in which harm occurs. Because the criminal law cannot play its role in confirming the moral worth of victims unless the conduct concerned is criminalised, there is thus often an additional reason to criminalise harmful behaviour.

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<sup>56</sup> *Church* [1965] 2 All ER 72 CCA. The Law Commission's most recent proposals would improve on this only slightly, requiring a defendant to be 'aware' that his conduct 'involved a serious risk of causing some injury': *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006).

<sup>57</sup> For consideration of the view that harm elements of criminal offences should always be accompanied by corresponding mental elements, see J Horder, 'A Critique of the Correspondence Principle in Criminal Law' [1995] Crim LR 759.

As promised above, I will now go into a little more detail about the relationship between harm and the need to re-affirm the claims of victims. Once again, it will be helpful to distinguish here between attacks and endangerments. Consider attacks first. Recall that attacks are those actions which are intended to cause harm. By their very nature, attacks will thus usually have specific victims (or at least specific targets) even when they do not result in harm. As such, the state still has the relevant additional reason to criminalise failed attacks – or, in the terminology of the criminal law, *attempts*. Whilst we have none of the corresponding reasons to document harm in attempt cases, we will usually still have reason to re-affirm the moral claims of specific persons.

We can contrast attempts with cases of harmless endangerment. Whilst harmless endangerment can sometimes have specific victims, this is not generally the case as it is with attempts. For example, consider once more the case of the dangerous driver. When she goes round the blind corner, she may endanger a specific pedestrian who narrowly avoids being harmed. However, she may endanger only a general class of people: say, ‘people who might have been walking on the footpath at the relevant time’. In this latter case, there is no need to re-affirm the claims of specific persons and, correspondingly, no additional reason to criminalise the driver’s conduct. This suggests that we have no general reason to criminalise harmless endangerment of the kind that we have to criminalise attempts.

Of course, it does not follow from this that the criminalisation of harmless endangerment is unjustifiable. However, it does follow that there may be some cases in which the occurrence of harm will make a difference to whether some type of endangerment ought to be criminalised at all. We have already seen that attacks are autonomously chosen in a way that endangerments need not be; thus, offences prohibiting the endangerment of a given interest are inherently more difficult to justify than offences prohibiting attacks against that interest. Furthermore, harmless endangerment does not generally give rise to a need to re-affirm the moral claims of victims. The case for criminalising harmless endangerment is therefore doubly disadvantaged when compared to the case for criminalising attacks. When endangerment results in harm, however, one of these disadvantages is not present. It is thus conceivable that harmfulness may prove conclusive in the decision to criminalise such conduct.

There is much more detail to add here. I do not mean to suggest that every token of attempted crime is justifiably criminalised, or that we should always be sceptical about

criminalising harmless endangerment. Rather, I merely mean to make some general observations about these two kinds of offence. Nevertheless, these observations might prove important, as the law must inevitably deal to some extent in generalisations. Generally speaking, the state has reason to criminalise attempts of a kind that it does not always have to criminalise harmless endangerment. This contributes to explaining the current state of English criminal law, in which there is no general offence of endangerment that corresponds to the general offence of attempt.<sup>58</sup> The criminalisation of attempts is generally justifiable, because attempts usually have specific victims and the relevant prohibitions do not impact greatly on our autonomy. However, neither of these statements is true of harmless endangerment. We may therefore do best to continue to approach the criminalisation of such conduct on a case-by-case basis.

### Conclusions

In this paper I have explored why and how the state may justifiably impose criminal liability for resulting harm. I began by exploring the problem of resultant moral luck, arguing that we should distinguish between the attribution and culpability senses of moral blameworthiness. I demonstrated that we have no reason to make attribution sensitive to what is within an agent's control, and thus that there can be no inherent objection to attributing to offenders the harms that they have caused. I also showed that the best construction of our intuitions does not support the subjection of our blaming practices to resultant luck. I then went on to argue that the communicative function of the criminal law gives the state reason to attribute harms to offenders, because of what doing so communicates to those offenders, as well as to victims and the general public. Regarding the latter two, I argued that justice may even compel such communication. Finally, I tentatively explored precisely how resulting harm might influence criminal liability in two contexts: offence definitions and criminalisation decisions. I argued that it might properly affect both, but that different considerations will apply to attacks and endangerments in determining the proper extent of its influence.

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<sup>58</sup> Criminal Attempts Act 1981, s 1. For an example of a more general offence of reckless endangerment – albeit one pertaining only to risks of death and serious injury – see s 211.2 of the American Model Penal Code.