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A DISTRIBUTIVE THEORY OF CRIMINAL LAW

AYA GRUBER*

ABSTRACT

In criminal law circles, the accepted wisdom is that there are two and only two true justifications of punishment—retributivism and utilitarianism. The multitude of moral claims about punishment may thus be reduced to two propositions: (1) punishment should be imposed because defendants deserve it, and (2) punishment should be imposed because it makes society safer. At the same time, most penal scholars notice the trend in criminal law to de-emphasize intent, centralize harm, and focus on victims, but they largely write off this trend as an irrational return to antiquated notions of vengeance. This Article asserts that there is in fact a distributive logic to the changes in current criminal law. The distributive theory of criminal law holds that an offender ought to be punished, not because he is culpable or because punishment increases net security, but because punishment appropriately distributes pleasure and pain between the offender and victim. Criminal laws are accordingly

* Professor of Law, University of Colorado Law School. I would like to thank Jorge Esquirol, Duncan Kennedy, Randy Benzanson, Arthur Bonfield, Cyra Choudhury, andré cummings, Michelle Falkoff, Herb Hovenkamp, Nick Johnson, Cynthia Lee, Angela Onwuachi-Willig, Todd Pettys, Carolyn Ramsey, Pierre Schlag, Peggie Smith, Sascha Somek, Jerry Wetlaufer, and Ahmed White for their helpful input. This Article benefitted immensely from presentation at the Iowa Legal Studies Workshop and the Colorado Faculty Colloquium.

distributive when they mete out punishment for the purpose of ensuring victim welfare.

This Article demonstrates how distribution both explains the traditionally troubling criminal law doctrines of felony murder and the attempt-crime divide, and makes sense of current victim-centered reforms. Understanding much of modern criminal law as distribution highlights an interesting political contradiction. For the past few decades, one, if not the most, dominant political message has emphasized rigorous individualism and has held that the state is devoid of power to deprive a faultless person of goods (or "rights") in order to ensure the welfare of another. But many who condemn distribution through the civil law or tax system embrace punishment of faultless defendants to distribute satisfaction to crime victims. Exposing criminal law as distributionist undermines these individuals' claimed pre-political commitment against government distribution.

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[A]s a simple matter of distributive justice, a decent and compassionate society should recognize the plight of its victims and design its criminal system to alleviate their pain, not increase it.

Anthony Kennedy[1]

INTRODUCTION

For centuries, penal theorists have debated the ethical origins of criminal liability and punishment. From the collective theorizing of thousands of the brightest minds, tomes of legal literature, and hundreds of years of debate, two predominant justifications of criminal punishment have emerged: retributivism and utilitarianism.[2] Although there are multiple twists on these themes, the basic concept is that criminal liability is justified either because the offender deserves punishment[3] or because punishment makes society safer, whether through deterrence, rehabilitation, or incapacitation.[4] The goal of this Article is to demonstrate that, contrary to most conventional thought, the philosophy underlying many areas of modern American criminal law has less to do with fault or utility than with distribution. Distribution involves fashioning legal rules to achieve a desirable equilibrium between specific individuals or between individuals and society.[5] In private disputes, when two

1. Judge Anthony Kennedy, Address at the Sixth South Pacific Judicial Conference (Mar. 3-5, 1987), *in* George Nicholson, *Victims' Rights, Remedies, and Resources: A Maturing Presence in American Jurisprudence*, 23 PAC. L.J. 815, 828 (1992).

2. *See* Kent Greenawalt, *Punishment*, *in* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282, 1284 (Joshua Dressler ed., 2d ed. 2002) (calling these the "dominant approaches"); PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES & CONTROVERSIES 83 (2005) (stating that utilitarianism and retributivism are the traditional punishment justifications).

3. *See* Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 179 (Ferdinand Schoeman ed., 1988) [hereinafter *Moral Worth*] (commenting that retributivism is a "straightforward theory" that justifies punishment "only because offenders deserve it").

4. *See* Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 857 (2002) [hereinafter *Deterring Retributivism*] (calling rehabilitation, incapacitation, and deterrence the "principal consequentialist theories of punishment").

5. *See* Richard O. Brooks, *"The Refurbishing": Reflections upon Law and Justice Among the Stages of Life*, 54 BUFF. L. REV. 619, 666 (2006) (observing that distributive justice requires "various goods [be] distributed according to some criterion"); *infra* Part IV.

persons' interests conflict over a scarce good, a distributive principle dictates that the resource be allocated in a just way, which may or may not involve rights claims or maximizing utility.[6]

The distributive theory of criminal law holds that an offender ought to be punished, not because he is culpable (as he may not have intended harm) and not because such punishment increases net security in the world (as it empirically may not), but because punishment appropriately distributes pleasure and pain between the offender and victim.[7] In the tort context, scholarly literature and case law engage in compelling analyses of rules that impose liability as a means to secure a fair distribution between parties, particularly of the strict liability doctrine.[8] Analogous to tort's distribution of wealth from defendant to plaintiff, criminal rules often distribute punishment to defendants in order to secure a good such as compensation, satisfaction, or "closure" for victims.[9] Today, the distributive aspects of criminal law are quite visible, as discourse regarding closure and "making victims whole" normatively endorses that criminal law should ensure a fair outcome by distributing pain to offenders and thereby satisfaction to victims.[10]

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6. *See* John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 RUTGERS L. REV. 1027, 1064 (2003) (noting that "distributions involve proportion; more to some means less to others"); Samuel Scheffler, *Justice and Desert in Liberal Theory*, 88 CAL. L. REV. 965, 986 (2000) (observing that distributive justice involves "how to allocate scarce goods among moral equals"); *infra* notes 40-42 and accompanying text.

7. *See* Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523, 1558-59 (2007) [hereinafter *Four Reflections*] (asserting that in distributive theories it matters not how but only that a person was hurt).

8. *See* David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210, 228 n.43 (1996) (describing modern tort law as a "'struggle' between the relatively limited liability of negligence and the redistributive power of strict liability" (quoting Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 467 (1992))); Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 727-28 (2008) (describing distributive justice as a predominant justification of tort law).

9. Distribution does not have to involve wealth. *See* Julian Larmont & Christi Favor, *Distributive Justice*, *in* STANFORD ENCYCLOPEDIA OF JUSTICE (Edward N. Zalta ed., 2008), http://plato.stanford.edu/entries/justice-distributive (noting that distributive principles "can vary in what is subject to distribution").

10. *See* Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance, and the Role of Government*, 27 FORDHAM URB. L.J. 1599, 1605 (2000) (noting the argument that failure to impose death is an "infliction of pain upon the victim's family"); Guyora Binder, *Victims and the Significance of Causing Harm*, 28 PACE L. REV. 713, 735-36 (2008) [hereinafter *Significance of Causing Harm*] (reciting the argument that "humiliation of the offender" vindicates victims); *infra* notes 262-64, 267 and accompanying text. Because pain and

Despite the fact that certain criminal policies have long reflected distributive values,[11] and distributive sentiments are apparent in the ideology and policies of the victims' rights movement,[12] penal theorists and criminal law scholars virtually ignore the possibility of a distributive theory of punishment. Consider Sanford Kadish's argument:

> It is hard to see ... how inflicting pain on the criminal restores anything—certainly it doesn't restore the victim to his property or compensate him for his economic loss or for his medical expenses and pain and suffering. And even if it somehow did, in the unpalatable sense that the victim received a restorative amount of pleasure from the offender's suffering, it is not the morality of retributive punishment that would have been demonstrated, but the desirability of satisfying the vengeful feelings of the victim, which is not the same thing.[13]

Theorists also assert that criminal law's exclusive blaming function makes the question of distribution misplaced.[14] However, in recent times, scholars have noted the many ways in which tort theory and criminal law theory overlap.[15] Moreover, financial restoration through tort suits is not the principal distributive intervention

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pleasure do not appear scarce, the distributive function of punishment is not obvious. *See* Scheffler, *supra* note 6, at 986 (asserting that punishment is unrelated to "conditions of scarcity"); Christopher D. Stone, Comment, *Sentencing the Corporation*, 71 B.U. L. REV. 383, 392 (1991) (calling crime victims' losses "undistributable").

11. *See* John L. Diamond, *The Myth of Morality and Fault in Criminal Law Doctrine*, 34 AM. CRIM. L. REV. 111, 129 (1996) (observing expansion of "nonfault criminal liability").

12. *See infra* Part III.

13. Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 692-93 (1994) (footnote omitted); *see also* Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 426 (2004) (stating that punishment "does not make the victim or society whole"); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1499 (1974) (describing emphasis on harm as a "vestige" of early emphasis on vengeance).

14. *See, e.g.*, Mark Perlman, *Punishing Acts and Counting Consequences*, 37 ARIZ. L. REV. 227, 229 (1995) (noting the view that responsibility for compensating for outcomes is appropriate only in tort law).

15. *See, e.g.*, John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193 (1991) (observing "the disappearance of any clearly definable line between civil and criminal law").

sought by victims' rights advocates, and lawmakers are responsive to the restoration-through-punishment argument.[16]

Understanding the distributive basis of criminal law and its current popularity reveals an interesting political contradiction. Redistributive programs have historically been products of left-progressive politics, engendering counterattacks from the right.[17] In the late nineteenth and early twentieth centuries, concern over legislatures' distributionist use of police power[18] prompted a legal response that emphasized property rights and freedom of contract.[19] Despite the decline of Lochnerism, over time, liberalism (meaning rights-regarding not left-leaning) became the dominant mode of legal reasoning for both conservatives and progressives.[20] Today, redistribution is a principal normative evil to conservatives,[21] marginally useful to mainstream Liberals,[22] and appealing only to leftists.

Many consider state regulation of one individual to establish some level of welfare for another fundamentally unjust.[23] The

16. *See infra* notes 267, 336-37 and accompanying text.

17. Although all legal rules affect distribution, many are not made in the name of distribution. *See infra* notes 46-48 and accompanying text.

18. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 27-31 (1992).

19. *E.g.*, Lochner v. New York, 198 U.S. 45, 57, 64 (1905) (holding that work hour restrictions violate constitutional "freedom of contract"); *see* HORWITZ, *supra* note 18, at 29-30 (observing *Lochner*'s distinction between police power "in fact" and "redistribution 'under pretence of regulation'" (quoting T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Boston, Little, Brown 1868))); Shubha Ghosh, *Decoding and Recoding Natural Monopoly, Deregulation, and Intellectual Property*, 2008 U. ILL. L. REV. 1125, 1180 (noting *Lochner*'s claim "that redistribution of resources is not within [state] police power").

20. *See* Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* LEFT LEGALISM/LEFT CRITIQUE 178, 189 (Wendy Brown & Janet Halley eds., 2002) [hereinafter *Critique of Rights*] (asserting that "rights now bear the main burden of universalization for both" Liberals and conservatives).

21. *See* Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 651-52 (1990) (remarking that conservatism is "united by an aversion to the redistributive normative authority of the political state").

22. *See Critique of Rights*, *supra* note 20, at 217 (observing that Liberals feel a "sense of danger" in abandoning rights claims); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 474 (1980) (noting that Liberals support baseline redistribution but generally reject private law distribution). In this Article, "Liberals" refers to persons associated with the modern-day Democratic Party, while "liberals" refers to persons following classical liberal philosophy.

23. *See* Kronman, *supra* note 22, at 473 (remarking that libertarians "deny that the state

standard libertarian view endorses as its utopian vision a society in which atomistic individuals pursue any private end, and the government plays the minimal role of protecting a bare-bones set of rights.[24] This antidistribution narrative has been popular since the 1970s,[25] when politicians capitalized on public dissatisfaction with Great Society policies and government spending to popularize the hyper-individualism ethic.[26] At the same time, a parallel justification for limiting distribution arose in the form of economic arguments about efficiency.[27] Today, efficiency concerns and liberalism meld to form a neoliberal paradigm that conceives of the pursuit of capital as one, if not the most, fundamental right.[28] The criminal system, however, appears insulated from these principles.[29]

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is ever justified in forcibly redistributing wealth"); Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 FORDHAM L. REV. 1811, 1814 (2004) (noting the view that "any redistribution [is] necessarily unjust").

24. *See* Kenneth W. Starr, *From* Fraser *to* Frederick: Bong Hits *and the Decline of Civic Culture*, 42 U.C. DAVIS L. REV. 661, 662 n.4 (2009) (stating that libertarians define humans in "individualistic, atomistic terms" and support "'freedom from all forms of social and legal constraint'" (quoting AMITAI ETZIONI, THE NEW GOLDEN RULE 34 (1996))). *See generally* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA ix *passim* (1974) (advocating a "minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on").

25. *See* Martha T. McCluskey, *Thinking with Wolves: Left Legal Theory After the Right's Rise*, 54 BUFF. L. REV. 1191, 1194 (2007) (book review) [hereinafter *Thinking with Wolves*] (observing that the Right has successfully undermined ideas grounding the twentieth-century welfare state).

26. *See* ROBIN L. WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW 92 (2003) (noting the dominant American belief in minimal government); Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 803 (2003) [hereinafter *Social Citizenship*] (observing that this shift occurred amidst "global economic changes" and "white backlash" to government-supported racial equality).

27. *See infra* notes 68-71 and accompanying text (discussing law and economics).

28. In this view, the state must promote the "will of the economic actor." West, *supra* note 21, at 657-58; *see also* Wendy Brown, *Neo-liberalism and the End of Liberal Democracy*, 7 THEORY & EVENT 1, 6 (2003), *available at* http://muse.jhu.edu/journals/theory_and_event/v007/7.1brown.html (noting the current configuration of morality as "rational deliberation about costs").

29. Some scholars observe the interconnectedness of the criminal system's growth and welfare's decline. *See, e.g.*, Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 618-23 (2009) [hereinafter *Rape and Feminism*] (asserting that the war on crime supported antiwelfare ideology); Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759, 819 (2005) (asserting that neoliberalism motivated a "shift in the social control of the lower classes" from welfare to criminal law).

Critics thus note with irony that the criminal regulatory system has grown to embody a massive and inefficient taxing-and-spending program that distributes funds to carceral programs nearly exclusively for the poor.[30] The substance of criminal law also became more distributionist as considerations of culpability and deterrence gave way to concerns over victims' interests.[31]

This Article offers an analytically descriptive account of facets of criminal law as distributive phenomena. Criminal laws are distributive when they mete out punishment for the primary purpose of ensuring victim welfare. A question might arise whether it is desirable or morally appropriate for the government to use criminal law to distribute pleasure to victims. Whether and to what extent criminal law should incorporate victim welfare as a consideration cannot be answered in the abstract any more than the question of what should be taxed and how much. Nevertheless, a cogent argument may be made that ensuring victim welfare through punishment is bad policy because victims actually heal through forgiveness,[32] or because in certain circumstances jailing offenders makes victims worse off.[33] One could also critique incorporating victims' interests into criminal policy on the ground that it inevitably strengthens the current oppressive carceral state.[34] These arguments do not establish that distributing through criminal law is inherently bad, just that it appears unjustified in its current form and context.

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30. *See, e.g.*, William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2004 (2008) (observing that conservatives support "redistributive" criminal justice spending); White, *supra* note 29, at 820 (arguing that the current neoliberal regime is "a contradictory blend" supporting capitalism and "illiberal" social norms).

31. *See infra* Part III.

32. *See* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 998 (1985) (asserting that victims heal through "[f]orgiveness, rather than vengeance"); *infra* notes 265-66 and accompanying text (discussing restorative justice).

33. *See* Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 803-09 (2007) [hereinafter *Feminist War*] (describing how arresting and jailing batterers may make battered women worse off).

34. *See* MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME 26 (2002) [hereinafter VICTIMS' IN THE WAR ON CRIME] (opining that during the war on crime, victims were rhetorical tools to enhance state authority); *Feminist War*, *supra* note 33, at 772 (stating that "[a]s a tool of tough-on-crime penological goals, the victim must occupy a specific, predefined legal space" that supports punitive policies).

Proving that the criminal law should never engage in distribution, however, is not the goal of this Article. Rather, the Article seeks to demonstrate two things. First, it will show that much of criminal law is actually distributive, rather than retributive or utilitarian, a possibility ignored thus far in the penal literature.[35] Second, it will undermine the claims of those who reject progressive laws and policies on the principled ground that the government should never engage in distribution. A popular view is that the state is devoid of power to deprive a person of his legitimate goods or "rights" in order to ensure the welfare of another, however welfare is measured.[36] But many of the same voices that condemn distribution through the civil law or tax system embrace criminal punishment to ensure victim satisfaction.[37] Thus, the distributive theory of criminal law exposes that society's distributionist sentiments have not evaporated in the face of seemingly neutral arguments regarding rights, economics, and limited government. Rather, society retains alternating instincts about individual rights, efficiency, and distributive fairness.[38] Lawmakers appeal to and marshal these instincts to serve distinct political interests and constituencies. Today, society's instincts have been marshaled to favor tort fault rules that benefit powerful corporate defendants but to reject the requirement of criminal fault for the benefit of politically salient crime victims.[39]

Part I of this Article defines distribution and discusses it in the context of tort and penal theory. Part II demonstrates that distributionist sentiments have long existed in American criminal law by analyzing the classically controversial doctrines of felony murder and the attempt-crime divide. Part III turns to modern criminal law and describes how concerns over distributive fairness to victims are increasingly replacing retribution and deterrence principles. Finally, Part IV maintains that power, race, and politics lie at the heart of why many reject government distribution as a matter of

35. *See, e.g.*, Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 18 (2005) (asserting that punishment is "not primarily redistributive").

36. *See* Kronman, *supra* note 22, at 498 (remarking that libertarianism "regards compulsory transfers aimed at achieving distributive fairness as a kind of theft"); *supra* notes 23-24.

37. *See infra* note 355 and accompanying text.

38. *See infra* Part IV.

39. *See infra* Part IV.

principle when it involves ensuring the welfare of the poor but heartily embrace distribution when crime victims' interests are at stake.

I. DISTRIBUTION IN TORT AND CRIMINAL LAW

Distributive justice, in its broad sense, means the fair apportionment of benefits and burdens in society.[40] In its narrow sense, distribution pertains to the fair allocation of goods between private individuals who dispute over scarce resources.[41] Here, the relevant egalitarian measure is "localized" between parties to the dispute, rather than between individuals and society.[42] The distributive theory of criminal law in this Article is about local distribution between criminal defendants and victims, and it regards solely those criminal laws whose principal justification appears to be satisfying victims' interests, as society constructs them, by imposing punishment on offenders.[43] Thus, this Article is not about how to distribute punishment throughout society (that is, what ought to be a crime).[44] Nor is it about constructing criminal law to respond to social inequality.[45] Rather, this Article's theory of criminal distribution simply means depriving an offender of liberty in order to increase the well-being of the victim, much like taxation deprives an individual of money in order to ensure the welfare of others.

In addition, the ideas in this Article should be kept distinct from the critique that all legal rules are distributive in nature, regardless of purported alternative justifications. Critical legal scholars have

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40. *See* V ARISTOTLE, NICOMACHEAN ETHICS, 1130b-1131a (Terence Irwin trans., 1985) (asserting that distributive justice involves providing a fair share of "honours or wealth or anything else that can be divided"); JOHN RAWLS, A THEORY OF JUSTICE 274-84 (1971) (setting forth background institutions that ensure "justice as fairness" but not endorsing socialism over capitalism).

41. *See* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 37-38 (2002) (noting that "'distributive' refers to the allocation of a particular loss between the disputing parties").

42. *See* Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 461 (1992) (observing that distribution may be "localized" where the relevant "group is limited to the victim and her injurer") (emphasis omitted).

43. *See supra* notes 7-10 and accompanying text.

44. *See generally* PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW (2008).

45. Rehabilitation is distributionist in this sense. *See Four Reflections*, *supra* note 7, at 1554.

long censured proponents of rights, fault, and other seemingly neutral rules for using arbitrary deontic principles to obscure the maldistributive and inegalitarian effects of certain legal arrangements.[46] For example, critics have asserted that the claim "the guilty should be punished" uses the purportedly objective philosophical concept of desert to obscure a legal regime that at best produces inequality and at worst deliberately preserves hierarchy.[47] This Article, however, does not presume that retributivism and utilitarianism are merely political mechanisms to camouflage unfair distribution.[48] Rather, it assumes that retributivism and utilitarianism are coherent philosophical constructs that satisfactorily explain many areas of criminal law, but it exposes distinctly distributionist criminal rules by analyzing certain doctrines that cannot be rationalized by retributivism or utilitarianism.

A. Fault, Utility, and Distribution in Tort Law

Distributive theorizing has long been a staple of tort law analysis.[49] Courts and scholars describe strict liability rules as a matter of distributive justice when they seek to fairly distribute the cost of accidents between injurers and injureds.[50] To the question, "Who should be liable for purely accidental injury?" the distributive

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46. *See generally* Peter Cane, *The Anatomy of Private Law Theory: A 25th Anniversary Essay*, 25 OXFORD J. LEGAL STUD. 203, 205 (2005) (observing that critical theorists "uncover the multifarious ways in which legal doctrine and institutions constitute, perpetuate and reflect social disadvantage"); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981) (demonstrating how interpretive constructs create substantive criminal rules that preserve social hierarchy).

47. *See* Kelman, *supra* note 46, at 646-47 (focusing on arbitrary temporal lines accepted by retributivism that exclude considerations of defendant background); Alice Ristroph, *How (Not) To Think Like a Punisher*, 61 FLA. L. REV. 727, 747 (2009) (demonstrating that "desert-thinking" may "provide[] a safe harbor for racial disparity").

