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Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense

AYA GRUBER†

INTRODUCTION

The innocent victim, the disempowered victim, the saintly victim, the humble victim, the heart-broken victim, the abused victim, the angry victim, the wrathful victim—all these images resonate strongly in the recent narrative of criminology. Less resonant are images of the wrongful victim, the abusive victim, the careless victim, and the reckless victim. Equally stark is the portrayal of victim blaming. Popular imaging and ideology relegate victim blaming to the province of morally bankrupt defense attorneys and misogynists. For instance, many feel that only the most strategic defense attorneys and the most chauvinist traditionalists blame women for domestic violence and rape.¹

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1. Cheryl Hanna, for example, argues:

“Blaming the victim” is a common theme in criminal practice. Defense attorneys and accused batterers routinely argue that the woman knew what buttons to push to make the accused hit her. Perhaps she provoked him by starting the argument. Maybe she failed to do her duties around the home, to give the accused batterer money, to buy diapers, or to stop the baby from crying. The power of these arguments rests on the false assumption that the woman is ultimately able to control and stop the violence.

Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1882 n.148 (1995-1996); see also Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 194 (2002) (“The notion of blaming the victim because of her conduct in precipitating a sexual crime is particularly problematic

Those who blame victims for crime exhibit ultimate lack of humanity.² Members of society with correct moral comportment tend to view victims as beyond reproach or doubt.³ This aversion to victim blaming transpires largely on an emotional level. Much like questioning the Iraq war at its inception could occur only at the risk of being characterized as anti-soldier and unpatriotic,⁴ the questioning of crime victims can occur only at the risk of being characterized as heartless or unethical. The crime victim, just as the American soldier abroad, captures the moral imagination of our country, engenders reverence, provides a rallying point, allows us to dissociate from the undesirable parts of life, and in doing so become more moral ourselves.⁵

in light of the history of similar abuses in rape law.”); Jerry von Talge, *Victimization Dynamics: The Psycho-Social and Legal Implications of Family Violence Directed Toward Woman and the Impact on Child Witnesses*, 27 W. ST. U. L. REV. 111, 131 (2000) (“Similar to a woman being blamed for being a rape victim (‘she asked for it’) and a woman being blamed for sexual harassment (‘she invited it,’ or, ‘she went along with it’), the battered woman is frequently blamed for domestic violence because she stayed in the battering relationship.”).

2. Political rhetoric often captures this sense of disgust for victim blaming. For example, in the 2002 campaign for attorney general of Florida between Charlie Crist and Buddy Dyer, the Crist campaign ran an outraged television advertisement claiming that Dyer wanted to allow criminals to sue innocent victims. Joe Follick, *Crist, Dyer Haven’t Played Nice in Battle for Office*, TAMPA TRIB., Nov. 1, 2002, at 4.

3. Martha Minow observes:

There is a strong tendency for people to couple a claim of victimhood with a claim of incorrigibility—that the victim knows better than anyone else about the victimization, and indeed the victim cannot be wrong about it This may reflect an almost religious view of suffering, empowering those who suffer with at least respect and perhaps reverence from others.

Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1434 (1992-1993) (footnotes omitted).

4. On March 10, 2003, Natalie Maines, singer for the country band Dixie Chicks, remarked to a London audience, “Just so you know, we’re ashamed the president of the United States is from Texas.” The negative response in the United States was overwhelming. The South Carolina House of Representatives, for example, promptly passed a Resolution condemning the Chicks for their “un-patriotic and unnecessary comments.” Karen Addy, *House Passes Resolution Condemning Dixie Chicks for Anti-Bush Remarks*, HERALD ONLINE (March 20, 2003), at <http://www.heraldonline.com/iraq/story/2353354p-2197233c.html>.

5. Markus Dubber states:

The identification with the victim at the expense of identifying with the offender provides an additional benefit to the onlooker, which may well have contributed to the success of the victims’ rights movement. By denying any similarities with the offender upon which identification

Positive victim imaging is largely a product of the politically powerful victims' rights movement⁶ and is closely intertwined with negative defendant characterizations⁷ and tough-on-crime politics.⁸ Victimhood narratives are at once both a cause and effect of increasing tough-on-crime sentiments. Victims' rights provisions often lead directly or indirectly to harsher sentences and decreased defendant protections,⁹ and the narrative of victims' rights serves as a

could be based, the onlooker transforms the essentially ethical question of punishment into one of nuisance control. An ethical judgment is no longer necessary Once the offender is excluded from the realm of identification, the question 'how could someone like us (or, stronger, like me) have done something like this' no longer arises.

Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3, 9 (1999-2000).

6. Markus Dubber observes that the victims' rights movement "began as and always remained a political movement, fueled by grassroots campaigns of concerned citizens backed by politicians eager to outdo their opponents in the tough-on-crime competition" *Id.* at 6.

7. Martha Minow observes:

Talk of victims seems to divide the world into only two categories: victims and victimizers. No one wants to be a victimizer, so potential victimizers try to recast themselves as victims. It becomes a world of only two identities, which essentially reduce to one characteristic, that of the helpless victim.

Minow, *supra* note 3, at 1433 (footnote omitted).

8. Lynne Henderson comments:

Recent victims' rights proposals appear to be driven more by the retaliatory view of retribution than by the moral aspect of retribution. The victim who participates in sentencing might further the ends of the retribution-as-vengeance theory by providing specific and graphic information about the crime—information that will provoke outrage.

Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 994 (1984-1985).

9. According to experts:

"Victims' rights" were—and are—used to counter "defendants' rights" and to trump those rights if possible. In an argument that traces back to at least the early 20th Century, people accused of crimes are probably "guilty as sin" and undeserving of so much legal protection. The argument continues that the constitution of a state, or of the United States, contains specific rights protecting those *accused* of crimes (and, in the case of *habeas corpus* and cruel and unusual punishments, those convicted of crimes). Victims of crimes, on the other hand, are blameless innocents far more "deserving" of rights, and they have absolutely no constitutional rights.... One fallacy in that argument immediately appears: Victims, as citizens, have many constitutional rights, regardless of the specific protections for defendants.

Lynne Henderson, *Co-opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 582-83 (1997-1998) (footnotes omitted).

rhetorical tool to justify and moralize the seemingly vengeful retributivist trend in criminal law.¹⁰ For this reason, "harmed and humble"¹¹ victims are characterized as vengeful rather than forgiving, angry rather than merciful.¹² Like the tough-on-crime movement, the victims' rights movement has grown into a major socio-political force in the criminal system.¹³ Victims have been put in the forefront, propelling the once-exclusively public area of criminal law inexorably toward privatization.¹⁴

Victims play a major role throughout the criminal process, from the inception of the investigation to the decision to parole inmates from jail.¹⁵ This has caused the once-clear line between the very public nature of criminal law and

10. See Dubber, *supra* note 5, at 6 ("Certainly in practice, if not in theory, retributivism quickly gave way to its consequentialist analogue, vengeance, and the crudest form of consequentialist penology, incapacitation. The rise of the so-called victims' rights movement in the United States formed an important part of this consequentialist (re)turn.").

11. George Fletcher advocates a penal theory in which "[t]he imperative of punishing the guilty springs not from our personal duties to high ideals but from our relationships with the humbled victims in our midst." GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS* 7 (1995).

12. Elizabeth Joh remarks:

[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 From the perspective of victimhood, the concept of mercy does not square with conceptions of helplessness and rage.

Elizabeth E. Joh, *Narrating Pain: The Problem With Victim Impact Statements*, 10 S. CAL. INTERDISC. L.J. 17, 28 (2000-2001).

13. Jonathan Simon comments on the social importance of the victims' rights movement:

Victims' rights has emerged over the past 25 years as one of the most important social movements of our time, comparable in its influence on our political culture to the civil rights movement or feminism. In part because of the enormous appeal of victimization to television media, the victims' rights movement has been able to make visible a whole host of criminal justice decisions that until recently were made with little attention to public justification.

Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 LAW & SOC. INQUIRY 1111, 1136 (2000).

14. See Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights*, 76 TEMPLE L. REV. 645, 649 n.18 (2004) ("The term 'privatization' in this article is meant specifically to describe the investment of prosecutorial powers, traditionally placed entirely in the hands of the government, in the private victim.").

15. See *id.* at Part I for a discussion of the prominence of the victim in criminal prosecutions.

very private nature of tort law to become blurred. Increasingly, victims play direct roles in the disposition of criminal cases, and their participation often is the difference between enforcement of criminal sanctions and non-enforcement.¹⁶ The crime victim's role in criminal cases now more than ever resembles a tort plaintiff's role in civil litigation.

Unlike tort law, however, modern criminal law is intensely one-sided in its treatment of victims and defendants. Crime victims and criminal defendants do not enter the trial process on an equal moral footing, as civil litigants arguably do. Rather, from the beginning victims are assumed blameless, truthful, and even beyond doubt.¹⁷ Conversely, defendants are considered guilty, not worthy of credence, and immoral.¹⁸ The designated victim of the criminal trial statutorily deserves victims' rights under victims' bills of rights before any determination of guilt on the part of the defendant or, in some cases, any determination that a crime has even occurred.¹⁹ The veracity of the victim,

16. See Geoffrey Hazard, *Criminal Justice System: Overview*, 2 ENCYCLOPEDIA CRIMINAL JUSTICE 450 (1983), reprinted in JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 3 (4th ed. 2000) ("Still another factor [in charging decisions] is the attitude of the victim. Victim attitude influences the availability of evidence, obviously so where a conviction can be obtained only if the victim will testify. But beyond this, the fact that the victim wants prosecution is morally and politically influential . . .").

17. See Minow, *supra* note 3, at 1434 ("Especially where feelings of hurt are involved, victims assert authority on the basis of their experience and treat statements of that experience as conclusive and the end of discussion.").

18. The presumption of dishonesty is made explicit to juries presiding over criminal cases in which defendants testify. Judges routinely instruct jurors as to the lack of credibility of testifying defendants. See, e.g., 5 DAVID M. BORDEN & LEONARD ORLAND, CONNECTICUT PRACTICE SERIES: CRIMINAL JURY INSTRUCTIONS § 3.8 (3d ed. 2001):

You will consider the importance to [the defendant] of the outcome of the trial. An accused person, having taken the witness stand, stands before you, then, just like any other witness and is entitled to the same consideration and must have his testimony measured in the same way as any other witness, including his interest in the verdict which you are about to render.

19. Victims' rights legislation generally does not distinguish between alleged victims and victims as proven after a criminal disposition. See, e.g., ARIZ. CONST. art. II, § 2.1 (Victims' Bill of Rights):

(A) To preserve and protect victims' rights to justice and due process, a victim of crime has a right:

1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.

and by negative implication the dishonesty of the defendant, is thus assumed *prima facie*.

Moreover, victims can control dispositions, even when contrary to the wishes of the prosecution. Experts remark:

Victims no longer are relegated to minor roles in the process: they are taking center stage in the courtroom, dramatically altering how justice is achieved. The aim of the victims' rights movement has been to give victims a "voice" in the process. But this understandably impassioned voice may drown out less popular calls for fairness and an objective search for truth.²⁰

The empowering of victims to this degree is justified in large part by the narrative of victimhood, mentioned above, which characterizes victims in a unilateral way. Victims are considered ultimately blameless, worthy of special rights, and trustworthy not to abuse those rights.

This one-sided view of victims, however, is a fiction. As any other people, victims differ in their characteristics. Martha Minow observes:

[E]veryone I know actually negotiates [different] identities—navigating between assigned images and inner feelings, new and

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2. To be informed, upon request, when the accused or convicted person is released from custody or has escaped.
 3. To be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.
 4. To be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing.
 5. To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.
 6. To confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition.

Although the "rights" listed above are all conferred at the pre-trial or trial stage, the Arizona Constitution's treatment of the victim assumes that a criminal offense has in fact occurred and the victim has been properly identified. Even though the provisions empowering the victim plainly have effect prior to a finding of guilt, the Constitution nonetheless defines "victim" as "a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative" *Id.* at § 2.1(C). Most U.S. states have passed similar Victims' Bills of Rights. *See, e.g.*, OKLA. CONST. art. 2, § 34; S.C. CONST. art. I, § 24; TENN. CONST. art. 1, § 35; UTAH CONST. art. I, § 28.

20. Alice Koskela, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 163 (1997).

old contexts, experiences, and ideals. Yet this complexity is denied by the cramped view of identity. This complexity is denied by the notion of victimization that confines those who invoke it and seals the confinement with the promise of absolution and support.²¹

Some victims are indeed trustworthy, truthful, blameless and ultimately innocent. Others, however, are bad actors themselves, have memory failures, falsely identify, provoke, and even lie. Some victims are in fact, and indeed encouraged by society to be, vengeful.²² Other victims, however, advocate mercy and forgiveness as part of the process of "closure,"²³ a process to which prosecutors and victim advocates often allude in justifying particularly severe punishments like the death penalty.²⁴ Yet quite clearly, the complexity and diversity of victims characteristics is not emphasized by the victims' rights movement or those advocating tough-on-crime policies.²⁵

Because the victims' rights movement embraces the one-sided characterization of victims as faultless, the increased presence of the victim in the criminal trial does not coincide with an increased scrutiny of wrongful victim behavior.²⁶ In fact, criminal law is devoid of many of the for-

21. Minow, *supra* note 3, at 1434 (footnote omitted).

22. Lynne Henderson observes:

"True" victims must remain always innocent and righteously angry at the same time. The rhetoric and images of victims' rights proponents ignore the effects of violence on the victims themselves, and those effects include victims becoming perpetrators as a result of their experiences.

Henderson, *supra* note 9, at 587.

23. See, e.g., Henderson, *supra* note 8, at 998 ("Forgiveness alone retains the uncontested authorship essential to responsibility and resolution. Forgiveness, rather than vengeance may, therefore, be the act that eventually frees the victim from the event, the means by which the victim may put the experience behind her.").

24. In *Payne v. Tennessee*, 501 U.S. 808 (1991), the Supreme Court ruled that the introduction of victim impact evidence at the sentencing phase of a death penalty case did not violate the Eighth Amendment. O'Connor's concurrence emphasizes the need for victim closure:

"Murder is the ultimate act of depersonalization." It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back.

Id. at 832 (O'Connor, J., concurring) (quoting Brief of Amici Curiae Justice For All Political Committee et al. at 3).

25. See Minow, *supra* note 3, at 1433.

26. See Gruber, *supra* note 14, at 660:

mal legal mechanisms contained in tort law that address the complex nature of victims' contributions to injurious transactions. There are, however, existing criminal law doctrines that do in fact assess liability to victims,²⁷ although they are often framed in terms of negating defendant *mens rea* rather than lessening liability due to the wrongful behavior of the victim.²⁸ Defenses like self-defense, provocation, defense of others, and defense of property, for example, lessen defendant liability or exculpate defendants based on wrongful victim behavior in very specific sets of circumstances.²⁹ There are no defenses, however, that exculpate or mitigate punishment more generally, that is, based on a variety of victim behaviors in a variety of criminal situations.³⁰

[I]t is clear that the victim's feelings, actions, characteristics, wishes, and even employment are now acceptable, even desirable, focal points in a criminal case. The focus on the victim, however, for the most part, serves the function of generally increasing liability and punishment for defendants. The trend toward inserting the victim into the culpability calculus clearly does not include scrutiny of victim behavior as a means to lessen liability or punishment for defendants.

27. The doctrines of provocation, self-defense, defense of others, and defense of property are all based, at least in part, on the fact that the victim did something wrongful or provoking. Victim blaming also enters the criminal case on an *ad hoc* basis as decisions not to prosecute, offers of favorable plea agreements, jury nullification, or more formally at sentencing. See, e.g., 18 U.S.C.A. § 5K2.10 (West 1996) (Federal Sentencing Guidelines) (providing for downward departure where victim provokes defendant's criminal behavior).

28. For example, the provocation doctrine is often framed as negating the defendant's intent for the crime rather than assessing culpability for the defendant's intentional act in light of the victim's wrongful behavior. See Gruber, *supra* note 14, at 672-77 (discussing provocation law and *mens rea*).

29. See, e.g., *U.S. v. Martinez*, 988 F.2d 685 (7th Cir. 1993) (provocation); *Starkey v. Dameron*, 21 P.2d 1112 (Colo. 1933) (defense of property); *Williams v. State*, 27 S.E.2d 109 (Ga. Ct. App. 1943) (defense of others), *overruled by Taylor v. State*, 112 S.E.2d 12 (Ga. Ct. App. 1959); *State v. Norman*, 378 S.E.2d 8 (S.C. 1989) (self-defense). These defenses also premise justification on the defendant's actual or reasonable perception of the victim's behavior.

30. The result is that the criminal law arbitrarily covers certain victim liability situations but not others. *Victim Wrongs* compares the following situations covered by the criminal law:

1. The victim, an abusive boyfriend, hits the defendant and leaves. The defendant, in response, throws his belongings out the window. The defendant is charged with destruction of property.
2. The victim has extorted money from the defendant until he is destitute. The defendant later attempts to steal some money from the victim. The defendant is arrested for attempted theft.
3. The defendant, a serially abused wife, kills her sleeping husband. The defendant is charged with murder.

The first article in this project, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights* ("Victim Wrongs"),³¹ advocates as a response to the one-sided nature of victim characterizations in the privatization trend a non-specific victim liability defense. It proposes a general defense that mitigates punishment or exculpates defendants when their criminal behavior occurs in direct response to wrongful behavior on the part of the victim. The term "non-specific" denotes that the defense applies to any criminal defendant who responds to wrongful victim behavior, under the specified conditions, as opposed to just murder or assault defendants.³² "Nonspecific" also captures the idea that wrongful victim behavior can include more types of behav-

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4. The defendant lives in a bad neighborhood. He has been assaulted and threatened several times by the victim, a gang member. In an effort to prevent further attacks by the victim, the defendant hires a person in the neighborhood to assault the victim. The defendant is arrested for assault and conspiracy.

to ones not covered by the law:

1. The victim, an abusive boyfriend, hits the defendant. The defendant, in response, stabs him. The defendant is arrested for aggravated assault and asserts self-defense and provocation.
2. The victim trespasses on defendant's lawn. The defendant comes out and hits him with a bat. The defendant is arrested for aggravated assault and asserts defense of property.
3. The defendant's husband has hit her a couple of times in the past. The husband goes to hit the defendant, and she grabs a gun and shoots him. The defendant is arrested for murder and asserts self-defense.
4. The defendant is a gang member who beats up and threatens all the children in the neighborhood. One of the children snaps and comes at the defendant with a knife. The defendant shoots the child. The defendant is arrested for murder and asserts self-defense.

Gruber, *supra* note 14, at 670-72 (footnotes omitted).

31. Gruber, *supra* note 14.

32. The doctrines of self-defense, provocation, defense of others and defense of property apply to specific crimes, generally murders and assaults, rather than to crime in general. Such doctrines do not generally apply to non-violent crimes, for example property or economic crimes. By contrast, the Federal Sentencing Guideline regarding victim conduct does take a more expansive approach to victim liability:

[The victim conduct] provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.

18 U.S.C.A. § 5K2.10.

ior than the current doctrines take into account.³³ The elements of the nonspecific victim liability defense are as follows:

1. The victim of the crime engaged in sufficiently wrongful conduct;
2. The victim's conduct caused the defendant to commit the charged offense;
3. The defendant was not predisposed to commit the charged offense; and
4. The defendant's response balanced against the victim's wrongful conduct dictates that the defendant should be exculpated or his punishment mitigated.³⁴

Victim Wrongs offers many arguments in favor of the nonspecific victim liability defense. First, by allowing the criminal law to account for victims not only as wronged actors but also wrongful actors,³⁵ the defense serves as a legal response to the unilateral, inaccurate, and dangerous narratives of victimization.³⁶ In addition, the victim liability

33. For example, self-defense is predicated on the wrongful victim behavior of imminently threatening the life of another. Certainly, there are other wrongful actions that may be undertaken by victims, for example, threatening future injury, economic destruction or other non-violent harms. See Gruber, *supra* note 14, at Part III for a discussion of wrongful victim behavior not covered by existing victim liability law.

34. See Gruber, *supra* note 14, at Part IV *passim* for a discussion of the elements of the defense.

35. See Gruber, *supra* note 14, at 650-51:

[R]ather than formulating a general argument against the victims' rights movement, this Article proposes an alternate solution to the privatization problem. It posits that the criminal law should incorporate a more complete and realistic view of the victim. The criminal law should account for the victim, not only as a wronged actor, but also as a wrongful actor where appropriate. The Article will show how the victims' rights trend logically dictates an increased focus on victim liability.

(footnotes omitted).

