

REVIEW ESSAY

Meaning and Motive in the Law of Homicide

JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER. By Samuel H. Pillsbury. New York and London, New York University Press, October 1998. Pp. xiii, 264. \$50.00 (cloth), also forthcoming in paperback, New York University Press, July 2000.

Reviewed by Guyora Binder*

In *Judging Evil*, Samuel Pillsbury has produced a comprehensive theory of homicide liability, the first such effort since Wechsler and Michael's classic articles of the 1930's.¹ These articles laid out and defended an analysis and gradation of homicide offenses in terms of the conscious imposition of risk that was later codified in the influential Model Penal Code. Wechsler and Michael's approach to homicide typified the Code's approach to culpability, causation and grading and is therefore emphasized in most criminal law courses. Thus while homicide law is significant in itself, it is also significant as a principal site of the most prominent criminal law reform effort of the twentieth century. Not surprisingly, Pillsbury's proposed reform of the law of homicide has broader implications for criminal law generally. In critiquing some features of the Model Penal Code analysis of homicide, Pillsbury also contributes to recent efforts to reconceive punishment as symbolic expression and to reconceive culpability as an assessment of motivation as well as cognition.

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1. Herbert Wechsler & Jerome Michael, A Rationale of the Law of Homicide I, 37 Colum. L. Rev. 701 (1973). Herbert Wechsler & Jerome Michael, A Rationale of the Law of Homicide II, 37 Colum. L. Rev. 1261 (1973).

In this review I will summarize Pillsbury's reform proposals and explicate his theoretical claims about punishment and culpability. I will conclude that these two theoretical positions both push Pillsbury further than he is willing to go, so that there is a disjunction between his premises and his conclusions. A particularly puzzling result is that Pillsbury basically follows the Model Penal Code in rejecting the felony murder rule, although his premises dictate the opposite conclusion.

I. PILLSBURY'S REFORM PROPOSALS

Pillsbury proposes that aggravated or first degree murder be predicated on the intent to kill or inflict great violence, plus one of a number of aggravating motives: killing for profit, to further crime, to affect legal processes, to gratify hatred of a group, or to exercise "cruel power." This proposal alters four features of prevailing law.

First, it adds intent to inflict great violence to the paradigmatic mental state of first degree murder, intent to kill. This includes among first degree murderers frenzied killers who may intend only to inflict great pain or injury on one or several victims without specifically contemplating their deaths.

Second, it rejects the additional requirement of premeditation or deliberation for first-degree murder. This change is designed not only to include the frenzied killer among first degree murderers, but also to exclude the mercy killer. The mercy killer may kill coolly and deliberately, but with a compassionate motive.

Third, it rejects an alternative conception of first degree murder as an unintentional killing caused in the course of a particularly dangerous or heinous felony such as armed robbery, rape, kidnapping, burglary and arson would be first degree murder. Pillsbury's proposal would punish as first-degree murder, however, unintentional killings committed in furtherance of crimes if accompanied by an intent to inflict great violence.

Fourth, it rejects certain classes of aggravating

circumstances commonly used to distinguish capital murders from other murders or first-degree murders. For example, the Model Penal Code views the fact that a killer is a prisoner² or has a prior criminal record³ as an aggravating circumstance. It also makes the imposition of harm or risk on multiple victims an aggravator. For Pillsbury, these aggravating circumstances improperly focus the capital sentencing decision on the killer's dangerousness rather than on desert.

Pillsbury proposes redefining voluntary manslaughter as a justifiably enraged killing, committed with intent to kill or extreme indifference to human life. Pillsbury retains the familiar conception of voluntary manslaughter as a murder mitigated by provocation. To qualify for this mitigation, a defendant must have had good reason to believe the victim had seriously wronged the defendant or a defendant's loved one.

