9

Is Strict Liability Rape Defensible?

Kyron Huigens

1. Introduction

The conventional account of strict criminal liability makes little sense.¹ Strict liability offenses are said to be those that do not require proof of criminal intent or negligence. Strict liability offenses are also said to be unjust because they authorize punishment for crime without proof of culpability, blameworthiness, or (in the term preferred here) criminal fault. But if the second claim is meant to follow from the first, as it usually is, then the conventional analysis of strict liability is a spectacular non-sequitur. The familiar list of fault elements—general and specific intents, purpose, knowledge, recklessness, negligence—does not exhaust the category of criminal fault. Positive law fault elements bear a complex relationship to the concept and norm of criminal fault—much more complex than is reflected in the conventional analysis of strict liability. The use of intentional states of mind to denote fault has less to do with the conceptual or normative features of fault than it does with rule of law values. Objective or (in the term preferred here) non-intentional fault extends beyond negligence; in fact, it is

¹ The ‘conventional account of strict liability’, as I use that term here, reflects a simplistic but widespread idea. As Justice Robert Jackson articulated it: ‘The contention that an injury can amount to a crime only when inflicted by intention is not a provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil’: Morissette v United States, 342 U.S. 246 (1952). There is much buried complexity in both the formal part of the conventional account of strict liability (regarding the absence of an intentional state of mind from the offense definition) and in the substantive part (regarding strict liability’s objectionable nature). This paper will not do either part justice. For thorough explanations of the formal and substantive dimensions of strict liability, see Kenneth W Simons, ‘When Is Strict Criminal Liability Just?’ (1997) Journal of Criminal Law & Criminology 1075; Stuart P Green, ‘Six Senses of Strict Liability: A Plea for Formalism’, in A P Simester (ed.), Appraising Strict Liability (Oxford: Oxford University Press, 2005). This paper merely advances, in Simons’s terms, ‘a substantive approach [that accepts] strict liability, if the criminal offense expresses substantive fault despite the formal absence of a culpability term’ (Simons, above, at 1185). The argument here could also be described without reference to strict liability at all as a defense of an extreme form of non-intentional fault (or ‘objective culpability’ to use a common but ambiguous term).
pervasive in the criminal law. Moral fault is not irrelevant to legal fault, and judgements of legal fault conform to judgements of moral fault at significant points. Any analysis of strict liability that does not take these features of the criminal law into account is bound to be inadequate.

In this paper, I will make three points that do take these features into account. First, strict liability rape is criminal liability imposed on the basis of non-intentional fault. The common description of strict criminal liability as the imposition of punishment without any proof of criminal fault fails to describe any legal punishment at all. Secondly, the non-intentional fault criterion in the definition of rape often consists, not of some familiar non-intentional fault criterion such as negligence or malice, but instead of the set, or some sub-set, of the offense's material elements. In other words, either alone or in some combination, rape elements such as minority, non-consent, threat, force, or victim incapacity are themselves fault criteria, of the non-intentional kind. Third, the use of non-intentional fault criteria consisting of the set or a sub-set of the material elements of the offense of rape is morally defensible at least in cases of reasonable mistake about non-consent. Whether it is morally defensible in cases of sexual conduct with a minor, or in cases in which the victim is mentally or physically incapacitated, are separate questions that might be subjected to the analysis that I describe below, but that will not be examined here.

2. Theoretical Premises

The arguments of this paper draw on a highly articulated conception of criminal fault that is a feature of a comprehensive aretaic, or virtue ethics, theory of punishment. Despite its density, complexity, and relative novelty, I will not defend this theoretical account of criminal fault here. I will only sketch it, so that we can move on to the analysis of fault in rape. Interested, outraged, or puzzled readers may wish to pursue the footnote references.

Criminal fault is an inference, drawn in the course of the adjudication of wrongdoing, to the effect that the practical reasoning of the defendant is deficient. This assessment of the quality of the defendant’s practical reasoning is not limited to the defendant’s reasoning in connection with the

2 For example, in Comm. v Lopez, 745 N.E. 2d 961 (Mass. 2001) the Supreme Court of Massachusetts upheld a conviction for rape following a trial in which the defendant’s reasonable mistake instruction was refused, saying: ‘Historically, the relevant inquiry has been limited to consent in fact, and no mens rea or knowledge as to the lack of consent has ever been required.’ The court added: ‘Any perception (reasonable, honest, or otherwise) of the defendant as to the victim’s consent is consequently not relevant to a rape prosecution.’ This is commonly described as ‘strict liability’ rape in the literature, using what I have called here the ‘conventional account’ of strict liability. Robin Charlow, for example, cites Lopez (among other cases) in support of her claim that ‘in a number of states, courts seem to treat the nonconsent element as one of strict liability, requiring no mens rea for conviction’: Robin Charlow, ‘Bad Acts In Search Of A Mens Rea: Anatomy Of A Rape’ (2002) 71 Fordham Law Review 263, 280–1.
offense—even if ‘in connection with’ is given a very broad construction. It extends, in addition, to an assessment of the defendant’s set of standing motivations, or ends—to their acquisition, development, maintenance, and ultimate issuance in the alleged offense. From an opposite perspective, criminal fault is an aspect of criminal wrongdoing. That is, the manner, circumstances, and specifics of the individual instance of wrongdoing alleged against the defendant are the subject matter of the adjudicative assessment of the quality of his practical reasoning that I have just described.\textsuperscript{3} This conception of fault is an aretaic conception of fault in part because it supposes that one’s ends are the subject of rational deliberation, and that one can, therefore, be held responsible for the state of one’s ends. The imposition of responsibility for the state of one’s ends is part of a system of just punishment in part because the proper disposition of individual actors’ ends is one of the objectives of punishment.\textsuperscript{4}

Three important points follow from this aretaic conception of criminal fault. First, criminal fault is not identical with any intentional state of mind. Rather, intentions are indicators of criminal fault that we incorporate into the positive law definitions of criminal offenses for rule-of-law reasons that are exogenous to fault (though not to just punishment). The jury can be directed by positive law to draw the inference of fault pursuant to (variously) rules, standards, or an unspecified permission to do so. This legal rule, standard, or permission might turn on (variously) the intentional or desiderative states of the defendant; the manner, circumstances, or specifics of his actions; or the consequences of his actions. At one extreme, the jury can be left to draw the inference of fault from all of the evidence, without any guidance whatsoever from positive law. This permissive option might violate the rule of law, but the other options in various combinations form a spectrum stretching back to an opposite pole represented by (say) a set of rules strictly requiring proof of an intentional state of mind with regard to each material element of the offense. The choice of the appropriate point on this spectrum in the definition of each element of a criminal offense—the choice of the relative legality\textsuperscript{5} of each fault inquiry—is determined with an eye to a value in the criminal law that is in tension with the value of legality. This competing value is fine-grainedness, defined as a low level of under- and over-inclusiveness in our rules of criminal liability, relative to a background justification of moral desert; or defined, alternatively, as a high degree of congruence between our legal judgments of desert and our moral judgments of desert. If legality is the rule of law as a law of rules, then the