48. Mark Kelman argues that retributivism serves "ideological needs": "if one reacts with enough horror and shock at the idea of punishing those one defines as faultless without paying much attention to how faultlessness is defined—perhaps one can ... simply rule out the determinist claim that 'crime is unavoidable.'" Kelman, *supra* note 46, at 611.

49. *See supra* note 8 and accompanying text.

50. *See* Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 406 (1959) (asserting that loss distribution "may be based on the [financial] capacity of the class of persons such as defendant in comparison with the class of persons such as plaintiff"); *see, e.g.*, Brooks v. Beech Aircraft Corp., 902 P.2d 54, 58 (N.M. 1995) (quoting Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 549 (N.J. 1982)) (calling strict liability fair because it places the cost of industry "upon those who profit" instead of "'the innocent victim'").

answer is whomever placing liability upon will secure a fair equilibrium.[51] For example, Judge Traynor famously opined in *Escola v. Coca Cola Bottling Co. of Fresno* that "[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public."[52] Thus, distributive justice demands that the "the burdens and benefits of risky activities [be] fairly apportioned."[53]

Opposition to tort law distribution manifests through arguments about fault and utility. Turning to fault arguments first, early twentieth-century theorists countered the principle that tort law should be about balancing costs by characterizing tort liability as a form of punishment only appropriate for those at fault.[54] Antidistributionist courts and scholars reframed the question of who should bear the burden of accidents as who deserves to pay.[55] However, emphasizing fault would be ineffective at completely stamping out distribution without a narrow concept of causation.[56] If many parties could be termed at fault, plaintiffs could proceed against only wealthy defendants.[57] Fault and causation rules thus work together to narrow the class of defendants who deserve liability.[58] These distribution-thwarting rules appeal to those with

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51. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965) (noting the strict liability argument "that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them").

52. 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).

53. Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 200 (2000).

54. *See* Paul J. Zwier, *"Cause in Fact" in Tort Law—A Philosophical and Historical Examination*, 31 DEPAUL L. REV. 769, 799, 802 (1982) (characterizing early twentieth-century tort law as a contest between realists who emphasized social need and natural law theorists who emphasized fault).

55. *See* Martin A. Kotler, *Utility, Autonomy, and Motive: A Descriptive Model of the Development of Tort Doctrine*, 58 U. CIN. L. REV. 1231, 1232 (1990) (describing tort law "as an attempt to punish conduct which violates certain core values").

56. *See* Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 475 n.130 (1990) (stating that libertarians embrace cause as "an objective phenomenon" that cannot be "manipulated" for distributionist purposes).

57. *See* HORWITZ, *supra* note 18, at 52.

58. *See* Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91, 95 (1995) (describing redistribution as "morally impermissible" because individuals must "shoulder the costs of misfortunes they did not cause").

libertarian sentiments,[59] those favoring industrial growth,[60] and those who believe judges are incompetent to engage in efficient or fair wealth distribution.[61] In addition, through analogizing tort damages to punishment, negligence proponents can maintain that holding an innocent tortfeasor liable is morally unjust.[62] This enables them to assert that the move from strict liability to negligence was not just a product of early twentieth-century courts' desires to subsidize industry, but the arrival of courts at the philosophically enlightened legal rule.[63]

In the latter twentieth century, a distinct attack on private law distribution emerged in the form of law and economics, which explains and justifies tort law with reference to efficiency.[64] The idea is that tort liability rules should and often do encourage would-be injurers and injureds to act in maximally efficient manners.[65] Critical legal scholar Duncan Kennedy describes law and economics

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59. *Id.*

60. *See* HORWITZ, *supra* note 18, at 124 (characterizing negligence as "the doctrine of an emerging entrepreneurial class" that argued against liability for injurious but "socially desirable activity").

61. *See, e.g.*, Rosenberg, *supra* note 8, at 229 (doubting whether courts possess expertise and authority to distribute); *cf.* Kronman, *supra* note 22, at 501 (observing that the judicial competence argument does not prove "distributional effects should also be ignored in the initial design of a system").

62. *See* HORWITZ, *supra* note 18, at 124 (commenting that courts viewed strict liability as "an amoral doctrine" because it imposed liability without blameworthiness); Robert J. Rhee, *Tort Arbitrage*, 60 FLA. L. REV. 125, 181 (2008) (noting that negligence is often equated with blameworthiness).

63. *See, e.g.*, James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908) (describing the move to negligence as an "ethical standard of reasonable conduct ... replac[ing] the unmoral standard of acting at one's peril"); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1733-34 (1981) (asserting that rejection of strict liability reflected the popular academic view of strict liability as "unmoral").

64. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 66-97 (1972); *see also* Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 604 (1989) (calling law and economics "a 'new' methodology and jurisprudential theory" from the 1970s); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1803 (1997) [hereinafter *Mixed Theories*] (tracing the "explosion" of law and economics scholarship to early works of Calabresi and Posner).

65. *See* Robert A. Schapiro, *Monophonic Preemption*, 102 NW. U. L. REV. 811, 820 (2008) (observing that law and economics views tort law as a means to the "optimal level of accident avoidance"). The dominant school of law and economics, the Chicago School, endorses a normative view of efficiency, although not all schools do. *Compare* Minda, *supra* note 64, at 609, *with* Lewis A. Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV. 349, 353-56 (1984) (stating that law and economics theories may be descriptive or predictive).

as a response in part to "the gigantic liberal law reform project ... carried out in the courts after World War I."[66] To conservatives who decry the undemocratic and inefficient nature of redistributing in private cases, the law and economics approach, which heralds efficiency as a determinate method of adjudicating private disputes, leaving larger distributive questions to be addressed by the democratic legislature, has natural appeal.[67] Thus, since the 1980s, a main scholarly project has been to encourage purging distributionist considerations from individual cases and claim that such concerns should be addressed, if at all, through large-scale programmatic policies.[68] There is, however, some potential conceptual overlap of utilitarian and distributive accounts of tort law:[69] efficiency may dictate distributively satisfying rules;[70] legal decisions made in the name of distributive fairness could end up being "efficient"; and some might support redistribution because an economically secure populace is utile.[71] Nonetheless, despite some conceptual spillage, fault supporters, utilitarians, and distributionists have staked out relatively distinct philosophical grounds for tort law.[72]

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66. *See* Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465, 468 (Peter Newman ed., 1998) [hereinafter *Law and Economics*] (observing that conservatives needed "a new method that would produce results more in tune with their views of economic rationality").

67. *See id.* (noting the conservative view that judicial progressivism is antidemocratic and counterproductive). Duncan Kennedy critiques progressive efficiency theory on the grounds that the cost internalization argument assumes a preexisting liberal regime, and that hypothesizing about perfect bargaining over joint costs produces indeterminate results. Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 395-98 (1981).

68. *See, e.g.*, Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994); *see also* Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HASTINGS L.J. 105, 143 (2008) (characterizing as "common wisdom" the rejection of "ad hoc" distribution in individual cases).

69. *See* JAMES GRIFFIN, WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE 168-69 (1986) (observing that "maximizing [interests] *is* a distributive principle"). However, utilitarians might not "address the problem of distribution as such." Jeremy Waldron, *Locating Distribution*, 32 J. LEGAL STUD. 277, 289 (2003).

70. *See, e.g.*, RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 97 (1995) (advocating strict liability on efficiency grounds); Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 1-6 (1980).

71. *See* HORWITZ, *supra* note 18, at 112 (noting the possibility that one could, "in the name of utility," seek to "redistribute wealth").

72. *See* KAPLOW & SHAVELL, *supra* note 41, at 29 n.26 (2002) (noting the "common belief"

B. Retribution, Utility, and Distribution in Criminal Law

The fault and efficiency foundations of tort law find symmetry with similar penal theories that base criminal liability on culpability or the production of utility through crime reduction.[73] Fault-based or retributivist accounts of criminal liability are often traced to Immanuel Kant's "categorical imperative," which defines ethical behavior as choices that are moral *a priori* (not subject to experiential reasoning) and universalizable.[74] The nutshell way of describing retributivism is that offenders "should be punished only because and to the extent that they deserve it," regardless of any benefit to society.[75] Retributivism demands that the defendant's culpability alone determine punishment, and hence it is called an "agent-relative" doctrine.[76] Thus, "retribution" as it is used in this Article should be distinguished from more colloquial characteriza-

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that distribution is "unimportant" in law and economics); *Law and Economics*, *supra* note 66, at 468 (remarking that law and economics "made a sharp distinction between efficiency oriented and distributively oriented decision-making").

73. *See Mixed Theories*, *supra* note 64, at 1811 (describing retribution and utility in criminal law as similar to correction and efficiency in tort law).

74. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 89 (H.J. Paton trans., Harper Torchbooks 1964) (1785) [hereinafter METAPHYSIC OF MORALS] ("Act as if the maxim of your action were to become through your will a universal law."); *see also* IMMANUEL KANT, THE PHILOSOPHY OF LAW 198 (W. Hastie trans., T. & T. Clark 1887) (1796) (stating that "Juridical Punishment" must be imposed "only because the individual on whom it is inflicted *has committed a Crime*"). The categorical imperative is "connected (entirely *a priori*) with the concept of the will," METAPHYSIC OF MORALS, *supra* at 74, and thus originates from "the *a priori* conditions of human cognition," Aya Gruber, *Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense*, 52 BUFF. L. REV. 433, 451 n.61 (2004) [hereinafter *Righting Wrongs*].

75. Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1835-36 (1999) [hereinafter *Atonement*]; *see also Moral Worth*, *supra* note 3, at 179. There is a critique of retributivism as "circular or empty." *See Deterring Retributivism*, *supra* note 4, at 861 (citing critics). In response, some espouse a mixed theory whereby utilitarian considerations dictate what should be a crime and retributivism limits punishment. *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 1-12 (1968); NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 179-209 (1982).

76. *See Righting Wrongs*, *supra* note 74, at 445.

tions of the principle as revenge.[77] A harmed victim might "seek retribution" whether or not the defendant is culpable.[78]

Although retributivists nearly universally define culpability with reference to mens rea,[79] they vastly differ on the kinds of mental states sufficient for liability. Retributivists generally believe that acting with more intention, for example purposefully, is more culpable than acting with less intention, for example negligently.[80] However, some theorists entertain the possibility that being unable to recognize certain risks is sufficiently morally blameworthy to merit retributive condemnation.[81] Of course, there are numerous retributivist objections to premising criminal liability on negligence, and many reject that negligence establishes culpability.[82] Nonetheless, for the purposes of this Article, arguments that equate negligence with fault fall under the retributive taxonomy.[83]

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77. *See, e.g.*, United States v. Frank, 864 F.2d 992, 1009-10 (3d Cir. 1988) (asserting that retribution focuses on victims' interests); *cf.* Adil Ahmad Haque, *Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law*, 9 BUFF. CRIM. L. REV. 273, 283 (2005).

78. *See* Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 75 (1990) (calling this "'harm-based' retributivism," which many theorists reject).

79. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 248 (2d ed. 1986) (noting that mens rea ensures the punished are "morally blameworthy"); Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943, 956 (2000) (calling mens rea "essentially retributivist").

80. *See, e.g.*, Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719, 766 (2007) (observing that retributivism differentiates between negligent and intentional acts); Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 90 n.430 (2003) (correlating blame with levels of intent).

81. *See, e.g.*, JEAN HAMPTON, THE INTRINSIC WORTH OF PERSONS 105 (Daniel Farnham ed., 2007) (claiming that failure to recognize risks reflects an actor's choice not to develop adequate moral faculties); Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. CONTEMP. LEGAL ISSUES 365, 397 (1994) (finding punishment for "culpable indifference" retributively appropriate). *But see* Michael D. Bayles, *Character, Purpose, and Criminal Responsibility*, *in* 1 LAW AND PHILOSOPHY 5, 11 (1982) ("Failure to conform to a standard of care on one occasion does not indicate an attitude of indifference to standards of care.").

82. *See, e.g.*, Stephen P. Garvey, *Self-Defense and the Mistaken Racist*, 11 NEW CRIM. L. REV. 119, 135-36 n.45 (2008) ("[N]egligence is (most often) an illegitimate basis upon which to premise retributive punishment."); Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 270 (1996) (concluding that "negligence cannot be construed as deontologically wrongful"); *cf.* MODEL PENAL CODE § 2.02(3) (1985) (prescribing recklessness as the minimum level of intent).

83. *See* John C. Jeffries & Paul B. Stephan III, *Defenses, Presumptions, and Burden of*

Retributive concepts may also underlie other required elements of crimes, for example, the requirement of actus reus.[84]

Utilitarian penal discourse premises punishment on the production of a beneficial state of affairs, namely security against crime,[85] and generally focuses on three main theories: deterrence, incapacitation, and rehabilitation.[86] Utilitarianism is considered at odds with retributivism because it sacrifices the *a priori* principle of desert to *a posteriori* considerations of utility.[87] Rehabilitation, which purports to produce utility by reforming criminals, is currently unpopular,[88] having been rejected as welfarist[89] and insufficiently retributive because it confers "benefits" on criminals.[90] Thus, for several decades, deterrence has been the most visible utilitarian justification, with incapacitation recently coming into vogue.[91]

Proof in the Criminal Law, 88 YALE L.J. 1325, 1372 (1979) (observing that most scholars find negligence "a minimally sufficient basis of guilt").

84. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 54 (1881) (calling it unjust to punish one who did not act). *But see* Theodore Y. Blumoff, *A Jurisprudence for Punishing Attempts Asymmetrically*, 6 BUFF. CRIM. L. REV. 951, 983 n.98 (2003) (noting that retribution's concern with intent "rais[es] the question, why wait for an act?").

85. *See* Mirko Bagaric & Kumar Amarasekara, *The Errors of Retributivism*, 24 MELB. U. L. REV. 124, 131 (2000) (observing that utilitarianism authorizes punishment only "if some good can flow from it").

86. *See* Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1079 (1964); *supra* note 4 and accompanying text.

87. *See, e.g.*, Bagaric & Amarasekara, *supra* note 85, at 133 (observing the persuasiveness of this objection to utilitarianism); John Bronsteen, *Retribution's Role*, 84 IND. L.J. 1129, 1137 (2009) (noting the criticism that utilitarians support "punishment of the innocent when that would increase overall utility").

88. Richard Lowell Nygaard, *Crime, Pain, and Punishment: A Skeptic's View*, 102 DICK. L. REV. 355, 362 (1998) ("Today, rehabilitation is dead."); *Righting Wrongs*, *supra* note 74, at 459 (noting that today, discussion of rehabilitation is "largely academic").

89. *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 75 (2001) (attributing rehabilitation's retrenchment in part to "a dominant political block that defined itself in opposition to old style 'welfarism'"); Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 329 (2004) (commenting that the purpose of punishment has changed from rehabilitation "to a mixture of deterrence, incapacitation, and retribution").

90. *See* Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 MINN. L. REV. 1447, 1505 (2003) (noting the argument that treatment is "soft on crime").

91. *See* Markus Dirk Dubber, *Rediscovering Hegel's Theory of Crime and Punishment*, 92 MICH. L. REV. 1577, 1620 (1994) [hereinafter *Rediscovering Hegel's Theory*] (calling incapacitation "the dominant goal of punishment"); Michael Tonry, *Learning from the Limitations of Deterrence Research*, 37 CRIME & JUST. 279, 285 (2008) (observing the popularity of the deterrence justification for "tough-on-crime" initiatives during the 1990s);

Today, it is common to encounter arguments characterizing certain criminals as undeterrable and calling for permanent incapacitation.[92]

Critics advance many arguments against penal utilitarianism, for example, that deterrence theory makes false assumptions about the actual psychology of potential offenders.[93] Despite a plethora of critiques, utilitarianism thrives.[94] Its adherents, like retributivists, use utilitarianism to explain existing criminal law elements. They describe the mens rea requirement as recognizing that unintentional harmers are not dangerous and cannot be deterred from doing that which they never intended.[95] Actus reus reflects the view that it is inefficient to sanction individuals who have chosen not to harm.[96]

Distribution in the criminal context has not been theorized as it has in the tort context. Nevertheless, it appears evident that retribution and utility bear the same hostile relationship to criminal distribution as fault and efficiency bear to tort distribution. Penal distribution dictates that the criminal receive the amount of punishment that restores the victim to an appropriate state.[97] To

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infra note 239 and accompanying text.

92. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 358 (1997) (approving indefinite civil commitment of "those who suffer from a volitional impairment rendering them dangerous beyond their control"); 142 CONG. REC. 10,312 (1996) (statement of Rep. Schumer) (advocating incapacitation to counter predators' "restless and unrelenting prowl for children").

93. *See* JAMES GILLIGAN, VIOLENCE 94-96 (1996) (critiquing deterrence as "based on complete and utter ignorance of what violent people are actually like"); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 459-65 (1997) (advancing these criticisms).

94. *See* Steven K. Erickson, *Mind Over Morality*, 54 BUFF. L. REV. 1555, 1570 (2007) (reviewing CHARLES PATRICK EWING & JOSEPH T. MCCANN, MINDS ON TRIAL (2006)) (positing that deterrence criticisms "never gain much popular traction" because the public supports the criminal system); *Righting Wrongs*, *supra* note 74, at 458 (noting that utilitarian punishment justifications "resonate the most strongly").

95. *See* JEREMY BENTHAM, THE THEORY OF LEGISLATION 322 (C.K. Ogden ed., Richard Hildreth trans., Kegan Paul, Trench, Trubner & Co. 1931) (1882) ("Punishments are inefficacious when directed against individuals who could not know the law, who have acted without intention."); Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1248-49 (1985) (contending that harm tends to be greater when there is intent).

96. *See* Edward J. Imwinkelried, *Using a Contextual Construction To Resolve the Dispute over the Meaning of the Term "Plan" in Federal Rule of Evidence 404(b)*, 43 U. KAN. L. REV. 1005, 1026 (1995) (stating "only voluntary acts are deterrable").

97. *See supra* note 7 and accompanying text.

put it in tort-like terms, when a defendant is not punished, the victim must "bear the entire burden" of the crime, whereas imposing punishment relieves the victim from shouldering the entire suffering burden.[98] The punishment dictated by the victim's need for closure may be less or more than what constitutes appropriate deterrence or desert.

Recently, a somewhat related school of retributivism, which holds that the culpable "deserve" to compensate victims, has emerged.[99] The concept that law serves a compensatory function has been a staple of tort theorizing for generations.[100] Tort scholars describe this apparently deontological basis for tort law in terms of the moral priority of a wrongdoer "fixing" his wrongs.[101] Analyzing the corrective basis of tort liability has been done with great care elsewhere,[102] but I will make some brief remarks here. Corrective justice occupies a philosophical middle ground between retributivism and distributionism because it requires fault as the trigger for liability and distribution as its corollary. Although the ability of an injurer to compensate does not create liability, an injurer who is at fault and thus liable must compensate.[103] Some describe correction

98. *See supra* note 53 and accompanying text.

99. *See, e.g.*, George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 52-55, 58-59 (1999); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1698 (1992) (calling retribution "a form of compensation to the victim").

100. *See* Daniel A. Farber, *Basic Compensation for Victims of Climate Change*, 155 U. PA. L. REV. 1605, 1641 (2007) (characterizing compensatory justice as a principal justification of tort law).

101. Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 357 (1992) [hereinafter *Corrective Justice Demands*] (asserting that corrective justice "demands that wrongful (or unjust) gains and losses be rectified"); Margaret J. Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 60 (1993) (opining that corrective justice creates a state between victim and injurer that is "morally appropriate ... to the status quo ante").

102. *See, e.g.*, Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 515-16 (1992); *Corrective Justice Demands*, *supra* note 101; Stephen R. Perry, *Comment on Coleman: Corrective Justice*, 67 IND. L.J. 381, 384-92 (1992); Ernest J. Weinrib, *The Monsanto Lectures: Understanding Tort Law*, 23 VAL. U. L. REV. 485, 498-99 (1989). *See generally* Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625 (1992) (categorizing and analyzing various corrective justice theories).

103. *See* Rosenberg, *supra* note 8, at 232 (remarking that corrective justice involves "a normative judgment regarding the specific harm-causing act"); Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 411-12 (2006) (observing that corrective justice involves remedying wrongdoing whereas distributive justice involves "just distribution"); *cf. Four Reflections*, *supra* note 7, at 1556 (noting that some

retributively as constituting what the culpable actor deserves.[104] However, it is not clear why restoring the victim is what one at fault must do.[105] Indeed, the retributive rationalization runs into even more problems when the compensatory amount relates to unforeseeable harms.[106]

Many assert that compensation is required to vindicate the value of victims.[107] If valuing victims is key, however, it seems that fault is not necessary. A person injured by faultless conduct is of no lesser value than one injured through negligence. Corrective justice proponents respond with the tautological argument that only *wrongdoing* creates the need for victim vindication.[108] But then there is the issue of why only culpable action is normatively related to correction.[109] In the end, it may be that corrective justice reflects both a distributionist mistrust of a society that forces victims to bear the costs of accidental injuries[110] and the reality of

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theories of corrective justice use causation, not fault, as the basis for liability).

104. *See, e.g.*, JOEL FEINBERG, DOING AND DESERVING 75 (1970) [hereinafter DOING AND DESERVING] (describing tort liability as "reparation" for "wrongdo[ing]," in which the tortfeasor "deserves to give"); John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 468 n.128 (2006) (characterizing "Jules Coleman's more recent work" as advocating "redistributing losses ... to wrongdoers who have rendered themselves deserving"); *cf.* JULES L. COLEMAN, RISKS AND WRONGS 324-25 (1992) (differentiating between those who produce compensable losses and the retributively culpable).

