# THE CRIME/TORT DISTINCTION: LEGAL DOCTRINE AND NORMATIVE PERSPECTIVES

Kenneth W. Simons*

This essay provides an overview of the crime/tort distinction. It first investigates some of the fundamental differences between criminal law and tort law in doctrine and legal structure. It then explores some important similarities and differences in normative perspectives between the two doctrinal fields. This typology should prove analytically useful for examining some of the specific issues at the borderline of crime and torts—such as the proper scope of punitive damage liability and the question whether criminal law as well as tort law should vary legal sanctions simply because of the fortuitous occurrence of harm.

## A. DIFFERENCES IN DOCTRINE AND STRUCTURE

"In the beginning," of course, crime and tort were not sharply distinguished. At early common law, a victim could pursue justice for the same wrongful act either through a forerunner of criminal law or through a forerunner of tort law.[1] But over time, criminal law and tort law have evolved to encompass a number of distinctive and contrasting features. The following nine features are especially salient.

(1) The state prosecutes violations of criminal law. A victim's consent is neither necessary nor sufficient for a prosecution to be brought. In tort law, by contrast, the victim decides whether to bring a tort claim and is free to choose not to do so.[2]

---

* Professor of Law, Associate Dean for Research, The Honorable Frank R. Kenison Distinguished Scholar in Law, Boston University School of Law.

[1] David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 59 (1996).

[2] Indeed, one recent theory of tort law, the civil recourse theory, championed by John C.P. Goldberg and Benjamin C. Zipursky, claims that the optional quality of a tort lawsuit is one of its most important, defining characteristics. John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 402-03 (2005); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003). I am not so sure

This structural difference is sometimes given a more substantive gloss: criminal law prohibits "public" wrongs and tort law "private" wrongs.[3] But what exactly does that mean? Part of what it means is this second point of distinction:

(2) Tort law typically requires harm as a prerequisite to a remedy. Criminal law does not. Specifically, criminal law punishes not only:

(a) Acts that are harmful to others, but also:

(b) Acts that are harmful only or mainly to the actor being punished;

(c) Dangerous acts that have not yet caused harm; and

(d) Acts that the community considers immoral, even if the acts are not "harmful" in the narrower sense of the term.

By contrast, tort law mainly provides a remedy for harmful acts, not for acts that create risks of future harm, and not for acts that are considered immoral but not harmful.[4]

(3) Criminal law often imposes much more severe sanctions than tort law, of course: loss of liberty or even of life. So the procedural protections in criminal law obviously are much more extensive and (in theory at least) a much greater barrier to liability. For example, the criminal defendant, unlike the tort defendant, must be proven guilty beyond a reasonable doubt, the exclusionary rule sometimes applies, and the double-jeopardy rule precludes the same jurisdiction from pursuing multiple convictions for the same conduct.[5]

(4) Criminal law, in theory at least, contains a proportionality principle, requiring that the punishment "fit" the crime.

---

about this. We might say the same about all civil remedies, whether they are based in tort or property law, contract, unjust enrichment, or statute.

[3] Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 934-35 (1984).

[4] To be sure, there are exceptions. Modern tort law can be viewed as allowing compensation merely for risk of harm in limited contexts, such as liability for loss of chance (for delayed medical diagnosis) or market-share liability. And injunctive relief to prevent future harm or future rights-violations is sometimes permitted, such as in nuisance and invasion of privacy cases.

[5] For a thoughtful account of how the civil-criminal distinction should, and should not, affect constitutional analysis, see generally William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 19-24 (1996).

Punishment should be proportional to the culpability of the actor and the seriousness of the harm or wrong he has committed or threatened.

But tort law does *not* purport to provide remedies proportional to the injurer's wrong: normally, compensation is the remedy, whatever the nature of the tort or wrong.[6] To be sure, the compensatory remedy is scaled to the severity of the harm caused, and, in that sense, is proportional.[7] But the tort remedy usually does not vary with the culpability of the injurer. Suppose, in three separate incidents, injurers A, B, and C cause precisely the same harm to their respective automobile accident victims; but A is strictly liable for a manufacturing flaw in the automobile, a flaw that could not have been prevented by due care; while B is negligent for momentarily taking his eyes off the road; and C is negligent for dangerously passing another car on a busy highway. A, B, and C will pay precisely the same damages.