36. Television images, like those exhibited in "America's Most Wanted," fuel stereotypical and one-sided views of victims:

The series, which featured reenactments of actual crimes followed by pleas to viewers to help catch the still-at-large perpetrators, . . . was not only sensational and melodramatic in form and style, it was explicitly oriented toward a view of crime as a family matter, for it invariably pitted victims of traditional nuclear families against the harrowing images of criminals as antisocial loners and lunatics preying on women and especially children. Michael Linder, one of the series producers, explained the criteria for choosing cases for the series in an

defense, it turns out, refines the current criminal law in desirable ways³⁷ and helps deconstruct and reconceptualize doctrines that have institutionalized patriarchal and racist belief systems.³⁸

This article is the second part of an ongoing project to develop and justify the nonspecific victim liability defense. While *Victim Wrongs* discussed the need for the defense, explained how the defense refines the law in positive ways, and touched on the elements of the defense, it left many issues to be discussed further. *Victim Wrongs* justifies the victim liability defense by appealing to the problem of the one-sided victim, the doctrinal coherence of the defense, and the defense's positive social impacts. It does not, however, examine philosophical justifications³⁹ of the defense.

The project of this article is to respond prospectively to potential criticisms of the defense based in penal theory. To

issue of *TV Guide*: "A drug dealer who shoots another drug dealer is not as compelling as a child molester or murderer If a man brutalizes innocent children, that definitely adds points." Such a hierarchy of victimization is a mainstay of the Victims' Rights Movement, which plays upon notions of decent families besieged by violent amoral criminals.

Elayne Rapping, *Television, Melodrama, and the Rise of the Victims' Rights Movement*, 43 N.Y.L. SCH. L. REV. 665, 675-76 (2000) (citing Anna Williams, *Domesticity and the Aetiology of Crime in America's Most Wanted*, CAMERA OBSCURA 97, 97-98 (January-May 1993); Van Gordon Sauter, *Rating the Reality Shows and Keeping Tabs on the Tabloids*, TV GUIDE, May 2, 1992, at 18).

37. The nonspecific victim liability defense unifies the disjointed collection of specific victim liability laws into a singular defense that applies to all crimes and all wrongful victim behavior. In addition, the nonspecific victim liability defense makes the law more coherent and fair by tempering the unwavering focus on defendant *mens rea*. Consequently, it reforms the system that arbitrarily discriminates against defendants who have been provoked, but are charged under statutes requiring reckless or negligent intents. Moreover, the defense can serve to police the boundaries of judicial, prosecutorial, and juror discretion and help prevent the misguided focus on gender-related, racial, and socioeconomic characteristics. See Gruber, *supra* note 14, at Part III.

38. The defense helps solve the "reasonable racist" and "provoked abuser" dilemmas by requiring wrongfulness on the part of the victim as a predicate to utilization of the defense. The misogynist defendant who kills his wife for attempting to leave him will not be able to claim that he was "provoked" by her attempts. Likewise, the racist defendant will not receive a defense when he claims that he "reasonably" feared the presence of an African-American on the subway. In both of these cases, the victims have not engaged in wrongful conduct; thus, the defendants' actions are not excusable no matter how much outrage the defendant actually felt. See *id.*

39. By this, I mean a particular mode of justification of criminal punishment that is based in penal theory.

that end, Part I of the article will explain the importance of penological discourse in criminal law theory and introduce several broad categories of penal philosophy. Part II of the paper will discuss the deontological criticism that the non-specific victim liability defense inaccurately reflects sentiments regarding just deserts. In responding to this important objection, the paper will distinguish the non-specific victim liability defense from the seemingly analogous tort principles of contributory and comparative negligence. Part III of the article will briefly respond to consequentialist critiques of the defense, which involve concerns over deterrence, rehabilitation, incapacitation, and redistribution.

I. PENOLOGICAL DISCOURSE

Penal theory is a specific subset of moral philosophy that explores the theoretical bases for criminal sanctions.⁴⁰ Defenders of particular criminal sanctions or defenses seek to find articulable bases for validation in the moral tenets of penal theory.⁴¹ Indeed, the dialogue of victims' rights and the tough-on-crime movement incorporates moral philosophy in the justification of proposed reforms and in support of existing laws. For example, death penalty proponents appeal to the retributive ideal of just deserts as a ground for capital punishment, especially in the face of evidence that death sentences are not deterrent.⁴² Alternatively, those in favor of indefinite civil commitment of pedophiles articulate the consequentialist goal of incapacitation as a

40. See generally A READER ON PUNISHMENT (R.A. Duff & David Garland eds., 1994).

41. Penal theories describe in theoretical terms why the state is permitted to engage in punishment. Scholars argue that the states use of force against its own citizenry demands philosophical justification. See R.A. DUFF, TRIALS & PUNISHMENTS 4 (1986) ("It is agreed that a system of criminal punishment stands in need of some strenuous and persuasive justification . . .").

42. In *Gregg v. Georgia*, 428 U.S. 153 (1976), Justice Stewart emphasized the retributive value of the death penalty:

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.

Id. at 183 (quoting *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring)).

rationale to respond to those who object on retributivist grounds to the appearance of unfair double punishment.⁴³

Analyzing the wealth of legal and philosophical literature regarding penal theory, one can distill two broad categories of theory: "Deontological" and "consequentialist." A deontological doctrine, also known as an "agent-relative" doctrine, is a theory in which "the moral principles governing human action are exclusively agent-relative."⁴⁴ This means that morality derives from a source independent of empirical outcomes.⁴⁵ A consequentialist doctrine, also known as a "teleological" doctrine, "in its purest and simplest form is a moral doctrine which says that the right act in any given situation is the one that will produce the best overall outcome."⁴⁶ In other words, a consequentialist theory

43. See *Kansas v. Hendricks*, 521 U.S. 346, 357-58 (1997):

"[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members." Accordingly, States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety.

(quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905)).

44. Samuel Scheffler, *Introduction to CONSEQUENTIALISM AND ITS CRITICS* 5 (Samuel Scheffler ed., 1988).

45. Paul Robinson offers a deontological account of justice, irrespective of consequences:

Here is what I mean by doing justice: Giving a wrongdoer punishment according to what he deserves—no more, no less—by taking account of all those factors that we, as a society, think are relevant in assessing personal blameworthiness. Justice, then, requires that, in assessing an offender's blameworthiness, we must take account of not only the seriousness of the offense and its consequences but also the offender's own state of mind and mental and emotional capacities, as well as any circumstances of the offense that may suggest justification or excuse.

Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of "Restorative Justice,"* 2003 UTAH L. REV. 375, 380 (footnote omitted).

46. Scheffler, *supra* note 44, at 1. Russell Christopher defines consequentialism as follows:

Consequentialism is the view that the value of an action or course of conduct is to be assessed from its consequences. A consequentialist theory of punishment would justify punishment on the basis of the good consequences promoted by punishment. Versions of consequentialism vary based on the type of consequence perceived to be relevant. The most well-known version of consequentialism is Jeremy Bentham's utilitarianism in which a course of conduct is evaluated by

dictates that one ought to do that which best achieves a desired⁴⁷ outcome. Thus, deontologists depart from consequentialists in two important ways: 1) They hold that one may be forbidden from doing something even if it would produce the best outcome; and 2) even if one is not forbidden from doing something, one is not compelled to do it merely because it produces the best results.⁴⁸

One immediate difficulty in relating any specific defense, crime, or even element of a defense or crime to an overarching theory of punishment is that penal theories often address the issue of why we punish (the goal of punishment in general), but less often address specifically the conduct to be punished, the type of punishment, and the extent of punishment.⁴⁹ It is up to the individual proponent

the principle of utility or the amount of happiness and suffering that is generated by the conduct. Other versions of consequentialism judge acts based on their promotion of, for example, autonomy, achievement, or fairness. The principal consequentialist theories of punishment justify punishment based on the good consequences of rehabilitating the offender so that she will not commit future crimes, incapacitating the offender so that he cannot commit crimes during the term of imprisonment, deterring the offender from committing future crimes (specific deterrence), and deterring others in society from committing future crimes (general deterrence).

Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 856 (2001-2002) (footnotes omitted).

47. I say "desired" rather than "the best outcome" because within consequentialist camps, the debate becomes more complex when, after it is settled that one ought to maximize the good, one is charged with determining what constitutes "the good."

48. Scheffler, *supra* note 44, at 4. Aaron J. Rappaport explains:

[J]ust deserts is a deontological principle. That means that justification should be grounded on the inherent rightness or wrongness of criminal conduct—not on its consequences with respect to some other principle of value. In this sense, just deserts does not acknowledge that there is some higher moral principle P that determines the relevance and importance of retributive claims.

Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 626 (2003).

49. Take, for example, a retributive theory espousing that we should punish those who deserve it. The questions that remain are: (1) who deserves it, (2) for which conduct should there be punishment, (3) what should that punishment be, and (4) how shall it be inflicted. Theorists have recognized a similar set of questions:

One commentator has declared that an adequate justification of punishment must provide answers to the following four questions: "Is the practice of punishment ever justifiable and if so under what conditions? What kinds of punishment are justified and must they

of the criminal sanction or defense to draw upon theory as a rhetorical tool for arguing in favor of her proposal.⁵⁰ Complicating matters is the fact that considerations other than merely why we punish come into play in erecting a system of criminal laws, for example, procedural values like democracy and due process.⁵¹ A utilitarian may reject a highly

involve suffering? Whom are we entitled to punish? Who is morally entitled to inflict punishment?"

Christopher, *supra* note 46, at 855 (emphasis in original) (quoting A. Wesley Cragg, *Punishment*, in *THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA* 706-707 (Christopher Berry Gray ed., 1999)).

50. This is quite obviously a very cynical view of the importance of penal theory to the criminal law, but it is reality. In practice, legislators talk about the moral significance or deterrent effect of putting killers to death. For example, Phoenix attorney and former Chief Assistant Arizona Attorney General Steve Twist declared, "[T]he death penalty affirms our highest moral values by protecting innocent life through insisting on the forfeiture of depraved life. It is a curious morality that finds barbaric ritualism in the execution of depraved murderers, when the evidence of both specific and general deterrence, the protection of innocent life, is so strong." Steve Twist, *Capital Punishment is Good Public Policy: A Response to Gerber and O'Connor*, 39 ARIZ. ATT'Y 17, 19 (Nov. 2002), available at http://azbar.org/ArizonaAttorney/pdf_upload/AZAT1102DeathPRO.pdf (last visited Apr. 14, 2004). Even particular prosecutorial choices are justified by retributivism or deterrence. Theorists comment:

This age-old debate over the justification of punishment is not merely of theoretical interest. The resolution of a wide-ranging spectrum of practical issues may crucially hinge on, or be substantially influenced by, the particular justification of punishment perceived to be defensible. What is perceived to be the leading theory of punishment influences legislatures' articulation of the purpose of punishment and courts' construction of such statutory articulations, which in turn, affect a host of other practical doctrines, policies, and procedures. Prominent among these are the viability of the victims' rights movement, the weakening of probation and parole, the "three strikes and you're out" legislation aimed at recidivists, and perhaps most significantly, the morality of the death penalty. Capital punishment has traditionally been supported by, and associated with, retributivism. That support was further strengthened with the Supreme Court's enthroning retributivism as the "primary justification for the death penalty."

Christopher, *supra* note 46, at 850-51 (footnotes omitted). Though utilizing the rhetorical value of penal theory is arguably an empirical reality, Ronald Dworkin specifically rejects such a practice, which he terms "outside in" reasoning, whereby the practical problem-solver "must shop from among ready-made" racks of theories. RONALD DWORKIN, *LIFE'S DOMINION* 29 (1993).

51. Describing and justifying a defense on the basis of penal theory is, itself, not an uncontroversial choice. A legal positivist would argue what ought to be a crime is essentially whatever the legislature says is a crime. See generally H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF*

effective criminal sanction on the basis that the majority of people in society disagree with it.⁵² A retributivist might refrain from punishing one convicted of a crime, whose promulgation violates substantive due process.⁵³ This is not to say, however, that penal theory is merely a rhetorical game. It serves an important function in the law. Russell Christopher offers the following explanation of the need for penal theory:

LAW 4-5 (Oxford Univ. Press 1992) (1968). Claire Finkelstein argues that the American legal system employs predominantly a positivistic method of legal justification:

Our legal system, in short, takes a predominantly positivistic approach to the notion of crime, meaning that there is no particular structure or content that legislation denominated "criminal" must have. As Henry Hart wrote a number of years ago, "If one were to judge from the notions apparently underlying many judicial opinions, and the overt language even of some of them . . . a crime is anything which is called a crime, and a criminal penalty is simply the penalty provided for doing anything which has been given that name."

Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CAL. L. REV. 335, 336 (2000) (quoting Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 404 (1958) (citations omitted)). I would describe positivist justifications as relying on second level values, namely, the value of legislative procedures institutions. What should be considered logically prior to, and perhaps apart from, the determination of what the legislature has done is the determination of what ought to be done. This is a question of theory. See *id.* ("Academics search for criteria to determine which activities are proper objects of prohibition, based on their adherence to norms that they believe ought to govern the use of the criminal sanction."). *Id.* Joel Feinberg offers the following rejection of positivism:

It is important to emphasize . . . that desert is a *moral* concept in the sense that it is logically prior to and independent of public institutions and their rules, not in the sense that it is an instrument of an ethereal "moral" counterpart of our public institutions.

JOEL FEINBERG, *DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 87 (1970).

52. That is to say that even those legislatures who tout the deterrent effect of proposed legislation will not cry foul if, through legitimate processes, the measures are not adopted. Thus, penal theory may be criticized as merely a mental game by positivists who believe that law is a function of legislatures, which, are, in turn, a function of majority rule.

53. Retributivists are not necessarily committed to supporting punishment of those guilty of a crime which embodied an illegitimate exercise of government power. In *State v. Saeiz*, 489 So. 2d 1125 (Fla. 1986), the Florida Supreme Court struck down a statute prohibiting the possession of embossing machines, observing that "[government] power . . . is not boundless and is confined to those acts which may be reasonably construed as expedient for protection of the public health, safety, welfare, or morals." *Id.* at 1127. A retributivist need not be committed to the argument that by virtue of being convicted of possessing an embossing machine, the possessor "deserves" punishment.

Why do we need to justify punishment? After all, crime and punishment seem to go together, as the old Frank Sinatra song goes, like "love and marriage" and a "horse and carriage." To doubt the legitimacy of punishment would seem to cast doubt on the enterprise of criminal law itself. Why would we bother to promulgate the prohibitions of the criminal law if they could be violated with impunity? For violations of the norms of criminal law, punishment seems to be an obviously fitting response. But punishment does require justification, for the same reason we consider conduct violating the core prohibitions of our criminal law to be wrong. Punishment involves the deliberate infliction of pain, suffering, and deprivation, which is *prima facie* wrong. So too, committing homicide or causing grievous bodily damage, under ordinary circumstances, is *prima facie* wrong. But just as the *prima facie* wrong of homicide may be justified or negated when committed under circumstances of self-defense as a response to a criminal attack, so also the state's infliction of the suffering and deprivation constituting punishment may be susceptible to justification as a response to the commission of a crime.⁵⁴

As Russell Christopher argues above, penal theory, like procedural values, serves an important function of discursive legitimation. Beyond mere discourse, however, the tension between deontology and consequentialism and the struggle to balance them is deeply rooted not only in the justifying language of criminal laws but also in the psyche of Western society. Society struggles to define laws to reflect our senses of justice, fairness, goodness, and expediency. Below, I describe generally the broad categories of penal theory, including their benefits and drawbacks, as a background to Parts II & III, which address the potential penological criticisms of the nonspecific victim liability defense.

A. *Deontological Theories of Punishment*

Deontological theories of punishment, like deontological theories generally, justify punishment on grounds other than future positive results flowing from the punishment.⁵⁵ The most influential deontological penal theory is retributivism. Retributivism is most often associated with the work of Immanuel Kant, who opines:

54. Christopher, *supra* note 46, at 852-53.

55. See *supra* text accompanying notes 44-45.

Juridical punishment can never be administered merely as a means of promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a crime*. For one man ought never to be dealt with merely as a means subservient to the purpose of another⁵⁶

While there are many glosses on this same theme,⁵⁷ "[r]etributivism is a very straightforward theory of punishment: We are justified in punishing because and only because offenders deserve it."⁵⁸

Unlike the consequentialist theories that will be discussed later, retributivism gives very little guide to who, when, and how much to punish.⁵⁹ Not only that, it fails to address whether moral culpability attaches to an act, a person, or some combination of both.⁶⁰ Perhaps the most cogent criticism of retributivism in particular and of deontological theories in general is that they are ultimately unsatisfying because they beg the further question of what it means to "deserve punishment."⁶¹ Moreover, deontology prohibits the

56. IMMANUEL KANT, *THE PHILOSOPHY OF LAW* (W. Hastie trans., 1887), reprinted in *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 102, 102 (Sanford H. Kadish & Stephen J. Schulhofer eds., 7th ed. 2001).

57. For a basic view of retributivist thought, one need look no further than the Bible. See IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* 13 (1989) ("The history of the retributive view of punishment begins with the biblical and talmudic ethical and legal ideas . . ."). The concept in proportionality of actions and consequences has been a theme throughout the history of retributivist thought. See, e.g., G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 129 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821) (declaring that punishment is "the crime turned round against itself").

58. Michael S. Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER AND EMOTIONS* 179 (Ferdinand Schoeman ed., 1987), reprinted in *CRIMINAL LAW AND ITS PROCESSES*, *supra* note 56, at 108.

59. The guidance offered by Kant is that punishment "must in all cases be imposed on [the offender] only on the ground that he committed a crime." IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100 (John Ladd trans., 1965) (1797).

60. The question is whether retribution theories posit that moral blameworthiness attaches to the person who commits bad acts or to the act itself. This brings up the difficult question of the role of criminal character in criminal law. See generally Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227 (2001).

61. R.A. Duff explains:

The central problem for a retributivist, whether negative or positive, is to explain this idea of desert. Punishment is supposed to be justified as an intrinsically appropriate response to crime; the concept of "desert" is supposed to indicate that justificatory relationship between past crime

and present punishment. But what is that relationship? How does crime call for punishment or make punishment appropriate? It is not enough simply to appeal to the supposedly shared intuition that the guilty deserve to suffer, since such an intuition, however widely shared, needs explanation: what do they deserve to suffer, and why?

R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, in 20 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 7-8 (Michael Tonry ed., 1996) (citations omitted). Here one confronts the ever-present philosophical problem of first principles. Ultimately, one can formulate either a consequentialist rationale for the circumstances under which someone deserves punishment, or one can base criminal prohibitions on first principles, which are inherently arbitrary. Richard Ned Lebow describes the tension as follows:

Philosophers from Kant on struggled to build an alternative metaphysical foundation for ethics; they failed because there are no incontrovertible first principles. Attempts to base such systems on feeling and customs are all open to the challenge of being arbitrary and culturally biased.

Richard Ned Lebow, *Ethics and Interests*, 96 AM. SOC'Y INT'L L. PROC. 75, 75 (2002). The tension between the arbitrary nature of first principles and the contingent nature of consequentialist justifications has led some reformers, most notably the pragmatists, to reject this particular justificatory enterprise all together. Thomas Grey describes how pragmatist Charles Sanders Peirce [R]everse[d] the Kantian hierarchy, and assimilated all human science, speculative philosophy, and moral inquiry into the category of the pragmatic. All judgments—scientific and moral as well as prudential and technical—were contingent, probabilistic, relative to a situation and to the interests of an agent or a community of agents. Thought was no longer to be conceived as something distinct from practice, but rather it simply was practice, or activity, in its deliberative or reflective aspect.

Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN L. REV. 787, 803 (1988-1989). See also Charles Sanders Peirce, *What Pragmatism Is* (1905), in 5 COLLECTED PAPERS OF CHARLES SANDERS PEIRCE, ¶¶ 411, 413 (Charles Hartshorne & Paul Weiss eds., 1934). In Kant's defense, he most likely would not agree that the basis for his moral theory, the categorical imperative, is completely arbitrary. Kant premises his moral theory on non-contradiction (logic), which comes from the categories. The categories are at once a necessary and contingent part of the human conditions (both *a priori* and synthetic). Thus, Kant's first moral principles comes from the *a priori* conditions of human cognition. See generally IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS *passim* (James W. Ellington trans., Hackett Publishing 1981) (1785). Although perhaps overcoming the first principles problem, Kant is now subject to the criticism that his own moral theory has become contingent. For example, philosopher Willard Quine contends that logic as manifested by the distinction between the analytic and synthetic, is itself a contingent choice. See generally WILLARD VAN ORMAN QUINE, FROM A LOGICAL POINT OF VIEW (1953). Thus, one could posit that there is nothing that necessarily dictates that moral rules should come from logic, or even that the fact of the human condition has anything to do with morality (the "is/ought distinction").

theorist from answering that question by appealing to anything in the empirical world.⁶² By prohibiting consequential analysis in any form, the retributive justification of punishment can seem hopelessly vague and arbitrary:⁶³

[O]nce retributivism departs from desert as the sole justification for punishment by resorting to consequences, and since the consequences may be obtained by punishing an offender without desert, retributivism is subject to the very same problems of consequentialist theories—justifying intentional punishment of particular, identifiable innocents and the use of offenders as mere means.⁶⁴

Retributivism, however, is only one way in which deontology manifests in penal theory. Apart from the formal doctrine of retributivism, deontology generally offers all-important limiting principles that may be used to temper absolutely consequentialist doctrines.⁶⁵ Principles like

62. For example, although Kant's categorical imperative is premised on the human condition, which is synthetic rather than analytic, it is not premised on *a posteriori* experiential justification. See KANT, *supra* note 61, at 29. R.A. Duff discusses the nonempirical nature retributivism:

A nonconsequentialist insists that actions and practices may be right or wrong in virtue of their intrinsic character, independently of their consequences. Thus what unites retributivist conceptions of punishment, insofar as they are essentially nonconsequentialist, is their insistence that punishment must be justified, not (primarily) by reference to its contingently beneficial effects, but in terms of its intrinsic character as a response to past wrongdoing. Hence the central retributivist claim that punishment is justified if and only if it is deserved in virtue of a past crime

Duff, *supra* note 61, at 6-7.