\textsuperscript{5} Not in the sense of its legal validity, but in the sense of its conforming more or less to rule of law requirements. In other words, I use the word ‘legality’ as it is used in the term ‘the principles of legality’.
pursuit of fine-grainedness requires a relaxation of legality. The pursuit of legality, on the other hand, entails a loss in fine-grainedness and at least the risk of a loss in the credibility and prestige of the criminal justice system.

Secondly, there is a distinction to be made between the proof and finding of positive fault elements, on one hand, and interstitial fault determinations on the other. Rules about intentional states of mind do not exhaust the concept and norm of legal fault, but the addition of non-intentional fault elements does not do so either. Fault is not confined in its operations and effects to ex ante, positive criteria. To say, as I did at the outset, that legal fault is an inference drawn in adjudication, is to acknowledge the limits of ex ante definition. Because fine-grainedness is an important value in criminal law and because moral judgements about deserved punishment are context-sensitive value judgements, the particulars of each case must be taken fully into account before any final determination on legal fault is made. This requires the introduction of evidence, which means that fault is to a great extent an ex post facto determination. One familiar example of this process is the jury’s determining the specific content of the reasonable person standard preliminarily to applying it to the defendant’s conduct, in a case turning on negligence. But the ex post facto operations of legal fault go well beyond determinations of negligence. There is necessarily a limit to the amount of guidance that can be provided to the jury ex ante by positive fault elements, whether in rule or standard form, and adjudication necessarily involves determinations of interstitial fault—judgements about legal fault that are made ex post, in the interstices of positive law. For example, both a contract killer and a loving husband who asphyxiates his terminally ill and gravely suffering wife act with an intent to kill and premeditation. But we assess their legal fault quite differently, and we do this in the interstices between those positive law fault elements. While judgements about interstitial fault have their greatest scope and effect in sentencing, they also play a large role in decisions to prosecute and they make even conviction more or less likely at the margins.

These first two points have implications for the relationship between legal fault and moral fault, and they should be briefly spelled out here. Interstitial legal fault and moral fault are quite alike, differing mostly in context. Interstitial legal fault is like moral fault in its informality and might be identical with moral fault in its subject matter and normative content from case to case; but it is inferred by legal actors for legal purposes within a legal institutional framework. Because the value of fine-grainedness pertains to the level of congruence between our respective judgments of legal and moral fault, this similarity between interstitial legal fault and moral fault has an important effect: our drawing the boundary between positive fault and interstitial fault in the choice and drafting of fault criteria sets the balance between the competing values of legality and fine-grainedness in the offenses that feature those fault criteria. For example, a fault criterion such as
negligence—a non-intentional standard—will make an offense in which it is used fine-grained: negligence captures most of our moral judgements of fault in positive law and leaves few of our moral judgements about fault in the interstices of the law. In contrast, a fault criterion such as premeditation—a rule about intentions—will make an offense in which it is used coarse-grained: premeditation captures relatively few of our moral judgements in positive law, and leaves many of our moral judgements in the interstices of the law to operate as interstitial judgements of legal fault.

The third and final point of this Part is that fault is to be distinguished from fair candidacy for punishment, also known (in the United States) as non-excuse or (in Britain) as the conditions of responsibility. If an insane person purposely causes the death of someone whom he knows to be a human being—say he believes himself to be John Wilkes Booth, the victim to be Abraham Lincoln, and the murder of Lincoln to be a requirement of history—then (assuming a standard definition of murder) he has acted with criminal fault. But he is not a fair candidate for punishment, because he lacks the grasp of reality and the freedom from internal duress that we require as a condition of criminal responsibility. In the language of the Model Penal Code, he does not have a defense of diminished capacity, but he does have an insanity excuse. Criminal fault concerns the quality of the defendant’s practical reasoning. Fair candidacy, in contrast, has to do with the defendant’s capacity for practical reasoning. Criminal fault is indifferent to moral luck—one is held responsible for the state of one’s ends and practical reasoning on the ground, in part, that deliberation on ends is a feature of an ordinary moral life. Fair candidacy for punishment, in contrast, is sensitive to moral luck; to the fact that not all moral lives are ordinary, and that deliberation on ends is sometimes difficult and sometimes simply impossible. Criminal fault is framed in positive law along a spectrum defined by competing values of legality and fine-grainedness. Fair candidacy, in contrast, is framed in positive law along a different spectrum: we accommodate moral luck in the criminal law only within limits imposed by the essential functions of law—public safety, social coordination, economic efficiency, and so on. A determination of fault is an endogenous (to wrongdoing), adjudicative complement to the legislative definition of an offense—and is therefore a highly context- and fact-specific, ex post facto, normative determination by the jury. In contrast, decisions about fair candidacy are exogenous (to wrongdoing) side-constraints on punishment. They are set by the legislature and implemented in adjudication by means of the application of a rule to adjudicated facts about the defendant’s capacities.

6 Compare, for example, § 2.04 of the Model Penal Code with § 4.01. Note that the terminology of diminished capacity and diminished responsibility is substantially different in the United States as compared to Britain. The text takes the American view that the defense of diminished capacity consists of a mental disease or defect’s negating a positive fault element.
3. Non-Intentional Fault and Strict Liability in Rape

The essential starting point in the analysis of fault in rape is the case of *DPP v Morgan.*7 Morgan, an NCO in the British Air Force, invited a group of junior airmen to have sex with his wife. He told them to ignore any objections from her, because his wife enjoyed rape fantasies and wanted to have sex with a number of men at one time. Mrs. Morgan did object when the airmen raped her, and the airmen duly ignored her. On trial for rape, they requested an instruction to the effect that their good faith belief in Mrs. Morgan’s consent was a ground for acquittal. If the offense of rape requires an intentional state of mind regarding non-consent, then their genuine good faith belief in her consent precluded their having any such state of mind. If it never occurred to them that Mrs. Morgan was non-consenting, then the rape could not have been an intended or an intentional act—done with purpose, knowledge, or even advertent recklessness—with regard to her non-consent.8 The trial court refused to give this instruction, the *Morgan* defendants were convicted, and the Law Lords affirmed the conviction. But the House of Lords affirmed the conviction only under a harmless error rule. The trial court did err in refusing to give the instruction, the Lords said, because rape requires an awareness of at least the risk of non-consent. In American terms, the *Morgan* defendants were entitled to their instruction because the law requires at least recklessness regarding non-consent to sexual intercourse, in accordance with the principle of Model Penal Code § 2.02(3).