This proposal avoids the two most familiar formulations of voluntary manslaughter. According to traditional common law rules, the mitigation of an intentional killing to manslaughter depended upon adequate provocation—usually a physical blow or personally witnessed adultery—and no interval or cooling time between the provoking event and the provoked killing.⁴ The Model Penal Code, by contrast, predicates mitigation upon “extreme mental or emotional disturbance” for which there is a “reasonable excuse,” based on the situation as the defendant perceived it.⁵ Pillsbury's proposal follows the common law rule in that it predicates mitigation on a partial justification of defendant's conduct rooted in the wrongdoing of the victim. Yet Pillsbury broadens the traditionally recognized categories of provocative wrongdoing and he eliminates the requirement

2. See Model Penal Code § 210.6(3)(a) (Proposed Official Draft 1962).

3. See *id.* § 210.6(3)(b).

4. See generally, 3 James F. Stephen, *A History of the Criminal Law of England* 63 (1883); Wayne R. LaFare & Austin W. Scott, Jr., *Criminal Law* 654-62 (1986); Richard G. Singer & John Q. LaFond, *Criminal Law* 162-65 (1997).

5. Model Penal Code § 210.6(4)(b) (Proposed Official Draft 1962).

of an immediate response to provocation. In requiring that mitigation hinge on the wrongdoing of the victim, Pillsbury rejects the Model Penal Code's notion that killers should be partially excused by virtue of strong emotion alone. Pillsbury would allow those who kill out of fear the opportunity to mitigate their liability to manslaughter with a claim of imperfect or unreasonable self-defense. In general, however, Pillsbury rejects the idea that passion diminishes responsibility for moral choice. Thus, we have seen, Pillsbury equates frenzied violence with coldly premeditated violence. Pillsbury judges offenders by the quality of their moral reasoning, and he therefore regards unreasoned or impulsive behavior as reprehensible.

Pillsbury also proposes a major revision of the law of unintentional homicide. Most jurisdictions punish two forms of unintentional homicide: homicide by risk-taking and homicide in the course of crime. Pillsbury has something to say about each.

Homicide by risk-taking is generally divided into three grades. Many jurisdictions punish various kinds of criminally negligent homicide, especially if caused by negligent driving.⁶ Criminal negligence is often defined as the failure to perceive a reasonably apparent risk of harm.⁷ Most jurisdictions punish reckless homicide as manslaughter or "involuntary manslaughter" (sometimes subject to smaller penalties than "voluntary" manslaughter). Typically, they define recklessness as actual awareness of a risk of harm.⁸ Finally, most jurisdictions punish some unintentional but grossly reckless homicides as non-aggravated murder, usually murder in the second degree.⁹ These second-degree murder statutes usually require recklessness and circumstances showing "depraved indifference to human life" or "extreme indifference to human life" or an "abandoned and malignant heart." These colorful phrases are rarely

6. See, e.g., California Penal Code §§ 192(C), 192.5, 193.5, 193.7 (1982).

7. See Model Penal Code § 2.02(2)(d) (Proposed Official Draft 1962).

8. See *id.* § 2.02(c).

9. See *Commonwealth v. Malone*, 47 A.2d 445 (Pa. Sup. Ct. 1946).

defined further, but they seem to embrace conduct which either creates an extremely grave risk, perhaps to many people,¹⁰ or which imposes risk for a morally reprehensible purpose such as a sadistic desire to frighten,¹¹ or a callous venality.¹²

Pillsbury does not discuss negligent homicide, as his topic is limited to the law of murder and manslaughter. However, he proposes revising definitions of depraved heart murder and involuntary manslaughter so as to focus on a volitional attitude of indifference to human life rather than a cognitive awareness of risk. Pillsbury defines depraved heart murder as causing "the death of a human being by the disregard of an obvious, extreme and unjustifiable risk of death, thus demonstrating extreme indifference to the value of human life."¹³

He defines involuntary manslaughter as causing the death of another "by the disregard of a substantial, unjustified, and reasonably apparent risk to human life, under circumstances that demonstrate a basic lack of concern for the welfare of others."¹⁴

Under these definitions, Pillsbury would punish as involuntary manslaughter or murder some deaths caused with little awareness of a risk of death, if the risk was apparent and the actor had a poor reason for being unaware of it (voluntary intoxication, for example). And he would punish death resulting from risk-taking based not only on the degree of risk, but on the reasons or motives for which the risk was imposed. Thus a high degree of risk imposed for a very trivial reason manifests great indifference to the value of human life and so justifies murder liability.