63. Richard Epstein argues that the only thing that can save the deontologist from hopeless arbitrariness is appealing to utilitarian principles:

One has to show why any given configuration of rights is superior to its rival conceptions, an undertaking that typically requires an appeal to consequences, less for particular cases, and more for some overall assessment of how alternative legal regimes play out in the long run. In a word, one has to become a utilitarian of some stripe to justify rules in terms of the consequences they bring about.

Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 1, 3 (1996).

64. Christopher, *supra* note 46, at 975.

65. Hurd observes:

[T]he principal payoff of deontological maxims is their ability to define and patrol the borders of consequential justification. Thus, good consequences cannot justify anything that is categorically forbidden, but they can justify whatever is not categorically forbidden.

Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 254 (1996).

fairness and proportionality limit the consequentialist from the unfettered use of any means to achieve good ends.⁶⁶ For example, the argument that we should not impose life imprisonment on drunk drivers even if it saves many more lives in the long run because to do so would be unfair, draws upon the deontological limiting principle of fairness. Leo Katz observes:

The criminal law, unlike most other branches of law, especially unlike the tort law, is apt to cultivate one's non-utilitarian (or, if you prefer, nonconsequentialist) intuitions. It is near-impossible to be a thoroughgoing utilitarian about the criminal law. Even those who think that deterrence has an important role to play in criminal law . . . generally refuse to accept it as the *only* aim. At the very least, they think deterrence needs to be tempered by other, deontological, i.e. nonconsequentialist, kinds of concerns. Only thus are they able to explain, for instance, why we are loath to impose life imprisonment for drunk driving, even though doing so would save many more lives than it would ruin. Only thus are they able to explain the strong check that the proportionality principle puts on any utilitarian aims we are pursuing.⁶⁷

Retributive theory counsels the proponent of any given defense or law not to justify the defense merely⁶⁸ on the basis that it produces the best (i.e. most efficient, most satis-

66. A pure retributivist would probably object to the idea of mixing consequentialist and deontological penal doctrine. For example Michael Moore states: [R]etributivism is *not* "the view that only the guilty are to be punished." A retributivist will subscribe to such a view, but that is not what is distinctive about retributivism. The distinctive aspect of retributivism is that the moral desert of an offender is a *sufficient* reason to punish him or her; the principle [that only the guilty may be punished] makes such moral desert only a *necessary* condition of punishment. Other reasons—typically, crime prevention reasons—must be added to moral desert, in this view, for punishment to be justified. Retributivism has no room for such additional reasons. That future crime might also be prevented by punishment is a happy surplus for a retributivist, but no part of the justification for punishing.

Moore *supra* note 58, at 107-08 (alteration does not appear in original document). The criticism again is that "deserving punishment" does not exist in a vacuum. Either the retributivist can ignore all empirical considerations and commit to a position that seems hopelessly arbitrary or accept some empirical considerations and seem less deontological.

67. Leo Katz, *A Look at Tort Law With Criminal Law Blinders*, 76 B.U.L. REV. 307, 307 (1996).

68. However, the pure retributivist would probably say more than, "do not 'merely' look at consequences," she would say, "do not look at consequences at all."

fy to the public, or most deterrent) results.⁶⁹ The defense or law must speak to the moral culpability of the defendant. To use self-defense as an example, the retributivist would reject any argument that self-defense rules ought exist because they prevent potential aggressors from engaging in violent, provocative behavior against others (because the other is then justified in killing the aggressor), in favor of the argument that a person who acts in self-defense does not deserve to be punished. Self-defense has been justified precisely in this nonconsequentialist manner:

The retributive theory of *public* punishment is a "rational" and principled theory The first theory of self-defense simply proposes that a *private* individual is entitled to defend herself in a way that serves retributive goals. The real facts, the real culpability of the attacker, should be directly relevant to the scope of her entitlement.⁷⁰

B. Consequentialist Theories of Punishment

Consequentialist theories of punishment justify punishment on the ground that it produces some desired state of affairs in society.⁷¹ The desired state of affairs can consist of many different things, for example deterring crime or saving money.⁷² In this sense, depending on the specific

69. As stated before, a facet of deontological thought is the prevention of empirical justification. See *supra* note 66.

70. Kenneth W. Simons, Book Review, *Self-Defense, Mens Rea, and Bernhard Goetz*, 89 COLUM. L. REV. 1179, 1182-83 (1989) (book review).

71. See *supra* notes 46-47 and accompanying text for a discussion of consequentialism. Russell Christopher describes a shared characteristic of consequentialist penal theories:

[C]onsequentialist justifications of punishment share the goal of crime prevention. Both crime and punishment are evils, but punishment is only a qualified evil. The evil of punishment may be outweighed by the good consequences that it generates. That is, punishment is a necessary evil that may be justified by its diminution of the incidence of crime.

Christopher, *supra* note 46, at 858-59 (footnotes omitted).

72. These types of consequentialist arguments are often made in favor of and against the death penalty:

Death penalty advocates argue that the death penalty deters would-be criminals by sending a message that violent crime will not be tolerated. Conversely, opponents argue not only that the death penalty fails to deter individual criminals, but also that the death penalty fosters—or

ends favored by the consequentialist, consequentialist penal theories can give much more guidance as to who, how, and when to punish.⁷³ There are, however, several criticisms of consequentialist theories of punishment. As stated previously, all consequentialist penal theories necessarily depend on the empirical success of the criminal law in achieving the desired state of affairs.⁷⁴ The theories lose their prescriptive steam if future empirical study shows

at least fails to deter—violent crime by sending a message that violence is the answer.

Paul Schoeman, *Easing the Fear of Too Much Justice: A Compromise Proposal to Revise the Racial Justice Act*, 30 HARV. C.R.-C.L. L. REV. 543, 547 (1995).

73. For example, if the goal is the prevention of child sex offenses, punitive policies and civil commitment procedures will specifically target the class of child sex offense defendants and the class of child sex crimes. See, e.g., KAN. STAT. ANN. § 59-29a01 (2003) (Commitment of Sexually Violent Predators; Legislative Findings):

The legislature finds that there exists an extremely dangerous group of sexually violent predators who have a mental abnormality or personality disorder and who are likely to engage in repeat acts of sexual violence if not treated for their mental abnormality or personality disorder. Because the existing civil commitment procedures under K.S.A. 59-2901 *et seq.* and amendments thereto are inadequate to address the special needs of sexually violent predators and the risks they present to society, the legislature determines that a separate involuntary civil commitment process for the potentially long-term control, care and treatment of sexually violent predators is necessary. The legislature also determines that because of the nature of the mental abnormalities or personality disorders from which sexually violent predators suffer, and the dangers they present, it is necessary to house involuntarily committed sexually violent predators in an environment separate from persons involuntarily committed under K.S.A. 59-2901 *et seq.* and amendments thereto.

74. See *supra* text accompanying notes 46-47. In other words, if a penal measure does not in fact deter, then its enactment cannot be justified on the grounds of deterrence. This is exemplified in death penalty jurisprudence. Empirical studies bore out that the death penalty was not, in fact, a deterrent to crimes. Thus, in justifying the death penalty Supreme Court justices moved away from utilitarian to retributivist arguments:

The foregoing contentions that society's expression of moral outrage through the imposition of the death penalty pre-empts the citizenry from taking the law into its own hands and reinforces moral values are not retributive in the purest sense. They are essentially utilitarian in that they portray the death penalty as valuable because of its beneficial results. These justifications for the death penalty are inadequate because the penalty is, quite clearly I think, not necessary to the accomplishment of those results. There remains for consideration, however, what might be termed the properly retributive justification for the death penalty that the death penalty is

them to fail to achieve their objectives. This makes consequentialism, in essence, a slave to future results and only truly valid retrospectively,⁷⁵ which, in turn, makes its purported prospective justificatory force at best speculative⁷⁶ and at worst mere rhetoric. The second and perhaps more persuasive criticism is that consequentialism counsels the use of unjust, unfair, or immoral means to achieve good ends, so long as there is a net balance of utility (however defined).⁷⁷ This, in turn, necessitates the application of

appropriate, not because of beneficial effect on society, but because the taking of the murderer's life is itself morally good.

Gregg v. Georgia, 428 U.S. 227, 238-39 (1976) (Stewart, J., concurring).

75. One can speculate about the deterrent effects of a measure. If, however, future study shows that the measure did not in fact decrease crime, then the argument must be abandoned. See *supra* note 74. Deterrence theory has been criticized heavily on this exact level. Critics contend that punishment, as exacted in the United States, does not actually deter crime, for several reasons. First, the likelihood of punishment for crime is not great enough to serve as a disincentive when weighed against the benefits of crime. Second, and perhaps more importantly, the actual psychology of those who commit crimes suggests that they do not evaluate their choices purely by weighing the pain of punishment against the benefit of crime. See Paul. H. Robinson, *The Utility of Desert*, 91 NW. U. L. REV. 453, 459-65 (1997). To the first argument at least, uber-utilitarian Jeremy Bentham who states, "The evil of punishment must be made to exceed the advantage of the offence," has a ready response: Merely because the United States has not succeeded in achieving efficient deterrence does not mean that deterrence is not a proper justification of punishment. It simply means that deterrence is not a proper justification of that specific system of punishment. JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 325-26 (1931), reprinted in *CRIMINAL LAW: CASES AND MATERIALS*, *supra* note 16 at 38.

76. See Epstein, *supra* note 63, at 3 ("A utilitarian approach is frequently attacked on the ground that the critical outcomes needed to fuel the system are invariably indeterminate.") (citations omitted).

77. This is a common criticism of ends-based reasoning in general. Guyora Binder and Nicholas Smith frame the retributivist argument against utilitarian penal justification as follows:

[T]he retributivist arguments that were most influential among philosophers and legal scholars asserted that utilitarianism could lead to excessive rather than insufficient punishment. Retributivists evoked the libertarian sensibilities of academics by warning that utilitarianism could justify punishment that transgressed the retributivist prohibition against undeserved punishment. Thus, indeterminate sentencing could lead to lengthy terms for minor offenses, based on discretionary and perhaps prejudicial predictions of dangerousness, or assessments of progress toward rehabilitation. Harsh punishment of a few hapless individuals might effectively deter millions from committing minor offenses. Worst of all, deterrence might be served, public fear might be dissipated, and vigilante violence forestalled, by framing and punishing innocent persons.

deontological limiting principles like fairness, proportionality, and due process to temper the means employed by the consequentialist.⁷⁸

Despite the criticisms of consequentialist thought, in creating the law, legislatures are often moved by utilitarian concerns. When lawmakers propose criminal sanctions, they do so because they want to stop crime. When lawmakers allocate money to education, they do so because they want to achieve, for example, higher rates of literacy.⁷⁹ Being goal-oriented is deeply rooted in law and public policy. Any proponent of a law or defense must be prepared to meet and address potential arguments that her proposal produces net disutility. In the criminal law context, utilitarian arguments generally fall into the broad subcategories listed below.

1. *Deterrence.* Deterrence theory is likely the most pervasive utilitarian justification of criminal punishment.⁸⁰ Simply put, the theory dictates that criminal punishment is justified by its ability to reduce crime. Deterrence theories abound in criminal law from the most straightforward formulations like those of Jeremy Bentham, who postulates simply that punishment should be geared to make the cost to the criminal exceed the advantage,⁸¹ to more complicated theories like that of Dan Kahan, extolling the deterrent ef-

Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L. J. 115, 118 (2000).

78. This, of course, indicates that both deontological and consequentialist justifications are necessary but not sufficient alone as grounds for a system of criminal punishment.

79. For this reason, United States Public Laws, for example, contain preliminary sections in which Congress makes factual findings about the problems they seek to remedy through legislation.

80. Experts observe:

The most influential consequentialist theory justifies punishment based on the general deterrence of future crime. To achieve general deterrence, the appearance or publicity of punishment is crucial. Actual punishment, without society's awareness, generates no general deterrent effect; but apparent punishment, even if without actual punishment, does provide general deterrence. Actual punishment serves only to produce apparent punishment. As a result, retributivists have criticized deterrence-based theories for being unable to justify actual punishment.

Christopher, *supra* note 46, at 857-58 (footnotes omitted).

81. Bentham states: "The evil of punishment must be made to exceed the advantage of the offence." BENTHAM, *supra* note 75, at 38.

fects of targeted public order policing.⁸² Where any given criminal law or defense fits into deterrence theory is difficult to determine and subject to speculation.⁸³ Deterrence theory, like consequentialism in general, is vulnerable to a wide array of criticisms, both philosophical and empirical. The philosophical objections concern the tendency of deterrence theories to reduce morality to empirical observation and to allow the use of unfair or disproportionate means to achieve deterrence.⁸⁴ The empirical objections concern the viability of punishment as a method to deter crime. Experts observe that deterrence theory is:

[B]ased on complete and utter ignorance of what violent people are actually like. [There is an] endless legion of mass murderers and assassins both "public" and "private," who are as ready to be killed as to kill—whose rage is so passionate and so blinding that it has caused the subjective distinction between killing and being killed to be all but obliterated and meaningless [E]ven when it seems motivated by "rational" self-interest, [violence] is the end product of a series of irrational, self-destructive, and unconscious motives.⁸⁵

Despite the shaky empirical ground upon which deterrence theory rests, society cares about crime reduction.⁸⁶ Thus, criminal laws which, at least in appearance, tend to reassure the public that they will stop crime, resonate the most strongly. Consequently, although readily objectionable on theoretical grounds, one must take steps to address deterrence concerns in order to gain public acceptance for her theory of criminal law.

2. *Rehabilitation.* Rehabilitation, once revered by utilitarians like Bentham,⁸⁷ is now at best a subordinate consid-

82. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 *passim* (1997).

83. Precisely because the fit will depend upon the future success of the policy in deterring crime. See *supra* text accompanying notes 74-75.

84. See *supra* text accompanying notes 77-78.

85. JAMES GILLIGAN, *VIOLENCE 94-96*, reprinted in *CRIMINAL LAW AND ITS PROCESSES* *supra* note 56, at 118.

86. See Gruber, *supra* note 14, at 664-66 (discussing political power of tough-on-crime movement).

87. See BENTHAM, *supra* note 75, at 338 ("It is a great merit in a punishment to contribute to the reformation of the offender, not only through fear of being punished again, but by a change in his character and habits.").

eration of penologists.⁸⁸ The idea is that criminal punishment exists to reform those who commit crime and/or may commit crime in the future.⁸⁹ The reality today is that addressing rehabilitative concerns is largely academic, as true rehabilitation occurs less and less often in the American justice system.⁹⁰

Rehabilitation theory is at odds with deontology in the sense that punishment is not meted out proportionally to desert, but rather to the degree that therapy is required. In two ways, this can be unfair. First, those easily rehabilitated can be punished less than they deserve. Second, those difficult to rehabilitate are punished to a greater extent, not for their past acts, but rather because the system is unable to create in them a psychology that will prevent future crimes. The key concept in relating rehabilitation to punishment is that only those who need rehabilitation should be subjected to custody by the State. In Benthamesque terms, the argument is that rehabilitating those who need no rehabilitation (because they are not criminally inclined), regardless of their culpability, produces net disutility.⁹¹

88. See CRIMINAL LAW, *supra* note 75, at 46 ("Today, we tend to think of rehabilitation as an ancillary goal of penal incarceration, involving educational or therapeutic 'programs' in the prison."). *Id.*

89. Penal law is then a means to the ends of reformation. These social ordering goals can be quite frightening without deontological checks. It brings to mind the idea of the society which pre-screens would-be criminals and send them to brain-washing reformation camps. Although this scenario seems like little more than science fiction fantasy, some theorists argue that this is what is precisely occurring in the arena of indefinite civil commitment of child sex offenders:

[S]exual predator laws have the appearance of a civil commitment law providing care and treatment for the mentally disabled. In reality, they are indeterminate preventive detention schemes, which deliberately inflict suffering on individuals committed under them.

John Q. La Fond, *Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375, 379 (1999).

90. See Richard Lowell Nygaard, *Crime, Pain, and Punishment: A Skeptic's View*, 102 DICK. L. REV. 355, 362 (1998) ("Today, rehabilitation is dead. Prison itself rehabilitates no one, and criminal sentencing has dissociated itself from the goal of rehabilitation.").

91. See BENTHAM, *supra* note 75, at 36 (Punishment should not occur if it is "efficacious," that is, it has "no power to produce an effect upon the will" and has "no tendency towards the prevention [of crime].").

3. *Other consequentialist justifications of punishment (incapacitation, prediction, and redistribution).* There are several more theories that justify punishment on the basis of outcomes rather than *a priori* culpability, a few of which I would like to touch upon here. Incapacitation theory is the concept that certain individuals should be removed from society to prevent them from harming others.⁹² Similarly, some theorists argue that there is a new legal penology in the United States centering on the management of dangerous groups in society.⁹³ Both incapacitation and the management theory embrace the idea that the law does or should respond, not to concepts of culpability, but rather to predictions about who will commit crime in the future. Of course, the notion that punishment should be meted out to people, not for what they have done, but for what they will do in the future is highly repugnant to deontologists who adhere to the belief in just deserts.⁹⁴ The predictive trend in the United States, however, cannot be ignored. Practices like preventive detention,⁹⁵ three strikes rules,⁹⁶ and civil commitment of pedophiles⁹⁷ all revolve around the principle

92. See JAMES Q. WILSON, THINKING ABOUT CRIME 145 (1983) ("When criminals are deprived of their liberty, as by imprisonment . . . their ability to commit offenses against citizens is ended. We say these persons have been 'incapacitated,' and we try to estimate the amount by which crime is reduced by this incapacitation.").

93. See Jonathan Simon, *Managing the Monsters: Sex Offenders and the New Penology*, 4 PSYCH. PUB. POL'Y & L. 452, 452 (1998) ("Recent laws aimed at addressing sex offenders reflect a transformation in the penal process that has been called the 'new penology.' This new penology sees crime as a problem of managing high-risk categories and subpopulations . . .").

94. Just deserts, by their very nature, apply to a person who has committed a wrong, not someone who may, but has not yet, committed a wrong. One could possibly imagine a deontological theory premising immorality on merely "thinking bad thoughts." In other words, it is culpable to contemplate future wrongs. The problem is that incapacitation theory does not necessarily premise punishment on thinking about committing bad acts, but rather on the person's empirical probability of committing future bad acts, as derived from an examination of his or her past behavior and other character traits. Moreover, even if thinking certain thoughts are morally culpable acts in themselves, a deontologist would have a hard time justifying the application of corporal punishment to those acts because of fairness and proportionality concerns.

95. See, e.g., 18 U.S.C. § 3142(e) (2003) ("Detention.—If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.").

that part of the function of criminal law is to prevent criminally inclined people from committing future crimes. When phrased in terms of "the safety of your children," people's retributive intuitions move quickly to the side. Successful tough-on-crime and victim-centered narratives⁹⁸ have moved even the highest court to embrace prevention as a goal of punishment.⁹⁹

96. See, e.g., CAL. PENAL CODE § 667(e)(2)(a) (1999) ("If a defendant has two or more prior felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment. . . .").

97. In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the U.S. Supreme Court explicitly iterated incapacitation of the dangerous as a legitimate exercise of governmental power:

We have already observed that, under the appropriate circumstances and when accompanied by proper procedures, incapacitation may be a legitimate end of the civil law. Accordingly, the Kansas court's determination that the Act's "overriding concern" was the continued "segregation of sexually violent offenders" is consistent with our conclusion that the Act establishes civil proceedings, especially when that concern is coupled with the State's ancillary goal of providing treatment to those offenders, if such is possible. While we have upheld state civil commitment statutes that aim both to incapacitate and to treat, we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others.

Id. at 365-66 (citations omitted).