Of course, punitive damages, in the small number of cases where they are awarded, are an important exception: they do achieve some degree of proportionality between the level of the injurer's culpability and the damages he must pay. But even punitive damages are not nearly as sensitive to differences in degrees of culpability as criminal law sanctions are. Although the degree of reprehensibility of the injurer's conduct is sometimes reflected in the size of a punitive damage award, many other factors also affect the size of that award, including whether the injurer's course of conduct caused widespread harm to persons other than the plaintiff.[8]

---

[6] *See* John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1142-43 (2007).

[7] Even this type of proportionality is undermined: by the difficulty or impossibility of providing genuine compensation for certain types of harms, such as pain and suffering or loss of enjoyment of life, and by the problem that wrongful death and survival statutes do not compensate for the lost enjoyment of life when the tort victim suffers an early death. Moreover, for certain types of intentional wrongs, such as civil rights violations, and perhaps invasions of privacy and other emotional harms, tort remedies might more aptly be characterized as reflecting respect for the victim or some type of redress for the rights-violation than as *compensatory*.

[8] Recent decisions of the Supreme Court do suggest, however, that states may not constitutionally give independent weight to harm to persons other than

Related to this point about proportionality is the following distinction:

(5) Criminal law contains a much broader spectrum of fault or culpability than does tort law. The spectrum is wider along two dimensions: the state of mind, or mens rea, element and the conduct, or social harm, element. Thus, the requisite culpable state of mind in criminal law ranges from strict liability to negligence to recklessness to knowledge to purpose, with punishment varying according to that mens rea. (The multiple degrees and categories of homicide are the best example of this range.) And the conduct or social harm element also ranges enormously. Every American jurisdiction contains an extraordinary number and range of criminal offenses.[9]

By contrast, most of tort law is governed by a negligence standard. There are relatively few categories of intentional torts and even fewer categories of recklessness and strict liability. To be sure, a number of distinct torts address distinct forms of conduct and social harm other than the physical harm that negligence law protects. For example, the protection of emotional harms ranges from emotional distress negligently created by an actor whose

---

the plaintiff in their punitive damage awards, although they may give weight to such harm in determining *reprehensibility*. Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063-64 (2007). This approach, and the Court's suggestion that reprehensibility depends on the harms risked, but not necessarily the harms caused, suggests that the Court increasingly views reprehensibility as similar to a criminal law conception of culpability. *See id.* at 1063-64; *see also* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003). In *State Farm*, the Court asserts that reprehensibility is "the most important indicium of the reasonableness of a punitive damages award" and that, in analyzing this factor, courts must consider:

> whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; . . . the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

*Id.* at 419 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575-77 (1996)). These factors would all be highly relevant in determining the degree of culpability of an actor facing criminal punishment.

[9] *See generally* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 9-10 (2008) (noting that at the federal level alone, commentators have estimated that we have 3,300 separate crimes and many more regulations that are enforceable through criminal sanctions).

conduct threatened physical harm, to invasions of privacy, to defamation. Nevertheless, the number of discrete tort causes of action pales in comparison to the number of distinct crimes.

(6) Criminal law requires a greater minimal level of fault before liability will be imposed than does tort law. This is a very crude generalization, with many exceptions. Still, the minimum fault requirement tends, in criminal law, to be something like gross negligence or even recklessness, while in tort law, ordinary negligence usually suffices.

Criminal law does contain some doctrines of strict liability, especially with respect to the grade of the offense (*e.g.*, reasonable mistake is no defense if it only goes to the amount of illegal drugs that the actor possesses or to the value of the goods that he has stolen) and also with respect to mistake or ignorance of law, where even reasonable mistake or reasonable ignorance is normally no defense.