In addition to punishing homicide by risk-taking, most jurisdictions punish unintentional homicide in the course of

10. See *People v. Jernatowski*, 144 N.E. 497 (N.Y. 1924).

11. See *Mayes v. Illinois*, 106 Ill. 306 (1883).

12. See *People v. Protopappas*, 246 Cal. Rptr. 915 (1988).

13. Samuel Pillsbury, *Judging Evil: Rethinking the Law of Murder and Manslaughter* 184 (1998).

14. *Id.*

crime. As we have already noted, many punish the causing of death during a dangerous felony as aggravated murder, that is murder in the first degree or capital murder. And as we have also noted, while Pillsbury would recognize the furtherance of crime as an aggravator for intentional killings, he rejects the notion that killing in furtherance of crime can be an aggravated murder unless accompanied by the intent to kill or commit "great violence." But there are other forms of liability for unintentional killings in the course of crime on which Pillsbury does not comment directly. Thus, many jurisdictions punish the causing of death during a dangerous felony as simple murder or murder in the second degree.¹⁵ And some jurisdictions punish the causing of death during a felony or even a misdemeanor as manslaughter, particularly if the predicate offenses involve some danger to human life or health.¹⁶

Pillsbury does not include these lesser forms of liability for unintentional homicide in the course of crime in his scheme. Although acknowledging that "the felony murder rule" takes many different forms in American law, he criticizes them all as inadequate: "Because the doctrine requires no mens rea as to the death of the victim, the connection between legal responsibility and culpability. . . remains haphazard."¹⁷

He also asserts that while motives are relevant in aggravating and mitigating murder, they should not play a role in defining murder:

In homicide we should employ motive analysis at either end of the culpability spectrum—for aggravated murder and . . . for manslaughters that involve legally adequate provocation. The great majority of homicide offenses will fall in between these two doctrines and should remain crimes that rely on traditional mens rea forms, without

15. See, e.g., Virginia Code Ann. §§ 18.2-32, 18.2-33 (Michie 1996)

16. See, e.g., La. Rev. Stat. Ann. § 31.1(a) (West 1989).

17. Pillsbury, *supra* note 13, at 108.

reference to motive.¹⁸

Thus a bad motive may raise simple to aggravated murder and a good motive may mitigate murder to manslaughter, but a bad motive should not aggravate manslaughter to simple murder.

With the puzzling exception of Pillsbury's treatment of unintentional homicide in the course of crime, Pillsbury's proposals are unified by an effort to predicate liability on deficient moral reasoning rather than merely awareness of risk. This concern with offenders' reasons for offending grows out of Pillsbury's account of punishment as a symbolic or expressive practice. In the next section, I will explicate and critique Pillsbury's expressive account of punishment. In the final section, I will return to Pillsbury's innovative account of culpability and his puzzling treatment of homicide in the course of crime.

II. AN EXPRESSIVE ACCOUNT OF PUNISHMENT

Until relatively recently, the possible purposes of punishment were thought to be pretty well exhausted by the debate between retributivism and utilitarianism.¹⁹ For much of the twentieth century, retributivism had little credibility as a philosophy of punishment. Then the 1970's witnessed a remarkable revival of retributivism among academic philosophers and legal theorists and a society-wide repudiation of rehabilitation as an aim of punishment. Among the many arguments that retributivists offered for punishing on the basis of desert, was a claim that punishment appropriately expressed blame for wrongdoing and respect for victims.²⁰ In the 1980's, some retributivist philosophers began to have second thoughts about rehabilitation, as they wondered whether the concept of

18. Id. at 123-24.

19. See, e.g., John Rawls, Two Concepts of Rules, 64 *Phil. Rev.* 3, 5 (1955).

20. See Jean Hampton, Punishment as Defeat, in *Forgiveness and Mercy* 124-28, 130 (Jeffrie G. Murphy & Jean Hampton eds., 1988); Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* 98-105 (1970).

punishment bore some relationship to the religious idea of “repentance.” They began to explore a new conception of punishment as an educative process that necessarily entailed efforts to persuade the offender to repent and reform.²¹ What both the expressive model of punishment and the later educative model of punishment shared was a common characterization of punishment as a kind of communicative discourse.