Had the *Morgan* defendants received the instruction to which they were entitled, their acquittal still would have required very credible testimony on their part, an extremely persuasive argument from defense counsel, and the willingness of the jury to adhere strictly to its instructions. Most commentators read the harmless error portion of the opinion to say that such a perfect storm of exemplary trial practice would never occur, and that the convictions should be affirmed because no jury would ever acquit these defendants. But even if this is a correct description of the Law Lords’ reasoning, it remains the case that the reasoning is wrong. To analyze harmless error by predicting an outcome invades the province of the jury. A proper harmless error analysis is far more deferential to the jury and far more likely to result in a reversal. Furthermore, not only do juries often follow their instructions conscientiously to outcomes that their members, as citizens, don’t personally endorse; appellate courts are bound to assume that juries do this. And finally, it is not at all impossible to imagine the *Morgan*

---

7 *DPP v Morgan* [1976] AC 182.
defendants’ testimony in a plausible light. Suppose that, to a man, they took the stand and showed themselves to be callous, immature, self-absorbed, and stupid—as the facts indeed suggest they were—so that their claim to have had a good faith belief in consent was credible. On these quite plausible assumptions, the Morgan defendants not only should have received their instruction, they should have been acquitted.

Clearly, something has gone wrong here. It goes beyond the relatively common, perhaps unavoidable situation of a court’s being driven to adopt implausible reasoning to avoid an unpalatable outcome. The Law Lords in Morgan were driven to adopt patently erroneous reasoning in order to escape an apparently insoluble dilemma. They were simultaneously committed to the principle of intentional states fault and to the notion that such morally bad men should not escape criminal liability. They could have jettisoned the latter of these commitments—as Glanville Williams would have had them do—on the grounds that the legal treatment of the case should be kept distinct from the moral treatment of the case. Or the Law Lords could have remanded the case in the hope and trust that the jury would convict the Morgan defendants. While many would have condemned this outcome, were it acknowledged, as a nullifying conviction for crime on moral grounds, others would defend it as a traditional and proper jury function: the quiet, invisible resolution of just such conflicts between law and morality.

The dilemma should be solved by grabbing the other horn and rejecting the intentional states conception of criminal fault. Think, first, of what the intentional states approach to fault says about the Morgan defendants. If they had intercourse with Mrs. Morgan out of callousness, immaturity, self-absorption, and stupidity, then the law grants them an acquittal because they were callous, immature, self-absorbed, and stupid. Mistake doctrine grants an acquittal, not because of the erroneous belief as such, but because of the reasons behind the erroneous belief. If I take another person’s umbrella from the restaurant’s vestibule because it looks exactly like mine, then I am not guilty of theft, because I am not at fault. I am not at fault because the reasons behind my mistake—good reasons that do not even suggest the deficient practical reasoning that otherwise might justify punishing me—not only explain my acquittal on a charge of theft, but also justify my acquittal. The problem in Morgan was that the reasons behind the defendants’ genuine good faith belief in consent were not good reasons. Their belief in consent, that belief’s negation of recklessness regarding non-consent, and the defendants’ logical claim on acquittal were all the direct products of their callousness, immaturity, self-absorption, and stupidity. To apply standard mistake doctrine to their case is to suggest

---

9 One indication of this is the fact that Morgan is no longer good law. Current law requires proof that the defendant ‘does not reasonably believe’ that the victim consents to sex, so that an unreasonable mistake such as that claimed by the Morgan defendants would support a conviction, not an acquittal: see Sexual Offences Act 2003, s. 1.
that these reasons behind their mistake justify an acquittal—which is, of course, absurd.

If, as is often assumed, people have no rational control over their own characters, then one might argue that an acquittal is appropriate. After all, the argument would go, it was not their fault that they were callous, immature, self-absorbed, and stupid. But to reason this way about Morgan would be to replace an analysis of fault with an analysis of fair candidacy, and with an utterly implausible analysis of fair candidacy at that. When we set side constraints on punishment on fair candidacy grounds—in recognizing a defense of insanity or duress, for example—we never draw the balance between acknowledging moral luck and serving the basic functions of law so much in favor of the former value. As an analysis of fault, however, to point to callousness, immaturity, self-absorption, and stupidity as reasons not to find fault in someone’s actions is, to say the least, implausible.

Following Morgan, British courts developed several strategies for dealing with the dilemma that the Morgan court dodged by means of its harmless error holding. Principally, they recognized a second interpretation of ‘reckless’ as it was used in the definition of rape. As the Law Commission summarized these holdings in a report on sex offenses:

On the question of recklessness, case law is that, in rape and other sex offences, the defendant is reckless if he does not have a belief that the other person is consenting, in circumstances in which he either knows there is a risk she does not consent or his attitude is one of indifference whether she consents or not. Thus it covers the situation where he knows that there is a risk that she does not consent and carries on regardless. It also appears to apply where the defendant has not specifically considered whether she consents, could not care less whether or not she is consenting, but presses on regardless. To put it another way, if a jury is sure that the defendant was indifferent to the wishes and feelings of the victim, aptly described as ‘couldn’t care less’, then, in law, he is ‘reckless’ for the purpose of sex offences.10

The ‘knows there is a risk’ version of recklessness is fundamentally different from the other, ‘attitude of indifference’ version of recklessness. The former definition is consistent with the Morgan defendants’ being entitled to an acquittal. The latter definition is not so consistent. It could have been said of each of the Morgan defendants that ‘his attitude is one of indifference whether she consents or not’. The difference between these two definitions of ‘reckless’ is that the former describes recklessness as an intentional state of mind, whereas the latter describes recklessness as inadvertence with an attitude.