98. The narrative preceeding the adoption of "Megan's Law" is an example. Jonathan Simon remarks:

One of the most unusual features of Megan's Law is its focus on information. In the legislative campaign for Megan's Law, this information logic was framed in populist terms of ineffective elites and ordinary people forced to grapple with menacing evils. As Maureen Kanka put the matter in a letter written to the House Judiciary Committee:

If pedophiles are going to be out on the street where they can accost our children, then parents have the right to know if they live on our streets. My daughter Megan would be alive today if I had known that my neighbor was a twice convicted pedophile. I had responsibility to protect my daughter. I have always told my children that I would never let anything happen to them. But I guess I lied. I could not protect my Megan as she was being brutally raped and murdered across the street from my home. I have to live with the fact that she screamed out my name as she was being murdered.

Simon, *supra* note 13, at 1140 (quoting Maureen Kanka's Testimony to the House of Representatives, Judiciary Committee, 1996 WL 117175 (Mar. 7, 1996) (Federal Document Clearing House)).

99. See *Hendricks*, 521 U.S. at 346.

Another interesting consequentialist goal that has emerged as a thread through the seam of criminal law, especially with the advent of the victims' rights movement, is redistribution. By this, I mean not only economic redistribution of funds from the criminal to the victim,¹⁰⁰ but also emotional redistribution of pain from the victim to the criminal, which, in victims' rights talk, is often referred to as "closure."¹⁰¹ Ideology embracing redistribution of pain is evident in many aspects of criminal law and is especially manifest in the death penalty context:

Assumptions about survivors' need for retribution or vengeance are often explicitly invoked in legal decision making. The failure to sentence a particular defendant to death or to a long prison term is often experienced as a devaluing of the worth of the victim's life, and thus another infliction of pain upon the victim's family, and indeed prosecutors explicitly call upon juries to return death sentences in order to affirm the victims' worth. One implicit assumption of introducing victim impact statements in capital cases seems to be that they will make the jury more likely to give a death sentence to help ease the survivors' evident pain.¹⁰²

In addition, redistribution ideology is reflected in restorative justice theory. Restorative justice promotes the idea that the basis for punishment should be restoring the victim.¹⁰³ The victim ought to be made whole through the operation of positive law. While victim restitution and restoration is a general goal of restorative justice theory, the restorative justice ideology does not necessarily prescribe the exact method of achieving that goal:

100. In addition to formal restitution ordered as part of sentencing, a victim may apply for and receive money prior to the disposition of a case from victim-witness assistance funds and after a conviction from victim compensation funds. See, e.g., 42 U.S.C. § 10602 (2004); COLO. REV. STAT. § 24-4.1-108 (2001); COLO. REV. STAT. § 24-4.2-105 (2001) (victim-witness assistance fund); D.C. CODE §§ 4-501—4-518 (2004) (victim compensation funds).

101. Victims' rights advocates contend that the proper way for victims to heal is through vengeance and punishment of the defendant. This provides the victim with "closure." On the flip side, some experts contend that forgiveness rather than redistribution of pain is the best method of closure. See *supra* notes 22-23 and accompanying text.

102. Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 *FORDHAM URB. L.J.* 1599, 1605 (1999-2000).

103. See generally Kathy Elton & Michelle M. Roybal, *Restoration, A Component of Justice*, 2003 *UTAH L. REV.* 43 *passim* (2003).

Restorative justice focuses on the injuries caused by and needs resulting from crime and acknowledges that effects of criminal acts reverberate beyond the victim and offender to the victim's families and friends, and the community [as] a whole.... [W]hile [restorative justice] places central emphasis on victim needs and the requirement that offenders are held accountable to victims, the restorative justice paradigm also responds to the mutual powerlessness of offenders and victims in the current system The restorative approach includes the victim in the justice process, and at the same time takes into account the needs of the offender. The community's role in restorative justice is to offer the offender the opportunity to 'make things right.' This may include the offenders performing community service, paying restitution to the victim, and/or participating in counseling to help increase their competencies.¹⁰⁴

Thus, redistribution theory, as evidenced by the restorative justice movement, justifies punishment not on the basis of fault or blame, but rather on the basis of restoring the injured party (or the person designated the victim) to a pre-crime state of affairs, or at least a better state of affairs. Proponents note that as a secondary effect of restorative justice policies, the offender is benefited because she is given the opportunity to distribute emotional well-being to the victim.¹⁰⁵

Redistribution theory, which is a consequentialist concept,¹⁰⁶ could go far in explaining why harmful criminal acts are punished in the absence of intent (strict liability crimes

104. *Id.* at 50-51 (quoting Anne McDiarmid, *Restorative Justice Principles in Dakota County Community Corrections*, 3 CRIME VICTIMS REP., (Mar./Apr. 1999, at 1)).

105. Inherent in this idea is that the offender benefits from being able to help the victim. Those who argue that the offender benefits from being in jail and reflecting on his crime employ similar reasoning. While semantically easy to characterize certain punishments as "beneficial" to the defendant (and thus not really punishment at all), most defendants sitting in jail or compelled into restitution would likely disagree.

106. The theory is consequentialist because it is geared toward a certain result, namely the restoration of the victim. Consequently, measures that restore the victim are a means to an end. This is inconsistent with deontological thought. My contention is that there is a de facto redistributive strain throughout criminal jurisprudence, though not explicitly recognized. The redistributive goals, however, explain many of the more confounding practices in criminal law. While redistribution may offer explanations as to why the criminal law takes on the form it does, the theory itself must be further justified. In other words, at some point there must be an analysis of whether the criminal law should serve redistributive goals. I hope to develop this analysis in the future.

like felony murder), in the presence of very little intent (negligence crimes), or where causation is tenuous.¹⁰⁷ In such cases, as critics point out, the retributive value of punishment is little, as moral culpability generally attaches to intentional acts.¹⁰⁸ The deterrent value is also questionable, as it is difficult to give people incentive not to do that which they never intended to do.¹⁰⁹ What is a tangible result

107. Redistribution, in theory, could possibly explain the preclusion of contributory negligence as a defense to negligent homicide. *See, e.g.*, *State v. Scribner*, 805 A.2d 812 (Conn. App. 2002) (disallowing a contributory negligence defense to vehicular manslaughter). A retribution problem arises because there is a real question whether a negligent defendant deserves punishment for murder, especially when harmless negligent driving is not sanctioned criminally. As for deterrence, it is unlikely that the defendant is a person likely to commit future crimes, especially if the death was partially caused by the decedent's negligence. Perhaps, the measure deters negligent driving in general. In that case, it would be an unfair way of deterring negligent driving (giving long jail sentences to those who happen to cause a harm through their negligence). In addition, the deterrence question is tricky because there is no evidence that these criminal rules deter negligent driving generally. Moreover, in the case of the negligent victim, the wrongfulness of both parties is arguably equal—they both engaged in wrongfully risky behavior that caused a bad consequence (namely the victim's death). What separates the victim from the defendant, however, is that the victim (and his family) suffers all the pain and loss. Redistributionist principles could justify bringing some pain into the defendant's life, thereby reducing pain (by creating closure) for the family.

108. This does, however, in some part depend on how one identifies those who deserve to be punished. One might argue that only intentional (or in Model Penal Code phraseology, "purposeful or knowing") wrongdoers deserve punishment. Another, however, may argue that recklessness as a mental state is equally as deontologically culpable. The Supreme Court has opined that those exhibiting reckless indifference to human life, just as those with a specific intent to kill, deserve the ultimate punishment:

[T]he reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

Tison v. Arizona, 481 U.S. 137, 157-58 (1987).

109. Jeremy Bentham opines, "Punishments are inefficacious when directed against individuals who could not know the law, *who have acted without intention*, who have done the evil innocently, under an erroneous supposition, or by irresistible constraints." BENTHAM, *supra* note 75, at 37 (emphasis added). One might argue, however, that although the defendant of a strict liability or negligence crime is not necessarily deterred, strict liability and negligence crimes encourage potential defendants to take more precautions, thus deterring them from committing future harms. This rationale is advanced in justification of punishment for strict liability "violations" or welfare/regulatory offenses:

The rationale of strict liability in public welfare statutes is that violation of the public interest is more likely to be prevented by

of the punishment in such cases is that the victim, who suffers the harm, is arguably "restored" from the defendant's later suffering.¹¹⁰ The reason strict liability or negligent crimes are punished is not to reflect the blameworthiness of the defendant, but rather to put both the innocent-intentioned defendant and innocent victim on more equal footing in terms of pain and harm. Redistribution theory also can explain the divide between attempts and completed crimes.¹¹¹ When a criminal completes a crime, the victim (and/or the family) suffers emotional and physical pain, which itself can be tempered by imposing subsequent punishment on the defendant. The victim thereby receives closure, and the pain is more equally distributed (assuming, as victims' rights proponents often do, that imposing pain on the defendant lessens the victims' pain).¹¹² When a criminal attempts but fails to complete a crime, there is often no victim, and thus punishment (or a severe degree of punishment) cannot be justified by reference to redistributive principles.¹¹³

unconditional liability than by liability that can be defeated by some kind of excuse; that even though liability without "fault" is severe, it is one of the known risks incurred by businessmen; and besides, the sanctions are *only fines*, hence, not really "punitive" in character.

FEINBERG, *supra* note 51, at 111. As Feinberg points, out, however, this rationale is not without risks to justice:

Two things are morally wrong: (1) to condemn a faultless man while inflicting pain or deprivation on him however slight (unjust punishment); and (2) to inflict unnecessary and severe suffering on a faultless man even in the absence of condemnation (unjust civil penalty).

Id. at 113.

110. See *supra* note 24 and accompanying text for Justice O'Connor's discussion of the restorative goal of the criminal prosecution in the context of victim impact statements.

111. The operative difference is that in the case of attempts there is no pain and loss to redistribute and no closure to give to the victim and/or her family.

112. See *supra* notes 22-23 and accompanying text for a discussion of the victims' rights movement and closure.

113. This may provide an answer to the challenging query as to why attempts should be separated from completed crimes. The argument against disparate treatment of attempts and completed crimes is that there is nothing ontologically significant separating a shooter who misses by a fraction of an inch from a shooter who kills. Joel Feinberg observes:

The difference in the sentences inflicted on two persons whose criminal wrongdoing was the same and whose degree of moral blameworthiness was identical seems to indicate that the legal system which countenanced it is not committed to the principle of proportionality,

Proponents of victims' rights would argue that restoration, redistribution, and closure are legitimate and expedient goals of criminal punishment,¹¹⁴ but many would disagree.¹¹⁵ Restorative justice concepts may conflict both with retributive and deterrence theories of juridical punishment. A retributivist would regard any justification of punishment that finds its origin outside of concepts of fault, blame, and desert highly offensive.¹¹⁶ A deterrence theorist would reject restorative programs that do not maximally discourage criminal activity.¹¹⁷ In addition, there are more general arguments against law as a mechanism of redistribution.

which requires that the severity of the punishment be proportional to the moral blameworthiness of the offense. In these examples the moral blameworthiness of criminals is identical, yet the punishment is much more severe in the one case than in the other. Unless there is some reasonable explanation for this discrepancy, the sentences seem to be more arbitrary than rational, the difference between the fates of A₁ and A₂ being determined not by their deserts but by *luck*, plain and simple.

Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It*, 37 ARIZ. L. REV. 117, 118 (1995). A possible reason for the disparity may lie in an alternate way of looking at criminal law, a very utilitarian way. Criminal sanctions should account for the immorality of the criminal act. Where two equally culpable shooters shoot the gun, but only one kills, both were equally immoral. One might argue, however, that criminal law should not only punish culpable actors but also restore the harmed party. Where there is no harm, there is no need for restoration. Thus, depending on the harm that actually resulted, even through the operation of luck factors, there may be a need for a higher sanction for restorative purposes.

114. See *supra* notes 22, 24 and accompanying text.

115. Where Kant would object philosophically, those who think that vengeance is not closure would object empirically. See Henderson, *supra* note 9, at 593-94.

116. Robinson, *supra* note 45, at 380 ("Restorative processes can provide some wonderful benefits, but they can also create serious injustices and failures of justice if used in a way that systematically conflicts with doing justice—where offenders are given more punishment, or less punishment, than their wrongdoing deserves."). Joel Feinberg explains the disconnect between compensation and desert:

[W]here compensation is not the redressing of injury and, hence, where it lacks the character of the mandatory repayment of a debt, desert is nonpolar. Either the suffering innocent deserve aid and succor or they do not, and that is the end of the matter. When the moral equilibrium is not unbalanced, there is no compensatory analogue of deserved punishment.

FEINBERG, *supra* note 51, at 75.

117. Robinson, *supra* note 45, at 382-83 ("For crime control utilitarians, doing justice has traditionally been thought of as suboptimal in reducing crime, or at least as less effective than the mechanisms of deterrence and incapacitation.").

Most of the debate concerning the propriety of the law as a redistributor of goods understandably occurs with reference to tort law, that is, at the private law level:

An ongoing debate in private law scholarship revolves around the legitimacy, desirability, feasibility, and expediency of trying to promote distributive goals through private law rules. . . . The main arguments against private-law-induced redistribution are: (1) the lack of predictability and expediency of such a redistribution; (2) the incompatibility of the distributive goals with other goals of private law; (3) the excessive intrusiveness on individual liberty caused by such a redistribution relative to alternative distributive mechanisms; (4) the lack of judicial accountability; and (5) the unfairness of redistribution by private law mechanisms due to the random nature of that distribution, namely, in the partiality of both its participants and results.¹¹⁸

While these arguments apply to private law, they are instructive in the criminal law context. If tort law is unequipped to redistribute wealth, one is hard pressed to imagine how criminal law judges are equipped to redistribute pain and manage closure, which are extremely nebulous psychological concepts. Moreover, if the distribution of wealth through the tort system is unfair because of the unevenness of the participation of litigants in tort suits, redistribution is certainly unfair in the criminal law context given the multitude of permissible and impermissible factors that go into any given prosecution and sentencing. The most cogent argument, however, is that the entire business of redistribution and closure makes sentencing not so much a function of the immorality of the defendant, but rather a function of attendant attributes of the victim of which the defendant may have been completely unaware.¹¹⁹ Consequently, although redistribution may underlie some con-

118. Tsachi Keren-Paz, *An Inquiry into the Merits of Redistribution through Tort Law: Rejecting the Claim of Randomness*, 16 CAN. J. L. & JURIS. 91 (2003).

119. Supreme Court law, since overruled by *Payne v. Tennessee*, 501 U.S. 808 (1991), held victim impact evidence to be a violation of the Eighth Amendment precisely because it resulted in punishment based on victim attributes of which the defendant could have been totally unaware:

The focus of a VIS [victim impact statement], however, is not on the defendant, but on the character and reputation of the victim and the effect on his family. These factors may be wholly unrelated to the blameworthiness of a particular defendant. As our cases have shown, the defendant often will not know the victim, and therefore will have

cepts of criminal punishment, it may ultimately reduce to little more than ideology grounded less in morality and more in the political power of the victims' rights movement.

C. Hybrid Theories of Punishment

The final justification of punishment addressed by this article is difficult to characterize as purely deontological or purely consequentialist in nature. Expressionism, as formulated by Joel Feinberg in "Doing and Deserving,"¹²⁰ is the idea that criminal law possesses a unique quality of allowing the punishing authority, or those in whose name it acts, to express symbolic condemnation for the act punished.¹²¹ Feinberg lays out several manifestations of this symbolic condemnation: (1) Authoritative disavowal, where the punishing authority disavows a criminal act of its agent or citizen,¹²² (2) symbolic nonacquiescence, where the punishing authority goes on record against an act previously accepted so as to testify to the recognition of its wrongfulness,¹²³ (3) vindication of the law, where the punishing authority gives meaning to existing statutes by enforcing them,¹²⁴ and (4) absolution of others, where the punishing

no knowledge about the existence or characteristics of the victim's family.

Booth v. Maryland, 482 U.S. 496, 504 (1987).

120. FEINBERG, *supra* note 51, at 98-118.

121. *Id.* at 98. Thus, "[p]unishment, in short, has a *symbolic significance* largely missing from other kinds of penalties." *Id.*

122. *Id.* at 101-02. Feinberg uses the example of an "airplane of nation A [that] fires on an airplane of nation B while the latter is flying over international waters. Punishing the pilot is an emphatic, dramatic, and well-understood way of *condemning* and thereby *disavowing* his act It testifies thereby to government A's recognition of the violated rights of government B in the affected area and, therefore, to the wrongfulness of the pilot's act." *Id.* at 101-02.

123. *Id.* at 102-03. Feinberg here uses the example of condemning paramour killings, which were once legal in the State of Texas. He states, "The demand for punishment in cases of this sort may instead represent the feeling that the paramour killings deserve to be *condemned*, that the law in condoning, even approving of them, speaks for all citizens in expressing a wholly in appropriate attitude toward them." *Id.* at 103.

124. *Id.* at 104. Feinberg explains, "A statute honored mainly in the breach begins to lose its character as law, unless, as we say, it is *vindicated* (emphatically reaffirmed); and clearly the way to do this (indeed the only way) is to punish those who violate it." *Id.*

authority absolves innocent suspects of blame by punishing the single guilty party.¹²⁵

This theory, it can be argued, is distinct from purely consequentialist theories because it recognizes the condemnatory purpose of criminal law aside from any maximizing of utility in society. Feinberg states, "Symbolic public condemnation added to deprivation may help or hinder deterrence, reform, and rehabilitation—the evidence is not clear."¹²⁶ Expressivism, however, is extremely difficult to characterize as purely deontological because the punished person is used as a means to the end of the various condemnatory purposes elaborated by Feinberg.¹²⁷ In other words, the criminal, under the expressivist theory, is punished not necessarily because he deserves it, but rather because, for example in the context of "absolution of others," it absolves other innocent suspects of blame.¹²⁸ In addition, it seems difficult to conceptualize the desirability of the condemnation apart from the consequences of the condemnation, whether it be better international relations, a more satisfied populace, innocent suspects' lives improved, or a more strongly revered criminal code.¹²⁹

Like retributivism, expressivism fails to answer the important question, "What acts ought the punishing authority condemn?"¹³⁰ Through his examples, Feinberg makes assumptions about the bases of the penal system apart from its expressivist function, namely, that there is an alternate way of determining what ought to be pun-

125. *Id.* at 105. Feinberg argues, "when something scandalous has occurred and it is clear that the wrongdoer must be one of a small number of suspects, then the state, by punishing one of these parties, thereby relieves the others of suspicion and informally absolves them of blame." *Id.*

126. *Id.* at 101.

127. Retributivist theory counsels that man may never be used as a means to an ends. See *supra* note 106 and accompanying text.

128. See *supra* note 125.

129. Michael C. Harper characterizes the expressivist function of law as follows:

A central function of the criminal law is to iterate the community's condemnation of certain behavior and associated mental states in a way that helps insure that the tendencies in all of us toward these behaviors and emotions can be internally controlled by a stern superego if not by a more integrated ego.

Michael Harper, *Comment on the Tort Crime Distinction: A Generation Later*, 76 B.U. L. Rev. 23, 25 (1996).

130. See *supra* notes 122-23 and accompanying text.

ished.¹³¹ To explain symbolic nonacquiescence, Feinberg uses the example of a Texas law that not only excused but justified paramour killings. He states, "The demand that paramour killings be punished may simply be the demand that this lopsided value judgment be withdrawn and that the state *go on record* against paramour killings and the law *testify to the recognition* that such killings are wrongful."¹³² Here there is a presupposition of the definition of "wrongful," although it is not apparent what it is.¹³³ It is unclear whether Feinberg thinks the punishing authority ought to condemn that which the people largely condemn,¹³⁴ or ought to condemn that which the people may not largely condemn but should condemn.¹³⁵ Likewise, the authoritative disavowal function takes for granted a prior moral calculation as to which acts should or should not be authoritatively disavowed.¹³⁶ Moreover, in the context of "vindication of the law," expressivism takes on an explicitly positivistic tone.¹³⁷ The precise function of punishment is to make laws have effect. Consequently, the reason a state punishes an actor is to give voice to laws that already exist.¹³⁸ This concept clearly does not speak to the more fundamental question of why particular laws should or should not exist.

Even more unclear is the question of whether expressivism is itself a ground for criminal punishment or if expression is merely an ancillary aspect of the government's

131. Ultimately then, saying that what ought be punished is that which the punishing authority ought to condemn is as unsatisfying as saying that what ought be punished is that which deserves to be punished. Both statements beg the further question of what ought to be punished or condemned. This leads back to the impenetrable problem of first principles. *See supra* note 61.

132. FEINBERG, *supra* note 51, at 103.

133. What is clear is that Feinberg thinks that paramour killings are wrong. What is unclear is why they are wrong.

134. This position, in effect, reduces expressivism to majoritarianism. For this precise reason, positivists reject the attempt to employ theory as the ultimate justifying mechanism. *See supra* note 52.

135. This view may solve the "naturalistic fallacy," which is concerned with deriving 'ought' from 'is'. *See* Robert P. George, *Kelsen and Aquinas on "The Natural-Law Doctrine"*, 75 NOTRE DAME L. REV. 1625, 1632 (1999-2002). However, it leads one back to the problem of first principles. *See supra* note 61.