105. *See* Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 LAW & PHIL. 1, 4 (1987) (maintaining that compensation may cause "suffering either more than or less than retributively deserved"); *Four Reflections*, *supra* note 7, at 1557 (observing that compensation may be "not enough punishment" or may be "more than the punishment one deserves").

106. *See* DOING AND DESERVING, *supra* note 104, at 58-59 (contending that the facts underlying desert "must be facts about that subject"). Hart and Honore rationalize the correction of unforeseeable harms as a form of "make up" retribution, stating that it seems fair to hold someone liable for unforeseeable loss "when we consider that a defendant is often negligent without suffering punishment." H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW 243 (2d ed. 1985).

107. *See, e.g.*, Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 GEO. MASON L. REV. 329, 348 (2007) ("Corrective justice ... provid[es] just desserts [sic] to others.").

108. *See, e.g.*, Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233, 1249 (1988) (book review) (observing that the victim's "claim to compensation as a matter of justice is *analytically* connected to ... the injurer's conduct").

109. A related objection is that distributing wealth is not true "compensation." *See* Gregory C. Keating, *The Heroic Enterprise of the Asbestos Cases*, 37 SW. U. L. REV. 623, 635-36 (2008) (commenting that death "is beyond compensation").

110. *See* Elizabeth Adjin-Tettey, *Replicating and Perpetuating Inequalities in Personal*

an individualized tort regime that prioritizes fault.[111] Yet the repackaging of fault and distribution as correction produces disortive effects that both retributivists and distributionists condemn.[112]

Corrective accounts of criminal law have recently made their way into the penal literature as victims become more important players in the criminal system.[113] Theorist George Fletcher, for example, opines that retributive justice demands "seeking equality between offender and victim by subjecting the offender to punishment."[114] The attempt to fit victim-based justifications of punishment into a retributive framework has been met with skepticism from retributivists,[115] who conclude that Fletcher's program "doesn't look retributive; it looks compensatory to the victims."[116] Moreover, even if some consideration of victim welfare is compatible with retributivism, retributivism surely cannot tolerate punishment to satisfy victims in the absence of intent-based culpability.[117] Thus, Fletcher does not approve of distributing pain to undeserving defendants (or distributing more pain than deserved) as a means of

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Injury Claims Through Female-Specific Contingencies, 49 MCGILL L.J. 309, 343-44 (2004) (asserting that corrective justice seeks to "rectify deviations" from the original "just distribution"); Rosenberg, *supra* note 8, at 233 (observing that "entitlements enforced by corrective justice simply reduce to a form of distributional insurance"). Corrective justice theorists respond that distributive justice cannot explain why tort law permits only recovery from human injurers. The answer may be that tort law developed in an era when individual suits were the only way to secure distribution and accidents were considered intentional. *See* Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 786 (1990) (observing that the "misfortunes we now interpret as accidental ... often were construed as intentional by reference to beliefs in witchcraft and sorcery").

111. Joel Feinberg explains tort liability as "[w]eak retributivism": "if someone has got to be hurt in [an] affair, let it be the wrongdoer." DOING AND DESERVING, *supra* note 104, at 220.

112. *See* Abel, *supra* note 110, at 799 ("Tort damages deliberately reproduce the existing distribution of wealth and income."); Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39, 43 (1994) (noting that corrective justice "ignores the plight of those injured in the absence of provable fault").

113. *See, e.g.*, Fletcher, *supra* note 99; Hampton, *supra* note 99.

114. Fletcher, *supra* note 99, at 58.

115. *See, e.g.*, Jesús-María Silva Sanchez, *Doctrines Regarding "The Fight Against Impunity" and "The Victim's Right for the Perpetrator to be Punished,"* 28 PACE L. REV. 865, 883 (2008) ("The theory of criminal law focused on the victim is not retributivist.").

116. Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 76 (1999). In addition, if "desert" is correction of harm, much of criminal law cannot be rationalized because it does not involve harm.

117. Jean Hampton endorses a corrective view of retribution that does not require harm to the victim. *See* Hampton, *supra* note 99, at 1661.

producing closure.[118] He, like others, writes off any such program as "reduc[ing] punishment to simple vengeance."[119]

Consequently, justifying criminal laws by reference to distributive ends is quite a separate endeavor from supporting laws that retributively punish or achieve maximum deterrence.[120] Although distributive justice, retributivism, and utilitarianism may be used to rationalize the same legal rule and often overlap in significant ways, they are separate justificatory programs with their own sets of supporters and detractors.[121] Part II analyzes traditional criminal laws that appear by many accounts unjustifiable by appeal to retributivism and utilitarianism and reveals their true distributive bases.

II. DISTRIBUTION EXPLAINS CLASSIC CRIMINAL LAW QUANDARIES

This Part examines traditional criminal law doctrines that have proven troubling to retributivists and utilitarians and determines whether, in fact, distribution could explain their continued existence. To that end, this Part considers the much-debated laws involving felony murder and the divergence between attempts and completed crimes.[122] Felony murder and attempt laws rest liability on results (what Sanford Kadish calls the "harm doctrine")[123] and

118. This seems to reduce compensatory justice to retributivism. *See* Heidi M. Hurd, *Expressing Doubts About Expressivism*, 2005 U. CHI. LEGAL F. 405, 407 (2005) (asserting corrective justice collapses into retributivism when it assumes that victims are "vindicated if and only if their offenders receive their just deserts" irrespective of victim restoration).

119. Fletcher, *supra* note 99, at 52.

120. *See* Rosenberg, *supra* note 8, at 232 n.55 (observing that distributive reasoning "applies a social criterion of fair wealth equilibrium independent of ... individual desert").

121. *See supra* notes 69-72 and accompanying text.

122. This Article deliberately excludes statutory rape and public welfare offenses. Statutory rape laws do not reflect distributive goals, but rather specific moral norms regarding sexuality and family. *See* Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691, 774-803 (2003). Public welfare offenses are not distributive because they generally do not involve actual injury, *see* State v. Warfield, 80 P.3d 625, 628 (Wash. Ct. App. 2003), and they are usually justified by utilitarianism, *see infra* notes 128-33 and accompanying text.

123. Kadish, *supra* note 13, at 679. Although Kadish uses "harm doctrine" to describe lessening liability for those who intend but do not produce harm, this Article uses the term to describe any link between liability and unintended results. The "harm doctrine" is distinct from John Stuart Mill's "harm principle," which limits government action to preventing harm. *See* JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859).

are subject to the critique that individuals should not be punished for "bad luck."[124] Although defenders of these laws offer various justifications, many scholars simply write them off as irrational.[125] A distributive rationale, however, appears to account fully for why these laws continue to exist and thrive in modern times.[126]

A. Felony Murder

The felony murder doctrine, which holds felons strictly liable for deaths occurring during felonies, "is one of the most widely criticized features of American criminal law."[127] Felony murder is not, however, the only strict liability criminal law. There is a discreet category of criminal laws called public welfare or regulatory offenses that make defendants strictly liable for violations of government regulations.[128] These offenses originated during the industrial revolution when federal legislation responded to the dangers inherent in mass production of consumable goods.[129] Lawmakers reasoned that strict liability was appropriate given the particular

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124. *See infra* notes 159-64 and accompanying text.

125. *See* Kadish, *supra* note 13, at 695-96; Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 238 (1994) (describing opposition to the harm doctrine as "the standard educated view").

126. *Cf.* John L. Diamond, *The Crisis in the Ideology of Crime*, 31 IND. L. REV. 291, 291 (1998) (asserting that lapses in the mens rea requirement demonstrate that criminal law may not be about retribution).

127. Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 966 (2008) [hereinafter *Culpability*]; *see also* MODEL PENAL CODE § 210.2 cmt. 1 (1980) (observing a lack of principled arguments in favor of the rule); Jeffries & Stephan, *supra* note 83, at 1387 (noting "fifty years of sustained academic and judicial hostility" to the rule).

128. *See* United States v. Dotterweich, 320 U.S. 277, 283-84 (1943) (holding defendant strictly liable for violating the Federal Food, Drug, and Cosmetic Act); United States v. Balint, 258 U.S. 250, 254 (1922) (holding defendant strictly liable for failing to comply with pharmaceutical regulations). These crimes are also controversial. *See, e.g.*, Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 902 (1999) (welcoming the end of strict liability regulatory offenses); *see also* Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure To Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579, 618 n.207 (1998) (observing an unfavorable view of strict liability crimes).

129. *See* State v. Gilman, 291 A.2d 425, 430 (R.I. 1972) (noting strict criminal liability's connection to regulation of industries affecting "public[] health and safety"); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 419 (1993) (commenting that regulatory crimes responded to dangers of the industrial revolution).

risks of widespread harm posed by industrialization,[130] the difficulty in proving negligence,[131] and the de minimus nature of most regulatory penalties.[132] As a consequence, the driving rationale of regulatory criminal law was utilitarian—to incentivize producers to use extra care in manufacturing.[133] Unlike regulatory offenses, felony murder does not involve large numbers of injuries, and intent is not especially difficult to prove.[134] Moreover, far from imposing a small regulatory penalty, application of the felony murder doctrine may be the difference between life and death.[135] Consequently, felony murder is often considered a crime of more questionable validity than public welfare offenses.[136]

Strict liability is, by its nature, troubling to retributivists,[137] and thus much of the defense of felony murder has taken place on distinctly utilitarian terrain.[138] Utilitarians assert that the felony

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130. United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 565 (1971) (observing the need to regulate dangerous devices and products); Morissette v. United States, 342 U.S. 246, 253-54 (1952) (remarking that the industrial revolution's "wide distribution of harm" necessitated "numerous and detailed regulations").

131. *See* Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 393 (1989) (noting the argument that it takes too much time to determine intent in regulatory cases).

132. The Model Penal Code and many lower courts permit strict liability only for "violations" or minor offenses. MODEL PENAL CODE § 2.05 (1985); *see* United States v. Wulff, 758 F.2d 1121, 1125 (6th Cir. 1985). However, the Supreme Court has not limited the sentence that may be imposed for regulatory crimes. *See Balint*, 258 U.S. at 252.

133. *See* DOING AND DESERVING, *supra* note 104, at 224 (maintaining that strict liability protects the public by providing safety incentives).

134. *See* Jeffries & Stephan, *supra* note 83, at 1385 (noting that felony murder prosecutors could prove culpability); 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, 1455 (1994) (asserting that strict liability felony murder "is not essential to combat a widespread societal threat").

135. *See* Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 783 (1999) ("[U]nlike littering, felony murder can bring a death sentence.").

136. *See* Kadish, *supra* note 13, at 695-97 (calling the rule "rationally indefensible").

137. *See* Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, 7 SOC. PHIL. & POL'Y 84, 88 (1990) (describing strict liability as inconsistent with retributivism); Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 LAW & CONTEMP. PROBS. 47, 64-65 (1986) [hereinafter *Criminal Responsibility*] (observing that retributivists reject punishment for unforeseeable consequences).

138. *See* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 131 (2004) (tracing the utilitarian argument to nineteenth-century theorists who saw the rule "as a device for regulating dangerous activities"); Tomkovicz, *supra* note 134, at 1450 (stating that the "rule's conflict with accepted culpability principles" creates need for

murder rule produces two main deterrent effects: (1) it deters potential criminals from committing felonies,[139] and (2) it encourages those who commit felonies to be careful.[140] The criticisms of the deterrence basis for the felony murder rule are legion. Many assert that given how felons reason and the infrequency and randomness with which deaths occur during felonies, there is little chance that potential murder liability measurably affects incentives.[141] Moreover, deterrence could be achieved more easily by increasing felony penalties or creating a predictable measure of enhancement, such as sentencing every tenth convicted felon to life,[142] than by placing felons on punishment "roulette wheels."[143]

Randomly giving life sentences, however, would never likely survive judicial or societal scrutiny.[144] This indicates that nonutilitarian moral intuitions explain the resilience of the rule.[145] In fact, retributive accounts of felony murder have long existed. One of the earliest retributive justifications of felony murder came in the form of the "transferred intent" principle.[146] The contention is that intent to commit a felony transfers to any concurrent death, such that the felon is presumed to have intended the death.[147] This concept of a

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deterrence justifications).

139. *See* Fisher v. State, 786 A.2d 706, 732 (Md. 2001) (stating that the rule "is intended to deter dangerous conduct"); *Criminal Responsibility*, *supra* note 137, at 64-65 (critiquing this deterrence argument).

140. *See* People v. Washington, 402 P.2d 130, 133 (Cal. 1965) (remarking that the rule's purpose is to deter negligent and accidental killings); Cole, *supra* note 78, at 97 (observing the argument that the rule promotes caution during felonies). *See generally* Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 450-53 (1985) (discussing deterrence arguments).

141. *See* Enmund v. Florida, 458 U.S. 782, 800 n.24 (1982) (citing a statistic that only 0.43 percent of robberies result in homicide); Roth & Sundby, *supra* note 140, at 452-53; Marcia J. Simon, Note, *An Inappropriate and Unnecessary Expansion of Felony Murder in Maryland*, 65 MD. L. REV. 992, 1010 (2006) (asserting that "it is highly unlikely that commission of a felony will result in death").

142. *See Criminal Responsibility*, *supra* note 137, at 64-65 (maintaining that deterrence could be achieved "more efficient[ly] by convicting every tenth felon of murder").

143. *See* United States v. Richardson, 238 F.3d 837, 840 (7th Cir. 2001) (approving a strict liability sentencing enhancement as a "punishment bonus").

144. I say "likely" because, given the phenomenon of repeat offender statutes, many felons are in an enhancement lottery. *See, e.g.*, ALA. CODE § 13A-5-9 (1975).

145. *See Criminal Responsibility*, *supra* note 137, at 65 (observing the rule's "resilience").

146. Transferred intent often describes the assessment of liability to one who intends a crime, acts, and produces an injury, but the person injured was not the intended victim. *See* MODEL PENAL CODE § 2.03(2) (2009).

147. *See* State v. O'Blasney, 297 N.W.2d 797, 798-99 (S.D. 1980) (stating that "general

culpability "trigger" is disturbing to retributivists because not all felons intend or even reasonably foresee death.[148] Thus, experts commonly dismiss such retributive accounts as ethically unsound.[149]

Nevertheless, there are more sophisticated retributivist justifications of the felony murder rule.[150] Some argue that the rule appropriately condemns felons who negligently cause death for immoral reasons.[151] However, many formulations of the felony murder rule plainly do not require negligence, much less ill will.[152] Cases impose murder liability when victims die of heart attacks,[153] when police shoot bystanders,[154] when dealers sell drugs that cause overdoses,[155] and in other situations that do not neatly fit in a negligence-plus-motive paradigm.[156] Others make a "practical retribution" argument that strict liability is justified because most felony murderers possess the requisite intent and to require mens rea risks exonerating some culpable killers.[157] However, as noted before, intent to kill

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malicious intent is transferred from [the felony] to the homicide") (internal quotation marks omitted).

148. *See* Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1110 (1997) (criticizing this "constructive culpability" where harm "trigger[s]" culpability) (emphasis omitted). There is a related ideology that once a person becomes a felon, he is perpetually culpable. *See* Gerber, *supra* note 135, at 782 (observing the view that "no felon can possibly be innocent").

149. *See, e.g.*, Gerber, *supra* note 135, at 770 (stating that transferred intent "contradicts our most basic conception of proportionality"); Kadish, *supra* note 13, at 695-97 (calling the transferred intent argument irrational).

150. *See, e.g.*, Simons, *supra* note 148, at 1123-24 (justifying the rule by asserting that felons should make "extensive efforts" to be careful).

151. *Culpability*, *supra* note 127, at 967 (defending an "expressive" theory that predicates blame on "the actor's expectation of causing harm" and "the moral worth of [his] ends") (emphasis omitted).

152. *See* Cole, *supra* note 78, at 126-27 (observing the argument that common underlying felonies do not establish blameworthiness for murder). *But see Culpability*, *supra* note 127, at 979 (calling such cases "sporadic").

153. *See, e.g.*, Klosin v. Conway, 501 F. Supp. 2d 429, 431, 442-43 (W.D.N.Y. 2007); Miller v. State, 512 S.E.2d 272, 274 (Ga. 1999).

154. *See infra* notes 194-96 and accompanying text (discussing cases).

155. *See, e.g.*, United States v. Soler, 275 F.3d 146, 153 (1st Cir. 2002); United States v. McIntosh, 236 F.3d 968, 972 (8th Cir. 2001) (applying a sentence enhancement to a drug dealer for an unforeseeable drug user death).

156. *See, e.g.*, Malaske v. State, 89 P.3d 1116, 1117 (Okla. Crim. App. 2004) (finding felony murder liability appropriate when the defendant gave alcohol to his underage sister and the sister shared it with her friend who drank excessively and died). Some cases predicate felony murder on strict liability offenses. *See, e.g.*, State v. Smoot, 737 N.W.2d 849, 850, 854 (Minn. Ct. App. 2007) (making strict liability DWI a predicate for felony murder).

157. *See* MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 156

is not particularly difficult to prove.[158] Moreover, treating nonculpable defendants as sacrificial lambs in the quest for aggregate just punishment seems fundamentally incompatible with Kantian retributivism. Thus, the question remains whether there is a deontological justification for the blanket felony murder rule.

In answering this question, it is helpful to provide a brief background to the concept of "moral luck."[159] There are tomes of philosophical writing on this topic,[160] but what follows is a truncated discussion for the purpose of discovering a retributivist justification for the harm doctrine. One of the strongest objections to the harm doctrine is that it premises punishment on mere luck.[161] Thus, it is unacceptable to assess murder liability to a felon who engaged in a relatively safe felony and encountered "bad luck" when the investigating officer accidentally shot his partner, but assess only felony liability to an armed robber who did not encounter resistance.[162]

Retributivism, however, regularly tolerates the operation of luck. "Bad luck" certainly accounts for a portion of almost every convict's criminal disposition (termed "constitutive luck"),[163] but retributivists do not consider that adequate ground to deny criminal liability.[164]

(1997) (calling this "consequentialist" retributivism that regards "the guilty receiving punishment as a good ... to be maximized").

158. *See* Cole, *supra* note 78, at 97 (commenting that such reasoning supports "strict liability throughout the criminal law"); *supra* note 134 and accompanying text.

159. *See* Russell Christopher, *Does Attempted Murder Deserve Greater Punishment Than Murder? Moral Luck and the Duty To Prevent Harm*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419, 421 (2004) [hereinafter *Luck and Harm*] (describing the moral luck issue as "whether, and to what extent," luck is relevant to desert). *Compare* Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad But Instructive Arguments Against It*, 37 ARIZ. L. REV. 117, 121 (1995) [hereinafter *Failed Attempts*] (asserting that luck introduces arbitrariness, which is "a bad thing in a legal system"), *with* Barbara Herman, *Feinberg on Luck and Failed Attempts*, 37 ARIZ. L. REV. 143, 144 (1995) (noting that "to say that luck brings arbitrariness into the law is not yet to offer an argument").

160. This topic was popularized in philosophical literature by the famous essays of Thomas Nagel, *Moral Luck*, *in* MORAL LUCK 57 (Daniel Statman ed., 1993), and Bernard Williams, *Moral Luck*, *in*, MORAL LUCK, *supra* at 35.

161. *See* Kadish, *supra* note 13, at 688 (asserting that fault cannot depend "on what is beyond [one's] control").

162. *See* Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1404 (2003) (maintaining that the "rational" position is that without mens rea there is no difference between a felony murderer and felon).

163. *See* Nagel, *supra* note 160, at 60 (defining constitutive luck as luck regarding "the kind of person you are").

164. *See* Jamal Greene, *Beyond* Lawrence*: Metaprivacy and Punishment*, 115 YALE L.J.

Luck regarding criminal opportunity (called "circumstantial luck")[165] is also generally palatable to retributivists. Circumstantial luck occurs when two similarly intentioned actors produce different results because one was presented with a criminal opportunity the other was not. Holding the noncriminal actor less culpable is acceptable to retributivists because there is always the possibility that he would have acted lawfully had the criminal opportunity arisen.[166]

The difficult case of bad luck for retributivists is when two defendants intend and act in the same manner, and luck is the only factor leading to disparate results ("resultant luck").[167] In this case, disparate results cannot be attributed to any different choices or nonchoices made by the two defendants.[168] Philosophers characterize the challenge as reconciling the obvious importance that law and society attach to fortuitous results with the unimpeachable logical mandate that luck should not matter.[169] Many have responded to this challenge with complex theories of liability and morality. The arguments rationalizing moral luck from a seemingly deontological standpoint appear to fall into three categories: proof, intuitionism,

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1862, 1909 (2006) (observing that a killer "with bad 'constitutive' luck" is still seen to murder "as an act of will"); Morse, *supra* note 13, at 367 (stating that the law treats people as "intentional agents" and not "flotsam and jetsam of the causal universe"); *cf.* Meir Dan-Cohen, *Luck and Identity*, 9 THEORETICAL INQUIRIES L. 1, 18-19 (2008) ("That one is who one is, is not a stroke of good luck or bad."). Some theorists critique retributivism for defining culpability with reference to a discrete set of choices in a small pocket of time. *See* Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1310 (2001) (criticizing criminal law for repressing "the reality of social influences" in favor of a "shaky idea of free will") (internal quotation marks omitted); Kelman, *supra* note 46, at 592-96.

165. *See* Nagel, *supra* note 160, at 60 (describing circumstantial luck as luck regarding "the kind of problems and situations one faces").

166. *See* Kadish, *supra* note 13, at 690 (asserting that bad luck may lead you to "reveal[] your badness" but "it is that choice for which you are blamed").

167. *See Luck and Harm*, *supra* note 159, at 426-27 n.31 (observing the argument that "only outcome luck is problematic").