Significantly, this solution to the Morgan dilemma cannot be reduced to negligence. The ‘attitude of indifference’ of this putative recklessness standard might be accompanied by unreasonableness, and it might lead to

inadvertence. But if an attitude of indifference is singled out and equated with advertent recklessness, then it hardly seems that the defendant’s fault lies in either his unreasonableness or his inadvertence, both of which are characteristics of negligence, not recklessness. On the contrary, the phrase ‘could not care less’ seems to condemn an attitude of indifference as such, and the association with advertent recklessness pegs this kind of fault at a step above mere negligence. The point is to highlight the defendant’s callousness instead of his cluelessness. When we allow the jury to convict on this basis, we have premised fault on an attitude instead of either an intentional state of mind or negligence. There is nothing wrong with this. An attitude of indifference is not an unfamiliar criterion of criminal fault. The Model Penal Code provides that a homicide committed recklessly under circumstances manifesting an ‘extreme indifference to the value of human life’ constitutes murder instead of manslaughter. Like the Law Commission Report, the Code describes indifference differently from unreasonable inadvertence, and treats indifference as evidence of a greater fault than negligence. The Code associates extreme indifference with recklessness, and uses indifference, in combination with recklessness, to indicate fault for one of the most serious offenses. ‘Indifference’ is a perfectly defensible addition to the doctrinal palette of fault criteria.

The question is whether it makes sense to call a rape committed out of an attitude of indifference a case of strict liability. It certainly meets the conventional definition of strict liability, in that it is a case of criminal liability secured without the proof of an intentional state of mind or negligence. But this is hardly satisfactory. We have just seen several good reasons to take an attitude of indifference as indicative of criminal fault. There is no reason we should not associate an attitude of indifference toward non-consent with recklessness, if it seems that such an attitude is as blameworthy as the conscious disregard of a risk of non-consent. Both intentional states and negligence are criteria of fault, not constitutive of fault, and there is no reason that an attitude cannot serve as a fault criterion just as well as an intentional state of mind or an inquiry into reasonableness. But if we do associate an attitude of indifference with recklessness, then there is no reason to think of a rape so committed as a case of strict liability. In light of this conclusion, a slight shift away from the conventional definition of strict liability may be in order. If we define strict liability as criminal liability obtained without proof of legal fault, and if an attitude of indifference is a kind of criminal fault, then a rape committed with an attitude of indifference would not be a case of strict liability.

However, there is a further difficulty lurking here. This modified definition of strict criminal liability—liability obtained without proof of legal fault—produces an empty set. Criminal fault is an aspect of wrongdoing,

---

11 Model Penal Code, § 210.2(1)(b).
Is Strict Liability Rape Defensible?

consisting of those features of the wrongdoing that are taken to be indicative of the quality of the defendant’s practical reasoning. Because both legal wrongdoing and the deficiency of the offender’s practical reasoning as an aspect of that wrongdoing are part of the justification of punishment—not of the practice of punishment, but of punishment in individual cases—proof of criminal fault is always and necessarily required in the legal adjudication of a criminal offense. Some aspect of the offense is used as a fault criterion in every case of legal punishment—whether as a positive fault criterion or an interstitial fault consideration. Therefore, any case of criminal liability—the authorization of legal punishment because of a violation of a legal prohibition—necessarily entails legal fault.

What, then, is strict liability if it is neither criminal liability obtained without proof of a state of mind or negligence, nor criminal liability obtained without proof of legal fault? The way out of this difficulty is to describe those cases that we think of as strict liability cases in terms of non-intentional fault. An offense definition might prescribe proof of fault by reference to an intentional state of mind or negligence, or it might prescribe proof of fault by reference to an attitude such as indifference, or it might prescribe proof of fault by reference to only the offense’s material elements. A ‘strict liability’ offense is one that falls in this last category. In other words, in a case of strict liability it is by reference to the offense’s material elements alone that both the deficiency \textit{vel non} and the relative deficiency of the defendant’s practical reasoning is assessed in the adjudication of, and in the decision to punish because of, an instance of that offense.

This kind of fault can offend against the rule of law. In a prosecution for an offense with no express fault elements, the adjudication of fault might consist of nothing but the adjudication of interstitial fault. That is, the material elements of the offense might be few, and not particularly to the point on the question of the quality of the defendant’s practical reasoning, so that it is in the interstices of the offense’s elements, and only there, that the jury could and would find fault. This presents a danger that the defendant’s apparent moral fault will overwhelm the legal fault inquiry. Or, to put the point another way, the moral assessment of the defendant’s act threatens to bleed through the boundary between moral norms and legal norms entirely, and to determine the disposition of the legal case against him. From this perspective, the fundamental objection to strict liability offenses is that fine-grainedness threatens to overwhelm legality, to a morally unacceptable degree.

The notorious case of \textit{Prince} exhibits this pattern: the defendant’s reasonable mistake about the age of a girl whom he removed from the

---

12 This is a basic difference between consequentialist and virtue ethics theories of punishment. I describe the difference with reference to H L A Hart’s consequentialist theory in Huigens, ‘Dead End of Deterrence’, above n. 3, at 978–80, 1028–31.

13 \textit{R v Prince} (1875) 13 Cox C.C. 138.
custody of her father could not serve as a defense, because unreasonable was not an element of the offense of which he was accused. However, the Crown, the jury, and the Law Lords were all able and quite willing to rest legal liability on Prince’s moral fault in his conduct with the girl, as that fault appeared from the evidence. Prince was not convicted without any proof of legal fault. As we have seen, this is impossible: because legal fault is merely an aspect of legal wrongdoing, a jury infers that the defendant’s practical reasoning is deficient in any case of criminal liability. The problem in Prince was instead insufficiently formal proof of fault. The finding of legal fault occurred in the interstices of the offense definition, in such a way that the jury was never required to distinguish moral fault from legal fault. This left Prince with no formal avenue to argue that he was not legally at fault, regardless of his apparent moral fault. It is important to note that, under this analysis, Prince’s legitimate objection to his conviction for a strict liability offense was an objection about the rule of law, instead of an objection about punishment in the absence of proof of fault as such.

It might seem to follow from this analysis of strict liability in terms of non-intentional fault that strict criminal liability is always unjust, in that it always involves a violation of the principle of legality. But the material elements of strict liability offenses are not always poorly suited to performing the functions of fault. A strict liability offense might consist, instead, of a coherent, systematic set of non-intentional fault elements that are implicitly dedicated to the task of fairly adjudicating the quality of the defendant’s practical reasoning in the context of his alleged commission of an offense. Even without making reference to customary fault elements (such as intentional states or negligence) or relatively novel fault elements (such as indifference) some set of the offense’s material elements might organize an inquiry into fault that is sufficiently formal to constitute a legal inquiry into fault. Depending on how an offense statute is written, its material elements alone might enable a person in much the same situation as Prince nevertheless to cabin the arguments of the prosecution and the discretion of the jury with sufficient formality to avoid a simple equation of moral and legal fault.