But strict liability is less widespread in criminal law than in tort law. Tort recognizes such strict liability doctrines as liability for abnormally dangerous activities, for manufacturing defects in products, and for wild animals.[10] Tort law also pervasively imposes strict liability in the form of vicarious liability, especially the liability of employers for the tortious acts of their employees.[11]

More fundamentally, criminal law targets conduct that is *impermissible*. Or, as economists might say, the optimal incidence of criminal conduct is zero.[12] But tort law sometimes creates liability for perfectly permissible conduct, conduct that we would not want to preclude. As Robert Cooter put it, criminal law exclusively imposes *sanctions*, while tort law sometimes *prices* an activity.[13]

---

[10] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM §§ 20, 22 (2005); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

[11] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 413-15 (1965).

[12] *See* Stuntz, *supra* note 5, at 20.

[13] Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1523 (1984). Similarly, in terms of the Calabresi/Melamed framework, criminal law creates a *property rule* (the victim has an entitlement that he cannot be forced to sell), while tort law sometimes creates a *liability rule* (in strict liability torts, the law essentially gives the injurer an entitlement to cause harm if he pays for it,

(7) Criminal law pays much less attention to the victim's conduct than does tort law. First, in criminal law, victim fault hardly ever matters. Contributory negligence is not a criminal law defense, but it is routinely taken into account in tort law.[14]

Second, the consent of the victim to the behavior of the wrongdoer, or to the risks imposed by his behavior, is much more likely to be a full defense in tort law than in criminal law.

Criminal law includes many so-called victimless crimes, that is, crimes in which both of the immediate parties to the transaction consent, such as prostitution, gambling, and drug distribution. And consent is generally no defense to causing serious bodily injury, as opposed to minor bodily injury, in criminal law; but in tort law, it will more often serve as a full defense.[15]

(8) Criminal law is statutory. The doctrine of common-law crimes is largely defunct. By contrast, tort law remains mainly a set of common-law, judge-made doctrines (although the statutory overlay is increasing).

This fundamental difference is related to many others. For example, criminal law tends to produce more detailed specifications of wrongful behavior than tort law, which, in important domains (especially negligence), creates liability standards that are maddeningly vague. At the same time, criminal

---

and gives the victim an entitlement to compensation). Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

[14] However, the victim's *faulty* conduct arguably does matter in a few places in the criminal law, especially in the doctrines of provocation (or heat of passion) and self-defense. For discussion, see generally Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 385, 405-18 (2005) (arguing that perpetrators should be entitled to a defense of complete or partial justification when victims reduce their right not to be harmed either voluntarily, by consent, waiver or assumption of risk, or involuntarily, by an attack on some legally recognized right of the perpetrator). For a reply, see Kenneth W. Simons, *The Relevance of Victim Conduct in Tort and Criminal Law*, 8 BUFF. CRIM. L. REV. 541 (2005).

[15] *See* WAYNE R. LAFAVE, CRIMINAL LAW 16 (4th ed. 2003) (noting that "consent of the adult injured party is a defense to intentionally inflicted torts," but might not be a defense in the analogous situation in criminal law); PAUL H. ROBINSON, CRIMINAL LAW 6-7 (1997). Of course, criminal law does include a number of crimes for which consent vitiates the harm and thus precludes conviction. Examples include rape and theft.

law is in some ways more difficult to change in response to changing conditions. Tort law provides a more flexible framework for challenging new forms of wrongdoing, such as clergy malpractice or invasions of privacy through new technology.

(9) Excuses to liability are recognized in criminal law much more readily than in tort law. Thus, the insane are generally liable for their torts, but are not criminally responsible (though again, this theoretical difference is belied by actual legal practice, since it is extraordinarily difficult for mentally disordered criminal defendants to succeed with an insanity defense). Moreover, criminal law and tort law differ in their treatment of children: even relatively young children are often liable for torts, but they are not criminally responsible.

### B. SIMILARITIES AND DIFFERENCES IN NORMATIVE PERSPECTIVES

Let us turn to the second set of issues: the similarities and differences in the normative perspectives underlying criminal law and tort law. First, we must distinguish between the functions that an area of law performs and the underlying reasons or principles that explain and justify those functions.