136. Feinberg's airplane shooting example assumes either: (1) shooting another country's plane over international waters is bad and should thus be disavowed; and/or (2) complying with international demands is valuable and authoritative disavowal helps countries achieve compliance. *See supra* note 122.

137. *See supra* notes 51-52 for a discussion of positivism.

138. *See supra* note 124.

execution of penal laws based on other philosophical grounds.¹³⁹ Does Feinberg advocate that the *primary* purpose of punishment should be the expression of condemnation? If so, this idea appears to lead to some problematic results. For example, if the main purpose of punishment is authoritative disavowal, it could be argued that that the state is justified in punishing high profile criminal defendants more than other criminal defendants.¹⁴⁰ If the purpose is vindication of the law, one could say the state would be justified in punishing large numbers of offenders quickly and perhaps without proper regard for actual innocence or procedural safeguards in order to show society that the law has effect.¹⁴¹

The other alternative is that Feinberg is saying that the State ought to punish for reasons apart from mere expression (either deontological or consequential), but when it punishes, it also serves an expressionist function. In all fairness, it appears that Feinberg does not believe that expressivist functions underlie the entire purpose of punishment. Rather, he argues that the expressive function of the law is an aspect that must be included in any philosophical account of punishment:

139. The question is: Has Feinberg argued that authoritative disavowal is the ground for erecting a system of punishment or that there are certain core values the punishing authority should support through authoritative disavowal.

140. Recent months have seen the conviction of Winona Ryder for multiple felonies related to a single incidence of shoplifting and the conviction of Martha Stewart for conspiracy. Many have speculated that the aggressive nature of these prosecutions was to "make an example" of Winona and Martha, a tactic that is troubling to much of the public. See, e.g., *Recap of June 14, 2003: Jailhouse Stocks?* (June 16, 2003) (statement by Gregg Hymowitz), available at <http://www.foxnews.com/story/0,2933,89512,00.html> (last visited Apr. 22, 2003) ("My concern is maybe we're going a little too far. Some of these charges against Martha Stewart are a little bit ridiculous. And to take a celebrity and try and make an example of them bothers me."). *Id.*

141. The so-called "war on drugs" included aggressive policing and prosecution policies to make drug laws resonate more strongly among members of the American public. Aggressive policies resulted not only in miscarriages of justice in individual cases, but also broader racially unjust policies:

Although the drug war has certainly sought to eradicate controlled substances and destroy the networks established for their distribution, this is only part of the story. As I shall explain, state efforts to control drugs are also a way for dominant groups to express racial power.

Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" was a "War on Blacks,"* 6 J. GENDER RACE & JUST. 381, 386 (2002).

A philosophical theory of punishment that, through inadequate definition, leaves out the condemnatory function not only will disappoint the moralist and the traditional moral philosopher; it will seem offensively irrelevant as well to the constitutional lawyer, whose vital concern with punishment is both conceptual, and therefore genuinely philosophical, as well as practically urgent.¹⁴²

To sum up, the foregoing discussion is meant to sketch out the broad categories of penal philosophy existing in the discourse of criminal law and victims' rights. In their most basic forms, deontological and consequentialist theories are mutually exclusive. If one is a pure deontologist, she may not justify a doctrine by its tendency to produce good. If one is a pure utilitarian, she may only justify a doctrine by its tendency to produce good. The consequentialist criticism of deontology is that the concept of just deserts, when divorced from the empirical world, rings hollow. The purely deontological derivation of right and wrong seems truly arbitrary. Conversely, the deontological objection to utilitarianism is that using any means to achieve a good end is unfair and that relying on future results is speculative.

The question is: Are consequentialist and deontological theories forever locked in an uncompromising battle for justificatory superiority in the criminal law?¹⁴³ I think the answer is "no." Where deontological theories may fail to provide a mechanism for determining to which specific acts moral culpability should ultimately attach,¹⁴⁴ utilitarian concepts (as well as other procedural concepts like democracy) can provide that ability.¹⁴⁵ For example, the decision to protect people's private investments over corporate discretion because doing so is best for the economy, gives the law a way to determine the moral culpability of certain forms of

142. FEINBERG, *supra* note 51, at 105.

143. See Hurd, *supra* note 65; see also Christopher, *supra* note 46, at 855 (indicating that "the modern debate over the justification of punishment stems largely from the impasse between retributivism and some form of consequentialism").

144. See *supra* notes 59-64 and accompanying text.

145. The legal positivist model says that we should look no further than the express statements of the law to determine what ought to be punished. See *supra* note 61. The procedural value model, like valuing democracy, is similar to legal positivism, but it adds one more level of abstraction: The positive law dictates what constitutes the "good," but only when the positive law has been achieved through moral means like the democratic process.

corporate risk-taking.¹⁴⁶ These types of consequentialist choices shape the actual doctrine of criminal law.¹⁴⁷ The deontological values emerge to restrain the consequentialist from using any means to affect the desired goal. For example, once consequentialist thought is utilized to determine a certain corporate act to be illegal, deontological principles enter to prevent the law from, say, imprisoning the guilty corporate executive for life.¹⁴⁸ This is because life imprisonment would exceed the bounds of the punishment "deserved" by the illegal actor.¹⁴⁹

As a result, there should exist, and in fact does exist in the law, a delicate balance between deontological and consequentialist concerns. Where the balance cannot be maintained, for example in areas where fairness and utility necessarily conflict, there will always be a sense of unease about where to draw the line. This article, however, does not claim to answer where the line between deontology and teleology should be drawn. My project here is to respond to what I anticipate to be the potential criticisms of the non-specific victim liability from both camps of philosophy. Part II addresses the deontological criticism of the defense, and Part III responds to consequentialist concerns with the defense.

146. Thus, with the goal of achieving a certain state of affairs in society, namely, protection of the investor, legislatures are guided in this area of criminal law. *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.) ("An Act to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.").

147. They give the positivist a mechanism for determining why the legislature acted the way it did, and the theorist fuel to voice the opinion that the legislature ought to act in a certain way.

148. *See* Katz, *supra* note 67, at 307.

149. Again this may beg the question of how much punishment is deserved by any given criminal act. Undeniably, however, retributivism must encompass, at some level, an idea of proportionality, however defined:

Though retributivism's rationale for the proportionality principle is undoubtedly thin (and perhaps nonexistent), that punishment should be in some way proportional to the crime is an intuition (like the wrong of punishing the innocent) that is so widely shared as to make its attack unpersuasive.

Christopher, *supra* note 46, at 891-92. Embedded within Christopher's criticism of retributive proportionality is an underlying question regarding deontological limiting principles: Why does retributivism require punishment to be fair and proportional? The easy, albeit perhaps unsatisfying, answer is: Because that is precisely what it means to give someone what they "deserve."

II. RESPONDING TO THE DEONTOLOGICAL OBJECTION

A. *The Deontological Objection*

Deontologists, and retributivists in particular, are pre-occupied with the concept of just deserts. As a result, a retributivist looking at the nonspecific victim liability defense could argue that the defense does not correctly mete out punishment on the basis of desert. In other words, the defense either exculpates those who deserve to be punished, punishes those who deserve to be exculpated, or both. Whether in the name of promoting efficiency, controlling crime, or just by happenstance, if the nonspecific victim liability defense does not punish those who deserve punishment because they deserve it, then the defense has failed from a retributivist perspective.¹⁵⁰

The easy initial response to the deontologist is that the nonspecific victim liability defense does capture what it means to "deserve" punishment. The proponent can argue that as with self-defense, the nonspecific victim liability defense dictates that under the specified conditions¹⁵¹ the defendant is not morally culpable (or as morally culpable as a defendant who does not meet the conditions). Consequently, the parameters of the nonspecific victim liability defense become the moral meters with which to measure the blameworthiness of the defendant. The nonspecific victim liability defense is thereby incorporated into the definition of what it means to "deserve" punishment.¹⁵² A defendant who meets the requirements of the defense simply does not deserve to suffer criminal sanctions (or as severe criminal sanctions).

This response, however, may seem completely unsatisfying. Basically, it is the tautological assertion that the

150. See *supra* note 53 and accompanying text (discussing retributivist theory).

151. See Gruber *supra* note 14, at Part IV.

152. This definitional move, that is, defining justice with reference to the victim liability defense, is not without criticism. H.L.A. Hart objects to the tendency to define punishment in terms of its justification, as a "definitional stop," which defines away the problem of justification. HART, *supra* note 51, at 4-5. My response is that the very nature of deontology makes definitional reasoning unavoidable. Having been prevented from appealing to anything experiential, see *supra* text accompanying note 62, the *only* way to fit a specific punishment into a retributive framework is by a *a priori* definition.

victim liability defense defines what it means to act culpably or nonculpably and thus desert is determined with reference to the defense. Like the criticism of deontology in general, the criticism of this response is that the assertion that the nonspecific victim liability defense captures the meaning of morality is an arbitrary assertion.¹⁵³ The important question that must be addressed in order to show that the victim liability defense comports with just deserts is: Why do the elements of the defense enumerated in the Introduction define the parameters of just desert? In answering this question, one must determine which acts and actors are excluded from the protective ambit of the defense and why.

While the defense is premised on "wrongful" victim conduct,¹⁵⁴ an issue arises as to whether "wrongful" conduct should be interpreted expansively to include negligent victim conduct. One could look to tort law and craft a criminal victim liability doctrine similar to contributory or comparative negligence.¹⁵⁵ By doing so, however, the nonspecific victim liability defense runs the risk of taking on the characteristics of a doctrine that exculpates rapists when the victim has dressed provocatively, or exculpates muggers when the victim has jogged in the park alone. Such a doctrine would appear to fly in the face of retributive concerns over just deserts.

Consequently, the powerful deontological criticism of the victim liability defense is that it fails to comport with just deserts because of its potential to create a regime in which crime victims are blamed for their own imprudence and culpable criminals are let off the hook. This is one of the most significant criticisms of the proposed nonspecific victim liability defense. The fear is that immoral criminals who prey on the weak, ignorant, or careless will be rewarded with reduced liability. Specifically, the defense could give license to blame battered women for staying in

153. The argument is that deontological first principles are either arbitrary or ultimately consequentialist in nature. See *supra* notes 59-64 and accompanying text.

154. This is the first requirement of the defense. For further explanation of the wrongfulness requirement, see Gruber, *supra* note 14, at 710-14.

155. See, e.g., Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181 (1994) (justifying contributory negligence in criminal law on the basis of efficiency principles).

abusive relationships, blame mugging victims for walking down dark alleys alone, and blame rape victims for "asking for it."¹⁵⁶ Indeed, this author has condemned the tendency to insert contributory negligence and assumption of risk principles into the rape trial:

[T]he foremost legal error in the rape trial [is] the "widespread bootlegging of the tort concepts of contributory negligence and assumption of the risk into the working law of rape." The importation of tort-type defenses into the rape trial is a legal flaw within the trial process that calls for a legal solution.¹⁵⁷

Below is an analysis of the potential responses to the deontological objection.

B. Response 1: The Consequentialist Benefits of Contributory Negligence in Criminal Law Outweigh the Deontological Harms

One way to respond to the deontological criticism is by arguing that the consequentialist benefits of victim blaming outweigh any concerns over just deserts. At least one theorist, Professor Alon Harel, has argued that the criminal law should incorporate a contributory negligence or comparative fault type defense premised on victims placing themselves in unreasonably vulnerable positions regarding the risk of being victimized.¹⁵⁸ He purports to extend "Coasian insight from tort law into criminal law."¹⁵⁹ Harel advocates contributory negligence rules in criminal law to encourage potential victims to take precautions, thereby creating positive externalities:

Precautions taken by victims provide two types of positive externalities. The first directly benefits potential victims by making crime less profitable; the second benefits the population at

156. These are the horror stories that victim blaming brings to mind. See Gruber, *supra* note 14, at 645.

157. Aya Gruber, *Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape*, 4 WM. & MARY J. WOMEN & L. 203, 211 (1997) (quoting Terri Villa-McDowell, *Privacy and the Rape Victim: The Inconsistent Treatment of Privacy Interests in Two Recent Supreme Court Cases*, 2 S. CAL. REV. L. & WOMEN'S STUD. 293, 327 (1992) (footnote omitted).

158. See Harel, *supra* note 155 *passim*.

159. *Id.* at 1188.

large by reducing the indirect costs of crime, in particular, the costs of the enforcement system.¹⁶⁰

There are, however, several problems with responding to the deontological criticism by asserting solely a consequentialist account of victim-blaming. First, economic analysis of criminal law is a specific subset of a utilitarian or consequentialist penal theory¹⁶¹ and is thus subject to the empirical criticism of consequentialism.¹⁶² Harel's theory is necessarily a theory that justifies, or at least explains, punishment on the basis of outcomes. Thus, the success of the theory depends on uncertain contingent results.¹⁶³ One could certainly argue that to the extent that economics matter, allowing a negligence defense to intentional crimes does not necessarily produce the most efficient outcomes:

[A] contributory negligence rule in criminal law may create incentives for criminals to commit crimes against careless people [T]here is enough crime to go around. Smart criminals still have incentives to rob wealthy people with alarm systems. The deterrence effect of criminal penalties to the dumb criminal who would likely get caught and punished, however, is all but lost. Harel does not take into account the incentive effect such a rule would have on people who, otherwise, would have been too scared to rob at all. Also, with more crimes against careless people without security systems (who are probably, on average, poorer), criminals will get less compensation for each crime. This, in turn, may increase the number of crimes thieves commit in order to steal the same amount.¹⁶⁴

Of course, currently there is no formal criminal defense that lessens the defendant's liability when the victim has

160. *Id.* at 1195-96.

161. Economic analysis counsels that the "correct" law is one that maximizes efficiency and minimizes inefficiency. Efficiency is generally measured in terms of wealth. Thus, law ought to be geared to maximizing wealth and minimizing costs.

162. See *supra* text accompanying notes 74-76.

163. See *supra* note 74 and accompanying text.

164. Gruber, *supra* note 157, at 243. Harel also recognizes the possibility of "displacement" crimes, but argues that "[d]isplacement of crime, however, can hardly justify the rejection of a criminal law principle of comparative fault." Harel, *supra* note 155, at 1200.

been careless.¹⁶⁵ As a result, there is no way to determine in any quantifiable manner whether contributory negligence increases or decreases crime or increases or decreases victim precaution. The criticism posited above is that a comparative negligence principle in criminal law will, in fact, lead to more crime because it would encourage criminals to prey on the poor. In turn, criminals will need to commit more crimes for the same gain. Harel, on the other hand, articulates positive consequences of shifting crime to the poor:

[B]etter precautions taken by potential victims in an affluent neighborhood may force criminals to turn their attention to less affluent neighborhoods and subsequently may persuade them to leave criminal activity altogether and choose instead *legal* substitutes, or at least to choose to commit a less serious crime.¹⁶⁶

One could debate endlessly whether, as a result of a contributory negligence defense, the criminal will turn to more or less crime. This debate, however, illuminates the basic criticism of justifying criminal punishment by efficiency: It can only be a contingent reason for punishment and carries little prospective justificatory force.¹⁶⁷ In addition, some empirical evidence exists to support the contention that a contributory negligence defense would lead to greater inefficiency. There is somewhat of a historical analog to criminal contributory negligence. Tort-type reasoning has occurred informally in the rape context.¹⁶⁸ Jurors have acquitted defendants, not because the victim consented to the sex, but rather because she "negligently" put herself in the position of being a victim of rape. Rape theorists contend that such practices have led to under-enforcement of rape laws.¹⁶⁹ Assuming the validity of consequentialist

165. While there is no formal contributory negligence defense in criminal law, the assessment of victim liability is significantly present throughout the criminal process. See Gruber, *supra* note 14, at 692-93.

166. Harel, *supra* note 155, at 1200.

167. See *supra* notes 74-76 and accompanying text (discussing empirical problems with utilitarianism).

168. See Gruber, *supra* note 157, at 212 (section entitled "The Pervasiveness of Tort Defense in Rape Law"), describing the formal and informal ways in which the criminal law of rape blames rape victims for imprudence.

169. Kathryn Carney, *Rape: The Paradigmatic Hate Crime*, 75 ST. JOHN'S L. REV. 315, 346 (2001):

deterrence theory,¹⁷⁰ under-enforcement of criminal laws leads to more crimes, which is inefficient.

In addition, the theory is vulnerable to the criticism that it is at odds with common fairness sentiments about criminal punishment.¹⁷¹ Contributory negligence in criminal law seems unfair and disproportional for several reasons. Moreover, any deontological account of criminal contributory negligence has unpalatable social implications. Similar to Professor Harel, Judge Richard Posner has offered an account of criminal law based on transaction costs:

The major function of criminal law in a capitalist society is to prevent people from bypassing the system of voluntary, compensated exchange—the “market,” explicit or implicit—in situations where, because transaction costs are low, the market is a more efficient method of allocating resources than forced exchange.¹⁷²

Critics contend that such an economic model is unable to characterize adequately or correctly why we have criminal prohibitions. Posner’s economic explanation of rape prohibitions as reducing potential victims’ cost of self-protection and potential defendants’ cost of overcoming those protections is particularly troubling to Professor Mark Tunick:

Posner realizes how perverse his argument sounds and at least pauses to acknowledge that of course “rape is a bad thing.” He

[R]ape is characterized by significant underreporting. This is attributed to the fact that rape victims feel that the police either could not or would not help them. The victims attribute this distrust to the fact that they often suffer a second time at the hands of an insensitive and gender-biased criminal justice system and because of social beliefs at large. Rape victims are correct in their perception. Studies have shown the prevalence of judicial bias against rape victims. The victim is often the one put on trial, with jurors focusing on extraneous factors like their clothing, lifestyle and demeanor. Additionally, studies of jury behavior and attitude reveal poorly disguised hostility toward rape victims, whom juries view as bringing the rape upon themselves . . .

170. Deterrence theory posits that the purpose of punishment is to affect the criminal’s “calculation of the chances for and against” success. BENTHAM, *supra* note 75, at 38.

171. In other words, creating criminal policies to maximize market efficiency could employ unfair means. See *supra* notes 77-78 and accompanying text.

172. Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985).

says his point is that "economic analysis need not break down in the force of such apparently noneconomic phenomena as rape." At this point his argument is far removed from not only a justification but also an explanation of some aspects of legal punishment—he gives a rationale which is not in the least bit persuasive as an account of the reasons we punish crimes of violence.¹⁷³

Professor Harel's theory is limited so that it does not apply to a woman who has "negligently" placed herself in a position to be raped. This, limitation, however, is not based on efficiency. Rather, in the rape context, Harel appeals to a non-economic, deontological, factor: "Equal protection."¹⁷⁴ In the end, then, even advocates of contributory negligence defenses in criminal law appeal to a retributivist check when it comes to non-economic crimes.

Even outside the rape context, fairness concerns militate against a contributory negligence defense. Assuming that it is expedient to punish one criminal less than another for the same behavior merely because the victim was negligent by, say, not investing in an alarm system, such a practice resonates as unfair or disproportionate. Even if one could discern a difference in the moral character of the negligent and non-negligent victim,¹⁷⁵ one would be hard pressed to see a difference in the moral character of the criminals who committed crimes against those victims. In fact, there is an argument that the state should particularly protect the "negligent," who may in all likelihood be disadvantaged, and particularly punish those who prey on negligent victims:

The criminal law shields victims against their own imprudence. They are entitled to move in the world at large with as much freedom as they enjoy behind locked doors. They can walk in the park when they want, sit where they want in the subway, and wear skimpy clothes without fearing that they will be faulted for precipitating rape. This is what it means to be a free person, and

173. MARK TUNICK, PUNISHMENT: THEORY AND PRACTICE 82 (1992).

174. Harel argues:

Women are more vulnerable to some crimes than men, since they are more likely to become victims of sexual offenses. Minorities are more vulnerable to racially based crimes than whites. The equal protection model should govern the distribution of protection to women and minorities because their vulnerability is involuntary.

Harel, *supra* note 155, at 1204.