4. RAPE, REASONABLE MISTAKE, AND DEFENSIBLE STRICT LIABILITY

Suppose that a convicted serial rapist escapes from prison. His escape and his record are widely publicized, along with warnings that he is armed and dangerous. One night while the escaped rapist is still at large, Dirk and Violet meet in a dim and smoky bar, and flirt with one another. Eventually, they leave the bar together. Then, under the glare of a streetlight, Violet realizes that Dirk matches the description of the escaped rapist. Seized with
terror, she accedes to his every suggestion and request, culminating in sexual intercourse with him. During the entire ordeal, Violet maintains an appearance of calm and compliance, and even pretends to enjoy sex with Dirk—but only because she fears for her life. She never freely consents to sex, but is instead coerced into sex by the threat of serious bodily injury or death. Needless to say, Dirk turns out not to be the escaped rapist, and indeed is unaware that an escaped rapist is at large. Furthermore, Violet’s feigned consent is so utterly plausible that it never occurs to Dirk that she has not actually consented to sex or that she fears for her safety.

Dirk has a genuine, good faith belief in consent of the kind that the Morgan defendants claimed, even though he is clearly mistaken about Violet’s consent. Because there was no force and no resistance, his claim of a good faith belief in consent is more plausible than theirs was. Dirk can argue persuasively that he did not rape Violet because he was not advertently reckless regarding her non-consent. It never occurred to him that there was even a risk she might not consent. If the jury were to be instructed that Dirk was ‘reckless’ if he had an ‘attitude of indifference’ or ‘couldn’t have cared less’ about the woman’s consent, Dirk still would have a strong argument for acquittal. He was not indifferent to her consent. Instead, he tried to get it in the usual ways that one tries to get consent to sex in clubs and bars. And Dirk inferred that he had consent, based on the social signals that he sent Violet and that he seemed to receive from her in return. The Morgan defendants, in contrast, received no such signals and had no reason to think that they had, apart from the implausible tale told by the victim’s husband. Finally, Dirk was not negligent. He continued to flirt with Violet and to otherwise take the trouble to seduce her after she left the bar. We can infer from this that Dirk recognized a risk of confusion about non-consent, and addressed it with conversation and social signaling. By the same token, if Dirk made a mistake about non-consent, he has a good argument that the mistake was reasonable. Not only did the victim not resist, she did not refuse; and not only did she not refuse, her conduct seemed to Dirk to welcome his attentions. Sex with a partner who is a relative stranger is a common enough occurrence, and usually does not involve rape.

The present question is whether a rape definition that does not explicitly provide Dirk an opportunity to argue either his lack of intent or his reasonable mistake can meet the requirements of legality. Before addressing the legality question, however, I want to describe how such a strict liability definition of rape might serve the countervailing value of fine-grainedness—defining a ‘strict liability’ offense, again, as one that turns on a non-intentional fault criterion consisting of the material elements of the offense, or some sub-set of them. By examining the value of fine-grainedness first, we will get a sense of the interstitial fault criteria that might threaten to overwhelm the legal fault criteria; and of the moral fault that might bleed through and threaten to determine the question of legal fault.
We can assume that, because Dirk’s mistake is reasonable, he would be acquitted of rape on a negligence standard. But it is not perfectly clear that this is the correct result—in the sense that it might not be the result that will track the moral assessment of the case sufficiently well to preserve the public credibility of the criminal justice system. Even if Dirk is reasonable, his insensitivity to the victim’s non-consent might be considered a sufficient failing to constitute criminal fault and to support his punishment for rape. (As I will explain below, this insensitivity is distinct from negligence.) Sexual intercourse is the most intimate transaction between human beings, and only an extraordinary and troubling insensitivity could cause a man not to detect a woman’s actual non-consent to sex. It might seem that criminal punishment is a heavy price to pay for insensitivity, but this may or may not be so, depending on what it is that the defendant is insensitive to. Fault is but an aspect of wrongdoing. The insensitivity involved in forgetting a wedding anniversary does not call for legal punishment. The insensitivity involved in having sex with an actually unwilling partner might well call for legal punishment.

Dirk lacks something that Aristotle called *aisthesis* and that David Wiggins translates as ‘situational appreciation’. A virtuous or law abiding person will see the circumstances that are the relevant starting points to normative deliberations; and he or she will also competently perceive when required to do so by moral or legal norms—as one might do when acting under a practical norm such as ‘Take the bread out when it is brown enough’. Conversely, one whose practical reasoning is deficient in *aisthesis* or situational appreciation might be neither virtuous nor law abiding. If this failure of situational appreciation occurs as part of some criminal conduct, then the actor will be criminally at fault.

In Dirk’s situation, a failure of *aisthesis*, of situational appreciation, is an adequate indication of fault—of disordered ends, and of the chronic failures of practical reasoning that are required to achieve and maintain that disorder. The insensitivity of a man who cannot detect the difference between feigned and genuine consent to sexual intercourse reflects a deficiency in practical reasoning that raises a legitimate public concern about the fitness of the individual to participate in society on a free and equal basis. The most likely explanations for Dirk’s insensitivity reflect poorly on his character. If Dirk could not detect even a brief flicker of fear at the moment Violet thought she recognized him as a rapist, then it seems that he pays little

---

16 Just as the criminal law does not require virtue, but only law-abidingness, so not only vice, but also *akrasia*—a chronic failure to do the right thing even when one knows the right thing to do—can constitute fault. Kynon Hugens, ‘On Aristotelian Criminal Law: A Reply to Duff’ (2004) 18 *Notre Dame Journal of Law, Ethics & Public Policy* 465, 492–3.
attention to the interior lives of others. If, in spite of his not being indifferent to Violet’s consent, Dirk was unable to sense her true wishes at any point during the extended period of time in which he flirted, engaged in foreplay, and had intercourse with her, then the likely explanation is that he is not good at ascertaining others’ true wishes. If Dirk failed to spot Violet’s non-consent in spite of her being as completely exposed to him as one’s partner is during sex, then it seems fair to conclude that Dirk was too self-absorbed really to perceive Violet as human being instead of as a sexual device. If during foreplay and intercourse Dirk was so completely caught up in his own sexual response that he was oblivious of his partner in producing that response, he simply seems immature.\(^{17}\)

Dirk’s insensitivity to Violet’s actual non-consent calls into question the ways in which he values things and has arranged his standing motivations or ends. Regardless of the state of his intentions toward her non-consent on the occasion of his conduct, and also regardless of his reasonableness or unreasonableness regarding her non-consent on that occasion, Dirk’s practical reasoning was deficient in a deeper, more persistent way that can constitute criminal fault, and that can support criminal liability—provided, as always, that this fault is determined in a way that meets the requirements of legality.