I. Tort law

A. Main *functions* of tort law:

1. Plaintiff obtains damages.
   a. As compensation (or redress)
   b. In excess of compensation (sometimes)

2. Defendant pays damages.
   a. As compensation (or redress)
   b. In excess of compensation (sometimes)

3. Deterrence of future torts (by the threat of future tort liability).

4. Loss-spreading.[16]

5. Reinforcement of social norms.[17]

I characterize these five items as functions of tort law in the sense that they describe what the award of a tort remedy *does*. These functions are either *constitutive* of tort remedies or *direct effects* of providing those remedies.

But it is a separate question whether any of these functions are justifiable, or if they are, why they are. Thus, "compensation" is often described as one of the purposes of tort liability. But by itself, this is not much of an argument. Compensation is not itself a good *reason* for any particular tort law doctrine. All injured people could benefit from compensation, whatever the source of their injury. So we really need to ask, what is it about defendant's behavior that justifies a duty on his part to compensate the plaintiff?[18] And similarly, it is more accurate to speak of "extracompensatory" rather than "punitive" damages insofar as this category of damages might be justified for reasons other than *punishing* the defendant.[19]

---

[16] I describe loss-spreading as a function, not an underlying normative principle, because loss-spreading can itself serve a number of different tort goals or embody a number of different tort principles, such as optimal deterrence of accidents, optimal insurance of accident victims, or distributive justice. *See* Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 613-16 (1985).

[17] Arguably, the failure to impose liability also reinforces (different) social norms.

[18] Indeed, even the function of "compensation" is sometimes a misleading description of actual tort practice. That is why I describe the relevant function as compensation or *redress*. Some so-called compensatory damages do not actually compensate a victim in the basic sense of providing the victim with something that is equivalent to what the victim lost, or that makes the victim indifferent between (a) not being victimized by the tort and (b) being victimized but receiving the damage award. Compensation in this sense is most clearly inadequate or infeasible when the actual victim has died or has suffered a serious personal injury. *See supra* note 7; Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 57-61 (1993).

[19] For example, "punitive" damages might be awarded in order to require the injurer to pay societal damages for harms to people other than the victim. *See* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE

The widespread assertion that compensation is itself one of the justifiable "goals" of tort law is therefore unhelpful and misleading. Compare the analogous argument in criminal law. We could say that the purpose of criminal law is to put convicted criminals behind bars, or that the purpose is to label those convicted of a crime as criminals. But it is perfectly obvious that these assertions beg the question: Why (and when) is physical incapacitation a legitimate function of punishment? Why (and when) is stigmatizing a convicted criminal justifiable? We need to address these more fundamental questions if we want to give a normative defense of our legal practices.

### B. Normative Principles Underlying Tort Law

Broadly, we can distinguish consequentialist and non-consequentialist justifications both of moral norms and of legal doctrines. In my view, to give a plausible and attractive explanation of either tort or criminal law, we need to look beyond consequentialist arguments, including the utilitarian law and economic approach that is an especially popular academic approach to tort law. Nonconsequentialist principles must be at least part of the best explanation and justification.[20] (The following list includes the principles most often offered by way of justification, but it is hardly exhaustive.)

#### 1. Corrective justice or vindication of rights

This principle adopts an ex post perspective.

---

L.J. 347, 349-52 (2003). Or they might be awarded in order to provide optimal deterrence in cases where the probability of detection of the tort is unusually low, as many economically oriented scholars have advocated. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 890-91 (1998).

[20] For discussion, see generally Kenneth W. Simons, *The Hand Formula in the Draft* Restatement (Third) of Torts*: Encompassing Fairness as Well as Efficiency Values*, 54 VAND. L. REV. 901 (2001) (providing a detailed evaluation of the draft *Restatement (Third) of Torts* and identifying its limitations in addressing efficiency and fairness). *See* Kenneth W. Simons, *Deontology, Negligence, Tort and Crime*, 76 B.U. L. REV. 273, 296 (1996) (explaining that the negligence doctrine can be based on a nonconsequential justification).