175. See *infra* text accompanying notes 200, 216-18.

the criminal law protects this freedom by not censuring those who expose themselves, perhaps with less than due care, to risks of criminal aggression.¹⁷⁶

The advocate of contributory negligence in criminal law might respond that any fairness concerns are outweighed by efficiency gains. This argument relies on a purely non-retributive account of criminal punishment:

The criminal law principle of comparative fault can . . . be described as a statement that society cannot afford to protect legitimate, nonculpable behavior of victims when that behavior is too costly. Under this interpretation, the victim's culpability is neither condoned nor deplored. The principle simply reflects the fact that societal resources are limited and thus should be directed to the most urgent societal needs. The protection of careless victims is a particularly costly enterprise and consequently we may have to sacrifice some of the protection granted to careless victims. This sacrifice need not imply that the victims' careless conduct is condemnable nor that the criminals' behavior is less culpable.¹⁷⁷

A limited cost-based rationale for criminal law, however, simply fails to strike an intuitively correct balance between deontology and consequentialism. Relying exclusively on cost as a justification for criminal policies is problematic because a criminal defense that does not find at least some ground in deontology will likely not pass philosophical, popular, or even political muster. For example, most people would agree that one who commits an unexcused murder should be punished; even if statistical analysis shows that such punishment has absolutely no deterrent effect, there is no chance the murderer would reoffend, the victim has no surviving family members who require closure, and nobody in society-at-large feels personally unsafe because of the murder.¹⁷⁸ In contrast, most people would have trouble punishing a complete innocent

176. George P. Fletcher, *Domination in Wrongdoing*, 76 B.U. L. REV. 347, 356 (1996).

177. Harel, *supra* note 155, at 1228.

178. This sentiment has been expressed exhaustively in the writings of Kant, *supra* note 56, at 103 ("Even if a civil society were to dissolve itself by common agreement of all its members . . . the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth.").

simply to deter crime, satisfy victims, or placate society.¹⁷⁹ Therefore, deontology has a very special place in the criminal law. Paul Robinson describes the special role of deontology in the criminal law as one of giving criminal prohibitions *credibility*, which ultimately furthers both retributive and consequentialist goals:

There is practical value, not just 'philosophical' value, in maintaining the criminal law's focus on moral blameworthiness. What we have in the past taken to be instances of injustice imposed by the criminal justice system on some individual, when the just desert principle is violated, we ought to understand now as instances of injustice imposed on us all, since each such instance erodes the criminal law's moral credibility and, thus, its power to protect us all.¹⁸⁰

Consequently, for the foregoing reasons, responding to the deontological objection to victim liability by asserting the consequentialist benefits of contributory negligence is ultimately unsatisfying and unpersuasive.

C. Response 2: A Contributory Negligence Rule in Criminal Law Does Adequately Reflect a Correct Distribution of Just Deserts

Another response to the deontological objection is that the objection "gets" deontology wrong. Importing a contributory negligence principle into criminal law is consistent with just deserts because contributory negligence is deontologically culpable.¹⁸¹ As support, the respondent will contend that contributory negligence and assumption of risk principles seem fair and correct in tort law because the

179. One might respond that repeat offender laws, three strikes provisions, and civil commitment of pedophiles punish criminals not solely because they are guilty of a crime in the past, but also because they are likely to commit crime in the future. In this sense, the policies punish the "innocent." The counterargument is that even these highly utilitarian laws apply only to those individuals who have been adjudicated guilty of some past crime. Thus, there is preserved some sense that the individuals deserve punishment.

180. Robinson, *supra* note 45, at 499.

181. This statement has two logical implications: (1) a contributorily negligent victim does not "deserve" victims' rights or as many victims' rights, and (2) a defendant who commits a crime against a contributorily negligent victim does not "deserve" to be punished or punished to the same extent as other criminals.

negligent plaintiff does not *deserve* to recover.¹⁸² Like the first response, this response also fails because it is unlikely that contributory negligence will comport with a deontological notion of just desert in criminal law, even if it seems fair in tort law. First, there are striking dissimilarities between tort law and criminal law that make it the case that a doctrine, which seems fair in tort law, will not necessarily be just in criminal law.

Discerning distinctions between tort and criminal law is not new. Philosophers and legal scholars have suffered¹⁸³ over the tort/crime distinction for years, trying, often unsuccessfully, to fit the complicated doctrines into discreet categories.¹⁸⁴ Surveying the wealth of comparative literature on tort and crime, three types of distinctions emerge: (1) distinctions between the prohibitions involved in tort law and criminal law (what tort law and criminal law dictate ought or ought not be done);¹⁸⁵ (2) distinctions between the

182. Prosser & Keaton describe contributory negligence as follows:

Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection. Unlike assumption of risk, the defense does not rest upon the idea that the defendant is relieved of any duty toward the plaintiff. Rather, although the defendant has violated his duty, has been negligent, and would otherwise be liable, the plaintiff is denied recovery because his own conduct *disentitles* him to maintain the action. In the eyes of the law both parties are at fault; and the defense is one of the plaintiff's disability rather than the defendant's innocence.

PROSSER & KEATON ON TORTS CH. 6 § 65.

183. I say "suffered" because of the challenge of distinguishing in a meaningful and coherent way between tort and crime. See Stephen Marks, *Utility and Community: Musings on the Tort/Crime Distinction*, 76 B.U. L. REV. 215, 240 (1996) (discussing factors that make "the tort/crime distinction so hard to define"). Marks observes:

In describing criminal and tortious activity, various scholars have sought to identify the salient characteristics of activities that fall into each category. For example, some observers characterize crimes as intentional, serious, and not requiring actual harm. Conversely, torts are not so serious, do not require intent, and require harm. Other scholars focus on less obvious characteristics . . . Others adopt a more functional approach to distinguishing tortious from criminal activities.

Id. at 218.

184. For interesting and varied discussions of the tort-crime distinction, see generally *Symposium: The Intersection of Tort and Criminal Law*, 76 B.U. L. REV. 1 *passim* (1996); *Symposium: Issues in the Philosophy of Law*, 37 ARIZ. L. REV. 1 *passim* (1995).

185. Tort law, for the most part, dictates that a person should not risk harm whereas criminal law categorically prohibits specified acts (regardless of the

remedies involved in tort and criminal law (monetary damages versus punitive measures);¹⁸⁶ and (3) distinctions between the enforcement mechanisms used to vindicate those rights and apply the remedies (private law versus public law).¹⁸⁷

Of the three, the distinction between the forms of the prohibitions in tort and criminal law is the most relevant to this discussion and arguably the most philosophically weighty. The distinction between the private nature of tort law and the public nature of criminal law is not an *a priori* philosophical distinction.¹⁸⁸ The private nature of tort law is merely a contingent enforcement mechanism of liability rules (like negligence).¹⁸⁹ One could easily imagine a system

harm produced). See Hurd, *supra* note 65, at 255 (arguing that negligence, which forms the bulk of tort law, whether formulated as risk-taking or unreasonableness, is ultimately a consequentialist concept whereas criminal law embodies deontological categorical prohibitions). Others characterize the divide as one between discontinuous prohibitions (torts) and categorical or continuous prohibitions (crimes), see John Coffee, *Does "Unlawful" Mean "Criminal"? Reflections of the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193-94 (1991), or a divide between a system which prohibits acts (crime) and a system which both prohibits acts and concerns "conditionally permissible" acts (tort). See Marks, *supra* note 183, at 240.

186. See Coffee, *supra* note 185, at 194 ("Characteristically, tort law prices, while criminal law prohibits.").

187. This argument dates as far back as William Blackstone. See Fletcher, *supra* note 176, at 347 (observing that torts are private wrongs and crimes are public wrongs). George Fletcher observes:

Blackstone had a point in identifying crimes as public wrongs and torts as private wrongs. Both crimes and torts claim victims, however, the victims' responses vary according to context. In criminal cases, the victim responds by hoping that the government will apprehend and successfully prosecute the offender. In tort disputes, the victim responds by demanding compensation.

Id. at 347 (footnotes omitted).

188. George Fletcher observes that "it is unclear [from the public/private distinction] what constitutes wrongdoing." *Id.*

189. While I characterize the public/private distinction as one of different enforcement—government prosecution versus private law suit, George Fletcher points to the existence of a different public/private distinction—the distinction between acts that harm only the individual (torts) and acts that harm society (crimes). Fletcher iterates Robert Nozick's argument that crimes create public fear such that society is affected by "hearing reports" of crimes in a way they are not affected by reports of tortious activity. Fletcher concludes, "Though the public component is admittedly vague, there does seem to be something more to crime than compensable harm to a single individual." George P. Fletcher, *A Transaction Theory of Crime?*, 85 COLUM. L. REV. 921, 925 (1985). This characterization of the public/private distinction, however, seems flawed. First of all, this argument reduces the "public" nature of crime merely to an empirical as-

in which the government enforced tort laws and distributed awards to the victims, or acted through another regulatory system.¹⁹⁰ Additionally, the fact that tort involves monetary remuneration rather than punishment does not seem to be of too much import.¹⁹¹ As illustrated previously, criminal

sertion about how the public feels about certain crimes. A "public" event must mean more than any event about which the public has a feeling. Second, the empirical assumption that the public is affected only by reports of crimes, as opposed to reports of tortious activity, is suspect. People generally react to reports of bad things that they think will happen to them. Thus, reports of a plane crash, due to the ordinary negligence of the pilot, which is hard to conceive of as anything other than a tort, will inspire fear in thousands compelling them not to fly. Likewise, a long-time happily married couple would likely not feel fear at reports of domestic violence, but rather pity, similar to the pity we feel for a paraplegic sky-diving victim, whose accident we do not believe will happen to us.

190. This, by the way, may end up being more efficient, given the great costs of the private court system. These costs and other concerns have led many jurisdictions to adopt tort reform statutes. Critics argue that, in limiting liability, tort reform ends up undercutting the prohibitory force of the law. See Robert S. Peck et al., *Tort Reform 1999: A Building Without a Foundation*, 27 FLA. ST. L. REV. 397 (2000).

[T]he recent demands for widespread tort reform, while directing attention to dissatisfaction with the tort system, tend to miss their mark, since significant underdeterrence already exists. Thus proposals that damage awards be capped, that limitations be placed on pain and suffering and punitive damages, and that stricter evidence be required for recovery should be rejected.

Id. at 440-41. In addition, there is also issue of the tenuous divide between public and private law, see *Shelly v. Kraemer*, 334 U.S. 1 (1948) (holding that the use of state court to enforce private covenant constitutes state action), and the historical lack of division between public and private law. See Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1322 (2002) ("Colonists who arrived on North American shores brought with them a tradition of allowing crime victims to initiate and prosecute their own cases."); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1234 (2003) ("some historical traditions permitted prosecutions initiated by private parties . . .").

191. Kenneth Simons characterizes the compensation/punishment distinction as follows:

The tortfeasor is entitled to harm the victim so long as he pays for the harm (with the expectation that this entitlement will induce him to take optimal care), while the criminal is not entitled to harm the victim even if the criminal is willing to pay for that harm.

Simons, *supra* note 70, at 273. Simons criticizes "price/prohibition and liability rule/property rule explanations [as] inadequate" because they fail to account for the deontological nature of tort law (including a deontological conception of negligence). *Id.* Without committing to a deontological conception of tort law, one can still criticize the above formulation of the tort/crime distinction. The

law is concerned not only with sanctioning, but also with victim compensation (both financial and emotional).¹⁹² These dual goals are achieved through a variety of measures both incarceration-based and monetary. Likewise through monetary awards, tort law is able to fulfill its dual purpose of sanctioning negligent or intentionally harmful behavior and compensating the injured party.¹⁹³

What seems to be the characteristic distinction between criminal law and tort law is the structure of the prohibitions. Eliminating the "fringes" of criminal law (strict liability and negligence crimes) and tort law (punitive damages and intentional torts),¹⁹⁴ criminal law is composed of

statement is puzzling to me, perhaps because of the unclear nature of the word "entitlement." Entitlement generally means a right to a benefit conferred by law. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 387 (10th ed.) (defining "entitlement" as "a right to benefits specified especially by law or contract"). It is hard to conceive of the tort law as giving tortfeasors who are willing to pay the right to injure victims. Rather, it is precisely because tortfeasors are not entitled to injure victims that they must pay, that they are "liable." Thus, Simon's follow-up statement, "this entitlement will induce [the tortfeasor] to take optimal care" is confounding. How can it be that tort law both seeks to *entitle* a paying tortfeasor to injure another and at the same time seeks to induce him to take optimal care? It is certainly unusual to characterize a law that sanctions behavior as entitling one to engage in the behavior as long as they are willing to submit to the sanction. If an entitlement is nothing more than a the right to commit a harm for which the harmer can afford to pay the legal price, cannot one conceive of criminal law as entitling a criminal to commit a crime so long as she is willing to submit to incarceration or a fine?

192. See Gruber, *supra* note 14, at 657 (referencing victim compensation programs).

193. Complicating the compensation/punishment distinction even further are the fringes of tort law and criminal law. Tort law contains clearly punitive dimensions like punitive damages. Criminal law contains clearly compensatory dimensions like sentences of restitution.

194. Many torts theorists would object strenuously to the contention that intentional torts are "fringes." Thus, it appears to be a big cop-out to describe criminal law and tort law as disparate by eliminating the fringes; however, when engaging in such broad categorizations of the two bodies of law, it is useful, if not necessary, to do so. Claire Finkelstein argues:

The sort of theoretical unity . . . implicit in legal institutions is, admittedly, approximate at best. Crimes of negligence and strict liability remain relatively rare exceptions, and great expansion of these forms of liability *would* signal that need to revise the account of criminal liability. This would not show that we had been wrong about the criminal law all along, but would suggest rather that the nature of the institution had changed. Intentional torts provide the obvious objection on the civil side, but there the answer to imperfection is rather different. Either one must say that the institution of tort law

specific categorical prohibitions, and tort law is about negligence. This is evidenced by the fact that the bulk of tort law centers on a general negligence prohibition, while criminal law centers on categorically prohibited acts and has no general negligence prohibition (although negligence is certainly the required intent in specified crimes):

With few exceptions, the 7000 prohibitions of the criminal law function as agent-relative maxims [T]hey prohibit agents from justifying their violation on consequentialist grounds. Inasmuch as intentional torts are "civil crimes"—that is, crimes upon which civil causes of action are parasitic—they occupy a pocket of tort law that appears equally deontological in content. But this pocket is a relatively small one. The bulk of tort law is comprised of negligent and strict liability offenses. Although strict liability, if purely applied, might be readily explained on deontological grounds, few so-called strict liability causes of action in tort law genuinely function to impose liability in the absence of negligence.¹⁹⁵

While the *system* of criminal punishment can be justified by overarching deontological or utilitarian concerns, the *form* of criminal prohibitions almost never requires the actor to make consequentialist choices.¹⁹⁶ Thus, criminal law categorically prohibits the actor from doing "immoral" things whereas tort law, through the general negligence prohibition, requires the actor to engage in analyses of future results of her behavior. In order to be non-negligent, one must act reasonably or appropriately with regard to risks of harm.¹⁹⁷ In order to comport with categorical prohibitions, the actor must refrain from the conduct, regardless of the outcome or the empirical likelihood of certain out-

does not form a theoretical whole, or one must appeal to the lowest common denominator. . . .

Claire Finkelstein, *The Irrelevance of the Intended to Prima Facie Culpability: Comment on Moore*, 76 B.U. L. REV. 335, 345-46.

195. Hurd, *supra* note 65, at 271-72.

196. In other words, the law may contain a categorical prohibition like, "Do not drive drunk." Such a prohibition does not ask the actor to calculate the risks of driving drunk, rather it absolutely prohibits drunk driving. This law, however, may be justified on deontological grounds ("drunk drivers deserve punishment") or consequentialist grounds ("drunk driving laws decrease motor vehicle deaths.").

197. See RESTATEMENT (FIRST) OF TORTS § 282 (1934) ("[N]egligence is any conduct . . . which falls below the standard established by law for the protection of others against unreasonable risk of harm.").

comes.¹⁹⁸ For this reason, much of negligence jurisprudence, for example the famous Hand formula, concerns very consequentialist cost-benefit analyses.¹⁹⁹ As a result, the concept of consequentialist as opposed to deontological wrongdoing is simply more palatable in tort law than in criminal law. Contributory negligence properly belongs in a system that requires actors to engage in risk analyses and not in a system that categorically prohibits acts. For this reason, contributory negligence principles are a better fit in tort law than in criminal law.

Some theorists, however, would counter the contention that contributory negligence is a consequentialist principle that belongs only in tort law by characterizing negligence as deontologically culpable. These theories purport to construct deontological "risk-based" accounts of negligence, which posit, in a nutshell, that unjustifiably risky behavior is deontologically wrong, apart from any consequential analysis.²⁰⁰ Heidi Hurd responds to this account of negligence, in part, as follows:

It is morally unacceptable to say that risking is deontologically wrong, or that risking is deontologically culpable. Recall the implications of identifying an act as a violation of a deontological maxim: that act is categorically prohibited. If risks are deontological wrongs, or if there is a deontology of culpability that categorically prohibits one from taking certain risks, then risks cannot be justified on consequential grounds.²⁰¹

Thus, negligence does not exhibit the deontological character of categorical prohibitions. If negligence, which consists of unreasonably risky behavior, were in fact deontological, a risky act could not be made non-negligent by

198. See *supra* notes 195-97 and accompanying text.

199. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (stating that an injury is not foreseeable if the costs of precautions to prevent the injury exceed the costs of the injury multiplied by the probability of the injury occurring if the precautions are not taken). Experts note that tort law "permits judges to act as roving efficiency commissioners charged with the task of identifying and achieving the cost-efficient mix of precaution and injury." John C.P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1512 (2002).

200. Some argue that negligence is deontologically wrongful, apart from its consequences, because negligent acts offend the (deontological) value of reciprocity. See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 548 (1972).

201. Hurd, *supra* note 65, at 264.

appealing to its likelihood to produce overall good outcomes. Tort law, however, does not operate this way. Consider the way the tension between deontological and teleological doctrines is generally set forth—by moral dilemma.²⁰² One can determine if she is a deontologist if she would be unwilling to kill an innocent person in order to prevent the killing (by another) of ten innocents. As a result, a deontological maxim dictating categorically that one ought not kill an innocent, even if doing so produces the best overall results, forces us to ignore our consequentialist intuitions.²⁰³

Negligence simply cannot be framed in this manner. The maxim dictating that “one ought not be negligent” cannot be tested by a consequentialist moral dilemma. For example, generally speaking, speeding is a negligent act, *per se*.²⁰⁴ Now, assume a person engaged in the seemingly negligent behavior of speeding to the hospital in order to promote the greater good of saving the life of a stabbing victim. It would make no sense to say that the person was *negligent* in speeding the dying person to the hospital. Rather, given the circumstances, the person’s behavior was in fact not unreasonably risky—it was not negligent at all.²⁰⁵

202. Many philosophical and even legal writings invoke the “moral dilemma” as a tool of testing theoretical leanings. See, e.g., *The Case of the Spelunccean Explorers: A Fiftieth Anniversary Symposium*, 112 HARV. L. REV. 1834, 1834-1923 (1999) (legal authors’ analyses of the moral dilemma involving several cave explorers who are forced to decide whether to sacrifice one of their lives in order to save a greater number of lives).

203. Consequently, the “dilemma” is created.

204. See, e.g., *Marks v. Mobil Oil Corp.*, 562 F. Supp. 759, 768 (D. Pa. 1983) (“In Pennsylvania, speeding violates the state motor vehicle code and is negligence *per se*.”).

205. See RESTATEMENT (SECOND) OF TORTS § 500 cmt. a (1964):

There may be exceptional circumstances which make it reasonable to adopt a course of conduct which involves a high degree of risk of serious harm to others. While under ordinary circumstances it would be reckless to drive through heavy traffic at a high rate of speed, it may not even be negligent to do so if the driver is escaping from a bandit or carrying a desperately wounded man to the hospital for immediately necessary treatment, or if his car has been commandeered by the police for the pursuit of a fleeing felon. So too, there may be occasions in which action which would ordinarily involve so high a degree of danger as to be reckless may be better than no action at all, and therefore both reasonable and permissible. Thus one who finds another in a lonely place, and very seriously hurt, may well be justified in giving him such imperfect surgical aid as a layman can be expected to give, although it would be utterly reckless for him to meddle in the matter if professional assistance were available.

The actor in this scenario would not be sanctioned by tort law. Consider then, a true deontological maxim dictating that one ought never speed. Because the maxim is categorical, one could not violate it even in the name of promoting greater utility.²⁰⁶ As a consequence, one could not speed to the hospital even to save the life of a dying person. The speeding defendant is therefore guilty, and it is no excuse that he sped to save the life of another. The result is that whether the prohibition is characterized as one against negligence (a teleological concept), or one against speeding itself (a deontological maxim) affects whether our speeding defendant will be sanctioned. Characterizing the prohibition against speeding as a subset of negligence is of obvious philosophical import precisely because negligence is at its core a consequentialist concept.²⁰⁷

In addition, a contributory negligence principle is a better fit in a system that is more explicitly concerned with results, like tort law. This is because tort law does not assess culpability on the basis of the actor's breach of a prohibition, but rather on the actor's tendency to produce a harmful result. Consequently, contributory negligence matters to the extent that the plaintiff caused or contributed to the harmful result. There can be little argument that tort law is more results-oriented than criminal law. Generally, in tort law, there is no suit for negligence that does not result in harm,²⁰⁸ and the amount of compensation relates to the

206. Precisely because the speeding in this case is *categorically prohibited* one could not violate it in the name of greater utility. See *supra* notes 195-97 (discussing the categorical nature of deontology).