Pillsbury, writing in the wake of these developments, offers a similarly communicative account of punishment, which I would summarize as follows.

1. In our everyday lives we are very concerned about making choices. Hence we value choosing.
2. We judge other people’s choices morally. Hence we believe choices can be evaluated and that people are responsible for their choices.
3. Actions have social meaning. Choices express values.
4. Crimes unjustly interfere with the preferences of others and so express contempt for them, or for the importance of choice.
5. Punishment repudiates the values expressed by the offense and reaffirms the worth of victims and of choice.
6. A purely utilitarian scheme would muddy that message by disjoining punishment from wrongdoing.

21. See, e.g., Herbert Morris, *A Paternalistic Theory of Punishment*, 18 *Amer. Phil. Q.* 263 (1981); R.A. Duff, *Trials and Punishments* 15-21, 246-62 (1986); Jean Hampton, *The Moral Education Theory of Punishment*, 13 *Phil. & Pub. Aff.* 208, 211 (1984).

7. Therefore, for punishment to effectively communicate the value of persons and of choice, it must be exclusively based on desert.

8. Offenders should not be excused based on the social or psychological causes of crime because these do not affect the social meaning of their offenses.

9. Offenders should instead be judged on the basis of their reasons because that is what determines the meaning of their offense.

Pillsbury's account of punishment as the expression of a societal opinion about the worthiness of the offender's reasons for action explains his emphasis on motive and purpose in developing criteria of aggravation, mitigation and liability for unintended harm.

Yet Pillsbury's expressive model of punishment raises a host of difficulties that he does not adequately address. These difficulties are perhaps best illustrated by considering his approach to the question of whether and how much to punish offenses caused by unjust social conditions or prior victimization.

In rejecting the relevance of unjust deprivation and prior abuse to criminal responsibility, Pillsbury sometimes runs together two quite different arguments. One argument is a determinist argument against retributivism. According to this argument, punishment should not be based on desert because no one deserves punishment, since no one is responsible for her choices. Since punishment cannot be based on desert it should instead be based on deterrence, reform and incapacitation, with the aim of determining choices for the better. From this utilitarian position one may proceed to argue that some offenses are not easily deterred because of the effects of social deprivation, or that redressing criminogenic social conditions is a more cost-effective way of reducing these offenses than punishment. But a second argument against

punishing crimes caused by unjust social conditions is neither determinist nor utilitarian. According to this argument punishment should depend on desert and desert depends on responsible voluntary choice. It follows that those who are deprived of the opportunity to make meaningful choices are not responsible for their choices and so do not deserve to be punished for them. Pillsbury rejects the deterministic position as incompatible with symbolic function of the criminal law in expressing the value of choice. But this is of course no answer to the second argument, which proceeds from voluntarist and retributivist premises.

What is Pillsbury's answer to the argument that offenders whose habits and personalities have been shaped by unjust conditions do not *deserve* punishment? Pillsbury in fact concedes that some of these offenders may not be fully blameworthy for their offenses. Yet, he reasons, we should not excuse these offenders from punishment because the causes of wrongdoing do not change its social meaning.

[F]airness and moral standards are opposed; we must choose between them. Any move to improve the fairness of punishment by taking into account social inequities would diminish our valuation of right conduct. Since in fact we cannot measure moral disposition . . . and should care about right and wrong, we choose responsibility over equity.²²

But should we really punish on the basis of the social meaning of offenses, rather than the offender's blameworthiness? After all, there can be a disjunction between the social meaning of an act and the actor's intent in committing it. Criminal law ordinarily conditions liability on culpability and responsibility, even if public perception is that an acquittal endorses the offense. If we should punish offenses caused by unjust social conditions in order to symbolize our disapproval of bad conduct, why not also punish offenses caused by mistake, accident,

22. Pillsbury, *supra* note 13, at 53.

duress and insanity?