2. Distributive justice

An illustration is vicarious liability, which is often justified by the idea that loss-spreading here serves the legitimate goal of requiring the many individuals who benefit from the activity to share its predictable accident costs. (Shifting the cost of accidents from negligent employees to their employers results in spreading that cost to consumers of the relevant product or service.)

Some strict liability rules can also be justified this way: they require compensation from the party who obtains a nonreciprocal benefit (as when a boat owner justifiably trespasses but uses the dock owner's property for his own benefit[21]) or who inflicts a nonreciprocal risk (as is typically the case when the actor engages in an abnormally dangerous activity or owns a wild animal).[22]

3. Deterrence, in order to promote efficiency

This law and economics approach exemplifies utilitarian principles.

4. Deterrence, in order to prevent wrongs or rights-violations

This is a mixed theory, which focuses on whether tort liability will produce good consequences, but not just on consequences for social welfare in the utilitarian sense.[23]

---

[21] Vincent v. Lake Erie Transp. Co., 124 N.W. 221, 221-22 (Minn. 1910).

[22] Moreover, what counts as a permissible risk for purposes of negligence law can depend in part on distributive justice principles, such as whether the class of persons exposed to the risk obtains sufficient benefit from the risk, or instead are the unilateral victims of the risky activity. *See* Kenneth W. Simons, *Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy*, LOY. L. REV. (forthcoming 2008); *see generally* RICHARD W. WRIGHT, THE STANDARDS OF CARE IN NEGLIGENCE LAW, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 249 (David G. Owen ed. 1995).

[23] *See* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1824-28 (1997).

## II. Criminal law

When we turn to criminal law, again it is important to distinguish the functions of a criminal sanction from the normative principles that plausibly justify that legal remedy. And once again, these functions of criminal law merely describe what the criminal justice system does. It is an entirely separate question whether any of these functions are justifiable, or if they are, why they are.

### A. Main *functions* of criminal law:

1. The state inflicts stigma on defendant.

2. The state inflicts suffering on defendant.

3. Deterrence of future crimes (by the threat of criminal sanctions).

4. The state incapacitates the defendant (sometimes).

5. Reinforcement of social norms.[24]

### B. Normative Principles Underlying Criminal Law

The normative principles that justify criminal law (again, a suggestive but nonexhaustive list) are as follows. They are parallel to the list of principles justifying tort law, in embracing both nonconsequentialist and consequentialist values.

1. Retributive justice

One common formulation is this: the state should punish defendant according to what he justly deserves.

2. Expressive or communicative justice

---

[24] Arguably, even the failure to punish also reinforces (different) social norms.

Here, the focus expands to whether the state should communicate, through public condemnation, that defendant has committed a serious wrong.

3. Deterrence, in order to promote efficiency

4. Deterrence, in order to prevent serious wrongs or rights-violations

C. Implications

What follows from this typology of doctrines and principles? Does this articulation of the standard features of criminal law and tort law suggest that we should be reluctant to tinker with our traditional approaches? Do these standard features have a compelling logic behind them?

Some would answer yes to both questions. Ernest Weinrib treats tort law as a self-contained, coherent system, one that should not be altered, even if on balance no-fault or criminal law would be better for society.[25] In a similar spirit, some think punitive damages are an alien encroachment on tort law.

I do not think we need to be so conservative and cautious. On the other hand, we should also resist the temptation to mix and match doctrines and functions at will. We *do* need to think seriously about what doctrines and features of tort law (or of criminal law) are essential to its underlying purposes. But we also must provide plausible arguments for what these underlying purposes are or should be. We should not merely assume the optimality or desirability of the contemporary state of the law.