207. Kenneth Simons asserts an interesting legal realist response to Hurd's contention that negligence is teleological. He argues that "when courts employ some form of a cost-benefit test of negligence, even when its deterrent efficacy is doubtful, they are often relying upon a deontological norm such as the norm that the injurer must show impartiality and consider the interests of potential victims with at least as much regard as she considers her own interest." Simons, *supra* note 70, at 280. While Simons may be correct that judges apply negligence rules with an eye toward deontological values, this doesn't necessarily mean that negligence, as a concept, is deontological. In a sense, Hurd's and Simons's argument are like apples and oranges. Hurd is describing the prohibition against negligence, from a pure doctrinal standard, as teleological. Simons is highlighting the multitude of factors that come into play (including deontological values) when judges administer tort liability rules like negligence.

208. The practical reason for sanctioning only harmful negligence is that ordinary negligence is such a common occurrence that regulating it through penal laws, in the absence of an injury, would be administratively impossible. First, it would require, at the very least, a governmental policing and regula-

amount of damage, not the amount of negligence.²⁰⁹ Moreover, tort law's emphasis on results attaches specifically to negligence. For intentional or extremely reckless torts, there are punitive damages to punish and deter tortfeasors who engage in the most severe tortious activity.²¹⁰ It is in the area of negligent acts that tort law premises recovery on injury.²¹¹ One may respond, however, that even criminal law does not sanction negligence that fails to result in an injury:

[T]he criminal law is unconcerned with harm-less negligence. Doesn't the law of attempt or some close relative of it, like reckless endangerment, criminalize at least serious, albeit harm-less negligence? The law of attempt itself certainly does not. In fact not only does the law of attempt not reach seriously negligent misconduct, it doesn't even reach knowing misconduct The common law here seems far more reflective of the widely shared intuition, that as a moral matter harm-less negligence is nearly blamefree.²¹²

tory system for mere negligence. It would also necessitate an elaborate system to ensure fair and impartial enforcement of such a sweeping provision. On the other hand, sanctioning only harmful negligence makes law, in part, a function of luck factors. Joel Feinberg argues, in the criminal law context, that the law should not be premised on luck. "[R]eliance on luck in the law is a kind of arbitrariness . . . arbitrariness is a bad thing in a legal system, and . . . it is inconsistent with the principle of proportionality to which most of us give regular lip service." Feinberg, *supra* note 113, at 121. Barbara Herman responds that "to say that luck brings arbitrariness into the law is not yet to offer an argument; but it is only a consideration of some yet to be determined weight." Barbara Herman, *Feinberg on Luck and Failed Attempts*, 37 ARIZ. L. REV. 143, 144 (1995). Herman goes on to say:

Feinberg argues against those who would distinguish attempts from successful actions on grounds of blameworthiness for harm caused. I have suggested that our moral interest in attempts is not exhausted by questions of blameworthiness for harm caused, and that some of the other features of attempts that interest us may mark them for different treatment in the criminal law.

Id. at 146.

209. See RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1979) ("[T]he law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort. The law is able to do this only in varying degrees dependent upon the nature of the harm.").

210. See RESTATEMENT (SECOND) OF TORTS § 908 (1979).

211. The victim who has encountered even gross recklessness but who does not suffer harm can at most recover nominal damages. See RESTATEMENT (SECOND) OF TORTS § 907 cmt. a (1979).

212. Katz, *supra* note 67, at 312.

While it is true that in criminal law there is no doctrine of attempted negligence, this does not necessarily mean that the criminal law is wholly unconcerned with harmless negligence. The criminal law includes a multitude of prohibitions that contain no result element, for example, possessory crimes. Many courts and legislatures have defined the *mens rea* element in possession crimes as something like negligence. That is, a person is guilty if she knew or *should have known* that she possessed illegal items.²¹³ This is one of many examples of harmless negligence in criminal law.

It cannot, however, be denied that results matter in criminal law, as exemplified by the fact that, in many cases, completed crimes are punished more severely than attempted crimes.²¹⁴ Theorists, however, struggle over the propriety of imbuing results in criminal law with moral significance.²¹⁵ In any case, in comparing criminal law to tort law, what is undeniable is that in tort law, results matter more. Subsequently, contributory negligence finds justification in tort law precisely because tort law is about consequential harms and results. Criminal law, on the other hand, is more about categorically prohibited acts, regardless of results. For this reason, it seems unfair to lessen the liability of a defendant who has breached a categorical prohibition merely because the victim acted negligently, which amounts only to consequential fault.

Defenders of a moral account of negligence, however, could argue that even if negligence is not deontologically wrongful, it is consequentially wrongful. They would

213. See, e.g., *State v. Gasta*, No. C3-00-1728, 2001 WL 641590, at *4 (Minn. Ct. App. June 12, 2001) ("To be convicted of first-degree sale of a controlled substance, the state must prove beyond a reasonable doubt that the defendant, on one or more occasions within a 90 day period, unlawfully sold one or more mixtures of a total weight of 10 grams or more containing cocaine, heroin, or methamphetamine, and that the defendant knew or *should have known* that the substance was a controlled substance.") (emphasis added).

214. For example, theft in the District of Columbia is punishable by a maximum term of 10 years in jail. See D.C. CODE ANN. § 22-3212 (2001). Attempted theft is punishable by a maximum term of 180 days in jail. See D.C. CODE ANN. § 22-1803 (2001).

215. It is this disparity between attempts and completed crimes, based on luck factors, to which Feinberg objects as arbitrary. See Feinberg, *supra* note 113, at 119. Gary Watson, however, notes that luck factors are in fact incorporated into some of our moral feelings. He asks, "Suppose I am saved at sea by a heroic and brilliant rescue attempt. While I would appreciate any efforts on my behalf, I feel a special gratitude to those who saved my life." Gary Watson, *Closing the Gap*, 37 ARIZ. L. REV. 135, 137 (1995).

contend that the nonspecific victim liability defense is justified in blaming the imprudent victim because imprudence is a consequential wrong, which is moral in nature.²¹⁶ Proponents of a moral conception of tort law make the following argument: If tort law were just about amoral social ordering, then merely causing a harmful result should be sufficient for liability. Instead, tort law involves some idea of fault.²¹⁷ In addition, an amoral explanation of tort law seems to fail to account for feelings of moral reprehensibility against certain tortious behavior and aspects of tort law like punitive damages. As a result, a comparative negligence principle in criminal law, like in tort law, appropriately accounts for the victim who has engaged in consequentialist wrongdoing:

[T]ort law . . . appears to preoccupy itself primarily with the concept of culpability that attaches to consequential wrongdoing, that is, negligence, while criminal law concerns itself primarily with the concepts of culpability that attach to deontological wrongdoing, that is, specific and general intent. Put boldly and bluntly, tort law appears to be about consequential wrongs, while criminal law appears to be about deontological wrongs.²¹⁸

There are, however, several responses to the argument that consequential wrongdoing on the part of the victim is "culpable" enough to absolve an intentional wrongdoer of liability. First of all, one can contend that negligent tortfeasors are not people about whom we feel the same degree of moral revulsion as criminals.²¹⁹ When one is sanctioned for

216. The argument is that narratives in both tort and criminal law cases imbue certain negligent actors with immoral traits. Depraved-heart murder doctrine, for example, describes the reckless killer in the most culpability laden terms. He is someone with a "heart void of social duty, and fatally bent on mischief." *Mayes v. People*, 106 Ill. 306 (1883), *reprinted in CRIMINAL LAW: CASES AND MATERIALS*, *supra* note 16, at 453.

217. See Simons, *supra* note 70, at 273:

[Some theories] imply that economic efficiency or a similar consequentialist goal best explains and justifies tort law. Such a utilitarian perspective fails to acknowledge the nonconsequentialist, deontological basis of many elements of tort law. For example, it cannot easily explain why tort law generally requires fault and abjures strict liability, or why tort law focuses retrospectively on the victim's right against the injurer.

218. Hurd, *supra* note 65, at 272.

219. This point, however, is debatable because, depending on the narratives employed, criminals may be able to garner sympathy, for example battered

negligence, it is not intuitively "fair" in the deontological sense.²²⁰ Rather, sanctioning one for negligence is only fair under a very consequentialist concept of fairness: That those who produce disutility, even inadvertently, should pay for it.²²¹

The limited nature of "morality" in negligence is also reflected in many other aspects of tort law. First, the moral import of tort judgments is quite different than the moral import of criminal punishment. Under the law of tort, the existence of simple negligence requires no more than the negligent actor paying for the actual consequences of his risk-taking. The negligent actor has to correct the disutility he has produced. In addition, unlike the many categorical prohibitions in criminal law that are graded, negligent actors are treated differently in tort law, not according to intent or conduct, but only according to outcomes.²²² As a result, some experts claim that criminal law "is organized around the notion of *moral* culpability" whereas tort law "has nothing to do with culpability" but "is designed to promote social welfare by imposing duties on agents that will help to organize their behavior prospectively in accordance with various non-moral norms."²²³

Regardless of whether negligence in general can correctly be characterized as consequentialist wrongdoing, it is very difficult to describe a crime victim's contributory negligence in the criminal law context as wrongful or immoral,

wives who kill, and tortfeasors may seem horrendous, for example the makers of the Pinto.

220. Unless, in considering the behavior of the negligent party, it is invested with some second-order deontological character like extreme indifference or even purpose. See *supra* note 108 and accompanying text. In addition, there is the argument that sanctioning negligent acts finds a deontological basis in reciprocity. See Fletcher, *supra* note 176, at 548.

221. Many are comfortable with the idea that tortfeasors should pay for disutility. This does not mean, however, that they would be comfortable characterizing the payment as *punishment*.

222. George Fletcher observes;

An important cleavage does in fact run between torts and crimes. The distinction is not expressed well as that between a *nonmoral* tort law and a *moral* criminal law. For tort theories—both fault and strict liability—might be based on solid moral principles. The cleavage is better appreciated by taking note of the equal moral standing of all torts as contrasted with the differential moral status of different crimes.

Fletcher, *supra* note 189, at 924.

223. Finkelstein, *supra* note 194, at 344-46.

whether consequentially or not. Contributory negligence, unlike tortfeasor negligence, is "conduct which involves an undue risk of harm to the person who sustains it."²²⁴ Even if ordinary negligence is a "consequential wrong,"²²⁵ merely increasing one's own risk of becoming a victim of an intentional crime strains the boundaries of any tenable concept of wrongdoing. When this is combined with the intentionally wrongful act of the defendant, it is very difficult to see any fair grounds for lessening defendant liability. It is true that one could simply define suboptimal self-protection as immoral behavior,²²⁶ but this seems quite far removed from ordinary intuitions regarding morality.²²⁷ Moreover, even if the existence or nonexistence of imprudence could justify treating two victims of the same crime differently under the law, it does not appear to justify treating the defendants who have intentionally harmed those victims differently. The only way to morally sanction treating the defendants differently is to make the hollow claim that a criminal who preys on an imprudent victim is more moral than a criminal who preys on a careful victim.

Let us assume, for the moment, that being careless about your own risk of victimization is an immoral act. Failing to invest in an alarm system, an omission that puts one at greater risk of crime, may then be considered immoral.²²⁸ Thus morality dictates that everyone ought to

224. RESTATEMENT (SECOND) OF TORTS § 463 cmt. b (1964).

225. See Hurd, *supra* note 65, at 272.

226. See Harel, *supra* note 155, at 1211-13.

227. See generally TUNICK, *supra* note 173.

228. Admittedly, it is not completely clear whether or not Harel believes that failing to invest in an alarm system is "careless" behavior. However, he carves out a very limited class of persons to which the comparative fault principle in criminal law is inapplicable:

What is the proper context for implementing the equal costs model? When is it fair to "reward" a less vulnerable victim and "punish" a more vulnerable victim? It would seem, as discussed above, that the involuntary vulnerability of a victim should not lead to granting her lesser protection. Moreover, when the voluntary behavior generating the vulnerability has unique social value, it deserves full protection. In both cases, the equal protection model should determine the distribution of protection. But if the victim's exposure to the risk is both voluntary and of no special social value, the principle of equal

buy an alarm system. Such a construction of morality leads to an incredibly disturbing view of the optimally moral society:

Although in this day and age it is certainly prudent to take certain precautions, the more we incorporate those precautions into the criminal law, the smaller the range of acceptable behaviors becomes. The ideal society becomes less a society where you do not have to buy an alarm system or always lock your doors and more a society where people are prisoners in their own homes.²²⁹

Indeed, even in tort law, contributory negligence lessens the defendant's liability only when the defendant acted negligently rather than intentionally.²³⁰ Contributory negligence simply does not provide a defense when the defendant has intentionally breached a categorical prohibition.²³¹ Likewise, the current criminal law does not recognize a contributory negligence defense to crimes.²³² As a result, responding to the deontological objection by claiming that blaming imprudent victims does capture the meaning of just deserts is also ultimately an unsatisfying response.

D. *Response 3: The Nonspecific Victim Liability Defense Comports with Just Deserts Because It Sanctions Wrongful Victim Behavior Rather Than Imprudent Victim Behavior*

My response to the deontological objection is that the nonspecific victim liability defense does correctly capture the concept of just deserts because it provides a defense only when the victim has acted wrongfully. As a result, the

costs should govern the distribution of protection and the equal protection principle should be disregarded.

Harel, *supra* note 155, at 1208.

229. Gruber, *supra* note 164, at 245.

230. See RESTATEMENT (SECOND) OF TORTS § 481 (1965) ("The plaintiff's contributory negligence does not bar recovery against a defendant for a harm caused by conduct of the defendant which is wrongful because it is intended to cause harm to some legally protected interest of the plaintiff or a third person.").

231. See, e.g., *Munoz v. Olin*, 76 Cal. App. 3d 85 (1977) (no comparative negligence defense to wrongful death action).

232. See 40 AM. JUR. 2D *Homicide* § 107 (noting the "general principle that contributory negligence is not available as a defense to a criminal prosecution"). This is true even when the crime is a negligent crime. See *State v. Scribner*, 805 A.2d 812 (Conn. App. 2002).

nonspecific victim liability defense must reject a definition of “wrongful” victim conduct that includes mere negligence with regard to risk of one’s own victimization.²³³ Premising the defense on this type of negligence is antithetical to the idea of “just desert.” For reasons discussed above, imprudence regarding one’s own safety generally does not and should not constitute a moral wrong. Consequently, those who engage in imprudent conduct should not be disadvantaged by the criminal law. Similarly, committing a crime against an imprudent victim is no less morally reprehensible generally (and perhaps even worse) than committing a crime against a careful victim.²³⁴

This is a line in the sand drawn to respond to the deontological criticism. The nonspecific victim liability defense will not protect those defendants who commit a crime against victims whose negligence lay only in failing to protect themselves adequately against intentional criminal acts. There are, however, other lines that could be drawn. For example, there is the issue of whether “wrongful” victim conduct includes negligent conduct in other contexts. One could imagine a crime victim whose negligence that poses a risk of harm to others (rather than just to himself) causes the defendant to commit a criminal act. Consider the following case involving an intentional defendant and a grossly negligent victim.

233. In this sense, the victim liability defense is completely at odds with contributory negligence, which defines, the victim behavior involved as exclusively putting oneself at risk of harm. *See supra* note 182.

234. Vulnerable victims are often protected more by the criminal law than non-vulnerable victims. Criminal protections offer increased penalties for those who prey on the young, old, and disabled. *See, e.g.,* Injury to a Child, Elderly Individual, or Disabled Individual TEX. PENAL CODE ANN. § 22.04 (Vernon 2003). Even within the prevailing construction of vulnerability, there are negative gender implications. In today’s society, elderly victims of abuse are vulnerable and worthy of extra protection, whereas battered women are responsible for remaining in the relationship. *See von Talge, supra* note 1 at 131. Child sex abuse victims are vulnerable and worthy of extra protection. *See, e.g.,* 18 U.S.C.A. § 2243 (1998) (providing increased penalties for sexual abuse of a minor). By contrast, female rape-by-fraud victims are ignorant and “should have known better.” In *People v. Evans*, 379 N.Y.S.2d 912 (1975), the defendant falsely claimed that sex with him was a “therapy.” The Court held:

It is not criminal conduct for a male to make promises that will not be kept, to indulge in exaggeration and hyperbole, or to assure any trusting female that, as in the ancient fairy tale, the ugly frog is really the handsome prince.

Id. at 922.

The victim, Jon, is driving at a grossly negligent rate of speed when he strikes and kills the defendant Carol's 6-year-old son who was crossing the street. Carol, having observed the killing, runs to Jon's car and hits him several times. Carol is charged with aggravated assault.²³⁵

The moral reprehensibility that attaches to Carol's act in the case above seems different instinctually than that which attaches to the mugger who preys on lone joggers in

235. Notice that this example is quite distinct from the situation in which a defendant, through negligent driving, kills a victim who was also driving negligently. In this case, contributory negligence will not be a defense to vehicular manslaughter, even though the defendant was merely negligent. In *State v. Scribner*, 805 A.2d 812, 816 (Conn. App. 2002), for example, the defendant, a police officer, in response to a "code 3" call (the highest emergency call), proceeded to the scene of the crime. En route, the defendant officer sped through a red light at an intersection, hitting the victim's car and killing her. The defendant was convicted of negligent homicide. Under applicable tort statutes governing the operation of emergency vehicles, the defendant could avail himself of a contributory negligence defense. The defendant argued that it was error for the trial court to prevent the defense from asserting contributory negligence of the victim as a defense to the crime, especially given that he could use the doctrine to prove that he was not civilly liable. The Connecticut Appellate Court responded:

[T]he general rule that contributory negligence is not a defense in a criminal case applies in a negligent homicide case where ordinary negligence is one of the required elements, unless such negligence on the part of the decedent is found to be the sole proximate cause of his death.

(citing *State v. Pope*, 313 A.2d 84, 85 (Conn. App. 1972)).

Perhaps this result seems unfair, as does, for example, the rule in Florida that an intoxicated defendant can be convicted of DUI manslaughter even in the absence of negligence on the part of the defendant and in the presence of negligence on the part of the decedent. See *State v. Hubbard*, 751 So. 2d 552, 563 (Fla. 1999). This may emanate from prevailing retributivist sentiments that lead to the conclusion that Scribner's category of negligence is not criminally culpable. Perhaps the result seems unfair because the defendant was no more a cause of death than the victim. The nonspecific victim liability defense does not weigh in on whether contributory negligence should be a defense to negligent crimes. This is because the defense requires that the victim's wrongful conduct caused the defendant to engage in the prohibited act. In Scribner's case, even if the victim's ordinary negligence (not with regard to risk of victimization but risk of harm in general) is considered wrongful conduct, one could argue that the conduct did not "cause" Scribner to commit the vehicular manslaughter. Thus, the issue of the propriety of punishing simple negligence in or out of the presence of contributory negligence is not addressed by the nonspecific victim liability defense.

the park.²³⁶ The question then is whether the requirement of "wrongful" victim behavior prevents the nonspecific victim liability defense from applying to the above scenario. In other words, must "wrongful" exclude all negligence and include only victims' intentional acts?

There are vast differences in types of negligence in criminal law. Although there is no criminal liability for general negligence, as there is in tort law, criminal law does incorporate negligence in a variety of contexts.²³⁷ Some of these contexts amount to no more than ordinary tort-like negligence plus a specified result. For example, a run-of-the-mill vehicular homicide statute criminally prohibits negligent driving which results in a death.²³⁸ In other contexts, however, negligence may be combined with other intents. A defendant may purposefully kill the victim, but negligently (that is, unreasonably) believe that the victim was threatening his life.²³⁹ Similarly, a defendant may purposefully have sexual intercourse with a victim, but negligently believe that the victim gave consent.²⁴⁰ In the context of vehicular homicide, the criminal defendant, like a tort defendant, has acted unreasonably regarding risk of harm to others (through operating her car in a certain manner). In the self-defense and rape cases, the defendants intentionally engaged in the prohibited conduct, but were unreasonable regarding the existence of conditions that would make the prohibited conduct legal under the specific

236. Jon was negligent regarding risk of harm to himself; however, the essential difference between him and the imprudent jogger is he was also negligent with regard to risk of harm to others.

237. See, e.g., *supra* note 235 (negligent manslaughter); *supra* note 213 (negligence as the required intent for possession of drug paraphernalia).

238. See, e.g., DEL. CODE ANN. tit. 11, § 630 (2001) ("A person is guilty of vehicular homicide in the second degree when [w]hile in the course of driving or operating a motor vehicle, the person's criminally negligent driving or operation of said vehicle causes the death of another person.").