168. *See* Kadish, *supra* note 13, at 690 (stating that retributivism may tolerate "[f]ortuity prior to choice" but not "fortuity thereafter"); Moore, *supra* note 125, at 237 (calling punishing nonculpable harmers an "anathema" to moral philosophers).

169. *See* Nicholas Rescher, *Moral Luck*, *in* MORAL LUCK, *supra* note 160, at 147; *see also Luck and Harm*, *supra* note 159, at 421 (noting conflict between the "nearly universal intuition" that results matter and the "seemingly unimpeachable argument" that people should not be punished for bad luck).

and instrumentalism. These arguments ultimately do not explain the harm doctrine as clearly as distribution.

The proof argument holds that unintentional harm matters as an indicator of the harmer's moral comportment.[170] This theory hypothesizes a thin version of luck in which consequences are less random than they appear.[171] Judith Andre, for example, morally differentiates the reckless driver who kills from the one who does not on the ground that "[s]ome people persistently misjudge, and in the process hurt other people. (We might call the agents 'morally accident-prone.') They are malformed in some way; something prevents them from correctly assessing the facts before they act."[172] Even if retributivists would accept being "morally accident-prone" as sufficient for criminal culpability,[173] there are lingering problems. First, if results always indicate character, we must believe that the spree killer whose stray bullet kills a terrorist about to detonate a bomb (saving thousands) has by virtue of that result evidenced something excellent in his character.[174] Second, even if results have some bearing on character,[175] the criminal law unlikely recognizes this attenuated connection as a basis for formal liability.[176]

Both the intuitionist and instrumentalist arguments begin with the recognition of a societal intuition to base blame on results.[177] The intuitionist account of moral luck contends that society's

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170. *See* Judith Andre, *Nagel, Williams, and Moral Luck*, 43 ANALYSIS 202 (1983); Norvin Richards, *Luck and Desert*, 95 MIND 198, 201 (1986).

171. *See* Andre, *supra* note 170, at 207 ("We have more control over the kind of person we are than we sometimes think."); Herman, *supra* note 159, at 148 (asserting that luck should not encompass "the normal or expectable range of independent (of our will), causally 'live' effects").

172. Andre, *supra* note 170, at 205.

173. *See id.* (conceding that the morally accident-prone "are neither blameworthy nor punishable"); *cf.* Hampton, *supra* note 99, at 1661-66, 1698-1701 (characterizing harm-causing as part of a bad character for which one is responsible).

174. *See* Morse, *supra* note 13, at 384-85 (supporting moral condemnation of one whose dangerous conduct "produces an entirely unintended and unforeseen benefit").

175. *But see id.* at 411 (asserting that results are "misleading indicators of both risk and mens rea").

176. *See* Andre, *supra* note 170, at 206 (distinguishing the "sense of diminished worth" from causing harm from "moral fault").

177. *See* Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 423 (2003) (observing that "people's punishment judgments are guided" by psychological significance of harm); Nagel, *supra* note 160, at 69 (commenting that "our basic moral attitudes ... are determined by what is actual").

intuition invests results with moral content.[178] However, as Joel Feinberg remarks, "That the bulk of the people believe that a particular proposition is true is a good reason, I agree, for tolerance and respect. But it is not a good reason, even in a democracy, for believing that proposition to be true."[179] Moreover, the purportedly collective social intuitions favoring the harm doctrine may be based on the feelings of crime victims and those sympathetic to them.[180] Yet victims who suffer horrible injuries often react in ways that they, themselves, in hindsight see as morally condemnable.[181] As one victim of the Oklahoma City bombings explained, "'Victims and family members are not dispassionate. We are angry, depressed, and mourning.'"[182]

Instrumentalist arguments regard the law's recognition of societal intuition as instrumentally important to some separate moral scheme.[183] Instrumentalist courts and scholars assert that divergences between criminal law and social intuition lead to bad results like widespread vigilantism and lack of public confidence in government.[184] Justice Stewart remarked in the death penalty context that "there are sown the seeds of anarchy" when "people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve.'"[185] However, a retributivist would plainly reject punishment of the

178. *See* R.A. DUFF, CRIMINAL ATTEMPTS 124 (1996) (noting that social intuition might "express a deep[] moral vision"); GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE 83 (1988) (asserting that law should reflect the "sensibilities of common people").

179. *Failed Attempts*, *supra* note 159, at 126; *see also* Morse, *supra* note 13, at 421-22 (arguing that social intuition does not mean "desert is independently attributable in part to results").

180. *See* Schulhofer, *supra* note 13, at 1516 (denying that intuitions supporting the harm doctrine have widespread appeal).

181. One Oklahoma City victim stated that after the bombing he "'wanted McVeigh and Nichols killed without a trial'" and concluded that "'victims are too emotionally involved in the case and will not make the best decisions.'" S. COMM. ON THE JUDICIARY, REPORT ON CRIME VICTIMS' RIGHTS AMENDMENT, S. REP. NO. 108-191, at 82 (2003) [hereinafter CRIME VICTIMS' RIGHTS AMENDMENT REPORT] (quoting Bud Welch).

182. *Id.* (quoting Patricia Perry).

183. *See, e.g.*, Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 28 (2007) (arguing that law should "maximize its moral credibility" by reflecting "community intuitions of justice").

184. *See, e.g.*, HART, *supra* note 75, at 36-37; Schulhofer, *supra* note 13, at 1511 (rejecting that "official retaliation" is better than "mob violence").

185. Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

innocent to cater to society's wishes.[186] Instrumentalist arguments also appear to prove too much and too little. Satisfying society's punitive demands could justify the imposition of punishment whenever society demands it, whether or not the defendant produces harm. Conversely, society's tolerance for crime might dictate foregoing punishment of culpable harm-causers.

Many retributivists thus simply write off the social intuition to blame for harm as mere inferential error, asserting that society unreasonably equates unintentional harm with culpability.[187] Nevertheless, a case could be made that society's intuition to blame when bad things happen is not arbitrary, irrational, or divorced from morality, but a reasonable manifestation of society's adherence to distributive justice principles in a culture of legal individualism.[188] The distributive logic behind punishing unintentional harmers is evident: there are two individuals involved in the criminal incident—the innocently intentioned, unlucky defendant and the innocent victim. The victim has been put in a deprived condition by the event involving the defendant, and the legal system's role is to create a fair distributive balance between the victim and criminal.[189] The question might then arise of why society supports alleviating victims' suffering in a retributively problematic way by punishing the nonculpable. The answer is that within the current criminal law narrative, punishment of offenders is the exclusive manner of providing relief to victims.[190]

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186. A consequentialist could argue that society becomes less stable when courts doctrinalize vengeance. *See* Schulhofer, *supra* note 13, at 1513.

187. *See, e.g.*, ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 100 (photo. reprint 1982) (1759) (calling adherence to the harm doctrine "an irregularity in the sentiments of all men"); Dripps, *supra* note 162, at 1388 (describing society's linking culpability with unintentional harm as a "fundamental attribution error").

188. *See* James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death*, 20 AM. J. CRIM. JUST. 1, 5 (1995) (commenting that jurors' "feelings of empathy can lead to helping").

189. *See* Nadler & Rose, *supra* note 177, at 447 (discussing a study finding mock jurors more lenient when victims were better able to cope); Tomkovicz, *supra* note 134, at 1471 (observing that victim injury "generates an inclination to respond" with payback).

190. *See, e.g.*, *Atonement*, *supra* note 75, at 1844 (maintaining that victim restoration can only be achieved by "vindicat[ing] the victim's worth through punishment"); *see also* Susan A. Bandes, *Victims, "Closure," and the Sociology of Emotion*, 72 LAW & CONTEMP. PROBS. 1, 10 (2009) (observing a "feedback loop" in which society promises victims closure and the system is structured by that promise).

Given that distribution is not the preferred discourse of criminal law,[191] or most law, there is a tendency to cover distributive sentiments by claiming fault.[192] Thus, courts examining felony murder do not overtly mention the distributive basis of the rule, preferring to rely on utilitarian reasoning, transferred intent, or tradition.[193] Nonetheless, some doctrinal developments underscore that victimhood is key in assessing felony murder liability. There is a line of cases holding that a defendant is not liable for felony murder when a cofelon dies, even though he would have been liable had an innocent been killed.[194] Courts avoid justifying this rule by overt reference to the comparative worth of felon and bystander victims.[195] However, the weak reasoning behind the division combined with its popularity belie that the doctrine reflects the basic view that felon-decedents should not receive distributive relief.[196]

To be sure, considering the felony murder rule a matter of distributive justice raises some inevitable questions. One question is why a distributionist regime would accept the notion that death is different. To answer, perhaps the fact that strict liability has not been extended to felonies producing nondeath harms is just a historical development with no clear connection to retribution, utility, or distribution.[197] However, there is a cogent argument that the death-is-different idea is more easily rationalized by distributionism than utilitarianism or retributivism. Utilitarians may be confronted with the argument that it would be far more effective to

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191. *See* Kadish, *supra* note 13, at 701 (contending that retributive instincts "run deep and powerfully in our culture").

192. *See* Ristroph, *supra* note 47, at 743 (noting that philosophical "rhetoric is available to defend almost any ... punishment").

193. *See supra* notes 138-40, 146-47 and accompanying text.

194. *See, e.g.*, Commonwealth v. Redline, 137 A.2d 472, 483 (Pa. 1958) (holding that the police's justifiable killing of a cofelon cannot engender murder liability).

195. *See, e.g.*, People v. Hickman, 297 N.E.2d 582, 586 (Ill. App. Ct. 1973) ("We do not ... indulge in the fanciful theory that the victim being a felon assumed the risk.").

196. Despite the ready criticisms, *see, e.g.*, People v. Austin, 120 N.W.2d 766, 770 (Mich. 1963) (asserting that it is impossible to draw a logical distinction between accidental and "justifiable" felony killings), courts widely implement this distinction, *see* People v. Raymer, 662 P.2d 1066, 1070 (Colo. 1983); State v. Hansen, 734 P.2d 421, 427 (Utah 1986); Wooden v. Commonwealth, 284 S.E.2d 811, 816 (Va. 1981); State v. Brigham, 758 P.2d 559, 561 (Wash. Ct. App. 1988); *see also* UTAH CODE ANN. § 76-5-203(2)(d)(ii) (West 2009) (creating an exception for felony murder liability when a co-felon is killed).

197. *Cf.* Tomkovicz, *supra* note 134, at 1458 (opining that historical influence might explain persistence of the rule).

deter felonies by making felons strictly liable for nondeath harms like destruction of property or injury. Empirically, these results likely happen more often than death, and punishing for them would more effectively shape incentives.[198] As a retributive matter, if fortuitous death indicates moral blameworthiness, then so should other fortuitous bad results.

By contrast, one could argue that death calls for a wholly different distributive solution. When nondeath harms occur, a victim can feel "closure" from punishing the felony alone, whereas when there is a death, more punishment must be meted out to restore survivors to an appropriate status.[199] In addition, death may create a tipping point between distributive and retributive sentiments. When victim suffering is significant, society embraces distributive intervention.[200] When harm is not great, society reverts back to fault instincts.[201] Today, however, distributive sentiments are beginning to trump culpability concerns in a variety of criminal cases, not just when harm is at its zenith.[202] In sum, it appears by all accounts that retributivism fails to make sense of the felony murder rule, and utilitarian defenses are internally contradictory and empirically unsound.[203] By contrast, the felony murder rule makes perfect sense as a means of distributing satisfaction to harmed victims by imposing increased penalties on felons who cause deaths.

B. The Attempt-Crime Divide

For decades, theorists have struggled to rationalize criminal law's mandate that two people who intend and commit the same

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198. *See supra* note 141.

199. *See* Vik Kanwar, *Capital Punishment as "Closure": The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. REV. L. & SOC. CHANGE 215, 228 (2002) (noting that because murder "cannot be ... compensated by monetary means," closure focuses on punishment).

200. *See* Tomkovicz, *supra* note 134, at 1464 (observing the "evocative symbolic value" of life).

201. There is also the question of why distributionist instincts have not led to all unintentional deaths being charged as murder. To answer, distributive sentiments trump retributive sentiments only when distribution burdens the socially disfavored, like felons. *See id.* at 1474 (remarking that the public rejects holding innocents, but not felons, liable for accidental death); *infra* Part IV.

202. *See infra* notes 287-95 and accompanying text.

203. *See* Simons, *supra* note 148, at 1112 (noting that "retributivists have yet to give an account of the acceptable dimensions of the moral luck 'differential'") (emphasis omitted).

criminal acts should be treated differently because one completed the crime but the other did not,[204] sometimes called the "punishment differential."[205] In fact, the preceding arguments involving moral luck are most often set forth in the context of this conundrum.[206] As with felony murder, there have been many attempts to justify the punishment differential by reference to utilitarianism and retributivism. As in the felony murder context, these attempts have been met with numerous objections.

The principal consequentialist justification of the punishment differential is that punishing completed crimes more severely will encourage attempters to abandon.[207] However, "by the time the defendant has done the substantial acts toward carrying out the crime that the law of attempt requires, there is very little chance of a change of heart."[208] Another suggestion is that the differential incentivizes those who, for example, shoot victims to try to save their lives.[209] Yet it seems quite far-fetched that a shooter will try to save his victim because he is afraid of the punishment differential.[210] As a result, utilitarian justifications engender much skepticism. This leaves the retributive argument that those who complete crimes are more culpable than those who do not.[211] As discussed in detail in Part II.A, there are many theories positing the moral con-

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204. *Failed Attempts*, *supra* note 159, at 117 (observing that "[e]very bona fide philosopher of law tries his hand" at this conundrum).

205. *See, e.g.*, *Luck and Harm*, *supra* note 159, at 419 (using the term "punishment differential"); Morse, *supra* note 13, at 390.

206. *See, e.g.*, *Failed Attempts*, *supra* note 159, at 117-21; Morse, *supra* note 13, at 363-66; *see also* Ken Levy, *The Solution to the Problem of Outcome Luck: Why Harm is Just as Punishable as the Wrongful Action that Causes It*, 24 LAW & PHIL. 263, 267-68 n.7 (2005) (citing articles on attempts and moral luck).

207. *See* Schulhofer, *supra* note 13, at 1519 (discussing the argument that the divide incentivizes "the actor to desist").

208. Kadish, *supra* note 13, at 687.

209. *See* Schulhofer, *supra* note 13, at 1519-20 (noting the argument that the punishment differential creates an incentive to aid victims).

210. There is also the argument that without the differential, "an actor who has attempted to kill, but has failed, would have no disincentive not to try again." *Luck and Harm*, *supra* note 159, at 420 n.7. But this is only true if the punishment for the attempt is not "a maximal sanction." *See* Marcelo Ferrante, *Deterrence and Crime Results*, 10 NEW CRIM. L. REV. 1, 24-25 (2007). In addition, being lenient on attempters "could tend to decrease deterrence." Schulhofer, *supra* note 13, at 1521; *see also* DUFF, *supra* note 178, at 122.

211. *See* Leo Katz, *Why the Successful Assassin Is More Wicked than the Unsuccessful One*, 88 CAL. L. REV. 791, 792 (2000) (arguing that the "real challenge" is providing deontological justification for the punishment differential).

tent of apparent luck, but these ultimately prove unsatisfying.[212] The question becomes whether there are other deontological arguments that explain the attempt-crime divide.

One plausible way to rationalize the divide from a retributive and utilitarian standpoint is by concentrating on the "substantial step" requirement.[213] Attempt law divides movements toward crime into preparatory acts that do not engender liability and substantial steps that bear a legally sufficient relationship to the completed crime.[214] The trend in criminal law has been toward characterizing acts quite removed from completed crimes, like reconnoitering, as substantial steps. Thus, the vast majority of attempts are not cases in which the crime certainly would have succeeded had resultant luck not intervened.[215] Retributivists, in turn, should have little trouble differentiating most attempters from completers because, as noted before, an actor who has not made any choice is less blameworthy than one who has made an immoral choice.[216] From a utilitarian perspective, persons whose attempts are far from completion are less dangerous and require less deterrence.[217]

Of course, this set of arguments does not directly respond to the hypothetical as framed by theorists, which necessarily involves identical defendants only separated by the "luck of the draw."[218] Nonetheless, there is a practical retribution argument here: it would be patently unjust to treat most attempters the same way

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212. *See supra* notes 159-86 and accompanying text.

213. *See* United States v. Saavedra-Velazquez, 578 F.3d 1103, 1107 (9th Cir. 2009) (asserting that there must be "a substantial step towards committing the crime" (quoting United States v. Sarbia, 367 F.3d 1079, 1085-86 (9th Cir. 2004))) (emphasis omitted); MODEL PENAL CODE § 5.01(1)(c) (1985) (stating that attempt requires "a substantial step in a course of conduct planned to culminate in his commission of the crime").

214. *See* United States v. DeMarce, 564 F.3d 989, 998 (8th Cir. 2009) ("A substantial step goes beyond 'mere preparation' but may be less than the 'last act necessary.'" (quoting United States v. Mims, 812 F.2d 1068, 1077 (7th Cir. 1987))); United States v. Smith, 264 F.3d 1012, 1016 (10th Cir. 2001).

215. *See* Herman, *supra* note 159, at 144 (maintaining that "not all attempts are like the shooting case (two shooters, two victims; one success, one failure due to the unexpected intervention of a mosquito)").

216. *See* DUFF, *supra* note 178, at 119-20 (commenting that retributivism supports less punishment for "incomplete attempts").

217. *See* Morse, *supra* note 13, at 389 (noting that "[m]ost preparatory conduct is not itself terribly dangerous or immoral").

218. *See* Kadish, *supra* note 13, at 679.

as completers, so attempts should be punished less.[219] In order to protect the many whose attempts are farther back on the timeline, the law gives a free pass to the few who have taken the last step.[220] Of course, a straightforward retributive solution to the punishment differential would be to grade steps along the preparation-to-completion timeline.[221] Today, courts resolve the punishment differential problem by unilaterally increasing penalties for attempts.[222]

The practical retribution argument, however, will not convince Kantians that the attempt-crime divide is morally defensible. Moreover, there is still the question of why, in the hypothetical case, people believe that the completer is more blameworthy. In addition to moral luck arguments, there are some deontological defenses of the divide that concentrate, not on the difference in wrongdoing, but on the difference in the warranted punishment.[223] Some scholars assert that although similarly situated attempters and completers are equally culpable, the fact that their results diverged impacts due punishment. Because the completer has benefitted from reaching his goal and the attempter has not,[224] the completer should suffer a greater deprivation.[225] However, as an empirical matter, a murderer

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219. *See* Morse, *supra* note 13, at 387; Daniel Ohana, *Desert and Punishment for Acts Preparatory to the Commission of a Crime*, 20 CAN. J.L. & JURIS. 113, 113-14, 131 (2007) (contending that blame is deserved only when the defendant "has succeeded in finalizing his preparations").

220. *See* Ohana, *supra* note 219, at 131 (maintaining that in the law of attempt, "[o]nly a rough approximation is possible").

221. *Cf.* Samuel Kramer, Comment, *An Economic Analysis of Criminal Attempt: Marginal Deterrence and the Optimal Structure of Sanctions*, 81 J. CRIM. L. & CRIMINOLOGY 398, 410 (1990) (making a utilitarian argument for grading attempts).

222. *See* Morse, *supra* note 13, at 379. This might explain politicians' desires to eliminate the harm doctrine from attempt law despite their support for it elsewhere.

223. Some argue that the completer is more blameworthy because he chose not to render aid, whereas the attempter was never faced with the choice. *See, e.g.*, *Luck and Harm*, *supra* note 159, at 424. But this would not justify the differential when the completer tries to aid or aid cannot be rendered.

224. *See* HART, *supra* note 75, at 131; Michael Davis, *Why Attempts Deserve Less Punishment than Complete Crimes*, 5 LAW & PHIL. 1, 29 (1986) ("The successful murderer has the advantage of having done what he set out to do.").

225. *See* Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 201 (2009) (positing that retributivists grade punishment according to offenders' subjective experiences of pain); Morse, *supra* note 13, at 426 (noting the argument that the completer "has gained more and should receive more blame and punishment to right the moral ledger").

may suffer agonizing remorse, whereas an attempter may experience feelings of relief that produce great joy. Moreover, most thoughtful retributivists reject predicating punishment on the offender's subjective experience because of the perverse implications.[226]

Thus, the question remains why people think that equally culpable completers and attempters should be treated differently.[227] The attempts to explain this intuition by appeals to utilitarianism or retributivism are not extremely persuasive. By contrast, as a distributive matter, it is perfectly rational to treat completers and attempters differently.[228] The remedial requirements attendant to actual victimhood simply do not exist when the attempter has not produced harm. When there is no victim, there is no one to whom to distribute pleasure, and a different judicial response is warranted.

To summarize, this Part has analyzed two criminal law doctrines traditionally considered troubling from retributive and utilitarian perspectives to uncover their distributive bases. Scholars often criticize the attempt-crime distinction as nothing more than the irrational premising of liability on bad luck. A distributive rationale, however, explains the social intuition that, with all other things equal, completers should be more liable than attempters. The distributive theory is perhaps most clearly underscored by the felony murder rule. The most straightforward explanation for the no-fault rule is that it permits criminal courts to create a desired distributive arrangement. Analyzing these classic criminal law antinomies reveals a glimmer of the distributive purpose of criminal law. This distributive justification has blossomed into an important basis for punishment in modern times.

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226. *See* Kolber, *supra* note 225, at 219-35 (discussing objections to subjectivizing punishment). There is also the argument that "if postcrime satisfaction is a genuine moral desert criterion, it should be applied to all criminals." Morse, *supra* note 13, at 427.