It is tempting to collapse the fault of insensitivity into the fault of negligence by saying that Dirk’s insensitivity to the woman’s condition constitutes his negligence toward her non-consent. But this is not quite right. Dirk was not, strictly speaking, unreasonable. Dirk is a sympathetic figure in this hypothetical in part because it appears that, had Dirk perceived his situation fully and accurately, then his deliberations, conclusions, and resulting actions would have stayed within morally and socially acceptable limits. Had he known that Violet thought he was the escaped rapist—perhaps had he even known there was an escaped rapist—Dirk would not have had sex with Violet. Dirk’s failure was specifically and exclusively a failure of perception. Negligence is, in contrast, a failure to meet a standard of conduct—a failure to which misperception might contribute, but which is more centrally a failure to reason or to reason correctly in the face of accurate perception. Notice, on this point, that an actor is both more negligent and more clearly negligent as he is shown to have had more and more knowledge of his actual situation, while he persists in producing prohibited results or engaging in prohibited conduct. Negligence involves inadvertence, but insensitivity is only one potential cause of inadvertence. Furthermore, negligence by definition entails inadvertence regarding consequences and conduct, but only sometimes involves inadvertence toward the situation that presents the starting points of normative deliberations. Unreasonableness

\(^{17}\) Incidentally, though it might read too much into the hypothetical to say so, if there was no point during sexual intercourse at which Violet could have realized that Dirk was too considerate and giving as a lover to be a rapist, then one almost has to conclude that Dirk was callous and obtuse in just the ways I have described.
and insensitivity are distinct failings—as is an attitude of indifference, as is an intention toward a prohibited act or result—and they indicate fault in different ways. The analysis of non-intentional fault will be better served if we distinguish insensitivity from unreasonableness, instead of conflating them under the heading of ‘negligence’. Our palette of fault criteria is too limited as it is, and we would be unwise to use negligence as a catch-all category for many different kinds of non-intentional fault. Furthermore, it will be more difficult accurately to assess the adequacy of any fault criterion as a matter of legality if we lack a precise and accurate understanding of the criterion that is supposed to pick fault out.

With this understanding of the fault that might be found in Dirk’s case, the question now is whether a set of offense elements that does not reference intentions, indifference, negligence, or any other explicit fault criterion can possibly perform the functions of fault and also meet our rule of law requirements. The danger to Dirk in this situation is that he will be convicted under a strict liability definition of rape, and to show that this will not necessarily follow is the best way to show that a strict liability rape definition does not offend against legality. Generally, however, the rule of law does not require offense definitions to tend toward producing either conviction or acquittal. The rule of law danger that concerns us, the danger specific to the definition of criminal offenses, is the danger that the moral assessment of the case will bleed through to the legal assessment of the case in a way that deprives the defendant of an effective legal defense to the criminal charge. Many criminal law scholars have thought that the most effective way to forestall this danger is to confine the jury’s discretion to a descriptive finding of a state of affairs, specifically an intentional state of mind regarding the more prominent features of the prohibited conduct or result. Morgan demonstrates that this requirement is too rigid in rape cases (though perhaps not for other offenses), and that it concedes too little to the countervailing value of fine-grainedness. A negligence requirement concedes more to fine-grainedness, but perhaps not enough, for the reasons I have given above. Any alternative approach to the adjudication of fault in rape, however, must still meet the requirements of legality. The goal is balance.

The question in the definition of rape is whether there is some set of material elements that can adequately, as a matter of legality, provide for the adjudication of fault in rape, without reference to either intentional states of mind or negligence.

To begin with, it is helpful to examine the nature of Violet’s non-consent. Her non-consent is not due to literal involuntariness. Unlike the unconscious rape victim, she retained her capacity for choice throughout. She always had the option of refusing sex, and retained the capacity to refuse sex, even though the alternative (as she thought) was to be assaulted or killed. Her case is one, instead, of hard choice involuntariness. She is in the position of the bank employee with a gun being held to his head. He has the choice to
refuse to open the vault and to have his head blown off instead. We describe his opening the vault as ‘involuntary’ because this is not much of a choice. So it is with Violet. Furthermore, Violet’s refusal to have sex probably would have required (under the assumptions she was making at the time) physical resistance. It is possible the rapist would kill her instantly upon her saying ‘No’, but given that he is a crazed rapist and not a crazed murderer, we can assume that he would try to get what he really wants, sex, before killing his victim—and if the sex comes with a violent struggle, perhaps so much the better for him. Both of these considerations tell us that Violet’s non-consent is inextricably bound up with another common element of rape: the use or threatened use of force.

It is hardly surprising, from this point of view, to discover that non-consent and force are often similarly bound up in the definition of rape. And yet the inclusion of force in the definition of rape sometimes has been thought to be problematic. Indeed, cases such as Violet’s are thought to be paradigmatic of the problem. The inclusion of force as a necessary part of the proof means that rape cannot be proved in a case in which the defendant found it unnecessary to use force on the victim, even though she did not truly consent to sex with him. This describes a troubling number of cases in which we would otherwise say that rape has occurred. It may frequently be the case that the defendant has a well-established reputation for violence and is significantly larger in size than the victim is, and knowing that resistance to the defendant’s demands would be futile, the victim gratifies him for only that reason. To add ‘a threat of force’ to the offense definition does not entirely solve the problem. Suppose the defendant has power, prestige, and authority to wield over the victim, and he successfully uses it to extort sex. Or, suppose the defendant has damaging information against the defendant and uses it to blackmail her, for sex. In order to treat these cases as the rapes they seem to be, at least one state has eliminated both force and threat of force as an element of rape by holding that proof of those elements of rape requires no more than proof of intercourse itself.  