Furthermore, given that there are many ways that society can express its value commitments, it is not clear that the goal of expressing those values can, by itself, justify punishment. Granting the desirability of expressing condemnation of the value choices made by offenders, why does this necessitate inflicting suffering? Pillsbury's account of punishment perhaps justifies its denunciatory aspect, but does not thereby automatically justify the afflictive aspect of punishment, the justification of which has been the traditional preoccupation of punishment theorists.

Finally, if punishment is to be justified by—and distributed according to—its symbolic significance, rather than desert, it is important to be honest about that symbolic significance. Punishment, particularly punishment of the victims of past social injustice, expresses many other messages beyond a condemnation of the punished conduct. If a very substantial portion of one demographic group is punished, that may be interpreted as an expression of contempt for or indifference to the welfare of that group. If such a group has been treated unjustly, the disproportionate punishment of members of that group may tend to legitimate that history of injustice. In a society that resolves many policy questions on a utilitarian basis, the decision to punish offenders without regard to the social consequences may imply those offenders—or the groups to which they belong—do not merit consideration in the social welfare calculus. There are also messages implied by high rates of incarceration generally. Different societies rely on incarceration to a greater or lesser extent for social control. High incarceration rates may express a low opinion of the population as a whole or lack of confidence in such alternative mechanisms of social control as education and persuasion. If punishment is to be justified and distributed only on the basis of its symbolic significance, it will be necessary to take all of its meanings into account, not just the palatable ones. Just as the social meaning of offending is not controlled by the intentions of

the offender, neither is the social meaning of punishment controlled by the intentions of lawmakers or legal theorists.

III. CULPABILITY AS COGNITION AND MOTIVATION

As noted above, many of Pillsbury's proposed reforms of the law of homicide condition liability on the actors' reasons, purposes and motives. Pillsbury would aggravate intentional murder to murder in the first degree only on the basis of heinous motives, and mitigate intentional murder to voluntary manslaughter only on the basis of a motive of righteous indignation. He would redefine depraved heart murder and involuntary manslaughter as crimes of culpable indifference to the welfare of others rather than simply awareness of risk. As part of this redefinition, he would condition liability on the moral worth of the reasons or motives for imposing risk rather than just on the degree of risk imposed and the degree of awareness of that risk.

This redefinition of culpability for homicide as a matter of motivation as well as cognition exemplifies a new and important development in criminal law theory. Recently, a number of younger criminal law scholars have mounted a challenge to the Model Penal Code's reduction of culpability to awareness of risk. They have argued that the assessment of culpability necessarily involves a judgment of the quality and character of the actor's practical reason that pays more attention to the values and purposes expressed by action.

In an important article, "Virtue and Inculcation" Kyron Huigens argued:

We blame and punish, ultimately, because each of us reasonably demands that each of the others pursues his chosen ends with a due regard for us—with a certain amount of maturity, disinterestedness, and perspicacity. We blame and punish if we find that quality of judgment lacking. It is not just harm, but the lack of judgment that results in harm that the criminal law condemns [I]n judging a person guilty we reject his chosen ends as

improper.²³

On the basis of these premises, Huigens supported criminal liability for negligent harm, despite the fact that negligent actors have no conscious awareness of a risk of harm. Huigens reasoned that the negligent actor is culpable for being so hasty or absorbed in projects of perhaps dubious worth that she fails to inform herself about their consequences for others. Thus unawareness of risk is culpable when the attitudes and aims that produce such unawareness are unworthy. Huigens therefore disagrees with the Model Penal Code's treatment of negligence as an anomalous or exceptional basis for liability.