227. *See* Herman, *supra* note 159, at 146 (noting the possibility "that what interests us about attempts has no bearing on moral blameworthiness").

228. *See* Cole, *supra* note 78, at 113 (noting that the differential may be explained by "increased public demand for retaliation when harm results").

III. DISTRIBUTIONIST SENTIMENTS UNDERLIE MODERN PENOLOGY

For the greater part of the twentieth century, victims' distributive interests were clearly subsidiary to defendants' fault and rehabilitative potential.[229] That began to change in the 1960s when rising crime rates and increasing media coverage made crime a hot-button political issue.[230] Over the next two decades, a confluence of factors, including rapid social changes, reaction to Warren Court progressivism, increases in capital flows, and new race relations, fueled a reactionary politic of crime and punishment.[231] The tough-on-crime political platform emerged with President Nixon's declaration of a war on crime[232] and rose to prominence during the presidency of Ronald Reagan, who used crime as the prime example of welfare's failure.[233] Because punitive reform carries political force,[234] it has remained a dominant message despite partisan changes in govern-

229. *See* Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 187 (2008) (noting that until the late twentieth century, rehabilitation was the primary sentencing goal); *supra* notes 88-92 and accompanying text.

230. *See* Vanessa Barker, *The Politics of Pain: A Political Institutionalist Analysis of Crime Victims' Moral Protests*, 41 LAW & SOC'Y REV. 619, 625 (2007) (attributing the public attitude to increasing crime rates in the 1960s and 1970s). *But see* KATHLYN TAYLOR GAUBATZ, CRIME IN THE PUBLIC MIND 5-8 (1995) (tracing public fear to media exaggeration, not crime rates).

231. *See* GARLAND, *supra* note 89, at 57; Feld, *supra* note 90, at 1462-1505 (discussing factors leading to the shift in penological views in the late 1960s through the 1980s); Angelina Snodgrass Godoy, *Converging on the Poles: Contemporary Punishment and Democracy in Hemispheric Perspective*, 30 LAW & SOC. INQUIRY 515, 529 (2005) (observing that "conservatives ... refram[ed] the crime issue from a question of inadequate social welfare to one of insufficient social control").

232. *See* Annual Message to the Congress on the State of the Union, 1 PUB. PAPERS 8, 12 (Jan. 22, 1970).

233. *See* Remarks at the Annual Conference of the National Sheriff's Association in Hartford, Connecticut, 1 PUB. PAPERS 884, 885 (June 20, 1984) (attributing crime rates to "a liberal social philosophy that too often called for lenient treatment of criminals"); *Rape and Feminism*, *supra* note 29, at 620 (commenting that in this era, "[h]orrendous criminals became ... invaluable as examples of why there should be 'no tolerance' for people's 'poor excuses'" (quoting Brown, *supra* note 28, at 6)); Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 70 (noting that Reagan and Bush waged several rhetorical wars on crime).

234. Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719 (2005) (observing the "strong incentive to add new offenses and enhanced penalties").

ment.[235] Today, crime control is "one of the few forms of domestic governance defensible within [conservative] political ideology."[236]

Tough-on-crime proponents waged their rhetorical campaign on three fronts: reforming the dialectic of retributivism, emphasizing deterrence and incapacitation, and introducing penal distribution. Political discourse of crime and punishment highlighted the desert component of retributivism and minimized its limiting principle of proportionality.[237] As a result, criminals could be seen as perpetually responsible and deserving of any amount of punishment.[238] At the same time, crime control advocates portrayed incapacitation and deterrence as necessary in a world rife with random violence.[239] Finally, if desert and utility could not justify ratcheting up punishment, politicians were quick to rely on distributive justice to victims.[240]

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235. *See, e.g.*, William Jefferson Clinton, *Remarks on Signing the Violent Crime Control and Law Enforcement Act of 1994*, 20 U. DAYTON L. REV. 567, 568 (1995) (signing the harsh crime bill and remarking that "[t]here must be no doubt about whose side we're on"); Bruce Western & Christopher Wildeman, *Punishment, Inequality, and the Future of Mass Incarceration*, 57 U. KAN. L. REV. 851, 853 (2009) (noting Democrats' support for "punitive criminal justice policy").

236. Jonathan Simon, *From a Tight Place: Crime, Punishment, and American Liberalism*, 17 YALE L. & POL'Y REV. 853, 854 (1999) (book review); *see also* Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 114 (2007) ("America, through its courts, has 'gotten tough' on crime.").

237. *See* Kyron Huigens, *What Is and Is Not Pathological in Criminal Law*, 101 MICH. L. REV. 811, 812 (2002) (lamenting that retributive rhetoric has justified a criminal "system of quarantine"); Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 255-56 (asserting that retributive rhetoric "has tended to sponsor extreme policies and practices that thoughtful retributivists themselves might well renounce" (quoting *Atonement*, *supra* note 75, at 1839)).

238. *See Feminist War*, *supra* note 33, at 768-69 ("Retributivism, as articulated during the war on crime, stood for the principle that the general, undifferentiated criminal element was constantly culpable to the highest degree.").

239. *See* Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 414 (commenting that rehabilitation has been replaced by incapacitation); Jonathan Simon, *Introduction: Crime, Community, and Criminal Justice*, 90 CAL. L. REV. 1415, 1418 (2002) (noting that the "dominant" penal ideology reflects "nineteenth-century notions of simple deterrence and elimination through exclusion or execution").

240. VICTIMS IN THE WAR ON CRIME, *supra* note 34, at 192 ("To maintain its fever pitch of hatred, the war on crime needs ever more, and ever more sympathetic, victims."); *Feminist War*, *supra* note 33, at 769-70 (noting that "the tragedy of the victim" sustained tough-on-crime ideology).

This Part will describe the rise of the distributive argument for criminalization in modern times, as manifested through popular discourse and legal doctrine. To that end, it will begin by discussing the victims' rights movement's paradigm of just punishment. Next, it will examine the proliferation of the harm doctrine in criminal law as evidenced by sentencing reforms and victim impact law.

A. Distribution in the Victims' Rights Movement

The victims' rights movement is the term given to various interests groups, active over the past thirty years, that have coalesced around the principles that the criminal law is inadequately attentive to victims' needs and the particular remedies should be increased victim participation and harsher punishments.[241] Some of the original victims' rights supporters were feminists concerned with the criminal system's treatment of rape and domestic violence victims.[242] The victims' rights movement, however, rose to prominence during the tough-on-crime era, and it gained popularity, not by denigrating criminal justice as sexist,

241. *See* Nora V. Demleitner, *First Peoples, First Principles: The Sentencing Commission's Obligation To Reject False Images of Criminal Offenders*, 87 IOWA L. REV. 563, 567 (2002) (observing that "[v]ictims demanded a greater role in the criminal justice system, asked for better treatment, and also sought higher penalties"); Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3, 6 (1999) (describing victims' rights as "a political movement, fueled by grassroots campaigns of concerned citizens" and savvy politicians). There are numerous articles discussing this movement. *See, e.g.*, Charles F. Baird & Elizabeth E. McGinn, *Re-Victimizing the Victim: How Prosecutorial and Judicial Discretion Are Being Exercised To Silence Victims Who Oppose Capital Punishment*, 15 STAN. L. & POL'Y REV. 447, 451-52 (2004); Barker, *supra* note 230, at 619; Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 289-92; Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1375-76; Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights*, 76 TEMP. L. REV. 645, 666 (2003); Lynne Henderson, *Co-Opting Compassion: The Federal Victims' Rights Amendment*, 10 ST. THOMAS L. REV. 579, 590 (1998) [hereinafter *Co-Opting Compassion*]; Henderson, *supra* note 32, at 937-38; Jon Kyl, Steven J. Twist & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephenie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV., 581, 583 (2005); Wayne A. Logan, *Confronting Evil: Victims' Rights in an Age of Terror*, 96 GEO. L.J. 721, 760 (2008) [hereinafter *Confronting Evil*].

242. See Barker, *supra* note 230, at 626 (noting that the early victims' rights movement included "unlikely coalitions made up of radical feminists [and] conservative 'law and order' groups"); Demleitner, *supra* note 241, at 567 (remarking that feminists were early victims' rights supporters).

but by calling for more exacting punishment of paradigmatically violent criminals.[243] As a consequence, although the movement may not have originated as a right-wing faction dedicated to enhancing punishment severity, the victim increasingly became the primary justification for ever harsher criminal laws.[244] Today, the victims' rights movement positions victims' rights in opposition to defendants' constitutional rights and explicitly embraces conservative anticrime policies.[245] Advocates have been successful in establishing victims' bills of rights in every state,[246] with provisions ranging from limiting the exclusionary rule[247] to retrenching the insanity defense.[248] One of the movement's most visible achievements has been to establish victim impact statements as essential evidence during sentencing.[249]

On the surface, the term "victims' rights" invokes a liberal rather than a distributionist paradigm.[250] Although rhetorically about

243. *See* Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 876 (2000) (commenting that conservatives were more successful at characterizing rape as a problem of predators than feminists were at characterizing rape as an issue of inequality); *Rape and Feminism*, *supra* note 29, at 622-24 (arguing that victims' rights rhetoric thwarts feminist reform).

244. *See* Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 841 (2001) (stating that the "war on crime is fueled by images of [vengeful victims] of horrific crimes"); *Co-Opting Compassion*, *supra* note 241, at 590 (remarking that since the beginning of the victims' movement, society has gravitated "towards harsher and longer punishments").

245. *See* Henderson, *supra* note 32, at 951 (observing the "conservative bent" of the current victims' movement); Thad H. Westbrook, Note, *At Least Treat Us Like Criminals!: South Carolina Responds to Victims' Pleas for Equal Rights*, 49 S.C. L. REV. 575, 579-80 (1998) (describing victims' rights as a counter to Warren Court reforms).

246. *See, e.g.*, ARIZ. CONST. art. 2, § 2.1; ILL. CONST. art. 1, § 8.1; DEL. CODE ANN. tit. 11, § 9402 (2010). According to the National Center for Victims of Crime, "[e]very state has a set of legal rights for crime victims in its code of laws." *See* NAT'L CTR. FOR VICTIMS OF CRIME, ISSUES: VICTIMS' BILL OF RIGHTS, http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32697 (last visited Sept. 30, 2010).

247. *See, e.g.*, CAL. CONST. art. 1, § 28(f)(2) ("[R]elevant evidence shall not be excluded in any criminal proceeding."); PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 28 (1982) (asserting that when "the 'criminal goes free because the constable blundered,' the *victim is denied justice*" (quoting People v. DeFore, 150 N.E. 585, 587 (N.Y. 1926))) (emphasis added) (footnote omitted).

248. *See, e.g.*, CAL. PENAL CODE § 25(a)-(b) (West 2010) (abolishing the diminished capacity defense and replacing the permissible ALI rule with the restrictive M'Naghten rule).

249. *See infra* Part III.B.2.

250. *See* John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 689-90 (2002) (calling the victims' movement "one of the most successful civil liberties movements");

rights, victims' rights ideology bears little relation to the small government principles most of its conservative supporters otherwise espouse.[251] Conservatives generally differentiate "real" rights from mere interests in welfare.[252] They endorse a Lockean analysis of rights as being appropriately about protections *against* government action ("negative rights"), not access *to* government benefits ("positive rights").[253] In this view, the right to private property is a real right, whereas with the right to education, the word "right" is a misnomer for a welfare scheme of government-funded education.[254] Of course, critics have long noted the incoherency of attempts to draw an objective line between rights protection and distribution.[255] For example, protecting property calls upon a vast legal regime to uphold the property owner's financial interests against competing interests.[256] Nonetheless, it is not necessary here to explode the difference between rights and distribution, because the victims'

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cf. Feminist War, *supra* note 33, at 776 (arguing that "[t]he group, 'victims,'" has not been "systematically subordinated by society").

251. *See supra* notes 21-28 and accompanying text.

252. *See, e.g.*, *supra* note 24; *see also Social Citizenship*, *supra* note 26, at 787 (asserting that conservatives characterize "rights to economic security as 'redistribution'" to render them "suspect").

253. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (MacPherson ed., Hackett Publ'g Co. 1980) (1690); *see also* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 122-34 (1969) (using this terminology).

254. *See supra* notes 250-52 and accompanying text; *see also* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195-96 (1989) (holding that the Due Process Clause "cannot fairly be extended to impose an affirmative obligation on the State"); Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 22-23 (1992) (noting the conservative belief that constitutions should incorporate rights to "freedom from state intervention, not rights which place positive obligations on the state"); *cf.* Leandro v. State, 488 S.E.2d 249 (N.C. 1997) (finding the North Carolina Constitution provides a substantive right to education).

255. *See* Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 389 n.7 (1984) (contending that "rights theory does not provide an objective, apolitical basis for decisionmaking"); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1058-59 (asserting that the legal decisions cannot be "rationally justified" by the "inherent logic of rights"); *supra* notes 47-48.

256. *See* Shelley v. Kraemer, 334 U.S. 1, 14 (1948) (holding that using state court processes to enforce racially restrictive covenants constitutes state action); *cf.* Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 361 (1980) (arguing that property is "merely a bundle of legal relations").

rights movement is not about negative rights and minimizing government.

Victims' rights rhetoric is about allowing victims to compel government action.[257] Victims' "rights" are actually demands that the state enable greater victim participation,[258] order financial compensation,[259] eliminate defense-friendly rules that impede convictions,[260] and ensure "adequate" punishment.[261] The last demand in this list particularly underscores the unusual way rights are described in the victims' rights movement. The victim has a "right" to the government punishing the defendant.[262] Victims' rights discourse calls on the government to engage with victims—to restore their dignity, ensure their satisfaction, and value them—in short, to give them their "due."[263] And as one commentator notes, people are "said to have 'their due'" when they "receive what they should according to the purpose and the criterion of a given distribution."[264]

Not all victim advocates support the model of benefitting the victim through defendant suffering. Restorative justice theorists

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257. Some victims' rights laws do protect alleged victims from invasive investigation techniques. *See* Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(a)(8) (2006) (mandating "respect for the victim's dignity and privacy"). However, "[b]ecause prosecutors undervalue victims' privacy," the victims' rights movement adopts an agenda "on which prosecutors and victims can agree: longer sentences and fewer procedural protections for defendants." Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1396 (2005).

258. *E.g.*, N.C. GEN. STAT. § 15A-832(f) (2003) (requiring the prosecution to obtain the victim's views about case disposition); ALA. R. EVID. 615(4) (exempting victims from the rule against witnesses); ARIZ. R. EVID. 615(4) (same); *see* John W. Stickels, *Victim Impact Evidence: The Victims' Right that Influences Criminal Trials*, 32 TEX. TECH L. REV. 231, 236-37 (2001) (noting that the purpose of Reagan's 1982 Task Force on Victims' Rights was to make victims "active participant[s] in the criminal justice system").

259. *See, e.g.*, COLO. REV. STAT. § 24-4.2-105 (2009).

260. *See* Daniel E. Lungren, *Victims and the Exclusionary Rule*, 19 HARV. J.L. & PUB. POL'Y 695, 697 (1996) (arguing that a system that prioritizes defendants' rights over victims' desire for retribution "has lost its sight and soul"); *supra* note 258.

261. *See* CAL. CONST. art. 1, § 28(a)(5) (giving victims the "right to expect that persons convicted of committing criminal acts are sufficiently punished in both the manner and the length of the sentences imposed").

262. *See id.* (granting victims "the right to expect that the punitive and deterrent effect of custodial sentences imposed by the courts will not be undercut or diminished by the granting of rights and privileges to prisoners"); Henderson, *supra* note 32, at 986 (observing that victims' rights policies "appear[] to assume that a victim has a right to a conviction").

263. *See* Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1016 (9th Cir. 2006) (stating that the CVRA puts defendants and victims "on the same footing" and restores victims' dignity); *see also supra* note 257.

264. Benson, *supra* note 102, at 536.

centralize the role of the victim but underscore the curative value of forgiveness, dialogue, and relationship building.[265] In the ideal restorative justice world, offenders and victims profit from participating in proceedings that promote healing.[266] Like social programs that seek to increase rather than divide "the pie," restorative justice seeks to increase pleasure for victims and offenders, not utilize the criminal law to distribute the scarce resource of pleasure between them. Unlike restorative justice supporters, the victims' rights movement maintains that victims receive closure through participating in proceedings as defendants' adversaries and seeing defendants punished.[267]

Victims' groups demand influence over the criminal process and elimination of defense-friendly substantive and procedural laws.[268] They indict current law for unfairly subordinating victims' interests to defendants' procedural protections and call for a more satisfactory balance.[269] One might assert that within the liberal framework, it

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265. *See generally* Erik Luna, *Introduction: The Utah Restorative Justice Conference*, 2003 UTAH L. REV. 1, 3-4 (discussing various definitions of restorative justice); Symposium, *Restorative Justice in Action*, 89 MARQ. L. REV. 247 (2005).

266. *See, e.g.*, Kathy Elton & Michelle M. Roybal, *Restoration, A Component of Justice*, 2003 UTAH L. REV. 43, 51 ("The restorative approach ... takes into account the needs of the offender."); Marsha B. Freeman, *Love Means Always Having To Say You're Sorry: Applying the Realities of Therapeutic Jurisprudence to Family Law*, 17 UCLA WOMEN'S L.J. 215, 226-27 (2008) (asserting that therapeutic programs benefit victims, offenders, and society).

267. *See, e.g.*, CAL. CONST. art. 1, § 28(a)(2) ("Victims of crime are entitled to have the criminal justice system view criminal acts as serious threats to the safety and welfare of the people of California."); VICTIMS IN THE WAR ON CRIME, *supra* note 34, at 167 (observing that restorative justice has "not been embraced by the [punitive] victims' rights movement"); Jennifer Gerarda Brown, *The Use of Mediation To Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1273-81 (1994) (critiquing restorative justice for undervaluing victims' desire to express anger); *supra* note 190.

268. *See, e.g.*, CAL. CONST. art. 1, § 28(f)(4) (specifying as a victim's right that "[a]ny prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence"); Russell P. Butler, *What Practitioners and Judges Need To Know Regarding Crime Victims' Participatory Rights in Federal Sentencing Proceedings*, 19 FED. SENT'G REP. 21, 24 (2006) (approving of a law that gives "victims the opportunity to review [presentence reports] and to argue for enhancements"); Andrew J. Karmen, *Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT. 157, 170 (1992) (noting that the movement seeks to "make it easier" to arrest suspects, order pretrial detention, change evidence rules to favor prosecution, and keep convicts in jail by limiting judicial review).

269. *See, e.g.*, 150 CONG. REC. 7296 (2004) (statement of Sen. Feinstein) (urging passage of the CVRA because "the scales of justice are out of balance"); PRESIDENT'S TASK FORCE ON

is acceptable for the government to deprive a person of something he obtained in a wrongful fashion.[270] Certainly, it is popular for victim supporters to claim that defendants do not deserve rights.[271] However, even if certain defendants are ultimately guilty, they cannot be said to have wrongfully obtained rights.

Instead, the liberal argument for reconfiguring the procedural balance must rely either on a "practical retribution" argument[272] that procedural rules privilege the guilty more than they protect the innocent[273] or the utilitarian claim that their costs outweigh their benefits.[274] In this view, changing the procedural balance is not distributionist but an independent retribution or utility-maximizing policy shift that only coincidentally benefits victims. This means, however, that defendants should have fewer procedural rights in all cases, not just ones involving victims. In turn, victims are material only if one assumes they have expertise on how to configure the system's procedural balance.[275] The rhetorical thrust of the victims' rights message is not so much that victims have expertise on the retributively appropriate procedural balance, but that changing the procedural balance vindicates victims' interests in healing

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VICTIMS OF CRIME, FINAL REPORT, *supra* note 247, at 114 (finding that the justice system lost its "essential balance" by disserving victims).

270. *See* Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1911 (2007) (observing the libertarian view that government protection only extends to "justly acquired" things).

271. *See* Doe v. Pataki, 940 F. Supp. 603, 622 n.15 (S.D.N.Y. 1996) (noting the view of New York Assembly members that "sex offenders did not deserve [constitutional] protection"); *Co-Opting Compassion*, *supra* note 241, at 582-83 (asserting that the movement contrasts guilty defendants who are "undeserving" of legal protection with victims who are "'deserving' of rights").

272. *See supra* notes 157, 219 and accompanying text.

273. *See* Akhil Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 644 (1996) (criticizing the exclusionary rule for giving guilty defendants "windfalls" but providing no remedy to innocents); Lawrence Crocker, *Can the Exclusionary Rule Be Saved?*, 84 J. CRIM. L. & CRIMINOLOGY 310, 326 n.57 (1993) (claiming that the exclusionary rule is a "distortion of retributive justice" because the guilty "go[] undenounced").

274. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 594 (2006) (refusing to apply the exclusionary rule to a knock-and-announce rule violation because its social costs outweigh its deterrence benefits).

275. *See* Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1434 (1993) (noting that victims assert expertise based on their experience); *cf.* CRIME VICTIMS' RIGHTS AMENDMENT REPORT, *supra* note 181, at 85 (quoting a bombing victim as stating, "we usually lack expertise and have a desire for vengeance that we claim is the need for justice").

through participation and punishment.[276] In sum, the victims' rights movement is deeply distributionist in its explicit message, the structure of its arguments, and the reforms it supports. The increasing focus on victims' interests combined with the prevalent trend of describing crime in victimhood terms[277] has had a profound effect on current criminal law's treatment of unintentional harm.