Most states, however, have retained a force element, and it is worth our while to consider why they have done so. Surely the elimination of force or threat from the offense definition would expedite conviction in cases such as those I have just described. However, if the elements of force and non-consent can be woven together in the definition of rape in a way that brings out their complementarity instead of their conflict, then the offense definition will be more responsive to the particulars of individual cases and more likely to produce an acquittal or conviction that matches the informal, moral assessment of the case. In other words, it will serve fine-grainedness. More important, for present purposes, a rape definition that weaves together force and non-consent in the right way will facilitate the fair

adjudication of the offense, because it will expand and complicate the prosecution’s proof. It will offer the defendant not only additional opportunities to argue a failure of proof, but more generally an adequate formal mechanism to contest legal fault. In other words, the right combination of non-consent and force in the offense definition could serve the value of legality. Even without making reference to customary fault elements (such as intentional states or negligence) or relatively novel fault elements (such as indifference) the material elements of the offense could organize an inquiry into non-intentional fault that cabins the arguments of the prosecution and the discretion of the jury with sufficient formality to avoid a simple equation of moral and legal fault.

California’s rape statute offers an example. In California, consent is defined as ‘positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily…’19 The extent to which this definition of consent is dependent on the notion of force becomes clear when one reads the related provisions that give meaning to the terms ‘free will’ and ‘freely and voluntarily’ in this context. Sexual intercourse is rape in California if, inter alia, ‘it is accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of another’.20 Duress, in turn, is defined as:

... a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.21

An alternative definition of rape further provides that sexual intercourse is rape:

Where the act is accomplished against the victim’s will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph, ‘threatening to retaliate’ means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.22

Under these definitions, Violer’s case, like the other cases involving non-consent but no force, can unquestionably be prosecuted and punished as rape. Because it draws on a multiplicity of force concepts—especially the assessment of retribution in light of ‘the total circumstances’—and then weaves non-consent and force together, the California statute overcomes the problem of the force element’s simply undercutting the non-consent element and the vindication of sexual autonomy that proof of non-consent is meant

19 California Penal Code § 261.6.
20 California Penal Code § 261(a)(2).
21 California Penal Code § 261(b).
22 California Penal Code § 261(a)(6).
to provide. This complex weave of force and non-consent concepts ensures a fine-grained fault inquiry—one that tends to produce legal assessments that square with our moral assessments of the cases. More to the present point, however, the complex weave of force and non-consent structures the fault inquiry in such a way as to serve the countervailing value of legality as well.

In Violet’s case, the prosecution might allege that rape was accomplished against her will by means of duress, menace, or fear in that the threat of force or violence from the escaped rapist (as she thought) coerced her to perform an act which otherwise would not have been performed. Alternatively, the prosecution might allege that rape was accomplished against her will by means of a threat to retaliate against her; specifically a threat to inflict extreme pain, serious bodily injury, or death. The most obvious line of defense for Dirk is that he had no intentional state of mind—no purpose, knowledge, intent to, intent that, or advertent recklessness—toward Violet’s acting against her will; toward a threat, violence, or danger; toward threatened retaliation; and so on. If the statute were to be interpreted as not requiring the prosecution to prove any such intentional state of mind, but only to prove negligence, Dirk would still be in good shape. The fact that Dirk was unaware that there was a rapist on the loose would permit him to argue his innocence under a negligence standard.

The question we need to answer is whether Dirk can defend himself adequately without recourse to either of those arguments. He can. Sexual intercourse ‘accomplished against a person’s will ... by means of duress’ etc., does not describe an act of Dirk. Likewise, in the alternative version, sexual intercourse ‘accomplished against a victim’s will ... by threatening’ does not describe an act of Dirk. Dirk engaged in sexual intercourse and Violet engaged in sexual intercourse against her will, but it misdescribes Dirk’s actions to say he accomplished sex against Violet’s will. Violet acted against her will as a result of duress, fear, threat, and so on, but it misdescribes Dirk’s action to say that he engaged in sex by means of any such thing. In short, it is not accurate to say that Violet was coerced—as opposed to her feeling coerced—if we cannot also say that Dirk did coerce her.

Now, it is true that the easiest way to convey that the acts described in the offense definition are misdescriptions of Dirk’s act is to say that Dirk had no intention such that ‘accomplished’ and ‘by means of’ are accurate descriptions of his act.23 This is why, in defining the act of rape, to require proof of such intentions might be our first choice. It will be most clear that the victim was coerced when we also can say that the defendant had an intention to coerce. Under a definition of rape that references an intention, Dirk would have a clear and powerful argument that the prosecution cannot prove its case. However, the question here is the general definition of rape, and in another case that we would assess morally as rape, a definition that requires

23 Intentions are best thought of as part of act descriptions. Duff, above n. 8, at 129–35.
proof of such intentions will create a troubling and apparently intolerable gap between the legal assessment of rape and the moral assessment of rape. In other words, because of the prospect of a case such as Morgan, we will give up something on the side of legality in order to gain something on the side of fine-grainedness in our definition of rape.

The requirement that the prosecution prove negligence regarding the elements of rape might provide a better balance between legality and fine-grainedness, as Morgan certainly suggests. We have excluded negligence as a possible fault criterion for purposes of our analysis, but we should take a moment to examine how it provides this balance. A negligence requirement forces the prosecution to match its proof to a description of Dirk’s act that does not refer to intentions, but that refers instead to a very wide range of factual, evaluative, and normative features of his act. The prosecution must show that Dirk failed to meet a standard of due care when he engaged in sex with Violet, based on the state of his knowledge at the time. The proof of this broader description of the act of rape serves fine-grainedness, but it also serves legality. It gives the defendant ample opportunity to deny that his act meets the description of the prohibited act. He can argue that his knowledge—including his not being aware even that an escaped rapist was at large—would not have led anyone to recognize a risk that Violet’s consent might not be genuine. From this, he can argue against the inference that he ought not to have engaged in sex with Violet because of such a risk. The threat or duress that Violet experienced is undeniable, but it is insufficient to make Dirk’s act of sexual intercourse rape under a negligence standard regarding non-consent.

Now the critical point: even without the kind of act description featured in a negligence requirement, the definition of rape in the California statute still gives the defendant opportunities to deny that his act matches the law’s description of the prohibited act. The threat or duress that Violet experienced will be undeniable, but the prosecution will find it necessary as a practical matter to portray Dirk’s act in such a way as to comprehend both this threat or duress as a feature of wrongdoing and also some aspect of that threat or duress that can be attributed to him. Otherwise, the prosecution runs the risk of acquittal—perhaps a nullifying acquittal, but one no less to be avoided for that. More significantly, the danger of a nullifying acquittal indicates that the value of fine-grainedness and the necessity of balancing legality with fine-grainedness constrain the prosecutor as well as the legislature. The prosecution cannot prosecute a case based on a hyper-technical, legalistic interpretation of the offense definition without undercutting the credibility of the criminal justice system—a danger brought home in the threat of a nullifying acquittal.