239. See MODEL PENAL CODE § 3.09(2) (Proposed Official Draft 1962).

When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification . . . but the actor is reckless or negligent in having such belief . . . the justification afforded . . . is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

240. See, e.g., *State v. Smith*, 554 A.2d 713, 718 (Conn. 1989) ("[T]he question for us is whether the evidence is sufficient to prove that a reasonable person would not have believed that T's conduct under all the circumstances indicated her consent.").

circumstances. These are just some of the ways in which negligence operates in criminal law. Moreover, negligence can take the form of consciously ignoring a risk or failing to appreciate the existence of a risk, both of which may affect moral sentiments differently.²⁴¹

The result is a system in which, depending on the type of negligence involved, the wrongfulness of the actor may be more or less apparent. This is not only because the negligence may constitute a consequential wrong, but also because the so-called negligence of the victim is invested with narratives of intentionality. Kenneth Simons distinguishes several different types of negligence in the criminal law context: "[C]onscious recklessness (where the defendant is aware of the risk), culpable indifference (where the defendant shows a grossly inadequate concern for a risk or harm), and simple negligence (where defendant, while negligent, is neither consciously reckless nor culpably indifferent)."²⁴² He argues that the character of the negligence determines whether or not its criminal prohibition comports with justice sentiments:

[C]ulpable indifference, not conscious recklessness, is ordinarily the appropriate threshold culpability for criminal liability on a retributive theory. Simple negligence is ordinarily insufficient. Although culpable indifference is highly correlated with conscious recklessness, it is not coextensive; sometimes, a defendant who is not aware of the relevant risk is nonetheless culpably indifferent and properly subject to blame and punishment.²⁴³

How then should the criminal law treat Carol's case? Carol committed an intentional criminal act, and thus under Simon's formulation is clearly morally culpable. Why should Jon's negligence let her off the hook? For one thing, Jon's negligence was the cause of Carol's culpable act. This

241. The Model Penal Code, for example, premises liability for reckless crimes on "consciously disregard[ing] a substantial and unjustifiable risk." MODEL PENAL CODE § 2.02(c) (Proposed Official Draft 1962). Other laws define recklessness as being unaware of such a risk. See, e.g., *Commonwealth v. Welansky*, 55 N.E.2d 902, 910 (Mass. 1944) ("[E]ven if a particular defendant is so stupid [or] so heedless . . . that in fact he did not realize the grave danger, he cannot escape the imputation of wanton or reckless conduct in his dangerous act or omission . . .").

242. Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. CONTEMP. LEGAL ISSUES 365, 397 (1994).

243. *Id.*

causal connection is of moral importance deontologically because the fact that Carol's behavior was caused by a "bad" act of Jon can show that she does not "deserve" to be treated the same way as someone who acts criminally for other reasons.²⁴⁴ Whenever an intentionally harmful act is a response to negligence, however, a proportionality problem arises. Some may feel that Carol's purposeful assault of John is disproportional because John did not intend to hit and kill her daughter—it was merely a product of his negligence.²⁴⁵ My guess, however, is that many others would feel that Carol's reaction is completely excusable because even though John was merely negligent, his actions produced such great harm.²⁴⁶ Whether or not Carol should be punished to the full extent of the law, punished to a lesser extent, or exculpated depends on particular conceptions of the culpability of negligence, the role of harm and results, and the influence of passion. The fourth part of the nonspecific victim liability test allows the factfinder to weigh the actions of the victim and the reactions of the defendant in determining to what degree punishment should be mitigated.²⁴⁷ The nonspecific victim liability defense will not, however, necessarily provide a concrete answer to, for example, how much weight should be given to the extent of the harmful results produced by the victim.

In the end, appealing to the nonspecific victim liability defense's self-limitations is the best way to respond to the deontological objection. Because of the requirement that the victim behave "wrongfully," the defense avoids reducing defendant liability on the ground that the victim did not protect himself adequately against crime. As to other forms of victim negligence that pose harm to others, they may or may not amount to exculpating or mitigating factors, depending on the particular nature the negligence, whether

244. See Gruber, *supra* note 14, at 715 ("In terms of the defendant, the premise of the victim liability defense is that those who merely respond to harmful victim behavior by committing crimes are less culpable than those who act criminally for other impermissible reasons.").

245. Indeed, people may believe, like Simons, that Jon's actions were not culpable or as culpable as an actor with a higher degree of intention.

246. When put in the context of Carol's great suffering at the loss of her daughter, they will find her acts to be either justified or at least excused. Many may base this idea of excuse on the existence of emotional factors that caused Carol to act from diminished capacity. Others, however, would likely find that hitting Jon is a reasonable response to the circumstances.

247. See Gruber, *supra* note 14, at 709 (discussing the balancing test).

other mental states are involved, and the likelihood and severity of the resulting harm. Once the victim's negligent or intentional conduct is established as wrongful, it must still be weighed against the actions of the defendant in determining whether the defendant should be exculpated or her punishment mitigated. Through this process, the non-specific victim liability defense adequately defines the boundaries of what it means to "deserve" punishment.

Consequently, the deontological concerns with the defense require a refined definition of "wrongfulness." Retributivist sentiments compel the defense to comport with ideals of just deserts. Any fair concept of just deserts must reject a system that negates defendant liability based on victim imprudence, that is, the victim putting herself at risk of crime. As a result, "wrongful" victim behavior cannot include behavior that is merely contributorily negligent. This is not necessarily to say that no negligence on the part of the victim can be a predicate for the defense. Some negligent acts pose risks, not just to the actor, but also to others. Such acts, when they cause great harm, could be seen as "wrongful" behavior that should lessen the liability of the defendant who responds to the behavior.

III. RESPONDING TO CONSEQUENTIALIST AND EXPRESSIVIST CONCERNS

A. *Consequentialist Critiques*

Deterrence theorists would likely criticize the nonspecific victim liability defense on two levels. First, the defense lessens the efficacy of criminal laws in deterring society members from committing crimes.²⁴⁸ Second, the defense lessens deterrence with regard to the individual defendant asserting the defense. Turning to the first deterrence objection, the argument is that on a society-wide level, the defense is not deterrent because it gives criminals an additional avenue for defending against a conviction, making it less likely they will be punished.²⁴⁹ This in turn lessens the

248. See *supra* notes 80-83 and accompanying text (discussing deterrence theory).

249. This argument has been used not only to counter specific criminal defenses but also procedural measures like the exclusionary rule. The argument

efficacy of criminal prohibitions in general because potential criminals will know that they can "beat the system" by focusing on victims' conduct.

One can respond to the deterrence criticism by appealing to deontology or consequentialism. Focusing on the deontological response first, the argument is that the victim liability defense is fair and therefore should be implemented even if it reduces deterrence.²⁵⁰ One can analogize the victim liability defense to self-defense, which does carve out an exception to criminal laws and in turn may slightly reduce their efficacy, but is nonetheless warranted because it defines the boundaries of just deserts. In addition, one can respond to the deterrence criticism by meeting the empirical objection on its own terms and arguing that the defense will not, in fact, reduce the efficacy of criminal punishment in general. Since the nonspecific victim liability defense is narrowly tailored, because it excludes certain victims and defendants from its protective ambit, it is specific enough not to undermine the bulk of the criminal law, much like self-defense does not undermine the bulk of homicide prohibitions.²⁵¹ Finally, one can point out consequential benefits of the defense by contending that the nonspecific victim liability defense, like self-defense, actually deters bad behavior generally by encouraging would-be wrongful victims to refrain from engaging in wrongful behavior.²⁵² As with tort law, the analysis is that victim liabil-

is that these measures lessen the efficacy of criminal prohibitions and increase crime. See *Alderman v. United States*, 394 U.S. 165, 174-75 (1969) (refusing to extend the exclusionary rule to evidence illegally seized from a co-defendant because "we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime").

250. Recall that deontological principles like fairness limit overly harsh criminal sanctions created in the name of deterring crime. See *supra* notes 66-67 and accompanying text.

251. See George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 556-58, 567-71 (1996) (discussing the narrow nature of self-defense).

252. Utilitarian arguments are often employed in this context to justify laws that affect the incentives of those injured by others. This occurs most often in the tort context. See, e.g., *Kaczmarek v. Allied Chemical Corp.*, 836 F.2d 1055, 1058 (7th Cir. 1987) (noting that comparative negligence has a "positive . . . effect on the incentives of potential victims to take care"). But it also happens in criminal law. See Gruber, *supra* note 14, at 651-52 (discussing specific victim liability criminal defenses).

ity, like plaintiff liability, could affect victim incentives in a maximally efficient way.²⁵³

The second critique can be lodged by the deterrence, incapacitation, and rehabilitation schools of consequentialist thought. It consists of the argument that the individual defendant who successfully asserts the defense will not, herself, be deterred from future crimes, given the opportunity for rehabilitation, or removed from society. Again, the response to this contention can be articulated on two levels. First, from a deontological standpoint, if it is fair to reduce or eliminate liability for this particular defendant, incarceration solely as a means to incapacitation, deterrence, or rehabilitation is objectionable. If it were not so, an easily rehabilitated murderer could serve, say, a year in jail, whereas a criminally-inclined shoplifter could spend a lifetime in jail. Now, the consequentialist could simply respond that this is not a bad thing. The precise reason that there are reforms like repeat offender laws and civil commitment of sex offenders is that the law does embrace the idea of detention, not based solely on the individual crime committed, but rather based on the future danger the defendant poses to society.²⁵⁴

Even the most die-hard consequentialists, however, may be persuaded by the following empirical response. The reason why concerns over the negative effects of the defense on the individual defendant are misplaced is that the non-specific victim liability defense is constructed in such a way as to make sure those defendants who fall within the ambit of the defense acted *uncharacteristically* because of unique circumstances created by the victim. Therefore, these defendants are not likely to repeat the criminal behavior.²⁵⁵ As such, they do not need to be deterred from committing future crimes since their criminal behavior only came about

253. Efficiency arguments, which are a specific subset of utilitarian thought, play a central justificatory role in tort law. From the Hand formula to modern law and economics, tort law has been identified jointly with cost-benefit analyses. See *supra* note 199 and accompanying text.

254. See *supra* notes 95-97 and accompanying text (discussing predictive trend in criminal law).

255. See Gruber, *supra* note 14, at 718-26 (analyzing the predisposition prong of the defense).

because of extraordinary circumstances.²⁵⁶ This argument, that the nonspecific victim liability defense is narrowly tailored, also shows that the defendants to whom the defense applies do not need to be incapacitated or rehabilitated (or at least not to the same extent as "ordinary" criminals).²⁵⁷ There may, however, be cases in which a nondisposed defendant overreacts to wrongful victim behavior in a way that demonstrates her dangerousness. In such cases, the fourth prong of the nonspecific victim liability defense allows the jury to balance the victim's behavior and the defendant's response and assess a level of punishment appropriate to the amount of dangerousness exhibited by the defendant.²⁵⁸

The next set of consequentialist critiques come from the redistributionists. They would posit that the nonspecific victim liability defense is problematic because it prevents the criminal justice system from making the crime victims "whole."²⁵⁹ Pain is not redistributed to the defendant, who caused the harm, and closure is not given to the victim. The first response to this criticism is to question the propriety of redistribution in criminal law. As noted in Part I, there are many reasons why the criminal law should not be in the business of distributing pain and closure.²⁶⁰

Assuming, however, that redistribution is a legitimate or desirable goal of punishment, there are deontological and

256. This may be achieved by setting forth criteria, for example, a lack of predisposition requirement, which separates those who act criminally only in extraordinary, artificial situations from those who act criminally by nature:

A predisposition inquiry focuses on when the defendant made the decision to commit the criminal act, which hopefully will provide a reliable indication of whether she made that decision of her own free will. This, in turn, is presumed to be evidence of whether the defendant poses a danger to society The most compelling justification for this distinction is that the principal purpose of a legal penalty is to protect society from those who would harm it, not from those whose wrongful conduct consists solely of a failure to exercise self-restraint [in an extraordinary circumstance].

Kenneth M. Lord, *Entrapment and Due Process: Moving Toward a Dual System of Defenses*, 25 FLA. ST. L. REV. 463, 474-75 (1998).

257. Arguably a person who uncharacteristically responded to wrongful victim behavior and is not predisposed to crime does not need social re-ordering. See *supra* notes 90-91 (discussing rehabilitation).

258. See Gruber, *supra* note 14, at 726-31 and accompanying text.

259. See *id.* at 656 n.48 (discussing closure and the victims' rights movement).

260. See *supra* notes 115-19 and accompanying text.

empirical responses to the criticism. Deontologically speaking, when the elements of the nonspecific victim liability defense are met, it is not fair to distribute pain to the defendant and closure to the victim. Even if redistributive goals justify punishment where both parties are innocent, for example, in the case of strict liability crimes where the victim is innocent but the defendant also had an innocent intent, redistribution should not necessarily justify punishment when the victim is the sole wrongful actor. Because the nonspecific victim liability defense is constructed so that it is clear that the victim has committed a wrong whereas the defendant has not necessarily (although the defendant has committed a tangible harm), the nonconsequentialist principle of fairness comes in to limit the redistributive theory from dictating that the injured party deserves closure (through punishment of the injurer).²⁶¹ Fairness dictates that a morally reprehensible victim should not be able to garner the panoply of victims' rights, and the redistributive power of the government, against a nondisposed defendant who merely responded to the wrongdoing. In essence the wrongful actor does not *deserve* to be restored by the defendant:

When a person suffers a loss, it may be the fault of another person or it may be no one's fault; and as we have seen, the nature of desert differs in the two cases. There is, however, a third possibility: the loss or injury may be his own fault. In that case, though he may well be entitled to help, we should be loath to say that he deserved it; for we do not as a rule compensate people for their folly or indolence, and even when we do, it is not because we think they deserve it.²⁶²

261. In other words, redistribution is proper only when the defendant is more culpable than the victim or, at least, as culpable as the victim. This prevents a wrongful victim from recovering from a non-wrongful defendant. Unlike criminal law, tort law more explicitly embraces redistributive goals. See Tsachi Keren-Paz, *Egalitarianism as Justification: Why and How Should Egalitarian Concerns Shape the Standard of Care in Negligence Law?*, 4 THEORETICAL INQUIRIES IN L. 275, 275-76 (2003) ("A correct and full understanding of the egalitarian concern and the tort of negligence requires a conclusion that the normative evaluation of one's action as negligent or not cannot be separated from the distributive results that this action entails."). Even in tort law, however, contributory and comparative negligence principles dictate that the plaintiff can recover only if she is less at fault than the defendant.

262. FEINBERG, *supra* note 51, at 75-76.

To put the response in a consequentialist framework, when a wrongful victim is rewarded a bad result has occurred. Feminists, for example, express disdain for treating decedent abusive husbands as innocent victims in cases where battered wives kill their husbands.²⁶³ Indeed, the most restorative-minded reformers would be hard pressed to argue that a wrongful victim who has been harmed due to his own wrongful actions *deserves* compensation.

To sum up, appealing to the particular framework of the nonspecific victim liability defense provides the response to the consequentialist critiques. To the extent that the defense is tailored to include only those defendants who are not criminally-inclined, the defense is able to overcome deterrence, rehabilitation, and incapacitation concerns. Because the defense defines the victim conduct relevant to the defense as "wrongful" conduct, it is able to withstand consequentialist concerns over redistribution and closure.

B. *Expressivist Concerns*

These concerns merit only a brief discussion, as it is unclear whether the expressivist would object to the defense or the nature of the objection. Here it is important to recall that the expressivist argues that any philosophical account of criminal law must account for the condemnatory function served by the law.²⁶⁴ The difficulty is that it is unclear whether expressivism is itself a ground for criminal punishment or if expression is merely an ancillary aspect of the government's execution of penal laws based on other philosophical grounds. In addition, if expressivism is the reason why the state punishes, what should or should not be included in that expression?²⁶⁵ Because of these nuances, it is difficult to determine the exact nature of an expressivist

263. During a hearing on a victims' rights resolution, the NOW Legal Defense Fund issued a statement that "constitutional guarantees afforded to criminal defendants are just as important—if not more—to battered women accused of striking back because batterers can use the amendment to retaliate." Lynne Henderson, *Revisting Victim's Rights*, 1999 Utah L. Rev. 383, 404 n.81 (citing *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearings on S.J. Res. 6*, 105TH CONG. 24 (1997) (statement of NOW Legal Defense Fund)).

264. See *supra* note 142 and accompanying text.

265. See *supra* text accompanying notes 130-41.

critique. It seems that the expressivist would say that the defense is not good if it embodies value judgments that the punishing authority ought not express (for example, that paramour killings are justified); but it is good if it reflects value judgments that the punishing body ought to express (for example, that paramour killings are unjustified).²⁶⁶ Again, however, this just begs the question of what ought to be expressed. *Victim Wrongs* makes the argument that the current law, in the absence of the nonspecific liability defense, often manifests morally inappropriate value judgments,²⁶⁷ much in the way that, according to Feinberg, Texas law on paramour killings involved morally incorrect ideology.²⁶⁸ In fact, *Victim Wrongs* specifically criticizes the tendency of provocation law, in its current form, to lead to the exculpation of men who kill their wives for attempting to leave them and shows how the defense improves this legal regime.²⁶⁹ Consequently, to the extent that the victim liability defense more accurately expresses correct moral judgments, it serves as a vehicle for the state to exercise its condemnatory function in an appropriate manner.

CONCLUSION

The goal of this project has been to reconceptualize victim liability in the criminal law and create a defense that responds to the privatization trend in criminal law, forms a more coherent doctrine than the existing collection of specific victim liability defenses, and adequately addresses

266. FEINBERG, *supra* note 51, at 103.

267. See Gruber, *supra* note 14, at 680-82.

268. FEINBERG, *supra* note 51, at 103.

269. Gruber, *supra* note 14, at 681-82:

There can be little doubt that those men who kill women for attempting to leave them, though moved to passion, are so moved because of their internalization of chauvinistic and oppressive beliefs concerning the proper role of women. Thus, the problem with provocation law is that it does not provide an adequate mechanism for judging which acts on the part of the victim the law should permit to excuse the defendant in killing. The question should not be whether the provocation at issue was in fact *adequate* to move the defendant to kill, but whether the victim behavior is *wrongful* enough that the law will permit people to indulge their passions and kill based on that behavior. In this sense, provocation law can be normative because it does more than merely reflect the passions of defendant. Rather, it informs the defendant, and thereby society, as to what may and what may not legitimately arouse passion.

philosophical sentiments about the purpose of criminal punishment. The first part of the project, *Victim Wrongs*, examines the role of the modern crime victim, explains how the nonspecific victim liability defense reforms and refines current victim liability law, and explores each of the four requirements of the defense. This article has discussed the nonspecific victim liability defense in the context of penal theory and has responded to both deontological and consequentialist concerns.

The nonspecific victim liability defense, as Part II explains, can comport with deontological concerns over just deserts. The defense is compatible with retributivism because the parameters of the defense set forth the boundaries of what it means to act without culpability. Much like the current criminal law regime treats a person who acts in self-defense as justified, a person who complies with the requirements of the nonspecific victim liability defense simply does not deserve to be punished or deserve to be punished to the same degree as someone who did not comply with the dictates of the defense. In order for this argument to be persuasive, an examination of the precise parameters of the defense was required. In order to comport the defense with sentiments of just deserts, a clear definition of "wrongful" victim behavior became expedient. What necessarily must be excluded from that definition of "wrongful" victim conduct, is victim conduct that merely puts the victim at risk of an intentional criminal attack. Such imprudence is not "wrongful" in the deontological sense. As a result, the nonspecific victim liability defense must be completely distinct from tort doctrines of victim liability like contributory and comparative negligence. Not all victim negligence, however, must be excluded from the definition of "wrongful" behavior. The defense draws a sharp distinction between negligence as to risk of one's own victimization, which is not wrongful, and negligence that poses a risk of harm to others, which may be considered culpable behavior, depending on the circumstances. The result is that, like intentionally wrongful behavior, some negligent or reckless victim behavior is wrongful and can be a predicate for the nonspecific victim liability defense. The fourth prong of the defense allows the gravity of the victim's behavior to be weighed against the gravity of the defendant's response in determining the extent of the defendant's culpability.

Part III of the article responded to utilitarian concerns that the defense would produce disutility by lessening deterrence, failing to incapacitate or rehabilitate the dangerous, and failing to distribute closure to victims. The response to these concerns also lay largely in an examination and explication of the parameters of the defense. By incorporating a lack of predisposition requirement and a balancing test, the nonspecific victim liability defense applies to a class of defendants that are not dangers to society and do not require deterrence, rehabilitation, or incapacitation. Moreover, because of the requirement of "wrongfulness," the defense ensures that the victims who participate in restorative programs and receive victims' rights fit better into the presupposed archetype of the blameless victim. Finally, the defense aids the criminal law in meeting its expressive functions by allowing the law to punish in an appropriate condemnatory fashion.

In the end, this project has recharacterized criminal law in a more transactional way so that criminal doctrines can account adequately for the relative moral culpability of all the parties to an injurious event. With the rise of the victims' rights movement, victims have gained unprecedented power in the criminal law, which in turn underscores the need for a more comprehensive assessment of their roles in criminal offenses. The nonspecific victim liability defense is a coherent and fair legal mechanism that allows the law to assess the culpability of the defendant in the context of the victim's wrongful conduct. Because the defense is based on wrongful rather than merely imprudent victim behavior, it will not result in the victim-blaming miscarriages of justices feared by deontologists. Moreover, the parameters of the defense respond adequately to consequentialist concerns. Subsequently, the nonspecific victim liability defense equitably balances the competing interests of victims and defendants and creates a legal regime that furthers both philosophical ideals regarding punishment and society's interest in a fair and consistent administration of justice.