B. Distribution in Criminal Law Reform

Very few scholars deny the influence of the victims' rights movement on the current state of criminal law.[278] Today, the centrality of harm and decreased role of mens rea is not reflected merely in a couple of troubling criminal law quandaries. Rather, it is manifest in many areas of criminal law. Victim-focused ideology is pushing the law toward eliminating different culpability standards for juveniles[279] and the mentally ill.[280] Moreover, harm is currently an explicit basis for punishment in any case in which it has been produced.[281] Parts III.B.1-2 address two areas of sentencing law exemplary of the distributive theory of criminal law.

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276. *See supra* notes 257-64 and accompanying text.

277. *See* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 172 (1999) (noting the emphasis on "harms to society" during the war on drugs) (emphasis omitted).

278. *See* Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143, 144 (1999) [hereinafter *Past Darkly*] (calling victim impact evidence law the "most prominent" achievement of the victims' rights movement).

279. *See, e.g.*, 151 CONG. REC. 9151 (2005) (statement of Rep. Gingrey) (stating that "16- and 17-year-olds are making adult, criminal decisions that equal tragedy for our neighbors"). *See generally* Feld, *supra* note 90, at 1522-23 (discussing how "conservative politicians ... demonized young people"); Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CAL. L. REV. 1107 (2009).

280. *See* Michael Louis Corrado, *Responsibility and Control*, 34 HOFSTRA L. REV. 59, 61-62 (2005) (observing that between 1980 and 2004, fifteen states restricted the insanity defense); *Feminist War*, *supra* note 33, at 781 (remarking that today "schizophrenic and psychotic defendants ... are routinely characterized as culpable, autonomous agents of crime").

281. *See* Andrew Nash, Note, *Victims by Definition*, 85 WASH. U. L.R. 1419, 1436-37 (2008) (observing that the U.S. Sentencing Guidelines (USSG) further victims' rights by "calibrating" sentences to victim harm).

1. Sentencing Reform

In the sentencing context, courts have openly come to embrace the argument that unintentional and unforeseeable results constitute valid bases for punishment.[282] Many cases uphold strict liability sentencing provisions on the bare ground that "sentencing is different."[283] Some courts unflinchingly impose strict liability on the basis of textual statutory interpretation of sentencing guidelines,[284] whereas others rely on weak philosophical justifications.[285] As with the classic criminal law quandaries, retributivists and utilitarians struggle to find appropriate justifications for strict liability sentencing provisions.[286] This, combined with the structure of sentencing guidelines and the manner of their interpretation by courts, indicates that distributive sentiments lay at the heart of the sentencing shift.

The federal sentencing guideline revolution in the 1980s was perhaps the single most important development signaling the rise of harm and the decline of culpability in penal law.[287] The guidelines formally link sentence length to harm, requiring judges to add penalty points whenever harm-based sentencing factors are

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282. Some courts say that the sentencer should account for victim harm as it evolves. *See, e.g.*, Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1016-17 (9th Cir. 2006) (asserting that the sentencer must consider victims' conditions "at the time it makes its decision").

283. *See, e.g.*, United States v. Walton, 255 F.3d 437, 443 (7th Cir. 2001); United States v. Griffiths, 41 F.3d 844, 845 (2d Cir. 1994) ("A distinction is drawn between strict liability crimes and strict liability enhancements.").

284. *See, e.g.*, United States v. Mitchell, 366 F.3d 376, 379 (5th Cir. 2004); United States v. Williams, 49 F.3d 92, 93 (2d Cir. 1995) (basing a strict liability interpretation of USSG § 2K2.1(b)(4) on congressional intent).

285. *See* United States v. Richardson, 238 F.3d 837, 840 (7th Cir. 2001) (upholding a strict liability provision as a sentencing "bonus"); United States v. Mobley, 956 F.2d 450, 453 (3d Cir. 1992) (asserting that strict liability provisions comport with retributivism and utilitarianism because guidelines are "offense-based").

286. Some courts justify strict liability provisions on the ground that the defendant should have exercised super care. *See, e.g.*, *Griffiths*, 41 F.3d at 846 (asserting that a firearm recipient has "the burden of ensuring that the firearm is not stolen"); *Mobley*, 956 F.2d at 456. However, these individual crimes are not hazardous industrial crimes for which super care is appropriate. *See supra* note 50.

287. *See* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 69 (2003) (observing that while harm-based adjustments may increase a probation sentence to life, culpability-based adjustments "rarely contribute more than two to four levels").

present.[288] The guidelines' starkest indication of the centrality of harm is the "relevant conduct" provision, which holds defendants accountable for "*all* harm that resulted from" any "acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant."[289] In many sentencing provisions involving harm, including the relevant conduct provision, the guidelines are silent on intent.[290]

Through the creation of guidelines, policymakers hoped to reform what both Liberals and conservatives considered arbitrary and inconsistent sentencing practices.[291] The U.S. Sentencing Commission sought to distill the main factors affecting judicial decision making and produce a formula for applying those factors to individual cases.[292] Although its origins may seem neutral, the guideline revolution coincided with the conservative political movements discussed above and accordingly formalized higher than average sentences[293] and incorporated the concept that harm should dictate punishment level.[294] The result is that the federal guidelines did not produce uniform sentences but did make sentences uniformly longer.[295]

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288. The USSG make physical injury a mandatory sentencing factor in crimes such as "Unlawful Manufacturing, Importing, Exporting, or Trafficking," U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2009), and "Smuggling, Transporting, or Harboring an Unlawful Alien," *id.* § 2L1.1. For economic crimes, the USSG list financial harms without reference to intent, but make death and serious bodily injury relevant when defendants impose a "conscious or reckless risk." *See id.* §§ 2B1.1(b)(13)(A), 2B5.3(b)(5)(A).

289. *Id.* § 1B1.3(a)(1)-(4) (emphasis added).

290. *See id.*; *supra* note 288.

291. *See* Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1361-62 (1999) (book review) (noting the bipartisan support for the USSG).

292. *See* 28 U.S.C. § 991(b)(1)(B) (2006) (creating the Sentencing Commission to "provide certainty and fairness").

293. *See* Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting) (noting that the USSG significantly increased average sentences for white collar crimes); Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1128 (2008) (observing that the USSG "provide for more [departure-based] increases than decreases").

294. *See* Nash, *supra* note 281, at 1436 (observing that the USSG impose heavier penalties for crimes involving victim harm); *supra* notes 288-89; *infra* note 304.

295. *See* Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 246 (2005) (characterizing the USSG as "a one-way upward ratchet"); Robert G. Lawson, *Difficult Times in Kentucky Corrections—Aftershocks of a "Tough on Crime" Philosophy*, 93 KY. L.J. 305, 318 (2004) (asserting that the USSG "proved to be less about correcting disparities" than increasing sentence severity (quoting Albert Alschuler, *The Changing Purposes of Criminal Punishment:*

It is true that in the pre-guideline era, judges routinely based sentences on unintentional (and even unproven) harm for a variety of reasons. Judges likely reasoned that the harm was probably intentional,[296] but there is also the possibility they acted to serve victim interests.[297] The common law permitted judges to sentence defendants to anything within the statutory range for any constitutional reason, rendering sentencings more like cases in equity.[298] As the sole meter of fairness, the judge could mete out pure retribution, send a deterrent "message," or create a distributive balance between the parties.[299]

Rather than abandon equitable considerations when constructing sentencing law, the federal guidelines discarded some and formalized others. The guidelines prohibit consideration of equitable factors that make the defendant a good candidate for less punishment despite apparent culpability, like disadvantaged upbringing,[300] and relegate others, like age, health, and family circumstances, to the status of extraordinary downward departures.[301] It does ring of retributivism to hold that, absent an extraordinary circumstance,

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A Retrospective on the Past Century and Some Thoughts on the Next, 70 U. CHI. L. REV. 1, 9 (2003))).

296. *See* Judge J. Phil Gilbert, Plenary Session III: The Nature and Severity of Punishment for Economic Crimes, Symposium on Federal Sentencing Policy for Economic Crimes and New Technology Offenses (Oct. 12, 2000), *available at* http://www.ussc.gov/2000sympo/ePlenaryIII.pdf (stating that loss is the best measure of culpability).

297. *See* Henning, *supra* note 279, at 1143 ("Victims' reactions ... may elicit sympathy that motivates judges to impose harsher sentences.").

298. *See* Williams v. New York, 337 U.S. 241, 247 (1949) (holding that because judges have discretion in punishment, they should possess "the fullest information possible").

299. *See id.* at 247-48 (observing that the judge's goal may be retribution, reformation, or rehabilitation).

300. *See* 28 U.S.C. § 994(e) (2006) (noting "the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant"); U.S. SENTENCING GUIDELINES MANUAL § 5H1.12 (2009) (deeming irrelevant a defendant's "[l]ack of guidance as a youth" or "disadvantaged upbringing"); *id.* § 5H1.10 (prohibiting consideration of socioeconomic background).

301. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 ("Age (including youth) is not ordinarily relevant in determining whether a departure is warranted."); *id.* § 5H1.6 ("[F]amily ties and responsibilities are not ordinarily relevant in determining ... departure."); Hofer & Allenbaugh, *supra* note 287, at 70 (observing that "[e]conomic hardship, drug addiction, a history of physical or sexual abuse, or a lack of guidance as a youth—for many, highly relevant to assessing an offender's culpability—are ignored by the Guidelines"); Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1953-54 (1988) (asserting that the USSG virtually eliminated personal background as a sentencing consideration).

the culpable should be punished. But this particular embrace of retributivism served to increase punishment and was thus consistent with victims' interests.[302] Equitable considerations that militated toward more punishment despite nonculpability, like victim injury, were not rejected as inconsistent with retributivism.[303] They became mandatory sentencing factors.[304]

The federal sentencing guidelines explicitly distinguish their guiding principles from "the principles and limits of criminal liability."[305] Courts have accordingly interpreted guideline provisions that premise punishment on injury as strict liability provisions,[306] with some courts creating a presumption of strict liability.[307] Courts often justify such decisions as textually compelled and simply elide the question of the propriety of premising punishment on unintentional harm.[308] Of course, this interpretive move is itself telling. If courts adhered to the purely retributive concept that culpability must accompany punishment, they would likely interpret the guidelines as requiring some level of intent or foreseeability.[309] In

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302. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. 3(A) (making "intended loss," which includes "impossible" losses, the measure of harm only when greater than "actual loss"); Hessick, *supra* note 293, at 1157 (positing that the USSG consideration of prior bad acts but exclusion of prior good acts may be based on concern for victims).

303. *See* Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 613-14 (2003) (asserting that retributivism "does not offer any obvious rationale" for harm-based sentencing provisions).

304. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL §§ 2A2.2-4, 2A4.1, 2A5.1, 2A6.2, 2B3.1 (adding points for victim injury); *supra* notes 288-89. The USSG also contain a discretionary upward departure for "significant physical injury." U.S. SENTENCING GUIDELINES MANUAL § 5K2.2.

305. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 cmt. n.1.

306. *See, e.g.*, United States v. Pacheco, 489 F.3d 40, 47 (1st Cir. 2007) (approving an upward departure for "significant physical injury" although the defendant lacked intent); United States v. Mitchell, 366 F.3d 376, 379 (5th Cir. 2004) (holding robbery defendant strictly liable for victim injury); United States v. Carbajal, 290 F.3d 277, 283 (5th Cir. 2002) (holding a drug conspirator responsible for unforeseeable drug deaths); United States v. Reeder, 170 F.3d 93, 109-10 (1st Cir. 1999) (counting harm unintentionally caused by a third party).

307. *See* United States v. Richardson, 238 F.3d 837, 840 (7th Cir. 2007) ("Sentencing enhancements generally are imposed on the basis of strict liability."); *Mitchell*, 366 F.3d at 379; United States v. Lavender, 224 F.3d 939, 941 (9th Cir. 2000).

308. *See* United States v. Litchfield, 986 F.2d 21, 23 (2d Cir. 1993) (imposing strict liability because a provision "did not contain a knowledge requirement"); *supra* note 284 and accompanying text.

309. *See* Richard Singer, *The Model Penal Code and ~~Three~~ Two (Possibly Only One) Ways Courts Avoid Mens Rea*, 4 BUFF. CRIM. L. REV. 139, 146-57 (2000) (noting that courts impose

the 2005 case *United States v. Booker*, the Supreme Court held that the federal guidelines must be discretionary rather than mandatory, but this did not diminish the importance of harm in sentencing.[310] The Court struck down mandatory guidelines, not because they premised punishment on unintentional harm, but because they violated the right to a jury.[311] Moreover, post-*Booker* law continues to bind judges to the guidelines to some degree,[312] and many judges simply elect to follow them.[313]

2. Victim Impact Evidence Law

Perhaps the doctrine that most clearly reflects the new distributive paradigm in criminal law is the law of victim impact evidence. In the 1991 case *Payne v. Tennessee*,[314] the Supreme Court reversed prior precedent[315] and held that prosecutors may present and comment on victim impact evidence during death sentencing proceedings.[316] Victim impact evidence is comprised of live witness testimony,[317] documentary evidence,[318] and even multimedia presentations[319] that describe the decedent's life and the impact of the death on surviving victims.[320] Prior Supreme Court precedent ruled

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strict liability on the basis of textual interpretation although the text is ambiguous and congressional history does not clearly support strict liability).

310. *See* 543 U.S. 220, 226, 244 (2005).

311. *See id.* at 226, 229, 233-34 (stating that the USSG would be permissible if advisory).

312. *See* Gall v. United States, 552 U.S. 38, 49-51 (2007) (admonishing district courts to begin with the guideline calculation and stating that appellate courts may presume the reasonableness of guideline sentences).

313. *See* Ellen S. Podgor, *Throwing Away the Key*, 116 YALE L.J. POCKET PART 279, 280 (2007), http://thepocketpart.org/images/pdfs/104.pdf ("The statistics show that judges usually stick to the sentences provided in the Guideline grid.").

314. 501 U.S. 808 (1991).

315. South Carolina v. Gathers, 490 U.S. 805, 811-12 (1989); Booth v. Maryland, 482 U.S. 496, 504 (1987) (barring use of impact evidence at death sentencing).

316. *Payne*, 501 U.S. at 825.

317. *See id.* at 814 (decedent's mother's testimony).

318. *See* Coddington v. State, 142 P.3d 437, 453 (Okla. Crim. App. 2006) (pre-death photo of decedent).

319. *See* People v. Kelly, 171 P.3d 548, 567-68, 572 (Cal. 2008) (video montage of photos and video clips of decedent's life set to music). The video is available on the Supreme Court's website, at http://www.supremecourtus.gov/media/media.aspx.

320. *See Past Darkly*, *supra* note 278, at 156 (observing that impact evidence relates "to the personal characteristics of the victim and the 'emotional impact of the murder on the victim's family'" (quoting *Payne*, 501 U.S. at 827)).

the admission of such evidence unconstitutional because it impermissibly allowed the jury to base death sentences on arbitrary factors unrelated to defendant culpability.[321] Much of Justice Rehnquist's majority opinion in *Payne* reflects the notion, discussed above, that harm counts during sentencing because sentencing is different.[322] The Court stated, "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities."[323] The Court responded to the contention that sentencing should be about culpability, not by linking unintentional harm with culpability, but by pointing to the felony murder doctrine and the attempt-crime divide as evidence that criminal punishment does not invariably require culpability.[324]

The majority also grappled with the claim that impact evidence invites juries to base sentences on the victims' perceived worth.[325] In response, Justice Rehnquist defended impact evidence as "designed to show instead *each* victim's uniqueness as an individual human being, whatever the jury might think the loss to the community resulting from his death might be."[326] He went on to say that the significance of the victim impact statement is to demonstrate that, regardless of personal failings or achievements, the victim is "a murdered human being."[327] Of course, the natural retort is that the jury does not need impact evidence to know that a murder victim is "a murdered human being." Moreover, if "uniqueness" is not about worth, then every victim is equally worthy and evidence of uniqueness is irrelevant.[328] Thus, one is left to wonder—if impact evidence

321. *See* Booth v. Maryland, 482 U.S. 496, 504 (1987) (holding that victim impact "may be wholly unrelated to the blameworthiness of a particular defendant").

322. *See Payne*, 501 U.S. at 820.

323. *Id.* at 825.

324. *Id.* at 819. The Court stated that "two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm." *Id.*

325. *Id.* at 823 (noting *Booth*'s concern that juries punish more harshly when "victims were assets to their community"); *cf.* Gill v. State, 300 S.W.3d 225, 231, 233 (Mo. 2009) (holding capital defendant's counsel ineffective for failing to introduce evidence of victim's possession of pornography).

326. *Payne*, 501 U.S. at 823 (internal quotation marks omitted).

327. *Id.* at 824.

328. *See id.* at 866 (Stevens, J., dissenting) ("The fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support.").

does not relate to the defendant's culpability or the victim's worth, what is the point of its admission?

The answer becomes clear when looking at the case from the perspective of the victims' rights movement. Victims' rights supporters lauded *Payne* as a great victory[329] for two primary reasons: First, the very process of expressing rage and pain is claimed to bring closure to surviving family members.[330] Second, the evidence is undeniably compelling, and its introduction is likely to increase the chances of a death sentence, which victims presumptively desire.[331]

Turning to the first, Justice O'Connor's concurrence underscores the process-based closure rationale. She opined that by admitting impact statements, courts could "give back" to victims.[332] Closure through participation is a distributive notion because it dictates the reconfiguration of procedures to secure victims' psychic benefits at the cost of defendants' interests.[333] Turning to the second, although some have argued that victim participation does not necessarily cause detriment to defendants,[334] the victims' rights movement and victim impact law generally assume an adversarial relationship.[335]

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329. *See id.* at 867 (noting that given the popularity of the victims' rights movement, "today's decision will be greeted with enthusiasm"); Jose Felipe Anderson, *When the Wall Has Fallen: Decades of Failure in the Supervision of Capital Juries*, 26 OHIO N.U. L. REV. 741, 768 (2000) (observing that victim groups "heralded" *Payne* as a victory).

330. *See* Joseph L. Hoffmann, *Revenge or Mercy? Some Thoughts About Survivor Opinion Evidence in Death Penalty Cases*, 88 CORNELL L. REV. 530, 537 (2003) (calling "the potential therapeutic effect" the "best argument" for impact evidence); *Past Darkly*, *supra* note 278, at 150-51 (observing the "asserted psychological value to survivors of having a chance to testify (and emote) about their loss").

331. *See Confronting Evil*, *supra* note 241, at 759 (commenting that impact evidence gives prosecutors a "strategic litigation advantage"); Minow, *supra* note 275, at 1416 (noting the "calculated judgment" that impact evidence causes sentencers to "sentence more stringently").

332. *Payne*, 501 U.S. at 832 (O'Connor, J., concurring).

333. *See supra* notes 268-69 and accompanying text (distribution and procedure).

334. *See, e.g.*, Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 636 (2009) (rejecting that impact evidence is "a ploy to more harshly punish defendants").

335. *See* Martha Minow, *Keynote Address: Forgiveness and the Law*, 27 FORDHAM URB. L.J. 1394, 1400 (2000) (contending that the purpose of impact evidence is "to provide vivid statements of pain and harm caused by horrific acts, not to permit forgiveness"); Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort To Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1710 (1997) (asserting the victims' movement considers "[m]ercy to the guilty [as] cruelty to the innocent" (quoting SMITH, *supra* note 187, at 88)).

While admitting victims' statements of anger and anguish, courts continue to prohibit victims from advocating against the death penalty.[336] As one expert opines, "[N]either the victims' rights community nor the Supreme Court generates or tolerates narratives in which victims' families can exercise mercy, kindness, or forgiveness towards defendants."[337]

The most obvious consequence of the admission of impact evidence is that it "encourage[s] jurors to decide in favor of death."[338] The majority opinion appears to endorse this outcome in its reciprocal fairness argument.[339] The Court asserted that if defendants may present mitigating evidence to avoid a death sentence, it is only "fair" that prosecutors be able to present impact evidence in favor of a death sentence.[340] In his dissent, Justice Stevens responded that to say "fairness requires that the State be allowed to respond with similar evidence about the *victim* ... is a classic non sequitur: The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or a mitigating circumstance."[341] As a matter of retributive justice, it makes little sense to balance the evidentiary scales between defendant and victim.[342]

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336. *E.g.*, Robison v. Maynard, 943 F.2d 1216, 1217 (10th Cir. 1991) (explaining that *Payne* does not require admission of "the opinion of a victim's family member that the death penalty should not be invoked"); *see* Baird & McGinn, *supra* note 241, at 468 (contending that antideath penalty victims' "desire[s] to affect the prosecutorial process is ignored").

337. Elizabeth E. Joh, *Narrating Pain: The Problem with Victim Impact Statements*, 10 S. CAL. INTERDISC. L.J. 17, 28 (2000).

338. Payne v. Tennessee, 501 U.S. 808, 856 (1991) (Stevens, J., dissenting); *see also* Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 135, 141 (Peter Brooks & Paul Gewirtz eds., 1996) (commenting that impact evidence "almost always" increases the chance of a death sentence).

339. *See Payne*, 501 U.S. at 822 (opining that *Booth* "unfairly weighted the scales in a capital trial").

340. *Id.* (lamenting that despite the lack of limits on mitigating evidence, the state may not offer "'a quick glimpse of the life' which a defendant 'chose to extinguish'" (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, J., dissenting))).

341. *Id.* at 859 (Stevens, J., dissenting); *see* Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants To Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility*, 57 HASTINGS L.J. 693, 737 n.148 (2006) (opining that "'moral force' can only be the sentiments ... that impel the desire to punish with death").