Further implications follow from these premises: if what makes inattention to risk culpable is a lack of concern for others and devotion to unworthy aims, these same volitional attitudes should enhance the culpability of actors who are aware of risk. Thus there is a volitional or motivational component to recklessness as well as negligence. In addition, even without awareness of risk, an actor's inattention to the welfare of others may be so great, or may be motivated by such trivial or even reprehensible aims, that she should be regarded as reckless rather than merely negligent. Another way of putting this idea is that we severely punish the conscious imposition of risk not because it is worse than a volitional attitude of indifference to harm, but because it provides a very clear manifestation of such indifference. Such a reinterpretation of recklessness as indifference was developed by Kenneth Simons in his important article, "Rethinking Mental States."²⁴

Simons similarly criticized the Model Penal Code's sharp distinction between conscious risk-taking and unreasonable inattention to risk:

23. Kyron Huigens, *Virtue and Inculcation*, 108 Harv. L. Rev. 1423, 1424 (1995).

24. Kenneth Simons, *Rethinking Mental States*, 72 B.U. L. Rev. 463 (1992).

Many modern legal standards devalue desire states relative to belief or cognitive states. For example, the influential Model Penal Code differentiates criminal recklessness from negligence in only one respect: recklessness requires conscious awareness of a substantial and unjustifiable risk, while negligence requires that the actor should have been aware of such a risk. Yet a traditional and defensible view sees recklessness as culpable *indifference* to risk (emphasis added). The terms “indifference,” “not caring,” and “callousness” all describe a culpable desire state—not a desire to harm, but an insufficiently strong aversion to harm, or a desire or willingness to create a risk of harm. The modern account of recklessness, emphasizing cognitive awareness of a risk, ignores or conceals the moral quality that “culpable indifference” expresses.²⁵

If recklessness, like negligence and purpose, is actually a desiderative state rather than a cognitive state, what about the last remaining culpable mental state defined by the Model Penal Code, “knowledge?” In a recent article Alan Michaels has argued that just as awareness of a risk of harm is morally significant as an index of a desiderative attitude of indifference to harm, knowledge of certain harm is morally significant as an even worse desiderative attitude: “acceptance” of harm.

[W]hat is it that makes the knowing actor morally culpable in the first place? It is not, of course, the knowledge that a particular action will be harmful. There is nothing wrong with the knowledge if the person chooses not to act . . . what makes the knowing actor morally culpable is . . . [t]he fact that . . . knowledge that she would cause harm was not sufficient to stop her from acting This is the core definition of acceptance. Acceptance and knowledge thus represent the same level of culpability.²⁶

It follows from this analysis that knowledge of harm is merely evidence of this culpable attitude of acceptance, and

25. *Id.* at 466.

26. Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. Cal. L. Rev. 953, 967 (1998).

that acceptance of harm could be established in other ways. Acceptance might be established by statements, for example, or by evidence that an offender has willfully avoided knowledge of an inculpatory fact she suspects to be true.

Dan Kahan is another criminal law scholar who has challenged a purely cognitive conception of culpability. In an article co-authored with the philosopher Martha Nussbaum, Kahan argued against what he called a “mechanistic” conception of emotion as a force independent of the actor’s will that interferes with rational choice and so diminishes moral responsibility for action. Instead, Kahan and Nussbaum argued for an “evaluative” conception of emotion as an indispensable part of practical reason that should itself be subject to moral assessment.²⁷ Reasoning from such premises, Kahan and Nussbaum conclude with Pillsbury that the defense of provocation, reducing murder to manslaughter liability, should be conditioned on the moral worthiness of the strong emotions prompting the homicide. They likewise share Pillsbury’s critique of the Model Penal Code’s extreme emotional disturbance defense for allowing any reasonably excusable emotion to mitigate homicide liability.²⁸

For Kahan and Nussbaum, as for Pillsbury, offending is a kind of communicative or meaning-making activity. To assess a provoked killing is to read it as the expression of an offended sense of honor and dignity, and to assess the propriety of that moral emotion. In a second article, Kahan extends his attack on purely cognitive models of culpability to the question of mistake of law. Here he argues that the exculpatory effect of mistakes of law should depend on a moral assessment of the offender’s ends, and a moral assessment of the norms embodied in the law. Thus,

27. See Dan M. Kahan & Martha C. Nussbaum, Two Conceptions of Emotion in Criminal Law, 96 Colum. L. Rev. 269, 278-97 (1996).