Barring argument based on intentions or negligence, the most plausible way for the prosecution to frame the act description of the offense in a way that will match the description of Dirk’s act is the argument I described
above, which links the threat or duress experienced by Violet to Dirk’s act of sexual intercourse by means of an appeal to his apparent insensitivity. In other words, the prosecution will attempt to expand the statute’s act description so that it comprehends not only the intercourse, non-consent, and force, duress, or threat, but also insensitivity. This appeal to interstitial fault will make the legal offense of rape almost perfectly congruent with a moral offense of rape so that fine-grainedness is served. However, the interstitial fault of insensitivity to non-consent in rape is highly dependent upon and effectively defined by the material elements of the offense. Dirk still has formal, legal means to argue that he was not insensitive in a way that matches even this fine-grained offense definition. He was insensitive to Violet’s non-consent, perhaps, but the statute defines non-consensual sex only in terms of the victim’s will being overborne by threat, duress, retribution, and so on. If Dirk is to be found guilty of rape under this offense definition, the prosecution will have to show that he was insensitive, not to non-consent, but instead to Violet’s feigned or putative consent as it is specifically born of threat, duress, or retribution. Put another way, non-consent simpliciter is not an element of the proof of rape because it does not appear as such in the offense definition. Only non-consent resulting from particular causes appears in the offense definition, and the act description of the offense therefore refers only to those particular kinds of non-consent. Dirk can argue that he was not insensitive to that kind of non-consent, even if he may have been insensitive to non-consent more generally.

So long as Dirk has a formal opportunity to defend the legal case against him with the arguments in the preceding paragraph, the legal offense of rape does not completely collapse the legal assessment of Dirk’s act as rape into the moral assessment of Dirk’s act as rape, so as to deprive him of adequate formal avenues of defense in the criminal case. He has an opportunity to defend because of the way in which the definition of rape weaves non-consent and duress, retribution, and threat together into a complex act description that arguably does not match Dirk’s act very well. (Note that the qualifiers in that sentence do not undermine the contention that legality is satisfied because Dirk has some formal opportunity to defend under the offense definition.) The arguments that Dirk must make against this criminal charge of rape will be substantively the same arguments that he will make against a moral charge of rape arising from the same incident. But so long as the legal definition of rape permits him a formal opportunity to make those arguments in the criminal case, the legal offense has not completely collapsed into the informal moral offense.

To see this more clearly, imagine Dirk’s trial. Assuming, plausibly, that Dirk has no criminal record, he will be able to take the witness stand and describe his actions from his own point of view. A sharp prosecutor will object on relevance grounds to any express statement such as ‘I honestly believed she consented’, or ‘I was careful to make sure that she consented’.
But a good defense attorney would still have ample opportunity to portray Dirk as anything but the callous, uncaring person the prosecution has portrayed in its case. Furthermore, a good defense attorney would be alert to evidence and argument from the prosecution that suggests that Dirk was anything more than callous and uncaring. If the offense definition does not premise rape on intentions or negligence, then evidence suggesting intentions or negligence is irrelevant, and argument addressing intentions or negligence is improper—no matter which side of the case it comes from. If the case is well tried from both sides in these respects, then the only reason to think that Dirk has committed rape will be that he was insensitive to Violet's fear and fear-inspired consent. That we do not know whether this argument would succeed or could be defeated on these facts tells us nothing more than the limits of hypothetical cases.

This trial scenario demonstrates that even a strict liability definition of rape—defined as rape premised on a non-intentional fault criterion consisting of (some of) the material elements of an offense—can structure the proof of rape so as to serve the value of legality. But an important corollary of my analysis lurks in this scenario, and it should be spelled out because it provides a doctrinal reason to adopt the analysis—and thereby provides another reason to think that strict liability offenses need not offend against legality. Because strict liability on the conventional understanding is seen as relief from the requirement to prove fault, instead of as a different kind of fault criterion, it seems that the prosecutor need not prove intentional fault or negligence, but that she may do so if she wishes. It is not at all clear, on the conventional understanding of strict liability, that she should be barred from suggesting that the defendant acted intentionally, with indifference, or with negligence. My analysis of strict liability makes it clear that any suggestion of intentional fault, indifference, or negligence from the prosecution should be barred from evidence, and why this is so. Strict liability is not the absence of criminal fault, and a strict liability offense does not simply relieve the prosecution of the necessity of proving criminal fault. Strict liability offenses turn on a different kind of criminal fault—different from intentions, indifference, and negligence. The prosecution is required to prove the fault prescribed by the offense, and it cannot be permitted do so by proving a different kind of fault. If the prosecution’s proof of fault suggests intentions, indifference, or negligence, then it should be objected to and excluded as irrelevant and prejudicial. If this is done—as it is in the trial of Dirk’s case that I imagined above—then the proof of fault in rape will be structured in such a way as to serve the value of legality well.

Even accepting that legality is served by this strict liability definition of rape, it does not follow that strict liability rape ought to be adopted. That

---

24 In other words non-intentional fault criteria—and especially those that consist of a set or sub-set of offense elements—do not ‘nest’ as intentional states are said to do in, for example, Model Penal Code § 2.02(5).
question, as I have suggested, turns on whether the values of legality and fine-grainedness are brought into a morally acceptable balance in the offense definition. One could well argue that the definition of rape that I have described above concedes too much to fine-grainedness. The moral case for treating Dirk’s actions as rape that I have outlined is, perhaps, one that few would endorse even as a moral assessment. If so, then to accommodate it in the legal definition of rape might seem to be unnecessary or morally wrong. Negligence might serve us better. However, the substantive disposition of that moral controversy is beyond the scope of the present paper. It suffices for present purposes to conclude that a sound argument can be made for strict liability rape, properly understood.

5. Conclusion

Is strict liability rape defensible? Yes, at least one particular kind of strict liability rape is quite defensible, even if we might conclude, ultimately, that we do not wish to adopt it. The same might be said of strict liability rape premised on minority; or on the mental or physical incapacitation of the victim; or even on a different set or subset of rape’s material elements. Each of these rape definitions has to be assessed separately for the moral adequacy of its balance between legality and fine-grainedness. For now, however, we know that the answer to such an inquiry is not necessarily ‘no’.