342. *Payne*, 501 U.S. at 860 (Stevens, J., dissenting) (observing that there is an evidentiary balance because the prosecution may present aggravating, and rebut mitigating, evidence).

As a matter of creating the appropriate distributive balance between the victims' need for closure and the harm of a death sentence, it makes perfect sense.[343] The majority candidly endorses admitting impact evidence in order to allow the prosecution to capitalize on "the full moral force of its evidence"[344] and remind the jury that victims "are, or were, living human beings, with something to be gained or lost from the jury's verdict."[345] Consequently, *Payne* is directly responsive to victims' interest in participation and punishment. So much is recognized by Justice Scalia's statement that *Payne*'s rejection of the notion that "a crime's unanticipated consequences must be deemed 'irrelevant'" reflects "a public sense of justice keen enough that it has found voice in a nationwide 'victims' rights' movement."[346]

Post-case developments underscore that *Payne* is about the distribution of pain and participatory closure, rather than an opinion based on the unanalyzed instinct that "harm matters" or the presupposition that defendants foresee a range of harms.[347] Today, prosecutors seeking the death penalty do not just present the arguably foreseeable effects of death on family members; they introduce evidence regarding community opinion,[348] highly inflammatory descriptions of decompositions and burials,[349] and even carefully crafted videos portraying the victim from childhood through adulthood.[350] The undertone of all these strategies is to

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343. *See id.* at 863 (asserting that *Payne* allows sentencers to make "ad hoc" decisions).

344. *Id.* at 825 (majority opinion).

345. *Id.* at 826; *see also* Booth v. Maryland, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting) (contending that sentences may be based on "human suffering the defendant has produced" and *"not* moral guilt alone").

346. *Payne*, 501 U.S. at 834 (Scalia, J., concurring); *see* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 405 (1996) [hereinafter *Empathy*] ("Victim impact statements are billed as encouraging empathy for the victim.").

347. *Payne*, 501 U.S. at 838 (Souter, J., concurring) (asserting that the "foreseeability of the killing's consequences imbues them with direct moral relevance"); *see also* John H. Blume, *Ten Years of* Payne*: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 267 (2003) (remarking that almost all death penalty jurisdictions authorize impact evidence and argument).

348. *See Past Darkly*, *supra* note 278, at 158 n.96 (citing cases admitting evidence of victims' standing in the community).

349. *See id.* at 165 (discussing a case in which the court admitted evidence "that the children were buried in the same caskets as their mothers").

350. *See, e.g.*, People v. Kelly, 171 P.3d 548, 567-68, 572 (Cal. 2008); *supra* note 319 and accompanying text. *See generally* Kelly v. California, 129 S. Ct. 564, 566-67 (2008) (Stevens,

remind the jury that it can vindicate victims' interests (both living and dead) by imposing the death penalty.[351] Exemplary is one case in which the decedent's family was permitted to implore the jury to "[r]enew our faith in the criminal justice system and bring a phase of closure to this ongoing nightmare that fills our lives."[352] Indeed, at least one scholar has recognized that *Payne* has a progressive valence because it introduces personal narrative into the legal process and encourages contextual, equitable, case-by-case decision making.[353]

In conclusion, conservative tough-on-crime ideology ushered in an era in American penal law and policy in which victim harm plays a central role. In popular politics as well as case doctrine, victims' interests now stand alongside and even trump concerns over retributive fault and social utility. Despite being couched in terms of liberal rights, the change in the criminal law is at its core distributionist. Increasingly, victims' rights advocates and other legal actors treat sentencing as a means to balance the amount of retributive or utilitarian punishment due to the criminal with the amount of closure demanded by her victim. As noted in the Introduction, however, the dominant political ideology in the late twentieth century was decidedly antidistributive. In tort law, distributive strict liability rules take a clear back seat to negligence and claims of moral fault and economic efficiency. In popular politics, condemnation of redistribution and "socialism" resonates with the public. Part IV posits an explanation for the rise of distributive reasoning in criminal law despite its profound unpopularity in other spheres.

J., commenting on the denial of *certiorari*) (noting that courts have admitted "testimony from friends, neighbors, and co-workers in the form of poems, photographs, hand-crafted items, and—as occurred in these cases—multimedia video presentations"); Blume, *supra* note 347, at 268 (observing the "overwhelming trend" of "unfettered admission" of impact evidence); *Past Darkly*, *supra* note 278 (analyzing a variety of impact evidence).

351. *See Confronting Evil*, *supra* note 241, at 735-36 (discussing a sentencing in which the prosecutor called impact evidence the "'most important'" aggravating factor, which helps jurors "'understand the pain, the horror and the agony'" suffered by victims' families (quoting Trial Transcript at 6677-78, United States v. Bin Laden, No. S(7) 98 CR 1023 (S.D.N.Y. May 30, 2001))).

352. People v. Williams, 692 N.E.2d 1109, 1124 (Ill. 1998).

353. Gewirtz, *supra* note 338, at 142-43; *see Empathy*, *supra* note 346, at 392 (discussing the claim that impact statements possess "progressive, pragmatic, and feminist" attributes).

IV. POWER, POLITICS, AND DISTRIBUTION'S FATE

This Part explores reasons for distribution's proliferation in criminal law and simultaneous decline in popular politics and private law.[354] Today, many of the same people who philosophically reject wealth redistribution and vocally call for tort reform to stamp out its few distributive areas also support government-imposed harsh punishment of offenders to "make victims whole."[355] There is a simple explanation for this apparent contradiction: power. In the late 1970s and 1980s, recessionary concerns, rapid urbanization, public dissatisfaction with Supreme Court progressivism, and other cultural and political factors combined to create a hospitable environment in which hyper-individualist antidistributionist sentiments could flourish.[356] This environment shaped political discourse on private law and criminal justice, which in turn served to reshape the social context.[357] The result is a cyclical relationship between popular cultural beliefs and dominant political

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354. *See* White, *supra* note 29, at 809 (observing retrenchment of the social welfare system and growth of the criminal system).

355. The 1994 Republican "Contract with America" consisted of a package of ten bills, including:

> 2. The Taking Back Our Streets Act: An anticrime package including stronger truth-in-sentencing, "good faith" exclusionary rule exemptions, [and] effective death penalty provisions .... 3. The Personal Responsibility Act: Discourage illegitimacy and teen pregnancy by prohibiting welfare to minor mothers and denying increased AFDC for additional children while on welfare, cut spending for welfare programs, and enact a tough two-years-and-out provision with work requirements to promote individual responsibility .... [and] 9. The Common Sense Legal Reform Act: "Loser pays" laws, reasonable limits on punitive damages and reform of product liability laws to stem the endless tide of litigation.

The Republican Contract with America, http://www.house.gov/house/Contract/CONTRACT.html (last visited Sept. 30, 2010) [hereinafter Contract with America]. *See* Anne E. Kornblut, *Revisiting '00 Part of Strategy for Bush in '04*, BOSTON GLOBE, May 23, 2004, at A1 (reporting that of George W. Bush's "four-issue strategy" in the 1994 governor campaign, three were crime, welfare, and tort reform).

356. *See* CHARLES W. DUNN & J. DAVID WOODARD, THE CONSERVATIVE TRADITION IN AMERICA 10 (1996) ("While supply-side economics occupied the headlines [in the 1980s], the social agenda galvanized individual allegiances to Reagan and the Republican Party."); *supra* notes 23-30 and accompanying text.

357. *See* White, *supra* note 29, at 819-26 (observing that market conditions sustain carceral policies, which in turn reinforce neoliberal structure).

ideology and policy.[358] In this setting, policymakers seek to both create law that reflects pre-existing sentiments and configure law to entrench values that undergird their political platforms.[359] Distributionist criminal law is currently popular because enacting policies in the name of crime victims serves distinct political interests and reflects and reinforces the existing social structure.[360]

In the tort context, right-leaning ideology rejects strict liability rules that facilitate wealth transfer to injured workers, environmental victims, and others.[361] For the past few decades, tort reform, that is, changing the law to minimize tort litigation, has been one of the mainstays of the political right.[362] Reigning in tort liability serves corporate, moneyed interests,[363] and its costs are borne by plaintiffs who, unless well organized, have little power.[364] That tort victims hold little political sway is evidenced by the fact that it is the plaintiff's bar, not victims' groups, who constitute the most powerful

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358. *See* Kerry Dunn & Paul J. Kaplan, *The Ironies of Helping: Social Interventions and Executable Subjects*, 43 LAW & SOC'Y REV. 337, 344-45 (2009) (remarking that individualism undergirds tort reform ideology and tort reform reinforces "hegemonic individualism").

359. *See Rape and Feminism*, *supra* note 29, at 621 (linking the current "discourse of criminality" to "efforts to entrench neoliberal individualist values"); *supra* notes 230-40 and accompanying text (popularity of punitive policies).

360. *See infra* notes 367-70 and accompanying text.

361. *See* William A. Dreier, *Beyond Workers' Compensation: Workplace Comparative Fault and Third-Party Claims*, 20 GA. ST. U. L. REV. 459, 464-65 (2003) (noting that "conservative commentators favor a negligence standard"). One might counter that strict products liability flourished in the conservative 1990s. However, experts observe a current "counterrevolution" where product liability's "paradigm of social welfare has been turned into an indictment of tort law and a justification for abandoning the system." Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 716 (1993). Others trace this exceptional phenomenon to "the very presence of the Third Restatement." Ellen Wertheimer, *The Biter Bit: Unknowable Dangers, the Third Restatement, and the Reinstatement of Liability Without Fault*, 70 BROOK. L. REV. 889, 936-37 (2005).

362. *See* Adam Feit, *Tort Reform, One State at a Time: Recent Developments in Class Actions and Complex Litigation in New York, Illinois, Texas, and Florida*, 41 LOY. L.A. L. REV. 899, 899 (2008) (describing tort reform and tracing its ideology to corporate groups in the 1970s); *supra* note 355.

363. *See* F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 472-73 (2006) (linking tort reform to lobbying efforts of the American Tort Reform Association, which includes powerful physician, manufacturing, and insurance groups); Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647, 656 (2008) (noting the claim that tort reform is "a product of powerful corporate interest groups and a campaign of disinformation").

364. *See* Richard L. Abel, *How the Plaintiffs' Bar Bars Plaintiffs*, 51 N.Y.L. SCH. L. REV. 345, 375 (2006-07) (asserting that despite the power of plaintiffs' lawyers, victims "cannot organize themselves into a force for change").

opponents of tort reform.[365] Tort reform's rhetorical strategy includes exploiting popular antidistribution ideology and asserting that government should not force corporations to give handouts to plaintiffs who should have been more careful.[366]

In the criminal law context, punitive policies and rhetoric are powerful political weapons.[367] For policymakers, being generally tough on crime perpetuates social conditions that only inure to their political benefit. Not only do victim-friendly provisions garner popular support, but when criminal law is strengthened, the group that loses is a subclass with very little political power.[368] Supporting crime control initiatives is especially rewarding for conservative politicians because increasing felony convictions leads to the disenfranchisement of those who, if they chose to vote, would likely vote for progressive candidates and policies.[369] Substantively, criminal rules serve to entrench the prevailing class and wealth structure.[370] Because strengthening the carceral state has political benefits, politicians abandon the minimal government, hyper-individualism, antidistribution rhetoric in their defense of crime control. Instead, they assert that serving crime victims' needs is indispensible to the fair, moral, and compassionate administration of justice.[371] Antidistribution sentiment becomes relevant only when

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365. *See id.*; *cf.* Feit, *supra* note 362, at 899 (observing that plaintiffs' lawyers and consumer groups have had "mixed success" at countering tort reform).

366. *See, e.g.*, *Session Three: Discussion of Paper by George L. Priest*, 10 CARDOZO L. REV. 2329, 2337 (1989) (statement of George L. Priest) (criticizing products liability law for "presum[ing] consumers are powerless to avoid the injury"); *see also* Dunn & Kaplan, *supra* note 358, at 344 (contending that tort reformers and the media "endorse 'individual responsibility' as a bedrock feature of American culture").

367. *See supra* notes 230-40 and accompanying text.

368. *See* Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 J. LEGAL STUD. 85, 102 (2004) (noting the argument that "legislators know that felons rarely vote and hence the cost of appearing 'tough' on crime is low"); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 794-95, 806-07 (2006).

369. Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1157 (2004) (noting that felony laws disenfranchise "more black men ... than were actually enfranchised by the passage of the Fifteenth Amendment" and citing a study that had Florida ex-felons voted in 2000, Al Gore would have won by more than 31,000 votes).

370. *See* Kelman, *supra* note 46, at 670-71; *see also* White, *supra* note 29, at 789 (contending that criminal law "reflect[s] and advance[s] the institutional and ideological interests of economic elites").

371. *See, e.g.*, 151 CONG. REC. 18,084 (2005) (statement of Sen. Craig) (stating that victims "deserve our support and compassion, not to mention our insistence on an aggressive law

opposing defense-friendly provisions that seek to insert defendant background into the criminal law equation.[372] When such policies are at stake, tough-on-crime advocates return to the mantra that law is about bright-line determinations of fault and not distributive fairness.[373]

However, one might find curious society's support of the counter-intuitive notion that it is unjust to hold faultless corporations liable for money damages[374] but fair to subject faultless human beings to incarceration.[375] Society's views make more sense, however, if one understands them as a function of specific politicized characterizations of those that reap the benefits and bear the burdens of distribution in tort and criminal law. Social science confirms time and time again that individuals' assessments of fault and harm are largely conditioned by the level of identification they feel with alleged injurers and victims.[376] Viewing the suffering of another human being may produce in an observer the desire to give that person relief, but it also may produce anger (if the observer blames the person for his own suffering) or pleasure (if the observer believes

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enforcement"); 151 CONG. REC. 6510 (2005) (statement of Rep. Poe) ("It needs to be reinforced as a culture that ... we will be compassionate toward [victims], and we will make sure that criminals who commit crimes against them will pay."); *see also supra* notes 40-41 and accompanying text (fairness argument).

372. *See, e.g.*, Remarks at the Annual Conference of the National Sheriff's Association in Hartford, Connecticut, 1 PUB. PAPERS 884, 885 (June 20, 1984), *available at* http://www.reagan.utexas.edu/archives/speeches/publicpapers.html (asserting that the "liberal" argument that crimes are "caused by a lack of material goods, an underprivileged background, or poor socioeconomic conditions" created "a class of repeat offenders and career criminals who thought they had the right to victimize").

373. *See* Dunn & Kaplan, *supra* note 358, at 343 (remarking that "individualism manifests" in criminal law rules that deem a defendant's social background irrelevant); *Co-Opting Compassion, supra* note 241, at 588 (observing the prevalent view that introducing background is "a manipulative ploy by wrongdoers to avoid individual moral responsibility").

374. *See* 141 CONG. REC. 11,449 (1995) (statement of Sen. Kyl) (calling for tort reform to "address this 'lottery mentality' of awarding arbitrary ... damages").

375. *See* Simons, *supra* note 148, at 1098 (maintaining it would be unthinkable to hold a tortfeasor "who save[d] his boat at the expense of a dock in the midst of a storm" criminally responsible). However, today "punishing harm contributes to the legitimacy of the criminal justice system." *Significance of Causing Harm, supra* note 10, at 737.

376. *See* Robert E. Lane, *Self-Reliance and Empathy: The Enemies of Poverty—and of the Poor*, 22 POL. PSYCHOL. 473, 478 (2001) (observing that "[t]he explanation of a victim's plight ... influence[s] the observer's desire to help"). By identification, I mean both empathy, which involves "imagining oneself to be in the position of the other," and sympathy, which "involves being flooded with emotion" on behalf of another. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987) [hereinafter *Legality and Empathy*].

the person deserves suffering).[377] A crime victim's suffering triggers society's desire to provide relief and, in turn, to demand government intervention.[378] The desire to improve the conditions of the crime victim's existence effectively trumps inconsistent retributive and utilitarian concerns.[379]

Society's empathetic tendencies, and hence society's understanding of victimhood and suffering, do not exist in a vacuum, but are formulated in complicated ways by cultural narratives, social consciousness, politics, and law.[380] Political scientist Robert Lane identified two particular factors that affect observers' assessments of individuals' claims of victimhood: (1) the individual's level of responsibility,[381] and (2) the extent to which the observer perceives the individual as similar to her.[382] Antiwelfare groups have long employed the strategy of exploiting racial animus and demonizing or other-izing individuals who benefit from welfare programs to defeat distributive policies.[383] Racialized narratives conjure up "stereotypes assigned to blacks, namely being 'lazy, criminal, [and] irresponsible,'"[384] and thus serve the dual purpose of establishing welfare recipients as dissimilar and undeserving. These narratives

377. *See* Lane, *supra* note 376, at 478.

378. *See supra* text accompanying note 5.

379. *See supra* notes 202, 287-95 and accompanying text. The question is why, given that "[a]s potential injurers, we each have a fundamental interest in liberty," and "[a]s potential victims, we each have a fundamental interest in security," society values only tortfeasors' liberty. *See* Keating, *supra* note 53, at 196.

380. *See* Benjamin Fleury-Steiner, *Narratives of the Death Sentence: Toward a Theory of Legal Narrativity*, 36 LAW & SOC'Y REV. 549, 552 (2002) (observing "how morality is constructed at the intersections of experiential, institutional, and historically specific identities").

381. Lane, *supra* note 376, at 475-80.

382. *Id.* at 483-84; *see also Empathy*, *supra* note 346, at 399 ("We feel empathy most easily toward those who are like us."); Fleury-Steiner, *supra* note 380, at 560 (reporting that death sentencing jurors "emplot[ ] stories of their own experiences" when "evaluating the defendant's responsibility").

383. *See* Martin Gilens, *"Race Coding" and White Opposition to Welfare*, 90 AM. POL. SCI. REV. 593, 602 (1996) (observing that "[a]lthough blacks represent only 37 percent of welfare recipients, perceptions of black welfare mothers dominate whites' evaluations of welfare"); *"Welfare Queen" Becomes Issue in Reagan Campaign*, N.Y. TIMES, Feb. 15, 1976, at 51 (discussing Reagan's publicizing of a black female who engaged in welfare fraud to attack the welfare system).

384. Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 795 (2007) (alteration in original). She further notes that "[g]overnmental assistance is not treated as welfare when the recipients are considered to be blameless," but blacks are not "viewed as blameless." *Id.*

are so powerful that they move people not only to vote against the general social interest, but also to vote against their own interests.[385] The constructed image of "lazy" black welfare "queens," for example, moved many poor white Americans to vote for reforms that cut their own benefits as well.[386]

The use of stereotype and caricature is not just a conservative strategy.[387] The current debate over healthcare reform often manifests as a battle of narratives. Democrats seek to paint the insurance industry as a monstrous conglomeration of evil, greedy corporations that gleefully inflicts pain on ordinary Americans.[388] The conservative counterattack, however, has not largely been to defend insurance companies. The most visible criticism has not even been the expected argument about healthcare quality. Rather, healthcare reform opponents have focused on a subsection of potential recipients who are foreign or racially other and therefore undeserving of healthcare.[389] Accordingly, one of the most prevalent assaults on healthcare reform is that "illegal aliens" will benefit.[390]

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385. *See Thinking with Wolves*, *supra* note 25, at 1292-93 (explaining that conservatives' exploitation of cultural insecurity explains why "non-wealthy white American voters lend support to [a] political agenda that advocates spending more money incarcerating people of color than securing most Americans' access to high-quality public education").

386. *See* Girardeau A. Spann, *The Conscience of a Court*, 63 U. MIAMI L. REV. 431, 433 (2009) (contending that "tacit appeals to racial prejudice" may "convince ordinary citizens to resist redistributive efforts that would have benefited whites").

387. *See* Hubbard, *supra* note 363, at 481 (observing that "[t]he political opponents of tort reform have adopted methods similar to those of proponents," including "arguing in terms of 'rights of victims'").

388. *See, e.g.*, 155 CONG. REC. S9070, S9072 (daily ed. Aug. 7, 2009) (statement of Sen. Brown) (reading into the record letters from uninsured individuals and quoting a doctor who stated, "I see the abuses [patients] suffer at the hands of the greedy insurance companies"); 155 CONG. REC. S7809, S7810 (daily ed. July 22, 2009) (statement of Sen. Reid) (stating that voting against reform supports "greedy insurance companies").

389. *See, e.g.*, 155 CONG. REC. H13,257, H13,263 (daily ed. Nov. 18, 2009) (statement of Rep. Akin) (asserting that "you've got illegal immigrants that come to this country and they're going to get health care"); 155 CONG. REC. H12,367 (daily ed. Nov. 5, 2009) (statement of Rep. Poe) ("Once again, Americans will continue to pay for illegals who disrespect the law.").