28. See *id.* at 305-23. Priority goes to Pillsbury who earlier articulated these ideas in Emotional Justice: Moralizing the Passions of Punishment, 22 Cornell L. Rev. 655 (1989) and Evil and the Law of Murder, 24 U.C. Davis L. Rev. 437 (1990).

nonnegligent ignorance of laws criminalizing mala prohibita should excuse while ignorance of laws criminalizing mala in se offenses should not. Ignorance of the law should excuse only the morally virtuous, Kahan contends.²⁹

Pillsbury's reconstruction of homicide law around motive and indifference rather than awareness of risk should be understood as part of the larger project of reconstructing culpability around desiderative states that has also been pursued by Simons, Huigens, Kahan and Michaels. Yet it is a curiously inconsistent and faint-hearted application of these principles. For Pillsbury draws back in horror from one of the clearest but also most controversial implications of this perspective for the law of homicide: the legitimacy of the felony murder rule. Pillsbury regards this doctrine as an unacceptable allocation of heavy moral responsibility for death on the basis of strict liability. He urges the elimination of first-degree felony murder and he leaves felony murder out of his reconstruction of second-degree murder liability. Furthermore, although giving motive an important place in the analysis of culpability for first degree murder and voluntary manslaughter, he denies its relevance to the analysis of culpability for second degree murder (although he in fact relies on motive analysis even here).

Why would a reconstruction of culpability around the moral assessment of motives and desires support the felony murder rule? In the first place, the felony murder rule is not a strict liability rule, at least not in the form in which it is found in almost every American jurisdiction. As Pillsbury concedes, most American jurisdictions condition felony murder either on a short list of inherently dangerous predicate offenses, or simply on the dangerousness of the underlying felony or the means by which it was perpetrated.³⁰ While he doesn't say so, most of the remaining jurisdictions condition it on some level of

29. See Dan M. Kahan, *Ignorance of Law is an Excuse—But only for the Virtuous*, 96 Mich. L. Rev. 127 (1997)

30. See Pillsbury, *supra* note 13, at 108.

culpability with respect to the risk of death,³¹ or on proximate cause standards that condition liability on the foreseeability of death.³² When felony murder is conditioned on dangerous predicate offenses, it is not a strict liability crime, but a crime of negligence, as Simons explains:

On first impression, any grading differential for which no formal culpability is required seems inconsistent with retributivism. Consider felony-murder as an example. We punish the felony at a certain level. We do not otherwise punish nonculpable homicide. Thus, adding a penalty to the felony because it resulted in death seems no more justifiable than punishing someone for an accidental, non-negligent homicide today simply because he committed a felony last year.

But this analysis is incorrect. Often, culpably doing X, which happens to cause Y, amounts to negligence (or to a higher culpability, such as recklessness) as to Y. Consider a more specific felony murder example. If armed robbery is the predicate felony, then it is not difficult to conclude that an armed robber should foresee, and often does foresee, a significant risk that robbery will result in a death. Thus, the robber is ordinarily negligent and often reckless as to the risk of death.

This analysis suggests that formal strict liability as to death (i.e. the lack of any explicit culpability requirement) can nevertheless be consistent with substantive culpability.³³

So the felony murder rule, as actually applied, imposes liability on the basis of at least negligence with respect to the risk of death. And, as we have seen, a theory of culpability that assesses the role of motive and desire in practical judgment approves of criminal liability for the negligent infliction of harm. Moreover, it does not necessarily distinguish recklessness or even depraved

31. See, e.g., Haw. Rev. Stat. §§ 707-701 (1976) (purpose); Ark. Code Ann., § 41.1502 (Michie 1987) (gross indifference); *Labastida v. State*, 931 P.2d 1334 (Nev. 1996) (gross indifference); *State v. Ortega*, 817 P.2d 1196 (N.M. 1991) (recklessness); Del. Code Ann., tit. 11, §§ 636(a)(2), (6) (1979) (criminal negligence).