Law and economics advocates have it a bit easier here: many of them have a relatively simple view of the purposes of all legal sanctions. If efficiency or maximization of social welfare is the uniform objective of all branches of law, then we should be free to

---

[25] *See* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 45-46 (1995). For a critique, see Kenneth W. Simons, *Justification in Private Law*, 81 CORNELL L. REV. 698 (1996) (reviewing ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995)).

tinker with or simply abandon legal doctrines to achieve that objective. Perhaps criminal law should be employed whenever tort law would be an ineffective deterrent (for example, when the defendant is poor and thus difficult to deter otherwise)—even though this prescription could result in serious criminal law sanctions for relatively minor forms of antisocial behavior. Perhaps punitive damages in tort law should be assessed only to compensate for otherwise inadequate incentives in cases where the tortious activity is especially difficult to detect[26]—even though this formulation is out of sync both with current doctrine and with popular intuitions about when punitive damages are properly awarded.[27] We could make criminal law much more like tort law; or tort law much more like criminal law. On the economic view, everything is contingent. All is up for grabs.

But if corrective and retributive justice are compelling rationales for the distinctive doctrines and remedial structures of tort law and criminal law, respectively, then the doctrines and structures of these different areas of law have a less contingent explanation. And then the crime/tort distinction has a basis in principle—or more precisely, a principle more nuanced than maximizing social welfare—and is not just a product of institutional constraints, administrative costs, and historical accident.

Consider two important issues at the borderline of criminal law and torts: punitive damages and "moral luck." Punitive damages might reflect a retributive rationale, akin to the just deserts principle asserted as a general justification for criminal law punishment. This is a nonconsequentialist rationale. Is it properly invoked in tort as well as criminal law? Even if we believe that corrective justice principles best justify the basic doctrines and structure of tort law? Perhaps these principles can, indeed, be accommodated in a justifiable manner—for example, by adopting a split recovery scheme under which victims do not receive the

---

[26] *See, e.g.*, Polinsky & Shavell, *supra* note 19, at 891.

[27] *See generally* Cass R. Sunstein, David Schkade & Daniel Kahneman, *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237 (2000) (analyzing two studies to determine people's beliefs in optimal deterrence and concluding that a majority of people reject current administrative and judicial policies with respect to deterrence).

entirety of the punitive damage award. At the very least, we should not rule out the possibility of such an accommodation.

Now consider the issue of "moral luck"—that is, the claim that the fortuitous occurrence of harm has a legitimate bearing on legal liability. In tort law, a driver who rounds a blind curve at an excessive speed will pay substantial damages if his dangerous driving results in a collision with an oncoming car and no damages if no car is present. In criminal law, the driver might be subject to liability in both cases, but will ordinarily face a much smaller sanction if no harm occurs. Advocates of this differential in punishment include some retributivists who claim that moral luck is relevant to retributive blame. But those who make this claim are sometimes accused of confusing criminal law with tort law in so recognizing moral luck. Whether and when the fortuity of harm should matter to legal liability is a notoriously difficult problem. The answer might depend on whether we can properly view criminal law, as well as tort law, as addressing the need to repair a relationship of the defendant to an actual victim.[28] This perspective might or might not be defensible, but it does not merely reflect a conceptual conflation of criminal law and tort law functions or principles.

The nascent field of crimtorts speaks to such issues at the borderline of the doctrinal categories. It is a field of considerable promise if it avoids these twin dangers: the dangers of an oversimplified instrumentalism and of an excessive demand for doctrinal purity and insulation.

---

[28] For some recent discussions of moral luck in tort law, see generally Ronen Avraham & Issa Kohler-Hausmann, *Accident Law for Egalitarians*, 12 LEGAL THEORY 181, 181 (2006); Goldberg & Zipursky, *supra* note 6; Gregory C. Keating, *Strict Liability and the Mitigation of Moral Luck*, 2 J. ETHICS & SOC. PHIL. 1 (2006). For discussions of moral luck in criminal law, see Michael Moore, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW ch. 5 (1997). For an overview of the philosophical debate, see Dana K. Nelkin, *Moral Luck*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed. 2004), *available at* http://plato.stanford.edu/archives/spr2004/entries/moral-luck/. For an argument that criminal liability should depend on the defendant being morally responsible, or answerable, in a relational sense, to his fellow citizens, see generally R A DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW (2007).