390. *See* Mark Murray, *NBC Poll: Doubts over Obama Health Plan: Misperceptions Abound on President's Health Overhaul Initiative*, MSNBC.COM, Aug. 18, 2009, http://www.msnbc.msn.com/id/32464936/ (reporting a poll in which a majority of respondents expressed concerns that illegal immigrants could access healthcare); Tony Reid, *Area Residents Fed Up with Illegal Immigration Take It to the Street*, HERALD-REVIEW.COM, Nov. 16, 2009, http://www.herald-review.com/news/local/article_cf5d1816-d2b0-11de-afb9-001cc4c002e0.html (reporting on a protestor who stated that "he doesn't believe the president" and thinks reform "will give illegal immigrants another way to drain American tax dollars"). It was this issue that

This charge is so powerful that Democrats have underscored its substantive validity by swearing that undocumented immigrants will not be covered.[391]

Given the factors Lane highlights, one might expect people to identify with innocent injured tort victims. Tort reformers certainly publicize the widespread "problem" of juries acting on sympathy and awarding wildly high damage awards when "evil" corporations injure "little" plaintiffs,[392] although whether this actually occurs is a matter of empirical dispute.[393] Reformers accordingly attack depictions of corporations as evildoers and the tort plaintiff as the innocent everyman and offer a separate account.[394] They construct and publicize a script involving lazy, careless tort complainants and their greedy lawyers exploiting the deep pockets of socially utile corporations.[395] Although corporations rarely play heroes in even tort reform narratives,[396] they are portrayed as easily exploitable, fragile, and indispensible to economic growth and security.[397] Recall

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compelled Republican Congressman Joe Wilson to shout "You lie!" during President Obama's address to Congress. *See Joe Wilson Says Outburst to Obama Speech "Spontaneous,"* CNN.COM, Sept. 10, 2009, http://edition.cnn.com/2009/POLITICS/09/10/obama.heckled.speech/index.html [hereinafter *Outburst to Obama Speech*].

391. *See Outburst to Obama Speech*, *supra* note 390; *see also* Remarks by the President to a Joint Session of Congress on Health Care Reform, DAILY COMP. PRES. DOC. 1, 4 (Sept. 9, 2009), *available at* http://www.whitehouse.gov/the_press_office/remarks-by-the-president-to-a-joint-session-of-congress-on-health-care/ (stating that "[t]he reforms I'm proposing would not apply to those who are here illegally").

392. *See* NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS 3 (1995) (asserting that for tort reformers, "juries are the apotheosis of irrationality, incompetence, and injustice").

393. *See* Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 964-76 (2007) (disputing the claim that punitive damages have been increasing in frequency, amount, and randomness); *see also* VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 36 (2000) (engaging in a qualitative study and finding that "jurors often doubt plaintiffs' claims").

394. *See infra* notes 396-401 and accompanying text.

395. *See, e.g.*, 150 CONG. REC. 20,119 (2004) (statement of Rep. Norwood) (warning about "judicial hellhole[s]," "frivolous civil lawsuits," and "greedy trial lawyers").

396. Tort reformers have an easier time painting doctor-defendants as innocents. *See* 141 CONG. REC. 11,449 (1995) (statement of Sen. Kyl) (defending medical malpractice reforms and mentioning the "heroic service of the doctors in the aftermath of the bombing in Oklahoma City").

397. *See, e.g.*, *The Common Sense Legal Reforms Act*, *in* Contract with America, *supra* note 355 (stating that the "dramatic growth in litigation carries high costs for the U.S. economy").

the famed McDonald's hot coffee lawsuit,[398] which became the iconic example of all that is wrong with tort litigation, and its plaintiff, Stella Liebeck, the archetype of a phony victim.[399] The case continues to shape views about tort victims even though debunking facts have demonstrated that Ms. Liebeck was far from a money-hungry swindler.[400] Within tort reform discourse, the victim is the fully responsible immoral party, and the defendant requires protection from an irrational, even socialist, legal system set on violating the defendant's rights in the name of redistribution.[401]

The popular criminal law narrative is arguably the polar opposite. War-on-crime discourse has effectively cemented the characterization of defendants as evil, fully responsible enemies upon whom no amount of government punitive effort may be spared.[402] To complement the image of the perpetually culpable offender, tough-on-crime rhetoric emphasizes ultimately innocent victims.[403] In fact, politicians often choose to publicize cases in which victims are definitionally not responsible, in particular, violent crimes involving small children.[404] This casts the criminal trial as a moral contest between blameless victims and evil, individually responsible

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398. Liebeck v. McDonald's Rests. P.T.S., Inc., No. CV-93-02419, 1995 WL 360309, at *1 (D.N.M. Aug. 18, 1994).

399. One website gives out "Stella Awards" to "outrageous" plaintiffs. *See* Stella Awards, www.stellaawards.com; *see also* RANDY CASSINGHAM, THE TRUE STELLA AWARDS: HONORING REAL CASES OF GREEDY OPPORTUNISTS, FRIVOLOUS LAWSUITS, AND THE LAW RUN AMOK (2005).

400. These include the fact that Liebeck suffered third-degree burns over 6 percent of her body; that she offered to settle her claim for $20,000; that McDonald's produced documents of 700 burn complaints; and that McDonald's policy required coffee to be served at 185 degrees, although average home coffee temperatures are between 135 and 140 degrees. *See* The 'Lectric Law Library, The Actual Facts About the McDonalds' Coffee Case, http://www.lectlaw.com/files/cur78.htm (last visited Sept. 30, 2010); *see also* Michael McCann et al., *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113, 119-26 (2001) (discussing the case).

401. *See* McCann et al., *supra* note 400, at 132 (observing that news coverage parallels "the simplistic tort tales circulated by tort reformers"). There is evidence that this type of narrative affects jury behavior as well. *See* Elizabeth Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A. J. 68, 69-70 (1979) (finding that jurors exposed to advertising about a litigation crisis awarded lower damages).

402. *See* Tomkovicz, *supra* note 134, at 1461 (observing society's "sense that we are locked in a mortal struggle with the enemy—criminals").

403. *See Co-Opting Compassion*, *supra* note 241, at 584 (noting the popular view that victims are "blameless").

404. *See* Kanwar, *supra* note 199, at 231 (observing that "white female children" are "the public's preferred image of a 'victim'").

defendants.[405] In turn, tough-on-crime advocates may describe crime victims as deserving of relief and contrast them with greedy tort victims, lazy welfare recipients, and others who are not deserving of government assistance.[406] In fact, those "lazy welfare queens" and other socially marginalized people, painted as paradigmatically undeserving by Reagan and like-minded others,[407] empirically constitute the majority of crime victims.[408]

The category "victims" as constructed by victims' rights ideology, however, presumptively excludes "welfare queens."[409] Within popular political discourse, victims are not racial, cultural, and socioeconomic others. They are white, middle-class, law-abiding citizens who have been subjected to horrific violence and demand harsh punishment of offenders.[410] Thus, "[t]he public face of the Victims' Rights Movement hides the most severely affected victims of violent crime, sexism and racism."[411] By contrast, prototypical criminals are definitionally other—either psychopathic monsters or angry minority perpetrators of urban crimes.[412] The relentless publicizing of irredeemable criminals successfully dethroned the historically prevalent view of defendants as ordinary citizens affected by life circumstances beyond their control[413] and installed an ethic of exclusive

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405. *See* Demleitner, *supra* note 241, at 568 (remarking that "[t]he victim became increasingly pitted against the offender, and only long sentences appeared to validate her pain and suffering").

406. *See* Barker, *supra* note 230, at 626 ("[T]he demand to restrict criminal offenders' rights emerged out of a backlash against ... welfarism."); Fleury-Steiner, *supra* note 380, at 569 (discussing a death penalty juror who considered himself a "'conservative avenger'" to "'even the score' against the pro-welfare, liberal establishment").

407. *See supra* note 383 and accompanying text.

408. *See* Kanwar, *supra* note 199, at 231 (noting the shared demographics of victims and criminals).

409. *Cf. Co-Opting Compassion, supra* note 241, at 585 (discussing President Clinton's statement that "[w]e sure don't want to give criminals like gang members" victims' rights (quoting William Jefferson Clinton, Remarks at Announcement in Support of a Victims' Rights Amendment, 1 PUB. PAPERS 976 (June 25, 1996))).

410. *See id.* at 584 (observing the construction of victims as "attractive, middle class, and white" persons subjected to "particularly brutal homicides"); *supra* notes 403-05.

411. Kanwar, *supra* note 199, at 231.

412. *See Rediscovering Hegel's Theory, supra* note 91, at 1621 (contending that the media has led "white" America to "see crime as something that is committed by others"); *Co-Opting Compassion, supra* note 241, at 586-87 (contending that society views defendants as "monsters," or "undifferentiated, poor, angry, violent, Black, or Latino male[s]").

413. *See* Barker, *supra* note 230, at 625 (noting that defendants, once seen as "victims of social deprivation," were replaced by "'innocent victims' in need of state action").

victim identification.[414] Austin Sarat deconstructs a capital prosecutor's argument, "We have a right to be vindicated and protected":

> "We" is both an inclusive and a violent naming, a naming fraught with racial meaning. Who is included in the "we"? While this "we" reaches from this world to the next as a remembrance of and identification with [the white victim], at the same time, it makes the black [defendant] an outsider in a community that needs protection from people like him.[415]

Despite these dominant tort and criminal law narratives, many continue to identify with tort plaintiffs' plights and others continue to prioritize defendants' liberty over victims' punitive demands. As a result, crime victims' advocates and tort reformers seek legal changes that minimize these intuitions while reflecting and reinforcing their preferred views of victimhood and responsibility. The tough-on-crime and tort reform rhetorical techniques for achieving legal reform are actually quite congruent: characterize the status quo as existing in a moment of crisis, criticize the law and courts as illegitimate and incompetent for failing to respond in the desired manner, and argue for reform.[416]

In the tort context, the crisis is an "explosion" of frivolous litigation.[417] Carefully crafted political messages and media sensationalism have led the public to believe that the majority of tort suits are in fact ill-founded.[418] Tort reformers follow up with the claim

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414. VICTIMS IN THE WAR ON CRIME, *supra* note 34, at 9 (linking the success of the victims' rights movement to psychic benefits of "identification with the victim"); *see also* FRANK G. CARRINGTON, NEITHER CRUEL NOR UNUSUAL 20 (1978) (contending that the "average citizen" is more "worried about ... becoming a victim" than being falsely accused).

415. Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 LAW & SOC'Y REV. 19, 49 (1993).

416. *See* Feld, *supra* note 90, at 1532 ("News media coverage of criminal justice administration typically emphasizes the 'failures'—defendants freed on legal 'technicalities' and by lenient judges—and presents advocates for more severe punishment as the remedy."); *supra* note 392.

417. *See* Hubbard, *supra* note 363, at 471 (observing that tort reformers decry a "lawsuit crisis").

418. *See, e.g.*, Contract with America, *supra* note 355; *see also* Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 447-51 (2004) (contending that the "media's delight in profiling loony litigation," combined with "political polemics and business-sponsored media campaigns," created "widespread agreement that the nation has too much frivolous litigation").

that courts and juries are incompetent and unfair because they engage in redistribution and argue for reform to narrow the law's reach over defendants.[419] As one expert explains:

> [The] push for reform has attempted to gain public support of its legislative agenda and its ideology through the use of massive publicity campaigns that share a common rhetorical emphasis on the importance of widely shared values like fairness, efficiency, and personal responsibility.... This rhetoric is bolstered by attacks on plaintiffs and on the judicial system by means of the constant repetition of an asserted need to address a crisis and of anecdotal "horror stories" about the "tort tax," a "litigation explosion," "lawsuit abuse," "frivolous lawsuits," "judicial hellholes" and "dishonorable" courts.[420]

Similarly, the first step in cementing tough-on-crime ideology involved media and political campaigns that described the magnitude of the crime problem as apocalyptic.[421] Although in the formative years of the war on crime, crime rates were in fact elevated, it was not reality but political salience that kept the "crisis" of violent crime in headlines.[422] For the past twenty years, crime rates have been decreasing[423] while public perception continues to be that crime rates are at an all-time high.[424] Like tort

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419. *See supra* note 392; *infra* notes 428 and accompanying text.

420. Hubbard, *supra* note 363, at 474.

421. *See Rape and Feminism*, *supra* note 29, at 621-22 (asserting that tough-on-crime politicians "routinely hyperbolize the danger of crime"); *see also* 151 CONG. REC. 20,461, 20,464 (2005) (statement of Rep. Poe) (supporting the 2005 Child Safety Act to "stop the epidemic of violence and sexual abuse" and stating that "we have been reaping the destruction of [Hurricane Katrina] ... [b]ut we have been for years reaping the greater destruction of a hurricane that continues to bring the wind, rain, and floods of the effects of child predators on America").

422. *See supra* note 230.

423. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FOUR MEASURES OF SERIOUS VIOLENT CRIME, http://bjs/ojp.usdoj.gov/content/glance/tables/4meastab.cfm (last visited Sept. 30, 2010) (showing stable rates for "actual" crimes between 1973 and 1994, dramatically decreasing rates between 1995 and 2001, and stable rates from 2001 to 2007, with a spike in 2006 and dip in 2007). In 2007, the last year recorded, crimes were at a historic low. *See id.*

424. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl. 2.33 (2008), http://www.albany.edu/sourcebook/pdf/t2332008.pdf (reporting that between 1989 and 2008, save for two years, a majority of respondents (67 percent in 2008) believed crime was up from the previous year).

reformers, victims' rights advocates condemn the legal system as inadequately responsive to the crime problem and call for radical changes.[425] Unlike tort reformers who argue that tort law should be more attuned to fault and eradicate illegitimate distributive concerns, the victims' rights movement seeks to make criminal law less attuned to fault and more concerned with victims' distributive interests.[426] Conservative ideology thus regards the tort system as hopelessly flawed because it is distributive, but simultaneously views the criminal system as inadequate because it is not distributive enough.[427] Many of the voices that exhort lawmakers to purge distributive considerations from individual tort cases invite criminal sentencing courts and juries to become roving calculators of punishment on the basis of victim suffering.

By this account, there is no principled conservative rejection of government distribution. Right-leaning policymakers do not withhold support whenever a legal rule is distributive. They only withhold it when the distributive rule burdens a favored group. For example, tort reformers condemn tort juries' distributive tendencies as illicit sentiments that require strict legal control,[428] but encourage and glorify criminal juries' desires to serve victims' interests.[429] Consider Justice O'Connor's argument that tort jury instructions must specifically guide jurors on how to assess punitive damages:

> In my view, [state punitive damage] instructions are so fraught with uncertainty that they defy rational implementation. Instead, they encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections. Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth. Multimillion dollar losses are inflicted on a whim.[430]

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425. *See supra* Part III.A.

426. *See supra* Parts III.A, III.B.2.

427. *See* Roederer, *supra* note 363, at 678 (remarking that tort reformers view judges as "neutral referees, rather than guardians of justice"); *supra* note 269.

428. *See* Deborah R. Hensler, *Jurors in the Material World: Putting Tort Verdicts in Their Social Context*, 13 ROGER WILLIAMS U. L. REV. 8, 14 (2008) (observing the conservative critique of tort juries' "predilection for wealth redistribution").

429. *See supra* Part III.B.2.

430. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting).

Compare this with her view of jury competence to assess victim impact statements and appropriately determine to send a defendant to his death:

> The State called as a witness Mary Zvolanek, Nicholas' grandmother. Her testimony was brief. She explained that Nicholas cried for his mother and baby sister and could not understand why they did not come home. I do not doubt that the jurors were moved by this testimony-who would not have been? But surely this brief statement did not inflame their passions more than did the facts of the crime ....
>
> ... In arguing that Payne deserved the death penalty, the prosecutor sought to remind the jury that Charisse and Lacie were more than just lifeless bodies on a videotape, that they were unique human beings. The prosecutor remarked that Charisse would never again sing a lullaby to her son and that Lacie would never attend a high school prom. In my view, these statements were permissible.[431]

Within right-leaning philosophy, it is unfair and uncaring to prevent the admission of evidence in a death sentencing that would allow the decision maker to exercise empathy.[432] When it comes to private law cases in which victims claim racial discrimination, empathy must be purged from the legal process, and the decision maker made to swear to emotionless neutrality.[433]

The one area in which conservative thinkers appear to prioritize a commitment to liberalism over the tough-on-crime agenda is rape law. Feminist rape reformers support polices like rape-shield and affirmative consent laws that seek to make rape trials fairer and

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431. Payne v. Tennessee, 501 U.S. 808, 831-32 (1991) (O'Connor, J., concurring).

432. *See* State v. Payne, 791 S.W.2d 10, 19 (Tenn. 1990) (calling the exclusion of victim impact evidence "an affront to the civilized members of the human race"); 153 CONG. REC. S8742, S8746 (daily ed. June 29, 2007) (statement of Sen. Kyl) ("A victim is not treated justly and equitably if her views are not even before the court."); *supra* note 346 and accompanying text.

433. This message was delivered in stark fashion at Justice Sotomayor's confirmation hearings. *See* 155 CONG. REC. S8822, S8823 (daily ed. Aug. 5, 2009) (statement of Sen. Coburn) (stating that empathy is "antithetical to the proper role of a judge"); Senator Jon Kyl, Opening Statement at Sotomayor Hearing (July 13, 2009), http://kyl.senate.gov/record.cfm?id=315656 (characterizing empathy based on "'gender and Latina heritage'" as "prejudices, biases, and passions," but stating that during "sentencing, it may not be wrong for judges to be empathetic").

less traumatic for rape victims.[434] Far from embracing these victim-friendly laws, conservatives and "third wave" feminists criticize the reforms as contrary to the liberal ideal that women should be individually responsible agents.[435] The retreat of conservatives to rights-based claims in this context further underscores the fluidity and political nature of their commitment against distribution. The political story that plays out in date rape cases is very different from the politics of general criminal prosecution discussed above.[436] Many accused date rapists, and certainly the ones who make headlines, do not necessarily belong to the subordinated groups to which defendants often belong.[437] Moreover, date rape reforms seek to change male behaviors that many people—especially those who harbor traditional views of gender roles—see as normal.[438]

As a consequence, date rape reforms are not politically popular like other victim-centered criminal laws.[439] Unlike the general "monster versus angel" narrative of crime, popular date rape narratives often portray the female complainant as irresponsible, or

434. *See In re* M.T.S., 609 A.2d 1266, 1274 (N.J. 1992) (characterizing the affirmative consent standard as a response to old law that put the victim on trial); *Rape and Feminism*, *supra* note 29, at 595-603 (discussing rape reforms); Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585, 1599 (2007) (noting that rape-shield laws seek to "spar[e] women humiliation").

435. *See, e.g.*, KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS 62 (1993) (arguing that affirmative consent "proposes that women, like children, have trouble communicating what they want"); Dan Subotnik, *Copulemus in Pace: A Meditation on Rape, Affirmative Consent to Sex, and Sexual Autonomy*, 41 AKRON L. REV. 847, 847 (2008) (critiquing affirmative consent as "fueled by the notion that contemporary women can't say 'no'").

436. *See supra* notes 368-71 and accompanying text.

437. *See* GARY LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 219 (1989) (quoting a juror who explained acquittal on the basis that the defendant was "[a] nice-looking young fellow," "[n]ice[ly] dressed, like a college boy").

438. *See* Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 684-85 (1999) (citing studies finding that men often believe coercive behavior is normal seduction).

439. *See Rape and Feminism*, *supra* note 29, at 638 (asserting that "reforms aimed at countering racial and gender stereotypes within the criminal system have very little purchase among those who advocate retribution and victims' rights").

worse, a liar[440] and the "nice boy" defendant as the true victim.[441] Many are thus keenly attuned to danger that rape reform could hurt "innocent" defendants and downplay the distributive benefits to victims by disclaiming that they are real victims and asserting that, like tort plaintiffs, they should have been more careful.[442] As a result, when feminists propose legal changes to remedy gender-based distributive inequities in the criminal trial, opponents respond with principled objections to tinkering with rights to achieve social change and assertions of victims' individual responsibility.

CONCLUSION

For better or worse, we have been living with distribution in the criminal law for centuries. The distributive basis for criminal law existed in small pockets of the law even when prevailing penal philosophy stressed that criminal law was all about defendants—their culpability, reformation potential, and dangerousness. Where harm was particularly great, as in the case of a felon who kills, distributive concerns poked through the otherwise retributive fabric of criminal law. In the current era, the rise of penal distributionism coincided with the retrenchment of distribution in politics and private law. Policymakers who condemned big government and welfare and extolled the virtues of individual responsibility sponsored legislation creating a massive governance structure concerned with creating a distributive balance between individuals involved in a criminal transaction. Despite the prominence of rights and self-reliance rhetoric, popular ideology welcomes the use of state penal authority to satisfy crime victims' interests. Thus, conservatives' claimed pre-political commitment against govern-

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440. *See* John Dwight Ingram, *Date Rape: It's Time for "No" To Really Mean "No,"* 21 AM. J. CRIM. L. 3, 7 (1993) (observing "a widespread belief that the female gender is rife with spiteful shrews who often falsely accuse men") (internal quotation marks omitted); Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN'S L. REV. 979, 995 n.58 (1993) (citing a survey in which 38 percent of men and 37 percent of women indicated a seductively dressed woman is partly responsible for rape).

441. *See Rape and Feminism*, *supra* note 29, at 598 (noting the "media publicizing cases of false reporting, in which accused date rapists play the role of folk heroes").

442. *See, e.g.*, *id.*; Subotnik, *supra* note 435, at 848 ("I never want to see a man's life devastated through a bad rap from some vindictive woman.").

ment distribution simply breaks down to a sophistic tool to be used or discarded in favor of dominant or politically relevant interests.

Understanding criminal law as a matter of distribution also opens up several interesting avenues of future analysis. For example, revealing the distributive basis of criminal law sets the stage for assessing whether current victim-based laws actually meet their purported distributive goals. Although touting victim-centered reforms serves prosecutors' and policymakers' interests, it is another question altogether whether such reforms actually improve victims' lives. Many scholars argue that victims heal by forgiving defendants and understanding the contextuality of the crime, not by engaging in acts of pure vengeance. Additional questions involve whether judges and juries are well suited to assess victim closure, whether fair distribution requires doing what crime victims purportedly want, and whether closure is something that must be distributed in a just society. All these questions I leave for another day. For now, it suffices to say that there is a distributive basis for criminal law, it has been with us for some time, and it is not going away soon.