32. See, e.g., *People v. Payne*, 194 N.E. 539 (Ill. 1935).

33. Kenneth W. Simons, *When is Strict Liability Just*, 87 *J. Crim. L. & Criminology* 1075, 1121-22 (1997).

indifference from negligence on the basis of actual awareness of risk. Instead, it does so on the basis of the degree of indifference to the welfare of others manifested by the imposition of risk. Indeed, Pillsbury himself is willing to hold drunk drivers liable for manslaughter and even murder when their actions cause death, despite their unawareness of the risk they are imposing while they are driving. He counts the ability to justify these results as evidence of the superiority of the “indifference” conception of recklessness to the “awareness” conception.³⁴ Thus Pillsbury concludes that actual knowledge of risk is irrelevant to the culpable indifference that can give rise to manslaughter or murder liability: “In unintentional homicide, a determination of culpable indifference depends on three factors: (1) *notice* of danger, (2) extent of danger, and (3) the defendant’s reasons for acting in a dangerous fashion.”³⁵

As this passage indicates, Pillsbury also conditions culpable indifference on the actor’s motives. Thus, Pillsbury concludes that a driver speeding to rush a sick child to the hospital is less culpable than a driver speeding to impress his friends. Similarly, a surgeon who, out of greed, provided grossly inadequate supervision and monitoring of anesthesia should be guilty of murder for the resulting deaths even if he was somehow unaware of the risk he was imposing.³⁶ Thus, a trivial or reprehensible motive enhances culpability for the foreseeable imposition of risk because it implies that the offender places very little value on the welfare of others. And there could hardly be a worse motive for foreseeably imposing risk than to further a serious crime. Indeed, this assessment of felonious motive is implicit in Pillsbury’s proposals for aggravating and mitigating intentional homicides. Pillsbury is willing to aggravate liability for killing in furtherance of crime, and to mitigate liability for killing in revenge for crime.

So, on Pillsbury’s premises, the foreseeable imposition

34. See Pillsbury, *supra* note 13, at 176-79.

35. *Id.* at 172 (emphasis added).

36. See *id.* at 171-72.

of risk is culpable and actual knowledge of risk is not necessary for manslaughter or murder liability. Moreover, the degree of culpable indifference depends on the degree of foreseeable risk and the moral worth of the motive for imposing it. Finally, dangerous felonies involve considerable foreseeable risk by definition, and the desire to commit a dangerous felony is a very bad motive, that can aggravate murder liability. From these premises it follows that offenders are very culpable for deaths they cause as a result of acts committed in furtherance of dangerous felonies. They are more culpable than those who foreseeably impose a substantial risk for a trivial or even morally reprehensible motive. Such offenders are, on Pillsbury's premises, extremely indifferent to human life and should be punished as murderers. Whether they are so culpable that they deserve punishment as aggravated murderers is another question. But Pillsbury offers no reason why we should not punish an extreme indifference murder as aggravated murder, if the danger imposed was sufficiently apparent and substantial, and the felonious motive for which it was imposed was sufficiently heinous.

The felony murder rule continues in force in the vast majority of American jurisdictions,³⁷ despite the constant complaints of criminal law scholars that it lacks any plausible basis in principles of desert.³⁸ Because they have eschewed efforts to develop any cogent moral rationale for the felony murder rule, the legal academy has rendered itself irrelevant to its further development and reform. Unfortunately, Pillsbury has perpetuated this strategic misjudgment. Although Pillsbury does not admit it, his premises in fact justify punishing the causation of death in the course of dangerous felonies as murder at least, and possibly aggravated murder in some cases. In failing to

37. See James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape our Criminal Law*, 51 *Wash. & Lee L. Rev.* 1429 (1994).

38. See, e.g., George P. Fletcher, *Reflections on Felony-Murder*, 12 *Sw. U. L. Rev.* 413 (1981); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 *Cornell L. Rev.* 446 (1985).

774 *BUFFALO CRIMINAL LAW REVIEW* [Vol. 3:755

acknowledge this implication, Pillsbury has squandered an opportunity: the chance to offer the first general theory of homicide that plausibly accounts for the felony murder rule. Had he done so, he would have clearly demonstrated the superiority of his desiderative account of culpability over Wechsler's cognitive account as a "rationale" of the American law of homicide.